

UNSAFE AND UNSOUND: HIV POLICY IN THE U.S. MILITARY

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ABSTRACT

Service members living with HIV are confronted with a set of policies regulating everything from their sexual behavior to their ability to hold certain jobs. Some of these rules impose criminal liability. Others make it difficult for people living with HIV to enlist, become commissioned officers, or deploy overseas.

The military's approach was developed in the 1980s, and reflected the bleak outlook for those diagnosed with HIV at the time. Today, however, advances in treatment and prevention have transformed HIV from a deadly disease into a manageable chronic illness—but the military's policies remain stuck in the past. In addition to being medically unsound, these policies unfairly single out service members with HIV, increase stigma, and are needlessly punitive. They are also vulnerable to legal challenge under the Administrative Procedure Act and the Fifth Amendment. Drawing on interviews with service members, lawyers, and public-health experts, this Comment makes the case for reform.

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Introduction

In November 2016, Senior Airman Branden Gutierrez began talking to another Airman on Grindr, the location-based smartphone dating application popular among gay men. Realizing they lived in the same barracks, the Airman invited Gutierrez to his room. “One thing led to another,” Gutierrez told me in an interview, and they ended up having sex.¹

A week and a half later, Gutierrez’s first sergeant told him that the Air Force Office of Special Investigations wanted to speak with him. Confused, Gutierrez agreed to be interviewed, and at first it seemed like a routine matter: the interview began with a series of simple questions, including his name, age, and rank. Then, the agents asked if he wanted to consult a lawyer. “Just to be safe,” said Gutierrez, “I said yes.”

Gutierrez soon learned that he was being charged with failing to disclose his HIV status to the man he had met on Grindr, even though his Grindr profile listed his HIV status as “positive, undetectable,” and, before having sex, the men had discussed an HIV-awareness tattoo Gutierrez has on his left forearm. The charge was based on a written order given to HIV-positive service members requiring them to disclose their status to all sexual partners. Gutierrez was also being charged with assault under Article 128 of the Uniform Code of Military Justice (UCMJ), on the theory that having sex without revealing his HIV status constituted “bodily harm to another person.”²

His lawyer told him that he had two choices: plead guilty and accept a dishonorable discharge, or fight the charges. “I was thinking to myself, I didn’t do anything wrong,” Gutierrez said. “I wanted to prove my innocence.” At trial, in August 2017, a military jury found him guilty of failing to disclose his HIV status but not guilty of assault (perhaps because the amount of HIV in his blood had been undetectable, and his partner had worn a condom, which together put the risk of transmission at effectively zero³). Eventually, Gutierrez was able to get the non-disclosure charge dismissed, which seemed like the end of it. But six months after the trial, in January 2018, Gutierrez’s squadron commander served him a letter of reprimand—a disciplinary action—that resurfaced his alleged failure to disclose his HIV status and declared that his behavior cast “serious doubt as to whether [he] possess[ed] the requisite character for military service.”⁴ Based on the HIV non-disclosure, and some minor disciplinary issues early in his career, Gutierrez was administratively discharged for “a pattern of misconduct” a few months later.⁵

Gutierrez’s story is not unique. The roughly 1,200 active service members living with HIV are confronted with a set of policies regulating everything from their sexual behavior to their ability to hold certain jobs.⁶ Some of these rules, like the one Gutierrez was alleged to have violated, impose criminal liability. Others make it difficult for people living with HIV to enlist, become commissioned officers, or deploy to combat zones—often with little regard for whether the virus actually impairs military readiness or puts fellow service members at risk.

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1. Interview with Branden Gutierrez, former Senior Airman, U.S. Air Force (Apr. 26, 2020). All quotations from Gutierrez in the Introduction come from this interview.
 2. Uniform Code of Military Justice, art. 128(a), 10 U.S.C. § 928(a) (2018).
 3. See *Protecting Others*, CTRES. FOR DISEASE CONTROL & PREVENTION (Jan. 28, 2021), <https://www.cdc.gov/hiv/basics/livingwith-hiv/protecting-others.html> [<https://perma.cc/NY3P-PZJD>] (“If you take HIV medicine and get and keep an undetectable viral load, you have effectively no risk of transmitting HIV to an HIV-negative partner through sex.”).
 4. Memorandum from Joshua M. Schaad, Lieutenant Colonel, Dep’t of the Air Force, to Branden D. Gutierrez, Senior Airman, U.S. Air Force (Jan. 25, 2018), <https://drive.google.com/file/d/1jum8Jmpx-3IEqqxQjvbPsooUUayIywf7/view> [<https://perma.cc/A54G-4T9X>].
 5. Interview with Peter Perkowski, Legal & Policy Dir., Modern Military Ass’n of Am. (Feb. 13, 2021).
 6. Karma Allen, *HIV-Positive Airmen Fighting to Stay in the Air Force in 1st-of-Its-Kind Case*, ABC NEWS (Feb. 10, 2020, 5:04 AM), <https://abcnews.go.com/US/hiv-positive-airmen-fighting-stay-air-force-kind/story?id=68276202> [<https://perma.cc/W2SM-8DY8>] (citing a Modern Military Association of America estimate of the number of active service members with HIV at roughly 1,200). Roughly 350 service members are diagnosed with HIV annually. BRYCE H. P. MENDEZ, CONG. RESEARCH SERV., IF11238, HIV/AIDS IN THE MILITARY 1 (2019).

The military's approach to HIV was developed in the 1980s, at the height of the epidemic.⁷ In 1985, the Pentagon began a mandatory program of HIV screening, testing all service members and recruits.⁸ Testing positive for HIV became an absolute bar to joining the military, and if a service member tested positive after enlisting, the expectation was that he would soon become too sick to work.⁹ This approach reflected the bleak outlook for those diagnosed with HIV. Until the late 1980s, there was no treatment for the virus.¹⁰ HIV typically progressed to AIDS – Acquired Immunodeficiency Syndrome – which left patients vulnerable to opportunistic infections like pneumonia, cancer, and tuberculosis.¹¹ And even when the first medicines became available, they were often difficult to take, ineffective, and accompanied by severe side effects.¹²

But times have changed, and the military's policies ought to have changed with them. Advances in treatment and prevention have transformed HIV from a deadly disease into a manageable chronic illness. Antiretroviral therapy, which requires only one pill a day, works by reducing the number of copies of the virus in the blood, keeping people healthy and making the disease virtually impossible to spread.¹³ Other militaries have updated their policies to reflect this new reality. The Israel Defense Forces (IDF), for example, recently relaxed its restrictions on HIV-positive service members, drafting them for the first time in 2019.¹⁴ Announcing the change, the head of the IDF's medical services department acknowledged that “[m]edical advancement in the past few years has made it possible for [HIV carriers] to serve in the army without risking themselves or their surroundings.”¹⁵ But the U.S. military still prevents people with HIV from enlisting, arbitrarily limits the opportunities available to troops who test positive after joining, and subjects personnel with HIV to strict rules governing sexual behavior. In addition to being medically unsound, such policies unfairly single out service members with HIV, increase the stigma surrounding the virus, and are needlessly punitive. They are also vulnerable to legal challenge under the Administrative Procedure Act and the equal-protection requirements of the Fifth Amendment.

This Comment proceeds in three parts. Part I describes the early history of the AIDS epidemic and lays out the major components of the military's approach to HIV: (1) regulations preventing people with HIV from enlisting or being commissioned as officers, (2) rules prohibiting service members with HIV from deploying to combat zones, and (3) orders regulating the sexual activities of people with HIV. Part II argues that such regulations are out of step with the latest science and leave personnel with HIV vulnerable to

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7. Laurie Garrett, *AIDS in the Military: Soldiers Tell of Army Base 'Leper Colony'*, L.A. TIMES (Mar. 12, 1989, 12 AM PT), <https://www.latimes.com/archives/la-xpm-1989-03-12-mn-896-story.html> [<https://perma.cc/5KRE-W8HN>].
 8. *Id.*
 9. *Id.*
 10. Irvin Molotsky, *U.S. Approves Drug to Prolong Lives of AIDS Patients*, N.Y. TIMES (Mar. 21, 1987), <https://www.nytimes.com/1987/03/21/us/us-approves-drug-to-prolong-lives-of-aids-patients.html> [<https://perma.cc/P2BG-L8CS>] (“The first drug proved to prolong the lives of AIDS patients was given [f]ederal approval today.”).
 11. Alice Park, *HIV Used to Be a Death Sentence. Here's What Changed in 35 Years*, TIME (Dec. 1, 2016, 3:03 PM EST), <https://time.com/4585537/world-aids-day-hiv> [<https://perma.cc/V5N8-6APP>] (“In the early days of the epidemic, most people progressed to AIDS, the advanced form of the disease, and then died of it.”).
 12. See JONATHAN ENGEL, *THE EPIDEMIC: A GLOBAL HISTORY OF AIDS* 130, 238, 245 (2006) (noting the problems associated with early AIDS drugs).
 13. *HIV Treatment as Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 3, 2020), <https://www.cdc.gov/hiv/risk/art/index.html> [<https://perma.cc/VL5N-FERP>].
 14. *IDF Will Draft HIV Positive Recruits for the First Time in 2019*, JERUSALEM POST (Dec. 9, 2018, 11:24), <https://www.jpost.com/israel-news/idf-will-draft-carriers-of-hiv-and-those-who-recovered-from-cancer-573844> [<https://perma.cc/UG9V-PLM8>]. Under the new policy, HIV carriers who pass the medical tests will be drafted like any other recruit, although they will still be prevented from holding combat roles. Judah Ari Gross, *Ending Longstanding Taboo, IDF Pushes for HIV Carriers to Enlist*, TIMES ISR. (Dec. 1, 2015, 11:04 PM), <https://www.timesofisrael.com/ending-longstanding-taboo-idf-pushes-for-hiv-carriers-to-enlist> [<https://perma.cc/F48Q-WNKR>]. According to Col. Moshe Pinkert, the change will help “remove some of the stigma surrounding the disease” and better integrate HIV carriers into Israeli society. *Id.*
 15. *#ReThinkHIV: New IDF Policy to Recruit Soldiers with HIV*, IDF (Dec. 1, 2015), <https://www.idf.il/en/minisites/our-soldiers/rethinkhiv-new-idf-policy-to-recruit-soldiers-with-hiv> [<https://perma.cc/TDB2-EKNP>].

discrimination and abuse. Part III concludes by offering a roadmap for reform. Throughout, the Comment draws on interviews with service members with HIV, highlighting the experiences of those most intimately affected by the military's approach.

I. HIV Policy in the Military

On June 5, 1981, the U.S. Centers for Disease Control and Prevention (CDC) published an article describing “cases of a rare lung infection” — *Pneumocystis pneumonia* — in five “previously healthy gay men in Los Angeles.”¹⁶ “The fact that these patients were all homosexuals,” read a note accompanying the report, “suggests an association between some aspect of a homosexual lifestyle . . . and *Pneumocystis pneumonia* in this population.”¹⁷ This article would later be recognized as the first official reporting on the AIDS epidemic.¹⁸ Within days, gay men across the country were coming down with infections, including a rare and aggressive cancer known as Kaposi’s Sarcoma, that preyed on weakened immune systems.¹⁹ By year’s end, the United States had reported 337 cases of individuals with severe immune deficiency; more than one-third were already dead.²⁰

In 1983, scientists discovered the virus believed to be causing AIDS, which soon became known as human immunodeficiency virus, or HIV. HIV eviscerates CD4+ T cells, a type of blood cell that helps the body fight disease.²¹ If left untreated, HIV progresses to AIDS, wreaking havoc on the immune system and leaving the body vulnerable to severe illness.²² By the end of the decade, the number of reported AIDS cases in the United States had soared to 100,000; by the end of the millennium, 14 million people had died of AIDS worldwide.²³

Where the virus spread, fear followed. People were so afraid that “nurses refused to take in meals to hospitalized patients[, d]octors in major medical journals debated whether they had a moral obligation to treat people with AIDS[, p]arents refused to see their sick children, and faith communities called patients with HIV an ‘abomination.’”²⁴ A Gallup poll from the late 1980s found that fifty-one percent of Americans believed “that it was people’s own fault if they got AIDS.”²⁵ Roughly forty-four percent, meanwhile, thought “AIDS might be God’s punishment for immoral sexual behavior,” and twenty-one percent maintained that “people with AIDS should be isolated from the rest of society.”²⁶

It was in this context that legislatures began criminalizing exposure to HIV. In 1986, Florida, Tennessee, and Washington became the first states to implement HIV-specific criminal laws.²⁷ In 1990, the Ryan White

16. *A Timeline of HIV and AIDS*, HIV.GOV, <https://www.hiv.gov/sites/default/files/aidsgov-timeline.pdf> [<https://perma.cc/7BLQ-K37V>].

17. *Pneumocystis Pneumonia—Los Angeles*, CDC (June 5, 1981), https://www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm [<https://perma.cc/BHL5-JL27>].

18. *A Timeline of HIV and AIDS*, *supra* note 16.

19. *Id.* Kaposi’s Sarcoma later became known as the “gay cancer.” *Id.*

20. *Id.*

21. *Human Immunodeficiency Virus (HIV) in Healthcare Settings*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 27, 2011), <https://www.cdc.gov/hai/organisms/hiv/hiv.html> [<https://perma.cc/FKP9-DGU8>].

22. *AIDS and Opportunistic Infections*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 21, 2020), <https://www.cdc.gov/hiv/basics/livingwithhiv/opportunisticinfections.html> [<https://perma.cc/T2X3-U339>].

23. *A Timeline of HIV and AIDS*, *supra* note 16.

24. Jen Christensen, *AIDS in the ‘80s: The Rise of a New Civil Rights Movement*, CNN (June 1, 2016, 5:37 PM EDT), <https://www.cnn.com/2016/04/14/health/aids-atlanta-emory-university-the-80s/index.html> [<https://perma.cc/PH5K-YLP2>].

25. Justin McCarthy, *Gallup Vault: Fear and Anxiety During the 1980s AIDS Crisis*, GALLUP (June 28, 2019), <https://news.gallup.com/vault/259643/gallup-vault-fear-anxiety-during-1980s-aids-crisis.aspx> [<https://perma.cc/JZ8N-4G5M>].

26. *Id.*

27. Anna North, *These Laws Were Meant to Protect People from HIV. They’ve Only Increased Stigma and Abuse*, VOX (Oct. 10, 2019, 11:27 AM EDT) (citing Helen McDonald, *Five Things You Should Know About the U.S.’s Criminalization of HIV*, AUTOSTRADDE

Comprehensive AIDS Resources Emergency (CARE) Act required states to certify the adequacy of their HIV-related criminal laws in order to receive federal funding for HIV care.²⁸ Today, twenty-eight states have HIV-specific criminal laws, twenty-five states have prosecuted people living with HIV under non-HIV-specific general criminal laws, and eight states apply sentencing enhancements to people living with HIV who commit an underlying sexual-assault crime.²⁹

The military, too, took steps to address the burgeoning crisis. In October 1985, the Department of Defense began a mandatory HIV-screening program.³⁰ The Army, Navy, Air Force, and Marine Corps screened each recruit, turning away anyone with a positive test.³¹ At least officially, active-duty members who tested positive were allowed to continue serving as long as they were able, but they may not have been expected to last long. Treating service members with HIV and keeping them on the payroll was seen as “the compassionate thing to do,” according to a doctor who oversaw HIV monitoring for the Air Force in the 1990s, “[b]ut the expectation was that they would soon become too sick to perform their duties and be medically discharged.”³² In the meantime, personnel with HIV were often removed from their units and demoted to lesser jobs.³³ They were also required to sign a pledge to avoid risky sexual practices, and many found themselves prosecuted for “sodomy, disobedience and other offenses related to sexual activity.”³⁴ At one Army post in Texas, there was even a special barracks wing reserved for HIV-positive troops known as the “HIV hotel” or “the leper colony.”³⁵ Some service members with HIV committed suicide or were pushed out of the military without medical coverage.³⁶

Today, medical advancements have dramatically changed the nature of HIV treatment and prevention. Yet despite these developments, many of the military’s policies remain stuck in the past. The remainder of this Part offers a comprehensive look at the various HIV-related regulations currently on the books, aiming to untangle a labyrinthine set of rules touching on almost every aspect of military life.

A. Enlisting and Commissioning as an Officer

Prospective service members first encounter the military’s wide-ranging HIV policies when they try to enlist or enter an officer-candidate program. By law, the Secretary of Defense has broad discretion to set standards for entry into the Armed Forces, a power that has been used to set certain minimum thresholds

(July 21, 2014, 7:00 AM PDT), <https://www.autostraddle.com/five-things-you-should-know-about-the-u-s-s-criminalization-of-hiv-246462> [https://perma.cc/R48S-5V5H], <https://www.vox.com/the-highlight/2019/10/3/20863210/hiv-aids-law-iowa-criminalization> [https://perma.cc/S2RV-APPL].

28. See Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, § 2647, 104 Stat. 576, 603 (repealed 2000).

29. *HIV Criminalization in the United States*, CTR. FOR HIV L. & POL’Y (July 28, 2020), <https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20the%20US%20%282020%29.pdf> [https://perma.cc/4F6V-7BLL].

30. Garrett, *supra* note 7.

31. *Id.*

32. Dave Philipps, *Sergeant Sues Defense Dept. over ‘Outdated’ H.I.V. Policies*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/us/defense-department-sued-hiv-policy.html> [https://perma.cc/448K-22VF].

33. Garrett, *supra* note 7.

34. *Id.*

35. *Id.*

36. Laurie Garrett, *Meet Trump’s New, Homophobic Public Health Quack*, FOREIGN POL’Y (Mar. 23, 2018 4:37 PM), <https://foreignpolicy.com/2018/03/23/meet-trumps-new-homophobic-public-health-quack> [https://perma.cc/3YJC-6CYN]. One of the architects of the military’s HIV policies was Robert Redfield, a retired Army lieutenant colonel who later became the head of the CDC during the Trump Administration. *Id.* He held a variety of regressive views on AIDS, arguing, for example, that condoms were an ineffective method of prevention and that the spread of the disease was due to a breakdown in family values. *Id.* He also advocated “delaying sexual activity until marriage to stave off infection.” *Id.*

for educational attainment and physical and medical fitness.³⁷ HIV is one of more than 400 medical conditions that currently disqualify a person from service, alongside facial deformities, night blindness, tuberculosis, a wide range of heart conditions and abnormalities, and a history of inflammatory-bowel disease.³⁸ In theory, such restrictions are designed to ensure that troops are “[f]ree of contagious diseases that may endanger the health of other personnel”; “[f]ree of medical conditions or physical defects that may . . . require excessive time lost from duty for necessary treatment or hospitalization”; and “capable of performing duties without aggravating existing physical defects or medical conditions.”³⁹

Americans hoping to enlist are typically screened for HIV and other medically disqualifying conditions as part of medical examinations at entrance-processing stations—where they are assessed for fitness for service—or at a military hospital or clinic.⁴⁰ Applicants for officer-candidate programs, meanwhile, are tested within seventy-two hours of arrival at the training site, while Reserve Officer Training Corps cadets and midshipmen must be tested before beginning their programs.⁴¹ A positive test is an absolute bar to joining the military as an enlisted man or officer, even if an applicant is currently undergoing HIV treatment and is otherwise healthy.⁴² In justifying this policy, a Navy instruction claims that service members with HIV “are not able to participate in battlefield blood donor activities or military blood donation programs,” and that the ban “avoid[s] current and future medical costs associated with [the disease] and reduce[s] the possibility that the individual shall be unable to complete the initial service obligation.”⁴³

If a service member is diagnosed for the first time *after* enlisting, he or she may continue to serve but may not later receive an officer’s commission. Enlisted personnel who wish to obtain a commission must technically be discharged at their enlisted rank and then commissioned as an officer.⁴⁴ This subjects them to renewed medical scrutiny, and they face the same medical qualification standards as those seeking to join the military for the first time.⁴⁵ Unlike officer candidates who have never served in the military before, for whom a positive test is a complete bar to service, officer candidates who are enlisted may remain in the military—but only at their nonofficer rank, with no further opportunity to become an officer in the future.⁴⁶

To understand how this policy affects service members in practice, consider the experience of Jeffery Pate, an Army enlisted nurse who tested positive for HIV in 2010.⁴⁷ When Pate was diagnosed, he was in the middle of applying to become a registered nurse, a promotion that would have required earning a degree and being commissioned as an officer. His diagnosis put those plans on hold, forcing him to forgo a role that would have meant greater responsibility and a higher salary. “Now that I’m HIV positive, my only

37. 10 U.S.C. § 504(b)(3)(A) (2018) (“No person who enlists under paragraph (2) may report to initial training until after the Secretary concerned has completed all required background investigations and security and suitability screening *as determined by the Secretary of Defense regarding that person.*” (emphasis added)).

38. OFFICE OF THE UNDER SEC’Y OF DEF. FOR PERS. & READINESS, DEP’T OF DEF., DoD INSTRUCTION 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION INTO THE MILITARY SERVICES 11-46 (2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf> [<https://perma.cc/UG4L-HURG>].

39. *Id.* at 4-5.

40. MENDEZ, *supra* note 6, at 1.

41. *Id.*

42. *See id.*

43. SEC’Y OF THE NAVY, INSTRUCTION 5300.30F: MANAGEMENT OF HUMAN IMMUNODEFICIENCY VIRUS, HEPATITIS B VIRUS, AND HEPATITIS C VIRUS INFECTION IN THE NAVY AND MARINE CORPS 8 (2018) [hereinafter SECNAV INSTRUCTION 5300.30F], <https://www.med.navy.mil/sites/nmcphc/Documents/nbimc/648501p.pdf> [<https://perma.cc/T5WJ-8H7P>].

44. Interview with Peter Perkowski, *supra* note 5; Interview with Jeffery Pate, Licensed Practical Nurse, U.S. Army (Oct. 18, 2020).

45. *Id.*; *see also* MENDEZ, *supra* note 6, at 1.

46. *See, e.g.*, DEP’T OF THE ARMY, ARMY REGULATION 600-110, IDENTIFICATION, SURVEILLANCE, AND ADMINISTRATION OF PERSONNEL INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS 21 (2014), https://www.army.mil/e2/downloads/rv7/r2/policydocs/r600_110.pdf [<https://perma.cc/9UUX-C4ED>]. The other branches have similar regulations. Interview with Peter Perkowski, *supra* note 5.

47. Interview with Jeffery Pate, *supra* note 44.

options are to stay in the military in my current role, or get out,” he said. “Becoming an officer is completely off the table.”

For Sergeant Nicholas Harrison, a member of the D.C. National Guard, the military’s policies have had a similar effect.⁴⁸ Harrison joined the Army in 2000, when he was twenty-three years old; a few years later, he “was discharged from active duty . . . [and] return[ed] to Oklahoma to become a member of the Oklahoma National Guard and to focus on his education.”⁴⁹ After earning a bachelor’s degree, he enrolled in law school with the goal of one day serving as an army lawyer.⁵⁰ Despite having to repeat his first year, which was disrupted when his unit deployed to Afghanistan, he ultimately received his J.D. in 2011.⁵¹ In 2012, he was diagnosed with HIV.

When Harrison was offered a position in the Judge Advocate General (JAG) Corps for the D.C. National Guard in 2013, he learned that there was a catch: the job required him to be commissioned, and, since he had been diagnosed with HIV, he was no longer eligible to do so. “The natural progression for anyone who has my experiences and has a law degree is to put that in practice in the courtroom,” Harrison told me. “But because of the policy that’s in place, I can’t do that.” By comparing the salary he receives in his current role to what he could have received as an officer, Harrison estimates that he has lost out on roughly \$50,000 since 2014. “Whenever I’m called up, I’m brought in to do more menial tasks like armory cleanup,” he said. “But my real skill set is in managing programs and analyzing legislation.”

B. Screening and Deployment

After enlisting, military personnel are screened for HIV as part of regular health check-ups, typically at least once every two years.⁵² Service members who test positive are “referred for appropriate treatment and a medical evaluation of fitness for continued service in the same manner as a Service member with other chronic or progressive illnesses.”⁵³ According to regulations, a service member who is found to be fit for duty “will be allowed to serve in a manner that ensures access to appropriate medical care.”⁵⁴ A service member is not considered fit to serve if he cannot “reasonably perform duties of his . . . office, grade, rank, or rating.”⁵⁵ He may also be considered unfit if he poses “a decided medical risk to the health of the member or to the welfare or safety of other members” or if his condition “imposes unreasonable requirements on the military to maintain or protect the Service member.”⁵⁶

As a matter of policy, the mere presence of HIV in the bloodstream is not enough to declare a service member unfit. The Navy, for example, allows Sailors with HIV to continue serving so long as they “do not demonstrate any evidence of . . . immunologic deficiency, neurologic deficiency, progressive clinical or laboratory abnormalities,” or any AIDS-defining condition.⁵⁷ In the Air Force, however, recent litigation has revealed a troubling pattern of involuntary separations for airmen with HIV.⁵⁸ On paper, the Air Force has the same policy as the other branches, declaring that HIV-positive status alone “is not grounds for medical

48. Video Interview with Sgt. Nicholas Harrison, D.C. Nat’l Guard (Oct. 18, 2020). Unless otherwise noted, the following quotations from Harrison, as well as the facts about his life, come from this interview.

49. Complaint at 12, *Harrison v. Mattis*, No. 1:18-cv-00641 (E.D. Va. May 30, 2018).

50. *See id.*

51. *Id.* at 12-13.

52. DEP’T OF DEF., INSTRUCTION NO. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS (HIV) IN MILITARY SERVICE MEMBERS 6 (2013), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/648501p.pdf> [<https://perma.cc/D68E-D9BB>].

53. *Id.* at 7.

54. *Id.*

55. DEP’T OF DEF., INSTRUCTION 1332.18, DISABILITY EVALUATION SYSTEM (DES) 27 (2014), https://warrior-care.dodlive.mil/files/2016/03/DoDI_1332.18.pdf [<https://perma.cc/5Z32-TLJQ>].

56. *Id.*

57. SECNAV INSTRUCTION 5300.30F, *supra* note 43, at 16.

58. *See Roe v. Dep’t of Def.*, 947 F.3d 207, 207, 234 (4th Cir. 2020).

separation or retirement.”⁵⁹ But the Modern Military Association of America, formerly known as OutServe-SLDN, an advocacy organization for LGBT+ and HIV-positive service members, has identified several airmen who were threatened with discharge after testing positive.⁶⁰ Two of them—Richard Roe and Victor Voe, both pseudonyms—are now plaintiffs in *Roe v. Department of Defense*, which was before the Fourth Circuit in 2019.

Roe’s story is illustrative. After he was diagnosed with HIV in October 2017, he was referred to the Disability Evaluation System to assess his fitness for continued service.⁶¹ Although both his commanding officer and primary-care doctor recommended that he be retained, the Air Force’s informal physical evaluation board recommended him for discharge.⁶² Roe appealed the decision, submitting additional letters of support from his commanding officer and other colleagues, as well as from the director of the HIV Medical Evaluation Unit at the San Antonio Military Medical Center, who said that he saw no “medical reason” that Roe should “not be returned to duty.”⁶³ Nevertheless, the Secretary of the Air Force Personnel Council affirmed the initial decision to discharge Roe, despite noting that he was complying with treatment and was asymptomatic and virally suppressed.⁶⁴

The bulk of the Air Force’s reasoning concerned the military’s regulations governing deployment. Under Department of Defense rules, certain medical conditions prevent service members from deploying overseas, depending on “the nature of the disability and if it would put the individual at increased risk of injury or illness, or if the condition is likely to significantly worsen in the deployed environment.”⁶⁵ HIV is among the health conditions that may preclude deployment, alongside pregnancy, certain cancers, symptomatic coronary artery disease, and “any unresolved acute or chronic illness or injury that would impair duty performance in a deployed environment.”⁶⁶ Service members with these conditions may still deploy if they receive a waiver, but in practice, service members with HIV rarely qualify.⁶⁷

In Roe’s case, the Air Force Personnel Council concluded that his HIV status precluded him “from being able to deploy world-wide without a waiver,” rendering him “ineligible for deployment to the Central Command (CENTCOM) Area of Responsibility (AOR) where the majority of Air Force members are expected to deploy.”⁶⁸ (Central Command’s area of responsibility spans four million square miles including Central

59. *Id.* at 214.

60. *Id.* at 217 (“Roe and Voe were not alone in receiving this disposition. OutServe-SLDN (OutServe), an organization that works on behalf of the LGBTQ+ and HIV-positive military community, identified four other HIV-positive Air Force servicemembers found unfit for duty and ordered discharged based upon identical reasoning.”).

61. *Id.* at 216.

62. *Id.*

63. *Id.*

64. *Id.*

65. DEP’T OF DEF., INSTRUCTION 6490.07, DEPLOYMENT-LIMITING MEDICAL CONDITIONS FOR SERVICE MEMBERS AND DoD CIVILIAN EMPLOYEES 7 (2010), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649007p.pdf> [<https://perma.cc/LTB5-7M9G>].

66. *Id.* at 10–12.

67. *Id.* at 8; *see also* Interview with Peter Perkowski, Legal & Policy Dir., Modern Military Ass’n of Am. (Apr. 25, 2020) (stating that service members with HIV rarely qualify for a waiver). The Navy has somewhat liberalized its deployment policies and now allows HIV-positive personnel to deploy to “large-platform ships and certain bases globally.” Ray Mabus, Opinion, *Discriminating Against HIV-Positive Military Members Is Unproductive for Our Military*, WASH. POST (Aug. 5, 2019), <https://www.washingtonpost.com/opinions/2019/08/05/discriminating-against-hiv-positive-military-members-is-unproductive-our-military/> [<https://perma.cc/AQM5-JTAC>]. In 2019, former Secretary of the Navy Ray Mabus “told a federal court of appeals it should affirm a preliminary injunction preventing the Air Force from discharging service members with HIV [in *Roe*],” arguing that it was “long past time for the U.S. military to integrate the latest medical science regarding HIV into military policies and to stop discriminating against service members with this medical condition.” *Id.*

68. *Roe*, 947 F.3d at 216.

Asia and the Middle East.⁶⁹) The Air Force also noted that it was “extremely unlikely” that an HIV-positive service member would qualify for a waiver, as CENTCOM “has never granted a waiver for an HIV positive service member to enter” the region in question.⁷⁰ Because Roe belonged to a “career field with a comparatively high deployment rate,” he was determined to be unfit for continued service.⁷¹ Roe’s coplaintiff, Voe, received a virtually identical determination, as have at least four other HIV-positive airmen.⁷²

In addition to affecting deployment, HIV status can also be a barrier to other employment opportunities in the military. According to Peter Perkowski, a legal and policy director of the Modern Military Association of America and one of the plaintiffs’ lawyers in *Roe*, “[w]e’ve seen pilots who were diagnosed with HIV get grounded, as well as doctors and medical practitioners, including mental-health practitioners, who were removed from their healthcare jobs after being diagnosed.”⁷³ No reliable data currently exist on the prevalence of such cases.

C. Safe-Sex Orders

Finally, the military regulates service members with HIV by surveilling and controlling their sex lives. Almost as soon as they receive their test results, service members with HIV are given what is known as a “safe-sex order.”⁷⁴ In the Air Force, for example, the order is two pages long and must be signed by the service member after receipt.⁷⁵ “Because of the necessity to safeguard the overall health, welfare, safety, and reputation of this command and to ensure unit readiness and the ability of the unit to accomplish its mission,” the order begins, “certain behavior and unsafe health procedures must be proscribed for members who are diagnosed as positive for HIV infection.”⁷⁶ Among other things, members are ordered to inform sexual partners of their HIV status prior to engaging in sexual relations and use condoms or other “proper methods” to prevent the transfer of bodily fluids during sex.⁷⁷

The safe-sex order is not merely guidance. As the document states, “[v]iolating the terms of this order may result in adverse administrative action or punishment under the Uniform Code of Military Justice for violation of a lawful order.”⁷⁸ Violating a lawful order falls under Article 92 of the UCMJ,⁷⁹ but that is not the only provision of the code that may be implicated by a failure to follow the safe-sex rules. Service members who neglect to disclose their HIV status before having sex—even if the sex is otherwise consensual, and regardless of whether the sexual activity involved condoms or was otherwise low-risk—can also be charged with sexual assault under Article 120 (on the theory that sex with someone who is HIV positive cannot be consensual without knowledge of that HIV status); simple assault under Article 128 (on the grounds that failing to disclose HIV status constitutes doing or attempting to do bodily harm to another

69. U.S. Cent. Command, *Area of Responsibility*, U.S. DEP’T DEF., <https://www.centcom.mil/AREA-OF-RESPONSIBILITY> [<https://perma.cc/LTG2-GJC8>].

70. Declaration of Martha P. Soper ¶ 11, at 6, *Roe v. Shanahan*, No. 1:18-cv-1565 (E.D. Va. Jan. 25, 2019).

71. *Roe*, 947 F.3d at 216.

72. *Id.* at 216–17.

73. Interview with Peter Perkowski, *supra* note 67.

74. Joseph Jaafari, *What It’s Like to Be HIV Positive in the Military*, ROLLING STONE (May 20, 2017, 2:00 PM ET), <https://www.rollingstone.com/culture/culture-features/what-its-like-to-be-hiv-positive-in-the-military-120407> [<https://perma.cc/6CJ7-4M8H>].

75. See DEP’T OF AIR FORCE, INSTRUCTION 44-178, HUMAN IMMUNODEFICIENCY VIRUS PROGRAM 43-44 (2014), https://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-178/afi44-178.pdf [<https://perma.cc/A6KX-N4AY>].

76. *Id.* at 43.

77. *Id.*

78. *Id.*

79. See 10 U.S.C. § 892(1) (2018).

person); or, under Article 134, conduct that is prejudicial to “good order and discipline in the armed forces” or likely to “bring discredit upon the armed forces.”⁸⁰

Until recently, service members who failed to disclose their HIV status before sexual activity could even be charged with aggravated assault, defined in part as assault that inflicts “substantial bodily harm or grievous bodily harm on another person.”⁸¹ Under the prevailing theory, as articulated by the Court of Military Appeals in 1993 in *United States v. Joseph*, the question was not “the statistical probability of HIV invading the victim’s body, but rather the likelihood of the virus causing death or serious bodily harm *if it invade[d]* the victim’s body.”⁸² Thus, the fact that HIV could become AIDS and lead to death was enough to render the sex aggravated assault, even if the probability of transmission was low. As the court held in *Joseph*, “[t]he probability of infection need only be ‘more than merely a fanciful, speculative, or remote possibility.’”⁸³

That precedent was overturned in 2015, in *United States v. Gutierrez*.⁸⁴ *Gutierrez* (no relation to Branden Gutierrez, whose story is outlined above) involved an airman stationed at Aviano Air Base, in Italy, who tested positive in 2007.⁸⁵ Despite receiving a safe-sex order, David Gutierrez allegedly had sex with multiple sexual partners without verbally informing them of his HIV status.⁸⁶ Eventually, the Air Force Office of Special Investigations got involved, and Gutierrez was charged with and convicted of aggravated assault.⁸⁷ On appeal, the Court of Appeals for the Armed Forces overturned *Joseph*, reasoning that an aggravated assault charge could not stand where the risk of transmission was so low as to be virtually nonexistent. The relevant question, according to the court, was whether “grievous bodily harm” was “the likely consequence of Appellant’s sexual activity.”⁸⁸ In this case, it was not, as the court concluded that none of the sex acts in question—protected oral sex, unprotected oral sex, protected vaginal sex, and unprotected vaginal sex—carried a greater than 1 in 500 chance of transmission.⁸⁹

Still, the court left open the possibility of criminal sanctions under other provisions of the UCMJ.⁹⁰ “There is nothing improper regarding the government’s reliance on generally applicable statutes to prosecute criminal conduct,” the court held, “but in cases involving HIV exposure, the government will be held to its burden of proving every element of the charged offense.”⁹¹

* * *

The military’s HIV policies thus govern nearly all aspects of military life: enlistment, promotions, deployment—even the private sexual decisions of consenting adults. Even if such rules may have seemed justifiable at the height of the AIDS epidemic, today it is clear they are not.

II. Outdated and Dangerous

The military’s HIV rules are the product of the early decades of the epidemic. For six years after the first cases were discovered, there was no treatment available. It was not until March 1987 that the U.S. Food and Drug Administration approved the first medication for AIDS: AZT, also known as zidovudine.⁹² Although

80. See *id.* §§ 920, 928, 934.

81. See *id.* § 928(b)(1).

82. *United States v. Joseph*, 37 M.J. 392, 397 (C.M.A. 1993).

83. *Id.* (quoting *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A. 1990)).

84. 74 M.J. 61 (C.A.A.F. 2015).

85. *Id.* at 63.

86. *Id.*

87. *Id.* at 64.

88. *Id.* at 66.

89. *Id.* at 66–67.

90. *Id.* at 67–68.

91. *Id.* at 67.

92. Molotsky, *supra* note 10.

this development was welcome news, the drug was “far from perfect.”⁹³ It was highly toxic, and the virus usually developed resistance to the medicine after just six months of therapy.⁹⁴ AZT appeared to work only if taken early in the course of the disease, and even then it typically delayed death by no more than a year.⁹⁵ Meanwhile, the medicine involved significant side effects, including fevers, muscular atrophy, and weight loss.⁹⁶

The military’s approach to HIV reflected this reality. The virus – and if not the virus, then the side effects of the medication – would have made it difficult for service members to carry out their duties safely and effectively. Even after scientists in 1996 developed antiretroviral therapy as a way to stop the virus from replicating, it required taking some thirty different pills a day at specific times – a daunting prospect on the battlefield.⁹⁷ According to one early study of compliance, “any patient missing over 20 percent of doses over a three-day period had a high likelihood of AIDS resurgence.”⁹⁸

Today, however, the situation is very different. As this Part will show, none of the military’s policies has evolved to reflect current advancements in HIV treatment and prevention. The policies are also discriminatory. Singling out service members with HIV, as many of the regulations do, serves no legitimate purpose and may also be illegal. Such regulations prevent otherwise capable service members from advancing in their careers, increase the stigma associated with the disease, and expose service members with HIV to criminal sanctions that are vastly disproportionate to the alleged harm.

A. The Military’s HIV Policies Are Medically Outdated

Rules prohibiting people with HIV from enlisting, becoming officers, or deploying overseas assume that the disease is both easy to transmit and highly disruptive. Today, neither is true. Consider, first, the data on transmission. In the worst-case scenario – that is, without accounting for risk-reducing factors like antiretroviral treatment or the use of condoms – there is a smaller than 1.5 percent chance of transmission from receptive anal sex and a less than 0.2 percent chance of transmission from individual acts of insertive anal sex, receptive penile-vaginal sex, and insertive penile-vaginal sex.⁹⁹ The risk of transmission from oral sex is even lower, and the CDC lists as “[n]egligible” the risk of acquiring HIV from biting, spitting, throwing body fluids, and sharing sex toys.¹⁰⁰

When the disease is treated, and people with HIV keep an undetectable viral load, the risk of any kind of sexual transmission becomes effectively zero. Although antiretroviral therapy once required taking dozens of pills a day, often with severe side effects, patients can now take a single pill once a day “with virtually no side effects” at all.¹⁰¹ The FDA also recently approved a once-monthly injection for HIV, which should make it even easier for people to access treatment.¹⁰² Antiretroviral therapy works by preventing the virus

93. ENGEL, *supra* note 12, at 130.

94. *Id.*

95. *Id.*

96. *Id.* at 238.

97. *Id.* at 245.

98. *Id.*

99. *HIV Risk Behaviors*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 2015), <https://www.cdc.gov/hiv/pdf/risk/estimates/cdc-hiv-risk-behaviors.pdf> [<https://perma.cc/U2AK-9MWT>].

100. *Id.*

101. *Latest Anti-Retroviral Drug Regimens Provide ‘Lazarus Effect’ for HIV Patients*, SCI. DAILY (Feb. 27, 2019), <https://www.science-daily.com/releases/2019/02/190227124843.htm> [<https://perma.cc/F6VV-WNKN>] (quoting Stephen A. Klotz, MD, professor in the Division of Infectious Diseases at the University of Arizona Department of Medicine).

102. *FDA Approves First Extended-Release, Injectable Drug Regimen for Adults Living With HIV*, U.S. FOOD & DRUG ADMIN. (Jan. 21, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-extended-release-injectable-drug-regimen-adults-living-hiv> [<https://perma.cc/8DMY-7D95>].

from multiplying, reducing the body's "viral load," which is the amount of HIV in the body.¹⁰³ By taking the medicines every day, people with HIV can reduce their viral load from upwards of a million copies of the virus per milliliter of blood to less than twenty copies per milliliter—an "undetectable" amount that makes it all but impossible to transmit the disease via sex.¹⁰⁴ In the words of the CDC, "all evidence to date suggests that it is not realistically possible to sexually transmit HIV while the person with HIV remains undetectable or virally suppressed."¹⁰⁵

The risk of sexual transmission can be reduced even further by preventive measures—for example, by using a condom. And an HIV-negative partner can reduce his or her risk by taking daily preventative medication, a strategy known as pre-exposure prophylaxis (PrEP),¹⁰⁶ which on its own (i.e., whether or not an HIV-positive partner is virally suppressed) has been shown to reduce the risk of sexual transmission by about ninety-nine percent.¹⁰⁷ New advancements may soon make pre-exposure prophylaxis even easier: the pharmaceutical giant Merck is currently testing an arm implant that would prevent HIV infection for over a full year.¹⁰⁸

Of course, the benefits of antiretroviral therapy depend on access to treatment and adherence to the regimen. On both counts, the military has substantial advantages. The military screens service members for HIV early and often, and its treatment programs are first-class: between 2012 and 2018, a remarkable ninety-nine percent of HIV-positive service members achieved viral suppression within one year of starting antiretroviral therapy, meaning that they had less than 200 copies of HIV per milliliter of blood.¹⁰⁹ This is significantly higher than the national rate. In 2016-17, for example, a little more than eighty percent of patients receiving HIV clinical care nationally were virally suppressed at their last test.¹¹⁰ (That number does not account for the roughly fourteen percent of people with HIV who do not know they have the virus, a problem that the military does not have thanks to its rigorous screening protocols.¹¹¹) Researchers noted that the military provides "free universal access" to the military health system for active-duty service members at all stages of HIV care, including "routine testing, specialty care evaluations, laboratory monitoring, and [antiretroviral therapy]."¹¹² In addition, service members with HIV are required to receive periodic evaluations, which likely encourages patients to stick with the treatment regimen.¹¹³

103. *HIV Treatment: The Basics*, HIVINFO (Sept. 24, 2020), <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/21/51/hiv-treatment--the-basics> [https://perma.cc/9YQH-2MS8].

104. *Id.*; *What Does HIV Viral Load Tell You?*, WEBMD (May 28, 2019), <https://www.webmd.com/hiv-aids/hiv-viral-load-what-you-need-to-know> [https://perma.cc/EPD2-TWWJ] (noting the difference between a high viral load and an undetectable one).

105. *Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION 3 (Dec. 2020), <https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf> [https://perma.cc/28X5-EE6V].

106. *PrEP*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 3, 2020), <https://www.cdc.gov/hiv/basics/prep.html> [https://perma.cc/G8XW-BDPZ].

107. *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 12, 2019), https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html#anchor_1562942347 [https://perma.cc/6NW5-LW5B].

108. Donald G. McNeil, Jr., *Someday, an Arm Implant May Prevent H.I.V. Infection for a Year*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/health/hiv-aids-implant.html> [https://perma.cc/CXJ9-3NJ7].

109. Shauna Stahlman, Shilpa Hakre, Paul T. Scott, Brian K. Agan, Donald Shell, Todd Gleeson, Jason M. Blaylock & Jason F. Okulicz, *Antiretroviral Therapy and Viral Suppression Among Active Duty Service Members with Incident HIV Infection—United States, January 2012–June 2018*, 69 MORBIDITY & MORTALITY WKLY. REP. 366, 366 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6913a2-H.pdf> [https://perma.cc/VP2C-QCHG].

110. *Id.* at 367.

111. *Basic Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 27, 2021), <https://www.cdc.gov/hiv/basics/statistics.html> [https://perma.cc/9DX6-BF22].

112. Stahlman et al., *supra* note 109, at 367.

113. *Id.*

Antiretroviral therapy not only effectively eliminates the risk of transmission; it also enables people with HIV to live normal, healthy lives. In 1996, when antiretroviral therapy was introduced, life expectancy for a 20-year-old with HIV was roughly 39 years; in 2011, life expectancy had jumped to about 70.¹¹⁴ Today, nearly half of those living with diagnosed HIV in the United States are 50 or older.¹¹⁵ In other words, people undergoing treatment for HIV are now more likely to die *with* the virus than *of* it.¹¹⁶

But the Department of Defense has not updated HIV policies to reflect this new medical reality. Take, for example, rules prohibiting people living with HIV from enlisting or commissioning as officers. It makes sense that the military should have the power to regulate who can serve, as such rules allow the military to protect the health and safety of its members and maintain a force that is ready for combat. But the military's medical standards should bear an actual relationship to the goals it aims to promote: protecting troops from contagious diseases, avoiding "excessive time lost from duty for necessary treatment or hospitalization," and ensuring a fit force.¹¹⁷ These overarching goals do not justify the ban on HIV-positive candidates. As the Fourth Circuit acknowledged in *Roe*, people who take daily antiretroviral medication and maintain an undetectable viral load "have effectively no risk of sexually transmitting the virus to an HIV negative partner," and "[t]hose who are timely diagnosed and treated experience few, if any, noticeable effects on their physical health."¹¹⁸ If a service member's health is affected by HIV—if, for example, a recruit or service member displays symptoms of AIDS—then that could be the basis for a case-by-case restriction. But the mere presence of HIV in the bloodstream should not be enough to disqualify someone who is otherwise capable of military service.

Nor should a positive test on its own be enough to prevent service members from deploying overseas. According to a government declaration in *Roe*, the ban on deployment to CENTCOM's area of responsibility has at least three justifications: first, that HIV medications "are highly specialized, and require constant, diligent compliance to be effective"; second, that "austere conditions may place Service members with mandatory medication or treatment regimens at risk because these regimens may be disrupted"; and third, that the "remaining force" might be exposed to HIV-infected blood "from treating, or being treated for, battlefield trauma, or for those individuals requiring battlefield blood transfusions."¹¹⁹

None of these arguments justifies a blanket ban. It is true that antiretroviral therapy requires constant and diligent compliance. But, as the Fourth Circuit noted in *Roe*, complying with the treatment regimen is not difficult: for most people, it involves taking a single pill once a day with no dietary restrictions and minimal side effects.¹²⁰ According to Dr. Craig W. Hendrix, a professor at Johns Hopkins University School of Medicine, the time and effort needed to take the necessary medication "is similar to that expended by service members deployed overseas who are prescribed daily medication for prophylaxis of malaria."¹²¹ Meanwhile, as the Fourth Circuit stated, viral load testing "is routine and can readily be conducted by a general practitioner, either on-site or by shipping a sample to a lab."¹²² In addition, according to Hendrix,

114. Annamarya Scaccia, *Facts About HIV: Life Expectancy and Long-Term Outlook*, HEALTHLINE (Apr. 24, 2020), <https://www.healthline.com/health/hiv-aids/life-expectancy> [https://perma.cc/3JTK-2DWZ].

115. *Growing Older with HIV*, HIV.GOV (Feb. 17, 2021), <https://www.hiv.gov/hiv-basics/living-well-with-hiv/taking-care-of-yourself/aging-with-hiv> [https://perma.cc/A4J3-V6VQ].

116. Although "HIV treatments have decreased the likelihood of AIDS-defining illnesses among people aging with HIV," certain other conditions remain more prevalent among people with HIV, including cardiovascular disease, lung disease, certain cancers, and several age-associated diseases, underscoring the need for regular care. *Id.*

117. DoD INSTRUCTION 6130.03, *supra* note 38, at 4.

118. *Roe v. Dep't of Def.*, 947 F.3d 207, 214 (4th Cir. 2020) (internal quotation marks omitted).

119. *Id.* at 226.

120. *Id.*

121. Expert Declaration of Dr. Craig W. Hendrix, M.D., in Support of Plaintiffs' Motion for Preliminary Injunction at 10, *Harrison v. Esper*, No. 18-CV-641 (E.D. Va. July 19, 2018) [hereinafter Hendrix Declaration].

122. 947 F.3d at 226.

point-of-care viral load testing, which can return results within ninety minutes, “is becoming increasingly prevalent and cost efficient.”¹²³

Next, it is unlikely that “austere conditions” will disrupt treatment regimens. Service members can be prescribed enough medication for several months at a time, and the medicines require no special storage or handling. Service members are trusted to take medication for conditions like diabetes, hypertension, and asthma, none of which are considered a categorical bar to deployment. HIV should be no different. What’s more, even if antiretroviral therapy is briefly disrupted, the results would not be dire. According to Dr. W. David Hardy, chair of the HIV Medicine Association’s Board of Directors and adjunct professor at Johns Hopkins University School of Medicine, “a person who experiences a lapse in their [antiretroviral therapy] will not immediately suffer negative health outcomes.”¹²⁴ It often takes weeks for a person’s viral load to climb back to a level that would not be considered suppressed, and it can take years for a person to experience any adverse health effects – all of which can be avoided by restarting medication.¹²⁵

As for the possibility of battlefield transmission, whether through blood splatter or blood transfusions, the evidence suggests that the government’s concerns are unfounded. “Blood splashes” are not well-documented sources of transmission, but even if they were, a service member with undetectable levels of the virus in his or her blood would be practically incapable of spreading HIV to others in this manner.¹²⁶ According to Dr. Hendrix, “[i]t is reasonable to conclude the risk of transmission through battlefield activities that present at most a theoretical risk of transmission is also effectively zero if the person with HIV has a suppressed or undetectable viral load.”¹²⁷

The concern about blood transfusions, meanwhile, is likewise misplaced. Whenever possible, the military uses prescreened blood – blood that does not contain HIV – “even in combat settings.”¹²⁸ The military-wide blood program “collect[s], test[s], and transport[s] blood to forward-deployed surgical units and theater hospitals,” which then provide blood to first responders.¹²⁹ In the event that prescreened blood is not available, first responders will take blood from a “walking blood bank,” a service member who has volunteered to donate blood when called upon, and whose blood has also been prescreened.¹³⁰ If that is not enough, medics will take blood from someone who has donated recently, and then they will ask for volunteers.¹³¹ There is a very low risk, in other words, that a service member with HIV would ever be called upon to give blood, and in any event they are prohibited from doing so. Just as a soldier with AB+ blood is not prohibited from deploying because he is unlikely to be able to donate blood, an HIV-positive soldier should not be singled out either.¹³²

In light of the overwhelming evidence, the military’s policies are vulnerable to challenge under the Administrative Procedure Act, which requires agency decisionmaking to evince a “rational connection between the facts found and the choice made.”¹³³ HIV-specific policies that do not account for medical advancements

123. Hendrix Declaration, *supra* note 121, at 11.

124. Expert Declaration of W. David Hardy, M.D., in Support of Plaintiffs’ Motion for Preliminary Injunction at 4, *Roe v. Shanahan*, No. 18-CV-01565 (E.D. Va. Feb. 1, 2019).

125. *Id.*; Interview with Gregg Gonsalves, Assistant Professor of Epidemiology, Yale Univ. (Jan. 5, 2021).

126. Hendrix Declaration, *supra* note 121, at 9.

127. *Id.*

128. Amici Curiae Brief of Former Military Officials in Support of Appellees and for Affirmance of the District Court Below at 17, *Roe v. Dep’t of Def.*, 947 F.3d 207 (4th Cir. 2020) (No. 19-1410).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 17-18 (noting that a person with AB+ blood can donate only to other people with the same blood type).

133. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

suggest a lack of reasoned decisionmaking, rendering such policies arbitrary and capricious. As the court in *Roe* concluded, in the context of a ban on deployment:

[Such a ban] may have been justified at a time when HIV treatment was less effective at managing the virus and reducing transmission risks. But any understanding of HIV that could justify this ban is outmoded and at odds with current science. Such obsolete understandings cannot justify a ban, even under a deferential standard of review and even according appropriate deference to the military's professional judgments.¹³⁴

Citing *Roe*, a district court in Maryland recently held that rules preventing service members with HIV from commissioning as officers could likewise be scrutinized under the Administrative Procedure Act "to determine whether they have departed from the military's statutory mandate to ensure that officers are 'physically qualified for active service.'"¹³⁵ If the regulations "appear to limit the attainment of officer roles for reasons unrelated to the officer's physical qualifications," the court said, "or for reasons not otherwise contemplated by the statute, then the courts may intervene."¹³⁶ On the record before it, the court held that it "could not conclude that a categorical bar against commissioning HIV-positive service members is acceptable under the APA."¹³⁷

B. The Military's HIV Policies Increase Stigma and Violate Equal Protection

Keeping outdated regulations on the books is not just medically unsound. In singling out people with HIV, such policies also worsen the stigma surrounding the virus and expose HIV-positive troops to discrimination and abuse. HIV has been shrouded in shame and fear since the first outbreak in 1981, when it was dubbed the "gay cancer" or "gay-related immune deficiency" and seen in many quarters as retribution for a deviant lifestyle.¹³⁸ Those suffering from the disease faced discrimination and worse. In one account, "[d]octors turned away HIV-positive patients. Funeral homes refused to bury people who had died of AIDS-related complications. Even children living with the disease were cast out."¹³⁹

Although advances in treatment have reduced some of the stigma surrounding the virus, the military's policies perpetuate old prejudices. For example, absent a convincing medical reason to prevent people with HIV from commissioning as officers or deploying overseas, such rules do little more than keep otherwise deserving troops from receiving promotions open to their peers. Safe-sex orders, meanwhile, single out service members with HIV for sexual surveillance even though there is a virtually nonexistent risk of sexual transmission and even though forcing people to disclose their status to sexual partners may invite physical harassment, violence, or intimidation. According to Christopher Reichle, a Petty Officer First Class in the Navy, safe-sex orders can also make service members with HIV feel subject to "an air of judgmental tracking."¹⁴⁰ Every six months, per military regulations, Reichle signs his safe-sex order and visits the Navy's preventive medicine office where a nurse grills him about his sexual practices. "I feel like I have my hand slapped every single time I go there," he said. "She'll say things like, 'How often do you drink? You know you make poor decisions when you are intoxicated, right?' I once made the mistake of telling her I'd had unprotected sex with a partner who was also HIV positive, and you should have seen the look she gave me." Reichle called this approach to treatment and prevention counterproductive, as he is now less likely to answer the nurse's questions truthfully.

The sexual-disclosure requirements are also troubling for constitutional reasons. For one, in seeking to police the sex lives of HIV-positive service members, the orders likely run afoul of the equal-protection

¹³⁴. *Roe v. Dep't of Def.*, 947 F.3d 207, 228 (4th Cir. 2020).

¹³⁵. *Deese v. Esper*, No. 18-CV-2669, 2020 WL 5230370, at *11 (D. Md. Sept. 2, 2020) (quoting 10 U.S.C. § 532(a)(3) (2018)).

¹³⁶. *Id.*

¹³⁷. *Id.* at *15.

¹³⁸. See Declaration of Trevor Hoppe, MPH, PhD at JA 656-57, *Roe*, 947 F.3d 207 (No. 19-1410), ECF No. 15-3.

¹³⁹. *Id.* at JA 657.

¹⁴⁰. Interview with Christopher Reichle, Petty Officer First Class, U.S.N. (Oct. 18, 2020).

guarantees of the Fifth Amendment. It is well known that the Constitution's promise of equal protection "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."¹⁴¹ To reconcile principle with reality, courts will uphold laws that neither burden a fundamental right nor target a suspect class so long as they bear "a rational relation to some legitimate end."¹⁴² Putting aside the question of whether a heightened standard of scrutiny ought to apply, criminalizing nondisclosure fails to meet even this admittedly deferential standard. Like the amendment the Supreme Court struck down in *Romer v. Evans*, safe-sex orders are both "too narrow and too broad."¹⁴³ They are too narrow because the requirements apply only to service members with HIV. There is no equivalent order for service members with other communicable diseases like hepatitis, herpes, or the human papilloma virus.¹⁴⁴ They are too broad, meanwhile, because the rules allow the military to discipline service members for failing to disclose their HIV status even if they were virally suppressed, wore a condom, or engaged in a sex act that had effectively no chance of transmitting the virus. (The rules do not, for example, distinguish between anal and oral sex, or between insertive and receptive acts.) The over- and under-inclusiveness of the orders belie any claim that they are rationally related to protecting the health and safety of the force.

Similar arguments apply to requirements that HIV-positive troops wear condoms or other protection during sex. Such requirements are also both too narrow, as people with other STIs are not required to use condoms, and too broad, as they do not account for the negligible risk of sexual transmission if the HIV-positive partner is virally suppressed (nor do they account for the possibility that both partners might be HIV-positive, or that the negative partner might be taking PrEP medication).

Under *Romer*, safe-sex orders might also be challenged on equal-protection grounds as evidence of animus toward people with HIV. In *Romer*, the Supreme Court suggested that a more demanding version of rational-basis review applies when a classification is driven by animus. Before the Court was a Colorado amendment that banned the state, its municipalities, and its agencies from enacting antidiscrimination policies to protect lesbian, gay, and bisexual people, which the Court denounced as a "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."¹⁴⁵ The animus did not have to be explicit; the Court inferred it from the fact that the law was "divorced from any factual context from which we could discern a relationship to legitimate state interests."¹⁴⁶ Given the current state of HIV prevention and treatment, the same could be said of the military's safe-sex orders. Courts should be especially attuned to the possibility of animus given the historic connection between HIV and the LGBT community and the military's history of "Don't Ask, Don't Tell."¹⁴⁷ Although gay service members may now serve their country freely, transgender people were banned from serving openly until recently, and a 2020 study found that most LGBT troops still feel reluctant to disclose their sexuality to their colleagues out of

¹⁴¹ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

¹⁴² *Id.*

¹⁴³ *Id.* at 633.

¹⁴⁴ This is not to say that there are no consequences for service members who test positive for STIs. Positive tests for a variety of sexually transmitted infections, including chlamydia, gonorrhea, and hepatitis B, are "reportable to public health officials in all branches of the military." Allison Batdorff, *STDs and the Military: Busting the Myths*, STARS & STRIPES (Dec. 16, 2007), <https://www.stripes.com/news/stds-and-the-military-busting-the-myths-1.72420> [<https://perma.cc/X8RY-NLM3>]. Meanwhile, service members who transmit genital herpes (and who do not wear a condom or tell their partner) can be charged with aggravated assault. Mathew B. Tully, *Sexually Transmitted Disease Can Lead to Criminal Charges*, MIL. TIMES (Mar. 27, 2016), <https://www.militarytimes.com/2016/03/27/sexually-transmitted-disease-can-lead-to-criminal-charges> [<https://perma.cc/2PD3-V6GW>].

¹⁴⁵ *Id.* at 635.

¹⁴⁶ *Id.*

¹⁴⁷ Alejandro de la Garza, "Don't Ask, Don't Tell" Was a Complicated Turning Point for Gay Rights. 25 Years Later, Many of the Same Issues Remain, TIME (July 19, 2018, 5:00 AM EDT), <https://time.com/5339634/dont-ask-dont-tell-25-year-anniversary> [<https://perma.cc/U9SC-SZRW>].

fear that they might be negatively affected.¹⁴⁸ Such fears are likewise common among HIV-positive service members who worry that they will face social- or career-related repercussions should their HIV status be made public.¹⁴⁹

Safe-sex orders may also constitute a violation of privacy under *Lawrence v. Texas*.¹⁵⁰ In *Lawrence*, the Court struck down a sodomy statute, holding that “[t]he State cannot demean [plaintiffs’] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”¹⁵¹ Although the Court acknowledged that there might be state interests compelling enough to justify such an intrusion¹⁵² – and, according to at least one state court, “[n]o one can seriously doubt that the state has a compelling interest in discouraging the spread of the HIV virus”¹⁵³ – advocates for service members with HIV argue that the safe-sex order is constitutionally suspect given the negligible risk of HIV transmission in the circumstances the order is applied.¹⁵⁴ In practice, however, this argument has proved to be a hard sell. According to Perkowski, “while military courts recognize that *Lawrence* applies to private, consensual activity, they also hold, universally, that sexual activity is not consensual if HIV status is not disclosed.”¹⁵⁵ In general, he said, applying *Lawrence* to invalidate safe-sex orders “will be a heavy lift given that courts have recognized the military’s interest not just in reducing the spread of HIV, but in maintaining good order and discipline and other factors unique to the military environment.”¹⁵⁶ For these reasons, though not yet tested at the appellate level, the safe-sex order has been upheld against every constitutional challenge made to it thus far in military courts martial.¹⁵⁷

The problem with the military’s safe-sex orders is not that they seek to promote safe sex within the military, but that they seek to do so in ways that entrench discriminatory stereotypes. The military is entirely justified in seeking to promote the sexual health of its members, not least because sexually transmitted infections (STIs) can sap morale and undermine military readiness. During World War I, STIs caused the U.S. military to lose a staggering seven million person-days, ranking second only to the Spanish flu in “disabling troops from performing their duties.”¹⁵⁸ And the problem has persisted in recent decades, with the military struggling to contain rates of sexually transmitted diseases that are significantly higher than they are among the civilian population.¹⁵⁹ But issuing safe-sex rules exclusively to HIV-positive service members is not the answer. If the military is serious about promoting the sexual health of its members, it ought to issue guidance to *all* service members reminding them to practice safe sex – to wear condoms, for example,

148. Dave Philipps, *As Biden Lifts a Ban, Transgender People Get a Long-Sought Chance to Enlist*, N.Y. TIMES (Jan. 25, 2021), <https://www.nytimes.com/2021/01/25/us/biden-transgender-ban-military.html>; Meghann Myers, *LGBT Service Members Are Allowed to Be Out and Proud, but a Fear of Repercussions Persists*, MIL. TIMES (June 15, 2020), <https://www.militarytimes.com/news/your-military/2020/06/15/lgbt-service-members-are-allowed-to-be-out-and-proud-but-a-fear-of-repercussions-persists> [https://perma.cc/5867-BXM3].

149. Interview with Christopher Reichle, *supra* note 140.

150. 539 U.S. 558 (2003). For a longer discussion of *Lawrence* and HIV-related statutes, see Amanda Weiss, Comment, *Criminalizing Consensual Transmission of HIV*, 2006 U. CHI. L.F. 389, 396–99.

151. 539 U.S. at 578.

152. See *id.*

153. *State v. Gamberella*, 633 So. 2d 595, 604 (La. Ct. App. 1993).

154. Email from Peter Perkowski, Legal & Policy Dir., Modern Military Ass’n of Am. (Feb. 14, 2021) (on file with author).

155. *Id.*; see also *United States v. Marcum*, 60 M.J. 198, 207 (C.A.A.F. 2004).

156. Email from Peter Perkowski, *supra* note 154; see also 60 M.J. at 207–08.

157. Email from Peter Perkowski, *supra* note 154.

158. Mark S. Rasnake, Nicholas G. Conger, Kenneth McAllister, King K. Holmes & Edmund C. Tramont, *History of U.S. Military Contributions to the Study of Sexually Transmitted Diseases*, 170 MIL. MED. 61, 61 (2005).

159. Nancy Montgomery, *High Military Rate of Sexually Transmitted Disease Defies Treatment and Education Efforts*, STARS & STRIPES (Dec. 4, 2017), <https://www.stripes.com/news/high-military-rate-of-sexually-transmitted-disease-defies-treatment-and-education-efforts-1.500804> [https://perma.cc/K9TG-28YD].

and to communicate frankly with sexual partners about STIs — while also bolstering STI-prevention training across the board. As the next Section will argue, such guidance should avoid one of the most pernicious aspects of the military's current safe-sex orders: the threat of criminal sanctions.

C. Safe-Sex Orders Are Needlessly Punitive

Safe-sex orders are part of a broader effort to criminalize exposure to HIV. Like the military, a number of states have laws that make it illegal to expose others to HIV or that enhance sentences for people who commit crimes while infected with the virus.¹⁶⁰ In recent years, activists and policymakers have pushed states to rescind such statutes, arguing that they are counterproductive. In 2013, for example, the President's Advisory Council on HIV/AIDS passed a resolution calling for an end to HIV-specific criminal laws and prosecutions, noting that criminalization "[c]reates a tool for control by abusers who threaten prosecution of partners who want to leave abusive relationships" and imprisons women and young people "without regard for complex reasons such as fear of violence or other situations when disclosure may not be advisable or safe."¹⁶¹ According to Catherine Hanssens, who runs the Center for HIV Law and Policy, laws criminalizing HIV have also been used as "a tool to target disfavored behaviors and identities, from gay men in the military to sex workers and those already incarcerated."¹⁶² In addition, the evidence suggests that the laws don't work. A number of empirical studies have found, for example, "that criminal laws are unlikely to increase disclosure, reduce risky behaviors, or reduce HIV transmission."¹⁶³

HIV-disclosure laws are also difficult to enforce fairly. Defendants who wish to prove that they actually did disclose their status will typically find that it is their word against those of their accuser. In 2003, for instance, the Court of Appeals of Ohio affirmed a sixteen-year sentence for a man who allegedly failed to disclose his HIV status to his sexual partner, despite his testimony to the contrary and despite testimony from a former girlfriend who said he had told her of his status before they had sex and always wore condoms.¹⁶⁴ In 2008, the Georgia Court of Appeals affirmed a ten-year sentence for a woman who had been convicted of failing to disclose her HIV status to her partner before sex — even though the court admitted that there was "conflicting testimony as to whether [the defendant had] told the victim of her HIV status before engaging in intercourse with him."¹⁶⁵ All that was required to find the defendant guilty, according to the court, was "some competent evidence for the jury to base its verdict."¹⁶⁶ These are far from the only examples involving guilty verdicts — and long sentences — in the face of contradictory evidence.

Finally, perhaps the most destructive aspect of HIV criminalization is that punishments for these so-called crimes are vastly "out of proportion to the actual harm inflicted."¹⁶⁷ Behaviors like spitting and biting — which, according to the CDC, carry a negligible risk of transmission — have yielded sentences as long as thirty-five years.¹⁶⁸ In the military, failure to follow an order can result in separation or demotion in rank, and assault can result in decades of confinement as well as automatic dishonorable discharge, loss of rank,

¹⁶⁰. *HIV and STD Criminalization Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 21, 2020), <https://www.cdc.gov/hiv/policies/law/states/exposure.html> [<https://perma.cc/VG8X-FR4W>].

¹⁶¹. *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments*, PRESIDENT'S ADVISORY COUNCIL ON HIV/AIDS (PACHA) 1 (Feb. 2013), https://www.hivlawandpolicy.org/sites/default/files/PACHA_Criminalization_Resolution%20Final%20012513.pdf [<https://perma.cc/G87X-G9QS>].

¹⁶². Interview with Catherine Hanssens, Exec. Dir. & Founder, The Ctr. for HIV Law & Policy (Jan. 12, 2020).

¹⁶³. Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1247 & n.55 (2015) (collecting empirical studies).

¹⁶⁴. *State v. Gonzalez*, 796 N.E.2d 12, 19-20 (Ohio Ct. App. 2003).

¹⁶⁵. *Ginn v. State*, 667 S.E.2d 712, 714 (Ga. Ct. App. 2008).

¹⁶⁶. *Id.*

¹⁶⁷. *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments*, *supra* note 161, at 1.

¹⁶⁸. *Id.*

forfeiture of pay, and registration on sexual-offender databases.¹⁶⁹ Under Article 15 of the UCMJ, any commanding officer may also, at his or her own discretion and “without the intervention of a court-martial,” impose a variety of nonjudicial disciplinary penalties, including suspension from duty, forfeiture of pay, reduction in pay grade, extra duties, and more.¹⁷⁰

To understand the toll that such penalties can take, I spoke to Branden Gutierrez and Ken Pinkela, both former service members who were discharged for HIV-related sexual conduct. Gutierrez, whose story is outlined above,¹⁷¹ recalled being devastated when his squadron commander recommended him for discharge. He started thinking about suicide and within a few weeks found himself in a psychiatric ward. “I had wanted to join the military after high school to follow in the footsteps of my aunt and uncle, who had retired after 28 and 30 years of active service,” Gutierrez said.¹⁷² “When the court martial came up, I thought I’d prove my innocence and continue on my path, and when it ended, I was relieved that I could get on with being a good Airman. But when the discharge happened, I just remember thinking, what was the point?”¹⁷³

After being discharged in April 2018—he received a general discharge¹⁷⁴ rather than an honorable or dishonorable one—Gutierrez was unemployed for nearly half a year. Depressed and emotionally unstable, he couldn’t bring himself to look for a job. When he eventually started to look, no one wanted to hire a former Airman without an honorable discharge. Eventually, his partner found him a job as a valet at a hotel, but Gutierrez is still trying to get his discharge upgraded so that he can qualify for education benefits under the GI Bill and go back to school.¹⁷⁵

Ken Pinkela joined the Army in 1987, when it was still illegal for gay men and women to join the military.¹⁷⁶ After stints in Europe and across the United States, Pinkela found out he was HIV positive in 2007 while deploying to Iraq. Five years later, a court-martial found him guilty of aggravated assault (after Gutierrez effectively eliminated aggravated assault as a possible charge for HIV exposure, the charge was reduced to assault and battery). According to the court, Pinkela had exposed a younger lieutenant to HIV, but there was no proof of transmission and Pinkela maintains that he and the man in question never even had sex. His case attracted quite a bit of publicity, with former President Jimmy Carter denouncing the charges and *Rolling Stone* reporting on the ordeal.¹⁷⁷

“I still cry every day,” Pinkela told me. “I’ve had more PTSD from this than when I was injured in the First Gulf War and was hospitalized for a year.” Technically, Pinkela was charged with a sex crime, so he initially thought he would have to register on a sex-offender list; he ended up successfully fighting Virginia’s attempt to make him do so, and then moved to New York, where a third-party review of his case concluded that there was no basis for the conviction. But he lost his pension and his career, and has been unable to find a new job because of his court-martial conviction. He tried running for public office—county legislator in Orange County, New York—but his opponent dug up information about his trial and publicized it on Facebook. Now, Pinkela is studying for the LSAT with the hope of becoming a lawyer and preventing what happened to him from happening to anyone else.

169. Interview with Peter Perkowski, *supra* note 67.

170. Uniform Code of Military Justice, art. 15, 10 U.S.C. § 815(b) (2018).

171. See *supra* Introduction.

172. Interview with Branden Gutierrez, *supra* note 1.

173. *Id.*

174. Technically, he received a general discharge “under honorable conditions.”

175. *Id.*

176. Interview with Ken Pinkela, former Army Lieutenant Colonel (Apr. 29, 2020). Unless otherwise noted, the following quotes from Pinkela and facts about his life come from this interview.

177. See Jaafari, *supra* note 74.

Conclusion

In 2017, the House Committee on Armed Services asked the Department of Defense to prepare a report outlining its HIV policies and how they “reflect an evidence-based, medically accurate understanding” of HIV.¹⁷⁸ The report the Department submitted concluded that current policies were “evidence-based in accordance with current clinical guidelines” and had been “reviewed and updated to align with evolving medical capabilities, technologies, evidence-based practices, and current scientific understanding of the nature of HIV infection, transmission, and management.”¹⁷⁹

That could not be further from the truth. Not only are the military’s HIV policies out of step with the latest medical knowledge, but they also unfairly single out people with the virus, entrench HIV-related stigma, and are needlessly punitive.

The good news is that these policies can be reformed. The military should update its policies to allow people living with HIV to join the military, commission as officers, and deploy overseas. Provided that HIV-positive service members are on antiretroviral therapy, there is little reason for a categorical ban; the military could reserve such a ban for people who are actually immunocompromised. Specifically, advocates challenging the military’s HIV policies have proposed a revised set of policies that would allow people to enlist, commission, and deploy so long as they have maintained an undetectable viral load for at least six months and have an adequate CD4+ count.¹⁸⁰ In general, the military should regularly update any medical standards to ensure that they are evidence-based and consistent with the latest science.¹⁸¹ As former Secretary of the Navy Ray Mabus wrote in 2019, in an opinion piece urging the military to eliminate restrictions on deployment, “[b]ased on decades of medical breakthroughs and scientific research, we know that people living with HIV who are receiving proper treatment are not only as healthy as anyone else but also pose essentially no risk of transmission to others in any setting.”¹⁸²

As for safe-sex orders, the military should stop issuing them to service members with HIV and rescind those that have already been issued. Instead, consistent with recommendations from the Center for HIV Law and Policy, the Department of Defense should issue universal, nonbinding health guidance to *all* service members “addressing the prevention and diagnosis of all sexually transmitted infections and risks, including HIV.”¹⁸³ Such guidance would “more effectively promote[] the sexual health of all servicemembers while protecting those living with HIV from being singled out unnecessarily for disparate treatment or threatened with UCMJ action.”¹⁸⁴ According to Pinkela, this would make a real difference in the lives of

¹⁷⁸ Letter from Stephanie Barna, U.S. Under Sec’y of Def. for Pers. & Readiness, to Representative William M. “Mac” Thornberry, Chairman, Comm. on Armed Servs., U.S. House of Representatives (Aug. 27, 2018), <https://go.usa.gov/xmQMX> [<https://perma.cc/YHJ3-JSHK>]; Letter from Stephanie Barna, U.S. Under Sec’y of Def. for Pers. & Readiness, to Senator John McCain, Chairman, Comm. on Armed Servs., U.S. Senate (Aug. 27, 2018), <https://go.usa.gov/xmQMX> [<https://perma.cc/YHJ3-JSHK>] (same).

¹⁷⁹ *Department of Defense Personnel Policies Regarding Members of the Armed Forces Infected with Human Immunodeficiency Virus: Report to the Committees on the Armed Services of the Senate and House of Representatives*, DEP’T DEF. 6 (Aug. 2018), <https://go.usa.gov/xmQMX> [<https://perma.cc/YHJ3-JSHK>].

¹⁸⁰ Email from Peter Perkowski, *supra* note 154.

¹⁸¹ The prohibition on HIV may not be the only one that needs updating. Activists have also recently pushed the military to update its policies around hepatitis B, for example, “to reflect the most current guidelines for hepatitis B management and treatment.” *Hepatitis B and the US Military*, HEPATITIS B FOUND., <https://www.hepb.org/resources-and-support/know-your-rights/us-military> [<https://perma.cc/K7F7-25S2>].

¹⁸² Mabus, *supra* note 67.

¹⁸³ Letter from Ivan Espinoza-Madrigal, Legal Dir., Ctr. for HIV Law & Policy, to William Sprance, Office of the Gen. Counsel, Dep’t of Def. 6 (July 1, 2014), https://www.hivlawandpolicy.org/sites/default/files/CHLP%20Comments%20to%20the%20Military%20Justice%20Review%20Committee_o.pdf [<https://perma.cc/RXB4-4SEK>].

¹⁸⁴ *Id.*

service members with HIV. “Service members wouldn’t have to look over their shoulder and worry about the possibility of a false allegation, or any allegation, related to their HIV,” he said. “We could just serve.”¹⁸⁵

In the meantime, activists and policymakers should do all they can to push the military on these issues. “The military moves very slowly, and moves when it has to, and it moves when the evidence is presented to decisionmakers that it should,” said Perkowski.¹⁸⁶ “Because there are fewer than 2,000 people in the military with HIV at any given time, it’s not a big enough population to get attention from anyone other than medical professionals.”¹⁸⁷ But it’s less about the number than the principle. For people living with HIV, there are real costs to maintaining the status quo. And there are costs for the military as well: by keeping HIV restrictions in place, the military loses troops who are fit and eager to serve, and misses the opportunity to set an example for the rest of society to follow. By fully integrating people living with HIV, the military can play an important role in destigmatizing the virus and undoing decades of discrimination. Over the past four decades, the experience of living with HIV has fundamentally changed. It is past time for the military to catch up.

¹⁸⁵. Interview with Ken Pinkela, *supra* note 176.

¹⁸⁶. Interview with Peter Perkowski, *supra* note 67.

¹⁸⁷. *Id.*