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Calley Asks Redefining Of Murder in Warfare

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Appellate lawyers for Lt. William L. Calley Jr., convicted two years ago of mass murder at Mylai, South Vietnam, asked the U.S. Court of Military Appeals yesterday to spell out a new legal definition of murder in the midst of warfare, one that would allow for "honest mistakes" by slow-witted soldiers who kill without malice.

Calley's Army appeals lawyer, Capt. J. Houston Gordon, argued that, under the present legal standard, "we run the risk of giving serious punishment to a soldier whose only crime is the slowness of his wit or his stupidity."

Instead, he said, the court should instruct military juries to consider the soldier's frame of mind at the time of the homicide. If the individual thought that he was following a legal order, even mistakenly,

that should prove that he acted without malice, reducing the charge from premeditated murder to voluntary manslaughter.

But, according to an appellate lawyer speaking for the Army, such a definition would be so subjective that each murderer could define his own frame of mind and, thus, escape punishment.

"If an officer ordered another officer to kill the President of the United States," Capt. Robert Roth suggested, "and the man subjectively believed he had to carry out all orders, then he could not be convicted of murder" under the Calley defense definition.

The question of what constitutes murder in combat consumed most of the two hours of oral arguments yesterday before the three-judge mili-

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tary court, the last forum in the military's chain of appeals. If this court refuses to set aside Calley's life sentence, the case goes to the Secretary of the Army for review and then to the President, either of whom could overturn the court-martial verdict handed down at Ft. Benning, Ga., in late March of 1971.

All of the principal figures from that controversial trial were in the paneled courtroom here yesterday to hear the final legal arguments—all except the 29-year-old defendant himself. Calley, convicted of murdering at least 22 civilians in the Vietnamese hamlet in mid-March of 1968, remains confined to his private apartment at Ft. Benning.

Col. Reid Kennedy, the military judge who presided at the four-month trial, now assigned to Ft. Bragg, N.C., was present to hear his courtroom instructions debated. So was Aubrey M. Daniel III, the young captain who was the successful prosecutor, now practicing law in Washington. So was Lt. Col. Kenneth A. Raby, Calley's Army defense lawyer at the trial, now assigned to the Pentagon.

George W. Latimer, Calley's chief defense lawyer, also presented arguments yesterday, insisting once again that the massive pretrial press coverage surrounding Mylai made it impossible for the former platoon leader from Charlie Company to receive a fair trial.

Latimer, noting that Judge Kennedy was present in the courtroom, said the military trial judge tried his best to limit the widespread news coverage of the Calley case, but his pretrial orders were ignored by the civilian news media.

"When the President of the United States made a statement that was very damaging to Lt. Calley," Latimer complained, "Col. Kennedy said, 'I can't do anything about that, I can't muzzle the President.' Col. Kennedy tried, but he wasn't very effective."

The issue of what constitutes murder was developed by Capt. Gordon, who said the



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George W. Latimer, chief defense lawyer for Lt. Calley, talks to newsmen outside U.S. Court of Military Appeals.

military's present definition creates an either-or dilemma for soldiers in combat, who are trained to obey orders and are often unable to distinguish which orders might be illegal.

Calley "did kill people, we do not dispute that," Gordon said. "But he did not possess the mind of a murderer."

Under the present standard, a soldier can invoke the defense of obedience to orders if it is established that "a man of ordinary sense and understanding" would have regarded the order as lawful. If the order is clearly illegal, such as an order to execute unarmed prisoners, including women and children, then obedience to orders is not regarded as a sufficient defense.

Gordon argued that this standard penalizes the soldier who mistakenly follows the order because he has "limited intelligence" and does not appreciate the distinctions between legal and illegal orders.

"Lt. Calley did not possess malice on the day in ques-

tion," Gordon insisted, "because, whatever he did, he did in the belief that he was doing his duty."

The Army, however, said Calley's plea on this issue is weak, first of all, because the evidence from his trial left considerable doubt that he received any order to kill unresisting civilians in the village. The disputed orders by his company commander, Capt. Ernest Medina, produced conflicting testimony in the trial and Medina himself was acquitted of murder charges.

Capt. Koth, arguing for the Army, said that even if Calley had received such orders, it was enough to demonstrate that an order to shoot unresisting captives was clearly unlawful and should not be obeyed.

"None of the people that he executed were threatening him with any harm," Roth said. "This killing of docile prisoners or civilians under control has never been justified."