THE END DOES NOT JUSTIFY THE MEANS: WHY DIMINISHED DUE PROCESS DURING REDUCTIONS IN FORCE IS UNJUST

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We must draw down wisely to avoid stifling the health of the force or breaking faith with our soldiers, civilians and families. Excessive cuts would create high risk in our ability to sustain readiness. We must avoid our historical pattern of drawing down too much or too fast and risk losing the leadership, technical skills and combat experience that cannot be easily reclaimed. We must identify and safeguard key programs in education, leader development, health care, quality of life, and retirement—programs critical to retaining our soldiers.[1]

I. Introduction

You are a captain in the U.S. Army and have served honorably as a commissioned officer for seven years.[2] On a regular Friday morning in

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[1] The Honorable John M. McHugh, Secretary of the Army and General Raymond T. Odierno, Chief of Staff, United States Army, A Statement on the Posture of the U.S. Army 2012, submitted before the Committee on Armed Services, U.S. House of Representatives, Second Session, 112th Congress, 11 (Feb. 17, 2012) (on file with author) [hereinafter Statement on Army Posture 2012].

[2] This hypothetical is based on the Officer Separation Board (OSB) initiated by the Secretary of the Army in the summer of 2015 that included the following:

mid-June, 2015, you receive an Email telling you that "based on your date of rank . . . [you are] in the zone of eligibility for the upcoming Officer Separation Board (OSB)."[3] Seeing the phrase "Officer Separation Board" makes your stomach turn. After all, you have worked hard, deployed, done your job exceptionally well and you have the Officer Evaluation Reports (OERs) to show for it.

Being an officer is your career and, professionally, you feel it is all you are trained to do. You took classes in college to prepare for your life as an officer and then left your family and friends to go serve your country at various locations around the world. After pinning on your captain rank in late 2012,[4] the next board you were expecting was the promotion board to major in another two to three years.[5] Now, your official military

> Regular Army (RA) officers in the [Army competitive category] and on the active duty list in the grade of captain with a date of rank as outlined below [23 July 2012–22 July 2013] who have served at least one year of active duty in the grade currently held [here, O-3] as of the convene date of their board [22–25 September 2015], and who are not eligible to be retired under any provision of law and are not within two years of becoming so eligible as of the convene date of their board will be considered by an OSB if they are not on a list of officers recommended for promotion to the next higher grade.

Military Personnel Message, 15-175, U.S. Army Human Res. Command, subject: FY15 Officer Separation Board (OSB) and (Enhanced) Selective Early Retirement Board (E-SERB), Captain (CPT), Army Competitive Category (ACC) (11 June 2015) [hereinafter MILPER Message 15-175] (included as attachment to email sent to OSB officers in summer, 2015) (emphasis omitted). An "[A]rmy competitive category" is a "separate promotion category established by the [Secretary of the Army] . . . for specific groups of officers whose specialized education, training, or experience, and often relatively narrow career field utilization, make separate career management desirable." U.S. DEP'T OF DEF., INSTR. 1320.14, COMMISSIONED OFFICER PROMOTION PROGRAM PROCEDURES GLOSSARY para. 1.c (11 Dec. 2013) [hereinafter DoDI 1320.14]. *See also* 10 U.S.C. § 621. As a result of this OSB, 740 of the 4000 captains undergoing the OSB were involuntarily separated. Jim Tice, *20 percent of screened Army captains booted by retention board*, ARMY TIMES (Feb. 11, 2016), http://www.armytimes.com/story/military/careers/army/officer/2016/02/11/20-percent-screened-army-captains-booted-retentionboard/80242652/.

[3] Email from CPT Kristina N. Clark, Adjutant General (AG), Captains Assignment Officer (June 12, 2015) (on file with author).

[4] MILPER Message 15-175, *supra* note 2. The date of rank for captains considered during the OSB in summer 2015 was July 23, 2012, through July 22, 2013. *Id.*

[5] *See* U.S. DEP'T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT para. 3-5.c. [hereinafter DA PAM. 600-3] (providing that "[n]ormally an officer within a cohort year group enters the primary zone of consideration for major around the 9th year of service").

personnel file (OMPF)[6] will be reviewed by a board several years earlier than you expected, in order to determine whether you should be removed from the service as part of a reduction in force (RIF).[7] All the board will have to determine the fate of your career are the documents in your OMPF.[8] The board members will never meet you face-to-face.[9] You cannot answer any questions the board members may have regarding documents in your OMPF, or provide any additional information about yourself.[10]

A flyer with frequently asked questions is included as an attachment to the Email you receive.[11] This flyer attempts to explain to you why this is happening.

> [Officer selection boards] and [Enhanced Selective Early Retirement Boards] are necessary to meet future force structure requirements. A reduction of officer billets in our future force structure combined with Captain Year Group[12] accessions to support a significantly larger force structure, high promotion selection rates, and high retention rates have caused officer imbalances and overages to support future requirements. The Army's drawdown plan is a balanced approach that maintains readiness while trying to minimize turbulence within the

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[6] U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCE RECORDS MANAGEMENT para. 3-8 (7 Apr. 2014) [hereinafter AR 600-8-104]. The official military personnel file (OMPF) is a file that is "reflective of a [s]oldier's permanent record." *Id.* A soldier's OMPF contains, among other things, folders relating to performance (evaluations, education, commendatory, and disciplinary), service (administration and compensation), and medical (health and dental). *Id.* tbl. 3-1. In some cases, the OMPF contains a "restricted folder." *Id.* Documents within a restricted folder "may normally be considered improper for viewing by selection boards or career managers." *Id.* tbl. 3-1.

[7] 10 U.S.C. § 638a (authorizing the Secretary of Defense to authorize the service secretaries to implement reductions in force through the use of OSBs). Reductions in force separate otherwise qualified officers from service based on the needs of the service. *See generally id.*

[8] *Id.*

[9] *See* DoDI 1320.14, *supra* note 2 (listing procedures followed by OSBs).

[10] *Id.*

[11] Human Resource Command, Headquarters Dep't of the Army, Frequently Asked Questions–FY15 Captain Army Competitive Category (ACC) Officer Separation Boards (OSB)/Enhanced Selective Early Retirement Boards (E-SERB) (10 June 2015) (unpublished information paper) (on file with author) [hereinafter OSB/E-SERB FAQs].

[12] DA PAM. 600-3, *supra* note 5, para. 3-3.*a*.(5). A "year group" is the fiscal year in which an officer was commissioned. *Id.* "Company and field grade officer groupings are termed cohort year groups." *Id.*

> officer corps. [Officer selection boards] and E-SERBs are integral parts of this plan and are based on congressionally mandated strength reductions and severely restricted budgets.[13]

The Email you receive tells you to "take all necessary steps to prepare your file for the applicable boards."[14] But you know there is so much more to you as an officer than the documents in your OMPF. You are concerned that this process will fail to protect you from being separated. Does the process adequately evaluate your "potential for future contribution to the Army?"[15]

Compare this scenario to that of another officer; one who has engaged in misconduct. Consider the case of a non-probationary officer[16] who receives a General Officer Memorandum of Reprimand[17] (GOMOR) for driving while intoxicated (DWI). If the Army wants to remove this officer from the service, the officer is entitled to a separation board, at which the officer can talk to board members directly, submit documents for their consideration, cross-examine witnesses against the officer, and otherwise

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[13] OSB/E-SERB FAQs, *supra* note 11.

[14] Clark, *supra* note 3.

[15] U.S. DEP'T OF ARMY, MEMO. 600-2, PERSONNEL—GENERAL POLICIES AND PROCEDURES FOR ACTIVE-DUTY LIST OFFICER SELECTION BOARDS, App. G, para. G-5. (25 Sept. 2006) [hereinafter DA MEMO 600-2].

[16] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-20.*b*.(1) (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24]. A "probationary officer" is a regular Army commissioned officer with fewer than five years of active commissioned service. *Id.* In 2008, 10 U.S.C. § 630 was amended to increase the five years to six years. 10 U.S.C. § 630. However, this change is not reflected in AR 600-8-24. AR 600-8-24. "Non-probationary" officers—those with more than five years of active commissioned service—are entitled to a separation board prior to being separated under AR 600-8-24. *Id.*

[17] *See* FORT BENNING, *Administrative Letter of Reprimand Fact Sheet*, U.S. ARMY (Mar. 2012), http://www.benning.army.mil/mcoe/sja/content/pdf/Letter%20of%20Reprimand.pdf (providing a general explanation of the memorandum of reprimand and its repercussions).

make a case for retention.[18] This officer also has the right to counsel on his or her behalf[19] and the right to appeal the decision of the board.[20]

As shown in the second hypothetical above, when a non-probationary officer's "performance of duty has fallen below standards prescribed by the Secretary of Defense,"[21] that officer is guaranteed certain procedural rights.[22] However, as shown in the first hypothetical, during a RIF, these procedural rights are significantly reduced. Even a non-probationary officer can be separated without many of the protections guaranteed to non-probationary officers being considered for separation due to misconduct.[23]

The due process rights to which officers are entitled during RIF OSBs provide insufficient notice of the basis for separation and an inadequate opportunity to be heard.[24] This is unjust to the officers in which the nation has invested time—often many years—and money developing. The process of OSBs also compromises the Army's "number one priority"—readiness—by potentially separating officers otherwise worthy of retention who may pass muster on paper.[25] This article argues that a commission in the U.S. Army is a protected property interest under the

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[18] 10 U.S.C. § 1185.

[19] AR 600-8-24, *supra* note 16, para. 4-12.a. "A Judge Advocate or [Department of the Army] civilian attorney will be assigned to each Board of Inquiry as the respondent's counsel." *Id.* para. 4-12.a. "The respondent is also entitled to retain civilian counsel at own expense." *Id.* para. 4-12.b.

[20] *Id.* para. 4-11.k. Respondents "have the right to submit to the [General Officer Show Cause Authority] a statement or brief within [seven] calendar days after receipt of the Board of Inquiry report of proceedings of the case." *Id.*

[21] *Id.* Glossary, Section II, Terms, "Substandard performance of duty."

[22] *See, e.g.*, 10 U.S.C. §1185; AR 600-8-24, *supra* note 16.

[23] *See* AR 600-8-24, *supra* note 16, para. 4-2.a-c. (Reasons for Elimination). Note that 10 U.S.C. § 638a was amended by Section 502 of FY13 National Defense Authorization Act (NDAA) in order to allow for "Reinstatement of Authority for Enhanced Selective Early Retirement Boards and Early Discharges." 10 U.S.C. § 638a.

[24] *See* 10 U.S.C. § 638a. *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 1985 U.S. LEXIS 68, 53 U.S.L.W. 4306, 118 L.R.R.M. 3041, 1 I.E.R. Cas. (BNA) 424 (1985) (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)) (finding "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case") (internal quotations omitted).

[25] General Mark A. Milley, Chief of Staff of the Army, Military Services Challenges Meeting Readiness, Modernization, and Manning Under Current Budget Limits, submitted before the Committee on Armed Services, U.S. House of Representatives, Second Session, 114th Congress, 2 (Sept. 15, 2016) [hereinafter Statement on Challenges Under Current Budget Limits 2016] (on file with author).

Constitution and requires greater due process than that afforded by an OSB.[26] Boards unfairly deprive officers of a property interest—their career—by providing inadequate process.

This article first examines the development and historical use of past reductions in force.[27] The purpose and procedures of OSBs as a means to accomplish reductions in force will then be explained.[28] The OSB process will be compared to the procedural protections afforded to officers at traditional administrative separation boards convened under Army Regulation (AR) 600-8-24.[29] Next, the article will discuss why a commission is a protected property interest under the Due Process Clause of the Fifth Amendment, and how various rules and regulations create a minimum expectation of notice and an opportunity to be heard prior to separation of non-probationary officers.

The argument that OSBs provide insufficient due process protections is premised on the contention that, after serving as a commissioned officer for a certain number of years, or after achieving a certain rank, a greater expectation in continued employment is achieved. This expectation creates something more than at-will employment that entitles non-probationary officers to notice and a meaningful opportunity to be heard.[30] This argument is furthered by the Army's use of the terms "tenure"[31] and "career status"[32] with regard to officers with more than five years of active, commissioned service.[33] This article will explain the significance courts have given to these terms in the employment context in order to show that

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[26] U.S. CONST. amend. V.

[27] 10 U.S.C. § 638a (authorizing the Secretary of Defense to authorize the service secretaries to implement reductions in force through the use of OSBs).

[28] National Defense Authorization Act for Fiscal Year 2013, 112 Pub. L. No. 239, § 502, 126 Stat. 1632 (2013) [hereinafter FY13 NDAA]. Section 502 of fiscal year (FY) 13 National Defense Authorization Act (NDAA), entitled "Reinstatement of Authority for Enhanced Selective Early Retirement Boards and Early Discharges," expanded 10 U.S.C. § 638a to authorize the service secretaries to conduct OSBs through December 31, 2018. *Id.*

[29] AR 600-8-24, *supra* note 16.

[30] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 600 (1973) (holding that rules and understandings created and fostered by a university may create de facto tenure in an otherwise non-tenured employee).

[31] DA PAM. 600-3, *supra* note 5, para. 5-5, tbl. 5-1.

[32] U.S. DEP'T OF ARMY, REG. 350-100, OFFICER ACTIVE DUTY SERVICE OBLIGATIONS para. 2-4 (8 Aug. 2007) (RAR 10 Aug. 2009) [hereinafter AR 350-100].

[33] *Sinderman*, 408 U.S. at 600.

officers who have obtained "tenure" and "career status" deserve the same level of protection as their civilian counterparts."[34]

Finally, this article recommends that the Army promptly address the gap in due process between the protections that typically apply to a commission and the minimal protections afforded by the OSB process. The proposed solution includes providing officers undergoing an OSB, at a minimum, (1) limitations on how far back in terms of rank and years the OSB can look into an officer's OMPF; (2) the opportunity for officers undergoing the OSB process to be heard in person at the OSB; and (3) notice of the reason(s) for separation. This remedy provides greater notice and an opportunity to be heard and protects both the individual officer undergoing the OSB process, as well as the national interest in not "drawing down too much or too fast."[35]

II. An Overview of Reductions in Force

The practice of expanding the size of the Army during conflicts, then later drawing down after those conflicts, has occurred throughout American military history.[36] These post-conflict force reductions are a necessary means by which the service secretaries manage personnel levels in order to meet current needs and requirements.[37] Yet the Army has a long "historical pattern of drawing down too much or too fast."[38] This has had a negative impact on both readiness and morale within the Army; and in the past has resulted in greater reductions than intended.[39]

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[34] Statement on Army Posture 2012, s*upra* note 1.
[35] *Id.*
[36] *See, e.g.*, ANDREW FEICKERT & CHARLES A HENNING, CONG. RESEARCH SERV. R42493, ARMY DRAWDOWN AND RESTRUCTURING (2012). *See also* Garry L. Thompson, Army Downsizing Following World War I, World War II, Vietnam, and a Comparison to Recent Army Downsizing (2002) (unpublished Masters thesis, U.S. Army CGSC) (on file with author).
[37] Joshua Flynn-Brown, Analyzing the Tension Between Military Force Reductions and the Constitution: Protecting an Officer's Property Interest in Continued Employment, 46 SUFFOLK U. L. REV. 1067, 1079 (2013).
[38] Statement on Army Posture 2012, s*upra* note 1.
[39] Flynn-Brown, *supra* note 37, at 1079.

A. A Brief History of Reductions in Force

Although this article focuses on the lack of due process afforded to individual officers who are subjected to OSBs, historically, reductions in force (RIFs) have also had a significant negative impact on the Army in terms of being ready to fight the next conflict. [40] Prior to addressing the impact on the individual officer, it is important to understand the impact such drawdowns have had on the Army in the past.

During the post-World War II (WWII) RIF, the Army went from a force of eight million soldiers and eighty-nine divisions in 1945, to just 591,000 soldiers and ten divisions by 1950, "a 93% reduction in manpower over five years."[41] "[T]he loss of many capable maintenance specialists resulted in widespread deterioration of equipment."[42] "The low personnel . . . readiness levels in 1950 became apparent during the initially weak U.S. military response when the Korean War broke out in June of that year."[43] For example, as a result of being poorly trained and inexperienced, the United States withdrew from its first engagement with North Korean Forces in the Battle of Osan on July 5, 1950.[44]

In early 1951, General Douglas MacArthur, in his post-WWII role as Commander in Chief of the Far East Command "notified Washington" of the need for "major reinforcement" in the region.[45] "At the time, however, there were no major reinforcements available."[46] In December of 1950, President Harry S. Truman declared a national state of emergency requiring, in part, "that the military . . . be strengthened as speedily as possible [in order to] repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the

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[40] Statement on Army Posture 2012, *supra* note 1. The negative impact of RIF drawdown is in addition to other post-conflict military cuts.
[41] FEICKERT & HENNING, *supra* note 36; *see also* Thompson, *supra* note 36.
[42] FEICKERT & HENNING, *supra* note 36; *see also* AMERICAN MILITARY HISTORY, VOLUME II, THE UNITED STATES ARMY IN A GLOBAL ERA, 1917–2003, Ch. 7 (Richard W. Stewart et al., eds., 2005).
[43] *Id.*
[44] ALLAN R. MILLETT, THE WAR FOR KOREA, 1950–1951: THEY CAME FROM THE NORTH 138 (2010).
[45] AMERICAN MILITARY HISTORY, *supra* note 42, at 236.
[46] *Id.*

United Nations and otherwise to bring about lasting peace."[47] However, "these efforts could not produce ready units until mid-1951."[48]

After the Korean War, the Army reduced again in size, this time by 33%, primarily between 1953 and 1957.[49] First, in order to "meet officer reductions, the [A]rmy instituted early release programs."[50] "Although performance was the criterion used for separating officers, the [A]rmy purportedly lost many of its most capable 'warriors' because a college degree was seen as being more important for retention than performance in combat."[51] As a result, a career as a military officer "quickly los[t] its luster" during this time.[52] In an effort to combat low morale, poor recruitment, and low retention, the Army ended up "raising pay, introducing new uniforms, increasing educational opportunities, instituting a reenlistment bonus, and ensuring that officer promotion opportunity remained at or close to wartime rates."[53]

The Army again faced the consequences of a rapid drawdown at the outset of the Vietnam War.[54] United States involvement escalated in Vietnam in the early 1960s.[55] In 1961, there were 858,622[56] soldiers in the Army. By the beginning of 1965, that number was only slightly higher at 969,966.[57] In the summer of 1965, as fighting in the region grew, "President Johnson announced plans to deploy additional combat units [to Vietnam] and to increase American military strength in South Vietnam to 175,000 by year's end."[58] "To meet the call for additional combat forces, to obtain manpower to enlarge its training base, and to maintain a pool for rotation and replacement of soldiers in South Vietnam, the Army . . .

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[47] Harry S. Truman, Thirty-Third President of the United States (1945-53), Proclamation 2914—Proclaiming the Existence of a National Emergency (Dec. 16, 1950).
[48] AMERICAN MILITARY HISTORY, *supra* note 42, at 236.
[49] DAVID MCCORMICK, THE DOWNSIZED WARRIOR 10 (1998).
[50] *Id.*
[51] *Id*.
[52] *Id.* at 10–11
[53] *Id.*
[54] FEICKERT & HENNING, *supra* note 36 (citing AMERICAN MILITARY HISTORY, *supra* note 42, Ch. 12).
[55] *Id.*
[56] David Coleman, *U.S. Military Personnel 1954-2014*, HISTORY IN PIECES, http://historyinpieces.com/research/us-military-personnel-1954-2014 (last visited Mar. 21, 2017).
[57] *Id.*
[58] AMERICAN MILITARY HISTORY, VOLUME II, THE UNITED STATES ARMY IN A GLOBAL ERA, 1917–2003, Ch. 10, p. 305 (Richard W. Stewart et al., eds., 2005), http://www.history.army.mil/books/amh-v2/amh%20v2/chapter10.htm (last visited Mar. 21, 2017).

[necessarily] relied on larger draft calls and voluntary enlistments."[59] "In January 1965, 5400 young men were called for the draft."[60] "By December of [1965], more than 45,000 young men were called."[61] "[A]t the height of the Vietnam War in 1968, the Army grew to over 1,570,000 men and women."[62]

After the Vietnam War, "budget reductions translated into a smaller Army and the Army's end-strength declined from its Vietnam War high of 1.57 million in fiscal year (FY) 1968, to 785,000 in FY 1974."[63] "Issues related to limited Army end-strength versus requirements, poor recruit quality, budgetary constraints, and lack of public support in the mid-to-late 1970s led senior Army leadership to characterize the Army as being a 'hollow force.'"[64]

As in previous drawdowns, the focus during the post-Vietnam drawdown was again "primarily on immediate reductions in accessions and separating/discharging others as soon as possible."[65] "The rapid and poorly planned demobilization of Army forces degraded morale, terminated many aspiring military careers, and released significant numbers of military personnel with limited transition assistance."[66]

In 1987, at the peak of the Cold War, the active Army consisted of 780,815 personnel and eighteen divisions.[67] However, by 1989, with the demise of the Soviet Union, the United States again cut defense budgets and manpower.[68] By the end of the cuts, the total force was reduced more

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[59] *Id.*

[60] Katie McLaughlin, *The Vietnam War, Five Things You Might Not Know*, CNN (Aug. 25, 2014, 3:47 PM), http://www.cnn.com/2014/06/20/us/vietnam-war-five-things.

[61] *Id.*

[62] FEICKERT & HENNING, *supra* note 36 (citing AMERICAN MILITARY HISTORY, *supra* note 42, Ch. 12).

[63] ANDREW FEICKERT, CONG. RESEARCH SERV., R42493, ARMY DRAWDOWN AND RESTRUCTURING (2014).

[64] *Id.* "The term 'hollow force' refers to military forces that appear mission-ready but, upon examination, suffer from shortages of personnel and equipment, and from deficiencies in training." ANDREW FEICKERT & CHARLES A. HENNING, CONG. RESEARCH SERV., R42334, A HISTORICAL PERSPECTIVE ON "HOLLOW FORCES" (2012) [hereinafter HOLLOW FORCES]. This term was first used to characterize the state of U.S. military forces after the post-Vietnam drawdown of the mid-1970s and again, as will be explained *infra*, during the post-Cold War drawdown of the 1990s. *Id.*

[65] FEICKERT & HENNING, *supra* note 36.

[66] *Id.*

[67] *Id.*; *see also* Gary L. Thompson, *supra* note 36.

[68] *Id.*

than 30% to 535,000 active duty soldiers.[69] The drawdown following the Cold War, however, was substantially different from the post-WWII, post-Korean War, and post-Vietnam War drawdowns.[70] Here, Congress provided a number of voluntary and involuntary tools to shape the size of each rank within the force—officer, warrant officer, and enlisted.[71] Although "[v]oluntary separations were emphasized,"[72] one involuntary separation measure included expanding the Defense Officer Personnel Management Act (DOPMA)[73] in order to grant the service secretaries the authority to conduct officer separation boards.[74]

At the conclusion of the Gulf War, policy debates about reducing the size of the Army were once again renewed.[75] As part of the Clinton administration's efforts to cut defense spending, the Secretary of Defense initiated a "Bottom Up Review," intended to modify the military force structure based on current and projected threats to national security.[76] "This review recommended placing added emphasis on U.S. air power and a reduction of Army end strength to 495,000 soldiers while retaining the ability to fight two major theater wars simultaneously."[77] These recommendations were implemented in March 1994,[78] and Army end-strength in 1994 was 541,343.[79] By 1999, this number had dropped to 479,426.[80] This number was again increased to a post-9/11 high of 566,045.[81]

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[69] *Id.*
[70] FEICKERT & HENNING, *supra* note 36.
[71] *Id.*
[72] *Id. See also* U.S. GOV'T ACCOUNTABILITY OFF., MILITARY DOWNSIZING: BALANCING ACCESSIONS AND LOSSES IS KEY TO SHAPING THE FUTURE FORCE, GAO/NSIAD-93-241 (Sept. 1993). Although authorized to use RIF, a 1993 GAO report assessed that the "DoD has given priority to achieving voluntary reductions." *Id.*
[73] Defense Officer Personnel Management Act, 96 P.L. 513, 94 Stat. 2835, 96 P.L. 513, 94 Stat. 2835 (Dec. 12, 1980) [hereinafter DOPMA].
[74] 10 U.S.C. § 638a.
[75] HOLLOW FORCES, *supra* note 64.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] David Coleman, *supra* note 56.
[80] *Id.*
[81] *Id.*

B. An Overview of the Current Reduction in Force

In early 2012, the DoD announced that the active Army would again be reduced in size, beginning in 2012.[82] Officer separation boards were just one part of this plan, and were "based on congressionally mandated strength reductions and severely restricted budgets."[83] Initially, the size was to be reduced from a post-9/11 peak in 2010, of about 570,000 soldiers, to 490,000 soldiers by the end of 2017.[84] Recently, in November 2015, the Army's active component personnel strength was 487,134 soldiers.[85] The drawdown goal for 2016 was 475,000 soldiers, with a goal of 450,000 by the end of 2018.[86] Army leadership stated end-strength reductions would "follow a drawdown ramp that allows us to take care of soldiers and families while maintaining a ready and capable force."[87] Eliminating talented officers can hurt not only experience and knowledge, but also morale.[88] "Most officers expect to continue serving in the military until choosing to voluntarily separate or retire. By involuntarily imposing separation on officers, [OSBs] violate this expectation."[89]

III. The Officer Separation Board

A. The Process

Having established the historical need to reduce the size of the force after a conflict, this section will turn to OSBs, which are one way the Army is carrying out these reductions.[90] The statutory basis for OSBs is found in 10 U.S.C. § 638a.[91] Title 10 U.S.C. § 638a was first enacted in 1990,

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[82] FEICKERT & HENNING, *supra* note 36.
[83] OSB/E-SERB FAQS, *supra* note 11.
[84] FEICKERT & HENNING, *supra* note 36.
[85] Jim Tice, *Army Will Cut 12,000 More Soldiers to Hit 2016 Goal*, ARMY TIMES (Jan. 10, 2016), http://www.armytimes.com/story/military/careers/army/2016/01/10/army-cut-12000-more-soldiers-hit-2016-goal/78371352/.
[86] Jim Tice, *Drawdown update: More Involuntary Separations Needed*, ARMY TIMES (Oct. 27, 2015), http://www.armytimes.com/story/military/careers/army/2015/10/27/drawdown-update-more-involuntary-separations-needed/73374634/.
[87] FEICKERT & HENNING, *supra* note 36 (citing transcripts from Statement on Army Posture 2012, s*upra* note 1).
[88] *Id.*
[89] Thurman C.C. McKenzie, The Defense Officer Personnel Management Act—the Army's Challenge to Contemporary Officer Management (2011) (unpublished monograph, U.S. Army School of Advanced Military Studies (SAMS)) (on file with author).
[90] 10 U.S.C. § 638a.
[91] *Id.* § 638a.(b)(4).

as a means by which service secretaries could involuntarily separate officers with greater than five years of active duty, commissioned service.[92] As will be shown in the procedures subsection below, OSBs provide very little protection to officers who are subjected to them, particularly by comparison to the protections provided to non-probationary, commissioned officers.[93]

1. The Purpose of OSBs

Officer separation boards are just one of several methods used to reduce the size of the force during a RIF.[94] "[Officer separation boards] . . . are necessary to meet future force structure requirements."[95] "The Army's drawdown plan is a balanced approach that maintains readiness while trying to minimize turbulence within the officer corps."[96] Officer separation boards are just one part of this plan and "are based on congressionally mandated strength reductions and severely restricted budgets."[97]

Under 10 U.S.C. § 638a, the Secretary of Defense can authorize service secretaries to select officers for discharge "based on the needs of the service."[98] Specifically, OSBs expand the power of service secretaries to involuntarily separate non-retirement eligible officers.[99] Department of the Army Memorandum 600-2, "establishes policy and prescribes procedure" for OSBs.[100] This memorandum states, in part, "The board will recommend for involuntary separation the number of officers specified whose potential for future contribution to the Army is, in the

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[92] *Id.* § 638a. *See also* McKenzie, *supra* note 89.

[93] The protections offered by 10 U.S.C. § 638a will be compared to those provided to non-probationary officers at traditional separation boards convened under AR 600-8-24 in the next section. AR 600-8-24, *supra* note 16.

[94] *See, e.g.*, 10 U.S.C. § 1174, Temporary Early Retirement Authority (TERA); 10 U.S.C. § 638, Selective Early Retirement Boards (SERB); and 10 U.S.C. § 638a, Enhanced Selective Early Retirement (E-SERB) (providing other means of reducing the size of the force).

[95] OSB/E-SERB FAQs, *supra* note 11.

[96] *Id.*

[97] *Id.*

[98] 10 U.S.C. § 638a.(d)(5). "Selection of officers for discharge under this subsection shall be based on the needs of the service." *Id.*

[99] *Compare* 10 U.S.C. §§ 638, 638a, *with* note 94 and accompanying sources (1174, SERB, E-SERB, TERA) (allowing for separation of retirement-eligible officers).

[100] DA MEMO 600-2, *supra* note 15 ("Board members . . . will use this memorandum.").

judgement of the majority of members of the board, less than that of their contemporaries."[101]

2. The Officer Separation Board Procedure

The Secretary of Defense must first authorize the Secretary of the Army to convene OSBs.[102] Having done so, the Secretary of the Army can then use OSBs to recommend separation for up to 30% of the officers in a particular grade.[103] These officers receive very little notice of the basis for their separation,[104] and no opportunity to be heard in person at the board.[105] Beyond the general provision that OSBs ultimately separate officers whose "potential for future contribution to the Army is . . . less than that of their [retained] contemporaries," separated officers will never know specifically why the OSB chose them for separation.[106] These boards may consider previously hidden portions of an officer's OMPF, known as the "restricted" file.[107] Finally, there is no procedure by which

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[101] *Id*. App. G, para. G-5.

[102] 10 U.S.C. § 638a.(a).

[103] 10 U.S.C. § 638a.(d)(3). "[T]he Secretary of the military department concerned may submit to a selection board . . . the names of all officers . . . in a particular grade." 10 U.S.C. § 638a.(d)(1). "The Secretary concerned shall specify the total number of officers to be recommended for discharge by a selection board." 10 U.S.C. § 638a.(d)(2).

[104] DA MEMO 600-2, *supra* note 15, App. G, para. G-5. Generally, OSBs evaluate an officer's "potential for future contribution to the Army." *Id.* However, separated officers never receive notice of why, specifically, they were separated. *Id.*

[105] *See generally* 10 U.S.C. §638a. (as will be shown below, the due process rights of an officer being separated for misconduct are significantly greater than those afforded to an officer during and OSB conducted in accordance with 10 U.S.C. § 638a).

[106] *Id.*; DA MEMO 600-2, *supra* note 15, App. G, para. G-5. *See infra* App. A for a letter written by an Army major (O-4) separated pursuant to an OSB. Thomas E. Ricks, *A Letter from a Major Fired by the Army*, FOREIGN POLICY (Aug. 7, 2014), http://foreignpolicy.com/2014/08/07/a-letter-from-a-major-fired-by-the-army/. The letter shows a lack of notice regarding the reason for separating this officer as well as the inability to overcome past character mistakes even after the passage of eight years. *Id.*

[107] DA MEMO 600-2, *supra* note 15, para. 7.b.(4). During OSBs, limited portions of the restricted file will be provided, as outlined in appendix G. *Id.* Appendix G includes the following guidance related to accessing the restricted file during an OSB:

> *g.* Restricted file criteria are explained below.
>
> (1) Only those restricted file documents listed below that are accurate, relevant, and complete may be considered by the board.
> *(a)* Article 15 or other UCMJ actions received as an enlisted member or as an officer that have not been set aside by proper authority. However, punishment under Article 15 or other UCMJ actions in a

separated officers can appeal OSBs.[108] Even if there was an appeal process, such general findings would likely make forming a basis of an appeal difficult at best.

Department of the Army Memo 600-2 lists four phases for the conduct of an OSB.[109] The first phase is to establish an order of merit list (OML).[110] Next, the board identifies officers fully qualified in career

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> Soldier's early career (specialist/corporal and below with fewer than 3 years of service) will not be considered in deliberation.
> *(b)* DA Suitability Evaluation Board (DASEB) filing of unfavorable information.
> *(c)* Promotion list removal documents when the officer is removed from the list.
> *(d)* Punitive or administrative letters of reprimand, admonition, or censure.
>
> (2) The board will use this information as only one of the factors considered in making recommendations. When considering information on the restricted file, the board must recognize that it was placed on the restricted file by competent authority for a specific reason.
>
> (3) The restricted files of the officers being considered have been carefully screened to ensure that certain matters retained on the restricted file for historical record purposes only have been temporarily masked. Such matters include OERs that have been determined to be unjust or erroneous in whole or part, corrective actions taken by the Army Board for Correction of Military Records (ABCMR) or a Federal District Court, and so forth. Because these historical records reflect actions determined to be unjust or erroneous, they may form no part of the board's evaluation. Moreover, the board will draw no inference from the presence or number of "masked" areas on a document. "Masked" areas can result from a number of administrative reasons that do not relate to the individual officer.
>
> (4) The DCS, G–1 or a designee will ensure that a careful screen is conducted prior to placing the restricted file before the board. Any restricted file seen by the board will be retained as part of the board record for those officers recommended for early retirement.

Id.

[108] Military Personnel Message, 15-176, U.S. Army Human Res. Command, subject: Fiscal Year 2015 Officer Separation Board (OSB) and (Enhanced) Selective Early Retirement Board (ESERB), Captain (CPT), Army Competitive Category (ACC) (11 June 2015). The Secretary of the Army approval of the board report is final action. *Id.* para. 5.

[109] DA MEMO 600-2, *supra* note 15.

[110] *Id.* App. G, para. G-9.*a*.

fields or skills identified as requirements.[111] Third, the board identifies officers to meet Active Army/other than regular Army (OTRA) guidance.[112] Finally, the board identifies officers who are to be recommended for involuntary separation.[113] At the conclusion of the deliberation process, the board conducts a formal vote to ensure that no officer is recommended for involuntary separation unless he or she receives the recommendation of the majority of the members of the board.[114] Each member of the board has an equal vote in this process.[115] The board identifies those officers who will be involuntarily separated only for compelling manpower reasons.[116]

An officer who is recommended for discharge by an OSB and whose discharge is approved by the Secretary of the Army shall be discharged on a date specified by the Service Secretary.[117] The discharge or retirement of an officer pursuant to this section is considered to be involuntary for purposes of other provisions of law.[118]

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[111] *Id.* para. G-9.*b*.
[112] *Id.* para. G-9.*c*.

> (2) The board will review the OML to determine whether the number of Active Army officers tentatively recommended for involuntary separation exceeds 30 percent of the total number of Active Army officers considered. If the number of Active Army officers tentatively recommended for involuntary separation exceeds 30 percent of the total number of Active Army officers considered, the board will remove, in order of merit, a sufficient number of Active Army officers from the tentative recommended list for involuntary separation to ensure that the total number of Active Army officers recommended does not exceed [thirty] percent of the total number of Active Army officers considered. . .
>
> (3) The board will ensure that the list of officers tentatively recommended for involuntary separation contains the number specified minus any Active Army and possibly other than Active Army officers removed in accordance with procedures outlined above.

Id.
[113] *Id.* para. G-9.d.
[114] *Id.* para. G-9.d.(3).
[115] *Id.* para. G-9.d.(3)(b).
[116] *Id.*
[117] 10 U.S.C. § 638a (d)(4).
[118] 10 U.S.C. § 638a(e). *See also* U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7A, Ch. 35, para. 350301.A.1.a. (Oct. 2015). Involuntary separation may entitle the servicemember to separation pay in accordance with DoD

Under paragraph 7 of DA Memorandum 600-2, the OSB examines the following information for each officer under consideration:

> (1) The performance portion of the officer's Official Military Personnel File (OMPF).
>
> (2) Approved requests for voluntary retirement or separation and statements of notification of involuntary retirement or separation.
>
> (3) Documents [related to "access to restricted file,"[119] "additional information," and "personal knowledge"].[120]
>
> (4) Official photo, if available.
>
> (5) Written communications, which may include the opinion of third parties about the officer concerned, submitted to the board by eligible officers.
>
> (6) Declination and disenrollment statements of professional development training.
>
> (7) Officer record brief (ORB) . . . .[121]

It is worth noting that the procedure for conducting OSBs is the same procedure used to conduct promotion boards.[122] However, unlike promotion boards, OSBs can consider hidden portions of an officer's OMPF.[123] Despite protections afforded to non-probationary officers under traditional separation boards, convened for reason(s) such as separation for misconduct and inefficiency,[124] the procedure that is used in separating

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Financial Management Regulation if "[t]he member is on active duty . . . and has completed at least 6 years, but less than 20 years, of active service." *Id.*

[119] DA MEMO 600-2, *supra* note 15, para. 7.b.(4).

[120] *Id.* para. 7.*b*.(4)., App. G, para. 7, b-d.

[121] *Id.* para. 7.*a*.

[122] *See* DODI 1320.14, *supra* note 2 (specifying the rules governing the conduct of promotion boards and the actions of promotion board personnel). As a matter of policy, the guidance provided by DoDI 1320.14 is applicable to OSBs, and a copy of that directive is provided to OSB members. DA MEMO 600-2, *supra* note 15, para. 6.

[123] DA MEMO 600-2, *supra* note 15, paras. 7.a.(3), 7.b.

[124] AR 600-8-24, *supra* note 16.

most officers is that used for promotion boards.[125] Thus, the same criteria used to determine whether an officer is suited to serve in the next higher grade is also used to determine whether an officer is qualified to serve at all.[126]

B. The Process of a Traditional Separation Board

Officers undergoing OSBs have very limited involvement in the board process, as described above.[127] By contrast, there are greater due process protections afforded to non-probationary officers at traditional separation boards that are conducted in accordance with AR 600-8-24.[128] These protections include notice of the reasons for proposed separation, an opportunity to be heard, and an appeal.[129]

First, AR 600-8-24 requires that an officer recommended for involuntary separation receive notice of the proposed separation at least thirty days[130] prior to a board convening in order to "determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence."[131] Generally, AR 600-8-24 lists the reasons a board may be convened as: "substandard performance of duty"; "misconduct, moral or professional dereliction, or in the interests of national security"; and "derogatory information."[132]

How much due process an officer being considered for separation under AR 600-8-24 will receive depends on whether that officer is in a

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125 DA MEMO 600-2, *supra* note 15. The manner, composition, and procedure for conducting promotion boards is substantially the same as for OSBs. *Id.*

126 *Id*.

127 *See generally* DA MEMO 600-2, *supra* note 15.

128 *See also* AR 600-8-24, *supra* note 16 (defining probationary and non-probationary officers). Note that when a probationary officer is recommended for separation with a proposed characterization of service of other than honorable (OTH), the case will be processed as if the officer were non-probationary. *Id*. para. 4-20.g. "If an Other Than Honorable Discharge is recommended, the case will be processed as if the officer was a non-probationary officer." *Id.*

129 AR 600-8-24, *supra* note 16.

130 *Id.* para. 4-11(b).

131 *Id.* para. 4-11.

132 *Id.* para. 4-2 (listing the reasons for separation, which include: (1) substandard performance; (2) misconduct, moral or professional dereliction, or in the interests of national security; or (3) derogatory information such as punishment under Article 15 or revocation of a Secret security clearance).

probationary versus a non-probationary status.[133] An officer reaches non-probationary status after having served as a commissioned officer for five years.[134] These officers are entitled to a board under AR 600-8-24, regardless of the characterization of the service recommended.[135]

Non-probationary officers[136] undergoing the separation process of AR 600-8-24 are entitled to be "present at all open sessions of the board,"[137] and are "provided with counsel . . . or . . . allowed to obtain civilian counsel of [their] own selection."[138] Such officers will also have "full access to the records of the hearings, including all documentary evidence referred to the board," and "[m]ay challenge for cause any member of the board."[139] Most significantly, officers recommended for separation under AR 600-8-24 are "allowed to appear in person and present evidence"[140] and "may submit documents to the Board of Inquiry from record of service, letters, answers, depositions, sworn or unsworn statements, affidavits certificates, or stipulations."[141] These officers may also "testify in person by sworn or unsworn statement, or elect to remain silent,"[142] and will "be asked before the hearing is terminated to state for the record whether he or she has presented all available evidence."[143] Finally, an officer at a separation board is "furnished a copy of the proceedings"[144] and "[has] the right to submit to the . . . General Officer Show Cause Authority [GOSCA] a statement or brief within [seven] calendar days after receipt of the Board of Inquiry report of proceedings of the case."[145]

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133 *Id.* para. 4-20.b.(1).

134 *See* National Defense Authorization Act for Fiscal Year 2008, 110 P.L. 181, 122 Stat. 3, 2008 Enacted H.R. 4986 (2008) [hereinafter FY08 NDAA]. Section 503 of FY08 NDAA authorizes the probationary period to be six years for an officer. *Id.* However, the Army has yet to update AR 600-8-24, so the five-year benchmark is still being used in Army actions. AR 600-8-24, *supra* note 16, para. 4-20.b.(1) (citing 10 U.S.C. § 630).

135 *Cf* AR 600-8-24, *supra* note 16, para. 4-20.*g*. With respect to probationary officers, "if an Other Than Honorable Discharge is recommended, the case will be processed as if the officer was a non-probationary officer." *Id.*

136 *See id.*

137 AR 600-8-24, *supra* note 16, para. 4-11.

138 *Id.*

139 *Id.*

140 *Id.* para. 4-11.e.

141 *Id.* para. 4-11.e.(2).

142 *Id.* para. 4-11.e.(4).

143 *Id.* para. 4-11.i.

144 *Id.* para. 4-11.j.

145 *Id.* para. 4-11.

If the board recommends elimination of a non-probationary officer, the case is forwarded to a Board of Review.[146] "The Board of Review is appointed by the Secretary of the Army, or his designee, and has the same board composition as the Board of Inquiry."[147] These boards review records of the case and then "make recommendations to the Secretary of the Army or his designee as to whether the officer should be retained in the Army."[148] A board of review may recommend elimination or retention.[149] However, appearance by the respondent, or the counsel, is not authorized at the board of review.[150]

Significantly, AR 600-8-24 provides that "an officer may not again be required to show cause for retention on [active duty] solely because of conduct that was the subject of the previous proceedings [that resulted in retention]."[151] This provision provides a retained officer with some degree of security. In contrast, 10 U.S.C. § 638a allows such an officer to again be "considered for elimination for . . . [that same] conduct."[152] The clear intent of this provision is to preclude later separation when a board recommended retention, yet 10 U.S.C. § 638a allows for just that.[153] Thus, the "final determination" language of AR 600-8-24, paragraph 4-4, is rendered anything but final during an OSB. The next section will argue the basis for providing non-probationary officers greater due process of law prior to being involuntarily separated.

IV. Procedural Due Process

The Fifth Amendment to the U.S. Constitution states, in relevant part, that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[154] Courts analyze due process of law in terms of both

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146 *Id.* para. 4-17.
147 *Id.*
148 *Id.* 4-17.a.
149 *Id.* para. 4-17.
150 *Id.* para. 4-17.a.
151 *Id.* para. 4-4.d.(4) ("[U]nless the findings and recommendations of the Board of Inquiry or the Board of Review that considered the case are determined to have been obtained by fraud or collusion.") *See also* 10 U.S.C. § 1182 ("If a board of inquiry determines that the officer has established that he should be retained on active duty, the officer's case is closed.").
152 AR 600-8-24, *supra* note 16, para. 4-4.*b*.
153 *Compare* AR 600-8-24, *supra* note 16, para. 4-4.*b*., *with* 10 U.S.C. § 638a.
154 U.S. CONST. amend. V.

substantive and procedural due process.[155] "Substantive due process concerns whether the government has an adequate reason for taking away a person's life, liberty or property [w]hile procedural due process . . . concerns whether the government has followed adequate procedures in taking away a person's life, liberty or property."[156]

In a substantive due process case, the issue to consider is whether the government acted with adequate justification.[157] In the realm of federal employment rights, the purpose of the Fifth Amendment Due Process Clause is to protect federal employees "against arbitrary government action."[158] Procedural Due Process Clause violations generally include cases where an agency proposes to take some adverse action against an employee, but has not allowed the employee an "opportunity to present reasons, either in person or in writing, why proposed action should not be taken."[159]

The analysis of a procedural due process challenge can be broken down into three questions. The first question is whether there is "a deprivation."[160] If so, the next question is whether "there [is] a deprivation of life, liberty or property."[161] Finally, where there is such a deprivation, the question is "what procedures are required prior to that deprivation?"[162] Each of these three questions will be analyzed below.

A. Is There a Deprivation?

"Only if there is a deprivation does the court need to go any further in its procedural due process analysis."[163] Case law is clear that depriving

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[155] *See* Erwin Chemerinsky, *Practising Law Institute: Section 1983 Civil Rights Litigation Symposium: Procedural Due Process Claims*, 16 TOURO L. REV. 871 (2000).
[156] *Id.*
[157] *Id.*
[158] Bd. of Regent v. Roth, 408 U.S. 564 (1972) (holding that "when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action").
[159] Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).
[160] Chemerinsky, *supra* note 155.
[161] *Id*.
[162] *Id.*
[163] *Id.*

someone of employment is a deprivation.[164] As such, taking an officer's commission is a deprivation requiring due process of law.[165] The procedural due process inquiry turns on whether the procedures followed prior to the deprivation were adequate.[166] As such, the focus of this article will be on pre-deprivation process—and lack thereof—during an OSB. The next question is whether a military commission constitutes property.[167]

B. Is There a Deprivation of a Life, Liberty, or Property Interest?

Prior to 1970, the Supreme Court generally analyzed whether there was a deprivation of a liberty or property interest using traditional common law understandings of what liberty and property meant.[168] That is, whether a person was deprived of property or liberty turned on whether that person claimed a loss of something considered to be a right, as opposed to a mere privilege.[169] The Court found there was no recognized deprivation of property in cases claiming a deprivation of something deemed only to be a privilege.[170]

Goldberg v. Kelly is the seminal Supreme Court case involving a property interest in something considered to be a privilege.[171] In *Goldberg*, welfare recipients were denied their welfare benefits without first being afforded some type of due process.[172] The Court noted that the constitutionality of terminating welfare benefits cannot be decided based

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[164] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 596 (1972); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
[165] *See, e.g.*, Weaver v. United States, 46 Fed. Cl. 69, 2000 U.S. Claims LEXIS 20 (Fed. Cl. 2000) (depriving an officer of a commission requires due process of law).
[166] *See* Chemerinsky, *supra* note 155, at 888. However, for due process protections to apply, it must be more than a mere request for a post-deprivation remedy. *Id.* at 874.
[167] *Id.* at 871.
[168] Goldberg v. Kelly, 397 U.S. 254, 263 (1970); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972) (noting "the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights).
[169] *Bd. of Regents*, 408 U.S. at 571.
[170] *Goldberg*, 397 U.S. at 262 (citing Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).
[171] *See* Chemerinsky, *supra* note 155, at 888 (noting that *Goldberg* "is the key Supreme Court case that departs from [the rights/privilege] analysis").
[172] *Goldberg*, 397 U.S. at 258.

on whether such benefits were "a privilege and not a right."[173] In *Goldberg*, the Court held "due process requires an adequate hearing before termination of [a benefit]."[174]

The Court has previously found that employees with formal tenure, as well as those working under a contract, both had property interests in their employment that were protected by due process.[175] It was not until two years after *Goldberg* that the Court first addressed the creation of such a protected property interest in the realm of public employees who had not received formal tenure.[176] In order to determine whether a non-tenured employee has established a property interest in continued employment requiring due process protections today, "[y]ou have to look to the Constitution, federal statutes, state constitutions, and state laws to *determine whether there is a reasonable expectation*."[177]

The general principle that employment as an officer in the U.S. Army is a property interest has never been overtly stated in a judicial decision.[178] However, cases involving equal protection claims raised by officers separated pursuant to selective early retirement boards (SERBs) reflect that officers do have a protected property interest in their commission.[179]

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[173] *Id.* at 262 (citing *Shapiro*, 394 U.S. at 627 n.6) (noting constitutionality of terminating welfare benefits cannot be decided based on whether such benefits were "a privilege and not a right") (internal quotations omitted).

[174] *Goldberg*, 397 U.S. at 261.

[175] *See, e.g.*, Slochower v. Board of Higher Education, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692, 1956 U.S. LEXIS 1137 (1956) (holding that a dismissed tenured public college professor held a protected property interest in continued employment); Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216, 1952 U.S. LEXIS 1430 (1952) (holding that college professors and staff members who were dismissed during the terms of their contracts had interests in continued employment that were safeguarded by due process).

[176] Perry v. Sindermann, 408 U.S. 593, 596 (1972); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

[177] Chemerinsky, *supra* note 155, at 882.

[178] *But see* Weaver v. United States, 46 Fed. Cl. 69, 2000 U.S. Claims LEXIS 20 (Fed. Cl. 2000) (applying Fifth Amendment analysis to an administrative discharge).

[179] *See, e.g.*, Christian v. United States, 46 Fed. Cl. 793, 2000 U.S. Claims LEXIS 110, 79 Empl. Prac. Dec. (CCH) P40, 321 (Fed. Cl. 2000) (finding, in part, "that the right to equal protection guaranteed by the Due Process Clause was infringed upon through the imposition [at a SERB] of 'unlawful gender and racially classified retention goals and selection consideration factors, and unlawful, gender and racially classified remedies for the possible disadvantages of societal discrimination.'"); *see also* Berkley v. United States, 45 Fed. Cl. 224, 1999 U.S. Claims LEXIS 266 (Fed. Cl. 1999) (finding that involuntary separation of Air Force officers was improper when based partly on race-based and gender-based criteria).

Also, cases involving challenges to agency actions against similarly situated federal and state employees, and even military cadets on their way to becoming officers, reflect that an officer's right to continued employment is a property interest that is protected by procedural due process.[180] The next section will address what is required to create a property interest on the part of employees without formal tenure.

1. Property Interest and the Expectation of Employment

On June 29, 1972, the Supreme Court, for the first time, addressed the issue of whether an interest in continued employment can exist without tenure or a formal contractual provision.[181] The Supreme Court held such an interest could arise through rules and understandings that create an interest in continued employment such that an employee could gain tenure rights, even where no formal tenure system exists.[182]

In *Board of Regents v. Roth*,[183] the respondent was hired as an assistant professor at a state university in Wisconsin.[184] He was hired for a fixed term of one academic year.[185] Under Wisconsin law, a state university teacher could acquire tenure as a permanent employee only after four years of year-to-year employment.[186] Having acquired tenure, a teacher was then entitled to continued employment "during efficiency and good behavior."[187] However, under Wisconsin law the respondent—having worked at the university for less than four years—was entitled to nothing beyond his one-year appointment.[188] Here, Roth completed the one-year

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[180] *See, e.g.*, *Bd. of Regents*, 408 U.S. at 571 (holding that lack of a contractual or tenure right to re-employment, taken alone, does not defeat college professor's claim that the nonrenewal of his contract violated the Fourteenth Amendment); *see also* Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967) (holding that cadets have a property interest in remaining at the Merchant Marine Academy).

[181] *Perry*, 408 U.S. at 596; *Bd. of Regents*, 408 U.S. at 577.

[182] *See generally* note 180 and accompanying sources. Both cases arise under the Fourteenth Amendment of the U.S. Constitution. *Id.* The Supreme Court has interpreted the Fourteenth Amendment to make the Bill of Rights "obligatory on the states" making these portions enforceable against the state governments. Gideon v. Wainwright, 372 U.S. 335, 341–42 (1963) (citing Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 235–41 (1897); Smyth v. Ames, 169 U.S. 466, 522–26 (1898)).

[183] *Bd. of Regents*, 408 U.S. at 577.

[184] *Id.* at 566.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

term he was hired for, but was not be rehired for the next academic year.[189] The Court found that Roth had no tenure rights to continued employment.[190]

In *Roth*, the Court noted that there were no statutory or administrative standards defining eligibility for re-employment.[191] Thus, state law clearly left the decision whether to rehire a non-tenured teacher for another year to the unfettered discretion of university officials.[192] As a matter of statutory law, a tenured teacher could not be "discharged except for cause upon written charges" and pursuant to certain procedures.[193] A non-tenured teacher was similarly protected, to some extent, during his one-year term.[194] However, the rules provided no real protection for a non-tenured teacher who was not re-employed for the next year.[195] The rules only required that he be informed by February 1, "concerning retention or non-retention for the ensuing year,"[196] but "no reason for non-retention need be given" and "[n]o review or appeal is provided in such case."[197]

In conformity with these rules, the university president informed the respondent that he would not be rehired for the subsequent academic year, but gave no reason for the decision, and no opportunity to challenge it at any sort of hearing.[198] The Supreme Court held that the respondent did not have a constitutional right to a statement of reasons or a hearing on the university's decision not to rehire him for another year.[199] However, the Court did note that if the respondent were entitled to such a hearing, "he would be informed of the grounds for his non-retention and [have the opportunity to] challenge their sufficiency."[200]

Compare *Roth* with *Perry v. Sindermann*,[201] which was decided the same day. In *Perry*, the Supreme Court recognized that a property interest can arise in cases where there is an expectation of continued employment,

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189 *Id.*
190 *Id.*
191 *Id.* at 566–67.
192 *Id.* at 567.
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.* at 568.
200 *Id.*
201 Perry v. Sindermann, 408 U.S. 593 (1972).

even in the absence of a contract.[202] The Court found that deprivation of such a property interest was constitutionally protected.[203] Citing *Board of Regent v. Roth*, the Court found "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support a claim of entitlement to the benefit . . . that he may invoke at a hearing."[204]

In *Perry*, the respondent was an untenured teacher in the state college system of the State of Texas who taught for four successive years under a series of one-year contracts.[205] However, after some controversy arose between the respondent and the college administration, the respondent's one-year employment contract was terminated, and the Board of Regents voted not to offer him a new contract for the following academic year.[206] The Regents provided no reason for the nonrenewal and did not allow the respondent any opportunity for a hearing to challenge the basis of the nonrenewal.[207]

The Court held that the respondent's lack of a contractual or tenure right to re-employment, taken alone, did not defeat his claim that the nonrenewal of his contract violated the Fourteenth Amendment.[208] The Court also found that although respondent's employment was not secured by a formal contractual tenure provision, it may have been secured by a no less binding understanding fostered by the college administration.[209] In particular, the respondent alleged that the college had a de facto tenure program, and that he had tenure under that program.[210] He claimed that he and others legitimately relied upon a provision that had been in the college's official faculty guide for many years:

> *Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he

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202 *Id.* at 596.
203 *Id.*
204 *Id.* at 601 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).
205 *Perry*, 408 U.S. at 594.
206 *Id.* at 594–95.
207 *Id.* at 595.
208 *Id.* at 596.
209 *Id.* at 599.
210 *Id.* at 600.

> displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.[211]

The *Perry* Court found that "[a] teacher . . . who has held his position for a number of years might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure."[212] The Court held, "the rules and understanding 'promulgated and fostered by state officials,' justified respondent's 'claim of entitlement to continued employment' absent 'sufficient cause.'"[213] This does not mean the employee is required to be reinstated.[214] However, proof of the entitlement to continued employment "absent 'sufficient cause' . . . would obligate college officials to grant a hearing at [the respondent's] request, where he could be informed of the grounds for his

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[211] *Id.*

[212] *Id.* at 602. The Court also noted portions of a guideline, adopted by the Coordinating Board, which read, in part:

> A. Tenure
>
> Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.
>
> A specific system of faculty tenure undergirds the integrity of each academic institution. 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. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years). . . .
>
> (3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities.

Id.

[213] *Id.* at 602–03.

[214] *Id.*

nonretention and challenge their sufficiency."[215] Establishing this claim to entitlement, however, required more than "a mere subjective 'expectancy'" on the part of the employee.[216]

Like the respondents in both *Board of Regents v. Roth* and *Perry v. Sindermann*, Army officers do not receive formal tenure.[217] However, there are rules and understandings created by the DoD that indicate a de facto tenure program similar to those in *Perry* when an officer is no longer probationary.[218] Non-probationary officers have served as commissioned officers for at least five years and are generally not involuntarily separated unless the provisions of AR 600-8-24 can be applied, and the separation is based upon sufficient cause.[219] Merely labeling an officer as non-probationary[220] creates something more than a subjective expectancy[221] on the part of the officer. Army regulation 600-8-24 lists the reasons a non-probationary officer might be subject to discharge, and defines the process by which a board may determine whether those reasons in fact took place, and whether discharge is warranted.[222] These understandings create a claim that non-probationary Army officers are entitled "to continued employment absent 'sufficient cause.'"[223] Other sources of such a property interest will be described below.

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[215] *Id.* at 603.

[216] *Id.*

[217] *But see* AR 600-8-24, *supra* note 16, para. 4-20.b.(1) (defining probationary officer); *see also id.* para. IV.B.2.*a*. *infra*, regarding the Army's use of the word tenure and career status, as applied to officers with more than five years of active commissioned service.

[218] *Perry*, 408 U.S. at 600 (using the phrase de facto tenure). These terms will be described in greater detail in the next two sections. AR 600-8-24, *supra* note 16, para. 4-20.b.(1) defines "probationary officer." The terms "probationary" and "non-probationary" as they relate to officers will be explained in greater detail below. *Id.*

[219] At a board convened in accordance with AR 600-8-24, the government has the burden to show why retention of an officer is not warranted. AR 600-8-24, *supra* note 16, para. 4-6.a. "[T]he board will determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence." AR 600-8-24, *supra* note 16, para. 4-6.a.

[220] AR 600-8-24, *supra* note 16, para. 4-20.*b*.(1) defines probationary officer as a regular Army commissioned officer with fewer than five years of active commissioned service. In 2008, 10 U.S.C. § 630 was amended to change five years to six years. *See also* FY08 NDAA, *supra* note 134.

[221] *Perry*, 408 U.S. at 603.

[222] AR 600-8-24. *See also* FY08 NDAA, *supra* note 134 (changing the term probationary officer from one with less than five years to one with less than six years).

[223] *Perry*, 408 U.S. at 602–03.

2. Additional Sources of an Expectation in Continued Employment as a Commissioned Officer

There are two additional sources of an expectation of continued employment as a commissioned officer.[224] First, Army regulations that use the terms *career status* and *tenure* with regard to commissioned officers create an expectation of continued employment and opportunity for advancement similar to the de facto tenure[225] the Supreme Court found in *Perry v. Sindermann*.[226] Second, the selective continuation (SELCON) process creates an expectation in continued employment once an officer is within four years of retirement.[227] Although these additional sources would not entitle officers separated at an OSB to be reinstated,[228] they do create an expectation of minimum due process prior to separation. The source of that expectation will be addressed as well.

The DOPMA was enacted on December 12, 1980, in order "[t]o amend title 10, United States Code [U.S.C.], to revise and standardize the provisions of law relating to appointment, promotion, separation, and mandatory retirement of regular commissioned officers of the Army, Navy, Air Force, and Marine Corps . . . ."[229] Title 10 U.S.C, Chapter 32 establishes limitations on the number of officers who may serve in various grades in the military based upon the annually approved total officer authorization also referred to as "end-strength."[230] Title 10 U.S.C.,

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[224] AR 350-100, *supra* note 32, para. 2-4 (career status) and DA PAM 600-3, *supra* note 5, para. 5-5, tbl. 5-1 (tenure). U.S. DEP'T OF DEF., INSTR. 1320.08, CONTINUATION OF COMMISSIONED OFFICERS ON ACTIVE DUTY AND ON THE RESERVE ACTIVE-STATUS LIST, (Mar. 14, 2007) (C1 Apr. 11, 2012) [hereinafter DoDI 1320.08].

[225] *Perry*, 408 U.S. at 602–03 (finding de facto tenure may exist where "rules and understandings, promulgated and fostered by state officials . . . justify [an employee's] legitimate claim of entitlement to continued employment absent 'sufficient cause'").

[226] DOPMA, *supra* note 73.

[227] DODI 1320.08, *supra* note 224. On April 11, 2012, DoDI 1320.08 was changed to read that officers shall normally be "selected for continuation if the officer will qualify for retirement . . . within 4 years of the date of discharge," instead of six years. *Id*.

[228] *Perry*, 408 U.S. at 602–03 (1972) (noting that "the rules and understanding 'promulgated and fostered by state officials,' justified respondent's 'claim of entitlement to continued employment absent 'sufficient cause,'" but that this does not mean the employee is required to be reinstated).

[229] DOPMA, *supra* note 73.

[230] 10 U.S.C. Ch. 32, Officer Strength and Distribution in Grade. *See also* McKenzie, *supra* note 89, at 13 n.35 ("Each year, Congress authorizes the total military end strength and subsequently the total officer end strength based upon input from the DOD, historical data, and other factors."). *See also* 10 U.S.C. § 691. Permanent end-strength levels to support two major regional contingencies. *Id.*

Chapter 36 addresses the provisions of DOPMA that govern career expectation in the various grades and establishes limits on how long an officer can remain in a particular grade.[231] Under DOPMA, officers not selected for promotion to the next higher grade within these limits face separation from the Army unless selectively continued beyond certain cutoff times in grade.[232]

The DOPMA rules are seen by many as "tenure limits," as most officers expect to serve in their current grade until at least the time of their next promotion board.[233] Department of the Army Pamphlet 600-3 also uses the term tenure in paragraph 5-5 as follows: "The effect of the 10 U.S.C. [and] DOPMA . . . on the tenure and retirement opportunity for officers is shown in table 5-1."[234] Table 5-1, for example, states a captain (O-3) receives tenure until "[p]romotion consideration for major."[235] Additionally, under Army regulation, an officer attains career status at the completion of five years of active duty commissioned service.[236] Career status is defined as: "Active duty with an unspecified termination date: Regular Army (RA) officers with or without a service obligation,[237] and who have more than five years continuous service."[238]

As the Supreme Court found in *Perry v. Sindermann*, although employment is not secured by a formal contractual tenure provision, it may be secured by rules and understanding fostered by the employer that are no less binding.[239] The *Perry* Court found "[a] teacher[,] . . . who has held

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[231] 10 U.S.C. Ch. 36 (Promotion, Separation, and Involuntary Retirement of Officers on the Active-Duty List).

[232] Selective continuation will be addressed in the next section.

[233] McKenzie, *supra* note 89. *See also* Flynn-Brown, *supra* note 37, at 1079 (citing to DOPMA, *supra* note 73). Congress enacted DOPMA in 1980, and Flynn-Brown stated that in support of DOPMA, 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." *Id.* (citing H.R. Rep. No. 96-1462, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 6333, 6343); *see also* Flynn-Brown, *supra* note 37. Thus, according to Flynn-Brown, Congress "expressed a belief that officers have a career expectation in continued employment once a service member reaches the grade of O-4." *Id.*

[234] DA PAM 600-3, *supra* note 5, para. 5-5, tbl. 5-1.

[235] *Id.*

[236] AR 350-100, *supra* note 32, para. 2-4.

[237] *Id.* Glossary, Section II, Terms. An "active duty service obligation" is "[a] specific period of active duty in the Active Army that an officer must serve before becoming eligible for voluntary separation or retirement." *Id.*

[238] *Id.* para. 2-4.

[239] Perry v. Sindermann, 408 U.S. 593, 599 (1972).

his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure."[240] The Court held "the rules and understandings promulgated and fostered by state officials[] justified respondent's claim of entitlement to continued employment absent sufficient cause."[241] Proof of such an entitlement "would obligate [an employer] to grant a hearing at [the employee's] request, where he could be informed of the grounds for his non-retention and challenge their sufficiency."[242] Further, the *Perry* Court found that establishing a claim to entitlement requires more than "a mere subjective expectancy" on the part of the employee.[243]

Non-probationary Army officers can point to Army regulation when arguing that they have acquired tenure,[244] and that they have attained career status.[245] These rules create more than subjective expectancies.[246] In addition to being told that they are no longer probationary, Army officers can point to these terms and show that they deserve to be "grant[ed] a hearing at [the officer's] request, where [the officer] could be informed of the grounds for . . . non-retention and challenge their sufficiency."[247]

In addition to being told that they have acquired tenure[248] and career status,[249] an additional rule that creates the understanding of continued employment once an officer is within four years of retirement is DoDI 1320.08.[250] This instruction relates to continuation selection boards (CSBs).[251] A CSB is "[a] board of commissioned officers convened . . . to recommend officers for continuation on the Active-Duty List."[252] Continuation selection boards are convened by the Secretary of the Army in order to extend officers in the grade of O-3 and O-4 on active duty

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[240] *Id.* at 602.
[241] *Id.* at 602–03 (internal quotations omitted).
[242] *Id.* at 603.
[243] *Id.* (internal quotations omitted).
[244] DA PAM 600-3, *supra* note 5.
[245] AR 350-100, *supra* note 32.
[246] *Perry*, 408 U.S. at 603 (noting "a mere subjective 'expectancy' is [not] protected by procedural due process").
[247] *Id.*
[248] DA PAM 600-3, *supra* note 5.
[249] AR 350-100, *supra* note 32.
[250] DODI 1320.08, *supra* note 224.
[251] *Id.*
[252] *Id.*

otherwise subject to discharge or retirement "when the needs of the [Army so] require."[253] "A commissioned officer on the Active-Duty List in the grade of O-4 who is subject to discharge . . . and will qualify for retirement . . . within [two to six] years of the date of discharge shall be given the opportunity to be considered by a [CSB]."[254] Under DoDI 1320.08, "Such an officer *shall normally be selected for continuation* if the officer will qualify for retirement . . . within [four] [255] years of the date of continuation."[256] This language creates another source of expectation in continued employment for officers who are within four years of retirement.[257] Although the 2012 version of DODI 1320.08 also added "there is no entitlement to continuation," a court may find this language does not negate the expectation.[258] This was seen in *Perry v. Sindermann*, for example, where the Supreme Court found an employee had de facto tenure despite a provision in the faculty guide that stated the college "has no tenure system."[259]

For the individual officer, DODI 1320.08, has the effect of creating "a property interest in continued employment" once that officer is within four years of retirement similar to that of the respondent in *Perry v. Sindermann*.[260] Not only does DoDI 1320.08 create this interest, but it is arguably designed to protect an officer's property interest in continued employment.[261] As in *Perry v. Sindermann*, "the existence of rules and understandings . . . may justify [a] legitimate claim of entitlement to continued employment absent sufficient cause."[262]

The next section will explore one additional source of the expectation of a property interest in a commission that warrants affording officers with

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[253] *Id.* para. 6.3 (Continuation of Officers Serving in the Grade of O-3 or O-4).
[254] DODI 1320.08, *supra* note 224, para. 6.3.1.
[255] *Id.* para. 6.3.1. (emphasis added). The 2007 version of DODI 1320.08 stated that "an officer shall normally be selected for continuation if the officer will qualify for retirement . . . within [six] years of the date of continuation." *Id.*
[256] *Id.*
[257] *Id. See also* Flynn-Brown, *supra* note 37, at 1079 (citing DODI 1320.08, *supra* note 224).
[258] DODI 1320.08, *supra* note 224, para. 6.3.1.
[259] Perry v. Sindermann, 408 U.S. 593, 599 (1972) (noting the faculty guide stated that the college "has no tenure system").
[260] *Id.* at 599 (internal quotations omitted).
[261] As shown, both DOPMA and DODI 1320.08, provide increased due process protections during a separation proceeding based on time in service. DOPMA, *supra* note 73; DoDI 1320.08, *supra* note 224.
[262] *Perry*, 408 U.S. at 599 (internal quotations omitted).

notice and an opportunity to be heard. As will be shown, cadets who are working toward earning a commission are afforded greater due process than officers separated at OSBs.

3. Property Interest Regarding the Opportunity to Gain a Commission

This section addresses the process of expelling cadets from the U.S. Military Academy (USMA) or from the Reserve Officer Training Corps (ROTC).[263] Cadets have a due process right to a fair administrative process prior to being expelled and, as such, officers deserve at least as much process prior to losing their commission.[264] Case law in this area establishes that cadets have a property interest in the opportunity to *gain* a commission, protected by the right to notice and opportunity to be heard prior to losing it.[265]

In *Andrews v. Knowlton*, cadets from the USMA brought a consolidated appeal seeking review of their expulsion for violating the cadet honor code.[266] The issue was whether the procedures followed by the USMA were "constitutionally sufficient."[267] The court held that appellants knew they would be expelled upon a finding of an honor code violation when they entered the USMA and that the penalty therefore did not violate due process.[268] Of note, the court in *Andrews* stated "it has been understood that the service academies are subject to the Fifth Amendment and that cadets and midshipmen must be accorded due process before separation."[269]

Compare *Andrews* with *Rameaka v. Kelly*.[270] In *Rameaka*, the petitioner completed his freshman and sophomore years as a ROTC

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[263] Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967).
[264] *Id*.
[265] *See generally* Major Justin P. Freeland, *All The Process That is Due: An Article on Cadet Disenrollments From the United States Military Academy and the Army Reserve Officers' Training Corps*, ARMY LAW., Sept. 2015. *See also Wasson*, 382 F.2d at 811).
[266] Andrews v. Knowlton, 509 F.2d 898 (1975) U.S. App. LEXIS 16556 (2d Cir. N.Y. 1975). Article 16 of the Regulations for the United States Military Academy, promulgated by the Secretary of the Army, governs the separation of cadets. *Id.* at 901. Section 16.04 deals specifically with separations for Honor Code violations. *Id.*
[267] *Id.* at 903.
[268] Andrews v. Knowlton, 509 F.2d 898 (1975) U.S. App. LEXIS 16556 (2d Cir. N.Y. 1975).
[269] *Id.* at 903.
[270] Rameaka v. Kelly, 342 F. Supp. 303, 304 (1972) U.S. Dist. LEXIS 13877 (D.R.I. 1972).

student at the University of Rhode Island.[271] Prior to the commencement of his junior year, he signed an enlistment contract for advanced ROTC training.[272] Unlike the first two years, enrollment in this program included:

> [A] commitment to military service which requires completion of the course and the acceptance of a commission, if tendered, to be followed by two years of active duty and further service as a member of a Regular or Reserve component of the Army until the sixth anniversary of the receipt of the commission, unless sooner terminated.[273]

The petitioner was alleged to have failed to fulfill his ROTC obligation, which led to an administrative board hearing.[274] It was alleged that prior to the petitioner's senior year, he concluded that he could not complete the required advanced military training because of financial hardship and the fact that his wife was about to give birth.[275] Early in the fall of his senior year, the petitioner dropped the required military science course.[276] Though he immediately reenrolled in the course after he was contacted by the senior military instructor, he nevertheless became delinquent in a number of ways.[277]

> On November 9, 1970, the petitioner was advised by letter from his professor of Military Science that his performance had been . . . "markedly substandard" and that he was placed on probation. The letter additionally stated, "A further review of your record will be made at the end of the semester. If your performance has not improved to a level expected of a fourth year student in Military Science and a potential officer in the United States Army, you may be considered for dismissal from

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[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.* Between the period of September 30, 1970, and December 9, 1970, petitioner failed to attend seven out of twenty-eight classes; did not turn in eleven out of twelve homework assignments; did not give his only scheduled student presentation; of two one-hour examinations given, he failed both with marks of forty-four and eighteen points below average; and of six quizzes, he failed all of them. *Id.*

> the program and possible charges of willful violation of your contract."[278]

The petitioner appeared before a board of officers on December 14, 1970.[279] The board found that petitioner willfully evaded his contract.[280] The petitioner's Professor of Military Science then orally notified the petitioner of the board's decision and told him not to worry.[281] However, the board finding were then transmitted to the First Army, recommending disenrollment.[282]

In January 1971, the petitioner dropped out of the university to work full-time and take extension courses elsewhere.[283] In May of 1971, he re-enrolled in the university and received his degree on June 13, 1971.[284] In the summer of 1971, the Army notified petitioner that he was ordered to active duty for willful evasion of his ROTC obligations.[285] The petitioner argued that he misunderstood a conversation with his Professor of Military Science subsequent to November 9, 1970, which led him to believe that, among other things, sanctions for willful evasion would not be imposed.[286] He further contended he did not believe the board hearing was called to consider any willful dereliction on his part.[287]

The petitioner argued denial of due process in several respects.[288] Notably, he contended that prior to, and at, the December hearing, he was not notified that he was being charged with willful evasion and that there was no basis in fact to support the finding of the board with respect to willful evasion of his contract.[289] The federal district court held that the notice given by the government "lacked specificity."[290] Although the government provided notice to the cadet, stating that a board would consider his dismissal from ROTC, it did not identify any specific grounds

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[278] *Id.* at 305.
[279] *Id.*
[280] *Id.* at 305–06.
[281] *Id.* at 303.
[282] *Id.* at 306.
[283] *Id.* at 303.
[284] *Id.*
[285] *Id.*
[286] *Id.* at 306–07.
[287] *Id.* at 303.
[288] *Id.*
[289] *Id.*
[290] *Id.*

for the board to consider.[291] As a result, the court granted relief and ordered the Army to hold another hearing after first providing the cadet with the grounds that it was considering as a basis for disenrollment.[292]

Rameaka is an important case for the proposition that understandings and beliefs on the part of a cadet can form the basis of additional due process rights.[293] According to the Army's own regulations, the Army must provide notice to a cadet, stating specific grounds for disenrollment.[294] This ties into the principle that the government must afford a cadet, and therefore arguably an officer, the opportunity to be heard.[295] Due process affords notice and opportunity to be heard prior to losing the *mere opportunity* to gain a commission, therefore, it is evident that there is an expectation of due process protection once a commission is obtained.

The existence of a protected property interest in continued employment and even continued enrollment at the USMA/ROTC strongly suggests there is also a protected property interest in retaining a commission in the military. Although there are traditional rules applied to how an officer may lose a commission once it is earned, OSBs have operated as an exception to those traditional rules and therefore violate the expectation of de facto tenure.[296] Having established that depriving an officer of a commission is a deprivation of a property interest, the issue next becomes whether that deprivation was without the due process of law.[297]

C. Was the Taking Without Due Process of Law? The Application to Commissioned Officers[298]

> Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When

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[291] *Id.*
[292] *Id.*
[293] *Id.* at 306–07.
[294] Andrews v. Knowlton, 509 F.2d 898, 903 (1975) U.S. App. LEXIS 16556 (2d Cir. N.Y. 1975).
[295] *Id.*
[296] 10 U.S.C. § 638a; Perry v. Sindermann, 408 U.S. 593, 600 (1972) (noting de facto tenure could be created despite lack of formal tenure).
[297] *See* Chemerinsky, *supra* note 155.
[298] *Id.*

> something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.[299]

The Due Process question in an OSB is whether the administrative procedures used to involuntarily separate a non-probationary officer during a RIF provide all the process that is due before depriving an officer of his or her commission.[300] In another case, *Garrett v. Leham*, the court noted "[i]n reviewing an administrative action, [the court will] apply the standard set forth in 5 U.S.C. § 706(2)(A): whether the administrative actions were 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'"[301]

In another case, *Cleveland Board of Education v. Loudermill*, the Supreme Court stated "[a]n essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"[302] "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'"[303] "This principle requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment."[304]

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[299] Bd. of Regent v. Roth, 408 U.S. 564 (1972).

[300] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 1985 U.S. LEXIS 68, 53 U.S.L.W. 4306, 118 L.R.R.M. 3041, 1 I.E.R. Cas. (BNA) 424 (1985) (citing Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1281 (1975)) ("The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.").

[301] Garrett v. Lehman, 751 F.2d 997 (1985) U.S. App. LEXIS 28599 (9th Cir. Cal. 1985) (citing Walker v. Navajo Hopi Indian Relocation Commission, 728 F.2d 1276, 1278 (9th Cir.), *cert. denied*, 469 U.S. 918, 105 S. Ct. 298, 83 L. Ed. 2d 233 (1984)).

[302] *Cleveland Bd. of Educ*., 470 U.S. at 546 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

[303] *Id.* (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)); *see* Bell v. Burson, 402 U.S. 535, 542 (1971).

[304] *Cleveland Bd. of Educ*., 470 U.S. at 532, 546 (citing *Board of Regents*, 408 U.S. at 569–70 (1972), Perry v. Sindermann, 408 U.S. 593, 599 (1972)).

Officers separated at OSBs never know why they were separated.[305] The opportunity to be heard consists only of a review of an officer's OMPF.[306] As such, the process deprives non-probationary officers of at least notice and an opportunity for a hearing prior to being deprived of their commission, despite the Army having fostered an expectation of these rights prior to separation.[307] The next section will address what greater protections should be afforded to non-probationary officers during OSBs.

V. The OSB Process is Inadequate to Properly Protect an Officer's Property Interest

The Supreme Court set forth a three-part test in *Mathews v. Eldridge* in order to determine if procedural due process is adequate in a specific circumstance.[308] The test first considers "the private interest that will be affected by the official action."[309] Next, the test requires that courts look to "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[310] Finally, the test considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[311]

Although the *Mathews* test has not yet been applied to evaluate the OSB process, the test has been applied to administrative government action in a variety of cases, ranging from the process required prior to detaining a juvenile in jail,[312] to regulating the control of guns.[313] The Supreme Court in *Hamdi v. Rumsfeld* applied the *Mathews* balancing test to the procedures due to citizens detained as enemy combatants.[314] As

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[305] *See also* Ricks, *supra* note 106.
[306] *See* DA PAM 600-2, *supra* note 15.
[307] *Perry*, 408 U.S. at 594.
[308] Mathews v. Eldridge, 424 U.S. 319, 339 (1976).
[309] *Id.* at 335.
[310] *Id*.
[311] *Id.*
[312] Schall v. Martin, 467 U.S. 253 (1984) (upholding New York's juvenile preventive detention statute).
[313] Spinelli v. City of New York, 579 F.3d 160 (2009) U.S. App. LEXIS 17640 (2d Cir. N.Y. 2009) (holding that suspending a gun shop owner's license, seizing firearms, and delaying a hearing for fifty-eight days violated the owner's due process rights).
[314] Hamdi v. Rumsfeld, 542 U.S. 507, 598 (2004).

such, if an officer were to challenge the OSB process, it is likely the reviewing court would apply the *Matthews* test in order to determine if procedural due process is adequate.[315]

The issue is whether adequate protection against arbitrary deprivation of a commission is provided during an OSB.[316] The existing process deprives officers of many of the protections they typically enjoy, including notice of the basis for separation; opportunity to be heard; and an opportunity to appeal.[317] Further, even if the opportunity to appeal a separation pursuant to an OSB were provided, any such appeal would be challenging, because separated officers never receive an explanation of the reasons for their separation,[318] and there is no record of the OSB procedures.[319]

Unlike termination of traditional government employees, expulsion of cadets from service academies, firing of a non-tenured school teacher, or even the denial of disability benefits, officers separated by way of an OSB have very little opportunity to be heard.[320] When examining the *Mathews* three-part test, the constitutional deficiencies of OSBs become even more apparent.

A. The *Mathews* Test

The Supreme Court in *Matthews* affirmed the proposition that the due process requirements for depriving an individual of property are "flexible and call for such procedural protections as the particular situation demands."[321] The *Mathews* Court held that a hearing was not required prior to the initial termination of disability benefits and determined that the respondent had not been denied his procedural due process rights when

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315 *Mathews*, 424 U.S. at 319, 339.
316 10 U.S.C. § 638a.
317 AR 600-8-24, *supra* note 16, para. 4-20.
318 *See generally* Ricks, *supra* note 106 (letter from Major Slider).
319 *Cf* AR 600-8-24, *supra* note 16, para. 4-6 ("the Board of Inquiry establishes and records the facts of the Respondent's alleged misconduct, substandard performance of duty, or conduct incompatible with military service").
320 *See* Slochower v. Board of Higher Education, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692, 1956 U.S. LEXIS 1137 (1956); Andrews v. Knowlton, 509 F.2d 898 (1975) U.S. App. LEXIS 16556 (2d Cir. N.Y. 1975); and Perry v. Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970).
321 Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

such benefits were initially terminated.[322] However, the Court found that "[s]ome form of hearing is required before an individual is finally deprived of a property interest."[323]

1. The First Mathews *Factor*

The private, individual interest an officer has in keeping his or her commission is strong.[324] The Supreme Court has "repeatedly recognized the severity of depriving someone of his or her livelihood."[325] Gaining a commission is an arduous process that, by itself, requires a significant investment of taxpayer money, as well as commitment on the part of the individual officer.[326] Further, once a commission is obtained, it is typically controlled by the procedures of AR 600-8-24.[327] "[P]rocedural due process is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action."[328] The right to due process "is conferred, not by legislative grace, but by constitutional guarantee."[329]

As such, the first *Mathews* factor weighs in favor of officers having notice and an opportunity to respond. As the Supreme Court noted in *Loudermill*, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[330] The Court went on to say that requiring "more than this prior to termination would

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322 *Mathews*, 424 U.S. 319, 339.

320 *Id*. (citing Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974)).

324 *Mathews*, 424 U.S. at 319, 335.

325 FDIC v. Mallen, 486 U.S. 230, 243, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988) (citing Brock v. Roadway Express, Inc., 481 U.S. 252, 263, 95 L. Ed. 2d 239, 107 S. Ct. 1740 (1987)); *Cleveland Bd. of Educ*., 470 U.S. at 543.

326 *See, e.g.*, Scott Beauchamp, *Abolish West Point—and the other service academies, too*, WASH. POST (Jan. 23, 2015), https://www.washingtonpost.com/opinions/why-we-dont-need-west-point/2015/01/23/fa1e1488-a1ef-11e4-9f89-561284a573f8_story.html ("It officially costs about $205,000 to produce a West Point graduate.").

327 AR 600-8-24, *supra* note 16, para. 4-20.

328 Bd. of Regent v. Roth, 408 U.S. 564 (1972).

329 *Cleveland Bd. of Educ*., 470 U.S. at 546 (citing Arnett v. Kennedy, 416 U.S. 134, 167 (1973)).

330 *Id.* at 170–71 (opinion of Powell, J.); Goss v. Lopez, 419 U.S. 565 at 581 (1975) ("The essential requirements of due process . . . are notice and an opportunity to respond.").

intrude to an unwarranted extent on the government's interest in *quickly removing* an *unsatisfactory* employee."[331]

However, this is not the case with OSBs, as evidenced by Major (MAJ) Slider's letter. Even after he was separated at an OSB, he was still unsure of the basis.[332] He could only speculate that the OSB considered a GOMOR he had received in 2006 for driving while intoxicated.[333] However, he was never told this directly nor given any opportunity to respond.[334] Further, where the Court in *Loudermill* addressed the need to "quickly remov[e] an unsatisfactory employee,"[335] the Army already has a regulation for removing officers who are "unsatisfactory"—AR 600-8-24.[336] Where the purpose of OSBs is to involuntarily separate officers based on the needs of the service, and not "quickly removing an unsatisfactory [officer]," a *Loudermill*-type argument for the need to "quickly remov[e]" such officers cannot be made.[337]

2. The Second Mathews *Factor*[338]

The next question is whether the "risk of an erroneous deprivation" of a commission under the current OSB procedures outweighs "the probable value, if any, of additional or substitute procedural safeguards."[339] In *Hamdi*, the government argued that its "interests in reducing the process available to alleged enemy combatants [were] heightened by the practical difficulties that would accompany a system of trial-like process."[340] Despite this, the *Hamdi* Court held "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual

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331 *Cleveland Bd. of Educ*., 470 U.S. at 546 (emphasis added).
332 Ricks, *supra* note 106 (letter from Major Slider).
333 *Id.*
334 *Id.*
335 *Cleveland Bd. of Educ*., 470 U.S. at 546.
336 AR 600-8-24, *supra* note 16. These reasons are listed in AR 600-8-24, para. 4-2, and include: (1) substandard performance, (2) misconduct, moral or professional dereliction, or in the interests of national security, or (3) derogatory information such as punishment under Article 15 or revocation of a Secret security clearance. *Id.*
337 *Cleveland Bd. of Educ*., 470 U.S. at 546.
338 Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See also* United States v. Hamdi, 542 U.S. 507, 531 (2004) ("On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.").
339 *Mathews*, 424 U.S. at 319, 335.
340 *Hamdi*, 542 U.S. at 531.

basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[341]

Balancing the amount of money, time, and effort the United States expends on an officer who has served for several years, versus the relatively short and easy process of separating an officer at an OSB,[342] it is clear that the risk of erroneous deprivation of an officer's commission is high.[343] The burden of conducting a heightened separation procedure would be weighed against the benefit of retaining officers who otherwise deserve to be retained, and replacing them with officers better-suited to be separated. This is especially true considering that most officers who are subject to OSBs are non-probationary.[344] Major Slider is just one example of an officer who, after receiving a GOMOR, went on to serve for eight years—and receive the benefit of substantial advancements in his career in the form of attending Ranger School, resident ILE and SAMS, leading soldiers in combat, and being promoted—only to be separated without being given a reason.[345]

The risk of an erroneous deprivation of such skills and experiences that "cannot be easily reclaimed" is unacceptably high.[346] Officers who have served honorably deserve at least as much protection as the citizen-detainee in *Hamdi* prior to losing their commissions.[347]

3. The Third Mathews *Factor*[348]

The third *Mathews* factor examines "the Government's interest, including the function involved and the fiscal and administrative burdens

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341 *Id.* at 533.

342 *See, e.g.*, MILPER Message 15-175, *supra* note 2. The OSB convened in summer of 2015 was scheduled to take four days, from 22 to 25 September 2015. *Id. See also* Tice, *supra* note 2, noting that 740 of the 4000 screened officers were separated by the OSB. *Id.*

343 *See* Beauchamp, *supra* note 326. *Cf.* DA PAM. 600-2, *supra* note 15.

344 *See* MILPER Message 15-175, *supra* note 2. The OSB convened in summer 2015 considered captains with date of rank to captain between 23 July 2012 and 22 July 2013. *Id.*

345 Ricks, *supra* note 106 (letter from Major Slider).

346 Statement on Army Posture 2012, *supra* note 1.

347 *Cleveland Bd. of Educ.*, 470 U.S. at 532, 546 (citing Arnett v. Kennedy, 416 U.S. 134, 167 (1973)). United States v. Hamdi, 542 U.S. 507, 533 (2004) (citing *Cleveland Bd. of Educ.*).

348 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

that the additional or substitute procedural requirement would entail."[349] The fact that an administrative process may be burdensome does not provide an exception to the constitutional requirements of the Due Process Clause.[350]

As stated in the opening quotation, the government has an interest in not "stifling the health of the force or breaking faith with our soldiers, civilians and families" during the current reduction in force.[351] Further, the Secretary of the Army sought to avoid "[e]xcessive cuts [that] would create high risk in our ability to sustain readiness . . . to avoid our historical pattern of drawing down too much or too fast and risk losing the leadership, technical skills and combat experience that cannot be easily reclaimed."[352]

As in *Mathews*, holding hearings prior to separating officers pursuant to OSBs would create the "visible burden" of the increased cost in terms of both time and money of conducting more thorough boards.[353] However, considering the government's interests, the "fiscal and administrative burden" [354] of augmenting OSBs with the additional procedural requirements of providing notice and an opportunity to be heard would be slight. During RIFs, where one potential goal is to avoid drawing down too fast, additional time for those quality officers being subjected to OSBs to remain in the force balances against this cost, especially in light of the great cost of making an officer.[355]

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[349] *Mathews*, 424 U.S. at 319, 335. *See also Hamdi*, 542 U.S. at 532 (addressing the third *Mathews* factor citing United States v. Robel, 389 U.S. 258, 264, 19 L. Ed. 2d 508, 88 S. Ct. 419 (1967)) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

[350] *See Cleveland Bd. of Educ.*, 470 U.S. at 532, 546.

[351] Statement on Army Posture 2012, *supra* note 1.

[352] *Id.*

[353] *Mathews*, 424 U.S. at 319, 337. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. *Id.*

[354] *Id.* at 319, 335.

[355] *See, e.g.*, Beauchamp, *supra* note 326 (noting the taxpayer cost for a USMA commission).

B. Proposed Solution

The minimum due process a non-probationary officer deserves prior to being separated by an OSB requires providing notice of the reasons for the separation and an opportunity to be heard.[356] The notice requirement must extend beyond the general provision that OSBs ultimately separate officers whose "potential for future contribution to the Army is . . . less than that of their contemporaries,"[357] and must include the specific factors the board considered in separating the officer. In this regard, OSBs should be limited in how far back they can look into an officer's history. Looking back to the probationary period of an officer's career, for example, warrants the OSB process "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law,"[358] because the Army already has a process for involuntarily separating probationary officers.[359] Reaching non-probationary status represents overcoming the probationary period and, as such, officers who have done so deserve to have the probationary period remain just that.[360] With regard to the opportunity to be heard, officers should be able to make an appearance before the board, if they so desire, in order to address any information the board is relying on in person.

Considering the requirements of the Constitution and the three *Matthews* factors, the process must also preclude the board from considering those portions of an officer's OMPF that the command has placed in the restricted portion.[361] Arguably, one purpose of having a restricted portion is to give officers the opportunity to overcome the

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[356] *Cleveland Bd. of Educ*., 470 U.S. at 546 (citing Arnett v. Kennedy, 416 U.S. at 170–71 (opinion of Powell, J.); Goss v. Lopez, 419 U.S. 565 at 581 (1975).

[357] Dep't Army Memo 600-2, App. G, para. G-5.

[358] Garrett v. Lehman, 751 F.2d 997, 1985 U.S. App. LEXIS 28599 (9th Cir. Cal. 1985).

[359] AR 600-8-24, *supra* note 16.

[360] *E.g.*, in MAJ Slider's case, the board considered a GOMOR he received eight years prior to the convening of the board. Ricks, *supra* note 106. Since that time, the Army had invested a great deal of time and money in developing MAJ Slider; yet because the OSB could look so far back, it could consider this GOMOR as a basis for his separation in spite of the significant investment both MAJ Slider and the Army have made in his career development. *Id.* Despite apparently having overcome the negative impact of the GOMOR, it was still used against him many years later. *Id.*

[361] *See* AR 600-8-104, *supra* note 6, tbl. 3-1 (stating that documents within a restricted folder "may normally be considered improper for viewing by selection boards or career managers").

information placed therein.[362] By allowing OSBs to consider such information, this purpose is negated.

VI. Conclusion

The endstate or purpose of an OSB is "to meet future force structure requirements."[363] The goal for meeting these requirement is a "balanced approach that maintains readiness while trying to minimize turbulence within the officer corps."[364] In light of the national interest in avoiding a drawdown that is too quick or too much,[365] OSBs serve as an improper means to achieve this goal because they result in a large number of separations[366] during a short period of time.[367]

A traditional separation board based on misconduct will consider only portions of an officer's service relating to that misconduct, creating a close temporal link between the conduct and separation.[368] However, an OSB can reach years back in order to determine what an officer's capability for future service is today.[369] There is no analogue in the law of federal employment to losing a job based on misconduct that occurred in the distant past.[370] In order to be a fair process, OSBs should consider only

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[362] *But see id.* para. 2-11.*e*.

> Review of the restricted folder and all evaluations is authorized in support of the Army's Personnel Suitability Screening Policy during post board screening processes to ensure the Army's interests are safeguarded when selecting a Soldier for select positions of leadership, trust, and responsibility and to prevent inappropriate reassignment, appointment, and/or promotion.

Id.

[363] OSB/E-SERB FAQs, *supra* note 11.

[364] *Id.*

[365] Statement on Army Posture 2012, *supra* note 1.

[366] *See* Tice, *supra* note 2 (noting that 20% of screened captains were separated at the 2015 captain OSB).

[367] *See* MILPER Message 15-175, *supra* note 2.

[368] *Id.*

[369] DA MEMO 600-2, *supra* note 15, para. 7.b.(4). During OSBs, limited portions of the restricted file will be provided, as outlined in Appendix G. *Id.*

[370] Although reductions in force do occur within the civilian federal employment system, separation actions pursuant thereto are not necessarily based upon "potential for future contribution to the Army [being] . . . less than that of their contemporaries." DA MEMO 600-2, *supra* note 15, App. G, para. G-5. In the law of civilian federal employment, a RIF is:

recent conduct as a basis for future capability. Further, although double jeopardy does not apply at administrative hearings, officers previously subjected to separation boards and subsequently retained should not be separated for the same underlying misconduct that formed the basis of the original separation board.[371] These greater protections would not only

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> [T]he release of a competing employee from his or her competitive level by furlough for more than [thirty] days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling; reorganization; the exercise of reemployment rights or restoration rights; or reclassification of an employee's position due to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days.

5 C.F.R. § 351.201(a)(2). The procedures for conducting a civilian federal employee RIF are similar to those for an OSB. However, unlike OSBs, the notice required by 5 C.F.R. § 351.802(a) requires an agency to give notice of:

> (1) The action to be taken, the reasons for the action, and its effective date;
> (2) The employee's competitive area, competitive level, subgroup, service date, and three most recent ratings of record *received during the last 4 years*;
> (3) The place where the employee may inspect the regulations and record pertinent to this case;
> (4) The reasons for retaining a lower-standing employee in the same competitive level under § 351.607 or § 351.608;
> (5) Information on reemployment rights, except as permitted by § 351.803(a); and
> (6) The employee's right, as applicable, to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations or to grieve under a negotiated grievance procedure.

5 C.F.R. § 351.802 (emphasis added). Of note, civilian federal civilian RIFs also include appellate rights. *See, e.g.*, Knight v. Dep't of Defense, 332 F.3d 1362 (Fed. Cir. 2003) (holding the Merit System Protection Board (MSPB) has jurisdiction over an appeal where an agency's action in choosing to place a civilian employee in a vacant, lower-graded position after a RIF in lieu of separation fell under RIF regulations and the employee could appeal her demotion by RIF action to the MSPB). Although not all of the listed protections afforded to federal employees during RIFs are applicable to officers, the rights given to civilian federal employees during RIFs serves as another example of some of the greater levels of protections that could be afforded an officer being subjected to an OSB: namely, reasons for the action, an opportunity to be heard, limiting consideration of officer evaluation reports to those from the past four years, and a right to appeal. 5 C.F.R. § 351.802.

[371] AR 600-8-24, *supra* note 16, para. 4-4.d.(4) ("unless the findings and recommendations of the Board of Inquiry or the Board of Review that considered the case are determined to

benefit the individual officers subjected to OSBs, but would also protect the national security interest.

The right to adequate procedural due process "is conferred, not by legislative grace, but by constitutional guarantee."[372] Based on rules and understandings promulgated by the Army, non-probationary officers have earned de facto tenure requiring a minimum level of procedural due process. This must include notice and an opportunity to be heard prior to being separated.[373] As such, non-probationary officers undergoing the OSB process deserve minimum protections.[374] The ends do not justify the means; OSBs deny officers careers in which they have a "constitutional guarantee, and they deserve due process."[375]

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have been obtained by fraud or collusion"); *see also* 10 U.S.C. § 1182 ("If a board of inquiry determines that the officer has established that he should be retained on active duty, the officer's case is closed.").

[372] *Cleveland Bd. of Educ.*, 470 U.S. 532 at 546 (citing Arnett v. Kennedy, 416 U.S. 134, 167).

[373] Perry v. Sindermann, 408 U.S. at 600 (1972).

[374] AR 600-8-24, *supra* note 16, para. 4-20.b.(1) (defining probationary officers).

[375] *Cleveland Bd. of Educ.*, 470 U.S. at 546 (citing Arnett v. Kennedy, 416 U.S. 134, 167 (1973)).

Appendix A
Letter from a Soldier Subjected to a Reduction in Force

My name is Major Charles V. Slider III and I am currently stationed at Fort Leavenworth, Kansas. I am an African-American armor officer, proud father, and husband and graduate of Lincoln University in Jefferson City, Missouri. I was selected for the recently convened Officer Separation Boards for [*sic.*] the Department of the Army for a mistake over eight years ago. The mistake was a DUI in which I received a General Officer Memorandum [of Reprimand] in 2006. Since this incident, I strived for excellence in every job that I performed.

I trained soldiers for deployments to Iraq as part of the surge into theater from 2006-2008. From 2008-2011, I attended and completed Ranger School, Air Assault School and earned the Expert Infantryman Badge. I commanded troops in combat in Afghanistan where I earned the Bronze Star Medal, Army Commendation Medal for Valor, and the Purple Heart for actions against a determined enemy in [Regional Command] East. After the deployment, I was selected as the executive officer for the deputy commander for the Combined Arms Center of Training at Fort Leavenworth serving in the capacity as the daily assistant for a general officer. The following year I was selected among a field of majors to attend the Commanding General and Staff Officer College at Fort Leavenworth, as well as the school of advanced military studies [SAMS]. Both prestigious institutes serve as the educational nexus for field-grade officers. Upon graduating from SAMS in May 2014, I was notified that I would not receive an assignment due to being assessed as high risk [because of] the [GOMOR] in my restricted file. On August 1, I was notified of my removal from active duty service. Although I accept this fate, this is not justifiable due to the sacrifices that both my family and I have endured.

As a [SAMS] graduate, my interpretation of this entire process is that it involved no critical thinking about the types of officers maintained in the current military structure. In certain cases, specific skills, attributes, and character traits are required in order to provide a balance of the warrior scholar. To this end the board process chose individuals for elimination that met all of the requirements, but possessed one black mark. Instead of using judgment and common sense in determining the number of officers required for service, an arbitrary number was provided. This created a system in which officers were selected based on a mistake rather than their

overall contribution to the Army. One lapse in judgment does not constitute a pattern of misconduct, nor a judgment of overall character. These types of decisions [*sic.*] knee-jerk reactions within the Army have the potential to erode trust within the lower ranks.

As an officer, I believe that we should be judged on our body of work, not one isolated incident. Furthermore, this act to remove me from service serves as a blunt example of how stoic and regimented the board process is as a system. As a Purple Heart recipient and proud member of the service, my family and I have given the Army our never-ending faith and commitment. However, the Army has seen it fit to remove my services as an officer from its ranks. Although the details of the board instructions will remain hidden, this also serves as ironclad proof that these awards [*sic.*] are merely a method to provide credibility to a force that has integrity issues and morally barren [*sic.*] for true sacrifices. This letter is an attempt to highlight the issues residing within an unfair system and to provide context to others within the system. As a combat veteran of two theaters, Iraq and Afghanistan, I do not expect to be treated differently or to receive any sort of pat on the back. However, my actions after 2006 prove my family's enduring faith to an ever-evolving conflict and requirements to serve. I have served this great nation with distinction and honor and deserve a valid explanation of why its leaders choose to remove my services from the American people. I accomplished every mission presented to [*sic.*] and went above and beyond what is expected of an Army officer. I hope that this letter finds you in good faith.

Very respectfully,

MAJ Charles V. Slider[376]

[376] *See* Ricks, *supra* note 106.