

# Military Cannot Discriminate Against HIV-Positive Servicemembers, Court Rules

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April 2, 2019

LGBTQ+ advocates recently won a major victory in a lawsuit challenging discrimination in the military on the basis of HIV status. On February 15, 2019, Judge Leonie M. Brinkema of the Eastern District of Virginia granted the request of two HIV-positive Air Force servicemembers to temporarily block their imminent discharge from the Air Force because of deployment restrictions based on their HIV status. In so doing, Judge Brinkema found the servicemembers had made a “strong and clear showing” that the Department of Defense and Air Force regulations governing the treatment of HIV-positive servicemembers were “irrational, outdated, and unnecessary,” and that the Air Force’s decisions to discharge them on the basis of those regulations were “arbitrary, unreasoned, and inconsistent.”

## Background on the Military Discrimination Case

Both servicemembers, pseudonymously Richard Roe and Victor Voe, were diagnosed with HIV after enlisting in the military. Roe takes one antiretroviral pill per day and Voe takes two antiretroviral pills per day to manage their diagnoses. The pills are stored in ordinary prescription bottles and refilled every 90 days. Since beginning these antiviral treatments, both servicemembers’ “viral load,” which is a measure of the presence of HIV virus in the blood, has been considered “undetectable.” Both Roe and Voe are asymptomatic and allege in their complaint that they are physically and mentally capable of continuing to serve in the Air Force.

Under Department of Defense and Air Force regulations, however, both Roe and Voe were required to undergo separate medical evaluations after testing positive for HIV “for the purpose of determining [their] status for continued military service.” These regulations also disqualify HIV-positive servicemembers from deploying to a region known as the Central Command (“CENTCOM”) theater-level area of responsibility that includes portions of the Middle East and Central Asia. According to the Department of Defense, the majority of Air Force members are expected to deploy to this region. Although the regulations technically provide for a waiver of eligibility for servicemembers with HIV, no such waiver ever has been granted, making disqualification from CENTCOM deployment effectively categorical. After multiple layers of appeals, and over the strong recommendations of each one’s commanding officer that he be retained, the Air Force nevertheless ordered both servicemembers’ discharge on the basis that their HIV statuses rendered them ineligible for deployment to CENTCOM.

## Discrimination of Servicemembers Violates 5<sup>th</sup> Amendment and APA

In finding that Roe and Voe are likely to succeed on their argument that the prohibition against HIV-positive servicemembers’ deployment to CENTCOM violates the [Equal Protection clause of the Fifth Amendment](#), Judge Brinkema noted that “[b]ecause of advances in medicine and science, HIV is no longer a progressive, terminal illness . . . [It] has gone from an untreatable disease marked by inexorable clinical progression through extreme debility to death to a treatable disease” (citations omitted). The CENTCOM prohibition, which was based on an outdated medical understanding of the disease, therefore lacked any rational relationship to a legitimate governmental interest. Judge

Brinkema likewise found that Roe and Voe were likely to succeed on their arguments that their discharges, which were based on the likely-unconstitutional prohibition, were “arbitrary and capricious” and therefore violated the [Administrative Procedure Act \(APA\)](#).

Importantly, and in finding that Roe and Voe likely would face “irreparable, actual harm” if they were discharged, Judge Brinkema acknowledged the “particularly heinous brand of discharge” Roe and Voe would face if the Air Force’s decisions were allowed to stand, in which the stigma of being removed from active duty would be “coupled with the indignity suffered because the reason for their discharges bears no relationship to their ability to perform [their jobs]” (internal quotation marks omitted).

As Judge Brinkema herself observed, “the history of HIV has largely been one of fear, misinformation, stigma, and moral outrage” – directed primarily at gay men and other LGBTQ+ individuals. The court’s refusal to legitimize military discharge decisions made on these [discriminatory bases](#) represents an important step along the path to equality for LGBTQ+ individuals in this and other contexts.