

AGUSTIN AGUAYO vs. THE SECRETARY OF THE ARMY

Why This Case Is Important

by attorneys Peter Goldberger, James Klimaski, and J.E. McNeil

Army Specialist Agustin Aguayo -- a Mexican-born, naturalized U.S. citizen from Los Angeles and a veteran of the Iraq War -- is in a U.S. military prison in Germany awaiting court martial and a possible jail sentence of up to seven years for refusing a second deployment to Iraq. Meanwhile, the United States Court of Appeals for the District of Columbia Circuit is considering Aguayo's appeal of the Army's refusal to release him from the military on the grounds that he is a conscientious objector; the Court will hear oral argument about his case on November 21. If Aguayo prevails in his appeal, the Army will be required to recognize his sincere conscientious objection and discharge him.

A medic in the U.S. Army, Aguayo was decorated for his service under combat conditions during his first tour in Iraq. In February 2004 he applied for an honorable discharge as a conscientious objector. In early 2006, despite favorable recommendations by the officer who investigated his case and other officers who know him best, Aguayo's conscientious objector application was turned down by the Secretary of the Army. The U.S. District Court for the District of Columbia (which has jurisdiction over court cases concerning U.S. military personnel stationed abroad) upheld the Pentagon's decision for reasons Aguayo's attorneys say are contrary to legal rules and precedents.

Aguayo's appeal is the first military conscientious objector case to come before the powerful and influential D.C. Circuit Court -- the court from which Justices Roberts, Thomas, Scalia and Ginsburg all advanced to the Supreme Court -- in the 35 years since the Vietnam War. His appeal is one of only a handful of Iraq War conscientious objector cases to reach the appellate level and is apparently the only one pending.

The government seeks in this case to sharply cut back on the existing legal precedent, set during the Vietnam War, according to which the civilian courts have authority, under the Writ of Habeas Corpus, to exercise oversight over the military's decisions regarding conscientious objector applications. This precedent serves to protect a key aspect of American religious liberty: the right of conscientious objection, which dates back to the Revolutionary War.

Yet, in the Aguayo case, the Army argues that the federal court should defer to military "expertise" without requiring any verifiable factual or logical basis for the Army's denial of his conscientious objector application -- an argument consistent with a variety of recent attacks on the authority of independent courts to use the historic Writ of Habeas Corpus to challenge unfettered Executive power. The decision of the United States Court of Appeals in the case of *Aguayo vs. the Secretary of the Army* will likely profoundly influence the willingness of the civilian courts to question the Executive's refusal to honor the right of U.S. military personnel to exercise their freedom of religion, including the right -- in accordance with conscience -- not to participate in war.