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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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JOHN DOE,

Petitioner

v.

DONALD RUMSFELD, Secretary  
of Defense, et al,

Respondents.

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NO. CIV. S-04-2080 FCD KJM

MEMORANDUM AND ORDER

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Late in the day on Friday October 1, 2004, petitioner filed a complaint and application for Temporary Restraining Order seeking to prevent his deployment to prevent his deployment to Iraq with his unit of the Army National Guard of the United States ("National Guard"). On October 5, 2004, the court denied petitioner's application for a Temporary Restraining order to

1 prevent his deployment to Fort Brag for training on October 5,  
2 2004.<sup>1</sup> This matter now is before the court on petitioner's  
3 motion for a preliminary injunction. Based on petitioner's  
4 representation that he will be deployed to Iraq on November 19,  
5 2004, the court set hearing on the preliminary injunction motion  
6 for November 5, 2004. After fully reviewing the parties' papers  
7 and hearing oral argument from parties' counsel, the court DENIES  
8 petitioner's request for a preliminary injunction.

#### 9 BACKGROUND

10 Three days after the attacks on the World Trade Center and  
11 the Pentagon, President George W. Bush signed a Proclamation  
12 declaring a national emergency "by reason of the terrorist  
13 attacks . . . and the continuing and immediate threat of further  
14 attacks on the United States." 66 Fed. Reg. 48, 199,  
15 Presidential Proclamation 7463 (September 14, 2001). In the same  
16 Proclamation, the President invoked his power under 10 U.S.C. §  
17 12302 to call the Ready Reserve, which includes the Army National  
18 Guard, to active duty.<sup>2</sup> Id. Also on September 14, 2001, the  
19 President signed an Executive Order delegating authority to  
20 activate reserve units to the secretaries of the armed forces.  
21 66 Fed. Reg. 48,201-48,202 (2001), Executive Order 13223

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23 <sup>1</sup> By random assignment, the case was assigned to this  
24 court; however, I was unavailable the following week. Pursuant  
25 to the Eastern District's Local Rules, the matter was referred to  
26 Judge Levi, who heard and denied the TRO on October 5, 2004. See  
Local Rule 63-122. Because the Local Rules currently do not  
provide expressly for case reassignment to the judge who hears an  
emergency matter due to the assigned judge's unavailability, the  
case was not reassigned and is before this court.

27 <sup>2</sup> The President has renewed annually the declaration of  
28 national emergency. See 67 Fed. Reg. 58, 317; 68 Fed. Reg.  
53,665; 69 Fed. Reg. 55,313.

1 (September 14, 2004). In or about March of 2003, the United  
2 States invaded Iraq for the purpose of toppling the regime of  
3 Saddam Hussein.

4 Shortly, thereafter, on May 1, 2003, petitioner enlisted for  
5 a one-year term in the Army National Guard.<sup>3</sup> In February of  
6 2004, petitioner voluntarily reenlisted for a second one-year  
7 term. His current enlistment is scheduled to expire May 1,  
8 2004.<sup>4</sup> On July 23, 2004, plaintiff's National Guard unit  
9 received orders to active duty in support of Operation Iraqi  
10 Freedom. Pursuant to those orders, the unit was deployed on  
11 October 6, 2004 to Fort Lewis, Washington for approximately 45  
12 days of training. Petitioner, is expected to deploy to Iraq  
13 along with his unit for 545 days on November 20, 2004.<sup>5</sup>  
14 According to petitioner, at the time he was advise of the  
15 mobilization order, he was told that any members of the unit who  
16 did not agree to voluntarily extend their enlistments would be  
17 placed under the Army's stop-loss policy.

18 On October 1, 2004, petitioner filed the present action  
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20 <sup>3</sup> Judge Levi granted petitioner's request to partially  
21 seal the record in this case with respect to petitioner's  
22 identity and to permit petitioner to proceed as John Doe, subject  
23 to later reconsideration. (October 5, 2004 Order Permitting  
24 Filing of Petition under Pseudonym and Sttement of Petitioner's  
25 Identifying Information Under Seal; Protective Order; Transcript  
26 of October 5, 2004 TRO hearing at 4-7.)

27 <sup>4</sup> The papers and statements of counsel are in conflict  
28 regarding whether petitioner's enlistment ends April 30, 2004 or  
May 1, 2005. For purposes of this order the court relies on the  
date in petitioner's Memorandum in Support of motion for  
Temporary Restraining Order, filed October 1, 2004.

<sup>5</sup> It is unclear from the record whether the 545 days of  
active duty are inclusive of, or in addition to, the 45 days of  
training at Fort Lewis.

1 seeking a temporary restraining order to prevent his deployment  
2 with his unit to Fort Lewis, Washington. The court denied the  
3 TRO on October 5, 2004, and petitioner is currently at Fort  
4 Lewis, Washington with his unit. Petitioner now seeks a  
5 preliminary injunction to prevent his deployment to Iraq with his  
6 unit. Petitioner claims that the order calling him to active  
7 duty for a period beyond his enlistment date, combined with the  
8 oral representations that he would be subject to stop-loss,  
9 abridges his due process rights, violates the terms of his  
10 enlistment contract and is otherwise contrary to federal law.

#### 11 STANDARD

12 The Ninth Circuit recognizes two tests for determining  
13 whether to grant a preliminary injunction.

14 Under the traditional test, the movant must establish four  
15 factors to obtain injunctive relief: 1) a likelihood of success  
16 on the merits; (2) a significant threat of irreparable injury;  
17 (3) that the balance of hardships favors the applicant; and (4)  
18 whether any public interest favors granting an injunction. Raich  
19 v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003).

20 Alternatively, the Ninth Circuit has articulated the test as  
21 requiring the moving party to demonstrate either (1) a  
22 combination of probable success on the merits and the possibility  
23 of irreparable injury or (2) that serious questions are raised  
24 and the balance of hardships tips in its favor. These two  
25 formulations are not inconsistent. Rather, they represent two  
26 points on a sliding scale in which the required degree of  
27 irreparable harm increases as the possibility of success  
28 decreases. Roe v. Anderson, 134 F.3d 1400, 1402 & n. 1 (9th Cir.

1 1998), aff'd, Saenz v. Roe, 526 U.S. 489 (1999).

## 2 ANALYSIS

### 3 I. Irreparable Injury

4 According to respondents, the Ninth Circuit requires a  
5 military plaintiff seeking preliminary injunctive relief against  
6 the military to demonstrate "circumstances that are genuinely  
7 extraordinary." Hartikka V. United States, 754 F.2d 1516,1518  
8 (9th Cir. 1985) (quoting Sampson v. Murray, 415 U.S. 61, 91-92  
9 (1974)).

10 Petitioner argues that the heightened standard adopted by  
11 the Ninth Circuit in Hartikka is inapplicable because this case  
12 does not involve the military's "internal personnel decisions."  
13 See e.g., Makua v. Rumsfeld, 163 F. Supp. 2d 1202 (D. Hawaii  
14 2001)(applying traditional test in granting preliminary  
15 injunctive relief to prevent military from conducting training at  
16 a military reservation.) In support, petitioner cites two  
17 similar district court cases from the Fourth Circuit that applied  
18 the traditional irreparable injury requirement in cases  
19 challenging involuntary mobilizations. Parrish v. Brownlee, 335  
20 F. Supp. 2d 661 (E.D. N.C. 2004); Irby v. United States, 245 F.  
21 Supp. 2d 792 (E.D. Va. 2003).

22 The court need not resolve which standard applies, because  
23 petitioner can satisfy neither test. Petitioner is enlisted in  
24 the military until May of 2005. There is no dispute that, until  
25 that time, petitioner is subject to activation and deployment.  
26 While the court readily acknowledges that such deployment is  
27 fraught with great personal risk, the order of deployment to Iraq  
28 during the course of voluntary enlistment is not the gravamen of

1 petitioner's claim for injunctive relief. Rather, it is the  
2 involuntary extension of his enlistment beyond May 1, 2005 under  
3 the military's stop-loss policy. Any injury to petitioner  
4 related to that challenge can only commence in May of 2005 when  
5 his term of enlistment expires.

6 Petitioner offers no legal basis to this court to enjoin  
7 petitioner's deployment in order to resolve his challenge to the  
8 stop-loss policy. While petitioner concedes he is subject to  
9 activation and deployment until the end of his enlistment in May  
10 of 2005,<sup>6</sup> petitioner argues that the orders under which he is  
11 being deployed are invalid because they illegally extend his  
12 enlistment. Petitioner concludes that, if the order is invalid,  
13 he cannot be called to active duty under such order, either  
14 during the period of his enlistment or afterward. (Reply at 5.)

15 The court disagrees with petitioner's analysis. The  
16 question before the court is whether it is necessary to prevent  
17 petitioner's deployment in order to avoid irreparable injury  
18 pending resolution of this case on the merits. Initially, the  
19 court notes that the status quo here is that petitioner is an  
20 enlisted member of the National Guard, subject to activation.  
21 Thus, to preserve the status quo, the court should not disrupt  
22 petitioner's activation during a period when he is admittedly  
23 subject to such activation, pending the court's determination of  
24 the merits of this case.

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26 <sup>6</sup> During oral argument, counsel for petitioner asserted  
27 that he would reserve the right to challenge such an order.  
28 However, any such challenge would need to raise separate grounds  
not raised here which relate solely to the extension of his  
enlistment.

1 Nor do the cases cited by petitioner support his position.  
2 Illustrative is Scaggs v. United States, 396 U.S. 1206 (Douglas,  
3 Circuit Justice 1969), in which the Court granted an army  
4 reservist's petition for habeas corpus and released him from the  
5 custody of the Army pending resolution of his appeal. However,  
6 the petitioner in Scaggs was situated quite differently than  
7 petitioner here. In that case, the petitioner was ordered to  
8 active duty for a period beyond his enlistment contract as a  
9 result of an alleged failure to comply with military orders to  
10 "join a unit of the Ready Reserve and attend regular drills."  
11 Id. The petitioner challenged not just the extension of his  
12 enlistment, but the *grounds for the order to active duty itself*,  
13 which he argued was "punitive and unauthorized." Id.  
14 Consequently any time the petitioner spent on active duty would  
15 cause immediate injury.<sup>7</sup> Here, by contrast, petitioner does not  
16 raise a challenge to the grounds for his *activation*, which was  
17 attendant to the mobilization of his entire unit; he challenges  
18 the *extension* of personal his enlistment. Thus, unlike the  
19 petitioner in Scaggs, his injury does not commence with  
20 activation, it occurs when his enlistment expires.<sup>8</sup>

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22 <sup>7</sup> The court also notes that the petitioner in Scaggs  
23 sought a Writ of Habeas Corpus. Consequently, the court did not  
24 grant injunctive relief, and did not address the irreparable  
25 injury requirement.

26 <sup>8</sup> The remaining cases cited by petitioner are  
27 distinguishable on similar grounds. See Patton v. Dole, 806 F.2d  
28 24 (2d Cir. 1986) (granting injunctive relief to prevent  
involuntary induction into Navy by former midshipman at Merchant  
Marine Academy who had resigned from academy); Kudley v. Hollo,  
431 F. Supp. 470 (N.D. Ohio 1976) (granting temporary restraining  
order to prevent Army reservist's call up to active duty for  
unexcused absences); Walsh v. Local Bd. No. 10, 305 F. Supp. 1274  
(S.D.N.Y. 1969)(granting injunctive relief to prevent

1           Moreover the balance of hardships tips strongly in favor of  
2 respondents. Permitting petitioner to avoid deployment, *during a*  
3 *period he admittedly is subject to such deployment*, would set a  
4 troubling precedent which could impede the military's ability to  
5 mobilize full-strength units were other similarly situated  
6 soldiers to file similar challenges.

7           From a practical standpoint, there is no impediment to  
8 petitioner's deployment. Respondents concede that the court will  
9 retain jurisdiction over this matter after petitioner is  
10 deployed, and agree that petitioner can be called back from Iraq  
11 if this court so orders. If petitioner prevails, his period of  
12 active duty will end in May of 2005; if petitioner's challenge is  
13 unsuccessful, he will remain on active duty under the military's  
14 stop-loss policy. Until that time, the military can deploy  
15 petitioner as it deems proper.

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28 petitioner's involuntary induction into the military).

1 **CONCLUSION**

2 In conclusion, petitioner has failed to demonstrate that he  
3 will suffer any immediate irreparable injury if injunctive relief  
4 is not granted. Consequently, petitioner's motion for  
5 preliminary injunction is DENIED. Because the merits of the case  
6 are well developed in the papers previously filed, and the court  
7 finds further oral argument will not be of material assistance,  
8 the court will provide respondent with an opportunity to submit a  
9 surreply, and thereafter issue a final written order on the  
10 merits of petitioner's claim.

11 IT IS SO ORDERED.

12 DATED: November 5, 2004

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14 FRANK C. DAMRELL, Jr.  
15 UNITED STATES DISTRICT JUDGE  
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