

16 Jul 70

Songmy Defendant Says Nixon Sways Army Court

By HOMER BIGART
Special to The New York Times

ATLANTA, Ga., July 15—A three-judge Federal court was told today that Sgt. Esequiel Torres, accused of murder in Songmy, South Vietnam, could not receive a fair trial in any American military court because President Nixon had already declared him guilty.

The "command influence" of the Commander-in-Chief would sway the judgment of members of the court-martial, Charles Longstreet Weltner, chief counsel for Sergeant Torres, told the panel.

The case is the first to reach a Federal court in connection with the alleged mass killing of noncombatants by American soldiers in the Mylai 4 hamlet of the Songmy village complex.

Sergeant Torres was joined in court by another Songmy defendant, Specialist 4, Robert W. T'Souvas, whose attorney George Davis of San Francisco, made a similar plea for a stay of court-martial proceedings.

Mr. Davis accused the military of seeking a "whitewash" of officers responsible for the killings while seeking a lowly scapegoat among the enlisted men.

Judges Show Interest

His client is no more guilty of indiscriminate killing than an artilleryman or a pilot of a B-52 bomber, Mr. Davis said.

On July 2, Mr. Weltner obtained an injunction barring an Army trial until a three-judge panel could decide whether a court-martial would violate the sergeant's constitutional rights.

Sergeant Torres, a 22-year-old Mexican-American from Brownsville, Tex., is accused of murdering at least three civilians with a machine gun in a search-and-destroy operation by units of the American Division at Songmy on March 16, 1968. He is also accused of hanging a Vietnamese man shortly before that incident.

In asking the Federal panel to enjoin the Army permanently from trying Sergeant Torres, Mr. Weltner cited remarks by President Nixon that he maintained would weigh heavily on the thinking of military court members who were hopeful of promotion.

Mr. Weltner recalled that on Dec. 16, 1969, shortly after the first disclosure of the Songmy incident, Mr. Nixon told a televised news conference, "I would start first with a statement: What appears was certainly a massacre and under no circumstances was it justified."

This statement, which was repeated by the Secretary of Defense, the Secretary of the Army and the Army Chief of Staff, was in effect an order to subordinates within the military establishment to "convict and punish Sergeant Torres," Mr. Weltner contended.

To Rule on Jurisdiction

Ranked against Sergeant Torres, Mr. Weltner said, "was a vast array of officers, noncommissioned officers and enlisted men, from the Department of Defense down to, the defendant's command, comprised of investigators, interrogators, prosecutors, lawyers and technicians — all of whom are under the command of the President, who, by his pronouncements, has judged the plaintiff guilty."

The three judges will rule whether they have jurisdiction to decide whether the charges against Sergeant Torres and a trial by the Army would violate his constitutional rights. If they decide they have jurisdiction, Mr. Weltner then hopes to bring out testimony by Army and Central Intelligence Agency officials to show that the slaughter of noncombatants was part of a planned policy.

Mr. Weltner submitted a brief accusing the Army of "selective prosecution." The defendant was merely a sergeant, he said, noting that no officers of field grade (major or above) and no Central Intelligence agents had been ordered prosecuted. The Army wanted a low-ranking "scapegoat," the lawyer said.

Peers Report Cited

He argued that the Army had already "held court" on the Songmy incident by drawing from the investigation report by an Army panel headed by Lieut. Gen. William R. Peers "official conclusions adverse to the plaintiff, without his being present or represented, thus denying to him the presumption of innocence."

Government lawyers filed a brief contending that the Federal court had no power to enjoin a courts-martial. Sergeant Torres would have to exhaust the appeal procedures open to him under military justice before seeking relief in civil court, they said.

The defense has challenged the legality of the Vietnam war the Government noted, but previous challenges to the constitutionality of the President's actions have been dismissed as a political question and not an issue to be settled by the courts.

Judges on the panel are Judge Griffin Bell of the United States Court of Appeals for the Fifth Circuit and District

Judges Sidney P. Smith Jr. and Albert J. Henderson Jr.

Lawyers for Sergeant Torres are Mr. Weltner of Atlanta, a former Congressman; S. George Berkley, of Miami, and W. Wyche Fowler Jr., of Atlanta.

The Government brief was filed by John W. Stokes, United States Attorney, and Beverly B. Bates, Assistant United States Attorney.