

Case No. 05-15680

IN THE UNITED STATES COURT OF APPEAL

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

**BRIEF OF APPELLANT**

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

|   | <b>Page</b> |
|---|-------------|
| <b>JURISDICTIONAL STATEMENT</b> .....   | <b>1</b>    |
| <b>STATEMENT OF ISSUES PRESENTED FOR REVIEW</b> .....   | <b>1</b>    |
| <b>STATEMENT OF THE CASE</b> .....  | <b>2</b>    |
| <b>STATEMENT OF FACTS</b> .....   | <b>3</b>    |
| <b>STANDARD OF REVIEW</b> .....   | <b>5</b>    |
| <b>SUMMARY OF THE ARGUMENT</b> .....  | <b>5</b>    |
| <b>ARGUMENT</b> .....   | <b>7</b>    |
| <b>I.    NEITHER THE PRESIDENT NOR THE ARMY SUSPENDED<br/>          ANY LAWS RELATING TO DOE’S SEPARATION FROM<br/>          MILITARY SERVICE</b> .....   | <b>7</b>    |
| <b>II.   SECTION 12305 IS UNCONSTITUTIONAL BECAUSE IT<br/>          PERMITS ARBITRARY INFRINGEMENT OF DOE’S<br/>          LIBERTY</b> .....   | <b>9</b>    |
| <b>III.  CONGRESS HAS CONSISTENTLY BARRED INVOLUNTARY<br/>          EXTENSIONS OF MILITARY SERVICE EXCEPT WHEN<br/>          CONGRESS DECLARES WAR OR A NATIONAL<br/>          EMERGENCY</b> .....            | <b>15</b>   |
| <b>IV.  DOE MAY NOT BE KEPT UNDER MOBILIZATION ORDERS<br/>          AFTER HIS GUARD ENLISTMENT HAS EXPIRED</b> .....  | <b>21</b>   |
| <b>V.   BECAUSE DEFENDANTS MISREPRESENTED THE TERMS<br/>          OF DOE’S “TRY ONE” YEAR, DOE’S INVOLUNTARY<br/>          EXTENSION IS FUNDAMENTALLY UNFAIR AND<br/>          VIOLATES DUE PROCESS</b> ..... | <b>24</b>   |
| <b>CONCLUSION</b> .....   | <b>28</b>   |

**CERTIFICATE OF COMPLIANCE ..... 29**  
**STATEMENT OF RELATED CASE ..... 30**

## TABLE OF AUTHORITIES

|   | Page       |
|---|------------|
| <b><u>Cases</u></b>   |            |
| <i>American Power &amp; Light Co. v. Sec. &amp; Exch. Comm'n</i> , 329 U.S. 90 (1946) . . .           | 12         |
| <i>Azarte v. Ashcroft</i> , 394 F.2d 1278 (9 <sup>th</sup> Cir. 2005) . . . . .                       | 23         |
| <i>Bechtel Constr., Inc. v. United Bhd. of Carpenters</i> , 812 F.2d 1220 (9th Cir.1987)<br>. . . . . | 23         |
| <i>Brown v. Dunleavy</i> , 722 F. Supp. 1343 (E.D. Va. 1989) . . . . .                                | 26         |
| <i>Colautti v. Franklin</i> , 439 U.S. 379 (1979) . . . . .   | 27         |
| <i>Coleman v. Watts</i> , 87 F. Supp. 2d 944 (D. Ariz. 1998) . . . . .                                | 26         |
| <i>Equitable Life Ins. Co. v. Halsey, Stuart &amp; Co.</i> , 312 U.S. 410 (U.S. 1941) . . . . .       | 26         |
| <i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992) . . . . .   | 14         |
| <i>Free Speech Coalition v. Reno</i> , 198 F.3d 1083 (9th Cir.1999) . . . . .                         | 13         |
| <i>Hamdi v. Rumsfeld</i> , 124 S.Ct. 2633 (2004) . . . . .  | 14, 15, 27 |
| <i>Itek Corp. v. First Nat'l Bank of Boston</i> , 704 F.2d 1 (1 <sup>st</sup> Cir. 1983) . . . . .    | 14         |
| <i>Kolender v. Lawson</i> , 461 U.S. 352 (1983) . . . . .   | 13         |
| <i>Korematsu v. United States</i> , 323 U.S. 214 (1944) . . . . .                                     | 15         |
| <i>Lee v. Madigan</i> , 358 U.S. 228 (1958) . . . . .   | 16         |
| <i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972) . . . . .                           | 27         |
| <i>Pence v. Brown</i> , 627 F.2d 872 (8 <sup>th</sup> Cir. 1980) . . . . .                            | 26         |
| <i>Poe v. Ullman</i> , 367 U.S. 497 (1967) . . . . .  | 10         |

|   |        |
|---|--------|
| <i>Santiago v. Rumsfeld</i> , ___ F.3d ___ (9 <sup>th</sup> Cir. May 13, 2005) . . . . .                | 24, 30 |
| <i>Scaggs v. Larsen</i> , 396 U.S. 1206 (1969) . . . . .  | 10     |
| <i>Schlanger v. Seamans</i> , 401 U.S. 487 (1971) . . . . .   | 10, 27 |
| <i>Shelton v. Brunson</i> , 465 F.2d 144 (5 <sup>th</sup> Cir. 1972) . . . . .                          | 26     |
| <i>Smith v. City of Jackson, Miss.</i> , 125 S.Ct. 1536 (Mar. 30, 2005) . . . . .                       | 19     |
| <i>Solomon v. Interior Regional Housing Auth.</i> , 313 F.3d 1194 (9 <sup>th</sup> Cir. 2002) . . . . . | 22     |
| <i>Taylor v. United States</i> , 711 F.2d 1199 (3d Cir. 1983) . . . . .                                 | 18, 19 |
| <i>Thai v. Ashcroft</i> , 366 F.3d 790 (9 <sup>th</sup> Cir. 2004) . . . . .                            | 5      |
| <i>United States v. Ani</i> , 138 F.3d 390, 391 (9 <sup>th</sup> Cir. 1998) . . . . .                   | 5      |
| <i>United States v. Castillo</i> , 34 M.J. 1160 (1992) . . . . .  | 20     |
| <i>United States v. Robel</i> , 389 U.S. 258 (1967) . . . . .   | 12     |
| <i>United States v. Ruiz</i> , 935 F.2d 1033 . . . . .  | 24     |
| <i>United States v. Vroman</i> , 975 F.2d 669 (9 <sup>th</sup> Cir. 1992) . . . . .                     | 24     |
| <i>United States v. Yoshida</i> , 526 F.2d 560 (Ct. Customs App. 1975) . . . . .                        | 14     |
| <i>Webster v. Reproductive Health Services</i> , 492 U.S. 490 (1989) . . . . .                          | 27     |
| <i>Withum v. O'Connor</i> , 506 F. Supp. 1374 (D.P.R. 1981) . . . . .                                   | 26     |
| <i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001) . . . . .  | 10     |

**U.S. Constitution**

U.S. Const., Art. I, sec. 8, cl. 12 ..... 11

**Statutes**

10 U.S.C. § 506 ..... 17, 19

10 U.S.C. § 10101 ..... 17

10 U.S.C. § 12103(a) ..... 17, 19

10 U.S.C. § 12301 ..... 13

10 U.S.C. § 12301(b) ..... 13

10 U.S.C. § 12301(d) ..... 13

10 U.S.C. § 12302 ..... 13

10 U.S.C. § 12304 ..... 13

10 U.S.C. § 12304(a) ..... 23

10 U.S.C. § 12305 ..... 8, *passim*

10 U.S.C. § 12305(a) ..... 8, 23

10 U.S.C. § 12403 ..... 17, 21

10 U.S.C. § 12406 ..... 21, 23

10 U.S.C. § 12407(a) ..... 21, 22, 23

28 U.S.C. § 1291 ..... 1

28 U.S.C. § 1331 ..... 1

28 U.S.C. § 1346 ..... 1

|                             |        |
|-----------------------------|--------|
| 28 U.S.C. § 1361            | 1      |
| 28 U.S.C. § 2241            | 1      |
| 28 U.S.C. § 2242            | 1      |
| 28 U.S.C. § 2253            | 1      |
| 32 U.S.C. § 302(c)          | 16, 17 |
| 32 U.S.C. § 303(c)          | 16     |
| 50 App. U.S.C. § 454 (c)(1) | 17     |
| 50 App. U.S.C. § 454(d)(1)  | 17     |
| 50 App. U.S.C. § 454(d)(2)  | 17     |

**Court Rules**

|                         |    |
|-------------------------|----|
| Fed. R. App. P. 4(a)(1) | 1  |
| Fed. R. App. P. 41(b)   | 24 |
| Fed. R. App. P. 41(c)   | 24 |
| Fed. R. Civ. P. 54(a)   | 1  |

**Other Authorities**

|  |    |
|--|----|
| Executive Order No. 13223, 66 Fed. Reg. 48201 (2001)   | 14 |
| Executive Order No. 12728, 55 Fed. Reg. 35029 (1990)   | 8  |
| Authorization for Use of Military Force Against Iraq Resolution of 2002,” Pub. L. No. 107-243 § 3(c)(1), 116 Stat. 1498. | 20 |

Authorization for Use of Military Force, Pub. L. 107-40 § 2(b), 115 Stat. 224  
(2001) (Afghanistan) . . . . . 20

James Madison, “Political Observations,” April 20, 1795, in 4 *Letters and Other  
Writings of James Madison* 491 (Philip R. Fendall, ed.) (1865) . . . . . 11

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  
. . . . . 18, 19

S. Rep. No. 98-174 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1081 . . . . . 20

## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction over this matter pursuant to 28 U.S.C. sections 2241, 2242, 1331, 1346, and 1361.

This court has jurisdiction under 28 U.S.C. sections 1291 and 2253 because this appeal is from a final judgment that disposes of all claims between all parties. (Excerpts of Record (“ER”) 78). *See* Fed. R. Civ. P. 54(a).

The judgment appealed from was entered on March 15, 2005. (ER 78). This appeal was timely filed on April 11, 2005. (ER 86-87). Fed. R. App. P. 4(a)(1).

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Is the involuntary extension of John Doe’s one-year enlistment authorized by 10 U.S.C. § 12305 when the government has not suspended any laws relating to Doe’s right to separate from military service?
2. Does 10 U.S.C. § 12305 arbitrarily deprive Doe of liberty without due process and violate separation of powers by allowing the Executive, without adequate guidelines, to require his compulsory military service?
3. Does the government’s involuntary extension of Doe’s one-year enlistment violate 10 U.S.C. § 12103, and 32 U.S.C. §§ 302, 303, which bar involuntary extensions except during periods of war or national emergency declared by Congress?

4. Does the government's involuntary retention of Doe in federal military service beyond the one-year term of his National Guard enlistment violate 10 U.S.C. § 12407(a), which provides that "[N]o member of the National Guard may be kept in Federal service beyond the term of his commission or enlistment"?

5. 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?

### **STATEMENT OF THE CASE**

After leading Doe reasonably to believe that his enlistment as a reservist in the National Guard "Try One" program would be limited to a one year term absent the gravest of emergencies identified by Congress, the Army ordered Doe to compulsory active duty in Iraq for eleven months beyond the end of his enlistment. Responding to the government's "bait and switch," Doe filed this action for a writ of habeas corpus, mandamus, and declaratory relief against Doe's commanding officer and other military officials ("the government") seeking to be released from the orders involuntarily extending his enlistment. (ER 1-5).

The parties agreed to submit the case to the district court on the merits based on the papers submitted in support of and in opposition to Doe's request for preliminary relief. (*See* ER 54, 57). On March 15, 2005, the district court issued a

Memorandum and Order denying Doe's claims and issued judgment against Doe. (ER at 53-77, 78).

Doe timely filed a notice of appeal on April 11, 2005. (ER 86-87).

### **STATEMENT OF FACTS**

Doe is a decorated combat veteran who honorably served an eight-year term of service in the United States armed forces, and then in May 2003 volunteered for a one-year term as a reservist in the California Army National Guard. (ER 9-17).

Doe enlisted in the 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. Doe's Guard enlistment required Doe to participate in a number of weekend training assemblies and a two-week training during the one-year term. In February of last year, Doe re-enlisted for another one-year "Try One" term, which was scheduled to expire on April 30, 2005. (ER 44).

However, on or about September 4, 2004, Doe's National Guard unit received mobilization orders requiring the unit's service on a tour of duty in support of military operations in Iraq for at least 545 days, beginning October 3, 2004. (ER 36-38). The mobilization order requires Doe's service on *active duty* until at least March 31, 2006, eleven (11) months beyond the expiration of the term of service

(“ETS”) specified in his contract. The mobilization order also caused Doe’s *enlistment* to be extended to December 24, 2031, pursuant to a directive implementing the Army’s “stop loss” policy in the Army National Guard. (ER 22).<sup>1</sup>

On or about October 4, 2004, several days after filing his action in the district court, Doe received an order to active duty directed to him individually, stating, consistently with his unit order, that he had been placed on active duty for up to 545 days “unless sooner released or extended,” effective October 3, 2004. (ER 40-42).

While the district court’s decision was pending, Doe was deployed with his unit to the Middle East in December 2004. However, in January, Doe was ordered by Army physicians to undergo medical treatment and screening by an Army

---

<sup>1</sup> This directive provides that:

[A]ll enlistments, reenlistments, extensions, and periods of service for [National Guard] soldiers who are members of units alerted or ordered to active duty UP [“under the provisions of”] 10 USC 12302 or 10 USC 12304 are extended until further notice.

\* \* \*

Enlisted soldiers due to separate due to ETS [“Expiration of Term of Service”] but who are being involuntarily retained under stop loss because their unit has received alert orders, will have their ETS date changed to 24 December 2031. [Emphasis added].

(ER 22 §§ 5, 6(c)(2)).

medical review board due to a pre-existing medical condition. The Court granted Doe's request for expedited processing of his appeal, as that review currently is scheduled for completion by July 23, 2005, subject to extension. Doe's contractual enlistment expired several weeks ago, on April 30, 2005.

Doe remains on active duty and his military paychecks continue to reflect his ETS as December 24, 2031.

### **STANDARD OF REVIEW**

This court reviews *de novo* a district court's decision to grant or deny a petition for a writ of habeas corpus. *Thai v. Ashcroft*, 366 F.3d 790, 793 (9<sup>th</sup> Cir. 2004). The district court's interpretation of statutes and regulations similarly are reviewed *de novo*. See *United States v. Ani*, 138 F.3d 390, 391 (9<sup>th</sup> Cir. 1998).

### **SUMMARY OF THE ARGUMENT**

John Doe was ordered to perform compulsory military service on active duty for at least eleven months beyond the end of his National Guard enlistment. The government's involuntary extension of Doe's enlistment is fundamentally unfair, unauthorized, and contrary to law, and the statute on which the government ostensibly relies must be declared unconstitutional.

As the Framers recognized, democratic government and the preservation of individual liberty require that the authority to impose compulsory military service be

placed in the hands of Congress, rather than the Executive. Consistent with this foundational principle, Congress has authorized the government to involuntarily extend enlistments of soldiers already serving in the armed forces only during periods in which Congress has declared war or a national emergency. This limitation ensures that the nation's representative body has determined that the circumstances justify imposing so substantial a burden on its men and women in uniform. Congress has neither declared war nor a national emergency during Doe's enlistment.

In a sole exception to these laws, Congress in 10 U.S.C. § 12305 intended to provide limited authority for the President to suspend laws relating to separation from military service when troops are needed to respond to a crisis. However, neither the President nor any official delegated this authority has *actually* suspended any of the laws prohibiting the government from extending Doe's enlistment. In any event, section 12305 fails adequately to circumscribe the authority it purports to provide to the President to allow soldiers' enlistments to be involuntarily extended. Section 12305, therefore, is unconstitutional, since it permits the arbitrary infringement of soldiers' liberty, and subverts constitutional limitations on Executive authority over military conscription.

The involuntary extension of Doe's service also violates 10 U.S.C.

§ 12407(a), which bars the government from keeping Doe under federal mobilization beyond his enlistment term.

Finally, the involuntary extension of Doe's service must be invalidated because the government misled Doe to enlist in what he reasonably believed was a one-year trial enlistment under the "Try One" program, and violated his right to due process by failing to provide Doe with meaningful notice of its purported "stop loss" authority.

## **ARGUMENT**

### **I. NEITHER THE PRESIDENT NOR THE ARMY SUSPENDED ANY LAWS RELATING TO DOE'S SEPARATION FROM MILITARY SERVICE**

The district court concluded that the involuntary extension of Doe's National Guard service was authorized under 10 U.S.C. § 12305(a). (ER 72-73). However, the district court overlooked the critical fact that the government has not actually suspended any laws governing Doe's separation from military service, the action it was required to take before it could lawfully extend Doe's service obligation. Thus, 10 U.S.C. § 12305 has never been properly invoked to permit the involuntary extension of Doe's enlistment.

10 U.S.C. § 12305(a) provides:

[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 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. [Emphasis added].<sup>2</sup>

By specifying only that the President “*may*” suspend any provision of law relating to separation when the requisite conditions are satisfied, section 12305 merely provides the President with the *authority* to suspend a law pertaining to separation. It does not, however, automatically *effectuate* such a suspension by operation of law. The statute does *not* provide – as the district court implicitly concluded – that laws relating to separation automatically “*are* suspended” when the prerequisite conditions have occurred. Under the statute’s plain terms, the President must first *exercise* his authority under section 12305 by suspending laws relating to separation, and making the necessary determination that a soldier is essential to national security, before the soldier’s enlistment may be extended.

The government purports to invoke section 12305 to justify its involuntary extension of Doe’s service. However, the government has never identified any order or directive issued pursuant to section 12305 that suspends laws entitling to

---

<sup>2</sup> The President’s authority under section 12305 was delegated in 1990 by President George H.W. Bush to the Secretary of Defense. Executive Order No. 12728, 55 Fed. Reg. 35029 (1990). The government has represented that this authority has been subdelegated within the Army to various subordinates.

Doe to separate from military service upon the expiration of his enlistment. Nothing in the National Guard's stop loss policy or in Doe's mobilization orders identifies any "provision of law relating to promotion, retirement or separation" applicable to Doe as having been suspended pursuant to section 12305.

The government also has never established that any official delegated section 12305 authority has made any finding or determination that Doe is a "member of the armed forces . . . essential to the national security of the United States," as required by the statute. Thus, an essential prerequisite for the government's extension of Doe's enlistment under section 12305 also was not satisfied.

The government has not taken the actions required by section 12305 to authorize the involuntary extension of Doe's enlistment. Thus, the orders extending his enlistment are contrary to law.

## **II. SECTION 12305 IS UNCONSTITUTIONAL BECAUSE IT PERMITS ARBITRARY INFRINGEMENT OF DOE'S LIBERTY**

Section 12305 also does not support the government's unilateral extension of Doe's enlistment, because Congress failed to include boundaries on the President's stop loss authority necessary to safeguard soldiers' liberty. The statute, therefore, is unconstitutional as it permits the Army arbitrarily to conscript soldiers such as Doe for extended compulsory military service.

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.

“Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Poe v. Ullman*, 367 U.S. 497, 543 (1967) (liberty protected by Fourteenth Amendment includes freedom from “all substantial arbitrary impositions”). In *Zadvydas*, the Supreme Court held that a statute permitting indefinite detention of an alien “would raise a serious constitutional problem,” and imposed an implicit time limitation of six months on a statute authorizing detention of removable aliens. 533 U.S. at 692-701. Section 12305 likewise fails to prevent arbitrary and indefinite deprivations of soldiers' liberty.

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 envisioned by the Founding Fathers. U.S. Const., Art. I, sec. 8, cl. 12. The Founders 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).

Freedom from arbitrary deprivation of liberty by the government also is protected in the Constitution by the requirement that Congress, in delegating its Constitutional authority, provide the Executive with intelligible principles and boundaries for the exercise of that authority. In enacting section 12305, Congress

failed to do so.

To properly delegate its power to order extended compulsory military service, Congress must, at minimum “delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *American Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946).

Congress must delegate with still greater specificity where the law affects individual liberties. *See United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) (“The area of impermissible indefiniteness narrows . . . when the regulation . . . potentially affects fundamental rights.”). As Justice Brennan wrote in *Robel*, “the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake.” 389 U.S. at 275. Vague legislative directives fail to ensure that an infringement on protected rights is “warranted and necessary.” *Id.* at 276. Thus, the need for legislative guidance “is especially acute . . . when liberty and the exercise of fundamental freedoms are involved.” *Id.*

Section 12305 provides no guidance and places no boundaries on the authority to impose compulsory military service beyond a soldier’s enlistment. Under section 12305, the authority to extend a soldier’s enlistment is triggered by the activation of reservists under 10 U.S.C. § 12301, 12302, or 12304. Yet the

President and military have unfettered discretion to call reservists to active duty.

Under section 12302, the President may order members of the reserve to active duty based on any existing national emergency or by declaring one; under section 12304, he may activate the reserves simply to support “any operational mission.” Indeed, 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). Thus, section 12305 allows the government to deprive a soldier of liberty by involuntarily extending his or her 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.

Due process requires more. Statutes that allow unbounded government discretion to deprive individuals of their liberty, and which thus “encourage arbitrary or discriminatory” application, violate due process. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (holding anti-loitering law unconstitutionally vague); *see also Free Speech Coalition v. Reno*, 198 F.3d 1083, 1095 (9th Cir.1999) (holding parts of anti-child pornography law unconstitutionally vague).

The constitutional protection against arbitrary deprivations of liberty by the government requires a “reasonable relation” between the infringement on liberty and the purpose for the infringement. *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992)

(invalidating civil commitment statute). Further, the action of a federal agency must be “consistent with the Executive Order that authorizes its promulgation.” *Itek Corp. v. First Nat’l Bank of Boston*, 704 F.2d 1, 7 (1st Cir. 1983); *see also United States v. Yoshida*, 526 F.2d 560, 578-79 (Ct. Customs App. 1975) (exercise of emergency powers must bear “a reasonable relation to the powers delegated and the emergency giving rise to the action.”). However, section 12305 fails to require any relationship between a soldier’s involuntary extension and the emergency cited as support for ordering his unit to active duty.<sup>3</sup>

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*, \_ U.S. \_, 124 S.Ct. 2633, 2650 (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

---

<sup>3</sup> This case demonstrates the problem. The government in September 2004 ordered Doe to active duty to serve in Iraq pursuant to Executive Order No. 13223. (ER - Orders). That Executive Order, issued days after the September 11 terrorist attacks, authorized the Secretary of Defense to activate the reserves “to respond to the continuing and immediate threat of further terrorist attacks on the United States.” 66 Fed. Reg. 48201 (2001). However, by September 2004, Saddam Hussein and his regime had long since been removed from power, and the government had declared that its goal of ending the threat of terrorism posed by the Iraqi regime was a “Mission Accomplished.”

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*, 124 S.Ct. at 2650 (citing *Korematsu*, 323 U.S. at 233-34). Section 12305 must be reconciled with Doe’s constitutional and statutory rights.

The district court’s decision must be reversed because American soldiers cannot constitutionally be required to serve involuntarily and indefinitely at the unfettered discretion of military authorities.

### **III. CONGRESS HAS CONSISTENTLY BARRED INVOLUNTARY EXTENSIONS OF MILITARY SERVICE EXCEPT WHEN CONGRESS DECLARES WAR OR A NATIONAL EMERGENCY**

In all laws that expressly address involuntary extensions of enlistments, Congress has maintained its exclusive constitutional authority to set the terms of compulsory military service. Congress has specified in those laws that the military may not unilaterally extend enlistments except during periods when Congress itself has declared war or a national emergency. As discussed above, Doe’s involuntary extension is not authorized by Section 12305 because no laws governing Doe’s separation from military service have been suspended. Even if they had been, the statute is unconstitutional and therefore void. Thus, the laws barring involuntary extensions except during periods of war or national emergency declared by Congress remain in force as to Doe and govern his enlistment.

In 32 U.S.C. section 303(c), Congress barred the involuntary extension of a National Guard enlistments absent a Congressional declaration of war. That section provides:

In time of peace, no enlisted member may be required to serve for a period longer than that for which he enlisted in the active or inactive National Guard.

32 U.S.C. § 303(c). The phrase “[i]n time of peace” is properly construed to mean any time when war has not been declared, or after hostilities have ceased even though a declaration of war remains in effect.<sup>4</sup>

32 U.S.C. section 302(c), similarly proscribes the involuntary extension of a National Guard enlistment unless Congress has declared a national emergency.

That section provides:

Enlistments or reenlistments in the National Guard may be extended -  
(1) [Voluntarily, for six months or more]  
(2) by proclamation of the President, *if Congress declares an emergency*, until six months after termination of that emergency.

32 U.S.C. § 302(c) (emphasis added).

---

<sup>4</sup> See *Lee v. Madigan*, 358 U.S. 228, 233-36 (1958) (construing statute barring court-martial for murder or rape committed within the United States “in time of peace” to bar court-martial for offense committed in 1949, even though the President did not proclaim the termination of the war with Japan until April 28, 1952, the effective date of the Japanese Peace Treaty). As the Court stated in *Lee*, “Statutory language is construed to conform as near as may be to traditional guarantees that protect the rights of the citizen.” *Id.* at 235.

10 U.S.C. section 12103(a), pertaining to “Reserve components,”<sup>5</sup> similarly requires that Congress declare war or a national emergency before the military may involuntarily extend a reserve enlistment:

[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).

In parallel provisions, Congress also has barred involuntary extensions of enlistments of members of the *regular* Army except during periods when Congress has declared war or a national emergency. *See* 10 U.S.C. § 506; 50 App. U.S.C. §§ 454(c)(1), (d)(1) and (d)(2). 10 U.S.C. § 506 provides:

An enlistment in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard in effect at the beginning of a war, or entered into during a war, unless sooner terminated by the President, continues in effect until six months after the termination of that war.

The legislative history of 10 U.S.C. § 506 demonstrates that Congress intended these statutes to limit the ability of the President and military to

---

<sup>5</sup> The term “Reserve Components” includes the Army National Guard of the United States and the Army Reserve, and thus applies to Doe. 10 U.S.C. § 10101. Members of the Army National Guard of the United States ordered to active duty become part of the Reserve of the Army. 10 U.S.C. § 12403.

involuntarily extend enlistments to periods in which Congress itself has declared war or national emergency. Congress enacted 10 U.S.C. § 506 in 1967 during the Vietnam war *specifically* to so limit the authority of the armed services. 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).

Prior to the enactment of section 506, the Navy and Marine Corps enjoyed broader latitude than the other branches of the armed services to involuntarily extend enlistments. While the Navy and Marine Corps could extend a sailor's or soldier's enlistment "in time of war or national emergency," the Army and Air Force were authorized to extend enlistments only during periods of "declared war." *See* S. Rep. No. 931, 1967 U.S.C.C.A.N. at 2636.

The Navy and Marine Corps abused their broader authority to rely also on a "national emergency" to trigger involuntary extensions. They identified the wholly-unrelated declaration of national emergency issued by President Truman in 1950 concerning the Korean peninsula to justify the extension of enlistments for duty in Vietnam. *Id.*

The Department of Defense "urged Congress to remove" the restriction on the Air Force and Army's ability to involuntarily extend enlistments except during periods of "declared war." *Taylor*, 711 F.2d at 1203; S. Rep. No. 931, 1967

U.S.C.C.A.N. at 2636. However, the Navy and Marine Corps' abuse of the Korean emergency to justify extensions of service for Vietnam demonstrated that placing authority to trigger involuntary extensions in the hands of the military led to arbitrary and unjust extension orders. Thus, Congress refused to follow the Defense Department's request and instead, "chose to *restrict* the authority of *all* the Secretaries" by extending to the Navy and Marine Corps the same "declared war" limitation that already applied to the Army and Air Force. *Taylor*, 711 F.2d at 1203 (emphasis added); S. Rep. No. 931, 1967 U.S.C.C.A.N. at 2652.

Although 10 U.S.C. § 506 pertains to enlistments in the "regular" armed services, Congress chose virtually identical wording in the parallel provision applicable to the reserves, 10 U.S.C. § 12103(a), indicating that it intended these statutes to have the same effect. *See, e.g., Smith v. City of Jackson, Miss.*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1536, 1541 (Mar. 30, 2005) ("[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Congress appears to have intended that section 12305 provide only a *limited* exception to this consistent statutory scheme requiring a Congressional declaration of war or emergency to trigger authority to extend enlistments. The Senate Report explains that the legislation 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. 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 commitment. The government’s unilateral extension of Doe’s service, therefore, is unauthorized by section 12305, and Doe’s service remains governed by the consistent statutory scheme prohibiting involuntary extensions absent a declaration of war or emergency by Congress.

Congress has not declared a war or national emergency at any time during Doe’s enlistment.<sup>6</sup> Thus, Doe’s orders requiring his compulsory service beyond his

---

<sup>6</sup> The resolutions authorizing the use of force in Afghanistan and Iraq do *not* constitute declarations of war. Congress declared in both resolutions that its authorizations for the use of force constituted “specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” Authorization for Use of Military Force, Pub. L. 107-40 § 2(b), 115 Stat. 224 (2001) (Afghanistan); Authorization for Use of Military Force Against Iraq Resolution of 2002,” Pub. L. No. 107-243 § 3(c)(1), 116 Stat. 1498. In *United States v. Castillo*, 34 M.J. 1160, 1164-65 (1992), the court construed the same wording in Congress’s authorization for the use of force during the First Gulf War and concluded that Congress, by referring to the specific statutory authorization of the War Powers Resolution, “very clearly signalled [sic] the authorization was *not* a declaration of war.” (Emphasis in original). The government has never argued that the use of force resolutions constitute declarations of war.

enlistment term are contrary to law.

#### **IV. DOE MAY NOT BE KEPT UNDER MOBILIZATION ORDERS AFTER HIS GUARD ENLISTMENT HAS EXPIRED**

In the plainest possible terms, Congress has prohibited involuntary extensions of National Guard service under federal mobilization orders. 10 U.S.C. section 12407(a), which specifically governs activation of the National Guard, unambiguously states that:

[N]o member of the National Guard may be kept in Federal service beyond the term of his commission or enlistment.

The intent and effect of this provision are clear: the orders mobilizing Doe and his National Guard unit for active duty place Doe in federal service. *See* 10 U.S.C. § 12403. Thus, Doe may not be kept under those orders beyond the expiration of his contractual enlistment term.

The district court ignored the express terms of section 12407(a), and accepted the government's constrained technical argument that the prohibition on federal Guard service beyond a contractual enlistment term pertains *only* when the National Guard has been called into federal service under 10 U.S.C. § 12406 in its capacity as the National Guard of a *State*. (ER 68-72). The district court's ruling is in error and leads to an absurd result that Congress cannot have intended.

The district court relied only on first sentence of section 12407(a), which

allows the President to specify the term of service of “the National Guard of a State” when called into federal service, for its conclusion that the entirety of section 12407(a) applies only when the National Guard of a State is called into service. (ER 68-69). However, in the relevant third sentence of section 12407(a) quoted above, Congress expressly and without qualification prohibited federal service beyond an enlistment term for “*any member* of the National Guard.” By referring to “*any member*” of the Guard, Congress clearly intended that this limitation apply regardless of the state or federal capacity in which that member has been called into service.<sup>7</sup> By its constrained and technical interpretation, the district court allows the federal government to infringe upon the ability of the Guard to fulfill its traditional domestic functions, such as fighting forest fires.

The district court’s conclusion that section 12407(a)’s limitation on federal service applies only to Guard members mobilized as the National Guard of State leads to an absurd result: 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*

---

<sup>7</sup> Indeed by using the general phrase “any member of the National Guard” in the key third sentence of section 12407(a), Congress must be presumed to have intended that the provision not be limited only to the “National Guard of a State.” *See Solomon v. Interior Regional Housing Auth.*, 313 F.3d 1194, 1199 (9<sup>th</sup> Cir. 2002) (“When Congress includes a provision in one part of a statute but excludes it in another, we deem the difference intentional and assign meaning to the omission.”).

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 two or more reservists have been mobilized for “any operational mission.” *See* 10 U.S.C. § 12304(a); 12305(a).

Congress cannot have intended to enact such an incongruous statutory scheme. *Bechtel Constr., Inc. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1225 (9th Cir.1987) (“Legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious.”). This Court “must avoid interpretations that would produce absurd results.” *Azarte v. Ashcroft*, 394 F.2d 1278, 1288 (9<sup>th</sup> Cir. 2005).

The district court erred in holding that the orders requiring Doe’s service on federal active duty beyond the expiration of his enlistment do not violate 10 U.S.C. § 12407(a).

**V. BECAUSE DEFENDANTS MISREPRESENTED THE TERMS OF DOE’S “TRY ONE” YEAR, DOE’S INVOLUNTARY EXTENSION IS FUNDAMENTALLY UNFAIR AND VIOLATES DUE PROCESS<sup>8</sup>**

Doe enlisted in the National Guard under a program called “Try One,” which the Guard makes available to soldiers who have completed a regular enlistment and wish to try one year of Guard service before making a full service commitment to the Guard. The “Try One” moniker means “try one year,” and was inherently misleading, as it purported by its name to specify the length of the term of service that Doe could expect upon enlisting. Even considering all the provisions of Doe’s contract and relevant law, Doe had no reasonable expectation that he could be ordered to perform involuntary military service beyond his one-year enlistment except in rare circumstances of national exigency. In light of the government’s material misrepresentations, the orders extending Doe’s enlistment are

---

<sup>8</sup> Doe acknowledges that the Court in *Santiago v. Rumsfeld*, \_\_ F.3d \_\_ (9<sup>th</sup> Cir. May 13, 2005) addressed some of the arguments raised by Doe in this section. *Id.*, Slip Op. at 5228-29. However, Doe’s enlistment under the “Try One” program, which specifically includes the duration of the enlistment in its title, raises a unique question. *See United States v. Vroman*, 975 F.2d 669, 672 (9<sup>th</sup> Cir. 1992) (where prior panel had not considered particular issue, prior panel’s ruling is not controlling). Further, as the time to request rehearing remains open in *Santiago*, Doe raises these arguments to preserve this issue should rehearing be granted. *See* Fed. R. App. P. 41(b), (c), and Adv. Committee notes (1998 Amend.) (“A court of appeal’s judgment is not final until issuance of the mandate.”); *United States v. Ruiz*, 935 F.2d 1033, 1037-38 (where opinion was withdrawn before mandate had issued, case was not “fixed as settled Ninth Circuit law”).

fundamentally unfair and should be invalidated.

In its contract, the government affirmatively advised Doe of several *specific* and *rare* circumstances under which the military could extend his enlistment without his consent: when Congress declares war or national emergency, or if Doe failed to satisfactorily perform his reserve obligations. (ER 7, 10). Nothing in the enlistment contract mentions or suggests the President's authority under section 12305 to authorize an involuntary extension whenever members of the reserve have been ordered to active duty.

Section 12305 had been in existence long before Doe enlisted for his first "Try One" year in 2003. Yet while identifying in the contract certain rare circumstances under which Doe's "Try One" enlistment could be extended, the government failed to include *any* reference to the very circumstance under which his enlistment now has been extended. The general provisions of the contract which specify that other laws may govern Doe's "conduct," and that changes in laws and regulations may affect Doe's "status, pay, allowances, benefits, and responsibilities," do not address the possibility of changes in the *term* of a soldier's service, and in any event are too vague to provide constitutionally adequate notice of the Army's purported "stop loss" authority. (ER 10). Similarly, regardless of whether statutory law generally may be deemed incorporated into an enlistment

contract, Doe's contract fails to provide adequate notice of the government's authority under section 12305 to extend his enlistment since the government affirmatively identified in the contract the circumstances under which he could expect that his enlistment could be extended. The government's sleight of hand in omitting any reference to its purported stop loss authority was inherently misleading.

An enlistment contract may be rescinded when military recruiters make material misrepresentations about the enlistment's terms or conditions, however innocent or non-negligent. *Pence v. Brown*, 627 F.2d 872, 874 (8<sup>th</sup> Cir. 1980); *Shelton v. Brunson*, 465 F.2d 144, 147 (5<sup>th</sup> Cir. 1972); *Brown v. Dunleavy*, 722 F. Supp. 1343, 1350 (E.D. Va. 1989); *Withum v. O'Connor*, 506 F. Supp. 1374 (D.P.R. 1981). The government's partial statement as to the circumstances under which Doe's one-year trial enlistment could be extended was clearly material to Doe and was grossly misleading.

A statement of half truth "is as much a misrepresentation as if the facts stated were untrue." *Equitable Life Ins. Co. v. Halsey, Stuart & Co.*, 312 U.S. 410 426 (U.S. 1941). As another court stated: "When one conveys a false impression by the disclosure of some facts and the concealment of others, such concealment is in effect a 'false representation.'" *Coleman v. Watts*, 87 F. Supp. 2d 944, 952 (D. Ariz. 1998).

The government invokes section 12305 to justify involuntarily extending Doe. However, 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. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2647 (2004). Involuntary military service is akin to physical custody or restraint, *see Schlanger, supra*, 401 U.S. at 489, and subjects an individual to graver consequences. In the context of penal provisions, it is elemental that a statute “give fair notice of the offending conduct” before a person may be subject to prosecution and government custody for its violation. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *see Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (due process requires that criminal laws give “a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”), *limited on other grounds, Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

Doe did not receive “fair” or “meaningful” notice that his enlistment could be extended under stop loss. The government’s misrepresentations and its failure to provide such notice require that his mobilization orders be invalidated.

## CONCLUSION

For all the reasons set forth above, this Court should prevent a manifest injustice by reversing the judgment of the district court and ordering Doe's immediate release from mobilization orders requiring his involuntary service beyond the expiration of his contractual enlistment.

Dated: May 19, 2005

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 32-1**

**Case No. 05-15680**

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points, and contains 6,186 words.

Dated: May 19, 2005

LAW OFFICES OF MICHAEL S. SORGEN

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

## STATEMENT OF RELATED CASE

This court has addressed an issue related to one of Doe's claims in *Santiago v. Rumsfeld, et al.*, No. 05-35005, \_\_\_ F.3d. \_\_\_ (9<sup>th</sup> Cir. May 13, 2005). In that case, Oregon National Guard soldier Emiliano Santiago challenged, among other things, that his enlistment contract failed to provide notice required by due process that his enlistment could involuntarily be extended for reasons not specified in his contract. This claim raises issues similar to Doe's claim in Section V, *supra*. Other issues raised by Santiago are not presented or applicable here.

**PROOF OF SERVICE BY MAIL AND E-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 Priority Mail delivery. On the date below, I caused to be served the within:

**BRIEF OF APPELLANT**

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, and by e-mail, 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  
E-mail: [h.thomas.byron@usdoj.gov](mailto:h.thomas.byron@usdoj.gov)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on May 19, 2005.

\_\_\_\_\_  
Rebecca Noreen Desnoyers