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Banging on the Backdoor Draft: The Constitutional Validity of Stop-Loss in the Military

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BANGING ON THE BACKDOOR DRAFT: THE CONSTITUTIONAL VALIDITY OF STOP-LOSS IN THE MILITARY

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INTRODUCTION

On September 14, 2001, in response to the terrorist attacks on the World Trade Center and the Pentagon just three days earlier, President George W. Bush declared a state of “national emergency” by virtue of the continued threat of terrorist attacks against the United States.¹ That same day, the President invoked his power “to suspend certain laws relating to promotion, involuntary retirement, and separation of commissioned officers”² and delegated that power to the Secretary of Defense.³ Under this authority, the various military institutions have enacted numerous “stop-loss” policies, by which military personnel are retained in service beyond the terms of their enlistment contracts. In other words, these policies aim to put a stop to the loss of military manpower during times of crisis by extending the service terms of members of the Armed Forces.

No single stop-loss policy exists. Congress actually authorized stop-loss shortly after the Vietnam War, for fear that the departure of combat soldiers would cripple the military.⁴ It was not until 1990, however, that this authority was first invoked. In preparation for the Persian Gulf War, President George H.W. Bush authorized then

1. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (“A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.”). The state of national emergency as announced in Proclamation 7463 has been extended annually, *see* 67 Fed. Reg. 58,317 (Sept. 12, 2002) (continuing the state of emergency through September 14, 2003); 68 Fed. Reg. 53,665 (Sept. 10, 2003) (continuing through September 14, 2004); 69 Fed. Reg. 55,313 (Sept. 10, 2004) (continuing through September 14, 2005), and is currently in effect, 70 Fed. Reg. 54,229 (Sept. 8, 2005) (continuing through September 14, 2006).

2. Exec. Order No. 13,223, 3 C.F.R. 785 (2002). In addition, the order provides for curtailing certain strength limitations within the various military branches and regarding various military offices. *Id.*

3. *Id.* This authority was later granted to the Secretary of Transportation as well, *see* Exec. Order No. 13,253, 3 C.F.R. 196 (2003), and then transferred from the Secretary of Transportation to the Secretary of Homeland Security, *see* Exec. Order No. 13,286, 3 C.F.R. 166 (2004).

4. *See* 10 U.S.C. § 12305 (2000) (“[D]uring any period members of a reserve component are serving on active duty ... the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.”).

Secretary of Defense Dick Cheney to suspend the retirement or separation of essential military personnel.⁵

The current wave of stop-loss policies began on December 4, 2001, when the U.S. Army announced the first of what would turn out to be many stop-loss orders.⁶ As described in the official army press release, the order allowed the Army to retain personnel possessing select skills "on active duty beyond their date of retirement, separation, or release from active duty for an open-ended period."⁷ A second stop-loss order—enacted January 2, 2002—brought the Ready Reserve and additional specialized soldiers within the ambit of the first order.⁸ In November 2002, the Army expanded stop-loss to include its entire reserve component, comprising the Army National Guard and the Army Reserve.⁹ Numerous stop-loss orders have followed, the most significant being the orders of November 13, 2003,¹⁰ and June 1, 2004,¹¹ which combined to apply stop-loss to all non-reserve soldiers deployed outside the continental United States. The result is that stop-loss currently applies to every soldier of the U.S. Army, as well as members of the Army Reserve components.

The Army is not the only branch of the military to have instituted stop-loss policies, but its policies have been the most pervasive. The Navy instituted stop-loss in January 2003 to retain certain personnel, but rescinded the order in May of the same year.¹² Similarly,

5. See Exec. Order No. 12,728, 55 Fed. Reg. 35,029 (Aug. 22, 1990) (delegating the President's authority under 10 U.S.C. § 673c (now § 12305) to the Secretary of Defense).

6. Press Release, U.S. Army, Army Announces Selective Stop-Loss (Dec. 4, 2001), available at http://www4.army.mil/ocpa/read.php?story_id_key=1412.

7. *Id.*

8. Press Release, U.S. Army, Army Announces Selective Stop-Loss 2 (Jan. 2, 2002), available at http://www4.army.mil/ocpa/read.php?story_id_key=1376.

9. Press Release, U.S. Army, Army Announces New Reserve Component Unit Stop Loss Policy (Nov. 22, 2002), available at http://www4.army.mil/ocpa/read.php?story_id_key=1251.

10. Press Release, U.S. Army, Army Announces Implementation of the Active Army Unit Stop Loss/Stop Movement Program (Nov. 17, 2003), available at http://www4.army.mil/ocpa/read.php?story_id_key=5415. Stop-movement is a program by which servicemen are prevented from moving to new assignments. Although often initiated concurrently with stop-loss programs, stop-movement will not be considered within this discussion.

11. Press Release, U.S. Army, Army Announces Change to the Active Army (AA) Unit Stop Loss/Stop Movement Program (June 2, 2004), available at http://www4.army.mil/ocpa/read.php?story_id_key=6013.

12. U.S. Navy, Navy Admin. Message No. 121/03, Termination of Stop Loss and Operational Hold (OPHOLD) Policy (May 15, 2003), available at <http://www.npc.navy.mil/ReferenceLibrary/Messages> (select year "2003"; then follow hyperlink next to message number

the Marine Corps authorized stop-loss for all active and reserve personnel in January 2003,¹³ but terminated it just four months later.¹⁴ In addition, the Air Force ordered stop-loss for forty-three officer career fields and fifty-six enlisted specialist career fields in March 2003,¹⁵ but reduced those numbers to twelve and thirty-six, respectively, in May 2003 on the grounds that “[s]top-[l]oss is inconsistent with the fundamental principles of voluntary service.”¹⁶

For purposes of this discussion, the term “stop-loss policy” will encompass all of the aforementioned policies but will refer to none specifically. The generic term will focus on the feature characteristic of all stop-loss policies: the involuntary retention of military servicemen beyond the terms of their enlistment contracts. The policies of the Army are particularly important, however, because of their widespread ramifications. It is estimated that as many as 40,000 soldiers—16,000 of whom are Reservists and National Guardsmen—have already been affected by the stop-loss policies.¹⁷ Fierce debate has arisen within the nation regarding stop-loss, with many opponents—Senators John Kerry and John McCain among them—labeling the policies as a “backdoor draft.”¹⁸ In addition, a number of servicemen have protested involuntary extension, attempting to resist stop-loss by “seeking exemptions, filing lawsuits or simply failing to report for duty.”¹⁹ Several of the legal challenges to stop-loss have already reached the federal district courts.²⁰

121/03).

13. U.S. Marine Corps, Marine Admin. Message No. 007/03, Marine Corps Stop Move and Stop Loss Policy (Jan. 7, 2003), available at <http://www.usmc.mil/maradmins/maradmin2000.nsf/maradmins> (select “MarAdmins” search option; search “007/03”).

14. U.S. Marine Corps, Marine Admin. Message No. 228/03, Termination of Stop Loss and Stop Move (May 12, 2003), <http://www.usmc.mil/maradmins/maradmin2000nsf/maradmins> (select “MarAdmins” search option; search “228/03”).

15. Press Release, U.S. Air Force, Air Force Implements Stop-Loss (Mar. 14, 2003) (on file with author).

16. Press Release, U.S. Air Force, Air Force Eases Stop-Loss Restrictions (May 15, 2003) (on file with author).

17. See, e.g., Lee Hockstader, *Army Stops Many Soldiers from Quitting*, WASH. POST, Dec. 29, 2003, at A1.

18. See Vincent J. Schodolski, *Pentagon Rule Worries Some: (‘Stop-loss’) Order Keeps Troops in Service After Terms End*, CHI. TRIB., Sept. 25, 2004, at 10.

19. Monica Davey, *Former G.I.’s, Ordered to War, Fight Not To Go*, N.Y. TIMES, Nov. 16, 2004, at A1.

20. See, e.g., *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274 (D.D.C. 2005); *Santiago v. Rumsfeld*, No. CV04-1747-PA, 2004 WL 3008724 (D. Or. Dec. 29, 2004), *aff’d*, 407 F.3d 1018 (9th Cir.

Meanwhile, the United States remains committed abroad in massive numbers.²¹ The aim of this Note is to analyze the potential challenges to the stop-loss policies that might be raised before a court.

Legal challenges to stop-loss will most likely be of three generic types: first, it can be argued that stop-loss effects a breach of the enlistment contract, for which the federal government must make recompense. Part III will consider the contractual challenge, and, in particular, the peculiar nature of enlistment contracts. Second, the executive and statutory authority on which stop-loss policies are based may be challenged. Part IV will address these challenges separately. Third, stop-loss is subject to constitutional challenge under the Fifth and Thirteenth Amendments. Part V will consider whether stop-loss violates guarantees of due process and the prohibition on involuntary servitude. Before proceeding to an assessment of the various challenges to stop-loss, however, this Note will introduce several background principles that will pervade the subsequent discussions. Part I will address these background principles. In addition, brief attention will be given to a political objection to the policies in Part II before assessing the legal challenges to stop-loss. This Note will ultimately conclude that the challenges to stop-loss are destined to fail, but will suggest that there may soon come a time when due process requires that stop-loss be limited.

I. BACKGROUND PRINCIPLES

A. A Recent Controversy: *Hamdi v. Rumsfeld*

A recent case may be helpful in predicting how the current Supreme Court might react to a stop-loss challenge. The case is *Hamdi v. Rumsfeld*,²² decided June 28, 2004. In *Hamdi*, the Supreme Court considered the legal implications of the detention of

2005), and amended by 425 F.3d 549 (9th Cir. 2005); *Doe v. Rumsfeld*, No. Civ. S-04-2080 FCD K, 2004 WL 2753125 (E.D. Cal. Nov. 5, 2004).

21. For example, an estimated 152,000 U.S. soldiers were serving in Iraq in February 2005. See Stephen J. Hedges, *Coalition Nations Look Ahead to Exit*, CHI. TRIB., Feb. 1, 2005, at 1.

22. 124 S. Ct. 2633 (2004).

a U.S. citizen (Hamdi) deemed an "enemy combatant" by the Executive. The initial inquiry was whether the Executive was authorized to detain citizens classified as enemy combatants.²³ After finding explicit congressional authorization for the detention of enemy combatants,²⁴ the Court nevertheless held that the safeguards within the detention procedure were inadequate to protect the due process rights of U.S. citizens.²⁵ In the backdrop of the Court's discussion lurked the terrorist attacks of September 11, a factual predicate of which the Court took overt notice.²⁶ The opinion, therefore, may be quite instructive on how a challenge to stop-loss would fare before the Supreme Court in the contemporary context. Reliance on *Hamdi* may not prove entirely sound, as the decisive opinion represents a mere plurality of the Court,²⁷ although only one justice would have upheld Hamdi's detention.²⁸ Nevertheless, *Hamdi* remains the most recent indicator of how the current Court will deal with post-September 11 challenges to executive and military actions.

B. A Jurisprudence of Deference

At this point, it is appropriate to take an aside to discuss the expansive deference that the judiciary has historically accorded its sister branches of government in the context of military affairs.

23. *Id.* at 2639.

24. *Id.* at 2639-40.

25. *Id.* at 2649-50.

26. The introductory paragraph to Justice O'Connor's plurality opinion recounts the terrorist attacks. *Id.* at 2635 ("On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks.").

27. Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. *Id.* at 2635.

28. Justice Thomas would have held Hamdi's detention a lawful exercise of presidential war powers. *Id.* at 2674 (Thomas, J., dissenting). Justice Souter, with whom Justice Ginsburg agreed, declined to entertain questions of due process because he found Hamdi's detention unauthorized by an act of Congress. *Id.* at 2660 (Souter, J., concurring in part and concurring in the judgment). Justice Scalia, in an opinion joined by Justice Stevens, would have vacated Hamdi's detention altogether on the grounds that such detentions are only authorized by the Suspension Clause of the Constitution. *Id.* (Scalia, J., dissenting) (discussing U.S. CONST. art. I, § 9, cl. 2).

*Rostker v. Goldberg*²⁹ demonstrates this notion in its language³⁰ and in its holding.³¹ Indeed, in *Rostker*, the Court maintained that such deference is not merely prudent, but is also constitutionally compelled.³² Deference in the military context is grounded in the "broad and sweeping" "constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end."³³ Furthermore, deference to Congress and the Executive in military matters is necessary because the judiciary is ill-equipped to competently address such matters.³⁴ Much of the spirit of this deference can be summed up in Chief Justice Hughes's famous phrase: the power to wage war is the "power to wage war successfully."³⁵ Because the Congress and the Executive are vested with broad authority in the military arena and because courts are peculiarly inexperienced in that arena, deference to the military judgments of Congress and the Executive has become a common practice of U.S. courts.

Judicial deference is not without its criticism. In particular, the practice has drawn the ire of commentators in regard to the war on

29. 453 U.S. 57 (1981).

30. *Id.* at 64-65 ("[P]erhaps in no other area has the Court accorded Congress greater deference [than] in the context of Congress' authority over national defense and military affairs").

31. In *Rostker*, the Court considered the claim that the Military Selective Service Act violated the equal protection component of the Fifth Amendment Due Process Clause because the Act discriminated by gender by not permitting women to register for the draft. *Id.* at 59. In rejecting the claim, the Court relied heavily on the fact that Congress had considered the "question of registering women for the draft" and concluded that such registration was not constitutionally mandated. *Id.* at 72-77, 83.

32. *Id.* at 67 (stating that "the Constitution itself requires such deference to congressional choice" in "the military context."). The political question doctrine may also be justified in both constitutional and prudential terms. See *infra* notes 47-49 and accompanying text.

33. *Rostker*, 453 U.S. at 65 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

34. *Id.* at 65-66.

"[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."

Id. (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

35. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934). For a general discussion of historical deference to the President in times of war, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 46-50 (1972).

terrorism that has arisen since September 11, 2001.³⁶ Moreover, the practice has at times been questioned by judges, including members of the Supreme Court. As Justice Murphy said in his oft-quoted and vehement dissent to *Korematsu v. United States*, "it is essential that there be definite limits to military discretion, especially where martial law has not been declared."³⁷ Korematsu's challenge to the internment of U.S. citizens of Japanese descent during the Second World War was famously rejected by the Supreme Court on the grounds of "[p]ressing public necessity."³⁸ A majority of the Court gave great heft and little scrutiny to the justification of internment offered by military authorities.³⁹

In dissent, Justice Murphy avowed that "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."⁴⁰ Korematsu's struggle and Murphy's dissent were vindicated forty years later when Korematsu's conviction for failing to abide by the internment order was vacated on the grounds that the military authority relied upon to support the original order contained critical omissions.⁴¹ In vacating the conviction, the district court said of the original *Korematsu* decision: "It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."⁴² Korematsu's story and its eventual resolution

36. See, e.g., Chris K. Iijima, *Shooting Justice Jackson's "Loaded Weapon" at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109, 116-17 (2004) (arguing that judicial deference to the military permits egregious racial discrimination on the part of the government); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 22-31 (2002) (same).

37. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting).

38. *Id.* at 216 (majority opinion).

39. *Id.* at 218 ("[W]e cannot reject as unfounded the judgment of the military authorities and of Congress" (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943))).

40. *Id.* at 234 (Murphy, J., dissenting).

41. *Korematsu v. United States (Korematsu II)*, 584 F. Supp. 1406, 1417-19 (N.D. Cal. 1984). In addition, in January 1998, Korematsu was awarded the Presidential Medal of Freedom—the highest award granted to civilians in the United States—in recognition of his perseverance in the face of injustice. Presidential Medal of Freedom Recipient Fred Toyosaburo Korematsu, <http://www.medaloffreedom.com/FredKorematsu.htm> (last visited Nov. 22, 2005).

42. *Korematsu II*, 584 F. Supp. at 1420.

provide a strong caution against excessive judicial deference to the military judgments of Congress and the Executive. Discussions of the propriety of stop-loss, therefore, must be sensitive to the practical reality that courts will often defer to the military decisions of Congress and the Executive, but must also be tempered by criticism which warns that deference can go too far.

C. Political Question Doctrine

Apart from the deference typically accorded to Congress and the Executive during times of war and national emergency, there exists the "political question" doctrine, which is particularly active in topics of war. The political question doctrine is a policy by which courts refuse to hear otherwise colorable constitutional claims on the theory that those claims are political in nature and therefore nonjusticiable. The doctrine has its origins in *Marbury v. Madison*, in which Chief Justice Marshall said that "the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."⁴³ Thus, as early as 1803, the Supreme Court resolved to refrain from considering disputes deemed political in nature.⁴⁴

The classic statement of the political question doctrine comes from *Baker v. Carr*.⁴⁵ In *Baker*, the Court outlined six scenarios which might transform an otherwise colorable claim into a political question:

Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need

43. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

44. *Id.* at 170.

45. 369 U.S. 186 (1962).

for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁴⁶

Scholars disagree as to whether the rationale for the political question doctrine is constitutional or prudential. Herbert Wechsler has famously articulated the former position,⁴⁷ whereas the latter has been endorsed by Alexander Bickel.⁴⁸ Language in *Baker* echoes both rationales. For example, “a textually demonstrable constitutional commitment of the issue to a coordinate political department” suggests a textual basis for political question doctrine, but “the potentiality of embarrassment from multifarious pronouncements by various departments on one question” suggests a prudential rationale.⁴⁹

Whatever the rationale for the political question doctrine, it is apparent that the doctrine has often been invoked when the claim at issue bears on the military judgment of the President or Congress.⁵⁰ Although the Supreme Court has rarely used the political question doctrine in the military context,⁵¹ lower courts have frequently used the doctrine. The Vietnam War provides a paradigm. Although numerous challenges to the constitutionality of the Vietnam conflict were brought, many were dismissed on political question grounds.⁵² In at least one case, the Supreme Court affirmed—albeit without opinion—a lower court decision that the propriety of the conflict was a political question.⁵³ More frequently,

46. *Id.* at 217.

47. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959).

48. See Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961).

49. *Baker*, 369 U.S. at 217.

50. See Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 68-78 (1977).

51. STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 172-73 (Aspen 3d ed. 2002). The authors suggest that the Supreme Court has only invoked the political question doctrine in two cases involving military issues: *Gilligan v. Morgan*, 413 U.S. 1 (1973), and *Goldwater v. Carter*, 444 U.S. 996 (1979). DYCUS ET AL., *supra*.

52. DYCUS ET AL., *supra* note 51, at 266. Many other challenges to the propriety of the Vietnam War were dismissed due to lack of standing. *Id.*

53. *Atlee v. Richardson*, 411 U.S. 911 (1973), *aff'g Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972).

however, the Court simply denied certiorari to such cases.⁵⁴ Although the mere denial of certiorari cannot be read as an express approval of the practice of lower courts to dismiss challenges to the Vietnam War as a political question, it is nonetheless the case that the lower court opinions went undisturbed.

The application of political question doctrine to the constitutionality of the Vietnam conflict was not without criticism, however. Academics⁵⁵ and Supreme Court Justices⁵⁶ alike objected to the doctrine in the context of Vietnam. Justice Douglas, in particular, opposed the practice: "The question of an unconstitutional war is neither academic nor 'political.'"⁵⁷ The vestiges of this criticism may have some effect on contemporary adjudications. For example, the District Court for the District of Columbia refused to label a challenge to the validity of the Persian Gulf War as a political question, holding instead that "courts do not lack the power and the ability to make the factual and legal determination of whether this nation's military actions constitute war for purposes of the constitutional War Clause."⁵⁸ There is reason to think that the current Supreme Court would at least consider a challenge to stop-loss, rather than to label the question "political." The plurality in *Hamdi*, although admitting that "we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war," nonetheless asserted that "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims" of constitutional authority and due process.⁵⁹ Even so, one must be mindful of the

54. See, e.g., *Mora v. McNamara*, 389 U.S. 934 (1967).

55. See, e.g., Lawrence R. Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 U. KAN. L. REV. 449, 480 (1968).

56. See, e.g., *Massachusetts v. Laird*, 400 U.S. 886 (1970) (Douglas, J., dissenting from the denial of certiorari); *Mora*, 389 U.S. at 934 (Stewart & Douglas, JJ., dissenting from the denial of certiorari).

57. *Laird*, 400 U.S. at 900 (Douglas, J., dissenting).

58. *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990).

59. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649-50 (2004). The plurality in *Hamdi* relied on language from Justice Murphy's dissent in *Korematsu*: "[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled." *Id.* at 2650 (quoting *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting)); see also *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 279 (D.D.C.

political question doctrine and its potential operation in assessments of the stop-loss policies. With the foregoing principles and a prelude to *Hamdi* in mind, the discussion now turns to the potential challenges to the stop-loss policies.

II. A QUESTION OF POLICY

Before addressing the legal challenges to stop-loss, a different sort of challenge deserves some attention: assuming that a national emergency declared by the President would authorize stop-loss, does the current emergency authorize stop-loss? More precisely, does the threat of future terrorist attacks justify extending enlistment contracts in order to prosecute conflicts abroad, such as in Iraq? It might be argued that Iraq never posed a terrorist threat to the United States, or that, even if it did at one time, it has not posed such a threat since the downfall of Saddam Hussein. Similar arguments might be made regarding the commitment of U.S. troops in Afghanistan. These sorts of policy-laden objections will no doubt infuse much of the popular discussion relating to stop-loss.

However compelling one might find these arguments, they seem destined to fail before the courts under the political question doctrine. Courts have long held that it is within the purview of the President to determine just when a national emergency exists.⁶⁰ This principle was at play in a recent challenge to the stop-loss policies. In *Santiago v. Rumsfeld*, Emiliano Santiago, a ready reservist, questioned “whether the national emergency declared by the President continues to apply to Afghanistan.”⁶¹ The court

2005) (“As to justiciability, the court notes that it would be likely to find Qualls’ claim justiciable. Recruiting activities, ‘by their very nature, involve a crucial intersection of the military and the general public that cannot be left to the sole discretion of the military.’” (quoting *Brown v. Dunleavy*, 722 F. Supp. 1343, 1349 (E.D. Va. 1989))).

60. See, e.g., *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827) (“[T]he authority to decide whether [a national emergency] has arisen, belongs exclusively to the President, and ... his decision is conclusive upon all other persons.”); see also *United States v. Yoshida Int’l, Inc.*, 526 F.2d 560, 579 (C.C.P.A. 1975) (characterizing the determination of whether a national emergency exists or persists as an “essentially political question[]” which courts will refrain from reviewing). But see *Hamdi*, 124 S. Ct. at 2674 (Scalia, J., dissenting) (stating that “whether the attacks of September 11, 2001, constitute an ‘invasion,’ for the purposes of the Suspension Clause, is a “question[] for Congress rather than this Court”).

61. *Santiago v. Rumsfeld*, No. CV04-1747-PA, 2004 WL 3008724, at *3 (D. Or. Dec. 29, 2004), *aff’d*, 407 F.3d 1018, 1020 (9th Cir. 2005), and amended by 425 F.3d 549 (9th Cir.

dismissed this contention in short order as an "essentially political issue."⁶² The question of what constitutes a national emergency sufficient to invoke emergency measures such as stop-loss is a political one; it is one for the President, rather than the judiciary, to decide with the occasional aid of Congress and the electorate.⁶³

In addition, courts routinely dismiss challenges to the President's use of force as political questions.⁶⁴ Tactical decisions, as well, are typically thought to be the exclusive province of the President as Commander in Chief of the Armed Forces.⁶⁵ All of this is to suggest that questions as to whether the threat posed by terrorist activity—on which Executive Order 13,223 and the current invocation of stop-loss are based⁶⁶—justifies the prosecution of a war in Iraq or the commitment of armed soldiers in Afghanistan are likely to be considered political questions.⁶⁷ This discussion is not meant to disparage such questions, nor to undervalue their political importance, but to suggest that the proper forum is not the courtroom, but rather the numerous instrumentalities of the political process, such as the proverbial soapbox or the floor of Congress.

2005).

62. *Id.*

63. Regarding the current emergency, Congress seems to agree that the Executive is the appropriate branch to uncover the parties responsible for the September 11 attacks. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ... in order to prevent any future acts of international terrorism against the United States" (emphasis added)).

64. *See, e.g.,* *Mahorner v. Bush*, 224 F. Supp. 2d 48, 52-53 (D.D.C. 2002) (dismissing on political question grounds a claim seeking an injunction against the use of the Armed Forces in Iraq).

65. *See, e.g.,* William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U. L. REV. 628, 638 (1970) (stating that the Commander in Chief has authority to make tactical decisions and to take prompt action during hostilities).

66. *See supra* notes 1-3 and accompanying text.

67. *But see infra* text accompanying notes 255-58 (discussing the problems posed by the indefinite nature of the "war on terror").

III. CONTRACT

A. *The Enlistment Contract*

The starting point for considerations of the legal validity of stop-loss policies must be the enlistment contract. Practically, such considerations would arise in the form of a challenge by a soldier who asserts that stop-loss is a breach of the enlistment contract to which the soldier and the government are parties. For purposes of this discussion, frequent reference will be made to Department of Defense Form 4/1 (Form 4/1).⁶⁸ This is the standard enlistment contract signed by all enlistees in the various branches of the U.S. Armed Forces and their reserve components.⁶⁹ Although Form 4/1 may be altered—via annexes—to reflect individual situations, this Note will assume the more likely scenario of a challenge brought by a soldier under the standard terms of Form 4/1.⁷⁰ Initial consideration, therefore, must be given to those terms.

1. *General Terms of the Enlistment Contract*

The terms of the standard enlistment contract are, in essence, quite simple. Section B of Form 4/1, entitled “Agreements,” contains the substance of the agreement between the parties. The soldier asserts: “I am enlisting/reenlisting in the United States [branch of service] this date for ____ years and ____ weeks beginning in pay grade ____.”⁷¹ The exchange is straightforward: the soldier commits to a specified term of service in exchange for a certain grade of pay. Yet, this is not the whole of the agreement. Section B continues by stating that “[t]he additional details of [the soldier’s]

68. U.S. DEP’T OF DEF., ENLISTMENT/REENLISTMENT DOCUMENT, DD FORM 4/1 (Jan. 2001) [hereinafter DD FORM 4/1], available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0004.pdf>.

69. Rod Powers, Military Enlistment/Reenlistment Document, <http://usmilitary.about.com/od/joiningthemilitary/l/blcontract.htm> (last visited Nov. 22, 2005) (describing Form 4/1 as “the ‘contract’ signed by all individuals enlisting in the Army, Air Force, Navy, Marine Corps, and Coast Guard, including members enlisting in the Delayed Enlistment Program (DEP), and enlisting in the National Guard and Reserves”).

70. Form 4/1 contains alternate provisions for enlistment in the Delayed Entry/Enlistment Program, which will not be addressed in this Note.

71. DD FORM 4/1, *supra* note 68. Form 4/1 provides that the term of service for first-time enlistees is, at present, eight years. *Id.*

enlistment/reenlistment are in Section C and Annex(es) ____.”⁷² Consequently, a soldier may challenge stop-loss as a breach of the general terms of Section B or of the additional requirements of Section C.

Putting aside momentarily the requirements of Section C, a challenge to the generic bargain struck shows promise. The challenge to stop-loss based on the general terms of Section B of the enlistment contract—i.e., a term of years in exchange for a grade of pay—would be that stop-loss represents a unilateral modification of the length of service term. Generally speaking, a contract modification is subject to the same legal requirements to which all contracts are subject: consideration⁷³ and mutual assent.⁷⁴ A modification that lacks the latter is therefore invalid. Exception to this general rule is frequently taken, however, to enforce fair modifications that are necessary to meet unforeseen circumstances.⁷⁵ One might argue that the national emergency on which stop-loss is justified constitutes an unforeseen circumstance which, in turn, validates a good-faith modification of the enlistment contract; yet, this argument is unpersuasive given the fact that Form 4/1 directly addresses situations of war and national emergency.⁷⁶ Looking only to Section B of Form 4/1, stop-loss would appear to be an unlawful extension of the term of service without the requisite assent of the enlisting party.

2. *Specific Terms of the Enlistment Contract*

The simple expression of terms in Section B of Form 4/1, however, does not conclude the bargain between the enlistee and the government. Section C of Form 4/1 contains several provisions that speak directly to the extension of the term of service. There are five such provisions. First, Form 4/1 provides that “[i]n the event of war” the term of service for all enlistees and reenlistees “continues until

72. *Id.*

73. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

74. *See id.* § 17.

75. *See id.* § 89(a) (permitting the modification of executory contracts in the absence of consideration “if the modification is fair and equitable in view of circumstances not anticipated by the parties”); *see also* U.C.C. § 2-209(1) & cmt. 2 (2005) (permitting modification in the commercial context so long as the contracting parties act in good faith).

76. *See infra* notes 77-82 and accompanying text.

six (6) months after the war ends.”⁷⁷ Second, members of the reserve components of the Armed Forces may have their terms of service extended during “a period of war or national emergency declared by Congress ... without ... consent” for up to six months after the period of war or emergency ends.⁷⁸ Third, ready reservists may be ordered to serve as many as twenty-four months of active duty during a “national emergency declared by the President” and their “enlistment may be extended so [they] can complete 24 months of active duty.”⁷⁹ Fourth, ready reservists who fail in their last year of service to perform “required training duty satisfactorily” may be held to extended enlistment of up to six months in order to complete their training.⁸⁰ Last, members of the Navy, Marine Corps, and Coast Guard serving on “naval vessel[s] in foreign waters ... may be retained on active duty until the vessel[s] return[] to the United States” so long as the extension of enlistment is “essential to the public interest.”⁸¹ Such persons are to be discharged within thirty days of their return to the United States.⁸²

The standard enlistment contract provides that terms of service may be extended in times of war until six months after the war ends.⁸³ Presumably, then, the war in Iraq would justify extension until six months after the war ends. One might argue that because President Bush called an end to hostilities in Iraq on May 1, 2003,⁸⁴ stop-loss was proper only through November 2003. Yet, the practical reality is that the war continues for as long as hostilities persist⁸⁵ and the U.S. military presence in Iraq is undiminished.⁸⁶ This reality seems to have influenced the result in *Qualls v. Rumsfeld*.⁸⁷ In *Qualls*, Judge Lamberth rejected a contention that stop-loss

77. DD FORM 4/1, *supra* note 68.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Form 4/1 does not indicate who is entrusted with the determination of whether the retention of personnel aboard navy vessels is “essential to the public interest.” *See id.*

82. *Id.*

83. *Id.* For a discussion of whether a formal declaration was necessary to initiate war with Iraq, see *infra* notes 156-62 and accompanying text.

84. *E.g.*, Stuart E. Eizenstat, Op-Ed., *Reconciliation, Not Just Reconstruction*, N.Y. TIMES, July 4, 2003, at A21.

85. *See id.*

86. *See supra* note 21.

87. 357 F. Supp. 2d 274 (D.D.C. 2005).

breached Qualls's enlistment contract on the grounds that the United States was at war with Iraq.⁸⁸ Judge Lamberth authored that opinion on February 7, 2005, *nearly two years after* Bush formally declared an end to hostilities in Iraq.

The standard enlistment contract also authorizes the involuntary extension of reservists for up to six months after the termination of a national emergency declared by Congress and of ready reservists for up to twenty-four months of active duty in times of national emergency declared by the President.⁸⁹ The national emergency declared by President Bush on September 14, 2001, has been consistently renewed and is currently in effect until September 8, 2006.⁹⁰ Seemingly, this national emergency would justify stop-loss as applied to some members of the National Guard and Ready Reserve within the letter of the enlistment contract. Although one might question whether a national emergency still exists in fact, it is extremely unlikely that a court would invalidate a presidential determination of national emergency.⁹¹ The indefinite nature of a national emergency predicated on the threat of terrorist attacks might pose some more difficult constitutional questions, but these are better addressed in discussions of due process.⁹²

From the foregoing discussion, it is clear that enlistees in the Armed Forces may be involuntarily retained within the terms of their enlistment contracts in the event of certain emergent circumstances such as war. Yet, extensions in each of these emergent circumstances is given a fixed term, typically six months after the circumstances terminate. By contrast, the stop-loss policies currently in force have no such limit. Rather, enlistment is extended for an open-ended period.⁹³ Whichever provision of Section C on which one relies to justify stop-loss within the terms of the enlistment contract, it seems obvious that an open-ended term of extension is ultimately unwarranted. Consequently, the stop-loss policies effect a breach of the enlistment contract between the government and the enlistee once war and national emergency come

88. *Id.* at 284.

89. *See supra* notes 77-79 and accompanying text.

90. *See supra* note 1.

91. *See supra* notes 60-63 and accompanying text.

92. *See infra* notes 256-60 and accompanying text.

93. *See supra* note 7 and accompanying text.

to an end or at least shortly thereafter. Yet, whatever bare principles govern contracts generally, it is abundantly clear that enlistment contracts are a unique species of contract, as the ensuing discussion will demonstrate.

B. Enlistment Contracts Distinguished

1. The Status Aspect

The Supreme Court elucidated the feature of enlistment contracts that distinguishes them from other types of contracts in *In re Grimley*:⁹⁴ "Enlistment is a contract; but it is one of those contracts which changes the *status*"⁹⁵ The enlisting party is transformed via the enlistment contract from citizen to soldier, or rather, his status is altered from that of citizen to that of soldier.⁹⁶ The effect of the change in status on the contractual relationship between the parties cannot be understated: "[W]here [status] is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes."⁹⁷ The Court was unequivocal in its assertions that the change in status accomplished by—and the obligations imposed by—enlistment contracts are not undone by breach on the part of either party.⁹⁸ The theory of enlistment contracts espoused in *Grimley* persists undiluted today.⁹⁹

Enlistment contracts are, therefore, distinguished from other types of contracts on the grounds that enlistment contracts are

94. 137 U.S. 147 (1890).

95. *Id.* at 151.

96. *See id.* As examples of other contracts that effect changes in status, Justice Brewer mentioned marriage contracts, by which a man and woman become husband and wife, and naturalization contracts, by which an alien becomes a citizen. *Id.* at 151-52.

97. *Id.* at 151.

98. *See id.* at 152 ("[I]t is a general rule accompanying a change of *status*, that when once accomplished it is not destroyed by the mere misconduct of one of the parties").

99. If anything, the theory of *Grimley* has gained force since its espousal in 1890. In *Bell v. United States*, the Court reaffirmed the principles of *Grimley* in emphatic language:

This basic principle has always been recognized. It has been reflected throughout our history in numerous court decisions and in the opinions of Attorneys General and Judge Advocates General. "Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes."

366 U.S. 393, 402 (1961) (quoting *Grimley*, 137 U.S. at 151).

status contracts. The language of Form 4/1 endorses the notion that enlistment contracts are distinct from other contracts, as it states that "enlistment is more than an employment agreement."¹⁰⁰ Furthermore, *Grimley* provides that a breach of contract does not invalidate enlistment contracts and the obligations they impose. This is not to say that a court could not intervene and invalidate a status contract,¹⁰¹ but breach alone will not suffice to void such a contract. Instead, some other invalidating factor¹⁰² would have to be adduced in order to void an enlistment contract.¹⁰³ In general, the theory of *Grimley* will prevent a soldier from escaping his obligations on the grounds that the government has breached the enlistment contract.

2. *The Role of Law*

An additional clause of Section C of Form 4/1 deserves consideration, as it might operate to make moot all previous discussions of breach of contract. This clause states: "Laws and regulations that govern military personnel may change without notice to [the enlistee]. Such changes may affect [the enlistee's] status, pay, allowances, benefits, and responsibilities as a member of the Armed Forces REGARDLESS of the provisions of this enlistment/reenlistment document."¹⁰⁴ By its language, the clause seems to give the government carte blanche to modify the terms of enlistment contracts via a change in laws of the United States. A colorable argument could be made that the term of service is not within the ambit of the change-in-law clause because term of service is not explicitly listed among those items subject to change (status, pay,

100. DD FORM 4/1, *supra* note 68.

101. Justice Brewer acknowledged this point. See *Grimley*, 137 U.S. at 152 ("It is true that courts have power, under the statutes of most states, to terminate those contract obligations").

102. The Second Restatement of Contracts lists "illegality, fraud, duress, [and] mistake" as examples of factors that might invalidate a contract. RESTATEMENT (SECOND) OF CONTRACTS § 214(d) (1981). For a more detailed discussion of some of these factors, see *id.* §§ 152-54 (pertaining to mistake) and *id.* §§ 159-64 (pertaining to fraud).

103. Although individual claimants might be able to escape contractual obligations on the ground of adhesion, duress, or some similar invalidating factor, it is not within the scope of this Note to address such claims. The focus, rather, is on challenges to stop-loss policies in general.

104. DD FORM 4/1, *supra* note 68.

allowances, benefits, and responsibilities). This argument seems stronger when one considers that extension of the term of service is given express attention in five other provisions of Form 4/1.¹⁰⁵ Nonetheless, the change-in-law clause suggests that the enlistment relationship is ultimately governed not by the terms of enlistment contracts, but rather by the laws of the United States.

The Supreme Court's approach in *Bell v. United States* supports the suggestion that the enlistment relationship is governed by statutory law and not by contract.¹⁰⁶ In *Bell*, the Court was called upon to determine whether soldiers taken prisoner during the Korean War were owed back pay for the period of their detention. In concluding that the soldiers were entitled to pay, the Court recalled the principles propounded in *Grimley*: enlistment contracts are unique in nature and not undone by breach on the part of either party.¹⁰⁷ The Court went on to observe, however, that "common-law rules governing private contracts have no place in the area of military pay."¹⁰⁸ Rather, the Court described "[a] soldier's entitlement" to pay during periods of detention as depending on a "statutory right."¹⁰⁹ The lesson to be learned from the Court's treatment of the contractual issue in *Bell* is that applicable domestic law will trump the common law of contract in adjudicating enlistment contract disputes. This lesson is consistent with the inclusion of the change-in-law clause in the standard enlistment contract.

When read together, *Grimley* and *Bell* stand for the following propositions. First, enlistment contracts are status contracts by which the enlistee is transformed from citizen to soldier. Second, as a consequence, neither the enlistment contract nor the obligations imposed thereby are void by breach of contract. Finally, the law of the United States, in situations in which it has spoken, takes precedence over any specific contractual language in determining the obligations that enlisted soldiers and the United States owe to one another. These principles imply that contract law will not invalidate involuntary extension of service in the form of stop-loss

105. See *supra* notes 77-82 and accompanying text.

106. 366 U.S. 393, 401 (1961).

107. *Id.* at 402.

108. *Id.* at 401.

109. *Id.* The Court grounded the entitlement in Article 57 of the Uniform Code of Military Justice. *Id.* at 401-02 (citing 10 U.S.C. § 857 (1958)).

despite the fact that such extension is probably a violation of both the general and specific terms of the standard enlistment contract. It would appear, therefore, that challenges to stop-loss must target the laws on which the policies are based rather than the terms of the enlistment contract. The justification of stop-loss in U.S. law is the next topic of discussion.

IV. CONSTITUTIONAL AUTHORITY

As authority for Executive Order 13,223, on which the stop-loss policies are said to rest, President Bush drew on both his inherent executive power and statutory authority granted by Congress.¹¹⁰ As such, this Note must consider whether stop-loss is justified by a statutory grant of authority or by the inherent power of the Executive. These considerations will be guided by Justice Jackson's eminent concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,¹¹¹ which is the immediate topic of discussion.

A. Justice Jackson's Concurrence

The starting point, as with most questions of executive action under congressional authority, is *Youngstown Sheet & Tube Co. v. Sawyer*¹¹² and, in particular, the famous concurrence of Justice Jackson.¹¹³ According to Jackson, presidential powers "fluctuate, depending upon their disjunction or conjunction with those of

110. Exec. Order No. 13,223, 3 C.F.R. 785 (2002). The order begins: "By the authority vested in me as President by the Constitution and the laws of the United States of America" *Id.*

111. 343 U.S. 579 (1952). *Youngstown* is commonly referred to as the *Steel Seizure Case*.

112. *Id.*

113. *Id.* at 634-55. (Jackson, J., concurring). In *United States v. Nixon*, a unanimous Court adopted Jackson's concurrence. See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 703, 707 (1974)). In *Dames & Moore v. Regan*, Chief Justice Rehnquist characterized Jackson's concurrence as "bring[ing] together as much combination of analysis and common sense as there is in [the] area" of presidential power. 453 U.S. 654, 661 (1981). In support of the proposition that questions of presidential authority begin with the Jackson concurrence, see Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 10-12 (1982) ("[Regarding] the relationship between the President and Congress ... [i]t is Justice Jackson's famous concurring opinion in *Youngstown* that has most influenced subsequent analysis.").

Congress.”¹¹⁴ Based on this principle of conjunction, Jackson divided executive action into three primary archetypes. The first category of action, in which the President acts pursuant to (express or implied) congressional authority (Category 1), represents the pinnacle of executive power.¹¹⁵ Presidential action that is buttressed by the authority of Congress is “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”¹¹⁶ At the opposite end of the spectrum lie presidential actions that are “incompatible with the expressed or implied will of Congress”¹¹⁷ (Category 2). Such actions must find authority in the exclusive and inherent powers of the President.¹¹⁸

The third category of presidential action concerns actions “in absence of either a congressional grant or denial of authority”¹¹⁹ (Category 3). Although an exclusive executive power may authorize these sorts of actions as well, Jackson maintained that “there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.”¹²⁰ Resolution of claims of authority in the so-called “zones of twilight” is unclear, although Jackson suggests that “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”¹²¹ With Jackson’s categorical framework in mind, discussion now turns to the topics of statutory and executive authority for stop-loss.

B. Statutory Authority

From Jackson’s opinion in *Youngstown*, it follows that executive authority for the stop-loss policies will be the strongest if supported by an express or implied grant of congressional authority. If the stop-loss policies appear contrary to the will of Congress, then only an exclusive executive power can justify the policies. It is neces-

114. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

115. *See id.* at 635-37.

116. *Id.* at 637.

117. *Id.* Although second in terms of the present discussion, this is the third category mentioned by Justice Jackson.

118. *See id.* at 637-38.

119. *Id.* at 637.

120. *Id.*

121. *Id.*

sary, therefore, to inquire as to whether stop-loss is endorsed by Congress. Beyond investigation as to potential congressional endorsement, the nondelegation doctrine may present an argument against stop-loss. Finally, reflection on an opinion of former Justice Douglas is appropriate when considering whether Congress has authorized stop-loss.

As an initial matter, Congress most likely has the power to initiate stop-loss policies. The Constitution gives Congress the power to "raise and support Armies."¹²² The Supreme Court has made clear that this power contains the power to conscript: "The constitutionality of the conscription of manpower for military service is beyond question."¹²³ If Congress has the greater power to conscript, presumably it has the lesser power to extend voluntary service. After all, conscription is not the only method of raising armies. As Justice Brewer said in *Grimley*, "[t]he government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all."¹²⁴ Stop-loss is simply another method by which the government exacts military service from its citizenry.¹²⁵

1. Delegation of the Authority To Extend Enlistment

If Congress has the power to initiate stop-loss, the question then becomes whether that power has been delegated to the President in the context of the current controversy. More directly, is the current invocation of stop-loss within Jackson's Category 1? To answer this question, one must seek to discover either express or implied congressional authorization for stop-loss, as well as any contrary indication of Congress's position on stop-loss.

122. U.S. CONST. art. I, § 8, cl. 12.

123. *Lichter v. United States*, 334 U.S. 742, 755-56 (1948) (grounding conscription in Congress's power to "raise and support Armies," and stating that the power to conscript is "inescapably express, not merely implied" (citing U.S. CONST. art. I, § 8, cl. 12)).

124. *In re Grimley*, 137 U.S. 147, 153 (1890).

125. To say that Congress has the constitutional authority to unilaterally extend enlistment contracts is not to say, of course, that this authority is not still subject to constitutional limitation. For discussion of potential limitations on Congress's authority to extend enlistment, see *infra* Part V.

a. Express Congressional Authorization

Congress has enacted numerous statutes that authorize certain presidential actions in the event of declared war or national emergency.¹²⁶ One such statute is 10 U.S.C. § 123(a), which provides:

In time of war, or of national emergency declared by Congress or the President ... the President may suspend the operation of any provision of law relating to the promotion, involuntary retirement, or separation of commissioned officers of the Army, Navy, Air Force, Marine Corps, or Coast Guard Reserve. So long as such war or national emergency continues, any such suspension may be extended by the President.¹²⁷

Executive Order 13,223, on which authority for stop-loss is said to rest, cites specifically to § 123(a) in suspending “certain laws relating to promotion, involuntary retirement, and separation of commissioned officers.”¹²⁸ It must be discerned whether § 123(a) truly authorizes stop-loss.

By its precise language, § 123(a) authorizes the President to suspend the operation of laws pertaining to the separation of commissioned officers. Absent from the statute is any language explicitly authorizing the President to extend the terms of service under enlistment contracts. The separation of officers, however, could certainly be construed to include the termination of a soldier’s term of service, officer or otherwise.

Hamdi v. Rumsfeld may be helpful in construing § 123(a). In *Hamdi*, the Supreme Court was called upon to determine whether the Authorization for Use of Military Force (AUMF)¹²⁹—issued a mere week after the September 11 attacks—authorized the

126. See, e.g., 10 U.S.C. § 12301(a) (2000) (authorizing the President to activate military reservists in “time of war or of national emergency declared by Congress”).

127. *Id.* § 123(a).

128. Exec. Order No. 13,223, § 2, 3 C.F.R. 785 (2002). Indeed, Executive Order 13,223 adopts the language of § 123(a) essentially verbatim. Congress has also provided for the suspension of promotion, retirement, and separation of members of the reserve components of the Armed Forces whenever those members “are serving on active duty,” although Executive Order 13,223 does not cite to this provision. See 10 U.S.C. § 12305(a) (2000).

129. Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

detention of enemy combatants.¹³⁰ The AUMF empowered the President “to use all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ... in order to prevent any future acts of international terrorism against the United States,”¹³¹ but made no mention of detention. Yet, in light of this broad grant of power by Congress and precedent permitting the detention of U.S. citizens designated as enemy combatants,¹³² the Court announced that “it is of no moment that the AUMF does not use specific language of detention.”¹³³

Hamdi suggests that the broad language of § 123(a)¹³⁴ will lead to a construction of the statute that authorizes stop-loss. Indeed, this was the case in *Santiago v. Rumsfeld*.¹³⁵ Santiago was a Ready Reservist whose term of service was set to expire on June 27, 2004.¹³⁶ Nonetheless, he was called to active duty in October 2004 with training and deployment to Afghanistan to follow.¹³⁷ By operation of stop-loss, his term was extended through December 24, 2031.¹³⁸ The court devoted much of the opinion to Santiago’s claim that his activation was invalid because it occurred after his original termination date.¹³⁹ The court did, however, say that 10 U.S.C. § 12305—which contains language nearly identical to § 123(a)¹⁴⁰—“state[s] that the ‘stop loss’ policy applies to any service

130. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004) (plurality opinion).

131. § 2(a), 115 Stat. at 224.

132. See *Hamdi*, 124 S. Ct. at 2640 (citing *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942)).

133. *Id.* at 2641.

134. The President is authorized to “suspend the operation of any provision of law relating to the promotion, involuntary retirement, or separation of commissioned officers” for “[s]o long as such war or national emergency continues.” 10 U.S.C. § 123(a) (2000) (emphasis added).

135. No. CV04-1747-PA, 2004 WL 3008724 (D. Or. Dec. 29, 2004), *aff’d*, 407 F.3d 1018 (9th Cir. 2005), and amended by 425 F.3d 549 (9th Cir. 2005).

136. *Id.* at *1.

137. *Id.* at *2.

138. *Id.* According to the court, the designation of December 24, 2031, was for purposes of administrative convenience. *Id.*

139. This claim was rejected by the court. *Id.* at *3.

140. Compare 10 U.S.C. § 123(a) (2000) (“In time of war, or of national emergency declared ... the President ... may suspend the operation of any provision of law relating to the promotion, involuntary retirement, or separation of commissioned officers of the [Armed Forces].” (emphasis added)), with 10 U.S.C. § 12305(a) (2000) (“[D]uring any period members of a reserve component are serving on active duty ... the President may suspend any provision of

members deemed necessary to national security.”¹⁴¹ It appears, therefore, that § 123(a) is likely to be construed to authorize stop-loss, despite the fact that the section does not mention the extension of enlistment contracts in precise language.

b. Implied Congressional Authorization

Even if § 123(a) is not held to expressly endorse stop-loss, authorization might be implied from other congressional action.¹⁴² For instance, when Congress authorized the President to use force in response to the September 11 terrorist attacks,¹⁴³ it also appropriated \$40 billion to—among other things—“provide[] support to counter, investigate, or prosecute domestic or international terrorism” and to “support[] national security.”¹⁴⁴ Appropriations are often thought to imply congressional approval of a course of military action by a President.¹⁴⁵ The \$40 billion appropriation issued on September 14, 2001, would seem to imply approval of the President’s actions taken that same day, i.e., Executive Order 13,223. Yet, in inferring congressional authorization of executive action, one ought not be overly reliant on the mere fact of appropriation, especially regarding military decisions. As the court said in *Mitchell v. Laird*: “A Congressman wholly opposed to the war’s commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting.”¹⁴⁶ The same

law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.” (emphasis added)).

141. *Santiago*, 2004 WL 3008724, at *3.

142. Justice Jackson stated that the President’s “authority is at its maximum” when the President “acts pursuant to an express or implied authorization of Congress.” *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

143. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

144. 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220, 220.

145. See, e.g., *Orlando v. Laird*, 443 F.2d 1039, 1042 & n.2 (2d Cir. 1971) (finding congressional ratification of President Johnson’s military operations in Southeast Asia in a \$700 million appropriation in connection with those operations).

146. *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973); see also War Powers Resolution, 50 U.S.C. § 1547(a) (2000) (“Authority to introduce United States Armed Forces into

might be said of appropriations in relation to Congress's attitude toward stop-loss.

Furthermore, if one assumes that § 123(a) does not expressly authorize stop-loss, congressional approval might also be implied from the mere fact that Congress has said nothing to indicate its disapproval of the use of stop-loss by the current administration. Justice Jackson suggested that in zones of twilight "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not *invite*, measures on independent presidential responsibility."¹⁴⁷ Jackson also suggested that the President's power in zones of twilight is "likely to depend on the imperatives of events."¹⁴⁸ If Congress has, in fact, remained silent on the notion of stop-loss, then President Bush may have been invited to act, especially when one considers "imperatives" such as the popular controversy regarding stop-loss¹⁴⁹ and ongoing hostilities in Iraq.¹⁵⁰ Congressional silence on the topic of stop-loss could, therefore, indicate that Congress believes it has authorized stop-loss or that it approves of the policy, whether previously authorized or not. Of course, congressional silence could simply mean that Congress has not the will to oppose the President regarding stop-loss.¹⁵¹

c. Contrary Indications of Congress's Intent

Although § 123(a) can be read to authorize stop-loss, an additional statute suggests that Congress did *not* intend to empower the President to extend enlistment contracts. The Uniform Military Training and Service Act (UMTSA) states in precise language that involuntary extensions of enlistment may occur only when *Congress*

hostilities ... shall not be inferred ... from any provision of law ... including any provision contained in any appropriation Act").

147. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (emphasis added).

148. *Id.*

149. See *supra* notes 18-20 and accompanying text.

150. See *supra* note 21 and accompanying text.

151. See, e.g., John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 878-89, 922 (1990) (arguing that in the context of presidential war making, Congress "lacks the will and/or courage" to oppose the President and "at the same time has no wish to be held accountable" for the President's war-making decisions).

declares a state of war or national emergency.¹⁵² By contrast, § 123(a), which does not speak specifically to the extension of enlistment contracts, delegates authority when Congress or the President has declared a state of national emergency.¹⁵³ Presumably, had Congress intended to authorize the involuntary extension in a national emergency declared by the President, it could have done so in the UMTSA, as it did in § 123(a).¹⁵⁴ The Defense Department's standard enlistment contract, in reciting a partial statement of existing U.S. law, gives some support to the notion that involuntary extension may be authorized only by Congress.¹⁵⁵ If Congress has reserved for itself the authority to involuntarily extend enlistment contracts, then stop-loss would fall into Jackson's Category 2 and, thus, have to be justified on executive authority alone.¹⁵⁶

At present, the argument that Congress has reserved the right to extend enlistment is likely to fail because Congress has given its approval to the current conflict. It is true that Congress has not declared war against Iraq. Yet, formal declaration is not the only method by which Congress can authorize war.¹⁵⁷ For instance, in *Orlando v. Laird*, the Second Circuit relied on the Tonkin Gulf

152. 50 U.S.C. app. § 454(c) (2000) (“[N]otwithstanding the provisions of this ... or any other Act, any person so enlisting shall not have his *enlistment extended without his consent* until after a declaration of war or national emergency by the Congress” (emphasis added)).

153. 10 U.S.C. § 123(a) (2000).

154. The plaintiff in *Doe v. Rumsfeld* proffered a version of this argument. See Petitioner's Memorandum in Support of Motion for Temporary Restraining Order, *Doe v. Rumsfeld*, No. CV S-04-2080-FCD K, 2004 WL 2753125 (E.D. Cal. Oct. 1, 2004), available at <http://www.sorgen.net/id30.htm>. Doe was a national guardsman who sought a preliminary injunction against the Secretary of Defense to prevent Doe's deployment to Iraq on the grounds that stop-loss was unlawful. The court declined to issue the injunction on the grounds that stop-loss posed no “immediate irreparable injury” to Doe because his term of enlistment had yet to expire. *Doe*, 2004 WL 2753125, at *3. The court, however, postponed issuing a final order on the merits until Doe could file a surreply. *Id.*

155. The contract provides that an enlistee's term of service may be extended “in the event of war” and that a reservist's term may be extended in “a period of war or national emergency declared by Congress.” DD FORM 4/1, *supra* note 68 (emphasis added). By contrast, ready reservists may be retained in order to complete up to twenty-four months of active duty “in [a] time of national emergency declared by the President.” *Id.*

156. See *infra* Part IV.C.

157. See, e.g., *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 41 (1800) (holding that Congress had authorized the quasi-war with France via certain statutes, despite the fact that Congress did not declare war); W. Taylor Reveley III, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1289-90 (1969) (stating that, as an alternative to declaration, joint resolution is “the most tenable method of authorizing the use of force”).

Resolution¹⁵⁸—a joint resolution—in finding congressional authorization for war in Southeast Asia.¹⁵⁹ Similarly, Congress passed a joint resolution in 2002 authorizing President Bush to use force in Iraq.¹⁶⁰ This resolution authorizes war in Iraq as the Tonkin Gulf Resolution (TGR) authorized war in Vietnam.¹⁶¹ To say that the United States is currently at war against terror by virtue of the AUMF of September 2001¹⁶² is a more difficult case, since the contours of such a war are ill defined.¹⁶³ Nonetheless, resolution of this complex problem is presently unnecessary, as Congress has authorized the war in Iraq. Thus, even if Congress intended that enlistment be involuntarily extended only when Congress had itself authorized war (via UMTSA), the UMTSA currently poses no obstacle to stop-loss because Congress has authorized war in Iraq.

From the preceding conversation, it seems likely that § 123(a) authorizes the stop-loss policies initiated under President Bush. Even if this is not the case, authorization might be plausibly implied from congressional appropriations and/or silence regarding stop-loss, though each of these actions is subject to equally plausible implications to the contrary. Although the UMTSA and portions of the standard enlistment contract seem to suggest that Congress has reserved the power to initiate stop-loss for itself, this suggestion probably does not apply in the current context, as Congress has approved the war in Iraq.

158. Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (authorizing the President "to take all necessary steps, including the use of armed force, to assist any member ... of the Southeast Asia Collective Defense Treaty").

159. *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971) ("The Tonkin Gulf Resolution ... clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia").

160. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 ("The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to ... defend the national security of the United States against the continuing threat posed by Iraq").

161. See *Doe v. Bush*, 323 F.3d 133, 144 (1st Cir. 2003); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 284 (D.D.C. 2005) (stating that in passing the Resolution Authorizing the Use of Military Force in Iraq (AUMFI) Congress "ha[d] initiated war in the same way it has initiated war since World War II").

162. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (containing delegation language similar to that of both the TGR and the AUMFI, but targeting terrorist nations, organizations, or persons).

163. See *infra* notes 255-57 and accompanying text.

2. *The Nondelegation Argument*

Having concluded that Congress has most likely authorized stop-loss in its current form, an additional point of discussion on the issue of delegation remains. A claimant challenging stop-loss might argue that even if Congress has authorized the President to unilaterally extend enlistment contracts, the grant of such authorization represents an impermissible delegation of congressional authority to the Executive. That Congress may not delegate its lawmaking authority to the Executive is a venerable principle of constitutional law.¹⁶⁴ Yet, despite the fervor with which it is often recited,¹⁶⁵ the nondelegation doctrine is applied with little rigor.¹⁶⁶ This is especially so in the national security context.¹⁶⁷ As such, it is fairly certain that stop-loss will not be struck down as an impermissible delegation of legislative power.

3. *Justice Douglas's Comment on Construction: The Credibility Gap*

Despite the likelihood that § 123(a) authorizes stop-loss, there are reasons why a court might wish to take a more limited construction of the statute. In *Morse v. Boswell*,¹⁶⁸ members of the Army Ready

164. *E.g.*, *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

165. *See id.*

166. In assessing allegations of impermissible delegation, the Court requires only that Congress provide an "intelligible principle" by which the Executive may be guided in execution of the delegated power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The Supreme Court has found this intelligible principle to be lacking and struck down congressional legislation on nondelegation grounds only twice. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

167. In *Lichter v. United States*, the Court stated, under the heading "A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes," that "[t]his power is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress." 334 U.S. 742, 778-79 (1948). *But see* Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 137 (1971) (arguing that overly broad delegation is antithetical to the proper functioning of the political process).

168. 289 F. Supp. 812 (D. Md. 1968), *aff'd mem.*, 401 F.2d 544 (4th Cir. 1968), *aff'd mem.*, 393 U.S. 802 (1968).

Reserve challenged their call to duty during the Vietnam War as a violation of their enlistment contracts.¹⁶⁹ The Supreme Court declined to hear argument in the case, but Justice Douglas suggested in dissent that care should be taken to comply with enlistment contracts whenever possible: "[w]here a reservist ... has counted on a declaration of war or of an emergency before he is called up and has a contract calling for reserve duty on those precise terms, I would, if possible, read subsequent legislation so as to preserve the promise made in that enlistment contract."¹⁷⁰ Although he conceded that Congress has plenary power to recall reservists for any purpose related to national security, Justice Douglas argued that determinations of whether Congress has, in fact, invoked that power ought to be approached cautiously.¹⁷¹ The rationale for such caution, according to Justice Douglas, is "to avoid creating a 'credibility gap' between the people and their government."¹⁷²

In light of recent and pointed criticism of the stop-loss policies, as well as recent lawsuits seeking to invalidate those policies,¹⁷³ a court might take seriously Justice Douglas's notion of a "credibility gap." The credibility gap is evident in the activities of the so-called "counter recruiters"—activists who claim that the military is misleading potential enlistees and who attempt to alert enlistees to the true nature of enlistment.¹⁷⁴ Moreover, allegations of deflated enlistment and decreased military morale abound in the popular media.¹⁷⁵ If such allegations turn out to be well-founded, one might attribute the phenomenon, at least in part, to a lack of credibility in the federal government as perceived by potential enlistees and current soldiers. In addition, the notion of a credibility gap gains increased purchase with the occurrence of incidents such as the Abu Ghraib prison scandal, which undermine public confidence in the

169. *Morse v. Boswell*, 393 U.S. 802, 803 (Douglas, J., dissenting from denial of application for stay).

170. *Id.* at 808.

171. *See id.* at 809.

172. *Id.*

173. *See supra* notes 18-20 and accompanying text.

174. *See* Rick Hampson, "Counter-recruiters" *Shadowing the Military*, USA TODAY, Mar. 8, 2005, at 13A.

175. *See, e.g.*, Dave Moniz, *Military Offering More, and Bigger, Bonuses*, USA TODAY, Feb. 21, 2005, at 2A; Thomas E. Ricks, *Survey: Troop Morale a Growing Worry*, CIN. POST, Mar. 26, 2004, at A12.

U.S. government and military institutions.¹⁷⁶ With these arguments in mind, Justice Douglas's suggestion that statutes ought not to be read to alter the terms of enlistment contracts¹⁷⁷ provides an alternative lens from which to view the effect of statutes on enlistment contracts.

C. Inherent Executive Authority

If a court were to find that Congress had not endorsed stop-loss, then Justice Jackson's concurrence in *Youngstown* suggests that the policy must find justification in the inherent and exclusive powers of the presidency.¹⁷⁸ Presumably, the inherent powers on which President Bush relied in instituting stop-loss were the commander-in-chief power¹⁷⁹ and implied executive war powers. The question of whether stop-loss can be rooted in either of these powers is broached with less analytical certainty than the question of statutory authority.

1. Intellectual Uncertainty

Although *Youngstown* provides the framework for analyzing executive action in relation to congressional authority, it may be that Justice Jackson's opinion is not particularly instructive regarding the proper contours of power inherent in the Executive.¹⁸⁰

176. See, e.g., Editorial, *The Truth About Abu Ghraib*, WASH. POST, July 29, 2005, at A22. Abu Ghraib is not the only event to shake public confidence in the military. The controversy surrounding the death of Pat Tillman is another such event. Tillman, a professional football player who gave up his career to become an Army Ranger, died as a result of friendly fire. The Army originally reported that Tillman died in a heroic charge of enemies while serving in Afghanistan, but subsequently admitted the true cause of death. Tillman's parents allege that the Army misreported the cause of death deliberately in order "to foster a patriotic response across the country." Josh White, *Tillman's Parents Are Critical of Army*, WASH. POST, May 23, 2005, at A1. For an example of disaffected soldiers, see Donna St. George, *For Injured U.S. Troops, "Financial Friendly Fire": Flaws in Pay System Lead to Dunning, Credit Trouble*, WASH. POST, Oct. 14, 2005, at A1 (describing "soldiers who [were] hit with military debt after being wounded at war").

177. See *Morse*, 393 U.S. at 808 (Douglas, J., dissenting).

178. See *supra* notes 116-17 and accompanying text.

179. U.S. CONST. art. II, § 2, cl. 1.

180. See Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 869-70 (1983) (suggesting that to begin an inquiry on inherent executive power with Jackson's opinion in *Youngstown* would

Moreover, the Supreme Court has developed no definitive framework by which to analyze claims of inherent executive power.¹⁸¹ Professor Erwin Chemerinsky suggests that the Court has used as many as four frameworks in assessing inherent executive power.¹⁸² Furthermore, while certain enumerated executive powers are easily defined,¹⁸³ the Commander-in-Chief powers are nebulous and without strict definition.¹⁸⁴ These considerations suggest that inquiries into exclusive executive power, especially in the military context, are fraught with uncertainty.

2. *The Commander-in-Chief and Executive War Powers*

The President would most likely argue that, as commander in chief of the Armed Forces, he is entitled to extend the enlistment of those persons who make up the Armed Forces. An immediate difficulty to any justification of stop-loss in terms of exclusive executive authority presents itself: the power to raise and support the Armed Forces is quite clearly delegated to Congress.¹⁸⁵ This power certainly includes the power to conscript and most likely includes the power to extend enlistment as well.¹⁸⁶ Given these facts, it is not at all obvious that stop-loss is within the Commander in Chief's power. As Justice Jackson posited in *Youngstown*, "[w]hile Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to

be a "[f]alse [s]tart"); see also Bruff, *supra* note 113, at 12-13 (noting *Youngstown's* indeterminate view on inherent executive power in absence of congressional restriction).

181. See Chemerinsky, *supra* note 180, at 870 ("The Court's holdings ... reflect [a] fundamental, unarticulated disagreement over the proper method for judicial review of inherent executive power.").

182. *Id.* at 870-78.

183. As examples of inherent executive power, Chemerinsky cites "executive privilege, impoundment, rescission of treaties, executive agreements, [and] removals of executive officials from office." *Id.* at 870.

184. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (describing the term "Commander in Chief" as "cryptic words" which "have given rise to some of the most persistent controversies in our constitutional history").

185. See *supra* Part IV.B.

186. See *supra* notes 122-23 and accompanying text.

command.”¹⁸⁷ A justification for stop-loss in the commander-in-chief power, therefore, seems dubious.

The “war powers” of the President are equally nebulous, and also less secure in constitutional text. Yet, whatever war powers may inhere in the title of Commander in Chief, the sum of war powers does not belong exclusively to the President. Rather, as Jackson said in *Youngstown*, the war powers are shared with Congress: “[The President] has no monopoly of ‘war powers,’ whatever they are.”¹⁸⁸ This is especially so in the context of stop-loss, where constitutional authority seems to have been given exclusively to Congress.¹⁸⁹ As such, a justification of stop-loss in terms of executive war powers seems as dubious—or perhaps more so—than a justification in the commander-in-chief power.

From the foregoing discussion, it seems likely that stop-loss is not authorized in the exclusive authority of the Executive. If, in addition, Congress’s will regarding stop-loss is unknown, then twilight shrouds the subject and the validity of stop-loss will likely “depend on the imperatives of events.”¹⁹⁰ Unfortunately, this conclusion provides scant prediction as to the validity of stop-loss. Perhaps here, the analysis devolves into the political question doctrine.¹⁹¹

187. *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). Jackson also posited that “the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.” *Id.* at 643-44. Justice Souter affirmed this principle, with citation to *Youngstown*, in his concurrence to *Hamdi*. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2659 (2004) (Souter, J., concurring in part and concurring in the judgment) (citing *Youngstown*, 343 U.S. at 643-44 (Jackson, J., concurring)). Certainly, the use of soldiers is a matter of military policy, but the terms of voluntary enlistment may well be a civilian affair, as suggested by the delegation to Congress—the popular branch of government—of the authority “to raise and support Armies.” See U.S. CONST. art. I, § 8, cl. 12.

188. *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring); see also *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970) (requiring “some mutual participation” by Congress and the Executive in order to constitutionally commit the United States to war).

189. See *supra* notes 184-85 and accompanying text (regarding the immediate difficulty faced by claims of exclusive executive authority for stop-loss).

190. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). That is to say, stop-loss would fall into Jackson’s Category 3. See *supra* text accompanying notes 118-20.

191. See Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 375 n.84 (1994-1995) (“The judicial doctrine[] of ... political question [is] designed to limit judicial intervention when abstract theories of law are not adequate to the ‘imperatives of events and contemporary imponderables’” (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))).

3. Potential Treatment in the Supreme Court

What then is to be said of a justification of stop-loss in terms of the Executive's powers as Commander in Chief or in times of war? It may be telling that in *Hamdi*, the Supreme Court declined to determine whether "the Executive possesses plenary authority to detain [enemy combatants] pursuant to Article II of the Constitution."¹⁹² Only Justice Thomas was prepared to hold that the detention of military combatants was a valid exercise of executive power.¹⁹³ Furthermore, in *Rumsfeld v. Padilla*, decided the same day as *Hamdi*, the Court also declined to answer questions of plenary presidential power in military matters.¹⁹⁴ It is, therefore, unknown to what extent the current Court would ascribe plenary war power to the Executive. If nothing else, *Hamdi* and *Padilla* demonstrate a reluctance on the part of the current Court to decide matters of inherent executive competence in military matters. It is likely that the Court would either stay its hand in determinations of inherent executive authority¹⁹⁵ or resort instead to the political question doctrine.¹⁹⁶

192. *Hamdi*, 124 S. Ct. at 2639 (plurality opinion).

193. *Id.* at 2674 (Thomas, J., dissenting) ("This detention falls squarely within the Federal Government's war powers").

194. See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004). Padilla, like Hamdi, was a U.S. citizen detained as an enemy combatant, though the former was captured while inside the United States, *id.*, and the latter captured while overseas, *Hamdi*, 124 S. Ct. at 2635-36. Padilla brought suit alleging that the detention violated his rights as guaranteed by the Fourth, Fifth, and Sixth Amendments. *Padilla*, 124 S. Ct. at 2716. The government responded with two arguments: (1) Padilla's detention was a proper exercise of the President's power as Commander in Chief, and (2) the Southern District of New York lacked jurisdiction to hear Padilla's habeas claim. *Id.* The district court accepted the government's contention that the President was empowered as Commander in Chief to detain enemy combatants, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 587-99 (S.D.N.Y. 2002), but the Second Circuit disagreed, see *Padilla v. Rumsfeld*, 352 F.3d 695, 710-24 (2d Cir. 2003). The Supreme Court, however, declined to resolve the conflict between the lower courts, instead dismissing Padilla's claim on the jurisdictional issue. *Padilla*, 124 S. Ct. at 2715.

195. This is especially likely if an alternative justification for stop-loss is available to the Court. See *supra* Part IV.B (discussing the statutory authority for stop-loss).

196. See Destro, *supra* note 191, at 375 n.84.

V. CONSTITUTIONAL LIMITATION

Even if it is determined that stop-loss is within the authority of the Executive—either inherently or by virtue of statutory grant—the policy remains subject to constitutional limitation.

That the Executive and Congress are entitled to great deference in the arena of military affairs is a common theme in Supreme Court jurisprudence.¹⁹⁷ This deference applies even in cases in which civil liberties are at issue, as *Korematsu v. United States* demonstrates.¹⁹⁸ Several scholars have suggested that the maxim *inter arma silent leges*—“in time of war the laws are silent”¹⁹⁹—accurately describes the Court’s treatment of civil liberties during times of war, at least in part.²⁰⁰ Chief Justice Rehnquist has authored a similar opinion.²⁰¹ “Without question,” the Chief Justice wrote, “the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war”²⁰²

Yet, deference to the military judgments of Congress and the Executive is not without constitutional limit, as *Ex parte Milligan*²⁰³ makes abundantly clear. *Milligan* is perhaps the most famous

197. See *supra* Part I.B.

198. See *supra* notes 37-40 and accompanying text; see also *Schenck v. United States*, 249 U.S. 47, 52 (1919). In *Schenck*, the Court upheld the conviction of a general secretary of the Socialist Party of the United States under the Espionage Act of 1917, which made it unlawful to obstruct recruitment into the Armed Forces. *Id.* at 48-49. *Schenck* had distributed leaflets through the mail comparing conscription to conviction and alleging a violation of the Thirteenth Amendment. *Id.* at 50-51. His conviction was upheld on the grounds that, in the context of war, the leaflets posed a “clear and present danger” to the war effort. *Id.* at 52.

199. BLACK’S LAW DICTIONARY 948 (rev. 4th ed. 1968).

200. See, e.g., Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815, 1830-32 (2003); Garrett Epps, *The Bill of Rights*, 82 OR. L. REV. 517, 525-26 (2003).

201. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218-24 (1998). Rehnquist’s account is meant to be almost entirely descriptive. The Chief Justice gave no opinion as to the constitutional propriety of the silence of the laws in times of war, other than to say that as a result of the historical treatment of civil liberties “it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government’s claims of [military] necessity as a basis for curtailing civil liberty.” *Id.* at 224-25. Recall that it was then Justice Rehnquist who authored the majority opinion in *Rostker v. Goldberg*, 453 U.S. 57 (1981). For a discussion of *Rostker*, see *supra* notes 29-34 and accompanying text.

202. REHNQUIST, *supra* note 201, at 218. Rehnquist limits his account to cases of declared war, but stipulates that insurrection is the “equivalent of a declared war.” *Id.* For purposes of this discussion, the distinction between declared war and undeclared war remains untreated. See *supra* notes 151-62 and accompanying text.

203. 71 U.S. (4 Wall.) 2 (1866).

statement of civil liberties in the military context ever uttered by the Supreme Court. In his oft-quoted opinion, Justice Davis suggested that threats to national security frequently pollute constitutional inquiries: "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question."²⁰⁴ Further, in strong language, Justice Davis charged the Court with the duty of overthrowing unlawful military rules:

By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings.²⁰⁵

Although there may be some cause for retreating from the fervor of the *Milligan* dicta,²⁰⁶ "[t]he ramifications of the *Milligan* case are with us to this day."²⁰⁷ With the warning and charge of *Milligan* in mind, the discussion turns to notions of involuntary servitude and due process.

A. Involuntary Servitude

The Thirteenth Amendment to the Constitution provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."²⁰⁸ *United States v. Kozminski*²⁰⁹ defined the Thirteenth Amendment's conception of involuntary servitude. Under *Kozminski*, the Thirteenth Amendment is violated when a person is compelled "by the use or threatened use of physical or

204. *Id.* at 109.

205. *Id.* at 119.

206. See, e.g., William H. Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L.J. 927, 935-37 (1997) (discussing the Court's "retreat from the dicta of *Milligan*").

207. *Id.* at 927.

208. U.S. CONST. amend. XIII, § 1.

209. 487 U.S. 931 (1988).

legal coercion" to render services.²¹⁰ Certainly, on its face, stop-loss would appear to be the compulsion of services via legal coercion, as soldiers under a stop-loss order who attempt to depart the military are subject to the legal punishments due a deserter. Yet, the inquiry is not so facile as that.

No one would contend this late in the day that conscription violates the Thirteenth Amendment. As has been said before, conscription is undoubtedly a constitutional exercise of governmental authority.²¹¹ This is true despite the fact that conscription poses a "vital interference with the life, liberty and property of the individual."²¹² In addition, numerous circuit courts have held that conscription, even in times of peace, does not violate the Thirteenth Amendment, and the Supreme Court has disturbed none of these opinions.²¹³ Conscription is distinguished from compulsory labor on the theory that the former is viewed as a civic duty that the citizen owes to the state.²¹⁴ The Thirteenth Amendment "certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc."²¹⁵ As an extension of military service, stop-loss seems to fall within the notion of civic duties.

By contrast, the ambit of activities that constitute compulsory labor is relatively narrow. "Modern day examples of involuntary servitude have been limited to labor camps, isolated religious sects, or forced confinement."²¹⁶ Stop-loss does not seem analogous to any of these examples. Given the unconditional language with which courts have traditionally upheld conscription and the characterization of military service as a civic duty, it seems unlikely that any court would hold that stop-loss violates the Thirteenth Amendment.

210. *Id.* at 948.

211. *See supra* notes 121-22 and accompanying text; *see also* The Selective Draft Law Cases, 245 U.S. 366, 387-88, 390 (1918) (holding that a selective draft is a valid exercise of Congress's power to raise armies, and that such a draft does not violate the Thirteenth Amendment).

212. *Lichter v. United States*, 334 U.S. 742, 756 (1948).

213. *See, e.g., United States v. Holmes*, 387 F.2d 781, 784 (7th Cir. 1968), *cert. denied*, 391 U.S. 936 (1968); *Badger v. United States*, 322 F.2d 902, 908 (9th Cir. 1963), *cert. denied*, 376 U.S. 914 (1964).

214. *Butler v. Perry*, 240 U.S. 328, 332-33 (1916).

215. *Id.* at 333.

216. *Steirer ex rel. Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 999 (3d Cir. 1993). The Third Circuit went on to list examples of typical Thirteenth Amendment violations. *Id.*

This is not to say that the Constitution poses no barrier to the infliction of involuntary extension, but rather that such extension is not prohibited outright by the unconditional language of the Thirteenth Amendment. If stop-loss is to be subject to constitutional limitation, such limitations must derive instead from the Due Process Clause.

B. Due Process

Despite judicial deference, Congress remains subject to the Due Process Clause of the Fifth Amendment in military matters.²¹⁷ The Fifth Amendment guarantees that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.”²¹⁸ A soldier might object that stop-loss is a deprivation of liberty without due process in that he is compelled to surrender his liberty when called to continue in military service beyond his term of enlistment. Assessment of the due process claim requires a two-part process. First, it must be determined whether there is a protected interest at risk of deprivation. If so, then that interest must be balanced against competing governmental interests.

1. Liberty Interest

The threshold inquiry in considerations of due process is whether the claimant presents a protected interest in liberty or property.²¹⁹ A soldier affected by stop-loss might present a liberty interest in multiple ways. On the one hand, a liberty interest might be stated simply as the interest in being free from compulsory labor. The problem with this statement is that stop-loss is unlikely to be

217. The majority concedes this point in *Rostker*, despite its sweeping endorsements of deference: “None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause.” *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)); see also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004) (plurality opinion) (“[D]ue process demands that ... an enemy combatant be given a meaningful opportunity to contest ... detention”); *id.* at 2660 (Souter & Ginsburg, JJ., concurring in part) (stating no disagreement with the plurality due process holdings).

218. U.S. CONST. amend. V.

219. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570-71 (1972); see also *Yashon v. Hunt*, 825 F.2d 1016, 1020-21 (6th Cir. 1987) (noting that whether a plaintiff has a protected interest is a threshold question).

equated with compulsory labor within the meaning of the Thirteenth Amendment.²²⁰ Yet, just because conscription does not amount to involuntary servitude does not mean that soldiers have no liberty interest in the timely termination of service. Another dissent from Justice Douglas gave elegant and forceful articulation to the interest of a soldier who is compelled to serve. Douglas disagreed with denying leave to a conscripted soldier who sought an injunction to stop the Vietnam War:

There is, of course, a difference between this case and the *Prize Cases* and the *Steel Seizure Case*. In those cases a private party was asserting a wrong to him: his *property* was being taken and he demanded a determination of the legality of the taking. Here the *lives* and *liberties* of Massachusetts citizens are in jeopardy. Certainly the Constitution gives no greater protection to *property* than to *life* and *liberty*.²²¹

The liberty, therefore, might be stated as the interest in being protected from involuntary extension of enlistment. Judge Lamberth took this approach in *Qualls v. Rumsfeld*, although he merely assumed for the sake of argument that such an interest was protected by due process rather than announcing an argument.²²² Judge Lamberth's assumption and Justice Douglas's words may imply that "involuntary extension is a deprivation of liberty."²²³

On the other hand, the liberty interest of a soldier serving under stop-loss might be described in terms of the opportunities of which the soldier is deprived by stop-loss. In *Board of Regents v. Roth*, the Supreme Court said that "[w]ithout doubt" the liberty guaranteed by the Due Process Clause "denotes ... the right of the individual ... to engage in any of the common occupations of life ... [and to] establish a home and bring up children."²²⁴ A member of the Armed Forces for whom enlistment is involuntarily extended will necessarily lose control over his career and potentially miss out on desirable employment opportunities. In addition, a serviceman operating under stop-loss might well be prevented from beginning a family or

220. See *supra* Part V.A.

221. *Massachusetts v. Laird*, 400 U.S. 886, 899 (1970) (Douglas, J., dissenting).

222. *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 285 (D.D.C. 2005).

223. *Id.*

224. *Roth*, 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

from watching his children grow up.²²⁵ This conception of the liberty at stake in stop-loss challenges strengthens the notion that such challenges present an interest subject to due process protections.

2. Mathews Balancing

Assuming a member of the Armed Forces has a protected liberty interest against involuntary extension of service, it must be established just what the Due Process Clause requires to protect that interest. The test “for determining the procedures that are necessary to ensure that a citizen is not ‘deprived of life, liberty, or property, without due process of law,’ is the test that [the Supreme Court] articulated in *Mathews v. Eldridge*.”²²⁶ *Mathews* posited that determinations of due process involve balancing three interests.²²⁷ First, consideration must be given to the “private interest” implicated by the governmental action.²²⁸ Second, courts must consider the risk that the private interest will be subject to “erroneous deprivation” by the existing procedures and the value of “additional ... safeguards.”²²⁹ Finally, courts must weigh “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”²³⁰

The applications of *Mathews* balancing to stop-loss presents a collision of monumentally important interests. On the one side, there exists the weighty interest of the government in the successful prosecution of war and in furnishing the materials and manpower

225. The court in *Qualls v. Rumsfeld* took notice of the significance of the loss of the companionship of one’s family. *Qualls*, 357 F. Supp. 2d at 286 (citing *Parrish v. Brownlee*, 335 F. Supp. 2d 661, 668 (E.D.N.C. 2004)). In addition, the plaintiff in *Santiago v. Rumsfeld* complained of the effect his extended service would have on his family. No. CV04-1747-PA, 2004 WL 3008724, at *2 (D. Or. Dec. 29, 2004), *aff’d*, 407 F.3d 1018 (9th Cir. 2005). Similarly, the plaintiff in *Doe v. Rumsfeld* stressed that he was the father of two young children with whom he was actively involved. Plaintiff’s Memorandum in Support of Motion for Temporary Restraining Order, *supra* note 154.

226. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (citations omitted).

227. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

228. *Id.*

229. *Id.*

230. *Id.*

requisite for such success.²³¹ On the other side of the equation lies the paramount interest of the individual to be free from compulsory labor, as well as the interests in directing the course of one's occupation and building a family.²³² The Due Process Clause, as the *Mathews* Court interpreted it, requires that these two interests be reconciled in such a way as to prevent the erroneous deprivation of liberty without process.²³³

In *Hamdi*, the Supreme Court balanced two robust interests, similar to those at play in the stop-loss controversy.²³⁴ "[T]he most elemental" individual "interest in being free from physical detention by one's own government"²³⁵ was pitted against "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."²³⁶ The Court held that due process requires that enemy combatants have notice of the factual bases for their detention and an opportunity to contest those facts before a neutral tribunal.²³⁷ Perhaps more striking, however, is the rhetoric that accompanied the holding of *Hamdi*. Justice O'Connor wrote:

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.²³⁸

The holding and—more directly—the rhetoric of *Hamdi* suggest that the current Court will not simply shy away from the liberty

231. See *Lichter v. United States*, 334 U.S. 742, 755-56 (1948); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

232. See *supra* notes 223-24 and accompanying text.

233. *Mathews*, 424 U.S. at 334-35.

234. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646-47 (2004) (plurality opinion).

235. *Id.* at 2646.

236. *Id.* at 2647.

237. *Id.* at 2648.

238. *Id.*

implications of stop-loss under the guise of deference to the coordinate branches of government.

3. *Due Process Limitations on Stop-Loss*

The penultimate inquiry, then, is this: what does due process require in the involuntary extension of enlistment contracts? *Qualls* held that, at the least, notice is required, but that the terms of the standard enlistment contract provided soldiers with adequate notice of stop-loss.²³⁹ If one of the concerns aroused by stop-loss is that the reasonable expectations of enlistees are being violated, then a notice requirement makes sense. *Qualls* is almost certainly correct in stating that due process demands that soldiers be given prior notice of stop-loss. As the Supreme Court said in *Mathews*, notice is part of the "essence of due process."²⁴⁰ One might question whether the terms of the enlistment contract do, in fact, afford adequate notice, considering the number of soldiers who have resisted stop-loss²⁴¹ and the claims of various "counter-recruiters" that enlistees are being misled by the military.²⁴² These concerns are lessened, however, by the fact that the military branches have published notice of the stop-loss policies in various press releases and administrative messages.²⁴³ Although it seems that due process requires that service members be given advance notice of involuntary extension, it is likely that adequate notice is given.

Yet, might something more than notice be required? The Court in *Mathews* did not stop at notice in describing the core of due process requirements: "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"²⁴⁴ The *Hamdi* Court reaffirmed the importance of a hearing, citing *Cleveland Board of*

239. *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 285 (D.D.C. 2005) (citing *Parrish v. Brownlee*, 335 F. Supp. 2d 661, 671-72 (E.D.N.C. 2004)). The provisions of the enlistment contract found to provide adequate notice are discussed *supra* notes 77-81 and accompanying text.

240. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

241. See *supra* note 19 and accompanying text.

242. See *supra* note 174 and accompanying text.

243. See *supra* notes 6-16 and accompanying text.

244. *Mathews*, 424 U.S. at 348 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

Education v. Loudermill for the proposition that an appropriate hearing is “[a]n essential principle of due process.”²⁴⁵ The opinion in *Qualls* implied that due process would protect soldiers from arbitrary and capricious decisions to extend enlistment, but that such capriciousness is ruled out by the fact that “similarly situated enlistees” are treated alike—i.e., they are all “subject to the standard terms of the enlistment contract and statutes.”²⁴⁶ Yet, the language in the *Mathews* and *Hamdi* opinions suggests that like treatment will not satisfy the demands of due process. The suggestion is that an “appropriate hearing” is required.

Of course, if the stop-loss policies are unconditional and apply to all similarly situated soldiers, then one might wonder what the point of a hearing would be. Perhaps the object of a hearing would simply be to ensure that no administrative error occurred in the extension of an enlistee’s term. Yet, an alternative would be to require an opt-out provision in the stop-loss policies—i.e., to allow certain qualified enlistees to opt out of extension. The criteria for qualification could be any number of factors, such as age, length of prior service, family size, income level, or a combination of these factors. Another alternative would be to allow qualified enlistees to elect to serve their extended term domestically, as conscientious objectors have been directed to domestic or civilian service in the past.²⁴⁷

In holding as it did in *Hamdi*, the Court was careful to point out that the due process requirements it imposed would not have a “dire impact on the central functions of warmaking.”²⁴⁸ It could certainly be argued that any hearing requirement regarding stop-loss might pose dire consequences for the prosecution of war, in terms of administrative cost. Yet, it must be noted that due process does not always require a formal hearing, the costs of which might be exorbitant in the aggregate.²⁴⁹ An appropriate hearing could be as

245. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (plurality opinion) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)).

246. *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 285 (D.D.C. 2005).

247. Paul M. Landskroener, Note, *Not the Smallest Grain of Incense: Free Exercise and Conscientious Objection to Draft Registration*, 25 VAL. U. L. REV. 455, 456 n.7 (1991).

248. *Hamdi*, 124 S. Ct. at 2649.

249. See, e.g., *Londoner v. City & County of Denver*, 210 U.S. 373, 386 (1908) (“[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument *however brief*, and, if need be, by proof, *however informal*.” (emphasis

simple as a written request to a claims officer charged with making objective evaluations of the claims. The cost of informal hearings might be no more severe than the cost of litigating the various legal challenges to stop-loss or prosecuting soldiers who resist involuntary extension.²⁵⁰

The cost of some sort of opt-out program is, of course, more severe, as it is measured in manpower as well as administrative cost. Yet, the government was able in the 1960s and 1970s to prosecute the war in Vietnam in spite of the conscientious objector exemption to involuntary service.²⁵¹ This is true despite the fact that conscientious objection was much more frequent in Vietnam than in the two world wars.²⁵² A provision allowing qualified soldiers to opt out of stop-loss—either entirely or in favor of domestic service—might help to assuage the credibility gap lurking between the citizens and the military²⁵³ and also to restore an element of voluntarism to voluntary military service.²⁵⁴ Although an opt-out provision might seem far-fetched to some, the story of one opponent of stop-loss suggests that this is not so. Former Army Captain Jay Ferriola was honorably discharged after he brought suit against the military alleging that stop-loss did not prevent his resignation from the Army.²⁵⁵

A final issue warrants discussion. An additional argument might be made that stop-loss, though valid in its first instantiation, must have necessary limits in terms of duration in order to satisfy the Due Process Clause. One wonders if there can be “definite limits to

added)).

250. See *supra* note 19 and accompanying text.

251. See, e.g., Recent Case, *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), 83 HARV. L. REV. 453, 459 (1969) (suggesting that costs of exemption in terms of money and manpower were not extreme).

252. See Matthew G. Lindenbaum, *Religious Conscientious Objection and the Establishment Clause in the Rehnquist Court: Seeger, Welsh, Gillette, and § 6(j) Revisited*, 36 COLUM. J.L. & SOC. PROBS. 237, 242 (2003). Admittedly, Vietnam might not be the best example of a successful prosecution of war, but any supposed lack of success is unlikely to be attributed entirely to the conscientious objector exemption.

253. See *supra* notes 171-75 and accompanying text.

254. Recall that when the Air Force limited its stop-loss provisions it stated that “[s]top-[l]oss is inconsistent with the fundamental principles of voluntary service.” See *supra* note 16 and accompanying text.

255. Patrick Healy, *Veteran Wins His Discharge After Taking Army to Court*, N.Y. TIMES, Nov. 6, 2004, at B4.

military discretion”²⁵⁶ in the context of a war without definition. The experience of Emiliano Santiago is telling: although the standard enlistment contract permits involuntary extension until six months after a war terminates,²⁵⁷ Santiago’s term was increased by an astounding twenty-seven years.²⁵⁸ Justice O’Connor, writing for the plurality in *Hamdi*, “recognize[d] that the national security underpinnings of the ‘war on terror,’ although crucially important, are broad and malleable” and, therefore, it was “not far-fetched” to suppose that “Hamdi’s detention could last for the rest of his life.”²⁵⁹ If one considers that the *Hamdi* decision is partially a product of the indefinite nature of the “war on terror,” then it may be that challenges to stop-loss are more likely to succeed as the policies grow more prolonged, or that at some point stop-loss would become impermissible under the Fifth Amendment. Of course, the alternative to stop-loss is a draft, and it seems unlikely that a court would ever issue a decision that would, in effect, mandate a draft.²⁶⁰

CONCLUSION

The outlook for enlistees who wish to challenge stop-loss in court does not seem especially bright, at least at present. Although stop-loss may well effect a breach of the general terms of the enlistment contract, the specific terms provide for extension in times of war, such as those in which the nation now lingers. Moreover, the enlistment relationship and an enlistee’s corresponding duties are unlikely to be undone by breach of contract and are likely to be governed by statutory law rather than the common law of contracts. Unfortunately for aggrieved enlistees, the statutory authority for stop-loss seems fairly solid. Furthermore, stop-loss does not violate the Thirteenth Amendment, and due process may require no more than adequate notice, which has probably been provided.

Yet, there may be some reason for optimism among protesting enlistees. Due process may require more than notice—perhaps a

256. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting).

257. See *supra* notes 77-78 and accompanying text.

258. See *supra* notes 134-37 and accompanying text.

259. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004) (plurality opinion).

260. On the other hand, if enlistment continues to decline and deployment continues to increase, a draft may be the inevitable consequence.

hearing, or perhaps a provision by which qualified enlistees can opt out of stop-loss. In addition, stop-loss may only be valid for so long as war exists. The open-ended nature of stop-loss may violate the enlistment contract in the absence of war, and the statutory authority for stop-loss seems somewhat less certain without war. This is important because due process might require that the indefinite nature of the war on terror eventually be given some definition in order to continue to justify stop-loss. Finally, Congress might be moved to revoke authorization for stop-loss as opposition increases and the credibility gap between the government and the people widens. Were Congress to revoke the statutory authority for stop-loss, exclusive executive authority seems unable to justify the policies.²⁶¹ So, there is hope for the aggrieved enlistee, though it may not be soon in coming.

Having completed the legal assessment of stop-loss, a parting note must be offered, which may be as important as all that has gone before. In times of war, passions often rule in place of reason.²⁶² Whatever might be the appropriate legal response to the problems proposed by stop-loss, the tumult of the day might prevent that response from coming to the fore. Yet, as the passions come to rest and reason comes to regret its abdication, the appropriate lawful response is able to emerge.²⁶³ As the nation moves farther and farther away from the attacks of September 11, 2001, and the war in Iraq, a tempered discussion of legal issues becomes more and more likely. Perhaps that time has already come; perhaps it is a ways away.

Legal analyses aside, presidents often push—if not completely ignore—the boundaries of the Constitution in times of war,²⁶⁴ and

261. As courts are unlikely to strike down stop-loss, it ultimately falls to Congress to address the problems posed by the policies. Although aggrieved soldiers are unlikely to achieve redress through an Article III court, they may well succeed in the court of public opinion, thus spurring Congress to act. Given the enormity of the issue and the viable—if not unassailable—grounds for judicial deference in military matters, this may be the proper result. Should Congress fail to react, however, one fears for the right of enlistees such as Emiliano Santiago whose service was extended involuntarily until 2031.

262. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 109 (1866); James R. Dawes, *Language, Violence, and Human Rights Law*, 11 YALE J.L. & HUMAN. 215, 227 (1999).

263. *Milligan*, 71 U.S. (4 Wall.) at 109.

264. As Franklin Roosevelt's former Attorney General Francis Biddle said: "[T]he Constitution has never greatly bothered any wartime President." FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962).

frequently presidential action goes unchecked by Congress or by the courts. In *Holtzman v. Schlesinger*²⁶⁵ the Second Circuit considered the constitutionality of the continued bombing of Cambodia.²⁶⁶ In dissent, Justice Oakes stated tersely: "That the Executive Branch had the power to bomb in Cambodia, there can be no doubt; it did so, and indeed is continuing to do so. Whether it had the constitutional authority for its action is another question."²⁶⁷ Oakes's statement suggests that the President's *power* is not equal to the President's constitutional *authority* in times of war—often the former quite exceeds the latter. This suggestion makes sense when one recalls the deference shown to executive judgment by the Supreme Court in cases such as *Korematsu*,²⁶⁸ and the fact that Congress often lacks the will to alter the course of presidential action.²⁶⁹ As such, even if one believes that the law mandates a response to stop-loss, it is by no means guaranteed that Congress or the courts would put a stop to stop-loss.

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265. 484 F.2d 1307 (2d Cir. 1973).

266. *Id.* at 1308.

267. *Id.* at 1318 (Oakes, J., dissenting).

268. See *supra* notes 37-42 and accompanying text; see also *supra* Part I.B (discussing judicial deference generally).

269. See *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (suggesting that members of Congress are compelled to support troops already committed to combat regardless of whether the members of Congress agree with the combat); Ely, *supra* note 151, at 878-79 (suggesting that Congress both "lacks the will and/or courage" to oppose the President and prefers to avoid accountability for decisions in military affairs).