

## RESOLUTION 05-02-06

### DIGEST

#### Military Law: Extension of Terms of Military Reservists

Amends 50 U.S.C. section 12305 to limit presidential power to call up reservists for periods beyond their enlistment contracts.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends 50 U.S.C. section 12305 to limit presidential power to call up reservists for periods beyond their enlistment contracts. This resolution should be approved in principle because it will provide a balance to presidential power to extend reservists' terms by ensuring congressional approval if there has been no declaration of war.

Current law allows the President of the United States to call up reservists for terms beyond their enlistment periods without a declaration of war or national emergency. This has resulted in a "back-door draft" by allowing repeated, indefinite extensions of enlistment terms of reservists for military needs in Iraq or elsewhere, despite the fact that reservists never contemplated such extensions when signing their contracts. This resolution would provide for presidential and congressional accountability by requiring a declaration of war for extensions of reservists' enlistment terms for the duration of that war. However, if there is no declared war, this resolution would require both a presidential declaration of a national emergency and express congressional authority for the terms' extensions following a report by the President describing the reasons why such extensions are essential for purposes of national security. This resolution also limits the period of any extensions based on a national emergency to six months, unless congress re-authorizes the extension after receiving an updated report from the President.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend 50 U.S.C. §12305, as follows:

- 1 §12305
- 2 (a) Notwithstanding any other provision of law, during any period members of a
- 3 reserve component are serving on active duty pursuant to an order to active duty under
- 4 authority of section 12301, 12302, or 12304 of this title, the President may suspend any
- 5 provision of law relating to promotion, retirement, or separation applicable to any member
- 6 of the armed forces who the President determines is essential to the national security of the
- 7 United States.
- 8 (b) A suspension made under authority of subsection (a) shall terminate (1) upon
- 9 release from active duty of members of the reserve component ordered to active duty under

10 the authority of section 12301, 12302, or 12304 of this title, as the case may be, or (2) at  
11 such time as the President determines the circumstances which required the action of  
12 ordering members of the reserve component to active duty no longer exists, whichever is  
13 earlier.

14 (c) The extension of the contractual enlistment period of a member of a reserve  
15 component under authority of subsection (a) shall not exceed ninety days unless (1) the  
16 member is serving on active duty under authority of a Congressional declaration of war, or  
17 (2) in the absence of such declaration of war, the President has declared a national  
18 emergency and Congress has expressly authorized the President to extend such terms of  
19 enlistment for periods greater than ninety days after receiving a report from the President  
20 describing the reasons why such extensions of enlistment periods are essential to the  
21 national security of the United States. Any Congressional authorization to extend enlistment  
22 periods for more than ninety days under authority of paragraph (c) (2) shall expire  
23 automatically after six months unless the Congress re-authorizes such extended enlistment  
24 periods prior to the end of each such six-month period. Any re-authorizations must also be  
25 based upon a report from the President describing the reasons why a national emergency still  
26 exists and why such extensions of enlistment periods are essential to the national security of  
27 the United States.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

#### STATEMENT OF REASONS

Existing Law: Allows the President to call up military reservists on active duty for periods of time exceeding their enlistment contracts without a declaration of war or national emergency.

This Resolution: Would limit the power of the President to call up reservists for periods beyond their contracts of enlistment, unless Congress declares war or the President declares a national emergency and Congress specifically authorizes extending the terms of enlistment.

The Problem: The War in Iraq is the longest war fought by the United States without military conscription. As has been extensively reported, this has caused great strains on the U.S. Army, among other things, in terms of its ability to mobilize sufficient manpower for the war and other military needs. As one way of meeting this challenge without resorting to a politically unpopular draft, the administration has instead instituted a “back door draft” by calling to active duty army reservists in ways that were never contemplated by those who joined the Army Reserve or National Guard. One of the most pernicious practices has been to call reservists to active duty for periods of time that exceed the length of the reservists’ enlistment contracts. (Many of these activated reservists have already served two or more years of active duty before being recalled for further indefinite tours of active duty.) If a reservist is called up shortly before the expiration of his or her term of enlistment, rather than discharging the soldier at the end of the enlistment term, the soldier’s enlistment is extended indefinitely through what are known as “stop-loss” orders issued by the Secretary of Defense. All of this is accomplished without either a war or

national emergency having been declared. Thus, in effect, both Congress and the President can avoid accountability for the “backdoor draft.”

No one would argue that in a declared war soldiers, including reservists, may be expected to serve for the duration. However, Congress has not declared war since 1941. No one also would argue that, in a true period of national emergency, reservists may be expected to be called up for active duty until the emergency has passed. However, emergencies are ordinarily of short duration, and the concept of a national emergency should not be used as a substitute for a declaration of war when the length of hostilities is likely to be indefinite. This resolution would permit enlistments to be extended for the duration of a declared war. But it would limit the duration of such extensions for the purposes of a national emergency, unless both the President and the Congress periodically re-visit the issue and take responsibility for extending the state of emergency and keeping troops on active duty beyond their terms of enlistment. This is called accountability, something sadly missing with respect to the War in Iraq.

In accordance with CDCBA rules, BASF timely offers this resolution for consideration. Consistent with traditional CDCBA practice, the Proponent reserves the right to timely withdraw or amend the resolution

#### IMPACT STATEMENT

This resolution will not affect any other statute, law or rule.

AUTHOR AND/OR PERMANENT CONTACT: John T. Hansen, Nossaman, Guthner, Knox & Elliott, LLP, 50 California Street, San Francisco, CA 94111; 415-438-7245; fax: 415-398-2438; e-mail: [jhansen@nossaman.com](mailto:jhansen@nossaman.com)

RESPONSIBLE FLOOR DELEGATE: John T. Hansen