
NOTES

THE LEGAL IMPLICATIONS OF UNAUTHORIZED PROMISES AND OTHER MILITARY RECRUITER MISCONDUCT*

*“It is said when a politician breaks his word, shame on him; but when a Nation breaks its word, shame on all of us.”*¹

I. INTRODUCTION

In April 2006, Army recruiters in Portland, Oregon enlisted eighteen year-old Jared Guinther as a cavalry scout, one of the most dangerous jobs in the Army.² Jared planned to leave for basic training in August, but his parents intervened when they learned about his enlistment.³ Doctors had diagnosed Jared as moderately to severely autistic when he was three years old—he had been in special education classes most of his life.⁴ Although the recruiters did not list Jared’s disability in his paperwork, the Army acknowledges that autism disqualifies people from military service.⁵ Jared’s parents repeatedly asked the recruiters to review his medical information, but they refused.⁶ When Jared’s mother told the Army sergeant supervising Jared’s recruiter that her son was ineligible for service, the supervisor said, “Jared’s an 18-year-old man. He

* The author would like to dedicate this Note to Lcpl. Barrett D. Schenk in the hopes that it may help him and all the men and women who have served our country receive the benefits they have earned. May we keep our promises as you have kept yours.

¹ 146 Cong. Rec. H7058, H7058 (Statement of Congressman Taylor).

² Michelle Roberts, *An Army of One Wrong Recruit*, THE OREGONIAN, May 7, 2006, at A01. For a full list of duties for the position of cavalry scout, skill level one, see US Army Info Site, Cavalry Scout Duties, <http://www.us-army-info.com/pages/mos/armor/19d.html>. Particularly dangerous duties of note include: “Loads, clears, and fires individual and crew-served weapons. Engages enemy armor with anti-armor weapons,” and “[a]ssists with construction of light field fortifications, laying and removal of mines, and emplacing demolitions. Requests and adjusts indirect fire.”

³ Michelle Roberts, *Army Decides Autistic Recruit Won’t Serve*, THE OREGONIAN, May 10, 2006, at A01.

⁴ See Roberts, *supra* note 2. Children with autism often exhibit social, linguistic, and behavioral problems, including difficulty communicating with others and problems regulating emotional responses, particularly in unfamiliar or overwhelming situations. MARGARET STROCK, NAT’L INST. OF MENTAL HEALTH, AUTISM SPECTRUM DISORDERS (PERVASIVE DEVELOPMENTAL DISORDERS) (2004), <http://www.nimh.nih.gov/health/publications/autism/nimhautismspectrum.pdf> at 7.

⁵ See Roberts, *supra* note 2.

⁶ *Id.*

doesn't need his mommy to make his decisions for him."⁷ Only after Jared's parents took their story to the media and had their Congressperson step in did the Army release Jared from his enlistment contract.⁸ The experience left Jared feeling embarrassed and manipulated by recruiters he thought were his friends.⁹

Jared's story is one example of the hundreds of instances of military recruiter misconduct that occur each year. In 2005, there were 629 substantiated allegations of recruiter irregularities, an increase of 220 instances from the previous year.¹⁰ Extreme cases involve sexual assault of teenage recruits of both genders.¹¹ This Note will primarily focus on false statements used to induce recruits to enter into enlistment contracts in the typical high school setting.¹² Recruiter misconduct more typically ranges from concealing a potential enlistee's medical condition (like Jared's) or criminal record, to promising enlistees benefits that they will never see.¹³ These false promises may include free healthcare for life, college loan repayment, and a stateside, non-combat billet.¹⁴ Recruiters also may misrepresent the implications of the military's "stop loss" policy and the duration of enlistment contracts.¹⁵ If a recruit changes his or her mind it is common for recruiters to tell them that the military will physically

⁷ *Id.*

⁸ *Id.*

⁹ See Roberts, *supra* note 3.

¹⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY RECRUITING: DOD AND SERVICES NEED BETTER DATA TO ENHANCE VISIBILITY OVER RECRUITER IRREGULARITIES 21 (2006) [hereinafter 2006 GAO REPORT]. The military uses a variety of terms to describe recruiter misconduct including recruiter misconduct, recruiter irregularities, and recruiter malpractice. Throughout this note these terms will be used interchangeably.

¹¹ Martha Mendoza, *AP Probe Looks at Recruiting Misconduct*, CBS NEWS, Aug. 19, 2006, <http://www.cbsnews.com/stories/2006/08/19/ap/national/mainD8JJJKQO0.shtml>.

¹² Practitioners in this area may also wish to explore further criminal sanctions or a cause of action under the Federal Tort Claims Act for these violations.

¹³ 2006 GAO REPORT, *supra* note 10, at 30-32.

¹⁴ See *Gulke v. United States*, 228 Ct. Cl. 720, 722 - 725 (1981).

¹⁵ The term "stop-loss" is used to refer to two distinct methods by which recruits may be retained or recalled to service beyond the duration of their initial enlistment. Every recruit initially enlists for a total of eight years. Typically recruits serve on active duty for a designated number of years and will serve the remaining years as part of the Individual Ready Reserve (IRR). IRR is distinct from the active reserve components. Troops serving as members of IRR do not drill or participate in training, but are subject to recall at any time up until eight years from the initial enlistment. Though the media frequently refers to this as stop-loss, it is technically an exercise of the President's Reserve Call-up Authority. Stop-loss formally refers to the president's discretionary power to extend enlistment contracts in times of war until six months after the war ends. For more information on the stop-loss policy see Rod Powers, *Military STOP LOSS. Is It a "Back-Door Draft?,"* GUIDE TO U.S. MILITARY (About.com), Dec. 17, 2004, <http://usmilitary.about.com/od/deploymentsconflicts/a/stop-loss.htm>.

force them to report for duty if they do not show up for basic training.¹⁶

It is unfortunate that not all military recruiters serve their country honorably and candidly.¹⁷ Their misrepresentations tarnish the reputation of those who have earned our respect.¹⁸ As the pressure to bring in more recruits builds, so does the incentive to get young men and women to sign on the dotted line.¹⁹ This pressure to recruit has also led to increased recruiter misconduct and the military continues to grapple with the legal consequences.²⁰

Pursuant to the No Child Left Behind Act, recruiters have unfettered access to high school students.²¹ Misconduct by recruiters is particularly problematic for this demographic of young people, especially those who do not have other options after graduation.²² Despite contract disclaimers, recruiters can persuade high-school kids not to read the fine print.²³ This is particularly true of students of low income, to whom recruiters promise free college tuition and other sizeable enlistment bonuses.²⁴ The procedural aspects of recruiting also play a role. The Delayed Entry Program (DEP) minimizes the immediate effect of signing an enlistment contract.²⁵ Pursuant to the program, recruits do not

¹⁶ Citizen Soldier, *The Military Enlistment Contract and You*, <http://www.citizen-soldier.org/cs12-enlistment.html>, Rod Powers, *The Delayed Enlistment Program*” GUIDE TO U.S. MILITARY (About.com), http://usmilitary.about.com/cs/joiningup/a/dep_2.htm.

¹⁷ 2006 GAO REPORT, *supra* note 10 at 20-21, 30-32.

¹⁸ Honest U.S. Military recruiters deserve the utmost respect. The all-volunteer military could not succeed without their diligent efforts—recruiters spend countless hours performing a service of immeasurable value to this country for very little reward. *See infra* note 22. They must meet difficult enlistment quotas and are often criticized for unpopular public policy beyond their control. They must turn away those who desperately want to serve but are not fit to do so. *Id.* They deserve compassion and support.

¹⁹ *See* 2006 GAO REPORT, *supra* note 10, at 21-24.

²⁰ *See id.* at 21.

²¹ U.S. ARMY RECRUITING COMMAND, SCHOOL RECRUITING PROGRAM HANDBOOK 10 (2004), *available at* http://www.usarec.army.mil/im/formpub/REC_PUBS/p350_13.pdf [hereinafter SCHOOL HANDBOOK].

²² *See* Charlie Savage, *Military Recruiters Target Schools Strategically*, THE BOSTON GLOBE, November 29, 2004, at A5.

²³ *See, e.g.*, The News Hour with Jim Lehrer: Challenging Stop-loss Orders (PBS television broadcast Feb. 24, 2005), *available at* http://www.pbs.org/newshour/bb/military/jan-june05/stop-loss_2-24.html (regarding the “stop-loss” policy); *infra* note 164. (regarding limits on student loan repayment); Roberts, *supra* note 2 (regarding timing of payment of enlistment bonuses).

²⁴ *See, e.g.*, Roberts, *supra* note 2.

²⁵ *See* United States Army Recruiting Command, Delayed Entry and Delayed Training Program, Regulation 601-95 (2002), http://www.usarec.army.mil/im/formpub/REC_PUBS/r601_95.pdf. *See also*, Central Committee for Conscientious Objectors, *Helping Out: A Guide to Military Discharges and GI Rights*, ch. 4 *available at* http://www.objector.org/helpingout/Helpingoutchapters/04_Delay_Enlist.pdf.

have to report to basic training for up to one year after signing up.²⁶ Therefore, it also may take a year or more for a recruit to realize he or she will not receive the benefits the recruiter promised.

Currently, the military has internal discipline procedures to limit recruiter misconduct.²⁷ However, this self-policing does not appear to deter misconduct effectively, particularly as the pressure to bring in new recruits continues to increase.²⁸ Furthermore, the military's internal discipline procedures are inadequate as they are purely punitive.²⁹ They do not provide the misled recruit with recourse. This is especially problematic for recruits who are promised benefits contingent upon completion of a certain period of service and then find such promises were invalid. In effect, by failing to uphold promises made by recruiters and relied upon by recruits, the government benefits from recruiter misconduct by receiving years of military service at a lower cost than they would have to pay otherwise. However, the ultimate discovery of misconduct costs the military in both dollars and recruits lost. Consequently, the federal government should re-evaluate the manner in which recruiting is conducted, and recruiters should be culpable for the misrepresentations they make in some circumstances.

Part II of this Note will provide an overview of the recruiting process and how the Delayed Entry Program creates an environment conducive to misconduct. Parts III, IV, V and VI will discuss recruiter authority and the application of traditional contract law and sovereign immunity principles to contemporary enlistment contracts. These sections will focus on how recruits falsely promised benefits have sought relief in previous cases, focusing primarily on *Schism v. United States*.³⁰ Part VII will outline how Congress could potentially ratify or acquiesce to recruiter promises through specific appropriations and will address some of the bars to recovery in *Schism*. Parts VIII and IX will address the military's own procedures for dealing with misconduct and issues concerning civilian recruiter corporations, respectively. Finally, Part X will discuss potential solutions to the issue of recruiter misconduct, both through systemic changes and through allowing wronged recruits a cause of action against the government in restitution and, in limited circumstances, against the culpable recruiters themselves.

II. OVERVIEW OF THE RECRUITING PROCESS: THE DELAYED ENTRY PROGRAM

Pursuant to statute, each military department is responsible for recruiting and

²⁶ Dept. of Defense, Form 4/1 (October 2007) (emphasis in original).

²⁷ 2006 GAO REPORT, *supra* note 10, at 28-29.

²⁸ *Id.* at 22.

²⁹ See discussion *infra* Part VII.

³⁰ 316 F.3d 1259 (Fed. Cir. 2002).

training its own forces, subject to the Secretary of Defense's oversight.³¹ Military recruiting takes place in a variety of settings, which depend largely upon where recruiters have the greatest access to potential recruits.³² Young people can sign up online, talk to a recruiter by phone, or sign up in person at their local recruiting office.³³ Recruiters primarily sign up soldiers and Marines by visiting local high schools and colleges.³⁴

Recruiters typically begin by establishing themselves within their communities.³⁵ They may chaperone high school dances, help coach sports teams, or give away promotional items such as key chains and other merchandise.³⁶ Instructional pamphlets provided to recruiters repeatedly describe the Army as a product to be sold, and even suggest that recruiters target "student influencers" (class officers, prominent athletes, editors of the school newspaper, etc.) to assist in promotional activities.³⁷ In fact, the Army's School Recruiting Program Handbook ("the Handbook") notes:

Some influential students such as the student president or the captain of the football team may not enlist; however, they can and will provide you with referrals who will enlist. More importantly . . . an informed student leader will respect the choice of enlistment [and], in turn, future Soldiers [will] feel good about their decision to join.³⁸

The Handbook even suggests that recruiters deliver donuts and coffee to the faculty once a month to build rapport and "advise teachers of the many Army opportunities."³⁹ The message of the Handbook is clear: establish as many contacts with "centers of influence," (parents, teachers, administrators, coaches, and popular or influential students) as possible and use them to sell the Army to students who need money for college or who have not decided what to do after graduation.⁴⁰ The process places a premium on getting young people to sign up, as evidenced by the Handbook's mantra for recruiters: "first to contact, first to contract."⁴¹

An integral part of military recruiting is the ASVAB, or the Armed Services Vocational Aptitude Battery, an aptitude test recruiters use to determine which

³¹ 10 U.S.C. § 3013(b)(1) (2000) (Army); 10 U.S.C. § 5013(b)(1) (2000) (Navy); 10 U.S.C. § 8013(b)(1) (2000) (Air Force).

³² SCHOOL HANDBOOK, *supra* note 21, at 3.

³³ GoArmy.com, How To Join, http://www.goarmy.com/contact/how_to_join.jsp (last visited Sept. 10, 2007).

³⁴ SCHOOL HANDBOOK, *supra* note 21, at 2-3, 8-9.

³⁵ *Id.* at 2-3.

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ *Id.*

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 2, 5.

⁴¹ *Id.* at 3.

students to target in their recruiting efforts.⁴² The ASVAB is a standardized test used to measure proficiency in a wide variety of areas such as math, reading comprehension, electronics, and automotive knowledge.⁴³ The ASVAB also provides recruiters with students' personal information including their Armed Forces Qualifications Test Scores.⁴⁴ These test scores determine if a recruit is eligible for military service, and what position is most appropriate.⁴⁵ According to the Handbook, the ASVAB is specifically designed to provide recruiters with pre-qualified leads on which students to target.⁴⁶ At the same time, the Handbook encourages recruiters to market the test as a "comprehensive career exploration program" and "a good practice test" for students to take in preparation for the SATs and ACTs.⁴⁷ In fact, the ASVAB's website barely mentions any connection between the ASVAB and the military even though the test is expressly designed to assist in military recruiting.⁴⁸

All of these measures provide recruiters with access, information, and influence to get students ages seventeen and older to sign enlistment contracts. However, the contracts recruits sign virtually never require recruits to report immediately to basic training.⁴⁹ Instead, most contracts require that recruits participate in the military's Delayed Entry/Enlistment Program, commonly referred to as DEP.⁵⁰ The DEP contract states in relevant part:

FOR ENLISTMENT IN THE DELAYED ENTRY/ENLISTMENT PROGRAM (DEP): I understand that I am joining the DEP. I understand that by joining the DEP I am enlisting in the Ready Reserve component of the United States (list branch of service) for a period not to exceed 365 days, unless this period of time is otherwise extended by the Secretary concerned. While in the DEP, I understand that I am in a nonpay status and that I am not entitled to any benefits or privileges as a member of the Ready Reserve, to include, but not limited to, medical care, liability insurance, death benefits, education benefits, or disability retired pay if I incur a physical disability. I understand that the period of time while I am in the DEP is NOT creditable for pay purposes upon entry into a pay status. However, I also understand that the period of time I am in the DEP is counted toward fulfillment of my military service obligation described in paragraph 10 below. While in the DEP, I understand that I must maintain

⁴² *Id.* at 6.

⁴³ ASVAB Overview, <http://www.asvabprogram.com/index.cfm?fuseaction=overview>. test (last visited Sept. 10, 2007).

⁴⁴ *Id.*

⁴⁵ SCHOOL HANDBOOK, *supra* note 21, at 6-7.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.*

⁴⁸ ASVAB Overview, *supra* note 43.

⁴⁹ Rod Powers, *The Delayed Enlistment Program*" GUIDE TO U.S. MILITARY (About.com), http://usmilitary.about.com/cs/joiningup/a/dep_2.htm.

⁵⁰ Delayed Entry and Delayed Training Program, *supra* note 25, at 1-2, 38.

my current qualifications and keep my recruiter informed of any changes in my physical or dependency status, qualifications, and mailing address. I understand that I WILL be ordered to active duty unless I report to the place shown in item 4 above by (list date YYYYMMDD) for enlistment in the Regular component of the United States (list branch of service) for not less than ___ years and ___ weeks.⁵¹

Recruits who participate in DEP may report to basic training as much as a year after signing their enlistment contract.⁵² In the interim, recruits may finish their education and report to the Military Entrance Processing Station for an initial physical assessment and other preliminary screening, while the military allocates slots in basic training according to capacity and need.⁵³

Critics of DEP believe that young people view the process from a *buy now, pay later* perspective like shopping with a credit card, and that DEP uniquely targets adolescents with poor impulse control.⁵⁴ “Studies have shown that teens’ brain structures make them less independent of group opinion and less likely to consider long-term consequences than adults a few years older,” making them uniquely susceptible to recruiters.⁵⁵ Controversy aside, DEP contracts are unique in that while they are considered mutually enforceable promises, there are virtually no consequences for recruits who decide to break the contract at this initial stage.⁵⁶ Participants in DEP are members of the military’s Individual Ready Reserve and may participate in limited training activities with recruiters and other DEP members, but generally are not subject to any significant negative consequences for breach until they have reported for basic training.⁵⁷ Similarly, recruits who become ineligible for service due to poor grades, illness, pregnancy, exceeding weight limits, felony conviction, drug use, etc., may also be dropped from the DEP program, or may renegotiate for a later date of active service depending on the reason for ineligibility.⁵⁸ Virtually all branches prohibit recruiter intimidation of recruits who decide to drop out of DEP.⁵⁹ For example, Army recruiter regulations state: “Under no circumstances will any [recruiter] . . . threaten, coerce, manipulate, or intimidate [DEP members], nor may they obstruct separation requests.”⁶⁰ “At no time will any [recruiter] tell a DEP member he or she must ‘go in the Army or he or she will

⁵¹ Dept. of Defense, Form 4/1 (October 2007) (emphasis in original).

⁵² Rod Powers, *The Delayed Enlistment Program*” GUIDE TO U.S. MILITARY (About.com), http://usmilitary.about.com/cs/joiningup/a/dep_2.htm.

⁵³ *Id.*

⁵⁴ Savage, *supra* note 22.

⁵⁵ *Id.* This criticism is consistent with recruiters targeting influential students to make the choice of military service popular in high schools.

⁵⁶ Delayed Entry and Delayed Training Program, *supra* note 25, at 6-8.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 6.

⁶⁰ Waiver, Future Soldier Program Separation, and Void Enlistment Processing Proce-

go to jail,' or that 'failure to enlist will result in a black mark on his or her credit record,' or any other statement indicating adverse action will occur if the applicant fails to enlist."⁶¹

Other branches have similar regulations denouncing recruiter intimidation as antithetical to the principles of the all-volunteer military.⁶² Although it is well established that the DEP contract is legally enforceable at this stage,⁶³ there have been virtually no instances of the armed forces compelling a recruit to report to basic training within the context of an all-volunteer force.⁶⁴

Despite these regulations, significant pressure remains on recruiters to secure contracts. When the need for troops is high and enlistment is down due to a current military conflict, economic prosperity and low unemployment, or both, these pressures are heightened.⁶⁵ Though no branch of the military actively penalizes recruiters for failing to meet their monthly quotas, successful recruiters receive both tangible and intangible benefits in the form of promotions and awards.⁶⁶ "In 2005, over two-thirds of those active duty recruiters responding to [an internal Department of Defense] survey believed that their success in making their monthly quota for enlistment contracts had a *make-or-break* effect on their military career."⁶⁷ Thus, the pressure on recruiters to bring in DEP contracts is significant and appears to correspond to recruiter misconduct.⁶⁸ A recent study by the Government Accountability Office found a correlation between the end of the monthly recruiting cycle when each recruiting station's performance is measured and instances of what the military dubs "recruiter irregularities."⁶⁹

Each branch of service has its own methods of measuring recruiter success, which impacts recruiter misconduct.⁷⁰ The Army, Navy, and Air Force generally evaluate the recruiters' ability to achieve monthly quotas for enlistment

dures, Regulation 601-56, 5 (2006), *available at* http://www.usarec.army.mil/im/formpub/REC_PUBS/R601_56.pdf.

⁶¹ Delayed Entry and Delayed Training Program, *supra* note 25, at 6.

⁶² See e.g. Military Personnel Procurement Manual, vol. 2, United States Department of the Navy (Feb. 2004) *available at* [http://www.usmc.mil/directiv.nsf/55fdafde3f044b0585256bd40066708b/736601ce41b86edd85256649005020c0/\\$FILE/MCO%20P1100.72C%20W%20ERRATUM.pdf](http://www.usmc.mil/directiv.nsf/55fdafde3f044b0585256bd40066708b/736601ce41b86edd85256649005020c0/$FILE/MCO%20P1100.72C%20W%20ERRATUM.pdf) at 4-48 (instructing Marine Corps recruiters not to chastise recruits who drop out of DEP).

⁶³ *Withium v. O'Connor*, 506 F. Supp. 1374 (D.C.P.R. 1981).

⁶⁴ I have been unable to find an instance of the military formally compelling a recruit to report to basic training as this is directly contrary to military regulations, except during a draft.

⁶⁵ 2006 GAO REPORT, *supra* note 10, at 22.

⁶⁶ *Id.* at 24-25.

⁶⁷ *Id.* at 23.

⁶⁸ *Id.* at 24-25.

⁶⁹ *Id.* at 26.

⁷⁰ *Id.* at 24.

based on the number of signed DEP contracts the recruiter brings in.⁷¹ This assessment method places a premium on getting the signed DEP contract, which may or may not yield a successful recruit. The Army spends an estimated \$17,000 to recruit and process one applicant prior to basic training; the inefficiency of an incentive system that rewards recruiters who bring in DEP contracts for unqualified or marginally qualified applicants therefore poses a significant cost to taxpayers.⁷² Recruiter misconduct actively adds to this cost both in terms of potential recruits lost and litigation costs, and by making future recruiting more difficult.⁷³ The incentives for civilian recruiter corporations are also primarily based on the number of DEP contracts that they are able to procure.⁷⁴ The problems associated with these corporations and how they are compensated are somewhat unique and will be discussed separately below.⁷⁵

In contrast to civilian corporations and the other military branches, the Marine Corps uses a different accountability system for assessing the proficiency of its recruiters.⁷⁶ “Marine Corps’ recruiters, unlike recruiters in other services, are held accountable when an applicant does not complete basic training and remain responsible for recruiting an additional applicant to replace the former basic trainee.”⁷⁷ Marine Corps Recruiting Command believes these procedures force Marine Corps’ recruiters to screen prospective applicants more thoroughly to ensure that a recruit is likely to complete basic training.⁷⁸ These more rigorous procedures appear successful.⁷⁹ The Marine Corps consistently retains the greatest percentage of recruits from DEP through basic training and appears to have the fewest instances of substantiated recruiter misconduct of the four branches.⁸⁰ Furthermore, the Marine Corps also has the fewest instances of recruiter criminal violations, the most egregious form of recruiter misconduct.⁸¹

III. CONTRACT LAW PRINCIPLES AND DEFERENCE TO MILITARY AUTHORITY

Historically, the judiciary has acknowledged that its authority over the military is limited out of deference to the military’s unique role and special compe-

⁷¹ *Id.* at 24.

⁷² *Id.* at 25-26.

⁷³ *See, e.g.* Schism v. United States, 316 F.3d 1259, 1303 (Fed. Cir. 2002) (J., Mayer, dissenting, citing Lynch v. United States, 292 U.S. 571, 580 (1934)).

⁷⁴ *Id.* at 23-24.

⁷⁵ See discussion, *infra* Part IX.

⁷⁶ 2006 GAO Report, *supra* note 10, at 24.

⁷⁷ *Id.* at 24.

⁷⁸ *Id.* at 24.

⁷⁹ *Id.* at 20-21, 25.

⁸⁰ *Id.* at 21.

⁸¹ *Id.* at 20 (cases of recruiter criminal violations per branch in 2005: Army 38, Navy 13, Air Force 12, Marine Corps 2).

tence in assessing and regulating its own affairs.⁸² The constitutionally required separation of judicial and executive powers, as well as prudential concerns regarding the military's need to maintain good order within its own ranks, circumscribe judicial authority.⁸³

However, when it comes to military recruitment and enlistment, courts are willing to provide judicial oversight to protect the rights of the public as they transition from civilians to members of the armed services: "such 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."⁸⁴ Nonetheless, several courts have made it clear that they do not wish to interfere with the administration of the military any more than is absolutely necessary to protect the legal rights of the individuals involved.⁸⁵

The Supreme Court considered issues of recruiter misconduct as early as 1890 in the case *In re Grimley*.⁸⁶ Though *Grimley* focused on the principle of a recruit's change in status, it established two important concepts with regard to contemporary jurisprudence in the area of enlistment contracts.⁸⁷ *Grimley* decisively stands for the proposition that traditional contract law principles govern enlistment contracts and civil courts have jurisdiction over such contracts.⁸⁸ Similarly, traditional contract law principles also govern contemporary enlistment contracts signed as part of DEP, and civil courts oversee them.⁸⁹ The Supreme Court held: "General principles of contract law are applied, rather than the law of any one state, because of the unique relation between the military and those in the armed services, and the need for consistent interpretation of enlistment contracts."⁹⁰ These cases are therefore subject to what has been described as "an evolving body of specialized federal common law."⁹¹

This specialized body of contract law is unique in that it offers limited reme-

⁸² *Brown v. Dunleavy*, 722 F. Supp. 1343, 1349 (E.D. Va. 1989) (citing *Goldman v. Weinberger*, 475 U.S. 503 (1986) and *Chapell v. Wallace*, 462 U.S. 296 (1983)).

⁸³ *Santos v. Franklin*, 493 F. Supp. 847, 851 (D.C. Pa. 1980) (citing *Brown v. Glines*, 444 U.S. 348 (1980) and *Burns v. Wilson*, 346 U.S. 137 (1953)).

⁸⁴ *Brown*, 722 F. Supp. at 1349.

⁸⁵ *Frentheway*, 444 F.Supp. at 278; *Withium v. O'Connor*, 506 F. Supp. 1374, 1379 (D.C.P.R. 1981).

⁸⁶ *In re Grimley*, 137 U.S. 147, 149 (1890) (recruit who lied about his age but enlisted could not later try to invalidate his enlistment to prevent jurisdiction for the purposes of a court martial).

⁸⁷ *Id.* at 150-52.

⁸⁸ *Id.* at 150.

⁸⁹ *Novak v. Rumsfeld*, 423 F. Supp. 971, 972 (N.D. Cal. 1976) (citing *Peavy v. Warner*, 493 F.2d 748 (5th Cir. 1974) and *Matzelle v. Pratt*, 332 F. Supp. 1010 (E.D. Va. 1971)).

⁹⁰ *U.S. v. Standard Oil Co. of California*, 332 U.S. 301, 305-306 (1947).

⁹¹ *McCracken v. U.S.*, 502 F. Supp. 561, 569 n. 62 (D. Conn. 1980) (citing *Standard Oil*, 332 U.S. at 305-06; *In Re "Agent Orange" Products Liability Litigation*, 635 F.2d 987 (2d Cir. 1980) (Feinburg, C.J., dissenting)).

dies in comparison to contract law pertaining to private parties.⁹² Civil courts have traditionally decided the outcome of military enlistment contract disputes on the basis of the remedy sought.⁹³ This distinction can be easily understood by separating these cases into two categories. The first category includes those cases where a recruit does not receive the benefits the military promised him or her prior to the completion of his or her service and seeks rescission of the enlistment contract. The second category includes those cases where the recruit has already performed his or her part of the bargain, such as serving for a specified amount of time. These cases are more problematic because they raise substantial issues regarding the appropriation of military funding and separation of powers, in addition to contract law claims.⁹⁴

The first category of cases typically involve the military's enticement of recruits with promises of training, educational benefits, or entering active duty at a particular rank.⁹⁵ Courts tend to resolve the cases within this category in the recruit's favor, provided he or she can show reasonable reliance on the recruiters' promises: "Under general contract principles, rescission of the enlistment contract is the proper remedy when military recruiters make material misrepresentations, even if innocent or non-negligent, that induce a prospective recruit to enlist."⁹⁶ Rescission is generally the appropriate remedy where the military is unable to perform its obligation, the terms of the contract are so ambiguous as to be misleading, or the military used fraud or misrepresentation to induce a recruit to enter into the contract.⁹⁷ Importantly, the actual enlistment contract itself need not expressly include the recruiter's material misrepresentations for the recruit to have a right to rescission based on those misrepresentations.⁹⁸ The fact that an enlistment contract may be silent with regard to certain promises is not dispositive under these circumstances.⁹⁹

⁹² See, e.g., *City of El Centro v. United States*, 922 F.2d 816, 823 (Fed. Cir. 1990).

⁹³ Compare *Grulke v. United States*, 228 Ct. Cl. 720, 725 (1981) (refusing to grant rescission of the enlistment contract for false promises of specific training) with *Schism v. United States*, 316 F.3d 1259, 1264 (Fed. Cir. 2002) (finding promises of lifetime free healthcare unenforceable).

⁹⁴ See e.g., *Schism v. United States*, 316 F.3d 1259, 1265 (Fed. Cir. 2002) and *Pence v. Brown*, 627 F.2d 872, 874 (8th Cir. 1980).

⁹⁵ *Grulke*, 228 Ct. Cl. at 721-22; *Brown v. Dunleavy*, 722 F. Supp. 1343, 1350 (E.D. Va. 1989); *Withium v. O'Connor*, 506 F. Supp. 1374, 1378 (D.P.R. 1981).

⁹⁶ *Brown*, 722 F. Supp. at 1350 (citing *Pence v. Brown*, 627 F.2d 872, 874 (8th Cir. 1980)); *Woodrick v. Hungerford*, 800 F. 2d 1413, 1416 (5th Cir. 1986); *Helton v. U.S.*, 532 F.Supp. 813, 828 (S.D. Ga. 1981); *Withium*, F. Supp. at 1378; RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

⁹⁷ *Withium*, 506 F.Supp. at 1378 (citing *Novak v. Rumsfeld*, 423 F. Supp. 971 (N.D. Cal. 1976); *Shelton v. Brunson*, 465 F.2d 144 (5th Cir. 1972); *Chalfant v. Laird*, 420 F.2d 945 (9th Cir. 1969)).

⁹⁸ *Pence*, 627 F. 2d at 873.

⁹⁹ *Id.*; see also *Brown*, 722 F.Supp. at 1350.

Rescission of an enlistment contract typically results in an honorable discharge from military service, preserving the service member's right to veterans' benefits he or she may be entitled to as a result of service prior to rescission.¹⁰⁰ To effectuate the discharge, military personnel may sue on the enlistment contract.¹⁰¹ The proper remedy for recruits who are induced to enlist on the basis of a violation of applicable law or military regulations, including recruiter misconduct, is the writ of habeas corpus.¹⁰² Federal courts have jurisdiction over these habeas corpus claims under 28 U.S.C. § 2241(c)(1) because active military service sufficiently constitutes custody for jurisdictional purposes.¹⁰³ Federal Courts have the power to grant a writ of habeas corpus to any "prisoner," and the Supreme Court has decided that the term applies to service members unlawfully detained in the armed services.¹⁰⁴ A writ of habeas corpus is sufficient to procure the discharge of a service member who was induced to enlist based on a defective contract.¹⁰⁵ Implicit within these cases is the idea that the military has the option to perform on the contract as promised, thereby eliminating the need for rescission and the service member's discharge via writ of habeas corpus.¹⁰⁶

The Secretary of Defense's regulations on enlistment agreements also state that an agreement is defective if "[a]s a result of material misrepresentation by recruiting personnel, upon which the member reasonably relied, the member was induced to enlist with a commitment for which the member was not qualified."¹⁰⁷ These regulations further state that an honorable discharge is the proper remedy under these circumstances, provided that the recruit brings the defect in his or her contract to an appropriate authority's attention within thirty days of its discovery, and the recruit requests separation from the military as a remedy.¹⁰⁸

Concerns regarding the separation of powers, as well as deference to the military's interests in administering its own personnel programs, may be responsible for the outcome in the second category of recruiter misconduct cases. This second category of cases usually involves military personnel who have already completed their service or the requisite period of service required to

¹⁰⁰ See *supra* note 97 and DEPARTMENT OF VETERANS AFFAIRS, *Federal Benefits for Veterans and Dependents*, at vi (2007), <http://www1.va.gov/OPA/feature/>.

¹⁰¹ *Peavy v. Warner*, 493 F.2d 748, 749-50 (5th Cir. 1974). See also *Johnson v. Chafee*, 469 F.2d 1216, 1218-19 (9th Cir. 1972).

¹⁰² *Id.*

¹⁰³ *Santos v. Franklin*, 493 F. Supp. 847, 851 (1980) (citing *Meck v. Commanding Officer, Valley Forge Gen. Hosp.*, 452 F.2d 758, 760 (3d Cir. 1971)).

¹⁰⁴ *Parisi v. Davidson*, 405 U.S. 34, 39 (1972); *Schlanger v. Seaman* 401 U.S. 487, 489 (1971).

¹⁰⁵ *Parisi*, 405 U.S. at 39; *Schlanger*, 401 U.S. at 489.

¹⁰⁶ *Pence v. Brown*, 627 F.2d 872, 875 (8th Cir. 1980).

¹⁰⁷ 32 C.F.R. § 41 App. A, Part 1(E)(3)(a) (1988).

¹⁰⁸ *Id.* at Part 1(E)(3)(b-c).

receive contingent benefits. Generally, the service members, sometimes as a class, have attempted to sue the military when the military does not deliver the promised benefits.¹⁰⁹ Rescission is not an appropriate remedy under these circumstances because the service member has already completed the requisite term of service required to earn benefits. While performance by one party would traditionally estop the other from revoking the contract, this is not the case with military enlistment contracts when the remedy sought is either damages or specific performance.¹¹⁰

Schism v. United States illustrates the unique issues that surround military contracts, where damages or specific performance would traditionally be the most appropriate remedy in the private context.¹¹¹ In *Schism*, the federal circuit attempted to tackle the complex issue of whether veterans could recover damages for false promises recruiters made to them to induce them to enlist in the armed services during World War II and the Korean War.¹¹² Air Force recruiters promised lifetime free healthcare for the veterans and their families if they served on active duty for twenty years.¹¹³ These promises were clearly made with the intent of inducing enlistment, during a difficult recruiting period.¹¹⁴ As young men, these recruits relied on these promises and performed their portion of the contract.¹¹⁵ For many years, they also received healthcare as promised through the Department of Veterans' Affairs (VA).¹¹⁶ However, in 1995 the VA switched from acting as the sole healthcare provider to providing government insurance through programs such as CHAMPUS (Civilian Health and Medical Program of the United States) and TriCare that follow a health management organization model, using VA facilities to provide the majority of care.¹¹⁷ At that point, many of the veterans were forced to enroll in Medicare B where they were responsible for paying premiums, co-pays, deductibles, and fees for themselves and their families; they subsequently sued for breach of contract.¹¹⁸ The court found that the promises were not enforceable even though the government conceded that the recruiters promised the veterans lifetime free healthcare at the time of enlistment and *Schism* had reasonably relied

¹⁰⁹ See e.g. *Schism v. United States*, 316 F.3d 1259, 1265 (Fed. Cir. 2002); *Sebastian v. United States*, 185 F.3d 1368, 1369 (Fed. Cir. 1999).

¹¹⁰ *Brown v. Dunleavy*, 722 F. Supp. 1343, 1353 (E.D. Va. 1989).

¹¹¹ *Schism*, 316 F.3d at 1264.

¹¹² *Id.* at 1263.

¹¹³ *Id.* at 1262.

¹¹⁴ *Id.* at 1262, 1269.

¹¹⁵ *Id.* at 1264.

¹¹⁶ *Id.* at 1263.

¹¹⁷ *Id.* at 1263-65 (CHAMPUS and TriCare were created pursuant to 32 C.F.R. 199.17 when the VA shifted from providing urgent healthcare in the form of hospital services to providing health insurance and preventative care through public and private physicians. See <http://www.tricare.mil> for more information about both plans).

¹¹⁸ *Id.* at 1263.

upon those promises¹¹⁹

The court in *Schism* cited several reasons for finding the promises of the Air Force recruiters unenforceable. First, the court determined application of contract law principles was inappropriate due to the unique nature of the relationship between the government and its employees.¹²⁰ The court also noted that, even if it applied contract principles, contracts between an individual and the government are treated differently than private party contracts, particularly in the employment context.¹²¹ The court further based its holding on the finding that recruiter promises of lifetime free healthcare were outside the scope of the Secretary of the Air Force's authority in light of the yearly congressional appropriation of funds for military benefits, and it therefore could not enforce such promises.¹²² Finally, the court held that Congress had not ratified the recruiters' promises, despite the many years the government performed on the contract.¹²³

The court reached the first finding on the basis that the military typically awards healthcare and other veterans' benefits as a form of military retiree compensation and precedent dictates that common law rules governing contracts should not be applied in this area.¹²⁴ Citing *U.S. v. Teller*, the court in *Schism* noted that the military's granting of pensions and privileges creates no vested right in the recipient, and Congress can redistribute or even withdraw such benefits at any time.¹²⁵ The court in *Schism* therefore concluded that "military retiree compensation, including free military medical care and government-provided insurance, is controlled *exclusively* by statute, and so action for breach of an implied-in-fact contract cannot lie."¹²⁶ This is true even though the recruiter and the recruit may both sign an enlistment contract agree-

¹¹⁹ *Id.* at 1262, 1264.

¹²⁰ *Id.* at 1274-75 (explaining that federal employees serve by appointment, not contract). See also *Chu v. U.S.*, 773 F.2d 1226, 1227-28 (Fed. Cir. 1985) (stating that it is a "well established principle that, absent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government.").

¹²¹ *Schism*, 316 U.S. at 1263-64.

¹²² *Id.* at 1264.

¹²³ *Id.* at 1289.

¹²⁴ *Id.* at 1264.

¹²⁵ *Id.* (citing *U.S. v. Teller*, 107 U.S. 64, 68 (1883)).

¹²⁶ *Id.* (emphasis added). See also *Larionoff v. U.S.*, 431 U.S. 864, 875-76 (1977) (upholding service member's right to receive variable enlistment bonus in effect at time of agreement to re-enlist, despite subsequent elimination of those incentives. Allowed relief on grounds that statute authorizing payment of extra bonuses to service members with critical skills was in effect at time of reenlistment and therefore bonuses could not be revoked because "the [variable enlistment bonus] could only be effective as a selective incentive to extension of service if at the time he made his decision the service member could count on receiving it if he elected to remain in the service.").

ing to its contents.¹²⁷ *Schism* acknowledged that this puts service members in the precarious position of relying on political whims, but expressed that the judiciary “can do no more than hope Congress will make good on the promises recruiters made”¹²⁸ Fortunately, the veterans obtained relief through political and legislative means. During the pendency of *Schism*, Congress amended 38 C.F.R. § 199 to provide military healthcare benefits to veterans over sixty-five who were previously made ineligible for veterans’ health benefits upon mandatory enrollment in Medicare.¹²⁹ This change, however, did not address the government’s misrepresentations that induced the veterans to enlist in the first place.

IV. SOVEREIGN IMMUNITY AND SPECIAL ISSUES REGARDING GOVERNMENT CONTRACTS

Sovereign immunity traditionally protects the government from suit except where the government has waived that immunity via statute.¹³⁰ In the case of veterans who already performed their part of the bargain, they are no longer in the custody of the government so a writ of habeas corpus is not an appropriate avenue of relief. Instead, these veterans must look to other statutes to find standing to sue. The veterans in *Schism* chose to sue under the Little Tucker Act, which authorizes district courts to hear cases against the government that are not tort claims and where the damages sought are less than \$10,000.¹³¹ Alternatively:

[T]he Court of Federal Claims has jurisdiction “to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1).¹³²

Recruits may also sue under the Contract Disputes Act of 1978 or 50 U.S.C. § 1431, which permits the President to authorize executive agencies to enter into certain defense contracts.¹³³ Finally, in cases of the most egregious mis-

¹²⁷ *Bell v. United States*, 366 U.S. 393, 401 (1961) (holding that even though enlisted soldier technically breached his contract by aiding captors while a prisoner of war, he was still entitled to basic pay for as long as he remained enlisted because pre-existing statute, rather than his enlistment contract, governed his right to basic pay).

¹²⁸ *Schism*, 316 F.3d at 1264.

¹²⁹ 10 U.S.C. § 1086(c) (2007).

¹³⁰ *See, e.g., Levin v. United States*, 403 F. Supp. 99, 101 (D. Mass. 1975).

¹³¹ *Schism*, 316 F.3d at 1264.

¹³² *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998).

¹³³ 41 U.S.C. §§ 601 et. seq. (2000) giving broad authority to government to contract, and 50 U.S.C. § 1431 (2000) giving broad authority to the President to authorize any department or agency to enter into contracts for the purposes of national defense.

conduct criminal charges may be filed against the recruiter, and victims may sue the United States under the Federal Tort Claims Act.¹³⁴

The veterans in *Schism* chose to sue under the Tucker Act for breach of an implied-in-fact contract. An individual can create a binding implied-in-fact contract with the government when there is mutuality of intent to contract, consideration, unambiguous offer and acceptance, and when the government's representative has "actual authority" to bind the government.¹³⁵ The first three elements are common to any contract.¹³⁶ When the United States is a party to a contract however, a crucial fourth requirement is added: the government representative whose conduct is relied upon must have actual authority to bind the government or the contract is not enforceable.¹³⁷ In assessing actual authority, the Supreme Court has determined that any private party who believes he or she is entering into a contract with the government bears the risk that the person with whom he or she is contracting may not have the actual authority to bind the government of the United States.¹³⁸ Consequently, the court in *Schism* found that the plaintiffs could not recover because the recruiters did not have the authority to promise lifetime free health care.¹³⁹

V. MILITARY RECRUITER AUTHORITY

The court in *Schism* concluded that the military did not have authority to bind the government with regard to enlistment contracts despite broad authority conferred by various statutes to the President and the secretaries of the military departments to regulate their own affairs.¹⁴⁰ The court specifically addressed the military's own regulations, as well as several statutes, including 5 U.S.C. § 301¹⁴¹ and 10 U.S.C. §§ 3013, 5013, and 8013.¹⁴²

5 U.S.C. § 301 states in relevant part that "[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records, papers, and property."¹⁴³ The Supreme Court has traditionally held that this is merely a

¹³⁴ See *Shirley v. United States*, 832 F. Supp. 1324 (D. Minn. 1993). As stated, this Note is primarily focused on false statements used to induce recruits to enter into enlistment contracts and thus will not address the last two options. Attorneys practicing in this area may wish to explore either or both. See discussion *infra* Part I.

¹³⁵ See *City of Cincinnati*, 153 F.3d at 1377.

¹³⁶ See *Id.*

¹³⁷ *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

¹³⁸ See *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *CACI, Inc. v. Stone*, 990 F.2d 1233, 1236 (Fed. Cir. 1993).

¹³⁹ *Schism v. United States*, 316 F.3d 1259, 1279.

¹⁴⁰ *Id.*

¹⁴¹ 5 U.S.C. § 301 (2000).

¹⁴² 10 U.S.C. §§ 3013, 5013, & 8013 (2000).

¹⁴³ 5 U.S.C. § 301 (2000).

housekeeping statute and does not confer actual authority to bind the government.¹⁴⁴ The court in *Schism* declined to make a determination as to the exact application of the statute, but noted that it “is clear that its scope is not broad enough to have provided authority to contract with recruits to the military for lifetime free medical care so as to bind both the Department of Defense and the Congress.”¹⁴⁵

The court acknowledged, and the government admitted, that the military’s branch secretaries had actively encouraged the recruiters to make the promises in question and that they had done so in compliance with internal military regulations.¹⁴⁶ However, the government was not legally bound to abide by them because Congress had never authorized these promises in the first place.¹⁴⁷ Therefore, the court concluded “the recruiters lacked actual authority, meaning the parties never formed a valid, binding contract.”¹⁴⁸ The historical legislation of military healthcare by Congress also indicates that 5 U.S.C. § 301 did not confer this authority, since no further legislation would have been necessary if the government had been bound by contract to provide these services.¹⁴⁹ *Schism* confined its analyses to 5 U.S.C. § 301 because this was the issue briefed by the parties, but the court also noted that 5 U.S.C. § 70 and the Anti-Deficiency Act both support its holding as both statutes place preconditions on obligating or spending appropriated funds.¹⁵⁰

In addition to addressing 5 U.S.C. § 301 directly, the court in *Schism* also considered the effect of the military’s own regulations developed under the authority conferred by the statute on the disposition of the recruiters’ promises.¹⁵¹ Since the underlying statute did not authorize such promises, the military could not make them binding by regulation.¹⁵² “In order to be valid regulations must be consistent with the statute under which they are promulgated.”¹⁵³ The court also noted that the regulations only permitted recruiters to promise healthcare on a space available basis.¹⁵⁴ Thus:

[E]ven if the Secretary of the Air Force himself had said to recruiters that

¹⁴⁴ *Schism*, 316 F.3d at 1279 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979) and *Sebastian v. United States*, 185 F.3d 1368, 1371 (Fed. Cir. 1999) (further citations omitted)).

¹⁴⁵ *Id.* at 1283-1284.

¹⁴⁶ *Id.* at 1284.

¹⁴⁷ *Id.* at 1284.

¹⁴⁸ *Id.* at 1284.

¹⁴⁹ *Schism*, 316 F.3d at 1283. See also 10 U.S.C. § 1086 (1966).

¹⁵⁰ *Schism*, 316 F.3d at 1283. The court also briefly addressed 5 U.S.C. § 70, another statute supporting this argument. The court declined to analyze this statute’s impact because neither party had briefed the court on this issue. *Id.*

¹⁵¹ *Id.* at 1284.

¹⁵² *Id.* at 1285.

¹⁵³ *United States v. Larionoff*, 431 U.S. 873 (1977).

¹⁵⁴ *Schism*, 316 F.3d at 1285-86.

they could and should promise free lifetime medical care to aid in recruitment, those promises would be a nullity, because . . . the pertinent regulations provided to the contrary: the retirees claim they were promised an "entitlement," but the regulations provided for space-available care only.¹⁵⁵

The Air Force representatives' statements therefore could not bind the government.

Schism next addressed the issue of whether the President's inherent powers as Commander-in-Chief authorized the recruiters' promises.¹⁵⁶ 10 U.S.C. §§ 3013, 5013, and 8013 provide for the positions and duties of the Army, Navy, and Air Force secretaries, respectively.¹⁵⁷ Today, all three statutes authorize the secretaries of each branch to conduct recruiting.¹⁵⁸ However, the President does not have the constitutional authority to make promises regarding lifetime entitlements to military personnel because such powers would encroach on Congress' constitutional role of appropriating funds as outlined in Article I § 8.¹⁵⁹ Allowing the executive branch to make binding promises to expend or obligate funds not yet appropriated would violate the separation of powers doctrine and the Anti-Deficiency Act.¹⁶⁰ "Thus, to the extent that military recruiters, in the absence of statutory authority, make promises that impose an obligation on the federal Treasury, they exceed their constitutional authority and abrogate Congress' authority under the Appropriations Clause, U.S. Const. art. I § 9, cl. 7."¹⁶¹

VI. THE IMPACT OF CURRENT DISCLAIMERS

The terms of the enlistment contracts themselves make it difficult to enforce recruiter promises. The standard contract asks recruits to certify twice that any promises or attached addendums not expressly included in the contract will not be honored.¹⁶² Importantly, this may be the first contract that a recruit, especially a high school recruit, ever signs. Recruiters have the advantages of an official uniform and superior knowledge about the enlistment process and may convince recruits that an express written contract is unnecessary to make the promises binding. If a recruit's parents are not supportive of his or her decision

¹⁵⁵ *Id.* at 1286 (citing Air Force Regulation 106-73).

¹⁵⁶ *Id.* at 1288.

¹⁵⁷ 10 U.S.C. §§ 3013, 5013, 8013 (2000).

¹⁵⁸ *Id.*

¹⁵⁹ *Schism*, 316 F.3d at 1288; U.S. CONST. art. I, § 8.

¹⁶⁰ *Id.* See also the Anti-Deficiency Act, 31 U.S.C. § 1342(a)(1) stating that a federal employee "may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

¹⁶¹ *Schism*, 316 F.3d at 1288.

¹⁶² Enlistment/Reenlistment Document Armed Forces of the United States, Department of Defense Form DD 4/1, (August 1998).

to join the military, the recruit may be reluctant to involve them in the process, thereby removing another form of oversight.¹⁶³ Unfortunately, even explicit written promises may also cause problems if the recruit fails to read the fine print.¹⁶⁴ For example, if a recruit has already completed college the military will often promise to pay off his or her educational loans as a benefit of service.¹⁶⁵ However, what recruits often are not told is that the military will only pay off debt owed to the government through its guaranteed federal student loan program; this benefit is not extended to recruits who borrowed money from private lenders.¹⁶⁶ The Army's recruiting literature does not make this apparent.¹⁶⁷

The courts traditionally resolve conflicts between the written enlistment contract and any verbal statements made by an individual recruiter in favor of the written instrument.¹⁶⁸ Where there is an express contract between the parties, "the implied contract, if it is to be valid, must be entirely unrelated to the express contract. The existence of an express contract precludes the existence of an implied contract dealing with the same subject."¹⁶⁹ In the case of enlistment contracts, which purport to be exclusive with regard to any promised benefits, it appears it would be very difficult to establish some other form of implied-in-fact contract based on the recruiter's verbal statements and assurances to the recruit and his or her family members. Even after the recruit has begun to serve in the military in reliance on verbal statements made by the recruiter, the contract's express terms and disclaimers tend to preclude finding some other implied contract. "The mere conferring of a benefit on the government does not create an implied-in-fact contractual relationship. Implied-in-fact contracts require conduct of the PARTIES manifesting assent."¹⁷⁰ However, in limited circumstances reformation of the contract might be appropriate. In order for the court to change the terms of a contract, a recruit would have to show clear

¹⁶³ See, e.g., Roberts, *supra* note 2.

¹⁶⁴ Anya Kamenetz, *Johnny Comes Marching Home to Loans*, THE VILLAGE VOICE, June 27, 2005.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; MONTGOMERY GI BILL, ARMY COLLEGE FUND, AND LOAN REPAYMENT PROGRAM, US ARMY RECRUITING COMMAND, REGULATION 621-1 at 5-7 (Oct. 30, 1998), available at http://www.usarec.army.mil/im/formpub/REC_PUBS/R621_1.pdf (includes a list of loans excluded from the loan repayment program).

¹⁶⁷ U.S. ARMY, THERE'S A DIFFERENCE BETWEEN WEARING SHOES AND FILLING THEM 9 (2006). The pamphlet states: "If you've already attended college, you'll be eligible for loan repayment.*" However, there is no explanation of the asterisk, nor is there any indication that certain loans are ineligible for repayment.

¹⁶⁸ *ITT Fed. Support Serv. Inc. v. United States*, 531 F.2d 522, 528 (Ct. Cl. 1976). See also *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir. 1990).

¹⁶⁹ *Atlas Corp.*, 895 F.2d at 754; *ITT Fed. Support Serv. Inc.*, 531 F.2d at 528.

¹⁷⁰ *Chavez v. United States*, 18 Cl. Ct. 540, 545 (1989).

evidence of fraud, accident, or mistake.¹⁷¹

VII. CONTRACT PERFORMANCE DOES NOT CONSTITUTE RATIFICATION OR ACQUIESCENCE

The court in *Schism* addressed whether Congress had ratified, or acquiesced to, the recruiters' promises of lifetime free healthcare by providing such care until 1995.¹⁷² Both parties in *Schism* acknowledged that Congress could ratify agency conduct giving it the force of law, even if it did not authorize the conduct.¹⁷³ "Congress may ratify an agency action through appropriation acts."¹⁷⁴ However, a general appropriation is insufficient; funds must be expressly allocated for a specific agency or activity.¹⁷⁵ In *Schism*, the court interpreted this standard to mean that Congress would have to expressly allocate funds with the purpose of giving the military authority to make binding promises, such as that of lifetime free medical care.¹⁷⁶ By construing the question so narrowly, the court effectively foreclosed a finding that Congress had ratified these promises, despite continued appropriations for the purposes of military recruiting and other enlistment incentives.

Schism also addressed whether Congress' years of appropriating funds for veterans' healthcare without objection bound it to continue to do so. "The doctrine of acquiescence is premised upon Congress' failure to act in response to an action it might view as previously unauthorized, unlike the ratification context where Congress affirmatively acted to demonstrate its approval of an agency action."¹⁷⁷ Past practice alone does not create such approval, but long-continued practice known and acquiesced to by Congress would raise a presumption of consent.¹⁷⁸ Finding that the plaintiffs had not shown sufficient "evidence that Congress as a whole was aware of the fact that the recruiters had promised, and the military branches had . . . provided, free lifetime medical care for military retiree," the court in *Schism* declined to find that Congress had acquiesced to the recruiters promises.¹⁷⁹

VIII. INTERNAL DISCIPLINE MEASURES FOR RECRUITER VIOLATIONS

Military recruiters, like all military personnel, are subject to the Uniform Code of Military Justice (UCMJ), which penalizes them for their misconduct if

¹⁷¹ *Hedges v. Dixon County*, 150 U.S. 182, 189 (1893).

¹⁷² *Schism v. United States*, 316 F.3d 1259, 1289 (2002).

¹⁷³ *Id.*

¹⁷⁴ *Id.* (citing *Ex parte Endo*, 323 U.S. 283, 303 (1944) and *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147-148 (1937)).

¹⁷⁵ *Id.* at 1290 (citations omitted).

¹⁷⁶ *Id.* at 1290.

¹⁷⁷ *Id.* at 1294 (citations omitted).

¹⁷⁸ *Id.* at 1295-1296 (citing *Midwest Oil* 236 U.S. at 474).

¹⁷⁹ *Id.* at 1297.

it is reported or discovered.¹⁸⁰ Recruiters may also receive non-judicial punishment in lieu of, or in addition to, punishment under the UCMJ.¹⁸¹ The UCMJ generally holds members of the military to a higher standard than civilian law, especially with regard to false statements made in the line of duty.¹⁸² Under the UCMJ and other military regulations, recruiters who make false statements are subject to a variety of penalties ranging from an informal reprimand to court-martial depending on the severity of their misconduct.¹⁸³ When Congress first enacted the UCMJ in 1950, it specifically included provisions regarding false statements by military personnel because such false statements have negative impacts on unit cohesion, perception of the military by the public, and the trust and integrity considered vital to military discipline.¹⁸⁴ Article 84 specifically applies to recruiters and prohibits military personnel from enlisting persons who are ineligible by law, regulation, or order and provides that personnel who enlist ineligible recruits shall be punished as a court-martial may direct.¹⁸⁵ While Article 84 governs recruiters who sign up ineligible recruits, Article 107 provides generally for the punishment of military personnel who make false statements in an official context.¹⁸⁶ Recruiters who do not conduct themselves with integrity may also be punished under Article 133 for “conduct unbecoming an officer and a gentleman,”¹⁸⁷ or under Article 134 for conduct “of a nature to bring discredit upon the armed forces.”¹⁸⁸

The court-martial process is distinct from a civilian court proceeding and provides a wider range of possible sentences, including barracks restrictions and hard labor.¹⁸⁹ The court-martial is typically composed of commissioned officers who sentence at their own discretion, except where the UCMJ

¹⁸⁰ 10 U.S.C. § 802 (2006).

¹⁸¹ 10 U.S.C. § 815 (2006).

¹⁸² Lieutenant Colonel Colby C. Vokey, USMC, *Article 107, UCMJ: Do False Statements Really Have to Be Official?*, 180 MIL. L. REV. 1, 1-2 (2004).

¹⁸³ US ARMY RECRUITING COMMAND, FAMILY ORIENTATION PAMPHLET 13 (2003), available at http://www.usarec.army.mil/im/formpub/REC_PUBS/p608_2.pdf. Under 10 USC § 815 all military personnel may be subject to non-judicial punishment which may include arrest in quarters, diminished food rations, forfeiture of pay, reduction in pay grade, or other similar punishment. The statute allows officers of higher rank to impose stricter punishments and vice versa. 10 U.S.C. § 815 (2006).

¹⁸⁴ *Id.*

¹⁸⁵ 10 U.S.C. § 884 (2000).

¹⁸⁶ 10 U.S.C. § 990 (1998).

¹⁸⁷ 10 U.S.C. § 933 (2001).

¹⁸⁸ 10 U.S.C. § 934 (2001). The term “conduct unbecoming” is often used in popular nomenclature to refer to charges under both sections of the statute. However, § 933 specifically pertains to commissioned officers and contains the exact phrase, while § 934 pertains to all military personnel generally and is intended to encompass dishonorable conduct not specifically provided for by statute.

¹⁸⁹ Rules of Court Martial 1002, Sentence determination, pp. II-123.

prescribes minimums or maximums.¹⁹⁰ The court-martial may also determine that no punishment is necessary, and may consider non-judicial punishments that a commanding officer has already imposed adequate disciplinary measures.¹⁹¹

The use of court-martial proceedings tends to be reserved for the most egregious cases of misconduct meriting formal proceedings. Because of the military's interest in maintaining order within its ranks, a number of less formal discretionary punishments are also available. Under 10 U.S.C. § 815, any commanding officer may impose non-judicial disciplinary punishments for minor offenses without the intervention of a court-martial, in addition to, or in lieu of admonition or reprimand.¹⁹² Non-judicial punishment can include confinement to quarters, forfeiture of pay, imposition of extra duties, and other similar punishments.¹⁹³ The rank of the officer imposing the punishment determines what punishments are available; higher-ranking officers are given a greater degree of discretion and may impose stricter sanctions than their lower-ranking counterparts.¹⁹⁴

It is clear that the possibilities of non-judicial punishment, court-martial, or both, deter recruiters who might otherwise engage in behavior contrary to existing military regulations and the UCMJ. Recruiters who deliberately sign up ineligible recruits, threaten or intimidate recruits, or make false statements in violation of the UCMJ risk losing their jobs, demotion, loss of pay, or even criminal prosecution, all of which provide significant incentives to be candid and act with integrity throughout the process.

Given the gravity of these punishments, it is unlikely that a private cause of action against individual recruiters would serve any additional deterrent effect or further the goal of eliminating recruiter misconduct. It is clear from the military's own statistics, however, that some additional form of deterrence is necessary to prevent the abuses that continue to occur.¹⁹⁵ It is also noteworthy that incentives to conduct honest recruiting do not resolve cases like *Schism* where higher-ranked officials, including the military's own branch secretaries, author-

¹⁹⁰ 10 U.S.C. § 825 (2006). A court martial consists of a group of disinterested commissioned officers convened to determine a defendant's guilt or innocence in a manner similar to a jury. Enlisted personnel may serve on a court-martial at the request of the defendant, provided that such enlisted personnel have not served in the same unit as the defendant. Whenever possible, the members of a court-martial should be of higher rank than the defendant.

¹⁹¹ Rules of Court Martial 1002, Sentence determination, pp. II-123, Rule 1003, Punishments, pp. II-124. *See also* pp. II-124-II-127 for a discussion of the punishments a court-martial may impose including, fines, reduction in pay, punitive separation from the military, confinement, hard labor, and death.

¹⁹² 10 U.S.C. § 815 (2006).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 2006 GAO REPORT, *supra* note 10, at 19.

ize the recruiters' promises.¹⁹⁶ Recruiting conducted by civilian recruiter corporations that are not subject to the UCMJ and military regulations poses additional issues with oversight and the lack of alignment between military and corporate interests.¹⁹⁷ A more comprehensive approach that requires recruiters to be responsible for both the quality and quantity of recruits they bring in is therefore needed to ensure a more honest and forthright recruiting process.

IX. CIVILIAN RECRUITER CORPORATIONS

In October 2000, Congress adopted a \$170 million pilot program to evaluate the possibility of outsourcing recruiting jobs to civilian corporations as part of the 2001 National Defense Authorization Act.¹⁹⁸ The goal was to determine if recruiting could effectively be completed by civilians, thereby allowing more service members to remain in the field, complete additional training, or conduct other military operations in their areas of expertise.¹⁹⁹ Building on an existing program for reservists, the statute provides for civilians to take over recruiting in ten geographic areas across the United States.²⁰⁰ Military Professional Resources, Inc. (MPRI) and Serco, Inc., which is also known as RCI, have both received contracts from the Army to conduct these operations for the last six years.²⁰¹ Each corporation recruits in its half of the ten geographical areas specified in the pilot program, and both corporations work closely with the Army Recruiting Command to ensure compliance with the Army's recruiting procedures and regulations.²⁰² In August 2006, MPRI received an additional contract for recruiting services at a base amount of \$11,196,996 with two one-year extension options that would bring it up to \$34,272,571 if exercised.²⁰³ On average, the military pays these corporations approximately \$5,700 per recruit and the corporations had signed up over 15,000 soldiers through 2006.²⁰⁴ Both MPRI and Serco hire former military personnel to conduct recruiting and have

¹⁹⁶ 10 U.S.C. § 802 was amended to apply the UCMJ to "persons serving with or accompanying an armed force in the field" which includes military contractors in the field, but not recruiter corporations operating in the United States. 10 U.S.C. § 802(a)(10) (2006).

¹⁹⁷ 2006 GAO REPORT, *supra* note 10, at 24.

¹⁹⁸ 106 Pub. L. No. 398, §§ 561-562, 114 Stat. 1654 (2000).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ MARCIA TRIGGS, *Civilian Recruiters*, THE ARMY NEWS SERVICE, Feb. 2002, available at <http://usmilitary.about.com/library/milinfo/milarticles/blcivrecruiters.htm>.

²⁰² MPRI Recruiting Homepage, <http://www.mprirecdiv.com> (last visited Sept. 15, 2007); Serco Recruiting Homepage, <http://www.serco-na.com/recruitment.htm> (last visited Sept. 10, 2007).

²⁰³ U.S. Dept. of Defense, Contracts, <http://www.defenselink.mil/Contracts/Contract.aspx?ContractID=3316> (last visited Sept. 10, 2007).

²⁰⁴ Renae Merle, *Army Tries Private Pitch for Recruits*, THE WASHINGTON POST, Sept. 6, 2006, at A01.

their own code of ethical regulations for employees.²⁰⁵ Employees typically receive a base salary of around \$20,000 with potential for more than twice that based on bonuses and commissions contingent upon the number of signed contracts they bring in.²⁰⁶ The end result is a highly competitive business that places a premium on bringing in signed DEP contracts. As Stewart Macgregor, a program manager for Serco, Inc., stated in an interview with *The Washington Post*, “If you want to eat steak, you have to put people in the Army The more [contracts] you write, the more you will be paid.”²⁰⁷

The issue of whether civilians are qualified or appropriate to act as recruiters has been raised several times since the pilot program’s inception. Proponents point to the efficiencies of using a corporate business model and the advantages of allowing the Army’s non-commissioned officers to remain in the field.²⁰⁸ Both companies are careful to point out that they employ veterans with relevant experience who are already established members of their communities.²⁰⁹ Employees often see their job as an extension of a career of patriotic service.²¹⁰ Both companies also offer continuing training to keep employees informed about the relevant rules and regulations of Army Recruiting Command.²¹¹

Critics of the program are troubled by private contractors employing essentially professional salespeople to sell the Army to America’s young people, especially given the age of recruits and the risks and dangers of military service.²¹² Representative Janice D. Schakowsky (D-Ill. 9th) noted “the use of contractors for this sensitive purpose, dealing with the lives of young people, is troublesome. There is a notorious lack of oversight in all contracts, so why would we expect that in this very sensitive area it would be any better?”²¹³ In addition to concerns regarding oversight, the fact that companies are profiting from signing up young people for military service raises ethical concerns. MPRI and Serco have numerous defense contracts for a variety of services both domestically and abroad that go well beyond military recruiting, in effect making military conflict a profitable enterprise for both companies.²¹⁴ Critics con-

²⁰⁵ MPRI Recruiting Homepage, *supra* note 202; Serco Recruiting Homepage, *supra* note 202.

²⁰⁶ Merle, *supra* note 204.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ MPRI Recruiting Homepage, *supra* note 202; Serco Recruiting Homepage, *supra* note 202. (MPRI’s products include maritime, driving, and marksmanship simulations and a multi-hazard emergency and routine operations management system. Serco provides fleet management, transportation, aviation, engineering, HR services, and logistics and supply services for government and private enterprise).

tend that because these corporations are for profit there is a misalignment of corporate and military interests. They contend that since these corporations do not share in the mission-based goals of the military, the government should provide more oversight over them, rather than expanding their role in military operations.²¹⁵

It is unclear whether employees of civilian recruiter corporations are guilty of more instances of recruiter misconduct than the military's own non-commissioned officers. "Since the pilot program started in 2002, 'recruiting companies have been statistically less productive,' according to an Army report. The companies had high employee turnover, especially for the first two years, and enlisted a lower quality of recruit."²¹⁶ Related to the issue of recruit quality is the fact that civilian contractors are not generally subject to the UCMJ.²¹⁷ This means that there are different incentives for civilian recruiters as opposed to the military's own personnel with regard to the number and quality of recruits they sign up. Market forces and the program's trial status certainly provide an incentive for corporations to continue to secure quality contracts, but economic and business concerns are hardly comparable to the penalties of a court-martial. In addition, as with every branch of the Armed Forces other than the Marine Corps, civilian recruiter success is primarily measured by the number of signed DEP contracts the recruiter brings in.²¹⁸

Private contractors usually receive 75% of their compensation when the DEP contract is signed and the remaining 25% when the recruit begins basic training.²¹⁹ "The Army's contract, therefore, does not tie compensation to the applicant's successful completion of basic training and joining the Army."²²⁰ Private contractor bonuses and other compensation also depend on bringing in DEP contracts.²²¹ Therefore, there are significant pressures for civilian recruiters to secure DEP contracts, but fewer incentives for them to ensure that a recruit will complete basic training. It remains to be seen whether this will lead to similar levels of recruiter misconduct in the private sector to the Army, Navy, and Air Force. This is an area of concern, however, because of the manner in which the military compensates recruiter corporations. A recent Government Accountability Office report noted that the "[Department of Defense's] need for oversight may become more critical if the department decides to rely on civilian contract recruiters in the future."²²² For this reason, recruits

²¹⁵ Press Release, Representative Janet Schakowsky, Schakowsky Calls for Contractor Accountability (June 13, 2006), http://www.house.gov/schakowsky/PressRelease_6_13_06_MilitaryContractors.shtml.

²¹⁶ Merle, *supra* note 204.

²¹⁷ See discussion *infra* Part VII.

²¹⁸ 2006 GAO REPORT, *supra* note 10, at 24.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Merle, *supra* note 204.

²²² 2006 GAO REPORT, *supra* note 10, at 13.

should have a private right of action against recruiter corporations for the misconduct of their employees. Such a cause of action would serve as a civilian counterpart to the UCMJ and provide sanctions against civilian recruiters who enlist unqualified recruits, make affirmative misrepresentations to recruits, or commit other acts of misconduct. It would also ensure that corporations would not profit from DEP contracts procured through misconduct.

X. POTENTIAL SOLUTIONS

In recent years, the Army has relaxed its entrance standards to alleviate some difficulties with meeting recruiting goals.²²³ While the Army continues to maintain that it is meeting recruiting goals, it is impossible to measure the accuracy of these statements. The current statistical data on recruiting and retention do not reflect the number of personnel retained or recalled to service through the military's stop-loss program, nor does it reflect how this program may reduce the need for new recruits.²²⁴ Even if the Army is meeting its goals, there is concern that they are enlisting a lower quality of recruit.²²⁵

In 2006, the Army increased the number of "category 4" recruits (recruits who receive the lowest scores on the Military Entrance Processing Exam) from two to four percent of its total forces in an effort to meet recruiting goals.²²⁶ Jared, the autistic teen who had been in special education since pre-school received a high enough score to qualify for the Army as a category 4 recruit.²²⁷ In March 2006, the Army modified its criteria to allow enlistment of recruits with visible tattoos.²²⁸ The Army has also relaxed its age requirements, increasing the maximum age at the time of enlistment from 35 to 42, and has increased the number of waivers granted to recruits who otherwise would not have met weight, medical or moral requirements for military service.²²⁹ In the past three years, the number of convicted felons who enlisted in the U.S. military almost doubled, rising from 824 in 2004 to 1,605 in 2006, and more than

²²³ Douglas Belkin, *Struggling for Recruits, Army Relaxes Its Rules*, THE BOSTON GLOBE, Feb. 20, 2006, at A1.

²²⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: PRELIMINARY OBSERVATIONS ON RECRUITING AND RETENTION ISSUES WITHIN THE U.S. ARMED SERVICES, GAO-05-419T, at 7-10 (2005).

²²⁵ Belkin, *supra* note 223.

²²⁶ Jim Garramone, *Recruit Quality Remains High, Defense Personnel Official Says*, AMERICAN FORCES PRESS SERVICE, July 12, 2006, <http://www.defenselink.mil/news/NewsArticle.aspx?ID=123>.

²²⁷ Roberts, *supra* note 2. The Army requires a score of 31 or higher on its entrance exam. Jared scored a 43. *Id.*

²²⁸ J.D. Leipold, *Army Changes Tattoo Policy*, ARMY NEWS SERVICE, March 15, 2006, <http://www4.army.mil/news/article.php?story=8692>.

²²⁹ Mark Thompson, *Lowering the Recruiting Standards?*, TIME MAGAZINE, Feb. 14, 2007, available at <http://www.time.com/time/nation/article/0,8599,1589745,00.html>.

125,000 people with criminal records have joined the military.²³⁰

Relaxing standards for new recruits is not the answer to the military's recruiting problems. It is unsafe and unfair to those already serving in the military after enlisting with the expectation that their brothers and sisters in arms would be held to the same more rigorous standards. It also may exacerbate the problem of recruiter misconduct. In effect, the Army is saying from the top down that it is permissible to enlist a less-qualified recruit or to bend the rules to meet the current enlistment quotas. This sends a poor message to recruiters when incentives for misconduct are already high.

A. *Implementation of the GAO's August 2006 Recommendations to Reduce Instances of Unauthorized Recruiter Promises and Other Recruiter Misconduct*

The GAO's August 2006 recommendations, including better recruiting oversight, should be implemented. Pursuant to the recommendations, the Army, Navy, and Air Force should begin utilizing the same recruiting standards and practices as the Marine Corps.²³¹ Twenty-five years ago, many considered the Marine Corps the worst branch of the military with regard to recruiting malpractice.²³² In 1978, the Marine Corps was subject to the first investigation of recruiter misconduct since the end of the draft.²³³ As part of the 1981 report, the Office of the Comptroller conducted a survey among the branches to determine what caused military recruiters to commit acts of misconduct.²³⁴ The results of that survey indicated that pressure to meet difficult quotas was one of the major causes of recruiter malpractice.²³⁵ Responding to the survey, one recruiter commented on the significant role of prevailing institutional attitudes in recruiter misconduct. "Irregularities stem from the officers and staff people. They do not actually say 'cheat' but they do say things that imply or can easily be inferred to mean cheat."²³⁶ The survey also indicated more than 40% of respondents in the Army felt that evaluating recruiter success on the basis of recruit survival and performance during the recruit's first term of service would

²³⁰ Editorial, *Not the Best or Brightest; Increased Granting of 'Moral Waivers' Dangerously Lowers Standards for Military Recruits*, THE HOUSTON CHRONICLE, Feb. 20, 2007, at 8B.

²³¹ 2006 GAO REPORT, *supra* note 10, at 34-35.

²³² OFFICE OF THE COMPTROLLER GENERAL OF THE UNITED STATES, RECRUITING MALPRACTICE: EXTENT, CAUSES, AND POTENTIALS FOR IMPROVEMENT, FPCD-81-34 (1981), available at <http://archive.gao.gov/f0102/115872.pdf>.

²³³ *Id.* at 1.

²³⁴ *Id.*

²³⁵ *Id.* at 22.

²³⁶ *Id.* Immediately following the end of the draft recruiting was especially difficult. Most recruiters at that time thought an all-volunteer force would not be viable and were in favor of reinstating the draft.

be an appropriate corrective action.²³⁷ The Marine Corps and the Navy later began using attrition as a measure of recruiter success, but the Marine Corps is still the only branch that specifically ties success to the recruits' completion of basic training.²³⁸ In 1998, the GAO once again suggested that measuring recruiter success this way would improve recruiting and retention in the armed services.²³⁹ The GAO reiterated its recommendation that the services switch to a more retention focused model (the "Marine Corps model") in its 2006 report as a way to reduce recruiter misconduct.²⁴⁰ The Department of Defense concurred with the GAO in 1998 and again in 2006, but the Army, Navy, and Air Force still have not implemented these recommendations.²⁴¹

The failure on the part of the Department of Defense to implement these changes is inexplicable. The Marine Corps model has proven to reduce recruiter misconduct and could easily be adapted for use by all four branches and their reserve components. Use of the Marine Corps model of recruiting would also benefit civilian recruiter corporations. Compensation for civilian recruiter corporations should emphasize retaining qualified recruits rather than bringing in signed DEP contracts.

The Marine Corps' success at restoring its own reputation in this area over the past twenty-five years speaks volumes. While adopting the Marine Corps model of recruiting will not eliminate all instances of recruiter misconduct, it will significantly reduce the incentives for committing it. Wrongfully enlisted recruits are less likely to complete basic training and remain in the military because they are typically not qualified for service or were falsely promised benefits they expected to receive during service.²⁴² However, because of the way recruiting numbers are currently measured, misconduct of this sort may increase an individual recruiter's short-term personal success in the other branches of the armed forces. Simultaneously, misconduct increases long term recruiting needs when improperly enlisted troops seek a discharge from the military administratively or through rescission of the contract.

Prevention and early detection of recruiter misconduct reduces both the monetary and intangible costs to all parties involved. Adopting the Marine Corps model will further both of these goals. It will also reduce the total cost to the

²³⁷ *Id.* at 21.

²³⁸ 2006 GAO REPORT, *supra* note 10; U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY RECRUITING: DOD COULD IMPROVE ITS RECRUITER SELECTION AND INCENTIVE SYSTEMS, GAO/NSIAD-98-58, at 5 (1998). The Navy provides rewards to recruiters based on the number of recruits who complete basic training but measures the number of signed DEP contracts for quota purposes. In contrast, Marine Corps recruiters must recruit and additional person for every recruit who fails to complete basic training.

²³⁹ 2006 GAO REPORT, *supra* note 10, at 5.

²⁴⁰ *Id.* at 26.

²⁴¹ *Id.*

²⁴² *Id.* at 4-5. *See* discussion *supra* Part III explaining the appropriate remedy for these troops is rescission of the enlistment contract and an honorable discharge.

American taxpayers of maintaining an all-volunteer force by increasing the integrity of the recruiting process. Recruiting one applicant costs the Army approximately \$17,000 and putting that applicant through basic training can cost up to \$60,000.²⁴³ Costs generated by changing the manner in which recruiting is conducted are therefore likely to be made up in increased retention of more qualified personnel. By shifting the focus of recruiters from the signed DEP contract to retaining more troops, the military could significantly enhance the quality of its personnel and reduce its future recruiting needs, thereby alleviating the pressure on recruiters to commit misconduct. The Marine Corps model, however, primarily addresses issues of recruiter integrity, and thus additional avenues of relief are necessary when recruiter integrity is not in question.

B. *Court Enforcement of Promises Authorized by the Military's Branch Secretaries: The Schism Dissent*

Adopting the Marine Corps model of recruiting will significantly deter recruiters from making unauthorized promises, but it will do little to prevent the sort of promises made in *Schism* that recruiters were encouraged to make by higher-ranking officials. Chief Judge Mayer and Senior Circuit Judge Plager authored spirited and persuasive dissents in *Schism* providing a possible solution to this type of recruiter misconduct.²⁴⁴ In reaching the conclusion that the government should be responsible for the promises of its military recruiters where the military's branch secretaries authorized such promises, the dissent addressed a key argument absent from the majority opinion.²⁴⁵ "The military has used promises of free lifetime healthcare to recruit and retain personnel to perform hazardous duties, often for less pay than they could have received in the civilian sector, and *for less than it otherwise would have had to offer.*"²⁴⁶ In *Barker v. Kansas*, the Supreme Court held that military retirement benefits are considered deferred compensation for services rendered for tax purposes.²⁴⁷ The dissent contends that promises of non-monetary retirement benefits, such as lifetime free healthcare, should likewise be treated as deferred compensation for services already performed, meaning the promises would not encroach on Congress' Article I role of appropriating funds.²⁴⁸ The dissent in *Schism* would hold Congress accountable for recruiter promises because the military's branch secretaries clearly authorized the promises knowing it would reduce the amount the military would have to pay recruits outright and would alleviate difficulties in recruiting sufficient troops.²⁴⁹ "Congress knew or certainly should be

²⁴³ *Id.* at 26.

²⁴⁴ *Schism v. United States*, 316 F.3d.1259, 1302 (Mayer, J., dissenting).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1303.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1301-1303.

charge[d] with knowing, how the billions of dollars it appropriated for military pay were allocated and that the amounts it appropriated for military pay were diminished by the imputed vale of medical care on active duty and after retirement.”²⁵⁰

Promises by military recruiters in this context should be considered a form of deferred compensation for previous service, rather than a gratuity. Recruits signing up for service do so with the understanding that they will receive these benefits, and in turn agree to lower salaries and other immediate forms of compensation. If the court treats these benefits as compensation, contract law dictates that the government cannot deprive veterans who have performed their end of the bargain of the fruits of their labor. “[In 1878], the Supreme Court held that the government cannot deprive a party with which it contracts ‘of the fruits actually reduced to possession of contracts lawfully made.’”²⁵¹ The dissent also notes that the service secretaries must have intended the promises they authorized to be binding, “because a contrary intent would degrade their long-term ability to recruit new servicemen.”²⁵²

The *Schism* dissent summarizes the natural reaction many people have upon hearing that veterans did not receive the healthcare they were promised when they enlisted.

Of course Congress knew; of course the service secretaries authorized promises in return for service; of course these military officers served until retirement in reliance; and of course there is a moral obligation to these men: it is called honoring the contract the United States made with them and which they performed in full.²⁵³

The *Schism* dissent also outlines how each of the requisite elements of an implied-in-fact contract (mutuality of intent, consideration, offer and acceptance, and authority to bind the government) were present in this instance.²⁵⁴ By allowing recovery in the limited circumstances where recruiters acted according to the express instructions of the executive branch, the dissent provides a mechanism for recovery independent of Congress’ future discretion.²⁵⁵ This is important because it does not leave the recruits’ rights subject to future political influence. The dissent would also appropriately hold Congress responsible for overseeing the manner in which the military uses the billions of dollars it appropriates for military recruiting.²⁵⁶ This approach acknowledges that the government as a whole is in a unique position to prevent the military’s branch

²⁵⁰ *Id.* at 1301.

²⁵¹ *Schism*, 316 F.3d at 1301 (citing *Sinking Fund Cases*, 99 U.S. 700, 720 (1878) and *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986)).

²⁵² *Id.* at 1302-1303 (citing *Lynch v. United States*, 292 U.S. 571, 580 (1934)).

²⁵³ *Id.* at 1301.

²⁵⁴ *Id.* at 1301-1307.

²⁵⁵ *Id.* at 1301-1311.

²⁵⁶ *Id.*

secretaries from authorizing inappropriate promises of the type made in *Schism*. When the United States benefits from such promises by receiving years of faithful service at a cost lower than what it would otherwise have to pay, it has an obligation to uphold its part of the bargain.

C. *Claims in Restitution for Benefits Conferred*

The court in *Schism* clearly acknowledges that the executive branch authorized the promises military recruiters made to Schism and others similarly situated, and that the plaintiffs relied on those promises. The court also stated they “[could not] readily imagine more sympathetic plaintiffs than the retired officers of the World War II and Korean War era”²⁵⁷ Despite these concessions, the court confined its opinion to implied-in-fact contract analysis and Schism’s claims failed.²⁵⁸ In contrast, restitution would have allowed Schism and the other plaintiffs at least some recovery.

Restitution provides a more concise, logical, and consistent method of dealing with the claims that arise from misstatements and false promises that the military recruiters made. Restitution specifically confronts the issues of lack of authority and congressional ratification that rendered Schism’s implied-in-fact contract claim unenforceable. Restitution would also remedy the illogical result of allowing rescission via habeas corpus to plaintiffs who have partially performed,²⁵⁹ while providing plaintiffs who have fully performed with no remedy.²⁶⁰ Plaintiffs could obtain rescission as a restorative remedy where voiding the enlistment contract is appropriate, while plaintiffs who have already conferred a benefit on the government through performance would also have recourse.

Judge Mayer’s dissent in *Schism* alludes to a potential restitution claim in evaluating whether or not the government had violated the plaintiffs’ Fifth Amendment rights by depriving them of contract rights without just compensation.²⁶¹ In developing this analysis, the dissent repeatedly emphasizes that even if Congress did not explicitly authorize the Secretary of Defense to promise

²⁵⁷ *Id.* at 1300.

²⁵⁸ The parties in *Schism* focused on whether the enlistment agreement constituted a binding contract and did not brief the issue of restitution. See Reply Brief of Plaintiffs-Appellants on Rehearing En Banc, No. 99-1402 (Fed. Cir. December 20, 2001) 2001 WL 34629712.

²⁵⁹ See, e.g., *Grulke v. United States*, 228 Ct. Cl. 720 (1981) and *DeCrane v. United States*, 231 Ct. Cl. 951 (1982) (allowing rescission of the contract via habeas corpus where recruits had been promised specific training or duty assignments).

²⁶⁰ See, e.g., *Schism*, 316 F.3d at 1264 and *Sebastian v. United States*, 185 F.3d 1368 (Fed. Cir. 1999).

²⁶¹ *Schism*, 316 F.3d at 1302. See also *Sebastian*, 185 F.3d at 1372 (discussing whether plaintiffs in a similar position to Schism had a property right to healthcare benefits as military retirees. The court concluded they had not sufficiently established a right to the retirement benefits to justify a challenge under the takings clause of the 5th Amendment).

lifetime free healthcare to military recruits, the government and the entire nation still benefited from the government's enhanced ability to recruit troops for lower pay than they otherwise would have had to offer.²⁶² The dissent tackles this as a Fifth Amendment claim because the parties pled their case as one of implied-in-fact contract giving rise to a property right.²⁶³ However, the court does not address whether Schism would have a claim in restitution to prevent unjust enrichment of the military and the federal government resulting from the military recruiters' promises.²⁶⁴

Part II of the *Restatement (Third) of Restitution and Unjust Enrichment* provides for liability in restitution in three circumstances that are relevant to this context. Specifically, the Restatement allows recovery when a non-monetary benefit is conferred,²⁶⁵ when performance has been rendered under an agreement that is otherwise unenforceable,²⁶⁶ and when a person obtains a benefit through undue influence or by breach of a duty imposed by a relation of trust and confidence.²⁶⁷ Each of these claims will be addressed below.

Section 9 of the Restatement states that:

- (1) A person who confers on another, by mistake, a benefit other than money has a claim in restitution as necessary to prevent the unjust enrichment of the recipient. Such a transaction ordinarily results in the unjust enrichment of the recipient to the extent that:
 - (a) specific restitution is feasible;
 - (b) the benefit is subsequently realized in money or its equivalent;
 - (c) the recipient has revealed a willingness to pay for the benefit; or
 - (d) the recipient has been spared an otherwise necessary expense.
- (2) Liability in respect of a nonmoney benefit conferred by mistake may exceed the demonstrable enrichment of the recipient only if
 - (a) the recipient had notice of the claimant's mistake, yet failed to take reasonable steps to avert the resulting transfer; or
 - (b) the recipient contributed substantially to the claimant's mistake.²⁶⁸

The recruiters in *Schism* admitted to making promises of lifetime free healthcare, and Schism relied on those promises as a non-monetary benefit of em-

²⁶² *Schism*, 316 F.3d at 1310.

²⁶³ *Id.* at 1301-1312.

²⁶⁴ *Id.*

²⁶⁵ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 9 (Tentative Draft No. 1, 2001).

²⁶⁶ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 (Tentative Draft No. 3, 2004).

²⁶⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 15 (Tentative Draft No. 1, 2001); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (Tentative Draft No. 4, 2005).

²⁶⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 9 (Tentative Draft No. 1, 2001).

ployment.²⁶⁹ Declining to enforce the promises “effectively requires the retirees’ to pay the costs the government incurred as a result of promising lifetime healthcare, the very same costs for which the government assumed the burden.”²⁷⁰ The government clearly received the benefits of over twenty years of service from a significant number of troops, as well the intangible benefit of the enhanced ability to recruit and retain troops based, at least in part, on the recruiters’ promises. Conversely, “the retirees must pay twice: once in active duty pay diminished by the value of the promised retirement health care; again when they do not get what was promised.”²⁷¹ Specific restitution was feasible, and a benefit was realized in the form of loyal military service. The government also revealed a willingness to pay for that benefit by performing as promised for a number of years,²⁷² and was spared a necessary expense because active duty personnel agreed to work in hazardous occupations for less money in anticipation of the promised retirement benefits.²⁷³ Furthermore, the government substantially contributed to Schism’s mistaken belief that the recruiters’ promises were enforceable and clearly had notice of the plaintiff’s mistaken belief and did nothing to correct it. The service secretaries actively encouraged Schism to believe he would receive healthcare as a benefit of employment and the government performed by providing that care until 1995, giving Schism no reason to believe he was not entitled to the benefits as part of his employment.²⁷⁴ Therefore, Schism and others similarly situated should have been able to recover the full market value of the promised benefits in restitution, not just the amount of the benefit conferred.

The courts have permitted restitution claims against the government in several analogous cases. In *Williams v. United States*, an Air Force major purportedly contracted with Williams for the paving of certain roads on an Air Force base.²⁷⁵ However, like the recruiters in *Schism*, the major lacked actual authority to bind the government.²⁷⁶ The court in *Williams* allowed recovery on the basis that it would be inequitable to allow the government to retain the benefits conferred without paying for them.²⁷⁷ In a similar case, *Campbell v. Tennessee Valley Authority*, the court allowed Campbell to recover in *quantum meruit* for the benefit he conferred on the Tennessee Valley Authority by reproducing certain microfilm for its library.²⁷⁸ Campbell had unknowingly contracted with the director of the library who did not have the authority to enter into such an

²⁶⁹ *Schism*, 316 F.3d at 1310.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 1286.

²⁷⁵ *Williams v. United States*, 127 F. Supp. 617, 622-623 (Ct. Cl. 1955).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Campbell v. Tenn. Valley Auth.*, 421 F.2d 293 (5th Cir. 1969).

agreement. The court allowed Campbell to recover the fair market value of the benefit conferred, noting that “the basic fact of legal significance charging the Government with liability in these situations is its *retention of benefits* in the form of goods or services.”²⁷⁹ The plaintiffs in Schism’s position should also be able to recover, at a minimum, the fair market value of the benefits they conferred, less the payments actually received.²⁸⁰ Given the substantial contribution of the government to their mistaken belief as to the enforceability of the promises, awarding the value of the promised services would also be appropriate.

Section 31 of the Restatement describes another potential claim in restitution that Schism could have raised. Section 31 provides for recovery by a person who renders performance under an agreement that is unenforceable by indefiniteness or by failure to satisfy an extrinsic requirement such as the Statute of Frauds.²⁸¹ The verbal and informal written promises that recruiters made to Schism, and that were also contained in recruiting documents from the Secretary of the Air Force, could thus give rise to a restitution claim, despite the court’s determination that the underlying contract claim must fail.

In *Crocker v. United States*,²⁸² the Supreme Court allowed Crocker to recover for furnishing satchels to the Post Office, despite rescission of the underlying contract for fraud.²⁸³ The measure of damages was the fair market value of the satchels.²⁸⁴ Similarly, in *Clark v. United States*, a ship was lost at sea while being operated by the Army pursuant to an unenforceable contract.²⁸⁵ The owner of the ship was entitled to recover damages measured by the benefit conferred, including the use of the ship for eight days.²⁸⁶ The Court held that the performing party could recover against the Government for the fair value of his property or services.²⁸⁷

The Restatement specifically provides that if the claimant receives the counterperformance specified in the parties’ original agreement, then an action for unjust enrichment will not lie.²⁸⁸ Were this to apply in *Schism*, the government would have had the option of either providing the healthcare as promised or of paying restitution to the extent of the government’s unjust enrichment resulting from the recruiters’ promises. Either result is preferable to leaving

²⁷⁹ *Id.* at 298 (citing *Prestex v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963)).

²⁸⁰ *Id.* at 296.

²⁸¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 (Tentative Draft No. 3, 2004).

²⁸² 240 U.S. 74 (1916).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Clark v. United States*, 95 U.S. 539 (1877).

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 543.

²⁸⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 (Tentative Draft No. 3, 2004).

elderly veterans without promised retirement benefits. The difficulty of assigning a fixed dollar amount to the benefit conferred by Schism does not obviate the government's responsibility and weighs in favor of allowing a claim that would encourage counterperformance as an alternative to litigation. "'Restitutory' damages are a second-best approximation of what the plaintiff actually lost as a result of the defendant's breach [U]nlike a rescission, no *damage remedy* can leave the injured party better off than performance of the contract" ²⁸⁹ However, a restitution claim where the defendant has the option of counterperformance allows the defendant to weigh the cost of defending the claim against the costs of performing as promised. Counterperformance is attractive because it provides a measure of predictability, while the fair market value of the services conferred presents a complex issue of material fact to be determined by the court. This type of recovery is also ideal because it most closely approximates the parties' original agreement.

Finally, plaintiffs might seek to enforce recruiter promises on the basis of either undue influence or a violation of a duty created by the special relationship of trust and confidence between recruiters and their recruits. These claims would not provide for recovery where recruiters acted in good faith, as they did in *Schism*. However, such claims would require the recruiter who committed willful misconduct to disgorge any profits derived from the breach, which would presumably include bonuses and other awards to the extent they were the product of misconduct. While this might be redundant of some of the punishments imposed by the UCMJ, such as forfeiture of pay, unlike the UCMJ it provides the wronged recruit with recourse against the breaching party. ²⁹⁰

Section 15 of the Restatement provides:

- (1) A transfer induced by undue influence is subject to rescission at the instance of the transferor or a successor in interest. Rescission under this section includes a claim to the recovery of benefits conferred.
- (2) Undue influence is excessive and unfair persuasion
 - (a) between parties who occupy, with regard to the transaction in question, a confidential relation or a relation of dominance on one side and subservience on the other; and
 - (b) the effect of which that the free will of the transferor is overcome by the will of the person exerting undue influence.

The official comment to section 15 of the Restatement notes that a "confidential relation arises between persons whose relationship may or may not be fiduciary in a legal sense" ²⁹¹ This category of confidential relation includes relations between most family members; between religious adherent and spiritual adviser; between physician and patient; between investor and financial

²⁸⁹ Andrew Kull, *Rescission and Restitution*, 61 *BUS. LAW* 578 (2006).

²⁹⁰ See *infra* Part VII.

²⁹¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 15 cmt. b (Tentative Draft No. 1, 2001).

counselor; and between close friends and neighbors, but a confidential relation need not fall within any of these recurring patterns.²⁹² “Rather it exists whenever it can be established as a fact that one party dealt with another on a basis of special trust and confidence; or that one party was in fact subservient to the other’s dominant influence.”²⁹³

While section 15 of the Restatement recommends recovery in cases of undue influence, section 43 provides for recovery in restitution where a party obtains a benefit via the breach of an established fiduciary duty, or in breach of an equivalent duty imposed by a relationship of trust and confidence.²⁹⁴ A person breaching such a duty is accountable to the person to whom such a duty is owed. The extent of recovery depends on the culpability of the defendant.²⁹⁵ “A defaulting fiduciary, a person who breaches a duty of confidence, or a person who profits from another’s breach of duty with notice of the wrong will be required to disgorge all gains (including consequential gains) derived from the wrongful transaction. An unwitting recipient of a benefit from another’s breach of duty will be liable only for the direct benefit derived from the wrongful transaction.”²⁹⁶

Military recruiters occupy position of considerable power and influence over their recruits. They are older, well trained to sell the military to young people, and have considerable control over recruits’ future placement in the military.²⁹⁷ One victim of criminal recruiter misconduct described her relationship with her recruiter as clearly one of dominance. She remarked, “[t]he recruiter had all the power. He had the uniform. He had my future. I trusted him.”²⁹⁸ The Army’s recruiting manual also continually emphasizes “establishing trust and credibility” with potential future recruits, even those who are as young as seventh or eighth graders.²⁹⁹ Perhaps most importantly, recruiters have access to highly confidential information, including a recruit’s medical history, HIV status, drug test results, high school grades, and criminal record.³⁰⁰ The criminal sanctions of the UCMJ for official false statements and wrongful enlistment further evince the importance of the recruiter’s position of trust and integrity.³⁰¹

Thus, while recruiters are not fiduciaries in a traditional sense they are in a

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (Tentative Draft No. 4, 2005).

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ The Recruiter Handbook, US Army Recruiting Command, Manual 3-01 (August 15, 2002), available at http://www.usarec.army.mil/im/formpub/rec_pubs/man3_01.pdf.

²⁹⁸ Mendoza, *supra* note 11.

²⁹⁹ The Recruiter Handbook, US Army Recruiting Command, Manual 3-01 at 25 (August 15, 2002), available at http://www.usarec.army.mil/im/formpub/rec_pubs/man3_01.pdf.

³⁰⁰ *Id.* at 48.

³⁰¹ See *supra* note 182.

position of trust and confidence vis-à-vis their recruits, giving rise to a duty on their part. This duty weighs in favor of allowing recruits to recover for the profits derived from an opportunistic breach of that relationship of trust. However, there are also prudential concerns weighing against allowing one member of the military to sue another in this fashion. Such a divisive action could potentially interfere with the military's ability to maintain order within its own ranks, discipline, and unit cohesion.³⁰² Traditionally, courts have sought to minimize their involvement in these types of military personnel issues, deferring to the military's own management expertise.³⁰³ As was previously stated, there is also little indication that such a remedy will deter misconduct when the prospect of a court martial already is in place. For these reasons, such a remedy should be implemented only with extreme caution.

D. *A Private Right of Action: An Appropriate Remedy for Cases Concerning Civilian Recruiter Corporations*

The idea of a soldier or marine suing his or her recruiter while serving in the armed services can be unsettling for the reasons stated above. However, concerns about discipline and order are not present when recruiting is conducted by civilian employees of recruiter corporations. A different system of accountability giving recruits a private right of action against these civilian recruiters and their employers is therefore appropriate.

Civilian recruiters are not subject to the UCMJ's sanctions, including court martial and other disciplinary actions that are in place to deter traditional recruiters from committing acts of misconduct.³⁰⁴ The corporations that employ them are in a position to oversee the conduct of their employees and to ensure compliance with recruiting regulations. Liability on the part of individual civilian recruiters and their employers is appropriate to serve the same deterrent function that the UCMJ serves in the public context. Civilian recruiter corporations must be held to a comparably high standard to that of the military because of the highly sensitive task they are charged with. These corporations are best equipped to bear the risks of misconduct by their own employees and can mitigate these risks through insurance, requiring their employees to indemnify them against losses, or requiring some form of security from their employees. This will also incentivize corporations to create a general culture of compliance while their employees will remain responsible for their own conduct. Although this may lead to some instances of unnecessary litigation, that is far preferable to leaving recruits without recourse in this context.

XI. CONCLUSION

There are serious problems with the United States' military recruitment pro-

³⁰² See, e.g., *Brown v. Dunleavy*, 722 F. Supp. 1343 (E.D. Va. 1989).

³⁰³ *Id.*

³⁰⁴ See *supra* Part IX.

cess.³⁰⁵ The effects of an unpopular war and its rising death toll, coupled with an increased number of young people attending college and fewer young people meeting the military's entrance standards, have made the recruitment process tougher than ever for military personnel.³⁰⁶ In turn, increased pressure to meet difficult enlistment quotas sometimes results in military recruiter misconduct.³⁰⁷ To prevent this misconduct from occurring, the military needs to adopt the more retention-focused recruiting methods of the Marine Corps in all of its branches.³⁰⁸ In doing so, the military can remove many of the present incentives to commit recruiter misconduct that go hand in hand with the current focus on getting recruits to sign DEP contracts.³⁰⁹ Promises authorized by the military's branch secretaries should be enforceable when recruits have already performed their part of the enlistment contract, further reducing misconduct on an institutional level.³¹⁰ Finally, civilian recruiter corporations should receive compensation based on their ability to recruit service members who make it through basic training and should be liable for the misconduct of their employees.³¹¹

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³⁰⁵ 2006 GAO REPORT, *supra* note 10 at 5.

³⁰⁶ *Id.*; Kelly Kennedy, *A Weighty Concern; More Fat Youths Making it Tougher to Get Recruits*, MARINE CORPS TIMES, January 22, 2007.

³⁰⁷ 2006 GAO REPORT, *supra* note 10.

³⁰⁸ See discussion, *supra* Part X.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*