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Keeping Faith: The United States Military Enlistment Contract and the Implementation of Stop-Loss Measures

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Keeping Faith: The United States Military Enlistment Contract and the Implementation of Stop-Loss Measures

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- I wonder, sir, do you feel that the Pentagon is keeping faith with those volunteers in the numerous stop-loss orders that have been called in the past two years, including the one called by the Army yesterday in which prospective retirees will not be allowed to go from Iraq and Afghanistan, until they get home and possibly 90 days beyond that. Do you think that the Pentagon is keeping faith with those people?

- I do, Charlie. I think the way one can—first of all, you've got to remember that each person involved in the armed forces, active and reserve and Guard, volunteered, and they made a conscious decision to serve their country. And God bless them; we appreciate that they've done that.¹

Secretary Rumsfeld at the United States Department of Defense News Briefing, January 6, 2004.

I. INTRODUCTION

Near Mosul, a suicide bomber entered a dining tent for United States military officers and detonated an explosive device that killed twenty-two people and wounded sixty-nine others.² The story was particularly disturbing because it happened in a mess hall, a place soldiers “assume they are safe.”³ But there was another disturbing aspect to this story, hidden away in the quiet life of one soldier—Army Specialist Jonathon Castro.⁴ He expressed personal reservations about the war in Iraq before he deployed, but served faithfully out of a deep sense of obligation and loyalty to his country.⁵ The term of his tour was involuntarily extended, and he died in

1. United States Department of Defense, News Transcript, *DoD News Briefing – Secretary Rumsfeld and General Myers*, Jan. 6, 2004, <http://www.defenselink.mil/transcripts/2004/tr20040106-secdef1104.html> [hereinafter *Briefing*].

2. John Hendren, *The Conflict in Iraq; Blast Likely a Suicide Bombing; Fatal Attack on Iraq Base Seen as an Inside Job*, L.A. TIMES, Dec. 23, 2004, at A1.

3. *Id.*

4. Wendy Thermos, *Army Spc. Jonathon Castro, 21, Corona; Killed in Mess Hall Blast*, L.A. TIMES, Jan. 9, 2005, at B14.

5. *Id.* “Though Castro felt an obligation to carry out his military duty, he questioned whether the U.S. had a legitimate reason for being in Iraq, his mother said.” *Id.*

the now infamous mess hall blast of December 21, 2004.⁶ Every loss of life is tragic, but this death was particularly egregious. You see, after completion of the terms of his contract in June, Castro's separation date was involuntarily extended, and he was ordered to remain in Iraq for at least three more months.⁷ The order seems troublesome enough at the thought of him returning months after he was scheduled to do so, but it became so much worse—he died six months after his contracted return home.⁸

What is a soldier to do? Military service is dangerous, but when a soldier nears the end of his or her contract the concerns increase. Many have planned family and career developments around a termination date, and so the stakes grow higher for both them and the people to whom they have made commitments. Specialist Dana Jensen faced that dilemma and chose not to go back.⁹ He enlisted as a member of the United States Army National Guard's "Try One" Program¹⁰ in Winchester, Virginia, but his unit was called up, which extended his obligation for the duration of his deployment.¹¹ More concerned about family, Jensen refused to report for duty¹² and was sent to the Army's desertion center with a reputation forever tarnished.¹³ Many among his community now shun him as a deserter, traitor, and a coward.¹⁴ Those outraged at the involuntary extension of soldier contracts, and touched by the gravity of his decision, respect his choice to reject the federal government's authority to extend his enlistment contract.¹⁵

This is not an article about the propriety of any of the United States' commitments around the world. This is not an article about foreign policy

6. *Id.*

7. *Id.*

8. *Id.*

9. Michelle Boorstein, *Walking Away From a Call to Serve*, WASH. POST, May 22, 2004, at B01.

10. See *infra* notes 102, 140-41, 232 and accompanying text.

11. Boorstein, *supra* note 9, at B01.

12. *Id.* This decision is termed going "absent without leave." *Id.*

13. *Id.*

14. *Id.* The local military community was outraged and boycotted Jensen's real estate firm. *Id.* An eight-year veteran named Bill Germelman did not mince any words:

Here's a guy who willingly shirked the obligation to his comrades as well as the state and federal government. You tell me if that's someone you want to do business with? He's enjoying a cafe latte while all my friends are sitting at Fort Bragg awaiting their fate . . . We are seething.

Id. At the local Elks Club, Scott Aiken "first joked that Jensen should 'be shot,' then said he never should have joined the Guard if he wasn't willing to go." *Id.*

15. Two local women were quoted as strongly supporting his decision, sympathizing with the bind he faced. *Id.* Despite this kind of support, Jensen himself recognized, "I'm not seen as the good guy . . . and I never will be." *Id.*

or about any particular administration's agenda—perceived or propagated. This Article is about those who are the hands and feet of such commitments and agendas; the lives that are committed bravely to the service of the United States of America in recruiting offices of all types in locations all around the country. Soldiers are asked to sign enlistment contracts which create the parameters of their employment. They sign their lives away, placing their liberty in the hands of the government, and all they get in return is a guarantee that the government will comply with the laws of the United States, including those that apply to terms that govern the length of their service. Ultimately, it is up to the federal government how these contracts are served, and seemingly, when they will end, directing the destinies of these brave men and women. This Article examines a particular circumstance in the exercise of that power—what happens when a soldier is denied the right to leave—and concludes that though it may be deemed legal, the United States is just not keeping the faith of its faithful servants when those servants must rely the most.

Section II explains the stop-loss policy and its application. It begins with a look at the military framework within which the stop-loss policy directly operates, followed by the policy's relationship to the political machinery responsible for its implementation. The section ends with an overview of how the policy's application has been challenged in recent history. Section III examines these challenges in detail, illustrating both the past and present state of the law. Section IV analyzes the legal issues common to these challenges, discussing those principles that seem largely established and those that are better suited for further litigation. Section V concludes by asserting that, despite the legal holes in the stop-loss policy which make it ripe for new suits, the courts will continue to affirm the application of stop-loss. Ultimately, if the stop-loss policy is to change, it is not the Judicial branch, but the Executive and Legislative branches which will have to act to keep the faith with the American soldier.

II. BACKGROUND

A. *Stop-Loss Defined*

Reading the United States Department of Defense definition of stop-loss,¹⁶ one could mistakenly get the impression that the policy is simple. The definition is brief: "Presidential authority under Title 10 U.S. Code 12305 to suspend laws relating to promotion, retirement, or separation of any member of the Armed Forces determined essential to the national

16. Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, *Stop-Loss*, <http://www.dtic.mil/doctrine/jel/doddict/data/s/05125.html> (last visited Feb. 2, 2006). The Joint Doctrine Division maintains the online dictionary which is searchable as amended through August 31, 2005.

security of the United States.”¹⁷ Codified as suggested by the definition in 10 U.S.C. § 12305, the primary stop-loss power is found in subsection (a):

Notwithstanding any other provision of law, during any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 12301, 12302, or 12304 of this title [10 USCS § 12301, 12302, or 12304], the President may suspend any provision of law relating to 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.¹⁸

A soldier placed on stop-loss is denied his or her contracted separation date and forced to remain on active duty at a current post or deployed to another.¹⁹

It was passed after the staffing difficulties of the Vietnam War, and according to military officials, keeps the United States forces strong enough to meet the various military commitments worldwide.²⁰ It was first used during the Persian Gulf War in 1990, and it certainly met its first test with success.²¹ With far less fanfare and public ridicule than it sees today, the stop-loss provision was used during the Persian Gulf War to plug significant gaps in service.²² As Americans watched Operation Desert Storm on their televisions, there was a sense of both horror and awe.²³ When it was over, its short duration was taken largely for granted as the new face of modern warfare. Somehow the rapidity of the success managed to alleviate most worries associated with these involuntary extensions, such that only one lawsuit challenged the power.²⁴

17. *Id.* This definition is a reproduction of the language of the cited statute.

18. 10 U.S.C. § 12305(a) (2006).

19. See United States Department of Defense, *DOD Authorizes Stop Loss*, Sept. 24, 2001, http://www.defenselink.mil/releases/2001/b09242001_bt454-01.html.

20. Josh White, *Soldiers Facing Extended Tours: Critics of Army Policy Liken it to a Draft*, WASH. POST, June 3, 2004, at A01. The idea behind stop-loss was to provide consistency in the units deployed so that new people were not constantly thrust into a tightly functioning unit. Lately, although the rhetoric from top military officials has stayed the same, the talk has shifted to a discussion of the increasing difficulties in maintaining the appropriate troop levels worldwide.

21. *Id.*

22. *Id.* It has also been used intermittently between the two Gulf Wars. See *infra* note 55.

23. See David Kirkpatrick, *News Industry Plans for War and Worries About Lost Ads*, N.Y. TIMES, Feb. 10, 2003, at C2 (discussing the impact of the Persian Gulf War on network and cable television); Peter Applebome, *Faded Glory: Looking Back at the Gulf War*, N.Y. TIMES, Jan. 16, 1992, at A1 (analyzing the effects and perceptions of the war).

24. See *infra* Part III.A.

More recently, stop-loss has been used to support the conflicts in Iraq and Afghanistan.²⁵ Although all branches have implemented stop-loss at one point or another,²⁶ the Army's use of the policy is the best illustrative example. Initiated most recently on November 30, 2001, the stop-loss order issued in the Army "allow[ed] the Army to retain soldiers with critical skills on active duty beyond their date of separation for an open-ended period."²⁷ Several modifications of the policy ensued, changing which officers and enlisted specialties were under such an order and which divisions—Active Army, Ready Reserve, or National Guard—were affected.²⁸ Modifications were also made to the length of time that soldiers' service could be extended. The policy was announced in 2001 as an "open-ended" extension, and it was not limited until September 2002, when an order restricted extensions to no more than twelve months after the contracted for separation date was issued.²⁹ Even in its twelve month iteration, the policy places a significant burden on the life and liberty of soldiers, one that may not have been contemplated when it was first used more than a decade ago.³⁰

25. See *supra* note 23.

26. Lisa Burgess, *Army Puts All Units Tapped For Iraq, Afghanistan on Stop-Loss, Stop-Move*, STARS AND STRIPES, June 3, 2004, available at <http://www.estripes.com/article.asp?section=104&article=21706&archive=true>. The Army's most recent use of the policy best exemplifies the many different ways the policy changes and affects soldiers.

27. *Army Enacts 'Stop-Loss' For Some Specialties*, Army News Service, Dec. 4, 2001, http://www4.army.mil/ocpa/read.php?story_id_key=1469 [hereinafter *Army Enacts*]. "Active duty" is defined as "[f]ull-time duty in the active military service of the United States. This includes members of the Reserve Components serving on active duty or full-time training duty, but does not include full-time National Guard duty." Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, *Active Duty*, <http://www.dtic.mil/doctrine/jel/doddict/data/a/00040.htm> (last visited Mar. 7, 2006).

28. The initial policy affected only selected officer and enlisted specialties in the Active Army. *Army Enacts*, *supra* note 27. In January 2002, the policy was expanded to include the Ready Reserve and National Guard. Marcia Triggs, *Stop Loss Expands to Reserve Components*, Army News Service, Jan. 2, 2002, http://www4.army.mil/ocpa/read.php?story_id_key=1178. The Active Army was removed from the stop-loss order in May 2003 but reinstated in November 2003. *Army Announces Changes in Stop Loss*, Army News Service, May 29, 2003, http://www4.army.mil/ocpa/read.php?story_id_key=161; United States Army News Release, *Army Announces Implementation of the Active Army Unit Stop Loss/Stop Movement Program*, Nov. 17, 2003, http://www4.army.mil/ocpa/read.php?story_id_key=5415. There have been numerous adjustments in the specialties affected by the orders. For a discussion of these changes, search the Army Public Affairs webpage at <http://www4.army.mil/ocpa/press>. For a discussion of officer ranks and the differences between the enlisted and officers, see United States Department of Defense, *The United States Military Enlisted Rank Insignia*, <http://www.defenselink.mil/specials/insignias/enlisted.html> (last visited Mar. 5, 2006); United States Department of Defense, *The United States Military Officer Rank Insignia*, <http://www.defenselink.mil/specials/insignias/officers.html> (last visited Mar. 5, 2006).

29. United States Army News Release, *Army Announces New 12-Month Stop Loss Policy* (Sept. 6, 2002), http://www4.army.mil/ocpa/read.php?story_id_key=1296. There have also been several modifications to the timing of extensions throughout the duration of stop-loss implementation. For the discussion of these changes, search Army Public Affairs at <http://www4.army.mil/ocpa/press>. It should be noted that these changes have been to effectuate specific policy goals based on war circumstances. The policy was initially created as an "open-ended" extension. That the Army has imposed limitations on itself cannot be equated to an external restraint on its extending power.

30. See *infra* notes 79-81 and accompanying text.

Whatever the case may have been, it is now being used to carry over large numbers of soldiers for long periods of time in order to fulfill the needs of our large and rather involved military commitments abroad.³¹

B. Stop-Loss and the War on Terror: How and Why?

How can the United States government tell its soldiers that they may not leave when their contracts conclude? According to the Authorization for Use of Military Force, passed on September 18, 2001, the United States faced the threat of terrorism and was in a state of emergency, violent emergency.³² The Authorization for Use of Military Force against Iraq³³ stated that the United States faced grave threat from the destructive capabilities and ambitions of the nation of Iraq.³⁴ Once approved by Congress, these propositions of military action became the trigger under the War Powers Resolution³⁵ to permit the deployment of American troops to endeavors abroad.³⁶ When the President wields authority as Commander-in-

31. Esther Schrader, *The Conflict in Iraq; Troops Told They Can't Leave Army*, L.A. TIMES, June 3, 2004, at A1. One anonymous senior officer called the program "a finger in the dike," but there seems to be no question that the United States is trying to stretch the number of troops to cover many positions world-wide. *Id.* Lieutenant General Franklin L. Hagenbeck stated, "I don't think there's a question that here in the near term that the United States Army, active and reserved, is stretched." *Id.* (internal quotations omitted).

32. Pub. L. No. 107-40, 115 Stat. 224 (2001).

33. Pub. L. No. 107-243, 116 Stat. 1498 (2002).

34. *Id.*

35. 50 U.S.C. § 1541(c) (2005). Passed as Public Law 93-148, the Resolution provides in part: The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Id. Note that when the President does not have a congressional declaration of war or authorization for specific use of troops, he or she may only continue the use of such troops for sixty days (unless extended specifically by Congress). 50 U.S.C. § 1544(b) (2005). The President may extend this period only for thirty more days if he or she makes written certification to Congress of the "unavoidable military necessity." *Id.*

36. See PETER IRONS, WAR POWERS 3-7 (2005). Irons argues that "the Framers placed the war-declaring power solely in the hands of Congress," and that "[t]hey also limited the president's authority as commander in chief of the armed forces, in the absence of a declared war, to that of 'repelling' attacks on American territory or of taking 'reprisals' for attacks on its citizens or property in foreign countries or on high seas." *Id.* at 3-4. Initially in American history, "[w]ithout a prior declaration of war by Congress, presidents could act only in 'emergencies' and for limited periods." *Id.* at 4. However, "every president since Nixon has disregarded—and in some cases flatly disobeyed—the provisions of what has become a monument to legislative futility." *Id.* at 7. The three military commitments to the cases presented here have been as a result of Congress approving a "blank-check authorization" for use of military force abroad each time. *Id.* at 7-9. No formal declaration of war, and no limit to the war-making power. *Id.*; see also BRIAN HALLET, THE LOST ART OF DECLARING WAR (1998) (chronicling the historic rise and fall of the formal war declaration);

Chief under the War Powers Resolution, he assumes other powers, not the least of which is the power to “suspend any provision of law relating to 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.”³⁷ The idea that the Commander-in-Chief can make these suspensions may seem innocuous, but the power is great. It is under this power—to suspend separations—that the President has involuntarily extended the terms of service of men and women who have already completed their term of service as defined in their enlistment contracts. That power appears far more oppressive as the current military commitments drone on with ends nowhere in sight.

When pressed as to why the stop-loss orders were necessary in a January 2004 press conference, United States Secretary of Defense, Donald H. Rumsfeld, was quick to point out that it was the recent history of “poor balance. . . in the active and Reserve components of the department” that created a need to retain certain skill sets and create adequate overlap between incoming and outgoing soldiers in the field.³⁸ Chairman of the Joint Chiefs of Staff, General Richard B. Myers, pointed to a change in American warfare over time, stating that “[i]n World War II, the armed forces went to war, and they stayed until victory. In Vietnam, units initially went to Vietnam, and then we replaced people individually, not by unit.”³⁹

With a dubious rationalization for the burden such a policy causes and wavering rationale for its use, President George W. Bush’s administration has vindicated little.⁴⁰ But then again, the federal government admits the

David Gray Adler, *The Constitution and Presidential Warmaking*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 183, 212 (1996) (discussing the disregard in recent history of the constitutional requirement of declared war); RYAN C. HENDRICKSON, *THE CLINTON WARS* 74 (2002) (explaining the Clinton decision to use troops in Bosnia as substituting the judgment of the United Nations for the judgment of Congress). *But see* JOHN YOO, *THE POWERS OF WAR AND PEACE* 143 (2005) (arguing that the Framers intended a more “flexible” approach to the declaration of war under which initiated hostilities since World War II have squarely fallen).

37. 10 U.S.C. § 12305(a) (2000).

38. *Briefing*, *supra* note 1.

39. *Id.*

40. Involuntary extensions have ruffled plenty of feathers and caused an image problem for the Department of Defense. The press has held the administration’s collective feet to the fire. In fact, these involuntary extensions were the subject of the very first question at the January 2004 press conference as Secretary Rumsfeld and General Myers were challenged that the United States may not be treating its all-volunteer forces with the honesty they deserve. *Id.* In a long answer, Secretary Rumsfeld minimized the magnitude of the policy’s ramifications. “I’m told there are about 1,500 out of a force in Afghanistan and Iraq that numbers, what, 130,000-plus, that are stop loss” *Id.* Moments later, Secretary Rumsfeld was corrected and reminded that the number of soldiers placed on stop-loss orders was more accurately approximated at 3,500. *Id.* General Myers followed and reiterated the critical need to maintain soldier numbers and the weight of the responsibility taken on by a soldier in enlistment:

The only thing I’d add to that is the obvious, but we’ve got to step back for just a second. You know, we are a nation at war. We’ve got a large part of our force over there doing very important work in two countries in a region that has previously and still is host to terrorist organizations. This is very important for our national security. It’s very

orders creating involuntary extensions, more commonly referred to as stop-loss orders, are undesirable at best.⁴¹ It is no secret that recruitment numbers and retention rates have forced them into a difficult situation.⁴² Certain branches of the military have, at different times, had to announce that they would be implementing stop-loss in order to meet their troop commitments in Iraq and Afghanistan while maintaining troop presence elsewhere.⁴³ Only adding to the growing problem is the fact that reports seem to indicate a sizeable fall in soldier morale,⁴⁴ and the implementation of such stop-loss

important for international security. And so, yes, the force is working very hard. We're asking extraordinary things from the force and their families. They're responding. I think most individuals understand and their families understand what we're asking them to do. We're asking them a lot. They're responding magnificently.

Id.

41. See United States Department of Defense, News Transcript, *Secretary Rumsfeld Town Hall Meeting in Kuwait*, Dec. 8, 2004, <http://www.defenselink.mil/transcripts/2004/tr20041208-secdef1761.html> [hereinafter *Town Hall*].

42. On Tuesday, January 24, 2006, "an unreleased study conducted for the Pentagon said the Army was stretched thin and close to a snapping point because of the wars in Iraq and Afghanistan." *Top General: U.S. Forces 'Stretched'*, (CBS television broadcast Jan. 26, 2006), http://www.cbsnews.com/stories/2006/01/26/iraq/main1240559.shtml?CMP=OTCRSSFeed&source=RSS&attr=U.S._1240559 [hereinafter *Top General*]. Only a day later, Secretary Rumsfeld disputed the claims, saying that reports characterizing the forces as strained near the breaking point were "just not consistent with the facts." *Id.* The following day, General George Casey was quoted at a press conference saying, "The forces are stretched . . . and I don't think there's any question of that." *Id.* He continued to explain that the Army was still in the process of a modernization strategy to alleviate the strain. *Id.* Only adding to the mixed messages, President Bush was asked in a press conference that day to comment on the conflicting reports. The White House, *Press Conference of the President*, Jan. 26, 2006, <http://www.whitehouse.gov/news/releases/2006/01/20060126.html>. He never directly answered the question, but asserted that the real question was "whether or not we can win victory in Iraq." *Id.* But the unreleased study "found that the Army may not be able to retain and recruit enough troops to defeat the insurgency in Iraq." *Top General, supra*.

43. *The Connection: Trying to Stop Stop-Loss*, (NPR broadcast Dec. 12, 2004), http://www.theconnection.org/shows/2004/12/20041210_a_main.asp [hereinafter *The Connection*]. Gary Solis, visiting professor at the United States Military Academy at West Point, opined that while continuity in the units may be part of the reason stop-loss has been implemented, there is a serious lack of troops to meet requirements worldwide. *Id.* He approximated that there were 138,000 troops in Iraq, 11,500 in Afghanistan, 37,500 in Korea, and 44,000 in Japan among the large troop installations worldwide. See *supra* note 31.

44. Staff Sergeant Latanzinsky famously asked Secretary Rumsfeld about the stop-loss policy during his visit to Kuwait. *Town Hall, supra* note 41. She reminded him that she joined an all-volunteer Army but was now serving under stop-loss orders and asked him when the military would stop using the program. *Id.* Her complaint was only one of many, which signaled to many (from politicians to military experts) that dissatisfaction was rampant. Thomas E. Ricks, *Rumsfeld Gets Earful from Troops*, WASH. POST, Dec. 9, 2004, at A01. See *60 Minutes II: Active Duty: No Way Out*, (CBS television broadcast June 16, 2004), available at <http://www.cbsnews.com/stories/2004/06/16/60II/main623492.shtml> (quoting former Army Captain Andrew Exum who claims soldiers are disgruntled); David Moniz, *Public Dissent May Be New, But Issues Are Old*, USA TODAY, Dec. 9, 2004, http://www.usatoday.com/news/world/iraq/2004-12-08-armor-usat_x.htm (quoting Senator John McCain, R-AZ, "Stop loss is a terrible thing for morale."); Editorial, *Strain Begins to Show As Iraq Stretches Military Thin*, USA TODAY, Dec. 9, 2004, <http://www.usatoday.com/news/opinion/>

programs can only serve to further drain that morale, which will in turn hurt retention rates.⁴⁵ This leaves the military no choice, in its estimation, but to continue to enforce these policies to maintain the forces it already controls.⁴⁶

C. *Stop-Loss Challenged: From Bush to Bush*

Exercise of Executive power in the United States has met with many challenges throughout history. President Lincoln widely expanded Executive power in his tenure as President, “assert[ing] the right to proclaim martial law behind the lines, to arrest people without warrant, to seize property, to suppress newspapers, to prevent the use of the post office for ‘treasonable’ correspondence, to emancipate slaves, [and] to lay out a plan of reconstruction.”⁴⁷ In the course of Lincoln’s innovative approach to national stabilization, the Supreme Court was given the opportunity to speak on the growth of the Commander-in-Chief role.⁴⁸ It upheld Lincoln’s power to institute a blockade on ports under his determination of national emergency,⁴⁹ but it rejected his unauthorized suspension of habeas corpus.⁵⁰ Later, President Franklin D. Roosevelt took a similarly expansive view of his power, and saw similar challenges to its exercise. Most notably, the Court upheld the Executive power to order the seizure and removal of Japanese Americans in response to perceived threats during a state of emergency.⁵¹ President Harry Truman acted with the same thunder during the Korean War, ordering the seizure of steel mills in the wake of a labor dispute, but after challenge to the action, the Supreme Court held that this was a stretch beyond the bounds of his constitutional authority.⁵²

editorials/2004-12-09-our-view_x.htm (discussing the troop response to a “morale-boosting visit” by Secretary of Defense Donald Rumsfeld).

45. See Ricks, *supra* note 44, at A01.

46. See *Town Hall*, *supra* note 41. Secretary Rumsfeld said it is a policy to maintain unit cohesion designed to keep consistency. *Id.*

47. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 58 (1973).

48. *Id.* at 64-67; see also FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 70-71 (2d ed. 1989) (discussing the Supreme Court’s rationale dealing with Executive power in war time).

49. See *Prize Cases*, 67 U.S. 635 (1863). It should be noted that this approval of Executive power was confined, in the majority opinion, to times of domestic emergency like insurrection or invasion. SCHLESINGER, *supra* note 47, at 65.

50. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). Congress later authorized Lincoln’s suspension proclamations seven months after his initial announcement of the suspension of habeas corpus. IRONS, *supra* note 36, at 80. “Before the Civil War ended, more than 10,000 people had been arrested and jailed without recourse to habeas corpus.” *Id.* This turned out to be the “greatest violation of constitutional rights until the mass incarceration of some 120,000 Americans of Japanese ancestry during World War II.” *Id.*

51. See *Korematsu v. United States*, 323 U.S. 214 (1944). Though not a unilateral act, it was an incredible and shameful display of presidential prerogative in a time of war. SCHLESINGER, *supra* note 47, at 116; see also WORMUTH & FIRMAGE, *supra* note 48, at 243.

52. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). It was not clear where President Truman “thought the limits on his emergency authority were.” SCHLESINGER, *supra* note 47, at 142. “If he could seize steel mills under his inherent powers, could he also seize newspapers

Just as historical exercise of broad Executive power has been met with substantial challenge, those affected by the presidential imposition of stop-loss have not remained silent about their treatment under the policy. It began with the first use of stop-loss under President George H.W. Bush's authority during the Persian Gulf War⁵³ as a soldier brought the first legal attack to the stop-loss policy.⁵⁴ Although the courts would remain relatively free of controversy over stop-loss for the next decade,⁵⁵ the advent of George W. Bush's War on Terror⁵⁶ brought a wave of legal confrontation about the implementation of the policy.⁵⁷ Each legal battle was a little different than the next, but fought under the same mantra: the federal government cannot do this.

Many reasons for the policy's invalidity have been suggested as a result of these lawsuits. Some of the reasons are more intuitive than others, largely because of the variety of circumstances in which these cases have arrived. One soldier had been on active duty for four years when he was placed on stop-loss and required to deploy to the front lines of conflict.⁵⁸ Two soldiers, having completed full terms of service, thought they were enlisting in year-long trial programs, but wound up placed on stop-loss and were not permitted to leave after their year was up.⁵⁹ Still another found himself placed on stop-loss during the last month of his enlistment.⁶⁰ His contract expired after the mobilization under the stop-loss order, but prior to his call

and radio stations?" *Id.* at 142-43. This limitation was an important, albeit minimal, step in the Supreme Court expressing limitation on the growth of Executive power. Donald L. Robinson, *Presidential Prerogative and the Spirit of American Constitutionalism*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 114, 120-23 (David Gray Adler & Larry N. George eds. 1996).

53. *See infra* notes 79-81 and accompanying text.

54. *See infra* Part III.A.

55. Stop-loss was used among the various branches during the Clinton administration's commitment of troops to Bosnia and Kosovo. *33,000 Troops Face Call-Up*, CHI. SUN-TIMES, Apr. 17, 1999, at 13. In sharp contrast, since the terrorist attacks on the United States in September 2001, through the end of December 2004, stop-loss was used eleven times. *The Connection*, *supra* note 43.

56. The War on Terror really began with the passage of the Authorization for Use of Military Force on September 18, 2001, but was cemented by President George W. Bush's radio address on September 29, 2001. President George W. Bush, Radio Address of the President to the Nation (Sept. 29, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010929.html>. He stated, "This is a different kind of war, which we will wage aggressively and methodically to disrupt and destroy terrorist activity." *Id.*

57. *See infra* Parts III.B-D.

58. *See infra* Part III.A.

59. *See infra* Parts III.B, III.D.

60. *See infra* Part III.C.

to active duty.⁶¹ With such diversity in circumstances, the lawsuits have been by no means identical, but many share common issues.

Stop-loss has been challenged on four general grounds. The first argument, one that has been fanned by the media, is that the Executive power of the President to utilize stop-loss has been invoked improperly.⁶² Accusing the President of circumventing the prescribed legal and administrative channels required by statute, the arguments have focused on the insufficiency of the requisite circumstances to allow the President to place soldiers on stop-loss.⁶³ The second argument is that the United States Government has breached its contract with the soldiers placed on stop-loss.⁶⁴ Military contracts are evaluated under traditional contract principles; thus the soldiers argue that the terms of their contract have been breached⁶⁵ or that they have been misled into acquiescing to it.⁶⁶ The third argument is that involuntary extension of enlistment contracts under stop-loss violates a soldier's procedural due process rights.⁶⁷ Such an argument turns on principles of notice and fairness applicable to the contract inquiry, but is rooted in the constitutional guarantees of such things for each person.⁶⁸ Finally, a fourth argument has been raised that views the other statutes related to and invoked by the stop-loss statute as presenting bars to the implementation of stop-loss by the President.⁶⁹ Because there are so many different aspects of military service, including both physical and status transitions, there are a wide range of statutes that coordinate to form the intricate parameters of military employment.⁷⁰ Several such statutes have been construed by those bringing suit to mean that the power conferred by the stop-loss statute was intended to operate under a special construction or certain other limits.⁷¹

Despite their great variety, the legal attacks on the stop-loss policy have been fruitless. None of the cases have reached the Supreme Court for adjudication, two were heard by the Court of Appeals for the Ninth Circuit,⁷² and two met their fate in district courts.⁷³ The review of each was clear, though maybe not thorough. Several issues were dismissed with little discussion, especially those not raised clearly or succinctly in the courts'

61. *See infra* note 182.

62. *See infra* Parts III.A, III.C.1, III.D.1.

63. *See infra* Parts III.A, III.C.1, III.D.1.

64. *See infra* Parts III.B.1.a, III.C.2.

65. *See infra* Parts III.B.1.a, III.C.2.

66. *See infra* Part III.B.1.b.

67. *See infra* Parts III.B.2, III.C.3, III.D.2.

68. *See infra* Parts III.B.2, III.C.3, III.D.2.

69. *See infra* Part III.D.3.

70. *See infra* Part III.D.3.

71. *See infra* Part III.D.3.

72. *See infra* Parts III.C-D.

73. *See infra* Parts III.A-B.

estimation.⁷⁴ A close evaluation reveals that some of the legal questions are in large part closed, although a slight opening may remain for future challengers.

III. THE LAWSUITS

A. *The Original Stop-Loss Suit: Sherman v. United States*⁷⁵ and *Executive Authority*

1. Executive Authority

Although involuntary extensions have received increased media coverage lately, lawsuits against the United States for this policy are not new. In 1991, Sergeant Craig L. Sherman petitioned for a writ of habeas corpus to the District Court of Georgia to prevent his dispatch to the Kingdom of Saudi Arabia.⁷⁶ Sherman enlisted with the Air Force Reserve under a contract which provided that he would serve in active duty for only four years.⁷⁷ He began active duty in 1986 and was thus set to conclude by the terms of his contract in 1990.⁷⁸ However, in 1990, President George H.W. Bush declared a national emergency and delegated⁷⁹ his authority under 10 U.S.C. § 12305⁸⁰ to the Secretary of Defense, which eventually resulted in the suspension of all separations of those in essential units.⁸¹ Sherman pursued the usual channels to avoid his extension and deployment

74. See *infra* notes 171-74, 224-27, 284-88 and accompanying text.

75. 755 F. Supp. 385 (M.D. Ga. 1991).

76. *Id.* at 386.

77. Originally, his contract provided for a period of active duty of not less than four years. *Id.*

78. *Id.*

79. Under the Executive Order Number 12,728 of August 22, 1990, the President delegated his authority to perform two critical functions. Exec. Order No. 12,728, 55 Fed. Reg. 35,029 (Aug. 22, 1990). Section 1 authorizes the Secretary of Defense and the Secretary of Transportation (commanding the Coast Guard when not under the direction of the Navy), to "suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces determined to be essential to the national security of the United States," and to make the determination as to which units and specialties are essential. *Id.* Section 2 allows the further delegation of the power as may be necessary among subordinates. *Id.* The order was amended by Executive Order Number 13,286 on February 28, 2003, to give this authority to the Secretary of Homeland Security instead of Transportation. Exec. Order No. 13,286, 68 Fed. Reg. 10,619, 10,626 (Feb. 28, 2003).

80. At the time of the case, it was codified as 10 U.S.C. § 673(c). *Sherman*, 755 F. Supp. at 387.

81. *Id.* at 386.

by applying for waiver.⁸² When his waiver was denied he was ordered to report to the Kingdom of Saudi Arabia on February 8, 1991.⁸³

Sherman's attack of the validity of the stop-loss order was simple: he was an active duty soldier, and the stop-loss provision applied only to those soldiers who were members of a reserve component.⁸⁴ He quoted the language of 10 U.S.C. § 12305, which provides:

[D]uring 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 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.⁸⁵

He claimed that as a soldier not serving with a reserve component, the President did not have the authority to involuntarily extend his contract.⁸⁶

The court found authorization in the heart of 10 U.S.C. § 12305, which specifically provides that the presidential power applies to "any member of the armed forces who the President determines is essential to the national security of the United States."⁸⁷ Under this analysis the court viewed this provision as speaking very generally, not just about the members of a reserve component, but to all enlisted men and women whether in the reserves or not.⁸⁸ In its analysis the court noted that though the statute begins with direct reference to the reserves, it concludes by giving the President authority over all persons in the armed forces.⁸⁹ The court found that a "more logical reading" of the statute was to find that Congress meant to give the President authority over all members of the armed forces and specifically included the reserves to avoid any confusion.⁹⁰

82. *Id.* Specifically, he applied orally for a hardship waiver, but it was denied. *Id.* After taking leave to be married, he submitted a written request for waiver and took leave again. *Id.* When he returned his petition was denied. *Id.* at 387.

83. *Id.*

84. *Id.*

85. *Id.* (quoting what is now 10 U.S.C. § 12305(a) (2000)).

86. *Id.*

87. 10 U.S.C. § 12305(a) (2000) (emphasis added).

88. *Sherman*, 755 F. Supp. at 387-88. Sherman's point is hardly incomprehensible. The statute begins with a clear statement specifying that the power of the President may be exercised upon members of reserve forces. *Id.* at 387. It is certainly more than plausible that the clause "to any member of the armed forces" modifies the description of the provisions that may be suspended or the branches of the military effected. At the very least, there seems to be reasonable conflict in the language.

89. *Id.* at 387.

90. *Id.* The court stated, "[i]t would make little sense to say that the President is allowed to call up or extend the enlistments of reservists in case of war but that he cannot do so for active duty personnel." *Id.* at 387-88. Legislative history was cited to show that Congress was concerned about the President's lack of power to preserve "regular and reserve personnel." *Id.* at 387 (citing S. Rep. No. 98-174 (1983), as reprinted in 1983 U.S.C.C.A.N. 1081, 1098) (internal quotations omitted).

By this rationale, the court dismissed any possibility of restriction or ambiguity in the statute, forcefully concluding:

In a nutshell, the Petitioner has asked this court to order the termination of his contract as an enlisted man in the United States Air Force in time of war, a decision which would trigger lawsuits and claims by other military personnel similarly situated and bring chaos to orderly military planning. If the law were clear that Petitioner is entitled to be discharged, then this court would order him discharged.⁹¹

2. Analysis

The court's analysis of the statutory language was as thorough as it could be for such a minimal attack to the stop-loss authority.⁹² Despite its clearly announced fear, it reasoned through the language and provided a reasonable plain language interpretation, which defeated Sherman's claim.⁹³ This was the first attack and a logical, although weak, attack. Later, the attacks would become more complex and the courts' legal analysis far weaker on the tough points.

And with that, Sergeant Craig L. Sherman was denied his last form of relief as the President's ultimate control over those on active duty was vindicated. His was only the first attempt to invalidate a stop-loss extension, and though stop-loss would remain absent from the courts for some time, the *Sherman* decision did not ameliorate any of the legal conflict the policy sparked.

B. "Try One," Stay for More: Qualls v. Rumsfeld⁹⁴ and the United States as Deceiver

Over a decade later, the United States once more committed troops to Iraq, again exhausting troop resources and necessitating stop-loss orders.⁹⁵ This time it was met with a new challenge. David W. Qualls and seven other servicemen filed suit in opposition to the order, and Qualls filed a

Yet, isn't it equally possible that though both were a problem, this was intended to cure the latter and not the former? Further, if both were a concern why not use inclusive language from the start?

91. *Id.* at 388.

92. *See id.* at 387.

93. *Id.*

94. 357 F. Supp. 2d 274 (D.D.C. 2005).

95. *See supra* note 22 and accompanying text.

motion for a preliminary injunction to prevent his deployment.⁹⁶ The court analyzed Qualls' likelihood of success on the merits in order to rule on his motion for preliminary injunction, ultimately finding his case lacking and denying the motion.⁹⁷ Unlike Sherman, Qualls' challenge was not based on the President's authority,⁹⁸ but on basic contract principles and the constitutional guarantee of procedural due process.⁹⁹

In 1986, Qualls joined the United States Military and remained on active duty until 1990, when he became a member of the Individual Ready Reserves until 1994.¹⁰⁰ He remained unaffiliated with the military¹⁰¹ until he reenlisted in the Army National Guard's "Try One" program on July 7, 2003.¹⁰² Before the end of the year, the Army called him to active duty at which time he was immediately subjected to the stop-loss order.¹⁰³ His separation date was changed from July 6, 2004, a year after his reenlistment date, to December 24, 2031, under the authority of 10 U.S.C. § 12305.¹⁰⁴ In his bid to avoid such an extension, Qualls argued on two main grounds. First, he argued that such an extension was a violation of the terms of his reenlistment contract and that he was misled into signing.¹⁰⁵ Second, he argued that he was denied a liberty interest without notice.¹⁰⁶ The court took each argument in turn.

1. Contract Principles

a. Breach

Qualls' first appeal was to contract principles, arguing that the extension of his duty was a violation of the terms of his reenlistment contract and that

96. *Qualls*, 357 F. Supp. 2d at 278.

97. *Id.* at 286.

98. Qualls did list a cause of action for "absence of statutory authority," but this argument was really just a facet of the other three claims. Complaint for Injunctive Relief and Petition for Habeas Corpus ¶¶ 68-69, *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274 (D.D.C. 2005) (No. 04-2113) [hereinafter *Qualls' Complaint*]. He argued that 10 U.S.C. § 12305 "[did] not provide that Defendants can involuntarily extend Plaintiffs' enlistment in violation of their enlistment contracts or by fraudulently inducing them to enlist in the military under a trial program of one year and then extending their military service indefinitely." *Id.* ¶ 69. He did not include any argument regarding Executive authority under the statute. *Id.* ¶¶ 68-69.

99. *Qualls*, 357 F. Supp. 2d at 279-85.

100. *Qualls' Complaint*, *supra* note 98, ¶18.

101. *Qualls*, 357 F. Supp. 2d at 279-80.

102. *Id.* at 278. This program, as the name suggests, committed him to only one year of service. *Id.*

103. *Id.*

104. *Id.* Though the 2031 date seems odd, if not implausible, recall that the policy is, at its heart, "open-ended." See *supra* note 28 and accompanying text.

105. *Qualls*, 357 F. Supp. 2d at 280-84.

106. *Id.* at 285.

he was misled.¹⁰⁷ The court found support for applying contract law to military contracts, stating, “[t]o determine whether the military has breached an enlistment contract or whether an enlistment contract is invalid, courts apply general, common law principles of contract law.”¹⁰⁸

Determining whether there was a breach in the terms of the contract was the court’s first task.¹⁰⁹ However, the terms themselves were the critical controversy. Not disputing the validity of the Executive power under 10 U.S.C. § 12305, Qualls claimed that there was no provision in the contract which included or adopted the statute as a term of the contract.¹¹⁰ Without notice of such a term, Qualls argued that his contract was not subject to extension.¹¹¹ Qualls’ local armory kept a copy of the contract, which Qualls offered as proof of the terms of his contract.¹¹² According to the Army, this copy lacked a page titled “C. Partial Statement of Existing United States Laws,” which is included in the typical contract executed by enlistees.¹¹³ The Army’s position was that the original contract contained the missing page on the reverse side of the contract’s first page, but it could not produce the original.¹¹⁴

After reviewing the evidence on the terms of the contract, the court did not anticipate a court would find a breach in a trial on the merits.¹¹⁵ Qualls

107. *Id.* at 280-85.

108. *Id.* at 279-80. The court also cited for support *Woodrick v. Hungerford*, 800 F.2d 1413, 1416 (5th Cir. 1986); *Cinciarelli v. Carter*, 662 F.2d 73, 78 (D.C. Cir. 1981); and *Pence v. Brown*, 627 F.2d 872, 874 (8th Cir. 1980). *Id.* at 280. Neither party briefed the issue of what body of contract law would apply, so the court did not speak on the choice of laws issue. *Id.* at 282 n.2.

109. The Restatement (Second) of Contracts § 235 defines breach by explaining the roles of each contracting party: “(1) Full performance of a duty under a contract discharges the duty. (2) When performance of a duty under a contract is due any non-performance is a breach.” RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981). The comments explain that “a duty is discharged when it is fully performed. Nothing less than full performance, however, has this effect and any defect in performance, even an insubstantial one, prevents discharge on this ground.” RESTATEMENT (SECOND) OF CONTRACTS § 235 cmt. a (1981). In the case of the military contract, the soldier contracts to provide services for a definite period of time subject to the contract terms. Qualls argues that the Army’s refusal to permit his separation according to the contracted date is non-performance of its duty. *Qualls*, 357 F. Supp. 2d at 282-84.

110. *Qualls*, 357 F. Supp. 2d at 282.

111. *Id.* at 280-81.

112. *Id.* at 280.

113. *Id.*

114. *Id.* Perhaps the most important message to soldiers from this specific legal oddity is a reminder to keep all their paperwork. Because, as the court noted, the challenger bears the burden of production, *id.* at 281, it would be wise for a soldier to understand that the government will not have to produce its own copy to sustain its conclusions if the soldier cannot produce the one he claims is aberrant.

115. *Id.* at 284. This appears to be an odd procedural misstep or factual insufficiency. It is quite possible that an Army which does not keep its own copy of the contract could have given him a copy to sign initially that did not include the back page alleged by the defense. In that case, the fact that

bore the burden of production at this stage, and though he claimed that the contract he produced contained the terms to which he assented, he at no point claimed that his document was the original or that it was identical to the original.¹¹⁶ He did not offer any copy of his own, kept by him since the time of signing, and he did not comment about his recollection of the contract he signed.¹¹⁷ Agreeing with the Army's position, the court found that the first page of the submitted contract did indicate that it was continued on the following page, and thus it was likely that the missing page was on the reverse side of the first page of the original.¹¹⁸ Accepting this proposition, the court concluded that the Partial Statement of Existing United States Laws was a part of the contract which Qualls signed.¹¹⁹

It evaluated each of the paragraphs included in the Partial Statement, with a special focus on three. The Army claimed authorization for the extension of the contract under paragraph 10(d)(1) which stated, "in times of national emergency declared by the President, a member of the Ready Reserve 'may be ordered to active duty. . . for not more than 24 consecutive months.'"¹²⁰ It also cited paragraph 9(c) of the enlistment contract which stated "in the event of war" the contract extends "for six months after the war ends."¹²¹ Finally, it cited paragraph 10(b) which stated that if reservists are:

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 [they] become a member during that period, [their] military service may be extended without [their] consent until six (6) months after the end of that period of war.¹²²

Acknowledging that none of these provisions expressly gave notice of the change of the separation date from 2004 to 2031, the Army asserted that these provisions gave notice of the possibility of the extension.¹²³ While the court ultimately found notice, it did not interpret the provisions as generously as the Army.

Of the three provisions offered in support of its position, the court found

the contract should have contained the back page is really irrelevant. For that matter, that other contracts do is irrelevant if *his* didn't. Yet his unwillingness to allege in good faith that the copy was an adequate representation of the original or his own memory to that end suggests that it may have, in fact, not been.

116. *Id.* at 281-82.

117. *Id.*

118. *Id.* at 281.

119. *Id.* at 281-82.

120. *Id.* at 282.

121. *Id.* (internal quotations omitted).

122. *Id.* (internal quotations omitted).

123. *Id.* Note that the court was attempting to make out a fairly weak inference of notice. None of these provisions actually mention stop-loss by name or directly list its statute. The court analyzed which of these paragraphs provided notice of the possibility of extension under any circumstances.

that the Army gave notice in paragraphs 9(c) and 10(b).¹²⁴ The court rejected the Army's assertion that paragraph 10(d)(1) had anything to do with the extension of the enlistment contract.¹²⁵ While the provision gave clear notice of the possibility of being called into active duty, "it [did] not permit the Army to unilaterally extend an enlistment without consent in order to make possible further service on active duty."¹²⁶ On the other hand, the court viewed the six-month extension term referred to in both of the other paragraphs as providing general notice of the possibility of involuntary extension.¹²⁷ The only triggering events necessary for the execution of those provisions is a "state of war."¹²⁸ The argument raised by Qualls that the United States was not in an officially declared war was summarily dismissed.¹²⁹ According to the court, the Authorization for the Use of Military Force on September 18, 2001,¹³⁰ under which troops were sent to Afghanistan, and the Authorization for the Use of Military Force in 2002,¹³¹ under which troops were sent to Iraq, were both essentially congressional declarations of war.¹³² The court further noted that this is the way that Congress has done so with every war operation since World War II.¹³³ Finding all the requisite circumstances to trigger both the 9(c) and 10(b) provisions, the court held that Qualls was subject to involuntary extension.¹³⁴ Therefore, he had notice of the possibility of involuntary extension, more generally, according to the stop-loss order.¹³⁵

124. *Id.* at 283.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 284 (internal quotations omitted).

129. *Id.*

130. Pub. L. No. 107-40, 115 Stat. 224 (2001).

131. Pub. L. No. 107-243, 116 Stat. 1498 (2002).

132. *Qualls*, 357 F. Supp. 2d at 283-84. See generally IRONS, *supra* note 36 (discussing the evolution of the presidential war-making power and the role—or lack thereof—of Congress in the process).

133. *Qualls*, 357 F. Supp. 2d at 284. The court offered two other reasons for discounting the "not at war" argument. *Id.* Although Qualls argued that paragraph 9(c) was codified in 10 U.S.C. § 506, and the legislative history of the provision uses the word "declared" once, the court found its usage too "unclear" to require an official declaration of war. *Id.* Also, the court noted that it was Qualls who argued for the application of general contract principles to this case, and accepting that premise, the court found that the terms of the contract itself make no mention of declared war. *Id.* With these additional two reasons the court squarely rejected any continued mention of the "not at war" argument. *Id.*

134. *Id.*

135. *Id.*

b. Misrepresentation

Qualls' next argument was also based on contract principles. He argued that both his reenlistment contract and the entire "Try One" website produced misrepresentations.¹³⁶ While the court quickly dispensed with the notion that his reenlistment contract had failed to disclose the possibility of involuntary extension based on its reasoning in the matter of the breach, it was not so hasty with the website claim.¹³⁷ The program advertised an opportunity to enlist for a one-year term, with an opportunity to terminate or reenlist for a full term at the conclusion of that one-year term.¹³⁸ However, even under the seemingly minimal one-year commitment, a stop-loss order can effectively extend the contract indefinitely.¹³⁹ Qualls argued that the premise of the website is the idea that the "Try One" Program is not a full commitment to military service.¹⁴⁰ Qualls alleged the website made an affirmative representation that the program "allow[ed] a veteran to serve for only one year on a trial basis before committing to a full enlistment," and another representation was made by the fact that it was located in a part of the website entitled "Trial Programs."¹⁴¹ In the reverse, Qualls argued that the fact there was no mention of the stop-loss possibility as a mammoth qualification to an otherwise minimal commitment constituted a material omission on the part of the Army National Guard.¹⁴²

The court did not review the merits of a possible claim of fraud and misrepresentation, because it found that Qualls' claim was facially insufficient.¹⁴³ To succeed on such a claim, Qualls needed to prove: "(1) a false representation or non-disclosure of material facts, (2) made with

136. *Id.* at 285. The Restatement (Second) of Contracts § 159 defines misrepresentation simply as "[a] misrepresentation is an assertion that is not in accord with the facts." RESTATEMENT (SECOND) OF CONTRACTS § 159 (1979). According to the accompanying note:

[a] misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words. Whether a statement is false depends on the meaning of the words in all the circumstances, including what may fairly be inferred from them. An assertion may also be inferred from conduct other than words. Concealment or even non-disclosure may have the effect of a misrepresentation under the rules stated in §§ 160 and 161.

Id. § 159 cmt. a. The introductory note indicates that a successful claim makes the contract at issue voidable. *Id.* §§ 159-73. Qualls raised only the terms of the contract itself as the offending assertions. *Qualls*, 357 F. Supp. 2d at 285. He alleged no issues of verbal misrepresentation, or misrepresentative non-disclosure. *Id.*

137. *Qualls*, 357 F. Supp. 2d at 285.

138. *Id.*

139. *Id.*

140. *Id.* Though his legal claim will be discussed in some length below, it bears mentioning that the point has greater ethical significance. The fact that a program entitled "Try One" exists as an alternative to other forms of enlistment, under the premise that it is a trial commitment for one year, seems to necessitate a greater level of notice of possible extension. It is not as though a soldier believes that he or she is entering into the same kind of commitment as under a standard contract, therefore those limitations that are still applicable should be elucidated fully as a matter of principle.

141. *Id.*

142. *Id.*

143. *Id.*

knowledge of its falsity, (3) with an intent to induce reliance, and (4) reasonable reliance on that representation.”¹⁴⁴ Without discussing any of the other elements required, the court held that Qualls did not prove his own reasonable reliance on any affirmative representations or omissions.¹⁴⁵ The only items he produced from the website were printed on November 22, 2004, well after his commitment was made.¹⁴⁶ He never submitted an allegation or proof of any representation or omission by an actual recruitment official.¹⁴⁷ Further, the court found that he never actually alleged that he specifically relied on the website or recruitment materials, only that these materials were targeted at recruits.¹⁴⁸ Without establishing the requisite prima facie case, the court was left with no choice but to dismiss the claim.

2. Procedural Due Process

Finally, Qualls argued that involuntarily extending his contract without proper notice would deprive him of a significant liberty interest without the due process of the law.¹⁴⁹ This, he argued, was constitutionally impermissible as violative of his procedural due process rights.¹⁵⁰ The prima facie case for a procedural due process claim requires proof of: (1) a property or liberty interest that is (2) deprived (3) without prior notice or opportunity to be heard.¹⁵¹ The court did not evaluate the claim that the contract extension was a “deprivation of liberty,” but merely assumed that to be the case in order to evaluate the issue of notice.¹⁵² Even with such a

144. *Id.* at 284 (citations omitted).

145. *Id.* at 285. This point is significant as the court said quite a bit in its silence. Since it did not need to reach the other elements of the claim, these elements remained open to interpretation in the recruitment context. It did briefly state that the Partial Statement of Existing United States Laws provided notice sufficient to rebut a charge of misrepresentation, referencing its prior discussion of contract terms. *Id.* Yet it was clearly a perfunctory statement, without any explanation as to how that analysis directly applied to a charge of misrepresentation. Nevertheless, the statement would later be used in a subsequent case as rationale to dismiss the notion once more. See *infra* Part III.B.4.

146. *Qualls*, 357 F. Supp. 2d at 285.

147. *Id.*

148. *Id.* at 285 n.7. Again, this was either an unfortunate oversight, or indicative that facts to support such an assertion just did not exist. See *supra* note 114.

149. *Qualls*, 357 F. Supp. 2d at 285.

150. *Id.*

151. 16B AM. JUR. 2D *Constitutional Law* § 905 (2004). According to this analysis, the court is charged with the duty to evaluate the interest asserted to decide if it meets the Fourteenth Amendment requirements of life, liberty, or property. *Id.* If so, the court must decide what process is required, which depends on a variety of factors. Among the factors considered are the nature of the right asserted, the nature of the proceeding, and the possible burden on the proceeding. *Id.*

152. *Qualls*, 357 F. Supp. 2d at 285.

grant, the court reasoned that the claim would likely fail for two reasons. First, relying on the analysis of the contracts claims, the court held that they did in fact have notice of the possibility of the stop-loss involuntary extension by the Partial Statement of Existing United States Laws.¹⁵³ Second, it found that the extension to which his contract was subjected was in no way arbitrary or capricious, as many similarly situated others faced the same extension.¹⁵⁴ The court found these reasons persuasive and held that he received the “notice that was due.”¹⁵⁵

3. Epilogue

After Qualls’ motion for a preliminary injunction was denied, the Army filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, both of which were granted.¹⁵⁶ The court found that he was no longer “serving pursuant to the allegedly unlawful extension of service that form[ed] the basis of his entire action.”¹⁵⁷ Qualls re-enlisted in February 2005 for another six years, but argued that he was under economic duress to do so.¹⁵⁸ The court thought little of this argument, calling it “a thinly veiled attempt to escape the consequences of his actions.”¹⁵⁹ As such, the court found that there was “nothing to remedy.”¹⁶⁰

In the amended complaint,¹⁶¹ Qualls reasserted his claims for breach, misrepresentation, and violation of his procedural due process rights,¹⁶² with

153. *Id.*

154. *Id.*

155. *Id.*

156. *Qualls v. Rumsfeld*, 412 F. Supp. 2d 40, 45 (D.D.C. 2006).

157. *Id.* at 43.

158. He argued that he had no other way to pay his bills and take care of his family and so needed to take the re-enlistment bonus. *Id.* at 43. The court maintained that “to prove economic duress a plaintiff must establish: (1) a wrongful act or improper threat; (2) the absence of a reasonable alternative to entering the agreement; and (3) the lack of free will.” *Id.* at 44 (citing *Applied Genetics Int’l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1242 (10th Cir. 1990)). According to the court, Qualls experienced no wrongdoing and was perfectly capable of not re-enlisting. *Id.* In a biting editorial, the court stated, “It is ironic that Qualls is trying to maintain an action seeking his release from the military when he himself precluded that very outcome.” *Id.* Perhaps a bit of irony lies in the courts’ statement, as it ignored the deep dilemma of a soldier of modest means. If facing stop-loss for any period past February, it makes sense that Qualls might have accrued weighty obligations, which could be alleviated by his re-enlistment. It is a six-year price to pay for a bonus needed desperately, while being forced to continue service under the old contract anyway.

159. *Id.*

160. *Id.* at 43.

161. The Army moved to dismiss the claims of Qualls and his anonymous co-complainants, and the court granted the motion. *Qualls v. Rumsfeld*, 228 F.R.D. 8 (D.D.C. 2005). It was dismissed without prejudice so that those willing to identify themselves could take up their claims once more. *Id.* In the amended complaint, six of the John Doe’s were dropped and the name of Rafael Perez was added. Amended Complaint for Injunctive Relief and Petition for Habeas Corpus ¶ 5, *Qualls v. Rumsfeld*, 412 F. Supp. 2d 40, 45 (D.D.C. 2006) (No. 04-2113) [hereinafter Amended Complaint].

162. Amended Complaint, *supra* note 161, ¶¶ 38-40, 41, 44-46. The statutory authority argument

his co-complainant Rafael Perez.¹⁶³ Perez did not reenlist, therefore the court could not dismiss his claims as with Qualls', but the court reached only his misrepresentation claim since he did not respond to the Army's motion to dismiss each one.¹⁶⁴ Though the court did reach the Perez's misrepresentation claim, it was quickly dismissed in the same manner as Qualls' claim was at the injunction stage.¹⁶⁵ The court added very little to the misrepresentation analysis it gave in Qualls' denial of injunction. In fact, the court cited the previous decision for the linchpin of its rationale: "the contract, with its statement of United States laws,¹⁶⁶ does indeed put Qualls on notice that the Army might involuntarily extend his term of service."¹⁶⁷ It reasoned that the words and actions of the recruiters did not add up to material misrepresentation, and any possibility of misleading language on the contract itself was disclaimed by the reference to United States laws.¹⁶⁸ With that, Perez's claim, as well as the case, was dismissed.¹⁶⁹

4. Analysis

It seems that the court took pains to be dismissive with Qualls' claims. The court's analysis paid little attention to the misrepresentation and due process arguments, in favor of a lengthy notice analysis, in its decision on breach.¹⁷⁰ Qualls could have made the misrepresentation and due process arguments stronger by alleging separate facts and distinguishing them more effectively from the breach of contract argument.¹⁷¹ That notwithstanding, the court may not have even received that well. In its subsequent dismissal of the entire case, the court seemed even more conclusory, despite the addition of another similarly situated plaintiff.¹⁷² With such a dismissive eye toward those claims, it is hard to stomach pieces of the notice rationale, but none harder than equating the authorizations for military force with a

was also reprised, but was again swallowed by his other causes of action. *Id.* ¶¶ 42-43; *see supra* note 98.

163. Amended Complaint, *supra* note 161, ¶¶ 38-40, 41, 44-46.

164. *Qualls*, 412 F. Supp. 2d at 44 n.1.

165. *Id.* at 45.

166. The court was referring to the "Partial Statement of Existing United States Laws." *See supra* note 110 and accompanying text.

167. *Qualls*, 412 F. Supp. 2d at 44-45 (quoting *Qualls*, 357 F. Supp. 2d at 285).

168. *Id.* at 44-45.

169. *Id.* at 45.

170. *Qualls*, 357 F. Supp. 2d at 284-85.

171. *Id.* at 284-86.

172. *Qualls*, 412 F. Supp. 2d at 45.

formal declaration of war.¹⁷³ Although it may be tempting to eliminate any distinction as a semantic diversion, the court merely cites long-standing practice as the source of the equivalency.¹⁷⁴ While a parallel should be necessarily drawn, a rejection of the distinction, without little more in the way of analysis, should trouble even the most sympathetic of readers.

With the shortcomings in both *Qualls*' complaint and the *Qualls* court's analysis, the next case appeared to be a tidier bundle of issues, fully alleged and fully reviewable.

C. *Putting it All Together Now: Santiago v. Rumsfeld*,¹⁷⁵ *A Better Test Case?*

Only one year after *Qualls*, stop-loss was the subject of another lawsuit. This time the challenge would incorporate elements of the two before it in a format that was presented slightly better than its predecessors. Unlike *Qualls*, Sergeant Emiliano Santiago enlisted fully in the Army National Guard, but was placed under the stop-loss order during the last month of his service.¹⁷⁶ After seeking exception to the stop-loss order through the proper administrative channels, Santiago filed a petition of habeas corpus and a petition of mandamus in the United States District Court for the District of Oregon, which was dismissed and from which he appealed to the Court of Appeals for the Ninth Circuit.¹⁷⁷

Sergeant Emiliano Santiago enlisted in the Army National Guard at the age of 18 on June 28, 1996, for a term of eight years to expire on June 27, 2004.¹⁷⁸ After completing basic training and advanced personal training, Santiago was released from active duty and only required to attend monthly weekend training sessions.¹⁷⁹ The month his contract was due to expire, Santiago learned his entire unit was subject to the stop-loss order.¹⁸⁰ Their orders included "six weeks of training, followed by deployment to Afghanistan for one year in support of 'Operation Enduring Freedom.'"¹⁸¹

173. *Qualls*, 357 F. Supp. 2d at 284.

174. *Id.*

175. 425 F.3d 549 (9th Cir. 2005).

176. *Id.* at 552-53.

177. *Id.* at 553. Santiago immediately sought relief from the stop-loss order. *Id.* He retained counsel who quickly sent a letter to the unit commander requesting release. *Id.* The letter gave notice that it was an "attempt to exhaust administrative remedies prior to filing suit to enforce his rights." *Id.* (internal quotations omitted). In its reply, the Oregon Military Department confirmed the extension of his contract and assured him that any waiver application would make its way through the "chain of command." *Id.* (internal quotations omitted). However, after examining the waiver policy, Santiago determined that any waiver application would be fruitless. *Id.*

178. *Id.* at 552.

179. *Id.*

180. *Id.* at 553.

181. *Id.*

A unique situation arose: his contract expired after the mobilization under the stop-loss order, but prior to his call to active duty.¹⁸²

Santiago's arguments amalgamated the highlights of his predecessors in battle. He argued that the President lacked the requisite congressional authority to extend his contract,¹⁸³ the extension of his contract constituted breach,¹⁸⁴ and he was denied his procedural due process rights.¹⁸⁵ Although he moved for a temporary injunction and restraining order, all relief was denied.¹⁸⁶ He appealed to the Court of Appeals for the Ninth Circuit and they took his arguments in turn.

1. Executive Authority

Just like Sherman, Santiago argued that the President lacked the necessary congressional authority to extend his contract.¹⁸⁷ This time the argument was far more nuanced. Because his contract expired after mobilization but prior to his call to active duty, he maintained that he was not subject to the presidential stop-loss authority.¹⁸⁸ According to Sherman, the Executive authority delegated by Congress only permitted the involuntary extension of the contracts of reservists if previously called to active duty.¹⁸⁹ Santiago cited 10 U.S.C. § 12305, which states,

Notwithstanding any other provision of law, during any period *members of a reserve component are serving on active duty pursuant to an order to active duty* under authority of section 12301, 12302, or 12304 of this title, the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President

182. *Id.* at 556; *see supra* note 26. "Mobilization" is defined in part as "[t]he process by which the Armed Forces or part of them are brought to a state of readiness for war or other national emergency." Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, *Mobilization*, <http://www.dtic.mil/doctrine/jel/doddic/data/m/03514.html> (last visited Mar. 7, 2006). The process "includes activating all or part of the Reserve Components as well as assembling and organizing personnel, supplies, and mater[ial]." *Id.*

183. Appellant's Opening Brief at 30, *Santiago v. Rumsfeld*, 425 F.3d 549 (9th Cir. 2005) (No. 05-35005) [hereinafter *Santiago's Brief*].

184. *Id.* at 10.

185. *Id.* at 23.

186. *Santiago v. Rumsfeld*, 425 F.3d 549, 554 (9th Cir. 2005). "The parties stipulated that the hearing on the preliminary injunction was to serve as a bench trial on the permanent injunction, to expedite appellate review. The district court . . . den[ie]d all relief." *Id.*

187. *Santiago's Brief*, *supra* note 183, at 30; *see supra* Part III.A.1.

188. *Santiago*, 425 F.3d at 557. *But cf. supra* text accompanying note 86.

189. *Santiago*, 425 F.3d at 556.

determines is essential to the national security of the United States.¹⁹⁰

In Santiago's view, the words "during any period members of a reserve component are serving on active duty" were meant to provide a limitation on which soldiers' service the President could legally extend.¹⁹¹ Plainly to him, those words indicated that only those soldiers currently called to active duty could be subject to such an extension.¹⁹²

The court handily eschewed such controversy in its interpretation of the provision. Looking at the words "during any period members of a reserve component are serving on active duty" the court found not a personal limitation but a temporal one.¹⁹³ It interpreted this language as "refer[ring] only to the *period of time* during which the President may exercise the power conferred by section 12305(a)."¹⁹⁴ While it acknowledged the lack of congressional record evidence to this effect,¹⁹⁵ it concluded that the record was not in opposition to such an interpretation on the face of the statute.¹⁹⁶

2. Contract Principles

Santiago also claimed that his contract terms precluded the extension of his contract.¹⁹⁷ Just as the *Qualls* court accepted the premise that general contract principles applied to the military enlistment contract, so did the *Santiago* court under a different set of precedents.¹⁹⁸ The court stated, "Enlistment contracts, with exceptions not relevant here,¹⁹⁹ are enforceable under the traditional principles of contract law."²⁰⁰

190. *Santiago's Brief*, *supra* note 183, at 30 (citing 10 U.S.C. § 12305(a) (2000)) (emphasis added).

191. *Santiago*, 425 F.3d at 557.

192. *Id.* While the inference is plausible, the court offered no other rationalization than that the statute was "not irrational when read according to its plain meaning." *Id.* at 558. Yet the court did not dismiss Santiago's reading as irrational, nor provide any other explanation as to why his interpretation did not demonstrate ambiguity. *Id.* at 557-59.

193. *Id.* at 557 (quoting 10 U.S.C. § 12305(a) (2000)).

194. *Id.*

195. *Id.* at 558. The court briefly recounted the legislative history by citing the House's adoption of the Senate provision. *Id.* It cited the House's assertion that the Senate Bill "authorize[d] the President, during a time of crisis or national emergency, to extend the enlistment or appointment of essential regular and reserve personnel serving on active duty regardless of the normal separation dates for those individuals." *Id.* (citing H.R. Rep. No. 98-352 (1983) (Conf. Rep.), *reprinted in* 1983 U.S.C.C.A.N. 1160, 1176).

196. Although the language was deemed by the court to simply restrict the period of time at issue, the congressional evidence cited by the court, see *supra* notes 193-96, can easily be read as affirming the notion that "active duty" qualifies the type of "reserve personnel."

197. *Santiago*, 425 F.3d at 552.

198. The court cited to *Taylor v. United States*, 711 F.2d 1199, 1205 (3rd Cir. 1983); *Jablon v. United States*, 657 F.2d 1064, 1066 & n.3 (9th Cir. 1981); and *Johnson v. Chafee*, 469 F.2d 1216, 1219-20 (9th Cir. 1972).

199. These notable exceptions are matters concerning military pay or benefits, as employment with the military is typically quite different in scope and nature than a standard civilian employment

Two main claims fueled Santiago's search for relief under contract principles. First, he argued that his contract specifically provided for several exceptions in which his contract rights could be altered, but that the conditions under which his contract was involuntarily extended did not fall into any of these exceptions.²⁰¹ Relying on the oft used Latin maxim, *expressio unius est exclusio alterius*,²⁰² he claimed that a state of emergency declared by the President was not enumerated as an event which could extend his enlistment and thus was excluded as a possible extending event.²⁰³ Second, he acknowledged that the contract provided:

Laws and regulations that govern military personnel may change without notice to me. Such changes may affect my status, pay, allowances, benefits, and responsibilities as a member of the Armed Forces **REGARDLESS** of the provisions of this enlistment/reenlistment document.²⁰⁴

Because this provision spoke of changes to laws and regulations, Santiago asserted that it did not apply to the President's actions under a law which existed prior to his signing of the contract.²⁰⁵ Under his reasoning, such an action did not fall into the broad exception, and therefore it could not alter the terms of his contract.²⁰⁶

The court flatly rejected both of these claims. The provision which Santiago cited for support of his second claim was precisely the reason his first claim was rejected. Its notification of the possibility of changes to the terms of the contract according to any changes in laws or regulations gave Santiago notice that his contract terms could be affected by federal law.²⁰⁷ The court denied a reading of the other enumerated exceptions as an exclusive list, since such a broad exception was included ostensibly to

relationship. *Santiago*, 425 F.3d at 554 n.4.

200. *Id.*

201. *Id.* His argument was that without such notification by the terms of the contract, his service was not subject to those requirements, and was thus complete. *Id.*

202. "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 620 (8th ed. 2004). The dictionary offers an example: "the rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote." *Id.*

203. *Santiago*, 425 F.3d at 554-55.

204. *Id.* at 556.

205. *Id.*

206. *Id.*

207. *Id.* While it is true that some expression of broad exception may be read to prevent an *expressio unius est exclusio alterius* interpretation, it can also be easily said that this exception, if not directly related to those enumerated factors, may be an exception unto its own without relation to the exclusive list. However, the court did indeed draw the former analytical bridge with little hesitation.

prevent binding the government to a finite list of actions.²⁰⁸ Delving further into Santiago's distinction between existing and changed laws, the court reached his second claim.²⁰⁹ The court found that the stop-loss order was within the broad exception which references the Partial Statement of Existing United States Laws, and therefore, any inquiry into whether or not the stop-loss order could be properly categorized as a change was irrelevant.²¹⁰ According to the court, this reference was sufficient to give notice that the terms of the contract were subject to existing laws in ways that were not delineated in the contract.²¹¹ But the court went further, and found that the stop-loss order could be properly categorized as a "change" for purposes of the exception, because "[w]ithout the suspension of those laws, Santiago would have been entitled to be separated in due course at the end of his term of enlistment."²¹²

3. Procedural Due Process

Finally, Santiago appealed to the constitutional principles of procedural due process,²¹³ claiming that he was denied a liberty interest without any notice to him prior.²¹⁴ Again, a procedural due process claim requires proof of: (1) a property or liberty interest that is (2) deprived without (3) prior notice or opportunity to be heard.²¹⁵ He claimed that his liberty was impermissibly restrained by the extension of his contract and that he had no notice of the possibility of the extension of his contract for reasons other than those expressed in the enlistment contract.²¹⁶ He also argued that the change of his release date to December 25, 2031, constituted an "indefinite extension" which also deprived him of his due process rights.²¹⁷ This argument equated the government's indefinite retention of Santiago's services with the government's indefinite detention of citizens, which violates the due process clause when the extent of such a detention is at the

208. *Id.* at 555.

209. *Id.*

210. *Id.* at 555-56.

211. *Id.* at 555.

212. *Id.* at 556.

213. The court noted that this argument was not raised or considered in district court. *Id.* at 559 n.10. An issue may be reviewed for the first time on appeal under the discretion of the court if "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Id.* (citing *Briggs v. Kent*, 955 F.2d 623, 625 (9th Cir. 1992)) (internal quotations omitted). The court felt that the necessary conditions were met and chose to review the claim. *Id.*

214. *Id.* at 559.

215. See *supra* note 151 and accompanying text.

216. *Santiago's Brief*, *supra* note 183, at 25.

217. *Id.* at 28.

sole discretion of the government and when clear congressional intent to do so is absent.²¹⁸

Despite Santiago's best efforts, these claims were discarded. The court relied upon its analysis of the contract terms under general contract principles and determined that there was notice of such a possible restraint on his liberty.²¹⁹ Under the court's rationale, a due process claim's element of notice turned on the same element of notice required under contract law. The court plainly stated "the government's failure to notify Santiago in his enlistment contract of each specific reason that his service might be extended involuntarily [did] not violate Santiago's due process rights."²²⁰

Santiago's claim about indefinite extension was also rejected. According to the court, the date fixed by the government was for administrative convenience, and the military guidelines generally spelled out the parameters of such extensions.²²¹ Thus, Santiago was not in fact subject to indefinite extension as his newly created separation date indicated.²²² With that, the court concluded its due process inquiry and found Santiago's constitutional rights intact.²²³

4. Analysis

What seemed so promising on its face to those who would challenge the stop-loss program, met a staunch rebuff. The court took two large liberties with the issues in this case. The first stretch was in the reading of the language of § 12305.²²⁴ Contrary to the court's conclusion, it seems that the average reader would find Santiago's plain language interpretation more plausible. In fact, the court's acknowledgement of the absence of legislative history to the effect of the conclusion it reaches further bolsters Santiago's interpretation.²²⁵ The second stretch is found in the court's contract

218. *Id.*

219. *Santiago*, 425 F.3d at 559.

220. *Id.*

221. *Id.* But see *supra* notes 27-29. As indicated above, the policy was open-ended from its inception, and any limitations placed on the time and manner of extension have come from the military authorities themselves. There has never been a change to the duration of extension from an external source. How, therefore, can the court merely cite the date given as administrative convenience? If placed on stop-loss for some period less than that indicated on paper, what will stop the military from merely changing that period to the full duration indicated? To claim that it cannot do so misses the point that the entire issue is about the power of the military to alter contract terms. Why would it have any less power to interpret the stated terms to their fullest extent?

222. *Santiago*, 425 F.3d at 559.

223. *Id.*

224. *Id.* at 557.

225. *Id.* at 558.

analysis. While Santiago's "change in the law" argument²²⁶ appeared to be rejected by adequate reasoning, the court failed to explain why applying the Latin maxim to the enumerated list of exceptions would be in error.²²⁷ The notion that an exception lodged in the fine print of the contract could reasonably be held to negate a reading of that section as creating a fixed list of exceptions seems overly simplistic. At the very least, this creates the kind of ambiguity that courts are charged with arbitrating. But the court was unwilling to do so, and Santiago was left with no claim to relief.

Unsuccessful, Sergeant Santiago was forced to seek the prayers of his church family the night before he was to be deployed.²²⁸ But Santiago was not the first to challenge the government's policy, and he was not the last. One soldier, who filed an amicus curiae brief on behalf of his comrade Santiago, was now preparing for a court battle of his own²²⁹

D. "Try One" Defeats Another: Doe v. Rumsfeld²³⁰ and a Statutory Scheme

Like Qualls and Santiago, Doe was a military veteran who served his full term previously.²³¹ Doe served an eight-year term with the Army and decided to enlist in the California State National Guard and the Army Reserve National Guard for a one-year term under the "Try One" program for veterans.²³² He signed his enlistment contract in May 2003, and reenlisted for a second one-year term in February 2004.²³³ Not too long after his reenlistment, on July 23, 2004, Doe was ordered to active duty, and his contract term was extended eleven months beyond his original separation date.²³⁴ Doe's unit was scheduled for forty-five days of training followed by immediate deployment to Iraq.²³⁵ Seeking to avoid deployment, Doe sought a writ of mandamus and a writ of habeas corpus.²³⁶ Additionally, he filed motions for declaratory and injunctive relief, and sought a temporary

226. *Id.* at 555-56.

227. *Id.* at 555.

228. *Challenging Orders*, Online NewsHour, Feb. 24, 2005, http://www.pbs.org/newshour/bb/military/jan-june05/stop-loss_2-24.html (last visited Mar. 7, 2006).

229. *Santiago*, 425 F.3d at 552 n.1.

230. 435 F.3d 980 (9th Cir. 2006).

231. Brief of Appellant at 3, *Doe v. Rumsfeld*, 435 F.3d 980 (9th Cir. 2006) (No. 05-15680) [hereinafter *Doe's Brief*].

232. *Id.*

233. *Doe*, 435 F.3d at 983.

234. *Id.*

235. *Id.* Due to a medical condition, Doe was never actually deployed. *Id.* He was instead retained on active duty under 10 U.S.C. § 12301(d) and sent to Sacramento, California, where he was medically monitored and treated. *Id.* The government attempted to prevent the review of this issue, claiming that case was moot due to his reassignment. *Id.* at 980-83. However, the court maintained its jurisdictional mandate under 28 U.S.C. § 1291. *Id.* at 982-83.

236. *Id.* at 983.

restraining order.²³⁷ The district court denied all his attempts for relief, and Doe filed an appeal based on a familiar challenge to the Executive power, and some new arguments about the conflicts between statutes authorizing certain military activities.²³⁸

First, Doe argued that the President extended his contract improperly under 10 U.S.C. § 12305 by not complying with all the required elements.²³⁹ Second, he claimed that the section itself was unconstitutional because it was an “arbitrary infringement on his liberty.”²⁴⁰ Finally, he argued that the extension of his contract violated 10 U.S.C. § 12407(a), 10 U.S.C. § 12103, and 32 U.S.C. §§ 302 and 303.²⁴¹

1. Executive Authority

Though substantively different than the attacks of his predecessors, Doe’s argument that the President improperly extended his contract met the same fate. While Sherman and Qualls focused their claims on what they perceived to be the President’s lack of statutory authority to extend military contracts, Doe offered a twist. He argued that the language of 10 U.S.C. § 12305 authorized the President to act in such a way as to affect the extensions of military contracts, but gave him a specific formula for doing so.²⁴² Specifically, Doe charged that the laws which entitled him to separation had to be suspended under the section, and that the section only provides that the President “may” suspend these laws; suspension does not occur as an operation of law.²⁴³ Further, the President never “exercise[d] his authority under section 12305 by suspending laws relating to separation,” nor did he subsequently “[make] the necessary determination[s] that a soldier [was] essential to national security.”²⁴⁴ Without those proper steps, a soldier’s enlistment, argued Doe, could not be extended.²⁴⁵

237. *Id.* These soldiers file for relief in whatever form they can, as fast as they can. Note that because Qualls was unsuccessful in his attempts, he felt compelled to reenlist before his case was heard on the merits. *See supra* note 158. This caused him to make out a claim of economic duress later. Though an issue of economic duress did not arise in this case, it just as easily could have. As the cases have demonstrated, it is difficult for a soldier to succeed upon preemptive relief. When this happens, the soldier continues to face his or her stop-loss order, while trying to litigate a claim of its invalidity. *See id.*

238. *Doe*, 435 F.3d at 983.

239. *Id.* at 980.

240. *Id.*

241. *Id.*

242. *Doe’s Brief*, *supra* note 231, at 7.

243. *Id.* at 8.

244. *Id.* at 8.

245. *Id.* at 8-9.

The court was not persuaded that such steps were necessary. On November 21, 2002, the military implemented stop-loss by its MILPER Message No. 03-040, which stated in part, “The provisions regulations governing voluntary retirements, separations, and REFRADs²⁴⁶ of officers and enlisted soldiers . . . are suspended”²⁴⁷ In a short sentence, the court held that the language of the message served to both suspend and extend in one step.²⁴⁸ Similarly, the court spent little time dismissing the claim that some sort of individualized determination must be made as to the relative necessity of a category of persons extended.²⁴⁹ The President is not required by § 12305 to make an individual determination, therefore his determination that members of the Army National Guard should be activated was sufficient.²⁵⁰

2. Constitutionality of 10 U.S.C. § 12305

Doe also argued that the very provision under which the President derived his power ran afoul of the Constitution as it “permit[ted] an arbitrary infringement of [his] liberty.”²⁵¹ The central feature of this argument was the lack of boundaries within § 12305 to contain the President’s authority to subject soldiers to the stop-loss order.²⁵² Under his reasoning, it allows the government to “conscript soldiers . . . for extended compulsory military service.”²⁵³ With a soldier’s liberty indefinitely vulnerable, Doe argued that “legislative guidance” was critical to providing a limit on the President’s power.²⁵⁴ Absent this power, he reasoned that what remained was “unbounded government discretion.”²⁵⁵

The court did not agree with Doe’s arbitrariness argument. In its reading of the statute, the court found sufficient limits within § 12305

246. The Army National Guard maintains a searchable database of military acronyms, and it explains that REFRAD means “Released from Active Duty.” Army National Guard, REFRAD, <http://www.armg.army.mil/tools/acronym.asp?search=refrad> (last visited Jan. 29, 2006).

247. *Doe*, 435 F.3d at 985.

248. *Id.* at 984-85. The rationale here again gives the reader cause to stop short. Doe’s reasoning that the implementation of stop-loss required some minimal process is not far-fetched by the language of the statute, yet the court simply dismissed it by providing a manner in which the steps are combined. *Id.* It appears that in this sentence the court both acknowledged the necessity of the suspend and extend process, but solved the dilemma it posed by a stretched reading of the MILPER message.

249. *Id.*

250. *Id.* at 985. The court also noted that this argument was foreclosed by the *Santiago* decision, which held that “the President’s power under § 12305(a) ‘was properly delegated to the Assistant Secretary of the Army for Manpower and Reserve Affairs, who entered the stop-loss order suspending the separation laws on November 4, 2002’ pursuant to MILPER Message No. 03-040.” *Id.* at 985 (citing *Santiago*, 457 F.3d at 557).

251. *Doe’s Brief*, *supra* note 231, at 9.

252. *Id.* at 9-10.

253. *Id.* at 10.

254. *Id.* at 12.

255. *Id.* at 13.

through the surrounding statutes it references.²⁵⁶ Sections 12301(a), 12302, and 12304 explain particular circumstances in which activation can be made, and the court reasoned that any exercise of power within these confines was not arbitrary.²⁵⁷ Concluding that these provisions were fairly adopted by § 12305, the court held that the power which Doe contested was not arbitrary in nature.²⁵⁸

Furthermore, Doe argued that the Executive power under this statute was delegated in a manner which violated the Constitution,²⁵⁹ and that he received no notice that his contract could be extended beyond the outlined term.²⁶⁰ Despite his efforts, the court dismissed each of these points quickly.²⁶¹ On the subject of delegation, the court quoted the Supreme Court: “[S]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”²⁶² The court turned to its own words in *Santiago v. Rumsfeld* on the subject of adequate notice.²⁶³ It found that the language in Doe’s contract was identical to that found in Santiago’s contract, which disclaimed the possibility of change to the laws affecting the contractual terms.²⁶⁴ Such a disclaimer, it concluded, was sufficient to give constitutionally required notice.²⁶⁵

256. *Doe v. Rumsfeld*, 435 F.3d 980, 985-86 (9th Cir. 2006). Yet note that the court did not offer a temporal limitation found in a combined reading of these statutes, and the duration of the stop-loss application for an individual soldier clearly implicates a liberty interest if unchecked.

257. *Id.* at 986.

258. *Id.*

259. *Doe’s Brief*, *supra* note 231, at 12.

260. *Id.* at 25-26. Here, Doe slipped in an argument of misrepresentation. He claimed the marketing of the Try One Program as an opportunity to assume military service for one year before choosing whether to make a full commitment was inherently misleading. *Id.* at 24-25. He applied this to the notice argument though, claiming that the name itself caused him to cease further inquiry as he had “no reasonable expectation that he could be ordered to perform involuntary military service beyond his one-year enlistment except in rare circumstances of national exigency.” *Id.* at 24. The court noted briefly, at the end of its discussion regarding notice, that the claim of misrepresentation required an offer of more than the simple marketing of the program under the “Try One” label. *Doe*, 435 F.3d at 986.

261. *Doe*, 435 F.3d at 986.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

3. Statutory Conflict

Finally, Doe made an argument not relied upon by his predecessors in the court battles that the other applicable statutes provided limitations on the President's power under § 12305.²⁶⁶ Doe offered 10 U.S.C. § 12407(a) as a limitation on the type of soldier over whom the President exercised this authority.²⁶⁷ He cited the statute, which states:

Whenever the President calls the National Guard of a State into Federal service, he may specify in the call the period of the service. Members and units called shall serve inside or outside the territory of the United States during the term specified, unless sooner relieved by the President. However, no member of the National Guard may be kept in Federal service beyond the term of his commission or enlistment.²⁶⁸

While the first sentence discusses the President's power in relation to the National Guard of the States, Doe focused on the third sentence, which he argued applied to any member of the National Guard, both of the States and United States.²⁶⁹ This signaled to Doe that the President could call a unit of the National Guard unit into federal service but could not extend any soldier's enlistment beyond the contract date.²⁷⁰

Doe also pointed to several statutes which he claimed formed a "statutory scheme prohibiting involuntary extensions absent a declaration of war or emergency by Congress."²⁷¹ He began with 32 U.S.C. §§ 303(c) and 302(c), which describe the requirements of a congressional declaration of war or national emergency, respectively, in order to extend the enlistments of members of the National Guard of the States.²⁷² Doe further cited 10 U.S.C. § 12103(a), which specifically "requires that Congress declare war or a national emergency before the military may involuntarily extend a reserve enlistment."²⁷³ In 10 U.S.C. § 12103, what Doe referred to as a parallel provision, Congress made a similar requirement for the involuntary

266. *Doe's Brief*, *supra* note 231, at 21.

267. *Id.* at 21.

268. 10 U.S.C. § 12407(a) (2006). The last sentence may appear particularly powerful to the lay reader. As the cases have suggested that the Partial Statement of Existing United States Laws puts the soldier on a kind of constructive notice of the laws applicable to the stop-loss power, the language of this statute is a reminder of how things do actually appear to a reader not generally versed in the laws of the United States. On the other hand, Doe's plain meaning interpretation of the statute is a basic reading that logically creates at least an ambiguity in the overall meaning of the statute.

269. *Doe's Brief*, *supra* note 231, at 21.

270. *Id.* at 22.

271. *Id.* at 20.

272. *Id.* at 16-17.

273. *Id.* at 17.

extensions of the contracts of each of the regular branches.²⁷⁴ According to these provisions, Doe reasoned that the intent of Congress has always been to prevent the President or the military from extending service contracts when Congress has not itself declared war or national emergency.²⁷⁵

The court received each part of this statutory scheme with skepticism. Although it accepted Doe's assertion that the President's power to call upon the members of a State's National Guard is limited, it rejected any extension of that argument to the members of the National Guard of the United States.²⁷⁶ Citing the first sentence of the statute, the court was careful to apply the subsequent statements as stemming from that original thought. It rejected his argument flatly based on settled statutory construction principles.²⁷⁷ Because Doe could not extend this argument beyond the State National Guard, the court found him squarely under the power previously discussed.²⁷⁸

With no more favor than that shown to the first argument, the court rejected the last part of Doe's "statutory scheme." It found these arguments "not well-founded."²⁷⁹ The requirements of 32 U.S.C. §§ 302 and 303 clearly apply to the State National Guard, but according to the court, may be extended no further.²⁸⁰ According to the court 10 U.S.C. § 12103 was also inapplicable, as Doe tried to use it to create a conflict between it and § 12305.²⁸¹ By its reading of the provisions, "[s]ection 12103 identifies certain circumstances where an act of Congress automatically extends the enlistment of a member of the National Guard of the United States."²⁸² The court refused to read that as an exclusive statement, and found that it is naturally consistent with § 12305 as just one circumstance which can bring about the extension.²⁸³

274. *Id.* Again, this important discrepancy in the constitutional description and use of the war-making power provides controversy as to the proper limitation on Executive power. See *supra* note 36.

275. *Doe's Brief, supra* note 231, at 18.

276. *Doe v. Rumsfeld*, 435 F.3d 980, 987 (9th Cir. 2006).

277. *Id.* at 987.

278. *Id.* at 988.

279. *Id.*

280. *Id.*

281. *Id.* at 984-88. By refusing to view this as an exclusive statement, the court easily sidestepped the landmine that exists in battlefield over congressional and presidential war-making roles. See *supra* note 36.

282. *Doe*, 435 F.3d at 988.

283. *Id.* The court continued, reasoning that even if the two sections were read to be in conflict, § 12305 would control as it "states the President's authority as identified in th[is] section applies '[n]otwithstanding any other provision of [the] law.'" *Id.*

4. Analysis

The error of the *Doe* court can be best characterized as oversimplification. The court determined that the MILPER Message served to both suspend and extend, but gave no reason why the court should consider such a simultaneous declaration as satisfying the specific statutory language requirement of a suspension.²⁸⁴ The statute makes no mention of any simultaneous actions.²⁸⁵ In another act of oversimplified reasoning, the court cites the statutes referenced by § 12305 but ignores the lack of *legislative* check on this Executive power. Doe's argument was that the Executive power must necessarily be limited by some kind of "legislative guidance" without which its exercise is arbitrary.²⁸⁶ The fact that other sections may add further description to the circumstances does not cure this problem. Finally, the *Doe* court strained to explain away a sea of inconsistencies brought by Doe's claim of a statutory scheme against involuntary extensions without a formal declaration of war or emergency by Congress.²⁸⁷ Perhaps the most illuminating aspect of its analysis on this point was its stated commitment to presidential authority under § 12305.²⁸⁸ Such a statement explained the viewpoint of the court more clearly than any other point.

So the court filed its affirmation of the district court's decision and settled the last of the pending stop-loss controversies, for now. Though the case may have been settled, several of the issues at the heart of those controversies remain.

IV. THE ISSUES NOW FRAMED

With a paucity of cases directly dealing with the implementation of stop-loss programs, it appears, in certain issues, to be a settled field of law. The cases clearly demonstrate that the courts are unwilling to find controversy when they can avoid it, because the consequences of acknowledging a crack in the door would be enormous.²⁸⁹ Courts are generally wary of the magnitude of their decisions, yet as the cases have seemingly sealed the casket on several issues, it seems a few small cracks in the door have been revealed.

284. *Id.* at 984-85.

285. *See* 10 U.S.C. § 12305 (2000).

286. *Doe's Brief*, *supra* note 231, at 9-12.

287. *Doe*, 435 F.3d at 987-88.

288. *Id.* at 988.

289. *See supra* note 91 and accompanying text.

A. *Closed Case: The Settled Issues*

The cases above demonstrate that several issues are without a doubt closed for discussion. These are the issues that carry the greatest weight since they call into question the very nature of government in the United States. Clearly the Executive authority to involuntarily extend soldiers time of service has been affirmed and strengthened since the days of *Sherman v. United States*. Though a great deal of Executive decision-making is considered a political question not subject to judicial review,²⁹⁰ the question of whether the President may invoke the stop-loss power has been more appropriately characterized as a matter of “interpretation and construction of [a] federal statute”²⁹¹ The same can be said of the various statutes that have been raised as evidence of congressional intent to prevent the use of stop-loss orders in the manner they are issued today.²⁹²

Section 12305 gives the President power to involuntarily extend the contracts of enlisted men and women upon the declaration of war or national emergency.²⁹³ Passed during the Gulf War era, it was meant to allow the United States to fulfill all of its obligations by requiring those soldiers already on active duty to stay until the time of crisis had passed.²⁹⁴ It was intended as a stop-gap measure, a policy to provide a temporary fix. Now it is being used to cover the deficits brought on by the occupation of Afghanistan and a protracted conflict in Iraq. Though its application has changed, the courts have held that the principles on which it is based remain solidly intact. *Sherman* was a message that absent clear language in a United States statute prohibiting the military from extending the contracts of enlistees, the court will not endeavor to make a decision which denies the Executive its power to extend.²⁹⁵ Under the same banner of presidential freedom, the President will be permitted to extend the contracts of nearly all persons necessary, as stop-loss may apply to any active duty soldier, and the

290. See generally *Baker v. Carr*, 369 U.S. 186 (1962) (outlining the parameters for the invocation of the “political question” doctrine).

291. *Doe*, 435 F.3d at 984. This construction is irrespective of the decision to go to war, or how “war” can be fairly defined by the President, both of which are arguably political questions. J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 39 (1991). However, at least *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990), has indicated that “courts have historically made determinations about whether this country was at war for many other purposes—the construction of treaties, statutes, and even insurance contracts.” *Id.* More recently the Supreme Court agreed to hear and decide whether the President’s authority to detain enemy combatants was exercised constitutionally. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

292. See *supra* Part III.D.3.

293. See *supra* notes 20-22 and accompanying text.

294. See *supra* notes 20-22 and accompanying text.

295. See *supra* Part III.A.1; see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“Our inquiry must cease if the statutory language is unambiguous . . .”).

President's power to call a unit into active duty remains settled. Finally, *Doe* settles the constitutionality of the provision in the affirmative.²⁹⁶ But the most controversial principle emerges from *Qualls*, which is the notion that the Authorization for Use of Military Force satisfies the requirement of congressional declaration of war or emergency.²⁹⁷

Thus, though the court has closed the door on inquiries about presidential power to place soldiers on stop-loss, a squeaky wheel remains. Can it be true that since the United States has in this instance "initiated war in the same way it has initiated war since World War II" the practice is valid?²⁹⁸ The nature of an authorization for use of military force is far different than a declaration.²⁹⁹ An authorization such as this requires only that the President make a demand to use force and that Congress support it.³⁰⁰ In order to get Congress to declare war, the President must present a case for it, laying bare the entire situation and the possible solutions.³⁰¹ It is easy to see the perceived guarantee of the latter. By exposing his or her hand, Congress is forced to fully weigh its options in response before giving its stamp of approval.

If it is clear that arguments challenging presidential power have been foreclosed, so are any arguments about statutory preemption. Doe's argument about a statutory scheme precluding the meaning of the plain language of the central statute met a quick fate.³⁰² The significance of the disposal of this argument cannot be underestimated. By finding no conflict among the statutes, the court actually raised the bar for any challenge to the presidential power discussed previously. Any inconsistency or irregularity will have to be explicit for the court to find any limitation on § 12305 power.³⁰³ It seems hard to believe that this will be possible, given the elaborate suggestions made by Doe. The court is not really willing to find

296. See *supra* Part III.D.2.

297. See *supra* notes 128-32. The President has the Executive Power to act in a state of emergency, but controversy still remains over the scope of that power absent a declaration of war. See *supra* notes 36, 47-52 and accompanying text.

298. *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 284 (D.D.C. 2005).

299. IRONS, *supra* note 36, at 270-71. What is missing with these rapid authorizations is the traditional deliberation and debate that traditionally accompanies a formal declaration of war. *Id.* It must be recognized that situations arise in which such deliberation and debate would be cumbersome, if not detrimental to the national interest, but in these circumstances war should be authorized for a limited scope and duration. *Id.*

300. See *supra* note 36.

301. The differences between authorization and formal declaration are numerous and far reaching. See generally IRONS, *supra* note 36, at 3-10 (outlining the evolution of the Presidential authority to declare war); Sidak, *supra* note 291, at 39-43 (discussing the definition of "war" and the President's ability to declare it).

302. See *supra* Part III.D.3.

303. See *Doe v. Rumsfeld*, 435 F.3d 980, 988 (9th Cir. 2006). The court reasoned that where "[t]here is nothing in the language of the statute to indicate this is the exclusive manner in which an enlistment can be involuntarily extended," the court will not implicitly read that exclusivity into the statute. *Id.*

such an instance, and in maintaining this posture, has preemptively declared the validity of the statute as containing the power of its most expansive reading.³⁰⁴ When the court says it must, where possible, avoid finding conflict in the plain language, it is in effect declaring the meaning settled absent a statutory amendment or additional limiting statute.³⁰⁵

Therefore, despite the court's power to review such statutory issues, it overwhelmingly embraces a deferential model of analysis, which avoids the mess that would inevitably result from finding the Executive power lacking or otherwise tightly confined.

B. *It Could Happen: What Remains*

However settled the principles of Executive power under § 12305 and the lack of conflict among the related statutes, it does not appear that the contractual and due process issues have been completely foreclosed. Unlike the deferential model evidenced above, matters of contract interpretation and procedural due process do not generally begin with such deferential analysis. It is true that the two cases which raised contract issues prominently in their stop-loss suits did not succeed on the basis of these arguments. The courts ultimately found no breach, no misrepresentation, and constitutionally sufficient process.³⁰⁶ Despite these results, the reasoning of each decision leaves three issues open for possible challenge. First, although the court found no breach of the terms, it left the possibility open that inadequate notice could be demonstrated.³⁰⁷ Second, the *Qualls* court left wide open the possibility that misrepresentation could be proven.³⁰⁸ Third, the validity of procedural due process claims is so inextricably tied to the issue of contractual notice that a successful claim on contractual notice could translate into a successful procedural due process claim.³⁰⁹

As the courts in *Qualls* and *Santiago* both held clearly, contract principles of law generally apply to military enlistment contracts.³¹⁰ It was held early in American history that the enlistment contract is one which changes status, like marriage or naturalization, such that nonperformance by

304. *See id.* The court held that "even if we found § 12305 to be in conflict with the statutes identified by Doe, which we do not, those conflicting terms would be expressly revoked," because § 12305(a) "plainly states the President's authority as identified in the section applies 'notwithstanding any other provision of law.'" *Id.*

305. *See id.*

306. *See supra* Parts III.B.1.a-b, III.C.2-3; *see also supra* note 60.

307. *See supra* Parts III.B.1.a, III.C.2.

308. *See supra* Part III.B.1.b.

309. *See supra* Parts III.B.2, III.C.3, III.D.2.

310. *See Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 279-80 (D.D.C. 2005); *Santiago v. Rumsfeld*, 425 F.3d 549, 554 (9th Cir. 2005).

either side cannot change his status as a soldier.³¹¹ This declaration has been the subject of varying interpretation over the years.³¹² However, courts have overwhelmingly applied contract principles to enlistment contracts for purposes of arbitrating the rights and responsibilities they contain.³¹³ With the affirmation of this maxim by the holdings in *Qualls* and *Santiago*, it seems that absent a direct reversal by the Supreme Court of this widely applied principle, it will remain the central measure for enlistment contract disputes.³¹⁴

Given the use of this measure for the foreseeable future, the rules that have guided the lower courts in their determination of notice in contractual disputes will govern. The idea that notice could possibly be insufficient in an enlistment contract did not originate with these recent cases. In *Wallace v. Chafee*,³¹⁵ the Court of Appeals for the Ninth Circuit most notably held that:

One who enters a contract is on notice of the provisions of the contract. If he assents voluntarily to those provisions after notice, he should be presumed, in the absence of ambiguity, to have understood and agreed to comply with the provisions as written.³¹⁶

311. *In re Grimley*, 137 U.S. 147, 151 (1890). See, e.g., *Walsh v. United States*, 43 Ct. Cl. 225 (1908); *Bell v. United States*, 366 U.S. 393, 402 (1961).

312. William P. Casella, Comment, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. CHI. L. REV. 783, 785 (1972). Although the Supreme Court clearly expressed an intent to preserve the relationship even in the face of performance defects, it is not precisely clear that they rejected the application of contractual principles in all circumstances. *Id.* In fact, lower courts have continued to apply contractual principles to enlistment contracts. *Id.* at 789.

313. See generally Casella, *supra* note 312. See, e.g., *Santos v. Franklin*, 493 F. Supp. 847, 851 (E.D. Pa. 1980) (citing *Peavey v. Warner*, 493 F.2d 748, 750 (5th Cir. 1974); *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972)). The case of *Pfile v. Corcoran*, 287 F. Supp. 554 (D. Colo. 1968), discussed the power of the United States government to abrogate its contracts with individuals in certain situations, but it also recognized that a "change of status does not invalidate the contractual obligation of either party or prevent the contract from being upheld, under proper circumstances, by a court of law." *Id.* at 556-57. Though the *Pfile* court found "wide discretion" in which the government could activate the plaintiff, it is distinguishable on two grounds. *Id.* at 560. First, the court in *Pfile* was dealing with a statute passed after the contract was signed that changed the plaintiff's duties. *Id.* at 556. In these cases however, the law apparently authorizing stop-loss was passed prior to the signing of the enlistment contracts. There is no argument about the government's power to change the terms, but whether or not there was notice of this preexisting statute as a condition of the contract. Second, *Pfile* authorizes abrogation as within the state's "sovereign right . . . to protect the . . . general welfare of the people." *Id.* at 560-61 (quoting *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232-233 (1945)). While no doubt the government must be able to call up the soldiers it has asked to wait in the wings for such time as war or emergency, it cannot be said that involuntary extensions are analogous. In the stop-loss situation, soldiers are being denied the ability to leave at their scheduled date, when in theory there are other soldiers available to serve, or there *should* be other soldiers available to serve. It is hard to say that the war making power should, therefore, require the involuntary extension of contracts.

314. See *supra* notes 108, 198 and accompanying text.

315. 451 F.2d 1374 (9th Cir. 1971).

316. *Id.* at 1377.

The court continued to explain why the case at bar was not ambiguous, finding no problems with tiny typeface, clear statements, or emphasis of critical points.³¹⁷ But what if one of these structural or substantive problems existed? *Qualls* and *Santiago* dealt relatively little with structural problems, instead focusing on the statements regarding to which laws the contract was subject.³¹⁸ Neither plaintiff raised the possibility that the structure of the contract itself was improper, especially in *Qualls*' case, given it was for a program to last ostensibly for one year.³¹⁹ What if *Qualls* had challenged his contract not on the basis of the incomplete copy of the contract, but instead on the basis that it was unreadable or that a lack of emphasis on such an important point made enforcement of the contract unconscionable? The *Santiago* court was similarly dismissive of the notice argument,³²⁰ but *Santiago* could have made a stronger notice case by elaborating in his brief.³²¹ Although he challenged that the list of extending events was exclusive, the court responded that there could be no intent to exclude because of the presence of the Partial Statement of Existing United States Laws in the contract.³²² If he had presented more than a bare argument of ambiguity in the terms he may have had more success.

However, *Wallace* seems to clearly indicate that ambiguity in the contractual notice is at least a justiciable issue.³²³ If *Santiago* had alleged, in the alternative, that the exclusivity of the list and presence of the Partial Statement of Existing United States Laws created an enormous ambiguity, the court would have been forced at the very least to adjudicate the issue. Both *Qualls* and *Santiago* aimed high with their allegations, urging the court to find the complete absence of terms or the most restrictive reading of the terms, but could have made stronger cases with more subtle arguments about structural sufficiency and language ambiguity.

If the notice argument was a slight miss, the misrepresentation argument was missed completely. The "Try One" Program by its very nature has a misleading effect on those who do not understand the wide-ranging power the government has over a soldier at the moment of enlistment. Both *Qualls* and *Doe* enlisted in such programs but neither one made a compelling

317. *Id.*

318. *Qualls' Complaint*, *supra* note 98, ¶¶ 64-65; *Santiago's Brief*, *supra* note 183, at 17-23.

319. *See supra* note 90.

320. *See supra* note 207 and accompanying text.

321. *Santiago v. Rumsfeld*, 425 F. 3d 549, 559 (9th Cir. 2005).

322. *Id.* at 555 (citing *United States v. Crane*, 979 F.2d 687, 690 (9th Cir. 1992)).

323. *Wallace v. Chafee*, 451 F.2d 1374, 1377 (9th Cir. 1971) ("If he assents voluntarily to those provisions after notice, he should be presumed, in the absence of ambiguity, to have understood and agreed to comply with the provisions as written.").

misrepresentation argument.³²⁴ In *Chalfant v. Laird*,³²⁵ the Court of Appeals for the Ninth Circuit reasoned that if a soldier could show fraud or imposition, then the enlistment contract would not necessarily be binding.³²⁶ *Shelton v. Brunson*³²⁷ provided that misrepresentative words or conduct could render a reenlistment contract void.³²⁸ Qualls attempted a misrepresentation claim on the basis of the marketing of the program as a one-year trial period on the website, but could not demonstrate reliance on those assertions on the website so the court refused to decide the issue.³²⁹ If he could have offered an accusation that a recruiter or other informational personnel affirmatively misled him in word or deed, there would have been an issue for the court to evaluate. Doe used facts that were useful in a contractual misrepresentation claim, but used them to bolster his lack of notice assertion.³³⁰ If he had alleged facts, assuming they existed, that tended to show misrepresentation based on the program name by the words or actions of a representative or continued misleading through additional literature, the court did not foreclose the success of such an argument.³³¹

And what of procedural due process claims? As each court has found the procedural due process argument turning mainly on the issue of notice, each one has relied on its contractual notice reasoning. This leaves a slight opening for a successful procedural due process claim. If in the notice cases above the plaintiffs could identify ways in which the notice was inadequate such that a contract notice claim would succeed, perhaps a court would more readily consider the notion that there has been a denial of notice where there has also been a substantial denial of liberty.

V. CONCLUSION: WHY IT WON'T

Though the courts have been terse and, at times, even hastily dismissive, it is unlikely that another court will find differently. The words of the *Sherman* court ring ominously to anyone who would dare bring the issue up again: “a decision [to terminate this contract] would trigger lawsuits and claims by other military personnel similarly situated and bring chaos to

324. See *supra* notes 136-148, 260 and accompanying text.

325. 420 F.2d 945 (9th Cir. 1969).

326. *Id.* at 946.

327. 465 F.2d 144 (5th Cir. 1972).

328. *Id.* at 147 (citing *In re Grimley*, 137 U.S. 147, 151 (1890); *Ex parte Blackington*, 245 F. 801, 803 (D. Mass. 1917); *Gausmann v. Laird*, 422 F.2d 394, 394 (9th Cir. 1969); *Chalfant*, 420 F.2d at 945).

329. See *supra* notes 143-48 and accompanying text.

330. See *supra* note 260.

331. *Doe v. Rumsfeld*, 435 F.3d 980, 986-87 (9th Cir. 2006). The court noted that any misrepresentation claim regarding the “Try One” Program would require an allegation based on more than the title and marketing of the program alone. *Id.* Certainly that leaves other manners of expression and conduct fully available for suit.

orderly military planning.”³³² The prospect of invalidating a military contract is bothersome to the courts, as they perceive such a decision as cutting against the very fabric of the operating military. This explains the various courts’ plain endeavors to recognize a strong Executive authority and a conflict-free statutory scheme. Although the Supreme Court has not spoken directly on the issue, the empty threats to Executive authority under Article II to detain enemy combatants issued in *Hamdi v. Rumsfeld*³³³ should give pause to anyone who would challenge the statutory validity of the stop-loss statute.³³⁴

And what of those cracks in the door? Although a case may arise that will force a court to more seriously analyze the claims of breach, misrepresentation, and violation of due process, it seems evident that the court will continue to resolve these questions in favor of preserving some level of normalcy and predictability in military operations. The District Court for the Middle District of Georgia was prescient in its conclusion in *Sherman* over a decade ago, as the decisions of the past few years have reflected this anxiety about disrupting administrative military power in a time of war. Then again, the situations posited in which a readily reviewable claim on any of these three issues may arise are quite particular and unlikely to come up with the frequency that will bring this statute before the Supreme Court any time soon.

Thus, it seems that stop-loss will survive future legal attack, though to the soldier enlisting, it may continue to be a jumbled mess of words, cross-referenced in fashion to just barely pass judicial examination. Relief will come only if the United States follows its vision for reorganization of actives and reserves and tailors its military commitments before finding itself in a situation again where it feels it must violate its own contracts, faithfully serving people. When it does so, it breaks the trust³³⁵ of its faithful soldiers, which should concern the federal government, on the most self-interested level, on the ability to recruit and retain in the future. But, the concern should be something more—instead of squeaking across the line of legal permissibility, shouldn’t the government aim higher and keep the faith?

332. *Sherman v. United States*, 755 F. Supp. 385, 388 (M.D. Ga. 1991).

333. 542 U.S. 507 (2004).

334. While requiring the President to provide more than “some evidence” to continue the detention, *Hamdi* “hardly requires the President to bend over backwards before detaining U.S. citizens for the definite time of his choice” John K. Setear, *A Forest With No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579, 628 (2005).

335. And this breach of trust does not go unnoticed. It seems that stop-loss is having a negative effect on morale that may worsen the troop shortage it is designed to prevent. See Mark Mazzetti, *Leader of Army Reserve Fears a ‘Broken Force,’* L.A. TIMES, Jan. 6, 2005, at A14; Vincent J. Schodolski, *Pentagon Rule Worries Some*, CHI. TRIB., Sept. 25, 2004, at C10; Editorial, *supra* note 44.

[Lieutenant General] Hagenbeck, speaking at a meeting where he unveiled the plans, rejected suggestions that the orders betrayed the trust of soldiers in the volunteer military. “I don’t regard that as a breach of trust,” Hagenbeck said. “I’d regard that as being a soldier in the United States Army, and this is what we do.”³³⁶

Hannah Dyer³³⁷

336. Schrader, *supra* note 31, at A1.

337. J.D. Candidate, Pepperdine University School of Law, 2007; B.A. Political Science and Economics, Boston University, 2004. The author would like to express her gratitude to the brave men and women of all branches of the United States Armed Forces who have fought for the freedom that is blindly enjoyed every minute of every day in this nation. She would also like to thank her friends and family around the country and the world for their kindness and encouragement. Finally, she would like to thank her mother, Ann Dyer, for the unconditional love and daily sacrifice which have made her education and this Article possible, and her brother, Benjamin Dyer, for his confidence and support which have been an amazing source of motivation. She dedicates this article to the life and memory of her father, Steven Dyer.