

**Case No. 05-15680**

(Panel Decision: January 12, 2006. Panel judges: J. Clifford Wallace,  
Stephen S. Trott, and Pamela Ann Rymer)

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

JOHN DOE,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
DONALD RUMSFELD, Secretary of	)
Defense; LES BROWNLEE, Secretary of	)
the United States Department of the Army	)
(Acting); REGINALD L. BROWN,	)
Assistant Secretary of the Army for	)
Manpower and Reserve Affairs; CAPTAIN	)
TORREY E. HUBRED, Company	)
Commander, and Does 1-10, inclusive,	)
	)
Respondents-Appellees.	)
	)

---

On Appeal from the United States District Court  
for the Eastern District of California, No. CIV-S-04-2080 FCD KJM  
The Honorable FRANK C. DAMRELL, JR., Judge

**PETITION FOR REHEARING EN BANC**

Michael S. Sorgen (State Bar No. 43107)  
Joshua N. Sondheimer (State Bar No. 152000)  
Law Offices of Michael S. Sorgen  
240 Stockton St., 9<sup>th</sup> Floor  
San Francisco, CA 94108  
Telephone: (415) 956-1360  
Attorneys for Petitioner-Appellant

**TABLE OF CONTENTS**

I. This Case Warrants En Banc Rehearing ..... 1

II. Section 12305 As Applied Here Permits Arbitrary Infringement of Doe’s Liberty ..... 5

III. The Involuntary Extension of Doe’s Service Was Unauthorized Because the Military Has Applied Section 12305 in Circumstances Far Beyond What Congress Intended ..... 11

IV. Doe’s Enlistment Contract Failed to Provide Meaningful Notice That His Service Could Be Extended Under “Stop Loss” ..... 14

V. Conclusion ..... 18

**TABLE OF AUTHORITIES**

**Federal Cases**

*Chan v. Society Expeditions, Inc.*, 123 F.3d 1287(9<sup>th</sup> Cir. 1997) ..... 16

*Doe v. Rumsfeld*, 435 F.3d 980 (9<sup>th</sup> Cir., Jan. 12, 2006) .....  
..... 2-4, 7, 9, 10, 12, 13, 14, 15

*Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) ..... 10, 16, 17

*Johnson v. Laird*, 435 F.2d 493 (9<sup>th</sup> Cir. 1970) ..... 17

*Korematsu v. United States*, 323 U.S. 214 (1944) ..... 10

*Santiago v. Rumsfeld*, 425 F. 3d 549 (9<sup>th</sup> Cir 2005) ..... 1, 2, 4,9,10, 14, 15

*Scaggs v. Larsen*, 396 U.S. 1206 (1969) ..... 5

*Schlanger v. Seamans*, 401 U.S. 487 (1971) ..... 5, 17

*Taylor v. United States*, 711 F.2d 1199 (3d Cir. 1983) ..... 12

*United States v. Gonzales*, 520 U.S. 1 (1997) ..... 16

*United States v. Robel*, 389 U.S. 258 (1967) ..... 6

*Youngstown Sheet and Tube Company v. Sawyer*, 343 US 579 (1952) ..... 6

**U.S. Constitution**

Art. I, sec. 8, cl. 12 ..... 5

## Federal Statutes

### 10 U.S.C.

§ 506 .....	11, 12
§ 12103(a) .....	11
§ 12301 .....	7, 8, 9, 16
§ 12301(d) .....	8
§ 12302 .....	7, 9, 16
§ 12302(a) .....	8
§ 12304 .....	7, 8, 9, 12, 16
§ 12304(a) .....	8, 12
§ 12305 .....	2, 4, 7, 8, 9, 10, 12, 13, 14, 16
§ 12305(a) .....	7, 10, 12, 14, 15, 17
§ 12406 .....	12
§ 12407(a) .....	12

### 32 U.S.C.

§ 302(c) .....	11
§ 303(c) .....	11

### 50 App. U.S.C.

§ 454(c)(1) .....	11
-------------------	----

§ 454(d)(1) ..... 11

**Other Authorities**

70 Fed. Reg. 8919 (Feb. 18, 2005) ..... 6

James Madison, “Political Observations,” April 20, 1795, in 4 *Letters and Other Writings of James Madison* 491, (Philip R. Fendall, ed.) (1865) ..... 5, 6

Presidential Proclamation No. 7757, 69 Fed. Reg. 9515 (Feb. 24, 2004) ..... 9

Relaya, C. Harold, Congressional Research Service, *National Emergency Powers* (updated Sept. 15, 2005) ..... 9

## **I. This Case Warrants En Banc Rehearing**

John Doe is a decorated combat veteran who honorably served an initial eight-year term of service in the United States armed forces. In May 2003 he volunteered for a one-year term as a reservist in the California Army National Guard under its so-called “Try One” program, which the Guard advertises as an opportunity for active duty veterans to experience service in the Guard for one year before deciding whether to make any long-term reserve commitment. In February 2004, Doe re-enlisted for another one-year “Try One” term, which was scheduled to expire on April 30, 2005.

However, after leading Doe reasonably to believe that his enlistment could not be extended beyond the one year term absent “a war or national emergency declared by Congress,” (Standard Enlistment Contract Section 10(b), ER10), the Army ordered Doe and his National Guard Unit to compulsory active duty in Iraq for at least 545 days beginning October 2004. The Army thus compelled Doe’s service on active duty until at least March 31, 2006, 11 months beyond the expiration of the term of service (“ETS”) specified in his contract. Like the serviceman in *Santiago v. Rumsfeld*, 425 F.3d 549 (9<sup>th</sup> Cir. 2005), Doe’s *enlistment* was extended to December 24, 2031, pursuant to a directive implementing the

Army's "stop loss" policy.<sup>1</sup>

Doe's enlistment contract did not warn him that the government could involuntarily extend his one-year term whenever other reservists are called to active duty, and made no mention of 10 U.S.C. § 12305 on which the government now relies. Yet, despite the government's "bait and switch," the *Doe* panel held the government's involuntary extension of Santiago's enlistment under its stop-loss policy was valid. The panel asserted:

Nothing in the record suggests Doe was misled or that the government made misrepresentations. While the military may have marketed the program to Doe as "Try-One," such marketing does not overcome the text of the enlistment agreement that Doe actually signed.

*Doe v. Rumsfeld*, 435 F.3d 980 (9<sup>th</sup> Cir., January 12, 2006), slip op. at 570.

Then relying on the same misreading of the contract and emphasizing in the same way the general language over the specific, the *Doe* panel stated: "As we held in *Santiago*, the enlistment agreement gave warning in plain language that [Doe's] service could be extended." *Id.* Of course, the *Doe* panel was bound by the previous *Santiago* panel on an issue decided in *Santiago*. Hence, even a blatantly

---

<sup>1</sup>The *Santiago* panel was all too willing to accept the Army's seemingly limitless reach and to explain away this arbitrary and unreasonable ETS date, reasoning that: "Santiago's new ETS is December 25, 2031 but this date was entered for administrative convenience. The stop-loss policy makes clear that soldiers 'will generally be mobilized for an initial period of 12 months but may be extended for a cumulative period up to, but not to exceed, 24 months.'" *Santiago*, 425 F.3d at 559.

erroneous ruling by the earlier panel on a straightforward issue of contract law can be corrected only by an en banc review. For a more detailed analysis of the contract misrepresentation and notice issues, see Section IV, *infra*.

The panel decisions render meaningless the government's promises to enlistees like Doe and Santiago. Moreover, by allowing what is in essence a "backdoor draft," the panel decisions threaten the bedrock of our all volunteer military – trust in the government to honor its commitments. The "backdoor" draft may alleviate several problems associated with overt public conscription: by targeting those who wear or have already worn the military uniform and have already proved their willingness to subject themselves to the spartan rigors of military life, the greater public remains unaffected by involuntary military service and the public outcry may temporarily be kept to a minimum. However, if this Court allows the Army to continue to forcibly retain those who have completed their service obligation, the precedential effect of giving the Army free rein over would-be civilians will continue to result in increased attrition and decreased enlistment rates, which in return will result in a marked reduction in the numbers of soldiers defending our borders and our interests abroad.

The *Doe* panel erroneously claims that Congress sufficiently limited the President's stop-loss authority to protect soldiers' due process rights. Slip op. at

568, finds “an intelligible principle” that guides the Army’s delegated authority to exercise legislative power. *Id.* at 569. The panel asserts that the President may exercise stop-loss authority only during a national emergency. *Id.* at 567. However, under the plain language of 10 U.S.C. § 12305, such authority can be exercised regardless of the existence of a national emergency. Further, the *Doe* panel’s conclusion that involuntary extensions of service may be imposed only on “members of a reserve component” who are “serving on active duty” (slip op. at 568) conflicts directly with the earlier *Santiago* panel’s holding that stop loss may be imposed on “any member” of the armed forces deemed essential to national security, “not merely those on active duty.” *Santiago*, 425 F.3d at 557-58.

Thus, the *Doe* panel decision raises two questions of exceptional importance:

(1) Does the government’s interpretation and application of 10 U.S.C. § 12305 arbitrarily deprive Doe of liberty without due process and violate the separation of powers by allowing the Executive, without adequate guidelines, to require his compulsory military service?

(2) Does the involuntary extension of Doe’s enlistment deny him due process where the government failed to provide meaningful notice of its purported “stop-loss” authority and misled him to enlist in the “Try One” program?

## **II. Section 12305 As Applied Here Permits Arbitrary Infringement of Doe’s**

## **Liberty**

Involuntary retention in military service infringes a soldier's constitutionally-protected right to liberty, and therefore must comport with due process. *See Schlanger v. Seamans*, 401 U.S. 487, 489 (1971) (habeas relief available to soldier claiming that he was being held in military service in violation of enlistment contract); *Scaggs v. Larsen*, 396 U.S. 1206, 1209 (1969) (Douglas, Circuit Justice) (habeas relief available to reservist to challenge call-up order involuntarily extending his enlistment term). Thus, any statute permitting the involuntary extension of a soldier's enlistment must protect against the arbitrary exercise of such authority.

The Founders sought to protect individuals from arbitrary military conscription by placing the power to order compulsory military service in the hands of Congress rather than the President – or for that matter, unelected military subordinates. For this reason, the Constitution's grant of power to the Congress to "raise and support Armies" is among the most fundamental features of the Constitutional framework. U.S. Const., Art. I, sec. 8, cl. 12. The Founding Fathers would have found antithetical to the Constitution and to individual liberty any statute that would place citizens under obligation of continued military service at the whim of the military itself. As James Madison wrote in his "Political Observations":

The Constitution expressly and exclusively vests in the Legislature

the power of . . . raising armies. . . . A delegation of such powers [to the President] would have struck, not only at the fabric of our Constitution, but at the foundation of all well organized and well checked governments.

\* \* \*

The separation of the power of raising armies from the power of commanding them, is intended to prevent the raising of armies for the sake of commanding them.

James Madison, "Political Observations," April 20, 1795, in 4 *Letters and Other Writings of James Madison* 491 (Philip R. Fendall, ed.) (1865).

In light of the Founders' grave concerns over any delegation of authority to the President to "raise armies," Congress must provide the Executive with intelligible guidelines for exercising its authority to order involuntary military service. Indeed, Congress must delegate with greater than ordinary specificity where the law affects individual liberties. *See United States v. Robel*, 389 U.S. 258, 275 (1967). Thus, if President Truman in his capacity as Commander in Chief lacked the Constitutional authority to seize the steel mills during the Korean War, *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952), then President Bush should similarly not be accorded arbitrarily the power to seize young men and women from the National Guard and extend their service for active combat duty in Iraq.

The panel concluded that the involuntary extension of Doe's National Guard

service was authorized under 10 U.S.C. § 12305(a), which provides that:

[D]uring any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 12301, 12302, 12304 of this title, the President may suspend any provision of law<sup>2</sup> relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.

But the panel plainly erred in its conclusion that Congress had sufficiently limited the President's stop-loss authority. The panel reasoned that Congress' delegation of authority in section 12305 is constitutionally adequate solely on the basis that: "Section 12305 incorporates the intelligible principle that the President has 'stop-loss' authority during 'times of national emergency.'" *Doe*, slip op. at 569. The panel is simply wrong. The President's stop-loss authority under section 12305 is not triggered by a declaration of emergency, but rather by the activation of reservists under 10 U.S.C. §§ 12301, 12302, or 12304. 10 U.S.C. § 12305(a) (President may exercise stop-loss authority "[d]uring any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 12301, 12302, 12304 of this title"). This activation of

---

<sup>2</sup> The panel also overlooked that the MILPER Message No. 03-040, on which it and Santiago exclusively relied to conclude that relevant provisions of law were suspended under section 12305, did not in fact suspend any *laws*, but only "regulations."

reservists under 10 U.S.C. §§ 12301, 12302 and 12304 fails to provide any boundary or intelligible guiding principle on the President's authority to require involuntary military service under "stop loss" because those sections grant the President unfettered discretion to call reservists to active duty, literally, "at any time."

Section 12304 allows the President to activate the reserves at any time in support of "any operational mission," 10 U.S.C. § 12304(a), and without declaring any emergency. Under section 12301, reserves may be ordered to active duty with their consent "[a]t any time." 10 U.S.C. § 12301(b) and (d) (emphasis added). The existence of a Presidentially-declared national emergency is just one of a variety of conditions under which the President may order members of the reserve to active duty. 10 U.S.C. § 12302(a). Thus, section 12305 allows the government to involuntarily extend an enlistment at any time, for any length of time, and for whatever purpose, whether or not that purpose is related to the reasons for which he or other members of the reserves have been ordered to active duty, and without any determination by the President or Congress that a national emergency exists.

Nor would a limitation on stop loss to "times of national emergency," (even if it were the operative standard), constitute any meaningful "intelligible principle" to guide the President. Some fourteen "national emergencies" presently remain in

effect, dating as far back as 1979. *See* Harold C. Relaya, Congressional Research Service, *National Emergency Powers* at 13-16 (updated Sept. 15, 2005). Surely, the Court would not assert that the mere existence of *any* of these emergencies – for example, the emergency relating to Cuba and its threatened disturbance to international relations<sup>3</sup> – provides a sufficient foundation for invoking “stop loss” to extend the enlistments of soldiers mobilized to Iraq.<sup>4</sup>

The panel also held that section 12305 was sufficiently limited based on the erroneous conclusion that “an extension of enlistment can be imposed only on ‘members of a reserve component’ that are ‘serving on active duty pursuant to an order to active duty under authority of section 12301, 12302 or 12304.’” *Doe*, slip op. at 568. The panel’s assertion is both wrong and flatly contradicts, in two ways, the Court’s previous panel opinion in *Santiago*, 425 F.3d at 557-58. *Santiago* held based on the plain language of section 12305 that stop loss may be imposed on “any member of the armed forces,” not just reservists. *Id.* Further, the Court rejected

---

<sup>3</sup> The national emergency relating to Cuba was declared in 1996 by President Clinton, and continued in effect each year since by Presidents Clinton and Bush, including an expansion of the emergency by President Bush in February 2004. Presidential Proclamation No. 7757, 69 Fed. Reg. 9515 (Feb. 24, 2004); 71 Fed. Reg. 2133 (Jan. 10, 2006) (continuing Cuban emergency another year).

<sup>4</sup> Nor does the Presidential emergency of September 14, 2001, regarding the threat of future terrorist attacks on the United States have any obvious or demonstrable relationship to the occupation of Iraq.

petitioner Santiago’s “central contention” that section 12305 only authorizes the President to extend enlistments of soldiers serving on *active* duty. It specifically held that the President’s stop-loss authority is not limited “merely [to] those on active duty.” *Id.* The errors in the *Doe* panel’s decision and its conflict with *Santiago* compels rehearing. The President’s stop-loss authority is plainly not circumscribed as the panel understood.

The Supreme Court recently made clear that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). Supporting its view, the *Hamdi* Court cited Justice Murphy’s dissent from the now-discredited majority opinion in *Korematsu v. United States*, 323 U.S. 214 (1944):

“[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.”

*Hamdi*, 542 U.S. at 535 (quoting *Korematsu*, 323 U.S. at 233-34). Section 12305 cannot be reconciled with Doe’s constitutional rights.

///

///

### **III. The Involuntary Extension of Doe’s Service Was Unauthorized Because the Military Has Applied Section 12305 in Circumstances Far Beyond**

## What Congress Intended

In all the laws that specifically allow involuntary extensions of enlistments, Congress has maintained its exclusive constitutional authority to authorize compulsory military service. All these laws allow the military to extend enlistments *only* during periods when *Congress itself* has declared war or a national emergency.

For example, section 12103(a) of Title 10, applicable to Doe, provides that:

[E]nlistments as Reserves are for terms prescribed by the Secretary concerned. However, an enlistment that is in effect at the beginning of a war or of a national emergency *declared by Congress*, or entered into during such a war or emergency, and that would otherwise expire, continues in effect until the expiration of six months after the end of that war or emergency.

10 U.S.C. § 12103(a) (emphasis added). *See also* and to the same effect, 32 U.S.C. §§ 302(c) and 303(c) (enlistments in National Guard); and 10 U.S.C. § 506 and 50 App. U.S.C. §§ 454(c)(1) (enlistments in regular Army), and 454(d)(1) and (d)(2) (reservists).

The panel erred in flatly ignoring 32 U.S.C. §§ 302(c) and 303(c) which authorize involuntary extension of a National Guard enlistment *only* when Congress has declared a war or national emergency on the ground that Title 32 governs only “the State National Guard and not the National Guard of the United States.” *Doe*, slip op. at 572-73. These two statutes apply to “*members*” or “*enlistments*” in the

National Guard, and under the dual enlistment system, Doe's enlistment is in *both* the state and federal National Guards. They apply regardless of whether the Guard member is *mobilized* under the President's authority under Title 32 (mobilization of federal "National Guard") or Title 10 (mobilization of state National Guard).<sup>5</sup>

Congress specifically enacted 10 U.S.C. § 506 in 1967, requiring its own declaration of war or national emergency to extend enlistments in the regular armed forces, to bar the Navy from continuing to abuse its then-existing authority to extend enlistments based on a Presidentially-declared emergency. S. Rep. No. 931, 9<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1967, *reprinted in* 1967 U.S.C.C.A.N. 2635, 2636; *Taylor v. United States*, 711 F.2d 1199, 1203 (3d Cir. 1983). The Navy had been extending enlistments for service in Vietnam based on the wholly-unrelated declaration by President Truman of an emergency relating to Korea in 1950.

---

<sup>5</sup> For the same reason, 10 U.S.C. § 12407(a), which provides that "*no member* of the National Guard may be kept in Federal service beyond the term of his commission or enlistment," also applies to members, like Doe, of the State National Guard, regardless of whether they are *mobilized* as members of the state or federal National Guard. The panel's reasoning also leads to an absurd result that Congress could not have intended: A member of the Guard could *not* be kept on active duty beyond the end of his enlistment to help defend the United States from the *gravest* of domestic threats, including an actual or threatened "invasion by a foreign nation" or a "rebellion against the United States government." 10 U.S.C. § 12406. Yet, the Guard member *could* be held on duty beyond his enlistment when other reservists have been mobilized for a routine "operational mission." See 10 U.S.C. § 12304(a) and 12305(a).

All of the statutes noted above are *in pari materia*, and reflect the same intent to retain Congress' exclusive prerogative to authorize involuntary extensions of military service. Section 12305 is an aberration and does not even explicitly discuss involuntary extension of enlistments. Instead, that section speaks to authorizing the President to "suspend ... laws relating to ... retirement or separation...." Yet the panel does not recognize this anomaly. Instead, it disregards the contrary provisions, justifying stop loss by finding "nothing in the language of the statute to indicate that it is the exclusive manner in which an enlistment can be involuntarily extended." *Doe*, slip op. at 573.

Congress clearly intended that section 12305 provide only a *limited* exception to this consistent statutory scheme requiring a Congressional declaration of war or emergency to extend enlistments. The Senate Report explains that section 12305 was intended merely to give the President the ability to temporarily expand the size of the active duty force "by allowing the President to bring credible influence to bear on a *crisis situation*," or to provide "*early and decisive reinforcement* to friendly forces" should deterrence fail. S. Rep. No. 98-174 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1081, 1099 (emphasis added). However, the government has gone far beyond the intended scope of the statute by involuntarily extending Doe's service to support a pre-planned, ongoing, long-term military occupation.

The government's unilateral extension of Doe's service is arbitrary and unauthorized even by section 12305. Thus, the length of Doe's service must be governed instead by the consistent statutory scheme prohibiting involuntary extensions unless there is a declaration of war or emergency by Congress. Congress has not declared a war or national emergency at any time during Doe's enlistment. Thus, Doe's orders requiring his compulsory service beyond his enlistment term are unconstitutional and contrary to law.

#### **IV. Doe's Enlistment Contract Failed to Provide Meaningful Notice That His Service Could Be Extended Under "Stop Loss"**

Relying as it must on the previous panel decision in *Santiago*, the *Doe* panel cited three provisions of Doe's service contract to conclude that Doe's enlistment agreement "identified the possibility" that his enlistment could be extended, and thus that he had received sufficient notice. *Doe*, slip op. at 569-70. However, *none* of the provisions cited by the panel is applicable.

The provision that "laws and regulations that govern military personnel may change without notice" is inapposite because no pertinent laws or regulations changed during Doe's National Guard enlistment. 10 U.S.C. § 12305(a) (though it was not even mentioned in Doe's form enlistment contract) was enacted in 1983. The Reserve Component Unit Stop Loss Policy and a directive implementing that

policy in the National Guard had been in effect since 2002. Doe enlisted under “Try One” in May 2003 and extended that enlistment for another “Try One” year in February 2004.

The “active duty” provisions cited by the panel from the enlistment contract, Section 10(c) and a sentence from the Statement of Understanding of Reserve Obligation and Responsibilities, do not authorize or even relate to *involuntary extensions* of an enlistment. Doe never asserted that his *order to active duty* was illegal, but only that the *involuntary extension of his enlistment* is unlawful and unauthorized. Doe was ordered to active duty for “at least” 545 days, some 11 months beyond the expiration of his one-year enlistment, and his enlistment was extended well beyond the period of his active duty to Christmas Eve of the year 2031.

Yet the *Doe* panel, like the *Santiago* panel, conflates the provisions as to when a soldier may be *ordered to active duty* with other provisions of the contract which *specifically* address the circumstances under which Doe’s reserve obligations may be *involuntarily extended*. *Doe*, slip op. at 564-69, *Santiago* 555-58. Specific provisions prevail over the general when interpreting a contract. *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1296 (9<sup>th</sup> Cir. 1997). The “active duty” provisions do not authorize or even mention involuntary extensions of enlistment.

Thus, they cannot properly be read to authorize involuntary extensions. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). *Compare* contract provisions 10(b),(c) and (d). ( ER 10).

The relevant provisions of Doe's contract specifically limit enlistment term extensions to periods when *Congress* has declared a war or national emergency, or if Doe failed to satisfactorily perform his reserve obligations. (ER 7, 10). Nowhere do those provisions advise Doe that his one-year service obligation could be *extended*, under section 12305, based solely on the activation of other reservists under sections 12301, 12302, or 12304.

Before the government may deprive an individual of his liberty it must provide not just some notice but meaningful notice that this might occur. The Supreme Court recently "reaffirm[ed] . . . the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law . . . ." *Hamdi, supra*, 542 U.S. at 531. Due process requires the government to provide notice "at a meaningful time and in a meaningful manner" before it deprives an individual of his liberty. *Id.* at 2649 (emphasis added) (internal

quotation omitted). The Supreme Court cautioned in *Hamdi* that “[i]t is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” *Id.* at 2648.

The involuntary extension of Doe’s National Guard enlistment for service in Iraq constitutes a substantial and grave restraint on his liberty. *See Schlanger, supra*, 401 U.S. at 489; *Johnson v. Laird*, 435 F.2d 493, 496 (9th Cir. 1970) (reservist called to active duty is “in custody” for purposes of habeas corpus). Yet, the contract’s vague suggestion that “laws or regulations may change,” when no laws in fact changed, and its provisions specifying when Doe could be called to active duty, provided *no* notice, much less “meaningful” notice, that the government could extend enlistment in circumstances not listed in the contract. When the government “hides the ball” by listing *other* grounds for involuntary extension in an enlistment contract but omits any reference to the very statute on which it later relies (10 U.S.C. § 12305(a)) to force a soldier to perform extended involuntary combat service, the government has not provided “meaningful” notice.

## **V. Conclusion**

For the reasons above, Doe respectfully requests that this Court grant rehearing *en banc*.

Dated: February 24, 2006

Respectfully submitted,

LAW OFFICES OF MICHAEL S. SORGEN

By: \_\_\_\_\_

Michael S. Sorgen

Attorney for Petitioner-Appellant John Doe

**CERTIFICATE OF COMPLIANCE  
PURSUANT TO CIRCUIT RULE 40-1**

**Case No. 05-15680**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing and for rehearing en banc is:

X Proportionately spaced, has a typeface of 14 points or more and contains 3989 words (petitions and answers must not exceed 4,200 words).

or

\_\_\_\_\_ Monospaced, has 10.5 or fewer characters per inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

\_\_\_\_\_ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Dated: February 24, 2006

LAW OFFICES OF MICHAEL S. SORGEN

By: \_\_\_\_\_  
Michael S. Sorgen

**PROOF OF SERVICE BY MAIL**

I declare that I am employed in the City and County of San Francisco, State of California. I am over eighteen years of age and not a party to the within entitled cause. My business address is 240 Stockton Street, 9th Floor, San Francisco, California, 94108. I am familiar with this office's practice for depositing mail for mail delivery. On the date below, I caused to be served the within:

**PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC**

on the party to said cause by depositing true copies of the items listed above in a sealed envelope, with postage thereon fully pre-paid for collection and processing with the United States Postal Service in San Francisco, California addressed as follows:

Robert Loeb  
Special Appellate Counsel  
H. Thomas Byron III, Attorney  
Civil Division, Appellate Staff  
U.S. Department of Justice, Room 7260  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530-0001

Major Louis Birdsong  
Chief, Litigation Division  
U.S. Army, Office of the Judge  
Advocate General  
901 N. Stuart St.  
Arlington, VA 22203-1837

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on February 24, 2006.

\_\_\_\_\_  
Maria Hwang