Whose Money Is It: Does the Forfeiture of Voluntary Educational Benefit Contributions Raise Fifth Amendment Concerns?

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Introduction

> *The Montgomery GI Bill and Army College Fund are ways to get part of your college education paid for just by enlisting in the U.S. Army. You contribute a small sum of money every month and can receive something that's beyond value—a college education.*[1]

A college education may be beyond value, but the value of Montgomery GI Bill benefits is easy to quantify.[2] The maximum current value of Montgomery GI Bill benefits is $40,860.[3] A soldier who leaves the Army with an honorable discharge is typically eligible to receive the full amount in educational assistance.[4] If the same soldier leaves with a general discharge under honorable conditions, he or she receives nothing.[5] The soldier also forfeits his or her voluntary contributions to the program.[6] Moreover, those soldiers with less than six years of service who receive a general discharge under honorable conditions may forfeit their voluntary contributions without the benefit of a formal hearing.[7]

This article argues that the policy concerning educational benefit forfeitures as currently implemented needlessly gives rise to cognizable claims under the Fifth Amendment.[8] Specifically, modern changes allowing voluntary contributions to the Montgomery GI Bill program[9] raise a serious new concern. The concern is that the automatic forfeitures by some soldiers separating with a general discharge violate the Fifth Amendment's Due Process and Takings Clauses.[10] These new constitutional claims open the door to previously unwarranted judicial review.

First, this article details the evolution of the Army's current Montgomery GI Bill benefits program and explains how the Army administers the program today. Second, it explores the threshold matter of whether the courts would even entertain a challenge to the program's current implementation. The article reaches the preliminary conclusion the courts could hear a claim raising constitutional concerns about the program. Third, after discussing possible contractual justifications for educational benefit forfeitures, the article details the current state of the constitutional law regarding due process and takings. Fourth, following this explanation, the article applies this law to the forfeiture of today's educational benefits and illustrates how the current implementation invites judicial scrutiny.

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1. U.S. Army Recruiting Command, *Army Benefits*, *available at* http://www.goarmy.com/army101/benefits.htm (last visited Mar. 10, 2004) (listing benefits available to Army soldiers).

2. The Army College Fund mentioned in the opening quotation is a program for payment of further educational benefits beyond those provided by the Montgomery GI Bill. *See* 38 U.S.C. § 3015(d)(1) (2000) (authorizing additional benefits "in the case of an individual who has a skill or specialty designated by the Secretary concerned as a skill or specialty in which there is a critical shortage of personnel or for which it is difficult to recruit"); U.S. DEP'T OF ARMY, REG. 621-202, ARMY EDUCATIONAL INCENTIVES AND ENTITLEMENTS paras. 2-12, 2-19 (3 Feb. 1992) (implementing the Army College Fund program). For the sake of brevity, this paper does not address the Army College Fund program in any detail. Note, however, while the Army College Fund and Montgomery GI Bill programs are distinct, they do have one significant thing in common—their eligibility requirements. *See id.* para. 2-15 (mandating soldiers remain eligible for Montgomery GI Bill benefits to receive Army College Fund benefits).

3. *See* discussion *infra*. The $40,860 amount assumes a three-year enlistment with the maximum allowable participation and contributions by the soldier.

4. 38 U.S.C. § 3011(a)(3)(B) (requiring discharge "from active duty with an honorable discharge").

5. Carr v. Brown, 5 Vet. App. 2, 3 (Vet. App. 1993) (affirming a Board of Veterans' Appeals decision that a general discharge under honorable conditions was not "the requisite character of discharge to establish basic eligibility for . . . educational benefits").

6. *See* 38 U.S.C. § 3011(e)(4) (requiring the "Secretary [to] deposit any amounts received as contributions under this subsection into the Treasury as miscellaneous receipts"); *see also* 38 U.S.C. § 3011(b) (providing that "[a]ny amount by which the basic pay of an individual is reduced under this chapter . . . shall revert to the Treasury and shall not, for purposes of any Federal law, be considered to have been received by or to be within the control of such individual").

7. U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL para. 2-2 (1 Nov. 2000) [hereinafter AR 635-200].

8. U.S. CONST. amend. V.

9. 38 U.S.C. § 3011(e) (originally enacted in the Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, § 105, 114 Stat. 1822, 1828-29 (2000)) (allowing, for the first time, soldiers to make voluntary contributions to the educational benefits program).

10. U.S. CONST. amend. V.

Finally, the article concludes with a simple suggestion to minimize the possibility of judicial review.

The Montgomery GI Bill

Precursor to the Montgomery GI Bill

Persons who entered military service on or after 1 January 1977 and before 1 July 1985 were eligible for the educational benefits provided by the Post-Vietnam Era Veterans' Educational Assistance Program (VEAP).[11] Under VEAP, service members voluntarily contributed funds to the program in return for matching funds from the Department of Veterans Affairs. The matching fund rate was two dollars for every dollar contributed.[12] The maximum voluntary contribution allowed was $2,700.[13] Congress simultaneously created "a deposit fund account entitled the 'Post-Vietnam Era Veterans Education Account'" to hold the contributions and matching funds.[14] The Department of Veterans Affairs administered this educational assistance program with funds "deposited into and disbursed from the fund for the purposes of such program."[15] If a service member received a dishonorable discharge, the member received a refund of his or her contributions, but no other benefit from the program.[16]

The VEAP "was generally considered to be a failure"[17] because it proved ineffective as a recruiting tool. During the time VEAP was available between 1977 and 1979, the Army did not meet its recruiting objectives.[18] Only about a third of enlisting recruits signed up for the program, prompting one senator to characterize it as "largely ignored."[19] In response to the program's unpopularity and failure as a recruiting tool, lawmakers sought to establish a more effective education assistance program.

The Montgomery GI Bill

The solution that Congress enacted was the Veterans' Educational Assistance Act of 1984.[20] It contains provisions for education assistance to members of both the active and reserve components and does not differentiate between the services.[21] The active component program and, specifically, the Army's implementation of the program is the focus of this article. The article does not contain a separate analysis of the reserve program, nor does it explore how other services implement the Montgomery GI Bill program.

Congress originally intended the Veterans' Education Assistance Act of 1984 to be a temporary program. It became effective on 1 July 1985 and was to expire on 30 June 30 1988.[22] The stated purpose of the program was "to provide a new educational assistance program to assist in the readjustment of members of the Armed Forces to civilian life."[23] If a soldier served three years, this original assistance consisted of $300 per month for thirty-six months for full-time schooling.[24] This $10,800 represented an increase of $4,200 over VEAP's benefits after subtracting out the soldier's contributions or forbearance of pay under each plan.[25]

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11. 38 U.S.C. § 3221(a).

12. *Id.* § 3222(b).

13. *Id.* § 3222(a).

14. *Id*.

15. *Id*. § 3222(e).

16. *Id.* § 3225.

17. 132 CONG. REC. S5982 (daily ed. May 15, 1986) (statement of Sen. Murkowski).

18. *Id*.

19. 133 CONG. REC. S6200 (daily ed. Apr. 21, 1987) (statement of Sen. Daschle).

20. Veterans' Educational Assistance Act of 1984, Pub. L. No. 98-525, § 1411, 98 Stat. 2553, 2553-64 (codified as amended in scattered sections of 38 U.S.C. (2000)).

21. *Id*. at 2555.

22. *Id*. at 2554.

23. *Id*. at 2553.

24. *Id*. at 2557.

25. The VEAP's maximum contribution was $2,700. Its maximum benefit was $8,100 after two-for-one matching. This benefit equated to the soldier receiving $5,400 in assistance from the government. Under the new program, the soldier received $9,600 in assistance.

Under the new program, the soldier's enrollment obligation originally consisted solely of $100 per month withheld from the soldier's basic pay for the first twelve months of service.[26] Representative Sonny Montgomery, who would eventually lend his name to the permanent title of the program, later stressed that these enrollment costs were not analogous to the contributions made under the unpopular VEAP.[27] He stated, "[T]he Montgomery GI Bill is not a contributory program. Participants agree to a lower rate of basic pay than that paid to nonparticipating service members and taxes are paid on the reduced pay level."[28] In other words, the soldier concerned never saw a deduction from his or her pay. The service simply paid the soldier less than it paid soldiers of the same grade and time in service that chose not to participate. Also contrary to VEAP, the original law did not establish a specific fund to receive the monies withheld from the pay of military members. These "[a]mounts withheld from basic pay . . . revert[ed] to the Treasury."[29]

In 1986, Congress took a preliminary step to establish a fund to receive the New GI Bill payroll deductions by amending the act to clarify the nature of the $1,200 cost of enrollment. According to the clarification, "Any amount by which the basic pay of an individual is reduced . . . shall not, for the purposes of any Federal law, be considered to have been received by or be within the control of such individual."[30] This amendment was originally "derived from section 103 of H.R. 3747, relating to the establishment of a New GI Bill Educational Assistance Fund, as ordered reported by the House Committee on Veterans' Affairs on July 29, 1986."[31] This fund would have presumably played the role of the Post-Vietnam Era Veterans Education Account under VEAP and held the funds freed by the payroll deduction.[32] Congress, however, never established the envisioned New GI Bill Educational Assistance Fund. To this day, the Department of Veterans Affairs administers the GI Bill from funds "appropriated to, or otherwise available to" it for the payment of the entitlements.[33] Because the pay reductions revert to the Treasury, there is no direct link between the pay reductions and the funding of the benefits program.[34]

Once the soldier enrolled in the program by accepting the reduction of basic pay, he or she had to meet three basic requirements to earn educational benefits upon leaving active duty. These requirements are nearly the same today.[35] They involve time in service, educational status, and characterization of discharge.[36]

First, the soldier had to serve the required amount of time. This required period could be twenty, twenty-four, thirty, or thirty-six months. If the soldier's initial obligation was less than three years, twenty-four months of service qualified him or her for the program. Soldiers with an initial obligation to serve less than three years needed to serve only twenty months if the government separated him or her for its convenience before their term of service expired. A three-year initial obligation required thirty months of service if separation was for the convenience of the government. A full three years of service was sufficient in all instances.[37] The second requirement demanded the soldier have a "secondary school diploma (or equivalency certificate)" at the completion of his or her service.[38] The third and final qualifying condition required that the soldier receive an honorable discharge.[39] These seemingly low threshold

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26. Veterans' Educational Assistance Act of 1984, Pub. L. No. 98-525, § 1411, 98 Stat. 2553, 2555 (1984).

27. New GI Bill Continuation Act, Pub. L. No. 100-48, 101 Stat. 331 (1987) (codified as amended in scattered sections of 38 U.S.C. § 3011 (2000)) (changing the short title of the section to the "Montgomery GI Bill Act of 1984").

28. 134 CONG. REC. 7,506 (1988).

29. Veterans' Educational Assistance Act § 1411(b).

30. Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. No. 99-576, 100 Stat. 3268 (1986) (codified as amended at 38 U.S.C. § 3011(b)).

31. 132 CONG. REC. S15589 (daily ed. Oct. 8, 1986) (Explanatory Statement on the Proposed Compromise Agreement on H.R. 5299, the Proposed "Veterans' Benefits Improvement and Health-Care Authorization Act of 1986").

32. *See* 38 U.S.C. § 3222(e).

33. *Id*. § 3035.

34. *See id*. § 3011(b).

35. *See id*. § 3011(a).

36. *See* Veterans' Educational Assistance Act of 1984, Pub. L. No. 98-525, § 1411, 98 Stat. 2553, 2554-55 (1984).

37. *Id*.

38. *Id*. at 2555.

39. *Id*.

requirements, coupled with the invisible nature of the enrollment cost, proved extremely attractive to those considering enlisting in the military.

The program was a highly effective recruiting tool. It was so successful one senator went so far as to credit it with "playing a major role in saving the All-Volunteer Force."[40] Furthermore, Representative Montgomery observed:

> Since the implementation of the New GI Bill on July 1, 1985, the ability of the Army to attract high quality graduates has improved. The average monthly percentage of high quality graduate contracts written increased to 57.9 percent during the first 12 months under the new program compared to the 50.8 percent for the final 12 months under VEAP . . . . An impressive 80 percent of new soldiers are presently participating in the New GI Bill—double the rate under VEAP.[41]

The program was also a fiscal success. Less than one year after its implementation, the program had already placed "approximately $75 million in revenues [in the Federal Treasury] as a result of the reduction in basic military pay."[42] The projected total revenue saved over the original three-year span of the program was $500 million.[43] The Congressional Budget Office estimated the reductions in pay would offset the cost of the program to the government until 1992 and thereafter only cost $50 million to $75 million a year.[44] Additionally, the Army estimated it was saving "$234 million annually due to reduced attrition" credited to the higher quality of recruits brought in under the program.[45]

In response to these successes, the New GI Bill Continuation Act of 1987 made the GI Bill program permanent and gave it the now-familiar name of the Montgomery GI Bill.[46] For the next thirteen years, Congress adjusted the program slightly at least every other year.[47] These adjustments made only minor changes.[48] The next significant change would not occur until 2000.

The Veterans Benefits and Health Care Improvement Act of 2000 allowed voluntary contributions to the program for the first time.[49] Under the Act, service members could voluntarily contribute up to $600 to the program. The soldier received an increased monthly benefit of one dollar for every four dollars contributed.[50] Once again, however, the statute did not provide for the placement of these contributed funds into any distinct account. Rather, the law stated, "The Secretary shall deposit any amounts received by the Secretary as contributions under this subsection into the Treasury as miscellaneous receipts."[51]

With the enactment of this law, Representative Montgomery's prior statement concerning the non-contributory nature of the program[52] became inapplicable as the service member could now contribute discretionary money to the program. As discussed earlier, voluntary contributions were the sole means of enrollment and participation in the unpopular VEAP before the Montgomery GI Bill.[53] Because a service member made VEAP

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40. 133 Cong. Rec. S6200 (daily ed. May 8, 1987) (statement of Sen. Cranston).

41. 132 Cong. Rec. E3608 (daily ed. Oct. 14, 1986) (insertion by Rep. Montgomery).

42. 132 Cong. Rec. E1423 (daily ed. Apr. 29, 1986) (letter to Rep. Montgomery from the Director of the Office of Veterans Affairs).

43. *Id.*

44. 133 Cong. Rec. S6200 (daily ed. May 8, 1987) (statement of Sen. Cranston).

45. *Id*.

46. New GI Bill Continuation Act, Pub. L. No. 100-48, 101 Stat. 331 (1987) (codified as amended in scattered sections of 38 U.S.C. (2000)).

47. *See* 38 U.S.C. § 3011 (2000) (detailing the history of the amendments to the section and indicating no amendments occurred in 1993, 1995, or 1997).

48. *See, e.g.*, Veterans Benefits and Programs Improvement Act of 1988, Pub. L. No. 100-689, §§ 102, 104, 102 Stat. 4161, 4162, 4166 (1988) (allowing eligibility for those completing twelve semester hours towards a college degree and allowing eligibility for those separated due to preexisting medical conditions or as the result of a reduction in force); Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 207, 112 Stat. 3315, 3328 (1998) (requiring services to provide information on the minimum requirements for education benefits to those separating early for the convenience of the government).

49. Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, § 105, 114 Stat. 1822, 1828-29 (codified as amended at 38 U.S.C §§ 3011(e), 3012(f), 3015 (LEXIS 2003)).

50. *Id.* at 1829 (codified as amended at 38 U.S.C. § 3015(g)).

51. 38 U.S.C. § 3011(e)(4).

52. 134 Cong. Rec. 7,506 (1988).

53. *See* discussion *infra*.

contributions from his or her discretionary income, Congress apparently deemed it necessary to include provisions for refunding the contributions in the event a service member became ineligible for the program. The statute even authorizes refunds in instances when the service member receives a dishonorable discharge.[54] Because pay reductions—not contributions—form the basis of enrollment in the Montgomery GI Bill program, it seems that Congress determined there was less of a need for a refund provision. The law stated the enrollment funds were never the soldiers' money,[55] so a refund seemed unnecessary. With voluntary contributions now authorized, a reimbursement provision appears more necessary; but one still does not exist. Additionally, the level of benefits a qualifying soldier may receive in exchange for these nonrefundable deductions and voluntary contributions is substantial.

The current level of benefits payable under the basic Montgomery GI Bill is $985 per month for fiscal year 2004.[56] A former soldier is entitled to a maximum of thirty-six months of benefits.[57] Voluntary contributions entitle the soldier to an additional monthly benefit equal to one dollar for every four dollars contributed.[58] For example, by contributing the maximum voluntary amount of $600,[59] the monthly benefit increases an additional $150 per month.[60] Over the course of the entire four years, basic Montgomery GI Bill benefits can total $40,860.[61] This is a significant return on the soldier's $1,200 enrollment and $600 contribution investment.

Easy Come, Easy Go—Signing Up For and Losing Montgomery GI Bill Benefits

Enrolling in the Montgomery GI Bill

Basic enrollment in the Montgomery GI Bill program occurs at enlistment. As part of the enlistment contract, the soldier may sign two forms. The first form is the Department of Defense (DD) Form 2366, Montgomery GI Bill Act of 1984 – Basic Enrollment.[62] The form contains a section titled, "Statement of Understanding for All Eligible Members," which notifies the soldier of some of the conditions of the program.[63] The form also indicates failure to complete the form "will result in the individual being automatically enrolled" in the program.[64] Strangely, while the form is designed to provide necessary information to the soldier, enrollment occurs even if the soldier never sees the form.

Part of the information provided by the form addresses the soldiers' lack of control over the $1,200 enrollment cost. The "Statement of Understanding" section declares, "[T]his basic pay reduction CANNOT be REFUNDED, SUSPENDED OR STOPPED, this is an IRREVOCABLE DECISION."[65] The form seeks to be equally unambiguous in addressing the characterization of discharge requirement. It states the soldier "must receive an HONORABLE discharge" and "[t]his DOES NOT include 'under honorable conditions.'"[66] Notwithstanding the form's use of capitals, it is unlikely a new enlistee would grasp the difference between an honorable discharge and a discharge "under honorable conditions." The soldier's signature also acknowledges he or she "must complete 36 months of active duty service (24 months if [their] enlistment is for less than 36 months)" before becoming eligible for Montgomery GI Bill benefits.[67]

54. 38 U.S.C. § 3225 (2000).

55. *Id*. § 3011(b).

56. *Id*. § 3015(a).

57. *Id*. § 3013(a).

58. *Id*. § 3015(g).

59. *Id*. § 3011(e)(3).

60. *Id*. § 3015(g)(1) (increasing "the monthly rate otherwise provided for . . . by . . . an amount equal to $5 for each $20 contributed by such individual").

61. This amount is derived from the following formula: ($985 Basic GI Bill Benefit per month) + ($150 Voluntary Contribution Benefit per month) x (36 months) = $40,860.

62. U.S. Dep't of Defense, DD Form 2366, Montgomery GI Bill Act of 1984 (MGIB) – Basic Enrollment (June 2002).

63. *Id*. sec. 3.

64. *Id*. Privacy Act Statement Section.

65. *Id*. sec. 3.

66. *Id*.

The second form signed by the soldier explains his or her eligibility to increase Montgomery GI Bill benefits by making additional contributions while on active duty.[68] This form, the DD Form 2366-1, also includes a "Statement of Understanding."[69] The soldier's signature acknowledges he or she "understand[s] that MGIB increased benefit option contributions are non-refundable."[70]

Failing to Qualify for Educational Benefits

Soldiers typically fail to qualify for educational benefits (and forfeit their pay reductions and voluntary contributions) in one of two ways. They fail to meet the length of service requirements or they fail to leave the service with an honorable discharge. Generally, a soldier's failure to meet the length of service requirement precludes receiving educational benefits; but the statute does contain several exceptions to the length of service requirements.[71] The law contains no exceptions, however, to the honorable discharge requirement.

Surprisingly, a soldier may completely fulfill his or her initial enlistment obligation, leave the Army under honorable conditions, and still receive no benefits. This situation occurs if the soldier receives a general discharge under honorable conditions.[72] Even if the general discharge under honorable conditions comes after the soldier otherwise fully qualifies for benefits, he or she is still ineligible.[73] For example, a soldier may serve an original three-year enlistment (fulfilling the contractual obligation and qualifying for all benefits) and choose to extend his or her enlistment for one year.[74] If, at the end of the fourth year, the soldier receives a general discharge under honorable conditions, he or she is ineligible for educational benefits and forfeits all pay reductions and contributions.[75]

Moreover, the Army's regulation governing enlisted separations states, "Both honorable and general discharges entitle a soldier to full Federal rights and benefits provided by law."[76] This assertion was true under VEAP, when the solder bore the lighter burden of simply avoiding a dishonorable discharge.[77] Currently, however, the assertion is categorically incorrect when applied to the eligibility determination for today's educational benefits. Under the Montgomery GI Bill, the burden on the soldier is greater.[78] The soldier must receive an "honorable" discharge to qualify for educational benefits.[79] Service under honorable conditions is not sufficient.

The Army's enlisted separation regulation states, "A general discharge is a separation from the Army under honorable conditions."[80] The Army issues such discharges to soldiers "whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge."[81] The Army may issue a characterization of under honorable conditions only when the reason for separation specifically allows such characterization.[82]

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67. *Id*.

68. U.S. Dep't of Defense, DD Form 2366-1, Montgomery GI Bill Act of 1984 (MGIB) – Increased Benefit Contribution Program (June 2002).

69. *Id*. sec. 2.

70. *Id*.

71. 38 U.S.C. § 3011(a)(1)(A)(ii) (2000) (authorizing length of service exceptions for the following early separation reasons: service-connected disabilities; non-service connected, preexisting medical conditions; non-disabling physical or mental conditions that interfere with duty performance; convenience of the government as a result of a reduction in force; and, other convenience of the government separations, provided the soldier served twenty months of a twenty-four month enlistment or thirty months of a thirty-six month enlistment).

72. Carr v. Brown, 5 Vet. App. 2, 3 (Vet. App. 1993) (affirming a Board of Veterans' Appeals decision a general discharge under honorable conditions was not "the requisite character of discharge to establish basic eligibility for . . . educational benefits").

73. No. 91-16 592, 1994 BVA LEXIS 7272, at *6 (Bd. of Vet. App. Feb. 7, 1994). The Board of Veteran's Appeals denied the educational benefits while stating,

> [T]he Board observes that the veteran did serve for three continuous years on active duty after 30 June 1985, and was probably entitled to receive educational benefits under Chapter 30 from 30 June 1988 until his discharge on 26 January 1989. However, on 26 January 1989, the veteran was given a general discharge.

Id.

74. *See* U.S. Dep't of Army, Reg. 601-280, Army Retention Program para. 4-9 (31 Mar. 1999) (listing reasons for extensions of enlistments).

75. *But see id*. para. 3-5 (requiring a determination of eligibility of discharge before determining eligibility for reenlistment). If a soldier eligible for education benefits reenlists rather than extending the original enlistment and if the pre-reenlistment discharge was honorable, a subsequent non-qualifying discharge under honorable conditions does not nullify the already earned eligibility. *See id.*

76. AR 635-200, *supra* note 7, para. 3-6.

77. 38 U.S.C. § 3225 (2000).

78. *See id*. § 3011(a)(3)(B).

Nearly every regulatory chapter authorizing a separation before a soldiers' expiration of term of service, however, also authorizes a general discharge under honorable conditions in certain circumstances.[83] The regulation also states, "It is a pattern of behavior and not the isolated incident that should be considered the governing factor in determination of character of service."[84] Nevertheless, the regulation allows for exceptions to this principle by indicating, "There are circumstances, however, in which the conduct or performance of duty reflected by a single incident provides the basis for characterization."[85] This exception often swallows the rule. A common example is the case of a soldier who tests positive for an illegal substance during unit urinalysis testing.

The Army Substance Abuse Program requires commands to process for separation those soldiers who test positive for illegal drugs.[86] The separation regulation characterizes abuse of illegal drugs as "serious misconduct" which may warrant separation.[87] Although the separation authority has the discretion to disapprove the separation, he or she may exercise this discretion only at the very end of the process.[88]

By the end of the process, the soldier's unit may have already completed the time-consuming preliminary work a separation requires.[89] The only step needed to complete separation of the potential drug offender is the separation authority's signature.[90] In this case, the separation authority may be more likely to err on the side of caution and separate the soldier. Absent very strong extenuating or mitigating circumstances, retaining the soldier may send the wrong message about the command's willingness to tolerate drug abuse. Even worse, if the soldier does have a drug problem, his or her retention may endanger other members of the command or unit readiness.

In addition, the separation authority may be under pressure to characterize the discharge as "general under honorable conditions." To do otherwise provides no disincentive to drug use. An honorable discharge would allow the soldier to exit the service early with all of his or her benefits intact, including the Montgomery GI Bill, provided he or she served the required time. Drug abuse becomes a painless way to leave the service early if the command characterizes the soldier's service as honorable. Awarding an honorable discharge in these cases also cheapens the value of such a discharge for those soldiers who actually complete their term of service without engaging in misconduct. Consequently, based on this single incident, it is likely the soldier exits the service with a general discharge and no education benefits. For example, in calendar year 2002, one U.S. Army brigade had fifty-six first-term soldiers test positive for illegal substances.[91] The brigade retained five of the sol-

79. No. 91-16 592, 1994 BVA LEXIS 7272, at *6 (Bd. Vet. App. Feb. 7, 1994). The Board of Veteran's Appeals stated:

> The Board has considered the veteran's argument that since a general discharge under honorable conditions was sufficient to establish eligibility under previous educational programs, it should also be considered as sufficient to establish eligibility for [Montgomery GI Bill] benefits. While it is true that a general discharge under honorable conditions is sufficient to establish eligibility for some benefits, the . . . law makes it absolutely clear that only an honorable discharge will establish eligibility under the [Montgomery GI Bill] program. Therefore, a general, bad conduct, undesirable, or dishonorable discharge does not satisfy that requirement. Consequently, insofar as the veteran only received a general discharge, even though it was under honorable conditions, he does not have basic eligibility for [Montgomery GI Bill] educational benefits.

Id.

80. AR 635-200, *supra* note 7, para. 3-7.

81. *Id*.

82. *Id*.

83. *Id*. chaps. 5-10, 13, 14. These chapters include separations for the convenience of the government, dependency or hardship, fraudulent enlistment, pregnancy, alcohol or drug abuse rehabilitation failure, discharge in lieu of trial by court martial, unsatisfactory performance, and misconduct.

84. *Id*. para. 3-7.

85. *Id*. para. 3-6.

86. *See* U.S. Dep't of Army, Reg. 600-85, Army Substance Abuse Program para. 1-35 (1 Oct. 2001) (providing that "[a]ll soldiers . . . who are identified as drug abusers, without exception, will . . . [b]e processed for administrative separation").

87. AR 635-200, *supra* note 7, para. 14-12.

88. *Id*. para. 2-3.

89. *See id*. para. 1-32 (requiring both a medical examination and a mental status evaluation for soldiers separating due to misconduct).

90. *Id*. para. 2-3.

91. E-mail from SSG Guadelupe Sorola, Noncommissioned Officer-in-Charge, Military Justice, Baumholder Branch Office, 1st Armored Division, to author (21 Mar. 2003) (on file with author).

diers. The brigade separated the other fifty-one soldiers using the notification procedures discussed below. All fifty-one received a general discharge under honorable conditions.[92]

The soldier's ability to influence this process varies based on his or her time in service. The Army can separate soldiers with less than six years of service through "notification procedures." Soldiers with six or more years of service may have their case heard before a formal administrative board.[93] Under notification procedures, however, there is no board or formal hearing. The soldier receives written notice of the recommendation for separation. The notice relates several facts. It includes the specific allegations forming the basis for the separation action and the specific provisions of the regulation authorizing separation. The notice also includes whether the proposed action could result in discharge from the Army. It also states the least favorable characterization of service or description of separation the soldier could receive. Finally, the notice describes the type of discharge and character of service recommended by the initiating commander and explains the higher commander may recommend a less favorable type of discharge and characterization of service.[94]

Under the notification procedures, the soldier's response rights once he or she receives the notice are very limited. He or she may submit written statements in his or her own behalf. The soldier may also obtain copies of documents sent to the separation authority supporting the proposed separation.[95] There is no right to demand a trial by court-martial or even a personal appearance before the separation authority.[96] If the separation authority decides to separate the soldier with a general discharge under honorable conditions, there is no additional process before $40,860 in Montgomery GI Bill benefits (including the soldier's $600 in voluntary contributions) disappears. There is no right to demand any additional process because the separation is an administrative matter and not punishment.[97]

In addition, the regulations do not allow for an administrative appeal before separation.[98] Furthermore, post-separation administrative appeal authorities cannot fashion a suitable remedy for the monetary loss suffered by the soldier. The Army Discharge Review Board can review the characterization of the discharge.[99] If the Discharge Review Board upgrades the discharge to honorable, the soldier receives the benefits and there is no loss. The Army Board for the Correction of Military Records can do the same.[100] Such an upgrade, however, is unlikely. In the urinalysis illustration, for example, the Army separated the soldier for "serious misconduct" because the facts of the case warranted a general discharge. Finally, while the Board of Veteran's Appeals has addressed the issue of refunding educational benefit contributions, it has repeatedly stated it lacks the statutory authority to actually award the refund.[101] This exhaustion of administrative measures makes the courts the soldier's final recourse. The question is whether the courts will hear the case.

The Threshold Matter of Justicibility

The courts will examine the loss of military educational benefits only if the claim rises to the level of a constitutional issue. Courts have long given great deference to decisions by military commanders.[102] Because they recognize military decision-making requires a special expertise, courts are loath to substitute their judgment for the judgment of military commanders.[103] Consequently, decisions by commanders often enjoy an added layer of protection from judicial scrutiny in many courts.[104]

92. *Id*.

93. AR 635-200, *supra* note 7, para. 2-2(c)(3) (detailing the right "[t]o a hearing before an administrative separation board . . . if he/she had 6 or more years of total active and reserve service on the date of initiation of recommendation for separation").

94. *Id*. fig. 2-1.

95. *Id*. para. 2-2.

96. *Id*.

97. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶¶ 3, 4 (2002) (detailing the process provided for imposing nonjudicial punishment, including the right to demand trial by court-martial before imposition of punishment).

98. AR 635-200, *supra* note 7, para. 2-2.

99. 10 U.S.C. § 1553(b) (2000) ("A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.").

100. 32 C.F.R. § 581.3 (b)(4)(ii) (2003) ("If persuaded that material error or injustice exists, and that sufficient evidence exists on the record, [the board members may] direct or recommend changes in military records to correct the error or injustice.").

101. *See* No. 97-06 933, 2000 BVA LEXIS 8321, at *10 (Bd. Vet. App. Mar. 28, 2000) ("[T]he VA has not been granted legal authority to refund the veteran's contributions. Moreover, VA's General Counsel has indicated that any recourse for refund of such funds would in any event not be with VA, but with each specific branch of the Armed Forces."); No. 96-37 340, 1998 BVA LEXIS 10271, at *9 (Bd. Vet. App. Apr. 2, 1998) ("[W]hile the Board sympathizes with the veteran, it has no legal authority to refund the veterans contributions. Therefore, it appears more appropriate for the veteran to address his dispute directly to the Department of the Army, an entity separate from the VA, and to request a refund therefrom.").

This deference, however, is not absolute.[105] Under appropriate circumstances, courts will review decisions by commanders.[106] A soldier's forfeiture of the new voluntary contributions may raise the constitutional question necessary to place notification procedure separations before the court. Consequently, the forfeitures may clear the first hurdle for a potential plaintiff—the *Mindes* test.[107]

The Mindes *Test*

Several Federal Circuits have applied the test from *Mindes v. Seaman* or a modified version of it to determine the justiciability of an internal military matter.[108] The test begins with two threshold determinations and then lays out four factors for the court to balance. As an initial threshold matter, "A court should not review internal military affairs in the absence of an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations."[109] The second threshold requirement mandates the "exhaustion of available intraservice corrective measures."[110] Even after an allegation meets these threshold requirements, there is no guarantee that the court will review it. Instead, the court next applies the four *Mindes* balancing factors.[111]

The most important balancing factor considers "[t]he nature and strength of the plaintiff's challenge to the military determination."[112] In explaining this factor, the court noted, "Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values."[113] Clearly, a constitutional issue standing alone may outweigh the remaining factors and tip the scales towards justiciability. The lesser balancing factors include an examination of "[t]he potential injury to the plaintiff if review is refused."[114] The court then considers "[t]he type and degree of anticipated interference with the military function."[115] The final lesser factor the court balances is "[t]he extent to which

102. *See* Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.").

103. *See* Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("Moreover, it 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 . . . ."); C.J. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962) ("The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.").

104. *See, e.g.*, Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971) (setting out a four-factor balancing test to be applied before examining an otherwise sufficient allegation concerning an internal military matter).

105. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("Men and women in the Armed forces do not leave constitutional safeguards and judicial protection behind when they enter military service.").

106. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.").

107. *Mindes*, 453 F.2d at 201.

108. *See, e.g.*, Wenger v. Monroe, 282 F.3d 1068, 1072-73 (9th Cir. 2002) (applying a modified version of the *Mindes* test); Meister v. Tex. Adjutant General's Dep't, 233 F.3d 332, 333 (5th Cir. 2000) (remanding case for evaluation under *Mindes* test); Robertson v. United States, No. 97-5183, 1998 U.S. App. LEXIS 8499, at *7 (10th Cir. 1998) (holding the district court erred in not applying *Mindes* test); Scott v. Rice, No. 92-2463, 1993 U.S. App. LEXIS 24641, at *6 (4th Cir. 1993) (noting prior endorsement of *Mindes* test in *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991) and applying it in the instant case); Doe v. Garrett, 903 F.2d 1455, 1463 (11th Cir. 1990) (finding nothing objectionable in the application of *Mindes* but noting *Mindes* analysis not always required); Jones v. New York State Div. of Military & Naval Affairs and New York State Army Nat'l Guard, No. 93-CV-0862, 1997 U.S. Dist. LEXIS 21387, at *25, *30-31 (N.D.N.Y May 7, 1997) (applying *Mindes* test while noting "[t]he Second Circuit has never expressly adopted or rejected the *Mindes* test"); Shuman v. Celeste, No. C-87-7702, 1989 U.S. Dist. LEXIS 16390, at *3 (N.D. Oh. Apr. 12, 1989) (holding application of *Mindes* test proper and noting the 6th Circuit has never expressly adopted *Mindes*). *Contra* Wright v. Park, 5 F.3d 586, 590-91 (1st Cir. 1993) (abandoning *Mindes* in civil rights claims arising incident to service); Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 768 (7th Cir. 1993) (declining *Mindes* in favor of a "determination of whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree"); Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1010 (8th Cir. 1989) (stating "*Mindes* is not a viable statement of the law"); Kreis v. Sec'y of Air Force, 866 F.2d 1508, 1512 (D.C. Cir. 1989) (declining to adopt *Mindes* test); Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981) (declining to adopt the *Mindes* balancing test); Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 389 (1984) (arguing "the use of a balancing test to determine a court's power to review a constitutional claim against the military is not justified").

109. *Mindes*, 453 F.2d at 201.

110. *Id.*

111. *Id.* at 201-02.

112. *Id.* at 201.

113. *Id.*

114. *Id.*

the exercise of military expertise or discretion is involved."[116] The opinion explained, "Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions."[117] An application of *Mindes* to the forfeiture of Army educational benefits appears to indicate the door is now open to judicial review.

Applying the Mindes *Test to Educational Benefit Forfeitures*

It is impossible to illustrate the application of the *Mindes* factors in a vacuum. The test requires a set of facts to form the basis of the application. Assume these hypothetical facts expanding on the urinalysis example used earlier. A soldier initially enlists for three years. She participates in the Montgomery GI Bill. She has already paid the maximum $600 voluntary contribution to increase her benefit level when she leaves the service. Towards the end of her original enlistment, she extends her enlistment for one year to remain overseas (she is not yet done traveling around Europe). After three years of service, she has met her length of service requirements. Unfortunately, after serving forty-five months, she tests positive for an illegal substance. She maintains her innocence. Rather than seeking a court-martial, the command elects to expeditiously separate her. Following all the applicable regulations and laws, the command separates her for misconduct using notification procedures and characterizes her service as general under honorable conditions. The general discharge disqualifies her from receiving educational benefits. After seeking unsuccessfully to have her discharge upgraded, she decides to take the matter to court.

Making the Threshold Determinations

The initial threshold determination for the court under *Mindes* concerns the nature of the allegation. The former soldier must allege the deprivation of a constitutional right or allege the Army acted in violation of applicable statutes or its own regulations.[118] The command in this case followed the separation procedures found in the Army regulation implementing the Department of Defense (DOD) directive concerning enlisted separations[119] and there are no applicable statutory requirements. Therefore, the question is whether the Army has deprived her of a constitutional right. For reasons fully explained later, the former soldier points to her $600 in forfeited voluntary contributions as proof she has suffered a constitutional deprivation.[120] The court may well agree.

The second threshold determination centers on the necessity of exhaustion of available intraservice corrective measures.[121] For reasons touched on earlier and more fully described later, the former soldier's attempts to use intra-service corrective measures are unsuccessful.[122] She exhausts her administrative remedies to no avail. Having met the threshold requirements, the former soldier will next argue the *Mindes* balancing factors also weigh in favor of allowing judicial review.[123]

Balancing the Mindes Factors

Putting aside until later the question of the primary balancing factor concerning the nature and strength of the claim,[124] one of the lesser balancing factors of the *Mindes* test is an examination of the potential injury to the plaintiff. On a practical and emotional level, most would agree the loss of $40,860 in educational benefits represents a significant potential injury to a person recently discharged from the military. Reintegration into civilian life may be difficult without these benefits. It is possible a court might see it as significant, especially in cases such as this example when the government received the benefit of its bargain by having the soldier serve beyond the initially required time in service. On the other hand, these educational benefits are exactly that—benefits paid to qualifying soldiers. The soldier failed to qualify. Of the other amounts involved, the $1,200 enrollment deduction statutorily was never the property of the soldier.[125] The Army cannot injure the plaintiff by withholding something in which she never had an interest. That

115. *Id.*

116. *Id.*

117. *Id.* at 201-02.

118. *See* U.S. Dep't of Defense, Dir. 1332.14, Enlisted Administrative Separations (21 Dec. 1993) [hereinafter DOD Dir. 1332.14]; AR 635-200, *supra* note 7, chap. 2.

119. AR 635-200, *supra* note 7, chap. 2.

120. *See* discussion *infra*.

121. *See generally* Guerra v. Scruggs, 942 F.2d 270, 272 (4th Cir. 1991) (describing the post-separation procedures available to upgrade a discharge).

122. *See* discussion *infra*.

123. *See* Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971).

124. *See* discussion *infra*.

leaves only the recently authorized $600 in voluntarily contributions as a potential monetary injury.

The loss of $600 does not appear nearly as dramatic as the loss of $40,860. The size of the loss, however, is not always the determinative factor. The court may choose to focus on the nature of the funds or the hardship involved.[126] In *Sniadach v. Family Finance Corporation*, the Supreme Court focused on these issues in striking down a Wisconsin statute allowing the pre-notice and pre-judgment garnishment of wages[127] as violating the Fourteenth Amendment's Due Process clause.[128] In this case involving $63.18,[129] the Court noted:

> We deal here with wages -- a specialized type of property . . . . We turn then to the nature of that property and problems of procedural due process. A prejudgment garnishment of [this] type is a taking which may impose tremendous hardship on wage earners with families to support.[130]

One federal court has concluded this "specialized type of property" warranting due process protection includes funds set aside for college tuition.[131] In *Aaron v. Clark*, Clark filed a bond for garnishment against Aaron in anticipation of a civil suit arising from a mutual automobile accident.[132] In response to the summons for garnishment, Aaron's bank turned over to the Fulton County Civil Court the $145 Aaron had deposited in the bank. The federal court noted, "Aaron is now, and was at the time of the garnishment, a full-time student at DeKalb County Junior College, and the funds on deposit at the . . . bank were to have been used to pay tuition for the upcoming quarter at that college."[133] The court stated, "[P]roperty garnished in this case—funds set aside for college tuition—is a 'specialized type,' the summary seizure of which could and did impose a *great hardship* on an alleged debtor."[134] The court overturned the law permitting this pre-judgment garnishment.[135]

While not a Montgomery GI Bill case, the federal court in *Aaron v. Clark* does concern itself with funds for education and a seemingly small garnishment amounting to the loss of only $145.[136] In 2003 dollars, the $145 of the 1972 case equates to $637.58.[137] This is very close to the $600 in voluntary contributions set aside for education the soldier forfeits if ineligible for educational benefits upon discharge. Additionally, it is hard to imagine a more difficult position than that of the discharged soldier in the example. She has soldiered for over three years with the expectation she will attend college using her educational benefits on discharge. Now ineligible for those benefits, she faces a considerable hardship the court may decide to examine.

In addition to the nature of the potential injury, the court must balance whether hearing the case will interfere with military functions.[138] Determining the composition of the service is undoubtedly a military function.[139] A court questioning whether the command should have separated a soldier runs a significant risk of interfering with that function. Generally, the

125. Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. No. 99-576, 100 Stat. 3268 (1986) (codified as amended at 38 U.S.C. § 3011(b) (2000)).

126. *See, e.g.*, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

127. *Id*. at 340.

128. U.S. CONST. amend. XIV.

129. *Sniadach*, 395 U.S. at 337.

130. *Id*. at 340.

131. Aaron v. Clark, 342 F. Supp. 898, 899-900 (N.D. Ga. 1972).

132. *Id.*

133. *Id*. at 899.

134. *Id*. at 900 (emphasis added).

135. *Id*. at 901-02.

136. *Id*. at 899.

137. Federal Reserve Bank of Minneapolis, *What Is a Dollar Worth?, available at* http://www.minneapolisfed.org/ Research/data/us/calc/ (last visited Jan. 6, 2004) (providing a Consumer Price Index-based calculator for determining relative worth).

138. *See* Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971).

139. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (stating that "it 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 . . .") (emphasis added).

command's ability to separate a soldier should remain largely free from judicial scrutiny so long as it comports with the law and regulations. The question here, however, is much narrower. It concerns the forfeiture of the soldier's educational benefits contributions, which the Veterans Administration administers and not the DOD. The court could avoid substituting its judgment for that of the commander on the essential military function question of the composition of the force. In other words, the court could address the issue of whether the Army deprived the soldier of a property right when she forfeited her educational benefit contributions without having to address the appropriateness of her discharge. Therefore, a court may feel justified in addressing this issue. One reaches a similar conclusion when weighing the third lesser prong of the balancing test.

The third lesser prong of the balancing test relates to the level of the military's expertise or discretion concerning the issue. A commander's expertise is certainly significant as to the characterization of discharge the soldier deserves. Commanders, much more than courts ever could, know what separates an "honorable" soldier from one who served "under honorable conditions." Regulation does limit the commander's discretion in this regard.[140] When the commander does have discretion, however, as in the example, the discretion is considerable. These factors, on the surface, weigh against review. Once again, though, a properly tailored question removes much of the possible deference provided under this prong. The narrow question centers on the forfeiture of the voluntary contributions, not the actual characterization of the discharge. Commanders have much less expertise when it comes to weighing the after-service effects of monetary losses suffered by former service members. This prong and the two preceding ones appear to weigh in favor of judicial review. The next prong, however, makes review overwhelmingly likely.

The last and most important factor the court must balance is the "nature and strength" of the challenge.[141] A constitutional challenge is not only "normally more important," but it is "unequal in the whole scale of values."[142] Regardless of how heavily or lightly one weighs the previous factors, it seems doubtless the court will address an issue of a constitutional nature.[143] The foregoing three lesser factors already tip the scales in favor of review. It is clear *Mindes* will not stand as a bar to review if the forfeiture of educational benefits also raises constitutional questions. It does. The forfeiture of the voluntary contributions raises significant constitutional issues centered on a lack of due process and uncompensated takings prohibited by the Fifth Amendment.[144] Before turning to those constitutional concerns, it is helpful to first dispel the notion that purely contractual principles justify the forfeiture of the soldier's voluntary contributions.

Application of Contractual Law Principles to Voluntary Contribution Forfeitures

Contractually, the soldier did agree to serve a certain term and earn a certain characterization of discharge in return for certain benefits. In spite of the Army initiating the separation, it is arguable the example soldier breached the agreement by misconduct and did not meet her end of the bargain. It is certainly reasonable to believe the soldier should not expect to receive educational benefits if she did not qualify for them. It is not reasonable to believe the soldier should expect the government to retain her property in the form of her voluntary contributions in the event she failed to qualify for the benefits. The Restatement (Second) of the Law of Contracts states:

> Damages for a breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.[145]

There are no contractual terms indicating an agreement on the part of the soldier to treat the voluntary contributions as liquidated damages. The forms simply indicate the contributions are nonrefundable.[146] Moreover, the loss of the $600 is, at best, an unenforceable penalty.

The Restatement (Second) of the Law of Contracts further explains, "[T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system

140. AR 635-200, *supra* note 7, para. 3-7 (indicating "[o]nly the honorable characterization may be awarded a soldier upon completion of his/her period of enlistment . . . ." and "[a] characterization of under honorable conditions may be issued only when the reason for separation specifically allows such characterization").

141. *Mindes*, 453 F.2d at 201.

142. *Id.*

143. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("Men and women in the Armed forces do not leave constitutional safeguards and judicial protection behind when they enter military service."); Chappell v. Wallace, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.").

144. U.S. CONST. amend. V.

145. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

146. *See* discussion *infra*.

of contract remedies is compensatory, not punitive."[147] The test for an unenforceable penalty consists of the following two parts:

> The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach . . . . The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show that the amount fixed is reasonable.[148]

The automatic forfeiture of the full amount of the voluntary contributions is obviously an unenforceable penalty. First, the government retains the full amount of the contributions in every case, regardless of the actual loss that resulted from the breach. In the example case, the soldier served the full term of her original enlistment. The government received exactly what it bargained for at the time of contract formation. The government suffered no actual loss due to the soldier's separation during her enlistment's extension period. Second, there is very little difficulty in any case in proving the loss. It is quite easy to calculate how much of the benefit of its bargain the government received in terms of service by the soldier. If the soldier served thirty months of a thirty-six month enlistment, the soldier served eighty-three per cent of the required time.

It would be difficult, however, to establish the dollar value of the loss to the government with certainty. Nevertheless, it appears certain the arbitrary $600 is not appropriate as liquidated damages in most cases. In fact, it would be fair to argue it is unreasonably small in the cases of soldiers the Army separates early in their enlistment periods. This clearly mitigates against an assertion that the Army ever intended the forfeiture of voluntary contributions to act as a liquidated damages provision. Consequently, there is no contractual justification for the automatic forfeiture of the voluntary contributions. It is, therefore, appropriate to return to the constitutional concerns the forfeitures raise.

Review of Fifth Amendment Law

> *No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*[149]

Substantive Due Process

The constitutional nature of the concerns raised by the forfeiture is important. As discussed earlier, the constitutional nature of the claim is the most important balancing factor under the *Mindes* test.[150] In the case of voluntary contribution forfeitures, the constitutional concerns arise from the Fifth Amendment. The phrase "due process of the law" in the Fifth Amendment encompasses two separate protections. The first is a bar against "certain government actions regardless of the fairness of the procedures used to implement them."[151] This is the "substantive" component of the Due Process Clause.[152] It "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[153] The courts reserve this extremely high level of protection to "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[154] Among the rights warranting such protection are the rights to marry, to procreate, to direct the upbringing of children, to marital privacy, to contraception, to bodily integrity, and to abortion.[155] Notwithstanding some very small indications to the contrary,[156] it is highly unlikely courts would extend this level of protection to Army educational benefits.[157] Even so, "when government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner."[158] This second form of

147. RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a (1981).

148. *Id.* § 356 cmt. b.

149. U.S. CONST. amend. V.

150. *See* discussion *infra*.

151. Daniels v. Williams, 474 U.S. 327, 331 (1986).

152. U.S. CONST. amend. V.

153. Reno v. Flores, 507 U.S. 292, 302 (1993).

154. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

155. *Id.* at 721.

156. *See* Cleland v. Nat'l Coll. of Bus., 435 U.S. 213, 220 (1978) ("The District Court's error was not its recognition of the importance of veterans' benefits . . ." in concluding "that veterans' educational benefits approach 'fundamental and personal rights' and therefore a more 'elevated standard of review' was appropriate.").

protection "has traditionally been referred to as 'procedural' due process."[159]

Procedural Due Process

Not every government action must comply with the requirements of procedural due process. "[T]o determine whether due process requirements apply in the first place, . . . [courts should] look not to the 'weight' but to the nature of the interest at stake."[160] The forfeiture of Army educational benefits certainly does not implicate life—the third constitutionally named interest. Nonetheless, procedural due process also imposes constraints on "governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause."[161] Educational benefits forfeitures implicate these two interests.

Liberty Interest

A soldier typically loses educational benefits concurrently with his or her discharge. Courts have generally found that a discharge, in and of itself, does not implicate any liberty interest.[162] Moreover, there is no right to serve in the armed forces.[163] Nevertheless, "where the State attaches 'a badge of infamy' to the citizen, due process comes into play."[164] Yet, a badge of infamy is not sufficient to guarantee procedural due process protection, because "injury to reputation by itself [is] not a 'liberty' interest . . . ."[165] To implicate a liberty interest, there must be stigmatizing damage to reputation plus something more.[166] This additional factor could be a property interest.

Property Interest

In *Board of Regents v. Roth*,[167] the Court detailed some of the attributes of "property" protected by the Due Process Clause. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[168] The Court further elaborated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[169]

In *Perry v. Sindermann*, the Court further explained this "independent source" did not have to be explicit.[170] At issue in the case was the question of whether the lack of an explicit tenure provision foreclosed the possibility a teacher had a property

157. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

> [T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Id.

158. United States v. Salerno, 481 U.S. 739, 746 (1987).

159. *Id*.

160. Bd. of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

161. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

162. *See, e.g.*, Beller v. Middendorf, 632 F.2d 788, 806 (9th Cir. 1980) ("The mere fact of discharge from a government position does not deprive a person of a liberty interest.").

163. *See, e.g.*, Lindenau v. Alexander, 663 F.2d 68, 72 (10th Cir. 1981) ("It is well established that there is no right to enlist in this country's armed services.").

164. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

165. Siegert v. Gilley, 500 U.S. 226, 233 (1991).

166. *See* Paul v. Davis, 424 U.S. 693, 701 (1976) ("This line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause.").

167. 408 U.S. 564 (1972).

168. *Id.* at 577.

169. *Id*.

interest in re-employment.[171] The Court held a property interest could exist in the absence of an overt legal provision.[172] Finally, in *Cleveland Board of Education v. Loudermill*, the Court held that, while a legislature may well be the source of a property interest, "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[173] State law or some other source may create the right, but constitutional law determines the acceptable level of due process. "Once it is determined that due process applies, the question remains what process is due."[174]

Amount of Process Due

The Court has never adopted a rigid approach to questions of adequacy in the realm of due process.[175] Instead, the Court has adopted a balancing test. The test consists of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[176]

By weighing each of these factors, the courts try to reach equilibrium between the rights of the individual concerned and the requirements of the government.

In addition to the due process protections described above, the Fifth Amendment also guards against unjust takings.[177] The two concepts are somewhat linked.[178] The definition of property certainly is central to each. Analysis under the Takings Clause, however, differs from that used in Due Process Clause cases.

Takings

The Takings Clause forbids the uncompensated taking of private property for public use. Its purpose is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[179] In making this determination, the courts have once again "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case."[180]

When conducting these factual inquiries, three factors have "particular significance" in determining if something rises to the level of an unjust taking.[181] The first factor is "the economic impact of the regulation on the claimant."[182] The second factor is "the extent to which the regulation has interfered with distinct investment-backed expectations."[183] The final factor is

170. 408 U.S. 593 (1972).

171. *Id*. at 601.

172. *Id*. (holding "absence of such an explicit contractual provision may not always foreclose the possibility that [an individual] has a 'property' interest").

173. 470 U.S. 532, 541 (1985) (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

174. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

175. *See, e.g*., *id*. ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."); Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.").

176. Gilbert v. Homar, 520 U.S. 924, 931-32 (1997) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

177. U.S. CONST. amend. V.

178. *See* Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 641 (1993) ("Given that [the plaintiff's] due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause." (quoting Connolly v. Pension Ben. Guaranty Corp., 475 U.S. 211, 223 (1986))).

179. Armstrong v. United States, 364 U.S. 40, 49 (1960).

180. *See, e.g*., Connolly, 475 U.S. at 224; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) ("As has been admitted on numerous occasions, 'this Court has generally' been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action must be deemed a compensable taking.") (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

181. *Connolly*, 475 U.S. at 225.

182. *Id*.

"the character of the governmental action."[184] Of these three factors, only the meaning of the third is not largely self-evident.

The Court enumerated and applied these factors in the case of *Connolly v. Pension Benefit Guaranty Corporation*.[185] In *Connolly*, the appellant argued the withdrawal liability the Multiemployer Pension Plan Amendments Act of 1980[186] imposed on employers withdrawing from pension plans constituted a governmental taking of property in violation of the Fifth Amendment.[187] The Court disagreed. Applying the third factor of the takings analysis, the Court found the character of the governmental action did not amount to a taking when "[t]he Government does not physically invade or permanently appropriate any of the [plaintiff's] assets for its own use."[188] In this case, withdrawing employers paid the penalty to the plan, not to the government. Consequently, there was no taking on the government's part.

The Court has given the government's use of "taken" property significance beyond that of even the government's destruction of the property. In *United States v. Causby*, the appellant owned a chicken farm near a municipal airport.[189] When military aircraft began using the airport, the ensuing disruption agitated the appellant's poultry to such an extent it destroyed the property's use as a chicken farm.[190] In holding the government's action was a taking in violation of the Fifth Amendment, the Court emphasized, "This is not a case where the United States has merely destroyed property. It is using a part of it for the flight of its planes."[191] The Court clearly considered the government's on-going use of the property significant.

In addition, the property covered by the Takings Clause is not limited to physical property such as chicken farms. The clause also protects funds under government control. In *Webb's Fabulous Pharmacies, Incorporated v. Beckwith*, the Court addressed the propriety of a state statute permitting a clerk of courts to retain the interest on monies deposited in the registry of the state court.[192] The statute allowed the state to consider the funds public money while on deposit.[193] The Court struck down the law, holding:

> [The government] may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.[194]

Thus, the state's use of the funds was unconstitutional because the "exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts."[195]

Other courts have been similarly unsympathetic to the practice of denying benefits while retaining contributions made in expectation of those benefits. For example, in *Lucas v. Seagrave Corporation*, one company merged with another and dismissed some employees as a result.[196] The Minnesota Federal District Court held that it was a triable issue of fact whether the dismissed employees were entitled to recover money contributed to the company's on-going pension fund based on the contractual principle of unjust enrichment.[197] In *Knoll v. Phoenix Steel Corporation*, the Third Circuit Court of Appeals used *Lucas* as an illustration of a case of a "company [] using the premiums, contributed by the dismissed employees, to meet future obligations owed by the company to the pension fund; yet,

183. *Id.*

184. *Id.*

185. *Id.* at 224-27.

186. 29 U.S.C. §§ 1381, 1391 (2000).

187. U.S. CONST. amend. V.

188. *Connolly*, 475 U.S. at 225.

189. 328 U.S. 256 (1946).

190. *Id.* at 259.

191. *Id.* at 263.

192. 449 U.S. 155 (1980).

193. *Id.* at 158.

194. *Id.* at 164.

195. *Id.* at 163.

196. 277 F. Supp. 338 (D. Minn. 1967).

simultaneously, the company was denying pension benefits to those employees it had dismissed."[198] The Third Circuit Court of Appeals applied the *Lucas* reasoning, but did not allow for the recovery of funds by former employees from the pension fund at issue because the fund no longer existed and the former employer was deriving no benefit from it.[199] Other courts have also referred to *Lucas* when examining cases concerning the recovery of benefits by terminated employees.[200]

The *Lucas* reasoning is contractual, not constitutional, in nature. For reasons described earlier, a purely contractual Montgomery GI Bill case without constitutional implications is unlikely to pass the *Mindes* test.[201] The *Lucas* unjust enrichment reasoning is important only to the extent it indicates terminated employees may have a property interest in funds they contributed to a benefit plan, even if there are no specific contractual provisions providing one. This is significant in light of the Court's holding in *Perry v. Sindermann*[202] that property interests need not be explicit to exist[203] and qualify for protection under the Fifth Amendment.[204]

The question remains whether Army educational benefits are a property interest that qualifies for Fifth Amendment[205] protection. Applying the above constitutional law to the program indicates the benefits warrant protection, at least in part. The Army's current implementation of the program raises constitutional concerns that revolve largely around the soldier's voluntary additional contributions.

Application of Constitutional Law to Army Educational Benefits

Due Process

The application of the Due Process method of analysis is a two-step process. The first question is whether there is an interest warranting protection under the Due Process Clause. In the case of Army educational benefits, both liberty and property interests are at risk. For reasons fully detailed later, only the threatened property interest truly implicates due process concerns.[206] If a threatened interest does warrant due process protection, the second question is what amount of process is sufficient. In applying the law to the loss of Montgomery GI Bill benefits, it becomes obvious the current level of process provided in separations under notification procedures is not sufficient to extinguish soldiers' property interest in their voluntary educational benefits contributions.

Is It a Protected Interest?

The first interest that may give rise to due process protection is that of liberty. The loss of educational benefits usually occurs concurrently with the discharge of the soldier. Furthermore, the loss may result because the characterization of the discharge was less than honorable. Although the discharge, standing alone, does not implicate a liberty interest,[207] the stigmatizing nature of the less than honorable nature of the discharge does bring it closer to implicating a liberty interest.

197. *Id.* at 344-45.

198. 465 F.2d 1128, 1131 (3d Cir. 1972).

199. *Id*.

200. *See, e.g*., Kolentus v. Avco Corp., 798 F.2d 949, 959 (7th Cir. 1986) (applying *Lucas*, but distinguishing the instant case as one in which the employees agreed to the termination provisions); United Steelworkers of America v. Harris & Sons Steel Co., 706 F.2d 1289, 1298 (3d Cir. 1983) (citing Lucas v. Seagrave Corp., 277 F. Supp. at 338, with approval); Craig v. Bemis Co., 517 F.2d 677, 683-84 (5th Cir. 1975) (noting the *Lucas* rationale as appealing, but rejecting it in the instant case as incompatible with state law); Adams v. Catalyst Research, Div. of Mine Safety Appliances Co., 659 F. Supp. 163, 165-66 (D. Md. 1987) (applying *Lucas*, but ruling on pre-emption grounds); Piech v. Midvale-Heppenstall Co., 594 F. Supp. 290, 297-98 (E.D. Pa. 1984) (applying *Lucas*, but dismissing an unjust enrichment claim because the terminations did not benefit the company); Shaw v. Kruidenier, 470 F. Supp. 1375, 1388 (S.D. Iowa 1979) (applying *Lucas*, but finding it inapplicable because the company did not benefit from employee forfeitures); Connell v. United States Steel Corp., 371 F. Supp. 991, 1001 (N.D. Ala. 1974) (citing *Lucas* with approval); Fredericks v. Georgia-Pacific Corp., 331 F. Supp. 422, 430 (E.D. Pa. 1971) (citing *Lucas* to support the denial of a motion to dismiss claim based on the theory of unjust enrichment). *Compare* Moore v. Home Ins. Co., 601 F.2d 1072, 1075 (9th Cir. 1979) (distinguishing *Lucas* as the result of extraordinary circumstances) *with* Rothlein v. Armour & Co., 377 F. Supp. 506, 511 (W.D. Pa. 1974) (distinguishing *Lucas* as requiring bad faith on the part of the terminating employer).

201. *See* discussion *infra*.

202. 408 U.S. 593, 601 (1972) (holding the "absence of such an explicit contractual provision may not always foreclose the possibility that [an individual] has a 'property' interest").

203. *See* discussion *infra*.

204. U.S. CONST. amend. V.

205. *Id*.

206. *See* discussion *infra*.

Even a general discharge under honorable conditions carries stigma.[208] In fact, under notification procedures, the Army requires the separating soldier to acknowledge she "may expect to encounter substantial prejudice in civilian life if [she receives] a general discharge under honorable conditions."[209] The Court has held, however, that this stigma or damage to reputation alone is also not enough.[210] Likewise, other courts have found notification-type procedures to be sufficient due process in these instances.[211]

> [W]hen the elements of a stigmatizing discharge are present, the remedy mandated by the Due Process Clause . . . is an opportunity to refute the charge, but that in the absence of evidence that the derogatory information about the affected party is false, the nature of the interest to be protected is not one that requires a hearing.[212]

The soldier receives this required opportunity to refute the charge by submitting written matters to the separation authority.[213] A liberty interest of this nature apparently needs no further due process protection.

Because of the voluntary contributions, the liberty interest is no longer the only interest implicated in cases concerning military discharges. The soldier may now also have a property interest in jeopardy. And, as the Court has noted, "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests."[214]

A property interest in educational benefits cases has three possible sources. The first possible source is the benefits themselves. While $40,860 is a significant amount of money, it is not property. The soldier must "have a legitimate claim of entitlement" before the benefits become property.[215] This is not the case when the soldier fails to qualify for the benefits. The soldier either did not serve long enough or did not receive the necessary honorable discharge. The soldier is not entitled to what she failed to earn.

The second possible source of a property interest is the $1,200 enrollment pay reduction. Yet, it also fails to qualify as a property interest. Although a statute can act as the necessary independent source of a property interest,[216] in this case, Congress went out of its way to statutorily prevent the creation of a property interest in the enrollment funds.[217] This is not an appli-

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207. *See, e.g.*, Beller v. Middendorf, 632 F.2d 788, 806 (9th Cir. 1980) ("The mere fact of discharge from a government position does not deprive a person of a liberty interest.").

208. Holley v. United States, 124 F.3d 1462, 1470 (Fed. Cir. 1997) (stating in the context of a case concerning a general discharge, "[S]tigma can not be imposed by government without due process of law."); United States v. Rice, 109 F.3d 151, 156 (3d Cir. 1997) ("There may be some stigma imposed by this [general discharge under honorable conditions] form of discharge, but it is significantly less than that associated with a dishonorable discharge . . . ."); Bland v. Connally, 293 F.2d 852, 858 (D.C. Cir. 1961) ("We think it must be conceded that any discharge characterized as less than honorable will result in serious injury. It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma . . . .").

209. AR 635-200, *supra* note 7, fig. 2-4 (providing a sample format for receipt of notification of separation initiation, acknowledgment, and election of rights).

210. Paul v. Davis, 424 U.S. 693, 701 (1976) ("This line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause.").

211. *See, e.g.*, *Holley*, 124 F.3d at 1470-71.

> The Regulation requires notice of the reasons for the proposed action and the opportunity to respond and to rebut the charges. Legal counsel was offered, and the opportunity to resign. As we have discussed, minimum due process was met by this procedure, and stigma based on truth, when accompanied by due process, cannot be avoided.

Id.; *see also* Roetenberg v. Sec'y of the Air Force, 73 F. Supp. 2d 631, 637 (E.D. Va. 1999) (holding that a stigmatizing discharge does not necessarily require a hearing); Guerra v. Scruggs, 942 F.2d 270, 279 (4th Cir. 1991) (holding a service member who had served less than six years and received a General Discharge without a hearing did not have a Due Process claim since "he had no liberty interest because while he had an interest in his good name, this interest was not infringed upon by the Army's proposed discharge for cocaine use").

212. *Roetenberg*, 73 F. Supp. 2d at 637.

213. AR 635-200, *supra* note 7, para. 2-2.

214. Arnett v. Kennedy, 416 U.S. 134, 155 (1974).

215. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

216. *Id.*

217. 38 U.S.C. § 3011(b) (2000) ("Any amount by which the basic pay of an individual is reduced . . . shall revert to the Treasury and shall not, for the purposes of any Federal law, be considered to have been received by or be within the control of such individual.").

cation of the now discredited "bitter with the sweet" approach to due process.[218] This former approach[219] posited the legislature could define the procedures for denying an interest because the legislature created the interest.[220] In this instance, Congress specifically chose not to create a property interest from the outset. The pay reductions for enrollment are not property. The only remaining possible property interest source is the recent option to make voluntary contributions to the plan.

The statute is silent as to the nature of the soldier's voluntary contributions. It is not a payroll deduction.[221] The soldier simply pays the contributions out of his or her pocket. The funds certainly are the soldier's property before she contributes them. The question is whether the soldier retains a protected property interest in the funds after the deposit. Applying contractual principles solely to determine if a property interest exists seems to indicate she does.

The soldier at least retains a restitution interest in the property.[222] To conclude otherwise ignores the possible unjust enrichment to the government. In the *Lucas* case[223] concerning employee contributions made to pension plans discussed earlier,[224] the court noted:

> It would seem equitable that employees, who failed to perform the conditions of the pension plan (continued employment until retirement) because of a group termination, should be entitled to an amount equal to the benefit conferred on an employer. The employees' failure to fulfill the conditions of the pension contract is not wilful [sic], indeed, it is quite involuntary. The employer is not in a position to argue that he is harmed by a non-performance of the pension conditions, in fact, he causes it. Yet the employer retains the full benefit of the employee's past service and secures favorable income tax treatment as well as the recapture of the accumulated pension credits created by forfeitures.[225]

In the case of educational benefit contributions, the soldier's separation is also typically involuntary. It is arguable the alleged misconduct that may form the basis for the separation is a willful act. A soldier with less than six years of service, however, is not entitled to a hearing to address the allegations, no matter how strongly he or she may deny them.[226] At separation, the government retains the soldier's forfeited contributions for its own use. The soldier receives absolutely no benefit of her bargain because she is now ineligible for benefits, yet the government retains the benefit of her past service and her $600 in contributions. At a time when the Army separates nearly twenty percent of its soldiers before their first enlistment expires,[227] the aggregate gain to the government is significant, whether intentional or not.

Consequently, contractual principles indicate an entitlement to the voluntary contributions. Such an entitlement is a possible source of property interests protected by the Due Process Clause of the Fifth Amendment.[228] Because the $600 in voluntary contributions is a protected interest, the question becomes whether the current process is constitutionally sufficient to extinguish that interest.

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218. *Arnett*, 416 U.S. at 153-54 (indicating one was only entitled to the process granted by the statute that conferred the interest—"where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet").

219. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures.

Id.

220. *See generally* Major Richard D. Rosen, *Thinking About Due Process*, ARMY LAW., Mar. 1988, at 5-6 (describing the development and eventual rejection of the "bitter with the sweet" approach).

221. 38 U.S.C. § 3011(e).

222. RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981) (defining "restitution interest" as the interest in having restored any benefit conferred on the other party).

223. Lucas v. Seagrave Corp., 277 F. Supp. 338, 344-45 (D. Minn. 1967).

224. *See* discussion *infra*.

225. *Lucas*, 277 F. Supp. at 344-45.

226. AR 635-200, *supra* note 7, para. 2-2(c)(3).

227. Information Paper, U.S. Army Personnel Command, subject: Manning the Force Update (Mar. 4, 2002) ("During FY01, training base attrition ranged from 13.5% to 14.5% and unit attrition ranged from 6.0% to 6.5%. It remains within these ranges for FY02.") (on file with author).

Is the Current Process Sufficient?

There is no question the current notification procedures are generally sufficient for separating a soldier from the service.[229] The question is whether the same procedures are adequate for depriving a soldier of her property. In upholding notification procedures as sufficient for separation, the Fourth Circuit Court of Appeals found it necessary to spell out these findings:

> To summarize, [the plaintiff] would not likely succeed on the merits of his Due Process claim for two reasons. First, *he has no property interest*. Second, he had no liberty interest because while he had an interest in his good name, this interest was not infringed upon by the Army's proposed discharge for cocaine use.[230]

The court clearly indicates the presence of a property interest may alter the analysis. Furthermore, application of the due process balancing test indicates notification procedures are most likely insufficient to deprive a soldier of her property.

The first balancing factor involves the private interest affected by the official action. The total loss of $40,860 in educational benefits appears to be a significant interest. For reasons already detailed, however, they are not a property interest of the soldier.[231] The only private interest warranting consideration is the voluntary contributions. Some may not consider the loss of $600 overwhelmingly significant. Few, however, would consider it acceptable for the government to demand $600 of them with their only recourse being the right to submit a letter in protest. Regardless of amount, the soldier has a legitimate property interest in these funds. This factor weighs in favor of requiring more process than notification procedures provide.

The next factor considers the risk of an erroneous deprivation of the interest through the procedures used. Notification procedures exist to separate soldiers from the service. The effect of the separation on educational benefits is only a collateral consequence. The process does not concern itself with whether the loss of educational contributions is appropriate in a certain case. In fact, separation authorities considering the soldier's loss of educational benefits as a motivation for awarding a general discharge do so in bad faith. A commander cannot seek to punish a soldier by awarding a general discharge to ensure the soldier is ineligible for benefits. Administrative separations are not punishment. A commander wishing to punish a soldier has the options of nonjudicial punishment or court martial. Those systems contain the extensive due process protections punishment requires.[232] Notification procedures do not have these protections. The risk of erroneous or unintentional deprivation of the property interest under notification procedures is, therefore, quite high. Not only is it possible a commander will not consider the loss of the contributions in a particular case, but there is a strong argument the commander should not consider it.

Nor is the risk of erroneous deprivation lessened through the soldier's possible recourse to the Army Discharge Review Board and Army Board for the Correction of Military Records. It is true the former soldier can receive considerable due process through Discharge Review Board proceedings. "A person who requests a review . . . may appear before the board in person or by counsel . . . [and] . . . witness[es] may present evidence to the board in person or by affidavit."[233] The fault in the Discharge Review Board process is its limited scope of authority. The board only "has authority to change a discharge or to issue a new discharge . . . [and] the [board] has no authority to rule on constitutional challenges to the Army's regulations."[234]

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228. Perry v. Sindermann, 408 U.S. 593, 601 (1972).

> "[P]roperty" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Id. (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

229. *See, e.g.*, Guerra v. Scruggs, 942 F.2d 270, 277 (4th Cir. 1991) (quoting favorably an Army Board for the Correction of Military Records finding that "the separation of soldiers with less than six years of service under the notification procedure of AR 635-200 and DOD Directive 1332.14 has not been held to be unconstitutional"); *see also* DOD DIR. 1332.14, *supra* note 118; AR 635-200, *supra* note 7. *Contra* May v. Gray, 708 F. Supp. 716, 723 (E.D. N.C 1988) ("[I]n the context of a General Discharge under Honorable Conditions, the protection of plaintiff's liberty and property interests demands an opportunity to be heard before separation. Accordingly, insofar as Army Regulation 635-200 (2-2)(d) denies plaintiff this opportunity, the regulation violates the minimum concepts of basic fairness."). *But see* Major David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, ARMY LAW., Oct. 1990, at 21 (analyzing the *May* decision and concluding "the value of the *May* decision apparently is limited to those cases in which the Army violates its own rules and procedures").

230. *Guerra*, 942 F.2d at 279 (emphasis added).

231. *See* discussion *infra*.

232. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES pts. II, V (2002) (detailing the extensive procedural rules for courts-martial and the procedures for imposing nonjudicial punishment, including the right to demand trial by court-martial in lieu of the imposition of nonjudicial punishment).

233. 10 U.S.C. § 1553(c) (2000).

The Discharge Review Board has no authority to rule on the Fifth Amendment argument, nor can it order the refund of the soldier's voluntary contributions. It is true the Discharge Review Board can return the lost benefit by upgrading the characterization of the discharge to "honorable" and thus restore Montgomery GI Bill eligibility. Even then, however, it is significant that there is very little process before the deprivation of the property. Additionally, there is nothing objectionable about the original characterization of the discharge in the example case. It was appropriate. It appears disingenuous for the board to use its limited power to review discharges or change a discharge based on an examination of constitutional matters beyond the scope of its statutory authority. Recourse to the Army Board for the Correction of Military records is similarly flawed.

The Board for the Correction of Military Records has much more far-reaching powers. It can "correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice."[235] This board also "has authority to consider claims of constitutional, statutory, and regulatory violations."[236] Additionally, it has the following statutory authority:

> The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section the amount is found to be due the claimant on account of his or another's service in the Army.[237]

At first glance, the Board for the Correction of Military Records appears capable of addressing the issue at hand. Unfortunately, it is not. Any repayment of a forfeiture must be the result of a military record correction. For example, if the board determines the service unjustly delayed a soldier's promotion, it may correct the record to reflect the proper date of the promotion. The new date of promotion entitles the soldier to the applicable back pay. The trouble in the example case is there is no erroneous record to correct. The soldier properly received a general discharge. Therefore, the board should not upgrade the discharge simply to return the lost educational benefits. This would be an unearned windfall for a soldier who properly received a general discharge. As a result, this board is also powerless to prevent or correct the erroneous deprivation of the voluntary contributions.

The second part of this balancing factor centers around the probable value, if any, additional or substitute procedural safeguards may have. Notification procedures afford the soldier notice and an opportunity to submit matters. Additional safeguards are not necessary and may not add value with regard to the separation process. Nevertheless, the intent of those procedures is to remove the soldier from the military, not deprive her of a protected interest. The Court noted:

> While "many controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.[238]

A key phrase in the above is "appropriate to the nature of the case." What is fine for terminating a soldier's service may not be adequate for terminating her property interest. Additional procedural safeguards have value in that they could meet the requirements for the termination of a property interest. The current automatic, unintended nature of the deprivation heightens the need for additional process. The Court stated, "[An] employee's ability to foresee the deprivation is 'of no consequence,' because the proper inquiry . . . is 'whether the state is in a position to provide for *predeprivation* process.'"[239] There must be some consideration of the property interest at stake before termination and the current process provides none. The question is then what process, if any, is the government in a position to provide.

This question leads to the third balancing factor. It involves the government's interest, including the function involved and the fiscal and administrative burdens the additional or substitute procedural requirement would entail. There is no doubt the government's interest in separating soldiers quickly is great. Its interest in the soldier's $600 in voluntary contributions is not. There is no compelling government interest in the $600 warranting failure to comply with the due process requirements necessary to terminate a property interest. As for the fiscal and

234. *Guerra*, 942 F.2d at 272-73.

235. 10 U.S.C. § 1552(a)(1).

236. *Guerra*, 942 F.2d at 273.

237. 10 U.S.C. § 1552(c).

238. Bd. of Regents v. Roth, 408 U.S. 564, 570 (1972) (quoting Bell v. Burson, 402 U.S. 535, 542 (1971)).

239. Zinermon v. Burch, 494 U.S. 113, 130 (1990) (quoting Parratt v. Taylor, 451 U.S. 527, 534 (1981)).

administrative burdens of any additional process, the Army already has in place a process meeting the requirements.

The Army provides a hearing before an administrative board in the case of soldiers who have served for more than six years or for soldiers the Army wishes to separate with an other than honorable discharge.[240] Respondents before this board receive the full range of due process protections. They have a right to appear, call witnesses, cross-examine witnesses, and be represented by counsel.[241] In spite of the increased administrative burden it entails, regulations already require the Army to provide this process in applicable cases. It is very likely these more formal procedures would be sufficient to terminate a soldier's property interests.

As discussed earlier, courts have found that discharging soldiers through notification procedures generally passes constitutional muster.[242] But, are these procedures sufficient to deprive a soldier of her property? The balancing test appears to indicate notification procedures are not adequate for terminating property interests. Property interests require additional due process protection. Because a property interest is in jeopardy, the forfeiture of the voluntary contributions to the government also raises Takings Clause concerns.[243]

Takings Clause

The first factual inquiry under the Takings Clause analysis involves the character of the governmental action. In the case of the forfeiture of voluntary contributions, the government has taken the money for its own use. The law requires the deposit of the money in the general treasury as a miscellaneous receipt.[244] There are no provisions for the segregation or return of these funds. Consequently, this is a permanent government appropriation of a personal asset for its own use. The placement of the funds in the general Treasury allows the government to use the funds however it pleases. This is precisely the type of governmental action against which the Takings Clause provides protection.

The second factual inquiry centers on the economic impact on the plaintiff. The question is not one of amount. The Court has recognized that not every assessment of a liability by the government constitutes a taking. In the *Connolly v. Pension Benefit Guaranty Corporation* case mentioned earlier,[245] the Court addressed whether a federal law "requiring an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's 'unfunded vested benefits'" constituted a violation of the Takings Clause of the Fifth Amendment.[246] Congress enacted this law to prevent employers from withdrawing from multiemployer pension plans and leaving fewer and fewer employers to bear the costs of the plan. Congress considered this unfair when some of those costs consisted of payments to former employees of the very employers withdrawing from the plan.[247] As in the case of educational benefits, the Takings Clause issue was the automatic loss of private funds mandated by the law.

The Court found the law did not violate the Takings Clause.[248] The Court reasoned, "The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the [plaintiff] and the plan to which [he] had made contributions."[249] The Court found no taking because the law contained "provisions . . . that moderate and mitigate the economic impact of . . . liability."[250] In the case of educational benefit contributions, there are no moderating or mitigating features. The soldier will always lose the full amount of her contributions, regardless of whether she served the entire enlistment term originally contracted for or not.

The Court also reasoned in *Connolly* that it weighs against a finding of a taking when "[t]here is nothing to show that the lia-

240. AR 635-200, *supra* note 7, paras. 2-2 ("The soldier will be further advised of the following rights: . . . To a hearing before an administrative separation board under section III if he/she had 6 or more years of total active and reserve service on the date of initiation of recommendation for separation."), 3-7 ("No soldier will be discharged per this regulation under other than honorable conditions unless afforded the right to present his/her case before an administrative discharge board.").

241. *Id*. para. 2-4.

242. *See* discussion *infra*.

243. U.S. CONST. amend. V.

244. 38 U.S.C. § 3011(e) (2000).

245. *See* discussion *infra*.

246. 475 U.S. 211, 211 (1986).

247. *Id*. at 215-16.

248. *Id*. at 227-28.

249. *Id*. at 225-26.

250. *Id.*

bility actually imposed . . . will always be out of proportion to [the] experience with the plan."[251] In the case of the voluntary contributions, this showing is obvious. No soldier who suffers this loss will ever have any experience whatsoever with the educational benefits scheme, beneficial or not. The nonqualified soldier cannot participate at all. In this respect, the aggrieved soldier never has even the potential for any past or future gain under the plan to balance her loss.

Finally, the Court also noted the law at issue in *Connolly* contained provisions exempting certain transactions from characterization as liability-inducing "withdrawals" and provided for the reduction of financial liability in certain instances, such as the liquidation of the business.[252] There are no such safeguards or partial protection for the forfeiture of educational benefit contributions—it is an all-or-nothing proposition. It appears the factors the Court considered important in concluding there was no taking in *Connolly* indicate the opposite conclusion is appropriate regarding the forfeiture of voluntary educational benefit contributions.

The third and final factual inquiry in taking cases concerns whether the government's actions interfere with expectations. The soldier involved certainly had notice that funds voluntarily contributed were not refundable. The forms she signed at enlistment state exactly that. Conversely, just because the forms said so does not make it so. In the *Webb's Fabulous Pharmacies, Incorporated v. Beckwith* case described earlier,[253] the Court concluded on constitutional grounds it was improper for the government to treat funds temporarily deposited with a state court as "public money."[254] The Court declared, the government, "by *ipse dixit*, may not transform private property into public property without compensation."[255]

All three of these factors point to the conclusion that the forfeiture of voluntary contributions to the educational benefits program is a taking. To paraphrase a court finding quoted earlier,[256] it would seem equitable that soldiers who failed to perform the conditions of their original enlistment (continued service until enlistment expiration) because of separation under honorable conditions should be entitled to an amount equal to the benefit conferred on the government. It seems unfair the government retains the full benefit of the soldier's past service as well as the funds created by forfeitures. The government has clearly taken something of value when it retains the soldier's $600 in voluntary contributions. The Takings Clause stands as a barrier against precisely this type of unjust appropriation by the government.

The Problem and the Solution

The forfeiture of voluntary contributions is troublesome under both the Due Process and Takings Clauses of the Fifth Amendment.[257] Consequently, it has the potential to become a legal problem for the Army. It may appear unlikely anyone would hire a lawyer over $600. As indicated by previous cases,[258] however, suits surrounding discharges are common. Additionally, while an individual plaintiff may not wish to hire an attorney over such a small amount, the possibility of a class action suit involving similarly situated plaintiffs exists.

As indicated earlier, available post-separation administrative remedies are ineffective. In addition, as previously noted, challenges to the forfeiture would probably pass the *Mindes* test.[259] The door to judicial review in federal district court is open.[260] The danger of this review, however, may not be readily apparent.

The Army certainly has no reason for concern if the issue was only the return of a former soldier's $600 in contributions. The real danger lies in the possible holding a judge may pro-

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251. *Id.* at 226.

252. *Id.*

253. *See* discussion *infra*.

254. 449 U.S. 155, 164 (1980).

255. *Id.*

256. Lucas v. Seagrave Corp., 277 F. Supp. 338, 344-45 (D. Minn. 1967).

257. U.S. CONST. amend. V.

258. *See, e.g.*, discussion *infra*.

259. *See* Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971).

260. 28 U.S.C. § 1346a(2) (2000).

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court [United States Court of Federal Claims], of: . . . Any other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded . . . upon the Constitution . . . .

Id.

nounce leading to that result. Based on the preceding analysis, a judge may declare notification procedures are constitutionally insufficient to form the basis for voluntary contribution forfeitures. Such a holding would preclude the Army from using notification procedures in the cases of soldiers who have such contributions at risk. A large number of soldiers participate in the educational benefits program. The Army would lose a valuable tool for separating many unworthy soldiers quickly and efficiently. While it is uncertain exactly how much additional process would be sufficient, it would certainly be more than currently provided under notification procedures. The Army might even face a future when a contribution of $600 or less buys a soldier the right to a full administrative board hearing before separation.

This open door to review does not have to remain open. All of the constitutional issues center on the voluntary contributions made by the soldier. The other associated forfeitures easily pass constitutional muster. Soldiers have forfeited these funds through discharge under notification procedures for years. Those separations have survived court challenges. The voluntary contributions, however, are a new wrinkle. The Army should return to the status quo ante by simply refunding the $600 to soldiers separating under notification procedures. It is not a significant amount of money. Separating soldiers already undergo a final pay accounting. Consequently, the administrative burden of the refund would not be very great.

In the event there is a judicial determination that voluntary contributions entitle soldiers to a full administrative board or if the Army wishes to preclude such a determination, there is another possible solution. The Army could offer a board to soldiers with voluntary contributions at risk. This additional process, however, requires greater time and effort on the part of the command to separate the soldier. The command could make a soldier's demand for a board less likely by offering a general discharge under honorable conditions in exchange for the soldier explicitly waiving the board and any claim to a return of the voluntary contributions. A full administrative board is not without hazards for the soldier. While the soldier would receive more process, a board has the authority to recommend a discharge under other than honorable conditions.[261] It is likely many soldiers would waive the board and any claim to the contributions rather than risk such a discharge. This solution still provides the possibility of a board, however small, to soldiers who did not previously have that right.

Conclusion

Assuming commanders prefer to conduct their business with as little intrusion by the courts as possible, it is in their best interest to avoid issuing unintended invitations for judicial review. The Army's current policy concerning the total forfeiture of monies contributed to educational benefit programs by soldiers who receive a general discharge under honorable conditions through notification procedures is one such open invitation to the courts. The forfeitures raise significant Fifth Amendment concerns. The Army is unnecessarily holding open the courtroom door to persons adversely affected by decisions that could and should be impervious to judicial review. The cost of shutting the door is negligible. Upon issuing a general discharge under honorable conditions using notification procedures, the Army should repay any voluntary educational benefit contributions made by the soldier. This is the best solution because it does not necessitate providing possible additional due process to any soldier. The maximum refund of $600 would be money well spent to preclude a subsequent court challenge. The cost to the Army in time and effort to provide additional process that comports with the heightened constitutional standards a judge might impose would be far greater.

261. AR 635-200, *supra* note 7, para. 2-12.b.(1)(a).