

RECENT CASES

CONSTITUTIONAL LAW — DUE PROCESS CLAUSE — NINTH CIRCUIT UPHOLDS THE ARMY'S STOP-LOSS POLICY. — *Santiago v. Rumsfeld*, 425 F.3d 549 (9th Cir. 2005).

Since September 11, 2001, and throughout the conflicts in Afghanistan and Iraq, the Bush Administration has praised America's "all-volunteer army" and denied the need to reinstitute the draft.¹ Yet to avoid troop shortages,² the military has turned to "stop-loss" orders that unilaterally extend the enlistments of currently serving soldiers.³ The Army alone has forced at least 45,000 soldiers, including Reservists serving on active duty, to extend their service.⁴ Some enlistees have sought protection from the stop-loss policy in court, claiming that their enlistment contracts prohibit such extensions and that the policy is unconstitutional. Recently, in *Santiago v. Rumsfeld*,⁵ the Ninth Circuit upheld the Army's stop-loss policy against claims that it violated an Army Reservist's enlistment contract and due process rights and that it was unauthorized by law.⁶ Although the court failed to articulate a test for judging Santiago's due process claim independently from his contract claim, it held that general notice to the enlistee that future laws could affect contractual terms was sufficient to overcome his due process challenge.⁷ Contrary to the assertions of the Ninth Circuit panel, however, meaningful and specific notice has a vital role to play in protecting both the rights of enlistees and the integrity of the all-volunteer army. When an existing law has the potential to affect an enlistee's liberty and providing notice of that law would not compro-

¹ See, e.g., President George W. Bush, Remarks in Wilmington, Ohio (Nov. 1, 2004), <http://www.whitehouse.gov/news/releases/2004/11/20041101-3.html> ("There will be no draft; we will keep the all-volunteer army an all-volunteer army."); Donald Rumsfeld, U.S. Sec'y of Def., Department of Defense News Briefing with Secretary Rumsfeld and General Myers (Jan. 7, 2003), http://www.defenselink.mil/transcripts/2003/to1072003_to107sd.html ("Today . . . every single person [in the military] is there because they stuck their hand up and said, 'I'd like to do that.'").

² See Eric Schmitt, *General Says the Current Plan Is To Maintain 120,000 Soldiers in Iraq Through 2006*, N.Y. TIMES, Jan. 25, 2005, at A8 (noting that the Army is "stretched nearly to the limit" and that the Army Reserve and National Guard are "running short of deployable units" due to commitments in Iraq).

³ The stop-loss regulation at issue in this case was implemented on November 21, 2002. See MILPER Message No. 03-040, TAPC-PDT-PM (Nov. 21, 2002), <http://perscomndo4.army.mil/milpermsgs.nsf/all+documents/03-040?opendocument>.

⁴ See Lisa Burgess, *Army Puts All Units Tapped for Iraq, Afghanistan on Stop-Loss, Stop-Move*, STARS & STRIPES, June 3, 2004, <http://www.estripes.com/article.asp?section=104&article=21706&archive=true>.

⁵ 425 F.3d 549 (9th Cir. 2005).

⁶ *Id.* at 560.

⁷ See *id.* at 554-55, 559.

mise national security, due process requires that the military supply such notice in the enlistment contract.

Emiliano Santiago enlisted in the Oregon National Guard, a reserve unit of the United States Army, on June 28, 1996, when he was eighteen years old and a junior in high school.⁸ Santiago signed up to serve for eight years, until June 27, 2004. During this time, he served as a helicopter refueler⁹ while maintaining a civilian job.¹⁰ In April 2004, the Army alerted the Oregon National Guard that mobilization might be imminent. While attending a weekend training camp in June 2004, just two weeks shy of his termination date, Santiago learned that he was subject to a stop-loss order and that his estimated date of termination had changed, at least officially, to December 24, 2031.¹¹ The Army mobilized Santiago's unit for active duty in October 2004. The unit was ordered to attend six weeks of training at Fort Sill, Oklahoma, before deployment to Afghanistan for at least one year.¹²

Santiago reported to Fort Sill but objected to the extension of his enlistment beyond the original eight-year term. He filed a petition for writs of habeas corpus and mandamus and for declaratory relief in federal court in Oregon.¹³ The district court denied all relief.¹⁴ It rejected Santiago's breach of contract claim¹⁵ and also held that application of the stop-loss order to units alerted but not yet mobilized was authorized by 10 U.S.C. § 12305(a),¹⁶ which states:

Notwithstanding any other provision of law, during 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, or 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.¹⁷

On appeal, Santiago reasserted his § 12305 and breach of contract claims and also raised a due process argument. The Ninth Circuit affirmed. Judge Canby, writing for the panel,¹⁸ addressed Santiago's

⁸ Appellant's Opening Brief at 3, *Santiago*, 425 F.3d 549 (No. 05-35005), available at http://www.nlg-la.org/military/Santiago_opening.pdf.

⁹ *Santiago v. Rumsfeld*, No. CV04-1747-PA, 2004 WL 3008724, at *1 (D. Or. Dec. 29, 2004).

¹⁰ See *Santiago*, 425 F.3d at 553.

¹¹ According to the Government, this date was only for the purposes of "administrative convenience." *Id.* at 559. The stop-loss policy only allows for mobilization of up to twenty-four months. *Id.*

¹² *Id.* at 553.

¹³ *Id.* at 553-54.

¹⁴ See *Santiago*, 2004 WL 3008724, at *3.

¹⁵ See *id.* at *1; see also *Santiago*, 425 F.3d at 554 n.3.

¹⁶ *Santiago*, 2004 WL 3008724, at *3.

¹⁷ 10 U.S.C. § 12305(a) (2000 & Supp. II 2004).

¹⁸ Judges Tallman and Rawlinson both joined the opinion.

contract claim under “traditional principles of contract law.”¹⁹ The court found that Santiago’s contract described several circumstances under which his term could be extended but did not specifically describe the stop-loss policy authorized by § 12305.²⁰ Yet the court rejected the argument that failure to detail this law, after specifying others, implied intent to exclude it from the contract.²¹ On the contrary, the panel focused on the following contractual disclaimer:

Many laws, regulations, and military customs will govern my conduct and require me to do things a civilian does not have to do. The following statements are not promises or guarantees of any kind. They explain some of the present laws affecting the Armed Forces which I cannot change but which Congress can change at any time.²²

From this language, the court inferred that the parties understood that laws not set forth in the contract would apply to Santiago as well as those specifically mentioned.²³

Next, the court ruled that the Army’s stop-loss order, under which Santiago’s term was extended, is consistent with Santiago’s contract, which contains an “explicit warning” that changes in the law could affect the key terms of the agreement:

Laws and regulations that govern military personnel may change without notice to me. Such changes may affect my status, pay, allowances, benefits, and responsibilities as a member of the Armed Forces REGARDLESS of the provisions of this enlistment/reenlistment document.²⁴

The stop-loss order, the court held, “qualifies as a ‘change’ in the law within the meaning of this clause.”²⁵

The court then addressed Santiago’s argument that the stop-loss order was unauthorized by law because he was not on active duty when it was applied to him. The court held that the plain meaning of § 12305, uncontradicted by extrinsic evidence of congressional intent, grants authority to the President to delay separation of *any* service-member whenever reserve units are serving on active duty pursuant to specified statutory provisions.²⁶ In the instant case, the President activated his authority under the statute when he declared a national emergency after September 11, 2001, and ordered reserve units to ac-

¹⁹ *Santiago*, 425 F.3d at 554. The court assumed that Santiago’s claims involved justiciable military decisions and that Santiago had exhausted his administrative remedies. *Id.*

²⁰ *Id.* at 554–55.

²¹ *See id.* Santiago based his argument on the canon of construction *expressio unius est exclusio alterius*: the expression of one thing implies the exclusion of another.

²² *Id.* at 555 (quoting Santiago’s enlistment contract).

²³ *Id.*

²⁴ *Id.* at 556 (quoting Santiago’s enlistment contract).

²⁵ *Id.*

²⁶ *See id.* at 556–58.

tive duty pursuant to 10 U.S.C. § 12302.²⁷ The Army's stop-loss order, which applied to reservists either "alerted" or ordered to active duty during this time period, thus remained well within the statute's grant of authority.²⁸

Finally, the court summarily rejected Santiago's due process claim. Treating this argument as "essentially a variation of his breach of contract claim," the court found that the contractual disclaimers described above "provided notice" that unlisted and subsequently enacted laws could affect the contract's terms.²⁹ "Under these circumstances," the court wrote, "the government's failure to notify Santiago . . . of each specific reason that his service might be extended involuntarily does not violate Santiago's due process rights."³⁰

The Ninth Circuit erred in its application of the due process notice requirement to Santiago's enlistment contract. When an existing statute implicates the critical liberty interests of an enlistee and specific notice of that statute would help protect the enlistee's interests without substantially burdening the military, due process demands that specific notice be given in an enlistment contract. Given the gravity of Santiago's interest in avoiding extension of his duty, the benefits likely to accrue from specific notice, and the low cost to the Army of explaining an existing statute in a contract, the court should have held the Army to a more rigorous notice standard.

Involuntary extension of an enlistment constitutes deprivation of a liberty interest sufficient to trigger due process protection. Although the constitutionality of military conscription has long been established,³¹ the military's power over its members has never been absolute,³² indeed, this power is limited by due process³³ and other consti-

²⁷ See Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). President Bush has renewed the declaration each year since. See, e.g., Notice of the Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 70 Fed. Reg. 54,229 (Sept. 8, 2005).

²⁸ *Santiago*, 425 F.3d at 556-57.

²⁹ *Id.* at 559.

³⁰ *Id.* The court also briefly addressed and rejected Santiago's claim that his due process rights were violated by the potential for "indefinite extension" of his enlistment, finding that the stop-loss policy, on its face, only called for service of up to two years. *Id.*

³¹ See, e.g., *Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding World War I draft); *United States v. Holmes*, 387 F.2d 781 (7th Cir. 1967) (upholding Vietnam War draft), *cert. denied*, 391 U.S. 936 (1968).

³² Limits on conscription power can be traced back to medieval England. Parliament restricted the conscription power of King Edward III in the fourteenth century. See WILLIAM BLACKSTONE, 1 COMMENTARIES *411 ("[I]t was also provided [by statute] that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of parliament." (footnote omitted)).

³³ See *Gonzales v. United States*, 348 U.S. 409, 412 (1955) (holding that "underlying concepts of procedural regularity and basic fair play" are applicable to the military); *Friedberg v. Resor*, 453 F.2d 935, 937 (2d Cir. 1971) (noting that the military must remain within the "broad confines of constitutional due process").

tutional guarantees.³⁴ Due process rights clearly extend to military personnel forced to serve against their will.³⁵ And there is no reason to believe that voluntary enlistment should lead to forfeiture of these rights. One district court recently noted that the involuntary extension of a volunteer reservist's contract, at least when combined with active duty service, implicated the enlistee's "significant life and liberty interests."³⁶ Further support can be found in the law of habeas corpus: Courts have held that both the order that a reservist report to active duty³⁷ and "the requirement that a man serve beyond his enlistment contract"³⁸ constitute deprivations of liberty sufficient to trigger habeas corpus review. The determination that a servicemember is "in custody" for habeas purposes is unaffected by voluntary initial enlistment.³⁹ Thus, by forcing Santiago to extend his enlistment and serve on active duty, the stop-loss order implicated his Fifth Amendment due process rights.

Due process requires some notice before the government can deprive an enlistee's liberty interest through involuntary extension of his term. In civil adjudication, notice has long been identified as a fundamental element of due process.⁴⁰ The Supreme Court has consistently held that notice must be granted "at a meaningful time and in a meaningful manner."⁴¹ In the context of enlistment, the most mean-

³⁴ See *United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979) ("It is now settled that the protections of the Fourth Amendment and, indeed, the entire Bill of Rights, are applicable to the men and women serving in the military services of the United States unless expressly or by necessary implication they are made inapplicable." (footnote omitted)).

³⁵ See, e.g., *Gonzales*, 348 U.S. at 414 (recognizing a due process right to a fair hearing to determine conscientious objector status); *Crotty v. Kelly*, 443 F.2d 214, 216 (1st Cir. 1971) (same).

³⁶ *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 286 (D.D.C. 2005).

³⁷ See *Hammond v. Lenfest*, 398 F.2d 705, 710-12 (2d Cir. 1968); *Tartt v. Sec'y of the Army*, 841 F. Supp. 236, 238 (N.D. Ill. 1993).

³⁸ *Scaggs v. Larsen*, 396 U.S. 1206, 1208-09 (1969) (reasoning that extension of an enlistment contract is analogous to other situations in which one is "detained, restrained, or confined").

³⁹ As the Second Circuit has noted, voluntary enlistment has "little meaningful relevance" to consideration of a petitioner's present restraint:

A person who voluntarily commits himself to the care of a hospital or other institution is obviously not "in custody" so long as it is his desire to remain. But it cannot be doubted that if he wishes to leave and is prevented from doing so, he can petition for a writ of habeas corpus to test the validity of what has become an "in custody" restraint on his liberty.

Hammond, 398 F.2d at 712 & n.10.

⁴⁰ See *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.").

⁴¹ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (internal quotation mark omitted); see also *id.* at 81 (noting that the "meaningful time" requirement mandates that notice must be given "at a time when the deprivation can still be prevented"); *Mullane v. Cent. Hanover Bank & Trust Co., Tr.*, 339 U.S. 306, 314-15 (1950) (explaining that "notice must be of such nature as reasonable to convey the required information" and

ingful mechanism to provide notice is the enlistment contract. At least one federal court has come to the same conclusion: "Assuming for the moment that involuntary extension is a deprivation of liberty . . . , due process would require some type of notice before that constitutional deprivation took place. For enlistees, notice of military personnel practices and procedures is given in their enlistment contracts."⁴²

The Ninth Circuit assumed that so long as the extension of Santiago's enlistment did not violate his contract, that contract provided sufficient notice to satisfy due process. In fact, however, the liberty interests at stake in the enlistment context demonstrate that ordinary contract principles are not necessarily sufficient to protect due process. Enlistment agreements, though generally governed by traditional rules of contract,⁴³ are unique in that they also assign the status of "soldier" to the enlistee. This status brings with it "correlative rights and duties" that cannot be revoked⁴⁴ or recompensed with money damages⁴⁵ and thus may, through their enforcement, deprive soldiers of liberty in ways an ordinary contract could not. As a result, the requisite level of notice in an enlistment contract must be evaluated in light of the liberty interests at stake rather than ordinary contract principles.

The requisite level of notice, and of due process in general, depends on the balance of the three factors enumerated in *Mathews v. Eldridge*:⁴⁶ the gravity of the enlistee's liberty interest, the extent to which additional notice would improve protection of that interest in comparison with existing safeguards, and the burden on the government in providing this notice.⁴⁷ The first prong can be swiftly addressed: Santiago had a strong interest in avoiding an involuntary extension of his enlistment, due to what Judge Canby called the "disruption, hardship and risk that extension of his enlistment is causing Santiago to endure."⁴⁸

Moving to the second factor, disclosure in enlistment contracts of existing laws that may extend service would significantly improve protection of soldiers' liberty interests. Santiago's contract provides only the most general notice that he could be forced to serve under stop-loss. As the court recognized, the contract fails to describe specifically the stop-loss power: that is, the power to extend soldiers' enlistments during a national emergency declared by the President. Yet the con-

that "[t]he means employed must be such as one desirous of actually informing the [interested party] might reasonably adopt to accomplish it").

⁴² *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 285 (D.D.C. 2005) (citations omitted).

⁴³ See *Santiago*, 425 F.3d at 554.

⁴⁴ See *In re Grimley*, 137 U.S. 147, 151-53 (1890).

⁴⁵ See *Jablon v. United States*, 657 F.2d 1064, 1066 (9th Cir. 1981).

⁴⁶ 424 U.S. 319 (1976).

⁴⁷ See *id.* at 334-35.

⁴⁸ *Santiago*, 425 F.3d at 560.

tract does provide details of several other known contingencies affecting enlistment terms. The contract's language closely tracks preexisting statutes that authorize the President to extend enlistees' service in particular circumstances.⁴⁹ Inclusion of this language suggests that the Army recognized the efficacy of providing specific notice of laws likely to lead to active duty or enlistment extensions. The source of this efficacy is not hard to imagine: specific notice of the § 12305 stop-loss policy, for example, would permit potential enlistees to better understand the consequences of their enlistment. Although addition of this disclaimer might have little practical effect on some enlistees' decisions, it could be a tipping point for others.⁵⁰ More importantly, however, those who still choose to serve would do so fully aware of the conditions under which they have agreed to extended enlistment. The liberty of these soldiers is protected by making the decision to serve their own. This qualitative difference between serving on stop-loss involuntarily or serving as the result of an earlier conscious choice exists regardless of the empirical effects of such notice on enlistment patterns.

The final *Mathews* prong addresses government burden. This burden must be calculated with sensitivity to the vital role the military plays in defending the United States. Due process would not demand a notice requirement that prevented the military from mustering troops in an emergency or otherwise threatened national security. Accordingly, laws affecting a soldier's term of service that are enacted subsequent to that soldier's enlistment may be valid even when the laws conflict with his enlistment contract.⁵¹ Still unaddressed, however, is whether the military would be burdened by providing clear notice to new recruits of *existing* laws that may cause an extension of enlistment. If this requirement were applied to all existing enlistment contracts, the costs may still be high: once soldiers like Santiago are actively serving under stop-loss, the burden of releasing all of them because their contracts provided inadequate notice may be great. But if retroactive application is limited to Santiago, the governmental burden shrinks: the military can notify new enlistees of existing laws rela-

⁴⁹ For example, paragraph 10(c) of Santiago's contract tracks 10 U.S.C. § 12301 (regarding enlistment extension during congressionally declared war or national emergency) and paragraphs 10(d)(2)(a), (b), and (c) track 10 U.S.C. § 12303 (regarding enlistment extension for failure to fulfill certain obligations). This contractual language is excerpted in Appellant's Opening Brief, *supra* note 8, at 17–18.

⁵⁰ Recruits are relatively likely to scrutinize contractual terms touching on the subject of active duty service. A 2004 study commissioned by the military found that fear of active duty combat was a major factor weighed by potential Reserve recruits. See GFK CUSTOM RESEARCH INC., U.S. MILITARY IMAGE STUDY 94 (2004) [hereinafter MILITARY IMAGE STUDY], available at <http://dccw.hqda.pentagon.mil/downloads/Army/ArmyEquityStudyConDeck1.pdf>.

⁵¹ See *Karpinski v. Resor*, 419 F.2d 531, 533 (3d Cir. 1969); *Schwartz v. Franklin*, 412 F.2d 736, 738 (9th Cir. 1969); *Winters v. United States*, 412 F.2d 140, 144 & n.6 (9th Cir. 1969).

tively easily, and currently serving soldiers would continue to be bound by these same laws without having received specific notice of them.⁵²

The only potential burden remaining is that specific notice of § 12305 might dampen recruiting. But this burden does not outweigh the liberty interest of the enlistee. Unlike situations in which the military is forced to respond to an emergency, here it has many methods at its disposal to counter a drop in recruiting; it can, for example, “overhaul its image as well as its product offering.”⁵³ In fact, providing specific notice of § 12305 may, in the end, benefit rather than burden Army recruitment: it could improve morale among soldiers serving under stop-loss and bolster the public’s trust in the recruiting process, which in turn might increase enlistment.⁵⁴

Due process thus obligates the military to provide more specific notice of existing laws, including § 12305, than of subsequently enacted ones. The Ninth Circuit, although professing that Santiago’s contract “provided notice,” eviscerated this requirement by declaring it was satisfied by general disclaimers regarding the applicability of present and future laws. Essentially, the court ruled that providing notice of a *lack* of notice is sufficient to satisfy due process. This assertion is problematic. Although Judge Canby was wise to avoid full retroactive invalidation of the stop-loss policy,⁵⁵ he should have ruled for Santiago and required future Army contracts to specifically explain the statute authorizing stop-loss. Such notice would protect the constitutional rights of American soldiers and “foster credibility among prospective recruits,”⁵⁶ helping ensure the survival of the all-volunteer army.

⁵² Although courts usually must give full retroactive effect to rules of federal law applied to parties in civil litigation, *see Harper v. Va. Dep’t of Tax.*, 509 U.S. 86, 97 (1993), the Supreme Court has left open the possibility that special circumstances could justify a decision with only limited retroactive effect, *see Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 757–59 (1995) (giving a decision full retroactive effect due to lack of special circumstances); *id.* at 761 (Kennedy, J., concurring in the judgment) (stressing that a decision with limited retroactive effect would be permissible if special circumstances existed). The cumulative effect on military operations of immediately releasing every soldier serving under stop-loss would likely qualify as such a special circumstance.

⁵³ MILITARY IMAGE STUDY, *supra* note 50, at 98.

⁵⁴ The 2004 recruiting study found that “distrust of recruiters” contributed to declining enlistment by African Americans but that the distrust might be countered by “programs & policies which positively address the issue.” *Id.* at 96, 102. This study also highlighted the link between troop morale and recruiting, suggesting that “returning Army Reservists [who] tell positive stories of their experiences” might help boost recruiting. *Id.* at 99; *see also Novak v. Rumsfeld*, 423 F. Supp. 971, 972 (N.D. Cal. 1976) (recognizing the importance of maintaining trust in recruiting through “candid disclosure and a commitment to follow through on recruitment promises”).

⁵⁵ The court handed down its decision while the Army still had 10,000 troops deployed under stop-loss, *see Lisa Burgess, Supporters of Stop-Loss Bonus Vow To Keep Up Fight for Extra \$2000 a Month*, STARS & STRIPES, June 26, 2004, <http://www.estripes.com/article.asp?section=104&article=22089&archive=true>, so a ruling affecting each of these soldiers might have jeopardized ongoing missions.

⁵⁶ *Novak*, 423 F. Supp. at 972.