

FRED P. GRAHAM

*Army Lawyers Seek Way
To Bring Ex-G.I.'s to Trial*

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WASHINGTON, Nov. 25—Pentagon lawyers are searching lawbooks to find if there is any way to prosecute men who took part in what has been called the massacre at Songmy but who have since been released from active duty.

A military source disclosed today that if the Army's legal experts conclude that they can press charges against the discharged men—despite a 1955 Supreme Court ruling that they concede makes such prosecutions highly unlikely—an announcement will be made in the next few days.

The reason is that some participants in the incident who are no longer in uniform are giving interviews in the belief that they are immune from prosecution. This could be highly self-incriminatory if an effort is to be made to try them in connection with the reported killing of a large number of Vietnamese civilians in the village of Songmy in March of 1968.

If the Army concludes that it cannot try the men, this could prompt Congress to pass a law to permit the trial of former servicemen in civilian courts for crimes they committed while in uniform—a step that the Supreme Court suggested by implication in its 1955 ruling.

The ruling concerned Robert W. Toth, a Pittsburgh steelworker who was seized in his home in a midnight arrest by military policemen five months after his discharge from the Air Force. They took him to Korea to face charges of having murdered a Korean.

The Supreme Court held that any former serviceman who had completely severed his ties with the service could not be denied his constitutional right to a civilian trial. But Justice Hugo L. Black stated in the majority opinion that Congress did have the constitutional authority to establish civilian courts to try former servicemen under such circumstances.

Although Congress has amended the Uniform Code of Military Justice since then, it did not take this step. Pentagon spokesmen have said that of the 24 men now being investigated in connection with the incident, 15 have been released from active duty.

Fred P. Graham, *New York Times*, November 26, 1969.

Arthur J. Keefe, an expert on military jurisdiction, who teaches law at Catholic University Law School here, said in an interview here today that some of these men might still be subject to court-martial, if they still have ties to the military.

Cites Such a Case

In one case, a former soldier who was still in the inactive reserves was called back to active duty five months after his release and was court-martialed for a murder committed while in uniform.

Professor Keefe said that at least one retired officer had been court-martialed on the strength of his military pension. If any of the men have been released and have reenlisted, they might also be tried before military courts, he said.

Professor Keefe said he would consider this a bad policy—even if it were good law—and the Pentagon officials say privately that they are moving on the same assumption. All men who have left active duty will be treated alike, they say. Unless a way can be found to try all who appear culpable, none will be tried.

Some lawyers believe that Congress could pass a law even now to permit the trial of the ex-soldiers in Federal district courts in the United States. The Constitution forbids *ex post facto* laws that make certain acts crimes after they have been committed. But a law that created a court to try crimes that existed in military law at the time of the massacre might not be held to be an *ex post facto* law.

Military sources have made it clear that they are not absolving any participants on the theory that they merely took orders.

Soldiers are required to obey all "lawful" orders, but not obviously unlawful ones. There have been instances in which men have been court-martialed for crimes they committed under orders from superiors, Pentagon sources say.