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A CONTRACTUAL ANALYSIS OF THE MILITARY ENLISTMENT†

Neil J. Dilloff*

Since July 1, 1973, this nation has had what is termed an “all-volunteer military.”¹ As a result, the primary means available for an individual to enter military service has become the enlistment contract. This article will explore whether or not this type of agreement is, in fact, a contract. We shall analyze what documents or acts are necessary to comprise this agreement between a volunteer² and the United States; whether a military enlistment agreement satisfies the traditional contractual elements, such as mutual assent, consideration, and capacity to contract; what is the effect of conditions stated in the contract; and, finally, breach and remedies for breach.

Before analyzing the agreement itself, it is important to describe how the courts and commentators have attempted to categorize it. One of the favorite definitions used by courts in grappling with the nature of the enlistment contract is:

Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes.³

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† Views expressed in this article are to be considered the views of the individual author and do not purport to promulgate or voice the views of the Judge Advocate General, the Department of the Navy, or any other Agency or Department of the United States.

1. This was accomplished by order of President Nixon. See 1973 U.S. CODE CONG. AND AD. NEWS 20; N.Y. Times, Aug. 29, 1972, at 1, col. 8.

2. A “volunteer” is one who freely and of his own accord offers himself for service in the Armed Forces. 6 C.J.S. *Army and Navy* § 21 (1937). This article will limit its discussion of the “volunteer” to only those persons, who after enlisting, become non-officers, or enlisted personnel. See 10 U.S.C. § 104(4) (1970); 10 U.S.C. § 261 (1970). A volunteer should be distinguished from an “inductee” who is a person brought into the military through the Selective Service System and from a commissioned officer, who is appointed by the President.

3. *In re Grimley*, 137 U.S. 147, 151 (1890). See also *Bell v. United States*, 366 U.S. 393, 402 (1961); *Chavez v. Fergusson*, 266 F. Supp. 879 (N.D. Cal. 1967); *Adams v. Clifford*, 294 F. Supp. 1318, 1320 (D. Hawaii 1969).

The same court went on to state:

By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status He cannot of his own volition throw off the garments he has once put on⁴

From the above, it can be seen that both contract and status are involved in the transition from a civilian to a member of the armed forces.⁵ Some courts have spoken in terms of, and rested their decisions solely on status.⁶ Many courts have talked in terms of contract, but have rested their decisions on a change in status.⁷ One court has been straightforward in its discussion of the two theories of contract and status and has meshed them into a reasoned, well-explained decision.⁸ Other courts have spoken strictly in terms of contract law.⁹ The modern trend and the best view, according to this author, is the latter line of cases.

One further quote may serve to further characterize the general nature of an enlistment contract:

Perhaps no relation between the Government and a citizen is more distinctly federal in character than that between it and members of its armed forces . . . the scope, nature, legal incidents and consequences of the relation between persons in service and the Govern-

4. *In re Grimley*, 137 U.S. 147, 152 (1890).

5. For a discussion of status and contract see Casella, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. CHI. L. REV. 783 (1972) [hereinafter cited as Casella].

6. *Taylor v. Resor*, 19 U.S.C.M.A. 405, 406, 42 C.M.R. 7, 8 (1970); *United States v. Noyd*, 18 U.S.C.M.A. 483, 490, 40 C.M.R. 195, 202 (1969); *United States v. Blanton*, 7 U.S.C.M.A. 664, 666, 23 C.M.R. 128, 130 (1957). See also Richardson, *Incidents of the Government-Servant Relationship*, 54 MICH. L. REV. 633 (1956).

7. *Bell v. United States*, 366 U.S. 393 (1961); *In re Morrissey*, 137 U.S. 157 (1890); *In re Grimley*, 137 U.S. 147 (1890); *United States v. Brooks*, 169 F.2d 840 (4th Cir. 1948), *rev'd* 337 U.S. 49 (1949); *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972); *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969); *In re McBee*, 287 F. Supp. 926 (S.D. Cal. 1968); *Pfile v. Corcoran*, 287 F. Supp. 554 (D. Colo. 1968).

8. *Pfile v. Corcoran*, 287 F. Supp. 554, 556-57 (D. Colo. 1968).

9. *Gausmann v. Laird*, 422 F.2d 394 (9th Cir. 1969); *Schwartz v. Franklin*, 412 F.2d 736 (9th Cir. 1969); *Larinoff v. United States*, Civil No. 626-73 (D.D.C., filed Sept. 28, 1973); *Bemis v. Whalen*, 341 F. Supp. 1289 (S.D. Cal. 1972); *Shelton v. Brunson*, 335 F. Supp. 186 (N.D. Tex. 1971), *aff'd* 454 F.2d 737 (5th Cir. 1972); *Colden v. Asmus*, 322 F. Supp. 1163 (S.D. Cal. 1971); *Goldstein v. Clifford*, 290 F. Supp. 275 (D.N.J. 1968); *Even v. Clifford*, 287 F. Supp. 334 (S.D. Cal. 1968).

ment are fundamentally derived from federal sources and governed by federal authority.¹⁰

I. THE COMPONENTS OF THE ENLISTMENT CONTRACT

What documents, public laws, or acts comprise the "enlistment contract?" Courts have had various answers to this question. The reason for this inconsistency is that there is a maze of forms, documents, statements, statutes, regulations, and an oath, all of which have been held, individually and in different combinations, as well as all collectively, to be the "enlistment contract."¹¹ The reason for describing just what documents, laws, or acts make up the enlistment contract is that we must have a "thing" to which we can apply our contractual analysis.

Although the various branches of the armed service have somewhat differing documents which make up the agreement, it can be generally stated that there are four basic components: (a) the enlistment instrument, Department of Defense Form 4—"Enlistment Contract-Armed Forces of the United States;" (b) an oath of allegiance which may be either verbal or written;¹² (c) a statement of understanding;¹³ and (d) the applicable federal statutes and regulations.¹⁴

A. *The Enlistment Instrument: Department of Defense Form 4*

One commentator has stated that this instrument, "is, according to armed forces regulations, 'the basic document establishing a legal relationship' between an enlistee and the federal Government."¹⁵ In *United States ex rel. Norris v. Norman*,¹⁶ the court held that the failure to sign the enlistment instrument voluntarily, was conclusive and the petitioner, who sought release from the Navy, was granted

10. *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947).

11. For a discussion of this topic see Casella, *supra* note 5.

12. When written, it usually is contained in Department of Defense Form 4-Enlistment Contract-Armed Forces of the United States (Feb. 1, 1970).

13. This may be a separate document or it may be incorporated into Department of Defense Form 4, *supra* note 12.

14. For purposes of this article, these are defined as all statutes and regulations whether directly concerned with recruitment, enlistment or not, which may subsequently affect the volunteer and his obligations under the contract.

15. Casella, *supra* note 5.

16. 296 F. Supp. 1270 (N.D. Ill. 1969).

a writ of habeas corpus. The court also rejected the Government's argument that the performance of duties, acceptance of pay, and the acceptance of food and housing brought about a "constructive enlistment" or a ratification.

In *Norman*, the oath of enlistment was part of the written enlistment form. The court stressed the role of this instrument and the oath contained therein:

The enlistment contract "must be completed whenever an individual enlists . . ." (citations omitted) . . . "The member must sign the Enlistment Contract in the presence of the officer administering the oath of allegiance."

. . . .
The short of it is that because he did not take the oath of enlistment, either orally or in writing, Norris did not enlist in the United States Navy on August 7, 1967. By the same token, the Navy could have sent Norris home for his refusal to take the oath since it was not bound either. For, as Mr. Justice Brandeis stated, "It is the actual enlistment, the oath of allegiance, that changes the status from a civilian to a soldier." *United States v. Union Pacific Ry. Co.*, 249 U.S. 354, 359, 39 S. Ct. 294, 63 L. Ed. 643; 6 C.J.S. Army and Navy § 21 (2) at p. 392.¹⁷

The main elements of an enlistment were further described by the court in *Goldstein v. Clifford*¹⁸ as being the enlistment instrument and the statutory law in effect when the instrument was signed.¹⁹

B. *The Oath of Allegiance*

The oath of allegiance has also been characterized by courts as the key event in the enlistment process.²⁰ In *Petition of Agustin*,²¹ parol evidence was allowed to establish whether or not an oath of allegiance was taken.²² The court characterized the oath itself as

17. *Id.* at 1274. Note, however, that the instant case turned on the additional fact that even though Norris later signed the enlistment document, his consent was involuntarily coerced by threat of a court-martial. *Id.* at 1275.

18. 290 F. Supp. 275 (D.N.J. 1968).

19. *Id.* at 279.

20. In *In re Grimley*, 137 U.S. 147, 157 (1890), the oath was referred to as the "pivotal fact" in enlistment.

21. 62 F. Supp. 832 (N.D. Cal. 1945).

22. *Id.* at 835.

“the fact of enlistment” (emphasis supplied).²³ *United States ex rel. Norris v. Norman*, *supra*, apparently subscribes to this view.

More recently courts have treated the oath as a necessary but not sufficient step in the enlistment process. In *Pfile v. Corcoran*,²⁴ the court stated:

Respondent's contention that the oath of enlistment constitutes the enlistment contract is untenable. While taking the oath may be a step which formalizes the enlistment, and without which there is no binding enlistment, this does not compel the conclusion that all the terms of enlistment become subservient to the final oath. . . .²⁵

Finally, the total lack of the oath, was characterized as a nonfatal defect in *United States ex rel. Stone v. Robinson*.²⁶ The case involved the validity of an agreement to extend an enlistment by a serviceman. This situation, although somewhat different from a person who enlists for the first time, shows the trend toward contract law and away from the rigid formalities associated with past characterizations of the enlistment as a change in status.²⁷

C. *The Statement of Understanding*

The principal case which expressly holds that the statement of understanding is the enlistment contract is *Pfile v. Corcoran*.²⁸ The court looked at other components of the agreement, such as the oath and the enlistment instrument, and concluded that because of the detailed and specific wording of the statement of understanding as well as its physical appearance, it “constituted the enlistment con-

23. *Id.*

24. 287 F. Supp. 554 (D. Colo. 1968).

25. *Id.* at 557.

26. 431 F.2d 548 (3d Cir. 1970). See also *Chalfant v. Laird*, 420 F.2d 945 (9th Cir. 1969).

27. Other cases with language minimizing the importance of the formalities, such as the oath, which are associated with enlistment are: *In re Agustin*, 62 F. Supp. 832 (N.D. Cal. 1945) (despite the fact that the court held the oath was essential, it also stated that, in general, other formalities in enlistment were not fatal to the enlistment); *In re Stevens*, U.S. 24 Law Rep. O.S. 205. *Contra*, *In re Grimley*, 137 U.S. 147 (1890); *Coe v. United States*, 44 Ct. Cl. 419 (1909).

6 C.J.S. *Army and Navy* § 21, at 392 (1937) states “[f]ormalities should be complied with,” but “[m]ere informalities should not invalidate the enlistment.” See also *United States ex rel. Norris v. Norman*, 296 F. Supp. 1270 (N.D. Ill. 1969).

28. 287 F. Supp. 554 (D. Colo. 1968). See also *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972).

tract [and] . . . that to the extent petitioners' enlistment [was] governed by contract terms, the statement of acknowledgment constituted that contract." (Emphasis added).²⁹

It seems logical that the statement of understanding, which spells out the duties and obligations of the parties, should be considered the enlistment contract, rather than the oath, which primarily goes to status, or the enlistment instrument, which largely contains personal data and which is used for inductees as well as volunteers.

D. *Statutes and Regulations*

However much signed documents such as the enlistment instrument, the written oath, and the statement of understanding, whether collectively or individually, appeal to the reader as constituting "the enlistment contract," one cannot escape the overriding effect of statutes and regulations on the enlistment obligation. For example, in *Rehart v. Clark*,³⁰ it was held that Navy regulations were "automatically a part of the contract" and that "existing laws are read into contracts in order to fix the rights and obligations of the parties."³¹

Contractually speaking, statutes and regulations should be thought of as entering into a contract via the doctrine of incorporation by reference, rather than by implication.³² This contractual doctrine of the incorporation by reference of the laws and regulations of the United States has been discussed by several courts.³³

29. *Pfile v. Corcoran*, 287 F. Supp. 554, 557 (D. Colo. 1968).

30. 448 F.2d 170 (9th Cir. 1971). See also *Schultz v. Resor*, 332 F. Supp. 708 (D. Wis. 1971).

31. *Id.* at 172. See *Casella*, *supra* note 5, at 811.

32. In *Mellinger v. Laird*, 339 F. Supp. 434, 444 (E.D. Pa. 1972), the contract was not presented to the court, so the court, sub silentio, implied it. Also, see *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89 (1848), in which the court stated that an enlisted person is presumed to have knowledge of the laws governing that branch of the service in which he enlisted. Other courts have discussed the doctrine of constructive enlistment, which serves as a basis for implying knowledge. See *Colden v. Asmus*, 332 F. Supp. 1163 (S.D. Cal. 1971); *United States ex rel. Norris v. Norman*, 296 F. Supp. 1270 (N.D. Ill. 1969); *United States v. King*, 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959); Note, *Military Law—Jurisdiction: Serviceman's Implied Consent to Military Status After Enlistment Term Expired Held Sufficient for Military Jurisdiction*, 46 N.Y.U.L. REV. 384, 389 (1971). Finally, in an opinion of the Judge Advocate General of the Army, it is stated that "an enlistment contract can be implied as well as express." 1918 Op. JAG 488 (1918).

33. *Colden v. Asmus*, 332 F. Supp. 1163 (S.D. Cal. 1971); *Goldstein v. Clifford*, 290 F. Supp. 275 (D.N.J. 1968); *Morse v. Boswell*, 289 F. Supp. 812 (D. Md. 1968); *Pfile v. Corcoran*,

The triggering phrase would be any one in the contract referring to the "laws of the United States," "regulations of the individual service," or other statements opening up the contract to include other documents. This statement should also serve the function of notice to the enlistee that his obligations are not solely governed by the four corners of the paper he is signing.

There is no doubt that statutes and regulations are part of the enlistment contract.³⁴ The problems arise when one party to the contract, the volunteer, is partially or totally unaware of the existence and the effect of these laws upon him. The effect of these laws in terms of a status change from a civilian to a member of the military, has already been discussed. Although "status" language constantly appears in the opinions, and the statutes and regulations must be dealt with, the laws of the country should be referred to in the contract as part of the contract, and not as some supervening, possibly unexpected force, which later is found to impinge upon what the volunteer thought his rights, duties, and obligations were at the time of contracting. This emphasis on keeping the whole matter within the framework of contract law is the essence of the material to follow. The enlistment agreement will now be analyzed in strictly contractual terms to discover whether or not it should and can be treated as an agreement coming within the traditional law of contracts.

II. TRADITIONAL CONTRACTUAL ELEMENTS AND THE ENLISTMENT CONTRACT

The requirements for the formation of an informal contract are:

- (1) Mutual assent;
- (2) Consideration;
- (3) Two or more parties having at least limited legal capacity; and
- (4) The agreement must not be one declared void by statute or by rule of the common law.³⁵

A. *Mutual Assent: Offer and Acceptance*

The enlistment contract is a contract for employment whereby

287 F. Supp. 554 (D. Colo. 1968).

34. 53 AM. JUR. 2d *Military, and Civil Defense* § 138 (1970).

35. L. SIMPSON, *CONTRACTS* § 8 (2d ed. 1965).

the volunteer offers his services and the Government accepts those services through its agents, the military recruiters.³⁶ In *McCord v. Page*,³⁷ the court stated that where no invalidity in the enlistment was claimed, such as fraud, duress, incapacity to contract, etc., and the volunteer of his own volition enlisted into the armed forces, the contract was enforceable. The offer was clear, certain, and definite so that the volunteer "was fully aware of the duties and responsibilities he thereby assumed."³⁸

*United States ex rel. Stone v. Robinson*³⁹ addressed the question of offer and acceptance in terms of the mutual written consent of the parties. The court held that where an extension of an enlistment was involved, whereby the military was the offeror and the volunteer was the offeree,⁴⁰ the oath by the volunteer was not an essential method of acceptance. Thus, the court apparently recognized two methods of acceptance, the oath and the written consent.

B. Consideration

The question of just what is the consideration in an enlistment contract has arisen in the context of bonuses and special promises allegedly made by the military to induce an individual to enlist. Consideration for the volunteer's services has taken many forms: special promises regarding initial or subsequent duty assignments, free education, monetary bonuses, and, of course, the normal monetary compensation for being a member of the armed forces. All of these forms of consideration should be viewed in the context that the enlistment contract is an agreement for the rendering of personal services and, as such, involves the exchange of certain liberties and freedoms by the volunteer, which he had previously enjoyed in his civilian life, in return for the consideration given by the military.⁴¹

36. *Ex parte Blackington*, 245 F. 801 (D. Mass. 1917), *aff'd*, 248 F. 124 (2d Cir. 1918).

37. 124 F.2d 68 (5th Cir. 1941).

38. *Id.* at 70.

39. 431 F.2d 548 (3d Cir. 1970).

40. Note the apparent difference in the positions of the parties regarding an original enlistment and an extension of an enlistment (a separate contract, modifying the terms of the original contract by increasing the length of obligated service). In the former, the Government is the offeree and in the latter the Government, desiring further service from the volunteer, becomes the offeror.

41. See *Krill v. Bauer*, 314 F. Supp. 965 (E.D. Wisc. 1970), in which the court posed the

*Matzelle v. Pratt*⁴² involved a petition for a writ of habeas corpus by an enlisted man who complained that he was being illegally detained by the Navy by being forced to remain in active service beyond the agreed expiration date. Petitioner originally enlisted in the Navy for four years and soon thereafter agreed to extend his enlistment for two additional years in return for advanced training in electronics and the payment to him of a special reenlistment bonus. Petitioner received the advanced training, and, during the two-year extension, he claimed that he had not promptly received his special bonus.⁴³ The court held that even though the agreed-upon consideration was not tendered promptly, time was not of the essence and that petitioner was not entitled to rescind the extension agreement. The court took notice of the fact that no offer of restitution for the value of the advanced education had been tendered by the plaintiff.

An alleged promise of an officer's commission in the Air Force was the disputed consideration in *Shelton v. Brunson*.⁴⁴ The objective of the petitioner's claim was the cancellation of a reenlistment contract, which contained a disclaimer of all promises outside the four corners of the instrument. Petitioner, an Air Force sergeant, had expected to receive an officer's commission under a special program when he completed two years of study at Colorado State University. Although petitioner entered the commissioning program and satisfactorily completed his schooling, he was notified that because he did not meet the physical qualifications for becoming an officer, he would not receive a commission.

In his application for a writ of habeas corpus, petitioner stated that he was induced by fraudulent misrepresentations to enlist in this educational program, alleging that he was promised that upon

question "[d]oes being in the Army curtail or suspend certain Constitutional rights?, [sic] the answer is unqualifiedly 'yes'." *Id.* at 966-67. See also *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir. 1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969).

42. 332 F. Supp. 1010 (E.D. Va. 1971).

43. Under the terms of the agreement, the normal method of such payment was in equal annual installments in each year of the two year period of extension over the original four year obligation. When approval is received from the Chief of Naval Personnel, the bonus (called a VRB and granted under the Navy's Variable Reenlistment Bonus Program) can be paid in one lump sum. In the instant case, Matzelle requested and received such approval, but the bonus was tendered two days late. *Id.* at 1011.

44. 335 F. Supp. 186 (N.D. Tex. 1971), *aff'd*, 454 F.2d 737 (5th Cir. 1972), *modified* 465 F.2d 144 (5th Cir. 1972).

completion of the course he would be commissioned.⁴⁵ The petitioner testified that the Air Force knew of his physical defects at the time he enlisted in the program and that he was assured he would receive a waiver as to any physical defect that may exist. In reliance upon these representations, he reenlisted for six years.

The district court held that the alleged consideration of the officer's commission in return for the reenlistment extension was not part of the contract. In effect, the court used the parol evidence rule to discount the petitioner's evidence regarding the consideration, as the representations of a commission and the waiver were oral. The court looked only to the enlistment instrument and gave heavy weight to the disclaimer clause therein which stated that no promise of any kind had been made to the petitioner except those stated in the document. The petitioner had signed the contract including the disclaimer, and the court denied petitioner's request for discharge from the Air Force.⁴⁶

On appeal, the Fifth Circuit affirmed the decision in part and remanded the case, holding that the statement of understanding contained in the enlistment instrument was ambiguous with regard to the question of petitioner's physical qualification for commission. The court stated that if oral misrepresentations were made to the petitioner regarding his eligibility for commissioning, he could avoid the contract.⁴⁷

*McCullough v. Seamans*⁴⁸ involved a habeas corpus proceeding in which two graduates of the Air Force Academy sought discharge from the Air Force as conscientious objectors before completing their active duty service requirements. The Air Force counterclaimed for the cost of the education received by the petitioners. The alleged consideration involved the promise by petitioners to satisfactorily complete their education and to serve as Air Force officers for a specified period of time in exchange for a free college education. The court decreed the discharge of the plaintiffs, but refused the claim for reimbursement by the Air Force. In reaching this decision, the court disregarded the normal contract rules regarding failure of consideration and breach of contract.

45. 335 F. Supp. 186, 188 (N.D. Tex. 1971).

46. *Id.* at 189.

47. 465 F.2d 144, 147 (5th Cir. 1972).

48. 348 F. Supp. 511 (E.D. Cal. 1972). *See also* Miller v. Chafee, 462 F.2d 335 (9th Cir. 1972).

The most recent case regarding enlistment contract consideration is *Larinoff v. United States*,⁴⁹ a suit for damages, in the form of a reenlistment bonus, similar to *Matzelle v. Pratt*. The court applied strict contract law principles in awarding relief to the plaintiffs. The court stated, *inter alia*:

This suit is for a reenlistment bonus, which Plaintiffs maintain is included in the consideration delineated in their contracts. The pertinent terms of the contract relating to consideration state: . . . "in consideration of the pay, allowances, and benefits which will accrue to me during the continuance of my service," The term Plaintiffs emphasize is "pay." Section 308 of Title 37 of the United States Code terms the reenlistment bonus (including VRB's) as "special pay." The definitional section of Title 37 of the United States Code, section 101(21) defines "pay" as including special pay. Therefore, the Court determines that the Plaintiffs have made a prima facie case that the suit . . . is founded upon a contract for compensation between the United States and its employees.⁵⁰

In *Larinoff*, the court found that the very wording of the contract stated the consideration. Therefore the court did not have to look outside the document itself and thereby subject itself to evidentiary exclusions under the parol evidence rule. The parol evidence rule could have been avoided in any case, in that the wording of the contract, i.e. "pay," was ambiguous, and under an exception to the parol evidence rule, one may look outside the written document in order to resolve ambiguities contained therein.⁵¹

C. Capacity to Contract

1. Age

The general common law rule is that the contracts of an infant

49. Civil No. 626-73 (D.D.C., filed Sept. 28, 1973).

50. *Id.* at slip opinion 5. Other contract language which may prove to be of precedential value regarding the issue of consideration, as well as the larger issue of treating enlistment as a normal contract, is found at pp. 7-9 (slip opinion). The court refers to the "bargained-for exchange" of active duty for training and the bonus; to the "inducement" of and the "reliance" by the plaintiffs on the promised consideration; and to the fact that the contract was a printed form by defendants and the language therein was strictly under their control, and as a result the contract must be construed most strongly against the author of the document, the Government.

51. L. SIMPSON, *CONTRACTS* § 101 (2d ed. 1965).

are voidable at the infant's option.⁵² However, courts have steadfastly refused to follow this rule in regard to military enlistment contracts.⁵³ The courts have, however, allowed the parent or guardian to assert the voidability of such contracts where the consent of the parent or guardian was required before the minor could enlist.⁵⁴

*In re Morrissey*⁵⁵ involved a federal statute which imposed the restriction of the minimum age of 21 on persons desiring to enlist without parental consent. The court held that the age at which an infant shall be competent to do any acts, or perform any duties, civil or military, depends wholly upon the legislature.⁵⁶ The habeas corpus petition of the volunteer, a lad of 17 years of age, was denied, despite the fact that his only living parent did not give her consent to the enlistment. The court avoided the effect of the 21 year age requirement as set forth in the applicable statute by stating that:

. . . [T]his provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor.⁵⁷

Thus the petitioner lost since it was he who sought the relief instead of his parent.

The opposite situation occurred in *In re Grimley*.⁵⁸ Habeas corpus relief was sought on the ground that the petitioner had passed the maximum age at which the law allowed persons to enlist, the maximum age set by statute being 35 years. Petitioner was 40 years old at the time of enlistment. The attorneys for petitioner made an interesting point in arguing that the "reasons for holding void an enlistment, like the present, above the maximum age are even

52. *Id.* at § 103.

53. *In re Morrissey*, 137 U.S. 157 (1890); *In re Grimley*, 137 U.S. 147 (1890); *Ex parte Beaver*, 271 F. 493 (N.D. Ohio 1921); *Ex parte Winfield*, 236 F. 552 (E.D. Va. 1916); *Ex parte Avery*, 235 F. 248 (E.D.N.C. 1916). See also H. MOYER, *JUSTICE AND THE MILITARY* 36-45 (1972).

54. See 6 C.J.S. *Army and Navy* § 22(b) (1937); 53 AM. JUR. 2d *Military, and Civil Defense* §§ 146-47 (1970).

55. 137 U.S. 157 (1890).

56. *Id.* at 159.

57. *Id.*

58. 137 U.S. 147 (1890).

stronger than in the case of one below the minimum age. The latter is a defect which time would speedily remedy, while time would only aggravate the former by rendering the recruit constantly less 'effective' and less 'able-bodied.'"⁵⁹ The court, in denying relief, gave great weight to the new status acquired by the petitioner and stated that the matter of age was "merely incidental, and not of the substance of the contract."⁶⁰ The real crux of the case is that the court refused to aid a person with unclean hands from avoiding a contract into which he entered voluntarily and knowingly. The court posed the question in discussing this equitable issue: "may [petitioner] utter a falsehood to acquire a contract, and [now] plead the truth to avoid it when the matter in respect to which the falsehood is stated is for his benefit?"⁶¹ The court answered this question in the negative.

Another theory, other than the theories of a change in status and pure equity, which has been used by courts in denying relief based on contractual incapacity because of minority, has been the supervening and plenary power of Congress to raise and support armies.⁶²

2. Insanity

The leading case in this area, *In re Judge*,⁶³ involved a habeas corpus proceeding in which the petitioner claimed that his enlistment in the Air Force was void because he was insane at the time of enlistment. Under 10 U.S.C. § 622, Congress provided that no insane persons are to be enlisted. The court recognized this defense to the formation of a contract, but held that the burden of showing insanity at the time of contracting was on the petitioner and that he had not met his burden of proof.

3. Fraud

Fraud in the inducement of an enlistment contract has often been alleged as a ground for seeking relief.⁶⁴ Although in the majority of

59. *Id.* at 148.

60. *Id.* at 151.

61. *Id.*

62. *See V. infra.* See also *United States ex rel. Goodman v. Hearn*, 153 F.2d 186 (5th Cir. 1946), *cert. denied*, 329 U.S. 667 (1946).

63. 148 F. Supp. 80 (S.D. Cal. 1956).

64. *Gausmann v. Laird*, 422 F.2d 394 (9th Cir. 1969); *Chalfant v. Laird*, 420 F.2d 945 (9th

cases, the plaintiff has not been granted relief, the courts have applied, on the whole, strict contract principles. There is one stumbling block to recovery, however, even if the misrepresentations are proven. Usually the fraud lies in something the enlistee was promised. As a rule, the promises were given by the recruiter, an agent of the Government, whom the courts have consistently found has no actual authority and hence cannot bind his principal, the United States.⁶⁵

An item of inducement, a bonus, was characterized, in *Larinoff v. United States*, as part of the consideration, and instead of the court relying on the misrepresentations themselves, it preferred to interpret the phrase in the contract concerning "pay" as including the alleged bonus.⁶⁶ Thus, even in the most recent case allowing relief, the court strained to rest its findings on the contract document itself, rather than on the obvious oral misrepresentations of the recruiting agent.

Another method of dealing with fraud in the inducement, which has not yet been discussed by any court, except in a dissenting opinion,⁶⁷ is the use of adhesion contract principles.⁶⁸ Although the law of adhesion contracts is not within the typical contract law rules, it appears that it may apply to these cases of fraud.⁶⁹ The law of unconscionability is also another emerging doctrine which may fill the gap between the strict status stance of some courts and the more general law of contract approach, taken by others, in regard to the military enlistment.

4. Duress

The most instructive case on the use of duress to avoid an enlist-

Cir. 1969); *Larinoff v. United States*, Civil No. 626-73 (D.D.C., filed Sept. 28, 1973); *Bemis v. Whalen*, 341 F. Supp. 1289 (S.D. Cal. 1972); *Wong v. Laird*, 4 S.S.L.R. 3650 (N.D. Cal. 1971); *Shelton v. Brunson*, 335 F. Supp. 186 (N.D. Tex. 1971), *aff'd*, 454 F.2d 737 (5th Cir. 1972), *modified*, 465 F.2d 144 (5th Cir. 1972); *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969).

65. *Shelton v. Brunson*, 335 F. Supp. 186, 189 (N.D. Tex. 1971), *aff'd*, 454 F.2d 737 (5th Cir. 1972), *modified*, 465 F.2d 144 (5th Cir. 1972).

66. *Larinoff v. United States*, Civil No. 626-73 (D.D.C., filed Sept. 28, 1973) (slip opinion at 5).

67. *Shelton v. Brunson*, 454 F.2d 737 (5th Cir. 1972) (Wisdom, J., dissenting).

68. See Casella, *supra* note 5, at 795-96.

69. Bolgar, *The Contract of Adhesion—A Comparison of Theory and Practice*, 20 AM. J. COMP. L. 53, 55-56 (1972); Casella, *supra* note 5.

ment contract is *United States ex rel. Norris v. Norman*,⁷⁰ in which a court-martial was used to coerce the signature of the plaintiff on his enlistment contract. Plaintiff had been promised the grade of petty officer second class after he was found qualified; but the enlistment contract he was tendered stated that he would only be granted the grade of petty officer third class. For this reason, petitioner refused to sign the enlistment instrument. Despite this omission, the recruiter, instead of sending petitioner away, directed him to proceed to a processing station, and from there, to a duty station. Petitioner was under the belief that a new contract with the correct grade specified therein was being forwarded to him for his signature. Soon thereafter, petitioner was ordered, on threat of prosecution via court-martial, to sign the original enlistment contract, specifying the lower grade. Norris then signed the contract, stating that his signing was not voluntary but was the result of the threat of court-martial.⁷¹ Under these facts, the court granted habeas corpus relief.

The courts appear to be split on the viability of the defense of incapacity to contract. In cases in which equity and justice demand and obvious facts compel a decision in accordance with traditional contract law, the courts seem to be willing to grant relief. However, the judiciary still appears to be reluctant to apply straight contract law across the board in this area. The barriers of military discretion and the paramount powers of the sovereign still seem to be sufficient to prevent the complete breakthrough of the application of contract law to the area of capacity to contract.⁷²

D. *Public Policy Restrictions*

The final prerequisite for the formation of a simple contract is that the purpose of the contract can not violate some overriding public policy.⁷³ The types of contracts which usually run afoul of this criterion are: contracts in restraint of trade, contracts illegal be-

70. 296 F. Supp. 1270 (N.D. Ill. 1969). Cf. *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261, 1265 (W.D. Pa. 1970), *aff'd*, 431 F.2d 548, 551 (3d Cir. 1970).

71. *United States ex rel. Norris v. Norman*, 296 F. Supp. 1270, 1274-75 (N.D. Ill. 1969).

72. Some courts have, however, stated their reliance on military discretion and the traditional judicial "hands-off" approach when regarding military matters. See *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972); *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969); *Goldstein v. Clifford*, 290 F. Supp. 275 (D.N.J. 1968); *Chavez v. Fergusson*, 266 F. Supp. 879 (N.D. Cal. 1967), *appeal dismissed*, 395 F.2d 215 (9th Cir. 1968).

73. L. SIMPSON, *CONTRACTS* § 8 (2d ed. 1965).

cause of their being harmful to the public interests, contracts to defraud or injure third parties, contracts harmful to the administration of justice, contracts harmful to the marriage relation, wagering contracts, and usurious contracts.⁷⁴

The military enlistment contract does not fall into any of these categories. In fact, one of the parties to the enlistment contract, the United States, is the maker of what is vaguely called "public policy." No case has challenged the enlistment contract as running afoul of this criterion, and it is doubtful if any compelling argument can be made in this area. It would be rather ironic to argue to a court that a contract made by Congress, who supposedly represents the public and as such echoes its policies, violates the "public policy" of the nation.

III. JUDICIAL INTERPRETATION OF THE MILITARY ENLISTMENT DOCUMENTS

There appear to be three basic rules which courts have used to interpret ordinary contracts: (a) words are to be given their plain and normal meaning (except when special usage varies their normal meaning and best effectuates the intention of the parties); (b) every part of a contract is to be interpreted, if possible, so as to carry out the contract's general purpose; and (c) the circumstances under which the contract was made may always be shown in order to ascertain the intention of the parties.⁷⁵ Along with these rules have come other doctrines regarding the certainty of terms,⁷⁶ the reading of the contract as a whole,⁷⁷ the statute of frauds,⁷⁸ and the parol evidence rule.⁷⁹

In *Larinoff v. United States*, Judge Richey applied several of the above contract law rules in interpreting the enlistment extension agreement in issue. First, since the issue in the case involved the question of whether or not the plaintiffs were entitled to special pay for agreeing to extend their period of service, the court applied the rule which took into account the technical usage of the word "pay"

74. *Id.* at § 214, *et seq.*

75. *Id.* at § 102.

76. *Id.* at § 43, *et seq.*

77. *Id.* at § 102; RESTATEMENT OF CONTRACTS § 235(c) (1932).

78. L. SIMPSON, CONTRACTS § 65 *et seq.* (2d ed. 1965).

79. *Id.* at § 98 *et seq.*

in the written agreement. Judge Richey interpreted it, by using the applicable statutes, to include the Variable Reenlistment Bonus (VRB) which the plaintiffs sought.⁸⁰

The court in *Larinoff* also applied the rule that the contract is to be interpreted, if possible, so as to carry out the intentions of the parties. The court found that "Congress intended that the VRB should assist in the attraction and retention of members of the armed forces with critical skills"⁸¹ and that the plaintiffs apparently thought that the contract called for the payment of the bonus because the bonus was in effect at the time plaintiffs signed their reenlistment contracts.⁸² Finally, the court stated:

The cardinal rule of contract law that comes into play when analyzing the language of a written instrument is that the document must be considered in light of the situation and relationship of the parties, the circumstances surrounding them *at the time of the contract*, and the nature of the subject-matter and the apparent purpose of the contract. . . . Applying this rule to the facts of this case there can be no dispute that the Navy was using the VRB at the time the Plaintiffs signed their extension, to induce reenlistment in critical areas.⁸³

The case of *Colden v. Asmus*⁸⁴ also made use of one of the basic contract interpretation tenets mentioned previously. This case involved a petition for habeas corpus by a Navy enlisted man on the ground that his enlistment extension was invalid. The court held that a Navy regulation which prescribed that attendance at one training school, rather than at three, was a sufficient prerequisite for extension, and was incorporated by reference into the enlistment contract. The court further stated that ". . . the intention of the parties to a contract must be determined from a reading of the contract as a whole."⁸⁵ The petition of the plaintiff was denied, and the extension agreement was held valid.

There have been no cases in which a plaintiff has alleged that the

80. *Larinoff v. United States*, Civil No. 626-73 (D.D.C., filed Sept. 28, 1973) (slip opinion at 5).

81. *Id.* at 3 (slip opinion).

82. *Id.* at 7 (slip opinion).

83. *Id.* at 8 (slip opinion).

84. 322 F. Supp. 1163 (S.D. Cal. 1971).

85. *Id.* at 1165.

lack of a written enlistment document vitiates the enlistment. Although there is no general statute of frauds requirement on the United States to have a signed writing by the party to be charged, it appears that under some state statutes, a writing would be required for such an employment contract.⁸⁶ However, the general rule that the formality of a writing is unnecessary to the validity of a contract appears to be applicable when there is other evidence that such a contract has been entered into.⁸⁷ However, if a statute of frauds argument were to be framed, it would have to be based on that section of the statute which requires a signed writing for those "contracts not to be performed within a year from the time of making."⁸⁸

Unlike the nonexistence of claims based on a violation of the statute of frauds, the parol evidence rule has undergone much scrutiny by the courts in the enlistment area.⁸⁹ In *Petition of Agustin*,⁹⁰ the court allowed into evidence the oral evidence as to the taking of the oath of allegiance, and specifically stated that "[p]arol evidence is admissible to establish the fact of enlistment."⁹¹ Other courts, while not specifically mentioning the parol evidence rule, have prohibited evidence of this nature by the use of disclaimer clauses in the written document itself, which clauses state that no promises, other than those specified in this document, have been made.⁹²

86. *In re Cohen*, 15 F. Supp. 690 (S.D.N.Y. 1936); *LaBett v. Heyman Bros., Inc.*, 13 N.J. Misc. 832, 181 A. 638 (1935), *aff'd*, 117 N.J.L. 115, 187 A. 36 (1936). *See generally*, L. SIMPSON, *CONTRACTS* § 82 (2d ed. 1965).

87. Examples include part or substantial performance by one party, detrimental reliance on the contract, and acceptance of the benefits under the contract. *See generally*, L. SIMPSON, *CONTRACTS* § 65 *et seq* (2d ed. 1965).

88. *Id.* at 82.

89. *Gausmann v. Laird*, 422 F.2d 394 (9th Cir. 1969); *Chalfant v. Laird*, 420 F.2d 945 (9th Cir. 1969); *Haines v. Laird*, Civil No. 71-2814-MML (C.D. Cal., filed Mar. 6, 1972); *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972); *In re Agustin*, 62 F. Supp. 832 (N.D. Cal. 1945). *See also* 6 C.J.S. *Army and Navy* § 21(a)(4) (1937).

90. 62 F. Supp. 832 (N.D. Cal. 1945).

91. *Id.* at 835. *See also* *Lebanion v. Heath*, 47 N.H. 353 (1867); 6 C.J.S. *Army and Navy* § 21(a)(4) (1937).

92. *Gausmann v. Laird*, 422 F.2d 394 (9th Cir. 1969); *Chalfant v. Laird*, 420 F.2d 945 (9th Cir. 1969); *Shelton v. Brunson*, 335 F. Supp. 186 (N.D. Tex. 1971), *aff'd*, 454 F.2d 737 (5th Cir. 1972), *modified*, 465 F.2d 144 (5th Cir. 1972).

IV. CONTRACTUAL CONDITIONS

A condition is any fact or event other than lapse of time which qualifies a promisor's present duty of performance.⁹³

An instructive case on the use of this contractual element is *Bemis v. Whalen*,⁹⁴ a case in which the triggering event was the enlistment by the petitioner, and the promised occurrence was the sending of the petitioner to electronics school. The court held that no breach of this condition occurred when the plaintiff was sent to a similar school, but was not sent, until six months later, to a school in the exact specialty he was allegedly guaranteed. It appears that the court was persuaded by two factors. The first factor was that the plaintiff had signed a disclaimer clause which negated all promises made to him and which also stated that he had had the contract explained to him. The second factor was that the court felt that plaintiff did finally receive the "benefit of his bargain" in that he was sent to the special school, albeit six months after the date he had been promised. The court stated:

The only variance between the literal terms of the contract and the actual performance of the contract is that part of the bargained-for terms were delayed for six months. It does not appear that time was of the essence, as it relates to the 5900 MOS (the special school to which he was to be sent) . . .⁹⁵

It is important to note, however, that the court recognized the doctrine of contractual conditions as applying to military enlistments. Especially important is that the court recognized the types of conditions, such as material and minor, even though it held that the alleged breach (the six month delay) was not material. The court did not state, however, that the condition specifying that the plaintiff would be sent to the particular school was a minor condition, but only that the breach of this apparently material condition was not sufficient to allow a remedy for the plaintiff. Thus, it can be stated with some authority that courts do recognize that certain conditions are material in military enlistments and that in the in-

93. L. SIMPSON, *CONTRACTS* § 144 (2d ed. 1965).

94. 341 F. Supp. 1289 (S.D. Cal. 1972).

95. *Id.* at 1292.

stant case, if petitioner never had received the promised schooling, he might have been able to sue for a breach of a material condition.

Another case which demonstrates the recognition of the validity of conditions in a military enlistment is *Shelton v. Brunson*.⁹⁶ Involved was the condition of the petitioner's finishing two years of university training, and the promise that the Air Force would give petitioner a waiver of his physical disabilities in order that he could become an officer. The lower court, relying on the lack of actual authority by the agents of the Air Force and on the traditional doctrine that courts would not interfere in military matters,⁹⁷ refused to recognize a breach of the promised waiver, an obviously material condition, and held that the Air Force could refuse the waiver and hence, the officer's commission.⁹⁸ The Court of Appeals later remanded the case on the issues of ambiguity in the contractual condition of waiver and oral misrepresentation.⁹⁹

V. MODIFICATION OF MILITARY ENLISTMENTS

Sometimes a fine line is drawn between a modification of a contract and a breach of a contract. The difference, traditionally, has been that in a subsequent modification, the mutual consent of both parties to the contract is necessary, consideration is required, and in many cases the modification has to be in writing to satisfy the statute of frauds.¹⁰⁰ In the enlistment area, however, courts have seen fit to dispense with all these prerequisites to modification and have allowed contracts to be unilaterally modified by the Government under the guise of supervening public policy.¹⁰¹ The founda-

96. 335 F. Supp. 186 (N.D. Tex. 1971), *aff'd*, 454 F.2d 737 (5th Cir. 1972), *modified*, 465 F.2d 144 (5th Cir. 1972).

97. *Orloff v. Willoughby*, 345 U.S. 83 (1953).

98. *Shelton v. Brunson*, 335 F. Supp. 186, 189 (N.D. Tex. 1971), *aff'd*, 454 F.2d 737 (5th Cir. 1972), *modified*, 465 F.2d 144 (5th Cir. 1972).

99. 465 F.2d 144 (5th Cir. 1972).

100. L. SIMPSON, *CONTRACTS* § 92 *et seq* (2d ed. 1965).

101. *In re Grimley*, 137 U.S. 147 (1890); *Antonuk v. United States*, 445 F.2d 592 (6th Cir. 1971); *Schwartz v. Franklin*, 412 F.2d 736 (9th Cir. 1969); *Ex parte Beaver*, 271 F. 493 (N.D. Ohio 1921); *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972); *Adams v. Clifford*, 294 F. Supp. 1318 (D. Hawaii 1969); *Morse v. Boswell*, 289 F. Supp. 812 (D. Md. 1968), *aff'd*, 401 F.2d 544 (4th Cir. 1968), *cert. denied*, 393 U.S. 1052 (1969); *Pfile v. Corcoran*, 287 F. Supp. 554 (D. Colo. 1968); *Winters v. United States*, 281 F. Supp. 289 (E.D.N.Y. 1968), *aff'd*, 390 F.2d 879 (2d Cir. 1968), *appeal denied*, 393 U.S. 896 (1968), *rehearing denied*, 393 U.S. 896 (1968); *Jones v. Loomey*, 107 F. Supp. 624 (D. Mich. 1952). *Cf.* *Gion v. McNamara*, Civil No. 67-1563-EC (C.D. Cal., filed Jan. 9, 1968).

tion for this claim of "supervening public policy" by the Government has been the war powers of Congress¹⁰² and the power of the President to regulate the military as its Commander-in-Chief.¹⁰³

The first category of cases in which this "super-policy" has been used to change the terms of enlistment contracts is demonstrated by the case of *Antonuk v. United States*.¹⁰⁴ This case involved a petition for habeas corpus by an Army reservist who had been recalled to active duty because of his excessive absences at his reserve drill meetings. One of the issues in the case concerned the period for which the petitioner was obligated to serve on active duty. His enlistment contract expressly stated that the call-up period would be no more than 45 days,¹⁰⁵ but subsequent to the contract a new statute was passed allowing the call-up period to be as much as two years.¹⁰⁶ In the petitioner's case, the call-up was to be for a period of one year, six months, and three days.¹⁰⁷ The court held that Congress may abrogate the terms of reservist enlistment contracts and joined "the vast majority of courts which have held that reservists may be activated pursuant to 10 U.S.C. § 673a, notwithstanding clauses in their enlistment contracts to the contrary."¹⁰⁸

The second category of cases concerns situations in which the reservists are called to active duty, not because of unsatisfactory performance at drill meetings, but under a statute which states that the President can activate forces when "he deems it necessary."¹⁰⁹ In *Goldstein v. Clifford*,¹¹⁰ reservists, who were activated pursuant

102. U.S. CONST. art. I, § 8.

103. U.S. CONST. art. II, § 2.

104. 445 F.2d 592 (6th Cir. 1971).

105. *Id.* at 598.

106. *Id.* See 10 U.S.C. § 673(a) (1971) and 32 C.F.R. § 100.3(c) (1973).

107. *Antonuk v. United States*, 445 F.2d 592, 598 (6th Cir. 1971).

108. *Konn v. Laird*, 460 F.2d 1318 (7th Cir. 1972); *Harmonson v. United States*, No. 24005 (9th Cir., filed July 1970), *rev'g* Civil No. 68-2109, 2 S.S.L.R. 3151 (C.D. Cal. 1969); *Karpinski v. Resor*, 419 F.2d 531 (3d Cir. 1969); *Schwartz v. Franklin*, 412 F.2d 736 (9th Cir. 1969); *Winters v. United States*, 412 F.2d 140 (9th Cir. 1969); *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972); *Heuchan v. Laird*, 314 F. Supp. 736 (E.D. Mo. 1969), *aff'd*, 427 F.2d 980 (8th Cir. 1970); *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969); *Adams v. Clifford*, 294 F. Supp. 1318 (D. Hawaii 1969); *Pfile v. Corcoran*, 287 F. Supp. 554 (D. Colo. 1968); *Winters v. United States*, 281 F. Supp. 289 (E.D.N.Y. 1968), *aff'd per curiam*, 390 F.2d 879 (2d Cir. 1968). *Contra*, *Gion v. McNamara*, Civil No. 67-1563-EC (C.D. Cal., filed Jan. 9, 1968). See also *Ansted v. Resor*, 437 F.2d 1020 (7th Cir. 1971); *Mickey v. Barclay*, 328 F. Supp. 1108 (E.D. Pa. 1971).

109. 10 U.S.C. § 263 (1970).

110. 290 F. Supp. 275 (D.N.J. 1968).

to this statute, cited a provision in their enlistment contracts which provided that they could be ordered to active duty only "in the event of a mobilization or emergency."¹¹¹ The reservists challenged their activation on the ground that the Executive Order issued pursuant to the statute violated due process and was a misreading and abrogation of their contract rights.¹¹² The court, avoiding the issue of an apparent modification of the original contract, preferred to rest its denial of relief on the ground that the statutory law, as well as the enlistment instrument itself, constituted the contract in issue. The court found no conflict in the wording, hence, no unconstitutional or contractual modification.¹¹³

Another modification situation occurs when a member of the military commits a criminal offense, and his period of enlistment runs out before he can be court-martialed.¹¹⁴ Courts have sanctioned a modification of the contract by allowing the member to be retained on active duty until he can be court-martialed, despite the fact that the terms of his contract state that he will be released from duty on a specific day, and despite the obvious fact that there was no mutual consent by the parties, nor consideration for the extension.

VI. BREACH

Any unjustified failure to perform when performance is due is a breach of contract which entitles the injured party to damages. If the breach is slight or insubstantial, it is called a partial breach, for which plaintiff's damages are restricted to compensation for the defective performance. If the breach is material, it is called a total breach, which gives to the injured party an election to substitute for his contractual rights the remedial right to damages for total failure of performance.¹¹⁵

111. *Id.* at 277-78.

112. *Id.* at 279.

113. *Id.*

114. *Gorko v. Commanding Officer*, 314 F.2d 858 (10th Cir. 1963) (court-martial jurisdiction upheld where enlistment expired between first trial and rehearing); *Ex parte Beaver*, 271 F. 493 (N.D. Ohio 1921); *Roman v. Curtis*, 291 F. Supp. 99 (W.D. Tex. 1968), *application for a stay of court-martial denied*, 393 U.S. 921 (1968); *United States v. Schuering*, 16 U.S.M.C.A. 324, 36 C.M.R. 480 (1966).

115. L. SIMPSON, *CONTRACTS* § 187 (2d ed. 1965); *RESTATEMENT OF CONTRACTS* § 314 (1932).

Despite the language of several courts¹¹⁶ which refuse to follow contract law regarding breach in this area of enlistments, at least one court has given full contractual explication of this element of contracts.¹¹⁷ *Bemis v. Whalen* was a suit for habeas corpus relief based on the grounds of false representation and breach of contract. The court extensively discussed the issue of breach, assuming sub silentio that it was applicable to such an enlistment contract. The court held that although there was a breach, it was not a material one, and the plaintiff was denied relief. The court stated, *inter alia*:

Enlistment is a contract between the United States and the enlistee and, in the absence of supervening statute, is governed by general principles of contract law. . . . A party induced by fraud or mistake to enter into a contract may rescind that contract Whether a given breach is material or essential, or not, is a question of fact.¹¹⁸

In *Adams v. Clifford*,¹¹⁹ the court held that the activation of a reserve unit, pursuant to a statute enacted after its members had signed their enlistment agreements and which statute contravened these agreements, did not amount to a breach of contract entitling the 283 plaintiffs to damages. The court avoided characterizing this unexpected activation as a breach by resting its decision on the status which the plaintiffs had assumed when they enlisted. The court stated that this change in status made the plaintiffs subject to the overriding powers of the Congress and the President.¹²⁰

VII. REMEDIES FOR BREACH

Although few courts have characterized in express terms a failure of performance by the Government to be an actionable breach thereby making the United States accountable to the enlistee for appropriate remedies, many courts have discussed the remedies sought by plaintiffs for this failure of performance.¹²¹ This section

116. *Bell v. United States*, 366 U.S. 393 (1961); *In re Grimley*, 137 U.S. 147 (1890); *Antonuk v. United States*, 445 F.2d 592 (6th Cir. 1971); *Adams v. Clifford*, 294 F. Supp. 1318 (D. Hawaii 1969); *Goldstein v. Clifford*, 290 F. Supp. 275 (D.N.J. 1968). For an excellent discussion of this position see *Pfile v. Corcoran*, 287 F. Supp. 554, 560-61 (D. Colo. 1968).

117. *Bemis v. Whalen*, 341 F. Supp. 1289 (S.D. Cal. 1972).

118. *Id.* at 1291.

119. 294 F. Supp. 1318 (D. Hawaii 1969).

120. *Id.* at 1322.

121. *Miller v. Chafee*, 462 F.2d 335 (9th Cir. 1972); *Nixon v. Secretary of the Navy*, 422

will examine the basic remedies which plaintiffs have sought and courts have grappled with in their treatment of enlistments.

A. Damages

Damages is the basic remedy for breach of contract, and "every breach entitles the party injured to sue" for them.¹²² There have been two cases in which plaintiffs have sought money damages for breach of an enlistment contract. In *Adams v. Clifford*, 283 Army reservists brought suit for a court order stating that the retroactive application of a statute calling them up to active duty was invalid and "that the issuance of unlawful orders [pursuant to the statute] breached each [of their] enlistment contract[s], and prevented each enlistee 'from transacting . . . [his] business and [each has] suffered great financial loss' in a sum of less [sic] than \$10,000, and asked compensatory damages therefore."¹²³ The court refused the requested relief, finding no breach and based its decision on the supervening powers of the President and Congress.¹²⁴

In *Larinoff v. United States*,¹²⁵ the court granted compensatory damages, including in its opinion, an admonition to the defendant Navy:

If the Defendants did not want to be committed to the payment of a VRB, they should have made a self-evident provision in the contract. The printed form contract after all, was drafted solely by the Defendants; its language was entirely within their control.¹²⁶

This granting of a monetary recovery against the Government in a case founded on breach of contract is a clear portent of how the

F.2d 934 (2d Cir. 1970); *Gausmann v. Laird*, 422 F.2d 394 (9th Cir. 1969); *Larinoff v. United States*, Civil No. 626-73 (D.D.C., filed Sept. 28, 1973); *McCullough v. Seamans*, 348 F. Supp. 511 (E.D. Cal. 1972); *Bemis v. Whalen*, 341 F. Supp. 1289 (S.D. Cal. 1972); *Matzelle v. Pratt*, 332 F. Supp. 1010 (E.D. Va. 1971); *Brehm v. Seamans*, Civil No. 70 Civ. 2905 (S.D.N.Y., filed Aug. 17, 1970); *Adams v. Clifford*, 294 F. Supp. 1318 (D. Hawaii 1969); *United States v. Averick*, 249 F. Supp. 236 (N.D. Ill. 1965).

122. L. SIMPSON, *CONTRACTS* § 195 (2d ed. 1965).

123. *Adams v. Clifford*, 294 F. Supp. 1318, 1320 (D. Hawaii 1969). The court probably meant to state that plaintiff alleged a sum of more than \$10,000 because at least \$10,000 is required for federal jurisdiction under 28 U.S.C. § 1331 (1970).

124. See *V. infra*.

125. Civil No. 626-73 (D.D.C., filed Sept. 28, 1973). Note that *Larinoff* is presently pending appeal.

126. *Id.* at 8-9 (slip opinion).

courts may, in the future, view military enlistment, i.e., as a normal contract. Although plaintiffs sought discharge from the Navy (rescission of the contract), the basic contract principle that if damages are an adequate remedy,¹²⁷ such damages will be the relief granted, was the court's solution.

B. *Rescission, Reformation, and Restitution*

*Nixon v. Secretary of the Navy*¹²⁸ involved a suit for cancellation of an extension of an enlistment agreement, in which the cancellation (rescission) was based on a Navy regulation,¹²⁹ rather than on a straight contract theory. Although the plaintiff's request for cancellation was timely, the court denied relief, because even though the purpose of the contract was not realized (plaintiff becoming a qualified nuclear power plant operator), he had received some of the benefits under the agreement. The Navy rule allowing cancellation applied only to those persons who had not yet received "any of the benefits" contemplated by the extension agreement, such as advancement to a higher pay grade, schooling in technical fields, etc.¹³⁰

Rescission under contract law rather than under a Navy regulation was sought in *Matzelle v. Pratt*.¹³¹ The basis on which rescission was sought was that the plaintiff had received a promised bonus payment two days late. The court found that this was not a material breach entitling the plaintiff to rescission, and rested its decision on strict contract law:

Counsel agree that this case is governed by the law of contracts. On that basis, the question is whether Matzelle is entitled to rescission of the contract. It seems clear that if Matzelle is entitled to any relief, rescission is not an appropriate remedy.

. . . .

A general principle of contract law is that rescission should be permit-

127. See note 115 *supra*.

128. 422 F.2d 934 (2d Cir. 1970).

129. *Id.* at 937-38. See also *Kubitschek v. Chafee*, 469 F.2d 1221 (9th Cir. 1972); *Johnson v. Chafee*, 469 F.2d 1216 (9th Cir. 1972). In *Kubitschek* and *Johnson*, the courts held that the taking of an oath before a warrant officer instead of a commissioned officer (which violated the Navy's Personnel Manual) was a minor defect in the execution of the enlistment, and rescission was denied.

130. *Id.* at 938. For a discussion of receiving benefits under an enlistment agreement, see H. MOYER, *JUSTICE AND THE MILITARY* 30-33, 35 (1972).

131. 332 F. Supp. 1010 (E.D. Va. 1971).

ted only when the complaining party has suffered a breach so material and substantial in nature that it affects the very essence of the contract and serves to defeat the object of the parties. . . . Assuming . . . that failure to pay the bonus on September 21 amounts to a breach, a delay of two days is plainly not so material and substantial as to justify rescission.¹³²

The court suggested that restitution to the Navy for the value of the education given the plaintiff would have strengthened his claim for rescission, since contract law does not allow a person to retain the benefits of a contract which he is now claiming to have been breached by the other party.¹³³ Another case recognizing the applicability of the remedy of rescission to enlistment contracts is *Bemis v. Whalen*. Again rescission was denied because the plaintiff had received the benefits of the contract, and the breach was not "total."

*Gausmann v. Laird*¹³⁴ was a case in which the plaintiff sought rescission of the contract, or in the alternative, reformation of his enlistment on the basis that he was guaranteed that he would be assigned to duty in Europe and never would be assigned to the war in Vietnam. The court, although denying relief, recognized the applicability of both of these remedies for breach of contract.¹³⁵

There are two recent cases in which the Government, as opposed to our volunteer, has sought the application of contract principles.¹³⁶ This is a contrast from the usual position of the Government, which is usually the defendant trying to hide behind the "supervening policy" and "hands-off the military" arguments in attempting to get the court to disregard standard contract law. In *Miller v. Chafee*,¹³⁷ the court stated in response to an attempted condition of repayment to the Government of education expenditures:

. . . Miller was entitled to be honorably discharged. . . . [His] ap-

132. *Id.* at 1012.

133. *Id.* at 1012-13.

134. 422 F.2d 394 (9th Cir. 1969).

135. *Id.* at 395.

136. *Miller v. Chafee*, 462 F.2d 335 (9th Cir. 1972); *McCullough v. Seamans*, 348 F. Supp. 511 (E.D. Cal. 1972). See Albrecht, *Recovery of Government-Funded Education Expenses From Naval Officers Who Request Discharge by Reason of Conscientious Objection*, 26 JAG J. 157 (1972).

137. 462 F.2d 335 (9th Cir. 1972).

plication made out a case for conscientious objector status, and the Government does not argue to the contrary. . . . Finally, we hold that the District Court improperly conditioned Miller's release upon his making monetary payments to the Government. . . . It attached an unauthorized burden upon Miller's exercise of his right to seek conscientious objector status, impairing his First Amendment rights.¹³⁸

In *McCullough v. Seaman*s,¹³⁹ Air Force academy graduates sought and received a judgment declaring them to be conscientious objectors. The court held, however, that they were under no legal obligation to reimburse the Air Force for the cost of their education.

It seems logical that if contractual principles are to be followed by the courts in this area, those principles should apply equally to both parties. The rationale for the denial of restitution in the *Miller* and *McCullough* cases is that the law of contracts must not conflict with or interfere with a higher set of principles embodied in the area of constitutional law, i.e., chilling the free exercise of religion for conscientious objectors. However, where no such first amendment rights are involved, the courts should allow restitution and rescission to all contracting parties in the enlistment. This would adhere to the basic contract doctrine of mutuality of remedy.

C. *Specific Performance*

An enlistment contract is a personal services or employment contract. It is almost universally held that a contract for personal services will not be specifically enforced, either by affirmative decree or by an injunction.¹⁴⁰ The general rule is apparently not applicable to enlistment contracts, since the courts have, in effect, ordered specific performance in the many different situations which have already been discussed.¹⁴¹ In reality, every time a court denies relief by way of a discharge, it is enforcing the contract so as to make the

138. *Id.* at 338. *But see* *Brehm v. Seaman*s, Civil No. 70 Civ. 2905 (S.D.N.Y., filed Aug. 17, 1970) in which a stipulation between the Government and the plaintiff for restitution by the latter was recognized as valid and was incorporated into the court's order.

139. 348 F. Supp. 511 (E.D. Cal. 1972). *See generally* *Benway v. Barnhill*, 300 F. Supp. 483 (D.R.I. 1969).

140. 5A A. CORBIN, CONTRACTS § 1204 (1964).

141. These are: extension of enlistment for court-martial, extension of period of activation for reserves, and use of the "supervening public policy" of the Government. *See, e.g.*, *Messina v. Commanding Officer*, 342 F. Supp. 1330 (S.D. Cal. 1972).

volunteer specifically perform. In a normal personal services contract, although there is no right to breach, there is the power to breach the contract with the added assurance that a court will not make the breaching party specifically perform.

The argument of "involuntary servitude" has long stood as a barrier to the specific performance of a personal employment contract.¹⁴² Surely, this argument is no more applicable than in the present context of the enlistment. Other arguments which have been advanced against specific performance include: the difficulty of enforcing the decree, the difficulty of gauging the quality of the work performed, and the undesirability of continuing the relationship between employer and employee after the loyalty, confidence, and association have been challenged or destroyed.¹⁴³ No cases have expressly discussed the question of making a volunteer specifically perform, but the basic rationale which has precluded any consideration of this contractual issue has been the all-encompassing supervening power of the Government in dealing with its military forces. Until this mantle of protection can be completely removed from enlistment agreement negotiations, it is unlikely that the issue will arise.¹⁴⁴

VIII. CONCLUSION

One basic theme of this article has been the increasing interest of the courts in viewing the enlistment agreement as a true contract, governed by traditional contract law. Although the courts have not yet arrived at the point where only contract law will be considered in deciding disputes of this nature, it seems apparent that the language of the opinions sound more and more like that time is coming.

The main objection to the use of contract law has been by the military and by the Government, while on the other hand, in most cases it is the volunteer who is urging its use. The reason for the former's reluctance to submit to contract law is based on the vestiges of the sovereign immunity doctrine.¹⁴⁵ It is true that the Government should be unhindered in the performance of its functions,

142. 5A A. CORBIN, CONTRACTS § 1204, at 401 (1964).

143. *Id.* at 400-01.

144. Sovereign power has also prevented the assertion of such doctrines as equitable estoppel. See *United States v. Rossi*, 342 F.2d 505 (9th Cir. 1965).

145. See *Pfile v. Corcoran*, 287 F. Supp. 554, 559-60 (D. Colo. 1968).

but by placing these types of agreements involving an individual's personal freedom under the law of contracts, it would seem that the Government is not being put in a unduly fettered position and would still be free to perform adequately.¹⁴⁶

The best method for this transition to the use of strict contract law is the inclusion in the contract itself, in express terms, of all the contingencies which can affect the performance of the contract and both parties' obligations and duties thereunder. This approach is a necessity because the question of whether the agreement between the volunteer and the Government is an actual "arms-length bargain" is a real one.¹⁴⁷ This suggested approach already has been implemented in some instances by the use of "general clauses" which state that the contract is subject to the laws of the United States and other vague descriptions of the possible contingencies, as well as the use of disclaimers.¹⁴⁸ A more specific statement is, in this author's opinion, necessary.

An awareness of the rights and liabilities an enlistee or volunteer incurs at the time of his signing of the enlistment agreement is absolutely necessary,¹⁴⁹ and the enlistee should also be made aware of any future possibilities which will alter his obligations. Until the principles of contract law are implemented, the redress for these abrupt changes in the agreement is quite limited. The use of contract law will also further due process¹⁵⁰ and general fairness by giving notice to the volunteer of all possible contingencies. In order for the enlistment to be legitimately termed a "contract," these prerequisites must be met, and the unfortunate characterization of enlistment as being a change in status will be banished forever in the catacombs of sovereign supremacy.

146. Further authority for this position can be found in the "contract clause" of the United States Constitution. U.S. CONST. art. I, § 10. See B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938). Although the "contract clause" only expressly applies to the states, it would arguably appear to be applicable to the Federal Government as well through the fifth amendment's due process clause.

147. See Casella, *supra* note 5, at 793-99. Cf. Wallace v. Chafee, 451 F.2d 1374 (9th Cir. 1971).

148. See Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971); United States *ex rel.* Stone v. Robinson, 431 F.2d 548 (3d Cir. 1970); Sheldon v. Brunson, 335 F. Supp. 186 (N.D. Tex. 1971), *aff'd*, 454 F.2d 737 (5th Cir. 1972), *modified*, 465 F.2d 144 (5th Cir. 1972); Even v. Clifford, 287 F. Supp. 334 (S.D. Cal. 1968).

149. See Garmon v. Warner, 358 F. Supp. 206, 211-12 (W.D.N.C. 1973) (no knowing and voluntary relinquishment of an understood right).

150. Cf. Dellaverson v. Laird, 351 F. Supp. 134, 141 (S.D. Cal. 1972).

