

# THANK YOU FOR YOUR (CONTINUED) SERVICE: HOW DOD’S MEDICAL STANDARDS FIND SOME SERVICE MEMBERS ELIGIBLE TO DEPLOY, BUT INELIGIBLE TO LEAD AS COMMISSIONED OFFICERS

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## INTRODUCTION

In 2018, Chief Petty Officer Shannon Kent received an offer to participate in one of the U.S. Navy’s highly competitive clinical psychology programs.<sup>1</sup> Kent—an enlisted Service member with fourteen years of experience—wanted to support fellow veterans battling post-traumatic stress disorder (PTSD).<sup>2</sup> The six-year program only accepted ten active-duty candidates a year, but given her credentials and character, the Navy accepted Kent only two days after completing her interview.<sup>3</sup> The program required Kent to

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1. See Richard A. Oppel Jr., *Her Title: Cryptologic Technician. Her Occupation: Warrior*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/2019/02/08/us/shannon-kent-military-spy.html>; Missy Ryan, *War Torn*, WASH. POST (Mar. 22, 2019), <https://www.washingtonpost.com/news/national/wp/2019/03/22/feature/navy-cryptologist-shannon-kent-who-died-in-an-isis-suicide-attack-in-syria-was-torn-between-family-and-duty/>; *Clinical Psychologist*, NAVY, <https://www.navy.com/careers/clinical-psychology> (last visited July 7, 2024); see *U.S. Military Rank Insignia*, U.S. DEP’T OF DEF. [hereinafter *U.S. Military Rank Insignia*] <https://www.defense.gov/Resources/Insignia/#officer-insignia> (last visited July 7, 2024) (explaining enlisted Service member ranks within the U.S. Navy’s structure).

2. Marty Skovlund Jr., *The Legend of Chief Shannon Kent*, COFFEE OR DIE MAG., Spec. Ed. 2022, at 38.

3. *Id.*; Oppel Jr., *supra* note 1. By 2018, Chief Kent had completed five combat deployments, mastered a half-dozen Arabic dialects, became a mother of two, and pursued both her bachelor’s and a master’s degree while serving on active duty. Oppel Jr., *supra* note 1; Ryan, *supra* note 1.

first become a commissioned officer prior to pursuing a PhD,<sup>4</sup> but shortly after her acceptance, the Navy revoked her invitation to attend based on her medical history.<sup>5</sup> Two years prior to her acceptance, Kent was diagnosed with thyroid cancer.<sup>6</sup> Although she was in remission at the time of her application,<sup>7</sup> the Department of Defense’s (DoD’s or the Department’s) regulation on commissioning eligibility automatically disqualified any officer candidate with a history of cancer.<sup>8</sup> The regulation allows a Military Service<sup>9</sup> to consider waivers, but DoD provides minimal guidance on what this entails, leaving each Service to approve waivers based on its own interpretation of medical risk.<sup>10</sup> Although Kent’s medical history prevented her from becoming an officer, it did not adversely affect her eligibility to remain in the Navy nor did it render her unfit to deploy.<sup>11</sup> Because of this paradox, Kent

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4. Ryan, *supra* note 1.

5. Oppel Jr., *supra* note 1 (revealing a disconnect between holistic qualification determinations and medical qualification standards). Per Department of Defense Instruction (DoDI) 6130.03 (Volume 1), anyone applying to either join the military or become an officer cannot have a history of any disqualifying condition listed in § 6. U.S. DEP’T OF DEF., INSTRUCTION 6130.03, VOL. 1, MEDICAL STANDARDS FOR MILITARY SERVICE: APPOINTMENT, ENLISTMENT, OR INDUCTION (2022), [hereinafter DODI 6130.03 (VOL. 1)], [https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003\\_vol1.PDF](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003_vol1.PDF).

6. Oppel Jr., *supra* note 1.

7. Skovlund Jr., *supra* note 2, at 37–38. Kent’s “cancer was removed in one surgery, and she was back to work within a day or two without missing a beat.” *Id.* at 38. Kent’s husband, Joe Kent, stated, “The officer accessions recruiters never brought up her medical stuff; technically, they should have never even let her apply.” *Id.* (highlighting a general misunderstanding of the Department of Defense’s (DoD’s or the Department’s) regulation by Service members at various echelons, including management).

8. DoDI 6130.03 (VOL. 1), *supra* note 5, § 6.29(b) (listing “[h]istory of malignancy” as a disqualifier).

9. “Military Services” refers to all six branches of the U.S. Armed Forces (the U.S. Army, U.S. Marine Corps, U.S. Navy, U.S. Air Force, U.S. Space Force, and U.S. Coast Guard), in addition to their Reserve Components. *DoD Issuance Style Guide*, WASH. HEADQUARTERS SERVS. 29 (May 8, 2024), [https://www.esd.whs.mil/Portals/54/Documents/DD/iss\\_process/standards/DoD\\_Issuance\\_Style\\_Guide.pdf](https://www.esd.whs.mil/Portals/54/Documents/DD/iss_process/standards/DoD_Issuance_Style_Guide.pdf).

10. See DoDI 6130.03 (VOL. 1), *supra* note 5, § 2.4(b).

11. Compare *id.* §§ 5–6, with U.S. DEP’T OF DEF., INSTRUCTION 6130.03, VOL. 2, MEDICAL STANDARDS FOR MILITARY SERVICE: RETENTION §§ 3, 5 (2022) [hereinafter DODI 6130.03 (VOL. 2)], [https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003\\_vol02.PDF](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003_vol02.PDF) (discussing the same policies—application for medical standards and disqualifying conditions—but in substantially fewer pages). See generally *infra* note 39 (explaining the difference between DoDI 6130.03 Volume 1 and Volume 2). In Kent’s case, the Navy applied DoDI 6130, Volume 1, § 6.29, which disqualified her based solely on the *history* of the

appealed the decision by not only applying for a waiver,<sup>12</sup> but also contacting members of Congress to address the issue.<sup>13</sup> By August 2018, Kent convinced Representative Walter Jones to address the matter with Navy and Pentagon officials.<sup>14</sup> But as Kent's plea for reconsideration made its way through the Navy's administrative channels, she received orders to deploy a fifth time.<sup>15</sup> On January 16, 2019, while operating in Syria, Chief Petty Officer Shannon Kent was killed in action by a suicide bomber.<sup>16</sup>

As the names of the four Americans lost that day surfaced, so did their personal stories.<sup>17</sup> In light of Kent's fight to change the regulations that found her qualified to deploy but disqualified her from commissioning, members of Congress responded by seeking clarification from DoD.<sup>18</sup> On February 4, 2019, seven members of Congress penned a letter to the acting Secretary of Defense Patrick Shanahan and Secretary of the Navy Richard Spencer.<sup>19</sup> The members requested an update on the Navy's revision and standardization of the medical waiver process applicable to enlisted Service members seeking a commission.<sup>20</sup>

condition. DoDI 6130.03 (VOL. 1), *supra* note 5, § 6.29. Conversely, DoDI 6130, Volume 2, § 5.29 disqualifies a currently active Service member for tumors and malignancies only if the conditions “*persist* despite appropriate treatment and impair function to preclude satisfactory performance of required military duties of the Service member's office, grade, rank, or rating.” DoDI 6130.03 (VOL. 2), *supra* note 11, § 5.29 (emphasis added).

12. Ryan, *supra* note 1.

13. Skovlund Jr., *supra* note 2, at 38–39.

14. See Gina Harkins, *Sailor's Combat Death Leads to Navy-Wide Policy Changes*, MILITARY.COM (Feb. 6, 2019), <https://www.military.com/daily-news/2019/02/06/sailors-combat-death-leads-navy-wide-policy-changes.html>.

15. Claudia Grisales, *Navy Revises Rules in Wake of Linguist's Death in Syria*, STARS & STRIPES (Feb. 6, 2019), <https://www.stripes.com/veterans/navy-revises-rules-in-wake-of-linguist-s-death-in-syria-1.567504>.

16. *Id.* Shannon Kent was posthumously promoted to Senior Chief Petty Officer. *Shannon Kent*, U.S. NAVY, <https://www.navy.mil/Women-In-the-Navy/Past/Display-Past-Woman-Bio/Article/2959760/senior-chief-shannon-kent/> (last updated Mar. 29, 2023). For the remainder of this Comment, Shannon Kent's rank will be referred to as “Senior Chief Petty Officer” or the colloquial “Senior Chief.”

17. William Branigin, Katie Mettler & Missy Ryan, *Americans Slain in Syria Attack: A Green Beret, a Former SEAL and Two Language Specialists*, WASH. POST (Jan. 18, 2019, 6:59 PM), <https://www.washingtonpost.com/world/national-security/pentagon-identifies-three-of-the-four-americans-killed-in-syria-suicide-bombing/2019/01/18/5c9f31b8-1b1e-11e9-88fe-f9f77a3bcb6c>.

18. Letter from Chris Van Hollen et al., U.S. Cong., to Patrick Shanahan, Acting Sec'y of Def., and Richard V. Spencer, Sec'y of the Navy (Feb. 4, 2019), <https://www.vanhollen.senate.gov/imo/media/doc/2-4-19%20Shannon%20Kent%20Letter%20Final%20Signed.pdf>.

19. *Id.*

20. *Id.*

By late February 2019, the Secretary of the Navy sent a response highlighting three key points.<sup>21</sup> First, DoD has one common accession standard, Volume 1 of DoD Instruction (DoDI) 6130.03, which applies to all Military Services and acts as a *minimum* standard.<sup>22</sup> Second, uniform policy is justified because it ensures applicants meet specific job requirements—such as suitable eyesight for pilots or the ability to remain underwater for prolonged periods of time for divers—which guarantee “that the government can expect a reasonable return on the investment in schooling, training, and education.”<sup>23</sup> Finally, the Secretary confirmed that Volume 1 of DoDI 6130.03 authorizes each Military Service to create and execute its own waiver process “that is consistent, transparent, and fair.”<sup>24</sup> The Secretary added that in Kent’s case, the Navy failed to meet those requirements, but it implemented new policies to avoid similar situations in light of her ordeal.<sup>25</sup>

The Secretary of the Navy also touted a 15<sup>0</sup>% increase in medical waiver approvals for enlisted commissioning applications; a result of Senior Chief Petty Officer Shannon Kent’s efforts to bring the issue to the Navy’s attention in the fall of 2018.<sup>26</sup> Per Secretary Spencer, the Navy’s notable improvement stemmed from its updated policy, which: (1) extends higher consideration to Service members who are considered deployable; (2) requires all medical authorities to operate on one common information technology (IT) system; (3) standardizes the appeals process and includes an option for Navy personnel to seek a second opinion by a medical professional; and (4) requires peers to review waivers for quality assurance and consistency.<sup>27</sup> The policy referenced by the Secretary is codified in the U.S. Navy’s Manual of the Medical Department, which contains guidance on medical evaluation for personnel seeking a commission.<sup>28</sup> Therein, the Navy also recalled oversight authority of assessments and waivers from some lower-echelon reviewers back to

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21. Letter from Richard V. Spencer, Sec’y of the Navy, to Kirsten E. Gillibrand, U.S. Cong. (Feb. 26, 2019) [hereinafter Sec’y Spencer’s Response] (on file with author).

22. *Id.*; see also DODI 6130.03 (VOL. 1), *supra* note 5.

23. Sec’y Spencer’s Response, *supra* note 21.

24. *Id.*

25. *Id.* (identifying the Navy’s new strategy as the “get-to-yes” policy which included four administrative changes to avoid similar situations to what Senior Chief Kent faced).

26. *Id.* (acknowledging Senior Chief Kent’s contribution).

27. *Id.* (explaining the general administrative changes the Navy applied to increase its waiver approvals by 15<sup>0</sup>%).

28. U.S. DEP’T OF THE NAVY, MANUAL OF THE MEDICAL DEPARTMENT, CHAPTER 15, CHANGE 167 (Feb. 15, 2019) [hereinafter MANMED, CHANGE 167], <https://www.med.navy.mil/Directives/MANMED/> (showing stricken language in red and capturing general changes in response to Senior Chief Kent’s efforts).

higher echelons with more resources and experience.<sup>29</sup> Most importantly, the Navy acknowledged the paradox Senior Chief Kent fought so hard to mitigate.<sup>30</sup>

Despite numerous Freedom of Information Act (FOIA) requests, informal inquiries, and formal inquiries to Congress since September 2023, these efforts have produced no publicly accessible records indicating that DoD provided members of Congress a separate response as requested.<sup>31</sup> Separate FOIA requests to confirm the Navy's 15% waiver increase metric<sup>32</sup> and understand the extent of personnel impacted by this issue were directed at the Office of the Secretary of Defense (OSD) and individual Military Services.<sup>33</sup> Specifically, the requests asked that these entities provide data identifying (1) the number of enlisted commissioning applicants who required a waiver; (2) the number of waivers approved and denied; and (3) the type of medical condition waivers were submitted for.<sup>34</sup> Separately, a FOIA request was also submitted to the entity that evaluates and reports on medical data for all Military Services: the Medical Standards Analytics and Research (MSAR) program.<sup>35</sup> As of publishing, these FOIA requests remain unanswered.

The Navy's administrative changes are not so narrow that they only apply to DoD.<sup>36</sup> Instead, they apply to a variety of organizations to help mitigate

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29. *Id.* at Article 15-30 to 15-31 (naming Article 15-31 "The Senior Chief Shannon Kent Process for Waiver of Physical Standards").

30. See Sec'y Spencer's Response, *supra* note 21.

31. See, e.g., Email from Sophia Navedo-Quinones, Am. U. Wash. Coll. L., to Walter Reed Army Inst. Rsch. Pub. Affs. Mailbox (Sept. 25, 2023, 9:27 AM) (on file with author) (informal inquiry); Email from Sophia Navedo-Quinones, Am U. Wash. Coll. L., to Nat'l Sec. Legis. Fellow for Sen. Ben Cardin (Oct. 18, 2023, 2:32 EST) (on file with author) (congressional inquiry); Email from Sec'y of Navy/ Chief of Naval Operations, Freedom of Info. Act & Priv. Program Off., to Sophia Navedo-Quinones, Am U. Wash. Coll. L. (Oct. 25, 2023, 4:30 PM) (on file with author) (Freedom of Information Act (FOIA) request).

32. Sec'y Spencer's Response, *supra* note 21.

33. Letter from Stephanie L. Carr, Freedom Info. Div. Chief, to Sophia Navedo-Quinones, Am. U. Wash. Coll. L. (Jan. 19, 2024) (on file with author) (responding to the FOIA request to the Office of the Secretary of Defense (OSD) by deferring response to the Military Services).

34. *Id.*

35. Medical Standards Analytics and Research, WALTER REED ARMY INST. OF RSCH., [hereinafter MSAR], <https://wrair.health.mil/Collaborate/Medical-Standards-Analytics-and-Research/> (last visited July 7, 2024); Email from Sophia Navedo-Quinones, Am. U. Wash. Coll. L., to U.S. Army Med. Rsch. & Dev. Command FOIA Mailbox (Oct. 25, 2023, 4:21 PM) [hereinafter MSAR FOIA] (on file with author).

36. See generally *The 2023 State of Essential Workplace Communications*, AXIOS HQ, <https://www.axioshq.com/research/2023-state-of-workplace-communications> (last visited

ambiguity, improve communication, and ensure standardized administrative processing.<sup>37</sup> A 15% increase in waiver approvals from implementing just four basic clerical changes may indicate a significant, systemic problem.<sup>38</sup> Given the Navy's success in addressing failures in the waiver process, it is reasonable to question why DoD has not required these changes be applied across all Military Services. Several concerns are raised after reviewing the applicable statutes and DoD's interpretation and implementation of those laws. Are DoD's actions arbitrarily limiting, inconsistent, or ambiguous? Is DoD overstepping its authority? Is DoD violating the constitutional rights of Service members?

Part I of this Comment summarizes the existing regulations affecting enlisted commissioning candidates, identifies the regulatory framework DoD must abide by, and explains how the agency creates, publishes, and delegates its regulations. Part II discusses recent litigation which—although narrowly focused on Service members with human immunodeficiency virus (HIV)—disputes the validity of DoDI 6130.03 and may clear the way for further challenges to its merits. Part III describes two of DoD's main arguments for maintaining current policy and one novel justification it could theoretically raise. Part IV explains the flaws of those three arguments by referencing comments by federal courts and statistics on military personnel readiness. Finally, Part V provides two recommendations DoD should apply to not only avoid further litigation, but also stimulate retention and uplift its Service members. First, DoD should revise its medical waiver policy to ensure it is uniform among all Military Services, as well as transparent and accessible to all Service members. Second, DoD should allow enlisted Service members to medically qualify for a commission under retention standards rather than accession standards.<sup>39</sup>

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July 7, 2024) (emphasizing the importance of consolidated data repositories, transparency, and clear communication).

37. *Id.*

38. Sec'y Spencer's Response, *supra* note 21.

39. Compare DoDI 6130.03 (VOL. 1), *supra* note 5, § 1.2, with DoDI 6130.03 (VOL. 2), *supra* note 11, § 1.2. DoDI 6130.03 (VOL. 1) § 1.2 explains that the purpose of the policy is to guide determinations for appointment (commissioning of officers), enlistment (voluntary entrance into the Armed Services), and induction (conscription) while DoDI 6130.03 (VOL. 2) § 1.2 states that the regulation focuses on guiding determinations on retainment of already serving personnel—a medical standard which is far less stringent and accounts for the expected physical impacts of the profession. See *infra* notes 214–218 (highlighting quantitative data that correlates time in Service with injury and other negative physical impacts).

## I. DOD'S REGULATORY FRAMEWORK

### A. *The Regulations Affecting Enlisted Commissioning Candidates & DoD's Analysis on the Matter*

The issues identified by Senior Chief Kent are not unique to the Navy. As noted by the Secretary, every Military Service maintains its own accession and waiver process.<sup>40</sup> While the applicable U.S. Codes only require candidates be “physically qualified,” as determined by the Secretary,<sup>41</sup> DoD has determined nine qualification requirements for Military Service candidates.<sup>42</sup> This agency-promulgated rule is captured in the Code of Federal Regulations as 32 C.F.R. § 66.6(b) and requires each Military Service to consider an applicant’s: (1) age; (2) citizenship status; (3) education level; (4) aptitude to learn; (5) medical qualification; (6) physical fitness; (7) dependency status; (8) character and conduct; and (9) drug and alcohol history.<sup>43</sup> In all, DoD’s rule contains more criteria than what is mandated in Title 10 of the U.S. Code.<sup>44</sup>

The agency rule also explains that candidates seeking a commission must submit applications that demonstrate “their adaptability, potential to perform, and conduct.”<sup>45</sup> Further down, the rule states that all applicants—regardless of whether they have experience in a Military Service or not—must meet the *accession* standards stipulated in DoDI 6130.03 Volume 1 to receive a commission as an officer; however, the rule makes no mention of the *retention* standards contained in Volume 2, which currently serving personnel already meet.<sup>46</sup>

DoD’s medical standards are defined in DoDI 6130.03, Volumes 1 and 2.<sup>47</sup> Volume 1 describes medical *accession* standards, which include the acts of enlistment (voluntary entrance into the Armed Services), induction (conscripted), and appointment (commissioning of officers).<sup>48</sup> Separately, Volume 2 details medical standards for already serving personnel who seek to remain in the military—*retention*.<sup>49</sup>

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40. Sec’y Spencer’s Response, *supra* note 21; *see also* DoDI 6130.03 (VOL. 1), *supra* note 5.

41. 10 U.S.C. §§ 532(a)(3), 12201(b).

42. Qualification Standards for Enlistment, Appointment, and Induction, 32 C.F.R. § 66.6(b)(1)–(9) (2022).

43. *Id.*

44. *See infra* Part III.C (discussing the applicable statutes and how they differ).

45. 32 C.F.R. § 66.4(c).

46. 32 C.F.R. § 66.6(b)(5). *Accord* DoDI 6130.03 (VOL. 1), *supra* note 5, § 5.1; DoDI 6130.03 (VOL. 2), *supra* note 11, § 3.1.

47. *See* DoDI 6130.03 (VOL. 1), *supra* note 5; *infra* Part I.B (discussing issuances).

48. DoDI 6130.03 (VOL. 1), *supra* note 5, § 1.2.

49. DoDI 6130.03 (VOL. 2), *supra* note 11, § 1.2.

But as previously noted, 32 C.F.R. § 66.6(b)(5) does not distinguish between a commissioning candidate who has never served—in short, a civilian—from a commissioning candidate who is already serving in the military.<sup>50</sup> Instead, the rule requires all candidates, regardless of prior military experience, to meet the stringent medical standards outlined in Volume 1 of DoDI 6130.03.<sup>51</sup> Questions arise when enlisted candidates, particularly those who are already battle-tested, have to meet the exact same medical qualifications as candidates with no military experience.<sup>52</sup>

In general, DoD applies *retention* standards to all currently enlisted personnel.<sup>53</sup> But when an enlisted Service member seeks to become a commissioned officer—a higher rank with different roles and responsibilities<sup>54</sup>—they must meet medical *accession* standards.<sup>55</sup> This means enlisted personnel who are otherwise considered fit to continue service and even deploy to austere environments may be denied the opportunity to become officers if they do not medically qualify.<sup>56</sup> This is further complicated by the fact that medical qualification standards vary based on each Military Service, the component of the Service (Active Component, Reserve Component, or National Guard), and the category of the career field a candidate wishes to apply to—known as military occupational specialty (MOS).<sup>57</sup>

As written, accession medical standards do not consider valuable prior service experience, the proven capacity of a candidate to lead troops, or the impact of years of service on an enlisted candidate's physical state.<sup>58</sup> With no clear, rational connection between congressional intent and DoD's policy, DoDI 6130.03 is susceptible to additional judicial scrutiny as an

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50. 32 C.F.R. § 66.6(b)(5).

51. *Id.*

52. This Comment focuses on active-duty enlisted personnel seeking a commission as a company grade officer (in the Army, Air Force, and Marine Corps) or junior grade officer (in the Navy), and not personnel seeking a commission as a Warrant Officer. These personnel will be referred to as “enlisted commissioning candidates.”

53. DoDI 6130.03 (Vol. 2), *supra* note 11, § 3.1 (“The medical standards . . . apply to: [] [a]ll current Service members”).

54. *U.S. Military Rank Insignia*, *supra* note 1. Per DoD, “[t]he commissioned ranks are the highest in the military. These officers hold presidential commissions and are confirmed at their ranks by the Senate.” *Id.*

55. DoDI 6130.03 (VOL. 1), *supra* note 5, § 5.1.

56. See *supra* note 11 and accompanying text (comparing the section of DoDI Volume 1 which was applied to determine Senior Chief Kent's medical qualification, with the section of DoDI Volume 2 which was not applied, but allowed her to continue service nonetheless).

57. See Sec'y Spencer's Response, *supra* note 21.

58. See *infra* Part IV.

Administrative Procedure Act (APA) violation.<sup>59</sup>

If denied the opportunity to commission for medical reasons, enlisted personnel can request a medical waiver,<sup>60</sup> but this process and its standards also differ among each Military Service, their Component, and for each MOS.<sup>61</sup> Currently, DoD does not have a uniform waiver process, guideline, or instruction on the type of evidence or statements Service members should include in their medical waiver requests<sup>62</sup>—unlike disqualification criteria, which DoD clearly explains in great detail.<sup>63</sup> Furthermore, information about the waiver process, materials needed, or the individuals delegated to make determinations is neither transparent nor publicly accessible, and the information that is accessible is only applicable to members of certain units.<sup>64</sup>

To understand the implications of DoD and each Military Service’s policies, the public can access MSAR reports;<sup>65</sup> however, those assessments may be misleading. MSAR, located at Walter Reed Army Institute of Research

59. *Infra* Part II. To comply with the Administrative Procedure Act (APA), the “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Sierra Club v. U.S. Dep’t of Interior*, 899 F.3d 260, 293 (4th Cir. 2018) (quoting *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

60. See DoDI 6130.03 (VOL. 1), *supra* note 5, § 5.2(c).

61. *Id.* § 5.2(c)(1).

62. *Id.* § 5.2(c)(1) (defining medical waiver as a request to find an applicant suitable for service, despite medical history if the applicant is capable of establishing, “sufficient mitigating circumstances/provid[ing] medical documentation that clearly justify waiver consideration.”). Compare *id.* (defining medical waivers), with Qualification Standards for Enlistment, Appointment, and Induction, 32 C.F.R. § 66.3 (2023) (defining waivers in general as “formal request[s] to consider the suitability for service of an applicant who because of . . . current or past medical conditions . . . may not be qualified to serve . . . using a ‘whole person’ review . . .”).

63. See generally DoDI 6130.03 (VOL. 1), *supra* note 5, § 6.

64. See U.S. MIL. ENTRANCE PROCESSING COMMAND, STANDARD OPERATING PROCEDURE: SUPPORTING MEDICAL DOCUMENTATION REVIEW PROGRAM (VERSION 3) 1–2 (2023) [hereinafter SMDRP PROCEDURE], [https://www.mepcom.army.mil/Portals/112/Documents/Recruiters%20and%20Service%20Liaisons/Guides-Instructions/SMDRP\\_SO\\_P\\_January%202023.pdf](https://www.mepcom.army.mil/Portals/112/Documents/Recruiters%20and%20Service%20Liaisons/Guides-Instructions/SMDRP_SO_P_January%202023.pdf) (providing an example of a unit specific procedure). The United States Military Entrance Processing Command publishes resources for recruiters that explain the Supporting Medical Documentation Review Program (SMDRP), but the purpose of this organization and its materials is to support the recruitment of new personnel seeking enlistment, not personnel already serving. *Id.*

65. See Knowledge Products, WALTER REED ARMY INST. OF RSCH., <https://wrair.health.mil/Collaborate/Medical-Standards-Analytics-and-Research/Knowledge-Products/> (last visited July 7, 2024) (providing access to annual reports for all three components of the MSAR Program).

(WRAIR), is the overarching program for the evaluation of Military Services' medical standards and policies.<sup>66</sup> The program began in 1995 when the Accession Medical Standards Analysis and Research Activity (AMSARA) was "chartered to evaluate medical accession standards . . . on enlisted [S]ervice members."<sup>67</sup> AMSARA was established in the post-Cold War era when U.S. policy required significant drawdown of troops,<sup>68</sup> thus logically limiting recruitment and retention quotas. Since its creation, AMSARA issues an annual report based on analysis of data it collects from accession and waiver authorities.<sup>69</sup> Surprisingly, while AMSARA's initial mission was to determine the impacts of medical standard policies on enlisted personnel, today's reports appear to exclude metrics of already serving personnel.<sup>70</sup> Although AMSARA's report contains the categories of metrics sought in FOIA requests,<sup>71</sup> its data does not reflect the population impacted by the issue addressed in this Comment. AMSARA's exclusion of these metrics makes it challenging to determine whether the report accurately depicts the impacts of DoD policy overall.<sup>72</sup>

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66. MSAR, *supra* note 35.

67. *Id.*

68. *Id.*; STEPHEN L.Y. GAMMONS & WILLIAM M. DONNELLY, DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FISCAL YEAR 1995 3 (2004), [https://history.army.mil/books/DAHSUM/1995/CMH\\_Pub\\_101-26-1.pdf](https://history.army.mil/books/DAHSUM/1995/CMH_Pub_101-26-1.pdf).

69. MSAR, *supra* note 35 (indicating the accession authorities include reviewers and approvers in the U.S. Military Entrance Processing Command (USMEPCOM) and the Defense Manpower Data Center (DMDC)); *Accession Medical Standards Analysis and Research Activity*, WALTER REED ARMY INST. OF RSCH. [hereinafter AMSARA], <https://wrair.health.mil/Collaborate/Medical-Standards-Analytics-and-Research/AMSARA/> (last visited July 7, 2024). Informal responses to FOIA requests directed attention to the Accession Medical Standards Analysis and Research Activity (AMSARA) annual reports, but these reports failed to provide insight on already serving personnel. MSAR FOIA, *supra* note 35.

70. WALTER REED ARMY INST. OF RSCH., *ACCESSION MEDICAL STANDARDS ANALYSIS AND RESEARCH ACTIVITY 2022 ANNUAL REPORT: MEDICAL DISQUALIFICATIONS, MEDICAL WAIVERS, ACCESSIONS AND OUTCOMES AMONG FY 2016-2020 MILITARY APPLICANTS 3* (2022), [https://wrair.health.mil/Portals/87/Documents/FY22%20AMSARA%20AR\\_Final\\_Publish.pdf](https://wrair.health.mil/Portals/87/Documents/FY22%20AMSARA%20AR_Final_Publish.pdf) ("Individuals identified as having prior service in any U.S. military component were excluded from all analyses.") (confirming the report is insufficient to determine impacts of medical standards on enlisted commissioning candidates).

71. *See generally id.* (discussing the number of medical disqualifications by Military Service and category of medical condition, as well as the number of waivers submitted and approved); MSAR FOIA, *supra* note 35.

72. *See infra* text accompanying notes 244–246 (highlighting Congress's concern regarding the accuracy of DoD's reporting on medical standard policies and waivers); *see also supra* note 35 (explaining the FOIA requested to quantify issues raised in this Comment and how challenging it has been to get a response).

### B. DoD Issuances

In addition to agency-promulgated rules in the Code of Federal Regulations, DoD publishes various issuances that “contain the various policies and procedures that govern and regulate activities and missions across the defense enterprise.”<sup>73</sup> DoD issuances are not general guidance for DoD Components<sup>74</sup> but legally binding orders.<sup>75</sup> Of these issuances, “directives,” “instructions,” and “manuals” are the primary methods of publishing policies and procedures.<sup>76</sup> Directives are signed by the Secretary or Deputy Secretary of Defense and establish DoD policy, delegate authority to DoD Component leadership, and assign responsibilities.<sup>77</sup> Instructions are signed by the OSD Component head<sup>78</sup> and further explain implementation of the Secretary’s directive by providing overarching procedures and assigning responsibilities.<sup>79</sup> Manuals provide further details on how the procedures to implement directives and instructions will be executed, typically including a

73. U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE AND MILITARY POLICIES, REGULATIONS, AND FORMS [hereinafter DOD POLICIES, REGULATIONS, AND FORMS], <https://www.defense.gov/Contact/Help-Center/Article/Article/2762957/departments-of-defense-and-military-policies-regulations-and-forms/> (last updated Sept. 23, 2021).

74. “DoD Components” comprise of all DoD organizational entities. U.S. DEP’T OF DEF., INSTRUCTION 5025.12, STANDARDIZATION OF MILITARY AND ASSOCIATED TERMINOLOGY § 1.1 (2020) [hereinafter DOD TERMINOLOGY], [https://www.jcs.mil/Portals/36/Documents/Doctrine/dictionary/repository/502512p\\_2020.pdf](https://www.jcs.mil/Portals/36/Documents/Doctrine/dictionary/repository/502512p_2020.pdf). If a DoD issuance applies to a DoD Component it will be explicitly stated by using terms such as “Military Departments,” or “the Combatant Commands” *See infra* note 78.

75. *Frequently Asked Questions About DoD Issuances*, WASH. HEADQUARTERS SERVS. [hereinafter *DoD Issuance FAQ*], [https://www.esd.whs.mil/Portals/54/Documents/DD/iss\\_process/FAQs.pdf](https://www.esd.whs.mil/Portals/54/Documents/DD/iss_process/FAQs.pdf) (last visited July 7, 2024).

76. *Id.*

77. *Id.*; *Overview of Department of Defense Issuances*, WASH. HEADQUARTERS SERVS. [hereinafter *Overview of DoD Issuances*], [https://www.esd.whs.mil/Portals/54/Documents/DD/iss\\_process/DoD\\_Issuances.pdf](https://www.esd.whs.mil/Portals/54/Documents/DD/iss_process/DoD_Issuances.pdf) (last visited July 7, 2024).

78. The term “OSD Component head” refers to “high-level officials within OSD” such as, but not limited to, the Assistant Secretary of Defense for Legislative Affairs, General Counsel of the Department of Defense, DoD Chief Information Officer, Inspector General of the Department of Defense, and the Under Secretaries of Defense. *Collective Terms for Leadership in DoD Issuances*, WASH. HEADQUARTERS SERVS. [hereinafter *Collective Terms for Leadership*], [https://www.esd.whs.mil/Portals/54/Documents/DD/iss\\_process/coordination/Collective\\_Leadership\\_Terms.pdf](https://www.esd.whs.mil/Portals/54/Documents/DD/iss_process/coordination/Collective_Leadership_Terms.pdf) (last visited July 7, 2024). Note, the term “OSD Component heads” is not interchangeable with “DoD Component heads,” which by law is only the Deputy Secretary of Defense, or “DoD Components.” *Id.*; *see also* DOD TERMINOLOGY, *supra* note 74.

79. *DoD Issuance FAQ*, *supra* note 75; *Overview of DoD Issuances*, *supra* note 77.

summary of the policy it is meant to facilitate.<sup>80</sup> Other types of issuances include “directive-type memorandums” and “administrative instructions.”<sup>81</sup> Directive-type memorandums are only issued for high-priority, time-sensitive actions, impacting DoD issuances currently in effect.<sup>82</sup> These memos are typically no longer than twenty pages, effective for twelve months from the date of signature, and are required to either be “incorporated into an existing DoD issuance, converted to a new DoD issuance, reissued, or cancelled.”<sup>83</sup> Each Military Service, referenced as “Military Departments” in an issuance,<sup>84</sup> publishes its own regulations, standardizing activities at lower echelons and explaining the procedures for implementation of policies in far greater detail.<sup>85</sup>

As it pertains to medical standards for officer accessions, the applicable directive is DoD Directive 5124.02, which vests legal authority for promulgating and implementing policy to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)).<sup>86</sup> From there, medical standards for accessions are further explained in DoDI 6130.03, Volume 1, which outlines medical standards applicable to individuals seeking an appointment, enlistment, or induction into the military and vests legal authority for authorizing medical waivers to the Secretaries of each Military Service.<sup>87</sup> The instruction emphasizes that it is DoD’s policy to “[u]se common medical standards for appointment, enlistment, or induction of personnel,” and it is to ensure individuals considered are “[f]ree of medical conditions or physical defects that may *reasonably* be expected to require excessive time lost from duty . . . or may result in separation from the Military Service for medical unfitness.”<sup>88</sup> Accordingly, DoD’s intent is met so long as a candidate is medically capable of completing their initial contract period, performing duties without further harming themselves, and adapting to various military environments.<sup>89</sup>

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80. *Overview of DoD Issuances, supra* note 77.

81. *Id.*

82. *DoD Issuance FAQ, supra* note 75; *Overview of DoD Issuances, supra* note 77; *see also infra* Part II.A (providing a relevant example of this type of issuance).

83. *Overview of DoD Issuances, supra* note 77.

84. Here, the term “Military Departments” refers to all five of the Military Services: the U.S. Army, the U.S. Marine Corps, the U.S. Navy, the U.S. Air Force, and the U.S. Space Force. *DOD POLICIES, REGULATIONS, AND FORMS, supra* note 73.

85. *Id.* (explaining the role of DoD issuances and Military Department publications).

86. U.S. DEP’T OF DEF., DIRECTIVE 5124.02: UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)) § 4.1.3 (2008) [hereinafter *DODD 5124.02*], <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/512402p.pdf>.

87. DoDI 6130.03 (VOL. 1), *supra* note 5, § 2.4; *see also supra* text accompanying note 11.

88. DoDI 6130.03 (VOL. 1), *supra* note 5, § 1.2 (emphasis added).

89. *Id.*

Volume 1 of DoDI 6130.03 defines responsibilities of the applicable DoD Components in § 2, identifies two key working groups in §§ 3–4, lists basic medical standards for appointment in § 5, and catalogs disqualifying conditions in § 6.<sup>90</sup> From the instruction, the Surgeon General of each Military Service is tasked with promulgating regulations applicable to their respective Service, including the medical waiver process.<sup>91</sup> A Military Service’s medical standards are never less rigorous than DoDI 6130.03, but they may be more stringent.<sup>92</sup>

### C. *Medical Waivers & Waiver Authorities*

Waivers are formal requests that allow a Military Service to exempt a candidate from standard policy, permitting the Service to consider a candidate’s suitability based on a “whole person” assessment.<sup>93</sup> The authority to review and approve waivers is delegated by DoD to each Military Service.<sup>94</sup> For an example of delegated roles, consider the Department of the Army, the largest Military Service.<sup>95</sup> The Department of the Army entrusts its Surgeon General with providing “guidance when necessary to the [medical] review [boards] and waiver authorities on the interpretation of the medical standards and appropriateness of medical waivers.”<sup>96</sup> However, the authority to approve a waiver of medical fitness standards for accessions is delegated from the Secretary of the Army, through the Deputy Chief of Staff G-1 (a non-medically qualified position), and then even further down the echelons to

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90. *See id.*

91. *Id.* §§ 2.4–2.5; *see generally* DEP’T OF THE ARMY, ARMY REGULATION 40-501: STANDARDS OF MEDICAL FITNESS I (2019) [hereinafter AR 40-501] (explaining who the proponent of the regulation is and what sources of authority apply, specifically for Army medical fitness standards); MANMED, CHANGE 167, *supra* note 28 at Article 15-30 to 15-31 (identifying Service Medical Waiver Review Authorities, their roles, and the intention of the waiver process).

92. *Compare* DoDI 6130.03 (VOL. 1), *supra* note 5, § 6.5(c) (stating, “[F]requent or persistent vertigo in the previous 12 months” as a disqualifier for all candidates), *with* AR 40-501, *supra* note 91, § 4-6(7)(d)(4) (stating, “[h]istory of vertigo, except physiologic vertigo induced by gravity forces, aircraft spins, or Bárány chair,” as a reason to disqualify candidates seeking flying duty as well as currently serving Army aircrew).

93. Qualification Standards for Enlistment, Appointment, and Induction, 32 C.F.R. § 66.6(b)(5) (requiring holistic review of applicant qualifications).

94. *Id.*

95. U.S. Dep’t of Def., Our Forces [hereinafter Our Forces], <https://www.defense.gov/about/our-forces> (last visited Aug. 1, 2024).

96. AR 40-501, *supra* note 91, § 1-6(b).

other nonmedically qualified commanders and administrative personnel.<sup>97</sup> The regulation does not describe a uniform process for medical waivers or recommend a list of materials a requestor should submit.<sup>98</sup> Instead, a requestor is left to defer to their designated higher headquarters, which varies based on the unit processing the requestor's candidacy application.<sup>99</sup>

Because of Senior Chief Kent's efforts, the Department of the Navy only entrusts waiver review to a limited number of medically trained personnel, and the process to request a waiver or appeal a decision is streamlined.<sup>100</sup> In the Navy, a candidate first requests waiver through the commissioning source's specified waiver process, which varies based on the commissioning program.<sup>101</sup> These Service Medical Waiver Review Authorities (SMWRAs) are entrusted to "proactively develop the medical waiver recommendation process to maximize positive waiver recommendations while maintaining quality applicants."<sup>102</sup> In its revised policy, the Navy discloses that the majority of delays in waiver processing are due to "inadequate information," and therefore, requestors are urged to, at minimum, provide the "most recent

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97. *Id.*; see also *id.* §§ 1-6(c)-(o) (listing different waiver authorities for different components of the Army). Medical waiver authority will vary at each commissioning source. *Id.* For example, the medical waiver authority for active-duty enlisted candidates and National Guard enlisted candidates who seek a commission in the Activity Duty Component, must receive approval from Commanding General of Human Resources Command. *Id.* § 1-6(k). However, if the same candidates seek to commission through the Reserve Officers' Training Corp (ROTC), the medical waiver authority becomes the Commanding General of the U.S. Army Cadet Command. *Id.* § 1-6(f).

98. See AR 40-501, *supra* note 91, § 1-6 (providing no instructions for requestors except for those commissioning through Officer Candidate School (OCS)—one of several Army commissioning sources).

99. Compare *SMDRP Procedure*, *supra* note 64, at ch. 1(e), with *Waivers and Exceptions to Policy (ETP): Medical Waiver and Medical Review*, U.S. ARMY RECRUITING COMMAND [hereinafter *Recruiting Command SOP*], [https://recruiting.army.mil/ISO/AWOR/WAIVERS\\_ETP/](https://recruiting.army.mil/ISO/AWOR/WAIVERS_ETP/) (last visited July 7, 2024). In addition to the standard DoD forms required for medical processing, the U.S. Army's Recruiting Command (USAREC) states a candidate should submit "medical treatment records and pharmacy records for all disqualifying conditions . . . clearance letter / [Memorandum for Record] from your physician or primary care provider . . ." *Recruiting Command SOP*, *supra*. Unlike USAREC, the U.S. Military Entrance Processing Command (USMEPCOM) standard operating procedure makes no mention of "pharmacy records," yet characterizes the qualification standards of doctors, includes social workers, and requires a requestor to submit mental health records. *SMDRP Procedure*, *supra* note 64 at ch. 1(e).

100. MANMED, CHANGE 167, *supra* note 28, at Article 15-31(3)(a)-(e).

101. *Id.* at Article 15-31(4) (instructing the reader to review § (3)(a)-(e)).

102. *Id.* at Article 15-30(3). The regulation also states "[t]he ability to perform military duties is a critical component of the waiver decision and *highest consideration should be afforded to those already serving in a deployable status.*" *Id.* (emphasis added).

complete physical examination, all pertinent past medical records, documentation regarding past and current limitations of activity associated with the condition, and the results of any laboratory testing.”<sup>103</sup> If a SMWRA does not recommend a waiver, the requestor can either appeal through their Service representatives (such as recruiters) or submit a congressional inquiry.<sup>104</sup> In either case, the requestor will have their appeal reconsidered by a new medical reviewer, potentially two more times.<sup>105</sup> The process today avoids confusing delegation and provides at least some insight into what a requestor should prepare.<sup>106</sup>

## II. THE EFFECTS OF RECENT LITIGATION

In April 2022, a federal court issued its opinion in favor of three Service members who challenged the application of DoDI 6130.03.<sup>107</sup> Agency-promulgated rules and issuances are subject to judicial review pursuant to the APA.<sup>108</sup> However, DoD rules are exempt if they are promulgated using “military authority exercised in the field in time of war or in occupied territory . . . .”<sup>109</sup> Notably, in *Harrison v. Austin*,<sup>110</sup> the court found the “military authority exception” does not apply if the rule in question is not actually made “in the field in time of war.”<sup>111</sup> Having established jurisdiction, the court questioned whether DoD’s HIV policies, when applied to enlisted

103. *Id.* at 15-31(4) (providing the minimum standard of evidentiary support a candidate should submit).

104. *Id.* at 15-31(5)(a)–(b).

105. *Id.* at 15-31(5)(b)(1)–(2) (explaining that if the second reviewer agrees that a waiver should not be recommended, the application goes to the Navy’s Bureau of Medicine and Surgery for the “final [third] medical waiver recommendation determination”).

106. See Sec’y Spencer’s Response, *supra* note 21.

107. See *infra* Part II.A.

108. See Administrative Procedure Act, 5 U.S.C. §§ 551(1), (4). Per the Supreme Court’s holding in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, (2024), the judiciary is not required to defer to an agency’s reasonable interpretation of agency-promulgated rules. See Benjamin M. Barczewski, Cong. Rsch. Serv., LSB11189, Supreme Court Overrules Chevron Framework 1 (2024). Separately, Military Services’ regulations—which rely on authority from DoDI 6130.03—could be scrutinized using the Auer Doctrine following the decision of *Kisor v. Wilkie*, 588 U.S. 558 (2019). Daniel J. Sheffner, Cong. Rsch. Serv., LSB10322, *Kisor v. Wilkie: Supreme Court Upholds the Auer Doctrine but Clarifies its Limitations* 2 (2019).

109. 5 U.S.C. § 551(1)(G).

110. 597 F. Supp. 3d 884 (E.D. Va. 2022).

111. *Id.* at 903–04 (stating in this matter, “there is no evidence that the deployment ban was a decision made ‘in the field.’ If anything, the evidence indicates that these were high-level policy decisions ‘made far from the field of battle,’ which is insufficient to invoke the military authority exception.”).

personnel seeking to commission or deploy, violated either the Fifth Amendment's Due Process Clause or the APA.<sup>112</sup> This landmark case demonstrated that federal courts were willing to hear challenges to DoD rules and policies, applying both constitutional and APA review frameworks.<sup>113</sup>

#### A. *Harrison v. Austin (E.D. Va. 2022)*

In the most recent (and arguably most relevant) case to challenge the lawfulness of DoD's medical standards, enlisted Service members in both the Army and Air Force challenged the application of DoDI 6130.03 on all Service members living with HIV.<sup>114</sup>

Nicholas Harrison, a member of the National Guard, claimed the Army's accession policy prevented him from becoming an officer based on his HIV status.<sup>115</sup> Similarly, co-plaintiffs Staff Sergeant Richard Roe and Senior Airman Victor Voe, filing under pseudonyms, challenged the Air Force's retention and accession policies because they had been discharged after being found medically unqualified due to their HIV status.<sup>116</sup> All three plaintiffs had acquired their HIV status after entering service and asserted that the Service's decisions violated their Fifth Amendment rights and the APA.<sup>117</sup>

Plaintiff Voe worked as an enlisted Service member in the Air Force for several years before attaining admission to the U.S. Air Force Academy (USAFA).<sup>118</sup> Voe retained his enlisted active-duty status while attending USAFA, and USAFA would ultimately serve as his commissioning source once he graduated.<sup>119</sup> In February 2014, during his second year at USAFA,

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112. *Id.* at 890, 900, 915.

113. *See id.*; *see also supra* note 109 and accompanying text (citing law which DoD had consistently used as a shield from judicial review); Barczewski, *supra* note 108 (confirming the judiciary's willingness to review agency-promulgated rules).

114. *See Harrison v. Austin*, 597 F. Supp. 3d at 889–90. Notably, in its decision the Court states, “[a]lthough no military branch other than the Army and Air Force is before the Court, nor are any policies directly implicated other than those relating to the commissioning or retention of [Service members with human immunodeficiency virus (HIV)], many of the conclusions in this opinion may have broader implications.” *Id.* at 890 (alluding to the fact that plaintiffs lacked standing to challenge the enlistment of initial entry recruits with HIV-positive status because they were already serving and this matter focused on already-serving personnel).

115. *Id.* at 889 (filing in May 2018).

116. *Id.* at 889–90, 896–98 (filing in December 2018).

117. *Id.* at 889–90, 900.

118. Complaint for Declaratory and Injunctive Relief at ¶¶ 30–32, *Voe v. Mattis*, No. 1:18-cv-01251 (D.D.C. May 30, 2018) [hereinafter Companion Complaint to *Harrison v. Austin*].

119. *Id.* ¶¶ 6, 9, 38, 40.

Voe was diagnosed with HIV after a routine health screening.<sup>120</sup> The diagnosis triggered a medical evaluation board to determine Voe's fitness for continued service.<sup>121</sup> Four months later, Voe's leadership team held a meeting to discuss Voe's future in the military<sup>122</sup> but struggled to determine how to proceed.<sup>123</sup> The complaint highlights USAFA's elaboration of the paradox:

*Accession standards precluded* individuals living with HIV from appointment, enlistment, or induction into the military, whereas *retention standards permitted* enlisted and commissioned officers diagnosed with HIV on active duty to remain *if found medically fit*. USAFA staff officers were confused about the applicable standard because . . . 'there was no verbiage specific to prior-enlisted cadets,' which [the plaintiff] was.<sup>124</sup>

In August 2014, while awaiting a decision, Voe took a "commitment oath" to remain at USAFA for two additional years (as an enlisted Service member) and then serve at least five years as an officer upon graduation.<sup>125</sup> Voe eventually received an endorsement of medical waiver from the USAFA superintendent, director of the Air Force's Medical Evaluation Unit, and Air Force Surgeon General.<sup>126</sup> USAFA officials, finding Voe was "medically fit to perform all of his duties as an officer," submitted an exception to policy (ETP) to the USD(P&R)—the ultimate approval authority for medical waivers—in December 2015.<sup>127</sup> Voe completed his training and all prerequisites to commission in the Spring of 2016, but the Air Force did not extend Voe an offer to commission because approval of the ETP was still pending.<sup>128</sup> By September 2016, Voe's ETP was being reviewed by the Air Force Chief of Staff and Vice Chief of Staff—individuals with no medical expertise or legal authority to review ETPs—rather than the actual approval authority for ETPs, the USD(P&R).<sup>129</sup> One month later, Voe's ETP was denied by the Secretary of

120. *Id.* ¶¶ 6, 33.

121. *Id.* ¶¶ 33–34

122. *Id.* ¶ 35.

123. *Id.* ¶¶ 35–36.

124. *Id.* (emphases added) (citation omitted).

125. *Id.* ¶¶ 38–40 (not a formal contract but a promise; ceremonial in nature).

126. *See id.* ¶¶ 37, 43–45 (illustrating Voe's chain of command supported his petition for waiver).

127. *Id.* ¶¶ 42, 48; 32 C.F.R. § 66.5 (authorizing the Secretary of each Military Service to "[e]stablish procedures to grant [medical] waivers," but requiring them to "[r]equest approval from the [Under Secretary of Defense for Personnel and Readiness (USD(P&R))] for generalized exceptions to these standards . . .").

128. *Id.* ¶¶ 49–55, 59–60 (explaining that the ETP was at one point rerouted to offices which were not originally identified as stakeholders in the staffing process and also highlighting a concern of whether these "stakeholders" had adequate training and understanding to determine such decisions).

129. *Id.* ¶¶ 48, 59–60, 63, 81; DoDI 6130.03 (VOL. 1), *supra* note 5, § 2.4.

the Air Force, which in turn prompted a review board to find Voe medically unfit for duty.<sup>130</sup> With no option to continue service as an officer or even reenlist, Voe was discharged from the Air Force in November 2016.<sup>131</sup>

DoD's initial argument claimed the policies barring HIV-positive Service members from deploying—which inevitably led to their separation<sup>132</sup>—were reasonably related to DoD's intention of mitigating risk.<sup>133</sup> But once the court declined to accept that argument,<sup>134</sup> DoD asserted three new defenses.<sup>135</sup> For Plaintiff Harrison specifically, DoD alleged that he lacked standing to argue that the medical policy violated the law because he was not denied a commission based solely on his HIV status but rather for other unrelated aspects within his application.<sup>136</sup> However, Harrison (like Voe) had submitted an ETP specifically for his HIV status,<sup>137</sup> which was subsequently denied by the Army, and therefore, the court declined to accept this

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130. Companion Complaint to *Harrison v. Austin*, *supra* note 118, ¶¶ 64–67, 71. Because Voe's request was an ETP, rather than a standard medical waiver, the appropriate approval authority for the request was in fact the USD(P&R). 32 C.F.R. § 66.5; DoDI 6130.03 (VOL. 1), *supra* note 5, § 2.4(b) (authorizing Secretaries of each Military Service to approve medical waivers).

131. *Id.* ¶ 71 (showing a Service member's detrimental reliance on promises made by his chain of command).

132. *Harrison v. Austin*, 597 F. Supp. 3d 884, 898 (E.D. Va. 2022) (alluding to bars on deployment status and how an inability to deploy may impact whether a Service member is retained).

133. *Id.* at 900–01. The risks argued by the government included: (1) a general risk that the Service member—deployed in an austere environment—would not be able to receive adequate medical care; (2) the risk imposed on other Service members who could contract the disease; and (3) a risk that the Service member will become incapable of adequately performing their job due to illness. *Id.* at 894, 900–01.

134. *Id.* at 901 (“Although the government argues that the acceptability of these risks should be left solely to the military's professional judgment, both this Court and the Fourth Circuit have previously held that plaintiffs have the better argument, and . . . the government's explanations for the military's deployment bar remains either contradicted by medical evidence or unsupported by the record.”).

135. *Id.*

136. *Id.* at 901–02 (“Among other things, the government points to Harrison's need to ‘overcom[e] potential ethical and conduct concerns regarding his failure to disclose his medical history and his failure to follow the orders in his HIV counseling statement,’ and the requirement that he ‘receive an age waiver . . . .’”).

137. *Id.* at 902 (“[I]t cannot be disputed that the military's accession policies regarding HIV-positive [S]ervice members prevented Harrison from obtaining an ETP . . . .”). At the time, DoDI 6130.03 did not allow individuals with HIV diagnosis to submit medical waivers but instead required them to submit ETPs—a completely different process. *Id.* at 895.

argument as well.<sup>138</sup> DoD's second argument contended that all claims should be dismissed because the three plaintiffs challenged *substantive* policies "committed to agency discretion by law" per the APA.<sup>139</sup> The Department's final argument also challenged the APA, but this time as to its applicability to DoD policies. DoD argued it was exempt from judicial review over its deployment ban, per 5 U.S.C. § 701(b)(1)(G).<sup>140</sup> The court dismissed DoD's pleas for deference and exemption.<sup>141</sup>

Subsequently, the court found that DoD violated both the APA and the Constitution, agreeing with plaintiffs' arguments that their separations and disqualifications for officer candidacy were based on stigma and reliance on outdated medical guidance.<sup>142</sup> All three plaintiffs were capable of continued service, and their status had little impact on missions or the well-being of others.<sup>143</sup> Supported by advances in medicine, the court found DoD's handling of Service members with positive HIV statuses' was unreasonable.<sup>144</sup>

Given the federal court's willingness to apply APA standards to DoDI 6130.03, DoD can anticipate that the regulation will remain susceptible to further judicial scrutiny. This likelihood may be what triggered DoD's decision not to appeal the federal district court's decision.<sup>145</sup> Instead, Secretary of Defense Lloyd Austin issued a directive-type memorandum,<sup>146</sup> another indication that DoD internally recognized significant flaws in its policies and the shift in society's view on certain medical conditions. The issuance took immediate effect, requiring all DoD Components to cease restricting HIV-positive personnel from deploying and commissioning based solely on their status.<sup>147</sup> It also triggered additional administrative actions, requiring a rewrite of DoDI 6130.03, which was re-published in 2022.<sup>148</sup>

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138. *Id.* at 902 (highlighting ambiguity and lack of transparency in the medical waiver process).

139. *Id.* at 902 (arguing DoD is owed deference to make such decisions as stipulated in the APA); 5 U.S.C. § 701(a)(2) (2018).

140. *Harrison v. Austin*, 597 F. Supp. 3d at 903.

141. *Id.* at 903–04.

142. *Id.* at 892, 916.

143. *Id.* at 911.

144. *Id.* at 916.

145. Rich Luchette, *Lambda Legal Celebrates Biden Administration's Decision to Abandon Appeal of Court Order Striking Down Discriminatory Restrictions on Service Members Living with HIV and Welcomes Pentagon's Policy Change*, LAMBDA LEGAL (June 8, 2022), [https://lambdalegal.org/newsroom/austin\\_us\\_20220608\\_ll-celebrates-biden-admins-decision-to-abandon-appeal-of-court-order/](https://lambdalegal.org/newsroom/austin_us_20220608_ll-celebrates-biden-admins-decision-to-abandon-appeal-of-court-order/).

146. Memorandum from the Sec'y of Def. to Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency, and DoD Field Activity Dirs. (June 6, 2022) (on file with author).

147. *Id.*

148. DoDI 6130.03 (VOL. 2), *supra* note 11, § 1.3 (Summary of Change 1).

### B. *Distinguishing Harrison v. Austin*

*Harrison v. Austin* narrowly focused on Service members with an HIV diagnosis, but as the decision alluded, there are potentially larger ramifications to DoD policy.<sup>149</sup> This Comment attempts to address the impacts of ambiguous policies and procedures on a much broader portion of personnel: all enlisted Service members seeking a commission. Beyond its spotlight on discriminatory practices, Voe’s story sheds light on issues with the administrative processes the Air Force, and potentially other Services, rely on.<sup>150</sup> From the outset, it was unclear to Voe’s chain of command (which went as high as a three-star general) which medical standard to apply to an enlisted Service member seeking a commission.<sup>151</sup> This created months of uncertainty and significant paperwork because USAFA was uncertain the superintendent’s “waiver authority” would suffice.<sup>152</sup> Even so, an ETP was staffed through the chain of command to the appropriate legal authority but, at some point, rerouted and reviewed by nonmedical experts.<sup>153</sup> These administrative processes reveal a lack of understanding from all echelons of leadership and perhaps—as the Navy only recently addressed<sup>154</sup>—a tendency for Military Services to overcomplicate processes, lack transparency, and delegate medical waiver authority far too low down the chain of command.

## III. DOD’S ARGUMENTS IN FAVOR OF CURRENT POLICY

### A. *Needing to Tailor Physical Requirements*

DoD’s requirements for accession and retention consider both physical and medical fitness.<sup>155</sup> As indicated in the Secretary of the Navy’s letter from February 2019, DoD’s policy has been predicated on the idea that each Military Service requires varying levels of fitness, and each MOS requires varying physical skills.<sup>156</sup> For instance, U.S. Marines are first required to become qualified as infantry riflemen prior to qualifying in their designated MOS.<sup>157</sup>

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149. See *supra* text accompanying note 114.

150. See Companion Complaint to *Harrison v. Austin*, *supra* note 118, at ¶¶ 35–36 (referencing the confusion Voe’s chain of command had when determining what regulation to reference and what authority level was appropriate to provide a waiver).

151. See *supra* text accompanying notes 122–124.

152. See *supra* text accompanying notes 126–127.

153. See *supra* text accompanying note 128.

154. See *supra* text accompanying note 27.

155. DoDI 6130.03 (VOL. 1), *supra* note 5, at Title Page (Purpose).

156. See Sec’y Spencer’s Response, *supra* note 21.

157. *Preparing for the Operating Forces*, U.S. MARINES, [https://www.marines.com/life-as-a-](https://www.marines.com/life-as-a)

Although other Military Services also require a core training event for all new recruits, the emphasis on being a rifleman is not as rigorous because each Military Service trains to operate in a different environment.<sup>158</sup> The U.S. Space Force, for example, leverages a “Holistic Health Approach” to physical fitness, allowing Guardians to wear fitness devices rather than requiring a traditional physical fitness exam to measure readiness.<sup>159</sup>

Even within the same Military Service, MOS physical demands vary greatly as Service members are specialized in their occupation. For example, a “Culinary Specialist” in the Army is responsible for ordering, inspecting, and preparing food and is expected to maintain skills in hospitality and the stocking and storing of supplies.<sup>160</sup> But an “Infantryman” in the Army is expected to learn evasion, weapons operation, and maintain physical fitness for potential close combat with enemy forces.<sup>161</sup> Both categories support the Army’s missions, but they are not expected to perform in the same manner physically.

### B. *Financial Impact*

DoD raises two arguments related to the cost calculation for Military Services: return on investment and cost. The often-cited argument for “return on investment” contends that enlisted Service members are “prone to leaving the [S]ervice after their first tour, whereas officers frequently provide a much-needed sense of continuity and experience by remaining in their careers for [twenty] years or more.”<sup>162</sup> Then-Secretary of the Navy Richard Spencer referred to the argument for “return on investment” in his response

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marine/life-in-the-marine-corps/preparing-for-operating-forces.html (last visited July 7, 2024).

158. *See Our Forces*, *supra* note 95 (explaining the Army’s focus is to provide ground forces; the Marine Corps prepares for contingency and combat operations on both land and sea; Navy serves as a strategic deterrent on vast bodies of water; and the Air Force maintains air and space capabilities).

159. *Space Force Details Holistic Health Approach, Continuous Fitness Assessment Study*, U.S. SPACE FORCE (May 24, 2023), <https://www.spaceforce.mil/News/Article/3406768/space-force-details-holistic-health-approach-continuous-fitness-assessment-study/>.

160. *Culinary Specialist*, U.S. ARMY, <https://www.goarmy.com/careers-and-jobs/career-match/support-logistics/creative/92g-culinary-specialist.html> (last visited July 7, 2024).

161. *Infantryman*, U.S. ARMY, <https://www.goarmy.com/careers-and-jobs/career-match/ground-forces/firearms-ammunition/11x-infantryman-jobs.html> (last visited July 7, 2024).

162. Nicholas Wood, *Bad Idea: The Officer-Enlisted Divide*, CTR. FOR STRATEGIC & INT’L STUD. (Jan. 7, 2022), <https://defense360.csis.org/bad-idea-the-officer-enlisted-divide/> (presenting charts comparing officer and enlisted longevity by years).

to Congress when he stated the accession standards were meant to ensure newly commissioned officers would remain long enough to secure “a reasonable return on the investment in schooling, training, and education.”<sup>163</sup>

The cost argument also considers the financial burden of maintaining Service members’ health.<sup>164</sup> In essence, it contends that certain medical conditions should be disqualifying not only because of the financial burden but also because of the potential logistical encumbrance of a Military Service.<sup>165</sup> This argument was raised in *Harrison v. Austin* when DoD claimed the lifelong cost of care for HIV placed a significant burden on the Department.<sup>166</sup> DoD estimated that an HIV-positive Service member could cost the Department as much as \$10,000 to \$25,000 per year.<sup>167</sup>

### C. Limits by Statute

In this instance, there is only one provision that explains the appointment of commissioned officers in the Active Component of the military.<sup>168</sup> For an appointment in the Active Component of a Military Service, the law states that an original appointment as a commissioned officer only requires a candidate to meet four general standards.<sup>169</sup> First, the candidate must be a citizen of the United States.<sup>170</sup> Second, the candidate must display “good moral character,”<sup>171</sup> a statement which Congress does not qualify further. Third, the candidate must physically qualify—also not qualified quantitatively or qualitatively.<sup>172</sup> Congress’s fourth qualification allows DoD to interpret its own standard by merely stating a candidate possesses “such other special qualifications as the Secretary of the military department concerned may prescribe by regulation.”<sup>173</sup>

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163. Sec’y Spencer’s Response, *supra* note 21; *infra* text accompanying note 235.

164. DoDI 6130.03 (VOL. 1), *supra* note 5, § 4.2(b)(2).

165. *Id.* § 4.2(b)(3).

166. *See* *Harrison v. Austin*, 597 F. Supp. 3d 884, 912–13 (E.D. Va. 2022).

167. *Id.* at 913 (estimating costs by considering antiviral therapy, clinical testing, updating medical kits with post-exposure prophylaxis, and transportation in and out of deployed environments).

168. *See* 10 U.S.C. § 532. Because the analysis of this document focuses on enlisted commissioning candidates in the Active Component of the military, it is more appropriate to analyze this section and not Title 10 of the United States Code, § 1205 (“Appointment of Reserve Officers”).

169. *Id.*

170. *Id.* § 532(a)(1).

171. *Id.* § 532(a)(2).

172. *Id.* § 532(a)(3).

173. *Id.* § 532(a)(4). The following subsection within the statute discusses the education required for appointment as a doctor in the military. *Id.* § 532(b).

DoD could argue the statute—as worded—requires DoD to consider every candidate who applies for a commission equally, based solely on the text, “*original appointment*.”<sup>174</sup> The plain meaning of the statute and the surrounding context does not indicate Congress intended to create a *carve-out* for already-serving personnel. Because of this, DoD may argue it has only one option: view every candidate equally, regardless of whether the candidate is already a member of a Military Service or not.

#### IV. FLAWS IN DOD’S POLICY JUSTIFICATIONS

DoD’s arguments are based on assertions that either lack quantitative evidence or are simply a product of the Department’s own statutory interpretations.<sup>175</sup> Without metrics to support DoD’s own assertions, a court could once again find these arguments too weak to garner agency deference.<sup>176</sup>

##### A. *Occupation Specialties Already Tailor Qualification Standards*

When considering the argument that some MOSes require “exceptional physical fitness,” DoD should recognize that those occupations already have safeguards in place to disqualify candidates who are not capable of physically performing.<sup>177</sup> For example, individuals interested in pursuing work in the Army’s Special Forces must be physically qualified to attend Airborne School—criteria not required for general entry into service.<sup>178</sup> But even if a candidate administratively qualifies, they still must attend (and pass) a qualification course that tests candidates’ mental acuity and physical stamina.<sup>179</sup> DoD applies this type of safeguard to all military occupations the Military Services have deemed unique enough to require specific physical standards.<sup>180</sup>

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174. 10 U.S.C. § 532 (emphasis added) (meaning there are no other types of appointments).

175. *Infra* Part IV.C.

176. *See supra* note 139 and accompanying text.

177. *See, e.g., Special Forces Qualification Course (SFQC)*, U.S. ARMY NAT’L GUARD, <https://www.nationalguard.com/special-forces-qualification-course> (last visited July 7, 2024) (describing basic selection requirements for those pursuing an occupation in U.S. Army Special Operations).

178. *Special Forces*, U.S. ARMY, <https://www.goarmy.com/careers-and-jobs/specialty-careers/special-ops/special-forces.html> (last visited July 7, 2024).

179. *Special Forces Qualification Course (SFQC)*, *supra* note 177.

180. *E.g., AR 40-501*, *supra* note 91, §§ 4, 5-3, 5-11 (describing physical standards for U.S. Army pilots, Rangers, and divers).

B. “Return on Investment” & Cost Burden Arguments Lack Evidentiary Support

While fiscally sound in theory, DoD’s argument that it should strive to ensure a “return on investment” invalidates the same policies DoD purports to uphold.<sup>181</sup> This assertion underscores erroneous perceptions that enlisted personnel—especially junior—are unreliable or have yet to prove loyalty to their Military Service,<sup>182</sup> but it could also be interpreted to infer a policy of ageism.<sup>183</sup> This is because enlisted commissioning candidates are generally older than standard Reserve Officers’ Training Corp (ROTC) or Service Academy<sup>184</sup> candidates because of their time in service, which typically requires nontraditional means of attaining the required bachelor’s degree.<sup>185</sup> An enlisted Service member may seek commission for a variety of reasons, including an interest in serving in a different capacity,<sup>186</sup> a passion for leading

181. *Taking Care of Our People*, U.S. DEP’T OF DEF., <https://www.defense.gov/Spotlights/Taking-Care-of-Our-People/> (last visited July 7, 2024) (“We recognize the service and sacrifice of our military and their families, and dedicate resources, services, policies and programs to support the more than 2 million uniformed [S]ervice members and 2.6 million family members across the globe.”); *Army People First*, U.S. ARMY, <https://www.army.mil/peoplefirst/> (last visited July 7, 2024); Mark Thompson, *What Does ‘People First, Mission Always’ Really Mean?*, U.S. AIR FORCE (Dec. 11, 2009), <https://www.af.mil/News/Commentaries/Display/Article/141695/what-does-people-first-mission-always-really-mean/>.

182. See generally Todd C. Helmus, S. Rebecca Zimmerman, Marek N. Posard, Jasmine L. Wheeler, Cordaye Ogletree, Quinton Stroud, et al., *Life As A Private: A Study of the Motivations and Experiences of Junior Enlisted Personnel in the U.S. Army* iii, xiii, 111–15, RAND CORP. (2018), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2200/RR2252/RAND\\_RR2252.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2200/RR2252/RAND_RR2252.pdf) (interviewing first-term Soldiers to determine issues that negatively impact retention, such as boredom, and providing insight into the likelihood first-term Soldiers will reenlist); U.S. DEP’T OF DEF., THE NONCOMMISSIONED OFFICER AND PETTY OFFICER 8–11 (Nat’l Def. Univ. Press, 2013), <https://www.jcs.mil/Portals/36/Documents/Publications/ncbackbone.pdf> (describing enlisted personnel with seniority over junior enlisted personnel (i.e., noncommissioned officers) as “[s]ervant-[l]eader[s]”).

183. Q&A: Ageing: Ageism, WORLD HEALTH ORG. (Mar. 18, 2021), <https://www.who.int/news-room/questions-and-answers/item/ageing-ageism>.

184. Ilana Kowarski, *A Guide to U.S. Service Academies, Military Colleges*, U.S. NEWS & WORLD REPORT (July 22, 2022), <https://www.usnews.com/education/best-colleges/articles/a-guide-to-u-s-service-academies-military-colleges> (stipulating that candidates for Service Academies must be “no older than 25 when they matriculate”).

185. *Eligibility & Requirements: Officers*, U.S. ARMY, <https://www.goarmy.com/how-to-join/requirements.html> (last visited July 7, 2024).

186. See, e.g., Skovlund Jr., *supra* note 2.

troops,<sup>187</sup> or a drive to attain financial security.<sup>188</sup> But regardless of the reason, pursuing a commission is not a short-term goal, as all personnel who commission incur a mandatory military service obligation of eight years.<sup>189</sup> Approximately 30% of officers are expected to complete a full term in Service—twenty years—as opposed to only 10% of enlisted personnel.<sup>190</sup>

The federal judiciary also found this argument unpersuasive, considering DoD’s inability to provide evidence of incurred costs.<sup>191</sup> In *Harrison v. Austin*, the court found there was no evidence that the cost of care varied any more for HIV-positive Service members as compared to HIV-negative personnel.<sup>192</sup> The argument is even less logical when a Service member is not being separated from Service but is being retained. The cost of maintaining a Service member is the same whether the member is enlisted or an officer.<sup>193</sup> Both categories of personnel receive access to the same healthcare services, regardless of rank.<sup>194</sup> Therefore, the healthcare costs of a retained enlisted Service member are no more costly to DoD than those of an officer.

### C. Statutory “Limits” Are the Result of DoD’s Own Interpretations

While the U.S. Code does not have a carve-out for enlisted Service members seeking a commission, it does not need one because the entirety of the text is written broadly enough to accommodate such circumstances.<sup>195</sup> The context of U.S. Code, Title 10, § 532 indicates that a narrow interpretation is not appropriate, given that it only expresses four criteria for appointment and the flexibility for those requirements to be waived.<sup>196</sup> The rigidity in the

187. See *infra* note 209 (explaining the role of an officer).

188. See *infra* note 211 and accompanying text (discussing the pay scale difference between officer and enlisted personnel and highlighting studies that show enlisted personnel are at higher risk of having to rely on government-sponsored social welfare assistance).

189. *Career Satisfaction Program (CSP) FAQ’s*, U.S. ARMY, <https://www.career-satisfaction.army.mil/faq.html> (last visited July 7, 2024) (explaining Active Duty Service Obligations and Military Service Obligations).

190. Mark Overberg, *Retiree? Or Retired Soldier?*, CHANGE OF MISSION, Jan.–Mar. 2024, at 1, [https://soldierforlife.army.mil/Documents/ChangeOfMission/Change\\_Of\\_Mission\\_Jan2024.pdf](https://soldierforlife.army.mil/Documents/ChangeOfMission/Change_Of_Mission_Jan2024.pdf).

191. *Harrison v. Austin*, 597 F. Supp. 3d 884, 914 (E.D. Va. 2022).

192. *Id.*

193. *E.g.*, *Tricare Prime*, TRICARE, <https://www.tricare.mil/Plans/HealthPlans/Prime> (last visited July 7, 2024) (making no distinction between officer and enlisted personnel’s healthcare).

194. *Id.*

195. See, e.g., 10 U.S.C. § 532(a)(3) (stating simply, “[I]s physically qualified for active service”).

196. *Id.* § 532(a).

accession process actually begins in the Code of Federal Regulations, where DoD—the drafter of the regulation—required the adoption of Volume 1 of DoDI 6130.03 over Volume 2.<sup>197</sup> Title 32, U.S. Code of Federal Regulations, § 66.6(b)(5), states:

Medical. (i) In accordance with DoD Instruction 6130.03, “Medical Standards for Appointment, Enlistment, or Induction in the Military Services[.]” . . . the pre-accession screening process will be structured to identify any medical condition, including mental health, that disqualifies an application for military service. (ii) Individuals who fail to meet established medical standards, as defined in DoD Instruction 6130.03, may be considered for a medical waiver.<sup>198</sup>

Section (i) of the provision does not identify a specific volume number for the issuance, although it does list the title.<sup>199</sup> Therefore, applying Volume 2 of DoDI 6130.03 for medical waiver determinations will not violate the applicable federal code because it does not expressly forbid the use of Volume 2.<sup>200</sup> DoD would not have to create a new issuance or incur costs in researching appropriate disqualification standards for currently serving personnel because Volume 2 is already published, and Military Services actively reference it to make retention decisions.<sup>201</sup> Separately, § 5 of DoDI 6130.03, Volume 1 states the medical standards apply to “[a]pplicants for appointment as commissioned or warrant officers or enlistment in any Military Service and Component,” but then identifies criteria that appear to apply only to initial entry recruits or returning veterans.<sup>202</sup> It explains that Volume 1 does not apply to medical conditions or defects that either occurred during the current contractual period or before the current contractual period but were aggravated in the line of duty.<sup>203</sup> The reader is then instructed to instead apply Volume 2—“Medical Standards for Military Service: Retention”—to those conditions.<sup>204</sup> Volume 2 recognizes military service affects personnel’s physical health by establishing far less stringent standards.<sup>205</sup> In practice, DoD ignores

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197. Qualification Standards for Enlistment, Appointment, and Induction, 32 C.F.R. § 66.6(b)(5) (2021).

198. *Id.* (making no mention of a specific volume).

199. *Id.* at (b)(5)(i).

200. Compare 10 U.S.C. § 532(f), with 32 C.F.R. § 66.6(b)(5) (showing that the agency-promulgated rule is the only law which requires the use of DoDI 6130.03 (Vol. 1)).

201. DoDI 6130.03 (VOL. 2), *supra* note 11, §§ 3, 5.

202. DoDI 6130.03 (VOL. 1), *supra* note 5, § 5.1(a)(1)–(3).

203. *Id.* § 5.1(b)(1)–(2).

204. *Id.* § 5.1(b)(3).

205. Compare *id.* § 6 (listing disqualifying conditions in forty pages of the volume), with DoDI 6130.03 (VOL. 2), *supra* note 11, § 5 (using only twenty-five pages to list disqualifying conditions); see also *infra* Part IV.D.

this reality for enlisted Service members seeking to commission.<sup>206</sup>

Congress's interest in supporting veterans is evident by the myriad of laws passed to honor their sacrifice and support their well-being. One example is the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) which prohibits the discrimination of protected veterans.<sup>207</sup> Per VEVRAA, a "protected veteran" includes (1) disabled veterans, (2) recently separated veterans, (3) active duty wartime or campaign badge veterans, and (4) Armed Forces Service Medal veterans.<sup>208</sup>

Gaining a commission changes a Service member's responsibility from being the "doer" and technical expert to the "planner" and manager of larger groups of personnel.<sup>209</sup> Receiving a commission also changes the pay scale a Service member qualifies for, allowing them to better support themselves and their families.<sup>210</sup> Professional development and financial health would surely encourage an enlisted Service member to seek a commission, but the benefits to the armed forces are equal, if not greater. This begs the question: what interest is served in preventing enlisted personnel from pursuing greater

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206. See *supra* INTRODUCTION.

207. 38 U.S.C. § 4212; see also *Am I a Protected Veteran?*, DEP'T OF LABOR, [hereinafter *Protected Veteran Infographic*], [https://www.dol.gov/sites/dolgov/files/ofccp/posters/Infographics/files/ProtectedVet-2016-11x17\\_ENGESQA508c.pdf](https://www.dol.gov/sites/dolgov/files/ofccp/posters/Infographics/files/ProtectedVet-2016-11x17_ENGESQA508c.pdf) (last visited July 7, 2024) (explaining how to determine protected veteran status).

208. *Protected Veteran Infographic*, *supra* note 207 (indicating that even active-duty Service members who deployed or received the Armed Forces Service Medal qualify for "protected veteran" status).

209. *Understanding the Roles of Military Officers and Enlisted Service Members*, MIL. ONE SOURCE, <https://www.militaryonesource.mil/military-basics/new-to-the-military/military-officer-and-enlisted-service-members-roles/> (last updated Sept. 17, 2021).

210. See U.S. GOV'T ACCOUNTABILITY OFF., FPCD-81-27, MILITARY PERSONNEL ELIGIBLE FOR FOOD STAMPS (1980), <https://www.gao.gov/assets/fpcd-81-27.pdf> (reporting in response to a request for information on military personnel). The report estimated approximately 19,700 Service members were eligible for food stamps—about 1.1%—while DoD estimated 24,000, and other sources estimated up to 275,000. *Id.* In 2015, DoD's Defense Commissary Agency reported active-duty Service members spent over \$21 million in SNAP benefits, triggering a similar investigation. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-561, DOD NEEDS MORE COMPLETE DATA ON ACTIVE-DUTY SERVICEMEMBERS' USE OF FOOD ASSISTANCE PROGRAMS 1 (2016), <https://www.gao.gov/assets/gao-16-561.pdf>. By 2022, DoD reported that 24% of active-duty Service members were experiencing food insecurity, with junior enlisted Service members being at the highest risk. *Strengthening Food Security in the Force: Strategy and Roadmap*, U.S. DEP'T OF DEF. 3 (July 2022), <https://media.defense.gov/2022/Jul/14/2003035423/-1/-1/1/strengthening-food-security-in-the-force-strategy-and-roadmap.pdf>.

responsibilities or better pay?<sup>211</sup> Moreover, what benefits do the armed forces gain by not utilizing a population of experienced and matured officer candidates?<sup>212</sup>

#### D. Irrational Application of Regulation

DoD's continued application of accession standards on enlisted personnel is irrational because scientific research and quantitative data indicate Service members are likely to suffer service-related injuries throughout their careers.<sup>213</sup> In 2011, Pew Research Center claimed, "[o]ne out of every ten veterans alive today was seriously injured at some point while serving in the military, and three-quarters of those injuries occurred in combat."<sup>214</sup> Over a decade later, DoD's Health of the Force report highlighted that 14% of active-duty Service members had been diagnosed with sleep disorders, 4.5% of the force had noise-induced hearing injuries, and there was an increase of

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211. In 2024, an E-6 with over six years of experience is paid \$3,904.80 per month, while a newly commissioned O-1 with no previous military experience is paid nearly the same amount (\$3,826.20 per month). *Military Pay 101: Basic Pay, Allowances and S&I Pay*, MIL. ONE SOURCE (Feb. 2, 2024), <https://www.militaryonesource.mil/military-basics/new-to-the-military/military-pay-101/>. An enlisted Service member generally must have at least seven years' time in service to be promoted to E-6. Stephen Bajza, *Army Ranks for Enlisted Personnel*, MILITARY.COM (Dec. 19, 2023), <https://www.military.com/army/enlisted-ranks.html>.

212. "Be recognized as a real leader. Your experience as a Soldier is valuable to you and to others. With your insight, you can be a real example and mentor to other cadets in the classroom and during training." *Enlisted Soldiers and ROTC*, U.S. ARMY NAT'L GUARD, <https://www.nationalguard.com/tools/enlisted-soldiers-and-rotc> (last visited July 7, 2024) (explaining why enlisted Service members should consider applying for a commission through ROTC).

213. *Injuries, Causes, Risk Factors, and Prevention Overview*, DEF. HEALTH AGENCY, <https://ph.health.mil/topics/discond/ptsaip/Pages/Army-Injuries-Causes-Risk-Factors-and-Prevention-Overview.aspx> (last updated Feb. 13, 2024) (stating "[a]lmost 50% of military [Service members] experience 1 or more injur[ies] each year [of service]"); Veronique Hauschild, *Non-Battle Injuries Result in More Medical Evacuations Than Combat*, U.S. ARMY (Jan. 29, 2015), [https://www.army.mil/article/141818/non\\_battle\\_injuries\\_result\\_in\\_more\\_medical\\_evacuations\\_than\\_combat](https://www.army.mil/article/141818/non_battle_injuries_result_in_more_medical_evacuations_than_combat) ("[T]he primary health threat to troops for more than two decades has been common muscle, joint, tendon/ligament and bone injuries like knee or back pain that are caused by running, sports[,] and exercise-related activities such as basketball and weightlifting.").

214. Ana Gonzalez, Rich Morin, Seth Motel, Eileen Patten & Paul Taylor, *For Many Injured Veterans, A Lifetime of Consequences*, PEW RSCH. INST., 2 (Nov. 8, 2011), <https://www.pewresearch.org/social-trends/2011/11/08/for-many-injured-veterans-a-lifetime-of-consequences>.

16% in traumatic brain injuries from the year before.<sup>215</sup> But even noncombat-related injuries have major impacts on Service members' health and Military Service readiness.

Noncombat musculoskeletal injuries (MSKIs) are estimated to account for approximately 60% of active-duty troops with limited duty days, making 65% of active-duty troops ineligible to deploy in the U.S. Army alone.<sup>216</sup> In 2017, the U.S. Army Active Component reported more than half of personnel had sustained at least one injury, and of those, “[o]veruse injuries compris[ed] at least 70%.”<sup>217</sup>

With the likelihood of injury during a standard duty so high, it is reasonable to deduce an enlisted commissioning candidate has a greater chance of requiring a waiver as compared to a candidate with no prior service. This assertion is further supported when we consider how many current Service members have been deployed supporting post-9/11 operations. In 2021, the Watson Institute at Brown University estimated the total number of Service members deployed to Iraq and Afghanistan alone was as high as three million.<sup>218</sup>

Even with clear evidence directly correlating injuries to military service, these medical conditions are still viewed through an analytic scope, which requires decisionmakers to ignore a Service member's sacrifice.<sup>219</sup> Looking past the physical wear-and-tear one expects to incur during service, the reality is that Service members who devote years to the military will experience unexpected life circumstances—like Senior Chief Shannon Kent.<sup>220</sup> When Volume 1 of DoDI 6130.03 is applied, certain medical conditions that DoD otherwise accepts will disqualify already serving personnel from becoming officers. In the case of Senior Chief Kent, that condition was a previous cancer diagnosis, which eliminated not only her ability to commission but also pursue her goal of serving fellow veterans.<sup>221</sup>

215. U.S. DEP'T OF DEF., DOD HEALTH OF THE FORCE 2021 4 (2021), <https://www.health.mil/Reference-Center/Technical-Documents/2022/12/14/DOD-Health-of-the-Force-2021>.

216. Joseph M. Molloy, Timothy L. Pendergrass, Ian E. Lee, Michelle C. Chervak, Keith G. Hauret & Daniel I. Rhon, *Musculoskeletal Injuries and United States Army Readiness Part I: Overview of Injuries and their Strategic Impact*, 185 MIL. MED. e1461 (2022).

217. *Id.*

218. *Costs of War: U.S. Veterans & Military Families*, WATSON INST. (Aug. 2021), <https://watson.brown.edu/costsofwar/costs/human/veterans>.

219. *But see* Sec'y Spencer's Response, *supra* note 21 (stating the Navy would “[d]irect[] highest consideration to be given to those serving in a deployable status” as a result of Senior Chief Kent's efforts to change the Navy's medical waiver policy). *See generally* DODI 6130.03 (VOL. 1), *supra* note 5 (making no mention of deference offered to enlisted Service members).

220. *See supra* text accompanying note 6 (describing Senior Chief Kent's “unexpected life circumstance” as cancer).

221. *See supra* note 8 and accompanying text.

Waiver authorities that extend some measure of deference to a Service member—as alluded to by Secretary of the Navy Richard Spencer—only raise more questions.<sup>222</sup> If waiver authorities are willing to show enlisted commissioning candidates some extent of deference, why not apply the already existing retention standard found in Volume 2 of DoDI 6130.03, which already grants these candidates deference?<sup>223</sup> Such actions suggest that Military Service waiver reviewers and approvers are either blatantly choosing not to abide by DoD’s policies or agree with the merits of this Comment’s argument and are willing to apply retention standards. The latter is problematic because simply affording enlisted commissioning candidates’ deference while still applying Volume 1 standards perpetuates the faults of an arbitrary and capricious issuance and leads to inconsistent treatment.

## V. RECOMMENDATIONS

### A. *Revise DoDI 6130.03 With a Uniform System for Submitting & Reviewing Waivers*

DoD should revise its waiver policy within DoDI 6130.03 to not only ensure uniformity among all branches but also increase accessibility and transparency for use by all Service members. DoD’s disqualifying conditions for accessions are clearly captured in the instruction’s § 6, which spans forty-one pages.<sup>224</sup> However, the waiver process is only vaguely referenced in a few sentences discussing authority responsibilities.<sup>225</sup> DoD has not published clear guidance for reference by Service members, and what is accessible is largely unit-dependent.<sup>226</sup> Inconsistencies and lack of transparency further add to the ambiguous nature of the applicable DoD and Military Service issuances. For immediate release, DoD could issue a directive-type memorandum, similar to what the Secretary of Defense Lloyd Austin issued after the *Harrison* decision.<sup>227</sup>

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222. Sec’y Spencer’s Response, *supra* note 21.

223. *See generally* DoDI 6130.03 (VOL. 2), *supra* note 11 (providing medical qualification standards for Service members seeking to remain in the military, which are far less stringent than medical standards found in Volume 1).

224. DoDI 6130.03 (VOL. 1), *supra* note 5, § 6.

225. *Id.* § 2.4.

226. *See SMDRP Procedure*, *supra* note 64 (providing an example of unit-specific guidance on waivers).

227. *Overview of Department of Defense Issuances*, *supra* note 77; *see also supra* Part II.A (providing a relevant example of this type of issuance).

Qualitative medical standards are established for all Military Services, so why not provide an objective and transparent waiver process as well? Doing so mitigates situations similar to what Senior Chief Kent and Senior Airman Voe faced while attempting to navigate a convoluted administrative action.<sup>228</sup> DoD should also consider limiting waiver authority (review and approval) to key personnel who understand medical conditions and have received training to make medical determinations for Service members.<sup>229</sup> As a starting point, DoD should apply the waiver framework developed by the Navy.<sup>230</sup> The Navy's revised policy clearly stipulates a *limited* number of waiver authorities—a policy which, by the Secretary of the Navy's own account, has contributed to the Navy's purported 15% waiver increase.<sup>231</sup> Equally as important, DoD should publish the updated framework directly within the instruction, ensuring it is easily accessible.

*B. Apply Volume 2 of DoDI 6130.03 to Enlisted Commissioning Candidates*

DoD should allow enlisted Service members to qualify for a commission under *retention* standards rather than *accession* standards. As a federal agency, DoD is entrusted with creating and implementing rationally based policies per the APA.<sup>232</sup> The APA also requires agencies to articulate *reasonable* explanations that support the agency's policy decisions.<sup>233</sup> The requirement to illustrate a reasonable connection is further emphasized in Executive Orders 13,563 and 12,866, which direct agencies to select regulatory approaches only after conducting full-scope assessments that weigh economic costs and facilitate equity.<sup>234</sup> Beyond the Secretary of the Navy's statement to members of Congress, no policy or explanations are publicly available.<sup>235</sup>

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228. See Sec'y Spencer's Response, *supra* note 21.

229. Cf. Companion Complaint to *Harrison v. Austin*, *supra* text accompanying notes 118–131 (providing an example of how involvement by untrained, nonmedical professionals negatively impacted the review of a Service member's request for ETP).

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

231. *Id.*

232. See *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 293 (4th Cir. 2018).

233. *Id.* (explaining that to comply with the APA, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted)).

234. Qualification Standards for Enlistment, Appointment, and Induction, 80 Fed. Reg. 16,269 (proposed Mar. 27, 2015) (to be codified at 32 C.F.R. pt. 66).

235. Sec'y Spencer's Response, *supra* note 21 (claiming that by referencing “Accession Standards . . . mandated by DoD instruction 6130.03,” Military Services and “the

Without connecting its policy and practices to strong national security reasoning, a court could—once again—find DoD’s arguments weak and unacceptable.<sup>236</sup> To avoid further litigation and facilitate retention, DoD is best served to apply its already established retention standards on enlisted commissioning candidates. Applying this standard would have no impact on the other qualification criteria required to become an officer. DoD could still disqualify a Service member for lacking character, maturity, or the ability to obtain a security clearance.<sup>237</sup> However, applying retention standards would avoid the application of an arbitrary and irrational regulation that does not consider the sacrifice and service faithfully executed by the enlisted corps.

### CONCLUSION

The issue faced by Senior Chief Shannon Kent and countless other Service members is not a new phenomenon, but there is no indication DoD willfully seeks to change the status quo.<sup>238</sup> Resistance to commissioning enlisted personnel has a long history deeply rooted in the separation of classes.<sup>239</sup> Although likely unintentional, this *tradition* has only been exacerbated by administrative procedures that have gone unchecked until fairly recently.<sup>240</sup> Retention issues over the last decade support the call for further review of DoD’s medical policy for accessions.<sup>241</sup> If enlisted Service members are eager and otherwise qualified to commission, what incentive do they have

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government can expect a reasonable return on the investment in schooling, training, and education.”).

236. See *Harrison v. Austin*, 597 F. Supp. 3d 884, 903 (E.D. Va. 2022).

237. See *Qualification Standards for Enlistment, Appointment, and Induction*, 80 Fed. Reg. 16,269, 16,271–72 (outlining standards for which DoD could disqualify a Service member).

238. *E.g.*, *supra* text accompanying notes 144–146 (demonstrating the need for courts’ involvement).

239. Nicholas Wood, *Bad Idea: The Officer-Enlisted Divide*, CTR. FOR STRATEGIC & INT’L STUD. (Jan. 7, 2022), <https://defense360.csis.org/bad-idea-the-officer-enlisted-divide/> (stating, “[t]he two-tiered system is based on antiquated and classist British military tradition,” which applied the “purchase system, ensuring that officers were of ‘good family’ and had access to money . . .”).

240. See *Harrison*, 597 F. Supp. 3d at 903 (E.D. Va. 2022); *Complaint for Declaratory and Injunctive Relief, Wilkins v. Austin*, No. 22-1272 (E.D. Va. Nov. 10, 2022).

241. See generally U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106551, NATIONAL SECURITY SNAPSHOT: DOD ACTIVE-DUTY RECRUITMENT AND RETENTION CHALLENGES 2 (2023) (recommending updates to waiver policies—specifically tattoos—to help recruitment of qualified candidates); *Military Personnel Retention*, RAND CORP., <https://www.rand.org/topics/military-personnel-retention.html> (last visited June 20, 2024) (featuring several articles and videos on retention issues).

to continue service if they are rejected for medical standards while otherwise retained? This paradox is not indicative of an organization that takes care of the people who so faithfully serve.

Unchecked agency rulemaking will be declared arbitrary and capricious.<sup>242</sup> Here, the agency promulgated rule—Title 32 of the Code of Federal Regulations, Part 66—has not been updated since 2015 and identifies no safeguards for oversight.<sup>243</sup> Fortunately, Congress began to address concerns over the medical waiver process in the most recent iteration of the National Defense Authorization Act (NDAA).<sup>244</sup> Within the 2024 NDAA, Congress explicitly instructed DoD to not only assess and improve its current medical standards and screening processes<sup>245</sup> but also “take such steps as may be necessary to improve the waiver process . . . .”<sup>246</sup> This demand for oversight is promising and should encourage DoD to ensure it is not promulgating or enforcing arbitrary rules.

The Comment does not intend to assert that all enlisted commissioning candidates should be granted a blanket medical waiver. It is reasonable to expect our pilots to have adequate vision and to expect our divers to have the physical capacity to function without oxygen for extended periods of time. Irrefutably, it is also reasonable to deny a candidate a commission based on questionable character and an inability to lead troops. But it is *unreasonable* to rule out an enlisted commissioning candidate based on physical injuries or illnesses that do not already render them disqualified for *continued service*. DoD medical standards, as applied to already serving personnel, are therefore arbitrary and capricious and should be further scrutinized by the legislative and judicial branches of our government.

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242. See *supra* notes 108, 113 and accompanying text.

243. Qualification Standards for Enlistment, Appointment, and Induction, 81 Fed. Reg. 64,061 (proposed Mar. 23, 2015) (to be codified at 32 C.F.R. pt. 66).

244. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 545, 137 Stat. 136, 265 (2023).

245. *Id.* § 545(a)(1)–(2)(A).

246. *Id.* § 545(a)(2)(B).