

DEC 19 1969

MEMORANDUM FOR HONORABLE EDWARD L. MORGAN
Deputy Counsel to the President

Re: Proposed letter from Secretary of the Army Resor to Chairman Rivers re submission of open CID investigative files.

Pursuant to the President's Memorandum of March 24, 1969 to heads of departments and agencies, we have examined the letter which Secretary of the Army Resor proposes to send to Congressman Rivers in response to the latter's request for "all reports, affidavits, photographs and all other pertinent documents, and material which may have any probative value in this inquiry" [the inquiry into the My Lai incident]. We agree with the Secretary of the Army and the Secretary of Defense that their refusal to supply certain documents, as indicated in the proposed letter, is proper.

The proposed letter is consistent with and carries out the principles enunciated in a letter from the Secretary of Defense to Senator Ribicoff on October 23, 1969 in connection with an on-going investigation by the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. At that time, the Secretary of Defense declined to supply material, including CID investigative reports and interviews, from open investigative files. The principles underlying that refusal, and the traditional refusal of this Department to furnish material from open investigative files (see 40 Ops. A.G. 45) are equally applicable here.

In considering the propriety of the refusal to supply statements from open CID investigative files, certain basic propositions must be taken as established. The right of Congress to conduct an independent investigation of the My Lai incident seems

clear, even though such an investigation may interfere with the simultaneous investigations being conducted by the Army. But the inability of the Executive to control a congressional investigation does not lead inexorably to the conclusion that the Executive must supply the fruits of its own investigative efforts to Congress. Similarly, it must be recognized that an independent investigation of the incident by Congress may prejudice the rights of those who are or may be formally accused of crimes. Again, however, it does not follow that statements and reports in an open investigative file developed by the Executive must be released. In short, the obvious fact that the Executive cannot preclude all interference by Congress in criminal or civil investigations by the Executive and cannot fully protect the rights of the accused against pre-trial disclosure is not of itself grounds for opening investigative files.

Over a number of years, a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigational files. Most important, the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation. The My Lai investigations clearly present such a danger.

Past opinions have also stressed the necessity for protecting information given by informants whose identity must be protected. This appears to be a minor factor in the My Lai investigations. A somewhat related concern, based once again on the release of information to the public, is the protection of the accused from pre-trial publication of prejudicial data in investigative files. Investigative files contain a good deal of unconfirmed and unsubstantiated information, the release of which could be seriously prejudicial to the trials of those ultimately charged with crimes. This is a major consideration in the My Lai investigations. Lt. Calley has

already been charged, and a number of others may be charged in connection with the alleged massacre itself. Moreover, it is possible that court-martial proceedings may be initiated against others, not directly involved in the My Lai incident itself, as a result of the so-called Peers investigation into allegations that the incident was not properly investigated by the Army. The protection of individuals from the prejudicial effects of unsubstantiated information collected by the government itself has long been recognized as a major reason for the refusal to give Congress access to open investigative files.

Finally, a number of persons whose statements have been taken by CID investigators may be witnesses in criminal trials connected with the My Lai incident. While their statements may be used during the criminal trials, their use will be subject to a number of judicially-imposed safeguards which could be of limited value if the statements themselves have already been disseminated.

To some extent, the concern over pre-trial publicity and disclosure of informants can be obviated by congressional assurances that material in open investigative files will be held in confidence. Yet such assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination to the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with "leaks". Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents.

All these considerations support the general proposition that it is proper for the Executive to deny congressional committees access to open investigational files. The question remains whether the My Lai investigation is an appropriate occasion for the application of this general principle. We believe that it is such an occasion. It is clear that the statements in question are parts of open CID investigative files. We do not find the arguments against invocation of the traditional rule altogether persuasive. We are, moreover, particularly concerned that compliance with this request by the committee will establish a precedent detrimental to the investigative operations of this Department as well as those of the CID.

There are two arguments against invocation of the traditional rule in this case. First, it appears that the proposed letter by the Secretary of the Army is internally inconsistent, since it expresses a willingness to supply the committee with "a complete copy of the testimony and statements of witnesses from the pre-trial investigation of Lieutenant Calley." Clearly such disclosure, if given publicity, could affect the Calley trial and might lead to some congressional interference in the investigative process. The Army's position is that such documents should be given to the committee, because these materials are part of a formal investigation under Article 32 of the Uniform Code of Military Justice which is regarded as a public proceeding. While members of the public and press were not in fact present, the Army does not feel it can deny access to those documents which it regards as public. Moreover, since defense counsel has all these materials, they are no longer subject to the exclusive control of the Army. We agree with the Army that there is no basic inconsistency between this response and the balance of the proposed letter.

The second alleged difficulty in the Army's position is what appears to be an inconsistency between its refusal to supply interviews and statements and its willingness to supply witnesses themselves. At the beginning of the hearings conducted by the Subcommittee, the Army was asked to furnish certain named witnesses, apparently identified to the Committee through press reports. After several days testimony was leaked to the press by committee members. As a result of an agreement then reached between Congressman Rivers and the Secretary of Defense, the congressional investigation was turned over to a special four-man subcommittee. It was further agreed, according to the Secretary, that the Army would provide witnesses upon request if (a) they were not directly involved in the Calley case, and (b) were either not involved in the Peers investigation, or, if they were so involved, the Peers group had finished with them.

There are thus three categories of possible witnesses before the subcommittee: (1) persons not involved in the

Calley case or Peers investigation; (2) persons with whom the Peers investigators are finished but who are not involved in the Calley case; (3) persons called directly by the subcommittee, most of whom are likely now to be civilians. Some of the statements which the Army does not want to disclose may be statements of persons in any of these categories. The Army is unwilling to give such statements at the present time, and is reluctant to give specific statements even at the time a particular witness is before the subcommittee.

The position of the Army, with which we agree, is as follows. First, as to witnesses not supplied upon request by the Army, the situation is not materially different than any congressional investigation where witnesses are directly summoned and Department of Justice investigative files and statements by such witnesses are sought. Presumably, such statements would not be given. Since the Army has not supplied the witnesses, its refusal to give statements can hardly be said to create an inconsistency. As to others -- witnesses not involved in the Calley case or in the Peers investigation -- the statements still contain unverified data, leads on other witnesses, etc., the release of which could be prejudicial to those charged and to the independent investigative efforts of the Army. Moreover, it is not clear that the Army can ultimately exert control over witnesses in any event.

Finally, there is a good deal of uncertainty about which witnesses and which documents are directly involved in the Calley trial and the Peers investigation. A request for all statements at the present time might call for a degree of judgment on these matters which simply cannot be exercised at present.

Sincerely,

Thomas E. Kauper
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Office of Legal Counsel