Armed Forces Enlistment: The Use and Abuse of Contract

Department of Defense Form 4—"Enlistment Contract-Armed Forces of the United States,"—is, according to armed forces regulations, "the basic document establishing a legal relationship"¹ between an enlistee² and the federal government. The courts have generally accepted the title of Form 4 at face value. They have viewed the relationship between enlistees and the armed forces as contractual and, therefore, essentially different from the relationship between the armed forces and persons inducted through the Selective Service System. This comment examines, first, the bases in precedent for the assumption that every enlistment creates a contractual relationship. It then describes the practical consequences of this view. The courts have looked to traditional contract rules to resolve disputes between enlistees and the armed services, often in derogation of constitutional norms and statutory requirements. In addition, they have found that enlistees have certain contractual rights that serve to limit the power of both the armed services and Congress. Since enlistment is now the primary, and may soon be the sole, means of filling the ranks of the armed forces,³ it is especially necessary that these consequences be recognized.

This comment concludes that an enlistee should be thought to have any sort of contractual right only if he has been induced to enter the armed services by the promise of special training or assignment. Outside this limited context, the application of contract principles to en-


² Enlistee refers to a person who has voluntarily enlisted in the armed forces, see 10 U.S.C. § 104(4) (1970), or a reserve component, see 10 U.S.C. § 261 (1970), as distinguished from an inductee, a person inducted through the Selective Service System, and from a commissioned officer appointed by the President. Armed forces regulations require that all enlistees sign Form 4, e.g., Army Reg. (AR) 601-210, Regular Army Enlistment Program, para. 6–10 (May 1, 1968) [hereinafter cited as AR 601–210]; NAVPERS 15838A, supra note 1; Air Training Command Manual (ATCM) 33-2, Recruiting Procedures for the United States Air Force, para. 11–3 (July 1, 1972) [hereinafter cited as ATCM 33-2]; MCO P.1100.61C, supra note 1, para. 2351(a); Army Reg. (AR) 140–111, Army Reserve Enlistment and Reenlistment, para. 5–8 (July 31, 1970, change no. 1, Apr. 9, 1971).

³ President Nixon has set July 1, 1973 as the date for transition to an all-volunteer armed force. E.g., 1971 U.S. CODE CONG. & AD. NEWS 18; N.Y. Times, Aug. 29, 1972, at 1, col. 8.
listment often results in injustice to enlistees and the contravention of the policies of the government.

I. THE APPLICATION OF TRADITIONAL CONTRACT RULES TO ENLISTMENT

Many courts during the nineteenth century characterized enlistment as a contract, perhaps because of the prevalent belief that contract is the ultimate principle of order in a civilized society. A few courts maintained that enlistment was an ordinary contract governed by the "well-established principles which regulate contracts generally." Most courts, however, perceived difficulties in reconciling ordinary contract rules to the exigencies of military policy and, while agreeing that enlistment was in some sense contractual, refused to apply contract principles to the problems before them.

The Supreme Court finally dealt with the subject in 1890. In In re Grimley, an enlistee who had been imprisoned as a result of his conviction by court martial sought release on the ground that, since he was

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5 This attitude is epitomized by Maine's aphorism that "the movement of the progressive societies has hitherto been a movement from Status to Contract," H. MAINE, ANCIENT LAW 170 (1st ed. 1861) (emphasis in original), and by Parsons's statement that "out of contracts, express or implied, . . . grow all rights, all duties, all obligations, and all law," 1 T. PARSONS, CONTRACTS 3 (1853); see Cohen, The Basis of Contract, 46 HARV. L. REV. 553, 570 (1933); Pound, Law as Developed in Juristic Thought, 30 HARV. L. REV. 201, 218-20 (1917).


7 The two positions met head-on in United States v. Blakeney, 44 Va. (3 Gratt.) 405, 409 (1847), when the court refused to apply to enlistment the contract principle that contracts of minors are voidable:

The enlistment is usually spoken of as a contract, and without impropriety, inasmuch as that expresses the mutual consent of the parties; but it is a contract of a peculiar nature . . . [and] in its principles and consequences, is certainly widely different from the ordinary civil compacts between individuals . . . I do not, however, object to the name of contract as applied to a voluntary enlistment: the name is unimportant, unless we suffer it to mislead us as to the true character of the thing. The dissenters would have had the name control the legal consequences: "[V]oluntary enlistment must be regarded as a mere contract, the validity of which is to be determined by principles applicable to all other contracts. . . ." Id. at 427. Blakeney and United States v. Cottingham, 40 Va. (1 Rob.) 649 (1849), contain the most penetrating and thorough discussions of enlistment in the nineteenth century cases. See also Tyler v. Pomeroy, 90 Mass. (8 Allen) 480, 485-86 (1864); Commonwealth v. Gamble, 11 S. & R. 92 (Pa. 1824).


9 137 U.S. 147 (1890).
over the statutory age limit when he enlisted, his enlistment was void and the court martial lacked jurisdiction over him. The Supreme Court noted that the case involved "a matter of contractual relation between the parties" and that "the law of contracts . . . is worthy of notice"; since Grimley had misrepresented his age to the recruiter, according to "the ordinary law of contracts" he could not, on the basis of his own misrepresentation, avoid the contract.\textsuperscript{10} The Court did not, however, rest its decision on ordinary contract law. It stated that in enlistment "something more is involved than the making of a contract . . . . Enlistment is a contract; but it is one of those contracts which changes . . . status . . . ."\textsuperscript{11} Although the Court failed to explain how its concept of a contract which changes status applied to the problem before it,\textsuperscript{12} its decision seems to have been based on a construction of the enlistment statute. According to the Court, Congress did not intend the statute to prevent persons over the statutory age limit from serving in the military,\textsuperscript{13} and, therefore, the statute could not serve to render the enlistments of such persons void.

The doctrine of Grimley—that enlistment is a contract which changes status—has been the subject of conflicting interpretations.\textsuperscript{14}

\textsuperscript{10} Id. at 150-51.
\textsuperscript{11} Id. at 151.
\textsuperscript{12} The only consequence suggested by the Court was that where status is changed, "no breach of the contract destroys the new status or relieves from the obligations which its existence imposes." Id. at 151. However, no one had argued that Grimley's desertion constituted a breach capable of terminating a contractual relationship and releasing him from service, exposing him "to an action for damages." Id. Grimley argued that his enlistment was never effected because he did not meet the statutory age requirement. It is difficult to see how his failure to meet that requirement or his misrepresentation concerning his age could be characterized as a breach.
\textsuperscript{13} Id. at 153; cf. United States v. Blanton, 7 U.S.C.M.A. 664, 666, 23 C.M.R. 128, 130 (1957), which reached an opposite conclusion regarding the minimum statutory age of seventeen.
\textsuperscript{14} This conflict has probably been caused by the awkward concept of "a contract which changes status." Although contract and status are protean and elusive concepts, it is clear that at the time of the Grimley decision, they were mutually exclusive. Endrey, \textit{Contract and Status}, 29 Austr. L.J. 333 (1955). The classic contract concept denoted a legal relationship that was voluntarily assumed, that could be voluntarily terminated (by agreement of the parties or by paying damages), and whose terms were determined by agreement. Status referred to a relationship imposed by operation of law, terminated only by operation of law, and whose terms were determined by law. R. Graveson, \textit{Status in the Common Law} 129-34 (1953). Justice Brewer probably intended to characterize enlistment as what would today be called a status voluntarily assumed. The two examples he gave of contracts that change status, marriage and naturalization, are referred to by modern writers as "status," see, e.g., G. Allen, \textit{Legal Duties} 39 (1931), as is voluntary enlistment, G. Treitel, \textit{The Law of Contract} 5 (3d. ed. 1970). Perhaps Justice Brewer refrained from characterizing enlistment simply as status because the contemporaneous conception of status popularized by Maine did not include "conditions as are the immediate or remote result of agreement." H. Maine, supra note 5, at 170.
One line of cases, exemplified by a series of recent decisions of the Court of Military Appeals, has held that there is no contractual relationship whatever between an enlistee and the armed services; instead, enlistment effects a status, the rights and duties of which are defined by statutes and regulations and to which the laws of contract are inapplicable. Federal district and appellate courts, however, continue to cite Grimley for the proposition that "[i]t is settled that enlistment in the military service establishes a contractual relationship." Some of the Court's statements in Grimley seem to support this proposition, but it is clear that Grimley's holding represents, at the very least, a rejection of the use of contract principles to resolve problems concerning matters governed by statute.

The difficulties involved in characterizing the relationship between the armed services and enlistees as contractual are suggested by examining an ordinary enlistment. The documents normally used to effect such an enlistment are virtually devoid of provisions that can be considered contractual terms. The Form 4 enlistment contract and


17 For the purposes of this comment, ordinary enlistment refers to enlistment without guarantees of special training or assignment. See note 122 infra.

18 Dept of Defense (DD) Form 4, Enlistment Contract—Armed Forces of the United States (Feb. 1, 1970) [hereinafter cited as DD Form 4]. The first part of this two-page standard government form consists of forty-nine spaces for recording personal data and is designed for use in processing inductees as well as enlistees. MCO P.1100.61C, supra note 1, para. 2351(1)(c); NAVPERS 15838A, supra note 1, art. B-22402(1). The remainder of the document contains the oath of enlistment (items 57, 58), the witnessing officer's confirmation of enlistment (item 59), two provisions that quote statutes applicable only to the Navy (items 51, 52), a provision that paraphrases statutes applicable only to reserve components (item 53), and the following provisions:

50. I know that if I secure my enlistment by means of any false statement, willful misrepresentation or concealment as to my qualifications for enlistment, I am liable to trial by court martial or discharge for fraudulent enlistment and that, if rejected because of any disqualification known and concealed by me, I will not be furnished return transportation to place of acceptance.

52. I am of legal age to enlist. I have never deserted from and I am not a member
the other documents used for an ordinary Army enlistment, for example, consist almost entirely of disclaimers and of spaces for recording personal data concerning the enlistee. The terms of any supposed contract must, therefore, be found in the statutes and military regulations governing enlisted members of the armed forces.

It is, perhaps, possible to characterize a relationship of this sort—one that, although voluntarily entered into, is governed entirely by statutes and regulations—as, in some sense, contractual. The Court in Grimley seems to have recognized, however, that there is some danger in doing this, that simply because enlistment can be considered a species of contract, it does not necessarily follow that disputes involving enlistment should be resolved according to the principles of the general theory of contracts. The rules of the general theory, as set

of the Armed Forces of the United States, the U.S. Coast Guard or any Reserve component thereof; I have never been discharged from the Armed Forces or any type of civilian employment in the United States or any other country on account of disability or through sentence of either civilian or military court unless so indicated by me in item 56, "Remarks" of this contract. I am not now drawing retired pay, a pension, disability allowance, or disability compensation from the government of the United States.

54. I have had this contract fully explained to me, I understand it, and certify that no promise of any kind has been made to me concerning assignment to duty, geographical area, schooling, special programs, assignment of government quarters, or transportation of dependents except as indicated.

55. I swear (or affirm) that the foregoing statements have been read to me, that my statements have been correctly recorded and are true in all respects and that I fully understand the conditions under which I am enlisting.

19 AR 601-210, supra note 2, para. 6-4 to 6-8, requires that in addition to Form 4, male enlistees sign the following documents: Department of Defense (DD) Form 98, Armed Forces Security Questionnaire; Department of Defense (DD) Form 398, Statement of Personal History; Department of the Army (DA) Form 3286, Statements for Enlistment, pts. II & III (all of which are records of personal data); and Department of the Army (DA) Form 3286, pt. III (which consists entirely of disclaimers and provisions pertaining only to special programs).

20 E.g., DD Form 4, supra note 18, item 54; Dep't of the Army (DA) Form 3286, Statements for Enlistment, pt. I, item 1a: "All promises made to me are contained in items 3 . . . 37 . . . 48 . . . of the DD Form 4, my Enlistment Contract."

21 The armed forces' recourse against an enlistee who supplies false personal data is not a contract action, but a court martial action for fraudulent enlistment. 10 U.S.C. § 883 (1970).

22 See, e.g., Patterson, The Restatement of the Law of Contracts, 33 COLUM. L. REV. 397, 411 (1933), which points out that the word "contract" has been used "to embrace all forms of legal obligation, or alteration of legal relations, grounded on manifestation of consent." See also Gilmore, Products Liability: A Commentary, 38 U. CHI. L. REV. 103, 111 (1970).

23 One commentator has observed that "the conception of 'contract' is stretched to micrometer thickness" when it is applied to so-called compulsory contracts, such as insurance contracts in which substantially all the terms are prescribed by law. Patterson, Compulsory Contracts in the Crystal Ball, 43 COLUM. L. REV. 731, 743 (1943). That there are limits to this stretching process, at least in terms of utility, is suggested by the efforts of courts and commentators to remove such status-saturated contracts as insurance policies, see Kessler, Forces Shaping the Insurance Contract, 1954 Ins. L.J. 151; Schultz, The Special
forth in the Restatement\textsuperscript{24} and the major treatises,\textsuperscript{25} were developed with reference to private law transactions, such as the sale of goods between merchants,\textsuperscript{26} that do not involve the considerations of public policy affecting transactions between enlistees and the armed services.\textsuperscript{27}

The Supreme Court has consistently rejected contract principles as an aid in resolving problems involving statutory requirements. In a companion case to \textit{Grimley}, In re \textit{Morrissey},\textsuperscript{28} the Court held that the validity of the enlistment of a minor “depends wholly upon the legislature”\textsuperscript{29} and is unaffected by common law contract principles.\textsuperscript{30} More recently, in \textit{Bell v. United States},\textsuperscript{31} the Court held that enlisted men were entitled under the applicable statutes to recover their ac-


\textsuperscript{24} \textit{RESTATEMENT OF CONTRACTS} (1932).

\textsuperscript{25} \textit{E.g.}, \textit{S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS} (3d ed. 1957).

\textsuperscript{26} See Summers, \textit{supra} note 23, at 566–67. Professor Summers argues: “If the ‘law of contracts’ is to be conceived as encompassing all contractual transactions, it must not be conceptualized as a single body of law but as a family of bodies of law, interrelated but each distinctive.” \textit{Id.} at 567. The members of the family would include the law of insurance contracts, partnership agreements, collective agreements, and among others, the “general theory of contract” presented in the treatises and the Restatement. The last member, he suggests, “is not a parent body of law but rather just another portion of the multifaceted law of contractual transactions.” \textit{Id}.


\textsuperscript{28} 137 U.S. 157 (1890).

\textsuperscript{29} \textit{Id.} at 159.

\textsuperscript{30} During the nineteenth century the contract rule that contracts of minors are, with a few exceptions, voidable at their election caused considerable difficulty because the enlistment of minors was a military necessity. \textit{See United States v. Bainbridge}, 24 F. Cas. 946 (No. 14,497) (C.C.D. Mass. 1816) (Story, J.); \textit{Commonwealth v. Gamble}, 11 S. & R. 93 (Pa. 1824). At least one court followed the rule to the conclusion that a minor who enlisted in the armed forces and committed a military offense could avoid his contract and thereby escape the jurisdiction of a court martial. \textit{Commonwealth v. Cushing}, 11 Mass. 67 (1814).

Half a century after \textit{Morrissey} the Court of Military Appeals, provoked by the persistence of counsel in arguing contract theory in cases involving the enlistment of minors, reemphasized that: “[A]lthough an agreement to enlist in an armed service is often referred to as a contract... [w]hat is really created is a status... As a result, no useful purpose is served by reviewing the common-law rules of contract and whether the contract of a minor is, under the common law, voidable at his election... We must... [instead] look to the statutes...” \textit{United States v. Blanton}, 7 U.S.C.M.A. 664, 665–66, 23 C.M.R. 128, 129–30 (1957).

\textsuperscript{31} 366 U.S. 393 (1961).
crused pay and allowances even though they had "behaved with utter disloyalty" while interned in a North Korean prison camp. It rejected the government's argument that the soldiers could recover nothing because their behavior constituted a material breach of their enlistment contracts. Despite these decisions by the Supreme Court, however, federal district and appellate courts have continued to employ contract rules to resolve problems concerning the statutes and regulations defining enlistees' rights and obligations, the constitutional rights of enlistees, and the procedures by which enlistment may be effected.

A. Statutes and Regulations

The case of Wallace v. Chafee illustrates the courts' use of contract principles to resolve essentially statutory questions. In Wallace, a Marine Corps reservist on inactive duty training was convicted by a summary court martial of having wilfully disobeyed the orders of a superior commissioned officer. The reservist sought relief on the ground that the court martial lacked jurisdiction over him. The Uniform Code of Military Justice provides that court martial jurisdiction extends to members of reserve units on inactive duty training only if they have voluntarily accepted written orders specifying that they are subject to the Code. The district court agreed with Wallace that his acceptance of such orders had not been voluntary within the meaning of the statute. The court argued that the acceptance of court martial jurisdiction is a waiver of fundamental constitutional rights of civilian criminal justice and that, in order to be valid, it must be an "intentional relinquishment or abandonment of a known right." The court found that the procedure by which Wallace accepted the orders reduced any element of choice "to its minimum dimensions": the orders had been presented to him in the midst of "a sea of forms," and he had been given no information concerning the Code or the consequences of his acceptance.

32 Id. at 394.
33 The Court, citing Grimley, emphasized that "common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right." Id. at 401.
34 451 F.2d 1274 (9th Cir. 1971).
37 Id. at 904. The court cited Johnson v. Zerbst, 304 U.S. 458, 464 (1938), which applied the standard of intentional relinquishment of a known right to the waiver of assistance of counsel in a criminal trial.
38 323 F. Supp. at 904.
39 Id.
The Ninth Circuit agreed with the district court's opinion that acceptance of court martial orders constitutes a waiver of fundamental rights and that the wording of the statute seemed to indicate "that Congress may have desired a truly voluntarily acceptance." Nonetheless, the circuit court reversed. It concluded that since a reservist accepts the orders "only as part of the contractual transaction of enlistment," it is sufficient if "the contract law standards of notice and volitional act are met." The court continued: "One who enters a contract is on notice of the provisions of the contract. If he assents voluntarily to those provisions after notice, he should be presumed, in the absence of ambiguity, to have understood and agreed to comply with the provisions as written. This is hornbook contract law."

The Ninth Circuit thus argued that the orders by which reservists are subjected to court martial jurisdiction constitute contracts and that, since Wallace had signed the orders, he must, according to contract law, be presumed to have understood them. It is difficult, however, to see why acceptance of the orders should be considered the making of a contract. The matter is governed by the statutory provision of the Uniform Code requiring voluntary acceptance, and this provision should, like all statutes, be construed to accord with constitutional requirements, without reference to the principles of contract law.

Contract principles have also been used to dispose of due process challenges to the procedures by which reservists are ordered to active duty for unsatisfactory participation in their reserve units. In Ansted v. Resor, the reservist claimed that his activation was unconstitutional because he had not been accorded a hearing. The court responded that the statutes and regulations did not require a hearing and that the reservist had contractually agreed to be subject to the procedures that they set forth. In Mickey v. Barclay, the court held it unnecessary

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40 451 F.2d at 1377. The court noted that article 2(3) is the only one of the twelve jurisdictional provisions of article 2 that makes UCMJ jurisdiction dependent upon voluntary submission.
41 Id.
42 Id.
43 10 U.S.C. § 673a (1970), authorizes the President to order to active duty for a period of up to 24 months "any member of the Ready Reserve . . . not assigned to, or participating satisfactorily in, a unit of the Ready Reserve." The President delegated that authority to the Secretary of Defense, Exec. Order No. 11366, 10 U.S.C. § 673a (Supp. 1972); the Secretary of Defense, in turn, delegated it to the secretaries of the armed forces, 32 C.F.R. §§ 100.8(a)(b), 101.3 (1972), who have promulgated regulations specifying activation procedures, e.g., Army Reg. (AR) 135–91, Policies and Procedures Governing Satisfactory Participation (June 11, 1968).
44 457 F.2d 1020 (7th Cir. 1971).
to determine whether activation procedures conformed to the requirements of due process because, the court stated, involuntary activation is simply a "sanction imposed upon a reservist for breach of his enlistment contract."47

Involuntary activation procedures are, however, no more contractual than the statutory provisions authorizing court martials. The documents that an enlistee signs when he enlists contain no provisions describing the procedures for involuntary activation. Even if the documents did contain such provisions, the real issue would remain what safeguards, if any, are constitutionally required48 in procedures by which the government affects substantial individual interests and deprives individuals of their liberty and constitutional rights.49 Contract principles can be of no help in resolving this question since contractual provisions cannot alter constitutional requirements, and the methods by which constitutional rights may be waived50 must be determined by reference to the Constitution itself.

B. Procedures for Effecting Enlistment.

The courts have frequently applied contract principles to resolve disputes concerning the procedures necessary to effect enlistment.51


49 The courts have generally acknowledged that the individual interests affected by activation are substantial. E.g., O'Mara v. Zebrowski, 447 F.2d 1085, 1089 (2d Cir. 1971). In Ansted and Mickey, petitioners were separated from their homes and employment for seventeen and sixteen months respectively, and were subjected to a significant loss of liberty and forfeiture of constitutional rights for those periods. See notes 95-96 infra.

50 In Gianatasio v. Whyte, 426 F.2d 908, 911 (2d Cir. 1970), cert. denied, 400 U.S. 941 (1970), the court implied that the "contract agreement" could "waive . . . procedural rights which might have otherwise existed without it."

51 An analogous problem, involving the procedures necessary to terminate an enlistment, was created by an opinion of the Attorney General which held that since an enlistment was a "contract . . . for a specific term of service . . .," it automatically ended when the term of enlistment expired, thus implying that an enlistee who simply departed from his post at that time could not be prosecuted for absence without leave or desertion. 15 Op. ATT'Y GEN. 152, 161 (1876) (emphasis in original). However, in United States v. Downs, 3 U.S.C.M.A. 90, 11 C.M.R. 90 (1959), the Court of Military Appeals expressly refused to apply the contract concept to this situation and held that "[b]ecause of the compelling necessity for an orderly separation procedure," an enlistment does not terminate until the enlistee is formally "discharged through one of the 'recognized legal modes of separation from the service'." Id. at 92, 11 C.M.R. at 92. See also United States v. Scott, 11 U.S.C.M.A. 646, 29 C.M.R. 462 (1960).
Among the consequences of this application of contract rules is the doctrine of constructive enlistment. For example, in a 1918 opinion the Army Judge Advocate General argued that "since an enlistment is the act of making a contract to voluntarily serve the Government as a soldier," it follows "logically that an enlistment contract can be implied as well as expressed"; therefore, the Judge Advocate concluded, an enlistment can be effected by the receipt of military pay or other benefits. The Judge Advocate's opinion, and the doctrine of constructive enlistment that it expressed, is clearly contrary to the Supreme Court's holding in Grimley that enlistment must be effected by formal oath. The requirement of a formal oath may serve a cautionary function, deterring ill-considered or accidental enlistments—a function of particular importance in view of the serious consequences that enlistment may have, including loss of liberty and forfeiture of certain constitutional rights. Despite these considerations, the doctrine of constructive enlistment has persisted.

The rules of contract have also been employed in cases concerning misconduct or misrepresentation by military recruiters. In Ex parte Blackington, for example, the court found that the recruiter had been...

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52 1918 Op. JAG 488 (1918). A civilian present at the National Guard Armory when the regiment was mobilized was "ordered to fall in." He obeyed the order, trained and served with the regiment for a year, and then applied for a discharge on the ground that he was not legally in the service because he had neither enlisted nor been inducted. The discharge was denied on the ground that the civilian had effected an implied enlistment by receiving pay and by rendering military service.

53 137 U.S. 147, 156 (1890). One issue in Grimley was "whether petitioner had, in fact, enlisted." Id. at 155. Immediately after he took the oath of enlistment from the recruiter, petitioner departed; he was arrested three months later as a deserter. The Court noted that article 47 of the Articles of War subjected to court martial jurisdiction "[a]ny . . . soldier who, having received pay, or having been duly enlisted . . . deserts . . . ." Id. at 156. Since Grimley had not received pay, it was necessary for the Court to determine what constituted an enlistment. Although the Court recognized that Grimley could have been court martialed if he had received pay, it did not suggest that the receipt of pay could constitute an enlistment. Since the receipt-of-pay clause was later eliminated from the desertion article, Act of Aug. 29, 1916, ch. 418, art. 58, 39 Stat. 660, there is presently no basis whatever for the notion that the receipt of pay subjects a person to court martial jurisdiction.

54 10 U.S.C. § 502 (1970), requires that every enlistee take an oath but is silent as to whether taking the oath is sufficient or necessary to effect an enlistment. 10 U.S.C. § 1031 (1970), however, implies that the oath is "required" to effect an enlistment.

55 See the discussion of "The Functions Performed by Legal Formalities" in Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800 (1941).


“actuated by bias and hostility”; he had enlisted the petitioner in the heavy artillery even though he had discovered that the petitioner suffered from a physical infirmity which would render duty near cannons hazardous. The court, nonetheless, dismissed the petition for habeas corpus. It held that, although the recruiter might be accountable to his superiors for enlisting a person unfit for service, he had no obligation to the petitioner to determine fairly his fitness for artillery duty. The court explained that enlistment “rests on a contract between the recruit and the government” based on the recruit’s offer of service and its acceptance by military authorities. In making this contract, the court stated, “the parties deal at arm’s length; neither occupies a fiduciary position towards the other; each looks out for his (or its) own interest.”

In several recent cases in which enlistees have sought discharge on the ground that their enlistments were induced by misrepresentation, the courts’ tendency to frame enlistment in contract terms has had two important consequences. First, courts have held applicable to such cases the principle of government contract law that agents of the United States cannot bind it contractually except within the scope of their actual authority. And second, they have assumed that the disclaimers in Department of Defense Form 4 are contractual provisions and must be construed according to orthodox contract principles.

In Gaumann v. Clifford, for example, an enlistee alleged that the recruiter had induced him to enlist by representing that upon enlistment in the Army’s Europe Option he would be assigned to Europe for four years. The enlistee claimed that the Army had breached its contract by reassigning him to Viet Nam after only one year in Europe. The district court ignored the question whether the recruiter had made the alleged representations. Instead, it scrutinized the enlistment

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58 Id. at 802.
59 Id. at 803. The continuing vitality of this arm’s length bargaining principle was evident in Wallace v. Chafee, 451 F.2d 1374 (9th Cir. 1971), in which the court assumed that since the court martial orders were presented to the reservist at the time he enlisted, the standard of voluntariness applicable to his acceptance of the orders was the same arm’s length bargaining contract standard applicable to the rest of the enlistment procedure.
60 Civil No. 49769 (N.D. Cal., Mar. 10, 1969), aff’d. sub nom., Gaumann v. Laird, 422 F.2d 394 (9th Cir. 1969).
61 The particular cases discussed in this section involve enlistees in the specialized enlistment programs discussed at note 122 infra, but the present discussion is applicable to all types of enlistment.
62 Although the Ninth Circuit affirmed per curiam on the basis of the district court’s determination “that no such guarantee as petitioner now claims was given,” Gaumann v. Laird, 422 F.2d 394, 395, the district court found only that the Army had made no such guarantee, not that the recruiter had made no verbal guarantee, Gaumann v. Clifford, Civil No. 49769 (N.D. Cal., Mar. 10, 1969); see note 63 infra.
documents and concluded that, since they contained no such guarantees, no relief was available. Because the petitioner in *Gausmann* framed the issue in terms of contractual breach, he could not prevail without a showing that the recruiter's representations were contractual terms, a result precluded by three orthodox contract principles: (1) such representations are not binding on the Army because the recruiter lacked authority to make them; (2) provisions in the documents that disclaim verbal promises must be enforced like other contractual provisions; and (3) such oral representations are inadmissible parol evidence.

Since he did not seek to enforce his enlistment contract by specific performance or damages, but merely sought discharge from the Army, the enlistee in *Gausmann* could simply have sought annulment of his enlistment on the ground that it had been induced by misrepresentation. This theory of the case could have been advanced whether or not enlistment is viewed as a contract and would have rendered the actual authority and parol evidence rules irrelevant. This approach was taken by the enlistee in *Shelton v. Brunson*. In that case, the enlistee alleged that he had been induced to reenlist by representations that he

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63 The court concluded: "None of the documents which constitute the enlistment contract indicate that the United States Army promised petitioner a tour of duty in Europe . . . for the entire term of his four year enlistment." *Gausmann v. Clifford*, Civil No. 49769, at 3 (N.D. Cal., Mar. 10, 1969).

64 For the principle that agents of the United States cannot bind it contractually except within the scope of their actual authority, see, e.g., *Condec Corp. v. United States*, 369 F.2d 753 (Ct. Cl. 1966); *Newman v. United States*, 185 F. Supp. 953 (Ct. Cl. 1955).

65 Petitioner had signed a statement of understanding which provided: "In connection with my enlistment in the Regular Army this date, I hereby acknowledge that I completely understand the following: That all promises made to me are contained in items 11, 13 or 37 of the DD Form 4, my enlistment record . . . ." *Gausmann v. Clifford*, Civil No. 49769, at 2 (N.D. Cal., Mar. 10, 1969).


met the physical requirements for an officer training program. Midway through the program, however, he was dismissed from it because he did not, in fact, meet those requirements, and he was reassigned to Iceland. The enlistee sought discharge on the ground that his enlistment had been induced by fraudulent misrepresentations. The district court denied relief, and the Fifth Circuit, in turn, denied a stay of the order transferring the enlistee to Iceland. The district court relied on both the actual authority doctrine and on the disclaimer contained in item 54 of Form 4, which states that "no promise of any kind has been made to me concerning assignment to duty, geographical area, schooling, [or] special programs . . . ." The court, applying ordinary contract principles, considered this provision conclusive evidence that the enlistee had not relied on any oral representations.

As Judge Wisdom argued in his forceful dissent to the Fifth Circuit's decision denying a stay, the district court's reliance on these contract doctrines was misplaced. First, the fact "that the recruiters lacked actual authority to bind the Air Force [was] irrelevant." Since the enlistee was seeking to avoid the enlistment on the ground of misrepresentation, "[t]he question [was] . . . one of apparent authority: whether it was reasonable for Shelton to conclude that the recruiters had the authority to bind the Air Force which their very function, and apparently their own words, suggested they would have."

Second, Judge Wisdom argued that if contract principles were to be applied, they should be those applicable to contracts of adhesion. In enlistment, as in transactions that have been characterized as adhesion contracts, standardized forms prepared by one party are presented to the other on a take-it-or-leave-it basis, and one of the parties is in exclusive control of important information concerning the subject matter.

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70 See Wong v. Laird, 4 S.S.L.R. 3650 (N.D. Cal. 1971), which granted such relief. The court found that the petitioner had been induced to enlist in the Army by a recruiter's representation that he would be assigned to duty as a stenographer. The court ordered that if petitioner was not assigned duty as a stenographer within twelve days, a writ of habeas corpus would be granted requiring that he be discharged.
72 Shelton v. Brunson, 454 F.2d 737 (5th Cir. 1972). An application for stay was denied by Justice Powell, No. A-880 (U.S., Feb. 28, 1972), was temporarily granted by Justice Douglas for the reasons stated in Judge Wisdom's dissent, No. A-880 (U.S., Mar. 4, 1972), and was denied by the Supreme Court, 405 U.S. 983 (1972).
73 454 F.2d at 737-38.
74 Id. at 737 (emphasis in original).
75 Id.
76 Some commentators have pointed out that such transactions should not necessarily be regarded as the formation of a contract. Bolgar, The Contract of Adhesion, 20 Am. J. Comp. L. 55, 55-56 (1972); Endrey, supra note 14, at 335.
of the transaction. This inequality of information is largely the result of enlistment procedures that fail to provide the enlistee with objective and complete information about the armed forces. The recruiter, a trained salesman for military programs under pressure to fill enlistment quotas, cannot be considered a source of such information; nor do the enlistment documents fill the gap. The documents, which contain a considerable amount of military jargon and fine print with cross-references to other military documents and no emphasis on the disclaimers, virtually compel the enlistee to rely on the recruiter for assistance in interpreting them. Moreover, Form 4 is only one of many documents presented to the enlistee when he enlists.

Judge Wisdom argued that the disclaimer in item 54 was ambiguous in its application to the alleged representations and that under adhesion contract principles it should be construed as inapplicable to

77 Another characteristic of many transactions referred to as adhesion contracts is a gross inequality of bargaining power between the parties. The essential characteristic of the adhesion contract, however, is that one party's acceptance of the terms is involuntary, either because of an inequality of bargaining power or information. See, e.g., Henningens v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960), which discusses both the superior bargaining position of automobile manufacturers, id. at 389-91, 161 A.2d at 86-87, and the inequality of information caused by the obscurity of the particular disclaimer in that case, id. at 365-67, 161 A.2d at 73-74. See also M. Benfield, New Approaches in the Law of Contracts 75 (1970). For a discussion of the principles of construction applied to the insurance contract, an adhesion contract characterized by gross inequality of information between the parties, see Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 208 A.2d 638, 644-45 (1965).

78 See Scepansky, The Techniques of Modern Recruiting, 19 Air U. Rev. 73, 76-77 (1968). The author, a brigadier general in the Headquarters of the Air Force Recruiting Service, states: "All would-be recruiters are introduced to the techniques of recruiting and interviewing in an eight-week Recruiter Training Course at Lackland AFB, Texas. . . . The students learn enough fundamental psychology so they can probe into a prospect's basic interests, desires, and ambitions. Once these are established, the recruiter learns to concentrate on those aspects of an Air Force career which would most appeal to the prospect—education, job satisfaction, security, etc. He discovers how to establish empathy with the prospect and overcome objections, and he acquires an intuitive sense of when to close the sale." Serious charges concerning hard-sell tactics of over-zealous recruiters are made in P. Barnes, Pawns, The Flight of the Citizen-Soldier 33-58 (1972), and in Hearings Before the Special Subcomm. on the Draft of the House Comm. on Armed Services, 91st Cong., 2d Sess. 12,656 (1970).

79 Each recruiting district and each recruiter receives a periodic enlistment quota which is expected to be filled. The Report of the President's Commission on an All-Volunteer Armed Force 65 (1970); Scepansky, supra note 78, at 84.

80 See, e.g., NAVPERS 15838A, supra note 1, art. B-1501. Other documents which all enlistees in the Navy must complete or sign include: Department of Defense (DD) Form 98, Armed Forces Security Questionnaire (four pages); Department of Defense (DD) Form 398, Statement of Personal History (four pages); Naval Personnel (NAVPERS) Form 1130/2, Fraudulent Enlistment Warning (two pages); General Services Administration Standard (SF) Form 93, Report of Medical History (two pages); Naval Personnel Form (NAVPERS) 1130/18, Affirmation of Truthfulness (one page).
them. Although the Fifth Circuit had refused to grant a stay of Shelton's transfer order, it recently vacated the district court's decision in Shelton and remanded the case for further proceedings. The court relied on a subjective theory of contract closely akin to adhesion principles. It agreed with Judge Wisdom that the disclaimer was ambiguous in its application to Shelton's medical qualifications for a commission and held that the disclaimer would not be effective unless both Shelton and the Air Force intended it to cover this question. The court held that if either Shelton or the Air Force did not so intend and if Shelton could establish that the alleged misrepresentations had been made, then Shelton was, as a matter of law, entitled to avoid the enlistment contract.

Even in the absence of ambiguity, however, the enforceability of the disclaimer is open to question. The courts have often refused to give effect to such clauses in adhesion documents when they are not conspicuous and prominently placed. Although item 54 is not in smaller print than the rest of the document—unlike the famous disclaimer in Henningsen v. Bloomfield Motors, Inc.—it is at the bottom of a dozen sentences of fine print and is unemphasized. Moreover, the prominence of item 54 must be judged in the context of the entire enlistment procedure. Under this approach, the disclaimer may be used as some evidence that the enlistee did not rely on the alleged misrepresentations, even though it cannot be taken as conclusive evidence of nonreliance. This approach may, therefore, be more realistic than those suggested in Judge Wisdom's dissent and in the Fifth Cir-
cuit's opinion. Under Judge Wisdom's approach, the ambiguous disclaimer is construed to be inapplicable to the misrepresentations; under the Fifth Circuit's, the disclaimer is inapplicable if the enlistee did not intend it to apply. Thus, under neither approach could the disclaimer be taken as evidence—however inconclusive—of nonreliance.

Another perspective on the misrepresentation problem can be obtained by abandoning the contract concept entirely and by viewing enlistment, not as the making of a contract, but simply as an administrative procedure by which persons enter the armed forces. Viewed in this way, analogies can be drawn from cases involving induction, the alternative method of entering the armed services. The courts have held that an inductee must be discharged from the armed services if his induction was precipitated by a prejudicial violation of Selective Service regulations. Since the armed services, as well as the Selective Service System, are required to follow their own regulations, and since some of the services have issued regulations that prohibit recruiters from making misrepresentations to enlistees, enlistees should be afforded similar relief. Moreover, recent decisions have held that even in the absence of such regulations, the Selective Service System has an

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87 For criticism of these indirect approaches, see Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 204-06 (2d Cir. 1955) (Frank, J., dissenting); Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629, 635 (1943).

88 Under this approach, as under the direct contract of adhesion approach, see text at note 84 supra, disclaimers such as item 54 are merely some evidence that the enlistee did not rely on the alleged misrepresentations.


90 See, e.g., Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Joy v. Resor, 342 F. Supp. 70 (D. Vt. 1972). The principle that administrative action in violation of regulations can constitute a denial of due process has been limited to military regulations developed for the "protection" or "benefit" of servicemen, as opposed to regulations designed simply to promote the efficient functioning of the military establishment. Silverthorne v. Laird, 460 F.2d 1175, 1186 (5th Cir. 1972); Cortright v. Resor, 447 F.2d 245, 251 (2d Cir. 1971). But see Clark v. Brown, 414 F.2d 1159 (D.C. Cir. 1969).

91 E.g., ATCM 33-2, supra note 2, para. 1-6 (emphasis in original): "Recruiting personnel will not make promises to applicants, except as authorized by this or other Air Force Directives... A single instance of misrepresentation, deception or other omission of vital facts when information is given the applicant by recruiting personnel will not be condoned." See also NAVPERS 15838A, supra note 1, art., 8-1114; AR 601-210, supra note 2. It is difficult to understand the purpose of such regulations if they are not for the protection of enlistees. See note 90 supra.
affirmative duty to give clear and correct information and advice when requested to do so;\(^9\) and that an inductee prejudiced by erroneous information given him by Selective Service personnel must be discharged.\(^9\) This principle has been applied even when the Selective Service employee had neither authority to dispense information nor an intention to mislead the inductee.\(^9\) The inquiry is simply whether the inductee relied to his detriment on the erroneous representation. Since both enlistment and induction result in an identical loss of liberty\(^9\) and forfeiture of constitutional rights,\(^9\) and both inductee and enlistee require information in order to make important decisions,\(^9\) the stan-


\(^{93}\) Powers v. Powers, 400 F.2d 438 (5th Cir. 1968).

\(^{94}\) See, e.g., United States v. Burns, 431 F.2d 1070, 1074 (10th Cir. 1970).

\(^{95}\) Retention in the armed forces has been held to constitute a sufficient deprivation of liberty to warrant extension of the habeas corpus remedy, which was originally restricted to persons in actual physical confinement, to members of the armed forces, and to members of reserve components. E.g., Jones v. Cunningham, 371 U.S. 236, 238 (1962); Hammond v. Lenfest, 398 F.2d 705, 710 (2d Cir. 1968); see Hansen, The Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military I, 3 S.S.L.R. 4001, 4002-03 (1971); Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1252-59 (1970).

\(^{96}\) The enlistee forfeits certain constitutional rights of civilian criminal procedure. He becomes subject to trial by a court martial, which is an administrative tribunal established under article I, section 8 of the Constitution, independent of the article III judicial power, United States ex rel. Toth v. Quarles, 350 U.S. 11, 14-17 (1955), without grand jury indictment (by express provision of the fifth amendment), and without a jury, Ex parte Quirin, 317 U.S. 1, 39 (1942). For an extensive discussion of the differences between civilian and military trials, see O'Callahan v. Parker, 355 U.S. 258, 261 (1969). Although Justice Black's observation in Reid v. Covert, 354 U.S. 1, 37 (1957), that "it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials," is still sound, it should be noted that the Court of Military Appeals has extended to courts martial many civilian procedures. For a recent summary, see Remcho, Military Juries: Constitutional Analysis and the Need for Reform, 47 IND. L.J. 193, 209-10 (1972). But see Parisi v. Davidson, 405 U.S. 34, 52 n.4 (1972) (Douglas, J., concurring).

The enlistee also suffers a curtailment of first amendment rights. T. Emerson, The System of Freedom of Expression 57 (1970). See also Cortright v. Resor, 447 F.2d 245, 252 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972); Noland v. Irby, 341 F. Supp. 818, 820-21 (W.D. Ky. 1971). Although ordinary government employees are also subject to restraints on their freedom of expression, United Public Workers v. Mitchell, 330 U.S. 75 (1947), the restraints imposed on the enlistees are unique because they are irrevocable.

\(^{97}\) The enlistee must decide whether to take the oath of enlistment (which is necessary to effect an enlistment, see note 53 supra). The inductee must decide whether to apply for certain deferments and to make certain appeals, see, e.g., United States v. Fisher, 442 F.2d 109 (7th Cir. 1971), and whether to take the step forward in the induction ceremony, which is necessary to effect induction, Billings v. Truesdell, 321 U.S. 542, 559 (1943);
standard applied in Selective Service cases should also be applied in cases concerning enlistment.98

II. ENLISTMENT AS A SOURCE OF CONTRACTUAL RIGHTS

Because of their tendency to view enlistment as a contract, the courts have assumed that enlistees have certain contractual rights, of which they cannot be deprived without due process of law. Although most of the courts have grounded such rights on specific written provisions in enlistment documents, a few courts have held that, even in the absence of such provisions, statutes governing enlistees are a source of contractual rights and that the power of Congress to alter such rights by statutory amendment is restricted by the fifth amendment.99

However, if the term "contract" is to have any meaning at all, an enlistee's contractual rights must be based on specific representations.


98 Analogies can also be drawn from standards of nonmisrepresentation and disclosure required in other governmental procedures which impose a loss of liberty and forfeiture of constitutional rights, such as criminal trial. See notes 95-96 infra. But see Wallace v. Chafee, 451 F.2d 1374, 1377 (9th Cir. 1971), discussed at notes 40-50 supra, in which the court distinguished enlistment from criminal trial on the ground that, whereas the criminal defendant has the court procedure "thrust upon him," the enlistee's entry into the armed forces is "purely volitional." Although that distinction could also be drawn between enlistment and induction, it is formalistic because both procedures have identical consequences. A distinction that could be drawn between enlistment and criminal trial is simply that the latter results in a more complete deprivation of liberty and constitutional rights, and, for that reason, more stringent safeguards may be necessary to ensure that the criminal defendant is informed of his rights.

99 For example, in Morse v. Boswell, 289 F. Supp. 812 (D. Md. 1968), aff'd per curiam 401 F.2d 544 (4th Cir. 1968), cert. denied, 393 U.S. 1052 (1968), 113 members of an Army reserve unit activated by the President during the Pueblo incident sought an injunction preventing the activation on the ground that it was in violation of their enlistment contracts. At the time the reservists enlisted, a statute provided that reserve units could be activated by the President only "in time of national emergency declared by the President." Subsequently Congress amended the statute to provide that reserve units could also be activated by the President "when he deems it necessary." The reservists contended that presidential activation pursuant to the amendment without a declaration of national emergency constituted a contractual breach. The documents that the reservists signed at the time of their enlistments contained no provision specifying the circumstances under which reserve units could be activated by the President, but the district court assumed that enlistment established a contractual relation and held that "the provisions of statutory law existing when each petitioner . . . [enlisted] became part and parcel of the enlistment contract." 289 F. Supp. at 814. It was then compelled to impose a questionable construction on the newly discovered contractual provisions in order to prevent their violation by the statutory amendment. Accord, Goldstein v. Clifford, 290 F. Supp. 275 (D.N.J. 1968); Sullivan v. Cushman, 290 F. Supp. 659 (D. Mass. 1968). See also Allman, Congress, the Courts, and the Unready Reservist, 23 JAG J. 113 (1969). For criticism of these courts' construction of the phrase "when otherwise authorized by law," see Morse v. Boswell, 393 U.S. 802, 808 (1968) (denial of application for stay) (Douglas, J., dissenting); Morse v. Boswell, 393 U.S. 1052 (1968) (denial of certiorari) (Douglas, J., dissenting).
made to him at the time of his enlistment.\textsuperscript{100} As Justice Douglas pointed out in his dissent in \textit{Morse v. Boswell}, the mere existence of a statute is no more a source of contractual rights for an enlistee than it is for any other citizen: "[I]t is within the power of Congress to change existing law and no type of estoppel interferes with its law-making power. . . . The disappointment realized by those who relied only on general law but did not have that explicit promise from their government in contract form is disappointment of a kind shared by all citizens in a society of shifting law."\textsuperscript{101}

Even when it is claimed that specific provisions in enlistment documents are sources of contractual rights it is necessary to examine the particular provisions and the reasons for regarding them as contractual. At the outset, it is useful to distinguish between two types of provisions: first, those that paraphrase statutes, such as certain provisions in the reserve component statements of understanding;\textsuperscript{102} and second,

\textsuperscript{100} Whether contractual obligation is viewed as based upon agreement, \textit{G. TRETtel, THE LAW OF CONTRACT} 1 (1970); \textit{UNIFORM COMMERCIAL CODE} § 1-201 (1972 version), or upon promise, \textit{I A. CORBIN, CONTRACTS} § 3 (1963), \textit{RESTATMENT OF CONTRACTS} § 1 (1932), it is based either upon the parties' actual intent and expectations concerning future events (the subjective or meeting-of-the-minds approach, see, e.g., \textit{T. PARSONS, supra} note 5), or upon a reasonable interpretation of the external manifestations of their intent and expectations, that is, of their acts and words (the objective approach, see, e.g., \textit{O. HOLMES, THE COMMON LAW} 309 (1881); \textit{I S. WILLISTON, supra} note 25, § 95). Since enlistment is a transaction between the enlistee and agents of the armed forces, an enlistee's contractual rights must be based upon those agents' written or verbal representations.

The mere existence of a statute is not a source of contractual rights because statutory provisions do not, in and of themselves, constitute promises concerning the legislature's future actions. \textit{See Wisconsin & Michigan Ry. v. Powers}, 191 U.S. 379, 387 (1903). A statute can be considered a source of contractual rights only if it is expressly or implicitly adopted by the parties as a contractual term. Williston attacked the judicial practice of treating a statute as an implied contractual term merely because it was in existence at the inception of the contract: "Doubtless, law frequently is adopted by the parties as a portion of their agreement. Whether it is or not in any particular case should be determined by the same standard of interpretation as is applied to their expressions in other respects." \textit{4 S. WILLISTON, supra} note 25, § 615, at 614. The results of that practice can sometimes be justified on policy grounds, \textit{see} \textit{Javins v. First Nat'l Realty Corp.}, 428 F.2d 1071, 1072-73, 1081 n.56 (D.C. Cir. 1970), but they cannot be justified by the policies supporting the enforcement of contracts, \textit{see} text at notes 130-31. The analysis in such cases could be clarified by separating the contractual and the statutory elements of complex legal relationships.

\textsuperscript{101} \textit{Morse v. Boswell}, 393 U.S. 802, 807 (1969) (denial of application for stay); \textit{see} text at note 105 \textit{infra}; \textit{cf.} \textit{Linsalata v. Clifford}, 290 F. Supp. 338 (S.D.N.Y. 1968), which involved the same fact situation as \textit{Morse} except that the documents signed by the reservist contained an express provision paraphrasing the old statute.

\textsuperscript{102} \textit{E.g.}, \textit{Navy-Marine Corps (NAVMC) Form 10480, Statement of Understanding upon Enlistment in the Marine Corps Reserve Six-Month Training Program} (Apr., 1967); \textit{Naval Personnel (NAVPERS) Form 1130/3, Statement of Understanding, Six Year Enlistment Program}, USNR (4-10 Months Active) (June, 1966).
those found in documents used for special enlistment programs, which concern matters governed by military regulation and constitute promises made to induce enlistment.

A. Reserve Component Statements of Understanding

Most courts have considered the statement of understanding a source of contractual rights. This conclusion appears to be based on a general assumption that all documents the enlistee signs are necessarily contracts rather than on any appraisal of the intent and effects of the provisions. For example in Pfile v. Corcoran, an enlistee in the Army Reserve signed, in addition to Form 4, a statement of understanding which provided: "If in any year I fail to perform satisfactorily any of the requirements set forth above, I can be ordered to perform active duty for training for a maximum of 45 days or be reported to selective service for immediate induction." This provision paraphrased statutes in effect when the document was signed, which Congress later amended to increase the maximum period of activation to two years.

When the enlistee was subsequently activated for seventeen months, he sought release from active duty on the ground that the activation violated the terms of his enlistment contract. The district court held that the document was a contract and that it had been breached by the activation; nonetheless, it concluded that the breach was justified as an exercise of Congress's war power.

Because the court assumed that enlistment necessarily creates a contractual relationship and, therefore, began its analysis by searching for the contract's terms, it rejected the Army's contention that the statement of understanding "does not purport to be any sort of contract or commitment, and has no legal effect other than to indicate that the enlistee is aware of the applicable law at the time of enlistment."

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103 See documents cited note 123 infra.
106 287 F. Supp. at 557.
109 The court based this assumption on a misreading of In re Grimley, 137 U.S. 147 (1890), which it cited for the proposition that "enlistment in the military service of the United States is a voluntary act establishing a contractual relationship." 287 F. Supp. at 556. See text and notes at notes 8-16 supra.
110 287 F. Supp. at 557.
111 Id.
There are at least two reasons why the Army's contention should have been accepted. First, it is doubtful that Congress has authorized the armed services to enter into contracts regarding subjects governed by statute. The Supreme Court has suggested that in determining whether a statute is the source of contractual rights, "it is of first importance to examine the language of the statute" to see whether it "provides for the execution of a written contract on behalf of the state..." It is difficult, however, to find language in the statutory provisions governing enlistees that can be construed in this way. Indeed, it is questionable that Congress has authorized the armed services to enter into contracts with enlistees regarding any subject. Even if such authorization can be implied from statutory provisions delegating broad powers to the secretaries of the armed forces and authorizing them to conduct intensive recruiting campaigns, it is doubtful that Congress intended to restrict its freedom to amend statutes by authorizing the services to make binding commitments to enlistees concerning statutory subjects. Second, contractual guarantees concerning subjects governed by statute are superfluous so long as the statute remains in force and, as the court's invocation

112 Dodge v. Board of Educ. 302 U.S. 74, 78 (1937); see Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 104 (1938). Both cases involved attacks on state legislation under the contract clause. In cases in which the Court has found congressional legislation abrogating government contracts violative of the due process clause of the fifth amendment, the contracts have been expressly authorized by statute. Perry v. United States, 294 U.S. 330, 346-47 (1935); Lynch v. United States, 292 U.S. 571, 576 (1934).

113 Possible examples of such provisions are 10 U.S.C. § 679 (1970), which provides for "active duty agreements" by which members of reserve components serve on active duty for extended periods, and 10 U.S.C. §§ 4348, 6959, 9348 (1970), which require cadets at the service academies to sign "agreements."

114 With the exception of 32 U.S.C. § 304 (1970), which provides that "[e]ach person enlisting in the National Guard shall sign an enlistment contract . . . ." no statutory provision expressly refers to "enlistment contracts." Although there are significant differences between enlistment in the National Guard and in other reserve components, see Johnson v. Powell, 414 F.2d 1060, 1063 (5th Cir. 1969), it is difficult to understand why enlistment in the National Guard should create a contractual relationship if enlistment in other reserve components does not.


116 Id. § 503.

117 For example, in Morse v. Boswell, 289 F. Supp. 812 (D. Md. 1968), aff'd per curiam, 401 F.2d 544 (4th Cir. 1968), cert. denied, 393 U.S. 1052 (1968), discussed at note 99 supra, the alleged contract with the enlistee concerned the procedure by which the President may activate reserve units to deal with an international crisis, a matter governed by 10 U.S.C. § 673(a) (1970).

118 The enlistee can simply bring an action to enforce the statute, such as an action in the Court of Claims to collect the pay and allowances prescribed by 37 U.S.C. § 204 (1970). See, e.g., Sofranoff v. United States, 165 Ct. Cl. 470 (1964); Clackum v. United States, 148 Ct. Cl. 404 (1960).
of the war power indicates, virtually worthless as soon as the statute is amended.

One factor, however, militates in favor of treating as contractual the statute-paraphrasing provisions of the reserve component statements of understanding. The documents and provisions are at present so ambiguous that a potential enlistee may be induced to enlist by statements that, he could reasonably believe, limit his reserve obligation.\(^1\)

Since the armed forces almost certainly do not intend such provisions to be contractual commitments,\(^2\) the problem could be solved most expeditiously by redrafting the documents to make that fact clear.\(^3\)

### B. Special Enlistment Programs

The courts have also assumed that when a person enlists in one of the armed services’ special enlistment programs,\(^4\) the provisions in his enlistment documents concerning the special training and duty assignments he is to receive\(^5\) are contractual.\(^6\) Unlike the provisions

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\(^1\) That such a belief would be reasonable is indicated by the fact that during the flood of litigation that followed the enactment of 10 U.S.C. § 673a (1970), more than two dozen federal courts accepted the contention that those documents contained contractual provisions limiting the enlistee's obligations. See Mellinger v. Laird, 339 F. Supp. 434, 444-46 (E.D. Pa. 1972), and cases cited therein.

\(^2\) For example, the regulation governing the Marine Corps Reserve statement of understanding provides that the document is “explanatory and not contractual in nature.” MCO P. 1100.61C, supra note 1, para. 2340. However, no such explanation appears in the document itself, Navy-Marine Corps (NAVMC) Form 14080, Statement of Understanding upon Enlistment in the Marine Corps Reserve Six-Month Training Program (Apr., 1967), and the courts that have dealt with the document have proceeded on the assumption that its provisions are contractual, Weber v. United States, 288 F. Supp. 491 (E.D. Pa. 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), cert. denied, 393 U.S. 896 (1968).

\(^3\) A clause similar to the following could be added: “The statements in this document are not promises or guarantees of any kind; they merely explain the present law, which is subject to change at any time by Act of Congress.”

\(^4\) These special enlistment programs include the Army’s Europe Option, AR 601-210, supra note 2, table 5-8 (change no. 5, Jan. 26, 1970), and Language School Option, id., table 5-17; the Navy’s Nuclear Field Program, NAVPERS 15838A, supra note 1, art. B-4111; the Marine Corp’s Ground Enlistment Program, Marine Corps Order (MCO) 1130.53C, Ground Enlistment Program (Apr. 6, 1972); and the Air Force’s Guaranteed AFSC Program, ATCM 33-2, supra note 2, table 2-3, and Officer Training School Program, id., para. 5-19.

\(^5\) Army, Navy, and Air Force provisions concerning special programs are contained in the following documents: Department of the Army (DA) Form 3286, Statements for Enlistment, Part VI; Naval Personnel (NAVPERS) Form 601-13, Administrative Remarks; Air Force (AF) Form 1114, USAF Enlistment Certificate and Agreement. The name of the document is entered in the blank in item 54 of Form 4. See note 18 supra. The Marine Corps provisions are written on Form 4 itself (items 25, 54). For the governing regulations, see note 2 supra.

\(^6\) E.g., Shelton v. Brunson, No. 72-1042 (5th Cir., Aug. 17, 1972); Rehart v. Clark, 448 F.2d 170 (9th Cir. 1971); Gausmann v. Laird, 422 F.2d 394 (9th Cir. 1969); Chalfant
in the reserve component statements of understanding, these provisions are referred to as "promises" or "guarantees," not only in the enlistment documents, but also in military regulations, recruiting brochures, and mass media advertising. In addition, they concern matters such as training and assignment of enlistees that are not governed by statute and that Congress has committed to military discretion.

Although these provisions cannot be viewed as terms in an otherwise contractual relationship, there is a sound reason for the position that these provisions, in themselves, constitute a contract between the enlistee and the government: it is necessary that some remedy be afforded when special program guarantees are breached, and contractual concepts are useful in framing an appropriate remedy.

1. The Need for Enforcement. Perhaps the central reason for providing a legal remedy for breach of promise is to encourage voluntary reliance on the kinds of promises that benefit society as a whole. Thus, for example, promotion of reliance on private commercial promises is necessary in an economic system that depends largely on free exchange rather than governmental compulsion for the distribution of resources. The promotion of reliance on the promises of


125 See, e.g., Air Force (AF) Form 1114, USAF Enlistment Certificate and Agreement (Oct. 1971): "The Air Force guarantees my initial classification and assignment in AF Specialty Code (AFSC) prior to enlistment, formal technical training, and choice of initial duty assignment upon completion of training." Since the regulations expressly authorize recruiters to make such guarantees, their enforcement is not impeded by the actual authority doctrine. See note 64 supra.

126 See, e.g., ATCM 33-2 supra note 2, para. 2-14(g)(3), which describes the Air Force's Guaranteed AFSC Program: "The Air Force guarantees job assignment prior to enlistment, formal technical training, and choice of initial duty assignment upon completion of training." When recruiters make guarantees that are not authorized by the regulations, the problem can be viewed as one of misrepresentation. See text at notes 68-98 supra.

127 E.g., "You can now enlist in the Air Force and be guaranteed that you will have the job you want." Directorate of Advertising, USAF Recruiting Service, Additional Guaranteed Jobs in the United States Air Force 3 (1972) (emphasis in original).

128 See, e.g., Newsweek, May 15, 1972, at 71; Life, May 19, 1972, at 29.


131 "When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated." Id. at 61. See also F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS 2 (1970).
the government is similarly necessary: to the extent that the government depends on the voluntary action of its citizens, rather than compulsion, to carry out its functions, such as the raising of armies, citizens must be able to rely on the promises that the government has made to induce them to act. If conscription is abolished and if the voluntary action of citizens becomes the sole means of filling the ranks of the armed services, the need to enforce guarantees made to induce enlistment will be particularly great. Recent studies made for the Department of Defense indicate that such promises would be one of the primary inducements of enlistment in an all-volunteer armed force.\textsuperscript{182}

The existence of the draft complicates the problem, however, since a high percentage of enlistees in recent years have probably been motivated by a desire to avoid conscription.\textsuperscript{183} But even under the bargain theory of consideration, the most stringent test that the courts employ to determine whether a promise is enforceable,\textsuperscript{184} voluntary enlistment constitutes sufficient consideration for the military's enlistment guarantee.\textsuperscript{185} The emphasis given such guarantees in the armed forces' recruiting campaigns indicates that they are "bargained for and given in exchange" for voluntary enlistment,\textsuperscript{186} and it can be


\textsuperscript{183} Hearings on the Review of the Administration and Operation of the Selective Service System, Before the House Comm. on Armed Services, 89th Cong., 2d Sess. 9935-36 (1966).

\textsuperscript{184} O. Holmes, The Common Law 293 (1881); Restatement of Contracts § 75 (1932).

The bargain theory has been widely attacked on the ground that it identifies as contractual too narrow a range of promises, 1A A. Corbin, Contracts §§ 199-96 (1963), but it seems evident that those promises that it does identify should be treated as contracts. Moreover, this doctrine has been used to identify contractual promises of the government. E.g., Lynch v. United States, 292 U.S. 571, 576 (1933); Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379, 386 (1903).

Enlistment cannot be regarded as insufficient consideration on the ground that it is merely the performance of a preexisting legal duty. See 1A A. Corbin, Contracts § 175 (1963). Despite the provisions of 50 U.S.C. App. § 454 (1970), no legal duty to serve in the Armed Forces can be said to exist in any realistic sense until an induction order issues. See United States v. Harris, 453 F.2d 862, 863 (9th Cir. 1972), which described the duty imposed by that statute as "a contingent obligation ... which ripens into a fixed obligation ... when the induction order issues." Contra, Note, 18 Am. U.L. Rev. 596, 601 (1969). More importantly, the obligations assumed by enlistment differ from those imposed by induction: the enlistee often assumes a term of service for three to six years, whereas the inductee must serve for only two years. Enlistments in the Navy, for example, are for four, five, or six years depending on the type of enlistment guarantee offered. NAVPERS 15838A, supra note 1, art. B-2206. Moreover, a male between the ages of eighteen and twenty-six may enlist in the Army for two years only if he enlists without an enlistment guarantee. 32 C.F.R. § 571.3 (1972).

Enlistment can, perhaps, most accurately be viewed as consent to, "the creation ... of a legal relation." Id. § 75(1)(c).
assumed that the military would not offer a particular guarantee to an enlistee unless it was necessary to induce his enlistment.\textsuperscript{137}

A judicial remedy for breach of enlistment guarantees is necessary, in addition, because of the inadequacy of the administrative remedies presently available. With the exception of the Army, the armed services have not created specialized administrative machinery to deal with alleged branches of enlistment guarantees, and, even under the Army procedure, disputes are resolved by administrative personnel without formal proceedings.\textsuperscript{138} While these procedures should be exhausted before judicial relief is sought,\textsuperscript{139} it is questionable whether limiting the enlistee to them would satisfy the requirements of due process.\textsuperscript{140}

2. The Utility of the Contract Concept. The proposition that specialized enlistment guarantees are a source of contractual rights does not mean that the entire relationship between the military and an enlistee in a special program becomes contractual simply because such guarantees are made. Rather, it suggests that the relationship should be viewed as governed partly by statute, partly by military regulation, and partly by contract. This conceptualization of enlistment proves useful whether an enlistee fails to receive the guaranteed training and assignments because of administrative action, a change in regulations, or a discrepancy between regulations and the written terms of the guarantee.

a. Administrative Action. If enlistment were viewed as simply a status governed by statutes and regulations, judicial remedies for enlistees who fail to receive guaranteed training or assignments because of administrative action could be based on the duty of the armed forces to follow their own regulations.\textsuperscript{141} But the regulations do not unequivocally require that an enlistee receive what he has been

\textsuperscript{137} The bargain theory is based on an assumption that if bargaining occurs, a party in a free bargaining position, such as the armed services, can protect its own interests. See Farnsworth, \textit{The Past of Promise: An Historical Introduction to Contract}, 69 COLUM. L. REV. 576, 598 (1969).

\textsuperscript{138} See AR 601-210, \textit{supra} note 2, para. 5-4.2 (change no. 4, Sept. 17, 1969).

\textsuperscript{139} Cf. United States ex rel. Norris v. Norman, 296 F. Supp. 1270, 1272 (N.D. Ill. 1969), an enlistment case in which the court dispensed with the exhaustion requirement because "it would be manifestly unfair once again to relegate petitioner to a perhaps non-existent administrative machinery."

\textsuperscript{140} If an enlistment guarantee is a contract, a military administrative procedure that deprives an enlistee of a promised benefit must conform to due process requirements. \textit{See} note 152 \textit{infra}.

\textsuperscript{141} \textit{See} note 90 \textit{supra}.
guaranteed, and the resolution of disputes is left to the discretion of administrative personnel. Any judicial relief must, therefore, be premised on contract principles.

The contract concept suggests at least three forms of relief: discharge from the armed forces (rescission), enforcement of the guarantee (specific performance), and damages. The damages remedy would probably involve insuperable problems of valuation. Discharge on a writ of habeas corpus is, however, an effective and justifiable remedy if the guarantee cannot be kept and if it is assumed that the enlistee would not have entered the armed forces without it. Contrary to a recent suggestion, such a remedy is not barred by the decision of the Supreme Court in Orloff v. Willoughby, in which the Court refused to review military duty orders. If an enlistment guarantee constitutes a valid contract, Orloff's holding that discretionary military action is unreviewable is inapplicable, because administrative action ceases

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142 E.g., AR. 601-210, supra note 2, para. 5-4.1 (change no. 4, Sept. 17, 1969): "Every effort will be made to scrupulously honor all promises made at the time of enlistment or reenlistment. Enlistment commitments will be met... by following established procedures for reporting and assigning individuals enlisted for an option... ."

143 See note 138 supra.

144 Fuller and Perdue's analysis of contract damages, Fuller & Perdue, supra note 130, at 66, suggests three measures of damages: the enlistee's expectation interest—the value of the promised benefit (such as computer training); the enlistee's reliance interest—the cost to the enlistee of his actual service in the military; and the enlistee's restitution interest—the value of the enlistee's actual service (which is already protected by the enlistee's statutory claim for pay and allowances, see note 118 supra). Measurement of the expectation interest involves placing an objective value on such promised benefits as assignment in Europe rather than in a combat zone; whereas measurement of the reliance interest requires both a determination of what portion of the enlistee's total cost is allocable to the contractual benefits (promised benefits) as opposed to the statutory benefits (pay and allowances), and a valuation of the enlistee's loss of liberty and forfeiture of constitutional rights. See notes 95-96 supra.

145 In Schlanger v. Seamans, 401 U.S. 487, 492 (1971), the Supreme Court expressly left open the question "whether, if petitioner be right in contending that his contract of enlistment was breached, habeas corpus is the appropriate remedy." The basis for such relief is that retention in the armed forces in violation of the terms of an enlistment guarantee constitutes unlawful custody.

146 In United States ex rel. Lewis v. Laird, 337 F. Supp. 118, 120 (S.D. Ill. 1972), petitioner sought discharge from the Army Reserve on a writ of habeas corpus on the ground that his enlistment contract had been breached. The court found no breach, but went on to say: "It seems doubtful that the extraordinary remedy sought would ever be available to obtain judicial review of an alleged breach by the Army of the provisions of a contract of enlistment. See Orloff v. Willoughby, supra." Contra, Bemis v. Whalen, 341 F. Supp. 1289, 1291 (S.D. Cal. 1972).

147 345 U.S. 83 (1953).

148 In Orloff, the Court dismissed the petition of a psychiatrist conscripted under the Doctors Draft Act, who sought discharge on the ground that he had been assigned duties, not as a doctor, but as a medical laboratory technician. The Court held that the statute required only that Orloff be assigned to duties within "medical and allied specialist
to be discretionary to the extent that it is governed by contract, as well as by statute or regulation. Specific enforcement of the guarantee, the second possible remedy, would often have the same practical effect as discharge, because the statutes and regulations governing discharge provide that the armed forces may terminate an enlistment at any time for the convenience of the government. Thus, if a court orders specific performance, the armed forces can discharge the enlistee rather than comply.

b. Changes in Regulations. The principle that the armed services must follow their own regulations cannot serve as a basis for judicial relief when regulations are changed to conflict with an enlistment guarantee. If, however, the guarantee is regarded as a contract, it can be argued that under the fifth amendment due process clause a change in regulations cannot deprive an enlistee of his contractual rights. In Winters v. United States, the court considered at length the effect of a change in regulations on the provisions of an enlistment document. Since the case did not involve a special program guarantee, it is doubtful that the enlistment provision with which it dealt should be considered contractual; but the court proceeded on the assumption that it was.

The plaintiff in Winters had enlisted in the Marine Corps Reserve, at which time he signed a statement of understanding that required him to attend 90 percent of all drills scheduled in each year. A subsequent regulation increased the requirement to 100 percent of all categories: since Orloff had been assigned to duties within these general categories, his particular assignment was discretionary and unreviewable. See Cortright v. Resor, 447 F.2d 245, 254 n.11 (2d Cir. 1971); Glazer v. Hackel, 440 F.2d 592 (9th Cir. 1971).

149 For a discussion of the jurisdictional bases for such relief, see Hansen, supra note 95, at 4009 (habeas corpus treated as application for mandamus); Hansen, The Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military II, 4 S.S.L.R. 4001 (mandamus), 4005 (injunctive relief).


151 See note 90 supra.


154 The provision in the Marine Corps Reserve statement of understanding paraphrased a regulation. Like the special program guarantees, the provision concerned a matter committed to the discretion of the armed forces, see Schatten v. United States, 419 F.2d 187, 189 n.2 (6th Cir. 1969); unlike those guarantees, however, it was not clearly held out as an inducement to enlist.
drills. The enlistee thereupon sought a declaratory judgment that the new requirement violated his enlistment contract and deprived him of contractual rights without due process. The district court agreed that the new requirement violated the contract but held that the breach was permissible because the amendment was within the Marine Corps's statutory authority. The Second Circuit affirmed. It appears, however, that the district court completely ignored the enlistee's claim that the new regulation violated, not the statute, but his contract. Alternatively, the court may have been applying to the regulation the same loose standard of review that is generally applied when statutes are challenged on substantive due process grounds.

Because of the difficulties involved in balancing the needs of national defense against individual interest, the courts should not pay the same deference to military judgments, expressed in regulations, as they do to the judgment of Congress. The armed forces, as immediate parties to enlistment contracts, are less disinterested than Congress, and the regulations promulgated by them are perhaps less thoroughly considered—at least as to their effects on individual enlistees—than legislation Congress has passed. There may be situations in which the interests of national defense require that retroactive regulations be allowed to abrogate the terms of enlistment contracts. The courts should, however, carefully scrutinize any claim by the military that such a necessity exists.

c. Discrepancy between the Guarantee and the Regulations. The

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156 390 F.2d 879 (2d Cir. 1968) (per curiam).
157 For the rational basis test, see Richardson v. Belcher, 404 U.S. 78 (1971); Nebbia v. New York, 291 U.S. 502, 525 (1933). In Winters, petitioner's other claim involved a due process attack on the retroactive application of 10 U.S.C. § 673a (1970), but the court made no effort to separate the two claims or to treat them differently.
158 One commentator has suggested that in the gold clause cases, Perry v. United States, 294 U.S. 330 (1935), and Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935), the Court took a "strict view" of congressional abrogation of federal government contracts than of private contracts because of "a feeling that it is more unfair to permit a party to a contract to modify its terms than for the legislature, as a disinterested body, to alter the rights created by a contract between private parties." Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 723 (1960). The armed forces, as immediate parties to enlistment contracts, are even less disinterested than Congress.
159 The congressional procedure, which includes hearings and debate, insures that a wider range of views will be considered than does the armed forces procedure. The latter is exempt from provisions of the Administrative Procedure Act, that provide that an agency "give interested persons an opportunity to participate in ... rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. §§ 553(a)(1), (c), (d), (e) (1970).
case of *Rehart v. Clark*\(^{160}\) exemplifies another situation in which the principle that the armed forces must follow their own regulations would be an ineffective basis for judicial relief. In *Rehart* an enlistee in the Navy's Nuclear Field Program was required to sign a document that extended the ordinary four-year term of enlistment by two years. The document stated: "REASON FOR EXTENSION. Training (Nuclear Field Program—BUPERSINST 1306.64 Series . . .). I understand that this extension agreement becomes binding upon completion of IC, EM and MM Class 'A' Schools . . . and thereafter may not be cancelled . . ."\(^{161}\)

When his original four-year term of enlistment expired, the enlistee sought to be discharged on the ground that, since he had completed only one of the three schools specified in the document, his agreement to extend was not binding. The Navy, however, refused to discharge him because, contrary to the statement in the enlistment agreement, a Navy regulation provided that extensions of this sort become binding upon completion of only one school.\(^{162}\)

The district court granted a writ of habeas corpus. The Ninth Circuit reversed, arguing that the Navy regulation was "automatically a part of the contract" because it had the force and effect of law and because "existing laws are read into contracts in order to fix the rights and obligations of the parties."\(^{163}\) This argument is simply another way of stating the conclusion that when statutes and regulations conflict with the terms of a contract, the statutes and regulations prevail. While this conclusions may often be sound with respect to conflicts between statutes and the terms of contracts between private parties, it is not justifiable with respect to a conflict between regulations promulgated by a military service and the terms of an agreement that the service has made. Since the service prescribes the contents of both the regulations and its agreements, it should have the responsibility for ensuring that the two do not conflict.

The Ninth Circuit’s decision, however, was not necessarily based on these broad grounds. The court also held that the district court had erred in invoking the parol evidence rule and in refusing to admit the regulation in evidence to help in interpreting the enlistment agreement. The regulation indicates that, in fact, the enlistment agreement contains a provision that extensions of this sort become binding upon completion of only one school.


\(^{161}\) 448 F.2d at 172.

\(^{162}\) Bureau of Personnel Instruction (BUPERSINST) 1306.64E (April 13, 1966), which was referred to in the extension document. See text at note 161 *supra*.

\(^{163}\) 448 F.2d 170, 173.
agreement contained a typographical error: it should have read "IC, EM or MM Class 'A' Schools." An enlistee who had received counselling and information concerning the Nuclear Field Program would probably have been aware that he would attend only one of these schools.\(^{164}\) Although the Ninth Circuit did not mention these facts, they suggest that its decision conforms to the adhesion contract principle that courts should read enlistment documents as they would reasonably be read by enlistees. Thus, if the Navy could establish that, in view of the information he had received concerning the Nuclear Field Program, it would have been unreasonable for Rehart to believe that he would attend all three schools, the provision in his extension agreement would not be given effect.\(^{165}\)

3. Breaches by the Enlistee. It is doubtful that the contract concept should be used to fashion a remedy for the armed services against enlistees in special programs who violate their enlistment agreements. In McCullough & Joy v. Seamans,\(^{166}\) the Air Force sought damages from an Air Force Academy graduate on the ground that, by obtaining a conscientious objector discharge, he had breached his agreement to remain in the service for five years in return for his free education. Although the cadet undoubtedly violated the provisions of the document he had signed, there is little basis for regarding that document as a contract since it merely paraphrased the governing statutes.\(^{167}\) The court, however, placed its decision on broader grounds and, without

\(^{164}\) The regulation is discussed in Colden v. Asmus, 322 F. Supp. 1163, 1165 (S.D. Cal. 1971). See also U.S. Recruiting Aids Division, (RAD) 69118, The Navy Nuclear Program 9-10 (April 1, 1969). The schools are not successive schools in a single career field but are the initial schools in three different career fields.

\(^{165}\) Alternatively the problem could have been viewed as one of misrepresentation. See text at notes 68-98 supra. Since relief for misrepresentations to enlistees should not depend on the presence of an intent to mislead (which certainly was absent in Rehart), and since misrepresentations can be written as well as verbal, the primary inquiry would have been the same as under the contract of adhesion approach, that is, whether the enlistee relied on the typographical error.

\(^{166}\) See Air Force Academy Form 205, Statement of Understanding. Cadets, unlike enlistees in special programs, are governed by a highly particularized statutory scheme and are generally regarded as occupying a unique military status. See Hoppel v. United States, 85 F.2d 237, 241 (D.C. Cir. 1936), cert. denied, 229 U.S. 557 (1936); United States v. Ellman, 9 U.S.C.M.A. 549, 26 C.M.R. 329 (1957); Zbar & Mazza, Legal Status of Cadets, 7 USAF JAG L. REV., Nov.-Dec., 1965, at 31. There is an express statutory requirement that cadets "sign an agreement . . . to accept an appointment and serve as a commissioned officer of the Regular Air Force for at least five years," 10 U.S.C. § 9348(a)(2) (1970), but since there are statutory consequences for failing to fulfill the "agreement," 10 U.S.C. § 9348(b) (1970), the document should be regarded, not as a contract, but as a written consent which is necessary to render the statutory scheme operative.
discussing the document involved, simply held that a contractual remedy was an inappropriate solution to the problem. Indeed, the opinion suggests that the armed forces probably should not be afforded a contractual remedy even when enlistees violate provisions that can be regarded as contractual. As the court argued, the contract concept is a clumsy device for fashioning a remedy and is unnecessary since the government, unlike the enlistee, can provide its own remedy by enacting statutes and regulations.

**CONCLUSION**

The contract concept is of limited usefulness in resolving disputes between enlistees and the armed forces. Enlistment can best be viewed, not as the making of a contract, but as an administrative procedure that results in a restriction of liberty and the loss of certain constitutional rights. Ordinarily that procedure establishes a relationship governed entirely by regulations, statutes, and constitutional requirements. It cannot usefully be conceptualized as contractual. When, however, specific guarantees are made to induce enlistment, it is possible to consider them as a kind of contract—a view that may facilitate their enforcement by the courts. To resolve disputes concerning such enlistment guarantees, the courts should look to adhesion contract or sui generis enlistment contract principles rather than to the rules of general contract theory.

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168 The court argued that the problem was "far too involved for simple contract principles to settle," and that it warranted a congressional solution. 5 S.S.L.R. at 3648. Compare Miller v. Chafee, — F.2d — (9th Cir. 1972), 5 S.S.L.R. 3575, rev'd 324 F. Supp. 1344 (D. Hawaii 1971), which rejected a similar claim on the questionable ground that to require that an enlistee discharged as a conscientious objector repay the cost of his education would impair the exercise of a first amendment right, *See* Gillette v. United States, 401 U.S. 437, 462 (1971); Turpin v. Resor, 452 F.2d 240 (9th Cir. 1971).

169 The court pointed out that "a suit for damages is hardly the medium for resolving the problem" and that a more effective remedy would be to require alternative civilian service, a remedy difficult to fashion through an application of contract principles. 5 S.S.L.R. at 3648. The damages remedy would also entail difficult problems of valuation. *See* Miller v. Chafee, 324 F. Supp. 1344, 1347 (D. Hawaii 1971), rev'd, — F.2d — (9th Cir. 1972), 5 S.S.L.R. 3575, in which, after allowing that remedy, the court added that it "offer[ed] no opinion as to what might be an appropriate measure of damages." Another contract remedy, specific performance of the agreement to serve in the armed forces, would be inappropriate in many situations in which it is desirable that the enlistee be discharged (such as when he has become disabled, or a conscientious objector). A third contract remedy, rescission, would be completely ineffective unless it were accompanied by an action for damages.