

WXPost *The Calley Case, Again*

SEP 29 1974

THE FIRST THING to be said about Judge J. Robert Elliott's decision overturning the conviction of Lt. William L. Calley Jr. is that the government ought to appeal it. The issues raised by the case are so important and the judge's opinion so sweeping that the matter cannot be allowed to rest where it is. Regardless of how one feels about the fairness of the situation in which Lt. Calley now finds himself or the Calley case as such, the legal ramifications of Judge Elliott's opinion are too great to go unchallenged.

Take, for example, his finding that Lt. Calley was denied a fair trial because of the publicity that surrounded the massacre at Mylai. When other judges have ruled that publicity interfered with a fair trial, they have limited their findings to the prejudice created in the minds of the particular jury that tried the case and have pointed out ways in which that kind of prejudice could be avoided at a new trial. Not content with such a finding, Judge Elliott held that there was no way in which the military courts could protect Lt. Calley's rights. This means, simply, that the military courts are unable to try any defendant whose case draws the kind of publicity that Lt. Calley's did. Such a ruling is, to be kind about it, novel.

Equally novel was Judge Elliott's handling of the ques-

tion of whether Lt. Calley's rights were violated when the House Armed Services Committee refused to turn over a report of its investigation into the Mylai affair. The judge said his answer (in Lt. Calley's favor) to the question was "obvious and easy" because of the Supreme Court's recent ruling against executive privilege in the White House tapes case. If we read the tapes decision correctly the answer is a little harder than that. The Supreme Court specifically did not decide this question in the tape case and the elements of the two cases are quite different.

We raise these two examples not to argue that Judge Elliott should have left the verdict in the Calley case standing but to explain why his decision must be appealed. And these are not the only reasons. It is not at all clear that a federal district judge is entitled to review a court-martial conviction as thoroughly as Judge Elliott did this one. Nor is it clear that he is right on the law in some other aspects of his opinion.

As much as many persons would like to put the Calley case out of mind and thus continue to close the book on the Vietnam war, it will have to be with us for a while. The legal issues raised are too important to be disposed of in the manner of Judge Elliott's decision.