

January 2014

Self-Inflicted Wounds: How Military Regulations Prejudice Service Members

Kyndra Miller Rotunda

Ari Freilich

Follow this and additional works at: <http://scholarship.law.umassd.edu/umlr>

 Part of the [Health Law Commons](#), and the [Military, War and Peace Commons](#)

Recommended Citation

Rotunda, Kyndra Miller and Freilich, Ari (2014) "Self-Inflicted Wounds: How Military Regulations Prejudice Service Members," *University of Massachusetts Law Review*: Vol. 9: Iss. 2, Article 8.

Available at: <http://scholarship.law.umassd.edu/umlr/vol9/iss2/8>

This Article is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in University of Massachusetts Law Review by an authorized administrator of Scholarship Repository @ University of Massachusetts School of Law.

Self-Inflicted Wounds: How Military Regulations Prejudice Service Members

Kyndra Miller Rotunda & Ari Freilich

9 U. MASS. L. REV. 422

ABSTRACT

This Article discusses two important facets of Military Regulation and veterans law. First, this Article explores how the Uniform Code of Military Justice treats veterans accused of committing self-injury. Thus, there is a prohibition on, including criminal prosecution of, attempted suicide, which this Article argues exacerbates the issues which many of our brave servicemen and women face upon returning home from combat, often carrying the burden of mental disorders such as post-traumatic stress disorder. Second, this Article delves into Air Force Regulations, which prohibits termination, without cause, once an officer reaches the rank of Major and has served at least fourteen years. Despite this codified prohibition, the Air Force has been terminating these individuals, without cause, and denying them their accrued retirement benefits. This Article argues that this practice is at best prohibited by Military Regulation and at worst unconstitutional.

AUTHORS

Kyndra Rotunda is an Associate Professor of Military & International Law and Executive Director of the Military Law Institute and AMVETS Legal Clinic at Chapman University; a Lecturer at Berkeley School of Law; and author of *HONOR BOUND: INSIDE THE GUANTANAMO TRIALS* (Carolina Academic Press), 2008 and *MILITARY AND VETERANS LAW*, (Thomson West Publishing), 2011.

Ari Freilich is a graduate of Stanford School of Law and presently a Post Doctoral Legal Fellow at the Military Law Institute and AMVETS Legal Clinic at Chapman University.

I.	INTRODUCTION.....	424
II.	THE MILITARY’S POLICY OF CRIMINALIZING ATTEMPTED SUICIDE EXACERBATES THE MILITARY’S SUICIDE EPIDEMIC	425
A.	Civilian Courts’ Modern Consensus.....	427
B.	Military Courts’ Anachronistic Approach	428
C.	The Military’s Highest Court Punts in <i>U.S. v. Caldwell</i>	432
D.	The Tragic Effects of the Military’s Criminal Suicide Policy	432
III.	LEGAL IMPLICATIONS OF THE AIR FORCE’S AD-HOC REDUCTION IN FORCE POLICIES	434
A.	Governing Statutes and Regulations.....	436
B.	Supreme Court Precedent and the Application of <i>Perry v. Sinderman</i>	438
C.	<i>Sinderman</i> Applied to Recent Air Force Terminations	439
D.	Policy Implications	441
IV.	CONCLUSION	441

I. INTRODUCTION¹

It is not surprising that military troops returning from Iraq and Afghanistan encounter reintegration challenges, which can range from suffering with symptoms of post-traumatic stress disorder (PTSD), discovering that they have been the victim of identity theft, or facing illegal home foreclosures.

Unfortunately, many of these problems are unavoidable and are the predictable result of lengthy deployments abroad. However, what is avoidable is the Military's response. The Military, *itself*, is the architect of many significant problems that service members face because of its unusual interpretations of Military Regulations. The Military interprets its regulations to prejudice service members.

This Article discusses and analyzes two policy areas in which the Military has embraced statutory or regulatory interpretations that harm and prejudice its members. The first policy area, analyzed below in Part II, governs the Uniform Code of Military Justice's criminal prohibitions on "wrongful" self-injury. The Article explains and discusses instances in which the Military has prosecuted sick and suicidal soldiers, who are often suffering with post-traumatic stress disorder (PTSD), for the crime of attempting suicide.²

The second policy area, discussed below in Part III, governs the Air Force's treatment of service members who are within six years of retirement and who are protected by Federal Law and Military Regulations from termination without cause once they reach the rank of Major and have served at least fourteen years. The Air Force, contrary to its own Regulations and to the Department of Defense Instructions, has terminated Airmen with fourteen years in service and denied them retirement benefits. These terminations not only prejudice service members, but may also violate the U.S. Constitutional

¹ The AMVETS Legal Clinic, at Chapman University, provides pro bono representation to service members and their families. The discussion and analysis in this Article originate from actual cases, which are now being litigated by Post Doctoral Fellows, and Faculty, in the AMVETS Legal Clinic. For more information about the AMVETS Legal Clinic, see *Law Scribbler: Chapman University Legal Clinic Does Double Duty*, A.B.A. J., 21 (Feb. 2013).

² This section of the Article [Part II] is adapted and excerpted from Ari Freilich, *Fallen Soldier: Military (In)justice and the Criminalization of Attempted Suicide After U.S. v. Caldwell*, 20 BERKELEY J. CRIM. L. 74 (2014).

provisions protecting property rights and guaranteeing procedural due process.³

II. THE MILITARY'S POLICY OF CRIMINALIZING ATTEMPTED SUICIDE EXACERBATES THE MILITARY'S SUICIDE EPIDEMIC⁴

A U.S. Army soldier was more likely to die by suicide last year than from combat, accidents, or illness. Military suicide rates climbed to an all-time high as the Pentagon scrambled for answers to stem the tide. But amid this deadly "suicide epidemic," the Military has clung to an outdated, cruel, and damaging policy of criminalizing suicide attempts and self-injury. This means that the 3500 service members who survived attempted suicide last year may still face years of jail time for succumbing to mental injury and disease.

The Military's numbers tell a tragic story. In July 2012, Defense Secretary Leon Panetta declared in testimony to Congress that a "suicide epidemic" was afflicting the Armed Forces.⁵ "'Something,' he said, 'is wrong.'"⁶ A record 350 active duty service members took their own lives that year, more than double the number from ten years before.⁷ Army suicide rates doubled even faster, in a span of just five years, to become the leading cause of death among Army forces.⁸ Across all the services, hundreds more died of suicide this decade than in twelve bloody years of war in Afghanistan.⁹

³ This topic is explored and discussed more fully in Josh Flynn-Brown, *Analyzing the Tension between Military Force Reductions and the Constitution: Protecting an Officer's Property Interest in Continued Employment*, 46 SUFFOLK L. REV. 1067 (2013).

⁴ This section of the Article is adapted and excerpted from Freilich, *supra* note 2.

⁵ See Kathleen Miller, *Military Faces Suicide 'Epidemic,' Panetta Tells Congress*, BLOOMBERG NEWS (Jul. 25, 2012), <http://www.bloomberg.com/news/2012-07-25/Military-faces-suicide-epidemic-panetta-tells-u-s-lawmakers.html>.

⁶ *Id.*

⁷ See James Dao & Andrew W. Lehren, *Baffling Rise in Suicides Plagues the U.S. Military*, N.Y. TIMES (May 15, 2013), <http://www.nytimes.com/2013/05/16/us/baffling-rise-in-suicides-plagues-us-military.html>.

⁸ Anna Mulrine, *Suicide 'Epidemic' in Army: July was Worst Month, Pentagon Says*, CHRISTIAN SCIENCE MONITOR (Aug. 17, 2012), <http://www.csmonitor.com/USA/Military/2012/0817/Suicide-epidemic-in-Army-July-was-worst-month-Pentagon-says>.

⁹ See IRAQ COALITION CASUALTY COUNT, *Afghanistan Coalition Military Fatalities by Year*, <http://icasualties.org/> (last visited May 8, 2014).

The Military's attempted suicide rate is even higher. The Department of Defense Suicide Prevention Office estimates that for every active duty suicide, 10 more active duty service members attempt to take their lives each year; at least half of those have to be hospitalized for their self-injuries.¹⁰ A Defense Department survey of nearly 30,000 active duty service members from every branch revealed that a staggering 2% of Army, 2.3% of Marines, and 3% of Navy respondents had attempted suicide at some point in their careers.¹¹ In addition, the Pentagon estimated that 950 veterans under VA care attempted suicide *each month* between October 2008 and December 2010.¹²

This tide of suicides has baffled the Military¹³ because, historically, the Military's suicide rate was significantly lower than the civilian rate.¹⁴ Military suicide rates began trending upward in 2004 and crested above the national average in 2008.¹⁵ Along with rising suicide rates, diagnosed cases of PTSD have increased steadily in the Military since 2003.¹⁶ More than one in five veterans of the Iraq and Afghanistan wars have now been diagnosed with PTSD, more than 300,000 men and women in total.¹⁷ Their mental injury from war, PTSD, is "strongly linked to suicidal behavior and it is a major predictor of who transitions from suicidal ideation to attempting suicide."¹⁸ Military physicians have also documented a rising trend in

¹⁰ DEFENSE SUICIDE PREVENTION OFFICE, *Section on Facts About Suicide*, http://www.suicideoutreach.org/about_suicide.htm (last visited Aug. 10, 2014) [hereinafter DEFENSE SUICIDE PREVENTION OFFICE].

¹¹ *Id.*

¹² Mulrine, *supra* note 8.

¹³ See Dao & Lehren, *supra* note 7.

¹⁴ DEFENSE SUICIDE PREVENTION OFFICE, *supra* note 10.

¹⁵ *Id.*

¹⁶ See FACE THE FACTS USA, *Shocking PTSD, Suicide Rates for Vets* (Jun. 6, 2013), <http://www.facethefactsusa.org/facts/the-true-price-of-war-in-human-terms/>.

¹⁷ Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 1, 13 (2004).

¹⁸ E.A. Selby et al, *Overcoming the Fear of Lethal Injury: Evaluating Suicidal Behavior in the Military through the Lens of the Interpersonal—Psychological Theory of Suicide*, 30 CLINICAL PSYCHOL. REV. 298, 301 (2010); William Hudenko & Tina Crenshaw, *The Relationship Between PTSD and Suicide*, DEPARTMENT OF VETERANS AFFAIRS NATIONAL CENTER FOR PTSD,

non-suicidal self-injuries, like habitual self-cutting, attributed to “long, repeated combat tours” and “strong feelings of desperation.”¹⁹

However, while the Military has acknowledged this growing suicide epidemic and taken steps to ameliorate the problem, it has left in place cruel and archaic regulations that punish service members who survive attempted suicide. It has continued to involuntarily separate or prosecute its sick and injured under criminal codes—Articles 115 and 134 of the Uniform Code of Military Justice (UCMJ)—that penalize attempted suicide and self-injury. Article 115 criminalizes “malingering,” which includes “intentional infliction of self-injury for the purpose of avoiding work, duty, or service.”²⁰ Article 134, called “the general article,” is an extraordinarily broad and unusual catch-all, criminalizing “all disorders and neglects to the prejudice of good order and discipline in the Armed Forces” and “all conduct of a nature to bring discredit upon the Armed Forces.”²¹ The Manual for Courts-Martial lists “self-injury without intent to avoid service” as a paradigmatic example of conduct punishable under this code.²² Military courts have continued to interpret those criminal statutes very broadly up to the present day.

A. Civilian Courts’ Modern Consensus

The legal history of suicide demonstrates that military justice has fallen woefully out of step with developments in civilian courts in this area. Most American civilian jurisdictions decriminalized attempted suicide by the end of the horse and buggy era.²³ Over fifty years ago, the Model Penal Code’s drafters wrote, “We think it clear that [attempted suicide] is not an area in which the penal law can be effective and that its intrusion on such tragedies is an abuse.”²⁴ The

<http://archive.is/UbO2> (last visited May 8, 2014) (citing studies that find a “robust relationship” between PTSD and suicide).

¹⁹ PATRICIA A. ADLER, *THE TENDER CUT: INSIDE THE HIDDEN WORLD OF SELF-INJURY* 37 (2011).

²⁰ 10 U.S.C. § 915 (2012).

²¹ 10 U.S.C. § 934 (2012).

²² See MANUAL FOR COURTS-MARTIAL UNITED STATES IV-60 (2008), available at <http://www.jag.navy.mil/documents/mcm2008.pdf>.

²³ See Thomas J. Marzen et al., “Suicide: A Constitutional Right?”—*Reflections Eleven Years Later*, 35 DUQ. L. REV. 261, 264 (1996).

²⁴ MODEL PENAL CODE § 201.5 cmt. at 1 (Tentative Draft No. 9, 1959).

drafters also rejected the criminalization of non-suicidal self-injury.²⁵ Subsequent Model Penal Code drafters went even further declaring that:

[C]riminal punishment is singularly inefficacious to deter attempts to commit suicide It seems preposterous to argue that the visitation of criminal sanctions upon one who fails in the effort is likely to inhibit persons from undertaking a serious attempt to take their own lives There is a certain moral extravagance in imposing criminal punishment on a person who has sought his own self-destruction, who has not attempted direct injury to anyone else, and who more properly requires medical or psychiatric attention.²⁶

No American jurisdiction has criminally punished a suicide attempt since 1961,²⁷ and today no state has any law criminalizing attempted suicide.²⁸ As the California Supreme Court wrote thirty years ago, “[A]ll modern research points to one conclusion about the problem of suicide—the irrelevance of the criminal law to its solution.”²⁹ This, the Federal Ninth Circuit said, is “the modern consensus” in this area.³⁰

B. Military Courts’ Anachronistic Approach

However, the modern Military has not adopted that consensus and has continued to criminalize self-injury. After the adoption of the UCMJ in 1951, military courts were initially hostile to the notion of punishing the suicidal, even though military law had long punished self-injury as a violation of the “general article.”³¹ In the 1955 case of

²⁵ See MODEL PENAL CODE § 211.1 (1985) (defining “assault” to include both assault and battery, where one “attempts to cause or purposefully, knowingly, or recklessly causes bodily injury to *another*”) (emphasis added).

²⁶ MODEL PENAL CODE § 210.5 cmt. at 2 (Official Draft & Revised Commentaries 1980).

²⁷ *Id.*; *Compassion in Dying v. Washington*, 79 F.3d 790, 859 n.14 (9th Cir. 1996) (“Research indicates that the last prosecution in the U.S. for attempted suicide probably occurred in 1961. The North Carolina Supreme Court relied on the English common law to determine that attempted suicide was punishable as a misdemeanor.”) (citing *State v. Willis*, 121 S.E.2d 854 (N.C. 1961)).

²⁸ *Compassion in Dying*, 79 F.3d at 810.

²⁹ In re *Joseph G.*, 34 Cal. 3d 429, 434 (1983) (quoting David S. Markson, *The Punishment of Suicide*, 14 VILL. L. REV. 463, 473 (1969)).

³⁰ *Compassion in Dying*, 79 F.3d at 847.

³¹ Capt. Richard L. Dunn, USAF, *Aspects of Malingering*, 17 A.F. L. REV. 1, 2 (1975).

United States v. Jacobs, for example, the Army Board of Review held that “intentional self-injury,” without more, was *not* a cognizable offense under military law.³² The Board required an additional showing that a service member’s self-injury actually impaired his ability to perform military duties in order to justify criminal punishment.³³

The Air Force Court of Military Review followed that same approach one week later in *United States v. Walker* and explicitly invalidated prosecutions for attempted suicide where there was no proof of fraudulent intent.³⁴ In that case, the accused had been convicted of “wrongfully and willfully attempting to commit suicide” under Article 134 after he consumed 100 sleeping pills.³⁵ Like the Army board in *Jacobs*, the *Walker* court concluded that “attempted suicide” was not, without more, a cognizable offense under military law.³⁶ The court attempted to limit commands’ unfettered discretion to prosecute crimes under Article 134, holding that courts “cannot grant to the services unlimited authority to eliminate vital elements from . . . offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under [the general article].”³⁷ After the *Walker* case, no further prosecutions of attempted suicide cases were reported for over a decade.³⁸

However, this measured approach did not hold. In the 1968 case of *United States v. Taylor*, the Military’s highest court signaled a serious shift when it approved the Article 134 conviction of a Seaman Recruit who superficially slashed his arms with a razor blade in order to “outdo the performance” of another serviceman who had engaged in the same conduct.³⁹ Though the Government never alleged that Taylor had intended to evade military duty through this act—or that he had genuinely attempted suicide—the U.S. Court of Military Appeals declared that the accused’s mental state and purpose were essentially irrelevant in Article 134 prosecutions. The court held that Article 134

³² *United States v. Jacobs*, 20 C.M.R. 458, 460 (A.B.R. 1955).

³³ *Dunn*, *supra* note 31, at 5.

³⁴ *Id.* at 343.

³⁵ *United States v. Walker*, 20 C.M.R. 931, 933 (A.B.R. 1955).

³⁶ *Id.* at 934.

³⁷ *Id.* at 935.

³⁸ *Dunn*, *supra* note 31, at 5.

³⁹ *U.S. v. Taylor*, 38 C.M.R. 393, 395 (C.M.A. 1968).

had “an objective orientation . . . calculated to preserve good order and discipline, without necessarily considering [the accused’s] particular mental attitude.”⁴⁰ Therefore, so long as the accused’s self-injury had a direct prejudicial effect upon the good order and discipline of the Armed Forces, he could be prosecuted for self-injury whether his purpose was wrongful or not.⁴¹ Where government prosecutors lacked sufficient evidence to charge the suicidal under Article 115 as duty-shirking malingerers, now they could cite the external effects of a failed suicide attempt to prosecute and punish the mentally ill and injured.

The Court of Military Appeals faced just that situation in *United States v. Ramsey*, where the court, citing *Taylor*, upheld the Article 134 conviction of an Army Specialist who shot himself in the shoulder while serving in Operation Desert Storm.⁴² Ramsey was arguably not genuinely suicidal. He had shot himself with a single round in a nonlethal area just after arriving in a combat zone, and his explanation for that conduct shifted multiple times.⁴³ However, the *Ramsey* court conducted no inquiry into Ramsey’s intent and sanctioned criminal punishment under Article 134 on the premise that he was in fact genuinely suicidal.⁴⁴ Because Ramsey admitted that his suicide attempt “killed the morale of his unit” and made his colleagues “work a little harder to try to fill the position that he was supposed to be filling,” the court ruled that he could be punished criminally for prejudicing good order and discipline.⁴⁵ The *Ramsey* court established a notably low bar for criminal prosecution. Commanders could allege that almost any suicide attempt affected the morale of those who knew and nearly lost a friend and colleague; moreover, treatment and hospitalization for survivors would leave duty stations temporarily unfilled. News that a service member had come down with measles or survived a car wreck might have the same prejudicial effect. In sum, these cases indicated that under Article 134, attempted suicide was increasingly looking like a strict liability offense.

⁴⁰ *Id.* at 395.

⁴¹ *Id.*

⁴² *U.S. v. Ramsey*, 40 M.J. 71, 75 (C.M.A. 1994).

⁴³ *Id.* at 72.

⁴⁴ *Id.* at 75.

⁴⁵ *Id.* at 74.

In *United States v. Johnson*, the U.S. Court of Military Appeals vastly broadened the scope of self-injuries punishable under Article 115, as well. The *Johnson* court approved the Article 115 prosecution of an Army Staff Sergeant who, to avoid facing a possible court-martial trial on other charges, attempted to hang himself while injecting a near-fatal dose of heroin.⁴⁶ The court accepted Johnson's suicide attempt as genuine but held that he could be prosecuted for fraudulently attempting to avoid work, duty, or service because he admitted that he attempted suicide in order to avoid the shame and embarrassment of a possible trial.⁴⁷ The court stated that Johnson's work, duty, and service *included* his "availability for prosecution" by military authorities.⁴⁸ Thus, his desire to escape that general "availability" amounted to criminally punishable duty-shirking. "Usually attempts to commit suicide are not thought of in connection with malingering," the court acknowledged. Commenting further, the court stated:

Probably this is because malingering has often been a tactic employed to extend, rather than shorten, life expectancy—and especially so in a combat situation. However, we perceive nothing in the definition of malingering which precludes prosecution for attempted suicide if the 'purpose' of the attempt is avoidance of 'duty or service.'⁴⁹

The court cited approvingly even broader language from its earlier opinion in *United States v. Mamaluy*, stating that Article 115 "unquestionably . . . intended to proscribe a self-inflicted injury which would prevent the injured party from being available for the performance of *all* military tasks."⁵⁰ The *Mamaluy* court had found that a suicidal service member's hospitalization, itself, was proof of the service member's purpose to shirk military duty: "If by injuring himself he forces the Government to confine him in a hospital, he has breached his obligation to the service and successfully escaped the performance of many [m]ilitary duties assigned."⁵¹

⁴⁶ *United States v. Johnson*, 26 M.J. 415, 417 (C.M.A. 1988).

⁴⁷ *Id.*

⁴⁸ *Id.* at 417.

⁴⁹ *Id.*

⁵⁰ *United States v. Mamaluy*, 27 C.M.R. 176, 178 (1959) (emphasis added).

⁵¹ *Id.*

C. The Military's Highest Court Punts in *U.S. v. Caldwell*

In July 2012, the same month the Defense Department declared that a “suicide epidemic” afflicted the Armed Forces,⁵² the Military’s highest court granted review of the following question in *United States v. Caldwell*: whether a bona fide suicide attempt remained criminally punishable under military law.⁵³ Two years earlier, Marine Corps Private Lazzaric Caldwell was convicted at special court-martial pursuant to his guilty plea on a charge of “wrongful self-injury” under Article 134, for slitting his wrists in “a genuine suicide attempt.”⁵⁴ The trial judge acknowledged that the self-injury offense was an “odd charge because . . . it is basically criminalizing an attempted suicide,”⁵⁵ but he approved a court-martial sentence that included confinement for six months and a punitive misconduct discharge,⁵⁶ despite evidence that the Marine suffered diagnosed depression and PTSD.⁵⁷

Though the *Caldwell* court’s April 2013 opinion narrowly rejected a strict liability interpretation of Article 134’s self-injury prohibition and vacated Private Caldwell’s conviction, the court dodged the central question before it and declined to invalidate criminal prosecution of the suicidal.⁵⁸ Alarming, the minority’s view that a depressed and suicidal veteran may be imprisoned for causing medical personnel to expend resources to save him lost by just a single vote.⁵⁹

D. The Tragic Effects of the Military’s Criminal Suicide Policy

In most respects, the modern Military has recently begun to approach suicide with informed compassion, recognizing that treatment is the best deterrent. It has initiated more than 900 suicide prevention programs and anti-stigma campaigns to promote mental

⁵² See Miller, *supra* note 5.

⁵³ *United States v. Caldwell*, 72 M.J. 137, 138 (C.A.A.F 2013).

⁵⁴ *Id.*

⁵⁵ *Id.* at 139 (citation omitted).

⁵⁶ *Id.*

⁵⁷ See *id.* at 145 & n.3 (Ryan, J., dissenting).

⁵⁸ *Id.* at 138 (majority opinion).

⁵⁹ *Id.* at 142 (Ryan, J., dissenting) (stating that the court overstepped its bounds by not enforcing strict liability).

health care,⁶⁰ especially for the 300,000 veterans of Iraq and Afghanistan who have already been diagnosed with PTSD.⁶¹ The Army's Suicide Prevention Strategy in 2012 called for "safe and positive messages addressing mental illness and suicide . . . to help reduce prejudice and promote help seeking."⁶²

But the Military is marching forward with one foot and backward with the other. Criminal prosecutions for attempted suicide and self-injury made many of the Military's therapeutic efforts ineffective and exacerbated this tragic problem. The Military's "safe and positive messages" addressing suicide obviously fall on deaf ears when they are still joined with the unmistakable threat of criminal punishment. While a soldier injured by shrapnel blast has no reason to fear punishment for his wound of war, his PTSD-stricken comrade-in-arms is likely confessing to a crime when he tells his psychiatrist about his suicidal behavior. After he admits to suicidal conduct, his psychiatrist, according to Military Regulations, would be compelled to stop the session on the spot to warn her patient of his rights against self-incrimination under Article 31.⁶³ The psychiatrist's subsequent questions about her patient's suicidal ideation and intent would be an essential part of the diagnostic process and would be crucial to arriving at a prescribed course of treatment, therapy, and rehabilitation. However, those same questions would be indistinguishable from Military Police interrogators' and might be used against the serviceman in a criminal court-martial.⁶⁴ Because health record privacy protections do not apply to the suicidal, that admission could be shared with his command and used against him at trial.⁶⁵ Without

⁶⁰ See THE CHALLENGE AND THE PROMISE: STRENGTHENING THE FORCE, PREVENTING SUICIDE, AND SAVING LIVES: FINAL REPORT OF THE DEPARTMENT OF DEFENSE TASK FORCE ON THE PREVENTION OF SUICIDE BY MEMBERS OF THE ARMED FORCES 42 (2010), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA529502>.

⁶¹ See Hoge et al., *supra* note 17, at 13.

⁶² *Id.*

⁶³ See *United States v. Calandrino*, 12 C.M.R. 689, 692–95 (A.F.B.R. 1953) (stating that a psychiatrist who suspected his patient of malingering should have warned him of his testimonial rights prior to initiating the interview).

⁶⁴ See *id.* at 689 ("Accordingly, the accused became 'a person suspected of an offense' within the meaning of UCMJ, Art 31, during the first interview and compliance with the cited article was required.").

⁶⁵ See 32 C.F.R. § 637.9 ("Medical records will remain under the control of the records custodian who will make them available for courts-martial or other legal

the hassle of a trial, the Military could also dishonorably discharge him, denying him access to the medical and mental health care he desperately needs.

No wonder so many choose to suffer in silence.

III. LEGAL IMPLICATIONS OF THE AIR FORCE'S AD-HOC REDUCTION IN FORCE POLICIES⁶⁶

While criminalizing suicide is an unusually bizarre example of the Military interpreting its own provisions to the detriment of service members, unfortunately it is not an isolated one. This section discusses another example in which the Military failed to follow its own explicit regulations, which resulted in the unjust and unlawful termination of 157 Air Force Officers.

In November 2011, the U.S. Air Force terminated 157 Air Force Officers who had been promoted to Major and had served at least fourteen years on active duty.⁶⁷ The Air Force had not selected them for promotion to Lieutenant Colonel; however, under Air Force Regulations, Department of Defense Policy, and Federal Law, that lone fact should not have led to their termination.⁶⁸ Federal Law and Military Regulations allow officers to remain in military service even if they were not selected for promotion to the next highest rank, so long as they have achieved the rank of Major, have completed at least fourteen years of military service, and do not have derogatory information in their personnel files.⁶⁹ Derogatory information includes things like conviction of crimes (such as driving under the influence)

proceedings. Procedures for obtaining information from medical records are contained in AR 40-66.” Recent changes to AR 40-66 occurred in 2008 that allow for disclosure of medical records when a soldier is accused of suicidal behavior. See U.S. Dep’t of Army, Reg. 40-66 ¶ 2-4 a.(2)(a), Medical Record Administration and Healthcare Documentation (2010), available at http://www.apd.army.mil/pdffiles/r40_66.pdf.

⁶⁶ For a thorough discussion of this issue, see Flynn-Brown, *supra* note 3.

⁶⁷ Joshua Flynn-Brown & Kyndra Miller Rotunda, *The Air Force Grounds Its Officers*, WALL ST. J. (Dec. 28, 2011), <http://online.wsj.com/news/articles/SB10001424052970204224604577030221768840762>.

⁶⁸ *Id.*; Mark Thompson, *Air Force: Firing for Effect?*, TIME (Jan. 2, 2012), <http://nation.time.com/2012/01/03/air-force-firing-for-effect/>.

⁶⁹ See Flynn-Brown, *supra* note 3, at 1068 (citing and discussing H.R. REP. NO. 96-1462, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 6333, 6343).

⁶⁹ *Id.*

or engaging in misconduct that results in a letter of reprimand or non-judicial punishment.⁷⁰

Regarding the termination of the 157 officers, the Secretary of the Air Force instructed the selective continuation board to apply only a five year protective window instead of the six year protective window provided by law.⁷¹ This meant that Majors who had at least fifteen years in service were allowed to continue their careers, but those with fourteen years in service (contrary to the governing law and regulations) could not, regardless of whether the officers had derogatory information in their personnel files.⁷² In fact, many of the 157 did not have derogatory information in their records and were exemplary officers.⁷³ Their careers were cut short when they were very near retirement and rightfully within the protective window. Consequently, the Air Force unlawfully denied these Officers their retirement pensions and medical benefits.⁷⁴ Why would the Air Force do such a thing? Terminating these personnel allows the Air Force to avoid its normal retirement obligations. Yes, the Air Force's motivation is the prosaic one of saving money by breaking promises to its military pilots.

The Secretary of the Air Force's unilateral decision to narrow the protective window from six years to five years raises several difficult legal questions. A most significant question is whether there is any room within existing law that would allow the Secretary to do this. Related to that is the question of whether the Secretary of the Air Force abused whatever discretion the law allows. Additionally, this retroactive change in the interpretation of the regulation raises the issue of whether the Air Force Officers have any legal claims stemming from their reasonable expectation that they could continue in service after serving for at least fourteen years and reaching the rank of Major.

What follows is a brief analysis and discussion of the governing law as it applies to this unusual situation. Ultimately, this Article

⁷⁰ *Id.* at 1077 & n.66.

⁷¹ The Selective Continuation Board considers promotion and retention of Officers whom the Air Force has "passed over" for promotion, i.e., declined to promote. See Flynn-Brown, *supra* note 3, at 1069.

⁷² *Id.*

⁷³ Flynn-Brown & Rotunda, *supra* note 67; Thompson, *supra* note 68.

⁷⁴ Flynn-Brown & Rotunda, *supra* note 67; Thompson, *supra* note 68.

concludes the following: that the applicable federal law and governing regulations are clear and thus leave no room for an alternative interpretation; that the Secretary acted unilaterally and without authority; and that terminating these Officers, contrary to the Air Force's written policy, violated their Constitutional property rights by denying them continued employment and violated their Constitutional procedural rights by failing to afford them a meaningful opportunity to be heard before their employment with the Air Force was terminated.

A. Governing Statutes and Regulations

The Military is not required to follow the provisions of the Employee Retirement Security Act (ERISA), which protects civilian retirement benefits and requires employers to provide some percentage of vested pension benefits after anywhere from three to seven years of employment.⁷⁵ Military retirement benefits do not vest at seven years, as would ordinarily occur in the civilian system. However, so long as the officers promote to the rank of Major and serve on active duty for at least fourteen years, something similar to vesting occurs. Military Regulations provide a safe harbor that allows officers to continue their military service until they have completed at least twenty years of active duty military service and are eligible for retirement.⁷⁶ Essentially, it protects them from being terminated without benefits on the eve of retirement.

Federal law, specifically The Defense Officers Personnel Management Act (DOPMA),⁷⁷ broadly governs personnel and promotion activities of officers within the Armed Services. Annotations from the floor debate at the time it was enacted in 1980 make clear that Congress intended to soften the rigid "up or out" policy of the Military by providing some expectation of continued employment after officers attained a certain rank and number of years in service. The House of Representatives Report to the Committee on Armed Services explains and interprets DOPMA by stating that an

⁷⁵ For a general discussion, and comparison to military benefits model, see Joshua Flynn-Brown & Joel Marrero, *For Those Who Protect Us, Fair Retirement Regulations Are In Order*, L. A. DAILY J., Feb. 22, 2012.

⁷⁶ See Flynn-Brown, *supra* note 3, at 1068 (citing and discussing H.R. REP. NO. 96-1462, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 6333, 6343).

⁷⁶ *Id.* at 1074.

⁷⁷ Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980).

officer “on attaining permanent O-4 grade, has a career expectation of twenty years in service” and after competing twenty years “is eligible for immediate retirement.”⁷⁸ The same report also makes clear that budget or financial constraints were not a “principal aim.”⁷⁹

The notion of a safe harbor for Officers reaching the rank of Major who have served at least fourteen years in service is further reflected in Department of Defense Instructions and Military Regulations, which explicitly guarantee that Majors who are within six years of retirement ordinarily will be continued on active duty, stating, “Commissioned officers on the Active Duty List who hold the grade of O-4 [Major], who are subject to discharge . . . shall normally be selected for continuation . . . if the officer will qualify for retirement within six years of the date of such continuation.”⁸⁰ The only stated exception to this rule is when derogatory information exists in an Officer’s personnel file.⁸¹

Until recently, every branch of the Military, including the Air Force, has interpreted DOPMA and relevant Department of Defense Instructions as providing a protective window that begins at the fourteenth year in service.⁸² In fact, Army regulations specifically *mandate* the continuation of Majors with at least fourteen years in service.⁸³ It was not until recently that the Air Force, and specifically Air Force Secretary Donnelly, unilaterally changed the protective window from six years to five years. That is, had the 157 Air Force Officers joined the Army fourteen years ago—or any other branch of service except for their Air Force—they would have been allowed to remain in Military service and earn a full retirement. It is clear that the Air Force acted capriciously in treating these Officers disparately.

⁷⁸ See Flynn-Brown, *supra* note 3, at 1068 (citing and discussing H.R. REP. NO. 96-1462, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333, 6343).

⁷⁹ *Id.* at 1074.

⁸⁰ H.R. REP. NO. 96-1462, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333, 6343.

⁸¹ See Flynn-Brown, *supra* note 3, at 1077 n.66.

⁸² *Id.* at 1081.

⁸³ *Id.* at 1072 & n.36 (citing DEP’T OF THE ARMY, DA MEMO 600-2, POLICIES AND PROCEDURES FOR ACTIVE-DUTY LIST OFFICER SELECTION BOARDS app. C, § C-2(a) (2006)).

Interestingly, after the case involving the 157 Air Force Officers received significant media attention,⁸⁴ the Department of Defense amended its Instruction, and adjusted the six year window down to a four year window.⁸⁵ However, this does not change the fact that the Air Force violated its own Instructions that existed at the time.⁸⁶ Changing the Instruction after the fact does not cure the legal violation at the time; it only exacerbates the problem. If the Air Force Secretary already enjoyed wide discretion, why change the Instruction at all?

B. Supreme Court Precedent and the Application of *Perry v. Sinderman*

The plight of the terminated Airmen is analogous to a case that the Supreme Court decided several years ago which supports the proposition that what the Air Force has done is unconstitutional—taking away a property interest without paying just compensation. The case, *Perry v. Sinderman*, involved a college professor whose employment contract was not renewed by the college where he worked.⁸⁷ Professor Sinderman served as a professor for ten years. During his last four years of employment, he served under a series of one year contracts.⁸⁸ The college then decided not to renew his contract but failed to provide an explanation for its refusal.⁸⁹ The college claimed that it had virtually no duty or obligation to the professor.⁹⁰

Professor Sinderman disagreed, claiming that the college had created something of a de facto tenure system based on peculiar wording in its Faculty Handbook which stated, “The Administration of the College wishes the faculty member to feel that he has permanent

⁸⁴ See Flynn-Brown & Rotunda, *supra* note 67; Thompson, *supra* note 68; Caroline May, *Military Advocates Decry Illegal Terminations*, THE DAILY CALLER (Nov. 25, 2011), <http://dailycaller.com/2011/11/25/military-advocates-decry-illegal-early-terminations-of-157-air-force-majors/#!>; Caroline May, *US Air Force Face Litigation for Illegal Termination of 157 Officers*, THE DAILY CALLER (Dec. 2, 2011), <http://dailycaller.com/2011/12/02/us-air-force-faces-litigation-for-illegal-termination-of-157-officers/>.

⁸⁵ Flynn-Brown, *supra* note 3, at 1079.

⁸⁶ *Id.*

⁸⁷ *Perry v. Sinderman*, 408 U.S. 593, 594–95 (1972).

⁸⁸ *Id.* at 594.

⁸⁹ *Id.* at 595.

⁹⁰ *Id.*

tenure as long as his teaching services are satisfactory[,] as long as he displays a cooperative attitude . . . and as long as he is happy in his work.”⁹¹

Professor Sinderman bolstered his argument by relying on guidelines enacted by the Coordinating Board of the Texas College and University System which guaranteed that teachers employed in the state or university system for seven years or more have some form of job tenure.⁹² The Board’s guidelines defined tenure as “assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated.”⁹³

The Supreme Court agreed with Professor Sinderman and rejected the notion that only a rigid, technical form would bind the college.⁹⁴ The Court found that Professor Sinderman did have a property interest in continued employment based on “existing rules and understandings” that were generally expressed in the Faculty Handbook and in the Texas University System’s guidelines regarding tenure.⁹⁵ The Court found that Mr. Sinderman had a property interest in reemployment based on the implied contract between Mr. Sinderman and the college.⁹⁶ Even though the college did not have a formal tenure plan, the Court agreed that the college may have created such a system in practice.⁹⁷ The Court said that these employment guarantees came in the form of explicit guarantees, such as the employer’s handbook, and implicit guarantees, such as the words and conduct by college officials and administrators, which could have led Professor Sinderman to reasonably believe that his job was secure.⁹⁸

C. *Sinderman* Applied to Recent Air Force Terminations

One may argue that a case arising in an academic context should not bind the U.S. Military. However, later cases make clear that the

⁹¹ *Id.* at 600.

⁹² *Id.*

⁹³ *Id.* at 600 n.6.

⁹⁴ *Id.* at 601 (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

⁹⁵ *Id.*

⁹⁶ *Id.* at 602.

⁹⁷ *Id.*

⁹⁸ *Id.*

holding in *Sinderman* applies to cases arising in the military context.⁹⁹ The Air Force may also have created legally binding obligations of continued employment to its Officers through implicit and explicit guarantees of continued employment.

For example, Air Force Publications explicitly guaranteed continued employment to Majors serving at least fourteen years in service. The Air Force's Commissioning Kit, which the Air Force provides to all Reserve Officer Training Corps Candidates, states, "Majors and above who are not selected for promotion are continued on active duty until eligible for retirement or up to 20 years for Majors However, in order to reduce overmanning, special boards can select some officers for early retirement."¹⁰⁰ This language explicitly guarantees continued employment for Majors with at least fourteen years in service until they are eligible for retirement, except in cases of overmanning, which would result in the Officer receiving an early retirement. The stated policy does not suggest, or even contemplate, that the Air Force would simply terminate Officers, leaving them with no retirement or long term medical benefits. In fact, it states the opposite. Officers could not have predicted that the Air Force would cut short their careers without benefits because the Air Force had explicitly said otherwise.

Further, the Officers in this instant case received e-mail communications from the Air Force's Personnel Office advising them that "based on precedent" they would be continued on active duty because they had at least fourteen years in service.¹⁰¹ At first, the Air Force acted consistently with this precedent. The Air Force had already issued orders for these officers to move to their next duty assignments.¹⁰² In some cases, the Air Force had already moved

⁹⁹ See Flynn-Brown, *supra* note 3, at 1073 (citing *Yamashita v. England*, No. 02-5176, 2002 WL 31898182 (D.C. Cir. Dec. 23, 2002); *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991); *Pauls v. Sec'y of the Air Force*, 457 F.2d 294 (1st Cir. 1972); *Spadone v. McHugh*, 842 F. Supp. 2d 295 (D.D.C. 2012); *Wilhelm v. Caldera*, 90 F. Supp. 2d 3 (D.D.C. 2000), *aff'd*, 6 F. App'x 3 (D.C. Cir. 2001)).

¹⁰⁰ See Flynn-Brown, *supra* note 3, at 1071 & n.31 (citing and discussing AIR FORCE ROTC CURRICULUM SECTION, TICKET: THE INITIAL COMMISSIONING KIT OF ESSENTIAL TRUTHS 42 (1996)).

¹⁰¹ See *id.* at 1071 n.32 ("[T]he implicit understandings included promises by personnel command counselors that officers within six years of retirement would be continued on active duty.").

¹⁰² See *id.*

Officers' household goods to new location assignments, when the Air Force unexpectedly and abruptly announced that the Airman would not be moving to another assignment but instead would be terminated.¹⁰³

In another instance, the Officer—a Pilot who had flown 269 combat missions¹⁰⁴—was on his way to Iraq when he learned that the Air Force was terminating his employment.¹⁰⁵ Not only did the Air Force explicitly guarantee continued employment, it initially acted in accordance with that guarantee, to the detrimental reliance of military families.

D. Policy Implications

Why does it matter? After all, these officers had received pay and benefits for at least fourteen years while they served. It matters because of the Military's all-or-nothing retirement system. Unless service members serve at least eighteen years, they receive neither a retirement pension nor benefits. Many of these families detrimentally relied on explicit and implicit promises made to them by the Air Force. The loss to these military families is significant. Furthermore, these terminations without pension and without medical benefits violated the law and may also have violated Constitutional provisions protecting property interests and guaranteeing due process of law.

IV. CONCLUSION

It is ironic that sometimes the Military is the primary contributor to problems faced by service members. This Article is based on two cases, which are currently being litigated. Both cases clearly demonstrate instances in which the Military opts for interpretations of its own rules and regulations to the detriment of service members, even when other interpretations are available that are more aligned with its own precedent. It is well known that suicide and unemployment are growing problems facing our Military personnel, but many people would be surprised to learn that the Military itself creates the very problems it complains about. One wonders whether

¹⁰³ *See id.*

¹⁰⁴ Thompson, *supra* note 68.

¹⁰⁵ *Id.* (“Major Kale Mosley was getting ready to board his KC-135 refueling tanker for Iraq last June when a commander pulled him aside. He was being fired . . .”).

the Band of Brothers (and Sisters) exists in today's U.S. Military, or whether it is an ideal of the distant past.