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You're in the Army Now! Reforming Military Enlistment Contracts

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YOU'RE IN THE ARMY NOW! REFORMING MILITARY ENLISTMENT CONTRACTS

*Jason Steck**

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“We’re here to protect democracy, not practice it.”¹

Late on Christmas Eve, a father hears a racket on his roof, rushes to investigate, and yells at a potential intruder.² The intruder falls from the roof, disappearing, but leaves his distinctive red and white clothing behind.³ Following the instructions on a card found within what he realizes was Santa’s clothing, the father dons the suit, completes the Christmas deliveries, and returns Santa’s sleigh to the North Pole.⁴ Only then is he shown the tiny inscription on the card mandating that whoever accepts Santa’s suit becomes Santa Claus.⁵ Hilarity ensues. The film *The Santa Clause* is a beloved Christmas comedy but, aside from the merits of Tim Allen’s acting performance, why is it beloved? The answer lies in a long filmmaking tradition featuring characters caught by terms of agreements they did not fully understand in advance.⁶

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¹ CRIMSON TIDE (Hollywood Pictures 1995).

² THE SANTA CLAUSE (Walt Disney Pictures 1994).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See, e.g., THE DEVIL AND DANIEL WEBSTER (RKO Pictures 1941) (a man sells his soul to the Devil and Satan comes to collect); IT’S A WONDERFUL LIFE (Liberty Films 1947) (a man wishes he was never born and is shown the results of his wish); THE LITTLE

The problem is far more than fodder for filmmakers, of course. The failure of contracting parties to comprehend the full extent of their obligations produces a steady stream of disputes both in and out of courtrooms.⁷ Although there is lavish case law addressing problems arising when contracting parties fail to understand the consequences of business contracts, there is another type of contract affecting hundreds of thousands of persons every year that has received virtually no attention: military enlistment.⁸

This article intends to fill that gap. Part One will survey the evolution of military enlistment contracts.⁹ Part Two will discuss two areas of standard contract law—the requirement that waivers of rights be made knowingly, voluntarily, and intelligently, and the principle that adhesion contracts are construed against the drafter—and show how the courts have refused to apply them to military enlistment contracts.¹⁰ Part Three will sketch a plan to reform future military enlistment contracts by providing important information to enlistees regarding the consequences of their contracted change of status.¹¹

I. ENLISTMENT AS CONTRACT

A. *Origins of the American Military Enlistment Contract*

American notions of military service have always been rooted in a direct relationship between the individual soldier and the state.¹² All citizens owed the State a duty of service, and the terms of that service were at the sole discretion of the State.¹³ The use of voluntary enlistment through contract was thus a matter of convenience, not a matter of right.¹⁴ Whenever the supply of volunteers should prove inadequate, the government retained the right to compel service on whatever terms it might dictate.¹⁵

MERMAID (Walt Disney Pictures 1989) (an infatuated mermaid trades her voice to become human); THE HUNGER GAMES (Lionsgate 2012) (a young girl volunteers to replace her sister in gladiatorial games and is sucked into a political maelstrom as well).

⁷ See generally E. ALLAN FARNSWORTH, ET AL., CONTRACTS: CASES AND MATERIALS (Foundation 2001).

⁸ See *Who is Volunteering for Today's Military?*, <http://www.defense.gov/news/Dec2005/d20051213mythfact.pdf> (accessed Apr. 12, 2015) (stating that 180,000 people enlist in the military every year).

⁹ *Infra* Part I.

¹⁰ *Infra* Part II.

¹¹ *Infra* Part III.

¹² Captain David A. Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1, 3–5 (1977) (tracing the emergence of the American system of military enlistment from its origins in feudal Europe).

¹³ *United States v. Blakeney*, 44 Va. (3 Gratt) 405, 408–09 (1847).

¹⁴ See *id.* at 409 (noting that the government “ought, in its discretion, to select, in the first place, for such service, those who are desirous of rendering it”).

¹⁵ See Schlueter, *supra* note 12, at 4–5.

Even in the early history of the United States, Congress tended to prefer voluntary enlistment to compelled service through conscription.¹⁶ But “the contract of enlistment is peculiar in that it is a contract made with the State, under the specific authority of the Constitution, and thus governed by those principles or considerations of expediency and economy, expressed in the term ‘public policy.’”¹⁷ Congress therefore determined who was eligible to enter into an enlistment contract, including such factors as “nationality, race, age, [and] physical and moral qualifications.”¹⁸ Congress also retained the inherent authority to unilaterally modify the terms of an enlistment contract, even retroactively.¹⁹ In short, the State’s choice to use the contractual form did not reduce the state’s power to compel military service, nor did it require that the state comply with common-law limits—such as the principle that contracts entered into by minors are voidable—that would interfere with its sovereign powers.²⁰

1. *United States v. Grimley*

The Supreme Court defined the nature of the 19th-century enlistment contract in *United States v. Grimley*.²¹ 40-year-old John Gimley enlisted in the army, claiming to be 28 years old.²² Congress had, at the time, set 35 years as the maximum age for an eligible enlistee.²³ After Gimley deserted from the army, he was tried by court-martial and found guilty.²⁴ A federal district court granted Gimley’s request for a writ of habeas corpus, ruling that Gimley’s enlistment was void because of his age and that the army therefore lacked the jurisdiction to court-martial him.²⁵

After the court of appeals affirmed the district court, the Supreme Court reversed.²⁶ The Court highlighted the unusual contractual nature of military enlistment stating, “[e]nlistment is a contract, but it is one of those contracts which changes the *status*, and where that is changed, no breach of the contract destroys the new *status* or relieves from the obligations which its existence imposes.”²⁷ The Court compared enlistment to marriage and naturalization, emphasizing that in both cases the misconduct of a party in

¹⁶ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 539–40 (2d ed. 1920) (describing congressional efforts to incentivize enlistment)

¹⁷ *Id.* at 538.

¹⁸ *Id.* at 540.

¹⁹ *See id.* at 539 (stating that an enlistment contract “is entered into with the understanding that it may be modified in any of its terms, or wholly rescinded, at the discretion of the State”).

²⁰ *Blakeney*, 44 Va. (3 Gratt.) at 414–15.

²¹ *United States v. Grimley*, 137 U.S. 147 (1890).

²² *Id.* at 150.

²³ *Id.*

²⁴ *Id.* at 149–50.

²⁵ *Id.* at 150.

²⁶ *Id.* at 150, 157.

²⁷ *Grimley*, 137 U.S. at 151.

entering into the contract cannot relieve him from the obligations he undertook in the contract.²⁸ The comparison to marriage drew on the longstanding view that marriage is a contractual relationship, entered into by parties that have the capacity to “understand[] the meaning, rights, and obligations of marriage.”²⁹ Accordingly, the Court held that Grimley could not by his own misconduct be relieved from the consequences of an otherwise valid enlistment,³⁰ concluding that “[t]he government, and the government alone, is the party to the transaction that can raise objections on that ground.”³¹

The *Grimley* Court also gave some insight into the procedural requirements for a valid 19th-century enlistment.³² Grimley argued, in part, that his enlistment was procedurally invalid because the recruiting officer had failed to read to him the Articles of War, as required by statute and army regulations.³³ Congress had mandated that the “rules and articles” governing an enlistee’s behavior “shall be read to every enlisted man at the time of, or within six days after, his enlistment.”³⁴ An Army regulation was more stringent, requiring that two articles be read to an enlistee prior to his taking the oath of enlistment, “after which he will be allowed time to consider the subject until his mind appears to be fully made up before the oath is administered to him.”³⁵ Because the Court found, as a factual matter, that the requirements had been met,³⁶ it did not address whether an enlistment was voidable for failure to comply with this notice requirement.³⁷ But the requirement that enlistees be read the articles of war nonetheless indicated a congressional intent to ensure that enlistees had some idea of what joining the military really meant.³⁸

²⁸ *Id.* at 152.

²⁹ In re Guardianship of O’Brien, 847 N.W.2d 710, 715 (Minn. App. 2014); see, e.g., In re Kincaid’s Estate, 57 N.W.2d 628, 633–34 (Minn. 1953) (quoting statute establishing requirements for marriage contract).

³⁰ *Grimley*, 137 U.S. at 150.

³¹ *Id.* at 150, 154.

³² See *id.* at 154 (describing Grimley’s enlistment process).

³³ *Id.* at 155–56.

³⁴ *Grimley*, 137 U.S. at 155–56.

³⁵ *Id.* at 156.

³⁶ *Id.*

³⁷ *Grimley*, 137 U.S. 147, 156 (1890). But see WINTHROP, *supra* note 16, at 546 (noting that enlistments that fail to comply with Army regulations were not voidable “against the consent of the government” because only Congress’ requirements are binding upon the government).

³⁸ *Grimley*, 137 U.S. at 156–57 (holding that “the taking of the oath of allegiance is the pivotal fact which changes the *status* from that of civilian to that of soldier”) (emphasis in original).

B. Military Enlistment Contracts in the All-Volunteer Force (AVF) Era

The abolition of the draft and the transition to an all-volunteer military provoked a debate over the contractual cast of military enlistment. Drawing on the language in *Grimley*, contract-law theorists analyzed the enlistment contract “as a true contract, governed by traditional contract law.”³⁹ This approach assessed the enlistment agreement itself as but one among several components of the enlistment contract, and it argued that statutes and regulations were incorporated into the enlistment contract by reference.⁴⁰ It assessed the sufficiency of enlistment according to traditional notions of contract law, including offer and acceptance, consideration, capacity of the parties to contract, and the strictures of public-policy considerations.⁴¹

Others replied, however, that *Grimley*’s use of enlistment-as-contract language was misleading, and that “the application of contract principles to enlistment often results in injustice to enlistees and the contravention of the policies of the government.”⁴² This approach argued that military enlistments were governed by statutes, making a contract-law approach inappropriate.⁴³ Further, the remedies for problems such as fraudulent enlistments procured by recruiters’ misrepresentations, “could [be] advanced regardless of whether enlistment is viewed as a contract.”⁴⁴ Rather than viewing enlistment as the formation of a contract, then, this approach argues that enlistment should “best be viewed . . . as an administrative procedure that results in a restriction of liberty and the loss of certain constitutional rights.”⁴⁵

The courts firmly resolved this debate in favor of treating enlistment in the all-volunteer era as a contract.⁴⁶ Courts have continued to note the change in status effected by an enlistment contract, but have cautioned that “change of status does not invalidate the contractual obligation of *either party* or prevent the contract from being upheld”⁴⁷ In particular, one court noted, “recruiting activities . . . by their very nature, involve a crucial intersection of the military and the general public that cannot be left to the sole discretion of the military.”⁴⁸ Thus, the determination of whether a valid enlistment contract is formed and the enforcement of the terms of that

³⁹ Neil J. Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121, 121–22, 148 (1974).

⁴⁰ *Id.* at 126–27.

⁴¹ *Id.* at 127–36.

⁴² William P. Casella, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. CHI. L. REV. 783, 783–84, 784–87 (1972).

⁴³ *Id.* at 789.

⁴⁴ *Id.* at 794.

⁴⁵ *Id.* at 813.

⁴⁶ *See, e.g.*, *Bell v. United States*, 366 U.S. 393, 402 (1961) (citing *Grimley* to support the statement that “[e]nlistment is a contract”).

⁴⁷ *Pfile v. Corcoran*, 287 F. Supp. 554, 557 (D. Colo. 1968) (emphasis added).

⁴⁸ *Brown v. Dunleavy*, 722 F. Supp. 1343, 1349 (E.D. Va. 1989).

contract “fall[] within the expertise of the judiciary” and “are decided under traditional theories of contract law.”⁴⁹

In adapting the contractual theory of enlistment for the AVF era, courts have limited the ability of the government to unilaterally modify the terms of the enlistment contract, holding, for example, that “[t]he integrity of the recruiting process in today’s all volunteer peacetime Navy compels rescission” when recruiters’ misrepresentations made it impossible for the prospective recruit to fully evaluate the costs and benefits of enlistment.⁵⁰ Courts have accordingly upheld challenges to the validity of enlistment contracts due to recruiters’ misrepresentations about the potential recruit’s eligibility for particular duty, the military’s failure to provide a promised training program, the military’s failure to provide promised incentive pay, and the military’s involuntary extension of an enlistment period in the absence of statutory authority.⁵¹

Apart from situations involving recruiters’ willful misrepresentations, however, the reach of courts’ application of contract-law principles to military enlistment contracts has continued to be somewhat limited. The Supreme Court held in *Bell v. United States* that military pay was governed by statute, not contract principles.⁵² Thus, although common-law contract principles would bar the government from unilaterally altering the terms of a contract, the government may nonetheless change the formula used to calculate the amounts paid under, for example, a reenlistment-incentive-bonus program, to the extent that such ad hoc changes serve legislative purposes.⁵³

Courts have also refused to grant rescission of enlistment contracts for the government’s violation of terms that the courts deem nonessential to the fundamental purpose of the enlistment contract. For example, in *Crane v. Coleman*, a federal district court declined to rescind an enlistment contract after the government failed to timely pay a promised enlistment incentive and failed to grant the enlistee a promised period of leave, ruling that these failures were “not so material and substantial as to defeat the purpose of the enlistment contract and the object of the parties.”⁵⁴ Thus, courts have often been deferential to the government in construing the government’s

⁴⁹ *Id.*

⁵⁰ *Id.* at 1353.

⁵¹ *Id.* at 1354 (allowing testimony regarding promises made that recruit would be enrolled in chosen training program in spite of his ineligibility); *Withum v. O’Connor*, 506 F. Supp. 1374, 1378 (D. Puerto Rico 1984) (military failed to honor promises to provide particular training and facilitated enlistee’s college education); *Frantheway v. Bodenhamer*, 444 F. Supp. 275, 278 (D. Wyo. 1977) (rescinding enlistment contract due to military’s failure to provide promised incentive payment); *Taylor v. United States*, 711 F.2d 1199, 1203 (3d. Cir. 1983) (holding that military’s extension of member’s enlistment lacked statutory authority).

⁵² *Bell*, 366 U.S. 393, 401–02 (1961).

⁵³ *United States v. Larionoff*, 431 U.S. 864, 871–72 (1977).

⁵⁴ *Crane v. Coleman*, 389 F. Supp. 22, 24 (E.D. Pa. 1975).

substantive burdens under the enlistment contract. Nevertheless, the courts have consistently reaffirmed the overarching rule that enlistment contracts are governed by contract law, leading at least one scholar to conclude that, when addressing challenges to enlistment agreements, “[a]ll courts have ruled according to contract law, where applicable.”⁵⁵

II. EXCEPTIONS TO ENLISTMENT AS CONTRACT

The sweeping claim—that courts treat military enlistments as contracts—turns out in practice to be riddled with exceptions. One such exception is that military enlistment contracts differ from other types of personal-services contracts in that courts remedy breaches of the enlistment contract by ordering specific performance.⁵⁶ This section will focus on two additional areas where courts recite the mantra that military enlistments are contracts, but depart from contract-law principles in practice.⁵⁷ Specifically, when addressing challenges to the validity of provisions in military enlistment contracts, courts have not applied the contract-law principle that ambiguity is construed against the drafter nor have they required that constitutional rights be waived explicitly.⁵⁸

A. Ambiguity Not Construed Against Drafter

A basic rule of contract interpretation requires that, when a contract term is ambiguous in its meaning or effect, the courts will resolve the ambiguity in a manner that favors the party that did not draft the ambiguous term.⁵⁹ This rule is often referenced using the Latin term *contra proferentem*, meaning literally “against the offeror.”⁶⁰ “The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.”⁶¹ Because its purpose is to protect a contracting party from the unpredictable effects of ambiguous language chosen by a drafting party, the rule is applied more vigorously in adhesion contracts.⁶² Insurance contracts

⁵⁵ Major Udi Sagi, *Specific Performance of Enlistment Contracts*, 205 MIL. L. REV. 150, 166 (2010).

⁵⁶ See *id.* at 170–89 (arguing that the application of the specific-performance remedy to enlistment contracts is justified because none of the policy concerns underlying the rule against that remedy for personal-services contracts apply to military enlistments); see also Dilloff, *supra* note 39, at 147 (noting that the “general rule” against ordering specific performance as remedy for breach of employment contracts “is apparently not applicable to enlistment contracts, since the courts have, in effect, ordered specific performance . . .”).

⁵⁷ See *infra* Part II.A–B.

⁵⁸ See *infra* Part II.A–B.

⁵⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

⁶⁰ BLACK’S LAW DICTIONARY 377 (9th ed. 2009); see e.g., *Mesa Air Grp. v. Dep’t of Transp.*, 87 F.3d 498, 506 (D.C. Cir. 1996).

⁶¹ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

⁶² David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 457–58 (2009).

are common examples of adhesion contracts because they are drafted by insurance companies and presented to clients without meaningful opportunity to negotiate over specific terms.⁶³ Accordingly, when the terms of an insurance contract are ambiguous, the rule requires that courts resolve the ambiguity in favor of the insured party.⁶⁴ For example, when an insurance contract required that the insured party provide a value estimate of the insured property and his estimate turned out to be unintentionally inflated, the Court ruled that the insurance company could not avoid paying the insured's claim because the contract language was ambiguous as to the consequences of an unintentionally erroneous estimate.⁶⁵

When employment contracts involve nonprofessional occupations and a strong disparity of power between employer and employee, employment contracts are adhesion contracts.⁶⁶ A prospective employer sets the terms of employment and offers these to the prospective employee on a take-it-or-leave-it basis.⁶⁷ Military enlistment contracts certainly fit the bill.⁶⁸ Enlistment contracts are drafted by the government and set forth in a standardized form.⁶⁹ Their terms are set by law and policy and are not subject to individualized negotiation or variation.⁷⁰ Prospective enlistees are told that their acceptance into military employment is subject to their ability and willingness to meet the conditions set by the government; the government does not promise to meet any conditions set by the enlistee.⁷¹ In every conceivable way, the terms of enlistment are controlled and monitored by the government, not the enlistee.

⁶³ *Id.* at 443–44 (citing the RESTATEMENT (FIRST) OF CONTRACTS § 236, cmt. d (1932)).

⁶⁴ *Id.* at 441–42. *But see also id.* at 451–57 (chronicling a decline in courts' use of the doctrine).

⁶⁵ *First Nat'l Bank v. Hartford Fire Ins. Co.*, 95 U.S. 673, 673–76 (1877).

⁶⁶ *See Allison E. McClure, Note, The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter Into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497, 1506–07 (2006) (“[I]nequality is inherent in the [nonprofessional] employment relationship because the employer generally controls the terms of the contract . . .”).

⁶⁷ *See, e.g., Arrowhead Sch. Dist. No. 75 v. Klyap*, 79 P.3d 250, 265 (Mont. 2003) (holding that teacher's employment contract was adhesion contract where teachers were not unionized and where there were 80 other applicants for the teaching position).

⁶⁸ *See Casella, supra* note 42, at 795–96 (arguing that it is wrong to treat enlistment agreements as contracts because doing so requires enforcing adhesion contracts).

⁶⁹ *See DD Form 4/1, Enlistment/Reenlistment Document*, ARMED FORCES OF THE UNITED STATES (Oct. 2007), available at <http://www.dtic.mil/whs/directives/forms/eforms/dd0004.pdf>.

⁷⁰ *See id.* at ¶¶ 9 (noting that Congress may change the terms of the enlistment contract at any time), 8.c (disclaiming all promises that depart from the standardized terms of the enlistment contract). *But see also Gengler v. Dep't of Defense & Navy*, 453 F. Supp. 2d 1217, 1238 (E.D. Cal. 2006) (ruling that enlistment contract that conflicts with statute was not necessarily unenforceable because statute does not specifically preclude enforcement of conflicting contracts).

⁷¹ *See id.* at ¶ 9.a(2) (informing enlistees that they may be discharged for failure to meet military standards).

The enlistment contract language is not only unalterable, it is also extremely vague regarding important matters. For example, the current enlistment contract requires prospective enlistees to acknowledge that “many laws, regulations, and military customs will govern [their] conduct.”⁷² The contract further provides that enlistees must “obey all lawful orders and perform all assigned duties,” but fails to explain how to differentiate “lawful” orders from unlawful ones or cite any of the military laws and regulations relevant to that determination.⁷³ The contract states that enlistees will be “[s]ubject to the military justice system,” but does not cite to any statutes or documents that define that system.⁷⁴ In fact, although the enlistment agreement cites provisions that relate to variations on the enlistees length of service, it includes no citations to specific statutes, regulations, or rules relating to military laws, procedures, or conduct rules.⁷⁵

Although the terms of the conduct section of the enlistment contract are vague and general, the effects of its provisions are massive. Once enlisted, military members are subject to an entirely different criminal justice system governed by the Uniform Code of Military Justice (UCMJ) and the Manual for Courts Martial (MCM).⁷⁶ In addition to defining well-known prosecutable crimes such as theft, sexual assault, and murder, the UCMJ and MCM define several crimes that are unique to the military, including insubordination, absence without leave, and desertion.⁷⁷ The UCMJ also includes “general articles” that broadly regulate conduct that is “unbecoming” and that can potentially impose the only criminal liability for purely political speech in American law.⁷⁸ Military members are also subject to voluminous regulations governing the groups they may associate with, monitoring their management of their financial affairs, and controlling the tiniest details of personal dress, accessorizing, and grooming.⁷⁹ Although it may be commonly assumed that military members know exactly what they

⁷² *DD Form 4/1, Enlistment/Reenlistment Document*, *supra* note 69, at ¶ 9.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at ¶ 10. *See id.* at ¶ 9.

⁷⁶ *See generally* 10 U.S.C. §§ 801–946 (2012) [hereinafter UCMJ]; MANUAL FOR COURTS-MARTIAL (2012) [hereinafter MCM], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

⁷⁷ UCMJ §§ 885, 886, 891; MCM pt. IV, §§ 9, 10, 15.

⁷⁸ *See* UCMJ §§ 933, 934; MCM pt. IV, §§ 59, 72.

⁷⁹ *See, e.g.*, Department of Defense Directive 1325.6 (2009; Supp. 2014) (prohibiting membership in racist groups), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/132506p.pdf>; Air Force Instruction 36-2906 (2013) (regulating member’s financial responsibility), *available at* http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2906/afi36-2906.pdf; Air Force Instruction 36-2903 (2011; Supp. 2014) (governing hair length and clothing and accessories worn), *available at* <http://www.afpc.af.mil/shared/media/document/AFD-140814-096.pdf>; *see also* *Garmon v. Warner*, 358 F. Supp. 206, 211 (W.D.N.C. 1973) (“Generally speaking, people have the right to wear their hair as they wish, and this right is protected by the due process clause. However, this is a ‘civilian’ right and full time soldiers may not be entitled to assert it.”) (citations omitted).

are getting into, the basis for this assumption is unclear; military enlistment contracts provide no specific notice of the unique legal and regulatory system to which military members acquiesce by signing the enlistment contract.⁸⁰

In spite of military enlistment contracts' status as adhesive employment contracts often entered into by very young adults with little or no sophistication in legal matters, and the vagueness of the contract language, courts have generally not applied *contra proferentum* when addressing challenges to the validity or meaning of the enlistment contract.⁸¹ In non-military contexts, courts might be skeptical of whether contracts signed under such conditions reflected genuine consent.⁸² But when reviewing challenges raised by enlistees, courts typically assume that military members somehow know exactly what they are getting into by enlisting.⁸³ Even when recruiters have failed to comply with statutes requiring that potential recruits be made aware of some details of the laws to which they will be subject, courts have found that the enlistee had sufficient knowledge of the obligations he accepted by enlisting.⁸⁴ There are few, if any, cases where courts have applied *contra proferentum* to interpret enlistment contract language in favor of the enlistee.

B. Implicit Waivers of Constitutional Rights

Another important area where courts routinely depart from the usual requirements of contract law is in the area of waivers of constitutional rights. Military enlistment results in waiver or modification of several constitutional rights,⁸⁵ including free-speech and free-association rights,⁸⁶ the right to free exercise of religion,⁸⁷ and the right to trial by jury.⁸⁸

⁸⁰ See *supra* notes 64–68 and accompanying text.

⁸¹ See DEP'T OF DEFENSE, 2012 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY 39 (2012) (noting that nearly 80% of military recruits have not yet received a bachelor's degree), available at <http://www.militaryonesource.mil/12038/MOS/Reports/2012>.

⁸² See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). In *Walker-Thomas*, Justice Skelly Wright observed, "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."

⁸³ See, e.g., *McCord v. Page*, 124 F.2d 68, 70 (5th Cir. 1941) (stating that the military member "was fully aware of the duties and responsibilities he . . . assumed" by enlisting).

⁸⁴ *Grimley*, 137 U.S. 147, 156 (1890).

⁸⁵ See *Krill v. Bauer*, 314 F. Supp. 965, 966–67 (E.D. Wis. 1970) ("Does being in the Army curtail or suspend certain Constitutional rights?, the answer is unqualifiedly 'yes'. Of necessity, he is forced to surrender many important rights. He arises unwillingly at an unreasonable hour at the sound of a bugle unreasonably loud. From that moment on, his freedom of choice and will ceases to exist. He acts at the command of some person—not a representative of his own choice—who gives commands to him which he does not like to obey. He is assigned to a squad and forced to associate with companions not of his selection and frequently the chores which he may be ordered to perform are of a most menial nature.").

It is well-established that individuals may waive constitutional rights by contract.⁸⁹ This is routinely done in the process of plea-bargaining in criminal cases.⁹⁰ Plea bargains are contracts, and courts will generally interpret and enforce their provisions in accordance with the principles of contract law.⁹¹ When determining if a criminal defendant has, through a plea bargain, validly waived his right to a jury trial, courts assess whether the waiver is knowing, voluntary, and intelligent.⁹² Waivers of constitutional rights in criminal cases must be explicit.⁹³ At a minimum, defendants must be specifically told that they are waiving their rights to have their guilt determined by unanimous vote of a 12-member jury and to participate in the selection of jurors.⁹⁴ “[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances.”⁹⁵ Thus, a valid waiver of constitutional rights in a criminal context requires at a minimum that the government specifically identify and explain the nature of the right being waived.

Similar requirements limit contractual waivers of rights in the commercial context. Like the waiver of constitutional rights in plea-bargain

⁸⁶ Compare U.S. Const., amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . .”), with MCM pt. IV, § 72 (prohibiting “disloyal statements”) and Department of Defense Directive 1325.6 (2009; Supp. 2014) (prohibiting membership in racist groups); see also Jason Steck, Note, *Dissent Without Disloyalty: Expanding the Free Speech Rights of Military Members Under the “General Articles” of the UCMJ*, 96 MINN. L. REV. 1606, 1611–13 (2012) (describing limits on military members’ free-speech rights).

⁸⁷ Compare U.S. Const., amend. I (prohibiting restrictions on the free exercise of religion), with *Bitterman v. Secretary of Defense*, 553 F. Supp. 719, 721–22 (D.C. 1982) (upholding Air Force regulation barring wearing of religious headgear while in uniform) and *McCord*, 124 F.2d at 69 (noting that the requirement that a military member salute the flag violated the religious teachings of the Watch Tower Bible and Tract Society).

⁸⁸ Compare *Andres v. United States*, 333 U.S. 740, 748 (1948) (holding that unanimous jury verdicts support findings of guilt in federal criminal trials), with MCM pt. II, Rule 921(c) (allowing guilt to be found based on a 2/3 vote of the court-martial panel in cases not involving mandatory application of the death penalty).

⁸⁹ See, e.g., *Lake James Cmty. Volunteer Fire Dep’t, Inc. v. Burke*, 149 F.3d 277, 280 (4th Cir. 1998) (“[S]imply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable.”).

⁹⁰ See generally Derek Teeter, Note, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Cases*, 53 U. KAN. L. REV. 727 (2005) (analyzing waivers of appeal rights in plea bargains).

⁹¹ See, e.g., *United States v. Puckett*, 556 U.S. 129, 137 (2009) (analyzing breach of plea agreement as breach of contract).

⁹² See e.g., *United States v. Carmenate*, 544 F.3d 105, 108 (2d Cir. 2008) (noting that courts require that waivers of rights in plea agreements be knowing, voluntary, and intelligent).

⁹³ See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (“[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights.”) (quotations and citations omitted).

⁹⁴ *Marone v. United States*, 10 F.3d 65, 68 (2d Cir. 1993).

⁹⁵ *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in original).

contracts, courts have required that waiver of constitutional rights in commercial contracts be knowing and voluntary.⁹⁶ For a waiver to be valid, it must be expressly stated in the contract itself.⁹⁷ Waivers in adhesion contracts are particularly suspect because they may lack indicators that the waived rights were adequately explained to the less-powerful party.⁹⁸ For example, in *Gonzalez v. Hidalgo County*, the court held that determining the validity of a jury-trial waiver provision in a lease between a landowner and a migrant worker required additional inquiry to establish whether it had been adequately explained to the migrant worker.⁹⁹

Near the beginnings of the AVF, there were signs that the courts might apply these standards to military enlistment contracts. In *Wallace v. Chafee*, the Ninth Circuit held that a military reservist was subject to the UCMJ because his enlistment contract explicitly referenced the code.¹⁰⁰ The court relied on the fact that the reservist's contract had referenced the UCMJ, putting him on notice that he would be subject to the military's jurisdiction.¹⁰¹ The court found that, by accepting enlistment after being notified that he would be subject to the UCMJ, the reservist voluntarily waived his rights to reject the UCMJ's restrictions.¹⁰² The court further held that the execution of the enlistment contract was a key turning point, after which the enlistee could no longer reject the application of the UCMJ, even if it was later found that the reservist had not fully understood the implications.¹⁰³

Similarly, in *Garmon v. Warner*, a federal district court enjoined enforcement of a military policy barring reservists from wearing wigs to temporarily comply with grooming and appearance requirements because "the hair regulation does not mention wigs" and where "[t]here was no knowing and voluntary relinquishment of an understood right, the requisites of a waiver do not exist."¹⁰⁴

These holdings would seem to place military enlistment contracts on the same footing as other contracts, requiring specific notice to enlistees in

⁹⁶ *E.g.*, *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985); *Lake James Cmty. Volunteer Fire Dep't*, 149 F.3d at 280.

⁹⁷ *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

⁹⁸ *See id.*; *cf.* *Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 186–87 (1972) (holding that jury-trial waiver was knowingly and voluntarily made where it was clearly stated in contract and parties were both sophisticated); *Lake James Cmty. Volunteer Fire Dep't*, 149 F.3d at 281 (holding that fire department's waiver of its rights was valid in spite of its "weak bargaining position" because the waiver was knowing and voluntary).

⁹⁹ *Gonzalez v. Hidalgo County*, 489 F.2d 1043, 1046 (5th Cir. 1973).

¹⁰⁰ *Wallace v. Chafee*, 451 F.2d 1374, 1377 (9th Cir. 1971).

¹⁰¹ *Id.*

¹⁰² *Id.* at 1378.

¹⁰³ *Id.*

¹⁰⁴ *Garmon v. Warner*, 358 F. Supp. 206, 211–12 (W.D.N.C. 1973). *Contra* Talley v. McLucas, 366 F. Supp. 1241, 1243–44 (N.D. Tex. 1973) (refusing to review Army's hair regulations out of deference to military's "demands of discipline and duty, and possibly to health and safety" (quotation omitted)).

the contract that they are subject to the UCMJ. But in the more than 40 years since *Wallace*, the language in the enlistment contract specifying that enlistees are subject to the UCMJ has been removed.¹⁰⁵ Even the pre-AVF notice provisions mentioned in *Grimley* seem to be absent in the current enlistment contract.¹⁰⁶ In spite of these omissions, no opinion from any court has cited *Wallace*'s implicit requirement that enlistees be notified that they are subject to the UCMJ. Although courts have required that enlistments be voluntary, no court has invalidated an enlistment contract for its failure to obtain a knowing and intelligent waiver of the enlistee's rights.¹⁰⁷ To the contrary, courts have applied the remarkable rule that "statutes and military regulations in effect when the [enlistment] agreement was made are incorporated into every enlistment agreement,"¹⁰⁸ without reference to the contract-law requirement that incorporated documents be referenced explicitly.¹⁰⁹ The courts' repetition of the rule that military enlistment is a contract thus is exposed as a rather thin veneer, concealing a reality that does not differ much from the earliest status-change theories, where contract-law requirements could be ignored at the whim of the sovereign.¹¹⁰

III. TOWARD A MORE FAIR MILITARY ENLISTMENT CONTRACT

The courts' continuing reluctance to hold the government to normal rules of contract interpretation and enforcement is not necessarily a barrier to reform. This section will outline changes that should be made to future military enlistment contracts to better inform military members of the rights waived or restricted by military enlistment.

In contrast to the vagueness that pervades the conduct section of the enlistment contract, the section relating to extensions on terms of enlistment

¹⁰⁵ See *DD Form 4/1, Enlistment/Reenlistment Document*, *supra* note 69, at ¶ 9.

¹⁰⁶ Compare 137 U.S. at 156–57 (noting the statutory requirement that certain Articles of War be read to enlistees near the time of their enlistment), with *DD Form 4/1, Enlistment/Reenlistment Document*, *supra* note 69, at ¶ 9.

¹⁰⁷ See, e.g., *United States v. Catlow*, 458 C.M.R. 758, 761–62 (C.M.A. 1974) (invalidating enlistment where enlistee was coerced by threat of incarceration); *United States v. Fry*, 70 M.J. 465, 475 (C.A.A.F. 2012) (recognizing a statutory requirement that those who voluntarily accept military pay and allowances can be deemed to have constructively enlisted notwithstanding defects in execution of enlistment contract).

¹⁰⁸ *Canonica v. United States*, 41 Fed. Cl. 516, 521 (1998).

¹⁰⁹ See, e.g., *Northrup Grumman Information Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cl. 2008) ("[T]he language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract."); see also *Casella*, *supra* note 42, at 796 (noting that language in enlistment contracts fails to "fill the gap" between enlistees' knowledge and the realities of military service).

¹¹⁰ See *supra*, notes 17–20 and accompanying text.

includes several specific citations to authorizing statutes.¹¹¹ Although these provisions are not exhaustive and may be altered by subsequent statutory changes, courts have found them sufficient to put enlistees on notice that their term of enlistment may be extended when relevant statutory conditions are met.¹¹² One way to correct the ambiguity in the conduct section of the enlistment contract would therefore be to include specific citations to the statutes codifying the UCMJ, thereby notifying potential enlistees of specifically where they might find the foundational rules for military members.¹¹³ To serve particularly diligent or inquisitive enlistees' efforts to fully comprehend the consequences of the enlistment contract, the conduct section of the contract could also reference the MCM, and recruiters' offices could be required to maintain copies of the UCMJ and the MCM for potential enlistees' reference. By explicitly incorporating these documents by reference into the enlistment contract, enlistees would be more fairly put on notice, much ambiguity would be removed from the contract, and the legal foundation for enforcing the UCMJ and MCM as parts of the enlistment contract would be made much more sound without need to resort to obsolete notions of a sovereign's right to arbitrarily impose the terms of military service.¹¹⁴ As at least one of the advocates of a contract-law approach to military enlistment contracts has noted, "[a]n awareness of the rights and liabilities an enlistee or volunteer incurs at the time of his signing of the enlistment agreement is absolutely necessary."¹¹⁵

Efforts to clarify the enlistment contract could also benefit from experience in obtaining valid waivers of constitutional rights in plea bargains and commercial contracts. When reviewing the validity of waivers of constitutional rights in plea bargains, courts focus on language that explicitly identifies the right being waived and obtains the criminal defendant's explicit agreement to waive the right.¹¹⁶ Similarly, courts reviewing the enforceability of contracts waiving jury-trial rights have required that the contract language explicitly identifies and waives the right.¹¹⁷ Although it

¹¹¹ Compare DD Form 4/1, *Enlistment/Reenlistment Document*, *supra* note 69, at ¶ 10, with *id.* at ¶ 9.

¹¹² See *Santiago v. Rumsfeld*, 425 F.3d 549, 555 (9th Cir. 2005) (upholding extension of member's enlistment contract under statute authorizing "stop-loss" policy in time of war); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 282–83 (D.C. Cir. 2005) (same).

¹¹³ 10 U.S.C. §§ 801–946.

¹¹⁴ See Dilloff, *supra* note 39, at 149 ("In order for the enlistment to be legitimately termed a 'contract,' these prerequisites must be met, and the unfortunate characterization of enlistment as being a change in status will be banished forever in the catacombs of sovereign supremacy."); see also *Std. Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003) ("Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship.").

¹¹⁵ Dilloff, *supra* note 39, at 149.

¹¹⁶ *Supra*, notes 91–95, and accompanying text.

¹¹⁷ *Supra*, notes 96–99, and accompanying text.

may be impossible to comprehensively identify and discuss every right that is waived or modified by enlistment, the conduct section could explicitly identify UCMJ and MCM provisions that restrict free-speech, free-association, free-exercise, and jury-trial rights.¹¹⁸ In combination with procedures that make the UCMJ and MCM available to enlistees for their review, these provisions could substantially improve enlistees' awareness of the consequences of entering into an enlistment contract.

Finally, enlistment contracts could benefit from experience in another area of status-changing contracts: marriage. State laws governing the validity of premarital agreements often require that, in order for the agreements to be presumptively valid, the parties must have opportunity to seek legal counsel.¹¹⁹ Since premarital agreements usually govern only the distribution of property upon dissolution of the marriage and military enlistment affects a much wider range of rights, the potential need for legal advice before enlisting in the military would seem much greater. It would not be onerous to require the government to include a phrase in the enlistment contract encouraging prospective enlistees to seek independent legal advice to resolve any questions they might have about the meaning of the contract's terms and allowing (as with some types of commercial contracts) a brief period within which an enlistee may cancel the contract.¹²⁰ These modest measures would mirror the protections applied in civilian employment contracts and help ensure that military enlistees were actually informed of the consequences of the enlistment contract.¹²¹

IV. CONCLUSION

Since the post-Civil War era, courts have used the language of contract when addressing challenges to enlistment agreements. But the courts use of the language of contract has not been accompanied by the application of important contract principles, particularly including *contra proferentem* and the requirement that constitutional rights can only be contractually waived if the rights are made knowingly and voluntarily. The failure to apply these principles in the era of the all-volunteer military risks reversion to a

¹¹⁸ See *supra* notes 86–88.

¹¹⁹ See, e.g., Minn. Stat. § 519.11, subd. 1 (2014); see also *Rudbeck v. Rudbeck*, 365 N.W.2d 330, 332 (Minn. Ct. App. 1985) (holding premarital agreement unenforceable where wife had no opportunity to consult with attorney).

¹²⁰ See, e.g., Minn. Stat. § 326B.811, subd. 1 (2014) (allowing customer in roofing contract to cancel within 72 hours).

¹²¹ See *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005) (applying a rule requiring that challenge to employment-agreement waiver of jury-trial rights include assessment of factors including “plaintiff’s experience, background, and education,” “the amount of time the plaintiff had to consider whether to sign the waiver,” “an opportunity to consult with a lawyer,” and “the clarity of the waiver”); see also Katherin J. Chapman, Note, *The Untouchables: Private Military Contractors’ Criminal Accountability Under the UCMJ*, 63 VAND. L. REV. 1047, 1074 (2010) (arguing for the insertion of clauses specifically imposing liability under the UCMJ into contracts for private military contractors).

time where the state, empowered to compel military service from its citizens, arbitrarily varies the terms of their service at its whim. This article proposes modest modifications to the enlistment contract that would flesh out the contractual cast of military enlistment and ensure, rather than assume, that prospective enlistees knowingly and voluntarily assent to the strictures of military service. It may be hilarious for Tim Allen to unwittingly stumble into a Santa suit, but it is much less so if the suit is combat camouflage.