



# THE INVISIBLE THREAT: HOW INCREASING MENTAL ILLNESS RATES AMONG AMERICA’S YOUTH POPULATION IS A NATIONAL SECURITY CRISIS

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## INTRODUCTION

The COVID-19 pandemic's perceptible impact on society has been largely recognized. Since the pandemic commenced in March 2020, the United States has recorded approximately ninety-five million COVID-19 cases and logged more than a million COVID-19-related deaths.<sup>1</sup> Less obvious, and far less scrutinized, though no less alarming, is the pandemic's impact on our nation's mental health. Recent studies indicate that anxiety and depression diagnoses increased in 2020, especially within younger population cohorts.<sup>2</sup> Approximately 34 percent of Americans born between 1997 and 2012—commonly referred to as Generation Z—believed that their mental health was worse in 2020 than it was in 2019, and roughly 82 percent indicated they could have used additional emotional support.<sup>3</sup>

America's mental health crisis comes at a time in which every branch of the United States military struggles to achieve its recruitment goals.<sup>4</sup> Reports indicate that only “23 percent of Americans ages 17–24 are qualified to serve without a waiver,” and of those eligible to serve, “only 9 percent . . . ha[ve] any inclination to do so.”<sup>5</sup> One explanation for this dynamic is that military service and its dubious outcomes are being perceived in an increasingly negative light.<sup>6</sup> Army Secretary Wormuth argued that the Department of Defense (“DoD”) needed to “do a better job of breaking down . . . the

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<sup>1</sup> See *COVID Data Tracker*, CDC, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Sept. 26, 2022).

<sup>2</sup> See generally Angel Vahratian et al., *Symptoms of Anxiety or Depressive Disorder and Use of Mental Health Care Among Adults During the COVID-19 Pandemic—United States, August 2020–February 2021*, 70 *Morbidity and Mortality Wkly. Rep.*, CDC 490–94 (Apr. 2, 2021).

<sup>3</sup> *Stress in America 2020: A National Mental Health Crisis*, AM. PSYCH. ASS'N 5 (Oct. 2020), <https://www.apa.org/news/press/releases/stress/2020/report-october>.

<sup>4</sup> See Courtney Kube & Molly Boigon, *Every Branch of the Military is Struggling to Make its 2022 Recruiting Goals, Officials Say*, NBC NEWS (June 27, 2022) <https://www.nbcnews.com/news/military/every-branch-us-military-struggling-meet-2022-recruiting-goals-officia-rcna35078>.

<sup>5</sup> *Id.*

<sup>6</sup> See Heather Mongilio, *Tough Military Recruiting Environment is About More than Low Unemployment, Experts Say*, USNI NEWS (Dec. 1, 2022), <https://news.usni.org/2022/12/01/tough-military-recruiting-environment-is-about-much-more-than-low-unemployment-experts-say>.

misperceptions . . . about serving in the military, which are understandable . . . given that we've been at war, essentially, for the last 20 years.”<sup>7</sup> Regardless of those issues, a significant underlying problem impacting military recruitment stems from stringent and rigid mental health standards. Current enlistment policies disqualify individuals with either active mental health diagnoses or a history of certain mental health disorders.<sup>8</sup> However, as the Defense Health Board recently stated, “the relationship between mental health conditions and military success is much more complicated than” previously thought.<sup>9</sup>

As more enlistment-age individuals seek mental health treatment and are subsequently diagnosed with a mental illness, the number of individuals both eligible and willing to serve will decrease. Therefore, DoD must adjust its narrow enlistment standards to reflect evolving mental illness classifications and shifting youth demographics.

Part I of this comment explores the history and state of America's mental health, particularly among its youth. Part II of this paper discusses DoD Instruction 6130.03, Section 6: Disqualifying Conditions, and subsection 6.28, Learning, Psychiatric, and Behavior Disorders, which “establishes physical and medical standards for appointment, enlistment, or induction into the military.”<sup>10</sup> Part II also assesses the impact of mental illness on military success and identifies potential problems stemming from DoD Instruction 6130.03. Part III explores the legal reasoning behind the end of *Don't Ask, Don't Tell* and applies the Supreme Courts' rationale to DoD Instruction

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<sup>7</sup> Ian Thomas, *The U.S. Army is Struggling to Find the Recruits it Needs to Win the Fight Over the Future*, CNBC (Oct. 26, 2022), <https://www.cnbc.com/2022/10/26/us-army-struggles-to-find-recruits-its-needs-to-win-fight-of-future.html>.

<sup>8</sup> See DEP'T OF DEFENSE, INSTRUCTION 6130.03, VOLUME I: MEDICAL STANDARDS FOR MILITARY SERVICE: APPOINTMENT, ENLISTMENT, OR INDUCTION, SECTION 6: DISQUALIFYING CONDITIONS, SUBSECTION 6.28 LEARNING, PSYCHIATRIC, AND BEHAVIORAL DISORDERS 50–52 (Nov. 16, 2022) [hereinafter INSTRUCTION 6130.03].

<sup>9</sup> See DEFENSE HEALTH BOARD, EXAMINATION OF MENTAL HEALTH ACCESSION SCREENING: PREDICTIVE VALUE OF CURRENT MEASURES AND PROCESSES 7 (Aug. 7, 2020) [hereinafter DEFENSE HEALTH BOARD].

<sup>10</sup> See INSTRUCTION 6130.03, *supra* note 8, at 1.

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6130.03, Section 6. Finally, Part IV offers policy recommendations to avert the looming national security crisis.

### I. AMERICA'S MENTAL HEALTH CRISIS

Anxiety and depression diagnoses have increased for decades.<sup>11</sup> Even before the COVID-19 pandemic, roughly 21 percent of Americans “reported having mental, behavioral, or emotional disorders.”<sup>12</sup> Research shows that our youth population (aged between 18 and 25) exhibits the highest rate of diagnosed mental, behavioral, or emotional disorders.<sup>13</sup> In general, “ADHD, anxiety problems, behavior problems, and depression are the most commonly diagnosed mental disorders in children,” with anxiety and depression alone affecting roughly 8.5 million children aged three to seventeen from 2016 to 2019.<sup>14</sup>

The concerning rise in mental health issues among young people underscores the importance of understanding the factors that contribute to this trend. Between 2005 and 2011, approximately one in five children aged three to seventeen were diagnosed with a mental, emotional, or behavioral disorder.<sup>15</sup> From 2009 to 2017, the rate of

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<sup>11</sup> See generally R.D. Goodwin et al., *Trends in Anxiety Among Adults in the United States, 2008-2018: Rapid Increases Among Young Adults*, 130 J. OF PSYCHIATRIC RSCH., 441–446 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7441973/>.

<sup>12</sup> *TrendWatch: The impacts of the COVID-19 Pandemic on Behavioral Health*, AM. HOSP. ASS'N (May 2022), <https://www.aha.org/system/files/media/file/2022/05/trendwatch-the-impacts-of-the-covid-19-pandemic-on-behavioral-health.pdf>.

<sup>13</sup> See *Mental Illness*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness> (last visited Jan. 6, 2023) (In 2020, “young adults aged 18-25 years had the highest prevalence of AMI (30.6%) compared to adults aged 26-49 years (25.3%) and aged 50 and older (14.5%)”).

<sup>14</sup> *Children's Mental Health: Data & Statistics*, CDC, <https://www.cdc.gov/childrensmentalhealth/data.html> (last visited Jan. 6, 2023).

<sup>15</sup> See Ruth Perou et al., *Mental Health Surveillance Among Children—United States, 2005-2011*, 62 MMWR SUPPLEMENTS 1–35 (May 17, 2013), <https://www.cdc.gov/mmwr/pdf/other/su6202.pdf>.

individuals reporting depression symptoms increased by 63 percent in the 18 to 25 age bracket.<sup>16</sup>

An article from the National Comorbidity Survey Adolescent Supplement indicates that between 2001 and 2004, 49.5 percent of adolescents aged 13-18 had a mental health disorder.<sup>17</sup> Finally, between 2008 to 2017, researchers found a “71 percent increase in young adults experiencing serious psychological distress” and a 47 percent increase in “the rate of young adults with suicidal thoughts.”<sup>18</sup> Scientists often explain these trends by “point[ing] to the growing use of digital media, increasing academic pressure, limited access to mental health care, health risk behaviors such as alcohol and drug use, and broader stressors such as the 2008 financial crisis, rising income inequality, racism, gun violence, and climate change.”<sup>19</sup>

The pandemic greatly exacerbated America’s underlying mental health crisis by destroying families, bankrupting businesses, forcing isolation, and depriving many of the opportunities we once took for granted, such as large gatherings, in-person meetings, and maskless interactions.<sup>20</sup> Specifically, experts point to broad stressors like “the murder of George Floyd, COVID-related violence against Asian Americans, gun violence, increasingly polarized political dialogue, growing concerns about climate change, and emotionally charged misinformation” to explain the increase in mental health disorders in 2020.<sup>21</sup>

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<sup>16</sup> Jim Sliwa, *Mental Health Issues Increased Significantly in Young Adults Over Last Decade*, AM. PSYCHOLOGICAL ASS’N (Mar. 14, 2019),

<https://www.apa.org/news/press/releases/2019/03/mental-health-adults>.

<sup>17</sup> Kathleen Merikangas, et al., *Lifetime Prevalence of Mental Disorders in U.S. Adolescents: Results from the National Comorbidity Survey Replication--Adolescent Supplement (NCS-A)*, 49 J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, 980, 980-83 (2010), <https://pubmed.ncbi.nlm.nih.gov/20855043/>.

<sup>18</sup> Sliwa, *supra* note 16.

<sup>19</sup> OFF. OF THE SURGEON GEN., PROTECTING YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL’S ADVISORY, at 8 (2021) [hereinafter PROTECTING YOUTH MENTAL HEALTH].

<sup>20</sup> See, e.g., *Action Required to Address the Impacts of the COVID-19 Pandemic on Mental Health and Service Delivery Systems in the WHO European Region*, WHO (June 30, 2021).

<sup>21</sup> PROTECTING YOUTH MENTAL HEALTH, *supra* note 19, at 8.

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While the “prevalence of anxiety and depression [increased] . . . by a massive 25%” in the first year of the pandemic for all generations, studies indicate that America’s youth were hit particularly hard by school closures and social isolation.<sup>22</sup> From March through October 2020, “the proportion of mental health-related visits increased by 24% among U.S. children aged 5–11 years and 31% among adolescents aged 12–17 years, compared with 2019.”<sup>23</sup> Other studies note that in 2021, 25 percent of America’s youth experienced depressive symptoms, and 20 percent experienced anxiety symptoms.<sup>24</sup>

The 2021 American Rescue Plan is evidence of a growing desire and trend to expand access to mental health treatment in the United States.<sup>25</sup> While an increase in mental health professionals will allow more individuals to seek treatment and lessen the stigma surrounding mental health, an increase in the availability of mental health professionals will likely result in more mental health diagnoses, and fewer individuals mentally qualified for enlistment.<sup>26</sup>

## II. DEPARTMENT OF DEFENSE ENLISTMENT POLICIES

As outlined in the 2022 Annual Threat Assessment of the United States Intelligence Community, “the United States and its allies

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<sup>22</sup> *COVID-19 Pandemic Triggers 25% Increase in Prevalence of Anxiety and Depression Worldwide*, WHO (Mar. 2, 2022), <https://www.who.int/news/item/02-03-2022-covid-19-pandemic-triggers-25-increase-in-prevalence-of-anxiety-and-depression-worldwide>.

<sup>23</sup> Lakshmi Radhakrishnan, et al., *Pediatric Emergency Department Visits Associated with Mental Health Conditions Before and During the COVID-19 Pandemic—United States, January 2019–January 2022*, CDC (Feb. 18, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/pdfs/mm7108e2-H.pdf>.

<sup>24</sup> See U.S. SENATE COMM. ON FINANCE, *MENTAL HEALTH CARE IN THE U.S.: THE CASE FOR FEDERAL ACTION 13* (2022) [hereinafter U.S. Senate Comm. on Finance Report].

<sup>25</sup> See *FACT SHEET: Improving Access and Care for Youth Mental Health and Substance Use Conditions*, THE WHITE HOUSE (Oct. 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/19/fact-sheet-improving-access-and-care-for-youth-mental-health-and-substance-use-conditions/>.

<sup>26</sup> See generally Stacey Weiner, *A Growing Psychiatrist Shortage and an Enormous Demand for Mental Health Services*, AM. ASS’N OF MED. COLLS. (Aug. 9, 2022) <https://www.aamc.org/news/growing-psychiatrist-shortage-enormous-demand-mental-health-services>.

... face an increasingly complex and interconnected global security environment marked by the growing specter of great power competition and conflict.”<sup>27</sup> In response to the increasingly complex global security environment, military personnel are subject to stringent standards. Additionally, the DoD requires military applicants to meet rigorous “access standards” to confirm that they are “medically qualified” to “meet retention or deployment” requirements.<sup>28</sup> For instance, military applicants must complete DoD Form 2807-2, *Accessions Medical Screen Report*, which “collects information about an applicant’s medical history” via a series of “Yes” or “No” questions, to “ascertain the presence of a potentially disqualifying medical condition.”<sup>29</sup> Form 2807-2 asks about the “applicant’s learning, psychiatric, and behavioral health history, including previous diagnoses.”<sup>30</sup> If the applicant answers “Yes” to any question on Form 2807-2, the United States Military Entrance Processing Command—as the main evaluating body—may ask to access the applicant’s medical records for additional review.<sup>31</sup>

If there is no disqualifying evidence, the applicant is prompted to “schedule an in-person screening” at a Medical Entrance Processing Station.<sup>32</sup> While there, applicants complete “specific screening processes” such as a Supplemental Health Screening Questionnaire, and a Behavioral Health Interview.<sup>33</sup> In 2018, approximately 232,000 out of 476,000 processed applicants successfully passed accession and joined the military.<sup>34</sup>

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<sup>27</sup> *Annual Threat Assessment of the U.S. Intelligence Community*, OFF. OF THE DIR. OF NAT’L INTELLIGENCE (Feb. 2022) [hereinafter *Threat Assessment*].

<sup>28</sup> *Report to the Armed Services Committees of the Senate and House of Representatives*, DOD 154 (Nov. 2021) [hereinafter Conf. Rep.]; Joint Explanatory Statement in the Conf. Rep. (H.R. REP. NO. 116-617), at 1678 (accompanying H.R. 6395, the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. No. 116-283) on Reporting of Data Related to Accession Standards and Mental Health History and Report on Health Care Records of Dependents who Later Seek to Serve as a Member of the Armed Forces) (Nov. 2021).

<sup>29</sup> DEFENSE HEALTH BOARD, *supra* note 9, at 20.

<sup>30</sup> *Id.* at 22.

<sup>31</sup> *Id.* at 21.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 21–22.

<sup>34</sup> *Id.* at 20.

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A. *Subsection 6.28, Learning, Psychiatric, and Behavior  
Disorders*

Subsection 6.28, “Learning, Psychiatric, and Behavior Disorders” of DoD Instruction 6130.03, identifies learning, psychiatric, and behavioral disorders barring appointment, enlistment, or induction into military services.<sup>35</sup> Under Subsection 6.28, military applicants with Attention Deficient/Hyperactivity Disorder (“ADHD”) are often disqualified from military enlistment if they have a recommended or prescribed individualized education program, a 504 Plan, or work accommodations after their fourteenth birthday. Additionally, applicants with ADHD are disqualified if they have “a history of comorbid mental health disorders, [a] prescribed ADHD medication in the previous twenty-four months, or documentation of adverse academic, occupational, or work performance.”<sup>36</sup> From 2016 to 2019, the CDC estimates that 6 million children aged 3 to 17 were diagnosed with ADHD.<sup>37</sup>

Next, military applicants with a depressive disorder are disqualified if they have undergone required outpatient care for more than twelve cumulative months, have symptoms or have been treated within the last thirty-six months, or have “required any inpatient treatment in a hospital or residential facility.”<sup>38</sup> Yet, Subsection 6.28 of DoD Instruction 6130.03 seemingly applies a one-size-fits-all approach to depression.

Finally, as with depression, military applicants with a history of anxiety are often disqualified if they required “outpatient care, including counseling . . . for [more] than twelve cumulative months.”<sup>39</sup> Moreover, applicants face disqualification if they are symptomatic, received treatment within the last thirty-six months, required inpatient care in a hospital or residential facility, experienced any

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<sup>35</sup> See INSTRUCTION 6130.03, *supra* note 8, at 50–52.

<sup>36</sup> See INSTRUCTION 6130.03, *supra* note 8, at 50.

<sup>37</sup> *Attention-Deficit/Hyperactivity Disorder (ADHD)*, CDC, <https://www.cdc.gov/ncbddd/adhd/data.html> (last visited Jan. 6, 2022).

<sup>38</sup> See INSTRUCTION 6130.03, *supra* note 8, at 51.

<sup>39</sup> See INSTRUCTION 6130.03, *supra* note 8, at 52.



recurrence of symptoms, or experienced any suicidality.<sup>40</sup> Like the DoD's treatment of depression, its classification of anxiety is a one-size-fits-all approach.

### B. *Waivers for Disqualified Applicants*

Although military enlistment standards are necessarily rigorous to ensure that military personnel are always combat-ready, some standards are too restrictive and may lack a clear scientific basis for excluding individuals. In short, DoD enlistment standards may “screen out individuals who could have had successful careers” in the military.<sup>41</sup> Disqualified applicants presumably make up a significant portion of the 77 percent of individuals who would not qualify for military service without a medical waiver.<sup>42</sup> Applicants pursuing a waiver must “undergo an evaluation by a medical evaluation board” and “submit documentation, including evidence that the disqualifying condition has been successfully treated” or provide a sufficient justification for the waiver.<sup>43</sup> The DoD needs combat-ready troops, but current enlistment policies exacerbate its inability to meet recruitment quotas.

### C. *Problems with Current Department of Defense Enlistment Policies*

The United States has a “deficit of thousands of entry-level troops.”<sup>44</sup> The U.S. Army only secured “about 40 percent of the roughly 57,000 new soldiers” it wanted to recruit by the end of fiscal year 2022.<sup>45</sup> In 2022 “the Navy was able to meet its [fiscal year] goal

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<sup>40</sup> See INSTRUCTION 6130.03, *supra* note 8, at 52.

<sup>41</sup> Beth J. Asch et al., *An Empirical Assessment of the U.S. Army's Enlistment Waiver Policies, An Examination in Light of Emerging Societal Trends in Behavioral Health and the Legalization of Marijuana*, RAND CORPORATION, ix (2021).

<sup>42</sup> See Thomas Novelly, *Even More Young Americans Are Unfit to Serve, a New Study Finds. Here's Why*, MILITARY.COM (Sep. 28, 2022), <https://www.military.com/daily-news/2022/09/28/new-pentagon-study-shows-77-of-young-americans-are-ineligible-military-service.html>.

<sup>43</sup> Beth J. Asch et al., *supra* note 41, at 156.

<sup>44</sup> Dave Philipps, *With Few Able and Fewer Willing, U.S. Military Can't Find Recruits*, N.Y. TIMES (July 14, 2022), <https://www.nytimes.com/2022/07/14/us-us-military-recruiting-enlistment.html>.

<sup>45</sup> *Id.*

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by just 42 sailors.”<sup>46</sup> However, officials increased the fiscal year 2023 recruitment goal to “37,700 active-duty sailors,” an “increase of 3,400 sailors over the recruiting goal for [fiscal year] 2022.”<sup>47</sup> Finally, the Air Force was “about 4,000 recruits short” of traditional levels in 2022.<sup>48</sup>

Experts point to several factors contributing to the military’s recruitment issues. First, military service is physically and mentally demanding, dangerous, and uniquely isolating.<sup>49</sup> As a result, only nine percent of those eligible to join the military without a waiver had any inclination to do so.<sup>50</sup> Second, military enlistment standards disqualify a majority of enlistment-age individuals, with only about “23 percent of Americans ages 17–24 . . . qualified to serve without a waiver to join.”<sup>51</sup> Notwithstanding the rigorous accession standards, the United States military still grapples with increasing rates of mental illness within its ranks.<sup>52</sup> While the profession itself may contribute to the development of mental illness, studies indicate that “85 percent [of Army soldiers] reported a mental health problem that began before

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<sup>46</sup> Heather Mongilio, *Top Stories 2022: Navy, Marine Corps Faced Tough Recruiting Environment*, USNI NEWS, <https://news.usni.org/2022/12/29/top-stories-2022-navy-marine-corps-faced-tough-recruiting-environment> (last visited Oct. 26, 2023).

<sup>47</sup> *Id.*

<sup>48</sup> Dave Philipps, *With Few Able and Fewer Willing, U.S. Military Can't Find Recruits*, N.Y. TIMES (July 14, 2022), <https://www.nytimes.com/2022/07/14/us/us-military-recruiting-enlistment.html>.

<sup>49</sup> See *Isolation and Deployment: Understanding the Cycle*, ENDEAVORS, <https://www.endeavors.org/steven-a-cohen-military-family-clinics-updates/the-isolation-of-military-life/> (last visited Oct. 26, 2023) (“Although military service members are usually not technically “alone” on deployment (surrounded by groups of fellow Soldiers, Airman, Sailors, Marines, etc.), they are all still detached from their main system of emotional support. Manuel Hernandez, a Licensed Professional Clinician (LPC) at the El Paso clinic, notes that these moments of separation can cause feelings of isolation. He goes on to state that eventually, this isolation can manifest into something greater such as “adjustment issues, trauma, anxiety, [and] depression.”).

<sup>50</sup> Courtney Kube & Molly Boigon, *Every Branch of the Military is Struggling to Make its 2022 Recruiting Goals, Officials Say*, NBC NEWS (June 27, 2022), <https://www.nbcnews.com/news/military/every-branch-us-military-struggling-meet-2022-recruiting-goals-officia-rcna35078>.

<sup>51</sup> *Id.*

<sup>52</sup> See generally, Val Willingham, *Study: Rates of many mental disorders much higher in soldiers than in civilians*, CNN HEALTH (Mar. 4, 2014), <https://www.cnn.com/2014/03/03/health/jama-military-mental-health/index.html>.

they entered the military.”<sup>53</sup> Other reports show that “77% of the 50,765 soldiers . . . reported that their mental illness began prior to enlisting.”<sup>54</sup> In 2019, the Assistant Secretary of Defense for Health Affairs directed the Defense Health Board to “provide recommendations . . . to improve health accession measures and processes.”<sup>55</sup>

The 2020 Defense Health Board report entitled, *Examination of Mental Health Accession Screening: Predictive Value of Current Measures and Processes*, outlines recommendations for improving mental health screening.<sup>56</sup> The report also highlights challenges to existing screening policy, namely “applicant non-disclosure, [the] limited predictive validity of assessment measures, and resource constraints relative to screening requirements.”<sup>57</sup> Underlying the report is the notion that “recruit[s] with a specific mental health history, condition, or diagnosis fail[ ] to meet the qualification standards for military service.”<sup>58</sup> Nonetheless, mental illnesses, unlike most physical ailments, are often hidden and require an examination beyond the rigid “Yes” or “No” system.

Applicants are routinely disqualified for an evidenced history of mental illness; however, application examiners “rely on applicant information from a pre-screening form, applicant answers during [an] interview, and information from available medical records.”<sup>59</sup> As such, applicants without a *documented* history of mental illness can conceal their issues indefinitely. For example, a *Military Times* article highlighted a situation in which parents’ decided to seek emotional support for their two daughters following their “multiple moves and [their father’s] multiple deployments to Afghanistan.”<sup>60</sup> Although the

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<sup>53</sup> Martha Bebinger, *Study: Soldiers Enter Military With Higher Rates of Mental Illness*, WBUR (Mar. 4, 2014), <https://www.wbur.org/news/2014/03/04/military-mental-health-suicide>.

<sup>54</sup> See DEFENSE HEALTH BOARD, *supra* note 9, at 40.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> *Id.* at 69.

<sup>57</sup> *Id.* at 36.

<sup>58</sup> *Id.* at 59.

<sup>59</sup> *Id.* at 37.

<sup>60</sup> Karen Jowers, *They sought help when their Army dad deployed. Now they’re barred from joining the military*, MILITARY TIMES (Mar. 29, 2018), <https://www.militarytimes.com/pay-benefits/military-benefits/health-care->

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two daughters were children at the time, their prior mental health treatment prevented them from future military enlistment and service.<sup>61</sup> Moreover, the article notes that “a child who received behavioral counseling at age 10 would be forever banned from military service were it not for the ability to make a waiver request.”<sup>62</sup>

Mental health treatment carries a negative stigma, which also manifests in the military. For example, soldiers contend “that recruitment standards have been reduced . . . to sustain force strength” for various conflicts.<sup>63</sup> As a result, “many believe that the practice of granting enlistment waivers to recruits with mental health problems” has produced “a less qualified workforce with ‘weak-minded’ or ‘bad’ Soldiers.”<sup>64</sup> There is little evidence, however, establishing that recruits granted mental health waivers were “substandard” compared to other recruits.<sup>65</sup>

“The relationship between mental health conditions [and] military success is much more complicated than” previously thought.<sup>66</sup> For example, a previous study found that “[I]sraeli service members with ADHD in addition to [increased mental health problems . . . and obesity . . . had similar attrition rates among Marines with and without ADHD].”<sup>67</sup> Such discrepancies in military accession suggest that current screening requirements have a “limited predictive validity of assessment measures.”<sup>68</sup> The DoD needs to revisit its enlistment policies.

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[benefits/2018/03/29/they-sought-help-when-their-army-dad-deployed-now-theyre-barred-from-joining-the-military/](https://www.defense.gov/Newsroom/Record/Article/ID/162000/benefits/2018/03/29/they-sought-help-when-their-army-dad-deployed-now-theyre-barred-from-joining-the-military/).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> M. Shayne Gallaway et al., *The Association Between U.S. Army Enlistment Waivers and Subsequent Behavioral and Social Health Outcomes and Attrition From Service*, 178 *MILITARY MEDICINE*, 261–266, 265 (2013).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See DEFENSE HEALTH BOARD, *supra* note 9, at 59.

<sup>67</sup> *Id.* at 42.

<sup>68</sup> *Id.* at 36.

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### III. DON'T ASK, DON'T TELL BARRING LGBTQ+ SERVICE: THE LEGAL CHALLENGES

Homosexuality in the United States military has been rigorously regulated, with the first provision—Article 93 of the Articles of Wars—dating back to 1917.<sup>69</sup> The military, invoking Article 93, routinely discharged homosexual servicemembers.<sup>70</sup> In 1949, the DoD implemented a formal policy requiring the “prompt separation of known homosexuals from the Armed Forces,” and in 1959, Directive 1332.14, *Administrative Discharges*, “listed homosexual acts and sodomy as ‘sexual perversion’” and a “reason for discharge from military service.”<sup>71</sup>

In 1973, the American Psychiatric Association removed homosexuality from the list of mental illnesses.<sup>72</sup> Nevertheless, following the “inconsistent application” of DoD Directive 1332.14, in 1981 and 1982, Deputy Secretary of Defense W. Graham Claytor, Jr. “made discharge mandatory for openly gay or lesbian personnel,” reasoning that the “presence of homosexual personnel would ‘seriously [impair] the accomplishment of the military mission.’”<sup>73</sup> Some officials suggested that “[homosexual] members adversely affect[ed] the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain public acceptability of military

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<sup>69</sup> DEP’T OF DEF., REP. OF THE COMPREHENSIVE REV. OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 20 (Nov. 30, 2010), <https://www.nytimes.com/interactive/projects/documents/pentagon-study-sees-little-impact-if-ban-on-gays-is-repealed> [hereinafter REPORT].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> U.S. GEN. ACCT. OFF., DEF. FORCE MGMT.: DoD’S POL’Y ON HOMOSEXUALITY (1992) [hereinafter DEF. FORCE MGMT.].

<sup>73</sup> DEP’T OF DEF., DoDD 1332.14, MEMORANDUM REGARDING HOMOSEXUALITY AND MIL. SERV. (1982); DEP’T OF DEF., SEPARATION OF REGULAR COMMISSIONED OFFICERS FOR CAUSE, DoDD 1332.30 (1981).

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service; and to prevent breaches of security.”<sup>74</sup> The DoD’s reasoning “mark[ed] a shift in the justification used for the discharge of gay and lesbian Service member from one based on physical or mental unfitness to serve to one based on negative impacts on mission accomplishment.”<sup>75</sup>

The executive branch subsequently made changes to DoD’s policies surrounding homosexuality in the military. In 1993, “President Clinton directed Defense Secretary Aspin to develop a draft executive order that would end discrimination due to orientation in determining who may serve in the U.S. military.”<sup>76</sup> The 1993 Military Working Group found that the presence of homosexuals in the military would have a “significant adverse effect on both the readiness of the force and unit cohesion.”<sup>77</sup> Likewise, Congress argued that “[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary.”<sup>78</sup> However, the exclusion of homosexuals decreases the readiness of the force and unit cohesion because it discharges diligent, hardworking service members and produces unwarranted social tensions.

Amid a heated debate about homosexuals serving in the military, President Clinton announced the 1993 *Don’t Ask, Don’t Tell, Don’t Pursue* policy (henceforth “Don’t Ask, Don’t Tell”), which prevented military leadership from “directly asking recruits about their sexual orientation,” and required homosexual “personnel to keep their sexual orientation private.”<sup>79</sup> “Don’t Ask, Don’t Tell” “prevent[ed] investigations from being started on an arbitrary basis.”<sup>80</sup> The policy was codified as 10 United States Code 654.<sup>81</sup> As written, service members who “engaged in . . . homosexual act[s],” confirmed their homosexuality, or “married or attempted to marry a person . . .

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<sup>74</sup> DEF. FORCE MGMT., *supra* note 72 at 2.

<sup>75</sup> REPORT, *supra* note 69, at 21.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See generally* 10 U.S.C. § 654.

<sup>79</sup> REPORT, *supra* note 69, at 19, 22.

<sup>80</sup> *Id.*

<sup>81</sup> DAVID F. BURRELLI, CONG. RSCH. SERV., R40782, “DON’T ASK, DON’T TELL”: THE LAW AND MILITARY POLICY ON SAME-SEX BEHAVIOR 4 (2010).

of the same biological sex” were separated from military service.<sup>82</sup> Section 654 differed from the original Don’t Ask, Don’t Tell policy given its failure to include the phrase “sexual orientation.”<sup>83</sup>

The DoD attempted to combine “both the restriction in the law” and President Clinton’s Don’t Ask, Don’t Tell policy, but DoD’s Office of the General Counsel maintained that “attempts to implement the statute, or analyze and evaluate it . . . resulted in confusion and ambiguity.”<sup>84</sup> Whereas the Don’t Ask, Don’t Tell policy defined “orientation” as a “sexual attraction,” the DoD defined “orientation” as “abstract sexual preference” that included “engage[ment] in sexual acts.”<sup>85</sup>

President Clinton’s ambiguous Don’t Ask, Don’t Tell policy resulted in extensive litigation.<sup>86</sup> However, the “Court never directly considered a challenge to [the Don’t Ask, Don’t Tell policy],” presumably because of “judicial precedents involving ‘special deference’ to the political branches to affirm the ‘considered professional judgment’ of military leaders to discipline or discharge a service member for homosexual conduct or speech.”<sup>87</sup> Given the lack of precedent directly relating to the Don’t Ask, Don’t Tell policy, lower courts hearing constitutional challenges to the Don’t Ask, Don’t Tell policy after the policy’s implementation initially relied on *Bowers v. Hardwick*.<sup>88</sup>

In *Bowers*, a man “was charged with violating [a] Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of [his] home.”<sup>89</sup> The Court identified two categories requiring enhanced judicial protections: (1) where “fundamental liberties” are “implicit in the concept of ordered liberty” and (2) where the “liberties . . . are ‘deeply rooted in the Nation’s

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<sup>82</sup> 10 U.S.C. § 654.

<sup>83</sup> See BURRELLI, *supra* note 81.

<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.* at 5.

<sup>86</sup> See JODY FEDER, CONG. RSCH. SERV., R40795, “DON’T ASK, DON’T TELL”: A LEGAL ANALYSIS 3 (2013).

<sup>87</sup> *Id.*

<sup>88</sup> See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>89</sup> *Bowers*, 478 U.S. at 188–89.

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history and tradition.”<sup>90</sup> Noting that neither category “extend[ed] a fundamental right to homosexuals to engage in acts of consensual sodomy,” the Court upheld Georgia’s sodomy statute.<sup>91</sup> Consequently, some individuals used *Bowers* to argue in favor of banning homosexual acts in the military, claiming that the ban “intruded upon no constitutionally protected right and was ‘rationally related’ to legitimate military needs for ‘unit cohesion’ and discipline.”<sup>92</sup>

The Court expressly overruled *Bowers* in 2003, in *Lawrence v. Texas*.<sup>93</sup> The Court held that a Texas statute banning sodomy was unconstitutional because it “further[ed] no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual.”<sup>94</sup>

The ruling in *Lawrence* further complicated the constitutionality of the Don’t Ask, Don’t Tell policy, presumably because courts struggled to apply the correct standard of judicial review.<sup>95</sup> For example, in *Witt v. Dep’t of Air Force*, the Ninth Circuit examined whether Major Witt’s suspension from the Air Force under the Don’t Ask, Don’t Tell policy because of her homosexual relationship with a woman “violate[d] substantive due process, the Equal Protection Clause, and procedural due process.”<sup>96</sup> The Ninth Circuit, however, had difficulty determining the proper level of scrutiny to apply to Major Witt’s due process claim.<sup>97</sup> Pre-*Lawrence*, lower courts often applied a rational basis review to the Don’t Ask, Don’t Tell policy.<sup>98</sup> In contrast, the Ninth Circuit noted that “the cases on which the Supreme Court explicitly based its decision in *Lawrence* are based on heightened scrutiny.”<sup>99</sup> The court therefore held that

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<sup>90</sup> *Id.* at 191–92.

<sup>91</sup> *Id.* at 192.

<sup>92</sup> FEDER, *supra* note 86, at 4.

<sup>93</sup> *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>94</sup> *Id.* at 578.

<sup>95</sup> FEDER, *supra* note 86, at 4.

<sup>96</sup> *Witt v. Dep’t of Air Force*, 527 F.3d 806, 809 (9th Cir. 2008).

<sup>97</sup> *See Id.* at 813.

<sup>98</sup> *See generally id.*

<sup>99</sup> *Id.* at 817.



“*Lawrence* requires something more than traditional rational basis review.”<sup>100</sup>

The Ninth Circuit subsequently invoked a heightened “as-applied” analysis.<sup>101</sup> Under that regime, where “the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.”<sup>102</sup> As a result, the Ninth Circuit remanded the case to the district court, which held that the government did not show that the Don’t Ask, Don’t Tell policy’s application to Major Witt “furthered the government’s interest in promoting military readiness, unit morale, and cohesion.”<sup>103</sup>

Following *Witt*, the First Circuit upheld the Don’t Ask, Don’t Tell policy in *Cook v. Gates*.<sup>104</sup> In *Cook*, the First Circuit examined whether the discharge of twelve former members of the United States military under the Don’t Ask, Don’t Tell policy violated their right to substantive due process, the Equal Protection Clause, or the freedom of speech.<sup>105</sup> Although the *Cook* court, like the Ninth Circuit in *Witt*, argued that the Don’t Ask, Don’t Tell policy should be examined under a heightened level of scrutiny,<sup>106</sup> it relied on Congressional findings regarding homosexuals serving in the military, “conclud[ing] that such as-applied challenges fail when balanced against the governmental interest in preserving military effectiveness.”<sup>107</sup>

Two years later, in *Log Cabin Republicans v. United States*, the United States District Court for the Central District of California provided a sweeping rejection of the Don’t Ask, Don’t Tell policy.<sup>108</sup> The Log Cabin Republicans, a non-profit organization, brought claims

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<sup>100</sup> *Id.* at 813–17.

<sup>101</sup> *Id.* at 819.

<sup>102</sup> *Id.* at 819.

<sup>103</sup> *Witt v. U.S. Dep’t of Air Force*, 739 F. Supp. 2d 1308, 1317 (W.D. Wash. 2010).

<sup>104</sup> *See Cook v. Gates*, 528 F. 3d 42, 65 (1st Cir. 2008).

<sup>105</sup> *Id.* at 47.

<sup>106</sup> *See* REPORT, *supra* note 69, at 34.

<sup>107</sup> FEDER, *supra* note 89, at 12.

<sup>108</sup> *See Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

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under the Fifth Amendment (substantive due process), and the First Amendment (freedom of speech, association, and petition).<sup>109</sup> Relying on the Ninth Circuit's *Witt* standard of review rationale, the District Court said that to "survive Plaintiff's constitutional challenge," the Don't Ask, Don't Tell policy must "(1) advance an important governmental interest, (2) the intrusion must significantly further that interest, and (3) the intrusion must be necessary to further that interest."<sup>110</sup>

The court's analysis focused on the second and third prongs of this heightened standard.<sup>111</sup> The District Court concluded that the Don't Ask, Don't Tell policy significantly undermined the government's interest in military readiness and unit cohesion and is not necessary to advance such interest.<sup>112</sup> As such, the court ruled the Don't Ask, Don't Tell policy unconstitutional, and granted a permanent injunction.<sup>113</sup>

The District Court's detailed analysis in *Log Cabin Republicans* highlighted the Don't Ask, Don't Tell policy's major impact on military recruiting. Dr. Lawrence Korb testified before Congress in 2007 "about the difficulty the military was experiencing in finding and retaining enough qualified recruits."<sup>114</sup> In short, the Don't Ask, Don't Tell policy discourages individuals—particularly those who identify as homosexual—who "would otherwise enlist from doing so" out of fear of being unjustly discharged or accosted.<sup>115</sup> Others maintained that "if the Act were repealed, the military would gain approximately 40,000 new recruits and approximately 4,000 members would re-enlist every year rather than leave voluntarily."<sup>116</sup>

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<sup>109</sup> *Id.* at 888.

<sup>110</sup> *Id.* at 965.

<sup>111</sup> *See Id.*

<sup>112</sup> *See id.* at 911–19.

<sup>113</sup> *See id.* at 888.

<sup>114</sup> *Log Cabin Republicans*, 716 F. Supp. at 916.

<sup>115</sup> *Id.* at 917

<sup>116</sup> *Id.*

The Don't Ask, Don't Tell policy was finally "repealed in full on September 20, 2011."<sup>117</sup>

A. *Don't Ask, Don't Tell Jurisprudence to Department of Defense Instruction 6130.03, Section 6: Disqualifying Conditions, Subsection 6.28, Learning, Psychiatric, and Behavior Disorders*

Classifying homosexuality as a mental illness was long used as a "justification for egregious discrimination, stigma, and cruel treatment methods."<sup>118</sup> While homosexual individuals experience higher mental illness rates compared to other groups,<sup>119</sup> homosexuality is not a mental illness given that it is not a "generalized impairment in social effectiveness."<sup>120</sup> As such, the military's unsupported ban on homosexuality via the Don't Ask, Don't Tell policy should not be considered equivalent to barring individuals with diagnosed mental illnesses from enlisting in the military.

The Don't Ask, Don't Tell jurisprudence hinged on the appropriate standard of judicial review. The courts predominately applied a "heightened" standard of judicial review in their legal analysis; however, the outcomes and legal rationales varied among the courts.<sup>121</sup> The Don't Ask, Don't Tell policy's jurisprudence may

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<sup>117</sup> *Repeal of "Don't Ask, Don't Tell"* HUM. RTS. CAMPAIGN, <https://www.hrc.org/our-work/stories/repeal-of-dont-ask-dont-tell> (last visited Oct. 26, 2023).

<sup>118</sup> *Being LGBTQ Was Long Considered a "Mental Disorder"*, FOUNTAIN HOUSE (June 23, 2022), <https://www.fountainhouse.org/news/being-lgbtq-was-long-considered-a-mental-disorder>.

<sup>119</sup> See Leann Bentley, *Why Does The LGBTQIA+ Community Suffer From Poor Mental Health At Higher Rates?*, UNIV. OF UTAH HEALTH, (July 7, 2021), [https://healthcare.utah.edu/healthfeed/postings/2021/07/lgbtqia\\_mental\\_health.php](https://healthcare.utah.edu/healthfeed/postings/2021/07/lgbtqia_mental_health.php).

<sup>120</sup> Allison Turner, *#FlashbackFriday -- Today in 1973, the APA Removed Homosexuality From List of Mental Illnesses*, HUM. RTS. CAMPAIGN (Dec. 15, 2017), <https://www.hrc.org/news/flashbackfriday-today-in-1973-the-apa-removed-homosexuality-from-list-of-me>.

<sup>121</sup> See, e.g., Cook, 528 F. 3d at 59–60 (upholding the Don't Ask, Don't Tell policy because it necessarily furthered the government's interest in preserving military effectiveness and cohesion); Log Cabin Republicans, 716 F. Supp. 2d. at 923 (rejecting the Don't Ask, Don't Tell policy was unconstitutional because it did not further the government's interest in promoting readiness, unit morale, and cohesion); Witt, 739 F. Supp. 2d. at 1316 (holding that the government did not show

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provide the courts and Congress with guidance in approaching the worsening military enlistment crisis. Assuming that most courts would invoke a “heightened” standard of judicial review—as they did in most legal challenges to the Don’t Ask, Don’t Tell policy—DoD Instruction 6130.03, Section 6: Disqualifying Conditions, Subsection 6.28, Learning, Psychiatric, and Behavior Disorders ““must [1] advance an important governmental interest, [2] the intrusion must significantly further that interest, and [3] the intrusion must be necessary to further that interest.””<sup>122</sup> The government has an important interest in promoting combat readiness, unit morale, and cohesion, but provisions in DoD Instruction 6130.03, Section 6: Disqualifying Conditions, Subsection 6.28, Learning, Psychiatric, and Behavior Disorders—particularly those related to preventing the enlistment of individuals with a history of anxiety and depression—do not significantly further that interest.

Similar to the arguments made against homosexual individuals serving in the United States military, some suggest that allowing individuals with a history of mental illness—namely anxiety and depression—to enlist will result in a “less qualified workforce.”<sup>123</sup> However, decades of research and innovation regarding mental illnesses allow for the treatment of most acute mental health struggles.<sup>124</sup> Oftentimes, these are “talented, capable, and intelligent people” who are prevented from enlisting based on the history of a mental illness.<sup>125</sup> In a Senate Armed Services Committee hearing, Dr. P. Murali Doraiswamy testified that “[t]here’s no evidence . . . to indicate that [acute mental health struggles] impairs performance.”<sup>126</sup>

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that the Don’t Ask, Don’t Tell policy’s application to Major Witt furthered “the government’s interest in promoting military readiness, unit morale, and cohesion”).

<sup>122</sup> Log Cabin Republicans, 716 F. Supp. 2d at 911 (citation omitted).

<sup>123</sup> Galloway et al., *supra* note 63, at 265.

<sup>124</sup> See generally Varalakshmi Vemuru, *Mental Illness is Curable, Treatable, and Preventable: a Story of Hope from India*, WORLD BANK BLOGS (Oct. 10, 2016), <https://blogs.worldbank.org/endpovertyinsouthasia/mental-illness-curable-treatable-and-preventable-story-hope-india>.

<sup>125</sup> See Peter Jaksa, Ph.D., *Uncle Sam Wants You! (Maybe)*, ADDITUDE (Nov. 3, 2022), <https://www.additudemag.com/uncle-sam-doesnt-want-you/>.

<sup>126</sup> Meghann Myers, *A Bill to Allow Recruits with Previous Mental Health Treatment is on the Way*, MIL. TIMES, (Apr. 8, 2022),

Moreover, “[b]etween 80% and 90% percent of people with depression eventually respond well to treatment”<sup>127</sup> and “[a]nxiety disorder is the most treatable of all mental illnesses.”<sup>128</sup> For the roughly ten-to-thirty percent of patients with “treatment-resistant depression,” studies point to different risk factors, including “not staying on prescribed antidepressants long enough,” a depression subtype misdiagnoses, wrong dosages, or skipping doses altogether.<sup>129</sup>

DoD Instruction 6130.03, Section 6 was developed to confirm that military applicants are “medically qualified” to “meet retention or deployment” requirements,<sup>130</sup> however, almost “85 percent [of Army soldiers] reported a mental health problem that began before they entered the military.”<sup>131</sup> As such, Subsection 6.28 does *not* significantly further, and is not necessary to further, the government’s important interest in promoting combat readiness, unit morale, and cohesion. Rather, Subsection 6.28, in conjunction with the documented deficiencies in the military’s one-size-fits-all screening methods, works against the government’s interest by “effectively cut[ing] off a population” of individuals who would otherwise enlist, notwithstanding their mental illness.<sup>132</sup>

### B. *Problems with a Legal Challenge*

Using the rationale outlined throughout the Don’t Ask, Don’t Tell jurisprudence, Subsection 6.28 could, on a case-by-case basis, be struck down as unconstitutional because the policy significantly undermined the government’s interest in military readiness and unit cohesion and is not necessary to advance such interest. However, this approach has two main problems. First, courts have given

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<https://www.militarytimes.com/news/pentagon-congress/2022/04/08/a-bill-to-allow-recruits-with-previous-mental-treatment-is-on-the-way/>.

<sup>127</sup> Felix Torres, M.D., *What Is Depression?*, AM. PSYCHIATRIC ASS’N, (Oct. 2020), <https://www.psychiatry.org/patients-families/depression/what-is-depression>.

<sup>128</sup> *Anxiety Disorders*, UTHEALTH, <https://hcpc.uth.edu/pages/wimi/anx.htm> (last visited Nov. 24, 2023).

<sup>129</sup> Khalid Saad Al-Harbi, *Treatment-Resistant Depression: Therapeutic Trends, Challenges, and Future Directions*, 6 PATIENT PREFER ADHERENCE 369 (2012).

<sup>130</sup> See Conf. Rep., *supra* note 28, at 1.

<sup>131</sup> Bebinger, *supra* note 53.

<sup>132</sup> Jaks, *supra* note 125.

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“longstanding deference to Congress on matters of national defense and military affairs.”<sup>133</sup>

Additionally, such judicial deference to Congress “cautions against granting review while Congress actively weighs the issue,”<sup>134</sup> as it is currently doing. For example, in 2022, Senator Dan Sullivan began drafting a bill to remove barriers preventing young Americans from enlisting “if [they had] previously been treated for anxiety, depression or other mental health struggles.”<sup>135</sup> Given Congress’s renewed interest in the enlistment of individuals with a history of mental illness, courts are unlikely to review current enlistment standards regulating mental fitness. If they do, it will be on a case-by-case basis similar to the Don’t Ask, Don’t Tell jurisprudence.

Readiness, including meeting enlistment quotas and retaining personnel, is a very important aspect “in relation to these challenges,” and “[e]vents of the past year remind us that global actors have the capability and intent to challenge peace and stability.”<sup>136</sup> For example, meeting enlistment quotas and retaining personnel may provide a “necessary advantage to deter [China] from violent pursuit of objectives at odds with our national interests.”<sup>137</sup> Employing a purely legal approach to this national security crisis poses will presumably result in a stalemate, thus emboldening our enemies to take advantage of our lackluster recruitment numbers.

#### IV. CONGRESSIONAL OR EXECUTIVE ACTION IS THE BEST PATH FORWARD

A more realistic and timely option would be the exercise of executive or legislative powers, rather than judicial intervention. For example, President Biden and Defense Secretary Lloyd Austin may, via executive order or a DoD Directive, alter the current enlistment

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<sup>133</sup> Nat’l Coal. For Men v. Selective Serv. Sys., 141 S.Ct. 1815, 1816 (2021).

<sup>134</sup> *Id.*

<sup>135</sup> Myers, *supra* note 126.

<sup>136</sup> Jim Garamone, *Vice Chiefs Talk Recruiting Shortfalls Readiness Issues*, DEP’T OF DEFENSE (Apr. 20, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3369472/vice-chiefs-talk-recruiting-shortfalls-readiness-issues/>.

<sup>137</sup> *Id.*

standards to allow for individuals with certain acute mental illnesses to join the military in non-combat roles. However, hanging the enlistment standards without simultaneously implementing precautionary measures, improving military mental health services, or developing targeted strategies to decrease the stigma inherent to mental illness and mental health treatment is counterproductive.

For instance, a recent RAND report indicates that veterans are occasionally “unable to access or receive high-quality care” due to “shortages in the mental health workforce.”<sup>138</sup> Other veterans believe that “admitting a mental health problem is a sign of weakness,” are “skeptical about the effectiveness of treatment,” and “fear . . . job or career repercussions from seeking mental health care.”<sup>139</sup> Thus, given that “one in five veterans experiences mental health problems, including posttraumatic stress disorder (PTSD), major depression, and anxiety,” the federal government should take additional measures before altering the current enlistment standards.<sup>140</sup> Doing so will help assuage any concerns that amended standards would impact the strength and capabilities of the military.

President Biden and Secretary Austin could also thoroughly review and revise the current enlistment screening methods employing various recommendations outlined in the 2020 Defense Health Board Report “Examination of Mental Health Accession Screening: Predictive Value of Current Measures and Processes.”<sup>141</sup> Recommendation 3.1, for example, would “[u]tilize the first 180 days of a Service member’s career for enhanced screening for pre-existing mental health disorders and common disqualifying conditions.”<sup>142</sup> Likewise, Recommendation 3.2 would require “further scientific validation of screening tools . . . to determine the extent to which they

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<sup>138</sup> *Improving the Quality of Mental Health Care for Veterans: Lessons from RAND Research*, RAND CORPORATION (2019), [https://www.rand.org/pubs/research\\_briefs/RB10087.html](https://www.rand.org/pubs/research_briefs/RB10087.html).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> DEFENSE HEALTH BOARD, *supra* note 9.

<sup>142</sup> *Id.* at 70.

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are predictive of future mental health diagnoses and related career outcomes.”<sup>143</sup>

Applying Recommendation 3.1 and Recommendation 3.2 may allow some individuals with a documented history of certain mental illnesses such as anxiety or acute depression to serve in the military instead of being instantly barred. Although a 180-day “enhanced screening” period would increase the total cost of enlistment procedures, it may save millions of dollars in recruitment efforts: a concept thoroughly discussed in *Log Cabin Republicans*.<sup>144</sup> A 2005 U.S. Government Accountability Office (“GAO”) report cited in *Log Cabin Republicans* estimated that “it could have cost the [DoD] about \$95 million in . . . fiscal year 2004 . . . to recruit replacements for service members separated under the [Don’t Ask, Don’t Tell] policy.”<sup>145</sup> According to Dr. Lawrence Korb “[s]uccessful recruiting includes not only the cost for sending out military recruiters . . . around the country, but also the costs of conducting medical and educational testing on recruits as well as the expense of their basic training.”<sup>146</sup> Likewise, “for every person discharged after ten years of service, six new servicemembers would need to be recruited to recover the level of experience lost by that discharge.”<sup>147</sup> Given the significant number of individuals separated from the military pre-and-post-enlistment because of a mental illness diagnosis, the DoD—as a result of the increasing rate of mental illness diagnoses—could easily surpass the 2005 GAO Report estimates.

## CONCLUSION

Certain mental illnesses—namely anxiety and depression—are undoubtedly on the rise in the United States, partly as a result of the COVID-19 pandemic. While many recognize the direct implications of America’s declining mental health, there is less emphasis on the lasting, widespread implications of such trends on our national security. In short, current military enlistment standards

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<sup>143</sup> *Id.*

<sup>144</sup> *See* *Log Cabin Republicans*, 716 F. Supp. 2d at 951.

<sup>145</sup> *Id.* at 951–52.

<sup>146</sup> *Id.* at 951.

<sup>147</sup> *Id.*



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are excessively rigid and prevent thousands of willing and able individuals from joining the United States military.

By employing a comparable legal approach underscored in the Don't Ask, Don't Tell jurisprudence, legal experts could challenge the legality of DoD Instruction 6130.03, Section 6: Disqualifying Conditions, Subsection 6.28, Learning, Psychiatric, and Behavior Disorders. A legal approach, however, will likely be unsuccessful given the court's deference to the legislative and executive branches on military and national security matters.

A better alternative would be for the legislative or executive branch to adjust its narrow enlistment standards to reflect the evolving mental illness classifications and treatments and shifting youth demographics. Congress or the President must also significantly increase access to mental health care for service members, and work to reduce the stigma surrounding mental illness in the United States. Individuals with mental health dilemmas are often just as capable and productive as their colleagues.

