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The United States Army Reserve:
Welcome to the Hotel California
We are all just prisoners here:

Captain Elizabeth Cameron Hernandez*

ON A DARK DESERT HIGHWAY2

Captain Matthew Linn joined the United States Army Reserve in 1997. He is a skilled Quartermaster officer who served on active duty for four years and served in his reserve capacity for the next four years. When he completed his eight-year military service obligation in 2005, Captain Linn submitted his resignation in order to pursue a career in the civilian sector. To his astonishment, he received a letter from the Army Reserve denying his resignation. It stated,

[t]he Army Reserve is facing a critical shortage of officers, and retention of every [S]oldier is important to our mis-

sion to safeguard the United States. The personnel

strength level for this officer’s area of concentration and grade is below the readiness level needed to support ongo-

ing contingency operations. In addition, [Captain Linn] has not provided compelling personal cogent reasons to

* I would like to thank Gerald Krimbill, Chief, Administrative and Civil Law Division, Fort Sam Houston, Texas, for his incredible support and mentorship.

1. EAGLES, Hotel California, on HOTEL CALIFORNIA (ELEKTRA ASYLUM 1976) [hereinafter HOTEL CALIFORNIA].
2. HOTEL CALIFORNIA, supra note 1.
justify approval.\(^3\)

And with that, Captain Linn’s resignation was denied and he was forced to remain in the Army Reserve beyond the eight years to which he originally agreed.

The purpose of this Article is to alert the reader to recent developments in the Army Reserve’s policy on officer resignations. The Article begins by describing the history and structure of the Army Reserve. It discusses the evolution of mandatory service and the legal authorities that provide for such service. Finally, the Article details the current status of the Army Reserve and the consequences of the Army Reserve’s new policy.

**THIS COULD BE HEAVEN OR THIS COULD BE HELL**\(^4\)

On April 23, 1908 Congress enacted Senate Bill 1424, creating the Medical Reserve Corps as the first federal reserve corps of trained officers.\(^5\) The reserve corps expanded in 1912 when Congress passed the Army Appropriations Act of 1912.\(^6\) This Act expanded the Army Reserve by creating the Regular Army Reserve.\(^7\) The Army Reserve expanded again in 1916 when Congress passed the National Defense Act of 1916.\(^8\) This statute created the Officers’ Reserve Corps, the Enlisted Reserve Corps, and the Reserve Officers Training Corps in addition to the Medical Reserve Corps.\(^9\)

\(^3\) Scenario based on Captain Brad Schwan’s attempts to resign from the Army Reserve. Michelle Tan, *Reservist Sues to Separate from Army, Attempts to Resign Were Both Rejected*, ARMY TIMES, May 22, 2006.

\(^4\) *HOTEL CALIFORNIA*, supra note 1.


\(^7\) U.S. Army Reserve – History, supra note 6.


\(^9\) See U.S. Army Reserve – History, supra note 6; see also CROSSLAND & CURRIE, supra note 5, at 20, 29 (noting that Officers Reserve Corps, Enlisted
The Medical Reserve Corps merged with the Officers’ Reserve Corps in 1917. After World War I, the Officers’ Reserve Corps and the Enlisted Reserve Corps were combined into the Organized Reserve Corps. In 1952, the Organized Reserve Corps was renamed the Army Reserve.

The modern Army Reserve consists of the Ready Reserve, Standby Reserve, and the Retired Reserve. The Ready Reserve consists of individuals in the Selected Reserve or the Individual Ready Reserve. Individuals in these categories may be involuntarily called to active duty for up to twenty-four consecutive months during a national emergency declared by the President or for up to 270 days if the President deems additional military support necessary. The Selected Reserve contains the most available reserve members and includes Soldiers classified as Troop Program Units, Active Guard Reserve, or Individual Mobilization Augmentees. Troop Program Units consist of Soldiers who generally train on selected weekends and perform annual training. Active Guard Reserve Soldiers are full-time Soldiers on active duty, who serve in Army Reserve units or organizations, or in units or organizations that provide support to the Army Reserve. Individual Mobilization Augmentee Soldiers usually train in drill periods and annual training and are assigned to an active component organization where they would serve if mobilized. All

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10. CROSSLAND & CURRIE, supra note 5, at 30.
14. Id. at §§ 10142, 10143, 10144.
15. Id. at §§ 10143(a), 10144(b), 12302(a), 12304(a).
19. U.S. DEP’T OF ARMY, REG. 140-145, INDIVIDUAL MOBILIZATION AUGMENTATION (IMA) PROGRAM, (Nov. 23, 1994); see also U.S. Army Reserve,
members of the Selected Reserve are considered to be in an active status. Conversely, Soldiers who are members of the Individual Ready Reserve are Soldiers in an inactive status who recently left active duty or an Army Reserve unit, but still have a military service obligation commitment remaining. These Soldiers are subject to involuntary recall.

The Standby Reserve consists of individuals in an active status or an inactive status. Standby Reservists in an active status may continue to train for retirement purposes, but receive no pay. They are eligible for promotion through the rank of colonel. Standby Reservists in an inactive status may not train for retirement points and cannot be promoted. Members of the Standby Reserve are liable for active duty only if there are not enough qualified members in the Ready Reserve and there exists a congressionally declared war or national emergency.

Individuals in the Retired Reserves are former reservists who are eligible for retired pay when they reach age sixty, but are not yet sixty. These Soldiers have not elected discharge and are not members of the Ready Reserve or Standby Reserve. They are in a retired status and may not be ordered to active duty unless it has been determined that there are not enough qualified reserves.

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supra note 17.


22. 10 U.S.C.S. § 10144(b)(1) (2007) ("Within the Individual Ready Reserve of each reserve component there is a category of members, as designated by the Secretary concerned, who are subject to being ordered to active duty involuntarily"); see also U.S. Army Reserve Personnel Command, supra note 16.


25. U.S. DEPT OF ARMY, REG. 140-1, MISSION, ORGANIZATION, AND TRAINING, ¶ 2-15(a) (Jan. 20, 2004); see also Standby Reserve, supra note 23.

26. U.S. DEPT OF ARMY, REG. 140-1, MISSION, ORGANIZATION, AND TRAINING, ¶ 2-15(b) (Jan. 20, 2004); see also Standby Reserve, supra note 23.


28. See id. at § 10154; see also U.S. Army Reserve, supra note 17.

29. See 10 U.S.C.S. § 10154 (2007); see also U.S. Army Reserve, supra note 17.
in an active status available.\(^{30}\)

Throughout history, trained Army Reserve Soldiers have supported the nation during times of peace or war.\(^{31}\) They have supplemented the Active Army in several conflicts, including Korea, Germany, Vietnam, Bosnia, Afghanistan, and Iraq.\(^{32}\) The Army Reserve is an important asset to the armed forces, with over one million Soldiers ready to be called upon when needed.\(^{33}\)

**So I Called Up the Captain**\(^{34}\)

**Mandatory Service**

The concept of mandatory military service began during the Civil War in 1863 when the federal draft was first established.\(^ {35}\) The President was given the authority to summon men between the ages of twenty and forty-five to serve on active duty.\(^ {36}\) Those who did not wish to serve, however, could be released from their military obligation by furnishing a substitute or paying a fee of $300 to the federal government.\(^ {37}\) These options favored the

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\(^{30}\) See 10 U.S.C.S. §§ 10141(b), 10154, 12301(a) (2007); see also id. at § 688 (generally, recall to active duty limited to twelve months).


\(^{32}\) U.S. Army Reserve – History, supra note 6. More than 240,000 reservists were called to assist in the Korean Conflict in 1950, and more than 69,000 reservists assisted with the Berlin Crisis in 1961. Even though Vietnam was not a large mobilization, almost 6,000 reservists fought. Reservists were also invaluable in the Middle East, with more than 84,000 reservists serving during Operation Desert Shield and Operation Desert Storm. Id.

\(^{33}\) See Role Within the Army: Powering the Army and Defending America’s Interests, http://www.armyreserve.army.mil/ARWEB/MISSION/Role.htm (last visited July 24, 2006). The first mobilization of the Army Reserve was in 1916, when the conflict between Mexico and the United States threatened war. Army reservists again answered the call in World War I, with nearly 170,000 enlisted and officer reservists serving. In 1942, reservists were called upon again to assist the United States in World War II. See U.S. Army Reserve – History, supra note 6.

\(^{34}\) HOTEL CALIFORNIA, supra note 1.


\(^{36}\) Union Conscript Act of 1863, ch. 75, 12 Stat. 731 (1863); see also Draft Riots, supra note 35.

\(^{37}\) Draft Riots, supra note 35; see also Eduardo Moises Penalver, Regula-
wealthy and intensified existing class tensions.\textsuperscript{38} Ultimately, the frustration over this draft system resulted in the New York City Draft Riots of 1863, when incensed citizens attacked symbols of the war.\textsuperscript{39} President Lincoln sent troops from Pennsylvania into New York to control the rioting.\textsuperscript{40} The draft was temporarily suspended for one month and was then completed without resistance.\textsuperscript{41}

The draft was next used in 1917 to call men to active duty for World War I.\textsuperscript{42} All men between the ages of twenty-one and thirty were eligible for the draft.\textsuperscript{43} This draft ended in 1920 when Congress passed the National Defense Act of 1920, which created a system of voluntary enlistment.\textsuperscript{44}

Voluntary enlistment continued until 1940 when President Franklin Roosevelt signed the Selective Training and Service Act of 1940.\textsuperscript{45} This act required that all men ages twenty-one through thirty-five register for the draft.\textsuperscript{46} This draft was implemented before the attack on Pearl Harbor, becoming the nation’s first peace-

\textit{tory Taxings}, 104 COLUM. L. REV. 2182, n.124 (2004) (comparing the military draft to in-kind taxation, as draftees were able to avoid their obligation by paying a $300 commutation fee).

\textsuperscript{38} Draft Riots, supra note 35.

\textsuperscript{39} Id. The first draft lottery for the Civil War took place on July 11, 1963. Id. Two days later, rage over the draft erupted. Id. For the next three days, citizens attacked symbols of the draft, including government buildings and items representing African American power. \textit{See Draft Riots Introduction}, http://www.virtualny.cuny.edu/draftriots/Intro/draft_riot_intro_set.html (last visited Aug. 27, 2006). Businesses were destroyed, people were assaulted, and black men were tortured and killed. \textit{See} Leslie M. Harris, \textit{The New York City Draft Riots of 1863, in IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626-1863}, available at http://www.press.uchicago.edu/Misc/Chicago/317749.html (last visited Dec. 26, 2006). Ultimately, almost 1,000 people were injured or killed as a result of the riots. \textit{Draft Riots, supra} note 35.

\textsuperscript{40} Draft Riots, supra note 35.

\textsuperscript{41} Id.

\textsuperscript{42} Selective Service Act, ch. 15, 40 Stat. 76 (1917) (codified as amended at 50 U.S.C. § 201); \textit{see also} Draft Riots, supra note 35.


\textsuperscript{44} \textit{See} National Defense Act of 1920, ch. 227, 41 Stat. 759 (1920).


time draft. This act also established the Selective Service System as an independent federal agency. The draft continued through the Cold War, the Korean War, and the Vietnam War.

At the close of the Vietnam War, the draft finally came to an end. In its place was the introduction of an all-volunteer army, which is often viewed as a smaller, better trained, and better qualified army. Although the U.S. maintains an all-volunteer army, male citizens between the ages of eighteen and thirty-five are required to register with the Selective Service in case of a future draft.

All-Volunteer Army

Since the draft was eliminated in 1973, the United States has prided itself on maintaining its status as an all-volunteer Army. Individuals who wish to join the armed services are given the freedom to choose which branch of service and which component they would like to enter, whether active duty, reserve, or National Guard. For example, many Soldiers today elect to enlist in the Army through the Delayed Entry Program. This program is an actual enlistment into the Individual Ready Reserves, with a contractual agreement to report for active duty sometime within the following 365 days. In fact, if one does not report for active duty

47. Background, supra note 45.
48. Id.
50. Selective Service, supra note 49.
52. Background, supra note 45.
53. See, e.g., George W. Bush, Address at Kansas State University (Jan. 23, 2006) (transcript available at http://www.whitehouse.gov/news/releases/2006/01/20060123-4.html) (“It is really important for the United States of America to have an all-volunteer Army.”).
55. 10 U.S.C. § 513 (2007); see also Rod Powers, The Delayed Enlistment Program (DEP), http://usmilitary.about.com/cs/joiningup/a/dep.htm (last vis-
on his designated day, there is a provision in the contract that allows the Army to order the individual to active duty and court-martial him if he fails to appear. In reality, however, people often fail to show up to active duty under this program, effectively breaking their contractual obligation, yet, not once in recent history has the Army taken action. So important to the Department of Defense is the concept of the all-volunteer Army, it has established a directive explicitly allowing anyone in the Delayed Entry Program to request a separation without reprisal. Additionally, the Army's Recruiting Command has published a regulation forbidding harassment of individuals who wish to separate from the Delayed Entry Program.

Stop Loss

Only under clearly defined circumstances does the President alone have the authority to hold service members past the expiration of their military service obligation; this policy is referred to as the President's Stop Loss power. Stop Loss is statutory authority that allows the President to "suspend any provision of law re-
lating 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.” Stop Loss can be applied to any Soldier, whether he is Active Army, Army Reserve, or National Guard. A Soldier may be held past the expiration of his obligation by up to 90 days after the end of his current deployment.

Stop Loss came into being shortly after the draft ended in 1973, in response to concerns that too many Soldiers were leaving Vietnam during the war. Stop Loss was not used until the 1990 Gulf War and has since been used during Bosnia, Kosovo, and after the attacks of September 11, 2001. Stop Loss is mainly used to retain those Soldiers who possess certain critical skills, such as languages and military police, in an Army currently lacking those specialties. Since January 2006, over 13,000 Soldiers have been subject to Stop Loss.

Some believe the Stop-Loss policy is tantamount to a draft, running contrary to the ideals of an all-volunteer army by involuntarily extending an individual’s service obligation. It is estimated that this policy has kept about 45,000 Soldiers past their

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68. See Kerry Says U.S. Now Has “Backdoor Draft” (2004), http://www.msnbc.msn.com/id/5129079/ (reporting presidential candidate John Kerry stated that the Bush administration had implemented a “backdoor draft” by requiring thousands of Soldiers to stay in the military past their service obligation if their units were deployed to Iraq or Afghanistan).
enlistment agreements. The Army justifies Stop Loss by maintaining that it increases combat readiness and cohesion by minimizing the number of Soldiers leaving certain units.

Despite the controversy, as recently as 2005, the courts have upheld the President’s Stop Loss authority. In Santiago v. Rumsfeld, a National Guardsman sued after his enlistment was extended by a Stop Loss order when his unit received notice that they would be mobilized. Santiago’s eight-year military service obligation with the National Guard would have been satisfied prior to his unit’s mobilization. Santiago argued that the Stop Loss order violated his enlistment contract, and that it exceeded the power given to the President. Santiago also argued that the application of the Stop Loss order violated his due process rights because he did not receive adequate notice that his enlistment contract could be unilaterally extended.

The Ninth Circuit Court of Appeals upheld the application of the Stop Loss order. Even though the enlistment contract that Santiago signed did not contain an express provision for Stop Loss, the contract did explain that new laws may be effected which would apply to him. The provision stated:

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.

69. See Ninth Circuit Upholds the Army’s Stop-Loss Policy, 119 HARV. L. REV. 907, 907 (2006); see also Tom Squitieri, Army Expanding “Stop Loss” Order to Keep Soldiers from Leaving, USA TODAY, Jan. 6, 2004.
70. See Tan, supra note 3, at 13.
72. Id. at 553.
73. Id.
74. Id. at 556-57. Santiago was not on active duty at the time the stop-loss order was announced. Id. Therefore, Santiago argued that the stop-loss policy did not apply to him. Id. The court disagreed, however, noting that the statute applies to reservists ordered or alerted to active duty. Id. Santiago had received a mobilization warning, so the statute applied to him. Id.
75. Id. at 559.
76. Id. at 556.
77. Id.
The court found that there was no contract violation because the Stop Loss order constituted a “change” in the law under this provision, and Santiago was properly subject to the order.\textsuperscript{79} Additionally, the court held that the President was within his statutory authority under 10 U.S.C. § 12305 because a national emergency had been declared.\textsuperscript{80} The court found no due process violation, as the enlistment contract contained disclaimers that subsequently enacted laws could alter the contract.\textsuperscript{81}

\textit{You Can Check Out Any Time You Like; But You Can Never Leave}\textsuperscript{82}

\textit{The Army Reserve’s New Policy}

The U.S. Army Reserve Command was created in 1991 and is responsible for most reservists in the continental United States.\textsuperscript{83} On December 17, 2004, the United States Army Reserve Command issued guidance for approving unqualified resignations from officers who have completed their service obligations and who are not subject to Reserve Component Stop Loss.\textsuperscript{84} This guidance was disseminated through Mr. Danny L. Underwood, Chief, Military Personnel Management Division, Deputy Chief of Staff, G-1.\textsuperscript{85} It

\textsuperscript{79} See Santiago, 425 F.3d at 556.

\textsuperscript{80} \textit{Id.} at 557.

\textsuperscript{81} See \textit{id.} at 559 (holding that general notice to the individual that any current or future law could alter contractual terms was sufficient to overcome due process challenge).

\textsuperscript{82} \textit{HOTEL CALIFORNIA.}, \textit{supra} note 1.


\textsuperscript{84} Because this rule was issued by the USARC DCS G-1, its applicability extends only to the U.S. Army Reserve. Therefore, although both the National Guard and the U.S. Army Reserve collectively comprise the “Reserve Component,” this Article will focus only on the U.S. Army Reserve.

\textsuperscript{85} Email from Danny Underwood, USARC G1 MPO; Douglas Belk, HRC-St. Louis; William Darling, HRC-St. Louis; and Helen Prewitt, HRC-St. Louis (Dec. 17, 2004, 03:53 CST) (on file with author).
provided that the Deputy Chief of Staff G-1 for the United States Army Reserve Command will approve unqualified resignations only if the officer has previously served in Operations Noble Eagle, Enduring Freedom, or Iraqi Freedom; if the officer provides compelling personal reasons for separation; or if the officer is assigned to a rank and specialty overstaffed by 50%. 86

If a Soldier has not served in one of the listed operations and if the Soldier is not assigned to an overstaffed rank, only “compelling personal reasons” will be accepted for resignation. 87 A compelling personal reason may include the death or disability of an officer’s family member if it renders the officer the primary caretaker and provider and any continued service “would result in undue and genuine hardship.” 88 If there is no death or disability of a family member, the officer must demonstrate that separation from the service will alleviate “undue and genuine hardship.” 89 If a Soldier is seeking resignation through the “compelling personal reason” prong, the officer must demonstrate that the hardship is permanent and can only be assuaged by the officer’s separation. 90 If the hardship existed before entry into the Army Reserve, the Soldier has the additional burden of demonstrating that the hardship has significantly worsened since entry into the Army Reserve despite the officer’s efforts to remedy the situation. 91 Additionally, if a Soldier is seeking resignation under this prong, he must include counseling statements from Army medical or chaplain personnel. 92

According to the policy, “[o]fficers whose resignation request is based on their own statement of a medical condition will be referred to a medical evaluation board to determine medical fitness.” 93 Thus, a Soldier’s own disability or medical condition should not be the basis of a resignation request, as that Soldier will instead be referred to the Physical Disability System for evaluation of medical fitness. 94 The Physical Disability System
then decides if the Soldier is fit for continued service. If the Soldier is fit, he must return to his unit and continue serving; if he is not fit, he will be medically separated from the Army.

Additionally, this policy does not apply to officers who are under a Stop Loss order; that is, to Soldiers who have been required to stay on active duty past their separation date by order of the President. If an officer who is subject to Stop Loss submits an unqualified resignation request, the request will be returned without action. Once the Stop Loss expires, Soldiers may then submit a resignation request, provided they satisfy the other requirements of this policy.

Term of Obligation

An Army Reservist's military service obligation is governed by statute: "[e]ach person who becomes a member of an armed force. . .shall serve in the armed forces for a total initial period of not less than six years nor more than eight years." The statute also explains that any period during the obligation not served on active duty will be served in a reserve component. This statutory provision is included in the enlistment contract, which every reservist enlistee must sign before he begins his service:

FOR ALL ENLISTEES: If this is my initial enlistment, I must serve a total of eight (8) years. Any part of that service not served on active duty must be served in a Reserve Component unless I am sooner discharged.

Individuals who enlist into the Army Reserve are usually placed into the Selected Reserve and are either full time active duty reservists or reservists who train in battle assemblies and

95. See U.S. DEPT OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION, ¶ 4-19(d) (Feb. 8, 2006).
96. See id. at ¶ 3-1(c).
98. Underwood, supra note 85.
99. Stop-Loss usually applies to deployed Soldiers. Thus, once the Stop Loss order expires, it may be easier to satisfy the requirements of the Reserve Command's policy if the Soldiers were overseas in one of the applicable operations.
100. 10 U.S.C.S. § 651 (a) (2007).
101. See id.
annual training.\textsuperscript{103}

Two additional statutes help define an Army Reservist’s term of commitment.\textsuperscript{104} Title 10 U.S.C.S. § 12203 states that “[a]ppointments of Reserves in commissioned grades are for an indefinite term and are held during the pleasure of the President.”\textsuperscript{105} While the statute provides that officers are appointed for an indefinite term, 10 U.S.C.S. § 12681 provides that “reserve commissioned officers may be discharged at the pleasure of the President.”\textsuperscript{106} These two provisions must be read in conjunction with each other in order to achieve a complete understanding of the provisions.

The statutes, when read together, do not provide for an indefinite term of service. A reading allowing reservists to remain on active duty or subject to recall in perpetuity would frustrate the statutory eight-year service requirement. The purpose of the statutes is to highlight that there is no property right in employment with the reserves, there is no guarantee of future employment, and the President has the authority to discharge the reservists.\textsuperscript{107} Further, the case law underscores the idea that Soldiers are held during their period of obligation, but may be discharged for any reason at the pleasure of the President.\textsuperscript{108} For example, in Ben Shalom v. Secretary of Army, the plaintiff could demonstrate no constitutionally protected property right to continued service, because the statute and regulation provided that the Army reservist could be discharged at any time.\textsuperscript{109}

In Alberico v. The United States, the United States Court of Appeals also emphasized that continued employment in the Army Reserves was a mere expectancy, and not a property interest protected by the Due Process Clause.\textsuperscript{110} Gregory Alberico, a captain

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\textsuperscript{105} Id. at § 12203(c).
\textsuperscript{106} Id. at §§ 12203, 12681.
\textsuperscript{107} See id. at §§ 12203, 12681.
\textsuperscript{108} See Carter v. United States, 509 F.2d 1150, 1156 (Ct. Cl. 1975) (noting that because reservists may be discharged at pleasure of the President, they do not have a property right in their commissions).
\textsuperscript{109} See Ben Shalom v. Sec’y of Army, 489 F. Supp. 964, 971 (E.D. Wis., 1980) (emphasis added).
\textsuperscript{110} See Alberico v. The United States, 783 F.2d 1024, 1027 (Fed. Cir.}
in the United States Army Reserve was indicted by a federal
grand jury in Colorado on August 12, 1977 for the theft of 375
pounds of explosives that he sold to FBI agents posing as terro-
rists.\textsuperscript{111} The Army regulation in place at the time did not provide
for an expedited removal. Accordingly, the Army drafted an
amendment to the regulation that would allow the Secretary of
the Army to remove Alberico before he reached his retirement.\textsuperscript{112}
The amendment was implemented and Alberico was released from
active duty less than three days before he would have been eligible
for retirement.\textsuperscript{113} Alberico requested through the Army Board for
Correction of Military Records that his involuntary release be ex-
punged and that his application for retirement be granted.\textsuperscript{114} The
Board denied his request and Alberico filed suit.\textsuperscript{115} Alberico
claimed that his release from active duty was a violation of due
process; specifically, that his status as a Reserve officer within two
years of retirement is a protected property
right.\textsuperscript{116} Both the
Claims Court and the appeals court disagreed with Alberico and
concluded that “[r]eserve officers such as Alberico have no reason-
able expectations of continued employment and thus no property
interests protected by the due process clause.”\textsuperscript{117} In reaching that
decision, the court relied on the statute that provided that “re-
serve commissioned officers may be discharged at the pleasure of
the President.”\textsuperscript{118}

In light of the case law, the focus of the two provisions is on
the authority of the President to discharge a Soldier.\textsuperscript{119} Reading
the statute as allowing for indefinite service, contrary to the Sol-

\begin{itemize}
\item 111. \textit{Id.} at 1025.
\item 112. \textit{Id.} at 1025-26.
\item 113. \textit{Id.} at 1026.
\item 114. \textit{Id.}
\item 115. \textit{Id.}
\item 116. \textit{Id.} Alberico also argued that the amendment to the regulation was
an unconstitutional bill of attainder or ex post facto law, that there was un-
equal treatment of reserve officers and regular Army officers, and that the
ABCMR did not give “due consideration” to his issues. The court disagreed.
\textit{Id.} at 1028-29.
\item 117. \textit{Id.} at 1026-27.
\item 118. \textit{Id.} at 1027. The statute relied upon in this case was 10 U.S.C.S. §
1162(a). This statute has since been repealed, but has been replaced with 10
U.S.C.S. § 12681, which contains the same provision
\item 119. \textit{See} benShalom v. Sec’y of Army, 489 F. Supp. 964, 971 (E.D. Wis.,
1980); \textit{see also} Alberico, 783 F.2d at 1027.
\end{itemize}
dier's wishes would run counter to the enlistment contract and would make the mandatory service obligation illusory. In addition to the statute and the enlistment contract, Army Regulation 350-100 further emphasizes the required service obligation. The regulation provides, "[o]fficers entering military service must complete a total of 8 years military service obligation." It continues by saying, "[s]ervice will be on active duty or in the Reserve components." Had the regulation envisioned that service in the Reserve component would be indefinite, it would not explicitly require only an eight year obligation.

Army Regulation 135-175 further clarifies the service obligation. The regulation states that "[n]ormally, an obligated officer will not be permitted to resign his office until such time as the obligated period of service is completed." This phrase also emphasizes that there is an obligated period of service and a Soldier is normally permitted to resign once that obligation is complete.

Army Regulation 135-175 continues by stating, "[r]esignations submitted by nonobligated officers may be accepted except under the conditions outlined below." The regulation then lists situations where resignations will not be accepted, including when:

1. The officer is under investigation or charges, being considered for administrative involuntary separation, in the hands of civil authorities, insane, or in default with respect to public property or public funds.
2. In time or war or national emergency declared by Congress.
3. When HQDA [Headquarters, Department of the Army], by separate instructions, restricts the acceptance of such resignations due to national emergency proclaimed by the President or under other conditions which may necessitate such action (i.e., peacetime expansion of the Active Army).

Thus, only under dire circumstances is a resignation not to be

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121. Id. at ¶ 2-1.
122. Id.
123. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS, ¶ 6-10(a) (Feb. 28, 1987) (emphasis added).
124. Id. at ¶ 6-10(b).
125. Id. at ¶ 6-10(b)(1)-(3).
accepted, none of which are present in the Reserve Command's policy.

Plenty of Room at the Hotel California

While the Army Reserve implements the new policy making it more difficult to leave, the Army is making it easier than ever to join. The Army is relaxing its rules on age, education, drug use, appearance and physical fitness. Congress has joined in the recruiting fervor and has doubled the maximum enlistment bonus to $40,000.

In March 2005, the Army Reserve raised its enlistment age limit from thirty-five to forty, followed by the Active Army in January 2006. Then in June 2006, the Army again increased its maximum enlistment age to forty-two in order to further expand the pool of potential recruits.

Previously, individuals who had not graduated high school or who had not obtained a General Equivalency Diploma were pro-

126. Hotel California., supra note 1.
127. See Douglas Belkin, Struggling For Recruits, Army Relaxes Its Rules, Boston Globe, Feb. 20, 2006, at A1 ("with little fanfare, the Army has eased enlistment restrictions, allowing [S]oldiers previously considered too heavy, too old, too sickly, or too uneducated to head off to basic training"). New standards helped the Army recruit more than 2,600 Soldiers in 2006. See Lower Standards Help Army Meet Recruiting Goal, USA Today, Oct. 9, 2006.
128. See 10 U.S.C. § 505(a) (2007) (raising maximum age for enlistment to forty-two); see also U.S. Army Raises Age Limit for Enlistment (2003), http://www.cas.unt.edu:8000/articles/06/08/07/0842214.shtml ("[i]n June, the Army raised its enlistment age limit from 40 to 42 — after raising it from 35 to 40 in February").
130. See Belkin, supra note 127, at A1.
131. See U.S. Dep't of Army, Reg. 600-9, The Army Weight Control Program (Sept. 1, 2006).
hibited from joining the military. In 2005, the Army instituted a new program called “Army Education Plus” in order to recruit high school dropouts. If a person has been out of school for at least six months but can pass a physical exam and the Armed Services Vocational Aptitude Battery, the individual is allowed to enlist in the new program. In addition, the Army will pay for the GED exam; indeed, the Army will even pay for a GED preparatory course.

A more lenient drug policy also helps more people enter the military. Previously, a recruit who tested positive for marijuana had to wait six months to retake the drug test required for enlistment. Now a recruit only has to wait forty-five days to retake the test.

The Army has also relaxed its rules on tattoos and permanent makeup. Formerly, Soldiers were not allowed to have any tattoos that could not be covered by the Army uniform. Now, new recruits are allowed to have tattoos on their hands and back of their necks, provided they are not “extremist, indecent, sexist or racist.” Soldiers are also be allowed to have “permanent makeup,” or tattooed eyeliner, eyebrows, and lip liner, so long as it

136. See Chenelly, supra note 129.
137. Id.; see also Army Education Plus Program Helps Recruits Earn GED (2005), http://www.usarec.army.mil/6thBde/6dbn/apa28sep05a.html.
138. Id.
139. Chenelly, supra note 129 (“The program allows recruiters to enlist a high school dropout, according to S. Douglas Smith, a spokesman for the U.S. Army Recruiting Command. But the enlistee must have the GED before shipping off to basic training .... What will not change is the Army's cap on the percentage of how many new [S]oldiers may enlist with a GED versus a high school diploma, Smith said. That limit is 10 percent of all new [S]oldiers for the year.”).
140. See Belkin, supra note 127, at A1.
141. Id.
142. Id.
143. See U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA, ¶¶ 1-8(b)(1)(a) and 1-8(e)(5), (Feb. 3, 2005); see also Lisa Hoffman, Tattoo Rules Fade for Army Recruits, PRESS OF ATLANTIC CITY, Mar. 18, 2006.
144. See Army Eases Tattoo Rules to Attract More Volunteers, ORLANDO SENTINEL, Mar. 31, 2006, at A5.
is "conservative."146

The Army has even instituted a special physical fitness test for overweight recruits who would otherwise be ineligible to join the military.147 Instead of the usual pushups, sit-ups, and two-mile run, overweight recruits must keep time to a metronome while walking up and down an elevated platform for five minutes.148 After the walking portion of the test, male recruits must perform fifteen pushups in one minute, and female recruits must do four.149 To pass the test, their pulse must be below 180 beats per minute.150 Meanwhile, the Army has revised its weight standards for Soldiers, allowing them to weigh more now than ever before.151

All these provisions are being implemented to make it easier to join the Army, and the numbers are telling: the Army exceeded its recruiting goal for 2006.152 The Active Army surpassed its recruiting goal of 80,000 recruits for fiscal year 2006, and the National Guard and Army Reserve fell only slightly short of reaching their goals.153 The Active Army exceeded its retention goals and

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146. See U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA, ¶ 1-8(b)(1)(a) (Feb. 3, 2005); see also Hoffman, supra note 143.

147. See Belkin, supra note 127, at A1. ("The test is not open to everybody. Overweight men must measure below 30 percent body fat. Female recruits must have a body fat measurement of between 32 percent and 36 percent."). The requirements for the conventional Soldiers are more stringent. An eighteen year old male cannot exceed a body fat percentage of twenty percent and an eighteen year old female cannot exceed a body fat percentage of thirty percent. See U.S. Army Weight Charts for Initial Accession, http://usmilitary.about.com/library/milinfo/blarintweightfemale.htm (last visited Aug. 7, 2006).


149. Id.; see also U.S. Physical Fitness Charts for Males Age 17-21, http://usmilitary.about.com/od/army/l/blfitmale17to21.htm (last visited Aug. 7, 2006) (The typical 18 year old male Soldier is required to run two miles in fifteen minutes, fifty-four seconds, complete fifty-three situps, and forty-two pushups in two minutes each.).

150. See Belkin, supra note 127, at A1.


152. See U.S. Army Surpasses Key Recruiting, Retention Goals, CHANNEL NEWS ASIA, Oct. 10, 2006 ("The U.S. Army surpassed key recruiting and retention goals for 2006, ending the fiscal year with more [S]oldiers under arms than at any time in more than a decade."); see also Roper, supra note 133.

153. See Lower Standards Help Army Meet Recruiting Goal, USA TODAY, Oct. 9, 2006 ("The Reserves recruited 28,378 of the targeted 28,500; and the
the reserve components experienced slight retention losses, but those losses were "within acceptable limits."154 Yet, despite the increasing number of recruits and the high retention rate, the Reserve Component's new policy makes it nearly impossible for an officer to leave.

I HAD TO FIND THE PASSAGE BACK TO THE PLACE I WAS BEFORE155

The Army Reserve's resignation policy is having a tangible effect. The unpublicized policy became effective in 2004, but was strengthened in 2005 by a memorandum signed by the commander of the United States Army Reserve Command, Lieutenant General James R. Helmly.156 In 2005, the Army Reserve received 695 resignation requests, approved 505 of them, and disapproved 190 of them.157 Since 2005, over one in four Reserve officers' request for resignation has been denied, resulting in over 400 officers who are involuntarily being kept on active duty after completion of their service obligation.158 The inception of this policy goes against the very idea of an all-volunteer Army, which was so proudly implemented after the Vietnam War. It forces Soldiers to serve who have fulfilled their service obligation and no longer wish to serve.

A mechanism already exists to extend service obligations unilaterally through the Stop Loss policy.159 This is a power Congress has given to the President, and applies in clearly defined circumstances.160 While some may criticize the President's Stop Loss authority as a "back-door draft," the Army Reserve's policy goes even further.161 The new policy disregards the restrictions imposed by the Stop Loss policy, potentially applying longer than six months and in situations where there is not even a declared
Further, where Stop Loss applies generally to deployed Soldiers for the purpose of maintaining unit cohesion, the Reserve Command’s new policy applies to everyone described in the memorandum in an effort to assuage perceived recruitment problems.\textsuperscript{163}

The Army Reserve’s new policy frustrates Congress’ intent by creating obligations that exceed those prescribed by Congress. Under the well-settled separation of powers doctrine,\textsuperscript{164} Congress is tasked with enacting necessary laws. Congress has an interest in regulating those circumstances where Soldiers may be involuntarily held past their required obligation, and they have done so by enacting the Stop Loss policy. Congress has expressly provided the President with the power to retain needed personnel under defined circumstances, and the Reserve Command’s broad new policy circumvents that direction by giving themselves the authority to make that decision.

It is an appreciable imposition to be retained on duty past the expiration of one’s military service obligation. Exactly because of the consequences involved in such a decision, Congress has expressly given the President the authority to make that decision. That decision should not be abrogated by the Army Reserve Command.

\textbf{T}\textsc{hey Stab It With Their Steely Knives; B}\textsc{ut They Just Can’t Kill The Beast}\textsuperscript{165}

Most recently, an Army Reservist sued the Army when his resignation was rejected.\textsuperscript{166} Captain Brad Schwan graduated from West Point in 1997 and served six years on active duty.\textsuperscript{167} In 2003, he became a member of the Individual Ready Reserve and began attending law school.\textsuperscript{168} In 2004, Captain Schwan left the Individual Ready Reserve and joined an Army Reserve unit.\textsuperscript{169} In 2005, he completed his eight-year service obligation, and submitted his resignation so that he might pursue civilian employment

\begin{itemize}
  \item 162. Underwood, \textit{supra} note 85.
  \item 163. Powers, \textit{supra} note 65.
  \item 164. \textit{See} U.S. CONST. art. I, § 1; \textit{id.} at art. II, § 1; \textit{id.} at art. III, § 1.
  \item 165. HOTEL CALIFORNIA., \textit{supra} note 1.
  \item 166. Tan, \textit{supra} note 3.
  \item 167. \textit{Id.}
  \item 168. \textit{Id.}
  \item 169. \textit{Id.}
\end{itemize}
with a prestigious law firm.\textsuperscript{170} His resignation was rejected.\textsuperscript{171} Captain Schwan submitted his resignation again in December 2005, and it was rejected a second time.\textsuperscript{172}

Captain Schwan filed suit in federal court in the Central District of California accusing the Army of breach of contract and forcing him into involuntary servitude.\textsuperscript{173} The Army cited the Reserve Policy and noted that Captain Schwan was a military intelligence officer – an understaffed position – and, under the new policy, they were authorized to retain him beyond his initial service obligation.\textsuperscript{174} Before the court could reach a decision, however, Lieutenant General Jack Stultz, the chief of the Army Reserve, accepted Captain Schwan’s resignation and granted him an honorable discharge.\textsuperscript{175} An Army Reserve spokesperson stated that “it was in the best interests of the Army and the best interests of the [S]oldier to grant the discharge.”\textsuperscript{176} By filing suit, Captain Schwan was ultimately able to separate from the Army after fulfilling his military service obligation. Hundreds more officers, however, are being involuntarily retained past their obligation because of the Army Reserve’s policy. Yet, because the court never reached a decision in Captain Schwan’s case, there is no end in sight for those officers, and the issue remains unresolved.

Congress has clearly articulated its intent that Soldiers fulfill a mandatory service obligation when they enlist in the Armed Forces. That obligation is prescribed by statute and the United States Army Reserve violates Congress’s objective by refusing to allow officers to resign their commission. The United States Army Reserve must rescind this unlawful policy in order to ensure the prided all-volunteer Army remains intact. Soldiers should be able to “check out” any time they like, once they have paid the bill by completing their obligated service.

\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} See Drew Brown, Army Officer Who Sued to Resign Commission is Honorably Discharged, SAN ANTONIO EXPRESS-NEWS, July 25, 2006, at 3A.
\textsuperscript{175} Id.
\textsuperscript{176} Id.