1979

Wagner, Valadez and Harrison: A Definitive Enlistment Trilogy

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The third formal check occurs just prior to the administration of the oath of enlistment. The enlisting officer explains to the applicants the general meaning of Article 83, Uniform Code of Military Justice (10 U.S.C. §883 (1970)) and the provisions for adverse administrative discharge for fraudulent enlistment. The applicants are then afforded an opportunity to discuss any withheld or falsified information with the briefer, and they are again asked if anyone instructed them to withhold or falsify information. Paragraph 6-7, AR 601-270/AFR 33-7/OPNAVINST 1100.4/MCO P1100.75.

The inauguration of the United States Military Enlistment Processing Command removed from the control of the recruiting services, the machinery for testing the mental ability and the medical condition of applicants for enlistment. Moreover, the procedures used in the AFEES have severed the nexus between the dishonest recruiter and the unqualified applicant. The applicant who raises his/her right hand, mouths the oath of enlistment, and signs the enlistment document (Department of Defense Form 4), has made his/her own decision. He/she knows what must be revealed and the consequences of not revealing the information, and he/she knows that the enlistment agreement is limited to the language on the signed documents. If an improper enlistment nevertheless occurs with the assistance of a recruiter, one might hope that the United States Court of Military Appeals would reconsider its opinion in *United States v. Russo*[6] in the light of the quality control measures adopted since that decision. The Court might view public policy as requiring punishment of both the recruiter and the enlistee for his/her own delicts.

Footnotes

[1] United States v. Russo, 1 M.J. 134 (C.M.A. 1975).

[2] *Id.* at 137.

[3] United States v. Little, 1 M.J. 476 (C.M.A. 1976).

[4] *Id.* at 478.

[5] Department of the Army General Order Number 7, 26 April 1976, and Department of the Army Regulation Number 10-52, 28 February 1977.

[6] 1 M.J. 134 (C.M.A. 1975).

Wagner, Valadez, and Harrison: A Definitive Enlistment Trilogy?

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Introduction

Enlistments continue to generate judicial and administrative interest. Over the past few years the topic has been raised in a variety of forums and forms; in some instances the law of enlistments has been refined and questions answered. But in other areas, the law remains unsettled, open to continued speculation, and subject to a variety of interpretations. One area where enlistment law has received keen scrutiny is the subject of enlistment contracts *vis a vis* the question of personal jurisdiction.

A recent trio of Court of Military Appeals decisions, *United States v. Wagner*,[1] *United States v. Valadez*,[2] and *United States v. Harrison*,[3] sheds some dispositive light on that issue. This article will examine these three cases and their potential impact on the law of enlistments. The first section reviews the three decisions and the remaining sections deal with some of the recurring issues raised in enlistment law and addressed by the Court in this most recent trilogy.

The Decisions

We turn our attention first to the Court's decision in *United States v. Wagner*, which served in several respects as the keystone for the *Valadez* and *Harrison* decisions. Gregory Wagner was arrested in Michigan in 1974 for carrying a concealed weapon in the trunk of his car. After being arraigned and during a meeting with his mother and appointed attorney, Wagner learned that the charge might be

dropped if he were to join the Army.[4] Wagner subsequently met with Sergeant Olds, a recruiter in Coldwater, Michigan, and took the initial preenlistment mental examination before disclosing to the recruiter that he had a charge pending against him. Sergeant Olds told Wagner that he would have to suspend processing the enlistment application until "the court took proper disposition of the case."[5] Several weeks later Sergeant Olds was told by the prosecuting attorney that an "Order Nolle Prosequi" had been entered in Wagner's case. Shortly thereafter Wagner joined the Army. The Army Court of Military Review viewed Wagner's enlistment as void but ruled that jurisdiction existed because of a valid constructive enlistment.[6]

The Court of Military Appeals noted that three separate questions were raised: First, should Wagner's enlistment contract be considered void *ab initio* due to a purported lack of voluntariness?; second, was there sufficient recruiter misconduct in the case to void "from the beginning" the enlistment contract?; and third, did the disqualification by a nonwaivable service regulation constitute "an inherent vice" so as to disable Wagner from acquiring military status as a matter of enlistment contract law principles?[7]

Turning first to the issue of "voluntariness," the Court relied upon its earlier decision in *United States v. Lightfoot*,[8] and distinguished Wagner's entry from that in *United States v. Catlow*.[9] Here, as in *Lightfoot*, Wagner had entered the service upon advice of counsel and not because of intimidation, improper influence, or the "carrot and stick" method found in *Catlow*. Wagner's enlistment was therefore "voluntary."[10]

The second issue caused little concern. The Court stated:

> We find no deliberate violation of recruiting regulations to allow the enlistment of an ineligible applicant in the present case, nor any negligence on the part of the recruiter sufficient to justify voiding the appellant's original enlistment contract. Accordingly, there was no recruiter misconduct within the meaning of the *United States v. Russo* . . . which would require us on this ground to dismiss the charges . . . .[11]

The third issue received greater attention. Wagner had enlisted in violation of a nonwaivable regulatory disqualification which prohibited individuals from enlisting if criminal or juvenile charges had been filed by civil authorities or were still pending.[12] The "precise legal question," according to Judge Fletcher, was "whether this regulatory disqualification in and of itself voids the original enlistment contract for purposes of court-martial jurisdiction."[13] Turning to the Supreme Court's decision in *In re Grimley*,[14] the Court noted first that the Supreme Court had placed emphasis on the fact that Grimley had failed to disclose his disqualification to the recruiter prior to his enlistment. Secondly, the Court was "particularly struck by the public policy considerations articulated in 1890, which retain their viability in our mind with respect to our present day military situation."[15] Finally, the Court stated that the regulation in question was constructued for the benefit of both the government and recruit but again cited *Grimley* as support for the proposition that undisclosed violation of the Army recruiting regulations, in and of itself, was not sufficient to void Wagner's enlistment contract.[16]

In addition, the Court made, *inter alia*, the following points:

a. There is no statutory prohibition against enlistment by a person, who through counsel, initiates a proposal of military service as an alternative to further prosecution for a civilian criminal offense.[17]

b. The recruiting regulation in question, unlike insanity, idiocy, or infancy, does not render the contracting party *non sui juris* so as to prevent the recruit from changing his status through enlistment contract.[18]

c. Where a mere regulatory disqualification exists, the enlistment contract remains "voidable," absent action by the recruit to void the contact, prior to the com-

mission of an offense. As such, it is a proper basis for court-martial jurisdiction.[19]

Recruiting regulations and recruiter conduct again appeared as key issues in *United States v. Valadez.*[20] Valadez had erringly entered service in the Navy due to an oversight on the part of a recruiter who failed to note that Valadez's age and failure to graduate from high school, cojoined with a low entrance test score, disqualified him.[21] The Court cited *Wagner, supra,* and again noted that although a regulatory violation may provide the recruit with standing to void his enlistment contract, the enlistment remains voidable.[22] Here Valadez's enlistment was not void merely because it violated a particular service regulation. Remaining was the issue of whether the recruiter's negligence in this case voided the enlistment contract. No, said the Court, citing its decision in *United States v. Russo.*[23] Simple negligence did not rise to a level sufficient to violate public policy.[24]

While the Court rejected the lower court's application of constructive enlistments in both *Wagner* and *Valadez,* it approved application of that doctrine in *United States v. Harrison.*[25] Harrison had enlisted while sixteen years of age, but after reaching seventeen received pay and benefits and indicated to his commanding officer an intent to perform his assigned duties—evidence, said the Court, which could be "construed as an offer on his part, when conditionally capable, to enlist or to mislead the Navy into accepting him as a regular servicemember."[26]

The question raised in *Harrison* was whether the recruiter had been negligent in not discovering that Harrison was a minor and, therefore, ineligible. When Harrison could not produce a birth certificate the recruiter unsuccessfully checked with the state's bureau of vital statistics. As an alternative, the recruiter checked with what Harrison claimed to be a family Bible which only confirmed Harrison's lie.[27] A telephonic check with a woman identifying herself as Harrison's grandmother also failed to disclose the sham. Satisfied that the recruit was eighteen, the recruiter completed the necessary paperwork.

Using its decision in *United States v. Brown*[28] as a template, the Court did not consider the recruiter's action "unfair":

> It is true, however, that the recruiter was negligent to the extent that he failed to recognize the apparent age ineligibility from the appellant's record of juvenile involvement. We hesitate, however, to equate such apparent inadvertent mistake by this recruiter with the failure to perform affirmative recruiting practices designed by regulation to prevent such enlistments, so apparent in the *Brown* case.[29]

The Government was, therefore, not estopped to argue constructive enlistment as a basis for court-martial jurisdiction over Harrison.

In effect, this recent trio of cases tracks in many respects with another trio of enlistment cases—Catlow (voluntariness), *Russo* (regulations), and *Brown* (constructive enlistment). The trios differ in one main respect. In this latest round of decisions the individual was considered amenable to court-martial jurisdiction. Several oft-confronted themes run throughout all these cases and provide further clarification of the present Court's posture on elistment contracts. In the following sections, we will briefly examine those themes.

The Enlistment: Voluntary Execution of a Contract

In these three cases, the Court evidenced a continued reliance on principles of contract law.[30] One of the core elements in any contract, of course, is voluntariness. In *Wagner,* the court emphasized that the recruit was *sui juris* and had not been coerced into joining the Army.[31] Whatever other defects may have existed in Wagner's enlistment, Wagner could not claim that he was incapable of contracting with the Government. The court did not specifically delineate what statutory or regulatory provisions would render the recruit ineligible, but the thrust of the opinion on this point was that Wagner possessed the legal capacity to contract.[32] However, if the qualifying statute

or regulation goes to the very power, or ability to contract (insanity, minority) then the enlistment contract may be invalid even if the Government can show voluntariness.[33]

The fact that the Court is relying on federal contract law is itself instructive and marks another instance in an overall shift from the position taken by this Court's precedessors, that the enlistment is primarily a change in status.[34] In so relying, the Court is swinging into a posture more in line with the civilian judicial treatment of the enlistment process—at least on the question of valid formation of an enlistment contract.[35]

Recruiting Regulations

The recurring problem of what impact, if any, recruiting regulation qualifications have on enlistments was raised both in *Wagner* and *Valadez*. You will recall that the regulatory disqualification in *Wagner* involved the "join-the-Army-or-go-to-jail" disqualification. In *Valadez*, the regulatory provisions on mental proficiency of the recruit were questioned. In both instances the court stated that the violation of a recruiting regulation, in and of itself, would not void the enlistment. The enlistment would instead be voidable.[36]

In so holding, the Court emphasized that it had never held that an undisclosed violation of a recruiting regulation would void an enlistment.[37] Whatever the court may have not held, its earlier decisions seemed to clearly predict a rule inextricably binding the Government to follow its recruiting regulations: failure to follow the recruiting regulations would result in a void enlistment.[38] The Court's refinement of the role of recruiting regulations is welcomed and the adoption of a rule which treats a regulatorily deficient enlistment as "voidable" falls more in line with prevailing contract law principles.

The disqualified recruit is still able to take advantage of the regulatory disqualification prior to, but not after, an offense has been committed. This last point raises some questions, however. In *Wagner*, the Court noted that "absent action by the recruit to void an enlistment suffering from mere regulatory disqualification, and prior to the commission of the offense, his enlistment contract remains merely voidable and is a proper basis for court-martial jurisdiction."[39] But in *Valadez*, the Court opined (when speaking of a regulatory violation) that the enlistment contract remains voidable "until the recruit takes action to void the contract, prior to his commission of an offense *and action taken by the Government with a view towards trial.*"[40] The latter quote appears inconsistent with the first. According to the language in *Wagner*, the recruit's right to avoid the enlistment is clearly cut off at the commission of an offense. The language in *Valadez* indicates that the commission of the offense and "action by the Government with a view towards trial" are the cut-off points. The two events do not necessarily, or normally, take effect on the same date. Which rule applies? The cases cited by the court to support both quoted rules, *Morrissey v. Perry*[41] and *United States v. Beans*,[42] dealt respectively with situations where the enlistees questioned their status before and after charges had been preferred. The Supreme Court's opinion in *Morrissey, supra*, and the public policy considerations so heavily relied upon in *Wagner* would demand that the recruit may not void the contract after an offense has been committed.[43] To allow the recruit to void his contract after the offense but before the Government acts, would give the recruit an effective "get-out-of-jail-free" ticket.

In summary, although the ultimate impact on the court's position on regulatory deficiencies in the enlistment contract is yet to be seen, several conclusions can be drawn. First, regulatory deficiencies in the enlistment will not necessarily void the enlistment. The Court has noted:

> It is only when the recruiting regulation also amounts in fact and law to either a lack of voluntariness, a statutory incapacity to contract, or a disability embraced within the enlistment contract principles intimated by the Supreme Court in *Grimley* . . . will such a disqualification be found

sufficient to void the enlistment contract *ab initio* as a basis for court-martial jurisdiction.[44]

Second, the Court, perhaps in a shift of philosophy or analysis, is allowing the Government a little breathing room in applying the myriad of technical recruiting regulations, at least in those cases where the defect is not disclosed.

Third, the recruit's right to invalidate the enlistment must be timely. Commission of an offense cuts off his standing and presents the Government with the option of exercising court-martial jurisdiction; an option many felt was abrogated after *Russo*.

Recruiter Conduct

Another common thread in the three cases is the action, or inaction, of the recruiters. The decisions on this point reveal no new or startling revelations but do offer some refinement of existing principles.

The recruiter conduct issue usually arises in one of two settings: in determining whether an enlistment is void *ab initio* under *Russo*[45] and/or in determining whether the Government is later estopped from arguing the existence of a constructive enlistment.[46] Both settings were present in this latest trio of decisions. In *Wagner*, the Court questioned the recruiter's conduct and found no deliberate violation of recruiting regulations nor any negligence on his part. In *Valadez*, the recruiter's simple negligence in not discovering a regulatory disqualification did not void the enlistment. And in *Harrison*, the Government was not estopped from showing a constructive enlistment because the recruiter had not acted unfairly.

In each case, the court further defined and refined its prior holdings in *Catlow*, *Brown*, and *Russo*. Several points may be gleaned from the Court's language. First, where a recruiter's actions in completing the enlistment process are in question, misconduct approaching that found in *Russo*—intentional violation of Article 84—must normally be present before the enlistment will be voided *ab initio* on the ground of recruiter misconduct. Enlistments resulting from mere recruiter negligence or good faith actions, according to the court, are not normally considered void because of public policy. In reaching that decision, the Court stated that such enlistments are not in the best interests of the public, the military, or the recruit, but "delicate" public policy considerations must be valued:

> Moreover, we can hardly classify simple negligence as a natural wrong in the manner of establishment of an enlistment contract, or conduct on the level of compulsion, solicitation or misrepresentation condemned by implication in *Grimley*. Finally, we believe that the interest of the primary society in the effective and disciplined fighting force significantly outweighs any possible concern on its part with an enlistment of an ineligible recruit inadvertently caused by simple negligence.[47]

But, the court also stated that actions amounting to something less than intentional misconduct and something more than mere negligence might nonetheless void an enlistment:

> Moreover, it is conceivable that negligence of a higher degree, *e.g.* wanton and willful, which is employed to avoid discovering recruiting disqualifications, coupled with the existence of such a regulatory disqualification, may be sufficient recruiter misconduct to justify declaring an enlistment contract so procured void *ab initio* for purposes of court-martial jurisdiction.[48]

A troubling facet of the recruiter conduct issues is the reliance placed by the Court on "unknowing" actions by the recruiter. In *Wagner* especially, the Court spoke in terms of undisclosed regulatory disqualifications.[49] However, in examining the thrust of the opinion, one can see that a recruiter might very well be aware of the deficiency, but inadvertently misread or misapply the appropriate regulatory provision, as in *Valadez*. Whether the Court assesses the recruiter's conduct as intentional, grossly negligent or merely negligent will determine whether the enlistment is valid. Reading

Wagner and *Valadez* together we see that the mere fact that a deficiency is "disclosed" does not always render the enlistment void *ab initio*. More is required.[50]

The degree of recruiter, or Government, misconduct necessary to estop argument of constructive enlistments is another matter. Apparently, less is required. In constructive enlistment situations, the Government is estopped if the actions of the recruiter, or the Government, are not "fair." What is "fair"? The court noted the amorphous nature of the term in *Harrison*[51] and rather than present detailed guidelines, the court instead relied on *Brown*, *supra*, to "elicit the boundaries" of the principle of estoppel.[52]

Thus, it seems that if recruiter misconduct, at the time of enlistment, amounts to an intentional violation of Article 84, UCMJ, the enlistment is void *ab initio* and the Government is also estopped from later showing a constructive enlistment. If the enlistment is void *ab initio*, for some reason other than recruiter misconduct, subsequent "unfair" or "unreasonable" actions on the part of the Governn mnment [3] may prevent the GGovernment from relying on the concept of conntructive enlistment.

Constructive Enlistment

In *Wagner* and *Valadez*, the Courts of Military Review had rested court-martial jurisdiction on constructive enlistments. Because the Court of Military Appeals found no evidence that the original disqualifying features were ever cured, it rejected application of that concept and instead turned its attention, as discussed in preceding sections, to the question of whether the enlistments in question were ever void *ab initio*.

In *Harrison*, the Court directly confronted the issue antated that it was satisfied with the lawfulness of the doctrine of construcive enlistment.[54] But, the Court added that its decision should not be "misconstttrued to sanction the carte blanche determinations by the lower courts of the constructe enlistments."[55]

While recognizin the validity of the concept, the Court nonetheless continued to restrict its application to situations where the Government has acted fairly. The conduct of the Government in *Harrison* was not unreasonable; the "apparent inadvertent mistake by the recruiter" did not amount to a failure to perform affirmative recruiting practices as was the case in *Brown*.[56] For the moment, the lower courts are tasked with determining on a case by case basis whether the actions or inactions of the recruiter were "unreasonable" or "unfair."

The *Harrison* case does little to remedy any of the uneasiness resting on the constructive enlistment question. The Court, instead of drawing some definitive guidelines, simply cited *Brown* as a pattern for the lower court's use in those cases in which improper recruiting practices are involved. The root of the problem in applying the concept of constructive enlistment to any given fact pattern is that the "fairness" requirement looks good on paper but poses numerous practical problems. The question often is reduced to whom the Court believes. If the Court believes that the Government has been consistently legitimate in its attempt to establish the military status of an accused, then personal jurisdiction will vest. One means of alleviating the troublesome concept of fairness which, as the Court recognized, "may give rise to misuse of the doctrine of constructive enlistment either in favor of the Government or the accused,"[57] is to create a statutory constructive enlistment in those cases where the individual has committed an offense.[58]

One point raised in both *Wagner* and *Valadez* should be addressed. In rejecting the need to apply the constructive enlistment concept in those cases, the court stated that there was no showing by the Government that the disqualifying conditions had ceased to exist.[59] That may have been the case in *Valadez*[60] but not in *Wagner*. The Court in *Wagner* cited *Catlow* for the continuing disability proposition. But in *Catlow*, the Court had stated that Catlow might have perfected a constructive enlistment if he had subsequently served voluntarily.[61] Assuming, as the Army Court of Military Review did, that Wagner's enlistment was void, then a valid constructive enlistment could ripen because, as the Court itself acknowledged in

Wagner, there was voluntary service by a party not suffering from "insanity, idiocy, or infancy."[62] The disability had dissapated.[63]

Public Policy

Although mentioned briefly in *Russo*, the court deals at some length in these three decisions with the concept of public policy. There are repeated references to the Supreme Court's reliance in *Grimley* on public policy considerations. With ever so subtle shifts in its reading of the delicate "public policy" or fairness, the court is free to validate or void any enlistment or constructive enlistment before it. In this triology it has chosen to validate the enlistments, and, therefore, the military status of the individuals.

In *Wagner*, the Court examined the recruiting regulation prohibiting enlistment of someone pending criminal charges and stated:

> [P]ublic policy considerations inherent in the maintenance of a disciplined and effective military to protect society at large dictate against construing such a regulatory disqualification as inherent in the substance of the contract and requiring automatic voiding of the enlistment contract without some action of the appellant prior to the commission of the offense.[64]

In *Valadez* the interest of the primary society in a disciplined fighting force outweighed any possible concern with an enlistment caused by inadvertent recruiter actions.[65] And in *Harrison* the Government was not estopped from showing a constructive enlistment because it had acted fairly.

In short, the Court applied, whether intended or not, a balancing test: it considered the individual's constitutional protections and the "constitutional interest in the protection of the primary society by an effective and disciplined fighting force."[66]

Conclusion

As noted at the outset, this most recent series of enlistment decisions provides some answers and solutions to enlistment contract questions. However, the decisions also raise new issues[67] while at the same time leaving others yet untouched.[68]

Counsel faced with issues similar to those raised in *Wagner*, *Valadez*, and *Harrison* will find guidance in those decision and may expect to raise, among others, the following issues and questions:

1. Does the disqualification in question go to the recruit's ability to contract (*e.g.* insanity, intoxication, minority)? *See Wagner.*

2. If so, the contract is probably void. If not, was the disqualification (statutory or regulatory) disclosed to the recruiter or other Government representative? If not, *see Wagner.* If so, counsel should be prepared to litigate whether subsequent recruiter or Government actions were intentional (violations of Article 84, UCMJ), wanton, willful, or merely negligent.[69] *See Valadez.*

3. If the disqualification was not disclosed and no recruiter misconduct was involved, did the recruit take any action to void his enlistment prior to committing an offense? *See Wagner* and *Valadez.*

4. Was the enlistment voluntarily entered?

5. If contract is void for some reason other than Government misconduct, was a constructive enlistment formed? If so, does fairness prevent the Government from asserting it? *See Harrison.*

In all situations counsel should be familiar with all three cases and prepared to argue the competing interests (*i.e.* balancing test) and public policy considerations. Both facets were continuing threads through and around the three decisions.

This most recent trio provides further catalyst for future enlistment decisions and administrative rulings.[70] It will no doubt continue to stir the varied interpretations and debates that surround the present Court of Military Appeals.

Footnotes

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General's School. Author of *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1 (1977), and *Constructive Enlistments: Alive and Well*, THE ARMY LAWYER, Nov. 1977, at 6.

[1] United States v. Wagner, 5 M.J. 461 (C.M.A. 1978).

[2] United States v. Valadez, 5 M.J. 470 (C.M.A. 1978).

[3] United States v. Harrison, 5 M.J. 476 (C.M.A 1978).

[4] Stipulated testimony at trial indicated that it was standard procedure in Wagner's county to give individuals, who were charged with offenses not considered heinous, the option of joining the Army in lieu of prosecution. United States v. Wagner, 5 M.J. at 464, citing the Army Court of Military Review's decision at 3 M.J. 898, 899 (A.C.M.R. 1977).

[5] United States v. Wagner, 5 M.J. at 464.

[6] United States v. Wagner, 3 M.J. 898, 901 (A.C.M.R. 1977). The Army Court of Military Review found ample evidence to support the constructive enlistment; Wagner had enlisted for a three versus two year (minimum) tour; he pursued an offered advance course in generator operation; performed all his normal duties and received benefits; received an accelerated promotion to Private E-2; took advantage of the Army's drug counseling program; did not protest his status and told his mother several times during basic training that "he really liked the Army." 3 M.J. at 901.

[7] United States v. Wagner, 5 M.J. at 465.

[8] United States v. Lightfoot, 4 M.J. 262 (C.M.A. 1978). Lightfoot was charged with burglary several months before his enlistment in the Navy. Through his attorney and with his parents' blessings, he advised the court of his desire to join the service. He was adjudicated a juvenile and placed on probation. The recruiter, not involved in these proceedings, was not aware that the charges had been dismissed contingent on Lightfoot's entry into the service, when he processed his enlistment.

[9] United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974).

[10] United States v. Wagner, 5 M.J. at 465. *See also* United States v. Stengel, NCM 77 2128 (N.C.M.R. 23 June 1978); United States v. Westphal, NCM 77 1259 (N.C.M.R. 23 Nov. 1977), *pet. denied* 5 M.J. 85 (C.M.A. 1978).

[11] United States v. Wagner, 5 M.J. at 466.

[12] Army Reg. No. 635-210, Personnel Procurement, Regular Army Enlistment, para. 4-11 (C6, 28 July 1976), prohibits individuals from enlisting if criminal or juvenile court charges by civilian authorities are filed or pending. Footnote 2 to Line 5 of Table 2-6 (C8, 24 June 1971) prohibits enlistment of:

Persons who, as an alternative to further prosecution, indictment, trial, or incarceration in connection with the charges, or to further proceedings relating to adjudication as a youthful offender or juvenile delinquent, are granted a release from the charges at any stage of the court proceedings on the condition that they will apply for or be accepted for enlistment in the Regular Army.

[13] United States v. Wagner, 5 M.J. at 466.

[14] In re Grimley, 137 U.S. 147 (1890).

[15] United States v. Wagner, 5 M.J. at 467.

[16] United States v. Wagner, 5 M.J. at 467. The Court's holding should not have offered any real surprises. In a footnote in *Lightfoot*, the court stated that "[a] failure to conform with applicable statutes and regulations in and of itself has been held by the Supreme Court *(In re Grimley, supra)*, as a matter of public policy, not to void the original contract on grounds of illegality." United States v. Lightfoot, 4 M.J. at 263, n. 3. *See also* United States v. Mills, NCM 78 0325 (N.C.M.R. 1978); United States v. Picou, CM 436169 (A.C.M.R. 1978); United States v. Feneback, NCM 77 1186 (N.C.M.R. 1977); United States v. Harris, 3 M.J. 627 (N.C.M.R. 1977).

[17] United States v. Wagner, 5 M.J. at 668.

[18] *Id.*

[19] United States v. Wagner, 5 M.J. at 469.

[20] United States v. Valadez, 5 M.J. 470 (C.M.A. 1978).

[21] Marine Corps Order 5310.2J, para 5(a)(1) (17 May 1972); Military Personnel Procurement Manual, Volume 4, Enlisted Procurement, Section 2011, para. 1c. The regulations provided that a person seventeen years of age, not a graduate of high school, must attain an AFQT score of 50. Valadez scored 40. The Court noted that although a recruiting official, other than the original recruiter was responsible for reviewing the AFQT scores at the testing station, the negligence would be chargeable to the government for purposes of court-martial jurisdiction. United States v. Valadez, 5 M.J. at 471, n.3.

[22] United States v. Valadez, 5 M.J. at 472.

[23] United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975).

[24] United States v. Valadez, 5 M.J. at 474.

[25] United States v. Harrison, 5 M.J. 476 (C.M.A. 1978).

[26] United States v. Harrison, 5 M.J. 476, 480.

[27] As noted by the Navy Court of Military Review in its decision, the Bible was not a "family Bible," but rather a Bible Harrison had found in his home and into which he had simply copied the information from his grandmother's family Bible, except for his correct birthdate. 3 M.J. 1020, 1026, n.7 (N.C.M.R. 1977). Before ac-

cepting this alternative verification, permitted by regulations, the recruiter checked with recruiting authorities and made further efforts to verify its entries. 5 M.J. at 482.

[28] United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974).

[29] United States v. Harrison, 5 M.J. at 482.

[30] United States v. Valadez, 5 M.J. at 473. In *Wagner*, the Court indicated at several points the applicability of contract law principles, especially in reference to those principles relied upon by the Supreme Court in United States v. Grimley, 137 U.S. 147 (1890). Recent federal court decisions have continued to apply contract law principles in assessing the validity of enlistment contracts. *See, e.g.*, Jackson v. United States, 573 F.2d 1189 (Ct. Cl. 1978); Frentheway v. Bodenhamer, 444 F. Supp. 275 (D. Wyo. 1977); Febus Nevarez v. Schlesinger, 440 F. Supp. 741 (D. P.R. 1977); Dubeau v. Commanding Officer, Naval Reserve, 440 F. Supp. 747 (D. Mass. 1977). *See generally*, Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1, 13-24 (1977).

[31] United States v. Wagner, 5 M.J. at 465.

[32] United States v. Wagner, 5 M.J. at 466. Here the Court relied on the language in Grimley, supra, which indicated that insanity, idiocy, infancy, or other disability which, in its nature, disables a party from changing his status or entering into new relations, might render the party incompetent. 137 U.S. at 152.

[33] Unanswered is the question of the validity of enlistment entered through coercion, but otherwise in conformity with an applicable statutes and regulations. Under principles of contract law, the enlistment would probably be considered void. But to avoid establishment of a valid constructive enlistment, the recruit would have to show the continuing disability of coercion. United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974); United States v. Wagner, 5 M.J. at 467.

[34] *See generally* Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1, 26-28 (1977).

[35] *See* note 20 *supra*.

[36] In doing so, the Court apparently made no distinction between waivable and nonwaivable regulatory requirements. In both *Wagner* and *Valadez*, the regulations in question were nonwaivable.

[37] United States v. Valadez, 5 M.J. at 472.

[38] *See, e.g.*, United States v. Little, 1 M.J. 476 (C.M.A. 1976); United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650, 1 M.J. 134 (1975). In *Little* the Court, citing *Russo*, ruled that a "technical violation" of the recruiting regulations voided the enlistment. Without ruling that the recruiter had intentionally violated Article 84, UCMJ, the Court's decision could logically be read as a harbinger of absolute fidelity to the pertinent regulations. In *Valadez* the Court cites *Little* for the proposition that "negligence of a higher degree, e.g., wanton and willful" joined with a regulatory disqualification might conceivably void an enlistment. Again, in *Little* there was no indication that the recruiter was either wanton or willful in his conduct. However read, *Little* does not fit neatly into the Court's new rule. *Cf.* United States v. Gonzalez, 5 M.J. 770 (A.C.M.R. 1978) (providing assistance in translating test question makes enlistment voidable); United States v. Shastid, NCM 77 2225 (N.C.M.R. 1977) (Recruiter used practice materials which were similar to actual AFQT test. Court distinguished *Little*).

[39] United States v. Wagner, 5 M.J. at 468, 469.

[40] United States v. Wagner, 5 M.J. at 472, 475 (emphasis added).

[41] United States v. Perry, 137 U.S. 157 (1890).

[42] United States v. Beans, 13 C.M.A. 203, 32 C.M.R. 203 (1962).

[43] The Court may have been thinking of a recent series of cases in which the timing of the termination of a servicemenber's status was crucial to a finding of personal jurisdiction. Action by the Government with a view toward trial is, in those cases, the critical point. *See, e.g.*, United States v. Hudson, 5 M.J. 413 (C.M.A. 1978); United States v. Hutchins, 4 M.J. 190 (C.M.A. 1978); United States v. Smith, 4 M.J. 265 (C.M.A. 1978). *See also* United States v. Torres, 3 M.J. 659 (A.C.M.R. 1977).

[44] United States v. Valadez, 5 M.J. at 472.

[45] United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650, 1 M.J. 134 (1975).

[46] United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974).

[47] United States v. Valadez, 5 M.J. at 475.

[48] *Id.*

[49] United States v. Wagner, 5 M.J. at 467. The recruiter knew that charges were pending against Wagner, but according to the Court, citing the holding of the Army Court of Military Review, he did not know of the agreement between the prosecutor, defense counsel, and Wagner to have the charges dropped. 5 M.J. at 466.

[50] Contributing to the possible confusion here is the Court's use of a number of terms to describe recruiter misconduct (*e.g.*, deliberate fraud, knowing, active misconduct, and misconduct). Reading all three cases together, it seems that the rule might be stated thusly: when the recruiter is actually aware of a statutory or regulatory disqualification, the enlistment will be voi-

ded if the recruiter *intentionally* smoothed the path to the enlistment.

[51] United States v. Harrison, 5 M.J. at 481. In addressing the fairness issue the court cited Reid v. Covert, 354 U.S. 1, 22, 23 (1957) for the proposition that "court-martial jurisdiction should be restricted to those persons who can 'fairly' said to be actual members or part of the armed forces." 5 M.J. at 480. Reading *Reid*, however, in context leads one to conclude that the Supreme Court was not speaking to the issue of whether the individual was in the service because of "fair actions" on the part of the Government but rather from a "fair appraisal" of the facts, the person could be considered in the service. 354 U.S. at 42 (J. Frankfuter, concurring).

[52] United States v. Harrison, at 479, 481.

[53] The "fairness" standard is not limited to just recruiters. Theoretically, any Government agent (commanding officer, clerk-typist, platoon sergeant) is bound by the fairness argument. *See* United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974).

[54] United States v. Harrison, 5 M.J. at 480, n.9. The Navy Court of Military Review's decision in *Harrison* is discussed in Steritt, *Military Law: In Personam Jurisdiction: Recruiter Misconduct Sufficient to Preclude a Constructive Enlistment. United States v. Harrison, 3 M.J. 1020 (N.C.M.R. 1977)*, 30 JAG J. 105 (1978).

[55] United States v. Harrison, 5 M.J. at 483.

[56] United States v. Harrison, 5 M.J. at 482.

[57] United States v. Harrison, 5 M.J. at 481.

[58] See Schlueter, *supra*, 34 at 56 for proposal to amend the UCMJ. The Joint Service Committee on Military Justice has under consideration a proposed amendment to provide for jurisdiction in such cases.

[59] United States v. Wagner, 5 M.J. at 465; United States v. Valadez, 5 M.J. at 473.

[60] In *Valadez*, the disability went to the question of the recruit's mental proficiency. Even so, if the Government could have shown that subsequent to the enlistment Valadez had shown a sufficient mental proficiency to satisfactorily perform his military duties, a valid constructive enlistment could have been established. *See* notes 61, 62 *infra*.

[61] The Court in *Catlow* assumed that after the civilian charges were dismissed the recruit could effectuate a constructive enlistment. However, Catlow made subsequent active and varied protestations against continued service. United States v. Catlow, 23 C.M.A 142, 48 C.M.R. 758 (1974). Wagner, after his charges were dropped, voluntarily performed his duties. *See N. 6, supra*.

[62] United States v. Wagner, 5 M.J. at 465. The Court in a footnote stated that "[t]he cases from this Court relying on *Catlow* have not held that the violation of a regulation in and of itself voids the enlistment contract, but instead have relied on a combination of factors, the *primary factor being coercion*, in the invalidation of the enlistment contract." [Emphasis added.] 5 M.J. at 468, n.14 *See also* n. 6, *supra*.

[63] A similar result may occur in those cases where the disqualified recruit completes his first enlistment and then reenlists. *See e.g.*, United States v. Ivery, 5 M.J. 508 (A.C.M.R. 1978) (Recruit assumed to have illegally entered the Army, but two years of honorable service had proved him to be "fully capable of functioning effectively in the military environment"). *Cf.* United States v. Long., 5 M.J. 800 (N.C.M.R. 1978) (Recruiter misconduct in first enlistment carried over to second enlistment executed only 27 days later).

[64] United States v. Wagner, 5 M.J. at 468.

[65] United States v. Harrison, 5 M.J. at 475.

[66] United States v. Harrison, 5 M.J. at 479. For a discussion of public policy considerations and their application through a balancing test, *see* Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1, 46-49 (1977).

[67] *See* notes 30 through 43 *supra* and accompanying text.

[68] For example, the burden of proof question was not addressed although it has been considered by the Courts of Military Review. *See, e.g.*, United States v. Jessie, 5 M.J. 573 (A.C.M.R. 1978); United States v. Loop, 4 M.J. 529 (N.C.M.R. 1977).

[69] In *Valadez*, the Court stated:

> Despite the salutary or beneficial effects which our decision in United States v. Russo, 1 M.J. 134 (C.M.A. 1975), may have had on recruiting practices, its primary concern was not to punish recruiters for violations of Article 84, Uniform Code of Military Justice, 10 U.S.C. § 884, by voiding enlistment contracts.

United States v. Valadez, 5 M.J. at 473, n. 7. Nonetheless, recruiters have been punished. *See* United States v. Hightower, 5 M.J. 717 (A.C.M.R. 1978). Recruiter conduct continues to provide spirited discussion and notwithstanding the Court's foregoing disclaimer, the Government, in order to establish jurisdiction is often tasked with showing the innocence of the recruiter. Consider the language from the decision in United States v. Loop, 4 M.J. 529 (N.C.M.R. 1977):

> This case illustrates a continuing problem in recruiter misconduct cases. We believe that the recruiter's lack of specific recall, as in this case some two years after the event, is not unusual and to be expected. A recruiter sees innumerable applicants for enlistment as a natural consequence of his job. To expect recall in detail of conversations which

take place in routine situations does not comport with reason or experience. The measure of proof of a negative fact which can be mustered and the expenditure of effort in money and manpower places a particularly onerous burden on the Government once an issue has been raised by a bald but detailed assertion of an accused seeking to avoid criminal penalities. 4 M.J. at 530.

[70]It is no secret that the Court's decisions in *Russo*, *Catlow*, and *Brown* generated a great deal of discussion, debate, and attempts to abate what many felt was a series of onerous and ill-conceived rules. Indeed, even the Comptroller General has indicated that a military court's determination that it does not have jurisdiction over an individual does not automatically void the enlistment for purposes of terminating the individual's entitlement to pay and allowances. *See* 57 Comp. Gen. 132 (1977).

Reductions for Inefficiency: An Overlooked Tool

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As enlisted members move up through the ranks, most do so with dedication. They know their abilities; they have confidence in their potential; they are proud of their stripes. Too often, however, the value of those stripes and the morale of a unit are diminished because of a command failure to act swiftly to reduce members who demonstrate their unworthiness for the grade they hold.

There is a tendency to think of inefficiency in terms of incompetence on the job—the inept mechanic, the clerk who cannot type. Inability to perform the duties of a grade or MOS is only one form of inefficiency. Besides inability to perform military duties satisfactorily, other examples of inefficiency include: failure to maintain acceptable standards of physical conditioning; financial mismanagement as evidenced by failure to support dependents or to satisfy long-standing personal indebtedness; and violations of the Uniform Code of Military Justice (UCMJ). This latter category is of particular concern because it appears commanders rarely consider reductions for inefficiency when they decide that court-martial charges are appropriate. Apparently there is a myth that reduction action at such a time is double jeopardy or that it would somehow be unfair. Such administrative actions prior to trial are perfectly legal.

Servicemembers who are suspected of criminal offenses are subject to nonjudicial punishment (Article 15, UCMJ), court-martial action, or civilian prosecution. Because reduction for inefficiency is an administrative procedure (para 7-64b, AR 600-200, Enlisted Personnel Management System), it is not to be used in lieu of Article 15 or for a single act of misconduct where performance of duty is otherwise satisfactory. However, conduct warranting action under the UCMJ also warrants a commander's immediate consideration of whether the member's total performance justifies retention in grade. A commander, knowing the pertinent facts of an incident and the prior record of the individual, may decide that a servicemember should not be retained in his or her current grade regardless of whether the soldier in question may later be proven a criminal (which involves more stringent rules of evidence and a different standard of proof). If the commander decides to act under AR 600-200, he may do so without regard to later action taken, or not taken, under the UCMJ.

Proper use of reduction authority not only ensures the ranks are filled with qualified personnel but also instills greater respect for and pride among those who conscientiously live up to their responsibilities. Subordinate commanders should be informed that they should consider administrative reduction in addition to other possible actions for misconduct.