Analyzing the Tension Between Military Force Reductions and the Constitution: Protecting an Officer's Property Interest in Continued Employment

Joshua Flynn-Brown*

I. INTRODUCTION

In 2011, the unemployment rate for military veterans discharged between the years 2001 and 2011 stood at 12.1%.[1] The jobless rate for all veterans stood at 8.3%.[2] Meanwhile, the overall unemployment rate hovered at 8.8%.[3] Between the U.S. government's current budgetary tailspin and the ongoing drawdown with respect to the wars in Iraq and Afghanistan, it is inevitable that service members will feel the impact of economic challenges. Nevertheless, this impact becomes even more dramatic when analyzing the Department of Defense's (DOD) force-shaping measures in 2011 because these force reductions are responsible for discharging tens of thousands of service members.[4]

Such deep military cuts present a unique opportunity to legally dissect the military's employment culture. Can the military fire service members at-will even when they are on the eve of retirement? Do constitutionally protected property rights attach, and if so, when? Can a legislative remedy protect officers?[5] These are some of the questions this Article addresses.

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* Mr. Flynn-Brown is an attorney and Post-Doctoral Fellow at the Chapman University Military Law Institute & AMVETS Legal Clinic located in Orange, California. The Institute and Clinic specialize in military law related matters and represent military personnel pro bono. I wish to acknowledge and thank Professor Kyndra Miller Rotunda for her tremendous support and advice throughout the writing and editing process. In addition, I wish to thank Professor Dwight Stirling for his input and recommendations. And finally, sincere thanks to the editors and staff at the *Suffolk University Law Review* for all of their hard work.

1. *See Economic News Release: Employment Situation of Veterans—2011*, BUREAU LAB. STAT. (Mar. 20, 2012, 10:00 AM), http://www.bls.gov/news.release/archives/vet_03202012.htm.

2. *See id.*

3. *See Economic News Release: The Employment Situation—March 2011*, BUREAU LAB. STAT. (Apr. 1, 2011, 8:30 AM), http://www.bls.gov/news.release/archives/empsit_04012011.htm.

4. *See* Gina Cavallaro, *Hundreds of Junior Officers Sent Packing,* MARINE CORPS TIMES, Mar. 14, 2011, http://www.marinecorpstimes.com/news/2011/03/marine-hundreds-of-lieutenants-rejected-031411w; Jim Tice, *Army to Cut Nearly 50,000 Soldiers Over 5 Years*, ARMY TIMES, Sept. 25, 2011, http://www.armytimes .com/news/2011/09/army-to-cut-nearly-50000-soldiers-over-5-years-092511; Justin Fishel, *Navy To Cut Jobs Amid Recession-Driven Sailor Surplus,* FOX NEWS (July 8, 2011), http://www.foxnews.com/politics/2011/07/ 08/navy-to-cut-jobs-amid-recession-driven-sailor-surplus.

5. For purposes of this Article, all mention of "officers" refers to officers on the Active Duty List.

Generally speaking, there is an assumption that military personnel can be fired at-will simply because they are in the military. For decades, however, the DOD, in conjunction with the support of Congress, has recognized a career expectation in continued employment, specifically within the officer ranks. For instance, in support of the Defense Officer Personnel Management Act (DOPMA),[6] signed into law in 1980, the House of Representatives openly declared that an officer, "on attaining permanent O-4 grade, has a career expectation of 20 years of service. At the completion of 20 years of service he is eligible for immediate retirement."[7] Thus, Congress—the lone body that has plenary constitutional power to regulate the military—expressed a belief that officers have a career expectation in continued employment once a service member reaches the grade of O-4.[8] This is clear evidence that members of Congress intended to limit the application of the "up or out" system as applied to officers.[9]

The career expectation in continued employment is all the more clear when analyzing the rules that the DOD has promulgated under the authority of DOPMA to protect O-4s not promoted to O-5. For example, when an O-4 is not promoted to the next grade, the officer is subjected to a selective continuation board.[10] This board's purpose is to continue officers on active duty even when not promoted. Such boards illustrate that the military's promotion system is not an absolute "up or out." More importantly, the DOD rule that governs the continuation process, Instruction Number 1320.08 (the Instruction), states that "[a] commissioned officer on the Active Duty List in the grade of O-4 who is subject to discharge . . . shall normally be selected for continuation if the officer will qualify for retirement . . . within 6 years of the date of continuation."[11] The 2007 version of the Instruction, applied during the

6. Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980) (codified as amended in scattered sections of 10 U.S.C.).

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

8. In the Army, Marine Corps, and Air Force, a service member in O-4 grade is a Major, whereas in the Navy or Coast Guard an O-4 is a Lieutenant Commander. *See The United States Military Officer Rank Insignia*, U.S. DEP'T OF DEF., http://www.defense.gov/about/insignias/officers.aspx (last visited Sept. 2, 2013) (displaying officer ranking system by branch of service).

9. *See* H.R. REP. NO. 96-1462, at 5 ("It is the committee's strong desire that these officers be continued to 20 years of service as a matter of course; only in unusual circumstances would this authority not be fully utilized.").

10. *See* 10 U.S.C. § 611(b) (2012) (granting authority to service secretaries to convene selective continuation boards). In addition, this provision is clear that the rules of the continuation boards are set by the Secretary of Defense. *See id.* § 611(c) ("The convening of selection boards under subsections (a) and (b) shall be under regulations prescribed by the Secretary of Defense.").

11. *See* DEP'T OF DEF., INSTRUCTION NUMBER 1320.08: CONTINUATION OF COMMISSIONED OFFICERS ON ACTIVE DUTY AND ON THE RESERVE ACTIVE STATUS LIST 3 (2007) [hereinafter 2007 INSTRUCTION], *available at* http://dopma-ropma.rand.org/pdf/DODI-1320-08.pdf. The Instruction, also formerly known as Directive Number 1320.08, has undergone various revisions throughout the course of its history. *See infra* notes 13, 63 and accompanying text (discussing 1981 and 1996 versions, respectively); *infra* note 67 and accompanying text (identifying Instruction's prior iterations). The most recent version of the Instruction, however, was not

historic 2011 reduction-in-forces program, has the force of law.[12]

Irrespective of the 2007 version of the Instruction and Congress's intent, force reductions in 2011 undercut the career expectation in continued employment for the first time in thirty years.[13] These actions suggest an ugly prioritization of economic concerns over troop welfare. To use the Air Force as a specific example, *in one month* the Air Force decided to involuntarily "separate"—or in other words, fire—157 O-4s who were not promoted to O-5.[14] These 157 O-4s will never receive retirement after more than fourteen years in service—contrary to the 2007 version of the Instruction and the intent of Congress—because the DOD refused to comply with the mandate that officers within six years of retirement be continued.[15] In April 2012, a few months after these terminations, the DOD conveniently changed the Instruction to conform to the mass firings, and attempted to give cover to service branches that had terminated qualified officers.[16]

This Article examines whether federal statutes, DOD regulations, and military practices and procedures have created a constitutionally protected property right in continued employment for officers in the context of a force-reduction policy. In addition, this Article analyzes the tension between the property interest in continued employment and the historic force reductions the DOD implemented in 2011, and continued through 2012. This Article

published until April 2012 *after* the 2011 officer terminations. *See infra* note 16 and accompanying text (discussing 2012 version).

12. *See* Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("The military no less than any other organ of the government is bound by statute, and even when granted unfettered discretion by Congress the military must abide by its own procedural regulations should it choose to promulgate them."); Collins v. United States, 101 Fed. Cl. 435, 442 (2011) ("Regulations are given the force of law even though the decision to promulgate them may have been inherently discretionary.").

13. Since September 1981, the requirement that O-4s passed over for promotion to O-5 receive continued employment existed in either a DOD Directive or Instruction. *See* DEP'T OF DEF., DIRECTIVE NUMBER 1320.8, CONTINUATION OF REGULAR COMMISSIONED OFFICERS ON ACTIVE DUTY 2 (1981) [hereinafter 1981 INSTRUCTION] (on file with author). Thus, the DOD's thirty-year old rule shows that O-4s are to be continued. *See id*.

14. *See* 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.

15. *See* MICHAEL B. DONLEY, SECRETARY OF THE AIR FORCE MEMORANDUM OF INSTRUCTIONS: FOR CY11A LIEUTENANT COLONEL LINE OF THE AIR FORCE (LAF) AND MEDICAL SERVICE CORPS (MSC); AND CY11A MAJOR MSC CENTRAL SELECTION BOARDS; AND CY11A MAJOR LAF, MSC AND NURSE CORPS (NC) AND CAPTAIN LAF AND NC SELECTIVE CONTINUATION BOARDS (2011) (on file with author). "However, as we are in a period of force reductions you normally should not continue an officer with negative quality indicators documented in his or her record, or who will not qualify for retirement within five years of the convening date of the board . . . ." *Id.* at 4-5.

16. *See* DEP'T OF DEF., INSTRUCTION NUMBER 1320.08, CONTINUATION OF COMMISSIONED OFFICERS ON ACTIVE DUTY AND ON THE RESERVE ACTIVE- STATUS LIST 4 (2012) [hereinafter 2012 INSTRUCTION], *available at* http://www.dtic.mil/whs/directives/corres/pdf/132008p.pdf (modifying 2007 version of Instruction and changing six-year protective window applicable to O-4s to four-year window). Thus, instead of the continuation of O-4s on active duty if "within 6 years of retirement," the 2012 version of the Instruction now reads "within 4 years of retirement." *Compare id.* at 4 (redlining "6" for "4" when discussing O-4's eligibility to be selected for continuation), *with* 2007 INSTRUCTION, *supra* note 11, at 3 (providing six-year window).

concludes that, in some instances, service members have a vested, constitutionally protected property interest in continued employment.

II. THE SUPREME COURT RECOGNIZES A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN EMPLOYMENT AND FEDERAL COURTS APPLY THESE HOLDINGS TO MILITARY MATTERS

Case law illustrates that a property interest can exist without a clear contractual provision granting the property right.[17] The Supreme Court has noted that existing rules or understandings that stem from independent sources, such as state law, can create and define the dimensions of property rights.[18] These rules or understandings secure certain benefits and support claims of entitlement to those benefits.[19] Such rules or understandings can arise both from words and conduct in light of surrounding circumstances,[20] and in the absence of a contractual provision.[21]

Perry v. Sindermann is the seminal case in which the Supreme Court indicated that a property right can arise from mutual understandings and rules rather than an explicit contractual right.[22] In *Perry*, the respondent was an untenured junior college professor who did not have his contract renewed. The college professor relied upon the college's official Faculty Guide to prove that he had a legitimate reliance upon his continued employment because the Guide said that professors who were under contract for at least seven years would have their employment continued.[23] Notably, the rule in *Perry* is quite similar to the DOD rules that mandate continuation if personnel are within six years of retirement; or in other words, if personnel have served at least fourteen years.[24]

The same day that *Perry* was decided, the Court also decided *Board of*

17. *See* Perry v. Sindermann, 408 U.S. 593, 596 (1972) (holding lack of contractual claim does not defeat constitutional considerations); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (explaining rights protected by due process extend beyond narrow conceptions of property).

18. *See Roth*, 408 U.S. at 577.

19. *See Perry*, 408 U.S. at 601 (citing *Roth*, 408 U.S. at 577) (stating existing rules and understandings stem from independent sources).

20. *See id.* at 602.

21. *See id.* at 601.

22. *See id.* at 602.

23. *See* Perry v. Sindermann, 408 U.S. 593, 600 (1972).

24. *Compare Perry*, 408 U.S. at 601 n.6 (quoting from Faculty Guide), *with supra* note 11 and accompanying text (quoting from 2007 version of Instruction regarding when O-4s can expect to be selected for continuation). The Faculty Guide in *Perry* stated:

> In the Texas public colleges and universities, this tenure system should have these components: (1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education.

Perry, 408 U.S. at 600 n.6.

Regents v. Roth.[25] Just as in *Perry,* this case involved the issue of whether a reliance interest in continued employment can exist without tenure or a formal contractual provision.[26] The Court made clear that property interests are subject to procedural due process and are not limited by a few rigid, technical forms.[27] On the contrary, property denotes a broad range of interests that are secured by existing rules or understandings.[28] These rules or understandings can be explicit guarantees such as an employer's handbook, or implied guarantees such as words or conduct over the course of a number of years.[29] Thus, as defined by the Supreme Court, rules or understandings need not be explicit contractual guarantees.[30]

The factual setting in *Perry* is similar to the circumstances military personnel were subjected to during the 2011 force reductions. For example, some of the officers terminated were Reserve Officer Training Corps (ROTC) graduates that arguably had an explicit guarantee of continued employment upon attaining the rank of Major.[31] Those that were not ROTC graduates were still subject to explicit and implicit rules and understandings, leading them to reasonably believe that they had a constitutionally protected property interest in continued employment.[32] Moreover, the language in the Faculty Guide in

25. *Compare Perry*, 408 U.S. 593 (decided June 29, 1972), *with* Bd. of Regents v. Roth, 408 U.S. 564 (1972) (decided June 29, 1972).

26. *See Roth,* 408 U.S. at 577.

27. *See id.*

28. *See id.*

29. *See* Perry v. Sindermann, 408 U.S. 593, 601-02 (1972).

30. *See id.* at 601; *see also Roth*, 408 U.S. at 577 ("[A] purpose of the ancient institution of property [is] to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.").

31. *See* AIR FORCE ROTC CURRICULUM SECTION, TICKET: THE INITIAL COMMISSIONING KIT OF ESSENTIAL TRUTHS 42 (1996) [hereinafter TICKET]. "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 earlier retirement." *Id.* The officers subject to this handbook were induced to join because of the promises set forth therein. An individual seeking to enter the Armed Forces through ROTC is a highly dedicated individual and is keenly aware and concerned about not only employment length, but also retirement potential. Thus, it is not a stretch to conclude that the promises in the ROTC handbook induced individuals to join.

32. *See* 2007 INSTRUCTION, *supra* note 11, at 4. These officers are still subject to the 2007 Instruction that mandated continuation if they were within six years of retirement. More importantly, the implicit understandings included promises by personnel command counselors that officers within six years of retirement would be continued on active duty. *See* E-mail from Autumn M. Foley, Chief, Officer Promotion Mgmt., Directorate of Pers. Servs. (USAF) (Jan. 20, 2011, 14:39 EST) (on file with author). Ms. Foley advised concerned officers that "based on precedent" they would be continued on active duty, even though these officers had not been selected for promotion to Lieutenant Colonel, because the officers had exceeded the fourteen-year threshold. *See id.* The understanding also included a pattern of conduct to continue O-4s for more than thirty years. *See In re* Brian E. Burr, No. BC-2011-02795, at 4 (Air Force Bd. for Corr. of Military Records Apr. 26, 2002), *available at* http://boards.law.af.mil/AF/BCMR/CY2011/BC-2011-02795.txt ("While we note the applicant's contention that the force drawdown of the 1990s established a precedence that officers with at least 15 years of honorable service should not be subject to involuntary separation, it is beyond the purview of this Board to change legally constituted policy."); Letter from Colonel Kelly Goggin, Chief, Cong.

Perry pales in comparison to the clarity of the 2007 Instruction that these service members are subjected to, which clearly indicates that O-4s would be continued if they were within six years of retirement.[33] The language is stronger and more forceful than the college's Faculty Guide because the 2007 Instruction explicitly states that officers shall be continued. Thus, if the Court in *Perry* determined the baseline for a property interest to be existing rules or understandings in a school's Faculty Guide, the officers' case is even more compelling because they can point to specific DOD rules, the legislative history of DOPMA, and a pattern of conduct over decades, which, taken together, amount to a wealth of evidence that the respondent in *Perry* did not have.[34] If the Supreme Court found that a constitutionally protected property right based on a reliance interest in continued employment may have existed in *Perry*, it should reach a similar conclusion in the present matter involving the termination of officers.[35]

Finally, a property right in continued employment is further evidenced by looking at how some military branches are handling force reductions. For example, the United States Army operates under a clear set of rules for determining continuation. First, by statute, "[Captains or Majors] *must be selected for continuation* by a board convened under the provisions of 10 U.S.C. 611 to be continued on active duty after a second failure of selection for promotion."[36] Second, "DOD policy *requires* that all active Army [Majors] within six years of retirement eligibility be continued."[37] Third, "the board *must continue* all [Majors] who are twice nonselected and within 6 years of retirement eligibility."[38] Thus, when considering United States Army legal memoranda, DOD rules, the legislative history of DOPMA, and the thirty-year pattern of conduct in conjunction with the holdings of *Perry* and *Roth*, it becomes apparent that some officers (especially O-4s) in 2011 had a constitutionally protected property interest in continued employment. Because

Inquiry Div., Office of the Legislative Liaison, to Sen. Jerry Moran (July 22, 2011) (on file with author) ("In practice, the Air Force (AF) has generally continued to retirement all Majors twice passed over for promotion to Lieutenant Colonel, regardless of years of service."). *Compare* 2012 INSTRUCTION, *supra* note 16, at 4 (providing guidelines for O-4 continuation), *with* 1981 INSTRUCTION, *supra* note 13, at 2 (providing guidelines for O-4 continuation).

33. *See supra* note 11 and accompanying text (quoting from 2007 version of Instruction continuing six-year standard).

34. *See* Perry v. Sindermann, 408 U.S. 593, 600-02 (1972) (relying on college's Faculty Guide as potential source of "de facto tenure program").

35. *See Perry*, 408 U.S. at 602-03 (acknowledging possible legitimacy of respondent's job entitlement claim and therefore affirming remand to district court); *see also supra* note 24 and accompanying text (quoting Faculty Guide from *Perry* opinion).

36. *See* 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) (emphasis added), *available at* http://armypubs.army.mil/epubs/pdf/m600_2.pdf.

37. *See id.* § C-2(d)(2) (emphasis added).

38. *Id.* § C-2(d)(3) (emphasis added).

a constitutionally protected property interest existed, the DOD violated that interest by terminating O-4s who qualified for continued employment.

Although it appears that a property interest in officers' continued employment was created, the question becomes whether circuit courts would apply the holdings of *Perry* and *Roth* in a military context. There are circuit court cases in which military personnel were unable to maintain a property interest in continued employment.[39] These cases, however, either came before the Instruction was promulgated; involved situations that allowed for immediate discharge such as disciplinary matters, honor code violations, or the inability to meet performance standards; or consisted of challenges to promotion instead of discharge.[40] It is clear that these cases simply did not rest on a challenge that a property interest was created, and as a result, the facts and evidence surrounding the 2011 force reductions are unique and can be readily distinguished from prior military case law. Nevertheless, these cases still cite *Perry* and *Roth* as guidance as to whether or not a property interest is created.[41] This precedent is extraordinarily important because such a holding illustrates that the property-interest test of *Perry* and *Roth* is *the test* in the military-employment context. Thus, although the plaintiffs in these cases were unable to meet the threshold established in *Perry* because they failed to show that the military had either implicitly or explicitly created a reliance interest in continued employment, these cases show that when making the argument that a property interest is created in the military context, one must point to evidence that existing rules or understandings either implicitly or explicitly created the property interest. Such a property interest is evident when deconstructing the 2007 version of the Instruction that officers in 2011 were subject to.

III. DOD INSTRUCTION 1320.08 IS DESIGNED TO PROTECT AN O-4'S PROPERTY INTEREST IN CONTINUED EMPLOYMENT

The recent force reductions shed considerable light on the importance of the DOD rules that govern the termination process within the respective service branches. Generally, the promotion and termination processes work hand-in-hand. In other words, if a service member is not promoted to a higher grade, he

39. *See generally* 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).

40. *See Yamashita*, 2002 WL 31898182, at *1 (illustrating challenge in question involved lack of promotion rather than challenge of discharge); *Guerra*, 942 F.2d at 271 (claiming plaintiff discharged due to disciplinary infractions); *Pauls*, 457 F.2d at 297 (indicating plaintiff did not argue that property interest in continued employment existed); *Spadone*, 842 F. Supp. 2d at 299 (asserting plaintiff discharged due to honor code violations); *Wilhelm*, 90 F. Supp. 2d at 4-5 (explaining plaintiff discharged due to inability to meet performance standards).

41. *See Guerra*, 942 F.2d at 278; *Wilhelm*, 90 F. Supp. 2d at 9.

has an increased chance of termination. Nevertheless, there is a gray area that stands between the promotion and termination procedures, known as the "selective continuation process." The selective continuation process's purpose is to maintain officers among the active duty ranks even though they have not been promoted to a higher grade.[42]

The Instruction is the governing regulation in the officer selective continuation process. It is also the rule that the 2011 force reductions violated because the rule specifically states that service secretaries of the individual military departments shall follow its policies and procedures.[43] The rule is thus mandatory, precluding the secretaries of the respective service branches from using their discretion to alter its language or act outside of its scope.

The Instruction was first published in 1981 after DOPMA was signed into law in 1980.[44] The authority of the Secretary of Defense to promulgate rules limiting officer termination, such as the aforementioned Instruction, resides in DOPMA, which provides that "[t]he Secretary of Defense shall prescribe regulations for the administration of this section."[45] Perhaps most importantly, DOPMA was enacted to allow for officers having attained O-4 status to have "an expectation interest in retirement."[46] In the House Report of the Armed Services Committee, the committee's intent was clear that these officers be continued until they could retire at twenty years unless there were "unusual circumstance[s]".[47] Moreover, a ranking member of the House Armed Services Committee stated on the record that "cost savings are not our principal aim," thereby taking cost savings out of the definition of unusual circumstances.[48]

Committee reports and statements from a member of Congress with such

42. *See* 2007 INSTRUCTION, *supra* note 11, at 4 (maintaining O-4s passed over for promotion remain on active duty within six years of retirement). For example, if an O-4 faces his final promotion board for O-5 and is not chosen for promotion, that service member will thereafter have his personnel records placed before a selective continuation board. *See id.* at 4. The process by which a selective continuation board chooses officers to remain on active duty is dependent upon the service branch's applicable Memorandum of Instructions (MOI), which is written by the service branch's secretary. *Cf.* OFFICER PROMOTIONS, ARMY REGULATION 600-08-29 ch. 1, § IV, pt. 1-33 (2005), *available at* http://www.apd.army.mil/jw2/xmldemo/r600_8_29/main.asp (explaining United States Army's method of utilizing MOIs for determining selective continuation process). For example, the Secretary of the Air Force will write the MOIs and distribute them to the selective continuation board. The problem—and subject of this Article—is that the Secretary of the Air Force changed the DOD rules by telling the selective continuation board to only consider officers for continuation if they are within five years of retirement, rather than the six years mandated by DOD rules. *See* DONLEY, *supra* note 15.

43. *See* 2012 INSTRUCTION, *supra* note 16, at 3 (indicating service secretaries shall administer Instruction's policies and procedures).

44. *See* 1981 INSTRUCTION, *supra* note 13, at 1 (establishing policies and procedures under DOPMA). *See generally* Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980) (codified as amended in scattered sections of 10 U.S.C.) (enacted December 12, 1980); 1981 INSTRUCTION, *supra* note 13 (dated September 18, 1981).

45. 10 U.S.C. § 637(e) (2012).

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

47. *See id.* at 4.

48. *See* 125 CONG. REC. 29,885 (1980).

authority are generally given substantial weight when determining the original intent of legislation.[49] In fact, members of the Supreme Court hold such reports in high regard. For example, studies have concluded that during "a 40-year period, over 60% of the Supreme Court's citations to legislative history were references to committee reports."[50] Additionally, as noted in the textbook *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, "[c]ommittee reports appear particularly well-suited for the authoritative role . . . . Most legislation is essentially written in committee or subcommittee, and any collective statement by the members of that group will represent the best-informed thought about what the proposed legislation is doing."[51] Moreover, the explanation of statutory meaning by the sponsors and legislators involved in the passage of the legislation are persuasive materials because these individuals are intimately involved in making sure the legislation's intent is clear for the voting record.[52] Here, both the Instruction and DOPMA as expressed through the House Armed Services Committee share the same intent to provide a career expectation to officers.[53] What logically follows from this intent is that the Instruction and DOPMA are in lockstep in creating a constitutionally protected property interest when the fourteen-year threshold is used as the benchmark to determine selective continuation.[54] Moreover, it is equally clear that a contravention of this intent occurs when officers with more than fourteen years in service are terminated for cost-saving purposes because allowing termination to save money was never the original intent of DOPMA when it came to long-serving officers.

49. *See* WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 981, 1000 (4th ed. 2007). William Eskeridge and his coauthors describe the prevailing consensus that committee reports and congressional members' representations about legislative intent merit such deference because other legislators rely on them when voting. *See id*.

50. *See id.* at 981 (citing Jorge Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1982)).

51. *Id.* at 982.

52. *See id.* at 1000.

53. Notably, even a nonpartisan analysis comes to the same conclusion regarding DOPMA's plain language and intent. In 1990, the DOD commissioned a study by RAND Corporation—a nonprofit public policy research institution—to determine how DOPMA was affecting military personnel and management. *See generally* BERNARD ROSTKER ET AL., RAND CORP., THE DEFENSE OFFICER PERSONNEL MANAGEMENT ACT OF 1980: A RETROSPECTIVE ASSESSMENT (1993), *available at* http://www.rand.org/content/dam/rand/pubs/reports/1993/R4246.pdf. The study stated that "[i]t was Congress's expectation that O-4s who failed to be selected to the next higher grade would be permitted to remain on active duty until they were eligible to retire at 20 years of service." *Id.* at 12.

54. The powers granted to an agency include the authority to promulgate the rules in the first place. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (holding administrative agency's power to promulgate regulations limited to authority delegated by Congress). In other words, the language expressing the intent that O-4s have a protected expectation interest in continued employment is satisfied by the proper language of the Instruction. Thus, the Instruction—and its six-year protective window—was a valid regulation in line with Congress's grant of authority, and the violation of the Instruction is a breach of not just the Instruction, but also of congressional intent.

A. The Plain Language of the Instruction Creates a Reliance Interest in Employment

The Instruction contains a provision stating that the service secretaries must comply with all the sections within the Instruction.[55] The Instruction is, by definition, nondiscretionary. The crux of the Instruction as applied to officers is section 6.3, which states that the rule applies to those selection boards held under the authority of 10 U.S.C. § 611(b) and to those officers who were twice passed over for promotion to O-5.[56] Once a service secretary convenes a selection board, the authority and guidance thereafter is determined by the Instruction.[57] The most important sentence in the rule states: "A commissioned officer on the Active Duty List in the grade of O-4, who is 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."[58] The 2011 force reductions breached this six-year window.[59]

The language of the Instruction is firm because it is unequivocally designed to protect officers that served more than fourteen years.[60] Fourteen years of service is a significant amount of time. Moreover, retirement at twenty years is one of the principal recruitment and retention tools for military personnel. In fact, the Air Force ROTC recruitment handbook addressed in Part II of this Article proves this point by essentially guaranteeing retirement upon reaching the rank of Major.[61] Thus, even if a service member is not continued, that service member—according to the ROTC guidebook—is assured retirement, thereby protecting the very income stream that a continued right in employment would produce.

B. Only in Unusual Circumstances Can the Service Secretaries Deviate from the Instruction

The importance of continuing officers with a minimum of fourteen years was so important to the DOD that they allowed deviation from the rule only

55. *See* 2007 INSTRUCTION, *supra* note 11, at 2.

56. *See id.* at 3.

57. *See id.* ("The Secretary of the Military Department concerned may, when the needs of the respective Military Service require, convene continuation selection boards according to [10 U.S.C. §] 611(b) . . . .")

58. *See id.*

59. As an example of a violation, the Secretary of the Air Force arbitrarily changed the six-year protective window to a five-year protective window without any authority to do so. *See* DONLEY, *supra* note 15. After this change was implemented, hundreds of officers were terminated despite having served well over fourteen years in the military—a result at odds with DOPMA and the Instruction.

60. *See* 2007 INSTRUCTION, *supra* note 11 (describing O-4s "shall normally be continued"). This language cannot be interpreted as *may be continued*, and as a result, those officers who are within six years of retirement must be continued. The Instruction had been complied with for thirty years until the DOD allowed service secretaries to change the *within 6 years* language to *within 5 years*.

61. *See* TICKET, *supra* note 31, at 42 (stipulating Majors not selected for promotion will normally be continued until eligible for retirement).

when unusual circumstances existed. The Instruction uses "derogatory information" as the only example of unusual circumstances.[62] Accordingly, if a service member has a minimum of fourteen years in service, but has derogatory information on his record, then that service member can be noncontinued under the rule.

Using derogatory information as an example of an unusual circumstance is significant because the Instruction in 2011 had different language than it did in the 1990s when it did not provide an example of unusual circumstances. Instead, the language of the 1990s' Instruction was left open-ended, which granted the service secretaries more authority to terminate.[63] In 2007, however, the DOD circumscribed the scope of unusual circumstances by inserting derogatory information as an example.[64] This limitation was a substantial change because it illustrates the DOD's clear intent to place constraints on what reasons the service secretaries can use to terminate O-4s. If the DOD wanted to allow the service secretaries a broad scope to interpret and define the term unusual circumstances for their respective military branches, it would not have provided derogatory information as an example.[65] Nevertheless, the DOD did not do so and the service secretaries' authority to terminate remained circumscribed.

But what does *derogatory information* mean? As an example, official Air Force documents reveal that this particular service branch has defined the scope of derogatory information to include DUIs (driving under the influence offenses), letters of reprimand, referral officer performance reports, and nonjudicial punishments.[66] Because of this limited definition, it appears that the respective service branches can further limit the scope of derogatory information, but cannot enlarge it to grant themselves more authority. An important take away from this narrowing-of-the-scope is the fact that unusual circumstances as applied to certain officer ranks cannot be defined to include force reductions, bad economic times, total end-strength mandates, or high-retention rates. The DOD had several opportunities to rewrite the Instruction and redefine unusual circumstances to mean economic hardship or something

62. *See* 2007 INSTRUCTION, *supra* note 11, at 3.

63. *See generally* DEP'T OF DEF., DIRECTIVE NUMBER 1320.08, CONTINUATION OF REGULAR COMMISSIONED OFFICERS ON ACTIVE DUTY AND RESERVE COMMISSIONED OFFICERS ON THE RESERVE ACTIVE STATUS LIST (1996) [hereinafter 1996 INSTRUCTION], *available at* http://biotech.law.lsu.edu/blaw/dodd/corres/pdf/d13208_102196/d13208p.pdf.

64. *See* 2007 INSTRUCTION, *supra* note 11, at 3 ("The Secretary of the Military Department concerned may, in unusual circumstances such as when an officer's official personnel record contains derogatory information, discharge an officer involuntarily in accordance with [10 U.S.C. §] 632 . . . .")

65. *See id.*

66. *See* Letter from Colonel Kelly Goggin, *supra* note 32 (listing disciplinary action and referral performance reports among derogatory information constituting grounds for noncontinuation.); *see also* Air Force Pers. Ctr., *Selective Continuation Fact Sheet* (2011) (on file with author) (listing referral officer performance reports, court martials, and nonjudicial punishments as examples of derogatory information).

broader in range so as to allow a larger spectrum of reasons to terminate an officer, but declined to do so.

Limiting the reasons and authority by which separation can occur creates an expectation among O-4s that when they *do not* have derogatory information on their records and they do have at least fourteen years in service, *they will be continued.* The Instruction is publicly available and well-read by the officer ranks because they have an interest in staying informed about their career potential and how long they can stay in the military. The Instruction's limitation on unusual circumstances is analogous to the *Perry* and *Roth* holdings in the sense that although the DOD is not bound by contract to continue officer employment, the mutual understanding and existing rule that a service member without derogatory information on his record will be continued favors creating a constitutionally protected property interest.

C. The New Instruction Proves the Clear Intent of the Old Instruction

There have been four iterations of the Instruction in its history.[67] From the outset, the first iteration makes clear that continuation is mandatory and the rest followed suit.[68] This Instruction was promulgated in 1981 immediately after DOPMA was signed into law.[69] Thus, it provides a clear indication of DOPMA's original intent through the unmistakable statement that O-4s "shall be selected for continuation."[70] This language indicates that the rule was designed to continue officers and comply with the intent behind the granting statute (DOPMA) to protect the reliance interest of certain officers in continuation on active duty.

The fourth and newest iteration of the Instruction was promulgated in April 2012 after significant negative media reports brought attention to the DOD's termination of officers who had more than fourteen years in service.[71] In the

67. *See generally* 2012 INSTRUCTION, *supra* note 16; 2007 INSTRUCTION, *supra* note 11; 1996 INSTRUCTION, *supra* note 63; 1981 INSTRUCTION, *supra* note 13.

68. *See* 1981 INSTRUCTION, *supra* note 13, at 2 (stating O-4s "shall be selected for continuation . . . if the officer will qualify for retirement . . . within 6 years of the date of such continuation").

69. *See id.* at 1; *see also* Defense Officers Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980) (codified as amended in scattered sections of 10, 14, and 37 U.S.C.).

70. *See* 1981 INSTRUCTION, *supra* note 13, at 2.

71. *See, e.g.*, Robert E. Corsi, Jr., Letter to the Editor, *Air Force Is Following Congress's Mandate, as It Must*, WALL ST. J., Jan. 6, 2012, http://online.wsj.com/article/SB10001424052970203462304577138970015876272.html; Josh Flynn-Brown & Kyndra Miller Rotunda, Letter to the Editor, *Air Force Is Off Base on Dismissals,* WALL ST. J., Jan. 20, 2012, http://online.wsj.com/article/SB10001424052970204542404577159111118755468.html; Flynn-Brown & Rotunda, *supra* note 14; David Larter, *Fired Majors Plan To Sue for Reinstatement*, AIR FORCE TIMES, Jan. 3, 2012, http://www.airforcetimes.com/news/2012/01/air-force-fired-majors-plan-to-sue-for-reinstatement-010312; Mark Thompson, *Air Force: Firing for Effect?,* TIME, Jan. 3, 2012, http://nation.time.com/2012/01/03/air-force-firing-for-effect; Caroline May, *Bill To Restore Benefits to 157 Separated Air Force Officers Gains Steam,* DAILY CALLER (Apr. 2, 2012, 2:12 PM), http://dailycaller.com/2012/04/02/bill-to-restore-benefits-to-157-separated-air-force-officers-gains-steam; Caroline May, *Military Advocates Decry 'Illegal' Early Terminations of 157 Air Force Majors,* DAILY CALLER (Nov. 25, 2011, 4:24

new version of the Instruction, the six-year continuation window is changed to a four-year window.[72] This final alteration of the rule speaks volumes about both the cold-hearted nature of the force drawdown process and the DOD's legal insecurity regarding the 2011 cuts. It is all too convenient that after the uproar caused by the 2011 mass terminations, the DOD changed the language of the Instruction to conform to the actions already taken. But, the irony with the new iteration of the Instruction is that the change in language illustrates that officers in 2011 did have a constitutionally protected property interest in continued employment, and the previous version of the Instruction was specifically designed to protect this interest. In addition, the new Instruction implies that the service branches made serious legal errors with respect to the 2011 terminations because if the terminations had been proper, there would be no need to alter the Instruction to conform to prior actions.

While inexplicable, the new rule brings up an important additional issue: On top of the change replacing the six-year window mandating selective continuation with a four-year window, the unusual-circumstances limitation is now gone.[73] Because the unusual circumstances language is gone, so too is the derogatory-information limitation. Such changes made clear that the previous version of the Instruction mandated continuation for officers within six years of retirement, provided they did not have derogatory information on their records. *If automatic continuation without derogatory information were not the case, there would be no need for the change.*

In addition, the fact that the new instruction mandates continuation of officers *within four years* of retirement illustrates that the purpose of the Instruction is *to continue officers*.[74] This is important because it is evidence that whatever numerical figure is used as a protective window—whether it is within six years of retirement or four years of retirement—the figure exists for a clear purpose: officer continuation. What follows from this is an intentional design by the DOD to create an expectation for officers, and an illustration of the DOD's clear understanding that these officers do have a property interest in continued employment.

IV. FORCE REDUCTIONS ARE NECESSARY BUT THEY MUST BE BALANCED AGAINST CONSTITUTIONAL PROPERTY INTERESTS

Force reductions are a necessary tool for service secretaries to manage personnel levels. When overmanning occurs, the secretaries should (and do)

PM), http://dailycaller.com/2011/11/25/military-advocates-decry-illegal-early-terminations-of-157-air-force-majors.

72. *See* 2012 INSTRUCTION, *supra* note 16, at 4.

73. *See id.* (showing changes to 2007 Instruction—specifically decreasing six years to four, and eliminating unusual-circumstances language).

74. *See id.*

have the ability to reduce manpower. After all, they manage their respective military branches for the purpose of maintaining war-fighting capabilities. In the same vein, when dire economic realities create a situation in which cost savings must be achieved, the service secretaries and the DOD have the unenviable job of finding these savings somewhere in the budget. Nevertheless, the responsibilities of the service secretaries and the DOD do not provide the authority to deviate from the law and DOD rules. Once DOD rules are in place, military officials must abide by them as they have the force of law.[75] If the DOD wished to have the ability to terminate certain groups of officers in 2011, such as those with more than fourteen years of service, the DOD should have rewritten the rules.[76] The DOD did not do so until 2012, and because of this delay, officers terminated in 2011 are uniquely situated.

The officers terminated in 2011 have a remarkable amount of evidence in their favor illustrating that they have a constitutionally protected property interest in continued employment. The House Armed Services Committee specifically states in the committee reports and congressional hearings on DOPMA that an officer "on attaining permanent O-4 grade, has a career expectation of 20 years of service."[77] The Instruction was built around this expectation as it requires that O-4s not promoted to O-5 must be continued on active duty if they are within six years of retirement (fourteen years in service).[78] Both DOPMA and the Instruction are in lockstep together making their union a powerful hammer for officers to use against the Pentagon.

Furthermore, a precedent of continuing officers on active duty is confirmed in challenges to the Board for Correction of Military Records (the Board)[79] as well as official documents from the Air Force's Congressional Inquiry Division to the United States Senate.[80] In one filing, a service member received a denial

75. *See* Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("The military no less than any other organ of the government is bound by statute, and even when granted unfettered discretion by Congress the military must abide by its own procedural regulations should it choose to promulgate them."); Farmer v. Phila. Elec. Co., 329 F.2d 3, 7 (3d Cir. 1964) ("There are instances when the President issues proclamations and orders, and governmental agencies promulgate rules and regulations, pursuant to a mandate or a delegation of authority from Congress. In such instances the proclamations, orders, rules and regulations have the force and effect of laws."); Collins v. United States, 101 Fed. Cl. 435, 442 (2011) ("Regulations are given the force of law even though the decision to promulgate them may have been inherently discretionary.").

76. Even with the 2012 revision, there is still an issue as to whether the DOD would have the authority to circumscribe the six-year protective window to a four-year protective window given the specific intent of DOPMA to create a property interest in continued employment for O-4s.

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

78. *See* 2012 INSTRUCTION, *supra* note 16.

79. *See In re* Brian E. Burr, No. BC-2011-02795, at 4 (Air Force Bd. for Corr. of Military Records Apr. 26, 2012), *available at* http://boards.law.af.mil/AF/BCMR/CY2011/BC-2011-02795.txt ("While we note the applicant's contention that the force drawdown of the 1990s established a precedence that officers with at least 15 years of honorable service should not be subject to involuntary separation, it is beyond the purview of this Board to change legally constituted policy.").

80. *See* Letter from Colonel Kelly Goggin, *supra* note 32 (stating Air Force generally will allow twice-passed-over O-4s to continue to retirement).

of reinstatement, but the Board admitted that precedent until 2011 had been to continue O-4s.[81] This is a significant admission, and one that undoubtedly intertwines these officers with the holdings of *Perry* and *Roth* because the Board essentially admitted that a pattern of conduct to continue officers existed. In *Perry*, the Court noted that a property interest can be created by "mutually explicit rules or understandings" rather than by contract.[82] An admission that a pattern of conduct existed shows proof of a mutual understanding that O-4s would be continued.

Finally, the actions of the service branches as a whole are instructive. In 2011, the only branch of service to terminate O-4s with more than fourteen years in service was the Air Force. As discussed above, the United States Army has legal guidance that mandates O-4 continuation in line with the Instruction and DOPMA.[83] The Air Force appears to stand alone in their personnel cuts. As the odd man out, the Air Force has a less than compelling case to argue that they were within their authority to terminate O-4s with more than fourteen years in service.

Taking all of this evidence together, it is reasonable to conclude that a constitutionally protected property interest is created in the continuation of O-4s on active duty—*in every service branch.* This is an important conclusion, and one that must be balanced against the force drawdown policies. For those officers who were already terminated—and for those yet to be terminated—there is still one other way for their property interest to be protected even if they are separated from service: legislation.

V. PROTECTING THE PROPERTY INTEREST AFTER TERMINATION WITH LEGISLATION: NOT A COMPLETE REMEDY, BUT A PARTIAL SUBSTITUTE

The obvious solution to the issues raised in this Article is for the respective service departments to reinstate those officers who were terminated with more than fourteen years of service and no derogatory information on their records. Even if it were so inclined, the likelihood that the military would mine its personnel database and perform such a daunting administrative task is quite low. In addition, reinstatement would in effect be an admission that the DOD made serious mistakes.

Another solution, litigation (inherently an option of last resort), also does not appear to provide an efficient remedy. In fact, when suing the military, service members face substantial legal barriers to staying in court. In a specific cause of action, such as the one for a constitutionally protected property interest as

81. *See In re* Brian E. Burr, No. BC-2011-02795, at 4.

82. *See* Perry v. Sindermann, 408 U.S. 593, 601 (1972); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 597 (1972) ("[Property interests] . . . are created and their dimensions defined by existing rules or understandings that stem from an independent source . . . .").

83. *See supra* note 36 and accompanying text.

discussed in this Article, courts require military personnel to satisfy different tests.[84]

For example, in the Fourth and Ninth Circuits the applicable standard—derived from the Fifth Circuit—is the *Mindes* test.[85] The test consists of two threshold elements followed by a four-factor balancing test.[86] The most crucial threshold—and the most difficult to satisfy—is the demand that intraservice administrative remedies be exhausted.[87] Thus, the test effectively forces a vast majority of personnel to file in their respective service branches' Boards before filing suit. The only way around such an arduous and time-consuming requirement is to provide proof that exhaustion is excused.[88] Due to the fact that the Board has the authority to determine constitutional claims, it is less likely that a court will view a service member's claim as rising to a level sufficient to satisfy the exhaustion requirement because the Board appears to be a viable remedy for most causes of action.[89] Once a service member files with the Board, a final decision could take years, which consequently could substantially harm the service member's career. Unfortunately, harm to a career is not a justification courts accept as satisfaction of the exhaustion requirement.[90] Thus, access to justice through the court system is littered with

84. *See* Wenger v. Monroe, 282 F.3d 1068, 1072 (9th Cir. 2002) (noting Ninth Circuit applies modified Fifth Circuit deference test); Guerra v. Scruggs, 942 F.2d 270, 276 (4th Cir. 1991) (stating Fourth Circuit has adopted Fifth Circuit's deference test); Lilly v. Schwartz, 713 F. Supp. 2d 15, 18 (D.D.C. 2010) (laying out test for determining whether to review military decisions). The *Lilly* court framed the review inquiry as "whether there has been substantial compliance with applicable statutes and regulations, whether the agency acted arbitrarily and capriciously, and whether there is substantial evidence to support the [military] agency's decision." *Lilly*, 713 F. Supp. 2d at 18 (alteration in original) (quoting Appleby v. Harvey, 517 F. Supp. 2d 253, 270 (D.D.C. 2007)).

85. *See Wenger*, 282 F.3d at 1072 (establishing modified Fifth Circuit deference test applicable in Ninth Circuit); *Guerra*, 942 F.2d at 276 (explaining Fourth Circuit employs Fifth Circuit's deference test); *see also* Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971).

86. *See Mindes*, 453 F.2d at 201-02. The two threshold elements are: the plaintiff must allege a deprivation of a constitutional right, statute, or regulation; and the plaintiff must exhaust intraservice remedies. *Id.* at 201. The plaintiff must next balance four factors: the nature and strength of the claim; the potential injury to the plaintiff if review is refused; the type and degree of anticipated interference in military function; and the extent to which the exercise of military expertise or discretion is involved. *See id.* In the Ninth Circuit, after meeting the threshold elements, the court proceeds based on a modified *Mindes* test. *See Wenger*, 282 F.3d at 1072.

87. *See, e.g.*, *Wenger*, 282 F.3d at 1073 (providing four options to excuse intraservice administrative-remedies threshold); Christoffersen v. Wash. State Air Nat'l Guard, 855 F.2d 1437, 1441 (9th Cir. 1988) ("[T]he alleged absence of such a[n intraservice] remedy does not preclude application of the *Mindes* test."); Williams v. Wilson, 762 F.2d 357, 360 n.6 (4th Cir. 1985) (noting inability of Board to give plaintiff all relief sought does not automatically excuse failure to exhaust).

88. *See Guerra*, 942 F.2d at 276. The requirement to exhaust administrative remedies is excepted when it can be shown the outcome to be predictably futile. *See id.*

89. *See* Bowman v. Brownlee, 333 F. Supp. 2d 554, 559 (W.D. Va. 2004) ("[T]he [Board] has the authority to consider claims based on statutory, regulatory, or *constitutional* violations.").

90. *See* Guerra v. Scruggs, 942 F.2d 270, 274 (4th Cir. 1991) (discussing stigma from delay between discharge and review); *Christoffersen*, 855 F.2d at 1443-44 (discussing financial hardships of officers). The Fourth Circuit has held that an extended delay between discharge and Board review that caused a stigma with

procedural landmines, despite the existence of a constitutionally protected property interest.[91]

Because of the difficulty of bringing suit, ironically the legislative route may be the quickest way to solve the problem. If the military will not comply with its own rules, Congress must take action and enact a law that protects their constituents' constitutionally protected property interests. After all, military personnel are constituents that deserve to be helped in an aggressive manner given the sacrifices they make through years of deployments.

Congress almost completed that task in 2012. In the last part of the 2011 legislative session, Congress understood that the drastic measures of the military were patently unfair to service members with substantial years in service. In the 2012 National Defense Authorization Act (Defense Bill), Congress reactivated Temporary Early Retirement Authority (TERA).[92] TERA provides that service members with at least fifteen years in service on the date of separation can receive prorated retirement for years served.[93] Additionally, under TERA, service members will receive lifetime medical coverage and be treated as retired.[94]

Prorated retirement is an employment substitute, albeit one much less than the roughly $80,000 per year that an O-4 would make.[95] Nevertheless, this option is a compromise solution that many service members may be willing to

civilian employers did not satisfy the heightened standard in military cases. *See Guerra*, 942 F.2d at 275. The Ninth Circuit has also discussed the financial hardships of officers if review was not granted and alluded to the economic harm that would tip the scales in favor of court review; however, the court was not definitive on the matter. *See Christoffersen*, 855 F.2d. at 1443-44. Thus, if a service member argues that a delay of twelve months from the time the individual filed with the Board and received an opinion caused substantial career harm, it is unlikely that the court will be persuaded.

91. *See generally* John A. Wickham, *Avoiding the Minefield in Judicial Review of Military Personnel Actions: Exhausting Administrative Remedies*, N.J. LAW., June 2007, at 28 (detailing threshold issues service members face when filing suit).

92. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §504(b), 125 Stat. 1298, 1390 (2011) (reactivating TERA).

93. *Compare id.* (reactivating TERA from 1993 National Defense Authorization Act), *with* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 4403, 106 Stat. 2315, 2702 (1992) (enacting TERA). For example, under TERA a service member's retirement at fifteen years will be calculated to be roughly $37,000 per year. *See* National Defense Authorization Act for Fiscal Year 1993 § 4403(e). TERA establishes "Computation of Retired Pay," which reduces prorated retirement payments by one-twelfth of one percent for every month in which a service member does not reach twenty years.

94. *See* CONG. BUDGET OFFICE, PRELIMINARY COST ESTIMATE FOR H.R. 3904, THE "KEEP AMERICA'S PROMISES ACT" (Apr. 11, 2012) (on file with author) ("The spending subject to appropriations consists of additional spending by the Defense Health System. As annuitants, they would become eligible for health benefits through the Department of Defense.").

95. *See generally Military Pay Tables—1949-2013*, DEF. FIN. & ACCOUNTING SERVICE, http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html (select "Jan. 1, 2011" hyperlink to download PDF) (last visited Oct. 21, 2013). According to the applicable 2011 Military Pay Table, the officers who are the subject of this Article—those separated in 2011 who are O-4 grade with more than fourteen years of service—would have been eligible to receive a salary of $6,851.10 per month, or approximately $80,000 per year.

take instead of pursuing litigation. Thus, the service branches save money because they neither have to pay a full salary, nor a full twenty-year retirement. Instead, the service branches pay a prorated portion that is just enough to keep service members happy.

There are problems, however, with Congress's approach. First, TERA only covers service members with fifteen years in service, yet the terminations involve service members with at least fourteen years in service, leaving a gap in service-length coverage.

Second, even though Congress reactivated TERA in the 2012 Defense Bill, the bill does nothing for those officers terminated in 2011 prior to the bill becoming law.[96] The Defense Bill was signed into law on December 31, 2011, and the terminations took place prior to that date.[97] Therefore, these officers were not protected by TERA. Even though TERA protects officers who were terminated after December 31, 2011, a serious caveat remains. TERA is extended to the service secretaries to be used as a force-management tool until 2018,[98] but the language of the law is discretionary rather than mandatory.[99]

96. During the run-up to the Defense Bill in 2012, Representative Denny Rehberg offered the Keep America's Promises Act to retroactively restore TERA protections to those officers in 2011 that had been left out. *See* Keep America's Promises Act, H.R. 3904, 112th Cong. (2011) (introducing Act on Feb. 6, 2012). The Act was simple in form and did not create any new substantive law; rather, it utilized existing TERA provisions and retroactively applied them to officers terminated in 2011. *See id.* § 2(a).

> The Keep America's Promises Act is intended, and should be construed in the event of any ambiguity, to extend the renewed Temporary Early Retirement Authority provided by the amendments made by section 504(b) of the National Defense Authorization Act for Fiscal Year 2012 . . . to retroactively cover members of the Army, Navy, Air Force, or Marine Corps . . . .

Id. § 2(a)(1). Notwithstanding these proposals, the Act would not have changed TERA's fifteen-year coverage to fourteen years. *See id.* § 2(a)(1)(B) (applying retroactivity to those officers with fifteen years in service). In other words, only officers with fifteen years of service on the date of termination are covered—leaving out officers terminated at year fourteen—even though a constitutionally protected property interest existed with those at fourteen years. Thus, the Keep America's Promises Act did not offer complete coverage to injured service members. Instead, the Act was a proposed partial remedy for the injury sustained—it would have been more proper if the Act changed TERA's protection from fifteen years to fourteen years. For those officers covered, a retroactively applied version of TERA would not have made them completely whole, however, it would have given them the option to take the prorated retirement payments or sue. Should they have taken the payments from TERA, the officers would have received lifelong medical coverage and would have been treated as retired. *See* CONG. BUDGET OFFICE, *supra* note 94. For the vast majority of officers, early retirement under TERA may seem to be the best option considering the alternative would be a drawn out legal battle with significant jurisdictional and procedural challenges. Unfortunately for the officers, the Act did not become law.

97. *See H.R. 1540 (112th): National Defense Authorization Act for Fiscal Year 2012*, GOVTRACK.US, http://www.govtrack.us/congress/bills/112/hr1540 (last visited Oct. 21, 2013) (detailing dates bill passed House of Representatives and Senate, as well as when signed into law). All terminations that took place prior to that date are not covered by the law because the bill does not contain provisions for retroactivity.

98. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §504(b)(1), 125 Stat. 1298, 1390 (2011).

99. *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 4403, 106 Stat. 2315, 2702 (1992); *cf.* National Defense Authorization Act for Fiscal Year 2012 §504(b)(1). Section 504(b)(1) of the National Defense Authorization Act for Fiscal Year 2012 reactivates provisions of the 1993 National

As a result, the service secretaries can choose not to employ prorated retirement, which appears to be the case because the Air Force and Navy Secretaries are offering TERA in the enlisted ranks, but not the officer ranks.[100] Therefore, although TERA is on the books, service secretaries have so far been quite conservative in using it. Moreover, all of this is irrelevant for those officers who were terminated in 2011 prior to the enactment of TERA.

VI. CONCLUSION

In the frenetic Washington D.C. atmosphere of budget cutting and hyper-partisanship, the DOD allowed callous cuts to the officer ranks, affecting men and women that served nearly half their lives in the military. Congress stepped in to offer protection by reactivating TERA, but the reactivation did not cover all affected service members. Additionally, TERA is being used less than sparingly, and only in the enlisted ranks.[101] Even during the drawdown of the 1990s, when TERA was also on the books, it was used heavily.[102] Force reduction periods are always a contentious and chaotic time; massive cuts come quickly and occur often. Because of the pace of cuts, service members greatly depend on the reasonableness of policymakers and service secretaries. Unfortunately, service members have been treated less than reasonably and less than honorably.

Regardless of Congress's attempted remedy, the terminated officers have a constitutionally protected property interest in continued employment. In 1980, members of Congress intentionally stated that O-4s have an expectation interest in retirement and shortly thereafter the DOD created a rule that mandated O-4s with fourteen years in service be continued on active duty.[103] In the last months of 2011, the DOD allowed the service secretaries to disregard thirty years of rulemaking and precedent, and consequently the officer ranks suffered a breach of their property interests.

Defense Authorization Act, specifically section 4403, which contains discretionary words such as "[d]uring the active force drawdown period, the Secretary of the Army may [retire a service member] . . . ." *See* National Defense Authorization Act for Fiscal Year 1993 § 4403(b)(1)(C) (explaining service secretary may reduce required number of years for retirement from twenty to fifteen).

100. *See* Chief of Naval Pers., *Transition Benefits: Early Retirement Approved for Some ERB-Separating Sailors*, DEP'T OF THE NAVY (Jan. 20, 2012, 5:16 PM), http://www.navy.mil/submit/display.asp?story_id=64910 (offering early retirement to some enlisted personnel); *Early Retirement Offered to Select Enlisted Airmen*, LITTLE ROCK AIR FORCE BASE (Apr. 6, 2012), http://www.littlerock.af.mil/news/story.asp?id=123297152 (offering TERA early retirement to 250 enlisted personnel). Although officer ranks are not being offered TERA yet, service secretaries will most likely offer it to officers in the coming years.

101. *See supra* note 100 and accompanying text.

102. *See supra* note 79 and accompanying text (discussing Brian E. Burr case before Air Force Board for Correction).

103. *See supra* note 9 and accompanying text (describing congressional intent to continue certain officers until retirement); 1981 INSTRUCTION, *supra* note 13, at 2 (establishing continuation policy for officers passed over for promotion, but who have at least fourteen years in service).

Just because the DOD cuts military personnel does not mean its actions are legal. The DOD is subject to the rule of law just as civilians are. Moreover, it is a common misconception that the promotion and termination system is absolute. In practice, the system is rule-based, placing a number of constraints on the service secretaries' authority to terminate personnel. These rules have been required by Congress and instituted by the DOD. Unfortunately, the DOD has ignored the law and the rules in its cost-cutting endeavors.

Large-scale litigation will have its challenges due to the standing issues military personnel will face in the circuit courts. Moreover, Congress is the proper body to oversee the DOD and to ensure it is following the rules. Should Congress not intervene, the injured service members will have to wait many years before they exhaust the remedies provided by their respective service branches' Boards. Then, once they have exhausted their administrative remedies, they can file in federal court. By the end of a federal suit, many more years will have passed and careers will have been forever injured. Ultimately, even though a constitutionally protected property interest is created, there are still procedural hurdles to enforcing it.

A constitutionally protected property interest in continued employment exists in the military. The DOD may not have intended to help in its creation after the passage of DOPMA, but the rules by which it operates place constraints on its ability to terminate certain officers in certain grades. In addition, it is unmistakable that Congress intended to create a property interest by the plain language in the House Armed Services Committee Report on DOPMA. Because a constitutionally protected property interest does exist, some of the force reductions involving O-4s in 2011 and continuing through 2012 and beyond are legally invalid.