US federal court blocks second court martial against Army war resister

Naomi Spencer
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On November 8, a federal judge blocked second Army court martial proceedings against First Lieutenant Ehren Watada, the first commissioned officer to openly refuse to deploy to Iraq. The decision is a substantial blow to the prosecution, which has maintained that civilian constitutional protections do not apply to military personnel.

Judge Benjamin Settle of the Western District court in Tacoma, Washington, issued a preliminary injunction against the Army until a military appeals court resolves whether a second court martial constitutes double jeopardy, since the first was not completed. Both the Fifth Amendment of the Constitution and Article 44(a) of the Uniform Code of Military Justice protect individuals against double jeopardy, or being tried for the same charges twice.

The ruling comes a month after Settle issued an emergency stay on proceedings, when Watada requested relief from Army prosecution as his appeals in the military court system were being exhausted. The second court martial was scheduled to begin October 9.

Watada, who remains stationed at the Seattle, Washington-area, Fort Lewis base, was court-martialed in February on one count of "missing movement" stemming from his refusal to deploy with his unit to Iraq in 2006, and on two counts of conduct unbecoming an officer in connection with public statements explaining his reasons for resisting the war.

Watada's refusal to deploy was based on evidence that the war was illegal and unauthorized, and that therefore his participation in it would make him a party to war crimes under the Nuremberg Principles and the US Constitution.

Two unbecoming conduct charges had been dropped as part of a January pre-trial agreement, after Watada agreed to sign a stipulation of fact in which he admitted that he had refused to board the plane to Iraq, and that he had given interviews in which he questioned the legality of the war. Military judge John Head subsequently threw out the stipulation and declared a mistrial just before Watada was to testify in his defense, insisting that the agreement amounted to a guilty plea. Both the defense and the government prosecutors objected to the mistrial ruling.

Settle issued the injunction against a second prosecution on three grounds. First, the court found that, with the second trial imminent on charges carrying six years in prison, Watada would "suffer irreparable injury if relief is denied."

The military has insisted that because the first court martial was not concluded, the second trial did not amount to double jeopardy. Against this claim, Settle cited *Arizona v. Washington*, a 1978 federal decision that clearly elaborated the law: "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accuse to stand trial."

Second, Settle concluded that Watada's double jeopardy claim, currently pending in the US Circuit Court for the Armed Forces, would likely succeed on its merits because "it is likely the military judge abused his discretion in rejecting the stipulation midway through the trial on the same information upon which he accepted it." Settle noted, "there was no manifest necessity for calling a mistrial, and...the record does not

reflect that reasonable alternatives to calling a mistrial were explored or entertained."

Furthermore, Head "likely abused his discretion in rejecting the Stipulation of Fact after the Government had presented its case and before [Watada] was allowed to present his." Neither the prosecution nor the defense believed that there was any reason to reject the stipulation, and, Settle wrote, "both parties agreed that they had a meeting of the minds as to the contents of the stipulation and its use."

Shortly before Head declared mistrial, the judge asked Watada to again explain his reasons for refusing to board the aircraft bound for Iraq. Watada responded, "Sir, my intent, as I stated in public statements and as I stated to my chain of command numerous times, was that the order to deploy to Iraq to support combat operations in OIF [Operation Iraqi Freedom] was to me, as I believed in the facts and evidence that I saw, an illegal order." He added, "And that the war itself was illegal, and any participation of mine would be contrary to my oath, and therefore I would have no other choice but to refuse."

The defense never denied that Watada refused orders, but has instead argued that the offenses for which the lieutenant is being tried do not deserve punishment because the orders themselves were illegal and military code necessitated their refusal.

The defense has held that Watada's public statements were not unbecoming conduct as defined by the Uniform Code of Military Justice: "dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty." Rather, the political content of Watada's public statements makes them protected speech under the Constitution.

In fact, Watada never stated anything contrary to military code or American and international law. "It is my conclusion as an officer of the Armed Forces that the war in Iraq is not only morally wrong but a horrible breach of American law," he stated in June 2006, the first occasion the military characterized as unbecoming conduct. "As the order to take part in an illegal act is ultimately unlawful as well, I must as an officer of honor and integrity refuse that order.... The wholesale slaughter and mistreatment of Iraqis is not only a terrible and moral injustice, but it's a contradiction to the Army's own law of land warfare. My participation would make me party to war crimes."

From the outset of the proceedings against Watada, it was clear that the military was less concerned with justice than with quashing dissent in its ranks and setting a harsh example. For the military and the Bush administration, declaring a mistrial and pursuing unconstitutional prosecution against the officer is preferable to allowing the Iraq war's legality to be challenged in court.

The military has consistently denied the relevance of Watada's motive. However, the fact that the unbecoming conduct charges leveled against Watada are the first such relating to statements of political dissent in the ranks since the Vietnam War is in itself revealing.

The war is deeply unpopular both within the military and among the general population. Disciplinary proceedings against expressions of this popular sentiment underscore the growing political divide between the troops and the military brass.

According to Army figures, more than 10,000 soldiers have deserted since the invasion of Iraq in 2003. The rate of desertion has increased every year; in 2006, just under 3,200 active-duty soldiers deserted the Army, compared to 2,543 in 2005.

The majority of US soldiers stationed in Iraq, like the overwhelming majority of Americans as a whole, want a complete withdrawal from the country. An independent measure of troop sentiment is rare. A Zogby poll conducted in February 2006 among active-duty soldiers in Iraq found that 72 percent felt troops should be out within a year. Of those, 29 percent said an immediate withdrawal was in order.