The Watada Mistrial: Here's What Really Happened
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t r u t h o u t | Report

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First Lt. Ehren Watada knew exactly what his case was about - and that scared the judge.

There was absolutely no reason to stop the Watada trial.

The judge's claim that Lt. Watada did not fully understand a document he signed admitting to elements of the charges is completely untrue (see Melanthia Mitchell, AP, 2/8/07).

The military seized on that claim and complimented the judge for "protecting the rights of the accused" in granting the mistrial.

Here's what really happened.

Lt. Watada repeatedly told the judge on Monday and Tuesday morning, before the trial began, that he agreed with the 12-page "stipulation of facts" that was provided to the panel of seven officers as evidence of most of the key events in this case. The lieutenant reminded the judge in every response that he continued to believe that his orders to go to Iraq were illegal.

I was there, with a roomful of media, military and civilian observers. We all saw the judge review the document at length and offer a number of suggested factual corrections. (Also see "Watada Lawyer: Double Jeopardy Will Be Argued If Second Trial Proceeds.")

The judge also asked Lt. Watada if he felt "compelled" or "coerced" in his decision to not board the plane to Iraq. The lieutenant assured him that it was an intentional act and that his failure to board the plane was not due to any fear for his personal safety, while carefully reasserting his belief that he had no duty to obey an illegal order.

The judge reminded him that he had already ruled that the order was legal. Lt. Watada responded that he understood what the judge was saying, and then repeated his belief once more.

The stipulation specifically stated that Lt. Watada did not waive any legal defenses not addressed in the document.

The purpose of this stipulation was to drop two charges against Lt. Watada (sparing him exposure to two additional years in prison) in exchange for a written agreement that most of the facts would be admitted into evidence, and thereby evaporate any purported reason for subpoenaing journalists to testify against the lieutenant at the trial.

The document was prepared by the government. When construing a document, it is interpreted in favor of the person who did not prepare it.

It was signed by all parties over a week ago. This was not a last-minute task.

The judge was satisfied. The stipulation was accepted by the court and distributed to the panel Tuesday morning.

The panel proceeded to hear the entire prosecution case on Tuesday: the 12-page written stipulation, two videos that were also part of the stipulation, and three prosecution witnesses that appeared to aid Lt. Watada's theory of the case.

The judge raised concerns about the document on Wednesday morning, moments before Lt. Watada was set to take the witness stand.

The judge had just received a new proposed legal instruction from Seitz. Since the judge had recently ruled that the order given to Lt. Watada to deploy to Iraq was "legal," Seitz took the logical next step. Entitled "Reasonable Mistake of Fact/Law," his new instruction was designed to inform the panel that even if Lt. Watada were "mistaken" in his belief that the order was illegal, a defense to the "missing movement" charge would be viable if the panel made a finding that Lt. Watada's belief that the order was illegal was "reasonable."

Shaken by this instruction, the judge tried to claim that Seitz had introduced some error by submitting this instruction, forgetting that the panel had not seen the instruction and hence any error was literally impossible!

Realizing the error of his ways, the judge then tried to speak to Lt. Watada about his understanding of the stipulation without asking Seitz for his permission. After initially warning the judge that he might not let him speak to Lt. Watada, Seitz relented and told the judge that he would let him speak to him over objection.

The judge repeatedly tried to shake Lt. Watada's insistence that he reasonably believed that he was following an illegal order, all the while insisting that he wasn't trying to mislead him in any way. Lt. Watada again respectfully but firmly punctuated his remarks with his state of mind.

Unsuccessful in his apparent effort to derail the defense, the judge then claimed that "I'm not seeing we have a meeting of the minds here," Head said. "And if there is not a meeting of the minds, there's not a contract." (Seattle Times)

At this point, both the defense and the government figuratively "threw their arms around each other" and repeatedly told the judge that they wanted the trial to go forward. Courtroom observers agreed that they had never seen such a thing in their lives.

The Seattle Times reported that "The defense and prosecution teams both believed the agreement did not constitute an admission of guilt. But the judge on Wednesday said the agreement included all the elements required to find Watada guilty. It was more than an agreement, Head said: It was what he termed a "confessional stipulation," with whatever reasons behind the action irrelevant to the question of guilt."

Lt. Watada's attorney, Eric Seitz, said that the stipulation was not an admission of guilt.

"No. Absolutely no way," he said. "Lt. Watada's a smart guy. He knew exactly what he was agreeing to." (Los Angeles Times)

The judge turned to the prosecution and said "I can't unring that bell." But then, in what appeared to be a moment of panic, he suggested to the prosecution that they recall their witnesses. He warned them that he was considering issuing a mistrial. He offered to let them reopen their case if they wanted to. He offered them whatever time they needed to make a decision "thirty minutes, an hour, or more." When the prosecution assured the judge that they only needed thirty minutes, there was a disappointed look on his face.

Apparently the defense was also asked if it would be willing to withdraw the stipulation and let the case proceed on that basis. As the panel had been relying on the stipulation throughout the prosecution case, the defense was not willing to do anything of the sort.

Upon the prosecution's return, they asked for a mistrial. The defendant opposed it. The motion was granted, and a new trial date was set. But now there was a new problem that may make any new trial impossible.

Once the trial commenced, "jeopardy attached." Once jeopardy attaches, a second trial is generally not possible. This is known as "double jeopardy."

Like all maxims, there are exceptions to the rule of double jeopardy. For example, if a verdict cannot be reached by the finder of fact, defendant cannot object to the resulting mistrial. Nor can the defense create error in order to get the defendant off the hook.

But a mistrial caused by judicial or prosecutorial error is another story. Generally, the charges must be dismissed in order to ensure that the authorities are not tempted to commit error in order to obtain a second trial when events are not going their way.

This is what happened here. The prosecution knew that Lt. Watada was not waiving his right to defend himself against the charges. Again, the stipulation specifically stated that no such waiver was being made.

The judge tried to make some mileage by reciting on the record a warning that he had previously given to Lt. Watada that by signing the stipulation, he was admitting that there was sufficient evidence on each element of the "missing movement" offense (for failing to board the plane to Iraq) for the panel to find him guilty.

"Sufficient evidence," however, is a far cry from any kind of admission that there was no evidence to rebut the prosecution's evidence. It may be news to the judge that trials are conducted for defendants who have pleaded "not guilty," not for those who admit guilt. Was the judge considering what kind of trial he was suggesting? A trial where the determination of guilt or innocence by a panel of seven officers was literally meaningless?

Let's close by examining the law on whether Lt. Watada can be forced to endure a second trial despite the double jeopardy doctrine. The latest case on the subject, US v. Eliot, 463 F.3d 858, 864 (9th Cir. 2006), states: "When, as here, a mistrial is ordered over a defendant's objection, retrial is permitted only if there was a "manifest necessity" for a mistrial (a case-by-case determination with a "high" burden). Other factors to look at are whether the trial judge (1) heard the opinions of the parties about the propriety of the mistrial, (2) considered the alternatives to a mistrial and chose the alternative least harmful to a defendant's rights, (3) acted deliberately instead of abruptly, and (4) properly determined that the defendant would benefit from the declaration of mistrial."

A case to look at for guidance is United States v. Rivera, 384 F.3d 49, 56 (3rd Cir. 2004) which states: "Critically, a mistrial must not be declared without prudent consideration of reasonable alternatives. Federal Rule of Criminal Procedure 26.3 requires that "[b]efore ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives. Where a District Court *sua sponte* declares a mistrial in haste, without carefully considering alternatives available to it, it cannot be said to be acting under a manifest necessity. Any subsequent reprosecution under those circumstances is barred by the Double Jeopardy Clause."

When you comment that you can't "unring a bell," and then ask the defendant to agree to withdraw a stipulation already seen by the finders of fact for an entire day, you have "consideration" about as "prudent" as a car crash.

Eric Seitz has stated, "My professional opinion is that Lt. Watada cannot be tried again because of the effect of double jeopardy," and will file a motion to dismiss the entire case. The Seattle Post-Intelligencer has reported that John Junker, a University of Washington law professor, agrees that the granting of mistrial over the defendant's objection has opened the door to such a defense.

"The notion is that you can't just stop in the middle and say, 'I don't like the way it's going' and start over," Junker said. "If the defendant objected, it does raise the possibility" of double jeopardy, Junker said. "That would happen in a civilian court, and I presume in a military court. That doctrine comes from the Constitution."

Marjorie Cohn, a professor at the Thomas Jefferson School of Law and a proposed expert witness for the defense, opines: "When the Army judge declared a mistrial over defense objection in 1st Lt. Ehren Watada's court-martial, he probably didn't realize jeopardy attached. Although he faces the possibility of a dishonorable discharge, the judge's grant of a mistrial precludes retrial on the same criminal charges."

Prominent Honolulu defense attorney Howard Luke states, "Was there manifest necessity? That's up to the court to decide...From what I understand, I think not. The case could have been continued."

I wouldn't bet against these four authorities. Any fair-minded review of this case will reveal that the defense was doing far better than anyone had expected; that Lt. Watada had protected his rights at every turn; and that the judge was scared of letting this case go to any factfinder who had any chance of being fully informed of Lt. Watada's belief that the war in Iraq is illegal.