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Greg Rinckey talks with the Navy Times about legal aspects for 300 sailors separated in 2011.

Booted sailors set sights on Supreme Court

Experts say appeal unlikely to be heard

By David Larter
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A group of 300 sailors separated by the 2011 enlisted retention boards is taking its case to the nation's highest court.Although a three-judge panel with the U.S. Court of Appeals in Washington, D.C., dismissed the case on July 11, their attorney, E.W. Keller, said he plans to appeal the decision to the U.S. Supreme Court."I think the decision made by the court of appeals is incorrect," Keller said in a phone interview. "They sort of ignored us and ignored the problem. They are using the military laws and regulations to supersede constitutional rights."A number of legal experts said they view the Supreme Court appeal as a long shot.The federal appeals court ruling followed precedent. Courts generally avoid ruling on civil claims in military personnel decisions outside of clear-cut discrimination cases, legal experts said, leaving the onus on the sailors to prove their records were flagged for the boards unjustly."The courts are reluctant to get into the merits of broad policy making," said Eugene Fidell, a military law expert at Yale University who reviewed the ruling. 'A sham'

In explaining his decision to appeal, Keller said sailors' employee rights were violated and they should have been allowed an administrative hearing.Keller also challenged the court's determination that it didn't matter whether the service needed to convene the ERBs, as long as Navy officials thought they had a good reason when they did.Keller said that ruling gives the Navy a blank check to manage its enlisted personnel, even in cases like the ERB, which officials later admitted was poorly

handled.“It was a sham,” Keller said. “They tried to justify it, but the Navy has admitted that it made a mistake. But the court ignored that. Basically [the judges] have said that no matter how wrong it is, the Navy can do it.”Keller argued before the appeals court that the judge in the federal claims court where the case was first heard shouldn’t have ruled on the matter because she had worked as a civilian attorney for the Navy — a contention also overruled by the appeals court.

'Chances are slim'

The ERBs separated 2,946 sailors, many of whom were mid-career sailors looking forward to retirement. Some were booted only days or months from their 15-year mark and eligibility for early retirement.Legal experts interviewed by Navy Times disagreed over whether the Navy should be given expansive force-shaping authority not subject to liability claims.Raymond Toney, a private defense lawyer who specializes in military cases, said the courts should exercise more oversight.“The military is given a lot of discretion and probably more discretion than it has earned,” he said, adding that inherent flaws in the system make it unlikely that the sailors will have their case heard by the Supreme Court.“The rule that judges are not given the task of running the military comes from the Supreme Court,” he said. “So, unless the veterans have identified specific statutes or regulations that were violated by the ERB process, my prediction is the Supreme Court will show no interest.“And even if they can show violations of law, their chances are still slim,” he added. “I certainly agree with the plaintiffs that the ERB process is unfair, but unfairness is not enough to engage the Supreme Court.”Greg Rinckey, a New York-based lawyer and former Army captain, agreed the process was harsh for the sailors who were separated, especially those who were close to retirement eligibility. But the idea of giving every sailor a hearing and forcing the Navy to fight each early separation through the courts would be unreasonable.“The Navy needs a way to manage its workforce,” he said.Fidell agreed, saying that declining defense budgets are forcing the services to downsize, and the courts shouldn’t have the authority to impede that.“The military does have to have a way to shake the tree,” Fidell said. “It’s not done very often and I’m sure it’s done with a heavy heart.”

Lawyer up

One defense attorney argues the Navy ought to give separating sailors a hearing or more due process.“It’s unfortunate that the Navy chose to discharge so many sailors with virtually no chance for them to

demonstrate their ability to continue to serve," Daniel Conway wrote in an email to Navy Times."It hurts confidence in the system when people lose employment and benefits with very little explanation and are not given a meaningful chance to be heard. It's bad business, but not against the law," said Conway, a partner in the law firm Gary Myers, Daniel Conway & Associates. "It's a policy that should probably be revisited and rewritten for a more meaningful opportunity for sailors to demonstrate their ability to serve."Sailors chosen for separation will have the best chance to contest it by identifying why their record was flagged and addressing any errors quickly, Conway said."You're looking for factual errors or documents or injustices in your record that may have led to separation," he said. "It's not a direct attack on the separation itself. This is a kind of collateral attack where you try to remove unjust records from your personnel files that caused the separation."Conway said common errors include unjust disciplinary actions, inaccurate performance evaluations, bias or prejudice from your command or even a medical issue, which can cause a sailor to be unjustly flagged.Finally, Conway said, it's important to lawyer up — and quickly."There are usually statutes of limitations on different avenues of relief," he said. "Most sailors seek relief through the Board for Correction of Naval Records, Naval Discharge Review Board, or federal court. It's important to get advice as soon as possible."