

COMMENTS

STOP LOSS: ILLEGAL CONSCRIPTION IN AMERICA?

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INTRODUCTION

The United States Army's use of stop loss orders, which force soldiers to continue their service beyond the term of their enlistment agreements, has received substantial press coverage over the past year. Presidential candidate John Kerry frequently criticized stop loss throughout his campaign, dubbing it a "backdoor draft" and accusing the administration of relying on the forced extensions to compensate for poor planning in advance of the occupation of Iraq.¹ The issue grabbed further attention after Secretary of Defense Donald Rumsfeld's December 2004 visit to Iraq, when troops in Kuwait grilled him on complaints ranging from stop loss to poor equipment and delinquent paychecks.²

Observers estimate that at any given moment the military is forcing approximately 7,000 soldiers to continue fighting in Iraq or Afghanistan, even though they have completed the service required by their enlistment agreements.³ Stop loss requires individual soldiers to continue serving until their entire unit rotates home or redeploys elsewhere, even if they were scheduled to leave the Army as many as ninety days before the unit was deployed in the first place.⁴

Critics argue that stop loss produces harsh results for soldiers and their families. Affected enlistees must remain in uniform when they had planned to return to their families and civilian lives, often wreaking havoc with their personal situations.⁵ Furthermore, continued service in a highly

1. See MSNBC.com, *Kerry Says U.S. Now Has "Backdoor Draft"* (June 3, 2004), at <http://www.msnbc.msn.com/id/5129079/> (accusing the administration of stretching the military too thin and using stop loss to increase manpower by 30,000 troops).

2. See Thomas E. Ricks, *Rumsfeld Gets Earful from Troops*, WASH. POST, Dec. 9, 2004, at A1 (reporting soldiers' complaints that they were being unfairly kept on duty beyond the end of their enlistment agreements).

3. See Monica Davey, *Eight Soldiers Plan to Sue Over Army Tours of Duty*, N.Y. TIMES, Dec. 6, 2004, at A15 (stating that those affected may have planned to retire, leave the military, or move to another military job).

4. See *id.* (explaining that the Army's purpose in instituting the policy is to avoid having to fill vacant positions in units with new soldiers as individuals' enlistments expire).

5. See Eric Schmitt, *Army Extending Service for G.I.'s Due in War Zones*, N.Y. TIMES,

dangerous combat zone can produce psychological and emotional trauma for both the soldier and his or her family thousands of miles away.⁶ And perhaps most fundamentally, soldiers argue that the treatment is simply dishonorable and unfair because the military is breaking its agreement with those who voluntarily enlisted to serve their country.⁷

Ten soldiers have filed three lawsuits asking courts to intervene and order their release from military service upon expiration of their enlistment agreements.⁸ Citing a statute enacted in 1951,⁹ they argue that nonconsensual extensions are expressly prohibited by law.¹⁰ They also argue that in any event, the extensions represent a breach of their enlistment agreements, and that the military should be compelled to honor its promises.¹¹ One of the suits further claims that the military fraudulently induced certain of the plaintiffs to enlist by neglecting to tell them about the possibility of extension, thus denying them liberty without due process.¹² Doubtless, many other soldiers are following the suits to see if similar judicial relief might be available to them.

This Comment analyzes two major theories asserted in the legal challenges lodged by the plaintiff soldiers and some observers. It concludes that, as counter-intuitive and unfair as it may seem, the government has the legal authority to extend the enlistments of soldiers without their consent. The analysis makes frequent reference to the lawsuits of John Doe 1 and 2, but also generalizes beyond the specific facts of their cases in order to predict the outcome for the larger Army.¹³ Part II.A analyzes the argument that federal statutes prohibit nonconsensual extensions and concludes that it was Congress's intent to give the President

June 3, 2004, at A1 (surveying the financial, childcare, emotional, and other difficulties suffered by military families).

6. See Andrew Exum, *For Some Soldiers the War Never Ends*, N.Y. TIMES, June 2, 2004, at A19 (blaming the multiple, consecutive tours of duty for levels of stress in excess of that normally experienced in combat).

7. See, e.g., *id.* (calling the nonconsensual extensions of soldiers under the stop loss policy "shameful" and "a breach of trust").

8. See Davey, *supra* note 3, at A15 (presenting an overview of the basic claims of the suits filed in federal courts in the District of Columbia and California).

9. Military Selective Service Act, 50 U.S.C. app. § 454 (2000).

10. See, e.g., Memorandum in Support of Application for Order to Show Cause § V.B, Doe v. Rumsfeld, (No. C-04-3361 SBA) (N.D. Cal. 2004) (on file with the American University Law Review) [hereinafter *John Doe No. 1 Memorandum*] (citing 50 U.S.C. app. § 454(c)(1)'s blanket prohibition on extensions without a declaration of war by Congress).

11. See *id.* § IV (setting forth the legal basis of John Doe's breach of contract cause of action against the Secretary of Defense).

12. See Complaint for Injunctive Relief and Petition for Habeas Corpus at 15-17, Qualls v. Rumsfeld, 357 F. Supp. 2d 274 (D.D.C. 2005), *dismissed*, 228 F.R.D. 8 (D.D.C. 2005) (No. 04-2113) (listing fraudulent inducement and material representation as one of the causes of action), available at http://www.ccr-ny.org/v2/legal/govt_misconduct/docs/QuallsComplt.pdf (last visited July 17, 2005).

13. See discussion *infra* Part II (analyzing statutes and enlistment agreements applicable to all members of the armed forces).

stop loss powers.¹⁴ Part II.B considers the possibility that the nonconsensual extensions may not breach the enlistment agreement,¹⁵ but concludes that even if they do, the government has the power to breach the agreements without releasing the soldier from his obligation to serve.¹⁶ This Comment does not address the claims that the military fraudulently induced individual recruits to enlist, or that the extensions violate enlistees' constitutional due process rights.¹⁷ Finally, this Comment concludes that while the government is likely to prevail, the result for affected soldiers is potentially so harsh and unexpected that the military should alter the enlistment agreement, especially considering the enormous sacrifices and risks that enlistees voluntarily undertake.¹⁸

I. BACKGROUND

The stop loss policy¹⁹ has undergone several changes in scope and application since it was implemented following the attacks of September

14. See discussion *infra* Part II.A (arguing that the relevant statutes, read together, in fact permit involuntary extensions under a national emergency declared by the President, as an exception to the general prohibition against such extensions).

15. See discussion *infra* II.B.1 (positing that stop loss may not breach the enlistment agreement because the latter states that enlistees are subject to obligations under law not expressed in the agreement and also because the agreement contains no express prohibition on nonconsensual extensions).

16. See discussion *infra* Part II.B.2 (citing a line of cases from the Vietnam War era holding that the government was permitted to extend soldiers' enlistments without their consent under a separate statutory authority even if doing so breached their enlistment agreements).

17. See *John Doe No. 1 Memorandum*, *supra* note 10, §§ 2-3 (asserting that implementation of stop loss exceeds the scope of authority on which it is based and also violates soldiers' substantive due process rights because the war in Iraq bears no rational relationship to the attacks of September 11, 2001). Courts are highly likely to find such foreign policy judgments nonjusticiable. See, e.g., *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 12, 38 (D.C. Cir. 2003) (holding that the executive branch's determination whether certain terrorist acts committed by the organization against the government of Iran in fact represented threats to U.S. nationals was nonjusticiable).

18. See discussion *infra* Conclusion (suggesting text that could be added to the standard enlistment agreement so that enlistees would be aware of the possibility of stop loss extensions).

19. Some officials and commentators use the term stop loss more broadly to refer to extension of soldiers' tours of duty (more properly termed "stop movement") or active duty service even when they are not required to serve beyond the expiration of their enlistment agreements. See, e.g., Tom Philpott, "Suit Challenges Bush's Reserve Policy," *FREE LANCE-STAR*, Aug. 29, 2004 (referring to stop loss with respect to soldiers whose active duty was extended without necessarily exceeding the term of their enlistment agreement, because they still owed a period of service in the reserve under their agreement), available at <http://www.freelancestar.com/News/FLS/2004/082004/08292004/1480151>.

Under this more expansive definition, some estimate as many as 81,000 soldiers may have been ordered to serve longer tours of duty in a combat zone, longer periods of active (as opposed to reserve) duty, or beyond the expiration of their enlistment agreements. *Id.* While all three types of extensions may involve some similar legal issues, this Comment aims to analyze only the extension of total service beyond the term of the enlistment agreement, which is what the military means when it uses the term "stop loss."

11, 2001,²⁰ but all of its variations require designated enlisted soldiers to continue serving in the military beyond the expiration of their enlistment agreements²¹ and without their consent.²² Critics of stop loss frequently refer to it as the “backdoor draft,” claiming that it effectively converts soldiers who enlisted voluntarily into conscripts once their agreements expire.²³ Both Democratic and Republican politicians have criticized the policy, with Senators John Kerry²⁴ and John McCain²⁵ insisting the policy is a direct result of the Bush Administration’s refusal to increase the size of the military and to deploy enough troops to Iraq. At a minimum, the much publicized reliance on stop loss is a sharp contradiction to the military’s general emphasis on the concept of an “All Volunteer Force” (“AVF”) as essential to its success.²⁶

20. See, e.g., U.S. Army Human Resources Command—Alexandria, MILPER Message No. 04-053: Expand Coverage Of The Current Active Army (AA) Stop Loss/Stop Movement Program (Jan. 7, 2004) (ordering the expansion from an initial limitation to soldiers with specialized skills, to all active forces deployed in Iraq and Afghanistan), available at <https://perscomnd04.army.mil/MILPERmsgs.nsf/All%2B Documents/04-053?OpenDocument>. Although stop loss was originally authorized in all branches of the armed forces, only the Army continues to implement it. *Id.*

21. As discussed *infra* in Part II.B.1, the document that enlisting soldiers sign is titled “Enlistment Document,” and in fact the Department of Defense may have so labeled it in order to support a defense that it is, in fact, not a contract. See ARMED FORCES OF THE UNITED STATES, DD FORM 4/1: ENLISTMENT/REENLISTMENT DOCUMENT (Jan. 2001) [hereinafter ENLISTMENT/REENLISTMENT DOCUMENT] (constituting the standard form signed by enlistees in all branches of the armed forces), available at [http://www.hqmc.usmc.mil/ar/mcefs.nsf/0/405db6c984609d17852569d10049bb05/\\$FILE/D D+4.pdf](http://www.hqmc.usmc.mil/ar/mcefs.nsf/0/405db6c984609d17852569d10049bb05/$FILE/D D+4.pdf). This Comment uses the term “enlistment agreement” since it is the term most commonly used by commentators. Analysis of its contents and legal status as a contract appears *infra* Part II.B.1.

22. See Josh White, *Soldiers Facing Extended Tours; Critics of Army Policy Liken It to a Draft*, WASH. POST, June 3, 2004, at A1 (noting that stop loss was first enforced only in regards to particular units as they were deployed but as of June 2003 now applies to all soldiers deployed to Iraq and Afghanistan until further notice).

23. See, e.g., Vincent J. Schodolski, *Pentagon Rule Worries Some; “Stop Loss” Order Keeps Troops in Service After Terms End*, CHI. TRIB., Sept. 25, 2004, at 10 (explaining that the effect of stop loss has been that thousands of members of the all-volunteer armed forces are no longer serving voluntarily); White, *supra* note 22, at A1 (suggesting that this policy of stop loss results in soldiers serving against their will).

24. See Press Release, Kerry-Edwards Campaign, New Kerry Ad on Bush Failure to Secure Explosives/Misjudgments that Have Made America Less Secure (Oct. 26, 2004) (claiming the Bush Administration has overextended troops because it failed to plan adequately for the war), available at http://www.johnkerry.com/pressroom/releases/pr_2004_1026d.html.

25. See *Flashpoints USA: Gwen Ifill interviews Sen. John McCain (R-AZ)* (PBS television broadcast, June 29, 2004) [hereinafter *McCain Interview*] (blaming Secretary of Defense Donald Rumsfeld’s failure to recognize that the military is too small for problems in Iraq and throughout the military), available at http://www.pbs.org/flashpointsusa/20040629/infocus/topic_02/trans_mccain.htm.

26. See Exum, *supra* note 6, at A19 (arguing that stop loss runs contrary to the much trumpeted concept of the All Volunteer Force (AVF) that has been in place since the aftermath of the Vietnam War and that is credited for producing a more motivated, better trained military).

Pentagon officials insist that stop loss is necessary to promote and preserve unit cohesion.²⁷ Pointing to lessons learned in Vietnam,²⁸ they worry that the trust and effectiveness established among soldiers who have long trained and fought together in the same unit would erode if individual soldiers could leave as their enlistment terms ended.²⁹ Normal attrition rates would cause a typical division to change out as many as 4,000 soldiers, about one-fifth of its total force, just before it deployed to a war zone.³⁰ Officials argue that the prospect of soldiers in the same unit meeting for the first time on the battlefield would endanger their ability to work together effectively and would put their lives at risk.³¹ Stop loss also supports Army Chief of Staff General Peter Schoomaker's overall policy of rotating entire units—rather than individual soldiers—in and out of combat zones, which he asserts actually provides greater predictability to soldiers and their families.³²

Many observers contend, however, that even assuming that the maintenance of unit cohesion is a valid goal, the Army's heavy reliance on stop loss is explained by a much more fundamental problem: it simply has too few soldiers to handle major operations, such as those in Iraq and Afghanistan, while meeting other U.S. commitments around the world.³³ Even if the Pentagon determined that rotating individual soldiers as their terms expire is not harmful to unit cohesion, the Army simply lacks the excess manpower to fill the vacancies that would arise without stop loss.³⁴

27. See Schmitt, *supra* note 5, at A1 (noting Deputy Chief of Staff for Personnel, Lieutenant General Franklin Hagenbeck's explanation that the purpose of the policy is to keep units together that have trained and fought together). General Hagenbeck rejected the idea that stop loss is a breach of trust and insisted that instead it is simply part of being a soldier. *Id.*

28. See Davey, *supra* note 3, at A15 (quoting an Army spokesperson's explanation that in the Vietnam conflict, efforts of the United States were weakened because individuals were rotated out just as they had become experienced and acclimated to conditions, and the unit then had to contend with a vacancy or adjust to a new, unknown member).

29. See Ilana Ozeroy, *Now It's Up to Them?*, U.S. NEWS & WORLD REP., June 14, 2004, at 22 (observing that the nonconsensual extensions are necessary to ensure units are able to continue fighting even as individuals' enlistment terms come to an end), available at <http://www.usnews.com/usnews/news/articles/040614/14iraq.htm>.

30. See White, *supra* note 22, at A1 (quoting General Hagenbeck as saying the disruption of switching out one-fifth of a unit's members just before deployment would be "nonsensical" and would put all other soldiers' lives at greater risk).

31. See *id.* (explaining that the policy was implemented with the aim of preventing loss of unit cohesion that plagued the Army in Vietnam).

32. Schmitt, *supra* note 5, at A1.

33. See Ozeroy, *supra* note 29, at 22 (quoting MIT researcher Cindy Williams as saying that even though unit cohesion is a valid aim of stop loss, the Army's numbers are insufficient considering how many soldiers are stationed or deployed overseas and the total length of time soldiers remain deployed).

34. See Schmitt, *supra* note 5, at A1 (noting that with all of the Army's ten divisions serving or rotating in or out of Iraq or Afghanistan, the available pool of active duty troops to draw upon for filling vacant positions is highly limited); see also U.S. Army Human Resources Command—Alexandria, MILPER Message No. 04-053: Expand Coverage of

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Whether there currently is a shortage of soldiers in the Army depends on the observer's perspective, but there is no doubt that its numbers have decreased sharply over the past decade. After the collapse of the Soviet Union and the end of the Cold War, Congress sought to realize a "peace dividend" by mandating deep cuts in military spending in general,³⁵ reducing the active duty force by approximately 283,000 soldiers.³⁶ Despite reduced personnel targets, the military still suffered significant staffing shortages due to the combination of private sector opportunities associated with the high-tech boom of the late 1990s and soldiers' frustrations over a series of poorly defined peace keeping missions.³⁷ The shortages mainly affected units and positions requiring specialized technical skills, but Congress and the President indulged the requests of the Joint Chiefs of Staff by approving substantial increases in pay and benefits for all positions.³⁸

Due to both the resulting high cost per soldier, which now runs the Pentagon an average of at least \$100,000 per year,³⁹ and a modernization strategy that emphasizes technology over labor,⁴⁰ the Bush Administration has consistently resisted legislated increases in troop strength.⁴¹ Army

the Current Active Army (AA) Stop Loss/Stop Movement Program, *supra* note 20 (showing that although stop loss was at first implemented only for certain positions requiring specialized expertise, the Army subsequently extended the policy to cover all units deploying to Iraq and Afghanistan).

35. See Schodolski, *supra* note 23, at 10 (recalling that the cuts were made under the assumption that changes in the world following the collapse of the Soviet Union meant the United States would need fewer active-duty soldiers to confront threats in the future).

36. See WILLIAM F. SAUERWEIN, MILITARY.COM, THE PEACE DIVIDEND RETURNS TO HAUNT US (Jan. 29, 2004), at www.military.com/NewContent/0,13190,Defensewatch_012904_Peace,00.html (relating that overall military end strength was reduced from 2.1 million personnel at the end of the Cold War to 1.3 million now, and the Army was reduced from 772,000 soldiers to 489,000 over the same period).

37. See Cindy Williams, *Introduction*, in FILLING THE RANKS: TRANSFORMING THE U.S. MILITARY PERSONNEL SYSTEM 1, 3 (Cindy Williams ed., 2004) (tracing the shortages to a failure to meet pre-set recruiting goals along with higher numbers of soldiers leaving or declining to reenlist in the military in the face of other opportunities in the private sector).

38. See *id.* at 3-4 (noting that total expenditures on military personnel increased by thirty-two percent despite concurrent reductions in forces by approximately 33,000 troops).

39. See *id.* (tracing current prohibitive costs per soldier to policy decisions made in the 1990s); see also *Force Rotation in Iraq, Hearing on the Iraq Troop Rotation Plan Before the House Comm. on Armed Serv.*, 108th Cong. 4-5 (2004) (testimony by General Peter J. Schoomaker) [hereinafter *Iraq Troop Rotation Hearing*] (discussing the stress of troop rotations on troops and their families); Jim Garamone, *Army Chief 'Adamantly Opposes' Added End Strength*, AM. FORCES PRESS SERV., Jan. 28, 2004 (reporting that Schoomaker "said it costs about \$1.2 billion a year for every 10,000 people added to the Army"), available at http://www.defenselink.mil/news/Jan2004/n01282004_200410288.html.

40. See OFFICE OF FORCE TRANSFORMATION, DEP'T OF DEFENSE, ELEMENTS OF DEFENSE TRANSFORMATION I (Oct. 2004) (explaining the Department of Defense's position that the force transformation initiative is rooted in the effect of globalization on the international security order and in the transition from the industrial age to the information age), available at http://www.of.t.osd.mil/library/library_files/document_383.ElementsOfTransformation_LR.pdf.

41. See, e.g., Bob Herbert, *Level with Americans*, N.Y. TIMES, June 7, 2004, at A27

officials say the Administration is adamant about taking advantage of its current emergency powers to achieve “temporary” increases in forces for up to four years, rather than supporting legislated increases that would create long-term constraints on expenditures and restructuring plans.⁴² Some observers, including one retired general, interpret this policy as a tacit admission that the Army deliberately relies on stop loss and similar measures to make up for overall troop shortages,⁴³ which suggests that the “unit cohesion” rationale is not the real motive.

Some observers go even further by suggesting that the Administration relies on stop loss in order to avoid the political embarrassment of deploying significantly more troops to Iraq.⁴⁴ To do so, critics contend, would be a very public admission that the Administration either failed to anticipate or deliberately misled the public about the risks and costs of a protracted war.⁴⁵ So instead, critics argue that the Administration increased manpower through the less politically-visible tactic of forcing soldiers to serve beyond their commitments.⁴⁶

Whatever the motives, few disagree that stop loss places a heavy burden on soldiers subject to the policy.⁴⁷ Many argue that it represents dishonorable and unfair treatment of soldiers who volunteered to enlist in

(quoting Senate Armed Services Committee member Senator Jack Reed’s complaints that the administration “vociferously opposed” his proposal to legislate adding of 10,000 troops, as it insisted on sticking to its transformation plan which predicated less dependence on the number of soldiers).

42. See *Iraq Troop Rotation Hearing*, *supra* note 39, at 4 (documenting General Schoomaker’s intention to use the “emergency powers” to grow the army by 30,000 troops, thereby “buy[ing]” the opportunity to restructure the army into smaller, more mobile brigades).

43. LT. COL. RALF W. ZIMMERMANN (USA RET.), U.S. SHOULD STUDY GERMANY’S MILITARY OVERHAUL (Feb. 4, 2004), at http://www.military.com/NewContent/0,1319,0,Defenswatch_020404_Overhaul,00.html (on file with the American University Law Review) (accusing Army Chief of Staff General Schoomaker of planning to bridge the shortage of troops and of facilitating the restructuring of the military through “dangerously manipulated and temporary strength increase[s] of about 30,000 personnel,” achieved through stop loss, national guard and reserve extensions, and exorbitant retention bonuses). General Schoomaker even acknowledged in testimony that stop loss is facilitating a temporary “bubble” to compensate for shortfalls in Iraq. See *Iraq Troop Rotation Hearing*, *supra* note 39, at *23 (recording that General Schoomaker made no mention of the unit cohesion rationale as a basis for stop loss, and instead only discussed it as an opportunity to further the force transformation plan).

44. See Herbert, *supra* note 41, at A27 (arguing that President Bush has never been candid with the public about the true costs and extreme sacrifices the war demands, and that the administration is simply using stop loss to mask the resulting personnel shortages).

45. See, e.g., *McCain Interview*, *supra* note 25 (reporting Senator McCain’s criticism that the Administration failed to anticipate the number of troops needed to win the peace and has refused to respond to its mistakes by increasing the size of the Army). Instead, it has refused to allow enlistees to leave the military. *Id.*

46. *Id.*

47. See *Iraq Troop Rotation Hearing*, *supra* note 39, at *9 (recording General Schoomaker’s acknowledgement that there is “no question” that soldiers are under stress).

the Army and results in unacceptable consequences for their families.⁴⁸ Stop loss is particularly harsh because it frequently forces soldiers who have just completed one or more tours of duty amidst the stress and exhaustion of combat to continue fighting with no break.⁴⁹ Some level the criticism that stop loss is even worse than a draft because it effectively punishes those who volunteered to serve.⁵⁰ Furthermore, few soldiers realized when they enlisted that the Army could force them to fight beyond the term of their enlistment agreement,⁵¹ thereby causing them to endure grave risks to their lives beyond the term to which they knowingly agreed.

A pre-determined, fixed period of service is arguably the very essence of an enlisted soldier's commitment, as distinguished from the life-long commitment required in exchange for the coveted officer's commission.⁵² Few could imagine that the military would choose to exercise stop loss, rather than recruiting additional volunteer enlistees.⁵³ Stop loss also plays havoc with the families of affected soldiers, forcing them to put off plans and extending the stress associated with having a loved one fighting in war.⁵⁴ With more than forty percent of soldiers in Iraq coming from the

48. See, e.g., Exum, *supra* note 6, at A19 (characterizing the treatment of soldiers under stop loss as "shameful" and "a breach of trust").

49. See *id.* (noting that many soldiers are extended without their consent after already having completed several consecutive tours of duty in Iraq and Afghanistan).

50. See *McCain Interview*, *supra* note 25 (broadcasting Senator McCain's criticism that stop loss is the worst kind of draft because it puts the burden on those who volunteered to serve). But see Schmitt, *supra* note 5, at A1 (quoting Army Deputy Chief of Staff for Personnel, Lieutenant General Franklin Hagenback's statement that such involuntary extensions and consecutive tours of duty are just part of being a soldier); White, *supra* note 22, at A1 (relaying Institute for Defense Analysis expert John Tillson's reasoning that it is only natural that when the country goes to war, those who must pay the burden are those who volunteered to serve in the military).

51. See e.g., Rone Tempest, *Soldier Sues to Remain at Home*, L.A. TIMES, Oct. 11, 2004, at B1 (reciting Army recruiter Lieutenant Colonel Michael Jones's doubts that "any veteran soldiers" would be surprised that they could be forced to serve involuntarily beyond their enlistment terms, implying that many might not know of such a possibility when they first bound themselves by enlisting); see also discussion *infra* Part II.B.1 (analyzing whether the enlistment agreement gives enlistees fair notice of the possibility of involuntary extension under stop loss and other scenarios where it is permitted under federal statutes). But see White, *supra* note 22, at A1 (suggesting that the country is at war and that if someone must carry the burden, it should be those who voluntarily joined the military, regardless of whether they knew of the possibility of stop loss extensions when they enlisted).

52. See Exum, *supra* note 6, at A19 (characterizing involuntary extensions of enlisted soldiers under stop loss as a "gross breach of contract" because a fixed period of service is the central feature of enlistment).

53. See Herbert, *supra* note 41, at A27 (drawing the analogy that the unexpected extensions of soldiers under stop loss orders are like trapping soldiers in a war zone with the exit doors locked).

54. See Schmitt, *supra* note 5, at A1 (quoting military families advocate Joyce Raezner saying that "[i]t affects people who made plans that didn't involve the Army"); see also MASTER SERGEANT (RET.) MICHAEL P. CLINE ET AL., STATEMENT OF THE MILITARY COALITION BEFORE THE PERSONNEL SUBCOMMITTEE, SENATE ARMED FORCES COMMITTEE 7 (Mar. 4, 2004) [hereinafter STATEMENT OF THE MILITARY COALITION] (citing the greater

National Guard and Reserves,⁵⁵ whose members normally serve part-time and are more likely to be married and have full-time jobs, many more young families are bearing the burden of this war than in previous conflicts.⁵⁶

Stop loss and its associated policies, which make more intensive use of enlistees rather than increasing their numbers, may also endanger the Army's morale and readiness. One National Guard battalion spent its last days before deployment under disciplinary lockdown after a number of its 635 members went AWOL and dozens more were involved in an internal brawl.⁵⁷ The exhaustion and frustration underlying these kinds of breakdowns only serve to undermine the unit cohesion stop loss supposedly promotes.⁵⁸ Furthermore, numerous critics worry that stop loss extensions are masking the Army's inability to convince weary soldiers to reenlist,⁵⁹ and that the policy itself only serves to further frustrate already disgruntled soldiers, increasing the probability of an enlistment crisis once stop loss ends.⁶⁰ Stop loss merely increases the Army's dependence on

workloads and ever greater sacrifices endured by family members of soldiers serving repeated, back-to-back deployments and extensions), *available at* <http://www.themilitarycoalition.org/Testimony/PDFs/4mar04SASC.pdf>.

55. See Kevin Taylor, *Soldier Sues Over "Stop Loss" Policy*, SPOKESMAN-REV., Oct. 20, 2004, at B4 (Metro Ed.) (relaying that forty percent of the fighting force were National Guard members by Summer 2004, even though the Guard members' roles are usually limited to helping communities in their home states deal with natural disasters rather than fighting in combat zones such as Iraq and Afghanistan).

56. See Schodolski, *supra* note 23, at 10 (reporting Northwestern University professor and military sociologist Charles Moskos's observation that the percentage of married service members in Iraq is much higher than has been the case in previous military conflicts).

57. See Thomas E. Ricks, *Strains Felt By Guard Unit on Eve of War Duty*, WASH. POST, Sept. 19, 2004, at A1 (citing soldiers' overly accelerated training schedule and deprivation of time with their families as the major causes of the underlying stress leading to the disorder).

58. See *id.* (quoting one unnamed soldier saying that the morale was too low to begin an eighteen-month tour of duty and wishing he had never enlisted); see also Mark Marzetti, *Leader of Army Reserve Fears a "Broken Force,"* L.A. TIMES, Jan. 6, 2005, at A14 (reporting the Army reserve commander's memo decrying the heavy burdens and "dysfunctional" Pentagon policies that are causing the Reserve to degenerate rapidly into a broken force in danger of being unable to carry out future missions). The memo also expressed concern over the Pentagon's policy of offering bonuses to try to overcome low morale and reenlistments, fearing that the bonuses threatened to turn a volunteer Army into one of mercenaries. *Id.*

59. See Eric Schmitt, *Army Officials Voice Concern Over Shortfall in Recruitment*, N.Y. TIMES, Mar. 4, 2005, at A16 (relaying that the Army missed its February 2005 recruitment goal by twenty-seven percent, the first time it had missed a monthly recruitment goal in nearly five years); Eric Schmitt, *Guard Reports Serious Drop in Enlistment*, N.Y. TIMES, Dec. 17, 2004, at A32 [hereinafter *Drop in Enlistment*] (reporting that the reluctance of soldiers leaving active duty to enlist in the National Guard has caused it to miss its recruitment goals by thirty percent).

60. See Schodolski, *supra* note 23, at 10 (describing outspoken stop loss critic Andrew Exum's concerns that the policy makes soldiers feel betrayed and dissuades reenlistment, a key factor in the Pentagon's ability to maintain end strength); STATEMENT OF THE MILITARY COALITION, *supra* note 54, at 10 (predicting that the stress that stop loss places on military

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nonconsensual extensions, making it difficult to see how the Army could ever drop the policy short of a full end to the conflict in Iraq.⁶¹

Two California National Guard soldiers whose enlistments were involuntarily extended sued the Department of Defense in federal court, each under the pseudonym John Doe.⁶² They seek to enjoin involuntary extensions of their service under claims that stop loss is not only ill advised, but illegal.⁶³ While the suits only seek an injunction against stop loss as to their individual cases, the implications for the Army of even a single successful claim would be enormous and could force the military to overhaul its entire approach to the war in Iraq.⁶⁴

In fact, in an apparent attempt to avoid the legal confrontation, the Pentagon offered to release John Doe 1 under a technicality in the stop loss order, and the case was dismissed.⁶⁵ But just after Doe 1's case was dismissed, his attorney filed a second, nearly identical suit against the Department of Defense on behalf of a second National Guardsman, John Doe 2.⁶⁶ Both suits assert that involuntary extensions of enlistees are prohibited by federal statute, breach the enlistment agreement, violate soldiers' due process rights, and exceed the authority of the enabling Executive Order because the war in Iraq bears no rational relationship to

families will convince soldiers not to reenlist).

61. See *Iraq Troop Rotation Hearing*, *supra* note 39, at *9 (referencing Army Reserve Commanding General James Helmly's comments that the reserves face a retention crisis when stop loss is lifted because dissatisfaction with their treatment may cause reservists to refuse to reenlist once they are allowed to leave).

62. *John Doe No. 1 Memorandum*, *supra* note 10, at 1; Memorandum in Support of Motion for Temporary Restraining Order at 1, *Doe v. Rumsfeld*, No. Civ. S-04-2080, 2004 U.S. Dist. LEXIS 23338 (E.D. Cal. Nov. 5, 2004), (Oct. 1, 2004) [hereinafter *John Doe No. 2 Memorandum*], available at <http://www.sorgen.net/id30.htm>; see *Tempest*, *supra* note 51, at B1 (observing that the suits are being taken seriously by the Administration, which has assigned veteran Department of Justice attorney Matthew Lepore to defend its stop loss policy in the federal suits).

63. See *John Doe No. 1 Memorandum*, *supra* note 10, at 3-19 (setting forth all of the theories in support of the plaintiff's request for a writ of mandamus); *John Doe No. 2 Memorandum*, *supra* note 62, at 3-12 (asserting the bases for a temporary restraining order in anticipation of an eventual request for a permanent injunction); *Tempest*, *supra* note 51, at B1 (relaying military law specialist and former Judge Advocate General Michael Noone's evaluation that the suits look valid on their face and are not frivolous).

64. See *Tempest*, *supra* note 51, at B1 (reporting that the Department of Justice has assigned a top attorney to defend the government in the case and quoting another attorney's observation that "[i]f anybody gets traction on this, I think there would be a flood of cases").

65. See Declaration of Byron K. Hopkins at 1-2, *Doe v. Rumsfeld*, (No. C-04-3361 SBA) (N.D. Cal. 2004) (on file with the American University Law Review) (declaring to the court on behalf of the California Army National Guard that since John Doe 1 had not mobilized within ninety days of the rest of his unit due to medical reasons, he was no longer subject to the stop loss order); see also *Taylor*, *supra* note 55, at B4 (Metro Ed.) (noting that the stop loss order against John Doe 1, who was granted temporary relief from stop loss as the Court prepared to hear his case, was withdrawn by the Department of Defense under a provision that makes stop loss inapplicable if a soldier does not join his unit within ninety days).

66. See *John Doe No. 2 Memorandum*, *supra* note 62, at 1 (alluding more briefly to the major theories sued upon in requesting a temporary restraining order).

the terrorist attacks of September 11, 2001.⁶⁷ A third suit by eight soldiers serving in Iraq makes similar claims, but also asserts that the Army fraudulently induced certain of the plaintiffs to enlist.⁶⁸

II. DISCUSSION

This Comment first argues that federal statutes authorize, rather than prohibit, exercise of stop loss. It then argues that, since the authority is conferred by statute, the military may exercise it even if doing so breaches soldiers' enlistment agreements.

A. *Properly Construed, Federal Statutes Give the President Stop Loss Power*

Although relevant statutes governing nonconsensual enlistment extensions appear facially contradictory,⁶⁹ sensible interpretation and construction⁷⁰ reveal that Congress intended to grant this power to the President in certain circumstances.⁷¹ While Congress could have been clearer, courts will find sufficient evidence to conclude that Congress intended to create exceptions on a case-by-case basis to the earlier bar on involuntary extensions made in lieu of congressional approval.⁷²

1. *Some statutes support stop loss while others appear to prohibit it*

The presidential power to extend the enlistment of any member of the armed forces without the member's consent stems from 10 U.S.C. §

67. See *John Doe No. 1 Memorandum*, *supra* note 10, at 3-13 (arguing the legal bases for the various causes of action alleged in the suit).

68. See Complaint for Injunctive Relief and Petition for Habeas Corpus at 15-17, *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274 (D.D.C. 2005), *dismissed*, 228 F.R.D. 8 (D.D.C. 2005) (No. 04-2113) (sketching the causes of action alleged in a suit on behalf of eight soldiers in federal court in Washington, D.C., including one plaintiff, Qualls, who chose to reveal his name rather than adopt a pseudonym in the case), available at http://www.ccr-ny.org/v2/legal/govt_misconduct/docs/QuallsComplt.pdf (Dec. 6, 2004).

69. Compare 50 U.S.C. app. § 454(c)(1) (2000) (prohibiting nonconsensual extensions of enlistments absent a declaration of war or national emergency by Congress), with 10 U.S.C. § 12,305 (2000) (permitting the President to suspend separations of enlistees when he has ordered reservists to active duty), and *id.* § 12,302 (authorizing the President to order reservists to active duty without a declaration by Congress).

70. See EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 157 (Gaunt, Inc. 1999) (1940) (distinguishing "interpretation" from "construction" of statutes, with the latter including reliance on sources outside the text of a single statute, but conceding that the distinction is primarily academic and rarely made by many courts).

71. See discussion *infra* Part II.A.2 (analyzing both the text of the various statutes involved as well as the legislative history to infer Congress's intent with regard to nonconsensual extensions of enlistments).

72. See, e.g., S. REP. NO. 98-174, at 198 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1081, 1098 (expressing the Senate Armed Forces Committee's intent to remedy the President's then lack of authority to prohibit separations, including under national emergencies he declares).

12,305.⁷³ This power only arises when any member of the reserves has been ordered to active duty pursuant to one of three scenarios defined in three other statutory provisions.⁷⁴ The military need that triggers the President's authority to order reservists to active duty also triggers his authority to extend the enlistment of any member of the military.⁷⁵ The three triggering scenarios consist of a war or national emergency declared by Congress (10 U.S.C. § 12,301), a national emergency declared by the President (10 U.S.C. § 12,302), or the President's determination of a short-term necessity to reinforce active forces in an operational mission "other than during a war or national emergency" (10 U.S.C. § 12,304).⁷⁶ The President⁷⁷ may then "suspend any provision of law related to promotion, retirement, or separation" of any member he deems essential to national security.⁷⁸ President George W. Bush declared the requisite national emergency three days after the terrorist attacks of September 11, 2001⁷⁹ and delegated his authority to order reservists to active duty,⁸⁰ thereby

73. 10 U.S.C. § 12,305(a) ("[T]he President may suspend any provision of law relating to a promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.").

74. See *id.* § 12,301 (permitting activation of reservists upon a declaration of war or national emergency by Congress); *id.* § 12,302 (permitting activation of the reserves upon a declaration of a national emergency by the President); *id.* § 12,304 (permitting activation of the reserves upon the President's determination that they are needed to support an operational mission, absent any declaration of war or national emergency).

75. In order to trigger the extension authority, however, the President must first activate members of a unit of the reserves under one of the three aforementioned scenarios. *Id.* § 12,305.

76. See *id.* (triggering the extension authority only when reservists have been ordered to active duty pursuant to 10 U.S.C. §§ 12,301, 12,302, or 12,304, but excluding 10 U.S.C. § 12,303). Section 12,303 provides for individual soldiers to be ordered into active duty if they have not been assigned to or are not participating satisfactorily in a reserve unit. *Id.* § 12,303. This provision is not dependent on the declaration of war or emergency, or on a necessity associated with an operational mission carried out by active forces. *Id.*

77. President George H.W. Bush delegated the discretion to exercise this extension authority to the Secretary of Defense and authorized the Secretary to redelegate such authority to any subordinate political appointee. See Exec. Order No. 12,728, 3 C.F.R. 302-03, 55 Fed. Reg. 35,029 (Aug. 22, 1990) (ordering delegation of the authority so that civilian appointees in the Pentagon would make the decisions regarding extensions).

78. 10 U.S.C. § 12,305.

79. See Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001) (declaring a national emergency in response to the terrorist attacks on the World Trade Center and the Pentagon and signaling the President's intention to invoke the emergency power under 10 U.S.C. § 12,302 to order reservists to active duty).

80. See Exec. Order No. 13,223, 3 C.F.R. 785 (2001), 66 Fed. Reg. 48,201 (Sept. 14, 1991) (authorizing the Secretaries of the respective armed forces to order reservists to active duty for up to twenty-four months). Interestingly, the order cites only "[T]itle 10, United States Code" and does not cite the specific section it relies upon for such authority, but the language of the order and term of the call-up of any given reservist mirror that provided in 10 U.S.C. § 12,302. *Id.* Perhaps the White House wished to leave ambiguous whether it was relying on 10 U.S.C. § 12,302, which requires a presidential declaration of national emergency, or 10 U.S.C. § 12,304, which requires no such declaration but includes a terrorist attack among possible scenarios. Compare *id.* (omitting reference to any specific section of Title 10), with Exec. Order No. 12,743, 3 C.F.R. 311 (1991), 56 Fed. Reg. 2,661

triggering the armed forces' ability to extend enlistments without the consent of enlistees.⁸¹

This seemingly straightforward support for executive extension authority appears to contradict older prohibitions that remain on the books.⁸² Most directly on point⁸³ is a provision enacted in 1951, which broadly commands that “*notwithstanding the provisions of this or any other Act, any person [voluntarily] so enlisting shall not have his enlistment extended without his consent until after a declaration of war or national emergency by the Congress.*”⁸⁴ The text of the 1951 provision collides directly with that of 10 U.S.C. § 12,305, which grants the President, “*notwithstanding any other provision of law,*”⁸⁵ the power to suspend enlistees' separations once any reservist has been ordered to active duty, including upon declarations by the President alone.⁸⁶ Further statutory analysis is therefore required in order to correctly discern Congress's intent regarding stop loss powers.

(Jan. 18, 1991) (documenting that when President George H.W. Bush authorized the service Secretaries to order reservists to active duty in anticipation of the Gulf War, he specifically cited the relevant section, 10 U.S.C. § 673, later recodified as 10 U.S.C. § 12,302).

81. See 10 U.S.C. § 12,305 (providing that the President may make the determination but making no mention of whether he may or may not delegate that authority to his civilian subordinates in the Pentagon).

82. See 50 U.S.C. app. §§ 454(c)(1), 454(d)(1), 454(d)(2) (2000) (prohibiting nonconsensual extensions of servicemen's enlistment terms absent a declaration of war or national emergency by Congress).

83. John Does 1 and 2 point to 50 U.S.C. app. § 454(d)(1) and § 454(d)(2) (prohibiting nonconsensual extensions of reservists' enlistments in the reserve components absent a declaration of war) and 10 U.S.C. § 506 (2000) (limiting nonconsensual extensions pursuant to war declared by Congress to six months past the end of the war) and these statutes' legislative histories to evidence a general legislative policy of prohibiting nonconsensual extensions, except where triggered by Congress. See *John Doe No. 1 Memorandum, supra* note 10, § V (citing the Selective Service Act of 1948 for post-World War II legislative policy that enlistees are relieved of any further obligation of military duty except in times of war as declared by Congress); *John Doe No. 2 Memorandum, supra* note 62 (setting forth the legal bases for the district court to grant an injunction temporarily terminating Doe's stop loss order).

84. 50 U.S.C. app. § 454(c)(1) (emphasis added).

85. 10 U.S.C. § 12,305 (emphasis added).

86. Compare *id.* (authorizing suspension of separations when reservists have been ordered to active duty under 10 U.S.C. § 12,301, 10 U.S.C. § 12,302, or 10 U.S.C. § 12,304 pursuant to wars, national emergencies, or military necessity), with *id.* § 12,301 (authorizing reservists to be ordered to active duty upon a declaration of war or national emergency by Congress for up to six months past the end of the war), *id.* § 12,302 (authorizing reservists to be ordered to active duty for up to twenty-four months upon a declaration of national emergency by the President and stating no prerequisite declaration by Congress), and *id.* § 12,304 (authorizing selected reservists to be ordered to active duty “other than during [a declared] war or national emergency” for up to 270 days when the President determines it is necessary to augment active forces during an operational mission). Note that the time limits embodied in sections 12,301, 12,302, and 12,304 restrict the length of activation of a given member or unit of the reserves, but not the authority to activate reservists generally. The stop loss authority therefore also continues so long as any members or units of the reserves are on active duty status. See *id.* § 12,305(a) (providing the authority to suspend laws relating to separation from the military “during any period members of a reserve component are serving on active duty [pursuant to] . . . section[s] 12,301, 12,302, or 12,304”).

2. *Analysis of the statutes' text and legislative history shows Congress intended to authorize stop loss powers*

Given the apparent conflict between the two governing statutes, courts will have to construe their meaning as applicable to the military's current use of stop loss authority.⁸⁷ They will likely use two approaches to construe the statutes, first employing a strict text-based approach, and then looking to legislative history to determine Congress's intent.

John Doe 1 and 2 argue that since "[i]t is a cardinal rule . . . that repeals by implication are *disfavored*," the older prohibitions on executive extensions of enlistments "*must be given effect*."⁸⁸ They therefore assert that the executive power to suspend separations upon the President's own declaration of a national emergency must be reconciled with the prerequisite of a congressional declaration of war or national emergency as recited in the older enactment.⁸⁹ The resulting meaning, they argue, is that for the President to trigger his power to suspend separations of enlistees by a presidential declaration of a national emergency, Congress must first also have declared a national emergency.⁹⁰

The courts' objective in carrying out statutory construction, whether wholly text-based or with reliance on extratextual sources, is to determine the legislative intent of the statute, and to make its language effective.⁹¹ Courts utilize canons of construction to interpret statutes when ambiguities arise.⁹² Accordingly, when interpreting various provisions of a code that

87. See *State ex rel. Besser v. Ohio State Univ.*, 721 N.E.2d 1044, 1048 (Ohio 2000) (giving a construction to statutory terms according to their normal or customary meaning); see also RONALD BENTON BROWN & SHARON JACOBS BROWN, *STATUTORY INTERPRETATION* 11 (2002) (stating that it is universally accepted doctrine that courts must construe statutes with the goal of giving effect to the legislature's intent).

88. See *John Doe No. 1 Memorandum*, *supra* note 10, § VI.A (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974)) (emphasis added) (citing case law incorporating the canon of construction for the proposition that so long as an older statutory provision remains on the books, courts are required to find some interpretation that allows the seemingly contradictory provisions to remain valid).

89. *Id.*

90. See *id.* (rejecting the proposition that 10 U.S.C. § 12,305 can be read as an exception to the older provision, reasoning that Congress could not possibly have intended the President to be able to trigger his own stop loss authority by activating the reserves pursuant to his own declaration of a national emergency). The suit argues that Congress could not have intended to allow the President to trigger his own stop loss authority because the legislative policy embodied in the older provisions showed a desire to keep the trigger in the hands of Congress. *Id.*

91. See *State v. Spencer*, 173 S.E.2d 765, 773 (N.C. 1970) (restating that in all cases, the intent of the legislature itself constitutes the law); CRAWFORD, *supra* note 70, § 158 (explaining that, out of respect for the tripartite theory of government, courts must always seek the legislative intent, regardless of whether the meaning is plain, such that a "bare reading" suffices, or whether it is obscure, such that various methods of interpretation must be employed in order to sort out ambiguities in language).

92. See *White v. Ultramar, Inc.*, 981 P.2d 944, 951 (Cal. 1999) (resorting to several well-settled canons of construction after noting that the statute at issue did not define one of its key terms); BROWN & BROWN, *supra* note 87, at 39 (explaining that courts rely on

appear contradictory, courts first look to the text to see if they can ascertain the provisions' meanings, and then give effect to each.⁹³ They will presume that Congress did not intend an implicit repeal of the earlier provision but will hold the earlier provision repealed, at least in part, if the newer law is irreconcilable with, or repugnant to, the older one.⁹⁴ Courts look to extratextual materials if the result of the textual analysis would otherwise be ambiguous or absurd.⁹⁵ Of the valid extratextual sources, courts typically look first to prior judicial interpretations, and then to legislative history.⁹⁶ Committee reports are strongly preferred over all other forms of legislative history because they are more likely to indicate the legislators' consensus, rather than the opinion of a single speaker.⁹⁷

various rules of interpretation only if the plain meaning of the text does not make the legislative intent clear but also cautioning that the meaning that emerges often depends upon which canons are given the most weight). The canons are based on centuries of judicial practice and serve to balance deference to the legislature and common law, while putting legislators on notice of how courts will interpret legislation if written in ambiguous ways. *See id.* at 23-24 (noting that the canons developed largely through judges' attempts to limit abrogation of the common law by legislatures which courts viewed as unsophisticated and commenting that in the last century American courts have interpreted statutes with more deference to the intent of the legislature).

93. *Cf. Rivera v. Comm'r of Corrections*, 756 A.2d 1264, 1280-81 (Conn. 2000) (finding a way to give effect to each of two conflicting sentencing provisions where such a construction served the purpose of each enactment and no express repeal was stated in the later provision); CRAWFORD, *supra* note 70, § 310 (observing that courts presume that legislatures enact new laws with a complete knowledge of all laws pertaining to the subject matter and that they therefore repeal provisions expressly when they mean to do so).

94. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1096 (Cal. 1998) (recalling that to overcome the strong presumption against implicit repeal the two provisions must be so inconsistent that they cannot have concurrent operation); CRAWFORD, *supra* note 70, § 310 (noting that an implicit repeal, if courts must find one because no other construction is possible, will only be found as to the particular aspects of the older law that are irreconcilable with the newer one). Other aspects of the older law that are not directly inconsistent with the newer one will remain in effect. *Id.*

95. *See Day v. City of Fontana*, 19 P.3d 1196, 1199 (Cal. 2001) (noting that in construing a provision governing drunk-driving torts the court could rely on extrinsic sources, including the legislative history, where the text of a provision was vague); CRAWFORD, *supra* note 70, § 324 (noting that courts may examine the legislative history, the context and conditions that spurred the enactment, and other provisions enacted contemporaneously in order to find the legislative intent); *see also* CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 10-11, 32-40 (2002) (concluding that at least seven justices of the U.S. Supreme Court favor a text-first approach to construction and only look to legislative history if the text yields an ambiguous or absurd result). Of the seven judges, each has his or her own ideas about just how ambiguous a text must be before looking to the legislative history. *Id.*

96. *See* MAMMEN, *supra* note 95, at 27-29 (observing that a survey of numerous cases indicates that the typical progression of the Supreme Court's analysis first looks to prior judicial interpretations, dictionary definitions, agency interpretations, legislative history, and then to traditional canons of construction). The second and third sources are not helpful in this case because there is no assertion that any ambiguity in reconciling the two sections is the result of poorly understood or highly technical terms. *See id.* at 18-22 (noting that courts sometimes look to agency interpretations of technical terms, but that the Supreme Court's deference to agency interpretations has waned since Justice Scalia joined the Court).

97. *See id.* at 26 (citing *Holder v. Hall*, 512 U.S. 874 (1994) for the Court's rationale that if it looks to legislative history as a result of ambiguity in the text, it will look to

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- a. *The conflicting provisions cannot be reconciled, so Congress must have intended to create an exception to the earlier ban on nonconsensual extensions*

A text-based attempt to construe the two provisions at issue strongly supports the conclusion that they are irreconcilable, or at best, result in extreme ambiguity.⁹⁸ By their “notwithstanding” language, both provisions purport to trump all others, including one another.⁹⁹ But it is difficult to imagine how, absent a declaration of war or national emergency by Congress, nonconsensual enlistment extensions could be absolutely barred on the one hand and yet expressly authorized on the other.¹⁰⁰

In an attempt to provide an interpretation by which both provisions could stand together,¹⁰¹ John Doe 1 and 2 suggest that 10 U.S.C. § 12,305 implicitly presupposes a congressional declaration of war or emergency before the President may extend enlistments under any of the three embodied scenarios.¹⁰² But such a hypothesis means that Congress’s declaration would permit executive discretionary powers that the President could only exercise by first declaring the same national emergency.¹⁰³ If

committee reports instead of other sources because committee reports at least reflect the consensus of that committee and are voted upon, whereas other forms of legislative history may reflect the view of only one person, who may not necessarily even be a member of the legislature).

98. *Compare supra* note 86 (showing that 10 U.S.C. § 12,305 allows the President to suspend separations upon three scenarios, two of which require no congressional act or declaration), *with* 50 U.S.C. app. § 454(c)(1) (2000) (prohibiting nonconsensual extensions of enlistments absent a congressional declaration of war or national emergency).

99. *Compare* 50 U.S.C. app. § 454(c)(1) (purporting to control despite “the provisions of this or any other act”), *with* 10 U.S.C. § 12,305 (2000) (purporting to control despite “any other provisions of law”).

100. *See* 10 U.S.C. § 12,305 (permitting extensions upon activation of the reserves pursuant to a presidential declaration of emergency (under 10 U.S.C. § 12,302) or a presidential determination that reservists are necessary to support an ongoing mission (under 10 U.S.C. § 12,304)). Section 12,304 by its very title authorizes “order to active duty *other than during war or national emergency*.” *Id.* § 12,304 (emphasis added).

101. *See* *Haubrich v. Johnson*, 50 N.W.2d 19, 22-23 (Iowa 1951) (noting that, if possible, courts will adopt any construction whereby a later act works to support, rather than to repeal, an earlier act); CRAWFORD, *supra* note 70, § 309 (stating that courts will accept any interpretation that avoids implied repeal so long as it is a fair and reasonable construction or hypothesis).

102. *See John Doe No. 1 Memorandum, supra* note 10, § VI (asserting that the interpretation that a congressional declaration is always presupposed must be accepted in order to read the provisions in harmony with each other). The plaintiffs further argue that the provision granting the President’s power to suspend laws related to separation of enlistees does not specifically authorize involuntary extensions. *Id.* But it is difficult to conceive of how “laws relat[ed] to . . . separation” (10 U.S.C. § 12,305) would be suspended without necessarily and primarily abrogating an enlistees *legal right* to separate at the end of his enlistment period.

103. *Compare* 10 U.S.C. § 12,302 (permitting the President to activate members of the reserves upon his own declaration of a national emergency but making no mention of any required declaration by Congress), *with id.* § 12,301 (providing for activation of reserve forces upon a declaration of war or national emergency by Congress but making no mention of any declaration that the President must then make before the activation may proceed).

Congress already formally expressed its view that a situation warranted the President's additional authorities, it is difficult to imagine what possible objective could be served by forcing him to parrot the same declaration.

Furthermore, the hypothesis that Congress presupposed its own declaration of a war or emergency in all three statutory scenarios is utterly at odds with the language of the three triggering statutory provisions.¹⁰⁴ The first expressly requires a congressional declaration of war or national emergency.¹⁰⁵ In contrast, the second expressly requires only a presidential declaration of emergency and makes no mention of any required declaration by Congress.¹⁰⁶ The third expressly states that it applies "other than during war or national emergency" and so requires no declaration by either branch.¹⁰⁷

A plain reading of the provisions shows that Congress intended to grant the President stop loss powers in three distinct scenarios, only one of which involves any declaration of war or emergency by Congress. Since the provision of this power directly contradicts the older, blanket prohibition¹⁰⁸ on nonconsensual extensions, the common sense implication is that Congress meant to create an exception allowing the President to extend enlistments in certain cases without any congressional declaration of war or emergency. The alternative theory—that 10 U.S.C. § 12,305 implicitly presupposes such a congressional declaration in all three scenarios—requires the assumption that Congress was particularly sloppy and incoherent in the drafting of 10 U.S.C. § 12,305, at times stating the requirement expressly, and at other times merely implying the requirement, even when no emergency exists.¹⁰⁹ The necessity to adopt such a nonsensical explanation in order to harmonize the two provisions militates

104. Compare *id.* § 12,301 (expressly requiring a congressional declaration of war in order to call up reserves after the six-month period beyond the end of the war), with *id.* § 12,304 (authorizing activation of the selected reserves "other than during war or national emergency").

105. *Id.* § 12,301.

106. *Id.* § 12,302.

107. *Id.* § 12,304.

108. 50 U.S.C. app. § 454(c)(1) (2000).

109. Under this hypothesis, Congress opted to make explicit its otherwise implicit requirement of a congressional declaration of war or national emergency only under the first scenario. See 10 U.S.C. § 12,301 (requiring a declaration of war or national emergency by Congress). Then, in the following statute enacted immediately afterward, Congress must have merely implied—but failed to state—this prerequisite for the power to be triggered under the second scenario, despite the corresponding provision's express requirement of a declaration of emergency by the President alone. *Id.* § 12,302. Finally, in adding the third triggering statutory scenario to 10 U.S.C. § 12,305, Congress must have impliedly intended to require itself to declare a war or national emergency when no war or emergency even exists. See *id.* § 12,304 (authorizing the call-up of reservists when necessary to support an operational mission "other than in time of war or national emergency").

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for the conclusion that Congress did in fact intend a partial repeal of 50 U.S.C. app. 454(c)(1).¹¹⁰

b. The legislative history shows Congress intended to create exceptions to the previous bar against nonconsensual extensions

Even though a text-based construction shows that the two provisions are incapable of coexistence, indulging the view that they are merely ambiguous¹¹¹ permits exploration of the legislative history in order to determine Congress's intent.¹¹² The extratextual sources only confirm the conclusion that Congress intended to carve out an exception¹¹³ to the earlier blanket prohibition.

The Senate committee report on 10 U.S.C. § 12,305 and a Pentagon submission to the same committee both support the conclusion that Congress intended to grant the President stop loss authority. The report of the Senate Armed Services Committee, which inserted 10 U.S.C. § 12,305's provision into appropriations¹¹⁴ legislation in 1983, documents

110. See *United States v. Jackson*, 302 U.S. 628, 631 (1938) (holding that a court will entertain an implicit repeal only if other possible constructions are unreasonable); CRAWFORD, *supra* note 70, § 309 (stating that courts will accept any interpretation that prevents implied repeal so long as it is a fair and reasonable construction or hypothesis, and that only where an unreasonable hypothesis can reconcile the two provisions may courts may find the contradicted aspect of the older provision repealed).

111. See CRAWFORD, *supra* note 70, § 158 (explaining that courts only look to extratextual sources if the textual analysis yields an ambiguous or absurd result).

112. See *Day v. City of Fontana*, 19 P.3d 1196, 1200 (Cal. 2001) (looking to the legislative history of a tort reform enactment when the text of the provision did not clarify whether it applied to the plaintiff's action); CRAWFORD, *supra* note 70, § 324 (explaining that courts permit consultation of extratextual sources, such as previous court decisions and legislative history, when text-based construction yields an ambiguous or absurd result). The only prior judicial interpretation on point concluded that 10 U.S.C. § 12,305 was in fact an "exception," though admittedly the decision carries relatively little weight compared to the legislative history since the decision was issued by a district court and never appealed. See *Sherman v. United States*, 755 F. Supp. 385, 386 (M.D. Georgia 1991) (holding that 10 U.S.C. § 12,305, then codified as 10 U.S.C. § 673(c), was intended by Congress as a specific exception to the broader prohibition of 50 U.S.C. app. § 454(c)(1) and reasoning that Congress must have known of the older provision when it considered the newer one).

113. See CRAWFORD, *supra* note 70, § 311 (stating that an earlier provision can only be repealed by implication to the extent that it is repugnant to the later provision, yielding a partial repeal of, or exception to, the earlier provision).

114. *But see BROWN & BROWN*, *supra* note 87, at 95-96 (citing *City of Los Angeles v. Adams*, 556 F.2d 40, 49 (D.C. Cir. 1977) (cautioning that some courts find the presumption against repeal by implication particularly strong when the later legislation is an appropriations bill, since substantive changes in the law are normally made in stand-alone bills and may not be read by legislators voting on the appropriations bill). However, changes in statutes governing military personnel policies are routinely made in appropriations bills, and the specific provision in question came up in the reconciliation conference, indicating that it was not inserted without notice by other members of the Senate and House. See H.R. REP. NO. 98-352, at 239 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1160, 1178 (accepting the provision that appeared in the Senate's version "authorizing the President . . . to extend the enlistment or appointment of . . . personnel serving on active duty regardless of the normal separation dates for those individuals").

with striking clarity the committee's rationale. It begins by focusing on the then-proposed provision¹¹⁵ that allows a call-up of the reserves to support "operational missions" of active forces without any declaration by Congress or the President, noting its concern that

the President lacks sufficient discretionary authority to augment the active forces in . . . crises in which a *declaration of war or national emergency would be considered premature*. . . . At the very time that he has augmented the active forces to respond to a crisis, the *President lacks the authority to prevent the loss of regular and reserve personnel who become eligible to separate* or retire from the military services. *The same exists*, although to a lesser extent, during a national emergency declared by Congress [10 U.S.C. § 12,301]¹¹⁶ and *during a national emergency declared by the President* [10 U.S.C. § 12,302]¹¹⁷. . . . [Accordingly, under the committee's proposed 10 U.S.C. § 12,305]¹¹⁸ the *President would be authorized to extend the enlistment or appointment of essential regular and reserve personnel serving on active duty under [Sections 12,301, 12,302, or 12,304]*.¹¹⁹

The committee report makes clear three decisive points. First, by casting the new power to *extend enlistments* as a remedy to the President's then lack of authority to *prevent separation* by those who would otherwise be *eligible* to do so,¹²⁰ the report makes clear that the contemplated extensions could be nonconsensual.¹²¹ Second, by recognizing that the challenge to retention existed during a national emergency declared by the President

115. See S. REP. NO. 98-174, at 1098-99 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1081, 1098-99 (addressing 10 U.S.C. § 12,304, then codified as 10 U.S.C. § 673, which permits activation of the reserves when the President determines that doing so is necessary to support an operational mission). The committee was concerned about the President's ability to prevent separations from the military; specifically, that he be able to ensure that activation of the reserves would result in a meaningful show of force and would not be reduced by normal expirations of enlistments at a time of crisis. *Id.* It noted that a primary purpose of the force augmentation authority was to deter aggression by Cold War-era enemies and defuse impending crises, thereby precluding the need for a declaration of war or emergency. *Id.*

116. See *id.* (citing 10 U.S.C. § 672, which was later recodified as 10 U.S.C. § 12,301).

117. See *id.* (citing 10 U.S.C. § 673, which was later recodified as 10 U.S.C. § 12,302).

118. See *id.* (citing the originally enacted provision of 10 U.S.C. § 673(c), which was later recodified as 10 U.S.C. § 12,305).

119. See *id.* (emphasis added) (citing "[s]ections 672, 763 [sic], or 673(b)"). It is clear from the preceding text and from the accompanying proposed provision that "673" is a typographical error, intended to be "673." The three cited provisions were later recodified as 10 U.S.C. § 12,301, 10 U.S.C. § 12,302, and 10 U.S.C. § 12,304, respectively.

120. S. REP. NO. 98-174, at 198-99 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1081, 1098-99.

121. "Prevent[ing]" an enlistee from separating from the military even though he is "eligible" to separate implies that he may desire to separate but will not be allowed to do so. If the committee had had in mind extensions only for those enlistees who desired to extend their enlistments, it would have instead spoken of *permitting* extensions by those enlistees who were not otherwise *allowed* to extend their enlistments. See *id.* (lamenting the President's inability to order retention of enlistees who are "eligible," rather than those otherwise required to leave the armed services).

alone, and by then purporting to remedy the problem by including 10 U.S.C. § 12,302 as a scenario for the President's exercise of the new authority, the committee made clear that it was granting extension authority to the President upon his own declaration of emergency.¹²² Third, by identifying the need for the new authority in the three distinct scenarios—(1) where no emergency is declared, (2) where an emergency or war is declared by Congress, and (3) where an emergency is declared by the President—the report makes clear that it in no way envisioned it necessary for Congress to declare an emergency or specially authorize extensions on a case by case basis in order for the President's power to arise under sections 12,302 or 12,304.¹²³

Finally, although admittedly beyond the content of the report itself, a statement submitted by the Joint Chiefs of Staff during testimony leading up to the committee report provides even further context.¹²⁴ The Joint Chiefs' statement emphasized the importance of "stop loss [to] . . . preclude the loss of trained people at the very time they are needed" but complained about the "inadequacy of laws governing" it.¹²⁵ The committee's recommendation to remedy the President's lack of authority following this submission, and even its use of similar language,¹²⁶ strongly corroborate that Congress intended to create exceptions to what it perceived as the excessive blanket prohibitions then in force, including 50 U.S.C. app. § 454(c)(1).

A text-based construction of the statutes therefore yields the inescapable conclusion that Congress must have intended 10 U.S.C. § 12,305 as an exception to the prohibition on nonconsensual enlistment extensions, since only a nonsensical hypothesis could otherwise explain the clear

122. *See id.* (listing then 10 U.S.C. § 673 (later recodified as 10 U.S.C. § 12,302) among the scenarios where the need to prevent separation existed, in addition to 10 U.S.C. § 672 (later recodified as 10 U.S.C. § 12,301) and 10 U.S.C. § 673(b) (later recodified as 10 U.S.C. § 12,304)).

123. *See id.* (leaving no doubt as to when it meant the new authority would arise by listing each of the scenarios both by statute citation and through summary of each scenario).

124. *Dep't of Defense Authorization for Appropriations for Fiscal Year 1984: Hearings on S. 675 Before the Senate Comm. on Armed Serv.*, 98th Cong. 468-69 (1983) (written statement of the Organization of the Joint Chiefs, United States Military Posture for fiscal year 1984) (recommending changes in the law based on lessons learned during a Joint Chiefs of Staff exercise dubbed "Proud Saber 83," which sought to identify systemic weaknesses in public and private sector mobilization for a major armed conflict).

125. *See id.* (lamenting that under the law the President had only limited ability to use stop loss and that a congressional declaration was needed in order to implement stop loss across all services). The Joint Chiefs recommended changing the law to give the President this power without having to resort to Congress. *Id.*

126. *Compare id.* (citing the benefit of stop loss to preclude separation "at the very time they are needed"), *with* S. REP. NO. 98-174, at 198-99 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1081, 1098-99 (complaining about the President's then lack of stop loss authority "at the very time" that he is trying to augment active forces).

contradiction.¹²⁷ But indulging the possibility that a purely text-based interpretation yields merely absurd or ambiguous results, examination of the legislative history only serves to prove further that Congress intended to carve out three exceptions to the prohibition on nonconsensual extensions of enlistees.¹²⁸

B. Stop Loss Extensions May Not Breach the Enlistment Agreement, But Even If They Do, Extensions Are Still Legal

1. Stop loss arguably does not breach the enlistment agreement

Nonconsensual extensions under stop loss arguably do not breach the enlistment agreement under contract law. A breach of contract is a failure to perform any binding promise that is part of the contract.¹²⁹ The agreement document notifies enlistees that soldiers are subject to lawful orders and makes no representation that it summarizes all applicable laws nor any promise to enforce only those laws that are summarized in the document.¹³⁰ In particular, it does not purport to list all circumstances under which a soldier's term of service may be extended.¹³¹ Therefore, while stop loss orders may be unexpected, courts are likely to find they do not breach any promise contained in the enlistment agreement.

The enlistment agreement (actually labeled "Enlistment/Reenlistment Document"¹³²) used for enlistees in all branches of the Armed Forces consists of four principal sections. Section A includes spaces for the enlistee's name and other identification data.¹³³ Section B is labeled "Agreements" and provides only for specification of the branch of service in which the recruit is enlisting, the duration of enlistment, and the beginning pay grade.¹³⁴ Section C consists of a single page labeled "Partial

127. See discussion *supra* Part II.A.2.a (undertaking a text-based analysis to show that where Congress intended to require its own declaration of war or national emergency, it expressly stated the requirement).

128. See discussion *supra* Part II.A.2.b (analyzing the legislative history and showing that Congress found the previous blanket prohibition on extensions to be excessive).

129. See RICHARD A. LORD, WILLISTON ON CONTRACTS § 63:1 (4th ed. 2002) (citing *Maine Yankee Atomic Power v. United States*, 225 F.3d 1336 (Fed. Cir. 2000) to illustrate that nonperformance of a promise does not always amount to a breach; namely that there is only a breach where there is no legal excuse for the nonperformance).

130. See ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C (stating that many laws, regulations, and customs will govern the enlistee's conduct, under a banner in all capital letters reading "Partial Statement of Existing United States Laws").

131. See *id.* § C.10 (listing various scenarios under which enlistees may be extended and reservists ordered to active duty but omitting any assertion that all possible scenarios are listed).

132. See *supra* note 21 (noting the ambiguity of whether the whole document is in fact an agreement or contract, and if so, what parts of it constitute "terms").

133. ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § A.

134. See *id.* § B (stating that "[t]he additional details of my enlistment/reenlistment are in Section C and Annex(es)").

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Statement of Existing United States Laws.”¹³⁵ Written in the first person, it states that the enlistee acknowledges and understands that the subsequent statements summarizing the law “*are not promises*,”¹³⁶ that enlistment is “more than an employment agreement,” that he is undertaking numerous obligations not required of civilians, that he must obey all lawful orders, that he will be subject to separation during or at the end of his enlistment, and that Congress may change or add to his obligations and benefits regardless of the content of the enlistment agreement.¹³⁷

Section C also lists various scenarios under which reservists may be called up to active duty and have their enlistments extended.¹³⁸ The terms of the various scenarios correspond to 10 U.S.C. §§ 12,301,¹³⁹ 12,302,¹⁴⁰ 12,303,¹⁴¹ and 12,304.¹⁴² Absent, however, is any mention of

135. *See id.* § C (presenting the disclaimer in larger, bolder font at the top of the page that contains all of the summaries at issue).

136. *See id.* § C.9 (stating that “[t]he following statements are not promises or guarantees of any kind”).

137. *See id.* (appearing under the heading “For All Enlistees Or Reenlistees”).

138. *See id.* § C.10 (appearing under the label “Military Service Obligations For All Members Of Active And Reserve Components, Including The National Guard”).

139. *Compare* 10 U.S.C. § 12,301 (2000) (authorizing call-up to active duty and extension until six months beyond the end of a war in the event that Congress declares a war or national emergency), *with* ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.10(b)-(c) (stating that “[i]f I am a member of a Reserve Component of an Armed Force at the beginning of a period of war or national emergency declared by Congress, or if I become a member during that period, my military service may be extended without my consent until six (6) months after the end of that period of war”).

140. *Compare* 10 U.S.C. § 12,302 (authorizing call-up to active duty for twenty-four months upon a declaration of national emergency), *with* ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.10(d)(1) (stating that “in time of national emergency declared by the President of the United States, I may be ordered to active duty (other than for training) for not more than 24 consecutive months” but making no mention of the possibility of an *extension* of the service person’s enlistment).

141. *Compare* 10 U.S.C. § 12,303 (authorizing call-up to active duty for twenty-four months and nonconsensual extension if the enlistee is not assigned to or participating satisfactorily in a unit of the reserve, with extension continuing until his total active service, including previous service, equals twenty-four months), *with* ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.10(d)(2) (acknowledging that

I may be ordered to active duty for 24 months, and my enlistment may be extended so I can complete the 24 months of active duty, if: a) I am not assigned to, or participating satisfactorily in, a unit of the Ready Reserve; and b) I have not met my Reserve obligation; and c) I have not served on active duty for a total of 24 months

but omitting the express limitation that such extension continues *only* until total active duty service reaches 24 months).

142. *Compare* 10 U.S.C. § 12,304 (authorizing the President’s activation of the Selected Reserve when he determines it is necessary to support an operational mission), *with* ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.10(d)(4) (“As a member of the Ready Reserve I may be required to perform active duty or active duty for training without my consent (other than as provided in item 8 of this document) as follows: . . . When determined by the President that it is necessary to support any operational mission, I may be ordered to active duty as prescribed by law, if I am a member of the Selected Reserve.”). Item 8 states normal duration of enlistment as well as the branch and pay grade. *Id.* The Selected Reserve is comprised of reservists who are either on active duty or assigned to a unit and are most readily available for call-up by the President, while the Individual Ready

nonconsensual extensions, over and above a simple call-up to active duty for the applicable period, resulting from the combined effect of 10 U.S.C. § 12,305 with either 10 U.S.C. § 12,303 or 12,304.¹⁴³ That is, the agreement does not state that a soldier's own enlistment may be extended indefinitely any time *any other* reservists have been activated, even when the extension is not necessary for him to complete his own required period of active duty.¹⁴⁴ This stands in contrast to the other listed scenarios, which do mention the possibility of nonconsensual extensions where they are expressly authorized in the applicable statutes.¹⁴⁵ The remaining parts of the enlistment agreement include the enlistee's acknowledgement that he has read the agreement, and the enlistee's taking of the oath.¹⁴⁶

There exists a colorable argument that the Pentagon's exercise of stop loss authority does not breach the enlistment agreement, even though the agreement does not expressly describe the scenario under which soldiers can have their enlistments extended without their consent. The determination turns in part on whether the requirements and scenarios within Section C are terms of an agreement¹⁴⁷ at all, or instead are simply a

Reserve is comprised of trained soldiers who are neither on active duty nor assigned to a unit but may be activated in numbers of up to 30,000 in a time of emergency. *See, e.g.*, U.S. ARMY, ARMY RESERVE FORCE STRUCTURE, *at* http://www.goArmy.com/reserve/nps/Army_reserve_force_structure.jsp#selected (last visited July 15, 2005) (explaining the distinctions between the three components of the Army reserve).

143. The statute provides that *activated reservists* may have their own enlistments extended involuntarily in order to satisfy their own call-up, as in 10 U.S.C. § 12,301 and § 12,303, and the enlistment agreement includes a reasonable summary of that provision. ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.10 (enumerating instances in which military service may be extended involuntarily). However, it does not mention the possibility that *any member* of the Armed Forces may have his own enlistment extended when *any other member* of the reserves is serving on active duty pursuant to 10 U.S.C. §§ 12,301, 12,302, or 12,304, which is the thrust of 10 U.S.C. § 12,305. *Id.* Similarly, although the enlistment agreement states that a reservist may be called up to active duty for not more than twenty-four months upon the President's declaration of a national emergency, it does not say his enlistment may be extended without his consent in order to achieve that period of active duty service. *Id.*

144. *Compare id.* § C.10(d)(2) (acknowledging that "I may be ordered to active duty for 24 months, and my enlistment may be extended so I can complete 24 months of active duty"), with 10 U.S.C. § 12,305 (providing that "during any period *members* of a reserve component are serving on active duty pursuant to an order to active duty . . . the President may suspend any provision of law relating to . . . separation applicable to *any member of the armed forces*" (emphasis added)).

145. *See, e.g.*, ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.10(d)(2) (stating that the soldier's enlistment may be extended without his consent if he fails to participate satisfactorily in a unit of the Ready Reserve, mirroring 10 U.S.C. § 12,303).

146. *Id.* §§ D, E.

147. *Compare* Maine Yankee Atomic Power v. United States, 225 F.3d 1336 (D.C. Cir. 2000) (defining a breach of contract as a failure to perform any binding promise that is part of the contract), with ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.9 (stating that "[t]he following statements are *not promises or guarantees of any kind*" (emphasis added)).

“partial statement of existing United States laws,” as the label reads.¹⁴⁸ The language of Section C, all phrased grammatically in the first person, reads like a series of acknowledgements by the enlistee, rather than mutual agreements by two parties to a contract.¹⁴⁹ Further, Section C repeatedly recites that the enlistee will be bound by the entirety of the “laws, regulations, and military customs,” that it is not a complete statement of the law, and that Congress may change the law at any time.¹⁵⁰

Under a literal reading, the enlistee is simply agreeing to be a soldier for a given period, at the specified starting pay rate, subject to any lawful order, with no pretense of agreeing to be subject to certain laws and not others. The various provisions of Section C, then, are not terms of an agreement at all, but simply an informational section requiring the enlistee to acknowledge some understanding of the nature and breadth of certain obligations he is assuming.¹⁵¹ Even if the provisions are analogous to terms of a contract, there are no affirmative provisions stating that the enlistee may *not* be extended without his consent in any other scenario.¹⁵² From this perspective, even if the enlistee has agreed to the scenarios as terms of a contract, extension under yet another scenario is not a literal breach of those terms.¹⁵³

At the same time, there is a strong argument that despite its unusual language and form, the enlistment agreement sets out the expectations of the two parties, and stop loss is a direct breach of the agreed term of enlistment. While courts frequently indulge in the legal fiction that parties

148. See ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C (warning repeatedly that soldiers are subject to numerous requirements which are not stated in the document and which Congress may change after enlistment but that soldiers are nonetheless subject to all lawful orders). If these provisions are not terms of an agreement, then the only terms of the agreement between the enlistee and the Armed Forces are those in Section B, which is expressly labeled “Agreements” and includes only the branch and duration of the enlistment along with the starting pay grade. *Id.* § B.

149. See, e.g., *id.* § C.9 (“Many laws, regulations, and military customs will govern my conduct . . .”).

150. See, e.g., *id.* (acknowledging that numerous rules outside the enlistment agreement govern soldiers’ rights and obligations and that even if the rules change after he enlists the soldier must still comply with them).

151. See *id.* § C.9(a) (acknowledging that “the following statements are not promises or guarantees of any kind” and that “my enlistment is more than an employment agreement”).

152. See *id.* (excluding any language that purports to rule out extensions other than those mentioned in the enlistment agreement). For example, although section C.10(d)(1) states that a reservist may be ordered to active duty “for not more than 24 consecutive months,” there is no analogous language limiting enlistment extensions anywhere the latter are mentioned. *Id.*

153. If a valid statute provides that the military may extend his period of enlistment, then the enlistee is bound by it simply because he has agreed to become a soldier. See *In re Grimley*, 137 U.S. 147, 152 (1890) (holding that by becoming a soldier the enlistee acquires a changed relationship to the state, with correlative rights and responsibilities, without reference to the terms defined in any enlistment agreement).

are assumed to know the law in criminal matters,¹⁵⁴ it is quite another thing to argue that military recruits, often just out of high school,¹⁵⁵ should be assumed to know the entirety of military law when they agree to risk their lives in service to the nation. It would seem reasonable that even though they are agreeing to be subject to lawful orders, they are doing so only for the duration allowed for in the enlistment agreement.¹⁵⁶ At a minimum, then, the “duration of service” from Section B, along with the enlistee’s acknowledgement in Section C that he will be subject to separation at the end of his enlistment, and the various specified scenarios under which his enlistment may be extended are all terms, or even conditions, of his agreement to assume the risks and obligations of a soldier.¹⁵⁷

Furthermore, where there is ambiguity in a contract, courts construe the ambiguity against the drafter,¹⁵⁸ especially where the other party had no meaningful opportunity to negotiate its terms.¹⁵⁹ From this perspective, the various sections relating to the term of enlistment should be construed in favor of the enlistee and against the government such that they limit the duration of his obligations to those expectations reasonably evidenced by the text of the contract.¹⁶⁰ And it would certainly seem reasonable to

154. See 21 AM. JUR. 2D *Criminal Law* § 153 (1998) (explaining that the common law principle that ignorance of the law is not a defense in criminal matters is based on the fear that rewarding such ignorance would undermine the organized legal system).

155. See, e.g., BETTY D. MAXFIELD, DEP’T OF THE ARMY, OFFICE OF ARMY DEMOGRAPHICS, ARMY DEMOGRAPHICS 1 (2003) (showing that 84.9% of all enlisted service members had a high school diploma or less education, while 4.8% held a college degree or post-graduate degree), available at <http://www.Armyg1.Army.mil/hr/demographics/FY03ArmyProfileWebVs.pdf>. The profile also shows that forty-seven percent of all enlisted service members (not just new enlistees) were between seventeen and twenty-four years old, with seventeen percent between seventeen and twenty years of age. *Id.*

156. See ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § B (stating the total duration of the enlistment in years and weeks under the heading “Agreements”). The agreement to enlistment, however, is phrased, “for not less than” the period agreed to. *Id.*

157. See *Elda Arnhold & Byzantio, L.L.C. v. Ocean Atl. Woodland Corp.*, 284 F.3d 693, 704 (7th Cir. 2002) (analyzing whether a one-day delay in performance was a material breach of a contract, such that the non-breaching party was released from the duty to perform); 17A AM. JUR. 2D *Contracts* § 685 (1998) (noting that material breach of a contract excuses nonperformance by the other party and the violated term then amounts to a constructive condition of the contract).

158. See *Carter v. Four Seasons Funding Corp.*, 97 S.W.3d 387, 398 (Ark. 2003) (construing an addendum to a contract against the party who drafted it); 17A AM. JUR. 2D *Contracts* § 343 (explaining that when other methods of contract interpretation fail to resolve ambiguity, courts may construe terms against the drafter or against the party supplying the form for the agreement).

159. See ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.9 (acknowledging that Section C states “some of the laws affecting the Armed Forces which I cannot change but which Congress can change at any time”).

160. See *Carter*, 97 S.W.3d at 398 (stating that it is “axiomatic” that contracts are construed against the drafter); 17A AM. JUR. 2D *Contracts* § 343 (explaining that when other rules of interpretation leave ambiguity, contracts should be construed against the drafter, especially when the drafter is seeking to defeat a requirement in the contract). Such an approach is particularly compelling since many soldiers view a fixed duration of service as

conclude that a document that lists three detailed scenarios under which enlistment may be extended without the consent of the enlistee is in fact listing all such scenarios.¹⁶¹ Stop loss, exercised where none of those scenarios applies and which results in compelled service beyond the duration specified under Section B, "Agreements," may therefore be a material breach of the terms or conditions of the contract.

2. *Even if stop loss breaches the enlistment agreement, courts will not permit soldiers to escape extensions*

Ultimately, whether or not stop loss breaches the enlistment agreement, the result will be the same: courts will require soldiers to serve out their extended enlistments. Courts' previous treatment of enlistment agreements and their deference to Congress's war powers indicate they will not force the military to release affected soldiers from service.

Unlike other types of contracts, enlistment agreements change the status of the enlistee from civilian to soldier, and therefore subject to lawful military orders.¹⁶² Since it would be physically impossible for the military to spell out in the enlistment agreement every possible obligation the law may impose on a soldier, an enlistee assumes the status of soldier relying primarily on valid statutes, rather than the precise terms of the agreement, to define his rights and obligations.¹⁶³ To the extent that terms of an agreement conflict with statutes enacted under Congress's sovereign war powers,¹⁶⁴ the government may contravene those terms and courts will not release the enlistee from his obligation to serve.¹⁶⁵ Therefore, since

the very essence of enlistment, as opposed to commissioning as an officer. *See, e.g.*, Exum, *supra* note 6, at A19 (arguing that an indefinite commitment of service is a feature of an officer's commission but is contrary to the concept of enlistment). *But see* Langston v. Langston, 784 A.2d 1086, 1095 (Md. 2001) (eschewing any reference to the parties' subjective intent in interpreting the terms of a separation agreement); 17A AM. JUR. 2D *Contracts* § 347 (noting that courts rely on the objective manifestations of parties' intent in interpreting contracts, and that their subjective intent, or belief as to the meaning of terms, is immaterial to the determination).

161. *See Metzger v. Clifford Realty Corp.*, 476 A.2d 1, 5 (Pa. Super. Ct. 1984) (noting that courts must seek the most likely intent of the parties based only on the objective meaning of the language in light of the objectives and circumstances); 17A AM. JUR. 2D *Contracts* § 338 (noting that contracts should be interpreted in order to ascribe the most reasonable, probable, and natural conduct to the parties).

162. *See, e.g., In re Grimley*, 137 U.S. 147, 151-52 (1890) (acknowledging that while enlistment is a contract, it changes the status of the enlistee to that of a soldier, and simple breach cannot destroy the new status).

163. *See Even v. Clifford*, 287 F. Supp. 334, 338 (S.D. Cal. 1968) (holding that unlike with other types of contracts, there was little basis for holding the government strictly bound by the enlistment agreement).

164. *See* U.S. CONST. art. I, § 8, cls. 11-12 (establishing Congress's powers to declare war and to raise and support armies, which are collectively termed the "war powers").

165. *See Even*, 287 F. Supp. at 338 (holding that special deference is owed to statutes enacted pursuant to Congress's war powers, such that the government need not strictly honor contract rights arising from enlistment agreements).

Congress intended, through 10 U.S.C. § 12,305, that soldiers' enlistments would be extended without their consent in a national emergency, courts will not permit soldiers to escape the extension even if it breaches their enlistment agreements.¹⁶⁶

a. Prior court decisions have held that the government may breach enlistment agreements

In deciding cases in which a breach of the enlistment agreement is alleged, courts frequently reproduce the language of *In re Grimley*.¹⁶⁷ In that landmark case, decided in 1890, the Supreme Court went to great lengths to distinguish enlistment agreements from other types of contracts:

Enlistment is a contract, but it is one of those contracts which changes the status, and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other.¹⁶⁸

The government has at times argued that the Court's reasoning in *In re Grimley* meant that enlistees have no contractual rights in the traditional sense, and that the soldier's rights and obligations arise solely from statutes, leaving little room for courts to opine on contractual rights.¹⁶⁹ Courts generally decline to accept such an extreme interpretation, which would carve out an area of contracts wholly outside their ability to review.¹⁷⁰ But they do adopt the view that, by voluntarily assuming the status of soldier, enlistees acquire an all-or-nothing¹⁷¹ package of rights and obligations distinct from those of civilians.¹⁷² Furthermore, in contrast to

166. See *Adams v. Clifford*, 294 F. Supp. 1318, 1321-22 (D. Haw. 1969) (reasoning that Congress's intent to affect service obligations was a controlling factor in permitting breach of the enlistment agreement).

167. See 137 U.S. at 151-52 (deciding a case where an enlistee sought escape from his enlistment agreement on the basis that he was not qualified to enlist because he was older than the maximum age allowed under statute at the time, thirty-five years of age).

168. *Id.*

169. See, e.g., *Pfile v. Cororan*, 287 F. Supp. 554, 555 (D. Colo. 1968) (responding to the government's claim that as a status contract the enlistment agreement subjected the soldier purely to lawful orders of the military, leaving little or no room for courts to decide contractual rights).

170. See, e.g., *id.* at 560-61 (holding that enlistment, as a status contract, means that a soldier cannot throw off his status by means of his own wrongdoing, but that courts may still decide disputes over enlistment contracts).

171. See, e.g., *Even v. Clifford*, 287 F. Supp. 334, 338 (S.D. Cal. 1968) (citing the importance of uniform administration of military obligations as a key reason for courts' reluctance to limit enlistees' statutory obligations according to terms of the enlistment agreement).

172. See *Adams v. Clifford*, 294 F. Supp. 1318, 1320 (D. Haw. 1969) (holding that when a citizen becomes a soldier, his relations to the state are changed and he assumes correlative

private contractual arrangements, expiration of the enlistment agreement does not automatically release the soldier from his obligations and convert him back into a civilian.¹⁷³ Instead, the military must undertake the affirmative act of discharging him, and until it does so, he remains a soldier.¹⁷⁴ No breach will relieve him of his obligations as a soldier unless a court orders his discharge.¹⁷⁵ And since enlistment contracts are not treated in the same manner as contracts between private parties,¹⁷⁶ courts will not order the soldier's discharge simply because lawful orders given him are inconsistent with the terms of the agreement.¹⁷⁷

A line of cases arising from the enactment of a Vietnam War era statute demonstrates that courts will not enjoin the military from extending soldiers' service obligations in breach of the enlistment agreement. In 1966, Congress enacted 10 U.S.C. § 12,303,¹⁷⁸ which authorizes the President to order to active duty for up to twenty-four months any reservist who is not assigned to a reserve unit or who is not performing satisfactorily.¹⁷⁹ The statute also permits the extension of enlistment

rights and duties). Underlying the court's holding was the recognition that rights and duties must be uniform among members of the armed forces, rather than vary person by person, in order to permit effective administration of the military. *Id.*

173. *See* Garrett v. United States, 625 F.2d 712, 714 (5th Cir. 1980) (holding that a marine could not sue for damages resulting from the military's delay in releasing him until months after expiration of his enlistment because until discharged he remained a soldier, even if only due to the military's negligence, and his claim was therefore not permitted under the Federal Tort Claims Act).

174. *Id.*

175. *Compare* Pfile v. Cororan, 287 F. Supp. 554, 557 (D. Colo. 1968) (noting that under proper circumstances, the enlistment agreement could provide the basis for ordering the discharge of a soldier in a habeas corpus proceeding), *with* Vereen v. Hargrove, 96 S.W.3d 762, 765 (Ark. Ct. App. 2003) (holding that whenever performance of an obligation under a contract is contemplated, failure to perform may release the other party from its obligations), *and* 17A AM. JUR. 2D *Contracts* § 685 (1998) (noting that material breach of a condition of a traditional contract releases the non-breaching party from his obligation to perform at the time of the breach by the first party, such that the second party's non-performance between the breach and any court intervention is excused).

176. *See* Adams, 294 F. Supp. at 1320 (holding that the change of status worked by enlistment agreements necessitates that courts not enforce their terms as readily as they would contracts among private parties).

177. *See id.* (ruling that Congress has the power as an attribute of sovereignty to enact laws even if doing so alters existing contracts and that doing so does not amount to a breach regardless of whether the government is a party to affected contracts).

178. *See* 10 U.S.C. § 12,303 (2000) (being codified at the time as 10 U.S.C. § 673(a)). The statute is still in effect and is reflected in the enlistment agreement under § C.10(d)(2). *Id.*; *see also* ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.10(d)(2) (providing that the enlistee, if a member of the reserve, may be ordered to active duty for not more than twenty-four consecutive months, and his enlistment extended so that he can complete the active duty, if he (a) is not then assigned to or participating satisfactorily in, a unit of the Ready Reserve, (b) has not met his reserve service obligation, and (c) has not served on active duty for a total of twenty-four months).

179. Most of the plaintiffs were reservists called up to active duty as a result of missing too many training sessions. *See, e.g.,* Pfile, 287 F. Supp. at 556 (stating petitioner had failed to attend summer training camp in July 1967 as required for reservists).

without the enlistee's consent if necessary to complete the active duty service.¹⁸⁰ Since it was enacted after the various plaintiffs enlisted, their enlistment agreements made no mention of it, but only referred to an older provision that authorized activation "not to exceed 45 days."¹⁸¹ When the military sought to order them to active duty or extend their enlistments, several enlistees sued alleging breach of their enlistment agreements.¹⁸²

In *Pfile v. Corcoran*,¹⁸³ the enlistment document contained no language stating the enlistee could be subject to additional service obligations enacted after his enlistment,¹⁸⁴ and the court acknowledged that his activation was in contravention of its terms.¹⁸⁵ Nonetheless, the *Pfile* court iterated a two-prong test, holding that Congress may abrogate contracts of any type when (1) it does so through exercise of some sovereign, paramount power and (2) the abrogation furthers the ends generally sought by that sovereign power.¹⁸⁶ Congress is then entitled to wide discretion as to what statutes are necessary to achieve its end.¹⁸⁷ The court found that Congress's powers to declare war and to raise and support armies (i.e., the "war powers")¹⁸⁸ are precisely such sovereign, paramount powers, and that a statute related to activation and extension of reservists fell within the "wide discretion" that Congress enjoys.¹⁸⁹ The court therefore held that the

180. 10 U.S.C. § 12,303(b).

181. *Pfile*, 287 F. Supp. at 556. Since the enlistment agreement in *Pfile* cited the applicable scenario for nonconsensual activation and then expressly stated that the duration of the activation was "not to exceed 45 days," the activation arguably represented a more clear-cut breach than is the case with stop loss, where the agreement omits the applicable category of extension entirely and therefore does not affirmatively set forth a cap on the duration of the extension. *Id.*

182. *See, e.g., id.* (alleging breach of contract when the enlistee-reservist was called up to active duty in excess of the time allowed for in his enlistment agreement).

183. *Id.*

184. *Cf. Adams v. Clifford*, 294 F. Supp. 1318, 1321 (D. Haw. 1969) (holding that a clause of the enlistment document requiring activation when "otherwise authorized by law" was sufficient to include requirements enacted by Congress after the enlistment date, such that no breach of the agreement occurred).

185. *See Pfile*, 287 F. Supp. at 557-58 (relating that *Pfile* was challenging his call-up to active duty for seventeen months, but the Army did not seek to extend his total enlistment).

186. *See id.* at 560 (stating that legislatures may abrogate even private contracts already in effect since "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order").

187. *See id.* at 561 (holding that Congress enjoys wide discretion as to what is "necessary" such that there is no requirement that it utilize measures that are the least intrusive on existing or future contracts).

188. The district court found it unnecessary to determine whether the Vietnam conflict was "a state of war" in order for the measure taken by Congress to further the ends generally sought by the war powers, noting that it "is scarcely a state of peace." *Id.* at 561. Presumably no one would contend that the situation in Iraq is a "state of peace" either, even though Congress never formally declared a war. *See* CNN.com, Forces: U.S. & Coalition/Casualties, at <http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/> (last visited Sept. 5, 2005) (tracking the more than two thousand coalition troop deaths since the invasion of Iraq).

189. *Pfile*, 287 F. Supp. at 561.

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statute could validly be applied to the petitioner even though it contravened the express limitation on activation in his enlistment contract.¹⁹⁰

Less than two weeks later, another district court held similarly in *Even v. Clifford*,¹⁹¹ where the petitioner challenged an eighteen-month call-up to active duty, even though the military imposed no enlistment extension. The court concluded that since Congress had the power to determine who would serve in the armed forces anyway, there was “little basis” for concluding the “government is strictly bound by the enlistment contract.”¹⁹² It found the petitioner’s complaint unsympathetic since he had voluntarily submitted to military authority in the first place by enlisting.¹⁹³

Courts have applied similar reasoning at the appellate level. The Ninth Circuit cited the *Pfile* and *Even* decisions in affirming the denial of a petition for habeas corpus in *Schwartz v. Franklin*.¹⁹⁴ It reasoned that the congressional war powers permitted “at least the minimal breach” of the petitioner’s enlistment agreement, and noted that a breach was also permitted in cases where the enlistment agreement did not even mention the general category of call-up that was later applied.¹⁹⁵ The court also held that no military emergency was necessary to justify Congress’s exercise of its war powers in regulating the length of required active duty.¹⁹⁶ The Ninth Circuit then cited *Schwartz* in *Scaggs v. Larsen*,¹⁹⁷ denying relief to a reservist whose enlistment was extended for seventeen months so that he could complete his active duty obligation imposed under 10 U.S.C. § 12,303. The U.S. Supreme Court then denied *Scaggs* certiorari.¹⁹⁸

190. *See id.* (recalling that the plaintiff’s enlistment agreement expressly limited his liability to activation for delinquent service to forty-five days and did not mention the possibility that Congress could add any new obligations after the enlistment).

191. 287 F. Supp. 334, 338 (S.D. Cal. 1968).

192. *See id.* (concluding that since Congress has the power to conscript its citizens into the military anyway, then it could order nonconsensual extensions of those who had already volunteered to enter and receive the benefits of service).

193. *Id.*

194. 412 F.2d 736, 738 (9th Cir. 1969) (reciting that the plaintiff had been ordered to active duty for a period exceeding the forty-five day limit in his enlistment agreement).

195. *See id.* at 739 (noting that other cases permitted breach of the enlistment agreement where statute authorized activation when the President “deems it necessary,” but the agreements made no mention of that possibility). *Schwartz*’s enlistment agreement provided for the possibility of activation in the scenario he faced, but for forty-five days instead of the twenty-four months permitted by statute. *Id.*

196. *See id.* (reasoning that the war powers include the power to raise and maintain armies even in peacetime so there is no requirement of a military crisis for their invocation).

197. 423 F.2d 1224, 1224 (9th Cir. 1970) (documenting the opinion in its entirety: “PER CURIAM: The order appealed from is affirmed. *Schwartz v. Franklin*, 9 Cir., 1969, 412 F.2d 736; *Winters v. United States*, 9 Cir., 1969, 412 F.2d 140; *Raderman v. Kaine*, 2 Cir., 1969, 411 F.2d 1102.”), *cert. denied*, 400 U.S. 930 (1970).

198. *See Scaggs v. Larsen*, 400 U.S. 930, 930 (1970) (deciding the second appeal that had come to it on the same case), *denying cert. to Scaggs* 423 F.2d 1224. The Supreme Court was already familiar with many of the factual and legal issues in *Scaggs*, as it had

b. Courts will permit the government to breach enlistment agreements through stop loss

In accordance with the established case law, courts will likely conclude that even if stop loss breaches soldiers' enlistment agreements, the Army is entitled to exercise it because it is authorized by a statute enacted under Congress's constitutional war powers.¹⁹⁹ Even if they adopt the view that the enlistment agreement can be reasonably read as spelling out all the scenarios in which the military may extend enlistments, courts will likely follow *Even* and hold that the government is not strictly bound by its terms.²⁰⁰ Following the logic of that decision, they are likely to reason that Congress has the power to conscript any citizen into military service, and has all the more power to extend the enlistments of those who voluntarily decided to subject themselves to the obligations of soldiers in the first place, even if doing so conflicts with the terms of their enlistment agreement.²⁰¹

Courts are likely to be even more deferential to the President's exercise of stop loss authority than they were to the Vietnam War era extension authority²⁰² because, in accordance with the second prong of the *Pfile* test, stop loss extensions are more directly related to the ends generally sought by the war powers.²⁰³ As was the case with the Vietnam War era

heard and granted his motion for temporary release from military custody pending the Ninth Circuit's review of his appeal on the merits of his petition for writ of habeas corpus. *Scaggs v. Larsen*, 396 U.S. 1206, 1206-07 (1969).

199. See 10 U.S.C. § 12,305 (2000) (relating to the raising and maintaining of the Army, a power granted by Article I, Section 8 of the United States Constitution). The reasoning of *Pfile* might be inapplicable if the Department of Defense attempted to extend enlistments pursuant to a regulation rather than an express statute. See 287 F. Supp. at 559 (emphasizing that the power to override contracts must stem from a statute enacted pursuant to Congress's sovereign powers).

200. See *Even v. Clifford*, 287 F. Supp. 334, 338 (S.D. Cal. 1968) (holding that courts do not treat enlistment agreements as they do contracts between private parties).

201. See *id.* (reasoning that restrictions on extensions in the enlistment agreement would not be enforced because doing so would indirectly fetter the power of Congress to enact uniform regulations for administering the armed forces).

202. Although 10 U.S.C. § 12,305 was enacted long after the cases challenging 10 U.S.C. § 12,303, the mechanics and effects are very similar. Compare 10 U.S.C. § 12,303 (coming into effect in 1966), with *id.* § 12,305 (coming into effect in 1983). Both statutes require a decision by the President, both are brought into play by activation of reservists, and both may result in nonconsensual extensions of soldiers in order to serve out the required period of active service. Compare *id.* § 12,303 (authorizing the President to call up reservists who are not assigned to a unit or performing satisfactorily and to extend the enlistments as needed to complete a twenty-four month period of active duty), with *id.* § 12,305 (authorizing the President to extend any member of the armed forces when any reservist has been called up to active duty pursuant, inter alia, to a presidential declaration of national emergency). Although 10 U.S.C. § 12,305 may result in the extension of any member of the military regardless of his or her own conduct, this aspect would not seem to make a difference under the rationale of *Pfile*. See *Pfile*, 287 F. Supp. at 560 (supporting its conclusion on the paramount sovereign powers of Congress without any reference to the conduct of the plaintiff in deserving the resulting extension of his service).

203. See *Pfile*, 287 F. Supp. at 560-61 (requiring that a measure be enacted pursuant to

extensions, stop loss is authorized under Congress's power to raise and support armies,²⁰⁴ so the first prong²⁰⁵ is equally satisfied. However, stop loss under 10 U.S.C. § 12,305 is designed to be invoked, and is being invoked, pursuant to a national security emergency declared by the President, whereas the *Pfile* line of cases applied where Congress intended the call-up and extension authority for the more mundane purposes of discipline and administrative efficiency.²⁰⁶ The military utilizes stop loss in order to provide sufficient combat strength in Iraq, whether one believes its purpose is for unit cohesion or maximization of end strength.²⁰⁷ As a result, stop loss arguably meets the second prong of the *Pfile* test²⁰⁸ even more convincingly than the Vietnam War era extensions,²⁰⁹ because stop loss is being exercised precisely in order to support military combat against external enemies, the core end sought by the sovereign war powers.²¹⁰

Additionally, stop loss extensions are exercised following an actual determination of military necessity, so courts are likely to be more deferential than in the Vietnam War era cases.²¹¹ In *Pfile*, the Court noted that once the two-prong test was satisfied, the government was entitled to "wide discretion" in determining what measures were "necessary," even where the result was the abrogation of contracts.²¹² Yet unlike the *Pfile* line of cases, where there was no particularized determination of military necessity at all, any breaches of enlistment agreements under stop loss occur pursuant to a determination that particular soldiers are "essential to

some sovereign, paramount power, such as the war powers, and that it further the ends generally sought by those powers before courts will permit abrogation of contracts through implementation of the measure).

204. See U.S. CONST. art. I, § 8, cls. 11-12 (establishing Congress's powers to declare war and to raise and support armies).

205. See *Pfile*, 287 F. Supp. at 560-61 (requiring that the measure be enacted under some sovereign, paramount power, and observing that the war powers are just such powers).

206. See *id.* at 559 (noting that the legislative history showed Congress intended 10 U.S.C. § 12,303 to make nonproductive reservists available for active duty without first referring them through the slow and bureaucratic processes of the Selective Service).

207. See discussion *supra* Part I (discussing conflicting views of whether stop loss is primarily aimed at promoting unit cohesion or increasing the number of available troops for the war effort).

208. See *Pfile*, 287 F. Supp. at 560-61 (holding that the government may abrogate contracts of any type when: (1) it does so through exercise of some sovereign, paramount power and (2) the abrogation itself furthers the ends generally sought by that sovereign power).

209. See *id.* at 555 (indicating that 10 U.S.C. § 12,303 was used as a more efficient means to discipline reservists who failed to perform their obligations satisfactorily, rather than to increase combat strength).

210. See U.S. CONST. pmb. (citing the need to provide for the common defense as a key purpose for conferring various powers, including the war powers, upon the federal government).

211. See *Pfile*, 287 F. Supp. at 560 (holding that Congress enjoys wide discretion as to what is "necessary" such that there is no requirement that it utilize measures that are the least intrusive on existing or future contracts).

212. *Id.*

the security of the United States.”²¹³ This contrasts with the *Pfile* line of cases, where no special determination of the individual soldier’s importance to the cause was necessary.²¹⁴ Thus, any breach or abrogation resulting from stop loss seems to fall even more comfortably within the wide discretion to which Congress is entitled.

Furthermore, in contrast to the *Pfile* line of cases, 10 U.S.C. § 12,305 has been on the books for more than twenty years.²¹⁵ Far from being adopted only after enlistees had made themselves subject to military orders,²¹⁶ stop loss was enacted long before any affected soldier enlisted or last reenlisted.²¹⁷ If the Pentagon may breach enlistment agreements pursuant to statutes that the enlistee had no way of knowing about when he enlisted, then it should be able to do so pursuant to a statute that has been on the books for twenty years.²¹⁸ Enlistees at least have the possibility of investigating the obligations 10 U.S.C. § 12,305 could impose before agreeing to change their status to that of soldier, thereby submitting to military authority until discharged.²¹⁹

Finally, the enlistment agreement at least mentions one scenario where enlistment may be extended pursuant to the declaration of a national emergency.²²⁰ Following the Court’s reasoning in *Schwartz*, if the Army may breach an agreement that does not even mention the scenario where a statute permits extensions, courts are likely to be even more deferential to the military when the agreement lists similar scenarios for nonconsensual extensions that are distinguished only by the duration of the compelled service.²²¹ Even if the agreement did not give actual notice of the particular

213. See 10 U.S.C. § 12,305 (restricting application of stop loss to enlistees the President determines are essential to national security). The fact that soldiers are actually being deployed to Iraq and Afghanistan suggests that the determination of military necessity is not just a ruse to increase troop strength generally.

214. See *id.* § 12,303 (requiring the President to consider only family responsibilities and field of employment to achieve fairness for affected reservists); *Pfile*, 287 F. Supp. at 555 (refraining from specifying whether the petitioners were to be deployed to Vietnam for combat or to play other roles in the military).

215. See 10 U.S.C. § 12,305 (coming into effect in 1983).

216. See *Pfile*, 287 F. Supp. at 555 (avoiding any implication that enlistees should have known of the increased liability to serve in supporting its holding).

217. Enlistments are for a period of up to six years, so continued service as an enlistee then requires reenlistment, where the soldier would again have to sign an Enlistment/Reenlistment agreement. 53 AM. JUR. 2D *Military and Civil Defense* § 67 (1996).

218. Compare *Pfile*, 287 F. Supp. at 555-56 (involving a statute that Congress enacted after the plaintiff enlisted), with 10 U.S.C. § 12,305 (coming into effect in 1983).

219. See *Even v. Clifford*, 287 F. Supp. 334, 338 (S.D. Cal. 1968) (implying that enlistees, by voluntarily submitting to military authority, must expect to be subject to unpleasant orders).

220. See ENLISTMENT/REENLISTMENT DOCUMENT, *supra* note 21, § C.10(b) (referring to the possibility for nonconsensual extension of service upon a declaration of war or national emergency by Congress).

221. See *Schwartz v. Franklin*, 412 F.2d 736, 739 (9th Cir. 1969) (noting that petitioner’s

scenario now invoked by the Pentagon, it advised the enlistee that his enlistment could be extended without his consent in a national emergency or war declared by Congress.²²² It simply omitted that his enlistment could also be extended in a national emergency declared by the President.²²³

Therefore, if the government may breach enlistment agreements by enacting statutes only tangentially related to combat readiness *after* the agreement is entered into, then surely it can do so through a statute that serves the primary purposes of Congress's war powers. This conclusion is all the more compelling when the statute was enacted long before the enlistment and the agreement listed similar scenarios where extensions could be compelled. Even if stop loss does breach enlistment agreements, courts will not order soldiers discharged as a result.

CONCLUSION

Few would argue that the burden of stop loss is not extraordinarily harsh on those soldiers forced to continue fighting in Iraq and Afghanistan long after their enlistment agreements have expired. Considering the sacrifice and service to the country required of all soldiers, nonconsensual extensions are particularly distasteful and unfair if the military makes no effort to actually inform the soldiers of that possibility upon enlistment. Furthermore, there is strong evidence that cutbacks in troop levels by Congress and the past two presidents were excessive and are in part responsible for the conditions leading to stop loss.²²⁴ Nonetheless, as discussed above, it was also Congress's intent to give the President the power to exercise stop loss authority in undeclared wars such as in Iraq and Afghanistan.²²⁵ And past decisions show that courts view enlistment agreements as quite distinct from private and civilian contracts, stemming from both the unique status of soldiers as well as the paramount need of the state to exercise war powers in order to preserve itself.²²⁶ Courts are therefore likely to be highly deferential to Congress's decision to grant the President stop loss authority.

enlistment agreement mentioned the possibility of forty-five day activations, but not twenty-four month activations, if a reservist was not assigned to a unit or if he performed unsatisfactorily).

222. See 10 U.S.C. § 12,301 (constituting the statutory source of the possibility of extension).

223. See *id.* § 12,305 (providing for the power of stop loss extensions in various scenarios).

224. See SAUERWEIN, *supra* note 36 (arguing that the roots of stop loss and the undersized military in general lie in decisions made as far back as 1992).

225. See discussion *supra* Part II.A (arguing that Congress intentionally created an exception to the earlier blanket prohibition on extensions in order to facilitate the President's ability to respond to threats).

226. See discussion *supra* Part II.B (arguing that the government may extend enlistees even if doing so violates express terms of the enlistment agreement).

In deciding the lawsuits challenging extensions in Iraq under stop loss, courts will of course have to consider the precedent they would create for nonconsensual extensions in future conflicts. Arguments that stop loss is fundamentally “shameful” and “a breach of trust”²²⁷ would likely resonate much less if not for the increasingly accepted view that the Iraqi conflict was not in fact necessary to protect U.S. national security.²²⁸ It is not difficult to imagine scenarios—such as if terrorists again conducted a major attack on the United States with the benefit of safe harbor given by foreign governments—in which such nonconsensual extensions might truly be necessary to protect the security of the United States, even where Congress would never formally declare war.²²⁹ For public policy considerations, in addition to strict construction of the statutes and reasons of stare decisis, courts are unlikely to rule that the President may not exercise stop loss powers, even if doing so breaches soldiers’ enlistment agreements.

However, considering the substantial sacrifice made by all enlistees, the military should at the very least take steps to ensure enlistees are aware of the various scenarios under which their service may be extended without their consent.²³⁰ The most straightforward way of doing so might be to revise its standard Enlistment/Reenlistment Document in order to advise enlistees of the possibility of nonconsensual extension. It could do so by simply adding the following subparagraph under Paragraph 10:

FOR ALL ENLISTEES: Whenever any member of a reserve component has been ordered to active duty in a time of national emergency declared by the President of the United States, or in time of war or national emergency declared by the Congress, or when the President has determined that such activation is necessary to support any operational mission, my military service may be extended without my consent for as long as any such reservist remains on active duty.

The difficult issues raised by stop loss ultimately have their source in the state’s power to compel citizens to fight in military combat, even if doing

227. See, e.g., Exum, *supra* note 6, at A19 (opining that the President should only use stop loss powers during a catastrophic national emergency).

228. See John F. Harris & Christopher Muste, *Fifty-six Percent in Survey Say Iraq War Was a Mistake*, WASH. POST, Dec. 21, 2004, at A4 (noting the poll identified the first point when a decisive majority of Americans concluded the war was not worth fighting).

229. See, e.g., 50 U.S.C. app. § 454(c)(1) (2000) (prohibiting by its terms nonconsensual extensions of enlistments absent a formal declaration of war by Congress). Despite the numerous occasions on which the United States has seen it necessary to engage in military conflict, it has done so without a formal declaration of war since World War II, and this pattern seems likely to continue. See Jay Tolson et al., *Selling Us a War*, U.S. NEWS & WORLD REP., Nov. 5, 2001, at 52 (exploring the benefits and pitfalls of engaging in military confrontations absent a formal declaration of war).

230. Plummeting recruitment in some branches of the military may indicate that many potential recruits have already learned of the risk through the media. See *Drop in Enlistment*, *supra* note 59, at A32 (reporting that the Army National Guard had missed its recruitment goal by thirty percent).

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so causes them to risk serious injury or death. Nonconsensual military service in one form or another appears to be inevitable so long as the United States decides to engage in military confrontations beyond the capacity of the permanent all volunteer force. However, if the government is going to use stop loss to conscript those who volunteered to serve in the first place, it at least owes new enlistees a complete disclosure of all the scenarios in which their enlistment might be extended without their consent.