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not allow agency questions to inhibit their determination of whether election results reflect true voter sentiment.

The concept of agency is a factor in a proper review of election conditions. The principal-agent relationship, however, should not be conclusive. The Fourth Circuit in *Georgetown Dress* relied upon the committee's status as the union's agent in finding that a fair election had not occurred. That approach emphasized too greatly the agency factor. Rather, where improper conduct during the campaign had the probable effect of influencing votes, the validity of the election should not depend upon whether agency principles can join the offending party and either the union or employer. The destruction of the requisite laboratory conditions is no less real and voter preference no less biased in the event such a link cannot be established.

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IX. MILITARY ENLISTMENT CONTRACTS

The discontinuance of the draft[1] and the advent of an all-volunteer army have caused military enlistment contracts to acquire an increasing significance.[2] Concerned about maintaining adequate

Sonoco of Puerto Rico, Inc., 210 N.L.R.B. 493, 86 L.R.R.M. 1122 (1974) (election set aside on basis of threats not attributable to union or company) *with* Hyster Co. v. NLRB, 480 F.2d 1081 (5th Cir. 1973) (employer not chargeable with acts of town council chairman) *and* Janler Plastic Mold Corp., 208 N.L.R.B. 167, 85 L.R.R.M. 1285 (1974) (no interference by union, and election not set aside if threats not attributable to union).

[1] General induction authority expired on July 1, 1973. 50 U.S.C. app. § 467(c) (Supp. IV, 1974), *amending* 50 U.S.C. § 467(c) (1970).

[2] Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121 (1974) [hereinafter cited as Dilloff]. The major challenge facing the Department of Defense in effectively instituting the all-volunteer army was to attract enough enlistees of quality to meet national security needs. The Department has been successful in this effort, and it is expected to be able to maintain a full peacetime force on a volunteer basis. *Hearings on Military Posture and H.R. 11500 Before the House Committee on Armed Services*, 94th Cong., 2d Sess. 34 (1976) [hereinafter cited as *Hearings*]. In the first six months of fiscal year 1976, the Armed Forces recruited 215,400 members, or 100.3% of their objective. *Id.* Although there are differences among the enlistment contracts of the various armed services, generally there are four basic components: a) the enlistment document; b) a verbal or written oath of allegience; c) the statement of understanding; d) any federal statutes or regulations which may affect the enlistee under the contract. Dilloff, *supra* at 123. Pfile v. Corcoran, 287 F. Supp. 554 (D. Colo. 1968), is an example of a court's recognition of the enlistment contract. The court in *Pfile* held that the statement of understanding was the most

numbers in the military, Congress has provided inducements to attract qualified people to enlist in the armed forces.[3] Paramount among these inducements are bonuses, which are often awarded when members of the military reenlist.[4] Enforcement of promises for bonuses made by the military frequently has been sought in the federal courts on the basis of contract principles.[5] The Fourth Circuit recently considered the issue of the enforceability of a bonus promise in a military reenlistment contract in *Carini v. United States.*[6]

In *Carini,* the appellees brought an action to recover a Variable Reenlistment Bonus(VRB)[7] promised to them as consideration for extending their original term of enlistment. In 1974, while the appellees were still serving their initial tour of enlistment, but after their contract for VRBs had been executed, Congress changed the law concerning VRBs and provided for Selective Reenlistment Bonuses (SRB), while abolishing the VRB.[8] The appellees were unable to

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important part of the contract since it contained the duties and obligations of the parties involved. *Id.* at 557. While the other components of the contract are important, they are not absolutely necessary because they function more as a formality. *Id.*; Dilloff, *supra* at 126.

[3] Larionoff v. United States, 533 F.2d 1167, 1169 (D.C. Cir. 1976) *cert. granted,* 45 U.S.L.W. 3407 (U.S. Dec. 7, 1976)(No. 76-413). Inducements such as bonuses are based upon the fact that a party in a free bargaining position, such as the government, can protect its self-interest. Farnsworth, *The Past of Promise: An Historical Introduction to Contract,* 69 COLUM. L. REV. 576 (1969). The Department of Defense's success in meeting recruitment goals is, to a large degree, the result of a vigorous recruiting and advertising campaign. One widely used recuiting incentive is the enlistment and reenlistment bonus. *Hearings, supra* note 2, at 35.

[4] 533 F.2d at 1169. As long ago as 1795 statutes were enacted to provide monetary bonuses for reenlistment. Act of January 2, 1795, ch. 9 § 5, 1 Stat. 408 (1795).

[5] Courts have traditionally regarded military enlistment contracts as contracts that change the status of the person enlisting. *In re* Grimley, 137 U.S. 147, 157 (1890). When there is a change of status, "no breach of the contract destroys the new status or relieves [the enlistee] from the obligations which its existence imposes." *Id.* at 151. Recently, however, courts have tended to construe military contracts strictly in accordance with contract law. *E.g.,* Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976), *cert. granted,* 45 U.S.L.W. 3407 (U.S. Dec 7, 1976)(No. 76-413); Gausmann v. Laird, 422 F.2d 394 (9th Cir. 1969).

[6] 528 F.2d 738 (4th Cir. 1975).

[7] Variable Reenlistment Bonuses were authorized by Congress for persons having specialized military skills that were in short supply. 37 U.S.C. § 308(g) (1970). This purpose was reflected in the House Reports which stated, "The most attractive way to provide a strong reenlistment incentive to first termers in a small part of the force is through a variable reenlistment bonus. A reenlistment bonus concentrates retention money at the reenlistment decision point, thereby getting the most drawing power per retention dollar." H.R. REP. No. 549, 89th Cong., 1st Sess. 47-48 (1965).

[8] The 1974 revision limited eligibility for the reenlistment bonus to those servicemen who possessed designated skills and who agreed to reenlist for a period of at least

qualify for the SRB because they failed to cancel their VRB agreements and sign new contracts providing for a longer period of service.[9] While the district court held that the 1965 statute providing for VRBs became a part of the reenlistment agreement, the Fourth Circuit held that it did not.[10] In reversing the district court, the court of appeals perceived reenlistment bonuses not as part of an enforceable contract, but a form of pay subject to complete congressional control.[11] Since military pay is not fixed at the time of the signing of the enlistment or reenlistment contract,[12] the court reasoned that contract consideration clauses are entered into with the knowledge of possible statutory alterations.[13] Congress' deliberate changing of the qualifications for reenlistment bonuses thus resulted in an unenforceable contract right for the payment of VRBs.[14]

The Fourth Circuit's holding in *Carini,* however, is in direct conflict with the District of Columbia Circuit's holding in *Larionoff v.*

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three years rather than the two years called for underVRB provisions. Armed Forces Enlisted Person Bonus Revision Act of 1974, § 2 (1), 37 U.S.C. § 308 (Supp. IV. 1974). The new statute also contains a "grandfather clause" which grants options to those people eligible for a reenlistment extension agreement who sign a new extention agreement requiring a period of extended service of at least two years greater than called for in the original extension agreement. *Id.*

[9] The 1974 amendments preserved an enlistee's right to receive regular reenlistment bonuses, but there was no provision for the preservation of the VRB, which was considered a special bonus. 528 F.2d at 740.

[10] *Id.* at 741.

[11] *Id.* The Fourth Circuit rested its finding on the Supreme Court's determination in Bell v. United States, 366 U.S. 393, 401 (1961), that "a soldier's entitlement to pay is dependent upon statutory right." That a soldier's entitlement to pay depends upon statutory right and not upon common law rules such a quantum meruit finds support in Abbott v. United States, 200 Ct. Cl. 384, *cert. denied,* 414 U.S. 1024 (1973).

[12] The Fourth Circuit determined that military pay is not fixed at the time of the signing of the contract because it is subject "to the unfettered control of the Congress," 528 F.2d at 741, which has paramount power regarding the support and control of the armed forces. *See* Larionoff v. United States, 533 F.2d 1167, 1191 (D.C. Cir. 1976).

[13] 528 F.2d at 741. The court's discussion of contract consideration clauses is strictly dicta since it previously determined that reenlistment bonuses are not an enforceable part of the contract. *Id.*

[14] *Id.* Although the Fourth Circuit denied the appellees the relief they sought, the court did sympathize with their situation:

> While in a legal sense they must be held to an awareness that Congress might change the statutes, they could not be charged with anticipation that the Congress would so change the statute as to make them unqualified for any special bonus. . . . Under the circumstances the Congress may wish to reconsider their situation and the moral claims they have against the United States.

Id. at 741-42.

United States.[15] As in *Carini,* the plaintiffs in *Larionoff* brought action to recover promised VRB awards.[16] The D.C. Circuit examined the legislative history of VRBs to ascertain their purpose and intent,[17] and found that Congress viewed VRBs as providing a useful incentive toward a career in the military at a time when a person is deciding whether to reenlist.[18]

The D.C. Circuit examined the military regulations concerning the granting of VRBs to determine at what time eligibility for the bonus began.[19] Despite the government's argument that the right to VRBs attached only when an extension or reenlistment period actually began,[20] the court in *Larinoff* concluded that the appellants were entitled to the VRBs in effect at the time they signed their reenlistment agreements.[21] In determining the effect of the 1974 repeal of the VRB statute and the subsequent enactment of the SRB statute, the D.C. Circuit effectively stated that reenlistment bonuses are contractual agreements enforceable against the government as property interests protected by the fifth amendment.[22] Because of the

[15] 533 F.2d 1167 (D.C. Cir. 1976), *cert. granted,* 45 U.S.L.W. 3407 (U.S. Dec. 7, 1976)(No. 76-413).

[16] *Id.* at 1172. In the alternative, the plaintiffs in *Larionoff* requested the rescission of their extension agreements accompanied with an order granting Honorable Discharges pursuant to 10 U.S.C. § 6291 (1970). 533 F.2d at 1172 n.14.

[17] Among the sources used by the D.C. Circuit in ascertaining legislative intent were *Hearings on H.R. 5724 and H.R. 8714 Before the House Comm. on Armed Services,* 98th Cong. 1st Sess., ser.13, at 2545 (1965). During floor debate over the Uniformed Services Pay Act of 1965, Representative Morton stated, "the career motivation that will be generated among the hard core elements, specifically the highly trained technical people throughout the services, will more than make up in actual dollars saved for the cost of the legislation [concerning VRBs]." 111 CONG. REC. 17206 (1965).

[18] 533 F.2d at 1175. During the floor debate concerning the implementation of the Uniformed Services Pay Act of 1965, Congress was persuaded that the Defense Department's belief in the VRB provisions was justified, since they would defer the cost of training a replacement whenever a first term enlistee chose to reenlist. 111 CONG. REC. 17206 (1965) (remarks of Rep. Morton).

[19] 533 F.2d at 1175-76. The D.C. Circuit specifically referred to Department of Defense Instruction 1304, 15, ¶ VI. A. (Sept. 3, 1970), in determining that eligibility for the VRBs accrued from the date the extension agreements were signed. *Id.* at 1176.

[20] *Id.* at 1175.

[21] *See* note 19 *supra.* The court supported its holding by stating that military obligations "obviously contemplate a situation in which enlisted personnel *attain eligibility* prior to the point at which they enter into periods of extended service." 533 F.2d at 1177.

[22] *Id.* at 1179. the Fourth Circuit in *Carini* failed to address this point because it concluded that reenlistment bonuses were not an enforceable contract right, therefore no issue concerning property interests protected by the fifth amendment would arise. *See* text accompanying notes 10-14 *supra.*

inherent property interests involved,[23] the *Larionoff* court held that congressional authority to abrogate government contracts was limited.[24] The court's review of the legislative history of the 1974 amendment led to the conclusion that the basic purpose of the legislation was to reduce government spending.[25] This objective, the *Larionoff* court concluded, did not give Congress the power to alter the contracts between the plaintiff and the Navy.[26]

The major discrepancy between the Fourth Circuit's holding in *Carini* and the D.C. Circuit's decision in *Larionoff* is the interpretation of the contracts involving reenlistment bonuses. The court in *Carini* determined that VRBs were not included in the reenlistment agreement, and that the contract itself anticipated the possibility of changes.[27] This finding has some legitimacy because of the congressional intent reflected in reports accompanying the institution of SRBs.[28] Nevertheless, the Fourth Circuit failed to analyze or cite any

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[23] Contractual rights are property interests protected by the fifth amendment. 533 F.2d at 1179. *See e.g.*, Perry v. United States, 294 U.S. 330, 337 (1935); Lynch v. United States, 292 U.S. 571, 579 (1934). Although not concerned with military enlistment contracts, *Perry* and *Lynch* both held that contract obligations by the government are recognized as property rights and if the government makes unilateral abrogations, the claimant has been deprived of his property without due process of law.

[24] 533 F.2d at 1179. This analysis is supported by Caola v. United States, 404 F. Supp. 1101 (D. Conn. 1975). In *Caola*, the plaintiffs sought habeas corpus relief or monetary damages for breach of a promise to pay VRBs. The government argued that even if the Navy were contractually obligated to pay the VRBs, the obligation was unenforceable because of Congress' plenary power to establish and alter military pay. 404 F. Supp. at 1106. The court refuted this argument by holding that the government can only unilaterally change contracts for the purpose of protecting the welfare of its citizens. *Id.* at 1107. This holding was based upon the Supreme Court's decision in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), which stated that limitations upon the government's impairment of contractual obligations are included within the fifth amendment's prohibition of a taking without just compensation. *Id.* at 438.

[25] 533 F.2d at 1180. In its consideration of legislative history, the D.C. Circuit stated, "[o]ur review of the legislative history leads us to conclude that the Congress was primarily concerned with reducing government expenditures by more narrowly tailoring the reenlistment bonus scheme to actual military requirements." *Id. See* H.R. REP. No. 93-857, 93d Cong., 2dSess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2984-85.

[26] 533 F.2d at 1180.

[27] 528 F.2d at 741. The court based its determination on the belief that VRBs were granted in consideration of the "pay, benefits and allowances which will accure" from the time an individual performs his services. *Id.*

[28] The major report supporting the *Carini* court's findings was entitled "Clarification of Interpretation of Bill Language." H.R. CON. REP. No. 93-985, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2998, 3000. Congress indicated that it would allow those eligible for VRBs to cancel their old extension agreements and sign new ones calling for a longer period of extended service. *Id.* at 3000. *See* note 9 *supra.*

legislative history to support its holding.[29] In contrast, the court in *Larionoff* extensively considered legislative history in determining that the plaintiff had an enforceable contract right to the VRBs.[30]

The status of VRBs and enlistment contracts has been litigated in several district courts,[31] and the decisions all presaged the holding in *Larionoff*. The Fourth Circuit itself expressed some reluctance concerning its decision in *Carini*, finding the plaintiff's situation very appealing and calling upon Congress to enact provisions for granting the promised bonuses.[32] The Fourth Circuit's support of the unilateral modification of enlistment contracts by congressional assertion of supervening public policy[33] has hindered the evolution of enlistment agreements toward the status of true contracts.[34]

The Fourth Circuit's restrictive approach toward granting relief to

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[29] The Fourth Circuit was criticized by the D.C. Circuit for its inadequate analysis of the issues in *Carini*. 533 F.2d at 1191.

[30] The most important aspect of the *Larionoff* court's interpretation of the legislative history of VRBs and SRBs was its conclusion that the reason for abolishing VRBs was financial only and did not arise from "the exercise of a paramount governmental power. . . ." 533 F.2d at 1179. *See* notes 23-25 *supra*.

[31] 533 F.2d at 1180 n.35. Aiken v. United States, Civ. No. 75-0062-N (S.D. Cal. August 26, 1975); Collins v. Schlesinger, Civ. No. 75-0053 (D. Hawaii May 20, 1975); Caola v. United States, 404 F. Supp. 1101 (D. Conn. 1975). The issues before these courts were indentical to those before the *Carini* and *Larionoff* courts of appeals. Using basically the same analysis as *Larionoff*, the courts found the existence of an enforceable contract right. For a discussion of *Caola*, see note 24 *supra*.

[32] *See* note 14 *supra*. Congress anticipated the problem noting that:

> In cases where commitment [a binding contract] has been made to a man with a four-year enlistment and a two-year extension that he can cancel the two-year extension and reenlist for four years and receive a reenlistment bonus for the four-year enlistment. The Navy expressed great concern that the language of the bill might be interpreted to require it to abrogate an understanding it had with enlistees and would operate in such a way as to cause serious retention problems in its most critical career field.

H.R. CON. REP. No. 985, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2998, 3000. The Fourth Circuit seemed to imply that it was Congress' responsibility to make provisions for those affected by statutory changes, and that the courts should not interfere.

[33] Congressional assertion of supervening policy in the area of military enlistment contracts has found support in many cases. *See, e.g., In re* Grimley, 137 U.S. 147 (1890); Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971).

[34] Courts have taken an increasing interest in interpreting enlistment contracts as true contracts. Dilloff, *supra* note 2, at 148. When these agreements are considered as contracts they are governed by the law of contracts. *Larionoff* is an example of a case in which the court used contract law to determine not only the type of agreement between the parties, but the allowable damages when there was a breach of that agreement. 533 F.2d at 1180.

individuals alleging breaches of their enlistment contracts was also illustrated in *Reamer v. United States.*[35] In *Reamer,* the appellant brought suit to recover expenses for an unfinished semester of school. The appellant contended that the military had failed to honor its agreement to delay his start of active duty until after he had finished a semester of law school. At issue was whether a typed statement deferring the appellant's entry into active duty was effective against the Army.[36] Evidence regarding the meaning of the statement differed. The appellant testified that he believed the statement would delay the start of his active duty; enlisting officers for the Army, however, claimed that they had told the appellant the statement concerning the delay was only a request and would not become valid until approved by the Army.[37] In denying the appellant relief, the court viewed the questioned statement in terms of ordinary contract law and found no error in the district court's admission of oral testimony to resolve the ambiguity in the interpretation of the contract.[38]

The Fourth Circuit's treatment of enlistment contracts in *Carini* and *Reamer* was not wholly consistent and the factual differences between the cases seemingly do not justify the discrepancies. The court in *Carini* did not allow the assertion of an action based upon contract law because it refused to recognize the reenlistment bonus as part of the contract.[39] In *Reamer,* however, the Fourth Circuit held that the questioned statement was included in the contract, and the court specifically stated that the usual rules of contract law would be applied to resolve the issue concerning the Army's promise.[40] Although *Carini* and *Reamer* possibly have reconcilable factual differences,[41] they do illustrate how the Fourth Circuit has varied its inter-

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[35] 532 F.2d 349 (4th Cir. 1976).

[36] The 56th paragraph of the enlistment contract was entitled "Remarks" and included the words, "Delayed from . . . active duty until 1 Feb. '69." 532 F.2d at 350.

[37] Although the enlisting officers had limited authority to bind the army to enlistment contracts, delays of more than 120 days were not a usual part of enlistment contracts and required special permission from a higher autority. This authority was presumed to come from within the Department of the Army. *Id.* at 351-52.

[38] *Id.* at 352. *C.f.* Roman v. Schlesinger, 404 F. Supp. 77 (E.D. N.Y. 1975). *Roman* was a habeas corpus action by a Navy sonar technician seeking release from a two-year enlistment extension agreement. The petitioner asserted that his reason for signing the extension was based upon the promise of an assignment to computer school. The action failed because contrary testimony by the recruiter indicated that the petitioner was never guaranteed any particular school. Further grounds for the dismissal of the action were based upon the petitioner's inability to show that the schooling he received had less value than the schooling he was allegedly promised.

[39] *See* text accompanying notes 10-14 *supra.*

[40] 532 F.2d at 351.

[41] The court in *Carini* held that legislation can alter an enlistment contract, 528