

**PROCEEDINGS OF AN ARTICLE 32(b) INVESTIGATION**

**in the case of U.S.**

**V-**

**First Lieutenant Ehren K. Watada,  
Headquarters and Headquarters Company, I Corps, Fort Lewis, WA 98433**

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**PERSONS PRESENT**

<b>LTC Mark Keith</b>	<b>Investigating Officer</b>
<b>CPT Daniel Kuecker</b>	<b>Trial Counsel</b>
<b>CPT Scott Van Sweringen</b>	<b>Assistant Trial Counsel</b>
<b>CPT Mark Kim</b>	<b>Assistant Defense Counsel</b>
<b>Mr. Eric Seitz</b>	<b>Defense Counsel</b>
<b>SSG Richard M. Goldstein</b>	<b>Reporter</b>
<b>1LT Ehren K. Watada</b>	<b>Accused</b>

**The Article 32(b) Investigating Officer called the Article 32(b) session to order at 0908 hours, 17 August 2006, Building 2027B, Fort Lewis, Washington 98433, pursuant to the attached orders.**

**The Investigating Officer made administrative announcements to the media personnel located inside the hearing room.**

**The Investigating Officer explained to the accused his rights to counsel.**

**The Investigating Officer stated, for the record that Mr. Eric Seitz and CPT Mark Kim were present at the defense counsel table, and verified that 1LT Watada wished to be represented by both.**

**The Investigating officer had both defense counsel verify that the information on the DD 457 was correct. Both defense counsel stated that the information on the DD 457 was correct and Mr. Seitz requested that it be noted that he has been admitted to the Bar for the states of California, Hawaii and the District of Columbia and he has also been admitted to practice law in front of all Military Magistrates**

**The Investigating Officer advised the accused of his duties as an Investigating Officer.**

**The Defense Counsel waived the reading of the charges.**

**The Investigating Officer advised the accused of his right to remain silent, his right to make a sworn or unsworn statement and his right to present evidence in defense, extenuation, and mitigation.**

**The Investigating Officer explained to the accused that any statement that he desired to make would be considered and weighed just the same as if given by any other witness.**

**The Investigating Officer stated that he had been given a copy of the investigative file that has been compiled in the case.**

**The Investigating Officer stated the investigative file contained:**

- 1. The Charge Sheet**
- 2. Appointment memorandum of the Investigating Officer**
- 3. Memorandums of Record**
- 4. Counseling statements**
- 5. CD-Rom with various media articles**

**The Investigating Officer stated the names of the witnesses he intended to call.**

**For the trial counsel:**

- 1. CPT Nelson**
- 2. CPT Kaplan**

**The Trial Counsel informed the Investigating Officer that only CPT Kaplan would be testifying at the hearing for the Trial Counsel.**

**The Investigating Officer informed the accused of the right to cross-examine the witnesses against him, and to call witnesses or to produce other evidence in his behalf.**

**The Investigating Officer went on to explain that after examination and cross-examination of each witness was complete he reserved the right to question each witness.**

**The Investigating Officer asked if the Defense has any witnesses to testify in defense, extenuation or mitigation on behalf of the accused.**

**The Investigating Officer explained that he does not intend to call Ms. Sarah Olsen or Mr. Greg Kakesako or LTC Bruce Antonia since these witnesses are unavailable.**

**The Investigating Officer asked the accused if he had any questions regarding his rights.**

**The accused responded that he did not and that he understood his rights.**

**The Investigating Officer verified with Defense Counsel that he intended to call the following witnesses:**

- 1. Mr. Denis Halliday**
- 2. Professor Francis Boyle**
- 3. Colonel Ann Wright (ret.)**

**The Assistant Defense Counsel objected to the use of the courtroom as the venue for the Article 32 hearing and stated his request that it be held in the OSJA training room since it could hold more people than the courtroom.**

**The Investigating Officer explained that the courtroom was the only room available per the order given by the military judge and that the setup of the courtroom was sufficient for the hearing.**

**The Defense Counsel began voir dire of the Investigating officer to determine how the Investigating Officer was approaching the Article 32 hearing.**

**The Investigating Officer answered that he had not served as an Article 32 Officer, he has never served on a court-martial, has no legal training, he has only received instructions relating to the procedural aspects of Article 32 and that he has read through the appropriate materials for conducting Article 32 investigations.**

**The Investigating Officer further explained that he had looked at the evidence provided by both counsel and that there weren't any other documents or evidence that he has reviewed in preparation for the hearing.**

**The Investigating Officer answered that no one has given him any suggestions on how he should consider ruling in regards to the issues that would be presented at the hearing.**

**The Investigating Officer confirmed that he understood that the defense would raise issues about the lawfulness of the war and that he was open to considering the issues from the reasoning's of the accused.**

**Prior to calling his first witness the Trial Counsel outlined the exhibit list that has been provided for the Investigating Officer as follows;**

**There are 26 items on the exhibit list. Number 10 is the DVD with statements that the Trial Counsel has provided to the Investigating Officer. There are 17 items on the DVD and the Trial Counsel has planned to show 2 or 3 at the hearing. The Trial Counsel does request that the IO review all of the items on the DVD as well as all of the other evidence presented to him.**

**The following witness was called, advised of his rights, sworn, and testified in substance as follows:**

Juan Carlos Samuel Kaplan, Captain, 3d Brigade, 2d Infantry Division.

### **DIRECT EXAMINATION**

#### **Questions by Trial Counsel:**

I am the rear detachment executive officer. I have been the executive officer since 1 June 06, prior to that I was the rear detachment commander starting on 1 February. As the rear detachment executive officer I oversee all administrative and logistical operations for the rear detachment. That includes pushing out the entire Brigade as it started deploying to theatre. As the rear detachment was taking over for the main body I was in charge of consolidating the entire logistical infrastructure of the brigade, administrative and logistical supplies and that they are working properly. After that I am responsible for caring for the Soldiers that are left behind under the command of the rear detachment and their families.

As the brigade started to leave from Fort Lewis, I was working with the brigade XO and the brigade adjutant to make sure as the flights were locked in how many seats we had, how many seats each subordinate unit had and then compiling the lists of who would be on each flight. After that we would put together the sequence of events for each day so that everyone could get on the plane and leave and make sure the brigade manifest site (the gym) was set up, the buses were ready and the people were in place to hand out food and water and, make sure the bags got on the buses and the streets were blocked off so that everyone got to the airplane.

The flight that was scheduled to take-off on the 22d of June was ADVON 1. That flight was the first big push for the brigade. It was a conglomerate of all the subordinate units from the brigade. All the people the brigade wanted to get to Kuwait to set the conditions for when the brigade's main body started arriving. They would set up the training, how Soldiers would be fed and where they would be living.

I saw the manifest of all of the Soldiers from the brigade that were supposed to be on that flight and 1LT Watada's name was on that list. He was supposed to deploy with the unit on the 22d of June and he did not.

**The Trial Counsel approached the witness and handed him an excel spreadsheet, which is Exhibit #2.**

The spreadsheet shows the different flights that were coordinated for the brigade, the date they were scheduled to depart and what their purpose was. The first one was; "The Torch," which was the initial grouping of people. That first left to do the initial coordination for what the brigade had to do in Kuwait.

After that flight is Advon #1, which I already explained and than Advon #2 and than the main body flights.

Going down from top to bottom you than see a sequence of times that the brigade put out to all of the units to show them the hit times they have to meet at brigade manifest in order to complete their mission and be on the plane.

Below that; in the case of 5-20, on each date it shows the allotted slots on each aircraft. Once main body flights were running it was supposed to be done "unit pure" but in the initial flights, "Torch" and "Advon" those were a conglomeration of all of the units in the brigade so each subordinate unit was given a certain number of seats on each flight so looking at the spreadsheet you can see for 5-20 based on their number of seats they took that number of seats and broke down how many people they were putting on from each one of their companies.

For the purposes of this discussion we are looking at the second column which shows Advon #1. This is a brigade generated list, detailing 5-20, 1LT Watada's Battalion at the time and their procedures for deploying.

The brigade was given 211 seats on this flight and 5-20th was given 22 seats. Out of those 22 seats 21 Soldiers flew and at the bottom it shows a "delta" of minus 1 and that minus 1 was 1LT Watada.

I was at the brigade manifest. No, 1LT Watada was not there. The manifest took place at Sheridan Gym on Stryker Ave which is located in the brigade area. After completion of the manifest the Soldiers departed on buses from the gym to McChord Air Base and from their, the Soldiers went on to the airplane.

1LT Watada did not show up at McChord. 210 personnel did get on that plane but we were planned for 211. I saw 1LT Watada later that day. I was tasked to be the escort officer to make sure that he arrived at his quarters where he was being assigned. He had been restricted to post as of that time so I was told to make sure he got to his new quarters. So, I escorted him from his unit to his new quarters.

The flight number for the aircraft that left was; BMYA91111173, that is correct.

## CROSS EXAMINATION

### Questions by Assistant Defense Counsel:

I saw 1LT Watada at the battalion area when I went to pick him up. No, I was not involved in any conversations with 1LT Watada and LTC Antonia. I was involved in a conversation with them later on during the day but not anything that happened prior to the brigade manifest.

Yes, I had a conversation with LTC Antonia at the time that I went to go and escort 1LT Watada but not prior to his arrival at the battalion area.

When I went to the battalion area later that morning after the flight had already departed, at that time besides the battalion commander I saw the battalion XO, I cannot remember his name right now, I saw the S3 and various NCOs. I also saw the direct supervisor for 1LT Watada, the Battalion Fire Support Officer but I cannot remember his name right now. When I arrived there, I had to wait a little while so I was talking with the FSO for a little while.

When I showed up to escort 1LT Watada the first person I was talking with was the Battalion Fire Support Officer. The conversation was just sort of pleasantries and about the situation and how you are doing and that sort of thing. After that he was released into my care I escorted him first to brigade headquarters.

Escort meant he followed me in his car back to brigade nothing more formal then that.

He followed me back to brigade headquarters and then we waited there while LTC Antonia spoke to the Brigade Commander and then in my presence 1LT Watada was given his set of instructions. The most significant was they changed the communications black out that he and everyone else had been on. It was not entirely lifted but he was given more –it was altered. The SOP for the brigade is once you go into the deployment sequence you are on a communications black out and I believe at that point LTC Antonia said to him that he could not talk to other people but there was some type of caveat to it but I cannot recall what that was. From there they explained that he was going to his quarters and that kind of thing. Once that was completed 1LT Watada followed me to his new quarters over by the Cascade Club and the shoppette.

I do recall that he was restricted to post which was the whole reason for him being given the new quarters. No, he was not told he had to stay in the quarters. The only other thing that stood out in my mind was that he had to report back to brigade headquarters at 0900 the following morning.

No there was not enough of a concern beyond the fact that they had given him a lawful order that required me to stay with him once I had insured that he was in his new lodging, so, no there wasn't that type of a concern.

I don't know and wouldn't be able to say why there wasn't that type of a concern. I couldn't speak for their mindset.

That was the first day that I had met 1LT Watada.

### **RE-DIRECT EXAMINATION**

#### **Questions by Trial Counsel:**

The communications black out is put in place for operational security. We have units leaving going on a flight over into a combat environment so we do not want anyone to get knowledge of the specifics of what time the flight is leaving and how many people are on the flight. For that reason we place a communications black out until they safely arrived at their destination.

I think I know why 1LT Watada missed the flight from what I have read and heard but I am not sure that is my determination.

No, there was not any evidence to show that there was a mix up in the time, that he was sick or anything like that. I was told when I was at the brigade manifest site that he was not coming to the brigade site. I was told this while we were doing the brigade manifest.

### **RE-CROSS EXAMINATION**

#### **Questions by Assistant Defense Counsel:**

The destination of the flight on 22 June that we have been talking about was Kuwait City and from there the unit would then go to Camp Buehring which is a camp there in Kuwait where they would start doing all of the mobilization activities for our movement into Iraq which was the ultimate destination.

**There being no further questions the witness was temporarily excused.**

**The Trial Counsel requested the showing of the DVD in evidence. The first clip was the public statement of 1LT Watada from 7 June 2006.**

**The first video shown was from clip #1. It started off with a news reporter from WCN News. The statement by 1LT Watada was as follows;**

Members of the religious community, members of the press and my fellow Americans, thank you for coming today. My name is Ehren Watada, I am a First Lieutenant in the US Army and I have served for 3 years. It is my duty as a commissioned officer of the United States Army to speak out against grave injustices. My moral and legal obligation is to the Constitution not to those who would issue unlawful orders. I stand before you today because it is my job to serve and protect America's Soldiers, its people and innocent Iraqis who have no voice. 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. Although I have tried to resign out of protest, I will be forced to participate in a war that is manifestly illegal. 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 war in Iraq violates our democratic system of checks and balances. It usurps international treaties and conventions that by virtue of the Constitution become American law. The wholesale slaughter and mistreatment of Iraqis is not only a terrible moral injustice, but it is a contradiction to the Army's own Law of Land Warfare. My participation would make me party to War Crimes. Normally, those in the military have allowed others to speak for them and act on their behalf. I believe that time has come to an end. I have appealed to my commanders to see the large issues of their actions. But justice has not been forthcoming. My oath of office is to serve and protect America's laws and its people. By refusing an unlawful order for an illegal war, I fulfill that oath today. Thank you.

**The Trial Counsel than requested the court be shown clip #13.**

This clip began with television station Q13 news reporter Christina speaking about 1LT Watada. She explains that 1LT Watada is supposed to fly out later that month and that he stated that the war is illegal and that as a Soldier he cannot go. The news reporter then goes to a fellow reporter named Nicole Sanchez who she explains just spoke with 1LT Watada.

Ms. Sanchez states; "I spoke with Lieutenant Watada just a little bit ago after a press conference here in this building behind me. He tells me that no matter what he will not fight in Iraq even if it means going to prison instead."

News report than goes to a video of 1LT Watada speaking. 1LT Watada states the following;

"I am willing go as far as it takes"

Ms. Sanchez returns to the screen and states; "1LT Watada turns 28 years old tomorrow. A birthday he will celebrate with the weight of the world on his Soldiers. Inside a press conference today Watada found lots of support from peace activists and veteran's against the war who attended. But he knows that not everyone agrees with his decision. Even his family initially disagreed with him. They told him to stick it out.

The news report than goes to another video of 1LT Watada who states the following;

"Just do your year, you feel the way you feel and just leave the military."

Ms. Sanchez returns to the screen and continues; "But Watada says he had to listen to his conscience. He shared with me what finally pushed him to make his decision to not join his unit, the 3d Brigade, 2d Infantry Division. Watada was listening to a talk radio show when a man called in who was upset that his brother was going to Iraq for the second time. The caller wanted to know why more people weren't speaking out against the war. In that moment Watada knew that person could be him.

1LT Watada returns to the screen and states; "Just being in the military does not excuse me from being silent."

Ms. Sanchez returns to the screen and states; "The Lieutenant's decision is concerning for people like Carl Stentzel, his father served in the Navy for 23 years. He says, he fears more members of the military might follow Watada's actions.

News cuts to a video of Mr. Stentzel saying; "In a chain reaction incident, it could all fall apart, I do believe but we have to hold strong to what we believe."

Ms. Sanchez returns and tells about a statement that Fort Lewis released. "For a commissioned officer to publicly declare an apparent attempt to violate military law, by refusing to obey orders is a serious matter and could subject him to adverse action. 1LT Watada says that he is not breaking his oath because he believes the war is illegal and that he must speak up."

1LT Watada returns to the screen and states; "We have a duty and an obligation to evaluate the truthfulness and the legality of every order, including the order to go to war."

Ms. Sanchez returns and goes on to say; "Lieutenant Watada tells me, he just learned this morning that he has one more chance to appeal for a resignation. He says he will do that but has already been told that he will likely be charged and could go to prison if he doesn't get on the plane at the end of the month."

**The video ends and the Trial Counsel explains that this past weekend 1LT Watada was a featured speaker for a Veteran's for Peace National Convention and that the next video clip was going to show that speech. The Trial Counsel asks the court to show clip #17.**

The clip begins with a speaker introducing 1LT Watada as someone who will not take a legal order. 1LT Watada comes up to a podium and gives the following statement.

"Thank you. I guess you can say that I am overwhelmed by all the support that I have been given, especially here tonight. Thank you everyone very much, and thank you all for your tremendous support. How honored and delighted I am to be in the same room with you tonight. I am deeply humbled by the company of the other wonderful speakers that came before me. You are all true American patriots. Although long since out of uniform, you continue to fight for the very same principles you once swore to uphold and defend. No one knows the devastation and suffering of war more than veteran, which is why we should always be the first to prevent it. I wasn't entirely sure what to say tonight. I thought as a leader in general I should speak to motivate. Now, I know that this isn't the military and surely there are many out there who

outrank me and at one point or another—and yes I am just a Lieutenant. And yet, I feel as though we are all citizens of this great country and what I have to say is not a matter of authority, but, from one citizen to another. We have all seen this war tear apart our country over the past 3 years. It seems as though nothing we've done, from vigils to protests to letters to Congress, have had any effect in persuading the powers that be. Tonight, I will speak to you on my ideas for a change of strategy. I am here tonight because I took a leap of faith. My action is not the first and it certainly will not be the last. Yet, on behalf of those who follow, I require your help, your sacrifice, and that of countless other Americans. I may fail. We may fail. But nothing we have tried has worked so far. It is time for change and the change starts with all of us. I stand before you today, not as an expert, not as one who pretends to have all of the answers. I am simply an American and a servant of the American people. My humble opinions today are just that. I realize that you may not agree with everything I have to say. However, I did not choose to be a leader to be popular. I did it to serve and make better the Soldiers of this country and I swore to carry out this charge honorably under the rule of law.

Today, I speak with you about a radical idea. It is one born from the very concept of the American Soldier or the service member. It became instrumental in ending the Vietnam War, but it has long been since forgotten. The idea is this; that to stop an illegal and unjust war, the Soldiers and service members can choose to stop fighting it. Now, it is not an easy task for the Soldier for he or she must be aware that they are being used for ill-gain. They must hold themselves responsible for individual action. They must remember duty to the Constitution and the people supersedes the ideologies of their leadership. The Soldier must be willing to face ostracism by their peers, worry over the survival of their families, and of course the loss of personal freedom. They must know that resisting an authoritarian government at home is equally important to fighting a foreign aggressor on the battlefield. Finally, those wearing the uniform must know beyond any shadow of a doubt that by refusing immoral and illegal orders they will be supported by the people not with mere words but by action. The American Soldier must rise above the socialization that tells them authority should always be obeyed without question. Rank should be respected but never blindly followed. Awareness of the history of atrocities and destruction committed in the name of America, either through direct military intervention or by proxy war is crucial. They must realize that this is a war not out of self-defense but by choice, for profit and imperialistic domination. WMD, ties to Al Qaeda, and ties to 9/11 never existed and they never will. The Soldier must know that our narrowly and questionably elected officials intentionally manipulated the evidence presented to Congress, the public and the world to make the case for war. They must know that neither Congress nor this administration has the authority to violate the prohibition against pre-emptive war, an American war that still stands today. This same administration uses us for rampant violations of time tested laws banning torture and degradation of prisoners of war. Thought the American Soldier wants to do right, the illegitimacy of the occupation itself, the policies of this administration, and the rules of engagement of desperate field commanders will ultimately force them to be party to war crimes. They must know some of these facts, if not all, in order to act.

Mark Twain once remarked, "Each man must for himself alone decide what is right and what is wrong. Which course is patriotic and which isn't. You cannot shirk this and be a man. To decide against your conviction is to be an unqualified and inexcusable traitor, both to yourself and to your country."

By this each and every American Soldier, Marine, airman and sailor is responsible for their choices and their actions. The freedom to choose is only one that we can deny ourselves. The oath we take swears allegiance not to one man but to a document of principles and laws designed to protect the American people. Enlisting in the military does not relinquish one's right to seek the truth; neither does it excuse one from rational thought, nor the ability to distinguish between right and wrong. "I was only following orders" is never an excuse. The Nuremberg Trials showed America and the world that citizenry as well as Soldiers have the un-relinquishable obligation to refuse complicity in the war crimes perpetrated by their government. Widespread torture and inhumane treatment of detainees is a war crime. A war of aggression born through an unofficial policy of prevention is a crime against the peace. An occupation violating the very essence of international humanitarian law and sovereignty is a crime against humanity. These crimes are funded by our tax dollars. Should citizens choose to remain silent through self-imposed ignorance or choice, it makes them equally as culpable as the Soldiers in these crimes. The Constitution is no mere document, neither is it old, out dated or irrelevant. It is the embodiment of all that Americans hold dear; truth, justice, and equality for all. It is the formula for a government of the people and by the people. It is a government that is transparent and accountable to whom they serve. It dictates a system of checks and balances and separation of powers to prevent the evil that is tyranny.

As strong as the constitution is, it is not foolproof. It does not fully take into account the frailty of human nature. Profit, greed, and hunger for power can corrupt individuals as much as they can corrupt institutions. The founders of the Constitution could not have imagined how money would infect our political system. Neither could they believe a standing army would be used for profit and manifest destiny. Like any common dictatorship, Soldiers would be ordered to commit acts of such heinous nature as to be deemed most ungentlemanly and unbecoming that of a free country. The American Soldier is not a mercenary. He or she does not simply fight wars for payment. Indeed, the state of the American Soldier is worse then that of a mercenary. For a Soldier for hire can walk away if they are disgusted by their employer's actions, instead, especially when it comes to war, American Soldiers become indentured servants whether they volunteer out of patriotism or are drafted through economic desperation. Does it matter what the Soldier believes is morally right? If this is a war of necessity, why force men and women to fight? When it comes to a war of ideology, the lines between right and wrong are blurred. How tragic it is when the term Catch-22 defines the modern American military.

Aside the reality of indentured servitude, the American Soldier in theory is much nobler. Soldier or Officer when we swear our oath it is first and foremost to the Constitution and its protectorate the people. If Soldiers realized this war is contrary to what the Constitution extols, if they stood up and threw their weapons down, no President could ever again initiate a war of choice.

**The Trial Counsel instructed the court to shut off the video.**

**The Trial Counsel informed the Investigating Officer that the charges were preferred on 5 July 2006 and the speech given took place this past weekend (12-13 August 06) and went on to request that the Investigating Officer include this speech in his investigation.**

**The Trial Counsel than clarified that one of the charges was based on an article done by Greg Kakesako out of the Honolulu newspaper. In the exhibit list there are two separate articles. The first one is an article from the 8th of June and the second one is an update from the 12th of July. The update was a change from the word "horrible" to the word "honorable."**

**The Trial Counsel requested that the Investigating Officer look at both articles.**

**Investigating Officer asked if the Trial Counsel was referring to items 11 and 12 and the Trial Counsel corrected that it was items 14 and 15.**

**The Trial Counsel then requested to point out where the language from the charge sheet is within the exhibits. Charge II, Specification 1, the Article 88 charge, which is the same in Charge III, Specification 2, came from the Sarah Olsen interview. The specific language identified comes from the 7 June interview and the first part of the statement comes from the second question in answer to Ms. Olsen's question. The next part comes from the fifth question and the final portion comes from the 5th from the end statement.**

**In regard to the second Article 88 specification and Specification 3 of Charge III, this comes from the Greg Kakesako news story. This comes from page 4 of 5 and is in the last paragraph. The Trial Counsel than stated that he would like the Investigating Officer to consider the entire Article but that is specifically where the language for the Charge came from.**

**Lastly, the Trial Counsel mentioned Charge III, Specification 1 came from the first statement that was show, which was from 7 June. The statement related to the charge comes from the 5th paragraph in the transcript.**

**The Trial Counsel asked the Investigating Officer to consider all of the exhibits that have been identified on the government exhibit list.**

**The Defense Counsel requested to make note that the Defense objects to all of the exhibits which have been offered. None of the exhibits have been authenticated except the one document that was shown to the government's witness (CPT Kaplan). Goes on to state that for the purposes of a court-martial none of the exhibits would be admissible due to lack of authentication.**

**The Defense Counsel noted that the Investigating Officer's attention was called for to note an inaccuracy in at least one document and that is normal when using second or third hand reports.**

**The Investigating Officer asked if the Defense was objecting to the video or the articles.**

**The Defense Counsel explained that he was objecting to both article and video since no basis for the videos would exist if the written form wasn't admitted. Some of the statements are hearsay since the reporters weren't making the statements themselves and**

**there are foundation and authentication issues that the government would need to address for court-martial.**

**The Trial Counsel explained that the government was aware of the issues and that the government does not have subpoena power at this time and that he has been in contact with attorneys for both the news reporters and is aware of the potential court-martial. The Trial Counsel went on to state that newspapers based on Military Rules of Evidence are self-authenticating.**

**The Investigating Officer asked if there were any other comments before proceeding into the defense witnesses.**

**Both Trial Counsel and Defense Counsel stated there were not.**

**The Investigating Officer asked the Defense Counsel if he was prepared to call his first witness.**

**The Defense Counsel explained that the witness have not arrived in the courtroom as of yet and that he would like to go through the defense exhibits prior to the witnesses arrival.**

**The Investigating Officer agreed and the Defense Counsel proceeded.**

**The Defense Counsel began with mentioning two briefs that had already been submitted. The first was the brief submitted by the ACLU and inquired if the Investigating Officer had received that brief. The Investigating Officer replied that he had not received it.**

**The Defense Counsel approached and offered the ACLU brief. The attorney who drafted the brief Mr. Aaron Kaplan is present in the hearing room. The Defense Counsel explained that the brief is relevant to the speech issues and makes arguments that the defense would adopt. Counsel went on to explain that the ACLU is not taking a position with regard to the legality of the war but that the brief addresses Charge II and III.**

**The second brief has already been provided to the Investigating Officer. It was written by Staughton Lynd and pertains to the legality of the war. He was retained by an organization called Historians against the War and The American Friendly Service Committee.**

**The Investigating Officer stated that he was not aware of the second brief. The defense counsel explained it is contained in the package of documents provided to him.**

**The Defense Counsel next spoke about the black binder that was provided to the Investigating Officer. The report inside the binder is a minority report from the members of the Judiciary Committee of the US Congress. This report was issued on 6 August and contains over 300 pages pertaining to the process by which the congress was asked to appropriate funds and authorize the military action taken in Iraq. Counsel explains that**

**the report documents all of the inaccuracies of the information that was provided to Congress and the basis upon which Congress was asked to act.**

**The remaining defense exhibits include excerpts from the Charter of the United Nations copied directly from US Statutes. Also excerpts from the Geneva Conventions also found in US Treaties (3316 and 3516) which come from October of 1950. These conventions were signed and ratified by the Congress.**

**The Defense Counsel also excerpted a portion of 18 USC 2441 which is the War Crimes Act. The act was enacted in 1996. Act has become controversial due to a memo circulated from the current administration in an effort to amend the act to provide protection for personnel that have formulated current policies.**

**Also provided by the Defense Counsel is a copy of a decision by the highest German Court that reviews matters pertaining to members of the German Military. Decision is summarized in the beginning of the packet. The decision was made on 21 June, 2005 and arose from a situation where a German soldier was ordered to work in support of the Iraq war and he refused to do so. The German Court ruled that there were serious issues with the unilateral military action taken by the US and Great Britain against Iraq. Also went on to rule that there was no legal justification for the attack on Iraq.**

**Other exhibits include two letters of support for 1LT Watada. The first letter is from Neal Abercrombie who is a member of Congress from Hawaii and the second is a letter from the former governor of Hawaii Benjamin Cayetano.**

**The Defense also offered the two OERs that 1LT Watada was given in Korea.**

**The final two exhibits are documents. The first is a package dated April 19th 2006. That contains the letter that 1LT Watada wrote in January to his command. Defense Counsel states that it emphasizes that long before any public statements were made there were efforts by 1LT Watada to meet with his command and express his concerns about the war and the fact that he held deep concerns and asked the command to speak with him before public confrontation. First is a letter of resignation over moral and legal issues about the war and was later followed by a formal request for resignation which was denied and then was followed by a request to transfer to a unit going to Afghanistan.**

**The last document is a pre-trial agreement request on the part of 1LT Watada to accept punishment with separation under less than honorable conditions.**

**The Defense Counsel states that they are willing to look at any avenue that would resolve the matter short of a public trial which would create more controversy.**

**The Investigating Officer asked if all of the documents were in the manila folder provided to him and the Defense Counsel confirmed that they were.**

**The Trial Council stated that the Article 15 that was turned down should not sway the Investigating Office in anyway in this matter.**

**The Article 32(b) Investigation recessed at 1015 hours, 17 August 2006 so the Defense Counsel could get their witnesses to the hearing.**

**The Article 32(b) Investigation reconvened at 1052 hours, 17 August 2006. All parties present prior to the recess were again present.**

**The Trial Council requested a follow up to the earlier voir dire of the Investigating Officer. Asked if the Investigating Officer would consider any objections to the relevancy of lawfulness and 1st amendment issues have been settled within the Supreme Court and the Court of Appeals for the Armed Forces.**

**The Investigating Officer stated he would consider those objections.**

**The Investigating Officer explained to the Defense Counsel that the Trial Council has completed their witness list and the video footage and asked if the Defense was prepared to call their first witness.**

**The following witness was called, advised of his rights, sworn, and testified in substance as follows:**

Professor Francis Anthony Boyle, civilian, Professor of Law at University of Illinois, College of Law, Champagne.

#### **DIRECT EXAMINATION**

##### **Questions by Defense Counsel:**

I have been teaching there since August of 1978. I teach public international law, international human rights, constitutional law of US foreign affairs and jurisprudence. I have also taught courses on criminal law, world politics and international law, international organizations and Latinos and the law.

I attended the University of Chicago as an undergraduate where I studied International Relations with Hans Morgenthau. I was elected to Phi Beta Kappa as a junior and graduated in three years. I also won the Sigma Zia certificate of merit and prize in biology. After that I went to Harvard for seven years. I have a doctor of law of Magna Cum Laude from Harvard Law school and a Master's degree and a PHD from Harvard in Political Science specializing in International Relations and its relationship with international law and organizations. I spent two years teaching at Harvard College, International Organizations, International Law, Human Rights. Then two years as an associate at the Center for International Affairs at Harvard and one

year with the Boston Law Firm of Bingham, Danet and Gould where I did international tax and tax.

I am a member of the American Society of International Law, the American Bar Association and the American Political Science Association.

I just sent the manuscript for my 10th book to my publisher and I have about 60 major professional articles.

In terms of military proceedings, the court-martial proceedings of USMC CPL Jeff Patterson, CPT Dr. Yolanda Hewitt-Vaughn from the Army, CPT Lawrence Rockwood from 10th Mountain Division and SSG Camillo Mejia. Those are some of the military proceedings that I have testified at and I also have testified many times in state and federal court.

I have been qualified as an expert witness in Military Court Proceedings and Federal and State Courts in International Law and especially the Laws of War under the Field Manual 27-10. The man who drafted this for the US Army, Professor Richard R. Baxter, was my teacher on the Laws of War at Harvard Law School and I was his top student while I was there.

Yes, I am knowledgeable about the US obligations in International Law and have studied and written about them repeatedly over the last 28 years.

The US Army Field Manual 27-10 incorporates International Law directly into 27-10 and all of the rules are here. Basically as drafted 27-10 includes the Hague Conventions of 1899 and 1907, the Kellogg-Briand Peace Pact of 1928, the United Nations Charter, and the Nuremberg Charter, judgment and principles as well as the Tokyo war crimes procedures.

This was published by the Army as of 1956. It was supplemented once and is valid and binding on troops in the field including 1LT Watada.

In order for the United States to enter into a war there are two basic requirements. First, warfare would have to be authorized by the US Congress pursuant to the War Powers Clause of the Constitution and secondly unless the US itself is attacked militarily or its troops it would have to be authorized by the UN Security Council. Otherwise, aggressive warfare would be a Nuremberg Crime against peace and that is stated in the Law of Land Warfare.

Professor Baxter incorporated the Nuremberg Charter, judgment and principles directly into the Law of Land Warfare in 27-10 including the notion of a crime against peace.

**The Defense Counsel asked the witness if the US complied with appropriate international procedures to obtain authorization before it invaded Iraq.**

**Objection by the Trial Counsel:**

**The Trial Counsel objected on the grounds of relevancy to the line of testimony towards the charges against 1LT Watada. It is a non-judicial question whether to deploy forces, it is a political question. Furthermore stating that being ordered to go to Iraq in 2006 is a separate issue after Iraq is a sovereign question as opposed to going to Iraq in 2003.**

**The Defense Counsel stated given the nature of the charges, especially the missing movement charge, that the soldier was given an order to participate in an action which could subject him to sanctions under any of the authorities which have been provided or alluded to by the witness. That could cause a soldier to do something which was in violation of International Law and as incorporated into US law by the US Army. The Defense Counsel goes on to state that if the statements made by 1LT Watada if true and accurate commentaries on what took place with respect to the start and conduct of the war cannot be punishable. They are protected as they constitute political commentary.**

**The Investigating Officer stated that he understood the Trial Counsel's objection and perspective but he would like to hear more from the witness but went on to remind the Defense Counsel that if the next two witnesses would have the same theme for the next two witnesses than depending on what the current witness has to say he might not have to hear from the next two witnesses.**

**The Defense Counsel explained that the next two witnesses will bring different experiences and different perspectives.**

#### **Questions by Defense Counsel continued;**

No, the Bush Administration did not go through the proper processes and meet its obligations before engaging in the military action of 2003. There was no authorization for the UN Security Council for the US to wage war against Iraq and that made it a crime against peace which is in violation of Paragraph 4-98 of FM 27-10.

Secondly, there was a war powers resolution adopted by Congress but that resolution was procured from Congress by fraud. First, the administration lied to Congress about Weapons of Mass Destruction and then they lied to Congress about Iraq having connections to Sept 11th.

Congress has no authority to authorize a crime against peace or a war of aggression. The current administration tried to get authorization from the Security Council and failed. Since the war started we have seen war crimes committed in Iraq such as the Abu Gharib torture scandal. The primary responsibility goes to the top of the chain of command. It was authorized by the Secretary of Defense and straight on down thru the top but so far the only soldiers to be prosecuted are lower level individuals.

Separately we have the use of cluster bombs in civilian areas. They are allowed on troop formations and tanks but if used in a city with a substantial civilian presence that does not comply with the Laws of War.

Next there is the use of depleted uranium. This violates the Geneva Protocol of 1925. This is also found in the Field Manual as a war crime. The depleted uranium is not only poisoning Iraqis but also our own troops.

Last is the use of shock and awe to start the war which was a war crime due to the wanton devastation of cities, towns and villages which is also a Nuremberg war crime.

The Nuremberg Tribunal was set up by the United States and the Nuremberg Charter is an executive agreement completed by the President within his authority as the Commander in Chief. It became part of the executive series and government statutes. Therefore the Nuremberg decision is reported as a Federal Rules decision and is now binding in US Federal Court.

The Geneva Conventions are applicable because they are treaties that the Senate has given their approval for. The four Geneva Conventions specifically the parts that cover the Law of Land Warfare were written right into the 27-10 Field Manual by Professor Baxter.

The US Supreme Court has recently emphasized the applicability of the Geneva Conventions is a recent decision with the US v. Hamdan which occurred this past summer. The Bush administration got very terrible and I would say criminal legal advice from his White House counsel Alberto Gonzalez and his Attorney General John Ashcroft. The advice was that the Geneva Convention did not apply to the war on terrorism. This advice directly contradicted the advice given to President Bush by the professional military lawyers. It also directly contradicted the advice given to him by the international lawyers at the State Department. Secretary of State Colin Powell also sent a memo to the President that the Geneva Conventions not only should be applied but must be applied. The President chose to listen to his political appointees which resulted in the torture scandals at Guantanamo. With that the Major General there acting under the orders from Secretary of Defense Rumsfeld went to Iraq with the mission of "Gitmoizing" the country and that led to the torture scandal at Abu Gharib.

It is my opinion if these orders had not been given by the Secretary of Defense and presumably with the approval of the President none of this scandal would have happened. The Army's current manual dealing with the interrogation of prisoner's of war is impeccable. There is nothing wrong with it. If not for these orders given, the Army would have applied that manual and none of this gross widespread torture would have happened.

This was Major General Miller who went from Guantanamo to Iraq and with the consent of Lieutenant General Sanchez proceeded with the "Gitmoize" Iraq. This torture is a grave breach of the Geneva Conventions and is a serious war crime. The Red Cross has determined that the torture has been widespread in Guantanamo, Iraq and also spread to Afghanistan. This determination described the torture as widespread and systematic which brings the situation to crimes against humanity that is also found in FM 27-10.

**The Investigating Officer interrupted the witness to ask him to clarify his response.**

**Questions by Investigating Officer:**

Before the tragedies that occurred on September 11th, the Army had an interrogation manual which was impeccable. Then, acting pursuant to the advice of Alberto Gonzalez and John Ashcraft and rejecting the advice of Colin Powell and the JAG Corps lawyers the President determined not to apply the Geneva Conventions to Al Qaeda or the Taliban. That decision was implemented on Guantanamo under Major General Miller. Then Secretary of Defense Rumsfeld instructed General Miller to go to Iraq and "Gitmoize" Iraq.

**IO: But that chain of events would have changed nothing for 1LT Watada and his decision not to deploy. Is that what I understand from your argument?**

That leads us to Mr. Seitz's argument.

**The Defense Counsel interrupted the witness to resume questioning the witness.**

**Questions by Defense Counsel continued:**

In regards to the charge of missing movement, it raises the question of, what is the course of 1LT Watada's duty under these circumstances of widespread crimes against peace, crimes against humanity and war crimes.

Under Melaney v. Wilbur the government must prove beyond a reasonable doubt that 1LT Watada had a duty to participate in this war.

**Questions by Investigating Officer:**

It is still possible to have war crimes occur in a war that is legally declared and has gone through the provisions as discussed earlier such as being declared by Congress.

Under the Nuremberg Judgment and principles a soldier has a right to absent himself from committing international crimes. The Soldier actually has an obligation to do so. The Tokyo accords established that those in command have a duty to absent themselves from committing international crimes; meaning crimes against peace, war crimes and crimes against humanity.

The addition of war crimes and the addition of further crimes during the engagements of this war make it easier for him to have made the decision not to go in the sense that he would be commanding troops in the field and he would have an obligation as a commander to make sure none of his troops committed war crimes because if they did occur he would be held accountable for them.

Yes, that is true for a commander for any war regardless of what war we are talking about.

In the situation of this war, where we see pervasive crimes we come to the right if not the obligation of 1LT Watada to choose not to participate in this war. The authority for that choice goes to the Tokyo War Crimes Tribunal where that tribunal, (set up by General MacArthur) tried the Japanese War Criminals ourselves. That tribunal ruled that commanders have an obligation to prevent war crimes.

No, I am not saying that anything he did while being deployed for this war would be a war crime.

The problem you have here is that the people at the very top of the chain of command, up to and including the Secretary of Defense authorizing war crimes so it would be very difficult if not impossible for 1LT Watada not to be committing war crimes.

Under the circumstances of this war, if he had deployed he would be facilitating a Nuremberg crime against peace.

So, in the sheer fact that he deployed he would be facilitating a Nuremberg crime against peace.

No, I am not saying that by just deploying in this war all soldiers have committed a war crime. I am saying that depending on the extent of your knowledge, judgment and experience. In the case of 1LT Watada he made a study of the facts and the law involved here and the more you know and the higher your rank the greater your responsibility. I am not saying that everyone over there is committing a war crime or facilitating a Nuremberg crime against peace. We are dealing with questions of criminal intent.

So, by that line of reason it is possible for a soldier to deploy in this war and not commit a war crime if that soldier was ignorant of the origins of the conflict and the laws involved.

Nuremberg also established that there is no such principle as collective guilt. Every question of guilty under war crimes is individual. I suspect that the vast majority of US forces see no problems with deploying. But in the case of 1LT Watada, he had an obligation to inform himself, he was going to be commanding troops in the field, he did study and research and he reached the conclusions that he did and because of that he is held accountable to what he knows.

5-01 of the Field Manual makes it clear that the commander is responsible for war crimes that have occurred or are about to occur. With this reasoning 1LT Watada had the knowledge of war crimes and he was required to act on that knowledge.

There might be other officers who haven't engaged in the type of study that 1LT Watada has. I cannot judge if they would be guilty or not because they are not here.

The US Supreme Court turned down a Writ of Certiorari in the case of General Yumashta because they determined that if a commander knows or should know that troops subject to his control either commit or are about to commit war crimes and fail to do anything about it they are responsible and the General was hanged for that.

## CROSS EXAMINATION

### Questions by Trial Counsel:

My role is the previous cases that I mentioned were as an expert witness and I was not paid.

The focus of my testimony covered much of the same ground as I have spoken about here today in the case of Us v. Hewitt-Vaughn. In the court-martial of CPT Rockwood at Fort Drum we dealt primarily with the laws of belligerent occupation that were applicable in Haiti.

All of these were in regards to criminal court-martial procedures. CPT Rockwood did not refuse to follow an order he attempted to stop torture at the main prison in Port-Au-Prince Haiti.

In the New York Times today Senator Warner, the chair of the Senate Armed Services Committee said that Congress is going to have to re-examine the War Powers Resolution authorization that was given for the war in Iraq.

Right now there is an existing authorization that Congress is operating under. I have already pointed out that that authorization was procured by fraud. The Bush administration lied about non-existent weapons of mass destruction in Iraq and lied about Iraq's connection with Afghanistan and 9/11.

When you have troops in the field fighting and dying yes the Congress keeps paying for the war.

Congressman John Conyers, the senior ranking member from the House Judiciary Committee has produced the report that was issued as of December. I have been consulting with the Congressman's office on many of these points and providing him advice and information.

I am not going to speak for the Congressman about his position on the legality of the war.

I cannot recall if any bills have gone in front of Congress in regards to this. I think someone may have introduced some bill but I cannot recall right now.

No, I am not aware that this issue has been raised in the courts.

In regards to the Hewitt-Vaughn case, at the Court of Appeals for the Armed Forces, I do not recall that they decided the issue of deployability is a non-justiciable question but a political question. The issue in that case, the Army Review Board agreed that she was denied due process of law.

I was there and it was a kangaroo court proceeding. Her defense was completely shut down and the review board did agree. Then, the Court of Military Appeals reversed on the grounds that she had been given due process of law.

**The Trial Counsel cited two cases where the court decided that the decision of troops deploying is not a justiciable matter but a political question as was the case decided by the Court of Appeals in Hewitt-Vaughn.**

At the end of the day that is what the Court of Appeals ruled in the Hewitt-Vaughn case but the essence of the case was whether or not she was afforded due process of law at the court-martial itself.

By getting on a plane and going to Iraq 1LT Watada would be facilitating a Nuremberg crime against peace. From my understanding he would be commanding troops in a Stryker Brigade.

No, I did not say that anyone deploying with a Stryker Brigade would be facilitating a war crime. But certainly that is the conclusion that 1LT Watada reached based on his study of both the facts and the law.

I did not say that someone who is well read and studied the origins of the conflict and would deploy over there that alone would be a facilitator or a war crime in of itself. I said that based on his study of both the facts and the law he concluded that he had a right to absent himself from committing a Nuremberg Crime against peace.

The war itself is a crime against peace and my understanding is that 1LT Watada's objection to deploying was not participating in a crime against peace.

If you have this hypothetical where one soldier thinks the war is legal and another does not the Nuremberg Judgment made it quite clear that where a soldier knows to a moral certainty that an order is illegal he has to disobey that order and that is subjective for each individual service member.

Yes, good order and discipline is a hallmark of the service and congress has a vested interest in maintaining that.

A soldier has an obligation to disobey illegal orders. The Field Manual states that the decision to wage war itself must follow both Constitutional procedures and authorization from the Security Council itself if the United States is not attacked.

The Bush Administration did not accept the argument that the UN Resolution from 1990 is still ongoing. That is why they tried to get a second resolution at the beginning of 2003 and failed.

The Security Council did not authorize military force in that resolution. The Security Council did authorize the US to use all necessary means to enforce and expel Iraq from Kuwait. The Bush Jr. administration tried to get a similar resolution and failed.

There was no language in the resolution to use all necessary means by force. Yes, going back to the 1990 resolution it did say by all necessary means. The resolution was limited to expelling Iraq from Kuwait; the language about restoring peace and security to the area was accomplished by that. The question at the point of the ceasefire was should the US go all the way to Baghdad and depose Saddam Hussein and President Bush senior said publicly that he did not have authorization from the Security Council to do that.

**Questions by the Investigating Officer:**

The International Court of Justice has the authority to declare this war illegal. In the United States a Federal Court could do so as well or the Supreme Court.

In August of 2002 I was engaged in public debate that there were no weapons of mass destruction in Iraq.

**The Investigating Officer asked the witness to answer if hypothetically there were weapons of mass destruction found in Iraq and/or the tie of Iraq into the attacks on Sept 11th would that change the opinion of the witness with regards to the legality of the war.**

There weren't any weapons of mass destruction found. That would all go back to the authorization of the Security Council, which was not there and also authorization by Congress. And Congress was lied to on both counts.

Congress was defrauded but with that did authorize action. It is hypothetical no tie between Iraq and 9/11. There was still no authorization from the Security Council so that made it a crime against peace. The UN refused twice to give President Bush Jr. authorization to use military force against Iraq.

**RE-DIRECT EXAMINATION**

**Questions by Defense Counsel:**

If the tie in between Iraq and the attacks on 9/11 did exist the United States would have the right to defend itself. That is a wild hypothetical though since the tie in did not exist. The right would come from both the Constitution and Article 51 of the UN Charter with necessary and proportionate response.

The hypothetical idea of Iraq having weapons of mass destruction and the US responding to that can be compared to the Cuban Missile Crisis. President Kennedy refused the advice of his top advisors to invoke Article 51 because Cuba had not attacked the United States.

Yes, I would agree that the decision by a soldier is a subjective decision based on what that soldier knows. It is correct that based on what is going on with the questions surrounding the legality of the war. I would not be here if the facts and the law back up the conclusions that 1LT Watada reached of his own accord.

Yes, it is fair to say that with respect to a different military action that has been properly authorized that an individual soldier who has decided for himself that he cannot participate, that would be a problem for discipline and good order and could be properly prosecuted.

**The Trial Counsel objected for the record based on relevancy, speculation, hearsay and the issue of the lawfulness of the war being non-justiciable.**

**There being no further questions the witness was permanently excused.**

**The Article 32(b) Investigation recessed at 1158 hours, 17 August 2006 so the could get their witnesses to the hearing..**

**The Article 32(b) Investigation reconvened at 1305 hours, 17 August 2006. All parties present prior to the recess were again present.**

**The following witness was called, advised of his rights, affirmed, and testified in substance as follows:**

Denis John Halliday, Civilian, New York City, NY.

### **DIRECT EXAMINATION**

After leaving college in 1962 I was a British volunteer in East Africa. I joined the UN in 1964, worked in Iran, Southeast Asia, New York and ended my career back in New York in 1998.

I worked for the United Nation's Development program for most of my career. That is an aid program. After that I became a member of the UN Secretariat. The Secretary General appointed me as Assistant Secretary General for human resources. I held that job in NY and then went to Iraq. In Iraq, I was the Chief of the Humanitarian Program in Iraq. After leaving the UN, the first thing I did was a Congressional Briefing in Washington.

My initial experience in Iraq was in 1997. I went there in the end of August to take up the post of Humanitarian Chief and I stayed there until October 1998. I have also been back to Iraq five or six times since than. The last time was in February 2003, right before the invasion.

I was asked to go there by The Institute for Public Accuracy. They sponsored my trip to talk to government people about changing policy to adjust their behavior to make it hopeful that the invasion wouldn't take place.

I was nominated along with Kathy Kelly an American who heads Voices in the Wilderness for the Nobel Peace Prize. I also received an honorary degree from Swarthmore University for the work that I had done for the UN and the International Gandy Peace Prize.

The UN peace charter is a very specific document. Article 2 very definitely rules out any use of aggression of force and military action against sovereign states. Chapter 7, articles 39, 40, 41 and 42 it rules out any sort of military action without the approval of the Security Council.

All of these parts relate to the invasion, pre-emptive strike if you wish against Iraq. No, the United States did not comply with its obligations under the UN Charter when it invaded Iraq. It never obtained a suitable resolution under Article 42 of Chapter 7.

To my knowledge there was not a rationale for defense but that would have been covered by Article 51.

No, it was not permissible for the United States to engage in military action against Iraq under the UN Charter.

No, that fact has not changed in the last 3 years, continuing an act of aggression which is a violation of international law does not get any better over time.

There is no effective provision that the UN Security Council can take when faced with one of the five permanent members who stands in violation of international law under the charter. This is a failure of the charter which goes back to its very origins.

This failure allows the United Nations to be controlled and dominated by the five permanent members of the Security Council.

Prior to the invasion of Iraq, in early 2003 that was anticipation that the attack would take place. They knew about the US Military's preparations with their air craft carriers in the Gulf. They knew about the failed attempts to put together a coalition as the first President Bush had done. My interest there was to go and talk with some of the ministers and see if they could make some adjustments that would make it more difficult for Mr. Bush to justify the invasion.

The people of Iraq had become used to living under very difficult conditions after the destruction in the name of the United Nations by the United States of the civilian infrastructure, water supplies, sewer systems, electric power, use of depleted uranium and cluster bombs. All of this was very much in the minds of Iraqi people. Because of this they were extremely concerned about the health and survival of their families.

I spoke with the Minister of Health and asked him what he was doing about the water supplies in anticipation of another attack on the civilian infrastructure. In response he said he

has authorized people to drill wells in their gardens. When I asked him what he was doing about the use of depleted uranium he replied that there was nothing he could do.

**Trial Counsel objected to the line of questioning based on relevancy of questions and how they relate to 1LT Watada's deployment.**

**The Defense Counsel stated that earlier they spoke about the commission of war crimes during the course of the war. Now we are talking about the devastating effects that the war has had on the population.**

**The Investigating Officer ruled that the consequences of the war or the situation on the ground did not have any bearing on the facts or the problem or what 1LT Watada's decision was.**

## **CROSS EXAMINATION**

### **Questions by Trial Counsel:**

To my knowledge there are not any actions or resolutions pending right now that would stop the current conflict.

I would question the statement that right now Iraq is a sovereign country. The UN does recognize Iraq right now as a sovereign country.

The government of Iraq today was assembled under occupation which raises a large question for many within the United Nations. The fact that the government has invited the United States to assist in Iraq is the status quo.

**There being no further questions the witness was permanently excused.**

**The following witness was called, advised of her rights, sworn, and testified in substance as follows:**

Colonel Mary Annette Wright, (Retired),

**Prior to the witness entering the courtroom, the Trial Counsel reminded the Investigating Officer that COL Wright is still subject to the UCMJ because she is a retired officer. Please recognize that there is a potential that she would have to be reminded of her rights based on what she plans to say on the witness stand.**

## DIRECT EXAMINATION

I am Mary Annette Wright, Colonel (Retired), Honolulu, Hawaii. I served in the United States Army for active duty for 13 years. I joined the Army in 1967. I also served for 16 years as a reservist. I retired in 1996 after 29 years as a Colonel.

I started out with administrative duties in the Women's Army Corps. My early assignments began in San Francisco, and then went to Europe as part of the NATO Subcommand. I was also a logistics officer working with international schools. As a reservist I worked with Vietnamese Refugees in 1975, when we had 300,000 refugees come out of Vietnam.

I was recalled to active duty in the early 80's and I worked as an instructor at the Special Warfare Center in Fort Bragg, North Carolina. There I taught Special Forces, Civil Affairs, Psychological Operations, 82d Airborne Division, 18th Airborne Corps and International Students that were attending that school.

Outside of my military duties I have also worked for the US government. After leaving active duty I went into the reserves but also began working with the Diplomatic Corps in 1987.

In the Diplomatic Corps I worked in Nicaragua and Grenada. After that I went to Somalia where I was recalled to Active Duty and worked as the Chief of Justice within UNISOM. There I headed up the attempt to reconstruct the Somali Police, Judicial System, Police and Prison System.

During my military service I have instructed military personnel in connection with their duties under FM 27-10. I did this as an instructor at the JFK Special Warfare Center at Fort Bragg. I taught about the Law of Land Warfare for approximately one year. During that time period I was able to explain to soldiers what the obligations and responsibilities of soldiers in an occupation scenario are.

As a part of our overall military training there is a history of service personnel being told that you do not have to follow an illegal order. It comes from the commissions that we take that we are to uphold the lawful orders of our superiors. Implicit in that is that if there is an illegal order you are under no obligation to follow it.

It is not too often that a soldier will say, "I won't follow that order, it was illegal." But it is part of our tradition that we call upon people in the military to use their brains to distinguish situations.

You don't want personnel who will carry out illegal orders and say that they were told to do it. You want military personnel who will think about what they are doing.

Yes, active duty personnel can be prosecuted for war crimes that they either commit or direct. There are two levels for that prosecution. The first are based on international laws against war crimes and the second is that the United States has codified the international laws on war crimes. This was done in 1996. This law says that you can be prosecuted for committing war crimes.

Right now there is a discussion going on within the Bush Administration asking for modification to the domestic law. Because it appears that based on some of the actions in the administration may now fall under violations of that domestic law.

The obligation of someone such as the accused who by participating in the current conflict in Iraq would be participating in war crimes would be to stand up and say that he cannot participate in it and that it would be an illegal order.

Under the Nuremberg Principles, both Germans and Japanese were executed for committing war crimes. The initiation of wars of aggression is the supreme crime under the Nuremberg Principles. They are codified in other international bodies of law such as the Geneva Convention.

## **CROSS EXAMINATION**

### **Questions by Trial Counsel:**

I first met 1LT Watada about six weeks ago in Seattle at a press conference that was held at the Lutheran Church. Yes, that was after his initial statement. I believe there was press conference earlier in the spring. I was notified about 1LT Watada by hearing about a soldier being from Hawaii that was not deploying with his unit because he felt that he could not do that because he felt the war in Iraq was something that he felt was wrong.

I do not remember whether I got in touch with his team or they got in touch with me because I too feel that the war in Iraq is illegal and in fact I gave up my career as a diplomat. I resigned in March of 2003. I was one of three who resigned in opposition to the war in Iraq.

I believe the person I spoke with on his team was one of his attorneys. I was going to be out in Seattle for a speech that I was giving and they told me that they were going to have a press conference with 1LT Watada's parents and his lawyer. That was the first time that I had met him.

Since that first meeting we have not had any interaction.

Yes, I have met with several soldiers who have gone to Canada. I have met with about 10 of them just north of Buffalo about six weeks ago and then I met with several that are on the west side of Canada just this last weekend.

The purpose of my visit was to be able to tell them that there are people who admire the position that they have taken and that it is a very difficult position to take.

I personally believe that the decision of the Bush administration to invade and occupy Iraq without getting the authority of the UN Security Council which is one of the legal basis' for the international community for having a war in another country or the other legal rationale that has been used at least by the US in the past (for example in Grenada) is if there is something happening in another country and you have to go in and save American Lives. That is the reason I ended up going to Grenada to save the lives of 800 Medical Students.

Neither one of these legal basis' have been met under the legal criteria by the Bush administration that makes this war fall under the category of a war of aggression which by international law is a war crime.

So, a person by saying that they will go to Iraq then one could argue that just by doing that that is participating in a war crime.

I think that one has to be very careful with what is being done in Iraq right now. If you look at the Law of Land Warfare and the responsibilities and obligations that the US is not meeting those responsibilities and obligations.

Yes, I think a person should be looking at what is going on right now and if the US is not providing the resources needed for the civilian part of the government as stated in the Law of Land Warfare they have to consider whether to be part of the conflict.

I think what hurts good order and discipline is when we have military personnel who are looking at what's happening and seeing that something has gone wrong here.

I would say that they may do it at their own jeopardy but yes a soldier must question whether an order is right or wrong. I do not think one or two or ten people saying they would rather resign then go to war would affect good order and discipline. I do not think it jeopardize the military but would rather make it stronger.

I think the unit knew very well what was happening because 1LT Watada asked twice to be able to resign. He had the courage and honesty to tell his command his feelings about the war and that he would give up his career over it and requested to resign. No, I do not think it would have affected the morale of the unit.

The Lieutenant is no different then other members making the same statements before Congress. You have senior members of the military going before Congress saying how they feel. I believe it is dishonest not to say what you think about what is going on. This shows that we have a healthy military.

No, I do not think the position that 1LT Watada took would jeopardize in any way the deployment of his unit. To my knowledge there were not hordes of people saying they would follow 1LT Watada because in general military folks do not do that.

Yes, I think it is fair to say that I respect 1LT Watada's decision but also I respect the authority of the military to punish him for it. There is an order in the military that if you challenge an order you do it at your own jeopardy. It is not at all certain that a hearing officer will agree with 1LT Watada's decision. But it is the right and the obligation of a soldier who strongly feels that going to war in Iraq is an illegal order due to it being an illegal war that he has every responsibility to stand up and say that.

But the military does also in return have every responsibility to have a procedure where all sides of it can be argued so that the hearing officer gets all points of view on it.

Yes, I am familiar with the missing movement charge against 1LT Watada.

Yes, I respect his decision but I would say there should be a very good discussion about whether or not it is a war crime. I know it is hard for the military to be discussing that because the military are the one's that have to salute to the civilian authority and say whatever you order and whatever it is.

As a military officer if you do go against what is being ordered and the leadership does not accept your resignation than you are at the mercy of the leadership and whatever they choose to do and subject to the code of military justice.

For me, in my position with all of the problems that I foresaw with the United States sending its military into Iraq and tragically all of the things that I saw have come to pass.

I wasn't the only one but a lot of people that were familiar with the Middle East saw that the US was going to have problems with occupying Iraq. But those are the things that people in the military must just go along with once the civilian leadership authorizes it and makes it policy.

If you get TCS your obligation and duty is to follow those orders and go to Iraq unless you feel they are based on unlawful and illegal criminal acts.

According to the newspaper we have had 40,000 soldiers who have made the decision that the war is illegal and unlawful. I have only heard of 8,000 of those soldiers.

I would say that if the premise is that the war in Iraq is a war crime then unfortunately everybody that goes along with it and goes over there is complicit in what's happening there. That hurts everybody because you in uniform expect that you will never be put into a position where you are ordered to commit just by going into an area that you are actually breaking international law.

If you look at the Nuremberg Principles they indeed state that the supreme war crime is the war of aggression, the invasion and occupation of a country that has done nothing to you.

I accept what you are saying about the courts ruling that war crimes are an individual act, that the decision to wage war is not a decision for the courts but for the executive and the

legislature and I will read the Court of Appeals decisions that you have stated such as US v. Hewitt-Vaughn.

**The Defense Counsel objected and thinks the Trial Counsel should not argue with the witness but should argue in front of the court-martial.**

**The Trial Counsel stated no further questions for the witness.**

**Questions by the Investigating Officer:**

I would say that I am probably an expert of MF 27-10 over 99.9% of the people of America but within the JAG Corps I would not be as expert as the people who have spent many years of their lives working on it.

Yes, I have done a lot of work in International Law and yes I would say that I am an expert.

No, I do not believe that the senior leaders in Iraq should be prosecuted for their participation in the war but I do believe that the senior leadership of our country who got our military into this war should be prosecuted for war crimes.

The distinction is that the decision of the civilian leadership of our country to send our military into this conflict is the war crime. The military gets stuck in the middle. Unless we are going to have a coup in our country, the military does what it is ordered to do.

Yes, if a Lieutenant can make those decisions on a personal basis than so should the senior leadership in our military such as the Generals, Colonels and the Lieutenant Colonels. I think they should be looking very carefully at what they are being required to do and I would hope that they in their own hearts will see that they have been put into a position that yes by what the military is having to do there can be considered a war crime.

**RE-CROSS EXAMINATION**

**Questions by Trial Counsel:**

No, I am not encouraging others to follow 1LT Watada's lead. It is a personal decision that every individual in the military needs to make for themselves. Just like I had to make my decision to resign in opposition to the war in Iraq, there were not many people who resigned from the State Department when the three of us resigned, I do not think there are large numbers of people refusing to deploy like 1LT Watada.

**There being no further question the witness was permanently excused.**

**The Investigating Officer reminded the accused of his right to make a statement or remain silent and asked if he would like those rights repeated and the accused responded that he did not wish the Investigating Officer to repeat those rights.**

**The Investigating Officer asked the accused if he wished to make a statement in any form at all and the accused responded that he did not.**

**The Investigating Officer declared the taking of evidence closed and instructed for the closing arguments to begin with the Trial Counsel going first.**

**The Trial and Defense Counsel made their closing arguments.**

**The Investigation Officer concluded the hearing by advising counsel of his requirements with regards to forwarding his recommendation to the convening authority.**

**The Article 32(b) Investigation was closed at 1424, 17 August 2006.**