UNITED STATES,

Plaintiff,

v.

EHREN K. WATADA,

Defendant

AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN CONNECTION WITH ARTICLE 32 HEARING

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I. INTRODUCTION

The American Civil Liberties Union of Washington (hereafter, ACLU) offers this brief to discuss the legal infirmities of Charges II and III, which seek to punish Lt. Watada solely for publicly stating his legal and moral objections to the war in Iraq. Under the facts charged, Lt. Watada's speech did not violate Article 88 (Contempt Toward Officials)[1] or Article 133 (Conduct Unbecoming An Officer And Gentleman)[2] of the Uniform Code of Military Justice. Using those articles to penalize Lt. Watada's statements would violate the First Amendment of the United States constitution.

The free speech rights of service members may be limited in cases where the speech would impair military functioning. That is not the case here. If the charges leveled in this case are allowed to proceed, it would mean that service members are completely barred from voicing their honest opinions on political subjects of significant public concern. Silencing speech like Lt. Watada's violates the constitution while it also harms the military and the public at large.

Amicus agrees that military service members must obey lawful orders. (The ACLU takes no position on Charge I, missing a troop movement.) The legitimate interests of the military can be fully addressed through the provisions of the UCMJ that relate directly to refusal to obey lawful orders. The military's interests do not require -- and the constitution does not allow -- criminalizing service members' expression of their political opinions.

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[1] Article 88 is codified at 10 U.S.C. § 888: "Any commissioned officer who uses contemptuous words against the President … shall be punished as a court-martial may direct."

[2] Article 133 is codified at 10 U.S.C. § 933: "Any commissioned officer … who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

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II. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington Foundation (ACLU) is a statewide, nonpartisan, nonprofit organization with more than 25,000 members, dedicated to the preservation of civil liberties, including the freedoms described in the Bill of Rights. This court martial proceeding is important to the ACLU because it involves the free speech rights of our nation's service members.

The service members who risk their lives to protect American ideals -- including freedom of speech -- must be allowed to exercise those rights themselves, to the maximum amount consistent with military functioning. The ACLU fully agrees with the principle that "our citizens may not be stripped of basic rights simply because they have doffed their civilian clothes." Chappel v. Wallace, 462 U.S. 296, 304 (1983). For this reason, the ACLU has appeared in both military and civilian courts where free speech rights of service members are implicated.

III. FACTS

The Army commenced court martial proceedings against First Lieutenant Ehren K. Watada on July 5, 2006. Charge I asserts that Lt. Watada missed a troop movement; amicus takes no position on that charge. Charges II and III are based solely on the following statements Lt. Watada is charged with making to reporters:

> Statement 1: "I could never conceive of our leader betraying the trust we had in him …. As I read about the level of deception the Bush administration used to initiate and process this war, I was shocked. I became ashamed of wearing the uniform. How can we wear something with such a time-honored tradition, knowing we waged war based on a misrepresentation and lies? It was a betrayal of the trust of the American people. And these lies were a betrayal of the trust of the military and the Soldiers….But I felt there was nothing to be done, and this administration was just continually violating the law to serve their purpose, and there was nothing to stop them….Realizing the President is taking us into a war that he misled us about has broken that bond of trust that we had. If the

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> President can betray my trust, it's time for me to evaluate what he's telling me to do."
>
> Statement 2: "I was shocked and at the same time ashamed that Bush had planned to invade Iraq before the 9/11 attacks. How could I wear this [honorable] uniform now knowing we invaded a country for a lie?"
>
> Statement 3: "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….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."

The Army charges that the Statements 1 and 2 violated Article 88 of the UCMJ (Contempt Toward Officials) and that all three statements violated Article 133 (Conduct Unbecoming An Officer And Gentleman).

IV. ARGUMENT

A. The Court Martial Has An Obligation To Avoid Constitutionally Questionable Prosecutions

The investigating officer has authority to inquire into all matters necessary to make a recommendation as to the disposition of the charges. Manual for Courts Martial ("MCM") § 405(e). The official commentary to this subsection explains that the investigation can include inquiry into constitutionally-grounded defenses such as the legality of a search or the admissibility of a confession. In the same way, Lt. Watada's defenses to Charges II and III require consideration of constitutional issues.

If a broad interpretation or application of a statute would create serious questions of constitutionality, courts must interpret the statute to avoid the constitutional issue altogether. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988); Ashwander v Tennessee Valley Authority, 297 US 288, 346-48 (1936)

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(Brandeis, J., concurring). Military courts adhere to this same long-established rule, holding that "if its language permits, a statute should be interpreted so that a constitutional danger zone is avoided." United States v. Calley, 46 C.M.R. 1131, 1194 (A.C.M.R. 1973). "Like ambiguous statutes, ambiguous Manual provisions should be construed in a manner that would avoid constitutional issues." United States v. Davidson, 14 M.J. 81, 89 (C.M.A. 1982) (Everett, J., concurring). The serious constitutional issues presented by Charges II and III are explored in Section IV.B. (below).

As explained in Part IV.C (below), it is entirely possible to interpret Articles 88 and 133 to avoid constitutional problems in this case. Indeed, a narrow interpretation of the articles is more in keeping with their plain meaning, history, and purpose. Properly construed, these Articles do not forbid the statements Lt. Watada is charged with making. The Article 32 hearing should therefore result in a recommendation against proceeding with Charges II and III, because there are not reasonable grounds to believe that a violation has occurred.

B. A Court Martial Premised On Lt. Watada's Statements Would Violate the First Amendment

1. Lt. Watada's Speech Would Enjoy Unquestioned First Amendment Protection In The Civilian Context

Imposing criminal penalties for expressing strong political disagreement with the President would be unconstitutional in a civilian context. Indeed, it would be flagrantly unconstitutional. First Amendment protection for statements like Lt. Watada's is especially strong, with deep historical roots. Before turning to the special context of the military, it is important to fully understand the strictness of the constitutional rules against punishing or restricting this type of speech.

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a) The Right To Speak About Political Topics, Especially Those Touching Upon War And Peace

Because a functioning democracy requires full and open discussion of important political topics, political speech is "at the core of what the First Amendment is designed to protect." Virginia v. Black, 538 U.S. 343, 365 (2003).

> Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.

R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). Lt. Watada's statements unquestionably constitute political speech about matters of great public importance, and thus deserve maximum First Amendment protection.

A unanimous Supreme Court has explained that objection to the "governmental decision to go to war" is "absolutely pivotal speech." City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994). Indeed, a large number of the leading First Amendment cases involved the rights of persons who criticized the country's war policies. E.g., Spence v. Washington, 418 U.S. 405 (1974) (right to display an upside-down flag with peace symbol on it as anti-war protest); Flower v. United States, 407 U.S. 197 (1972) (right to distribute anti-war leaflets near a military base); Cohen v. California, 403 U.S. 15 (1971) (right to wear a jacket reading "Fuck The Draft"); Schacht v. United States, 398 U.S. 58 (1970) (right to perform an anti-war play while wearing military uniforms); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (right of high school students to wear black armbands to protest war).

"Freedom to differ is not limited to things that do not matter much." Street v. New York, 394 U.S. 576, 592 (1969). To the contrary, the strength of First Amendment protection rises

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when the speech involvers matters of great public importance, such as the morality and legality of a war.

b) The Right To Vigorously Criticize The Government And Public Officials

"One of the prerogatives of American citizenship is the right to criticize public men and measures." Baumgartner v. United States, 322 U.S. 665, 673-74 (1944) (Frankfurter, J.). The ability to verbally oppose government officers without risking prosecution "is one of the principal characteristics by which we distinguish a free nation from a police state." Houston v. Hill, 482 U.S. 451, 453-64 (1987). If anything, the more powerful the government figure being opposed, the more important the right to criticize -- even if the criticism is stinging and personal. "Debate on public issues should be uninhibited, robust and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

Before the United States declared independence from England, the colonists were bitterly opposed to sedition laws that made it illegal to speak ill of the King or his ministers even if the statements were true. One of the most important sedition prosecutions in colonial times was the trial of John Peter Zenger, who was charged in 1735 with publishing articles accusing the Royal Governor of New York with acting illegally and improperly. The jury refused to convict, even though Zenger unapologetically admitted that he had published the offending articles. The verdict gained great fame throughout the colonies, and Zenger became a folk hero. His victory is regarded as "one of the most significant events to shape American thinking on freedom of speech." Rodney A. Smolla, Smolla And Nimmer On Freedom Of Speech § 1.3 (2001). Gouverneur Morris, one of the Framers of the Constitution, called the Zenger trial "the morning star of liberty" in the colonies. People v. Marahan, 368 N.Y.S.2d 685, 689 (N.Y. Sup. 1975).

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Lt. Watada's statements accusing the current administration with illegal activity are just like John Peter Zenger's statements, and equally deserving of protection.

Another formative national experience involved the notorious Sedition Act of 1798, which made it illegal to criticize the President or members of Congress with intend to "bring [them] into contempt or disrepute." 1 Stat. 596. James Madison condemned the Sedition Act, writing: "It is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures." See New York Times, 376 U.S. at 275 n.15. The Sedition Act is now recognized as a bleak moment in our nation's history: unpopular at the time, quickly repealed, and repudiated ever since. Id. at 273-76. Modern First Amendment law recognizes that it is unconstitutional to charge a person with sedition (that is, criticizing important governmental figures). Even in the area of ordinary defamation lawsuits, "injury to official reputation" is an invalid basis to suppress anti-government speech. Id. at 272.

The "freedom to be intellectually diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," includes the ability to publicly express "opinions which are defiant or contemptuous." Street, 394 U.S. at 593. The same freedom applies when the opinions require discussion of public officials -- including the President. In Watts v. United States, 394 U.S. 705 (1969), a draftee was charged with threatening the life of President Johnson by saying: "I am not going [to Vietnam]. If they ever make me carry a rifle the first man I want to get in my sights is LBJ." Id. at 706. The Court overturned the conviction, noting that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." Id. at 707. The Court noted how "the language of the political arena … is often vituperative, abusive, and inexact,"

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and that it cannot be illegal to use a "very crude offensive method of stating a political opposition to the President." Id. at 708.

c) The Right Against Vague Laws

Due process prevents any prosecution under a law that is so vague that it does not give "the kind of notice that will enable ordinary people to understand what conduct it prohibits" or that "may authorize and even encourage arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56 (1999). A vague law that affects free speech is forbidden under the First Amendment as well, because it can be used as a tool for official censorship. The Supreme Court has consistently struck down laws that make a person vulnerable to punishment for speech under standards that can mean different things to different people. For example, a law prohibiting display "a sign, symbol or emblem of opposition to organized government or … propaganda that is of a seditious character" was found unconstitutional because it was so vague that it could extend even to statements of loyal opposition to the party currently in power. Stromberg v. California, 283 U.S. 359 (1931). Rules barring "treasonable" and "seditious" speech by university professors are likewise unconstitutionally vague, because their inherent subjectivity will lead to restriction of important public dialogue. Keyishian v. Board of Regents, 385 U.S. 589, 601 (1967).

Article 88 prohibits "contemptuous words" against the President, without providing any further definition. It has been long-established that a law purporting to prohibit "contemptuous" treatment of the American flag is unconstitutionally vague. Smith v. Goguen, 415 U.S. 566 (1974). In Goguen, the defendant had no way of knowing that including an American flag on the seat of his pants would be deemed "contemptuous" by a prosecuting attorney, and indeed there could be no predicting when and how the law would be enforced. On similar grounds, Gooding

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v. Wilson, 405 U.S. 518 (1972), struck down a statute that made it illegal to use "opprobrious words or abusive language" in the presence of another.

2. Lt. Watada's Speech Enjoys Constitutional Protection In The Military Justice Context

This review of constitutional law shows that any prosecution for criticizing the government or the President violates American values and is presumptively unconstitutional. See generally, Richard W. Aldrich, "Article 88 of the Uniform Code of Military Justice," 33 U.C.L.A. L. Rev. 1189 (1986); John G. Kester, "Soldiers Who Insult The President," 81 Harv. L. Rev. 1697, 1701-08 (1968). Given how strongly the First Amendment protects statements like Lt. Watada's, the government must demonstrate extraordinary justification before it can eliminate that protection within the military justice system. While courts afford substantial deference to military decision-making, Congress is not "free to disregard the Constitution when it acts in the area of military affairs." Rostker v. Goldberg, 453 U.S. 57, 67 (1981). Accord, Weiss v. United States, 510 U.S. 163, 176 (1994). Even in the military context, the Court's task is to "decide whether Congress . . . transgressed an explicit guarantee of individual rights which limits [Congressional] authority." Rostker, 453 U.S. at 70. In particular, "members of the military are not excluded from the protection granted by the First Amendment." Parker v. Levy, 417 U.S. 733 (1974). The rules regarding vagueness of criminal statutes are also regularly applied in courts martial. E.g., United States v. Guaglione, 27 M.J. 268, 272 (C.M.A. 1988) ("it still is necessary that, through custom, regulation, or otherwise, he be given notice that his conduct is unbecoming").

For example, the officer in United States v. Wolfson, 36 C.M.R. 722, 723 (A.C.M.R. 1966), was charged under Article 133 because he was "constantly complaining" and "bitching" about conditions in the field. On appeal, the Court relied on the constitutional right of free

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speech to interpret the offense narrowly; in the process, it recognized the value to the military of respecting free speech.

> 'Bitching'…sometimes serves a useful purpose. It provides an outlet for pent-up emotions, therapy for frustrations and a palliative for rebuffs and rejections…The right to complain is undoubtedly within the protection of the first amendment of the Constitution of the United States guaranteeing freedom of speech… [The accused's complaints]… may be classified as inappropriate and improper and his whining exhibited bad taste and poor judgment. In our opinion, however, it did not reach the level of conduct unbecoming an officer and gentleman.

Id. at 728.

The ACLU recognizes that the government has a compelling need for a powerful and effective military. But this interest does not require speech restrictions so sweeping that they would make it criminal, without more, for a service member to express legal and moral disagreement with the President's military actions. The military may certainly prosecute conduct that endangers military readiness, but this does not transfer into a similar ability to prosecute speech about the political decision to go to war. Just as a statement of support for draft evasion is not equivalent to aiding and abetting the offense of draft evasion, Bond v. Floyd, 385 U.S. 116, 133-34 (1966), Lt. Watada's expression of his personal political views was not equivalent to disobeying orders or otherwise engaging in conduct that harms military readiness.

The First Amendment protects not only Lt. Watada's right to speak, but the public's ability to hear him. "Where a speaker exists … the protection afforded is to the communication, to its source and to its recipients both." Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 756 (1976). Since one purpose of free speech is to ensure an informed electorate, it makes little sense for the government to prevent the public from hearing the views of military officers about matters of war and peace. Officers are likely to be well-informed and

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able to provide valuable information and insights to the public. To paraphrase Bond v. Floyd, "the interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to" military officers. 385 U.S. at 136. Indeed, an anti-war message may be particularly important for the public to hear when it comes from an officer:

> As [Aristotle] observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile.

City of Ladue, 512 U.S. at 56.

These principles are not altered by Parker v. Levy. That case upheld a court martial for conduct unbecoming an officer where an army doctor made racially-divisive statements urging African-American soldiers to refuse orders to report to Vietnam. 417 U.S. at 736 ("I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States"). The Court had no trouble concluding that this inflammatory appeal to racial division was subject to court martial, id. at 757, 761, so the Court did not ever consider whether it would be proper to court martial Dr. Levy solely for his statements of personal opposition to the war. Parker was a fact-specific case involving facts not present here. Indeed, the Court left open the possibility that in another case, it may be necessary for the Court to intervene if the UCMJ is applied to speech "which would ultimately held to be protected by the First Amendment." Id. at 761. This is such a case.

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C. Properly Construed, Article 88 and Article 133 Do Not Apply to Lt. Watada's Speech

For the reasons described above, a court martial against Lt. Watada for making the statements charged has grave constitutional weaknesses. Fortunately, those problems are avoidable. Since Lt. Watada's statements do not actually violate Articles 88 and 133, there is no need to proceed with a constitutionally doubtful prosecution. Under the rule of avoiding constitutional questions, it would be improper to proceed with the court martial on Charges II and III, since the existence of a serious constitutional defense means there is no lawful basis to prosecute.

1. Lt. Watada Did Not Violate Article 88

Article 88 authorizes court martial of "any commissioned officer who uses contemptuous words against the President." The Manual for Courts Martial does not further define what "contemptuous" statements are. However, it explains that "if not personally contemptuous, adverse criticism of [the President] in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article." MCM § 888. William Winthrop's influential treatise on military law expressed a similar notion: "An adverse criticism of the Executive expressed in empathetic language in the heat of a political discussion, but not apparently intended to be personally disrespectful, should not in general be made the occasion of a charge under this article." William Winthrop, Military Law and Precedents 566 (2nd ed. 1920).

From this, it appears that a "contemptuous" statement is one that does more than simply disagree with the President's actions in office. Instead, it must be a statement implying that the President is an intrinsically unsavory or disreputable person regardless of his job performance, or that the President is corruptly or disloyally misusing the office. This is consistent with the ordinary meaning of "contempt," which the Oxford English Dictionary defines as "The action of

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contemning or despising; the holding or treating as of little account, or as vile and worthless." "Contemning," in turn, means "to treat as of small value, treat or view with contempt; to despise, disdain, scorn, slight." Oxford English Dictionary (2nd Ed. 1989). More is required than political disagreement, or even an accusation of wrongdoing. To be contemptuous, a person must express hatred, scorn, or spite towards the President personally.

The requirement that a "contemptuous" statement include an element of personal opprobrium, is consistent with the history of Article 88. Its predecessors arose in the days of the English monarchy, where any criticism of the King was forbidden. Kester, 81 Harv. L. Rev. at 1701-08. In a real sense, Article 88 is a remnant of the same anti-sedition laws that inflamed the American colonists and led the Founders to declare independence. Significantly, Great Britain abolished the portion of the Army Act that penalized "traitorous or disloyal words regarding the Sovereign." The committee report on the 1955 revision identified a number of compelling reasons to repeal the law: that it was "really a relic from Jacobite days; that its retention in a revised Act might carry the implication that the forces, as opposed to civilians, were given to using disloyal words; and that the serious expression of individual disloyalty would be bound to amount to some other offence." Id. at 1707-08.

In America, the steady progression over the years has been to narrow the scope of Article 88. In 1775, for example, the Articles of War punished any officer or soldier who behaved with "contempt or disrespect towards the general or generals, or commanders in chief of the continental forces" Lt. Col. Michael J. Davidson, "Contemptuous Speech Against the President," 1999-JUL Army Law. 1, 2. Since then, the scope of this article has steadily narrowed: fewer people are subject to the rule (only officers), it applies to speech about a smaller range of persons, and it no longer extends to mere expressions of "disrespect." These changes were intentional. When the modern UCMJ was enacted after WWII, Congress had the

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opportunity to examine a draft of Article 88. The Committee's discussion revealed that many Senators viewed the article with "uneasiness" and that the civilian experts responsible for drafting it viewed it with "distaste" and had actually recommended deleting it. Kester, 81 Harv. L. Rev. at 1718. The draft version before the committee would have penalized "contemptuous or disrespectful words." Senators Kefauver and Saltonstall felt that the term "disrespectful" was excessively "restrictive." Senator Kefauver asked, "What is some other adjective we could put in place of 'disrespectful'?" Hearings on S. 857 and H.R. 4080 before the Subcommittee of the Committee on Armed Services, 81st Cong. 332 (May 27, 1949). The term "disrespectful" was ultimately removed from the Article's final form. The legislative purpose, therefore, was to limit Article 88 only to extreme and hateful remarks, and not mere criticism or even statements tinged with disrespect.

The history of court martials for criticizing the President provides yet more evidence of its narrow scope. Before the enactment of the UCMJ, the predecessors to Article 88 were chiefly used to punish scornful personal epithets. During the Civil War, convictions resulted for referring to President Lincoln as "loafer," "thief," a "damned tyrant," and a "damned black republican abolitionist." During World War I, there were convictions for calling President Wilson a "grafter," "the laughing stock of Germany," and a "God damn fool." During WWII, convictions occurred for referring to President Roosevelt as "a crooked, lying hypocrite," "the biggest gangster in the world next to Stalin," and "Deceiving Delano." Davidson, 1999-JULY Army Law. at 5. A typical example is the defendant in Sanford v. Callen, 148 F.2d 376 (5th Cir. 1945), who called President Roosevelt "a dirty politician, whose only interest is gaining power as a politician and safe-guarding the wealth of the Jews. […] President Roosevelt and his capitalistic mongers are enslaving the world by their actions in Europe and Asia, by their system of exploiting." The only known prosecution under the current Article 88 of the UCMJ was

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United States v. Howe, 37 C.M.R. 429 (C.M.A. 1967), where an officer was seen at a political demonstration carrying a placard containing the following (misspelled) messages: "Let's Have More Than A 'Choice' Between Petty, Ignorant, Facists In 1968" and "End Johnson's Facist Aggression In Vietnam." Unlike Lt. Watada, Lt. Howe was making a personal attack on the President: rather than explaining in reasoned terms his policy disagreements with the President, he resorted to personal attacks, saying that the President was ignorant, petty, and a fascist.

These vituperative personal insults differ markedly from Lt. Watada's carefully worded statements. He did not use profanity, did not engage in name-calling, did not claim that the President acted to promote his own self-interest, did not attribute treasonable or disloyal motives to the President, and did not imply that the President was unfit for office. To be sure, Lt. Watada expressed his belief that the President had made false statements about Iraq, and that these false statements injured the nation in general and to the armed forces in particular. But Lt. Watada expressed his beliefs as respectfully as their substance allowed. He expressed disappointment toward the President, not hatred. Indeed, Lt. Watada's statements seem to vocalize an inner reflection of his own feelings as a result of the President's actions. Lt. Watada stated that he felt shocked and ashamed, that he questioned his ability to wear his uniform with his newfound knowledge, and that he felt a legal and moral obligation to refuse the order to deploy. These were all statements reflecting Watada's state of mind. As he spoke, he used the phrases "I felt," "I was," "I became," "I must," and "it was my conclusion." These descriptions of Lt. Watada's own emotions are not "contemptuous words" against anyone else.

2. Lt. Watada Did Not Violate Article 133

Article 133 authorizes court martial for any commissioned officer "who is convicted of conduct unbecoming an officer and a gentleman." As explained in the Manual for Courts

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Martial, the gravamen of the offense is that the officer engages in conduct demonstrating that the officer is personally immoral or unfit for duty:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.

MCM § 933. Examples of conduct that would indicate this type of moral failing on the part of the officer include "knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family." Id. The common thread uniting these offenses is that the officer's conduct "must be so disgraceful as to render an officer unfit for service." Guaglione, 27 M.J. at 271.

Lt. Watada's statements of sincere, considered political opinion is wholly different from the self-indulgent misconduct subject to Article 133. Persons convicted for conduct unbecoming an officer have all engaged in actions that are morally reprehensible regardless of the political beliefs of the person who commits them. The conduct falls outside the standards society sets for its "gentlemen" (of either sex) and as such for its military officers. The diverse array of

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Article 133 cases shows that that convictions are proper only in cases of socially prohibited behavior where the defendant is satisfying his or her own desires without any pretense of assisting others or behaving ethically. E.g., United States v. Hartwig, 39 M.J. 125 (C.M.A. 1994) (sexually suggestive letter to a 14-year-old); United States v. Miller, 37 M.J. 133 (C.M.A. 1993) (deliberate disregard to health of his stepdaughter and failure to seek necessary medical attention for her serious burns); United States v. Maderia, 38 M.J. 494 (C.M.A. 1994) (association with a known drug smuggler); United States v. Sanchez, 29 C.M.R. 32 (C.M.A. 1960) (indecent acts with a chicken).

By contrast, an officer may exhibit undesirable traits without violating Article 133. Tardiness, for example, is not adequate grounds for conviction. United States v. Clark, 15 M.J. 594, 596 (A.C.M.R. 1983). Carping and complaining about military life may be "inappropriate and improper" and reflect "bad taste and poor judgment," but it is not a violation. Wolfson, 36 C.M.R. at 731. While publicly associating with a known prostitute is a violation, merely walking down the street in the Frankfurt red-light district and "ogling the wares" inside a brothel is not. Guaglione, 27 M.J. at 272. These cases make clear that "not every delict or misstep warrants punishment under Article 133." Id. at 271.

Significantly, military courts take First Amendment standards into account when deciding whether an officer violated Article 133. As described above, the Court found that the chronic complaints of the officer in Wolfson were not a violation, in part to protect First Amendment speech rights. In United States v. Shober, 26 M.J. 501, 502 (A.F.C.M.R. 1986), an officer had an affair with a subordinate civilian employee during which he took nude photographs of her (with her consent). The court found the sexual relationship to be conduct unbecoming an officer, but not the photography. Court martials for consensual nude pictures could lead to chilling effects and self-censorship for officers who pursue photography as a

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hobby. "Under the language of this allegation any officer who has an interest in photography had best limit the subject matter to still-life, landscapes and fully-clothed models." Id. Interpreting Article 133 to have such an impact on constitutionally protected artwork would not serve the purposes of the rule.

In Lt. Watada's case, the question is whether it is somehow reprehensible to express serious legal and moral opinions about matters of undeniable public importance. It is not. The Founders themselves knew that it was the highest calling of a gentleman to be fully engaged in the political life of one's country. Far from being a sign of moral unfitness, such statements indicate a highly developed moral sense. Lt. Watada's statements indicate that he was attempting to fulfill his legal and moral obligations as an officer, not that he was pursuing selfish pleasures for their own sake. Unlike Dr. Levy, who fomented us-against-them racial divisions among the troops, Lt. Watada simply described his own careful assessment of his obligations under domestic and international law. Whether or not one agrees with Lt. Watada's conclusions, it was no sign of personal degradation or moral unfitness for him to speak his conscience on gravely important issues of war and peace.

V. CONCLUSION

For the foregoing reasons, the investigating officer's report should recommend against any further proceedings on Charges II and III.

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DATED this 15th day of August, 2006.

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