

Soldiers challenging 'stop loss' policy

Class-action suit expected against extended service

By Nan Levinson, Globe Correspondent | December 6, 2004

The first class-action lawsuit challenging a policy that allows the military to extend soldiers' terms of enlistment involuntarily is expected to be filed today in federal court in Washington.

The Center for Constitutional Rights seeks a hearing this week on a request for an injunction on behalf of soldiers subject to what are known as stop loss orders.

Such orders authorize the military to suspend nearly all discharges, transfers, and retirements, and to retain soldiers who have been deployed or whose units have been alerted for deployment.

As troop strength is strained by activity in Iraq and Afghanistan, thousands of active-duty soldiers and reservists are forced to remain in uniform after fulfilling the terms of their contracts. Many could be sent to Iraq or Afghanistan for second or third tours of combat.

According to Charley Richardson, a cofounder of Military Families Speak Out, the Center for Constitutional Rights is planning to file suit in the US District Court for the District of Columbia in the name of people who, but for stop loss orders, would be out of the military. "Therefore," he said, "the remedy is to let them out." Plaintiffs include soldiers in Iraq and Kuwait and one still in the United States trying not to be shipped out.

Staughton Lynd, an attorney in Ohio involved in the case, declined to give specific numbers, saying on Saturday that court papers were being finalized.

Stop loss measures were authorized by Congress after the Vietnam War and implemented during the Persian Gulf War of 1991. The current policy was authorized by an executive order signed by President Bush three days after the terrorist attacks of Sept. 11, 2001, and has been invoked 11 times since.

At least six lawsuits challenging the legality of stop loss and a related policy concerning members of the Army Individual Ready Reserves have been brought by individuals in California, New York, North Carolina, Hawaii, and last week, by a National Guardsman

in Oregon. The Individual Ready Reserves includes soldiers who have completed active duty and are now being recalled.

Soldiers and their lawyers have characterized stop loss as everything from a breach of contract to involuntary servitude, from an overstepping of presidential authority to a "backdoor draft."

"We don't have a draft -- except for people who have volunteered," Richardson said.

The first legal challenges to the policy were brought by two California National Guardsmen, identified as John Doe. Both were combat veterans who, after completing active duty, enlisted in the California Army National Guard under Try One, a one-year program for veterans. Both were notified to report for tours of duty that would extend far beyond a year and probably would send them to Iraq. Michael Sorgen, one of the lawyers representing both men, said this changed them "from volunteers into conscripts."

The first case was voluntarily dismissed when the military promised not to deploy the soldier, making the second case, filed Oct. 1 in Sacramento, the first full challenge to the policy.

Other challenges have involved reservists who were called up after completing their contracts. The number of soldiers affected by the policies changes with the number of troops deployed. According to the nonpartisan website Operation Truth, under mobilization of the Individual Ready Reserves, 5,600 service men and women who have been discharged will be forced back into service.

Jay Ferriola, 31, an Army Reserve captain from New York, served in South Korea and Germany, completed the terms of his contract, and resigned his commission in June. In October, he was ordered to return to active duty for 18 months, including time in Iraq. He sued, charging that the orders were a breach of contract and a violation of his constitutional right against involuntary servitude. He prevailed in court, earning a temporary stay of deployment. The Army later agreed to give him an honorable discharge.

Sorgen used a similar argument in the John Doe case, charging that stop loss violates a soldier's right to due process, but he also argued that the policy involves excessive authority by the president. Because the executive order authorizing the policy was signed in response to the events of Sept. 11 and because no evidence of cooperation between Al Qaeda terrorists and Iraq has been found, the argument goes, the order does not cover "nation-building service in Iraq." Without a declaration of war by Congress, the involuntary extension of service under stop loss is a breach of contract, Sorgen argued. A federal judge disagreed and refused to enjoin the National Guard from sending John Doe to Iraq while his case is considered. The US Court of Appeals for the Ninth Circuit in San Francisco upheld the judge's decision.

Richardson thinks the lawsuit's effect will be substantial.