RIN 2900–AQ95

Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge

COMMENTS OF
THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND
SWORDS TO PLOWSHARES

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I. EXECUTIVE SUMMARY

Swords to Plowshares and the National Veterans Legal Service Program ("Petitioners") submit these comments in response to the proposed rule issued by the Department of Veterans Affairs' ("VA") on July 10, 2020 ("Proposed Rule").[1]

VA's current regulations unlawfully prevent former service members who received less-than-honorable discharges from obtaining critical VA benefits for which they are qualified, such as health care, housing, education, disability compensation, and employment training.[2] To challenge their character of discharge and gain eligibility, these veterans have to endure lengthy, complicated adjudications, all while they are denied access to supportive services and left—often literally—out in the cold.

Petitioners are grateful that VA has taken action that is intended to address this unacceptable reality. However, VA's Proposed Rule falls short, and, in many respects, violates congressional directives and statutory mandates. The legislative history of the Servicemen's Readjustment Act of 1944 ("1944 G.I. Bill") demonstrates Congress's expansive and generous attitude toward veterans, including those with less-than-honorable discharges. Congress enacted the "other than dishonorable" eligibility standard drafted by Harry Colmery, former National Commander of the American Legion, who explained the purpose of that phrase as follows:

> I was going to comment on the language "under conditions other than dishonorable." Frankly, we use it because we are seeking to protect the veteran against injustice . . . . We do not like the words "under honorable conditions"

[1] AQ95-Proposed Rule - Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41471 (proposed Jul. 10, 2020).

[2] Throughout this Comment, Petitioners use the terms "former service member," "former member," "service member," and "veteran" interchangeably to refer to all individuals who served in the armed forces, regardless of discharge status. Petitioners do not use the term "veteran" to mean only those individuals who have been able to successfully establish status as a "veteran" under 38 U.S.C. § 101(2), but rather in an expansive way that acknowledges the value of all former service members' contributions to our country and in accord with Congress's intent in enacting the Servicemen's Readjustment Act of 1944 (the "1944 G.I. Bill").

> because we are trying to give the veteran the benefit of the doubt, because we think he is entitled to it.[3]

Under the plain language of the relevant statutes and their legislative intent, veterans should be excluded only if they received or should have received a Dishonorable discharge.[4] Three current United States Senators said as much in comments in the instant proceeding: "Congress only authorized exclusion of those servicemembers who received or should have received dishonorable discharges by military standards. Congress did not intend for VA to create a new standard that would be more exclusionary that the military standard and did not give VA any authority to do so."[5] However, under the Proposed Rule, service members can be excluded from VA for minor infractions that, by themselves, would never warrant a Dishonorable discharge. The Proposed Rule contains vague and ill-defined legal terms that will result in inconsistent, arbitrary, delayed, and unlawful Character of Discharge ("COD") determinations.

Therefore, VA should amend its Proposed Rule and adopt a final version of Section 3.12 that is consistent with the following standards:

- Presume eligibility of all administratively discharged veterans, except those discharged in lieu of court-martial;
- Remove regulatory bars in excess of VA's statutory authority that operate to exclude veterans based on misconduct that never could have or would have led to a Dishonorable discharge; and
- Require holistic consideration of compelling circumstances in all cases.

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[3] *Hearings on H.R. 3917 and S. 1767 to Provide Federal Government Aid for the Readjustment in Civilian Life of Returning World War II Veterans Before the H. Comm. on World War Veterans' Legislation*, 78th Cong. 415 (1944)), (statement of Harry W. Colmery, past National Commander, American Legion).

[4] *See, e.g.*, S. Rep. No. 78-755, at 15 (1944) ("Many persons who have served faithfully and even with distinction are released from the service for relatively minor offenses. . . . It is the opinion of the committee that such discharge should not bar entitlement to benefits otherwise bestowed unless the offense was such, as for example those mentioned in section 300 of the bill, as to constitute dishonorable conditions.").

[5] Comments on RIN 2900-AQ95, Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge from Richard Blumenthal, Jon Tester & Sherrod Brown, U.S. Sen., U.S. Senate (Sep. 3, 2020) (on file with Regulations.gov (beta)) at 3 ("Comments of Blumenthal, Tester, and Brown").

A proposed draft regulation that incorporates these recommendations is included at the end of this Comment.

II. BACKGROUND

In their decades working in the veterans community, Petitioners have seen firsthand the harms and injustices suffered by veterans with less-than-honorable discharges and the failures of the current systems that were created to serve them. Petitioners' years of experience representing veterans, including in VA COD adjudications and Department of Defense ("DOD") discharge upgrades, compelled Petitioners to seek reforms of the flawed COD regulations.

A. Hundreds of Thousands of Veterans Are Denied Access to the Benefits They Need and Deserve Because of Unlawful Exclusionary Policies

Hundreds of thousands of former service members are not considered "veterans" because of VA's current COD regulations at 38 C.F.R. § 3.12. Many of these former service members deployed to combat, experienced hardships, suffered trauma, and risked their lives. Many have physical and mental wounds that persist to this day. All who served did so when most of the fellow Americans did not. Yet, they are unable to access health care, disability compensation, homelessness prevention services, and other benefits offered by VA—solely because of their discharge status.

In many cases, former service members received less-than-honorable discharges because of trauma, hardship, or discrimination. Studies have found a strong correlation between having a mental health condition in service, whether because of combat or Military Sexual Trauma ("MST"), and being less-than-honorably discharged. For example, Operation Iraqi Freedom Marine Corps combat veterans with Post Traumatic Stress Disorder ("PTSD") are eleven times more likely to be discharged for misconduct and eight times more likely to be discharged for

substance abuse than similar veterans without PTSD.[6] Systemic and institutionalized discrimination, such as against LGBTQ service members and service members of color, has also led to higher rates of less-than-honorable discharges in those communities. A recent study by Protect Our Defenders found that Black service members in all branches are "substantially more likely than White service members to face military justice or disciplinary action."[7] Black service members are between 1.29 times and 2.61 times more likely to have disciplinary action taken against them than White service members in an average year.[8] The accumulation of disciplinary infractions leads directly to less-than-honorable discharges.

Those in-service experiences often continue to affect a service member after discharge, especially when compounded by the shame, stigma, and exclusion imposed by a less-than-honorable discharge characterization. Thus, veterans with less-than-honorable discharges have higher rates of homelessness, mental health conditions, incarceration, and unemployment.[9] They are three times more likely to experience suicidal ideation.[10] But because of their discharge characterization, the service members who need VA's services the most usually cannot access them.

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[6] Robyn M. Highfill-McRoy, Gerald E. Larson, Stephanie Booth-Kewley & Cedric F. Garland, *Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines*, BMC Psychiatry, Oct. 25, 2010, at 5.

[7] Don Christenson & Yelena Tsilker, *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System, at* i-ii (2017), protectourdefenders.com/disparity.

[8] *Id*.

[9] Adi V. Fundlapalli et al., *Military Misconduct and Homelessness Among US Veterans Separated from Active Duty, 2001-2012,* 314 J. Am. Med. Ass'n 832 (2015); Claire A. Hoffmire et al., *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans*, 56 Am. J. Prev. Med. 727 (2019); Sara Kintzle et al., *Exploring the Economic and Employment Challenges Facing U.S. Veterans: A Qualitative Study of Volunteers of America Service Providers and Veteran Clients* (May 2015).

[10] Hoffmire, *supra* note 9 at 730.

Service members who received less-than-honorable discharges are presumed ineligible for VA benefits. They can challenge that presumption through the COD review process. However, the COD process is significantly flawed. The review process is opaque and many service members do not understand how to request an eligibility review. The COD process is burdensome on both VA adjudicators and the veteran, and often takes a year or more to complete. While the review is pending, veterans are excluded from many or all VA benefits even though they may, in fact, be eligible. However, under the current regulations, VA annually deems about 80 to 90 percent of veterans who received other than honorable discharges to have served "dishonorably" despite the fact that they were not separated with a Dishonorable discharge—and thus VA bars them from accessing VA benefits. Both at the Regional Office level and at the Board of Veterans' Appeals, there are vast disparities in rate and reasons for benefits denials. For example, in Fiscal Year ("FY") 2018, the Oakland Regional Office granted 39.7 percent of COD determinations, while the Milwaukee Regional Office granted just 5.9 percent.[11]

Decisions denying CODs are overwhelmingly based on VA's overbroad regulatory bars rather than Congress's statutory bars. Because of VA's regulations governing COD adjudications, these denials usually fail to take into account mitigating factors, such as mental health and combat service. From 1992 to 2015, the Board of Veterans' Appeals denied the COD appeals of three out of four veterans with PTSD or Traumatic Brain Injury ("TBI"), and denied 85 percent of the COD appeals of Vietnam combat veterans.[12]

While this COD review process is tragically flawed, it is more than most veterans with less-than-honorable discharges get. The vast majority of veterans with less-than-honorable

[11] FOIA data on file with Petitioners.

[12] Attached as Exhibit 1, Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper Discharges, at 14-15 [hereinafter Ex. 1, *Underserved*].

discharges have never even received a COD review from VA. Only about ten percent of less-than-honorably discharged veterans have undergone COD review. The remaining 90 percent are excluded by default, because VA has chosen to presumptively exclude all veterans who were not honorably discharged.

The failure to timely provide supportive services to veterans with less-than-honorable discharges compounds issues with their health and well-being and reduces their chances for successfully reintegrating into civilian society. Because VA denies or delays assistance, these veterans must turn to other, less resourced sources for help: local non-profits, shelters, state and municipal programs, other federal programs, and their friends and family members.

VA is tasked with upholding our nation's obligation to care for those who served in uniform. VA has publicly committed to reducing veteran suicide, ending veteran homelessness, and supporting veterans with mental health conditions, including those who served in combat and experienced MST. The current COD regulations prevent VA from accomplishing those goals. They pose an unnecessary burden on the VA's adjudicatory systems while tying the hands of the thousands of VA health care professionals, social workers, case managers, peer specialists, outreach staff, and others who want to serve the veterans most in need of their help, regardless of discharge status.

As a matter of law and policy, VA must update its COD regulations.

B. Petitioners' Petition For Rulemaking

To address the failures of the COD adjudicatory system, on June 5, 2015, Petitioners submitted a brief petition for proposed rulemaking, which VA acknowledged by letter dated July 14, 2015. On December 19, 2015, Petitioners submitted their full and expanded petition for

proposed rulemaking ("Petition").[13] In the Petition, Petitioners requested that VA make the following four changes:

- **38 C.F.R. § 3.12(a): Reduce Administrative Burdens & Delay Through Updating the Presumption of Eligibility.** Petitioners proposed reducing the number of service members who are presumptively ineligible by requiring prior COD review only for those with punitive discharges or discharges in lieu of court-martial. This would reduce the costly administrative burden associated with the current regulations, as well as accord with Congress's intent to exclude only those discharged under "dishonorable conditions" and to give all former members the "benefit of the doubt."

- **38 C.F.R. § 3.12(d): Align Regulatory Bars with Statutory Text and Congressional Intent by Correctly Defining Disqualifying Misconduct and Considering Mitigating Factors.** Petitioners proposed adopting a definition for "dishonorable conditions" that excludes former service members based only on severe misconduct (i.e., conduct that could and would have actually led to a Dishonorable discharge under the practice of military law) and that includes express consideration of mitigating factors, such as behavioral health and extenuating circumstances, and favorable service, such as combat and hardship deployments. Considering compelling circumstances is required to accord with congressional intent and will help eliminate the disparities across how different service branches use non-punitive, administrative discharges for misconduct.

- **38 C.F.R. § 17.34: Grant Tentative Health Care Eligibility.** Petitioners proposed providing tentative eligibility for health care to all service members who were administratively discharged, who probably have a service-connected injury, or who probably honorably completed an earlier term of service pending a COD eligibility review.

- **38 C.F.R. § 17.36: Improve Health Care Enrollment Processes.** Petitioners proposed creating a more veteran-friendly healthcare enrollment process by adding more detailed instructions for VA staff and requiring that VA staff encourage individuals to apply for healthcare.

[13] Attached as Exhibit 2, Dec. 19, 2015 Petition to Amend Regulations Restricting Eligibility for VA Benefits Based on Conduct in Service.

The Petition was supported by numerous veterans service organizations and advocacy organizations.[14] Members of Congress have also called on VA to take "immediate action" to comply with the law and take action on the Petition.[15]

C. The Proposed Rule

On May 27, 2016, VA granted the Petition and initiated rulemaking. And on July 10, 2020, more than five years after Petitioners submitted their initial petition for rulemaking, VA issued its Proposed Rule.

1. *VA Did Not Propose Changes to 38 C.F.R. § 3.12(a)*

The Proposed Rule does not include changes to Section 3.12(a), which governs which former service members must undergo an individual COD eligibility review and are presumptively excluded from VA access until the successful completion of that review.

2. *VA Proposed Changes to 38 C.F.R. § 3.12(d)*

VA's Proposed Rule suggests amending Section 3.12(d) in five main ways.

First, under the current regulations, acceptance of an undesirable discharge to escape trial by general court-martial renders a discharge under "dishonorable conditions." VA's Proposed Rule replaces the term "undesirable discharge" with "discharge under other than honorable conditions or its equivalent" and replaces "to escape trial" with "in lieu of a trial" to, according to the Notice, "conform to the te[r]minology that service departments currently use and to avoid ascribing motivation or stigma to a former service member's decision to accept a discharge rather than to proceed to trial by a general court-martial."

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[14] *See* Exhibits 3-9.

[15] *See* Exhibit 10, Mar. 5, 2020 Letter from Senate to VA.

Second, the bar for "homosexual acts involving aggravating circumstances" would be revised to remove the express reference to sexual orientation and instead apply to all sexual acts involving aggravating circumstances, regardless of the sexual orientation or gender identity of the victim or perpetrator.

Third, "moral turpitude" would be defined as "a willful act that gravely violates accepted moral standards and would be expected to cause harm or loss to person or property."

Fourth, VA's Proposed Rule provides additional detail in the regulatory bar for "willful and persistent misconduct." VA proposes to define "persistent misconduct" as "instances of minor misconduct occurring within two years of each other, an instance of minor misconduct occurring within two years of more serious misconduct, and instances of more serious misconduct occurring within five years of each other" and to define "minor" misconduct as "misconduct for which the maximum sentence imposable" under the Manual for Courts-Martial "would not include a dishonorable discharge or confinement for longer than one year if tried by a general court-martial." The Proposed Rule also offers additional guidance on how absences without leave ("AWOL") of various lengths will be considered under the willful and persistent misconduct bar.

And fifth, VA's Proposed Rule creates an enumerated list of "compelling circumstances" that must be considered as potentially mitigating the misconduct. VA proposes to extend consideration of "compelling circumstances" to the regulatory bars of sexual misconduct involving aggravating circumstances, offenses involving moral turpitude, and willful and persistent misconduct, but not to the regulatory bar for discharges in lieu of general court-martial.

3. VA Did Not Propose Changes to 38 C.F.R. §§ 17.34 and 17.36

The Proposed Rule does not include changes to Sections 17.34 and 17.36, with the indication that a proposal would be forthcoming at a later date.

III. SIGNIFICANT ASPECTS OF THE PROPOSED RULE ARE UNLAWFUL, ARBITRARY, AND CONTRARY TO VA'S MISSION

The Proposed Rule overall fails to comport with the statutory text and congressional intent. As set forth more fully below, the proposal misconstrues the meaning of "dishonorable" to deem far too many veterans disqualified based on misconduct that never would have led to a Dishonorable discharge. The proposal also contravenes Congress's intent to expand eligibility and give veterans the "benefit of the doubt" through VA's presumption that all other-than-honorably discharged veterans are ineligible—until they are subjected to a lengthy COD review process and prove their worth. The Proposed Rule creates a burdensome, complex system that will be difficult for VA adjudicators to administer in a fair and consistent manner and that will operate to exclude far too many veterans from receiving the care and support that they need.

On behalf of the thousands of veterans with less-than-honorable discharges that they have helped, Petitioners call on VA to adopt a final rule that is consistent with law and congressional intent; that can be fairly, equitably, and compassionately applied to allow those who have served our country to access the benefits they need; and that allows VA to fulfill its mission of caring for those who have borne the battle.

A. The Legal & Historical Background of the 1944 G.I. Bill

Before addressing specific recommendations for certain subsections of the Proposed Rule, it is important first to understand the overall conceptual framework that Congress created through the 1944 G.I. Bill that must be properly implemented by VA in its final regulation. The 1944 G.I. Bill simultaneously created the "conditions other than dishonorable" eligibility standard and the statutory bars (later codified at 38 U.S.C. §§ 101(2) and 5303(a), respectively). These sections have not materially changed since the enactment of the 1944 G.I. Bill, with the exception of Congress enacting an additional statutory bar for extended unauthorized absences in the post-

Vietnam War era.[16] Therefore, VA must understand and comply with the legislative intent behind the 1944 G.I. Bill and any regulation governing the availability of benefits must comport with Congress's mandates.

Prior to 1944, Congress had legislated a number of different standards for veterans benefits eligibility depending on the benefit at issue and the era or war in which the veteran served. Some benefits required fully Honorable discharges; some excluded only those with Bad Conduct or Dishonorable discharges. Some laws specifically excluded veterans who had been discharged under certain circumstances. The 1917 War Risk Insurance Act, for example, excluded former service members who had been discharged for:

> mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he was found guilty by court-martial, or that he was an alien, conscientious objector who refused to perform military duty or to wear the uniform, or a deserter.[17]

In the years before World War II, the most recent eligibility standard Congress enacted was a law granting the VA Administrator discretion to choose the standard; with that authority, the Administrator limited benefits only to former members with Honorable discharges.[18]

Congress clearly rejected those previous standards in enacting the 1944 G.I. Bill. In considering and enacting the 1944 G.I. Bill and its "other than dishonorable" eligibility standard, Congress was seeking to accomplish a number of goals, as expressed in the text of the final statute and as discussed extensively in congressional hearings and the contemporaneous legislative record. Congress expressly chose an eligibility standard that was different than the standard used

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[16] *See Garvey v. Wilkie*, No. 2020-1128, 2020 WL 5048433 at *6 (Fed. Cir. Aug. 27, 2020).

[17] *See, e.g.*, Act of June 25, 1918, ch. 104, 40 Stat. 609, *amended by* World War Veterans' Act, ch. 320, 43 Stat. 607 (1924).

[18] Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from Veteran Services*, 122 Penn. St. L. Rev. 69, 82-83 (2017).

in prior legislation. It did not grant unlimited discretion to VA, and it did not limit access to those with only Honorable discharges. Congress created specific statutory bars that would bar eligibility (to bar veterans who had committed severe misconduct), but otherwise Congress wanted to give veterans with less-than-honorable discharges the "benefit of the doubt" and offer them the support and care they needed. While many urged Congress to require an Honorable discharge, Congress explicitly—and strongly—rejected that proposal.[19] Notably, in 1944, at the time that Congress expanded the eligibility criteria, just 1.7 percent of service members were discharged with a less-than-honorable characterization.[20] Legislators therefore intended to enact a rule under which less than 1.7 percent of veterans would be unable to access VA's benefits and services.[21]

The standard Congress chose for "other than dishonorable" mandated that former service members would be excluded only on the basis of severe misconduct that could have and would have led to a Dishonorable discharge.[22] Congress envisioned a limited role for VA in this process: to exclude service members who should have been dishonorably discharged but were not because of a procedural or technical error.[23] The statutory bars that Congress wrote into law were a guide for the level of severe misconduct that should be disqualifying.[24] In making the eligibility determination, Congress also wanted mitigating factors, such as combat service or war wounds, to

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[19] *Id*. at 85.

[20] Ex. 1, *Underserved*, at 11.

[21] *Id*.

[22] Adams & Montalto, *supra* note 18, at 88.

[23] *Id*.

[24] S. Rep. No. 78-755, at 16 (1944) ("It is the opinion of the Committee that such discharge [less-than-honorable] should not bar entitlement to benefits otherwise bestowed unless such offense was such, as for example those mentioned in section 300 of the bill [listing the statutory bars], as to constitute dishonorable conditions.").

be taken into consideration.[25] Congress thought that VA should not be strictly bound by the military's characterization, which it thought might be overly harsh or unjust.[26] Rather, Congress saw VA as having a very different mission than the military: to help veterans recover from war and reintegrate into civilian society so that they could lead healthy and productive lives after their service.[27] In reality, VA has created a less forgiving standard that denies benefits *more often* than if the military's characterization were left alone.

As the 1944 G.I. Bill is the authorizing statute under which VA's regulations are promulgated, any final regulation must be formulated in harmony with this statutory background. The specific comments below are informed by this history: they propose changes to the current regulation and Proposed Rule that create a standard of exclusion only where the service member committed severe misconduct that could have led to a Dishonorable discharge, that account for mitigating circumstances and positive service, and that give service members the "benefit of the doubt." Put another way, a final rule that excludes veterans based on minor misconduct, that fails to account for mitigating or positive factors, and that presumptively excludes so many who have served our country in uniform would be unlawful, in violation of statute, arbitrary, and capricious.

Both the current regulation and the Proposed Rule go well beyond the exclusions contemplated by the statutory text and the legislative history and improperly revive and expand prior existing bars which Congress rejected in the 1944 G.I. Bill. Nothing in the text of the statute or the legislative history requires that VA use the existing regulatory bars as a framework for Section 3.12—nor indeed does the law require that VA create any regulatory bars at all. Much of

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[25] Adams & Montalto, *supra* note 18, at 105.

[26] *Id*. at 89-90.

[27] *Id*. at 112.

the legislative history, in fact, calls into question or expressly rejects the exclusionary criteria that VA has long imposed. In particular, it appears contrary to basic principles of administrative law that after Congress created a wholly new eligibility standard that broke from prior standards, VA reinstated into regulation the earlier exclusionary standards that Congress rejected. That is, Congress used some of the standards from the 1917 War Risk Insurance Act (desertion, conscientious objector, and alien, under certain conditions) as statutory bars in the 1944 G.I. Bill, but *did not* enact the bars for moral turpitude or willful and persistent misconduct of which the member had been convicted by court-martial. For VA to impose those statutorily discarded standards in even broader form (i.e., without the requirement of a court-martial conviction) violates the law and means that they must be removed from the final rule.[28]

We call on VA to uphold the legacy of the World War II Era Congress and the responsibility that those representatives bestowed on VA to ensure that all who served in uniform succeed in their post-service lives. The 1944 G.I. Bill mandates nothing less. VA's current rule—which excludes post-9/11 veterans at four times the rate that the pre-1944 law excluded World War II veterans—is failing to do that. But in issuing this final rule, VA can correct the errors of the past and give all veterans the care and support that they deserve.

B. 38 C.F.R. § 3.12(a): Presumption of Ineligibility

Although VA's Proposed Rule makes some stylistic changes to the current Section 3.12(a), the proposal does not substantively change the subsection. Both the current regulations and the Proposed Rule presume the eligibility of service members with Honorable and General (collectively, "under honorable conditions") discharge characterizations and presume the

[28] *See Scofield v. Lewis*, 251 F.2d 128, 132 (5th Cir. 1958) ("The Regulations must, by their terms and in their application, be in harmony with the statute. A Regulation which is in conflict with or restrictive of the statute is, to the extent of the conflict or restriction, invalid.").

ineligibility of service members with Other Than Honorable, Bad Conduct, or Dishonorable discharge characterizations. These latter service members are required to undergo a burdensome COD review through which VA decides whether it considers their discharge "other than dishonorable" and therefore will allow them to access benefits. As discussed later in this Comment, the majority of veterans do not undergo COD determinations for numerous reasons, and those that do are overwhelmingly unsuccessful in establishing eligibility. Those few veterans who are eventually successful in proving eligibility are denied critical benefits while their COD determination is pending.

Section 3.12(a)'s presumption of ineligibility goes against congressional intent, is arbitrary and capricious, violates the Equal Protection Clause of the U.S. Constitution, and represents a bad, outdated policy. VA can and should presume eligibility for all administrative discharges, except those in lieu of court-martial.

1. *Section 3.12(a) Violates Congress's Intent*

As discussed above, the legislative history of the 1944 G.I. Bill reveals that Congress intended to provide benefits to almost all veterans, not just those honorably discharged. Congress made only "dishonorable" conduct disqualifying. By using the military legal term of art "dishonorable," Congress understood "dishonorable conduct" to refer to only very severe misconduct.[29] By presuming that former service members without honorable discharges are ineligible for benefits, VA departs from Congress's intent by denying and delaying the benefits of eligible veterans. To return to Congress's original intent, VA should amend Section 3.12(a) to presume the eligibility of the majority of administratively discharged service members.

[29] Adams & Montalto, *supra* note 18, at 111.

Congress intended to provide benefits to veterans without honorable discharges. During hearings over the Act that became the 1944 G.I. Bill, the bill's drafter Harry Colmery stated that the language "other than dishonorable" in the Act was selected because "we are trying to give the veteran the benefit of the doubt, for we think he is entitled to it."[30] Mr. Colmery also noted that deserving service members may receive unfavorable discharges and that these service members are "just as needy of the help and benefits provided under this act."[31]

Legislators understood "dishonorable conduct" that would disqualify a service member from receiving benefits to refer to very serious misconduct. In the House Report accompanying the bill, the House Committee on World War Veterans' Legislation stated that "[e]xcept upon dishonorable discharge, it is the view of the committee that recognition should be given of meritorious, honest, and faithful service."[32] The Senate Report accompanying the bill flagged the language "other than dishonorable" as correcting "hardships under existing laws requiring honorable discharge as a prerequisite to entitlement."[33] The Senate Report noted that many "persons who have served faithfully . . . are released from the service for relatively minor offenses, receiving . . . a discharge without honor . . . ."[34] The committee thought that "such discharge should not bar entitlement to benefits otherwise bestowed unless the offense was such . . . as to constitute dishonorable conditions."[35] Carl Brown, the Chief of Claims at the American Legion,

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[30] *Hearings on H.R. 3917 and S. 1767 to Provide Federal Government Aid for the Readjustment in Civilian Life of Returning World War II Veterans Before the H. Comm. on World War Veterans' Legislation*, 78th Cong. 415 (1944), (statement of Harry W. Colmery, past National Commander, American Legion).

[31] *Id*. at 416.

[32] H.R. Rep. No. 78-1418, at 17 (1944).

[33] S. Rep. No. 78-755, *supra* note 4, at 15.

[34] *Id*.

[35] *Id*.

testified during hearings over the bill that if the service member "did not do something that warranted court-martial and dishonorable discharge, I would certainly not see him deprived of his benefits."[36] A recent Federal Circuit opinion confirms the understanding that the statute was meant to deny benefits only to those former service members guilty of severe misconduct.[37]

The current and proposed regulations stand in direct contravention to this intent.

2. *Section 3.12(a) Draws an Arbitrary Line That Treats Similarly Situated Service Members Differently and Violates Equal Protection*

In addition to conflicting with Congress's intent, Section 3.12(a) draws an arbitrary line between veterans who served in different branches of the military or in different eras of war. Similarly situated veterans are treated differently by VA, raising concerns about the lawfulness of VA's determinations as to benefits eligibility.[38] This proposal is both arbitrary and capricious in violation of the standards set forth in the Administrative Procedure Act[39] and presents concerns under the Equal Protection Clause of the United States Constitution.

Different branches assign the types of discharge characterizations at different rates, leading to a disparate impact on similarly situated service members who served in different branches. For example, a service member in the Navy may receive an Other Than Honorable discharge for misconduct, but had he served in the Army and committed the same misconduct, he would have

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[36] *Hearings on H.R. 3917 and S. 1767 to Provide Federal Government Aid for the Readjustment in Civilian Life of Returning World War II Veterans Before the H. Comm. on World War Veterans' Legislation*, 78th Cong. 419 (1944) (statement of Carl C. Brown, Chief of Claims, National Rehabilitation Committee, The American Legion).

[37] *Garvey v. Wilkie*, *supra* note 16, at *6.

[38] *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1313 (D.C. Cir. 2014) (alteration in original) (citing *BNSF Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005)) ("As a general matter, an agency cannot treat similar situated entities differently unless it 'support[s] th[e] disparate treatment with a reasoned explanation and substantial evidence in the record."); *Steger v. Def. Investigative Serv. Dep't of Def.*, 717 F.2d 1402, 1406 (D.C. Cir. 1983) ("The Board cannot, despite its considerable discretion, treat similar situations dissimilarly and, indeed, can be said to be at its most arbitrary when it does so.").

[39] 5 U.S.C. § 706(2)(A).

received an Honorable discharge. Under this example, the service member in the Army would be presumed eligible for VA benefits, whereas the Navy service member would not, despite the fact that the same misconduct was at issue. Of all Other Than Honorable, Bad Conduct, and Dishonorable discharges since 1980, almost half—45 percent—were issued by the Navy.[40] The Marine Corps accounts for 24 percent of the presumptively ineligible discharges over that same period, even though the Marine Corps is the smallest of the service branches.[41] To look at it another way, taking Fiscal Year 2011 as an example, the Air Force assigned Other Than Honorable discharges to just 0.5 percent of enlisted airmen separated that year, while the Marine Corps assigned Other Than Honorable discharges to 10 percent of enlisted Marines—a twenty-fold difference.[42]

Enlisted Service Members Discharged as Percent of Characterized Discharges, FY11

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
Army	81%	15%	3%	0.6%	0.1%
Navy	85%	8%	7%	0.3%	0.0%
Marine Corps	86%	3%	10%	1%	0.1%
Air Force	89%	10%	0.5%	0.5%	0.0%
Total	84%	10%	5%	1%	0.1%

[40] Attached as Exhibit 11, Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges, at 22 [hereinafter Ex. 11, *Turned Away*].

[41] *Id.* (In contrast the Army, which has the most personnel, accounts for 27 percent of presumptively ineligible service members. The Air Force accounts for less than 5 percent.).

[42] Ex. 1, *Underserved*, at 12.

These service branch disparities have persisted over time, and they are not due to any difference between those who enlist in the Air Force versus the Marine Corps or any other branch. A 1980 Government Accountability Office report found that the differences could not be explained by individual merit or misconduct, but rather were caused by each branch's distinct disciplinary policies and culture.[43] For example, there are significant differences in how the service branches address single instances of drug use. In the Marine Corps, administrative separation with an Other Than Honorable discharge is practically mandatory; in the Army or Air Force, the service member would likely be discharged with a General characterization, or may not be separated at all. VA's Proposed Rule fails to account for these differences whatsoever, and data even show that VA adjudications often exacerbate the disparities.[44] By presuming that these service members are ineligible for benefits, VA disparately excludes service members from some branches, treating them unequally without a rational reason to do so.

Just as there are different discharge characterization rates across branches, there are also disparities over time. The percentage of veterans presumed ineligible by VA depends on the era in which the service member served. Since World War II, and despite some increased procedural protections for service members being discharged, all the branches have increased their use of less-than-honorable discharges. For example, whereas the military overall discharged 1.7 percent of World War II veterans with less-than-honorable discharges, that rate increased to 2.8 percent by the Vietnam Era and 6.5 percent in the Post-9/11 Era.[45] Because VA presumes ineligibility for all

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[43] Comptroller General, Report to the Congress of the U.S.: Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Is Needed, U.S. GAO FPCD-80-13 (Jan. 15, 1980), https://www.gao.gov/products/FPCD-80-13.

[44] Ex. 1, *Underserved*, at 2-3.

[45] *Id.* at 2.

less-than-honorably discharged veterans under Section 3.12(a), these changes in military practice have significantly increased the percentage of veterans who are presumptively excluded by VA's rule and who require a COD evaluation. Indeed, because VA never conducts a COD review for the vast majority of less-than-honorably discharged veterans, VA currently excludes 2.8 percent of Vietnam Era veterans and 6.5 percent of Post 9-11 veterans.[46] These rates of exclusion are multiples higher than the rate of excluded World War II veterans when Congress expressly chose to expand eligibility—a clear signal that VA's rule is miscalibrated.

While the point should be obvious, it is worth noting that service members in today's military, despite the higher rates of less-than-honorable discharges, are not inherently "less honorable" than those who served in prior eras. As evidence of that, service members from all eras have similar rates of punitive (Bad Conduct and Dishonorable) discharges—0.7 percent of World War II veterans and 1.0 percent of Post-9/11 veterans—suggesting that the rate of severe, felony-level misconduct has remained steady. It is just the rate of administrative Other Than Honorable discharges, where service members have significantly fewer rights, that has increased. Like the disparities across service branches, the disparities across eras of service raise significant equal protection issues. Veterans alike in all but the years they wore the uniform are being treated differently by VA. By presuming that all Other Than Honorably discharged service members are ineligible for benefits, VA disparately impacts service members who have served recently.

By treating similarly situated veterans differently and denying similarly situated veterans who served in different eras or branches access to benefits at different rates, VA fails to consider

[46] *Id.*.

the relevant factor of the rate of less-than-honorable discharges meted out in different eras and by different branches. In so doing, VA acts arbitrarily and capriciously and in violation of the APA.[47]

3. *Section 3.12(a) Is Bad and Outdated Policy*

Both the current and proposed versions of Section 3.12(a) are bad policy. Presuming ineligibility of veterans with less-than-honorable administrative discharges unnecessarily burdens both veterans and VA. The current and proposed versions of Section 3.12(a) are unmoored from the actual practice of military separation law, which has changed to increase drastically the number of veterans with Other Than Honorable administrative discharges. Presuming ineligibility of these service members also prevents VA from helping veterans at heightened risk of suicide, homelessness, and incarceration.

The presumption of ineligibility also unnecessarily burdens both the former service members and VA adjudicators. These burdens would be alleviated by a regulation that required CODs only for those veterans most likely to have engaged in conduct that may be deemed "dishonorable," that is, those discharged because of or in lieu of court-martial. This would allow eligible veterans to access their benefits without undue delay and would reduce the burdens on VA.

a. *Unreasonable Burden on Veterans*

Currently, service members seeking benefits who are presumed ineligible must seek a COD determination before they can access most services. These veterans are unduly burdened by presumed ineligibility during the lengthy COD process and delayed access to benefits. The COD

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[47] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

process often takes years to complete.[48] During this time, veterans who are presumed ineligible for benefits languish without access to benefits to which they may be entitled. Many veterans have not gone through the burdensome COD process, leaving many potentially eligible veterans without access to benefits.[49] As one example, the Veterans Legal Clinic at the Legal Services Center of Harvard Law School represented an Operation Enduring Freedom Marine Corps combat veteran who received an Other Than Honorable discharge for a single instance of using "hasheesh" after he deployed to Afghanistan. With pro bono help from the Clinic, the veteran was able to apply for VA health care, and VA eventually approved his application based on the finding that no statutory or regulatory bar applied (and later granted him service-connected disability compensation for deployment-related mental health conditions). But VA took nearly *two years* to render that initial determination, during which time the veteran was unable to access any health care at VA. By simple application of the existing regulations, it was clear to the veteran's advocates that he should be eligible—and VA eventually agreed—but the presumption of ineligibility barred the veteran until he proved his eligibility to VA. There was no way that VA could retroactively award the veteran the health care and support it denied him during those difficult years when he was dealing with unstable employment, a service-connected mental health condition, suicidal ideations, and the death of a parent.

Besides the thousands of veterans excluded from VA until they prove their eligibility, the much larger majority of presumptively ineligible service members never undergo a VA COD review at all. These veterans thus may never gain access to benefits to which they may be entitled. Veterans who seek benefits and are denied are often not told about the process for applying for a

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[48] Ex. 1, *Underserved*, at 12.

[49] *Id*.

COD determination.[50] They may be erroneously told that they are categorically ineligible for services.[51] These veterans are unable to access benefits and do not seek COD review, and they are not counted in statistics of veterans seeking CODs or denied benefits.

b. *Unnecessary Burden on VA Adjudicators*

Presuming ineligibility of veterans who do not have honorable discharges also unnecessarily burdens VA adjudicators. To conduct a proper COD review, VA adjudicators must conduct a complex, legally technical, and records-heavy process that involves numerous steps, and they are given a unique level of discretion compared with other adjudicatory functions. After screening the veteran's file and identifying COD as an issue, the VA adjudicator must send a notice to the former service member about the review and elicit information and records in support of eligibility. The adjudicator must also offer the former service member the opportunity for an in-person hearing and hold such hearing if requested.

Meanwhile, VA must gather numerous records and must decipher complex documents and regulations. Adjudicators are required to consider all available records, including service treatment records, personnel records, and records of proceedings pertaining to the veteran's discharge. But records are frequently missing from service members' personnel files and service treatment records, and key separation documents are often hard to read, inaccurate, or imprecise, hampering the adjudicator's ability to correctly identify the misconduct that led to discharge and any contributing factors. The adjudicator will have to screen whether there is a mental health condition that might rise to the level of "insanity" and, if so, prepare a referral for a medical examination. The adjudicator must then make and document a formal determination before

[50] Ex. 11, *Turned Away*, at 2.

[51] *Id*.

referring the determination to the Veterans Service Center Manager or designee for approval. Depending on the outcome of that review, further medical examinations may be needed, if the adjudicator finds the member eligible for Chapter 17 health care only. Finally, after all those steps, the adjudicator must send the former service member a decision notice communicating the outcome of the administrative decision. Then VA must determine how to further process the administrative decision.

Unsurprisingly, this process can—and often does—take years. For the four Regional Offices in which COD determinations are currently centralized, the average days to complete COD claims in FY 2018 were all over one year: 484 days in Little Rock, 517 days in Muskogee, 371 days in Nashville, and 486 days in Winston-Salem.[52]

Moreover, the initial COD determination may not be the end of the road for the claim. Because Regional Office adjudicators fully or partially deny the vast majority of veterans' COD claims—79 percent were denied in FY 2018—there could be years of supplemental claims and appeals before the matter is finally resolved.[53]

c. *VA's Ineligibility Presumption Harms the Most Vulnerable Veterans*

By presuming the ineligibility of hundreds of thousands of veterans, the current and proposed Section 3.12(a) prevents VA from offering prompt help to veterans who are at significant risk of suicide, homelessness, and incarceration. Service members discharged other-than-honorably are three times more likely to experience suicidal ideation than those with Honorable or General discharges.[54] That increased risk can be entirely eliminated if the veteran has access to

[52] FOIA data on file with Petitioners.

[53] *Id*.

[54] Hoffmire, *supra* note 9, at 727-80.

VA health care. Yet, VA's current presumption of ineligibility prevents or dangerously delays most of these veterans from getting that life-saving help.

Section 3.12(a) also impedes VA's mission of helping veterans recover from homelessness or preventing them from becoming homeless in the first place.[55] Veterans with Other Than Honorable discharges are presumed ineligible for the HUD-VASH program, a highly successful homelessness reduction partnership that combines the value of a Section 8 housing voucher with the wrap-around support of VA social work and health care services. That program uses VA's health care eligibility standard and funnels eligibility determinations through VHA. For service members with Other Than Honorable discharges, who may be health care-eligible based on a service-connected disability or pursuant to a COD Review, there is no clear path to apply for HUD-VASH, undergo an eligibility determination, and gain access to the program. As a result of VA's restrictive policies regarding eligibility and applications, national efforts to end veteran homelessness are hampered.

Section 3.12(a) likewise prevents VA from helping veterans avoid incarceration or have a successful reentry into the community. According to the Bureau of Justice Statistics, 23.2 percent of service members in prison, and 33.2 percent of service members in jail, have less-than-honorable discharge characterizations.[56] These increased rates are likely due to the higher rates of mental health conditions and homelessness among the less-than-honorably discharged veterans population. Yet, VA's Veteran Justice Outreach workers, who provide services to incarcerated veterans and support diversionary Veterans Treatment Courts across the country, are only able to

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[55] Emily Brignone et al., *Non-Routine Discharge from Military Service: Mental Illness, Substance Use Disorders, and Suicidality,* 52 Am J. Prev. Med. 557, 558 (2017).

[56] *See* Dep't of Justice Bureau of Justice Statistics, Veterans in Prison and Jail, 2011-12 (Dec. 2015), https://www.bjs.gov/content/pub/pdf/vpj1112.pdf; *see also* Ex. 1, *Underserved*, at 23.

work with VA-eligible veterans—and Section 3.12(a) presumptively excludes all less-than-honorably discharged veterans. As a result, states often entirely exclude less-than-honorably discharged veterans from participating in Veterans Treatment Court[57]—which are built around the supportive services VA provides—denying those veterans access to the supportive resources of those courts and instead subjecting them to more punitive, harsh carceral policies and conditions.

4. *VA Must Extend § 3.12(a) Presumptive Eligibility to All Administratively Discharged Veterans, Except Those Discharged in Lieu of Court-Martial*

Congress created the "other than dishonorable" eligibility standard that intentionally does not refer to specific DOD discharge characterizations but rather to general standards of conduct. Yet, VA presumes eligibility for thousands of veterans who may, in fact, have been discharged under circumstances that meet a statutory or regulatory bar for benefits—so long as the military characterized their service as Honorable or General. Through Section 3.12(a), VA made the judgment that, as a matter of policy and administrative efficiency, it would not require former service members with Honorable or General discharges to go through the burdensome COD review process prior to accessing VA benefits and health care, because only the minority of such members likely committed "dishonorable" conduct in service.

VA must extend this presumption of eligibility to other administratively discharged veterans who are unlikely to have committed dishonorable conduct: those with Other Than Honorable discharges that were not in lieu of court-martial. A military commander has already decided that these former service members did not commit misconduct serious enough to warrant a court-martial referral, whether because of the lack of severity of the misconduct, the presence of mitigating circumstances, or both. Under a properly constructed set of regulatory bars, which

[57] Ex. 1, *Underserved*, at 21-22.

excludes only for serious misconduct and takes into account mitigating factors, most or all of these veterans should be found eligible, and thus the burden of the COD review on VA and the veteran is needless.

If VA is concerned that a veteran deemed presumptively eligible should be excluded, VA has the option to conduct a COD review and propose to terminate benefits. VA already applies this procedure to honorably discharged veterans deemed presumptively eligible, such as those who were separated as conscientious objectors.[58] The advantage of a policy of presuming eligibility is that it reduces the burden on VA, is easily administered on the face of the DD 214 (by looking at the character of service and narrative reason boxes), and allows veterans who are entitled to benefits to start accessing them more quickly, rather than waiting months and years during which time their health conditions likely worsen and their lives become more unstable.

C. 38 C.F.R. § 3.12(d): Regulatory Bars & Compelling Circumstances

VA must establish regulatory bars that properly interpret the text of the governing statute, accord with the statutory scheme, and honor Congress's intent. A faithful regulatory interpretation would result in bars that exclude only those former service members who committed severe, unmitigated misconduct that should have led—but for a technical or procedural reason did not lead—to a Dishonorable discharge. The Proposed Rule does not currently do that, and therefore further changes are needed.

Moreover, it is important to recognize as a starting point that no act or statement of Congress requires that VA impose any regulatory bars at all. VA chose to create the existing regulatory bars based on its own general rulemaking authority under 38 U.S.C. § 501(a).

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[58] *See, e.g.*, *Title Redacted by Agency*, No. 12-41864, 2012 WL 7014448, at *3 (Bd. Vet. App. Dec. 7, 2012) (ordering a remand for a conscientious objector with an Honorable discharge characterization to determine whether the servicemember is barred from VA services by the statutory bars at 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(1)).

Curiously, the bars that it chose are based on statutes and regulations that pre-existed the 1944 G.I. Bill and that Congress expressly rejected and overwrote therein. As such, those bars are contrary to law.[59] Thus, there is nothing that requires VA to use the current or proposed regulatory language—or indeed that prevents VA from removing the regulatory bars altogether.

Decades of experience with the existing regulatory bars clearly show that the COD rule is fundamentally flawed and that major revision is needed to bring it into line with statute, enable a workable administrative system, and get help to veterans who desperately need it.

Despite centralizing COD adjudications in four Regional Offices, vast disparities in COD outcomes remain. In FY 2018, one of those four offices, the Little Rock RO, issued full grants in 33.3 percent of CODs, whereas another office, the Muskogee RO, issued full grants in just 14.8 percent—a two-fold difference.[60] Moreover, despite centralization, the other 54 Regional Offices still are responsible for a significant portion of COD decisions, and similar disparities exist across those ROs.[61] Disparities in treatment of similarly situated veterans based purely on which RO determines their eligibility is a quintessentially arbitrary and capricious result.[62]

The current regulatory bars have vastly more exclusionary effect than the statutory bars. More than 50 percent of veterans denied full access to VA benefits in FY 2018 were excluded based on the regulatory bars alone.[63] The proposed regulatory bars—because of their similarity to

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[59] *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1383 (D.C. Cir. 1985) ("[W]hen an agency does not reasonably accommodate the policies of a statute or reaches a decision that is 'not one that Congress would have sanctioned,' . . . a reviewing court must intervene to enforce the policy decisions made by Congress.") (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

[60] FOIA data on file with Petitioners.

[61] *Id*.

[62] *See, e.g., Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.").

[63] FOIA data on file with Petitioners.

the existing bars or even greater breadth—are likely to continue that trend. The outsized impact of the regulatory bars on preventing former service members from accessing basic benefits shows that these bars are clearly contrary to law. Two fundamental principles of administrative law and statutory interpretation are that an agency's regulation must be within the scope of the authority granted by Congress and cannot render the statutory text meaningless.[64] For example, under the proposed regulations service members could be disqualified for willful and persistent conduct for being AWOL for less than 180 days despite Congress requiring at least 180 days to disqualify a service member under a statutory bar. More examples of the Proposed Rules conflicting with and exceeding the statute are given below. By overreaching and swallowing up the statute, VA's current and proposed regulations are unlawful.

We urge VA to reconsider in a more holistic fashion which former service members it is truly seeking to exclude from basic veteran benefits and to remove the existing and proposed regulatory bars. However, to the extent that VA decides to continue to use the existing framework of regulatory bars, we ask that VA make the following changes:

1. *38 C.F.R. § 3.12(d): Preamble*

The Proposed Rule reframes the prefatory language of the regulatory bars to state that "[b]enefits are not payable where the former service member was discharged or released under one of the following conditions."

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[64] *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982) ("The challenged Regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose.'"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979) ("What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued."); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) (An agency's "'interpretation' of the statute cannot supersede the language chosen by Congress."); *Doe, 1 v. Fed. Election Comm'n*, 920 F.3d 866, 874 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 2506 (2020) ("It is hornbook law that an agency cannot grant itself power via regulation that conflicts with plain statutory text.").

Under current practice and Court of Appeals for Veterans Claim precedent, the relevant misconduct to be considered in a COD determination is the specific misconduct that led to discharge.[65] An adjudicator may not consider any misconduct that did not lead to discharge, and should not be combing through a veteran's service records to find other misconduct on which basis the veteran could be excluded. This accords with the text of the statute, which directs attention to the conditions under which the service member was "discharged or released." This also conforms to principles of due process, because a service member should be aware of the likely consequences of a disciplinary action; if the misconduct was not noticed in the discharge paperwork then the member did not have a full opportunity to know that it could bar access to benefits and to then challenge that action. Limiting consideration to the misconduct that was noticed on the separation or court-martial paperwork and that actually led to discharge is also efficient for VA adjudicators: the adjudicator can focus on the separation paperwork rather than digging through the whole file to find some other, perhaps nonexistent, misconduct allegations.

The Proposed Rule is seemingly ambiguous on which misconduct the COD review should focus, though the law makes clear that it should be solely the misconduct that led to discharge. For clarity and consistency of application and to bring its regulations into compliance with the statute, VA should revise the prefatory language in the final rule to state that a former service member may be deemed ineligible only on the basis of misconduct that was listed on the administrative separation notice or court-martial conviction and that actually formed the basis of the discharge.

[65] *See Gardner v. Shinseki*, 22 Vet. App. 415, 420-21 (2009); *Frazier v. Shinseki*, No. 09-3765, 2011 WL 1930395, at *3 (Vet. App. May 20, 2011) (nonprecedential).

2. *38 C.F.R. § 3.12(d)(1): Discharge in Lieu of Court-Martial*

Under the current version of Section 3.12(d)(1), service members who are discharged for accepting an "undesirable discharge to escape trial by a general court-martial" are deemed discharged under dishonorable conditions. VA proposes replacing the term "undesirable discharge" with "discharge under other than honorable conditions or its equivalent" and the term "to escape trial" with "in lieu of a trial."

VA's proposed regulation is unlawfully vague in two respects. First, it is not clear what is "equivalent" to a "discharge under other than honorable conditions." Some readers, including VA adjudicators, may think that a General discharge is equivalent, when that is not what VA appears to intend. And while no veteran receives an "Undesirable" discharge anymore, there remain hundreds of thousands of veterans who served in the Vietnam War era or earlier who have such characterization, and the rule must account for them, too. The final rule should use more specific language such as "undesirable discharge or discharge under other than honorable conditions in lieu of general court-martial."

Second, the Proposed Rule fails to fully clarify who is not covered by this regulatory bar: namely, service members who were discharged in lieu of *special* court-martial. A common error in COD determinations is the wrongful exclusion of service members discharged because of or in lieu of special court-martial, though the statutory and regulatory bar expressly state that only *general* court-martial is disqualifying. The Legal Services Center of Harvard Law School represented a veteran initially denied on exactly these erroneous grounds. The veteran served two Honorable enlistments in the Army, which included deploying to Afghanistan, before receiving an Other Than Honorable discharge in lieu of special court-martial for helping a fellow Soldier buy drugs. After the Regional Office wrongfully denied him, it took three years for a Decision Review Officer to issue a new COD determination that granted his eligibility—during which time the

veteran was denied thousands of dollars of compensation benefits. To better prevent such clear errors, VA should expressly state in its final rule that those discharged in lieu of special court-martial are not barred under this provision.

Furthermore, for reasons described more below, we strongly object to the exclusion of veterans discharged in lieu of general court-martial from "compelling circumstances" consideration as arbitrary, discriminatory, and harmful.

3. *38 C.F.R. § 3.12(d)(3): Moral Turpitude*

Under the current version of Section 3.12(d)(3), veterans can be deemed "dishonorable" for committing a single offense involving moral turpitude, a term for which the current regulation provides no definition, though it states that "generally" felonies involve moral turpitude. VA's Proposed Rule defines "moral turpitude" as "a willful act committed without justification or legal excuse which gravely violates accepted moral standards and . . . would be expected to cause harm or loss to person or property," a standard set forth in a 1987 VA Office of General Counsel precedential opinion. This proposal is impermissibly broad and untethered from any military legal principles, in violation of the statute and VA's authority. In addition, the phrase "moral turpitude" is inherently vague and will lead to inconsistent and arbitrary decision making.

As explained above, VA must remove the moral turpitude bar because it violates administrative law. Congress chose not to include moral turpitude as a statutory bar in the 1944 G.I. Bill, though such a bar had existed in prior statute and other bars from that statute were carried forward. This demonstrates Congress's rejection of moral turpitude as a bar to benefits. However, VA not only improperly reinstated the moral turpitude bar, it broadened it.[66] In the 1946 COD regulation, VA excluded veterans for not just offenses of moral turpitude that resulted in court-

[66] *See Nat. Res. Def. Council*, 768 F.2d at 1383.

martial conviction (the prior statutory standard) but to all morally turpitudinous offenses of which convicted by military or civilian court. VA later broadened the bar even more to its current state, where no court-martial or other court conviction is required at all. This directly contravenes the statute and Congress's intent, and thus the moral turpitude bar exceeds the authority that Congress delegated to VA.

Substantively, VA's proposed definition of "moral turpitude" encompasses behavior that does not meet the high standard of "dishonorable." "Moral turpitude" is a concept that does not exist in military law; there is no armed forces case law or practice to draw on in formulating a reasonable and appropriate standard. This alone calls into question VA's use of the term in its regulatory bars.

In VA law, "moral turpitude" is not defined by statute or regulation. However, relying on legal dictionaries, the Board of Veterans' Appeals has defined moral turpitude as "conduct that is contrary to justice, honesty, or morality"[67] and "[b]aseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general."[68] The Office of General Counsel issued a precedential opinion in 1987 that held that an offense involves "moral turpitude" "if it is willful, gravely violates accepted moral standards, is committed without justification or legal excuse, and, by reasonable calculation, would be expected to cause harm or loss to person or property."[69]

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[67] *Title Redacted by Agency*, Bd. Vet. App. 20016688 (Mar. 5, 2020), https://www.va.gov/vetapp20/files3/20016688.txt.

[68] *Title Redacted by Agency*, Bd. Vet. App. 20011599 (Feb. 11, 2020), https://www.va.gov/vetapp20/files2/20011599.txt.

[69] General Counsel's Opinion, Veterans Administration, Op. G.C. 6-87 (July 27, 1987).

Other areas of federal law, such as immigration, do have a developed definition and concept of "moral turpitude." But in two main respects, VA's proposed definition sweeps far more broadly than those doctrines and impermissibly expands the legally accepted and commonsense definition of "moral turpitude" to behavior that must not warrant a Dishonorable discharge. First, VA's proposed definition of moral turpitude encompasses unintentional behavior. It is axiomatic that acts of moral turpitude—"[b]aseness, vileness, or depravity"—include an element of intent. Yet, VA's proposed version of Section 3.12(d)(3) states that the misconduct "would be *expected to* cause harm or loss to person or property" (emphasis added). This would permit VA to assess the offense using an objective standard that does not take into account the former service member's actual intent or state of mind. As a result, VA's definition of moral turpitude impermissibly encompasses accidental and reckless acts.

Second, VA's definition of moral turpitude includes "harm or loss to . . . property" without the requirement of fraud that "moral turpitude" definitions typically require. Without fraud, mere willful property damage might be considered "dishonorable" and therefore presumptively disqualifying.

A proper definition of moral turpitude that accords with existing legal doctrines would encompass: "conduct that involves fraud, or conduct that gravely violates moral standards and involves the intent to harm another person." Such a definition of moral turpitude is properly limited to truly egregious and intentional behavior—and behavior that may actually warrant a Dishonorable discharge.

In any event, the term "moral turpitude" is inherently vague and subject to personal opinions based on an individual's own moral viewpoint. Although VA proposes to explain "moral turpitude" in more words, the proffered definition is so broad as to remain open to varying

interpretations. This failing was pointed out in the 1973 Nader Report on Vietnam Veterans with the following description: "[a]n older VA employee in Montgomery, Alabama, may consider smoking marijuana an offense involving moral turpitude, while his younger counterpart in San Francisco would merely be amused."[70] The likelihood of such disparities has not disappeared in the passing years. Just this year, Petitioner Swords to Plowshares received a decision from the Muskogee Regional Office denying a client's COD determination on "moral turpitude" grounds because he had tested positive one time for drugs that he has used to self-medicate his service-related mental health condition, whereas the Legal Services Center represented a veteran who was discharged for one-time drug use and neither this bar, nor any other bar, was found to apply. VA has expressed a goal of providing clear guidance and comprehensible standards to its adjudicators so that they can render consistent decisions on a national scale. The use of the phrase "moral turpitude" undermines that goal.

To better accord with statute and create an easily applied rule, Petitioners propose removing the phrase "moral turpitude" and replacing it with a list of offenses that VA considers morally turpitudinous as that term is properly defined. That is, the bar would exclude former service members who committed the offenses of treason, mutiny, spying, rape, sabotage, murder, arson, burglary, kidnapping, or the attempt of any of these offenses, and offenses that have a maximum punishment of life imprisonment under the Uniform Code of Military Justice.

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[70] John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *Beyond T.B.D.: Understanding VA's Evaluation of a Former Service Member's Benefit Eligibility following Involuntary or Punitive Discharge from the Armed Forces*, 214 Mil. L. Rev. 1, 172 (2012).

4. *38 C.F.R. § 3.12(d)(4): Willful and Persistent Misconduct*

Under the current and proposed version of Section 3.12(d)(4), service members who are discharged for committing "willful and persistent misconduct" are considered discharged under dishonorable conditions. These terms are currently interpreted and applied far too broadly. By going well beyond the limits contemplated by the drafters of the 1944 G.I. Bill, VA has acted unlawfully in enacting and enforcing this regulatory bar.[71] VA relies on its general definition of "willful misconduct" to mean any intentional conduct—minor or otherwise— that violates any rule, or any reckless action that has a probability of doing so. VA now proposes to create a definition of "persistent" to mean two or more incidents of misconduct or misconduct that lasts more than one day. VA's definition places few limits on what is willful or persistent; any sequence of misconduct citations, regardless of whether they are related, of similar character, or occurred close in time, qualifies as "persistent." Under VA's Proposed Rule, service members commit "willful and persistent misconduct" if they commit

- multiple instances of "minor misconduct occurring within two years of each other";
- a single instance of "minor misconduct occurring within two years of more serious misconduct"; or
- multiple instances of "serious misconduct occurring within five years of each other"

These imprecise and expansive standards permit almost any disciplinary problems to be considered "willful and persistent misconduct." Unsurprisingly, the vast majority of CODs are denied on the basis of "willful and persistent misconduct"—and this bar will likely remain the primary basis for

[71] *See Nat. Res. Def. Council*, 768 F.2d at 1383.

excluding veterans from VA if the Proposed Rule is promulgated in its current form.[72] VA must avoid that unlawful and unwanted outcome for the reasons explained below.

As an initial matter, the willful and persistent misconduct bar should be eliminated entirely because it exceeds Congress's grant of authority to VA.[73] The willful and persistent misconduct bar conflicts with the governing statute by assigning a "dishonorable" label to minor misconduct for which service members never would have been—and indeed were not—discharged Dishonorably.[74] Indeed, the rule can exclude a service member for misconduct that quite literally never could have led to a Dishonorable discharge because such punishment is not permitted for those offenses. For example, two unauthorized absences of less than one day would be considered "dishonorable" under VA's proposed willful and persistent misconduct bar—but a Dishonorable discharge is not authorized under such circumstances. VA's Proposed Rule thus violates the plain text of the statute.

What is more, as with the moral turpitude bar, Congress expressly chose not to include "willful and persistent misconduct" of which convicted by court-martial as a statutory bar in the 1944 G.I. Bill, though such a bar had existed in prior law. Yet VA not only created such a bar, it removed the requirement of a court-martial conviction—vastly expanding the number of veterans

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[72] Ex. 1, *Underserved*, at 23.

[73] While *Garvey v. Wilkie* did uphold the willful and persistent misconduct bar as valid exercise of VA's discretion, that decision misunderstood the nature of Congress's Vietnam Era legislation and the standard of "dishonorable" conduct in military law. *See Garvey v. Wilkie*, No. 2020-1128, 2020 WL 5048433 (Fed. Cir. Aug. 27, 2020). Further, the *Garvey* decision specified that the willful and persistent misconduct bar should apply only to serious misconduct. The Proposed Rule does not so limit the application of persistent misconduct, but rather explicitly includes minor misconduct.

[74] Minor misconduct itself is ill defined. *See* Comments of Blumenthal, Tester, and Brown (noting that the definition of "minor misconduct" is "too expansive and vague, and thus risks excluding veterans whom Congress intended to be eligible for benefits").

excluded under its ambit. The willful and persistent misconduct thus violates the statute and exceeds the authority Congress delegated to VA.

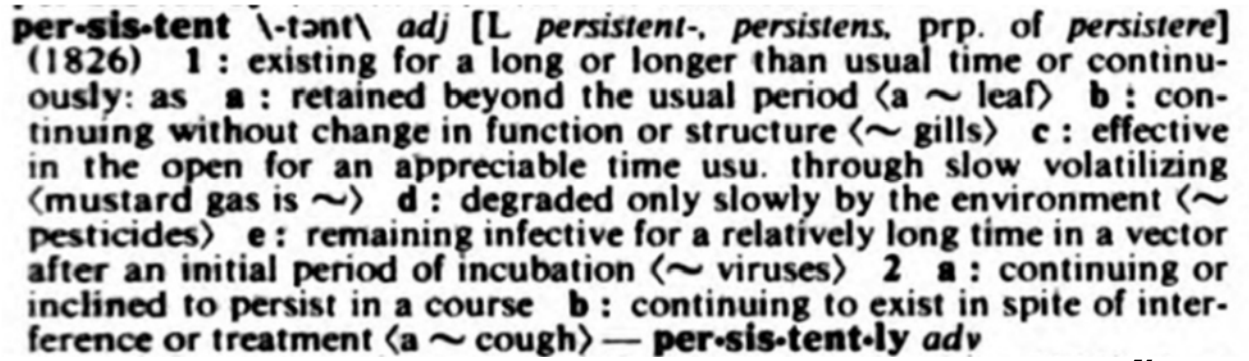
However, if VA chooses to employ the "willful and persistent misconduct" phrasing—which it should not—then the language should account for the following changes. Revisions are needed to correct the fundamental misunderstanding of military law reflected in the Proposed Rule and to avoid the arbitrary and unwanted results that will necessarily ensue.

First, VA's proposed two-year timeframe for minor misconduct is meaningless under the actual practice of military law. As explained in the Notice, VA based its two-year timeline on the statute of limitations for non-judicial punishment. That limitations period has little valence in military law, and there are other principles and standards of military law that place limits on how long after an offense non-judicial punishment can be imposed. It would therefore be arbitrary to use two years as a bright-line rule for disqualifying misconduct. A more reasonable line would be one year.

Second, VA's Proposed Rule does not account for multiple instances of misconduct arising out of the same act. If a commander is motivated to discharge a particular service member, the commander could easily—and frequently may—charge multiple minor offenses arising out of a single act of wrongdoing. VA's proposal fails to recognize this reality and thus operates to exclude service members who were targeted for separation or who, in a moment of crisis, may have rapidly deteriorated. Instead, VA should require that incidents of misconduct be separate and distinct to court as willful and persistent.

Third, VA's proposed definition of "persistent" is flawed. Citing the Tenth Edition of Merriam-Webster's Collegiate Dictionary, VA defines persistent conduct as conduct "that is ongoing over a period of time" or "that recurs on more than one occasion." However, the cited

dictionary does not include "more than one time" anywhere in its definition of "persistent." Rather, the full definition from the tenth edition of Merriam-Webster's Collegiate Dictionary is:



per·sis·tent \-tənt\ *adj* [L *persistent-, persistens,* prp. of *persistere*] (1826) **1 :** existing for a long or longer than usual time or continuously: as **a :** retained beyond the usual period ⟨a ~ leaf⟩ **b :** continuing without change in function or structure ⟨~ gills⟩ **c :** effective in the open for an appreciable time usu. through slow volatilizing ⟨mustard gas is ~⟩ **d :** degraded only slowly by the environment ⟨~ pesticides⟩ **e :** remaining infective for a relatively long time in a vector after an initial period of incubation ⟨~ viruses⟩ **2 a :** continuing or inclined to persist in a course **b :** continuing to exist in spite of interference or treatment ⟨a ~ cough⟩ — **per·sis·tent·ly** *adv*

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According to several other dictionaries and commonsense, two wrongful acts over a two-year period do not constitute ***persistent*** misconduct.[76] And to the extent VA was reinstating the willful and persistent misconduct bar (of which convicted by court-martial) that existed in pre-1944 veterans benefits law, it is worth noting that the definition of "persistent" in the second edition of Webster's Collegiate Dictionary, published in 1910, was: "1. Inclined to persist; tenacious of position or purpose. 2. (Biol.) Remaining beyond the period when parts of the same kind

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[75] Merriam-Webster's Collegiate Dictionary, at 867 (10th ed. 1993) (1: existing for a long or longer than usual time or continuously: as a: retained beyond the usual period . . . b: continuing without change in function or structure . . . c: effective in the open for an appreciable time usu. through slow volatilizing . . . d: degraded only slowly by the environment . . . e: remaining infective for a relatively long time in a vector after an initial period of incubation . . . 2 a: continuing or inclined to persist in a course b: continuing to exist in spite of interference or treatment.")

[76] *Persistent*, Merriam-Webster's Unabridged Dictionary(last visited September 1, 2020), https://www.merriam-webster.com/dictionary/persistent (defining persistent as "existing for a long or longer than usual time or continuously"); *Persistent*, Lexico (last visited September 1, 2020), https://www.lexico.com/en/definition/persistent (defining persistent as "[c]ontinuing to exist or endure over a prolonged period"); *Persistent*, Oxford English Dictionary (last visited September 1, 2020), https://www.oed.com/view/Entry/141468?redirectedFrom=persistent#eid (defining persistent as "[o]f an action or event: continual, recurrent; repeated, esp. constantly"); *Offender*, Black's Law Dictionary (11th ed. 2019) (defining "persistent felony offender" as "[s]omeone who has at least thrice been convicted of felonies usu. of a specified level of seriousness and often within a specified period . . .").

sometimes fall off or are absorbed; ***permanent***."[77] Thus, at the very least, misconduct must consist of at least three separate incidents of serious misconduct within one year of each other, where the service member has been counseled and had the opportunity to correct the behavior. Such a definition is more accurate and faithful to the statute.

Fourth, VA's Proposed Rule does not prevent service members being disqualified for willful and persistent conduct for being AWOL for less than 180 days despite Congress's clear guidance to the contrary. In the statutory bars, Congress provided a specific standard for how much AWOL must be to qualify as sufficiently severe to forfeit eligibility: at least 180 days. And such absence can be excused by compelling circumstances. However, AWOL for shorter periods under VA's Proposed Rule can warrant a dishonorable designation on the basis of willful and persistent behavior. For example, the Court of Appeals for Veterans Claims has interpreted the "willful and persistent" regulatory standard to be satisfied with periods of AWOL of only thirty days despite the statutory 180-day standard. A fundamental principle of statutory interpretation is that an agency cannot interpret a law so as to render another part of that law superfluous—but that is exactly the consequence of a regulatory bar that excludes former members who were AWOL for less than 180 days consecutively. That is impermissible and is in direct conflict with Congress's statutory bar.[78]

The willful and persistent misconduct bar has been used thousands of times to exclude veterans whom Congress expressly said should be granted access to benefits and whom VA says it wants to help. Among them are many of the veterans Petitioners and the Legal Services Center have represented: an Operation Enduring Freedom Marine Corps combat veteran who used "spice"

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[77] Webster's Collegiate Dictionary (2d ed. 1910) (emphasis added). Similarly, that edition defined "persist" as "To stand firm; to be fixed and unmoved; to continue steadfastly; to persevere." *Id*.

[78] *See Nat. Res. Def. Council*, 768 F.2d at 1383.

to self-medicate his undiagnosed PTSD and was other-than-honorably discharged for drug abuse; a Vietnam War Army combat veteran who went AWOL—for fewer than 180 days—after redeploying because of an argument triggered by his undiagnosed PTSD and received an Undesirable discharge; a Black Korean War Era veteran who suffered racial discrimination and was given an Undesirable discharge for minor misconduct when his superiors thought that his seeking medical treatment was "malingering"; a veteran who was repeatedly raped and sexually harassed by a Non-Commissioner Officer and then given an Undesirable discharge in lieu of court-martial when he "showed disrespect" to his superiors.

The willful and persistent misconduct bar, both facially and as applied, is probably the most egregious violation of the statutory text and congressional intent. By its plain language, it operates to exclude veterans for conduct that never could have led to a Dishonorable discharge, as well as many more veterans for which realistically they never would have been dishonorably discharged. The bar is also the easiest path for front-line VA adjudicators to deny eligibility to a veteran; all they need to do is find two instances of misconduct in an enlistment period, even if they were not the basis of the discharge. VA must keep in mind the reality of mass claims adjudication and burdens placed on Veterans Service Representatives in their daily work. VA should not make it so easy to cut a person who served our country off from benefits. We therefore strongly urge VA to remove the willful and persistent misconduct bar in its entirety.

5. *38 C.F.R. § 3.12(d)(5): Aggravated Sexual Acts*

Under the current version of Section 3.12(d)(5), service members are considered dishonorable if discharged for committing "homosexual acts involving aggravating circumstances." VA's Proposed Rule replaces the word "homosexual" with "sexual," meaning that Section 3.12(d)(5) would apply to all such sexual acts, not just "homosexual acts."

We fully agree that VA and the military should strongly oppose those who have committed sex crimes against others and find ways to support and assist MST survivors. However, there are ways to do so that do not promote discrimination against LGBTQ veterans, who themselves have often suffered MST.

While VA's proposed amendment appears to be a step in the right direction, Section 3.12(d)(5) should be eliminated, not amended. It must not be forgotten that the origin of this provision was even more expressly discriminatory: the 1959 version of this regulation read that "homosexual acts or tendencies generally will be considered a discharge under dishonorable conditions"[79] and the 1963 version of the regulation created a bar for "generally, homosexual acts."[80] The legacy of this overt discrimination remains in the current text.

Given the military's and VA's long history of discriminating against LGBTQ service members, the seemingly neutral language in the proposed version of Section 3.12(d)(5) would likely be enforced more often against LGBTQ servicemembers.[81] Indeed, between the end of WWII and the repeal of the Don't Ask, Don't Tell ("DADT") policy in 2011, about 114,000 servicemembers were involuntarily separated based on sexual orientation.[82] And sexual

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[79] 38 C.F.R. § 3.12(c) (1959).

[80] 38 C.F.R. § 3.12(d)(5) (1963).

[81] *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (noting that "[g]ays and lesbians were . . . barred from military service"); *see also* Comments on RIN 2900-AQ95: Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge from Beth Goldman, Pres., N.Y. Legal Assistance Group (Sep. 4, 2020) (on file with Regulations.gov (beta)) at 10-12 (noting that the Proposed Rule will have a continued "disparate impact" on LGBTQ servicemembers).

[82] Matthew M. Burke, *Bill Would Upgrade Records of Those Discharged Under DADT*, Stars and Stripes (June 21, 2013), https://www.stripes.com/news/us/bill-would-upgrade-records-of-those-discharged-under-dadt-1.226901.

orientation discrimination against service members is still prevalent in the military today.[83] Consensual sodomy was a crime under the Uniform Code of Military Justice until 2003 and largely used to prosecute LGBTQ service members.[84] Allegations of other "sex" crimes, both in the past and today, are often disparately charged against LGBTQ service members by individuals who was to express their personal moral objection to LGBTQ individuals. For example, Swords to Plowshares represents a male Navy veteran who was discharged with an OTH due to a sex offense with aggravating factors after he was caught kissing another man in public. Under the Proposed Rule, a VA adjudicator may still find this meets the definition of a sex crime sufficient to bar this veteran from benefits.

Removing this bar would not suddenly allow those who had intentionally committed severe sex offenses to access VA benefits. Under the Uniform Code of Military Justice, rape and sexual assault have a mandatory Dishonorable discharge.[85] Furthermore, rape and aggravated sexual assault could be listed under Section 3.12(d)(3) as a "morally turpitudinous" offense.[86] Removing Section 3.12(d)(5) entirely is necessary to fully end its historical discrimination against LGBTQ veterans, and the harm VA seeks to prevent by including this subsection can be better accomplished by other means.

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[83] Carla Groves, *Military Sexual Assault: An Ongoing and Prevalent Problem*, 23 J. Hum. Behav. Soc. Ent. 747 ("Considering the traditionally anti-LGBT military environment, LGBT service members are likely at higher risk of experiencing MST when compared to non-LGBT service members." and "sexual orientation discrimination frequently occurs" in the military).

[84] *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); Act of Aug. 10, 1956, 70A Stat. 74 (1956) (codified at 10 U.S.C. § 925, repealed 2003).

[85] 10 U.S.C. § 920.

[86] *See, e.g.*, *(Title Redacted by Agency)*, Bd. Vet. App. 20016688 (Mar. 5, 2020), https://www.va.gov/vetapp20/files3/20016688.txt ("[T]he appellant's conduct, specifically the unconsented sexual touching of a civilian in the confines of his car, as well as the admission of biting and struggling with her after she rejected his advances, constitutes an offense of moral turpitude" and "is certainly contrary to justice, honesty, and morality").

6. *38 C.F.R. § 3.12(e): Compelling Circumstances & Mitigating Factors*

Under the current version of Section 3.12(d), there is no provision permitting or requiring consideration of extenuating or mitigating factors. VA's Proposed Rule adds such a provision through a "compelling circumstances" "exception" for the regulatory bars of "moral turpitude," "willful and persistent misconduct," and "sexual acts involving aggravating circumstances or other factors affecting the performance of duty," but not "discharge in lieu of a trial" or "mutiny or espionage." VA proposes the following list of mitigating factors:

- a clinical diagnosis of, or evidence that could later be medically determined to demonstrate existence of, posttraumatic stress disorder, depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder, impulsive behavior, cognitive disabilities, and co-morbid conditions (i.e., substance use disorder and other mental disorders);
- combat related or overseas-related hardship;
- sexual abuse/assault;
- duress, coercion, or desperation;
- family obligations or comparable obligations to third parties; and
- age, education, cultural background, and judgmental maturity.

We strongly support the creation of a "compelling circumstances" consideration in the rule and appreciate the breadth of factors that VA proposes to include. Indeed, we believe the consideration of positive and mitigating factors to be required by statute because it is inherent in the concept of "dishonorable"—a term of art in military law. In Petitioners' experience practicing veterans law, they too often had veteran clients denied eligibility on the basis of misconduct for which there were clearly evident explanations, or where the veterans had simply messed up after years of dedicated service. A requirement that VA adjudicators listen to and consider the broader context of a veteran's service accords with statute and affords veterans the opportunity to access needed benefits.

The proposed compelling circumstances capture very important factors that should be considered in VA eligibility determinations, and we overall agree with the factors VA proposes to include. We do, however, wish to point out specific ways in which VA's Proposed Rule is flawed, too narrow, or otherwise will therefore fail to live up to its intended purpose.

a. Compelling Circumstances Must Include Holistic Review of the Veteran's Service

Framing the mitigating factors as an "exception" infers that service members can access benefits only if they have an excuse for their behavior. That misconstrues the statutory text and congressional intent. As noted above, the drafter of the 1944 G.I. Bill used the language "other than dishonorable" to give veterans the "benefit of the doubt" and to create a presumption of eligibility. A framework such as VA proposes, which excludes veterans unless certain conditions are met, flips the intended presumption. VA should instead use the language proposed in the Petition to require adjudicators to balance the alleged negative conduct against compelling circumstances. And, as discussed above, VA should presume eligibility under Section 3.12(a).

Also, the list of "compelling circumstances" should be framed as a non-exhaustive list so that the totality of the circumstances is weighed when rendering eligibility determinations. Veterans should be allowed to present mitigating and extenuating circumstances not explicitly included on this list, and VA should have to consider them.

b. Denying Compelling Circumstances Consideration to Veterans Discharged In Lieu of General Court-Martial is Arbitrary, Unreasonable, and Harmful

VA proposes to exclude service members discharged after accepting an Other Than Honorable discharge in lieu of trial by general court-martial from "compelling circumstances" consideration. This is unjust and irrational. In justifying this proposal in the Notice, VA claims that such service members need not have access to the mitigating factors because they can consult

legal counsel and receive mental health examinations before being other-than-honorably discharged in lieu of trial by general court-martial. But the right to counsel is not unique to service members who are discharged in lieu of court-martial; all service members facing Other Than Honorable or punitive discharge have the right to consult with legal counsel, whether they are being discharged in lieu of court-martial or for serious misconduct, a pattern of misconduct, drug abuse, or other basis.[87]

Similarly, the right to a pre-separation mental health examination is not unique to service members discharged in lieu of court-martial; such examinations are currently afforded to service members being administratively separated for misconduct of any sort.[88] However, the requirement of a pre-separation mental health screening is a relatively recent development and applies only to certain subsets of service members. Congress mandated such screenings for service members who had deployed to combat within the past 24 months only in 2009; it then expanded the protection to members who reported MST in 2018.[89] Thus, the vast majority of veterans—including all veterans who served in Vietnam, the First Gulf War, and the early years of the wars in Iraq and Afghanistan did not have the benefit of this law. What is more, many service members were denied the protection even after it was created. A 2017 GAO Report found that the military routinely failed to provide screenings or conducted inadequate screenings, and that 62 percent of service members discharged for misconduct from 2011 to 2015 had been diagnosed with a mental

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[87] Department of Defense Instruction No. 1332.14 (Jan. 27, 2014); *see also* U.S. Marine Corps Order 1900.16 (Nov. 26, 2013); Dep't of Army Reg. No. 635-200 (Dec. 19, 2016); Navy Personnel Command Manual §§ 1910-406, 1910-504 (Jul. 18, 2008); Air Force Instruction No. 36-3208 (Jul. 1, 2020).

[88] 10 U.S.C. § 1177.

[89] National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115–91, 131 Stat. 1379 (2017) (codified as amended at 10 U.S.C. § 1552)

health condition in service, yet separated anyway.[90] This same report even found that the Marine Corps and Army were systematically denying mental health screenings to members being discharged in lieu of court-martial in particular.[91] Denying veterans discharged in lieu of general court-martial consideration of "compelling circumstances" is therefore discriminatory and arbitrary—and it would operate to exclude many veterans whom Congress intended to provide benefits.

Also, failing to extend the compelling circumstances consideration to service members discharged in lieu of trial by general court-martial irrationally discriminates against former Soldiers because the Army uses such "Chapter 10" discharges much more than other branches.[92] Thus, service members who committed the same misconduct—for example, self-medicating drug use or AWOL to escape a sexually abusive superior officer—could be addressed under different administrative separation procedures based on the branch and VA could then reinforce that disparity, despite the underlying circumstances being identical. That disparate result for similarly situated veterans is arbitrary and capricious.[93]

Similarly, it appears irrational—and contrary to statute and congressional intent—to allow compelling circumstances consideration for veterans discharged for rape or sexual assault but not for veterans discharged in lieu of general court-martial. A veteran can be discharged in lieu of

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[90] *DOD Health: Actions Needed to Ensure Post Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations*, U.S. GAO GAO-17-260, 2-3 (May 16, 2017) https://www.gao.gov/assets/690/684608.pdf.

[91] *Id.* at 19.

[92] FOIA data (on file with Legal Services Center of Harvard Law School).

[93] *See, e.g., Steger v. Def. Investigative Serv.*, *supra* note 38 at 1406 ("The Board cannot, despite its considerable discretion, treat similar situations dissimilarly and, indeed, can be said to be at its most arbitrary when it does so.").

general court-martial for much less serious offenses, including technical violations of military regulations and self-medicating drug use.

The harshness of this proposal is perhaps best illustrated through the true experiences of our veteran clients. As just two examples, the Veterans Legal Clinic at the Legal Services Center of Harvard Law School has represented an Operation Enduring Freedom Army combat veteran who had served in the Special Forces and completed multiple enlistments before being discharged under Other Than Honorable conditions in lieu of court-martial merely for violating a travel order—while on leave, he visited his fiancée outside the permitted travel radius. Despite having a PTSD diagnosis related to his deployment, this veteran did not receive a pre-separation mental health screening because his combat deployment was more than two years prior to separation. The Clinic also represented a Post-9/11 Army veteran and MST survivor who went AWOL to escape her violently abusive husband and was discharged under Other Than Honorable conditions in lieu of court-martial. VA's Proposed Rule would look only at the manner in which these veterans were discharged, refusing to consider the context in which it happened, and exclude them from benefits. That would be unjust. VA should avoid these unwanted outcomes by extending "compelling circumstances" consideration to all regulatory bars.

c. Positive Factors Must Account for the Inherent Value of Military Service

While we appreciate and support VA's proposal to consider not just mitigating factors but also the positive and favorable service of veterans, the language used to convey that concept is unconstitutionally vague. The Proposed Rule requires consideration of the veteran's service besides the misconduct and whether such service was "honest, faithful and meritorious and of benefit to the Nation." Whether a veteran's service was "of benefit to the Nation" is entirely indeterminate and will lead to inconsistent outcomes based on who reviews the claim. The phrase

"meritorious" has a special meaning in military law to signify acts of individual achievement, which sets a higher standard that some service members—who volunteered to serve, who were willing to deploy but not called on to do so, who fulfilled all their duties until something went wrong—may not meet if a commander did not choose to bestow an award or medal. Yet such members should also be given credit for the time that they serve our country in uniform. VA should create a standard that honors the service and sacrifices inherent in all military service, especially now when so few Americans perform such service.

d. Clarification of and Additions to the Mitigating Factors Are Needed

We are highly supportive of a compelling circumstances factor for mental health conditions that existed in service. The importance of having a general consideration of mental health conditions cannot be understated given the significant research showing how in-service mental health conditions directly lead to less-than-honorable discharges. There are significant flaws with the way that mental health is considered under the current regulatory scheme, including the difficulty—both legal and personal—that veterans face in claiming "insanity," which is currently the sole path for veterans' in-service mental health to be factored into the COD decision.[94]

However, VA's proposed list of mitigating mental health conditions should be broadened and reframed so as not to be used in an exclusionary manner. Lawyers and others who are expert in interpreting regulations can see that this mental health mitigating factor provision is a non-exhaustive list that provides examples of conditions but could include any other mental health condition. In practice, Petitioners frequently see how non-exhaustive lists in the hands of an inexperienced or uninterested adjudicator are used as a checklist—and if the veteran's condition

[94] 38 C.F.R. §§ 3.12, 3.354.

is not on that list, then it does not qualify. Moreover, many studies have established that service members are often misdiagnosed or undiagnosed in service.[95] For example, one Legal Services Center client—an OEF Army combat veteran with an Other Than Honorable discharge—was misdiagnosed with "Intermittent Explosive Disorder" in service, but later found by VA to be 100 percent service-connected for PTSD and TBI. Moreover, all Vietnam era veterans served before PTSD was even a recognized condition by the psychiatric profession.

Under the current proposal, many qualified service members will not receive benefits to which they are entitled simply because they do not meet the rigid set of conditions in VA's Proposed Rule. We recommend that VA issue a final rule that refers broadly to mental health conditions that existed at the time of the conduct leading to discharge, including evidence of a mental health condition even if such condition was not diagnosed until after the member's discharge.

We also strongly support the consideration of "sexual assault and abuse" as a mitigating factor. Petitioners have represented countless MST survivors who were less-than-honorably discharged when they tried to escape the MST, in retaliation for reporting the MST, or because of a related mental health condition.[96] However, the proposal is narrower than VA's definition of MST: it fails to accord members who experienced sexual harassment consideration.[97] VA should broaden this subsection to include sexual harassment as well.

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[95] *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors*, Human Rights Watch (May 19, 2016), https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors. (From 2001 to 2010, "potentially thousands of [service members] were misdiagnosed and wrongfully administratively discharged" because "proper procedures were not followed.").

[96] *Id.*

[97] 38 U.S.C.§ 1720D

Similarly, VA should also include Intimate Partner Violence ("IPV") as a mitigating factor. Each year, thousands of service members report experiencing IPV at the hands of military or civilian partners.[98] Like service members who experience MST, those experiencing IPV are at heightened risk of developing PTSD or another mental health condition, face barriers to accessing support and treatment, may have limited routes to reporting the violence, and may respond in a way that could be misinterpreted as "misconduct" and lead to less-than-honorable discharge. Because of the similarities between MST and IPV survivors, VA should expressly consider IPV as a "compelling circumstance."

Furthermore, we support the extension of the right of veterans to raise in COD review that a valid legal defense would have precluded court-martial conviction for the alleged misconduct, currently Section 3.12(e)(3) of the Proposed Rule. However, such consideration is too narrow. The rule states that the defense "must go directly to the substantive issue of absence or misconduct rather than to procedures, technicalities, or formalities." Due process is not a "technicality" or "formality"—it is a fundamental principle of American law. The Proposed Rule seems to deny veterans the right to present issues of constitutional and statutory due process rights as a defense, though such defenses could have been brought in the court-martial itself. To accord with law, including military legal practice, the consideration of a valid legal defense must extend to all defenses, substantive and procedural.

Finally, VA should include as a mitigating factor whether the service member experienced discrimination in service or was discharged for pre-textual reasons, whether that discrimination was on the basis of race, sexual orientation, gender or gender identity, national origin, or otherwise.

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[98] *See, e.g., Report on Child Abuse and Neglect and Domestic Abuse in the Military for Fiscal Year 2018*, DOD (Mar. 12, 2019), https://download.militaryonesource.mil/12038/MOS/Reports/fap-fy18-dod-report.pdf; *Evaluation of Military Services' Law Enforcement Responses to Domestic Violence Incidents*, DOD (Apr. 19, 2019), https://media.defense.gov/2019/Apr/25/2002120678/-1/-1/1/DODIG-2019-075.PDF.

A recent report from Protect Our Defenders found that Black service members are significantly more likely to receive non-judicial punishment or court-martial compared with White service members.[99] And a 1972 Department of Defense report thoroughly documented the extensive racial discrimination throughout the military justice system, in courts-martial, non-judicial punishment, and discharge—as well as in duty assignments and other aspects of military life.[100] As discussed above, for many decades, LGBTQ veterans were subject to institutionalized discrimination that led to disparate punishment and discharge, and they were frequently targeted for punishment by bigoted commanders. VA should allow veterans to present discrimination as a reason that mitigates or explains allegations of in-service misconduct by expressly including "discrimination" as a compelling circumstance.

D. 38 CFR 17.34/36: Health Care Enrollment

VA did not propose any changes to 38 C.F.R. §§ 17.34 and 17.36, but the Notice states that VA "is still considering appropriate changes" in light of the 2018 enactment of 38 U.S.C. § 1720I, which grants mental health evaluation and treatment to certain veterans discharged under Other Than Honorable conditions. Petitioners proposed changing Section 17.34 so that tentative eligibility for health care is provided to all service members who were administratively discharged, who probably have a service-connected injury, or who probably honorably completed an earlier term of service pending eligibility review. Petitioners further proposed amending Section 17.36 to create a more veteran-friendly healthcare enrollment process by adding more detailed instructions for VA staff and urging VA staff to encourage individuals to apply for health care.

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[99] Christenson, *supra* note 7 at i-ii.

[100] *Report of the Task Force on the Administration of Military Justice in the Armed Forces*, DOD (Nov. 30, 1972), https://ctveteranslegal.org/wp-content/uploads/2013/03/DoD-Task-Force-on-the-Administration-of-Military-Justice-in-the-Armed-Forces-v1.pdf.

Petitioners reaffirm that these changes should be made for the reasons stated in the Petition. Given that Petitioners submitted this request in 2015 and VA granted the Petition as to these provisions in 2016, any further delay in issuing a proposed rule would be unreasonable. We therefore urge VA to issue changes in line with our proposal forthwith.

E. Petitioners' Proposed Rule

To summarize our recommendations, below is proposed language for VA's final rule:

38 C.F.R. § 3.12. *Benefit eligibility based on character of discharge.*

(a) *Presumption of eligibility.* If the former service member did not die in service, then pension, compensation, or dependency and indemnity compensation is payable for claims based on periods of service that were terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)). Unless issued in lieu of court-martial, an administrative discharge is a discharge under conditions other than dishonorable. Discharges issued by court-martial or issued in lieu of court-martial must be reviewed under paragraphs (c) and (d) in order to determine whether the discharge was under other than dishonorable conditions.

. . .

(d) *Regulatory standards for dishonorable conduct.* A discharge is under dishonorable conditions only if the specific conduct for which the former service member was discharged should have led to a Dishonorable discharge by general court-martial, as defined in subsection (1) below, and is not outweighed by compelling circumstances in the service member's record.

> (1) A discharge for only the following types of misconduct may be under dishonorable conditions, unless compelling circumstances exist:
>
> > i. A discharge in lieu of trial by general court-martial. Such discharge must be shown by documentation establishing that charges were referred to a general court-martial by a general court-martial convening authority. This provision does not include a discharge in lieu of special court-martial or a discharge in lieu of court-martial approved prior to the referral of charges.
> >
> > ii. A serious offense of which convicted by court-martial. Only the following offenses are serious under this section: Murder, Rape, Sexual Assault, Arson, Kidnapping, Mutiny, Spying, Treason, and the attempt of any of these offenses, and any offenses that under the Uniform Code of Military Justice are punishable by confinement for life.
>
> (2) A discharge is not under dishonorable conditions where compelling circumstances demonstrate favorable service or mitigate the misconduct. Evidence that exists outside the member's service records, including evidence of behavioral changes or that was not

documented during service, may establish a compelling circumstance condition or event. Compelling circumstances may be found based on the totality of the circumstances of the former service member's service, to include consideration of such factors as:

i. Mental and physical health. This includes whether the former service member may have been experiencing a mental or physical health condition at the time of the misconduct that led to discharge. This also includes consideration of military sexual trauma, intimate partner violence, operational stress, or other such circumstances or hardship.

ii. Personal and family circumstances. This includes the former service member's age, maturity, and intellectual capacity, and any family obligations or comparable obligations to third parties.

iii. Conditions of service. This includes discrimination, command climate, disparate or arbitrary action, era of service, and service branch.

iv. Favorable service to the nation. A determination of favorable service to the nation will consider factors including:

a. The overall duration and quality of service.

b. Combat, overseas, or hardship service.

c. Medals, awards, decorations, and other achievements or acts of merit.

v. Legal error in discharge. This includes whether a valid legal defense would have precluded a conviction for misconduct under the Uniform Code of Military Justice, to include consideration of substantive and procedural rights.

IV. CONCLUSION

Petitioners appreciate VA's efforts to clarify the regulatory bars to benefits based on COD, but further reform is needed. VA's Proposed Rule is arbitrary and capricious and contrary to Congressional intent, and the Rule would leave countless veterans unserved as a result of bad policy decisions. VA should revise its Proposed Rule as described herein to ensure that all who served in uniform receive the benefits they rightfully earned.

Respectfully submitted,

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September 8, 2020

V. ABOUT THE PETITIONERS

The National Veterans Legal Services Program ("NVLSP"): NVLSP is an independent, nonprofit veterans service organization that has served active duty military personnel and veterans since 1981. NVLSP strives to ensure that our nation honors its commitment to its 22 million veterans and active duty personnel by ensuring they have the benefits they have earned through their service to our country. NVLSP has represented veterans in lawsuits that compelled enforcement of the law where the VA or other military services denied benefits to veterans in violation of the law. NVLSP's success in these lawsuits has resulted in more than $5.2 billion dollars being awarded in disability, death and medical benefits to hundreds of thousands of veterans and their survivors. NVLSP offers training for attorneys and other advocates; connects veterans and active duty personnel with pro bono legal help when seeking disability benefits; publishes the nation's definitive guide on veteran benefits; and represents and litigates for veterans and their families before the VA, military discharge review agencies and federal courts. For more information, go to www.nvlsp.org.

Swords to Plowshares: Founded in 1974 by veterans, Swords to Plowshares is a community-based not-for-profit 501(c)(3) organization that provides needs assessment and case management, employment and training, housing, and legal assistance to approximately 3,000 veterans in the San Francisco Bay Area each year. Swords to Plowshares promotes and protects the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities. For more information, go to www.swords-to-plowshares.org.

The Veterans Legal Clinic at the Legal Services Center of Harvard Law School: The Veterans Legal Clinic at the Legal Services Center of Harvard Law School provides pro bono representation to veterans and their family members in a range of veterans and military law matters, as well as pursues initiatives to reform the systems that serve the veterans community. Located at

the crossroads of Jamaica Plain and Roxbury, the Legal Services Center is composed of six clinics—the Veterans Legal Clinic, Consumer Law Clinic, Housing Law Clinic, Family Law Clinic, Federal Tax Clinic, and LGBTQ+ Advocacy Clinic—and is Harvard Law School's largest clinical placement site. The Center's longstanding mission is to educate law students for practice and professional service while simultaneously meeting the critical legal needs of the community.

In addition to providing individual pro bono representation to veterans with less-than-honorable discharges before VA and the DOD military review boards, the Veterans Legal Clinic collaborates with other veterans organizations on initiatives to update and improve government policies that prevent veterans from accessing needed care and supportive services and to train more pro bono advocates about how to represent veterans with bad paper. Among these initiatives are the Underserved report and associated Petition for Rulemaking on behalf of Swords to Plowshares and the National Veterans Legal Services Program, which asked VA to amend its COD regulations that govern eligibility for basic VA services for veterans with less-than-honorable discharges; the Turned Away report, which documented the nationwide practice of VHA unlawfully denying veterans with less-than-honorable discharges the right to apply for health care; and the Discharge Upgrade Practice Manual, a forthcoming treatise co-authored with Connecticut Veterans Legal Center on how to effectively advocate for veterans seeking to correct an unlawful or unjust discharge status or to gain access to VA benefits and care.

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 1

UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER DISCHARGES

Swords to Plowshares

VETS HELPING VETS SINCE 1974

NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

UNDERSERVED

How the VA Wrongfully Excludes Veterans with Bad Paper

Prepared by the

Veterans Legal Clinic

Legal Services Center of Harvard Law School

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EXECUTIVE SUMMARY

Hundreds of thousands of Americans who served in our armed forces are not "veterans," according to the Department of Veterans Affairs (VA). Many of them deployed to a war zone, experienced hardships, and risked their lives. Many have physical and mental injuries that persist to this day. All of them served at a time when most Americans do not. Yet, the VA refuses to provide them healthcare, disability compensation, homelessness assistance, or other services because these former service members have bad-paper discharges.[1]

Today, the VA is excluding these veterans at a higher rate than at any point in our history. The rate is more than twice the rate for Vietnam Era veterans and nearly four times the rate for World War II Era veterans. The high rate is due almost entirely to the VA's own discretionary policies, not any statute. That is, it is entirely within the VA's power to help these veterans if it chose.

Indeed, Congress intended for the VA to provide services to almost all veterans with bad-paper discharges. In 1944, Congress simplified and expanded eligibility for veteran benefits so that returning service members would be supported in their rehabilitation and reintegration into civilian society. Congress explicitly chose to grant eligibility for basic VA services even to veterans discharged for some misconduct, provided that the misconduct was not so severe that it should have led to a trial by court-martial and Dishonorable discharge.

The VA has failed to heed Congress's instructions. Instead, the VA created much broader exclusion criteria than Congress provided, failing to give veterans due credit for their service to our country. The VA's regulations do not properly account for in-service mental health conditions. Except in narrow circumstances, the VA's regulations do not allow consideration of whether the misconduct is outweighed by meritorious service—such as in combat or overseas, or that earned medals or awards—nor do they permit consideration of mitigating factors—such as hardships or extenuating circumstances. Even minor and infrequent discipline problems that could not lead to a Dishonorable discharge by court-martial can bar a veteran for life. Most damagingly, VA regulations place an entire category of veterans with non-punitive, administrative discharges called "Other Than Honorable" in an eligibility limbo—a state that most never leave.

Veterans with bad-paper discharges are often in great need of the VA's support. They are more likely to have mental health conditions and twice as likely to commit suicide. They are more likely to be homeless and to be involved with the criminal justice system. Yet, in most cases, the VA refuses to provide them any treatment or aid.

The VA's broad and vague regulations are contrary to law and create a system that does not work for the VA or for veterans. The VA's system for determining eligibility is complex and burdensome, produces inequitable and unfair outcomes, and stops the agency from effectively addressing the national priorities of ending veteran suicide and homelessness. Men and women who served our nation in uniform are unable to access basic veteran services.

The Report presents new findings about the VA's eligibility standards and how they affect veterans, including:

- The VA excludes 6.5% of veterans who served since 2001, compared to 2.8% of Vietnam Era veterans and 1.7% of World War II Era veterans.[2]
- Over 125,000 veterans who served since 2001 are unable to access basic veteran services, even though the VA has never completed an evaluation of their service.
- Only 1% of service members discharged in 2011 are barred from VA services due to Congress's criteria. VA regulations cause the exclusion of an additional 5.5% of all service members.
- 3 out of 4 veterans with bad-paper discharges who served in combat and who have Post-Traumatic Stress Disorder are denied eligibility by the Board of Veterans' Appeals.
- In 2013, VA Regional Offices labeled 90% of veterans with bad-paper discharges as "dishonorable"—even though the military chose not to dishonorably discharge them.

- VA Regional Offices have vast disparities in how they treat veterans with bad-paper discharges. In 2013, the Indianapolis Regional Office denied eligibility to each and every such veteran who applied—a denial rate of 100%—while the Boston Regional Office denied eligibility to 69%.
- The VA's policies cause enormous and unjustified differences depending on branch of service. Marine Corps veterans are nearly 10 times more likely to be ineligible for VA services than Air Force veterans.

The Report concludes with recommendations for how to improve the current system. Those recommendations include that the VA can and should revise its regulations to more accurately reflect congressional intent to exclude only those whose misconduct should have led to a trial by court-martial and Dishonorable discharge. It should do this by requiring consideration of positive and mitigating factors and by not disqualifying veterans for minor misconduct. The VA can and should require pre-eligibility reviews only for veterans who received punitive discharges or discharges in lieu of a general court-martial. The VA can and should grant access to basic healthcare while it makes eligibility determinations so that veterans can receive prompt treatment for service-related injuries. And the VA and veteran community organizations should make sure that all staff and volunteers understand that—under current law—veterans with bad-paper discharges may be eligible for some VA benefits and that those veterans should be encouraged to apply. Adoption of those recommendations would help to ensure that no veterans are denied the care and support that our nation owes them—and that Congress intended to provide them.

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1 Every service member who leaves the military after more than six months on active duty receives a "character of service," also known as a discharge characterization. Options for characterization now are: Honorable, General (Under Honorable Conditions), Other Than Honorable, Bad Conduct, and Dishonorable. Prior options for characterization existed, including Undesirable and Without Honor. For purposes of this Report, a "bad-paper discharge" refers to a discharge that is Other Than Honorable, Bad Conduct, or Dishonorable and Other Than Honorable encompasses Undesirable and Without Honor.

2 All discharge characterization statistics in this Report take into account characterized discharges only; they do not include uncharacterized discharges. The service branches assign administrative "uncharacterized" discharge statuses to most service members who do not complete 180 days of active duty—for example, if they leave the service prior to completing basic training. See Dep't of Defense Instruction 1332.14, enc. 4, § 3(c) (2014).

CONGRESS'S PLAN FOR AMERICA'S VETERANS

The Post-World War II Origins of the VA's Eligibility Standard

The modern standard for basic eligibility for most veteran benefits traces back to 1944. In that year, as World War II was coming to an end, Congress developed a plan to welcome home the millions of Americans who served in uniform and to aid their successful transition to civilian life. The resultant statute—called the Servicemen's Readjustment Act, but more commonly known as the G.I. Bill of Rights—made available to veterans medical, vocational, disability, rehabilitation, housing, and education benefits on a scale unmatched in the nation's history.[3]

In enacting the statute, two of Congress's main goals were simplification and expansion. Previously, each veteran benefit had its own eligibility criteria, and those criteria differed depending on when the veteran had served. For example, pensions for disabled Spanish-American War veterans required an Honorable discharge; vocational rehabilitation for World War I veterans required an Honorable or Under Honorable Conditions discharge; and disability compensation for World War I veterans required any discharge other than Bad Conduct or Dishonorable.[4] With the 1944 Act, Congress simplified the criteria so that one basic standard applied for all VA benefits and across all services.[5]

> If such offense [resulting in discharge] occasions a dishonorable discharge, or the equivalent, it is not believed benefits should be payable.
>
> ***House Report on 1944 G.I. Bill***

> It is the opinion of the Committee that such [discharge less than honorable] should not bar entitlement to benefits otherwise bestowed unless such offense was such ... as to constitute dishonorable conditions.
>
> ***Senate Report on 1944 G.I. Bill***

The standard that Congress chose also expanded eligibility to ensure that no deserving veteran was wrongfully denied services.[6] The most recent veteran benefit legislation that Congress enacted before the G.I. Bill required a fully Honorable discharge for some benefits.[7] But the 1944 statute excluded only service members discharged "under dishonorable conditions"—a criterion that incorporated the existing military-law standard for Dishonorable discharges. In this way, Congress wanted to extend basic services not only to those who received Honorable discharges, but also to those who received discharges considered less than Honorable but who did not warrant a Dishonorable discharge by court-martial—a category that could include those with "Undesirable" or "Other Than Honorable" discharges.[8] Congress specifically and forcefully rejected a proposal by certain military commanders that an Honorable discharge should be required to access benefits.[9]

Congress recognized that some service members who deserved a Dishonorable discharge by sentence of a court-martial may instead have been administratively separated with a less severe discharge characterization because of expedience or error on the military's part.[10] To prevent such veterans from accessing benefits, the statute gave responsibility for deciding eligibility to the VA, not the Department of Defense (DOD). That is, eligibility for basic veteran services depends on the VA's determination as to whether the veteran should have been sentenced to a Dishonorable discharge by court-martial, not on the discharge characterization assigned by the military.

> In passing the [G.I. Bill], the Congress avoided saying that veteran's benefits are only for those who have been honorably discharged from service…. Congress was generously providing the benefits on as broad a base as possible and intended that all persons not actually given a dishonorable discharge should profit by this generosity.
>
> ***1946 House Committee on Military Affairs***

Congress provided the VA with two instructions to decide who should have merited a Dishonorable discharge and therefore should be excluded from the VA. First, the statute lists factors that indicate dishonorable service and that are *per se* bars to benefits.[11] Those factors embody either a service member's rejection of military authority or commission of a felony-level offense: (1) desertion; (2) discharge as a sentence for conviction by a General Court-Martial; (3) absence without leave for more than 180 days without compelling circumstances to explain the absence; (4) conscientious objection with refusal to follow orders; (5) request for separation by an alien; and (6) resignation by an officer for the good of the service.[12] Second, Congress instructed the VA to exclude service members discharged "under dishonorable conditions." Its reference to "dishonorable conditions" as opposed to a "Dishonorable discharge" instructs the VA to exclude additional veterans who deserved a Dishonorable discharge, even if their conduct did not fall into one of the categories Congress listed.

Congress's Pragmatic & Principled Reasons for the "Other-Than-Dishonorable" Standard

Congress's choice for the VA's eligibility standard was motivated by reasoned policy and informed by a keen understanding of the military.[13] Legislators articulated five main justifications for their decision.

First, members of Congress expressed gratitude for veterans' service and sacrifice and acknowledged an obligation to care for those injured in war. Thus, they determined that only severe misconduct should forfeit access to basic veteran services.[14]

Second, legislators expressed particular concern about wounded combat veterans. They understood the toll that such service can have on a person. They sought to ensure that no veteran wounded in war and later discharged for repeated regulation violations, periods of unauthorized absence, or substance abuse would be barred from treatment and support.[15]

> The congressional committees which studied the measure apparently believed that if the conduct upon which the discharge was based could be characterized as dishonorable the veteran should be barred from any benefit; if it could not be so characterized, the veteran should be eligible.
>
> ***1956 President's Commission on Veterans' Pensions***

Third, Congress expanded eligibility criteria for basic readjustment services, and reserved more selective eligibility criteria for a small number of benefits intended to reward excellent service. The 1944 G.I. Bill of Rights provided services to

Discharge Characterizations

Administrative Separation			*Punitive (Court-Martial)*	
Honorable	General or Under Honorable Conditions	Other Than Honorable or Undesirable	Bad Conduct	Dishonorable
VA Decided Presumptive Eligible		*VA Decided Presumptive Ineligible*		

compensate, indemnify, or offset actual losses experienced by service members: compensation if a disability limited a person's ability to work; healthcare if they were disabled during service; vocational rehabilitation for people whose disabilities required them to learn new trades; income support for people whose careers were disrupted by wartime military service; education for people who did not have a civilian trade after several years of military service.[16] Those benefits were not intended as rewards for good performance—they were basic services to make up for actual losses or harms experienced while in the military. Congress sought to withhold such support for actual injuries in only the most severe cases of misconduct. In contrast, Congress established higher eligibility standards for benefits intended to reward exceptional service, such as the federal veteran hiring preference and Montgomery G.I. Bill education benefit. Those benefits require a discharge Under Honorable Conditions or a fully Honorable discharge.

> I was going to comment on the language 'under conditions other than dishonorable.' Frankly, we use it because we are seeking to protect the veteran against injustice. . . . We do not use the words 'under honorable conditions' because we are trying to give the veteran the benefit of the doubt, for we think he is entitled to it.
>
> ***Harry Colmery, American Legion, 1944 G.I. Bill Hearings***

Fourth, Congress knew that there would be a cost to military families and to society as a whole if the federal government did not provide services to returning veterans. The memory of the challenges faced by World War I Era veterans in reintegrating into civilian life and the government's failure to support that transition was fresh in legislators' minds.[17] They recalled veterans waiting in breadlines because they could not find jobs or afford basic necessities, and remembered the many who were sick and wounded but unable to obtain treatment.[18]

Fifth, Congress was concerned about the fairness of the military administrative separation process, particularly where procedural protections of courts-martial were absent. Legislators were aware that different commanders and different service branches had different discharge policies, which could lead to inequities and unfairness. Therefore, Congress sought to smooth out those imbalances by adopting a single inclusive standard that would be applied by a single agency and accord all veterans the "benefit of the doubt."[19]

> Lest we forget, our heroes and starving veterans of World War No. I . . . were run out of the National Capital at the point of bayonets and with tear gas when they came to fight for their rights—simple rights—to work and earn a livelihood in a democracy for which so many of their buddies paid the supreme sacrifice. With that record so clear in my mind, I pledged to my boys fighting everywhere, and to their parents, that history shall not repeat itself.
>
> ***Rep. Weiss, in support of 1944 G.I. Bill***

In sum, Congress thoughtfully and deliberately expanded eligibility for basic veteran services as part of a modern VA eligibility standard. Legislators drew on their experiences with years of involvement in World War II, the nation's recovery after other wars, prior experiences with other veteran benefits standards, their understanding of the military, and their desire to honor and support those who served our country. Based on that assessment, Congress decided to deny basic readjustment services only to those who received, or should have received, a Dishonorable discharge by sentence of a court-martial. Congress reaffirmed the expansiveness of that standard in 1955 when it codified the law and incorporated the standard into the definition of "veteran" itself. That is, Congress chose to deny these basic

services to those who served in uniform only if they behaved so poorly that the national government should not recognize them as "veterans" at all.

> Every soldier knows that many men, even in his own company, had poor records, but no one ever heard of a soldier protesting that only the more worthy should receive general veterans' benefits. "This man evaded duty, he has been a 'gold bricker,' he was hard to live with, yet he was a soldier. He wore the uniform. He is one of us." So they feel. Soldiers would rather some man got more than he deserves than that any soldier should run a chance of getting less than he deserves.
>
> ***1946 House Committee on Military Affairs***

Legislators understood then that men and women leaving the service should have access to programs to help them transition back to civilian life and build a good future for themselves and their families. That same eligibility standard exists today—yet the VA is failing to implement Congress's clear standard and carry forward its spirit of inclusion and generosity.

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3 Pub. L. No. 78-346 (1944), 58 Stat. 284 § 1503 (1944) (codified at 38 U.S.C. § 101 et seq.).
4 Pub. L. No. 66-256, 41 Stat. 982 (1920) (pension); Pub. L. No. 66-11, 41 Stat. 158 § 2 (1919) (vocational rehabilitation); Pub. L. No. 65-90, 40 Stat. 398 § 308 (1917) (disability compensation).
5 In 1984, Congress changed the eligibility standard for education benefits to require an Honorable characterization. Pub. L. No. 98–525, § 702(a)(1) (1984). This law thus shifted the eligibility determination for this benefit from the VA and to the DOD.
6 Id. See generally S. Rep. No. 78-755, at 15 (1944); H. Rep. No. 78-1418, at 17 (1944); Hearing on H.R. 3917 and S. 1767 to Provide Federal Government Aid for the Readjustment in Civilian Life of Returning World War Veterans Before the H. Comm. on World War Veterans' Legislation, 78th Cong. 415-16 (1944) [hereinafter House Hearings on 1944 Act]; President's Comm'n of Veterans' Pensions, Staff of H. Comm. on Veterans' Affairs, Discharge Requirements for Veterans' Benefits (Comm. Print. 1956).
7 See, e.g., Pub. L. No. 73-2, 48 Stat. 8 (1933); Pub. L. No. 68-242, 43 Stat. 607 (1924); Pub. L. 37-166, 12 Stat. 566 (1862); Veterans' Bureau Regulation No. 6 (March 21, 1933).
8 See, e.g., S. Rep. No. 78-755, at 15; 90 Cong. Rec. 3,077 (1944). .
9 70 Cong. Rec. 3,076 (March 24, 1944).
10 E.g., H.R. Rep. No. 78-1624, at 26 (1944); 90 Cong. Rec. 3,076-77 (1944); House Hearings on 1944 Act, supra note 5, at 190, 415-17.
11 S. Rep. No. 78-755, at 15 (1944).
12 58 Stat. 284 § 300 (1944), Pub. L. No. 78-346 (1944). The bar for service members who were absent without leave for more than 180 days was added in a later statute. Pub. L. No. 95-126, 91 Stat. 1106 (1977).
13 In the 1940s, more than 40 percent of members of Congress had served in the military. Today, only 18 percent are veterans. Congressional Research Service, Representatives & Senators: Trends in Member Characteristics Since 1945 (Feb. 17, 2012); Rachel Wellford, By the Numbers: Veterans in Congress, PBS News Hour (Nov. 11, 2014).
14 House Hearings on 1944 Act, ***supra*** note 6, at 415.
15 House Hearings on 1944 Act, ***supra*** note 6, at 417.
16 58 Stat. 284 (1944) (titled "An Act To provide Federal Government aid for the readjustment in civilian life of returning World War II veterans"). E.g., 90 Cong. Rec. 4,443 (1944) (statement of Rep. Bennett); 90 Cong. Rec. 3,076-78 (1944).
17 E.g., 90 Cong. Rec. 415 (1944) (statement of Rep. Angell); 90 Cong. Rec. A3008 (1944) (statement of Rep. Weiss).
18 E.g., 90 Cong. Rec. A210-211 (1944) (statement of Sen. Riley).
19 E.g., 90 Cong. Rec. 5,889-90 (1944) (statement of Rep. Rogers); House Hearings on 1944 Act, at 415; id. at 416-20.

HOW THE VA EXCLUDES VETERANS

This report provides data to evaluate whether the VA has been true to Congress's vision for the nation's veterans.

The stakes could not be higher. Exclusion from the VA means the denial of housing for those who are homeless, [20] the denial of healthcare for those who are disabled, and the denial of support to those whose disabilities prevent them from working. Exclusion from the VA also means that those who served our country are not even recognized as "veterans" by our government.

Are the right people being excluded? Is due consideration given to mental health conditions that may have led to discharge, hardship conditions of service, and to overall quality of service? Are we doing all that we can to address urgent crises, such as high rates of homelessness and suicide among the veterans population?

The data show that the answer to all of those questions is, sadly, "No." The VA is excluding 125,000 veterans who served since 2001 without ever reviewing their service—at least 33,000 of whom deployed to Iraq or Afghanistan. That amounts to 6.5 percent of veterans who served since 2001. [21] Whether the veteran deployed or had a service-related mental health condition has little if any effect on whether the VA grants access to services. Veterans with bad paper discharges are at greater risk of homelessness and suicide, yet it is nearly impossible for such veterans to navigate the bureaucracies to get VA healthcare or homelessness prevention services. These and other findings are discussed in detail in this report.

This report exposes a historically unprecedented abandonment of America's veterans. In 1944, the percent of veterans excluded from the VA was 1.7%. Even for veterans who served during the Vietnam War Era, the rate was 2.8%. (See Appendix I). At no point in history has a greater share of veterans been denied basic services intended to care and compensate for service-related injuries. The same "Other than Dishonorable" eligibility standard has applied throughout that period, from 1944 to the present day. Yet, the share of veterans excluded has nearly quadrupled.

Even when federal benefits were only available to veterans with fully Honorable discharges, prior to the passage of the 1944 G.I. Bill of Rights, the exclusion rate was a mere 2% because almost all service members received Honorable discharges. [22]

> *125,000*
>
> ***Number of Post-2001 veterans who cannot access basic VA services***

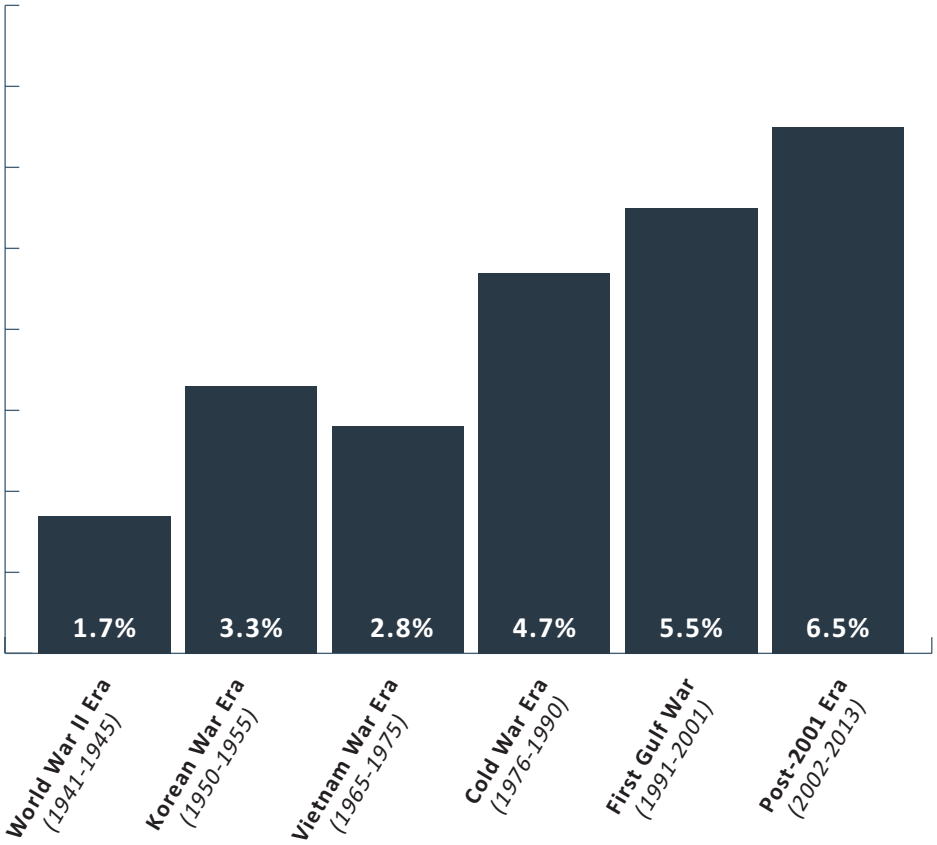
Although the G.I. Bill of Rights was intended to expand access to basic services, in practice the VA is turning away more veterans than ever before.

The Increased Exclusion Rate is Not Due to Worse Conduct by Service Members

A four-fold increase in the rate of exclusion from veteran services could only be appropriate if veterans today were four times as "Dishonorable" as during the World War II Era. That is not the case.

One sign that service members are not behaving more dishonorably than in prior eras is that service members do not receive more punitive discharge characterizations. There are two types of military discharge characterizations: administrative and punitive. A punitive discharge—Bad Conduct or Dishonorable—must be imposed by a court martial. An administrative discharge—for example, Honorable, General, and Other Than Honorable—results from a command decision that does not involve a court martial. No conduct meriting a court-martial is required to administratively discharge a service member; indeed very minor disciplinary issues can serve as the basis for an administrative Other than Honorable discharge.[23] Unlike a punitive discharge, an administrative discharge characterization is not intended to be a punishment. That the procedural protections of a court-martial do not apply to administrative discharges contributes to wide differences among service branches and commands as to what

Veterans Excluded from Basic Veteran Services by the VA, as Percentage of All Veterans for Selected Eras



conduct results in an Other than Honorable discharge characterization.

Since World War II, the percentage of service members who receive punitive discharges—that is, discharges for misconduct that justified a court-martial conviction—has stayed roughly the same: around 1%. (See Appendix B). Meanwhile, the percentage of service members who receive non-punitive Other Than Honorable discharges has increased five-fold. (See Appendix B). That is, the percentage of people whose service is characterized as "dishonorable" by the military has remained constant, while the percentage of people who service was considered "dishonorable" by the VA has ballooned.

A second sign that service members' conduct is not increasingly dishonorable compared to earlier eras is that there has been no increase in the percentage of service members whose conduct violates the specific eligibility criteria provided by Congress. DOD data for separations during Fiscal Year (FY) 2011 show that about 1% of veterans, including those with non-punitive discharges, are barred from basic veteran services by statutory criteria. (See Appendix D). That rate is about equal to the share of veterans who received punitive discharges when the 1944 G.I. Bill of Rights was enacted, and which has remained relatively constant in the years since then.

Most Excluded Veterans Never Receive an Eligibility Evaluation from the VA

The VA has erected barriers that prevent veterans from gaining access to basic services. For example, the VA does not conduct eligibility evaluations automatically when a service member is discharged, and therefore many veterans do not know whether they are or may be eligible for VA services. In order to establish eligibility for basic veteran services, a veteran with a bad-paper discharge must first apply to the VA and receive a Character of Discharge (COD) review from a VA adjudicator, during which the VA evaluates the veteran's records and other evidence and applies its Character of Discharge regulations to decide whether the former service member is a

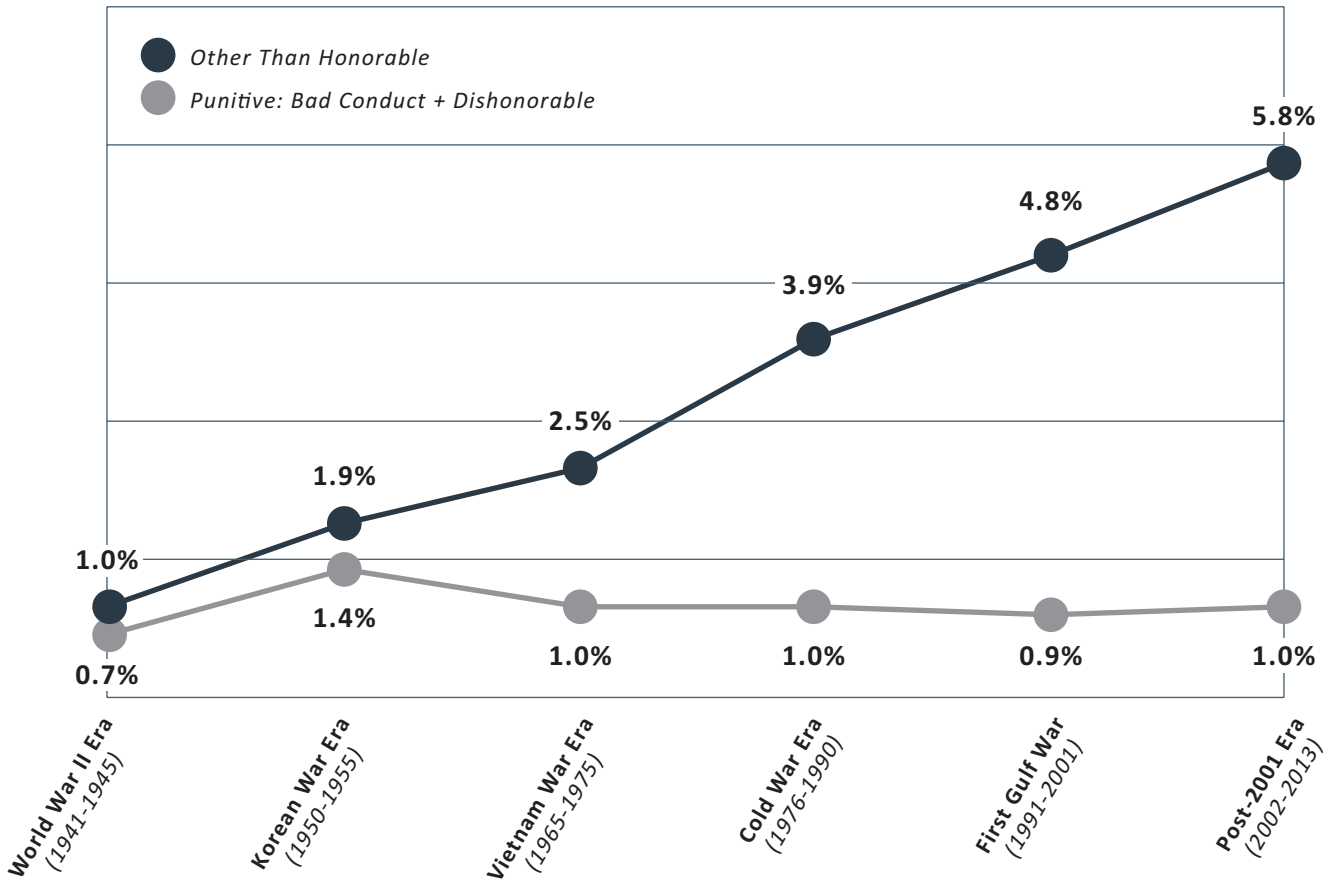
"veteran." In practice, the VA fails to initiate COD reviews when veterans request healthcare at a VA hospital or clinic. Nor does VA policy provide a path for an eligibility evaluation to occur when a veteran seeks homeless shelter services. Instead a Character of Discharge review occurs only when a veteran applies for a benefit from the Veterans Benefit Administration (VBA). Until the veteran applies to the VBA and the VBA completes a lengthy Character of Discharge adjudication, almost no services are available to the veteran. [24]

90%

Percent of Post-2001 veterans with bad paper discharges have not been reviewed for eligibility by the VA

Only 10% of veterans with bad-paper discharges receive an eligibility evaluation from the VA. (See Appendix G). The remaining 90% of veterans, whose service has never been evaluated, remain in a bureaucratic limbo: unable to access the VA, but not given a fair evaluation of their actual conduct in service. Many of these veterans sought healthcare or housing services from the VA, only to be turned away without any COD review and having been erroneously told that they are categorically ineligible for services. These denials are not recorded, creating a class of outcast veterans that the VA treats as invisible.

Veterans with Bad-Paper Discharges as Percent of All Veterans with Characterized Discharges



1,200 Days

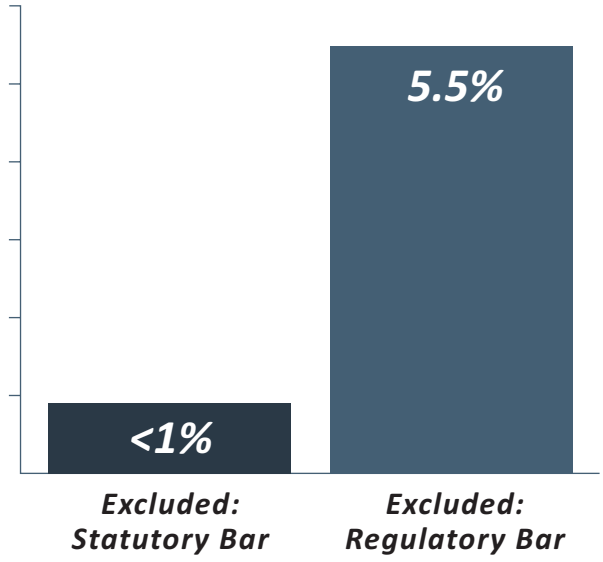
Average length of time for VA to conduct a Character of Discharge Determination

Long delays in completing COD reviews also contributes to the low rate of eligibility determinations. The COD review is highly burdensome on the agency and the veteran. It requires VA employees to gather extensive records, review those records and other evidence the veteran submits, and make detailed findings. Currently, the average time that the VA takes to complete the COD process is 1,200 days—more than three years. [25] During that time, the veteran cannot access VA healthcare, disability benefits, or other supportive services.

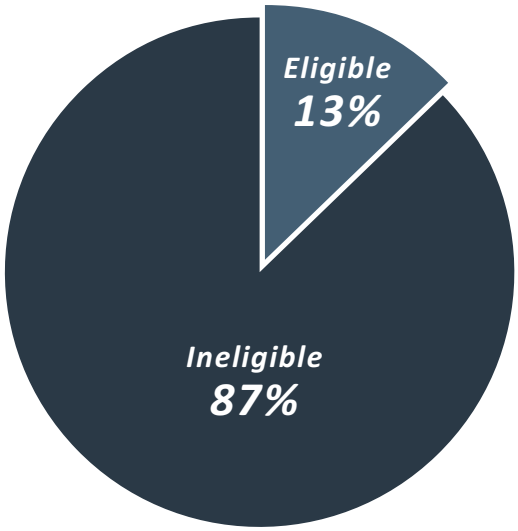
The VA's COD Regulations Deny Eligibility to the Large Majority of Veterans

Overall, the VA finds that service was "dishonorable" in the vast majority of cases in which it conducts a COD. For example, in FY 2013, VA Regional Offices found service "dishonorable"—and therefore that the veteran was ineligible—in 90% of all cases it reviewed. (See Appendix F). Veterans who appeal such decisions obtain similar results:

Veterans Discharged FY11 Who Are Excluded by the VA, as Percent of All Veterans Discharged FY11



Board of Veterans' Appeals Character of Discharge Determinations 1992-2015



Board of Veterans' Appeals (BVA) decisions since 1992 have found service "dishonorable" in 87% of cases. (See Appendix E). For all COD determinations from all eras, the finding was "dishonorable" 85% of the time.[26] In other words, 85% of veterans with bad-paper discharges who applied for some VA benefit have been told that their service was so "dishonorable" that they forfeited all rights to almost every federal veteran benefit.

These exclusions are almost all based on the VA's discretionary criteria, not any statutory requirement created by Congress. Congress provided explicit criteria for exclusion from basic veteran services in its "statutory bars," and Congress also gave the VA some authority to exclude other veterans whose conduct was of similar severity. The adequacy of the VA's regulations can be assessed, in part, by how closely its actual exclusion rate compares to the exclusion rate that Congress had as a baseline. The data show that the VA's regulatory criteria exclude far more veterans than Congress's statutory criteria.

For example, DOD data reveal that, of all service members discharged after entry-level training in FY 2011, no more than 1% would be excluded from VA under a statutory bar. (See Appendix D). Yet, the VA excludes approximately 6.5% of service members discharged in FY 2011. The 5.5% difference is due

entirely to the VA's own discretionary regulations. In short, the VA excludes more than five times more veterans under its broad regulatory standards than Congress chose to exclude by statute.

That is true both for overall exclusion rates and for individual eligibility decisions. At the Board of Veterans' Appeals, seven out of every ten veterans denied VA eligibility have been excluded on the basis of the VA's own discretionary criteria, rather than congressional requirement. (See Tables K.1 and K.2). Likewise, at the VA Regional Offices in FY 2013, at least 2 out of every 3 veterans excluded because of their discharge status were denied solely on the basis of the VA's own regulatory bars.[27]

VA Regulations Result in Unequal Exclusion Rates Between Branches

The historically unprecedented exclusion rate today is due almost entirely to the VA's discretionary choice to presume ineligibility for veterans who received administrative Other Than Honorable discharges. That choice deprives tens of thousands of veterans of needed care, despite the fact that their service would not be considered "dishonorable"—and was not deemed dishonorable by the military.

What is more, significant disparities exist among the administrative separation practices of the various service branches. The Army, Navy, Air Force, and Marine Corps each has its own separation regulations and policies. Moreover, within each branch, different units and commands may implement those regulations and policies in a different manner. Thus, service members who engage in similar misconduct may receive disparate treatment: one may be retained, another may be discharged under General conditions, another discharged under Other Than Honorable conditions.

88%

Percent of Post-2001 Marine Corps veterans presumptively eligible for VA

98%

Percent of Post-2001 Air Force veterans presumptively eligible for VA

This is due to different leadership styles, not differences in degrees of "dishonor." A report of the Government Accountability Office (GAO) on discharge characterization documented the range of discharge practices and ascribed disparities to differences in leadership and management styles rather than a measurable difference in "honor" or "character." [28] The GAO compared Marines and Airmen with the

Enlisted Service Members Discharged as Percent of Characterized Discharges, FY11

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
Army	81%	15%	3%	0.6%	0.1%
Navy	85%	8%	7%	0.3%	0.0%
Marine Corps	86%	3%	10%	1%	0.1%
Air Force	89%	10%	0.5%	0.5%	0.0%
Total	84%	10%	5%	1%	0.1%

same misconduct, service length, and performance history, and found that the Air Force was thirteen times more likely to give a discharge under honorable conditions than the Marine Corps.[29]

Because the VA presumptively excludes veterans with non-punitive Other Than Honorable discharges, this discrepancy results in significant differences in VA eligibility. For service members with equivalent conduct histories, Airmen are 13 times more likely than Marines to be deemed presumptively eligible—and recognized as a "veteran"—by the VA. This results in significant differences in aggregate. Whereas 98% of veterans who have served in the Air Force since 2001 can access the VA when they leave the service, only 88% of Marines from the period are presumptively recognized as "veterans" by the VA. (See Table K.9). The VA has effectively decided that Marines are more than five times more "dishonorable" than Airmen.

This disparity provides a potent reminder for why Congress decided to exclude only veterans who received or should have received a Dishonorable discharge by court-martial. Although there are wide discrepancies among services in their administrative discharge practices, the service branches are remarkably similar in how they use punitive discharges. Congress specifically noted that the discretion given to commanders for administrative separations can result in unfair outcomes, and gave veterans the benefit of the doubt by only excluding those who received or deserved a Dishonorable discharge by court-martial. Because the VA's regulations have presumptively excluded all veterans with administrative Other Than Honorable discharges, the VA is failing to act in accordance with Congress's decision.

Eligibility Decisions Fail To Adequately Consider Mental Health Conditions that May Have Contributed to Discharge

Overall, the VA's COD regulations prevent consideration—except in narrow and specific circumstances—of facts that Congress intended the VA to take into account: mitigating factors, extenuating circumstances, and positive facts. As one example, the VA's regulations provide little room for consideration of whether any mental health condition explains or mitigates the conduct that led to the veteran's bad-paper discharge. It is deeply unfair—and contrary to Congress's intent—to exclude veterans from basic veteran services for behavior that is symptomatic of mental health conditions that may be related to their service.

T.W., Marine Corps, Vietnam

T.W. earned two Purple Hearts and four Campaign Ribbons while serving as a rifleman in Vietnam. He was sent to combat while still 17 years old. Before his 18th birthday, he had a nervous breakdown and attempted suicide. After being involuntarily sent back to Vietnam for a second tour, he experienced another nervous breakdown, went absent without leave, and was then separated with an Other Than Honorable discharge.

T.W. was later diagnosed with Post-Traumatic Stress Disorder, and he applied to the VA for service-connected disability compensation. The VA denied his application because of his discharge.

It is well established that Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), depression, operational stress, and other mental health conditions can lead to behavioral changes. In some cases, military commanders incorrectly attribute those behaviors to bad character, rather than as signs of distress and disease. Indeed, a 2010 study of Marines who deployed to Iraq found that those who were diagnosed with PTSD were eleven times more likely to be discharged for misconduct and eight times more likely to be discharged for substance abuse than Marines without a PTSD diagnosis.[30]

Yet, the VA's regulations contain only one narrow provision related to mental health: misconduct leading to discharge may be overlooked if the veteran was "insane" at the time of the misconduct leading to discharge.[31] The VA's definition of "insanity" is

antiquated—out of step with the practices of modern psychology and psychiatry, which no longer deem people "insane."[32] Review of BVA decisions demonstrates that Veterans Law Judges often interpret "insane" in a narrow way, to exclude veterans who clearly exhibited symptoms of PTSD, TBI, or other mental health conditions when they engaged in the misconduct that led to their discharge. In cases where the veteran claimed the existence of PTSD, the BVA found them eligible based on the "insanity" exception in only 9% of cases.[33]

Moreover, the "insanity" standard can be hard for veterans to prove. It requires a medical opinion from a qualified psychologist, psychiatrist, or medical doctor, and many veterans cannot obtain such an opinion to support their application. In practice, VA adjudicators rarely send veterans to Compensation & Pension examinations for a medical opinion as to whether they met the "insanity" standard.

Due to the limitations of the "insanity" standard, the presence of a mental health condition has little effect on the outcome of Character of Discharge determinations. In cases whether the veteran alleged some mental health condition, the Board of Veterans' Appeals found the veteran's service "dishonorable" 84% of the time—a negligible improvement from the overall denial rate of 87%. (See Table K.4). A claim of PTSD lowers the denial rate to 81%, and a claim of TBI lowers the denial rate to 72%. Even, these improved rates of success for veterans who have PTSD and TBI still leave three out of every four such veterans unable to access basic veteran services such as healthcare and disability compensation.

3 out of 4

Veterans with bad-paper discharges who have PTSD or TBI and are denied eligibility for benefits by the BVA

The inadequacy of the current regulations is rendered even clearer by considering those veterans who deployed to a war zone and now state that they have PTSD related to their service. For those veterans who served in combat and have PTSD, the BVA denies eligibility 73% of the time. (See Table K.7). That exceptionally high rate of disqualification not only violates Congress's intent, but is also blatantly contrary to public policy. To the veterans who may be in the greatest need of mental health and medical care, the VA refuses to provide any treatment or support.

The VA publicly recognizes that mental health conditions related to military service can impact a veteran, as reflected in its statements that the "impact of disabilities may be considered" in a COD review "during the analysis of any mitigating or extenuating circumstances that may have contributed to the discharge."[34] But the reality of the VA's current regulations is that they allow for consideration of mental health only in very limited circumstances. The harmful effect of that omission is apparent in the decisions the VA makes.

Eligibility Decisions Do Not Consider Whether the Veteran Served In Combat or Other Hardship Conditions

Another example of the failure of the VA's regulations is the absence of any generally applicable provision for considering whether the veteran served in hardship conditions, including whether the veteran served in combat.

Congress, in developing the 1944 G.I. Bill of Rights and creating the expansive "other than dishonorable" eligibility standard, demonstrated concern for veterans who had served abroad and fought in combat. Legislators wanted to ensure that they had access to basic rehabilitation and support services that would help them reintegrate into civilian life, even if they got into trouble or did not have an unblemished record. As a matter of current-day policy, that concern and reasoning continues to make sense. Indeed, the VA stated publicly that it does consider "performance and accomplishments during service."[35]

13%

Average rate of success in CODs at BVA for veterans, regardless of deployment

15%

Average rate of success in CODs at BVA for veterans who deployed to Vietnam

Decisions by the BVA show that these goals are not being achieved. For example, the BVA's overall denial rate for COD claims from 1992 to 2015 is 87%. For veterans who deployed to Vietnam, the denial rate improves just 2%. Service in combat improves the denial rate to 77%, and for veterans who deployed to Iraq or Afghanistan since 2001, the denial rate is 65%. (See Table K.6).

While the VA does treat a veteran with a recent deployment more favorably, the fact remains that 2 out of every 3 veterans who deployed to Iraq or Afghanistan—perhaps multiple times—are considered by the VA as so "dishonorable" that they forfeited their right to be recognized as a "veteran" and to receive basic veteran services like healthcare.

8%

Average rate of success in CODs at BVA for veterans who deployed to Vietnam, but did not claim PTSD

11%

Average rate of success in CODs at BVA for veterans who did not claim PTSD, regardless of deployment

The results are even more stark if mental health is removed from the analysis. Hardship and combat service should lead the VA to look more favorably on a veteran's service, even if it did not lead to a mental health condition. The decisions of the BVA show that this is not the case—and in some cases, hardship service made the BVA less likely to grant a COD claim. For example, the overall denial rate for COD claims is 87%. Combat service that did not result in PTSD reduces the denial rate to 85%—a two percentage-point difference, indicating that combat service has hardly any effect on VA eligibility decisions. (See Tables K.7 and Table K.8). Deployment to Iraq or Afghanistan that did not result in PTSD reduces the denial rate to 70%. Yet, for veterans who deployed to Vietnam but do not claim PTSD, the denial rate is higher than average. The VA considers them "dishonorable" 92% of the time.

Overall, contingency and combat deployments have limited effect on whether a veteran's service is deemed "other than dishonorable." In some cases, such service makes it more likely that the VA will deny access to basic services.

Whether a Veteran Is Eligible May Depend on Irrelevant Criteria Such as Where the Veteran Lives and Which Judge Decides the Application

The VA has 58 Regional Benefit Offices (RO) that process applications for veteran benefits. For the most part, each RO processes the benefit applications for veterans that live in its area.

The COD regulations and other laws that the ROs apply are the same across the country, but the outcomes can and do vary drastically by location. For example, in FY 2013, the Regional Offices adjudicated 4,603 COD decisions. (See Appendix J). Overall, the RO decided that veterans had "dishonorable" service in 90% of those COD claims. Yet, the Indianapolis, Boise, and Wichita ROs denied a remarkable 100% of COD claims by veterans with bad-paper discharges. In contrast, the Boston RO denied only 69% of such claims.

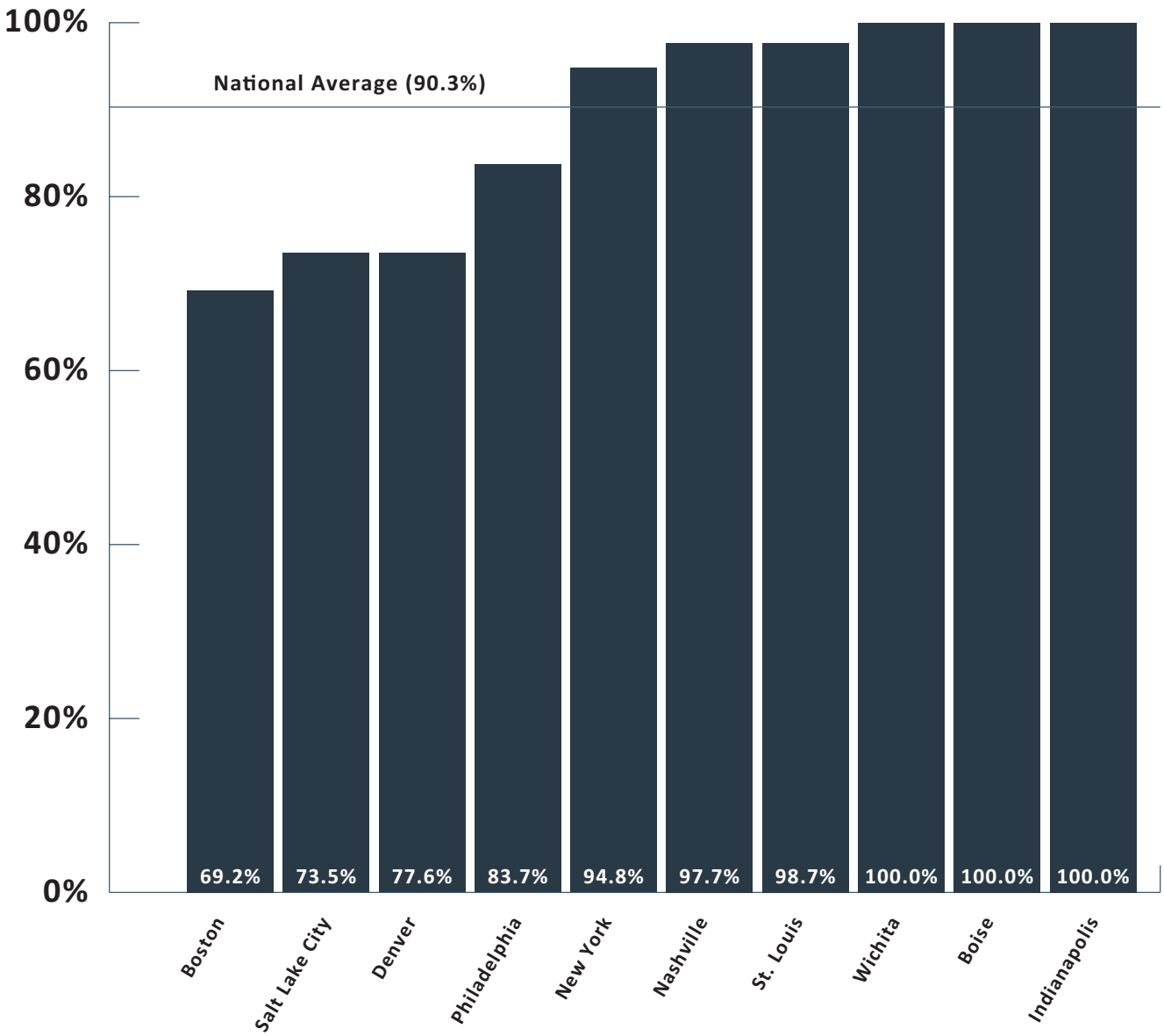
Those regional disparities are not new. In 1977, one member of Congress pointed out that "the Denver Regional Office has indicated that in the adjudication of cases of veterans with Other Than Honorable discharges in 1975, only 10 percent were ruled eligible for benefits" while the "Minnesota VA Regional

Office, on the other hand, ruled that 25 percent of those veterans . . . were eligible for VA benefits."[36]

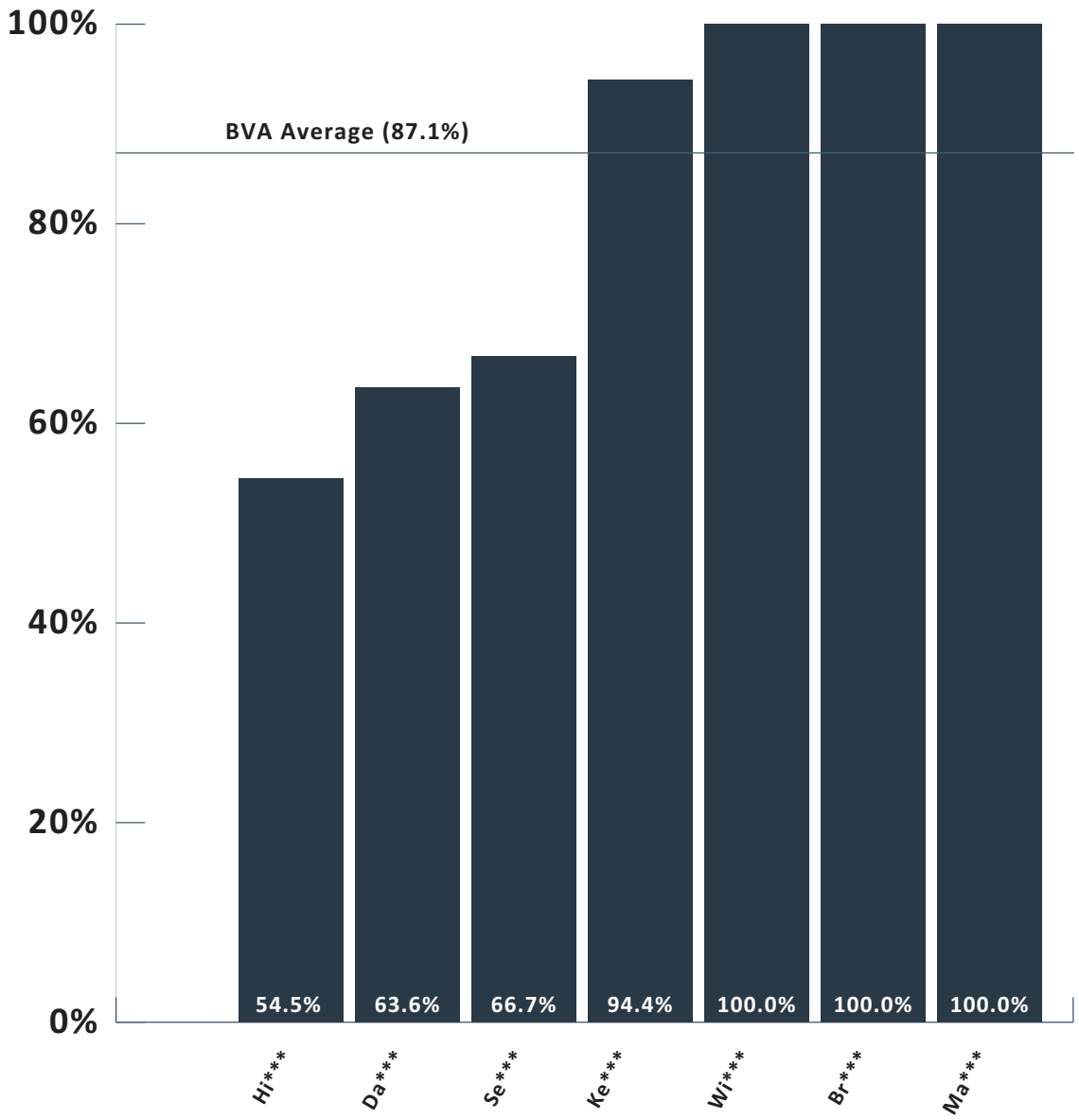
This wide variation in decision outcomes also appears in the differences between Veteran Law Judges. The BVA is located in Washington, D.C. and hears all appeals from across the country. Yet, which Veterans Law Judge hears the appeal significantly affects the likelihood that a veteran's appeal will be granted.

An analysis of BVA decisions from 1992 to 2015 reveals that, overall, Veterans Law Judges deny 87% of Character of Discharge appeals—that is, they uphold the Regional Office's finding that the veteran's service is "dishonorable" and therefore disqualifying. However, some Veterans Law Judges deny 100% of the Character of Discharge appeals that they hear. In contrast, other Veterans Law Judges deny as few as 54.5% of such appeals. (See Table K.11).

Percent of Veterans with Bad Paper Found "Dishonorable" at Initial Application for Selected Regional Offices, FY13



Percent of Veterans with Bad Paper Found "Dishonorable" on Appeal to Board of Veterans' Appeals for Selected Veterans LAw Judges, 1991 to 2015



That level of disparity among the Regional Offices and among the adjudicators is unfair and demonstrates how the VA's current COD regulations do not adequately implement a nationally uniform standard as Congress intended. Where a veteran lives should be irrelevant. Who considers the application should not matter. But, under the current regulations, those factors are demonstrably and profoundly important.

The VA's Current Character of Discharge Process Is Unnecessarily Complex

The VA's regulations governing whether and how a veteran with a bad-paper discharge can establish eligibility are procedurally and substantively complex. They create unnecessary burdens for the VA and for veterans seeking services.

Procedurally, initiating and pursuing a COD determination is difficult. The experience of many veterans and veteran advocates is that the Veterans Benefits Administration routinely starts the COD process when a veteran applies for service-connected disability compensation, pension, housing loan, or other such

benefit, but that the Veterans Health Administration does not start the COD process when a veteran seeks healthcare or treatment from a VA hospital or clinic. Also, there is no direct way for VA's front-line staff—such as social workers in the VA's homelessness prevention programs and Veterans Justice Outreach coordinators in the criminal diversion programs—to initiate COD reviews for veterans with whom they come into contact. The VA's failure to refer veterans for a COD Determination directly decreases the number of eligibility reviews conducted, and indirectly reduces the likelihood that the veteran will apply again later or elsewhere.[37]

Moreover, many VA employees, staff and volunteers with veteran community organizations, and veterans themselves have the misconception that veterans with bad-paper discharges are categorically ineligible for any VA services. The misconception that veterans without an Honorable or General discharge are categorically ineligible is widespread. Sometimes, that misconception is even perpetuated by the VA's own statements.[38] The low rate of successful CODs further contributes to the confusion.

The effects of this confusion about who may be eligible are both harmful and far-reaching. VA staff, volunteers, and other veterans may provide incorrect information regarding potential eligibility. Many veterans with bad-paper discharges do not even apply as a consequence. If the veteran does not apply, or is prevented from applying, then the VA never makes a decision as to whether the veteran is eligible for basic VA benefits. The VA will not conduct a COD unless a veteran asks, and until then, presumes that all veterans with bad-paper discharges are ineligible.

The majority of veterans with bad-paper discharges cannot access the VA because the VA never conducts a COD in the first place. The cumulative effect of the difficult initiation process is that, for Post-2001 veterans with bad-paper discharges, 90% have never received a COD determination at all.[39] That high rate of exclusion by default could be remedied by changes to the VA's policies and regulations: its instructions to enrollment staff could be clearer, it could provide better training to staff, and the process could be streamlined.

Representative White:

Does the Veterans' Administration codify the criteria [for Character of Discharge Determinations] at all for these to be determined judgments or are these strictly human judgments?

VA Associate General Counsel Warman:

We do have a regulation that is very general.

Representative White:

So there is great room for variance?

VA Associate General Counsel Warman:

Yes, there is.

1971 Hearing Before the House Armed Services Committee

Substantively, if the COD process does start, the regulations that the VA applies are complicated, imprecise, and burdensome. There are layers of statute, regulation, and guidance, and there are rules, exceptions to rules, and exceptions to those exceptions. The VA must review voluminous records to properly conduct a Character of Discharge determination. The VA must obtain a veteran's entire military personnel file and service treatment records, and review those documents and any others that the veteran submits. The burden of that process is evident by the current waiting time for a veteran undergoing a COD: 1,200 days.[40] For the most part, the regulations do not use bright-line rules or specific language.

The cumulative effects of the VA's complex, overbroad, and vague regulations are that the VA spends more time and resources and makes inconsistent and inequitable decisions, while veterans in need are unable to access basic veteran services.

Clearer regulations could reduce the burden on the VA, enable fairer decisions, and provide veterans the benefits that they deserve.

The Military Discharge Upgrade Process Is Not a Replacement for the VA COD Process or Reform of COD Regulations

At the same time that it created the modern eligibility standard for basic VA eligibility, Congress also established a new path for veterans with bad-paper discharges to change their character of service. In 1944, Congress authorized discharge review boards within each service branch that veterans could petition to obtain a "discharge upgrade."[41] Thus, since World War II, a veteran with a bad-paper discharge could pursue two avenues to access veteran benefits: establish other-than-dishonorable service before the VA or convince the service branch to grant a more favorable character of service.

Applying for and obtaining a discharge upgrade can resolve the need for a veteran to go through the VA's COD process. However, the existence of a discharge-upgrade process does not replace the COD process, nor does it relieve the VA from its duty to fashion regulations that conform to Congress's intent.

First, Congress knowingly created two different systems with different legal standards, and those two systems have existed in parallel for more than seventy years. Congress chose not to require that veterans go through a discharge-upgrade process in order to access basic VA benefits; it created a more liberal standard in the first place.

Second, the process of applying for a discharge upgrade is slow, complicated, and opaque. The review boards generally take ten to eighteen months to decide a veteran's application, few veterans apply, the rates of success are low, and information about how to submit a successful application is scarce.[42] For example, although the Army discharged an average of more than 10,000 service members with General, Other Than Honorable, or Bad Conduct discharges each year from 2007 to 2012, the Army's Discharge Review Board decided an average of only 3,452 per year during that same time period.[43]

T.H., Army, First Gulf War

T.H.'s service during the First Gulf War earned him the Combat Infantryman Badge. After returning to the United States, he began experiencing symptoms of Post-Traumatic Stress and he attempted to commit suicide. He requested leave to spend time with his family. After that request was denied, he left and was later separated with an Other Than Honorable discharge.

For 20 years, T.H. attempted to access basic VA services but the VA turned him away. Eventually, a legal advocate helped him obtain a discharge upgrade. The VA never decided his application for eligibility.

The number of decisions is likely higher than the actual number of unique individuals who apply, because veterans can submit second applications or reapplications for a hearing. The data therefore suggest that the Army— and likely the other service branches, too— do not now have the capacity and resources to consider discharge-upgrade petitions if all veterans with bad paper were to apply. Moreover, historically, the percentage of applications that are successful is low.[44] A discharge-upgrade application is therefore not an adequate solution for veterans urgently in need of assistance, nor for veterans who face other challenges and lack access to resources to aid them in applying.

Third, requiring the service branches to change their discharge-related policies and procedures is an inefficient and indirect route to improving access to the VA. For more than a century, the DOD has found it appropriate to use the discharge characterization scheme to maintain discipline and order in the military and to recognize degrees of performance by service members. DOD's purposes in characterizing discharges are not the same as the VA's purposes in considering the circumstances of discharge to determine eligibility. The question before the service branches at the time of discharge and upon application for a discharge upgrade is markedly different

from the question of whether a veteran should be able to access healthcare, rehabilitation, and other basic services. Given the separate roles and distinct goals of DOD and the VA, reform of the discharge review process is not a solution for problems at the VA.

Fourth, the separation between the discharge-upgrade process and the VA COD process preserves the distinction between basic veteran services and "reward" benefits. Congress has designated some benefits as rewards for exceptional service, such as the G.I. Bill education benefit and the federal government veteran hiring preferences, by requiring a fully Honorable discharge or a discharge Under Honorable Conditions, respectively. The DOD and the service branches control access to those benefits by deciding the initial characterization at discharge and by granting discharge upgrades. If a discharge upgrade from the DOD is required to get even basic services such as healthcare for disabilities, the special value of the "reward" benefits is diminished.

In sum, Congress created complementary but distinct systems by which less-than-honorably discharged veterans could address different problems: an error in their discharge status versus the need for treatment, rehabilitation, and support. Neither system is a substitute for the other.

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20 As of the writing of this Report, the Department of Veterans Affairs extends some limited homelessness services to some veterans whom it has not adjudicated "other than dishonorable" and are not "veterans" under its current regulations. Namely, such veterans may receive support from temporary housing services such as the Grant Per Diem program. However, the VA Office of General Counsel is reviewing the legality of that practice. Congress has proposed—but has not passed—legislation that would expand eligibility for homelessness services. Neither current VA practice nor the proposed legislation provide eligibility for the HUD-VASH housing voucher program, the only permanent response to veteran homelessness, to veterans with bad-paper discharges. See Dep't of Veterans Affairs Office of Inspector General, Report No. 14-01991-387, Veterans Health Administration: Audit of Homeless Providers Grant and Per Diem Case Management Oversight (June 2015); Homeless veterans Service Protection Act of 2015, S. 1731, 114th Cong. (2015).
21 VA FOIA Response (on file with authors); DOD FOIA Response (on file with authors); telephone Interview with Director, Dep't of Veterans Affairs Office of Interagency Strategic Initiatives (June 17, 2014). See Appendix H, infra page 51, for notes on methodology of calculating the rates of exclusion.
22 Appendix I, infra, page 51.
23 Dep't of Defense Instruction 1332.14, enc. 4, § 10 (2014).
24 38 C.F.R. § 17.34. Prior to receiving a Character of Discharge determination, some veterans with bad-paper discharges may be able to access VA-operated Vet Centers. However, by law, the Vet Centers can serve only some veterans, such as those who served in a combat theater or experienced Military Sexual Trauma, and can offer only limited services related to readjustment, such as counseling and referrals. See 38 U.S.C. § 1712A. Veterans who experienced Military Sexual Trauma also may be able to access limited trauma-related counseling and care at other VA facilities. See 38 U.S.C. § 1710D; 118 Stat. 2385, Pub. L. No. 108-422 (2004).
25 As of September 2015, the average claim pending time for End Product that includes Character of Discharge Determinations was over 600 days. This indicates that the time to completion is about 1,200 days.
26 Telephone Interview with Director, Dep't of Veterans Affairs Office of Interagency Strategic Initiatives (June 17, 2014). A 2007 Commission provided the overall "dishonorable" rate of 78%. Veterans' Disability Benefits Comm'n, Honoring the Call to Duty: Veterans' Disability Benefits in the 21st Century, at 94 (Oct. 2007).
27 VA FOIA Response (on file with authors).
28 Gen. Accountability Office, Rep. No. FCP-80-13, Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Is Needed 29-33 (1980).
29 Id.
30 R.M. Highfill-McRoy, G.E. Larson, S. Booth-Kewley, C.F. Garland, Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines, BMC Psychiatry (2010).
31 38 C.F.R. § 3.12(b).
32 See generally Amer. Psych. Ass'n, Diagnostic & Statistical Manual of Mental Disorders (5th ed. 2013).
33 Analysis of BVA decisions on file with authors.
34 Dep't of Veterans Affairs, Claims for VA Benefits & Character of Discharge, at 5 (March 2014) [hereinafter VA COD Factsheet].
35 VA COD Factsheet, supra note 34, at 5.
36 123 Cong. Rec. 1657 (1977) (statement of Sen. Hart).
37 Accounts and records of individual veterans (on file with authors).
38 For example, the VA's website on this issue states: "To receive VA compensation benefits and services, the Veteran's character of discharge or service must be under other than dishonorable conditions (e.g., honorable, under honorable conditions, general)." Applying for Benefits and Your Character of Discharge, available at http://www.benefits.va.gov/benefits/character_of_discharge.asp (accessed March 19, 2016).
39 Appendix G, infra page 50.
40 As of September 2015, the average claim pending time for End Product that include Character of Discharge Determinations was over 600 days. This indicates that the time to completion is about 1,200 days.
41 Pub. L. No. 78-346, 58 Stat. 284 § 301 (1944) (codified at 10 U.S.C. § 1553).
42 Vietnam Veterans of America & National Veterans Council for Legal Redress, Unfinished Business: Correcting "Bad Paper" for Veterans with PTSD 1, 11 (2015); Alissa Figueroa, A Losing Battle, Fusion (2014).
43 DOD FOIA Response (on file with authors); Army Review Board Agency, 2012 Annual Report (Nov. 2012); Army Review Boards Agency, 2011 Annual Report (Oct. 2011).
44 Unfinished Business, supra note 42, at 1-2.

THE CONSEQUENCES OF DENYING ACCESS TO VA

The high rates of ineligibility have grave consequences for the veterans denied access to the VA, as well as to society as a whole. Veterans with bad-paper discharges face increased risk of mental health conditions and suicide, of becoming involved with the criminal justice system, and of homelessness. In recent years, leaders and agencies across the country, including the VA, have focused on preventing veteran suicide, reducing veteran incarceration, and ending veteran homelessness. The VA's exclusion of so many veterans with bad-paper discharges directly impedes progress on achieving these goals.

Mental Health & Suicide

For many veterans with bad-paper discharges, the misconduct that precipitated that discharge was related to in-service mental health issues. After service in combat or other high-stress environments, or after experiencing Military Sexual Trauma, service members may undergo behavioral changes stemming from Post-Traumatic Stress Disorder, Traumatic Brain Injury, Major Depressive Disorder, and operational stress.[45] Behavioral changes may result in infractions, which superiors often do not recognize as symptoms of mental health conditions but instead attribute to bad character. Indeed, a study of Marines who deployed to Iraq found that those diagnosed with PTSD were eleven times more likely to be separated for misconduct than those without that diagnosis and eight times more likely to be discharged for substance abuse.[46]

Those mental health issues are not likely to dissipate after service members leave the armed forces. Veterans discharged for misconduct are twice as likely to commit suicide as those honorably discharged.[47]

In the past few years, the United States government, including the President, Congress, and the Department of Veterans Affairs, has prioritized addressing the epidemic of veteran suicide. Congress has passed legislation expanding services to at-risk veterans, and the VA has created additional suicide-prevention outreach and counseling services. One of the most effective ways to reduce suicide is to bring those at risk into VA care: studies show that veterans outside of VA care have a 30% higher rate of suicide than those under VA care.[48] While the suicide rate for those in VA care is falling, the rate for those veterans outside VA care is increasing.[49]

The VA's refusal to provide mental-health treatment to the high-risk veteran population who have bad-paper discharges directly interferes with its efforts to adequately and fully address the issue of veteran suicide. Counter-intuitively, the VA's regulations create a suicide pipeline: the veterans most at risk of suicide are the ones most likely to be turned away from effective suicide prevention treatment.

11x

increased likelihood that Marines who deployed to Iraq and were diagnosed with PTSD were discharged for misconduct

Incarceration

Veterans who received bad-paper discharges are overrepresented in the criminal justice system. According to the Bureau of Justice Statistics, 23.2% of veterans in prison and 33.2% of veterans in jail were discharged with bad-paper, compared to less than 5% of the total veterans population.[50]

Federal and state governments have taken steps to reduce the number of veterans who have incarcerated. The VA created a Veteran Justice Outreach (VJO) program with staff who provide case management and other supportive services to veterans to help them avoid unnecessary incarceration. However, the VJO Program can only assist VA-eligible veterans, and VA's current restrictive application of its eligibility standard excludes most veterans with bad-paper discharges. States and counties have established Veteran Treatment Courts and other diversionary programs to rehabilitate, rather than incarcerate, veterans. Yet, those courts often rely heavily on VA services to complement their efforts, and are therefore hindered in their mission because of the significant percentage of veterans the VA deems ineligible. Indeed,

one-third of Veteran Treatment Courts do not allow veterans who are not "VA eligible" to participate in their programs at all.[51]

Homelessness

Veterans with bad-paper discharges are at high risk for homelessness. They are estimated to be at seven times the risk of homelessness as other veterans.8 In San Diego, a 2014 survey found that 17.1% of unsheltered veterans had bad-paper discharges.[52] In Houston, a 2014 survey found that 2 out of every 3 unsheltered veterans had bad-paper discharges.[53]

> *2 out of 3*
>
> ***unsheltered veterans in Houston have bad paper discharges***

The national, state, and local governments across the country have been partnering to end veteran homelessness. Many of the resources committed to addressing that problem are filtered through VA programs, which apply the VA eligibility standard. For example, the major program that provides permanent housing support—and therefore is an essential part of the effort to end chronic homelessness—is the HUD-VASH program, which combines the value of a Section 8 housing voucher with the wrap-around support of VA social work and healthcare services. The VA's restrictive implementation of the other-than-dishonorable eligibility standard leaves most veterans with bad-paper discharges unable to access the crucial support that could help them find stable and secure housing. The VA's current COD system impedes nationwide efforts to end veteran homelessness.

Without the time and resources of VA to aid these veterans, the burden of care falls on their families and friends, on state and local governments, and on community non-profits. Costs do not disappear; they are merely shifted elsewhere—and may even grow because of delays in obtaining necessary treatment and support

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45 L.M. James et al., Risk-Taking Behaviors and Impulsivity Among Veterans With and Without PTSD and Mild TBI, Military Medicine, April 2014, at 179; E.B. Elbogen et al., Violent Behavior and Post-Traumatic Stress Disorder in US Iraq and Afghanistan Veterans, British J. Psychiatry, Feb. 2014, at 204, 368-75; A. Tateno et al., Clinical Correlates of Aggressive Behavior After Traumatic Brain Injury, J. Neuropsychiatry & Clinical Neurosciences, May 2003, at 155-60.

46 R.M. Highfill-McRoy, G.E. Larson, S. Booth-Kewley, C.F. Garland, Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines, BMC Psychiatry, Oct. 2010.

47 M.A. Reger et al., Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the US Military, J. Am. Med. Ass'n Psychiatry (2015).

48 Janet E. Kemp, Veterans Health Admin., Suicide Rates in VA Patients Through 2011 with Comparisons with Other Americans and Other Veterans Through 2010 (Jan. 2014), http://www.mentalhealth.va.gov/docs/suicide_data_report_update_january_2014.pdf.

49 Id.

50 Dep't of Justice Bureau of Justice Statistics, Veterans in Prison and Jail, 2011-12 (Dec. 2015).

51 Julie M. Baldwin, National Survey of Veterans Treatment Courts 13-14 (2013) (on file with authors).

52 A.V. Gundlapalli et al., Military Misconduct and Homelessness Among U.S. Veterans Separated from Active Duty, 2001-2012, J. of Amer. Medicine (2015); Stephen Metraux et al., Risk Factors for Becoming Homeless Among a Cohort of Veterans Who Served in the Era of the Iraq & Afghanistan Conflicts, Amer. J. of Public Health (2013).

53 Regional Task Force on the Homeless, 2014 San Diego Regional Homeless Profile, at 16 (2014).

54 Coalition for the Homeless, Houston/Harris County/Fort Bend County Point-in-Time Enumeration 2014 Executive Summary, at 11 (2014).

WHAT'S WRONG WITH THE VA'S REGULATIONS

Congress gave the VA responsibility for applying the eligibility standard it enacted in the 1944 G.I. Bill of Rights. Despite Congress's deliberate expansion of eligibility to exclude only those with dishonorable service, the VA has denied eligibility to the vast majority of veterans with discharges between Honorable and Dishonorable. As shown above, the eligibility decisions exclude far more than Congress intended, unfairly ignore important issues such as mental health and hardship conditions of service, and result in widely divergent exclusion rates among services and across geographic regions.

These outcomes are the direct result of regulations that the VA created and is free to amend. These outcomes are not required by statute. In fact, for some issues, VA regulations are contrary to specific statutory instructions that are favorable to veterans. If the VA's decisions do not correspond with the public's expectations or with Congress's intent, the VA can and should amend its regulations.

There are three VA regulations that determine the extent of exclusion from its services, each of which are discussed below. First, the VA created standards that define "dishonorable conditions" that lead to forfeiture of veteran services. Second, the VA decided that service members with Other Than Honorable characterizations are presumptively ineligible, meaning that the VA will not provide services unless and until it conducts a COD eligibility review. Third, the VA determined the procedures required to actually receive that review.

The VA's Regulatory Definition of "Dishonorable" Service

During a COD review, VA adjudicators will apply the statutory criteria created by Congress as well as its own regulatory criteria that decide whether services was under "dishonorable conditions." In other words, on top of Congress's straightforward statutory bars, the VA created an additional layer of regulatory bars that excludes more veterans. As shown above, almost all COD evaluations result in a denial of eligibility, and a substantial majority of denials are based on the VA's discretionary criteria rather than Congress's statutory criteria. Therefore, if the wrong veterans are being excluded from VA services, in most cases that is because of the VA's own regulations.

The VA's regulatory criteria defining "dishonorable" service bar eligibility when discharge resulted from: (1) willful and persistent misconduct, unless the misconduct was minor and the veteran's service was otherwise meritorious; (2) acceptance of an undesirable discharge to escape trial by general court-martial; (3) offenses involving moral turpitude; (4) homosexual acts involving aggravating circumstances; or (5) mutiny or spying.[55] The "willful and persistent misconduct" bar is by far the most frequently used basis for denying eligibility, representing 84% of eligibility denials by the Board of Veterans' Appeals between 1992 and 2015. (See Table K.2).

These standards may appear reasonable at first. However, they are extremely broad and vague, and they fail to account for important facts, directly producing unfair and unreasonable outcomes. The standards have proved impossible to implement in a consistent manner, causing stark and arbitrary disparities.

The Willful & Persistent Bar Results in Exclusion for Minor Disciplinary Issues

The vast majority of eligibility decisions—90% of decisions in 2013—result in a finding of "dishonorable" service. That high rate of denial is largely the result of the VA's exclusion of any veteran who displayed what it deems "willful and persistent misconduct."

In many instances, the VA finds "willful and persistent"—and therefore "dishonorable"—conduct that Congress and the military would not deem dishonorable. The VA has defined "willful" misconduct to include intentional action known to violate any rule at all or reckless action that probably violates a rule. The regulation does not require that the misconduct would have led to a General Court-Martial, or a court-martial of any kind. The only substantive limitations are that misconduct does not encompass "technical violations" of police regulations or "isolated and infrequent" drug use.[2] As for "per-

sistent" misconduct, the VA has interpreted the term to mean more than one incident of misconduct—but the multiple incidents do not have to be related in any way, to occur within a particular period of time, or exceed a level of severity.

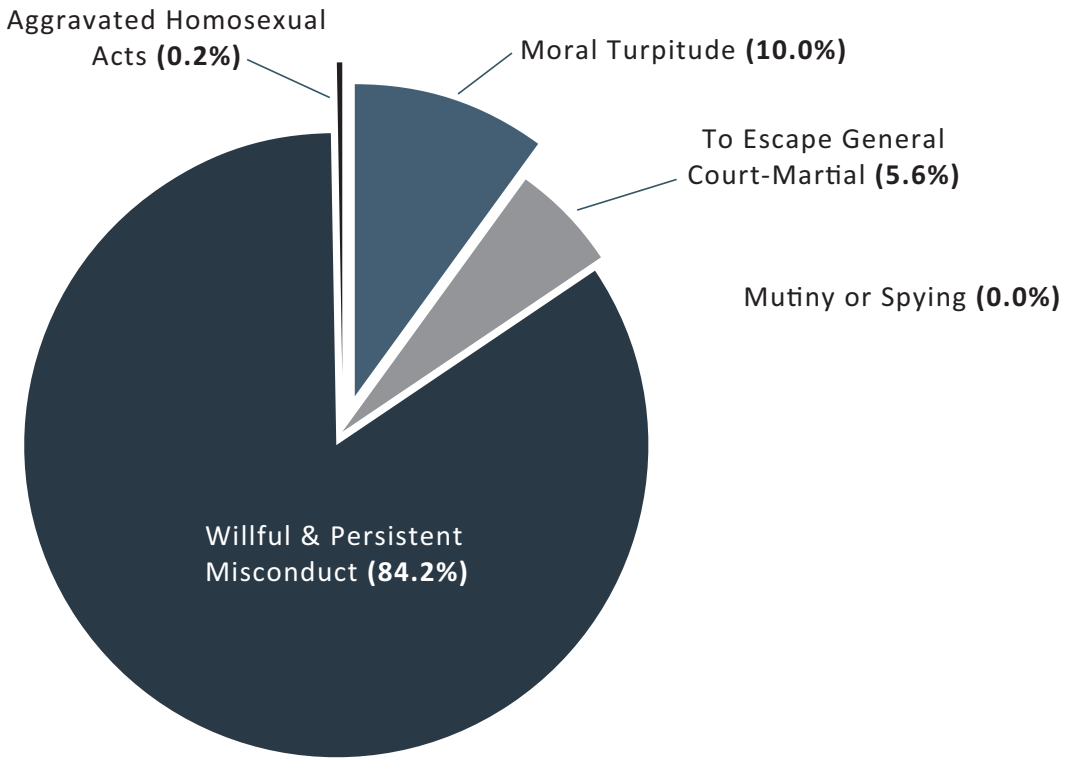
The regulation does permit limited consideration of mitigating circumstances: if the VA considers the misconduct "a minor offense" and the veteran's service was "otherwise honest, faithful, and meritorious." In practice, that exemption is very narrow because of the strict standards for what counts as "minor" and what deserves the title "meritorious." An offense is "minor" only if it does not "interfere" with military duties[57]—and virtually all misconduct during a veteran's service is capable of being framed as an interference. "Meritorious" service must go above and beyond the service member's assigned duties—and thus, for example, the VA has found that the combat service of an infantryman is not "deserving praise or reward" because it was part of his job description.[58] Thus, even a veteran who displayed "exemplary service" during the First Gulf War was nevertheless considered to have served "dishonorably" because of a one-week absence.[59] The VA's narrow provision for mitigating factors is contrary to military law, which requires that military judges evaluate the circumstances surrounding the misconduct as well as a broad range of positive factors, including "good conduct," "bravery," "fidelity," "efficiency," and "courage."[60]

J.E., Marine Corps, Post-2001

J.E. twice deployed to Iraq and, while in service, was diagnosed with Post-Traumatic Stress Disorder. He was cited for talking to his Sergeant while he had a toothpick in his mouth and then discharged after he failed a single drug test.

The VA denied him eligibility for basic veteran services on the basis of "willful and persistent" misconduct.

Percent of all COD Denials Based on Regulatory Bars, Board of Veterans' Appeals, 1992-2015



This term therefore results in a finding of "dishonorable" service for very minor performance and discipline issues that never could have led to a trial by general court-martial and a sentence of a Dishonorable discharge. For example, Veterans Law Judges have found veterans' discharges "dishonorable" based in part on unauthorized absences as short as 30 minutes.[61] Under military law, only absences of more than thirty days can lead to a Dishonorable discharge.[62] Moreover, a Veterans Law Judge found to constitute "persistent" three unrelated incidents of misconduct over the span of four years and barred a veteran on that basis.[63] The military chose not to court-martial that veteran for the infrequent misconduct—but the VA decided that it rendered his service so "dishonorable" that he had forfeited his right to basic veteran services.

The imprecise and expansive standards for the terms "willful," "persistent," "minor," and "meritorious" allow the VA to deem almost any disciplinary problems to be disqualifying from all basic veteran services.

The Regulation Does Not Consider Mental Health Disorders Other Than "Insanity"

The presence of mental health disorders such as PTSD and TBI rarely leads to favorable eligibility decisions and access to basic veteran services, as the data above showed. The VA's COD regulations simply do not allow VA adjudicators to consider mental or behavioral health issues other than "insanity."

The failure to consider mental health conditions in regulation and in fact contradicts Congress's intent. In 1944, when Congress enacted the G.I. Bill of Rights and set the modern standard for VA eligibility, many legislators specifically stated that they wanted disabled veterans to be able to access basic VA services. It also contradicts the military-law definition of "dishonorable" service, in which mental and physical health conditions must be considered as mitigating factors when evaluating service.[64] It contradicts the public and official commitments of the VA, which has told Congress and veterans that mental health issues are considered during COD decisions.[65] And it is inconsistent with public expectations for how veterans should be treated.

The Regulation Does Not Consider Exemplary Service, Hardship Service, or Other Positive or Mitigating Factors

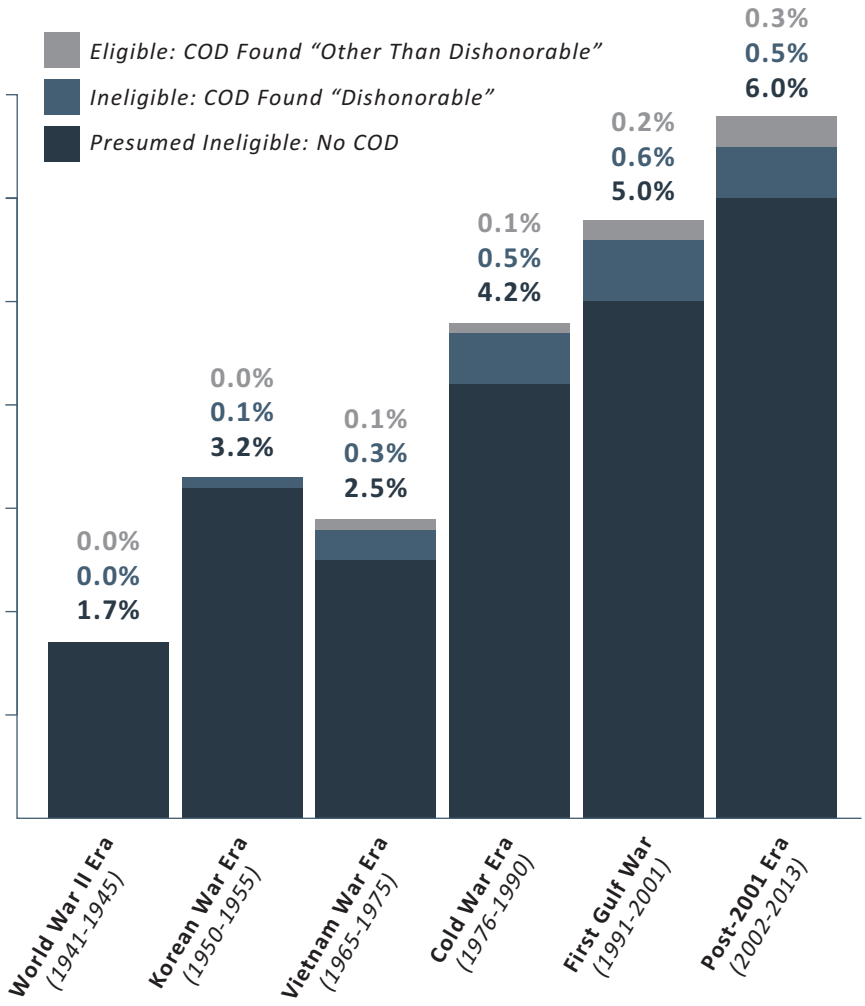
The data above show that the VA excludes veterans with combat service or hardship service from basic veteran services at nearly the same rate as others, indicating that these factors are not considered in COD decisions.

This is due to the fact that the VA's regulations do not permit adjudicators to consider these factors. Although VA regulations define certain conduct that disqualifies a veteran, there is no provision in the regulation for considering positive factors of service. The "willful and persistent" bar does include a limited opportunity to consider overall service, but that exception does not apply to the remaining regulatory criteria. In no case do VA regulations defining "dishonorable" service permit evaluation of other mitigating factors such as situational stress, family issues, or personal problems.

This is incompatible with statute and public expectations. Members of Congress stated publicly on the record that they intended for positive factors, such as combat or hardship service, to be weighed against any negative conduct. Military law requires that these factors be considered when deciding if service was "dishonorable."[66] The VA itself states that it "considers . . . any mitigating or extenuating circumstances."[67] Yet, the VA's regulations simply do not allow for consideration of positive or mitigating factors.

> *VA Associate General Counsel Warman:*
>
> One of the problems that we have frankly is that these [Character of Discharge regulation] terms are very broad and very imprecise.
>
> ***1971 Hearing Before the House Armed Services Committee***

Veterans' Eligibility for Basic VA Services, as Percent of All Veterans Discharged for Selected Eras



The failure of the VA to consider mitigating circumstances under its regulatory standard contrasts with the statutory standards. Under one of its statutory prohibitions, Congress specifically instructed the VA to overlook the misconduct if there were "compelling circumstances" to explain it. Given this instruction, the VA issued regulations for when it would overlook that statutory bar, including "family emergencies or obligations"; "the person's age, cultural background, educational level and judgmental maturity"; "how the situation appeared to the person himself or herself"; and the presence of mental illness or other injuries from service.[68] However the VA did not include this analysis in its own regulatory bars, and none of those factors may be considered for the vast majority of veterans with bad paper discharges.

Vague Regulations Cause Widely Inconsistent Outcomes

The data above demonstrate that veterans receive disparate treatment from different Regional Offices and different Veterans Law Judges. This does not necessarily reflect error or bad faith on the part of the judges or local adjudicators at Regional Offices. Instead, the degree of inconsistency is the inevitable product of the vagueness and breadth of the VA's regulations. The undefined terms in the COD regulations—"willful," "persistent," "minor," "meritorious"—permit highly exclusionary and divergent results. Some adjudicators may grant eligibility anyway, resulting in different outcomes for people with similar service histories.

The VA itself has acknowledged that its COD regulations are flawed. As far back as 1977, the VA

General Counsel told Congress: "One of the problems that we have frankly is that these terms are very broad and very imprecise."[69] But, nearly four decades later, those regulations remain in place—broadly and imprecisely excluding more and more veterans from basic veteran services. Indeed, in the four decades since, the exclusion rates have steadily crept higher, such that now more than double the percentage of veterans are excluded than at the time of the VA's 1977 admission.

The Aggravated Homosexual Conduct Bar Is Unlawfully Prejudicial

The VA's regulations have not been updated to comport with changed legal standards or modern policy. One example of that is the regulatory bar to receiving benefits based on aggravated homosexual conduct.

Currently, the VA's regulations deny benefits in cases of "homosexual conduct" that involves "aggravating circumstances" or "other factors affecting the performance of duty." The regulation lists as examples of such conduct "child molestation," "homosexual prostitution," and "homosexual acts" where a service member has taken advantage of his or her superior rank, grade, or status.[70]

Misconduct involving molestation of a child, prostitution, coercion, or other predatory sexual acts can and should be disqualifying. However, this conduct would be barred anyway under the "moral turpitude" regulatory bar. The specific prohibition for homosexual conduct serves only to suggest that this behavior is worse when committed by a homosexual veteran. This singling out of a single class of veterans based on their sexual orientation is unacceptable, and it is unlawful in the wake of the repeal of Don't Ask, Don't Tell[71] and the Supreme Court's decisions in Obergefell v. Hodges[72] and United States v. Windsor.[73] Because the regulation serves no lawful purpose, it should be removed.

The VA's Presumption of Ineligibility for Veterans with Other Than Honorable Discharges

Another regulation that determines the extent of exclusion from veteran services is the VA's presumption of ineligibility for certain veterans. The VA does not review all veterans' records of service prior to granting access to basic veteran services. In 1964, the VA voluntarily decided not to review those with Honorable or General (Under Honorable Conditions) discharges but to review all others, including those with Other Than Honorable (OTH) and Bad Conduct discharges.[74]

J.R., Marine Corps, Post-2001

J.R. served as a rifleman for more than seven years. After three combat tours to Iraq and Afghanistan, he began to experience symptoms of Post-Traumatic Stress Disorder, used drugs to self-medicate, and then was separated with an Other Than Honorable discharge. His problems led to divorce from his wife and estrangement from his children.

J.R. sought treatment for PTSD from the VA and was turned away because of his Other Than Honorable discharge. An advocate eventually helped him initiate the COD process. Until the VA makes a decision, J.R. cannot access any basic VA services, and if the VA denies his application, he may never get services from the VA.

The VA's decision about whose service to review was based on its own priorities and calculations, not statute. Some veterans with Honorable or General discharges may not be eligible for VA services because they meet one of the "statutory bars" that Congress said precludes eligibility, and the VA can terminate previously granted benefits on that basis. Nevertheless, the VA reasonably extends eligibility to all of those veterans with Honorable and General discharges without requiring a pre-eligibility review. This, in turn, allows the many veterans who urgently need services to gain access faster. By contrast, for veterans with Other Than Honorable, Bad Conduct, and Dishonorable discharges—that is, with "bad-paper" discharges—VA regulations bar access to

most services until the agency has conducted an COD.[75]

This presumptive exclusion of all veterans with bad-paper discharges is the VA's own choice. No statute requires that presumption. In fact, Congress authorized the VA to deny eligibility to a veteran with a discharge better than Dishonorable only if the service branch's characterization was mistaken or insufficient. The VA could decide today to cease requiring a COD review for veterans with Other Than Honorable discharges. As the agency does for veterans with Honorable and General discharges, the VA would only review discharge-based eligibility where facts and records made clear that one of Congress's statutory bars applied, such as if available evidence demonstrated that the discharge was the result of or in lieu of a general court-martial. This would ensure immediate access to services for veterans who need it, while still allowing the VA to exclude those who are ineligible under Congress's statutory standards.

Changing the VA's presumption of ineligibility to a presumption of eligibility could address the low rate of veterans who received CODs. That change would accord with Congress's original purpose. It would expand access to the VA, and bar access only where misconduct was of significant severity. That action would also reduce the administrative burden on the VA in conducting COD reviews. Importantly, thousands of wounded veterans would be able to receive veteran-focused healthcare, rehabilitation services, and much-needed support from the VA.

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55 38 C.F.R. § 3.12(d). See Appendix A, infra, pages 39-41, for full text of the regulation.
56 38 C.F.R. §§ 3.1(n)(3), 3.301(c)(3).
57 Cropper v. Brown, 6 Vet. App. 450, 452-53 (1994).
58 Title Redacted by Agency, No. 03-09358 (Bd. Vet. App. June 19, 2009).
59 Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).
60 Rule for Court-Martial 1001(c).
61 Title Redacted by Agency, No. 96-01792 (Bd. Vet. App. Jan. 30, 1996).
62 Manual for Courts-Martial, Maximum Punishment Chart, app. 12 (2012).
63 Title Redacted by Agency, No. 04-04453 (Bd. Vet. App. Feb. 17, 2004).
64 Manual for Courts-Martial, pt. V.1.e. (2012); Rules for Courts-Martial § 1005(d)(5); see also Military Judges' Benchbook, Dep't of Army Pamphlet 27-9, para. 2-5-13.
65 VA COD Factsheet, supra note 34, at 5.
66 Manual for Courts-Martial, pt. V.1.e. (2012); Rules for Courts-Martial § 1005(d)(5); see also Military Judges' Benchbook, Dep't of Army Pamphlet 27-9, para. 2-5-13.
67 38 C.F.R. § 3.12(d)(4).
68 38 C.F.R. § 3.12(c)(6).
69 S. Rep. 97-387, Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, at 355 (1977).
70 38 C.F.R. § 3.12(d)(5).
71 Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, 3516, 3517 (2011),
72 Obergefell v. Hodges, 135 S. Ct. 2071 (2015).
73 United States v. Windsor, 133 S. Ct. 2675 (2013).
74 28 F.R. § 123 (1963) (codified at 38 C.F.R. § 3.12(a)).
75 38 C.F.R. § 3.12; see Dep't of Veterans Affairs, Adjudication Procedures Manual, No. M21-1, pt. III.v.1.B.

RECOMMENDATIONS & CONCLUSIONS

In 1944, Congress expanded access to benefits to support the reintegration of returning veterans. Congress made clear its intent to exclude only the small percentage of veterans who engaged in severe misconduct such that their services was "dishonorable" by military standards. While the number of veterans discharged by court-martial and subject to Congress's statutory bars has remained at around 1% over the subsequent decades, the number of veterans the VA chooses to exclude has skyrocketed. The VA now excludes 6.5% of veterans who served since 2001.

That high rate is due almost entirely to the VA's discretionary criteria. The VA requires a lengthy and burdensome eligibility evaluation process for far more veterans than Congress intended to bar, resulting in the exclusion of thousands of veterans discharged for minor misconduct. The low rate of successful CODs, the complex procedures, the misperception of ineligibility, and the failure to determine eligibility for veterans seeking healthcare leave too many veterans unable to access care and treatment.

The system is broken from all perspectives and is not serving anyone's needs. It is not the system that Congress envisioned—it serves far fewer veterans and fails to holistically consider a veteran's service. It is not even the system that the VA wants—it is an overly burdensome process that cannot be fairly and consistently applied and that prevents the VA from achieving its goal of caring for those "who have borne the battle." Most importantly, it is not the system that veterans need—they are denied basic services that they deserve. No person who served this nation in uniform should be left without healthcare if they have disabilities, without housing if they are homeless, without support if they cannot work.

Seven concrete and practical solutions are proposed below. More detailed descriptions of the proposals, as well as additional facts and analysis, can be found in the Petition for Rulemaking submitted by Swords to Plowshares and the National Veterans Legal Services Program to the Department of Veterans Affairs, which asks the VA to change its Character of Discharge regulations. The Petition is available online at ***http://j.mp/VA-petition***.

1. The VA Should Change Its COD Regulations To Bar Only Veterans Whose Misconduct Warranted a Dishonorable Discharge, As Congress Intended

The current COD regulations exclude far more veterans than Congress intended and for relatively minor infractions. This is the direct result of the VA creating regulations that are not in line with military-law standards for "dishonorable" conduct, which is the standard that Congress instructed the VA to adopt.

The VA should change its COD regulations to align with the standards from military law. To be disqualifying, the misconduct—viewed in light of the veteran's service overall and considering all mitigating factors—must have warranted a dishonorable discharge characterization. For example, the "moral turpitude" regulatory bar could require that the offense involve fraud or conduct that gravely violates moral standards with an intent to harm another person; and the "willful and persistent misconduct" regulatory bar could require three or more separate incidents of serious misconduct within a one-year period. The general presumption should be that an administrative discharge is "other than dishonorable" unless there is clear evidence that a Dishonorable discharge by court-martial would have been appropriate. Minor offenses would not prevent veterans from accessing basic healthcare and rehabilitation services.

Such changes would both align the VA with military law and congressional intent, and would result in a less burdensome adjudication process. The standards are clearer and easier to apply than existing regulations. The reduced complexity and decreased administrative burden could positively affect not only veterans with bad-paper discharges, but all veterans seeking support and assistance from the VA.

2. The VA Should Revise Its COD Regulations To Consider the Positive and Mitigating Facts of a Veteran's Service

The VA's current COD regulations largely operate as a one-way ratchet. With a few narrow exceptions, they list factors that may disqualify veterans from being eligible but do not list factors that may weigh in favor of the veteran. Adjudicators are simply not allowed to consider mitigating factors, mental health, or favorable service. The inevitable result is that hundreds of thousands of veterans—many of whom deployed to war zones, garnered medals and awards, and dedicated years of their lives to serving our country—cannot access basic veteran services.

The regulations should require that VA adjudicators consider any and all such factors, and should specifically mandate that they consider the length of the veteran's service; whether the veteran served in combat; whether the veteran deployed in support of a contingency operation; whether the veteran served in other hardship conditions; whether the veteran earned any medals, awards, or commendations; the veteran's age, education level, maturity, and background; and whether extenuating circumstances existed.

This change is necessary to harmonize VA practice with the military-law standard for "dishonorable" service and with congressional intent. Military law considers a wide range of mitigating factors when deciding if service was "dishonorable," and Congress listed many when describing the statute's intent. Those changes would also conform the regulations with the VA's public statements that the agency does consider mitigating factors and would allow the VA to serve veterans in need. Those changes would accord proper credit to the service and sacrifices of our nation's veterans.

3. The VA Should Revise Its COD Regulations To Account for In-Service Mental Health Conditions

Some veterans incur psychiatric wounds because of their service to our country, and those conditions can affect their ability to maintain order and discipline. Despite publicly recognizing that fact, the VA's COD regulations make no accommodation for in-service mental health issues that do not rise to the level of "insanity."

The VA should revise its regulations to consider whether a veteran suffered from a mental or physical disability or operational stress while in service and to evaluate whether that condition adversely affected the veteran's state of mind at the time of the misconduct leading to discharge.

That change would align the regulations with congressional intent and military-law standards, and would be supported by scientific studies and the VA's own research and public statements. No veteran who has psychiatric wounds related to service should be denied care from the VA to treat those wounds.

4. The VA Should Not Require Prior Eligibility Reviews for Veterans with Administrative Discharges

No statute requires that the VA conduct a COD review for every veteran with a less than Honorable or General discharge. That is a policy of the VA's own making. The VA should change its policy to remove the requirement for a COD for categories of veterans who are unlikely to be found "dishonorable." Pre-eligibility review should be limited to veterans with Bad Conduct or Dishonorable Discharges and to the subset of veterans with Other Than Honorable discharges issued in lieu of court-martial. While Other Than Honorable discharges issued in lieu of court martial may indicate potentially dishonorable service, the other bases for this characterization do not require any court-martial proceeding and are therefore unlikely to have involved "dishonorable" service. The VA would retain the power to conduct a review at any later time and terminate benefits if that review revealed that a statutory bar applied.

This small change would open the VA's doors to the majority of veterans now excluded, and simultaneously could reduce the administrative burden on the VA's claims processing system. Changing the presumption of ineligibility to a presumption of eligibility would ensure that many more deserving veterans

could access basic VA healthcare and rehabilitation services.

5. The VA Should Simplify Its Application Process & Adjudication Standards

The VA's current application and adjudication processes are a burden on both veterans and the VA. Many veterans are unable to or prevented from applying for healthcare, homelessness prevention programs, or other VA assistance because there is no simple and direct route or because they are misinformed about their potential eligibility. If they are able to apply, they generally wait years for the VA to make a decision, and in the meantime are unable to access VA healthcare or other supportive services. The VA, meanwhile, has to gather voluminous records from multiple sources, review those records, and then apply the overbroad, vague COD regulations to the veteran's individual circumstances. The overly complex system serves the interests of neither the veterans nor the VA.

The VA should adopt and enforce a "no wrong door" policy for all veterans seeking care and assistance. Front-line VA staff should encourage every veteran with whom they come into contact to apply for benefits and services, and they should provide them with the appropriate application. It should not matter whether the veteran seeks healthcare, housing, or disability compensation; nor should it matter when, where, or for how long the veteran served. The current rules for VA eligibility are complex and full of exceptions, and one cannot tell from just looking at a veteran's DD 214 discharge papers whether he or she is eligible or ineligible. The best policy is to make it easy for all veterans to apply.

Furthermore, the VA can change its regulations so that they are less complex and easier to apply. For example, rather than exclude veterans for the broad and unspecific term "willful and persistent misconduct," the regulation could exclude veterans who had three or more incidents within a one-year period that would merit a dishonorable discharge under military law. Such concrete, detailed rules would reduce the burden on VA adjudicators and thereby reduce the amount of time that veterans have to wait for a decision. This specificity and clarity would also promote consistency in decisions and address inequities across regional offices and service branches.

Simpler rules and easy access would benefit both the VA and the veteran community. The VA would be better able to accomplish its mission to provide for veterans and their families, and veterans would be better able to access the care that they need and deserve.

6. VA Staff Must Understand VA Eligibility & Procedures

The misperception that veterans with bad-paper discharges cannot access any VA services is widespread. Many veterans, VA employees, staff and volunteers of community organizations that serve veterans, and others in the veteran community share that misunderstanding.

The law on this point is plain: a veteran with any type of discharge may be able to access some VA services. A veteran with an Other Than Honorable, Bad Conduct, or even Dishonorable discharge could be eligible under some circumstances. One cannot know whether the veteran is eligible merely by looking at the veteran's DD 214 discharge papers. The VA must conduct a COD review to determine the veteran's eligibility or ineligibility.

The VA should undertake new education and training efforts to ensure that all staff understand the actual standards for eligibility and how to initiate a COD review. No veteran seeking healthcare, housing, disability services, or other support from the VA should be wrongfully denied the opportunity to apply.

7. The VA Should Extend Tentative Healthcare Eligibility to Veterans with Other Than Honorable Discharges

Currently, veterans with Honorable and General discharges can access VA healthcare while the VA processes their applications to check that they meet enrollment criteria—that is, the VA grants them "tentative eligibility" based on the probability that

they will ultimately be found eligible. Meanwhile, the VA denies tentative eligibility to veterans with bad-paper discharges. While those veterans wait the average 1,200 days for the VA to decide their COD claims, they cannot access VA healthcare and they are at risk of their condition worsening.

If the VA adopts the proposed changes to the COD regulations and brings the exclusion rate in line with Congress's original intent, then the VA must also revise the regulation about tentative eligibility for healthcare. Adoption of the proposed changes would make it more probable that veterans with Other Than Honorable discharges would be found eligible for basic VA services. Extending them tentative eligibility would be a practical complementary change. Whether or not the VA changes the underlying regulations, extending tentative eligibility for healthcare to these veterans is appropriate. Providing some basic healthcare to veterans, many of whom served in combat or have service-connected injuries, while they await the VA's decision, is reasonable given their service.

As a nation, it is our duty and obligation to offer those who have served our country more than mere expressions of gratitude when they return home. The VA can and should change its regulations to ensure that no veterans are wrongfully denied the care and support that they deserve.

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This report is dedicated to all those who have served our country and to their families.

APPENDIX

Appendix A: Current VA Regulations

38 C.F.R. § 3.12. Character of Discharge.

(a) If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) A discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)).

(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See §3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term established basic eligibility to receive Department of Veterans Affairs benefits means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be

considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service

members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

. . .

38 C.F.R. § 3.354. Determinations of insanity.

(a) Definition of insanity. An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

(b) Insanity causing discharge. When a rating agency is concerned with determining whether a veteran was insane at the time he committed an offense leading to his court-martial, discharge or resignation (38 U.S.C. 5303(b)), it will base its decision on all the evidence procurable relating to the period involved, and apply the definition in paragraph (a) of this section.

38 C.F.R. § 17.34. Tentative Eligibility Determinations.

Subject to the provisions of §§ 17.36 through 17.38, when an application for hospital care or other medical services, except outpatient dental care, has been filed which requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized without further delay if it is determined that eligibility for care probably will be established. Tentative eligibility determinations under this section, however, will only be made if:

(a) In emergencies. The applicant needs hospital care or other medical services in emergency circumstances, or

(b) Based on discharge. The application is filed within 6 months after date of discharge under conditions other than dishonorable, and for a veteran who seeks eligibility based on a period of service that began after September 7, 1980, the veteran must meet the applicable minimum service requirements under 38 U.S.C. 5303A.

Appendix B: Number of Enlisted Service Members Discharged by Character of Service and Service Branch Per Year

World War II Era: 1941 to 1945

	Army			Navy				Marine Corps				
	HON	OTH	DD	HON	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
1941	203,096	5,460	1,752	24,335	379	1,420	70	4,804	158	501	387	53
1942	85,394	4,138	933	55,768	1,080	1,990	60	7,046	985	673	437	117
1943	763,612	16,133	3,323	75,672	2,324	4,701	90	22,097	4,218	767	258	111
1944	396,438	18,793	7,580	112,587	3,723	6,372	103	33,206	4,941	524	60	50
1945	4,736,208	11,095	8,627	180,435	4,576	8,620	283	62,165	2,677	520	149	95
Total	**6,184,748**	**55,619**	**22,215**	**448,797**	**12,082**	**23,103**	**606**	**129,318**	**12,979**	**2,985**	**1,291**	**426**

Source: Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, H. Rep. No. 97-887 (1977).

Korean War Era: 1950 to 1955

	Army					Navy					Marine Corps				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
1950	234,719	0	17,239	2,496	3,545	131,866	5,095	1,552	5,135	775	33,685	432	379	985	181
1951	144,268	4,200	6,462	1,164	2,379	84,422	4,912	1,411	2,537	370	37,969	1,034	514	585	115
1952	388,501	13,687	5,189	1,744	2,452	133,437	5,663	2,454	1,895	170	94,875	2,337	880	639	61
1953	737,496	15,789	492	1,576	3,488	148,355	3,270	2,863	3,112	75	41,304	2,022	1,262	1,297	43
1954	519,118	23,674	12,179	1,644	4,840	143,123	4,986	3,867	4,013	68	123,973	3,021	1,551	2,174	94
1955	619,543	18,726	14,611	968	2,555	214,035	12,126	3,529	3,127	76	51,324	1,407	1,901	2,669	127
Total	**2,643,645**	**76,076**	**56,172**	**9,592**	**19,259**	**855,238**	**36,052**	**15,676**	**19,819**	**1,534**	**383,130**	**10,253**	**6,487**	**8,349**	**621**

Source: Administrative Discharge Procedures and Discharge Review, H. Rep. No. 95-79 (1975).
*Note: Source did not provide data for Air Force administrative separations from 1950-1955.

1956 to 1964

	Army					Air Force				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
1956	318,500	10,783	11,877	221	91	*	*	*	*	*
1957	292,934	6,593	15,228	146	59	171,667	11,347	7,214	2,470	711
1958	321,737	7,814	17,515	207	57	174,020	12,664	8,300	2,267	428
1959	308,038	5,910	11,031	165	48	161,470	7,380	7,124	1,522	244
1960	223,502	10,160	7,474	125	43	141,437	7,246	4,189	1,342	207
1961	254,046	11,889	8,319	123	25	177,849	7,160	1,699	1,057	119
1962	295,319	12,198	7,968	140	23	168,692	6,037	1,295	412	120
1963	341,418	11,658	8,490	179	22	118,575	6,158	1,220	324	63
1964	354,215	12,616	8,479	137	20	175,723	4,671	848	290	66
Total	**2,709,709**	**89,621**	**96,381**	**1,443**	**388**	**1,289,433**	**62,663**	**31,889**	**9,684**	**1,958**

	Navy					Marine Corps				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
1956	211,114	9,219	2,540	1,846	66	64,264	2,523	1,874	2,325	212
1957	142,329	5,431	3,165	222	50	71,451	4,435	1,468	1,616	175
1958	178,414	6,901	3,527	2,784	40	53,621	2,117	1,375	1,395	63
1959	142,117	7,346	3,555	1,971	30	62,082	1,970	1,486	1,180	47
1960	143,165	6,342	2,697	1,663	30	52,160	2,667	1,867	1,019	24
1961	143,990	5,866	2,972	1,521	10	31,448	2,233	1,604	871	9
1962	154,138	6,809	2,474	1,261	11	35,896	2,484	1,465	961	19
1963	158,398	5,141	2,535	1,154	2	39,502	2,112	1,296	804	10
1964	157,658	4,735	3,142	1,002	2	47,573	2,303	1,274	901	10
Total	**1,431,323**	**57,790**	**26,607**	**13,424**	**241**	**457,997**	**22,844**	**13,709**	**11,072**	**569**

Source: Administrative Discharge Procedures and Discharge Review, H. Rep. No. 95-79 (1975).
*Note: Source did not provide data for Air Force administrative separations in 1956.

Vietnam War Era: 1965 to 1975

	Army					Air Force				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
1965	269,862	13,925	8,561	157	14	210,314	4,407	781	224	33
1966	330,391	9,935	6,385	149	13	197,758	3,238	505	157	37
1967	332,919	8,865	5,758	217	10	101,381	2,479	713	375	35
1968	498,071	8,378	6,871	183	5	88,728	2,441	738	138	5
1969	558,938	7,865	6,532	859	164	138,874	4,180	598	169	14
1970	615,042	11,262	14,114	1,273	306	121,072	4,348	423	150	24
1971	521,109	14,270	19,746	1,856	243	134,484	5,009	724	146	1
1972	449,071	20,619	30,105	1,702	267	120,820	6,689	932	121	5
1973	219,971	18,047	23,346	1,296	339	192,672	7,707	748	99	6
1974	222,876	19,870	20,645	1,122	196	178,103	6,630	743	220	3
1975	233,517	22,110	16,316	1,481	239	166,127	3,291	623	237	1
Total	**4,251,767**	**155,146**	**158,379**	**10,295**	**1,796**	**1,650,333**	**50,419**	**7,528**	**2,036**	**164**

	Navy					Marine Corps				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
1965	156,045	5,425	2,854	947	5	41,879	1,720	982	760	10
1966	139,029	6,025	2,781	850	4	39,583	1,685	873	628	3
1967	169,845	6,267	2,561	1,310	7	53,539	1,951	709	663	18
1968	171,719	5,361	2,812	1,537	7	78,472	2,080	1,286	1,028	17
1969	189,229	5,562	2,720	1,278	4	93,335	2,246	2,542	1,356	5
1970	228,169	8,459	1,996	921	12	117,273	5,265	4,378	1,620	33
1971	190,979	13,257	1,247	1,480	12	97,793	7,720	7,422	1,255	69
1972	167,791	11,397	1,881	771	8	66,788	6,514	3,427	1,573	76
1973	176,688	10,465	1,806	290	11	57,389	4,461	3,149	1,221	78
1974	150,721	14,314	2,395	276	17	57,880	5,146	5,553	1,370	99
1975	151,820	17,124	3,179	321	6	51,594	6,475	6,897	1,548	47
Total	**1,892,035**	**103,656**	**26,232**	**9,981**	**93**	**755,525**	**45,263**	**37,218**	**13,022**	**455**

Source: Administrative Discharge Procedures and Discharge Review, H. Rep. No. 95-79 (1975).

Cold War Era: 1976 to 1990

	Army, Navy, Air Force & Marine Corps				
	HON	GEN	OTH	BCD	DD
1976	542,674	53,135	30,721	3,435	229
1977	509,693	38,922	18,104	2,349	190
1978	446,870	29,678	15,054	1,823	160
1979	491,644	26,683	14,544	1,854	286
1980	499,950	23,541	15,553	2,242	272
1981*	*483,308*	*28,418*	*16,812*	*3,448*	*301*
1982	466,666	33,294	18,071	4,653	330
1983	477,511	35,582	23,176	5,757	138
1984	423,660	32,194	24,883	5,617	268
1985	426,244	27,639	20,627	5,235	293
1986	426,931	26,581	21,790	6,040	726
1987	430,530	22,808	20,083	6,136	781
1988	477,655	22,280	19,266	6,544	821
1989*	*370,515*	*20,342*	*17,346*	*5,852*	*727*
1990	263,465	18,404	15,425	5,160	633
Total	**6,737,316**	**439,501**	**291,455**	**66,145**	**6,155**

Source: Department of Defense Response to FOIA Request (on file with authors); U.S. Census Bureau, Statistical Abstract of the United States 1980, at Table 622 (1980); U.S. Census Bureau, Statistical Abstract of the United States 1988, at Table 561 (1988).

*Note: Source did not include data for 1981 and 1989. Therefore, data presented here is interpolated from adjacent years.

First Gulf War Era: 1991 to 2001

	Army					Air Force				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
1991	81,973	7,049	2,696	884	360	54,310	3,811	331	559	43
1992	155,816	7,192	2,339	209	33	71,812	3,267	296	294	40
1993	93,144	4,780	1,859	293	43	55,685	2,897	231	384	53
1994	74,869	4,518	1,562	97	23	46,182	3,040	248	404	46
1995	73,338	4,277	1,651	143	16	52,081	2,958	190	453	71
1996	71,028	4,837	1,911	142	29	38,992	3,188	247	466	70
1997	60,767	3,983	2,149	220	18	38,642	3,209	229	364	61
1998	61,799	4,814	2,399	140	39	39,279	2,938	241	399	87
1999	62,228	4,412	2,307	27	11	37,300	2,868	201	460	91
2000	51,607	4,040	3,590	103	58	33,927	2,737	187	269	48
2001	46,991	3,812	2,745	39	20	37,774	2,587	165	209	23
Total	**833,560**	**53,714**	**25,208**	**2,297**	**650**	**505,984**	**33,500**	**2,566**	**4,261**	**633**

	Navy					Marine Corps				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
1991	56,595	3,040	7,918	1,458	70	28,088	833	1,460	786	93
1992	65,879	3,151	9,117	969	1	35,446	1,138	2,230	858	94
1993	69,946	3,036	8,481	93	1	31,897	953	2,305	591	68
1994	69,826	2,556	6,954	20	0	27,651	762	2,171	503	63
1995	58,043	2,365	6,316	13	0	19,640	706	1,322	1,201	25
1996	49,248	3,027	5,910	11	0	6,958	630	383	1,137	23
1997	50,834	4,146	5,328	569	0	25,004	650	2,498	956	89
1998	36,673	2,808	3,957	284	0	25,471	617	2,507	1,361	47
1999	41,982	2,762	4,369	16	0	21,856	693	1,927	1,034	63
2000	33,018	3,652	4,319	38	0	23,280	682	2,411	729	62
2001	31,122	2,186	5,089	39	0	23,285	708	2,551	890	52
Total	**563,166**	**32,729**	**67,758**	**3,510**	**72**	**268,576**	**8,372**	**21,765**	**10,046**	**679**

Source: Department of Defense Response to FOIA Request (on file with authors).

Post-2001 Era: 2002 to 2013

	Army					Air Force				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
2002	39,782	5,080	6,127	32	66	13,985	2,005	136	200	7
2003	36,261	6,222	3,135	26	53	23,963	2,003	157	81	11
2004	54,580	4,976	2,300	30	5	26,284	2,530	160	229	12
2005	55,260	5,393	2,453	38	16	34,594	2,733	202	138	19
2006	47,272	4,783	2,624	40	3	27,127	2,519	199	272	35
2007	46,261	5,631	3,333	105	12	32,255	2,261	159	354	34
2008	43,140	6,197	2,878	204	9	25,218	2,041	117	204	47
2009	43,393	7,302	2,660	336	29	21,281	2,183	137	160	26
2010	44,811	7,959	2,430	212	13	23,350	2,306	148	285	30
2011	48,087	8,743	1,908	336	47	22,958	2,622	125	141	6
2012	56,211	10,426	1,799	41	3	22,879	2,494	124	177	19
2013	68,554	9,285	1,326	248	15	23,401	2,276	123	180	27
Total	**583,612**	**81,997**	**32,973**	**1,648**	**271**	**297,295**	**27,973**	**1,787**	**2,421**	**273**

	Navy					Marine Corps				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
2002	25,196	1,794	5,510	42	0	22,101	816	2,812	1,142	36
2003	30,199	2,520	5,497	62	0	20,444	694	2,048	1,246	47
2004	33,134	3,192	5,470	688	0	22,851	630	1,963	1,160	57
2005	32,973	3,072	4,775	673	0	24,130	693	1,900	1,243	84
2006	35,566	3,151	4,096	369	0	24,912	724	2,263	738	41
2007	36,456	3,167	3,462	541	0	23,416	698	2,210	1,275	86
2008	32,181	2,578	2,761	258	0	19,893	622	2,117	794	85
2009	29,471	2,677	2,275	163	0	21,103	766	2,560	472	68
2010	23,747	2,375	1,878	120	0	22,821	981	3,038	482	49
2011	22,672	2,181	1,750	70	0	25,834	1,003	2,871	306	41
2012	28,137	2,098	1,495	137	0	27,529	1,058	2,598	333	28
2013	24,247	1,836	1,256	106	0	28,472	1,138	2,216	231	23
Total	**353,979**	**30,641**	**40,225**	**3,229**	**0**	**283,506**	**9,823**	**28,596**	**9,422**	**645**

Source: Department of Defense Response to FOIA Request (on file with authors).

*Note: The authors obtained DOD's responses to other similar FOIA requests that report different data than that included here. Not all of the data are different, but for those that are, the differences in the numbers range from one to hundreds and could be higher or lower. The disparities in the data marginally affect the calculations of totals and rates by tenths of one percent or less. The authors chose to rely on the FOIA response they originally obtained because it provided data for all service branches, for both punitive and administrative discharges, and for enlisted service members separate from officers, which best allowed for analysis of the VA's policies and of the effects of those policies. Copies of the other FOIA responses are available upon request.

Appendix C: Total Number & Percentage of Enlisted Service Members Discharged by Character of Service for Selected Periods

	Sum of Army, Navy, Marine Corps & Air Force					Percentage of Army, Navy, Marine Corps & Air Force				
	HON	GEN	OTH	BCD	DD	HON	GEN	OTH	BCD	DD
World War II Era	6,762,863	12,979	70,686	24,394	23,247	98.1%	0.2%	1%	0.4%	0.3%
Korean War Era	3,882,013	122,381	78,335	37,760	21,414	93.7%	3.0%	1.9%	0.9%	0.5%
Vietnam War Era	8,549,660	354,484	229,357	35,334	2,508	93.3%	3.9%	2.5%	0.4%	0.0%
Cold War Era ('76-'90)	6,737,316	439,501	291,455	66,145	6,155	89.3%	5.8%	3.9%	.9%	0.1%
First Gulf War ('91-'01)	2,171,286	128,315	117,297	20,114	2,034	89.0%	5.3%	4.8%	.8%	0.1%
Post-2001 Era ('02-'13)	1,518,392	150,434	103,581	16,720	1,189	84.8%	8.4%	5.8%	0.9%	0.1%

Source: Department of Defense Response to FOIA Request (on file with authors); U.S. Census Bureau, Statistical Abstract of the United States 1980, at Table 622 (1980); U.S. Census Bureau, Statistical Abstract of the United States 1988, at Table 561 (1988); Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, H. Rep. No. 97-887 (1977); Administrative Discharge Procedures and Discharge Review, H. Rep. No. 95-79 (1975).

Appendix D: Number of Enlisted Service Members Discharged in FY2011 Who Are Excluded from Basic VA Services by Statutory Criteria

Statutory Bar	Number Excluded
Discharge as a Sentence of General Court-Martial	<726
Desertion	<548
Absent Without Leave for More than 180 Days Without Compelling Circumstances	
Conscientious Objector who Refused to Perform Military Duties	<23
Alien who Requests Release During Wartime	n/a
	<1,297

Source: Department of Defense Response to FOIA Request (on file with authors); Department of Defense Code Committee on Military Justice, Annual Report FY2011 (2011).

EXPLANATION

- *Discharge as a Sentence of General Court-Martial:* The actual figure is probably lower because not all servicemembers sentenced to a punitive discharge by general court-martial actually receive that punishment. Some sentences are suspended or set aside on appeal.
- *Desertion & Absent Without Leave for 180+ Days:* This figure is the number of enlisted separations with Interservice Separation Code 1075 and is based on data obtained through a FOIA request. That Code is used both for Desertion and AWOL for more than 180 days. The actual figure is likely less because the VA can determine that some number of veterans who were AWOL for more than 180 days had "compelling circumstances" that justified the absence.
- *Conscientious Objector with Refusal:* This figure is the number of enlisted separations with Interservice Separation Code 1096 and is based on data obtained through a FOIA request. That Code is used for discharges for all conscientious objectors. The actual figure is likely less because the statutory bar applies only to the subset of veterans who were conscientious objectors and also refused to wear the uniform or perform military duties.
- *Aliens who Request Release During Wartime:* No data were reported in the Department of Defense FOIA request. Available information suggests that the number is very small.

Appendix E: Decisions of the Board of Veterans' Appeals

Total BVA Character of Discharge Determinations, 1992-2015

	Number	Percent
Granted (Eligible)	129	12.9%
Denied (Ineligible)	870	87.1%
Total	**999**	

Source: Analysis of publicly available decisions of the Board of Veterans' Appeals.

Appendix F: Decisions of the VA Regional Offices

Total VARO Character of Discharge Determinations in FY2013

	Number	Percent
Granted (Eligible)	447	9.7%
Denied (Ineligible)	4,156	90.3%
Total	**4,603**	

Source: Department of Veterans Affairs Response to FOIA Request (on file with authors).

Appendix G: Character of Discharge Determinations by Era of Service

Total VARO Character of Discharge Determinations by Selected Eras of Service

	Total Number of Decisions	Percent Denied (Ineligible)	Percent Granted (Eligible)
World War II Era	3,600	89%	11%
Korean War Era	6,807	85%	15%
Vietnam War Era	35,800	78%	22%
Cold War Era ('76-'90)	44,310	78%	22%
First Gulf War Era ('91-'01)	19,269	71%	29%
Post-2001 ('02-'13)	13,300	65%	35%
Total	**155,416**	**85%**	**15%**

Source: Telephone Interview with Director, Dep't of Veterans Affairs Office of Interagency Strategic Initiatives (June 17, 2014).

Appendix H: VA Eligibility Status for Post-2001 Veterans Who Completed Entry Level Training, 2001-2013

Note as to methodology: To calculate the number and percentage of veterans eligible for the VA, we (1) obtained from DOD the numbers of service members discharged for each characterization for each year since 1940; (2) labeled all service members with Honorable or General characterizations "presumptively eligible" per VA regulations; (3) obtained from the VA the numbers of veterans with bad-paper discharges who were found eligible by COD and who were found ineligible by COD and so labeled them; and (4) subtracted from the total numbers of veterans with bad-paper discharges the numbers of veterans who received a COD and labeled the resultant number "presumptively ineligible." The rate of exclusion is the sum of veterans presumed ineligible and found ineligible, divided by the total number of veterans.

VA Eligibility for Post-2001 Veterans

	Number	Percent
Eligible		**93.5%**
Presumed Eligible	*1,668,050*	*93.2%*
Found Eligible by COD	*4,600*	*0.3%*
Ineligible		**6.5%**
Found Ineligible by COD	*8,700*	*0.5%*
Presumed Ineligible	*108,190*	*6%*

Source: analysis of Department of Veterans Affairs Response to FOIA Request and Department of Defense Response to FOIA Request (on file with authors).

Appendix I: VA Eligibility Status for Selected Eras of Service

VA Rate of Exclusion for Selected Eras of Service

	Eligible			Ineligible		
	Presumed Eligible	*Found Eligible by COD*	**Total**	*Found Ineligible by COD*	*Presumed Ineligible*	**Total**
World War II (pre-1944 Act)	6,762,863	0	**98.1%**	n/a	131,306	**1.9%**
World War II (post-1944 Act)	6,775,842	400	**98.3%**	16	117,911	**1.7%**
Korean War Era	4,004,394	997	**96.7%**	5,810	130,707	**3.3%**
Vietnam War Era	9,047,198	7,800	**97.2%**	28,000	232,180	**2.8%**
Cold War Era ('76-'90)	7,176,727	9,680	**95.3%**	34,630	319,444	**4.7%**
First Gulf War Era ('91-'01)	2,285,138	5,500	**94.5%**	13,769	120,156	**5.5%**
Post-2001 Era ('02-'13)	1,668,050	4,600	**93.5%**	8,700	108,190	**6.5%**

Source: analysis of Department of Veterans Affairs Response to FOIA Request and Department of Defense Response to FOIA Request (on file with authors).

Appendix J: Character of Discharge Determinations by VA Regional Offices, FY 2013

Granted: found "other than dishonorable" and therefore eligible.
Partial Denial: found "dishonorable" but no statutory bar applies and therefore could apply for limited healthcare for any service-connected disabilities.
Denied: found "dishonorable" and therefore ineligible.

Regional Office	Granted	Partially Denied	Denied	Total	Percent "Other Than Dishonorable"	Percent "Dishonorable"
Albuquerque	1	14	15	30	3.3%	96.7%
Anchorage	0	0	1	1	0.0%	100.0%
Atlanta	13	100	49	162	8.0%	92.0%
Baltimore	6	13	8	27	22.2%	77.8%
Boise	0	7	3	10	0.0%	100.0%
Boston	12	9	18	39	30.8%	69.2%
Buffalo	19	80	40	139	13.7%	86.3%
Central Office	0	1	0	1	0.0%	100.0%
Cheyenne	6	7	10	23	26.1%	73.9%
Chicago	5	48	22	75	6.7%	93.3%
Cleveland	6	95	24	125	4.8%	95.2%
Columbia	5	65	44	114	4.4%	95.6%
Denver	15	34	18	67	22.4%	77.6%
Des Moines	1	35	9	45	2.2%	97.8%
Detroit	14	97	38	149	9.4%	90.6%
Fargo	1	2	5	8	12.5%	87.5%
Fort Harrison	0	14	7	21	0.0%	100.0%
Hartford	6	39	18	63	9.5%	90.5%
Honolulu	1	11	10	22	4.5%	95.5%
Houston	6	82	34	122	4.9%	95.1%
Huntington	6	30	23	59	10.2%	89.8%
Indianapolis	0	50	30	80	0.0%	100.0%
Jackson	2	24	14	40	5.0%	95.0%
Lincoln	3	64	21	88	3.4%	96.6%
Little Rock	2	33	17	52	3.8%	96.2%
Los Angeles	14	46	20	80	17.5%	82.5%
Louisville	5	38	11	54	9.3%	90.7%

Regional Office	Granted	Partially Denied	Denied	Total	Percent "Other Than Dishonorable"	Percent "Dishonorable"
Manchester	1	8	2	11	9.1%	90.9%
Manila	0	0	3	3	0.0%	100.0%
Milwaukee	12	132	95	239	5.0%	95.0%
Montgomery	5	41	23	69	7.2%	92.8%
Muskogee	2	67	31	100	2.0%	98.0%
Nashville	3	88	41	132	2.3%	97.7%
New Orleans	3	16	21	40	7.5%	92.5%
New York	3	33	22	58	5.2%	94.8%
Newark	14	48	33	95	14.7%	85.3%
Oakland	15	56	26	97	15.5%	84.5%
Philadelphia	42	94	122	258	16.3%	83.7%
Phoenix	9	68	31	108	8.3%	91.7%
Pittsburgh	1	8	8	17	5.9%	94.1%
Portland	10	51	13	74	13.5%	86.5%
Providence	4	20	11	35	11.4%	88.6%
Reno	3	13	4	20	15.0%	85.0%
Roanoke	16	83	31	130	12.3%	87.7%
Salt Lake City	9	18	7	34	26.5%	73.5%
San Diego	18	56	25	99	18.2%	81.8%
San Juan	4	12	6	22	18.2%	81.8%
Seattle	11	69	31	111	9.9%	90.1%
Sioux Falls	4	19	8	31	12.9%	87.1%
St. Louis	1	51	26	78	1.3%	98.7%
St. Paul	26	105	103	234	11.1%	88.9%
St. Petersburg	38	248	114	400	9.5%	90.5%
Togus	16	42	14	72	22.2%	77.8%
Waco	13	109	57	179	7.3%	92.7%
Wichita	0	14	4	18	0.0%	100.0%
Wilmington	3	4	3	10	30.0%	70.0%
Winston-Salem	12	81	40	133	9.0%	91.0%
Total	**447**	**2692**	**1464**	**4603**	**9.7%**	**90.3%**

Source: analysis of Response to VA FOIA Request (on file with authors).

Appendix K: Analysis of Decisions of the Board of Veterans' Appeals, 1992-2015

Note as to Methodology: The authors' analysis of and conclusions regarding the Character of Discharge Determinations of the Boards of Veterans' Appeals are based on decisions from 1992 onward that are available online at http://www.index.va.gov/search/va/bva.jsp. From 1992 through 2015, the Board of Veterans' Appeals issued 999 decisions that decided a Character of Discharge Determination issue. Some of those 999 decisions did not set forth specific factual findings under 38 C.F.R. § 3.12(c) or (d), as required by regulation, and those decisions were therefore excluded from the analysis.

Table K.1: Character of Discharge Determinations by Statutory Bar, Board of Veterans' Appeals, 1992-2015

Issue	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Conscientious Objector with Refusal	1	0	1	100.0%	0.0%
Sentence of General Court-Martial	0	0	0	n/a	n/a
Resignation for the Good of the Service	0	0	0	n/a	n/a
Desertion	1	18	19	5.3%	94.7%
Alien Requested Release	0	0	0	n/a	n/a
AWOL 180+ Days without Compelling Circumstances	28	172	200	14.0%	86.0%

Table K.2: Character of Discharge Determinations by Regulatory Bar, Board of Veterans' Appeals, 1992-2015

Issue	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Undesirable to Escape General Court-Martial	3	26	29	10.3%	89.7%
Mutiny or Spying	0	0	0	n/a	n/a
Moral Turpitude	2	47	49	4.1%	95.9%
Willful & Persistent Misconduct	22	394	416	5.3%	94.7%
Homosexual Acts Involving Aggravating Circumstances	0	1	1	0.0%	100.0%

Table K.3: Character of Discharge Determinations Involving Mental Health, Board of Veterans' Appeals, 1992-2015

Issue	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Undesirable to Escape General Court-Martial	3	26	29	10.3%	89.7%
Mutiny or Spying	0	0	0	n/a	n/a
Moral Turpitude	2	47	49	4.1%	95.9%
Willful & Persistent Misconduct	22	394	416	5.3%	94.7%
Homosexual Acts Involving Aggravating Circumstances	0	1	1	0.0%	100.0%

Table K.4: Character of Discharge Determinations In Which Veterans Claim Mental Health Condition or Brain Injury, Board of Veterans' Appeals, 1992-2015

Mental Health Condition	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Post-Traumatic Stress Disorder	44	189	233	18.9%	81.1%
Traumatic Brain Injury	8	21	29	27.6%	72.4%
Personality Disorder/ Adjustment Disorder	21	113	134	15.7%	84.3%
Other Mental Health Condition	48	231	279	17.2%	82.8%
Any Mental Health Condition	**71**	**362**	**433**	**16.4%**	**83.6%**

Table K.5: Character of Discharge Determinations In Which Veteran Claims Post-Traumatic Stress Disorder & Consideration of "Insanity", Board of Veterans' Appeals, 1992-2015

Outcome	Number	Percent
Ineligible: Not "Insane"	149	63.9%
Ineligible: "Insanity" Not Considered	40	17.2%
Eligible: "Insane"	21	9.0%
Eligible: Other Basis	23	9.9%
Total	**233**	

Table K.6: Character of Discharge Determinations For Veterans Who Served in Selected Contingency Deployments or Combat, Board of Veterans' Appeals, 1992-2015

national average: 90.3%

Contingency Deployment	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Vietnam	34	193	227	15.0%	85.0%
Iraq/Afghanistan	8	16	24	33.3%	66.7%
Any Combat Service	38	125	163	23.3%	76.7%
Any Contingency	42	212	254	16.5%	83.5%
All Veterans Who Did Not Deploy	*87*	*658*	*745*	*11.7%*	*88.3%*

Table K.7: Character of Discharge Determinations For Veterans Who Served in Selected Contingency Deployments or Combat & Who Claimed Post-Traumatic Stress Disorder, Board of Veterans' Appeals, 1992-2015

	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Contingency Deployment & Combat Service	28	69	97	28.9%	71.1%
Contingency Deployment & No Combat Service	3	42	45	6.7%	93.3%
All Veterans Who Claimed PTSD	*44*	*189*	*233*	*18.9%*	*81.1%*
All Veterans Who Did Not Claim PTSD	*85*	*681*	*766*	*11.1%*	*88.9%*

Table K.8: Character of Discharge Determinations For Veterans Who Served in Selected Contingency Deployments or Combat & Who Did Not Claim Post-Traumatic Stress Disorder, Board of Veterans' Appeals, 1992-2015

Contingency Deployment	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Vietnam	8	92	100	8.0%	92.0%
Iraq/Afghanistan	3	7	10	30.0%	70.0%
Combat	8	44	52	15.4%	84.6%
All Veterans Who Did Not Claim PTSD	*85*	*681*	*766*	*11.1%*	*88.9%*

Table K.9: Character of Discharge Determinations by Service Branch, Board of Veterans' Appeals, 1992-2015

Issue BVA average: 87.1%	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Army	52	373	425	12.2%	87.8%
Navy	27	150	177	15.3%	84.7%
Air Force	3	23	26	11.5%	88.5%
Marine Corps	10	96	106	9.4%	90.6%
Not Specified	36	223	259	13.9%	86.1%

Table K.10: Character of Discharge Determinations by Discharge Characterization, Board of Veterans' Appeals, 1992-2015

Issue	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Undesirable/Other Than Honorable	106	704	810	13.1%	86.9%
Bad Conduct	10	102	112	8.9%	91.1%
Dishonorable	2	43	45	4.4%	95.6%
Uncharacterized/Not Specified	11	21	32	34.4%	65.6%

Table K.11: Character of Discharge Determinations by Veterans Law Judge, Board of Veterans' Appeals, 1992-2015

Veterans Law Judge	Granted	Denied	Total	Eligible: Percent "Other Than Dishonorable"	Ineligible: Percent "Dishonorable"
Ma***	0	14	14	0.0%	100.0%
Br***	0	13	13	0.0%	100.0%
Wi***	0	12	12	0.0%	100.0%
Ho***	0	11	11	0.0%	100.0%
Mo***	0	11	11	0.0%	100.0%
Su***	0	11	11	0.0%	100.0%
Tr***	0	10	10	0.0%	100.0%
Ke***	1	17	18	5.6%	94.4%
Pe***	1	15	16	6.3%	93.8%
Ba***	1	12	13	7.7%	92.3%
Ro***	1	12	13	7.7%	92.3%
La***	1	12	13	7.7%	92.3%
Br***	2	18	20	10.0%	90.0%
Cr***	1	9	10	10.0%	90.0%
Da***	1	9	10	10.0%	90.0%
Kr***	1	9	10	10.0%	90.0%
Ly***	1	9	10	10.0%	90.0%
Po***	2	16	18	11.1%	88.9%
Sc***	2	13	15	13.3%	86.7%
Ph***	4	23	27	14.8%	85.2%
Or***	2	9	11	18.2%	81.8%
Ha***	2	9	11	18.2%	81.8%
Du***	2	9	11	18.2%	81.8%
Se***	4	8	12	33.3%	66.7%
Da***	4	7	11	36.4%	63.6%
Hi***	5	6	11	45.5%	54.5%
Total: All VLJs	**129**	**870**	**999**	**12.9%**	**87.1%**

Source: analysis of BVA Decisions (on file with authors).
*Note: Only BVA Veterans Law Judges who issued ten or more decisions regarding Character of Discharge Determinations are included by name. However, all Veterans Law Judges' decisions are included in the Total.

The National Veterans Legal Services Program (NVLSP) is an independent, nonprofit veterans service organization that has served active duty military personnel and veterans since 1980. NVLSP strives to ensure that our nation honors its commitment to its 22 million veterans and active duty personnel by ensuring they receive the federal benefits they have earned through their service to our country. NVSLP offers training for attorneys and other advocates, connects veterans and active duty personnel with pro bono legal help when seeking disability benefits, publishes the nation's definitive guide on veteran benefits, and represents and litigates for veterans and their families before the VA, military discharge review agencies and federal courts. For more information go to *www.nvlsp.org*.

Founded in 1974 by veterans, **Swords to Plowshares** is a community-based not-for-profit 501(c)(3 organization that provides needs assessment and case management, employment and training, housing, and legal assistance to approximately 3,000 veterans in the San Francisco Bay Area each year.Swords to Plowshares promotes and protects the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities. For more information go to *www.swords-to-plowshares.org*.

The Veterans Legal Clinic at the Legal Services Center of Harvard Law School provides pro bono representation to veterans and their family members in a range of veterans and military law matters, as well as pursues initiatives to reform the systems that serve the veterans community. Located at the crossroads of Jamaica Plain and Roxbury, the Legal Services Center is composed of five clinics—the Veterans Legal Clinic, Consumer Law Clinic, Housing Law Clinic, Family Law Clinic, and Federal Tax Clinic—and is Harvard Law School's largest clinical placement site. The Center's longstanding mission is to educate law students for practice and professional service while simultaneously meeting the critical legal needs of the community. For more information go to *www.legalservicescenter.org*.

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 2

DECEMBER 19, 2015 PETITION TO AMEND REGULATIONS RESTRICTING ELIGIBILITY FOR VA BENEFITS BASED ON CONDUCT IN SERVICE SUBMITTED BY THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

December 19, 2015

The Honorable Robert McDonald
Secretary
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, D.C. 20401

Re: Petition to amend regulations restricting eligibility for VA benefits based on conduct in service

Dear Secretary McDonald,

Please find enclosed a Petition asking the VA to amend its regulations restricting eligibility for VA benefits based on applicants' conduct in service. The scale of exclusion from veteran services is a historically unprecedented stain on our nation's conscience. This is due almost entirely to VA regulations, and the Petition describes how the VA can and should change those regulations to better align VA practice with its ethical mandate and its statutory obligations.

We have been grateful to see your personal commitment to serving all those who served the nation. We agree with the sentiment you shared at the Veterans Court Conference this July, that services for veterans with less than honorable discharges are "not only critical and not only smart to achieve our goals, but in my mind they are also about ethics and morals because we need to make sure that no veteran is left behind."

Like you, we remember that every one of these men and women served at a time when most in our society does not do so. While some may have forfeited rewards such as the G.I. Bill, none deserve to be left homeless without housing assistance, disabled without health care, or unable to work without disability compensation.

We think you will agree that the current situation is unacceptable:

- The VA excludes current-era veterans at a higher rate than at any prior era: three times more than Vietnam-era veterans, and four times more than WWII era veterans. Almost 7% of post-2001 service members, including at least 30,000 who deployed to a contingency operation, are considered "non-veterans" by the VA.

- Regional Offices decide that service was "dishonorable" in 90% of cases they review. Some denied 100% of the cases they reviewed in 2013.

- Appeals decisions deny eligibility to 81% of veterans reporting PTSD; 83% of veterans with hardship deployments, including OEF, OIF and Vietnam; and 77% of veterans with combat service.

- Marines are ten times more likely to be excluded from VA services than Airmen, even when they have equivalent performance and discipline histories.

- The VA takes about four years to make an eligibility decision. Over 120,000 post-2001 veterans have not received an eligibility review and are therefore ineligible by default.

- Veterans excluded under current regulations are twice as likely to die by suicide, twice as likely to be homeless, and three times as likely to be involved in the criminal justice system.

The VA can reach these veterans. The Department has tied its own hands with unnecessarily restrictive regulations. Statutory requirements bar only about 1% of servicemembers, yet VA regulations result in the exclusion of nearly seven times this number of current-era veterans. VA regulations decide which veterans require an eligibility review, what procedures they must follow to obtain one, and what standards to apply on review. The VA can amend its regulations to reach more veterans who deserve the essential and life-saving services that the VA provides.

This Petition supplements an informal request that we made to the Department's General Counsel on May 27, 2015, which she accepted as a Petition for rulemaking in a letter dated July 14, 2015. We greatly appreciate the General Counsel's receptiveness to our concerns so far, and we look forward to continuing to collaborate on this important issue.

Deserving veterans are turned away from VA hospitals every day. We ask the VA to expedite a review and amendment of its regulation in order to ensure that we are in fact serving all who served.

Michael Blecker
Executive Director
Swords to Plowshares

Barton Stichman
Joint Executive Director
National Veterans Legal Services Program

Daniel Nagin
Clinical Professor of Law
Director, Veterans Legal Clinic
Legal Services Center of Harvard Law School

Drew Ensign
Latham & Watkins LLP

cc: Leigh Bradley, General Counsel
Bill Russo, Director, Office of Regulation Policy & Management
Bradford Adams, Swords to Plowshares
Dana Montalto, Veterans Legal Clinic, Legal Services Center of Harvard Law School

PETITION FOR RULEMAKING

TO AMEND

38 C.F.R. §§ 3.12(a), 3.12(d), 17.34, 17.36(d)

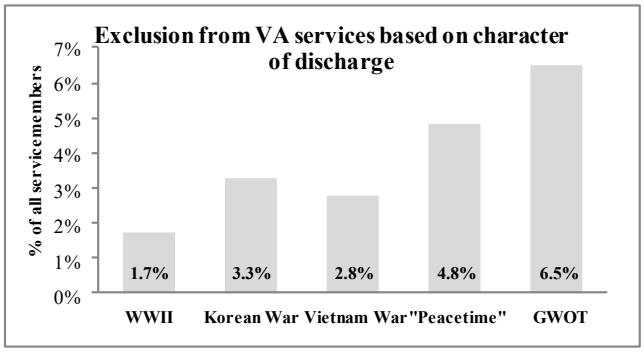
REGULATIONS INTERPRETING 38 U.S.C. § 101(2)

REQUIREMENT FOR SERVICE "UNDER CONDITIONS OTHER THAN DISHONORABLE"

I. EXECUTIVE SUMMARY

The Department of Veterans Affairs (VA) does not recognize all former service members as veterans. Since 2001, about 125,000 people have been discharged from active military service who do not have veteran status at the VA. This includes at least 30,000 service members[1] who deployed to a contingency operation during their service. The rate of exclusion from VA services is higher now than at any earlier period: it is three times as high as for Vietnam-era service members and four times as high as for WWII-era service members.

Almost all of these exclusions are the result of discretionary policies that the VA itself chose and that the VA is free to modify. Congress identified certain forms of misconduct that must result in an exclusion from VA services. In addition, Congress gave the VA authority to exclude other service members at its own discretion. The VA decides which service members will require an evaluation, and it decides the standards to apply. These discretionary standards are responsible for 85% of exclusions; only 15% are due to standards set by Congress.



These are some of the veterans most in need of its support. One study showed that Marine Corps combat veterans with PTSD diagnoses were eleven times more likely to get misconduct discharges, because their behavior changes made them unable to maintain military discipline. Since 2009, the Army gave non-punitive misconduct discharges to over 20,000 soldiers after diagnosing them with PTSD. Yet they can access almost no services because the VA does not recognize them as veterans. They have access to almost no health care or disability assistance from the VA, they do not have access to services that address chronic homelessness, and they generally do not have access to specialized services like veterans treatment courts. The

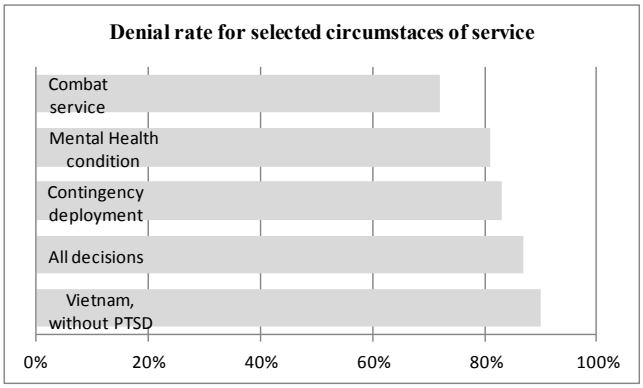
[1] The term "service members" will be used throughout the petition to refer to all individuals who served in the armed forces at any point in their lives, not merely those currently serving, and including both those who meet the statutory definition of "veteran" and those who do not.

effects of this exclusion are devastating: the suicide rate among these veterans is twice as high as for other veterans; the rates of homelessness and incarceration are at least 50% higher.

The VA requires an individual eligibility review for about 7,000 service members discharged each year. This currently takes an average of approximately 1,200 days to complete, and VA regulations do not provide tentative eligibility for health care in the meantime. These reviews are not automatic, though, and most service members do not receive this review at all: only 10% of the post-2001 service members who require a review have received one.

The denial rate is remarkably high. In FY2013, the VA denied eligibility in 90% of the cases it reviewed. The VA's standards fail to account for essential information about a veteran's service:

- **Mental health**. The VA's standards only account for mental health problems that rise to the level of "insanity." This typically does not account for behavioral health problems associated with military service. An analysis of 999 BVA eligibility decisions issued between 1992 and 2015 found that the VA denied eligibility in 81% of cases where the veteran reported PTSD.



- **Duration and quality of service**. The VA's standards do not consider duration of service, and consider quality of service only in limited circumstances. When quality of service is considered, it applies a high standard that does not treat combat service as inherently meritorious. VA appeals decisions denied eligibility to 77% of claimants who had combat service.

- **Hardship service**. The VA's standards do not consider whether the person's service included hardship conditions such as overseas deployment. VA appeals decisions denied eligibility to 83% of those who served in Vietnam, Iraq, Afghanistan or other contingency operations.

- **Extenuating circumstances**. The VA's standards do not consider extenuating circumstances such as physical health, operational stress, or other personal events that might explain behavior changes.

The regulation's vague terms produce inconsistent outcomes. In FY2013, denial rates at different Regional Offices varied between 100% in Los Angeles and 65% in Boston. Between 1992 and 2015, denial rates by individual Veterans Law Judges varied between 100% and 45%.

The VA's standards and practices violate the express instructions of Congress. Congress instructed the VA to exclude only service members whose conduct in service would have justified a dishonorable discharge characterization. Military law contains guidance about what conduct warrants a dishonorable characterization. Yet the VA's regulations depart drastically from the military-law standard. They exclude tens of thousands of service members for minor or moderate discipline problems that never would have justified a punitive characterization. Because of differences in discharge practices between service branches, the VA excludes Marines more than ten times as frequently as Airmen.

This Petition proposes amendments to regulations that will remedy these deficiencies. The proposed amendments make the following changes:

- Standards of review. Adopt standards for "dishonorable conditions" that consider severity of misconduct, overall quality of service, behavioral health, and other mitigating factors.

- Scope of review. Require individual evaluation only for service members with punitive discharges and those with administrative discharges issued in lieu of court-martial.

- Access to health care. Instruct VA medical centers to initiate eligibility reviews for service members who require it, and to provide tentative eligibility.

II. THE STATUTORY REQUIREMENT FOR DISCHARGE "UNDER CONDITIONS OTHER THAN DISHONORABLE" AUTHORIZES THE VA TO EXCLUDE ONLY SERVICE MEMBERS WHOSE CONDUCT WOULD JUSTIFY A DISHONORABLE DISCHARGE CHARACTERIZATION

In granting and barring access to veteran services, the VA must act within the statutory authority granted by Congress. The statutory scheme for limiting eligibility based on misconduct in service has two elements: mandatory criteria and discretionary criteria.[2] The discretionary element derives from the statutory requirement to provide most services only to service members separated "under conditions other than dishonorable."[3] Congress authorized the VA to decide whether service members were separated under "dishonorable conditions," including authority to define standards of "dishonorable conditions" by regulation. These regulations must of course set forth a permissible interpretation of the statute.

This section discusses the extent of the VA's authority to define the contours of "dishonorable conditions." It explains the source of the VA's rulemaking authority, and it presents interpretive guidance from the statutory scheme, the legislative history and binding interpretive caselaw. These sources provide clear instruction to the VA on what types of conduct Congress considered "dishonorable" for the purposes of forfeiting access to veteran services. Because the VA's current regulations fail to implement Congressional intent, they should be amended.

A. The statute gives the VA limited discretion to deny "veteran status" to service members separated under "dishonorable conditions"

The statutory scheme for limiting eligibility for veteran services based on military misconduct includes two elements. The first element of the statutory scheme is a minimum conduct standard incorporated into the definition of a "veteran." Almost all of the services and benefits provided by the VA are furnished only to "veterans," their spouses and dependents.[4] However, not all former service members will be recognized as "veterans":

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[2] See Section II.A below, discussing 38 U.S.C. § 5303(a) and 38 U.S.C. § 101(2).

[3] 38 U.S.C. § 101(2).

[4] E.g., id. § 101(13) ("The term 'compensation' means a monthly payment made by the Secretary to a veteran because of … ."); id. § 101(14) ("The term 'pension' means a monthly or other periodic payment made to a veteran because of … ."); id. § 1710(a)(1)(A) ("The Secretary shall furnish hospital care and medical services which the Secretary determines to be needed to any veteran for a service-connected disability … ."); id. §

> A veteran is a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.[5]

The requirement for separation "under conditions other than dishonorable" establishes a threshold level of in-service conduct that is necessary for recognition as a "veteran," and thereby to receive veteran services.

The statute provides no definition for the term "dishonorable conditions." The use of the phrase "dishonorable conditions," as opposed to "dishonorable discharge," requires an independent assessment of whether actual conduct was dishonorable rather than simply adopting the judgment given by the Department of Defense (DOD) at separation.[6] The statute does not define that conduct standard explicitly, which leaves the VA with authority to adopt a standard by regulation,[7] so long as that regulation is a "reasonable interpretation of the statute."[8] Where "Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."[9]

The second element of the statutory scheme is a list of six specific offenses that will "bar all rights of such person under laws administered by the Secretary."[10] The statute disallows services to people discharged for any of the following reasons, unless the person was "insane at the time of the offense":

- By sentence of a general court-martial;
- For conscientious objection, when the service member refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority;
- For desertion;

2012(a)(1) ("[T]he Secretary … shall provide to a recipient of a grant … per diem payments for service furnished to homeless veterans … .").

[5] 38 U.S.C. § 101(2).

[6] See Camarena v Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683 (Fed. Cir. July 7, 1995); see also section II.B below.

[7] 38 U.S.C. § 501.

[8] Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009).

[9] Id. at 218 n.4.

[10] 38 U.S.C. § 5303(a), (b), (c).

- For an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence;

- By resignation by an officer for the good of the service;

- By seeking discharge as an alien during a period of hostilities.

38 U.S.C. § 5303(a), (b), (c).

The two elements of the statutory scheme differ in several ways. Whereas the first element provides a general "dishonorable conditions" standard for exclusion, the second element lists specific prohibited conduct. Because the VA has defined the first element in a regulation,[11] its criteria are commonly called the "regulatory bars"; because the second element's criteria are specifically defined in statute, with limited need for regulatory refinement for the definition, its criteria are called the "statutory bars."[12] Although they speak to the same ultimate issue (*i.e.*, whether a service member's conduct bars access to VA services), they are two distinct requirements that must be independently satisfied to establish eligibility.

The number of people excluded by each element differs substantially. Most of the statutory criteria are recorded in DOD data, so it is possible to estimate the number of people they exclude. For example, of all the service members discharged in FY2011, at most 1,297 people are barred by statutory criteria (see

Table 1). That amounts to only 1% of all enlisted service members discharged after entry level training.[13]

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[11] 38 C.F.R. § 3.12(d). The content of this regulation is explained in section III.B below.

[12] E.g., U.S. Dep't of Veterans Affairs, Adjudication Procedures Manual, No. M21-1 pt. III.ii.7.1.a ("On receipt of a claim, review all evidence to determine if there is a statutory or regulatory bar to benefits.") [hereinafter Adjudication Procedures Manual].

[13] This excludes uncharacterized discharges. Discharge data was obtained by a DOD FOIA request, see Table 20 below.

Table 1: Number of enlisted service members discharged in FY2011 who are excluded from VA benefits by statutory criteria

Statutory bar	# excluded
Discharge by general court-martial	< 726[14]
Desertion	< 548[15]
AWOL for more than 180 days not warranted by compelling circumstances	
Conscientious objector who refused to perform military duties	< 23[16]
An alien who requests their release during wartime	n/a[17]
Total	**< 1,297**

In contrast, the regulatory criteria that the VA has established to define "dishonorable conditions" exclude approximately 7,000 people discharged each year since 2001—nearly seven times as many service members as excluded by the statutory bars.[18] In other words, approximately 4 out of every 5 former service members denied veteran services are excluded on the bases of the VA's own discretionary criteria rather than Congressional requirement.

[14] Data provided in the Annual Report of the Code Committee on Military Justice FY 2011. The actual figure is probably lower. This is the number of people sentenced to a discharge at a General Court-Martial, but some of these convictions may have been suspended or set aside on appeal.

[15] This figure is the number of enlisted separations with Interservice Separation Code 1075, based on data obtained by a FOIA request to the DOD. Interservice Separation Code 1075 is used for discharges for desertion or for AWOL for at least 180 days, therefore this figure includes two of the statutory bars. The actual figure may be less than this, because the VA has discretion to give eligibility to people who were AWOL for more than 180 days if there were "compelling circumstances" to warrant the absence.

[16] This figure is the number of enlisted separations with Interservice Separation Code 1096, based on data obtained by a FOIA request to the DOD. Interservice Separation Code 1096 is used for discharges for conscientious objectors. The actual figure may be less than this, because the statute only bars conscientious objectors who also refused to wear the uniform or perform military duties.

[17] This data is not reported by the DOD. Available information suggests it likely is a very small number.

[18] See Section IV below for a discussion of the outcomes of current regulatory standards.

Table 2: Comparison of the two elements of the statutory scheme

	"Statutory bars"	"Regulatory bars"
Statutory authority	38 U.S.C. § 5303(a,b)	38 U.S.C. § 101(2)
Scope of prohibited conduct per statute	Six specified bases: desertion, general court-martial sentence, etc.	Separation "under dishonorable conditions"
VA's responsibility for interpretation	Criteria are defined by Congress	Criteria are defined by VA rulemaking
Regulatory implementation	38 C.F.R 3.12(b, c)	38 C.F.R 3.12(a, b, d)
The number of people excluded	At most 1,297 service members discharged in FY11, or 1% of all service members.[19]	About 7,000 service members discharged in FY11, or 5.8% of all service members.[20]

B. Congress intended the "dishonorable conditions" standard to exclude only people whose conduct would merit a dishonorable discharge characterization

Although the statute does not set forth an express definition for "dishonorable conditions," the statutory text, statutory framework, and legislative history leave very limited scope for interpretation.[21] The statutory context shows clearly that Congress intended the "dishonorable conditions" requirement to exclude only those whose behavior merited a dishonorable discharge characterization by military standards. Congress authorized the VA to exclude people who *did receive or should have received* a dishonorable characterization, but not to exclude those who did not deserve a dishonorable characterization.

The language of the statute itself supports this limitation. The word "dishonorable" is a term of art when used in the context of military service, and it must be assumed that Congress chose that term in order to adopt its existing meaning.[22] There is no reason to believe that

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[19] See
Table 1 below and accompanying text.

[20] See Table 11 below and accompanying text.

[21] "Ambiguity is a creature not of definitional possibilities but of statutory context." Brown v. Gardner, 513 U.S. 115, 118 (1994) (citing King v. St. Vincent's Hospital, 502 U. S. 215, 221 (1991).

[22] "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." Morissette v. United States, 342 U.S. 246, 263 (1952);

Congress intended the VA to create a new definition for this term when "dishonorable" has a settled meaning within the context of military service. If Congress wanted to adopt a new standard it would have used a new term, such as "unfavorable," "disreputable," "unmeritorious," or "discreditable." It did not do so.

This conclusion is further supported by the legislative history of how that term was chosen. The current statutory scheme was established with the 1944 Servicemen's Readjustment Act,[23] known as the "G.I. Bill of Rights", and it remains essentially unchanged today.[24] That law enacted the two elements of the statutory scheme identified above: it made benefits available only to service members discharged under "conditions other than dishonorable,"[25] and it barred services when discharge resulted from specified conduct.[26] The Senate had originally proposed to use the term "dishonorable discharge" for the first element, in which case the military's discharge characterization would have conclusively resolved eligibility. Congress, however, changed the term to "dishonorable conditions" in response to a specific concern about people who should have obtained a dishonorable discharge but who evaded a court-martial for administrative or practical reasons. The Senate Report thus explained that:

> A dishonorable discharge is affected only as a sentence at a court-martial, but in some cases offenders are released or permitted to resign without trial—particularly in the case of desertion without immediate apprehension. In such cases benefits should not be afforded as the conditions are not less serious than those giving occasion to dishonorable discharge by court-martial.[27]

Branch v. Smith, 538 U.S. 254, 281 (2003) ("[C]ourts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes."); Reno v. Koray, 515 U.S. 50, 57 (1995) ("'It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms,' since Congress is presumed to have 'legislated with reference to' those terms." (citation omitted)).

[23] Pub. L. No. 78-346, 58 Stat. 284 (1944).

[24] A cosmetic change took place with the codification of veterans laws in 1958. Pub. L. No. 85-857, 72 Stat. 1105 (1958). The original statute had not incorporated the "dishonorable conditions" standard into a definition of "veteran," as is the case today. The original statute simply stated that a separation "under conditions other than dishonorable is a prerequisite to entitlement to veterans' benefits." The 1958 codification incorporated the criteria into the definition of "veteran." This did not change the underlying standard or the statutory framework.

[25] Pub. L. No. 78-346, § 1503.

[26] Id. § 300.

[27] S. Rep. No. 78-755, at 15 (1944) (emphasis added).

Congress recognized that in some circumstances a service member might receive a characterization different than what they actually deserved. To account for this, Congress gave the VA authority to deny eligibility if the service members' service was in fact dishonorable under the military standard, even if they did not receive that punishment in service.[28]

The legislators themselves said explicitly that they intended the VA to exclude only people whose service would merit a dishonorable characterization under existing standards. The House Report explained how it intended the phrase "dishonorable conditions" to be used:

> If such offense [resulting in discharge] occasions a dishonorable discharge, or the equivalent, it is not believed benefits should be payable.[29]

The Senate Report on the bill provided a similar explanation of the term:

> It is the opinion of the Committee that such [discharge less than honorable] should not bar entitlement to benefits otherwise bestowed unless such offense was such ... as to constitute dishonorable conditions.[30]

Individual legislators involved in drafting the bill repeated this in floor debates, for example:

> If [the service member] did not do something that warranted court-martial and dishonorable discharge, I would certainly not see him deprived of his benefits.[31]

And:

> We very carefully went over this whole matter [of choosing the "dishonorable conditions" standard]…. This is one place where we can do something for the boys who probably have "jumped the track" in some minor instances, and yet have done nothing that would require a dishonorable discharge.[32]

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[28] See also Hearings Before the H. Comm. on World War Veterans' Legislation on H.R. 3917 and S. 1767 to Provide Federal Government Aid for the Readjustment in Civilian Life of Returning World War Veterans, 78th Cong. 415-16 (1944) [hereinafter House Hearings on 1944 Act]; President's Comm'n of Veteran Pensions (Bradley Comm'n), Staff of H. Comm. on Veterans Affairs, Discharge Requirements for Veterans Benefits, Staff Report No. 12, (Comm. Print. 1956) [hereinafter Bradley Commission Staff Report].

[29] H. Rep. No. 78-1418, at 17 (1944) (emphasis added).

[30] S. Rep. No. 78-755, at 15 (emphasis added).

[31] House Hearings on 1944 Act, *supra* note 28, at 419.

[32] 90 Cong. Rec. 3077 (1944).

These statements show that Congress intended the "dishonorable conditions" requirement to adopt the existing meaning of and standard for "dishonorable" discharge.

Congress chose the "dishonorable" term deliberately. All of the services had used intermediary characterizations between "honorable" and "dishonorable" for decades, including "without honor," "bad conduct," "undesirable," "ordinary," and "under honorable conditions."[33] The drafters knew about this range of discharge characterizations,[34] and knew that an "other than dishonorable" standard would create eligibility for service members with service that was not honorable. Congress could easily have adopted any of those lesser standards for eligibility, but did not.

Congress adopted the "dishonorable" term despite specific requests to adopt more stringent standards. Senior military commanders expressly requested that Congress adopt a higher characterization as the eligibility standard, and this request was considered both in committees and in the full Senate.[35] The bill's sponsor acknowledged the commanders' request, explained to the full Senate that it had been "considered very carefully both in the subcommittee on veterans affairs and in the Finance committee and in the full committee itself," and reported that the Committee had chosen to adopt the "dishonorable" standard instead.[36] The bill passed that day.

Indeed, the bill revoked eligibility standards associated with higher discharge characterizations. Previously, each veteran benefit had its own eligibility standard, and Congress had used a variety of criteria for excluding service members based on conduct in service.[37]

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[33] For a history of discharge characterizations, see Hearings on the Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 87th Cong. 8 et seq. (1962).

[34] E.g., "Many boys who do not receive honorable discharges have capabilities of being very excellent citizens. They receive other than honorable discharges. I differentiate them from dishonorable discharges for many reasons." 90 Cong. Rec. 3076-77 (1944). "You say either honorably discharged, discharged under conditions not dishonorable, or discharged under honorable conditions. Those latter two things do not mean the same thing." House Hearings on 1944 Act, *supra* note 28, at 419.

[35] 90 Cong. Rec. 3076 (1944).

[36] "Mr. President, let me say that I am very familiar with the objections raised by Admiral Jacobs. In my opinion, they are some of the most stupid, short-sighted objections which could possibly be raised. They were objections that were considered very carefully both in the subcommittee on veterans affairs and in the Finance committee and in the full committee itself." Id.

[37] For a complete list of eligibility criteria for all benefits available prior to 1944, see Bradley Commission Staff Report, *supra* note 28, at 9.

Some benefits were available only to those who received Honorable discharge characterizations;[38] others to those who were discharged "under honorable conditions";[39] others to those who received anything better than a Bad Conduct or Dishonorable characterization;[40] others to those who received anything but a Dishonorable characterization;[41] others to those who engaged in specified dishonorable conduct regardless of characterization;[42] and some benefits had no minimum conduct standard at all.[43] The 1944 act harmonized eligibility criteria among the various benefits by providing a single standard applicable to all benefits. After a long period of experimentation, the 1944 G.I. Bill of Rights represented Congress's informed and experienced judgment as to the appropriate standard. And in setting that unified standard Congress notably selected a standard that was akin to the most lenient of all of these standards, making only "dishonorable" conduct disqualifying.

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[38] E.g., health care benefits after 1933. Pub. L. No. 73-2, 48 Stat. 8 (1933) and Veterans' Bureau Regulation No. 6 (March 21, 1933).

[39] E.g., vocational rehabilitation services following WWI. Pub. L. No. 66-11, 41 Stat. 158 (1919).

[40] E.g., service-connected disability compensation and health care for WWI veterans. Pub. L. No. 65-90, 40 Stat. 398 (1917).

[41] E.g., health care benefits after 1924. Pub. L. No. 68-242, 43 Stat. 607 (1924); Pub. L. No. 71-522, 46 Stat. 991 (1930).

[42] E.g., service-connected disability compensation and vocation rehabilitation after 1924. Pub. L. 68-242 (1924). That statute barred services to veterans who were discharged due to mutiny, treason, spying, desertion, any offense involving moral turpitude, willful and persistent misconduct resulting in a court-martial conviction, or being a conscientious objector who refused to perform military duty or refused to wear the uniform.

[43] E.g., service-connected disability payments prior to WWI. Pub. L. 37-166, 12 Stat. 566 (1862).

Table 3: Evolution of conduct standards for Compensation eligibility, 1862-1944

Enactment	Conduct standard	Citation
1862	No exclusion	Pub. L. 37-166
1917	Excluded Dishonorable and Bad Conduct discharges	Pub. L. No. 65-90
1924	Excluded those discharged for specified conduct associated with Dishonorable discharges, even if no Dishonorable discharge occurred	Pub. L. 68-242
1933	Excluded any "discharge not specifically an honorable discharge." Excluded "Bad Conduct", "Undesirable", "For the Good of the Service", and "Ordinary."	Pub. L. 73-2 (1933); 38 C.F.R. § 2.0164 (1938).
1944	Excludes only service members discharged "under dishonorable conditions" or who were discharged for specified conduct associated with Dishonorable discharges.	Pub. L. 78-346

Contemporaneous official statements and analyses support the conclusion that Congress intended to exclude only service members whose conduct would have justified a dishonorable characterization. In 1946 the House Committee on Military Affairs issued a report on the use of discharges that were less than honorable but better than dishonorable. The report stated:

> In passing the Veterans' Readjustment Act of 1944, the Congress avoided saying that veteran's benefits are only for those who have been honorably discharged from service…. Congress was generously providing the benefits on as broad a base as possible and intended that all persons not actually given a dishonorable discharge should profit by this generosity.[44]

The 1956 final report of the President's Commission on Veteran Pensions, chaired by General Omar Bradley, who had been the VA Administrator during implementation of the 1944 Act, explained the "Legislative Purpose" behind the "dishonorable conditions" eligibility requirement as follows:

> The congressional committees which studied the measure apparently believed that if the conduct upon which the discharge was based could be

[44] H. Rep. No. 79-1510, at 8 (1946) (emphasis added).

> characterized as dishonorable the veteran should be barred from any benefit; if it could not be so characterized, the veteran should be eligible.[45]

This finding is supported by a detailed Staff Report by the Commission.[46]

This conclusion is also the binding interpretation of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). In Camarena v. Brown, a veteran with a Bad Conduct discharge argued that the statute only permitted exclusion of veterans whose service was characterized as dishonorable by the DOD. Reviewing the text and legislative history, the Court disagreed with the claimant, finding that the phrase "dishonorable conditions" gave the VA discretion to exclude people with discharge characterizations other than fully dishonorable. The Federal Circuit, however, confirmed that congressional intent was to exclude only those who were responsible for equivalent misconduct:

> The legislative history of the enactment now before this Court shows clearly a congressional intent that if the discharge given was for conduct that was less than honorable, ... the Secretary would nonetheless have the discretion to deny benefits in appropriate cases where he found the overall conditions of service had, in fact, been dishonorable.[47]

These statements show that Congress wanted the "dishonorable conditions" bar to exclude only people whose conduct would have merited a dishonorable discharge characterization. Congress did not intend for the VA to create a new standard that would be more exclusive than the military characterization standard, and indeed did not provide it any authority to do so. Congress gave the VA independent authority to evaluate in-service conduct only in order to exclude people who should have received a dishonorable military characterization, but who avoided this due to errors or omissions by the service, and the VA's authority extends only so far as to exclude people under that standard.

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[45] President's Comm'n of Veteran Pensions (Bradley Comm'n), Findings and Recommendations: Veterans' Benefits in the United States 394 (emphasis added).
[46] Bradley Commission Staff Report, *supra* note 28, at 9.
[47] No. 94-7102, 1995 U.S. App. LEXIS 16683, at *8 (Fed. Cir. July 7, 1995) (emphasis added).

C. The "dishonorable" characterization standard only excludes service members who exhibited severe misconduct aggravated by moral turpitude or rejection of military authority

Because Congress intended the "dishonorable conditions" bar to exclude only service members whose behavior would have merited a dishonorable discharge characterization, the VA's interpretation of the term "dishonorable conditions" must replicate that standard. The statute itself, legislative history, and military practice all provide consistent guidance on what factors merit a "dishonorable" discharge.

1. Guidance in Statute

The first source for interpreting what Congress intended is the text of the statute itself.[48] Although the statute does not define "dishonorable conditions," the VA's interpretation of that term must be consistent with the overall statutory framework.[49] This section will show that the statutory framework requires the term "dishonorable conditions" to encompass only conduct as severe as what is listed in the statutory bars.

This conclusion is supported by two canons of statutory construction. First, agencies and courts should not adopt an interpretation that renders any element of the same statute superfluous.[50] That result would arise if the VA's definition of "dishonorable conditions" were so much more exclusive than the statutory bars that the VA's discretionary standard effectively eclipsed Congress's mandatory standard. There is considerable evidence that the VA's standard has done just that—rendering the statutory bars a tiny fraction of the disqualifications. Second, a general statutory term cannot be interpreted so that it provides a different outcome for an issue that was expressly addressed by Congress elsewhere in statute.[51] That result would arise in this case if the VA's definition of "dishonorable conditions" excluded people who were absent

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[48] BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

[49] "The Supreme Court has cautioned 'over and over' again that 'in expounding a statute we must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law … .' Only by such full reference to the context of the whole can the court find the plain meaning of a part." Smith v. Brown, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (quoting U.S. Nat. Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993)).

[50] "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Hibbs v. Winn, 542 U. S. 88, 101 (2004) (citation omitted).

[51] "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228 (1957) (citation omitted).

without leave for less than 180 days, because Congress has specifically spoken on this issue and expressly decided that only 180 days or more of absence should justify exclusion from eligibility.

Congress specifically endorsed this canon of interpretation in its explanation of the Act. The Senate Report explained the relationship between the "dishonorable conditions" element and the statutory bars. It stated that the statutory bars were intended to list the types of conduct that would result in a dishonorable discharge, and that the "dishonorable conditions" bar was meant to replicate this standard:

> It is the opinion of the Committee that such discharge [less than honorable] should not bar entitlement to benefits otherwise bestowed unless such offense was such, as for example those mentioned in section 300 of the bill [listing the statutory bars], as to constitute dishonorable conditions.[52]

The conduct listed in the statutory bars described the type of conduct that Congress associated with dishonorable discharges—and that Congress therefore wanted the VA to exclude.

Thus, the statutory bars provide guidance on the types and severity of misconduct that the discretionary bars may exclude. The statutory bars can be divided into two categories. One category includes conduct that rejects military authority: desertion, absence for more than six months without compelling circumstances to justify the absence, conscientious objection with refusal to follow orders, and request for separation by an alien during wartime. This does not include failures to follow rules, conflicts with superiors, or insubordination. The second category in the statutory bars includes felony-level offenses that warranted the most severe penalty: a discharge by a general court-martial or a resignation by an officer for the good of the service. Notably, that category does not exclude those discharged by special court-martial; or those discharged subsequent to a summary court-martial, both of which were already in use by 1944; or those discharged after a general court-martial that did not impose a punitive discharge. This indicates that Congress specifically intended for eligibility to be granted to people with moderate misconduct, such as misconduct that would lead to special court-martial conviction,

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[52] S. Rep. No. 78-755, at 15 (1944) (emphasis added).

misconduct that would lead to a discharge characterization less severe than "dishonorable," or unauthorized absences of up to 179 days.

2. Guidance from Legislative History

A second source for guidance on the type of conduct associated with a dishonorable discharge characterization is the set of examples offered by legislators when explaining the bill. They listed conduct that should lead to exclusion and conduct that should not lead to exclusion (see Table 4). These examples show that Congress understood "dishonorable conduct" to refer only to very severe misconduct. Congress explicitly anticipated that a wide range of moderate to severe misconduct would not result in a loss of eligibility because it was not fully "dishonorable."

Table 4: Eligibility exclusion standards according to examples in the Congressional Record

Conduct that should result in forfeiture of eligibility	Conduct that should not result in forfeiture of eligibility
• Desertion[53] • Murder[54] • Larceny[55] • Civilian incarceration[56] • Substance abuse ("chronic drunkenness") not associated with a wartime disability[57] • Shirking ("the gold-brickers, the coffee-coolers, the skulkers")[58]	• Discharge for AWOL that did not involve desertion[59, 60] • Conviction of civilian offenses that did not result in incarceration[61] • Conviction by special court-martial[62] • Violations of military regulations[63] • Substance abuse ("chronic drunkenness") associated with a wartime disability[64]

[53] Id. at 15.
[54] 90 Cong. Rec. 3076-77 (1944).
[55] Id.
[56] Id.
[57] Id.
[58] H. Rep. No. 1624, at 26 (1944).
[59] House Hearings on 1944 Act, *supra* note 28, at 190.
[60] Id. at 417
[61] Id. at 415.
[62] Id.
[63] Id.
[64] Id.

Some standards can be derived from these examples. Congress wanted to bar service members who committed crimes of moral turpitude, as shown by either civilian incarceration or a general court-martial; and Congress wanted to bar service members who rejected military authority, as shown by desertion or shirking. On the other hand, moderate or severe misconduct such as insubordination, absence without authorization, and violations of military regulations that did not warrant a general court-martial would not have resulted in a dishonorable discharge and therefore would not result in forfeiture of veteran services.

Finally, the examples show that an assessment should be based on overall service, not merely the conduct that led to discharge. This is shown, for example, by the fact that legislators wanted to ensure eligibility for wounded combat veterans discharged for repeated regulation violations, periods of absence without leave, or substance abuse,[65] even if that conduct might lead to exclusion for others.[66] This is also the binding interpretation of statute by the Court of Appeals for the Federal Circuit:

> The legislative history of the enactment now before this Court shows clearly a congressional intent that if the discharge given was for conduct that was less than honorable, ... the Secretary would nonetheless have the discretion to deny benefits in appropriate cases where he found the overall conditions of service had, in fact, been dishonorable.[67]

3. Guidance from military practice

Military law and practice provide guidelines for defining conduct that Congress considered "dishonorable."

The dishonorable discharge is authorized by Article 58a(a)(1) of the Uniform Code for Military Justice (UCMJ), and its criteria are provided in the Manual for Courts-Martial (MCM). The 2012 MCM provides a general description of conduct that justifies dishonorable characterization:

> A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of

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[65] House Hearings on 1944 Act, *supra* note 28, at 417.
[66] 90 Cong. Rec. 3076-77 (1944).
[67] Camarena v. Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683, at (Fed. Cir. July 7, 1995) (emphasis added).

> offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment.[68]

The 1943 MCM provided a Table of Maximum Punishments to identify the offenses that were potentially eligible for a dishonorable discharge characterization.[69] However, this table alone does not determine what conduct was "dishonorable" because a dishonorable discharge is not warranted in every case where it is authorized. An extensive body of military law addresses the question of what misconduct is "minor" or "serious", and it is well settled that the table of maximum punishments alone does not determine serious misconduct that deserves severe punishment.[70]

Military law provides three pieces of guidance for deciding when a dishonorable characterization is justified. First, certain conduct by its nature requires a dishonorable discharge. This includes desertion, spying, murder and rape,[71] and other civilian felonies.[72] It also includes severe moral turpitude: judge advocates were instructed to suspend dishonorable discharges "whenever there was a probability of saving a soldier for honorable service"[73] but not for offenses of moral turpitude.[74] Second, there are limited cases where a dishonorable discharge is warranted for lesser offenses if their repetition shows a rejection of military authority. The 1943 MCM stated that a dishonorable discharge might be warranted for conduct that did not itself justify a dishonorable discharge if there had been five previous convictions.[75] The 2012 MCM states that a dishonorable discharge is authorized when there have been at least three prior convictions within the prior year for crimes that did not themselves warrant a dishonorable

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[68] Rules for Court Martial 1003(b)(8)(B) (2012) [hereinafter RCM].
[69] Office of the Judge Advocate Gen. of the Army, "A Manual for Courts-Martial", at 97 et seq. (Apr. 20, 1943).
[70] See, e.g., United States v. Rivera, 45 C.M.R. 582, 584 n.3 (A.C.M.R. 1972) (possession of 8.2 milligrams of heroin that could have resulted in 10 years' confinement is a minor offense); United States v. Hendrickson, 10 M.J. 746, 749 (N.C.M.R. 1981) (a 13-day unauthorized absence is a minor offense); Turner v. Dep't of Navy, 325 F.3d 310, 315 (D.C. Cir. 2003) (indecent assault was a minor offense, taking into account seven years of prior good service).
[71] Manual for Courts-Martial ¶ 103(a) (1943) [hereinafter MCM 1943].
[72] RCM 1003(b)(8)(B). See also United States v. Mahoney, 27 C.M.R. 898, 901 (N.B.R. 1959).
[73] Cited in Evan R. Seamone, Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism, 208 Mil. L. Rev. 1, 56 (Summer 2011); see also MCM 1943 ¶ 87b, "[T]he reviewing authority should, in the exercise of his sound discretion, suspend the execution of the dishonorable discharge, to the end that the offender may have an opportunity to redeem himself in the military service unless it was an offense of moral turpitude."
[74] MCM 1943 ¶ 87b. See also United States v. Mahoney, 27 C.M.R. 898, 901 (N.B.R. 1959).
[75] Id. ¶ 104c.

discharge.[76] Third, in all cases, a dishonorable discharge may only be applied after consideration of a full range of mitigating factors.[77] These include age, education, personal circumstances, work performance, quality and duration of service, and health factors.[78] In general, military law holds that misconduct is not severe where the commander responded with non-judicial punishment under Article 15 of the UCMJ. This form of punishment is only available when the commander decides, based on the circumstances of the offense, that misconduct was minor.[79] Military law treats this as compelling evidence that, when applying the required analysis of mitigating factors, the misconduct should be considered minor.[80]

Early VA practice adopted this standard. The first regulation stated that "dishonorable conditions" existed where there was a discharge for: mutiny; spying; moral turpitude; or "willful and persistent misconduct, of which convicted by a civilian or military court."[81] The first three criteria clearly reflect serious military and civilian misconduct. For the fourth criterion, the requirement for persistent convictions ensured that only misconduct severe enough to warrant repeated prosecution would be a basis for eligibility exclusion. Early VA practice applied this standard. The first review of VA practice on this matter was conducted in 1952 by an Army judge advocate.[82] The author reviewed VA decisions on this point and found that eligibility would probably be denied for a service member given a Bad Conduct discharge if the service member had previously been convicted twice for two other offenses.[83] By implication, lesser disciplinary actions, such as administrative actions, reduction in rank, non-judicial punishments, or single court-martial convictions, would not establish a history of recidivism sufficient to warrant a "dishonorable" characterization service.

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[76] Manual for Courts-Martial ¶ 1003(d) (2012) [hereinafter MCM 2012].
[77] Id. pt. V.1.e. (An otherwise serious offense under this rule may still be considered minor based on "the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, [and] record and experience."); RCM 1005(d)(5) ("Instructions on sentence shall include: A statement that the members should consider all matters in extenuation, mitigation and aggravation.")
[78] MCM 2012 pt. V.1.e. See, e.g., Military Judges' Benchbook, DA Pam 27-9 ¶ 2-5-13.
[79] MCM 2012 pt. V.1.e.
[80] Middendorf v. Henry, 425 U.S. 25, 31-32 (1976) (in determining whether an offense is "minor," the adjudicator will first question whether it was the subject of Article 15—nonjudicial—punishment, as "Article 15 punishment, conducted personally by the accused's commanding officer, is an administrative method of dealing with the most minor offenses").
[81] 11 Fed. Reg. 8731 (Aug. 13, 1946).
[82] William Blake, Punishment Aspects of a Bad Conduct Discharge, 1952 JAG J. 1, 5 (1952).
[83] Id. at 8-9.

The same standard of "dishonorable" conduct applies today. More punitive discharges are characterized as Bad Conduct rather than Dishonorable, because the Bad Conduct discharge was not adopted across the military branches until the enactment of the Uniform Code of Military Justice in 1950.[84] In order to account for this change, a historical comparison should look at overall punitive discharge rates, combining both Dishonorable and Bad Conduct discharges. The rate for punitive discharges has not changed over time.

4. Synthesis of guidance on standards for "dishonorable" characterization

The section above described standards for "dishonorable" conduct from statutory text, legislative history, and military practice. These sources all provide similar standards that can be summarized as follows.

First, most misconduct is not "dishonorable." It is only appropriate for offenses "requiring severe punishment." This leaves a large range of misconduct that is culpable, that is punishable, that is not honorable, and that may justify separation, but that does not warrant a "dishonorable" characterization. This has been a fact of military justice and administration since 1896.[85] Congress and the military services had long recognized that "dishonorable" only describes the most severe forms of misconduct. The 1944 G.I. Bill of Rights clearly states that lesser forms of misconduct should not forfeit eligibility.

Second, a dishonorable characterization is appropriate after a single offense for military offenses that show a rejection of military authority: desertion, spying, mutiny, and absence without leave for 180 days. This does not include military offenses of insubordination, conflicts with chain of command, or absence without authority for less than 180 days. Military law treats these as discipline problems, not as evidence of dishonorable character.

Third, a dishonorable characterization is appropriate after a single offense for crimes of moral turpitude or civilian felonies.

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[84] The Bad Conduct discharge had been used in the Navy and Marine Corps since the18th century, but was not adopted by the Army and the Air Force until the enactment of The Uniform Code of Military Justice, Pub. L. 81-506, 64 Stat. 107 (1950).

[85] 1 William Winthrop, Military Law and Precedents 848-49 (2d ed. 1896).

Fourth, repeated misconduct shows dishonorable character only where each act is itself severe enough to warrant punitive action through court-martial, and only after repeated failures to rehabilitate. In general, misconduct that is punished with non-judicial punishment under Article 15 of the UCMJ is minor and does not show dishonorable character.

Finally, a "dishonorable" characterization is only appropriate after considering a full range of mitigating factors.

D. Administrative discharges for misconduct generally do not indicate "dishonorable conditions."

By only excluding service members whose conduct would justify a dishonorable discharge, Congress intended the VA to grant eligibility to most people with administrative discharges for misconduct.

There are two categories of military discharges: punitive and administrative. "Punitive discharges" are issued as a sentence at a court-martial. Punitive discharges may be characterized as "Dishonorable" or as "Bad Conduct."[86] All other forms of discharge are administrative discharges, issued not as a punitive sentence at court-martial but as a purely administrative action when a person is not considered suitable for continued service.[87] The DOD has provided the military branches with instructions on what circumstances might justify an administrative separation, such as end of enlistment[88] or pregnancy.[89] These administrative discharges may be characterized as "Honorable," "General (Under Honorable Conditions)," or "Other Than Honorable."[90]

Under military law and regulations, some misconduct may warrant an administrative non-punitive discharge. The DOD authorizes administrative discharges for misconduct that does not involve a court-martial conviction.[91] These discharges may be characterized as Other Than

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[86] UCMJ art. 56a.
[87] "It is DOD Policy that … Separation promotes the readiness of the Military Services by providing an orderly means to Evaluate the suitability of persons to serve in the enlisted ranks of the Military Services based on their ability to meet required performance, conduct, and disciplinary standards." U.S. Dep't of Def., DOD Instruction 1332.14 – Enlisted Administrative Separations ¶ 3.a.1. (Jan. 27, 2014) [hereinafter DODI 1332.14].
[88] Id., Enclosure 3 ¶ 1.
[89] Id., Enclosure 3 ¶ 3.a.4.
[90] Id., Enclosure 4 ¶ 3.a.1.a.
[91] Id., Enclosure 3 ¶ 10.

Honorable,[92] which indicates a "significant departure from the conduct expected of" service members,[93] but not misconduct so severe that it warrants a punitive discharge, such as "minor disciplinary infractions,"[94] "conduct prejudicial to good order and discipline,"[95] or "discreditable involvement with civil or military authorities."[96] Although this discharge has negative consequences for the service member, including stigmatization, it is not intended as punishment; its purpose is to separate a service member whose behavior, while not dishonorable, does not conform to expectations for military conduct.[97] This intermediary category of discharge—neither under honorable conditions nor dishonorable—is not an error or oversight. Military justice and administration recognize that some misconduct is *undesirable* without being *dishonorable*, and the administrative separation for misconduct exists to provide a proportional response to this intermediary level of indiscipline.[98] Although the names and criteria for these non-punitive discharges have changed over time, this basic structure of military discharges has been in place for over a century.[99]

The question that the 1944 G.I. Bill answered is what support, if any, should be provided to service members in this intermediary category, whose service was neither under honorable conditions nor dishonorable. Its clear answer is that most or all service members in this category should receive these readjustment services.

First, this is shown by the fact that Congress chose the "dishonorable" characterization standard, rather than other standards that were available at the time. Previous laws had excluded service members with administrative discharge characterizations less than Honorable.[100] The Compensation eligibility regulation in place when the G.I. Bill was enacted excluded these

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[92] Id., Enclosure 3 ¶ 10.c.
[93] Id., Enclosure 4 ¶ 3.b.2.c.1.a.
[94] Id., Enclosure 3 ¶ 10.a.1.
[95] Id., Enclosure 3 ¶ 10.a.2.
[96] Id.
[97] E.g., "[A] Chapter 10 [administrative discharge for misconduct] is administrative and non-punitive." United States v. Smith, 912 F. 2d 322, 324 (9th Cir. 1990); "An undesirable discharge does not involve punishment. It reflects only that the military has found the particular individual unfit or unsuitable for further service." Pickell v. Reed, 326 F. Supp. 1086, 1089-90 (N.D. Cal.), aff'd, 446 F.2d 898 (9th Cir.), cert. denied, 404 U.S. 946 (1971).
[98] See RCM 306(c), advising separation as one of several methods for disposing of misconduct through administrative action rather than punishment.
[99] 1 William Winthrop, Military Law and Precedents 848-49 (2d ed. 1896) (describing the use of the "Without Honor" characterization by the Army).
[100] See Section II.B above.

discharges by name, barring eligibility for "an 'undesirable discharge,' separation 'for the good of the service,' an 'ordinary discharge' (unless under honorable conditions) or other form of discharge not specifically an honorable discharge."[101] By revoking this standard, the 1944 bill clearly intended to create eligibility for these characterizations.

Second, Congress only justified excluding service members with discharges better than "dishonorable" when the military branch erred. Legislators stated that they wanted to exclude those who received discharges better than dishonorable only when the service members should have received a dishonorable discharge, but administrative error or omission by the military branch prevented this.[102] If, however, a service member correctly received a non-punitive discharge for misconduct—because their conduct was undesirable but not dishonorable—then Congress wanted them to retain eligibility. While Congress knew that *some* errors or omissions would occur, and gave the VA authority to account for those, Congress never alleged that *most* such discharges were erroneous.[103] Because most discharges are correctly issued, and correctly-issued administrative discharges for misconduct should be eligible, most such discharges should provide eligibility.

Third, Congress recognized that administrative separation procedures have fewer safeguards against error or unfairness than punitive discharges, and they explicitly wanted to give veterans the benefit of the doubt by providing eligibility to these service members. Congress listed several examples of situations where a person might unfairly receive an administrative discharge for misconduct, such as when they received unfavorable discharges because it was an expedient way to downsize units,[104] or when service members "run afoul of temperamental commanding officers."[105] Congress knew that these unfair situations arise, and extended eligibility to service members with administrative discharges for misconduct to ensure that they were not excluded. The sponsor of the House bill said:

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[101] 38 C.F.R. § 2.0164 (1938).
[102] See Section II.B above.
[103] This is consistent with the presumption of regularity that governs VA interpretations of DOD actions. "The 'presumption of regularity' supports official acts of public officers. In the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties. United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926)." Butler v Principi, 244 F.3d 1337, 1340 (Fed. Cir. 2001).
[104] 90 Cong. Rec. 4348 (1944); 90 Cong. Rec. 4454 (1944).
[105] 90 Cong. Rec. 4454 (1944).

> I want to comment on the language 'under conditions other than dishonorable.' Frankly, we use it because we are seeking to protect the veteran against injustice.... We do not use the words 'under honorable conditions' because we are trying to give the veteran the benefit of the doubt, because we think he deserves it… we do not want the committee or the Congress to cut off a hand in order to cure a sore thumb.[106]

The Chairman of the House Committee echoed this sentiment, with reference to the number of petitions relating to unfair discharges that would otherwise arise:

> I am for the most liberal terms, and I will tell you why… If this is not the case, we would have 10,000 cases a year, probably, of private bills [from people seeking record corrections to obtain veteran benefits]. I believe that the most liberal provision that could go into this bill should be adopted, and the most liberal practice that could be reasonably followed should be pursued. [107]

Congress gave this "benefit of the doubt" by extending eligibility to people with administrative discharges less than "under honorable conditions."[108] This intent is only effectuated when most or all administrative discharges for misconduct receive eligibility.

Congress's skepticism about the fairness of administrative discharge characterizations is still valid today. Unlike punitive discharges, where judicial proceedings ensure some degree of consistency and fairness, administrative discharge regulations permit widely divergent outcomes based on the same circumstances. Consider the case of a single positive drug test: one commander could refer the service member to a special court-martial which could sentence a Bad Conduct discharge under UCMJ Article 112a; another commander could withdraw the court-martial referral and convene an administrative separation board in lieu of court-martial, which generally receives an Other Than Honorable discharge;[109] another commander could refer the service member to rehabilitation, and if the person uses drugs again the commander could

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[106] House Hearings on 1944 Act, *supra* note 28, at 415, 417.
[107] Id. at 419-20.
[108] This does not refer to the "benefit of the doubt rule," 38 U.S.C. § 5107. That rule is an instruction to the VA for how to evaluate uncertain facts against clear eligibility criteria. Nor does this refer to 'Gardner's Rule' of statutory construction, where ambiguity in legislation should be construed in veterans' favor. Brown v. Gardner, 513 U.S. 115, 118 (1994). Here, the congressional standard is already clear, and Congress referred to the "benefit of the doubt" only to explain why it set its clear standard as liberally as it did. The VA does not need to apply any "benefit of the doubt" in order to arrive at a liberal eligibility standard, because Congress incorporated its "benefit of the doubt" into clear statutory instructions.
[109] DODI 1332.14, Enclosure 3 ¶ 11.b.

pursue an administrative separation for Drug Rehabilitation Failure, which generally receives an Honorable or General characterization;[110] and finally another commander could impose non-judicial punishment and permit the service member to complete their service. This degree of command discretion in administrative separation proceedings permits wide discrepancies in how individuals are treated based on race,[111] their mental health condition,[112] leaders' personalities,[113] history of sexual assault,[114] or other factors. The uneven application of administrative discharge standards is clearly apparent in discharge rates between military branches. While services' punitive discharge rates are generally similar, varying between 0.3% in the Navy and 1.1% in the Marine Corps, their use of administrative discharges varies tremendously. The use of administrative disparity is *20-fold*: between 0.5% in the Air Force and 10% in the Marine Corps.

Table 5: Discharge characterizations, FY2011

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
Army	81%	15%	3%	0.6%	0.1%
Navy	85%	8%	7%	0.3%	0.0%
Air Force	89%	10%	0.5%	0.5%	0.0%
Marine Corps	86%	3%	10%	1.0%	0.1%
Total	**84%**	**10%**	**5%**	**1%**	**0.1%**

This difference between services is due to administrative policies, not individual merit. The Government Accountability Office has done a thorough study on discharge characterization

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[110] Id., Enclosure 3 ¶ 8.b.

[111] M.R. Walker, An Analysis of Discipline Rates Among Racial/Ethnic Groups in the U.S. Military, Fiscal Years 1987-1991 (1992); Def. Equal Opportunity Mgmt. Inst., Dep't of Def., Report of the Task Force on the Administration of Military Justice in the Armed Forces (1972). Racial disparities in discharge characterizations still exist.

[112] Combat veteran Marines with PTSD diagnoses are 11 times more likely to be discharged for misconduct. R.M. Highfill-McRoy, G.E. Larson, S. Booth-Kewley, C.F. Garland, Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines, BMC Psychiatry (Oct. 25, 2010).

[113] For a discussion of how command philosophies result in differing outcomes for equivalent facts, see Gen. Accountability Office, Rep. No. FCP-80-13, Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Is Needed (1980) [hereinafter GAO Report].

[114] See Human Rights Watch, Embattled: Retaliation Against Sexual Assault Survivors in the US Military (2015).

disparities between services.[115] It documented that this range of discharge practices reflects differences in leadership and management styles, not degrees of "honor" in different services:

> Simply stated, different people get different discharges under similar circumstances, and the type of discharge an individual gets may have little to do with his behavior and performance on active duty.[116]

The GAO compared discharges of Marines and Airmen with the same misconduct history, service length, and performance history, and found that the Air Force was 13 times more likely than the Marine Corps to give a discharge under honorable conditions.[117] Military leaders justified their practices with unit-level considerations, not individual merit: some believed that expeditious termination was in the best interest of the services, while others believed that maximizing punishment helped reinforce unit discipline.[118]

The clear implication of an "other than dishonorable" standard is that Congress intended service members with characterizations higher than "dishonorable" to retain eligibility. This includes those who were administratively separated for misconduct with Other Than Honorable discharges, a non-punitive characterization two steps above "dishonorable." While Congress anticipated that some people in this category would receive those characterizations in error, exclusion of those service members was meant to be the exception rather than the rule.

E. The clear intent of Congress to exclude only service members whose conduct merits a dishonorable characterization advances the statute's purpose and goal.

The purpose of the statute was to support the "readjustment" of people leaving the military.[119] The services created in the bill were intended to compensate, indemnify, or offset actual losses experienced by service members: compensation if a disability limits a service member's ability to work; health care if they were disabled during service; vocational rehabilitation for those whose disabilities require them to learn new trades; income support for those whose careers were disrupted by wartime military service; education for those who do not

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[115] GAO Report, *supra* note 113. While that study is now 35 years old, the disparities between services' discharge characterizations has only widened since that time, indicating that its findings are still valid.
[116] Id. at ii.
[117] Id. at 29-33.
[118] Id. at 32.
[119] Pub. L. No. 78-346, 58 Stat. 284 (1944).

have a civilian trade after several years of military service. These were not rewards for good performance, they were basic services to make up for actual losses or harms experienced while in the military.

Because the services were intended to help readjust from actual harms or losses, it is appropriate that Congress should withhold that support only in the most severe cases of misconduct. The question is not whether a service member performed so well that they earned a reward, but whether they performed to poorly that they should forfeit care and support services. As one of the House drafters explained:

> "[A service member] gets an unfavorable discharge, and yet he may have been just as dislocated as anyone else. He may be just as needy of the help and the benefits that are provided under this act."[120]

The House Committee on Military Affairs reaffirmed this position two years later:

> Every soldier knows that many men, even in his own company, had poor records, but no on ever heard of a soldier protesting that only the more worthy should receive general veterans' benefits. "This man evaded duty, he has been a 'gold bricker,' he was hard to live with, yet he was a soldier. He wore the uniform. He is one of us." So they feel. Soldiers would rather some man got more than he deserves than that any soldier should run a chance of getting less than he deserves.[121]

Legislators also justified the expansive eligibility standard in terms of social cost. If the government does not correct for these actual losses experienced during service, then worse outcomes are likely to follow.[122] A Senator explained that purpose this way:

> We might save some of these men. . . . We may reclaim these men but if we blackball them and say that they cannot have [veteran services] we will confirm them in their evil purposes.[123]

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[120] House Hearings on 1944 Act, *supra* note 28, at 416.
[121] House of Representatives Committee on Military Affairs Report No. 1510, 79th Congress 2d Session, "Investigation of the National War Effort" (January 30, 1946) at 9.
[122] For a discussion of the social costs that result from military criminalization of behavioral health problems, see Evan R. Seamone, et al., Moving Upstream: Why Rehabilitative Justice in Military Discharge Proceedings Serves a Public Health Interest, 104 Am. J. Public Health 1805 (Oct. 2014).
[123] 90 Cong. Rec. 3077 (1944).

By creating a "dishonorable" standard, Congress decided that forfeiture of these readjustment services should be rare. This ensured fairness to service members who have in fact made sacrifices for the military, and it minimized the social cost that may result from abandoning veterans who need services.

Congress created other benefits that it intended only as a reward for exceptional performance, and for these benefits it created a higher eligibility standard. The 1984 Montgomery G.I. Bill was intended to incentivize enlistment and reward good service, rather than offset actual losses.[124] Congress created an elevated eligibility standard for that benefit, requiring a fully Honorable discharge characterization of service.[125] Similarly, Congress limits unemployment benefits[126] and Federal veteran hiring preferences[127] to those discharged under honorable conditions. These elevated standards are appropriate where the purpose of the benefit it to induce and reward good service.

Congress specifically rejected the idea that readjustment services should be given only as rewards for good service. The chief of the Bureau of Naval Personnel had requested that services only be provided to veterans discharged under honorable conditions, so that they could be used as rewards for good service:

> [Under the "other than dishonorable" standard] benefits will be extended to those persons who will have been given bad-conduct and undesirable discharges. This might have a detrimental effect on morale by removing the incentive to maintain a good service record.[128]

He requested that Congress adopt an "honorable conditions" standard, and that request was formally considered both in committee and by the full Senate at floor debates. Congress rejected this request. The Senator who sponsored the bill was a former Army Colonel and future judge

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[124] "The purpose of this chapter are ... to promote and assist the All Volunteer Force Concept of the Armed Forces by establishing a new program of educational assistance based upon service on active duty .... to aid in the recruitment and retention of highly qualified personnel." 38 U.S.C. § 1401(2) (1985) (as enacted by Pub. L. No. 98-525, § 702(a)(1) (Oct. 19, 1984), now codified as 38 U.S.C. § 3001(4) (2015)).

[125] 38 U.S.C. § 3011(a)(3) (2015). Other education benefits since then have also used the Honorable discharge characterization standard.

[126] 5 U.S.C. § 8521(a)(1)(A).

[127] Id. § 3304(f)(1).

[128] 90 Cong. Rec. 3077 (1944).

on the U.S. Court of Appeals for the D.C. Circuit. He summarized the drafting committee's response as follows:

> I am very familiar with the objections raised by Admiral Jacobs. In my opinion, they are some of the most stupid, short-sighted objections which could possibly be raised. They were objections that were considered very carefully both in the subcommittee on veterans affairs and in the Finance committee and in the full committee itself.[129]

Faced with a request to limit eligibility to veterans discharged under honorable conditions, Congress rejected this in the strongest possible terms.

In sum, Congress provided several justifications for expanding eligibility for readjustment services so that they only exclude those who showed dishonorable conduct. First, the services respond to actual harms or losses, and support for these disabilities or opportunity costs should be withheld only reluctantly. Second, service is inherently praise-worthy and every service member has earned at least some gratitude from the nation. Third, military commanders' administrative decisions are highly uneven, and so guaranteeing that all deserving veterans receive timely services means serving some who might not be as deserving. Finally, our society suffers when military veterans are denied mental health or other services, and it is in everyone's interest that these needs be met. The purpose of the 1944 G.I. Bill was to correct, compensate, or indemnify actual losses incurred by those who served our nation's armed forces, and narrow or burdensome eligibility criteria would frustrate that purpose if they prevented deserving service members from accessing services they need.

F. Neither Congress nor the Courts have endorsed the VA's interpretation of this statute

Congressional intent may be inferred when Congress endorses an agency's interpretation. In this case, Congress has repeatedly re-enacted the same statutory language as originally adopted in 1944. Ordinarily this might suggest that Congress agrees with the VA's interpretation of the statute. However, two facts contradict this.

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[129] Id. at 3076-77 (emphasis added).

First, neither of the two Congressional committees with jurisdiction over this statute have ever held a hearing on it. Witnesses periodically raise the issue,[130] and occasionally the issue arises tangentially to a different matter under investigation,[131] but neither Committee has directly investigated it in a hearing. The most closely-related hearings were those held in 1977 to discuss special discharge upgrade programs that had changed characterizations for certain Vietnam-era veterans. Those hearings resulted in legislation that prohibited the VA from granting eligibility to people who received those discharge upgrades unless they were also found eligible under existing "other than dishonorable" standards.[132] However, none of the hearings discussed the adequacy of the VA's standards. Instead, the legislators' interest was to avoid unequal treatment for different wartime eras. In fact, they specifically encouraged the VA to adopt more inclusive standards. The House Report on the bill stated:

> One of the most disturbing aspects of the special discharge review program is the singling out of a limited class of former military personnel as the beneficiaries of favorable treatment. . . . [T]he President could partially remove one of the greatest injustices in the program by providing that the same criteria for upgrading the discharges of this special class of service persons as a matter of equity be made available to veterans of all periods of war. [133]

Not only did Congress not endorse the VA's standards at the time, they invited the Executive to expand eligibility more broadly. It has not done so.

Second, public and official statements by the VA have misrepresented its practices in critical aspects. As discussed in detail in Section IV.E below, official communications to the Senate Veterans Affairs Committee in 2013[134] and the House Minority Leader in 2015[135] both

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[130] See, e.g., Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs, 103d Cong. 116 (1994) (written testimony of Jonathan Shay, M.D., Ph.D.); Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents: A Community Perspective: Hearing Before the H. Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs, House of Representatives, 103d Cong. 106 (1993) (written testimony of Warren Quinlan, New England Shelter for Homeless Veterans).

[131] See, e.g., Hearing on S. 1307 Before the S. Comm. on Veterans Affairs Eligibility for Veterans' Benefits Pursuant to Discharge Upgrading, 95th Cong. 344 et seq. (1977).

[132] Pub. L. No. 95-126, § 4, 91 Stat. 1106, 1108 (1977).

[133] H. Rep. No. 96-580, at 13 (1977), *reproduced in* Hearing on S. 1307 Before the S. Comm. on Veterans Affairs Eligibility for Veterans' Benefits Pursuant to Discharge Upgrading, 95th Cong. 597 (1977).

[134] Attached herein as Appendix B.

[135] Attached herein as Appendix C.

made significant, substantive errors in describing how it implements this statute. Under these conditions, Congressional approval cannot be inferred from Congressional silence.

Nor have the Courts ever endorsed the VA's interpretation of this statute. No court has ever passed on the interpretive questions raised by this Petition. Instead, the only remotely related case decided merely that the VA had authority to promulgate regulations that could exclude service members with discharge characterizations other than dishonorable *at all*.[136] The Federal Circuit did not address the limits of the VA's authority to do so, only deciding that the Department was not categorically barred from disqualifying former servicemembers with discharge characterization better than dishonorable. Petitioners do not dispute that the VA has that authority. But, as explained above, the VA may only lawfully exercise that authority where the conduct at issue would have justified a dishonorable discharge.

The VA's interpretation of this statute is unlikely to receive deferential treatment. Courts defer to Agency interpretations of statutory terms only when Congress delegated interpretive authority,[137] when the text, context and history of the statute leave doubt as to Congressional intent,[138] and when the Agency proposes a permissible interpretation of the statute.[139] Here, Congress has provided the VA with a specific standard that has existing meaning under law, the Department squarely lacks authority to adopt a different standard.[140] Furthermore, the text, context and history of the statute provide clear guidance—in some cases numerical standards[141]—on what that standard should be. If any ambiguity remains, courts will resolve that doubt in favor of the former service member. The Supreme Court has long ago recognized that the "solicitude of Congress" to service members requires courts and agencies to

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[136] Camarena v Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683 (Fed. Cir. July 7, 1995).
[137] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).
[138] Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984).
[139] Id.
[140] The VA's authority to define "dishonorable conditions" is further eroded by the fact that the DOD, a different agency, has principal responsibility for administering that standard. The VA does not have the technical expertise that typically justifies Chevron deference. A similar situation exists under immigration statutes, where the Bureau of Immigration Affairs must decide some cases based in part on criminal histories. Because the BIA does not adjudicate criminal offenses, Courts have held that the BIA has no special administrative competence to define criminal law terms and the BIA's regulatory interpretations of those terms deserve no special deference. See, e.g., Marmolejo-Campos v. Holder, 558 F.3d 903, 907-8 (9th Cir. 2009).
[141] I.e., the standard for how long an absence without leave should justify exclusion, 38 U.S.C. § 5303(a).

interpret veteran legislation generously.[142] That is particularly true here as the relevant question is whether the government will recognize a veteran's service at all.[143] Such a grave decision cannot be made without express Congressional instruction, and the VA would be acting outside its authority to create new exclusions that Congress did not provide.

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[142] Henderson v. Shinseki, 562 U.S. 428, 440-1 (2011) (explaining "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); see also Kirkendall v. Dep't of the Army, 479 F.3d 830, 844 (Fed. Cir. 2007) (en banc) (applying the "canon that veterans' benefits statutes should be construed in the veteran's favor").

[143] This canon was applied to the question of whether a service member's conduct forfeits eligibility for basic veteran benefits in Wellman v. Wittier, 259 F.2d 163 (D.C. Cir. 1953). A 1943 Act barred veteran benefits to former service members "shown by evidence satisfactory to the Administrator of Veterans' Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States." 57 Stat. 554, 555 (1943). The VA terminated benefit eligibility to a WWII veteran who was found to have "rendered assistance to an enemy of the United States" based on his participation in Community Party activities in Michigan during the Korean conflict. The Court held that "while [the statute] authorizes a determination by the Administrator upon 'evidence satisfactory to' him, his ruling … is not simply discretionary with him. If it depends upon an erroneous interpretation of the law, it may be subject to review by the courts." Wellman at 167-68. The Court found that the VA's interpretation of the statue was invalid because it imputed a more exclusive standard than Congress had expressly provided. "The strict interpretation necessary as to so drastic a forfeiture statute … requires that it be limited in its application to the specific grounds spelled out by Congress, with clear proof of the overt acts relied upon. Thus, if the Administrator has exceeded his authority in the determination he makes, his ruling becomes arbitrary or capricious in the legal sense. He may not deny a right which the statute creates, except for validly and legally sufficient grounds." Id.

III. CURRENT REGULATIONS

The VA has defined the term "dishonorable conditions" with three regulations. One regulation, 38 C.F.R 3.12(a), defines what service members will require an individual review prior to receiving services. A second regulation, 38 C.F.R 3.12(d), lists conduct that shows "dishonorable" service. A third regulation, 38 C.F.R 3.12(b), rebuts a "dishonorable" characterization where mental health problems rise to the level of "insanity." In addition, VA policies have created an implied requirement for "honorable" service. The following sections describe these standards and how they are applied.

A. Requirement for individual review: 38 C.F.R. § 3.12(a)

VA regulations first divide service members into two broad groups: those that it treats as presumptively eligible, and those that require individual review of conduct prior to recognition as a "veteran." Nothing in statute instructs the VA to automatically include or exclude anybody, and discharge characterizations mean different things in each service,[144] so in principle the VA could require individual character of discharge reviews for every service member. But that would be highly inefficient, and the VA has reasonably adopted a rule providing presumptive eligibility in many instances.

The VA's current regulations waive pre-eligibility review for service members with "Honorable" and "General Under Honorable Conditions" discharge characterizations. This is accomplished by 38 C.F.R. § 3.12(a):

> A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

The use of the phrase "is binding" might suggest that this requirement is imposed by statute or caselaw. It is not. The VA adopted this regulation in 1964 voluntarily, without any statutory obligation to do so.[145]

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[144] See Section IV.H below for a discussion of differences between discharge characterizations in different branches.

[145] This rule was added in 28 Fed. Reg. 123 (Jan. 4, 1963). Compare 38 C.F.R § 3.12 (1963) with 38 C.F.R § 3.12 (1964). The authority for that rule making was the Secretary's general authority to make rules of adjudication, 38 U.S.C. § 501(a), not any specific Congressional mandate.

This rule does not guarantee eligibility for these service members. Veterans Health Administration (VHA) eligibility staff and Veterans Benefits Administration (VBA) rating officials typically approve eligibility for service members with Honorable and General characterizations without further evaluation,[146] but this does not guarantee eligibility. The regulation only waives the regulatory bars, not the statutory bars, because the VA does not have the authority to waive statutory criteria. Thus, a service member who violated a statutory bar, but who nevertheless received a General or Honorable characterization at discharge[147] or from a Discharge Review Board,[148] is ineligible for VA services, notwithstanding the VA's waiver of individual review under 38 C.F.R 3.12(a). Furthermore, Congress has prohibited the VA from binding itself to discharge characterizations issued by certain Vietnam-era discharge review programs.[149] For these reasons, 38 C.F.R 3.12(a) does not guarantee eligibility for people with Honorable and General discharges. Instead, it creates presumptive eligibility so that they may receive services without a prior eligibility review. If the VA later identifies that the person's eligibility is in question, it will conduct a review and terminate eligibility if required. This is a practical measure to ensure that services for the large percentage of eligible veterans are not delayed because of concerns about the few who are ineligible.

> ***Josh Redmyer.*** *Marine rifleman with over seven years of service. After four years of service and three combat tours to Iraq and Afghanistan, he started using drugs to self-medicate symptoms of PTSD and received an OTH discharge. His drug use and behavior problems led to divorce from his wife and separation from children. He sought PTSD treatment from the VA and was turned away because of his discharge. An independent advocate helped him start an eligibility application. Although the duration of his service makes it likely that he will become eligibility for VA benefits, the VA will not provide services until it completes its COD review, typically a 3-year process.*

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[146] Adjudication Procedures Manual, M21-1MR pt. III.v.1.B.5.c (a formal finding to determine veteran status is not required for Honorable and General discharge characterizations) [hereinafter Adjudication Procedures Manual]; Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (2009) (a Character of Discharge review is not required for Honorable and General discharge characterizations).

[147] See, e.g., Title Redacted by Agency, No. 10-32 746 (Bd. Vet. App. Dec. 7, 2012) (ordering a remand for a conscientious objector with an Honorable discharge characterization do determine whether the service member is barred from VA services by the statutory bar at 38 U.S.C. § 3505(a), 38 C.F.R. § 3.12(c)(1)).

[148] Discharge characterizations provided by Discharge Review Boards do not waive statutory bars. 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(f), (g)). Discharge characterizations provided by Boards for Correction of Military (Naval) Records do waive statutory bars. 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(e).

[149] 38 U.S.C. § 5303(e) (1977); 38 C.F.R 3.12(h); Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.9.

In contrast, the regulation prohibits most services from being provided to people with Other Than Honorable, Bad Conduct, or Dishonorable characterizations until they receive an individual review—a process that the VA calls a "Character of Discharge Determination" (COD).[150] The procedure for reviewing conduct is highly burdensome on both the VA and the service member. For the VA, it requires a separate adjudication based on a close reading of a full service record and any other evidence that the service member submits. The VA is unequipped to actually adjudicate all of these claims: although the VA requires eligibility review for about 7,000 service members discharged each year,[151] the VA only completes reviews for about 4,600 per year.[152] For the service member, it creates a major delay to receiving services. The average length of pending claims is currently 600 days,[153] indicating that the average time to complete one of these claims is almost four years.

The obstacles are even greater for service members seeking health care. Whereas the VBA routinely commences an eligibility review whenever a less-than-honorably discharged service member files a claim for compensation or pension, the hospital facilities of the VHA do not. Instead, the VHA regularly turns away such service members when they seek health care and treatment and does not initiate a COD Determination at all. Indeed, the VHA amended its Eligibility Determination Handbook in April of this year to remove instructions about how to initiate an eligibility determination.[154] In its place, the Handbook now refers generally to the "other than dishonorable" requirement but does not instruct staff to request an eligibility determination. VHA staff are left piecing together disparate regulations to figure out, for example, how to start that service member's enrollment process and whether he or she may be eligible based on a prior term of service.[155] As a result, there is a de facto denial of health care for deserving service members; they will be denied by default and may believe—incorrectly—that they are categorically ineligible.

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[150] See Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.
[151] See Table 20 below and accompanying text.
[152] See Table 17 below and accompanying text.
[153] As of September 2015, the average claim pending time for End Product that include character of discharge decisions was over 600 days. This indicates that the time to completion is about 1,200 days.
[154] Compare Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (Nov. 5, 2009) with Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(c) (Apr. 3, 2015).
[155] Cf. 38 U.S.C. §§ 5100, 5102, 5107; 38 C.F.R. §§ 3.150, 17.34, 17.36(d)(1).

Even if the VHA does initiate an eligibility review, present policies prohibit VHA medical centers from providing tentative eligibility for health care while COD review is underway. When an application for health care is filed and eligibility cannot immediately be established, current regulations allow a VA facility to provide care based on "tentative eligibility" to those who will "probably" be found eligible.[156] But the regulation limits "tentative eligibility" to emergency circumstances and recently discharged service members, and implementing guidance excludes less-than-honorably discharged veterans from receiving tentative eligibility.[157] Some service members may be granted "humanitarian care," but this is only available for emergency treatment, it is provided at the hospital's discretion, it may be revoked at any time, and the service member must pay for any services provided.[158] Service members in that situation, even ones who may ultimately be found eligible, are simply unable to receive timely health care from the VA.

E. I. *Army sniper who earned the Combat Infantryman Badge in Iraq. After one year in Iraq, he received an OTH discharge after a series of 4 arguments with his supervisor on one day. He was denied VA eligibility three times, until an attorney assisted him and a Senator intervened on his behalf.*

K. E*. Served the Navy for five years, but a positive drug test and an off-duty citation for public drunkenness led to an OTH discharge. He is now homeless in San Francisco but unable to access VA health care.*

B. Definition of conduct rising to the level of "dishonorable conditions" of service: 38 C.F.R 3.12(d)

VA regulations describe what conduct shows "dishonorable conditions" as follows:

> (d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

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[156] 38 C.F.R. § 17.34.
[157] Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(b) (Nov. 5, 2009); 38 C.F.R. § 17.34; 38 FR 28140, 28141 (May 14, 2013) (explaining that only Honorable and General discharges qualify for tentative eligibility because those are the only cases where eligibility "probably will be established").
[158] 38 U.S.C. § 1784; 38 C.F.R. § 17.101.

> (1) Acceptance of an undesirable discharge to escape trial by general court-martial.
>
> (2) Mutiny or spying.
>
> (3) An offense involving moral turpitude. This includes, generally, conviction of a felony.
>
> (4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.
>
> (5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

There are no data as to which bases are most frequently applied in Regional Office decisions. However, an analysis of all Board of Veterans' Appeals (BVA) decisions on this issue between 1992 and 2015 shows that the "willful and persistent misconduct" element is the basis for 84% of "dishonorable conditions" decisions by BVA judges.

Table 6: Denials based on regulatory bars in BVA decisions, 1992-2015[159]

38 C.F.R. § 3.12(d) criteria	Percentage
(1) OTH discharge in lieu of GCM	6%
(2) Mutiny or spying	0%
(3) Moral Turpitude	10%
(4) Willful and Persistent Misconduct	84%
(5) Aggravated Homosexual Acts	0.2%

[159] Source: analysis of 999 BVA decisions issued between 1992 and 2015, on file with author. These figures do not include decisions where eligibility was denied based on the statutory bars, nor decisions where eligibility was denied without a specific factual finding under 38 C.F.R. § 3.12(c) or (d).

1. Willful and persistent misconduct

The "willful and persistent misconduct" bar is the most common basis for denial because it is an extremely expansive and vague standard. It plausibly encompasses almost all conduct that would lead to any form of misconduct discharge.

The VA has defined "willful misconduct" to include intentional action that is known to violate any rule, or reckless action that has a probability of doing so.[160] It does not require that the conduct have led to a court-martial or even a non-judicial punishment. The only substantive limitation is that "misconduct" does not include "mere technical violation of police regulations,"[161] and it does not include "isolated and infrequent use of drugs."[162] If the misconduct is "a minor offense" then the adjudicator may consider whether overall quality of service mitigates the misconduct, as discussed below, but this does not mean that "minor" misconduct is ignored. Even minor offenses constitute "willful misconduct" that can be a basis for finding "dishonorable" service. For example, BVA decisions have justified eligibility denial in part on absences as short as 2 hours and 18 minutes,[163] and 30 minutes.[164]

> ***J. E.*** *Marine with two Iraq deployments who was diagnosed with PTSD while still in service. He was cited for talking to his sergeant with a toothpick in his mouth, and was then discharged for a single positive drug test. Denied VA eligibility for "willful and persistent misconduct."*

The term "persistent" only means multiple incidents of misconduct, or misconduct that lasts more than one day. It may mean any sequence of any misconduct citations, even if they are not related to each other and even if they are spread out over time. For example, "willful and persistent misconduct" was found for a service member who had a non-judicial punishment in 1998 for off-duty alcohol use, a second non-judicial punishment in 1999 for visiting an unauthorized location, and a discharge in 2001 for a positive drug test.[165] The term "persistent"

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[160] 38 C.F.R. § 3.1(n)(1) ("Willful misconduct means an act involving conscious wrongdoing or known prohibited action … (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.").
[161] 38 C.F.R. § 3.1(n)(3).
[162] 38 C.F.R. § 3.301(c)(3).
[163] Title Redacted by Agency, No. 12-19246 (Bd. Vet. App. May 5, 2015).
[164] Title Redacted by Agency, No. 96-01792 (Bd. Vet. App. Jan. 30, 1996).
[165] Title Redacted by Agency, No. 04-04453 (Bd. Vet. App. Feb. 17, 2004).

has also been interpreted by some Veterans Law Judges to mean a single absence without leave lasting more than a day, effectively depriving the "persistent" term of genuine force.[166] Although other decisions have applied the "persistent" standard more narrowly,[167] the regulation permits a very expansive interpretation of this term.

The regulation provides a limited opportunity to consider the quality of overall service as a mitigating factor if discharge resulted from "a minor offense." The Court of Appeals for Veterans Claims (CAVC) has interpreted "a minor offense" to mean only misconduct that does not "interfere[] with … military duties."[168] Because most military misconduct relates to military duties in some way, this exception is very limited. In practice, the standard for "minor offense" varies widely. One decision found that an absence of one week was "not minor,"[169] while another concluded that an unauthorized absence for 5 months was "minor."[170] If misconduct was not "minor," then there is no opportunity to consider overall service. For example, one BVA decision noted "exemplary service" during the first Persian Gulf War, but denied eligibility because the underlying misconduct, absence without leave of one week, was "not minor."[171] Even when the misconduct is found to be "minor," the regulation allows it to be mitigated only by service that is "meritorious." That is a very high standard. The VA does not consider all military service as inherently meritorious: even combat service is not meritorious because that is simply the required service of an infantryman and thus not "deserving praise or reward."[172] Even many years of proficient service cannot be considered as a potential mitigating factor.

In combination, the imprecise and expansive standards for the terms "willful," "persistent," "minor" and "meritorious" permit almost any disciplinary problems to be considered "willful and persistent misconduct." The VA trains its staff to apply the regulation according to this highly exclusive standard. For example, its training materials on this topic state

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[166] See, e.g., Title Redacted by Agency, No. 00-23 239, Bd. Vet. App. (Bd. Vet. App. Sept. 11, 2001) ("[B]ecause he spent 45 days of his service time in an AWOL status, the offense essentially occurred 45 times, i.e. once for each day he was gone, it is persistent.").

[167] For example, some decisions have found that an absence without leave is not "persistent" if its duration was less than 6% of the total service period. Title Redacted by Agency, No. 0108534 (Bd. Vet. App. Mar. 22, 2001) (finding 117 days of AWOL, which constituted 5.8% of the claimant's service, not to be willful and persistent).

[168] See, e.g., Cropper v. Brown, 6 Vet. App. 450, 452-3 (1994).

[169] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

[170] Title Redacted by Agency, No. 06-19120 (Bd. Vet. App. July 7, 2006).

[171] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

[172] See, e.g., Title Redacted by Agency, No. 0309368 (Bd. Vet. App. June 19, 2009).

that "willful and persistent misconduct" is present when there are "multiple failures to be at appointed place."[173]

> ***Orlando Tso***. *Marine rifleman who developed a drinking problem after being encouraged to join in violent and drunken hazing activities in his unit. He went to over 100 AA meetings over the course of two years, but was arrested for drinking under the influence and was given an OTH discharge after 3 years of service. Denied VA eligibility.*

2. Moral turpitude

Internal VA materials provide some additional definition of the term "moral turpitude." The M21-1 "Adjudication Procedures Manual" defines "moral turpitude" as "a willful act committed without justification or legal excuse [that] violates accepted moral standards and would likely cause harm or loss of a person or property."[174] The Manual refers to VA General Counsel Precedential Opinion 6-87, discussing the definition of "moral turpitude," but the M21-1 Manual incorrectly states the Precedential Opinion's holding, which defines "moral turpitude" as conduct that "gravely violates accepted moral standards."[175] The M21-1 omits the "gravely" qualifier, failing to capture high standard of misconduct implied by the term "turpitude." The VA has proposed a new definition that further dilutes the term by removing any reference to community standards at all. The proposed Part 5 Rewrite Project would define the moral turpitude as conduct that is "unlawful, willful, committed without justification or legal excuse … which a reasonable person would expect to cause harm or loss to person or property."[176] This proposed definition removes any reference to misconduct of an amoral character, departing significantly from accepted military, criminal, and civil caselaw that limits "moral turpitude" to offenses that involve some fraudulent, base, or depraved conduct with intent to harm a person.[177]

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[173] Character of Discharge Determination Trainee Handouts, at 7 (July 2012) (on file with authors).
[174] Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.3.c.
[175] VA Gen. Counsel Precedential Op. 6-87 (Feb. 5, 1988).
[176] 78 Fed. Reg. 71,042, 71,172 (Nov. 27, 2013) (proposed rule to be codified at 38 C.F.R. § 5.30(f)(3)).
[177] See John Brooker, Evan Seamone, and Leslie Rogall, Beyond TBD: Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary Or Punitive Discharge From The Armed Forces, 214 Mil. L. Rev. 1, 171 et seq. (2012) (hereinafter "Beyond TBD").

3. Aggravated homosexual conduct

This regulatory bar singles out one class of service members based on their sexual orientation, and excludes them for conduct that might not be used to exclude other service members with heterosexual orientation. This definition notably has not changed since (1) the repeal of "Don't Ask, Don't Tell" and (2) the Supreme Court's decisions in *Obergefell v. Hodges*, 135 S.Ct. 2071 (2015) and *United States v. Windsor* 133 S.Ct. 2675 (2013).

4. Absence of provision for considering extenuating factors

This regulatory paragraph contains no provision for considering extenuating or mitigating factors. The text of the regulation simply states that a discharge is considered to be "under dishonorable conditions" when any of the listed conduct is shown, without giving an opportunity to consider other factors. The "willful and persistent misconduct" bar includes a limited provision for considering overall service, as discussed above, but this does not apply to any other bars.

> ***Stephen Raimand***. *Combat veteran with multiple OIF and OEF deployments. He took unauthorized absence when his wife, who had eight miscarriages, threatened to commit suicide if he went on another deployment. He returned voluntarily and was sentenced to a Bad Conduct discharge. His nightmares sometimes make him vomit in the morning and he cannot drive a car safely. The VA labels him a "non-veteran" and denies all services.*

This contrasts with other provisions, where the VA has adopted a comprehensive analysis of extenuating circumstances. The VA adopted a list of factors that might mitigate the statutory bar against services to those who were absent without leave for more than 180 days. This list of mitigating factors considers hardship service conditions, disabilities, personal stressors, age, and educational background.[178] But the VA did not extend that standard to its regulatory definition of

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[178] 38 U.S.C. § 5303(a) states that an absence without leave of 180 days or more will bar services "unless warranted by compelling circumstances." The VA has defined that term at 38 C.F.R. § 3.12(c)(6): "The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence. (i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation. (ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be

"dishonorable conditions," and the CAVC has held that this omission prohibits the VA from considering these factors under its "dishonorable conditions" analysis.[179] Therefore no regulatory provision allows adjudicators to consider these extenuating factors in their eligibility decisions.

The following Board of Veterans' Appeals decision provides an example of how these considerations are formally excluded from the analysis under the VA's regulatory bars:

> The governing law and regulations do not provide for any mitigating factors in determining whether actions that are not minor offenses are willful and persistent misconduct. Therefore, assuming that the appellant now suffers from PTSD, his in-service marital problems and any PTSD are irrelevant.[180]

Similarly, the VA denied eligibility to another service member based on one fight with a noncommissioned officer and a single one-week absence, despite significant external pressures such as a PTSD diagnosis in service, "exemplary" service during the first Persian Gulf war, and having three family members murdered within the prior two years.[181]

Richard Running. *Army combat medic during invasion of Iraq, cited for "discipline, dedication, and bravery" under fire. Started to self-medicate with drugs after his return, leading to OTH discharge. He was unable to keep a job for more than 6 months after service, started to use drugs more, and ended up incarcerated. The VA labels him a "non-veteran" and denies eligibility.*

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evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began. (iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities."

[179] Winter v. Principi, 4 Vet. App. 29, 32 (1993).

[180] E.g., Title Redacted by Agency, No. 12-36342 (Bd. Vet. App. Oct. 19, 2012) ("The governing law and regulations do not provide for any mitigating factors in determining whether actions that are not minor.").

[181] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

C. Rebuttal of "dishonorable conditions" in cases of "insanity" - 38 C.F.R. § 3.12(b)

VA regulations provide only one opportunity to consider whether mental health mitigates the discipline issues that led to discharge. Congress created an exception to the statutory bars in cases where the service member was "insane" at the time of the misconduct,[182] and the VA extended that exception to its regulatory bars as well.[183]

Although the VA adopted a regulatory definition of "insanity" that could potentially reach a range of mental and behavioral health issues,[184] the VA Office of General Counsel issued a Precedential Opinion that interprets the term to require a very high degree of mental impairment.[185] In practice, Veteran Law Judges applying the Precedential Opinion's holding characterize the "insanity" exception as "more or less synonymous with psychosis,"[186] and "akin to the level of incompetency generally supporting appointment of a guardian."[187] The VA has proposed to formalize this narrow interpretation by changing its regulatory definition of "insanity" to conform with the standard for criminal insanity, requiring such "defect of reason" that the person did not "know or understand the nature or consequence of the act, or that what he or she was doing was wrong."[188]

> ***Ted Wilson***. *Marine rifleman with two purple hearts and four campaign ribbons for service in Vietnam. He was sent to combat while still 17 years old, and had a nervous breakdown and suicide attempt before his 18th birthday. He was sent back to Vietnam for a second tour involuntarily, and had a third nervous breakdown that led to an AWOL and an OTH discharge. Denied Compensation for PTSD because of his discharge.*

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[182] 38 U.S.C. § 5303(b).
[183] 38 C.F.R. § 3.12(b).
[184] "Definition of insanity. An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides." 38 C.F.R 3.354(a). The Court of Appeals of Veterans Claims has held that this definition is lower than the criminal insanity standard used in the Model Penal Code. See Gardner v Shinseki, 22 Vet. App. 415 (2009).
[185] VA Gen. Counsel Precedential Op. 20-97 (May 22, 1997).
[186] E.g., Title redacted by agency, No. 10-16336 (Bd. Vet. App. May 3, 2010).
[187] E.g., Title redacted by agency, No. 15-19246 (Bd. Vet. App. May 5, 2015).
[188] 71 Fed. Reg. 16,464, 16,468 (Mar. 31, 2006).

The narrow scope of the "insanity" exception results in limited application to behavioral health issues such as PTSD and TBI. From 1992 to 2015, the Board of Veterans' Appeals denied eligibility to 88% of service members who claimed PTSD. The BVA granted eligibility to only 3% of claimants on the basis of an "insanity" finding; 10% were granted eligibility for other reasons. For 24% of claimants with PTSD, the "insanity" exception was not even considered.

Table 7: Results of "insanity" determinations by the BVA in cases where PTSD was claimed[189]

	% of cases involving PTSD
Eligibility denied – not "insane"	63%
Eligibility denied – "insanity" not considered	24%
Eligibility granted – "insane"	3%
Eligibility granted – other reasons	10%

Three features of the regulation limit the applicability of the "insanity" exception. First, it requires that a medical doctor state that the veteran was "insane" in service,[190] even though this is not a clinically approved diagnostic term.[191] In our experience, this has made doctors reluctant to give medical opinions on this issue. Second, service members must self-identify as "insane," which is unlikely to occur in cases of behavioral health problems such as PTSD or TBI. Third, in practice the VA rarely interprets the term "insanity" as broadly as regulation allows. Veteran Law Judges typically define the term "insanity" narrowly to include only psychoses or inability to comprehend one's actions.[192] This interpretation excludes cognitive and behavioral health problems often associated with post-traumatic or operational stress that leads to misconduct discharges.

One BVA decision illustrates why the "insanity" exception has only limited applicability:

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[189] Data on file with authors.

[190] Whether a person is "insane" is a medical question that must be established by competent medical opinion. See Zang v. Brown, 8 Vet. App. 246, 254-55 (1995).

[191] Medical opinions relating to mental health must apply the diagnostic criteria of the Diagnostic and Statistical Manual 5th Edition. 38 C.F.R § 4.125(a). "Insane" is not a diagnosis in the DSM-5, nor in prior editions.

[192] E.g., Title Redacted by Agency, No. 1004564 (Bd. Vet. App. 2010) ("Generally, the predicate for insane behavior within the meaning of VA law and regulations is a persistent morbid condition of the mind characterized by a derangement of one or more of the mental faculties to the extent that the individual is unable to understand the nature, full import and consequences of his acts, such that he is a danger to himself or others.").

> Initially, the Board points out there is no claim or evidence that the appellant was insane at the time of the offenses in question that resulted in his OTH discharge. The appellant has not produced any evidence from a qualified medical doctor who has expressed an opinion that he was insane prior to, during, or after his period of AWOL.… Additionally, when asked during the Board hearing, the appellant stated he was not insane. He did say that he had been harassed and that he might have been suffering from the symptoms and manifestations of PTSD, but he was not insane.[193]

Because of these limitations, the "insanity" exception is rarely used in practice.

D. Implied requirement for "honorable" service

Some eligibility decisions have mistakenly adopted an "honorable service" requirement. Nothing in statute or regulation requires "honorable" service. Instead, statute and regulation only require that "dishonorable" service be excluded, and military law has long established that some service is less than "honorable" without being "dishonorable."[194] Nevertheless, VA adjudicators routinely state that "only veterans with honorable service are eligible for VA benefits"[195] and deny eligibility when service was "not honorable for VA purposes." Some BVA decisions also explicitly adopt an "honorable service" standard, as in the following example: "[the service member's misconduct] was not consistent with the honest, faithful, and meritorious service for which veteran's benefits are granted. Moreover, the other incidents of misconduct reflect an ongoing pattern of disciplinary offenses which were not of an honorable nature."[196]

> ***Terrance Harvey***. *Army soldier who earned the Combat Infantryman Badge for service in the First Gulf War. On his return he started experiencing post-traumatic stress symptoms and attempted suicide. He was denied leave to be with his family, but left anyway. After a 60 day absence he returned and was given an OTH discharge. He was denied services for 20 years until an attorney helped him get a discharge upgrade; his VA eligibility application was never decided.*

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[193] Title Redacted by Agency, No. 1008205 (Bd. Vet. App. 2010).
[194] See Section II.D above.
[195] See sample COD decision included as Appendix A.
[196] Title Redacted by Agency, No. 06-39238 (Bd. Vet. App. Dec. 18, 2006).

Two elements of the regulatory scheme produce this outcome. First, the regulatory definition of "dishonorable conditions" is so expansive that almost any misconduct that justifies a discharge would also justify a "dishonorable conditions" finding.[197] This is evident from the standards themselves, which provide so little substantive limitation on what conduct might be considered "dishonorable." It is also shown by the decision rates: in FY2013, the VA found that service members were ineligible in 90% of all cases it reviewed.[198] A regulatory scheme that excludes up to 90% of service members with intermediate discharges cannot be measuring "dishonorable" service, it is measuring "honorable" service.

The second feature of VA policy that encourages the use of an implied "honorable conditions" standard is that the VA's internal designation for eligible service is "Honorable for VA Purposes." A service member with a discharge characterization that is not presumptively eligible under 38 C.F.R. § 3.12(a)—those with Other Than Honorable, Bad Conduct, or Dishonorable discharge characterizations—is labeled "Dishonorable for VA Purposes" in VA's eligibility databases.[199] If the Character of Discharge review is favorable, their status will be changed to "Honorable for VA Purposes."[200] This terminology suggests that service members must show that their service was "honorable." Although this designation is administrative, it has been adopted by numerous adjudicators, for example Veterans Law Judges who state "when a service member receives discharge under other than honorable circumstances, VA must decide whether the character of such discharge is honorable or dishonorable."[201] This binary analysis is inconsistent with statute. The 1944 statute does not require that service be "honorable", it only requires that it be better than "dishonorable." Nor does the statute create new definitions of the terms honorable and dishonorable "for VA purposes." Instead, the statute requires the VA to exclude service that was "dishonorable" according to existing military law standards. The mischaracterization of service eligibility in the VA's eligibility database likely contributes to incorrect application of eligibility criteria.

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[197] The authorized bases for a non-punitive administrative discharge for misconduct are provided in DODI 1332.14 ¶ 10(a) (2014).
[198] VA FOIA Request, on file.
[199] The VHA eligibility database is Hospital Inquiry (HINQ); the VBA eligibility database is Beneficiary Identification and Records Locator Subsystem (BIRLS).
[200] See Adjudication Procedures Manual *supra* note 146 pt. III.v.1.A.4.e.
[201] E.g., Title Redacted by Agency, No. 15-19246 (Bd. Vet. App. May 5, 2015).

IV. THE CURRENT REGULATORY SCHEME IS UNJUST, INCOMPATIBLE WITH STATUTORY OBLIGATIONS, AND UNDULY BURDENSOME ON BOTH VETERANS AND THE VA

A. VA regulations are excluding current-era service members at a higher rate than at any other period in the nation's history

More service members are excluded from the VA's care and support than Congress intended, more than the American public would expect, and more than at any point in history. This is due entirely to the VA's discretionary eligibility regulations.

Overall, the VA decides that service was "dishonorable" in the vast majority of cases in which it conducts a COD review. In FY 2013, VA Regional Offices found service "dishonorable" in 90% of all cases (see Table 8). Board of Veterans' Appeals decisions since 1992 have found service "dishonorable" in 87% of its cases (see Table 9). The average for all decisions, from all eras, was 85% "dishonorable" (see Table 10).

Table 8: Character of Discharge decision outcomes at Regional Offices, FY2013[202]

Outcome	Number of decisions	%
Ineligible ("dishonorable")	4,156	90%
Eligible ("other than dishonorable")	447	10%
Total	**4,603**	

Table 9: Character of Discharge decision outcomes by the BVA, 1992-2015[203]

Outcome	Number of decisions	%
Ineligible ("dishonorable")	870	87%
Eligible ("other than dishonorable")	129	13%
Total	**999**	

[202] FOIA request to the VA on file with authors.
[203] Analysis of BVA decisions on file with authors.

Table 10: Character of Discharge decision outcomes based on era of service[204]

	Number of decisions	"Dishonorable"
WWII	3,600	89%
Korean War	6,807	85%
Vietnam War	35,800	78%
"Peacetime"	44,310	78%
Gulf War	19,269	71%
Post-2001	13,300	65%
Total[205]	**155,416**	**85%**

Those figures do not paint a full picture, however, because the number of people actually excluded from VA services also depends on the percentage of veterans who *require* a review and the percentage who *receive* one. Table 11 shows that the actual exclusion rate for current-era veterans is 6.5% of all service members who completed entry level training.[206] This occurs because, first, the VA presumes ineligibility for the 6.8% of all service members with characterizations less than General, including the large number of people with non-punitive, administrative discharges characterized as Other Than Honorable; and then, second, the VA has completed COD reviews for only 10% of those presumptively ineligible service members (see Table 10). This leaves 6% of all Post-9/11 veterans ineligible for VA services by default, because the VA requires a review but has not conducted it. While the VA has granted eligibility to 35% of current-era veterans whose service it has reviewed, this only amounts to an additional 0.3% of all service members since so few have received a review. The bottom line is that 6.5% of current era veterans who seek health care, housing or other services will be turned away.

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[204] Telephone interview with Stacy Vazquez, Director, Interagency Strategic Initiatives, Department of Veterans Affairs (June 16, 2014). Data accurate as of May, 2013.

[205] This figure is greater than the sum of each era listed above because it includes service members discharged outside those periods, such as between the Korean War period and the Vietnam War period.

[206] Service members discharged during entry level training typically received an "Uncharacterized" discharge. This petition does not address the regulations that govern this type of discharge. 38 C.F.R § 3.12(k).

Table 11: Current VA eligibility status of post-2001 service members who completed entry level training[207]

	Number	% of service members
Recognized as a "veteran"		***93.5%***
Presumed eligible (Honorable or General)	1,668,050	93.2%
Found "other than dishonorable" by COD	4,600	0.3%
Not recognized as a "veteran"		***6.5%***
Found "dishonorable" by COD	8,700	0.5%
Presumed ineligible (OTH, BCD or DD, and no COD has occurred)	108,190	6%

This is the highest exclusion rate that has ever existed. Although the VA is granting eligibility to current era veterans at a somewhat higher rate than previously (see Table 10), the VA is requiring eligibility reviews for more service members than ever before. Even when eligibility was only provided to servicemembers with fully Honorable discharge characterizations, as was the case in the Second World War period immediately prior to enactment of the current standards,[208] the exclusion rate was only 2% because 98% received "Honorable" characterizations. We have determined exclusion rates for years since then, where data is available. Table 12 summarizes that analysis.

[207] DOD FOIA Response 14-0557; telephone interview of Stacy Vazquez, Director, Interagency Strategic Initiatives, VA of Veterans Affairs on June 16, 2014.

[208] See Table 3 above and accompanying text. Prior to the 1944 statute, each benefit for veterans of each wartime period had different eligibility criteria. However the most recent eligibility laws enacted prior to WWII had required "honorable."

Table 12: Exclusion rates for selected periods of service[209]

	Recognized as "veteran"			Not recognized as "veteran"		
	Presumed eligible[210]	Found eligible by COD[211]	**Total**	Found ineligible by COD[212]	Presumed ineligible, no COD	**Total**
WWII ('41-'45)[213] *Pre-1944 standard*	6,762,863	0	**98%**		131,306	**1.9%**
Post-1944 standard	6,775,842	400	**98%**	16	117,911	**1.7%**
Korean War[214] ('50-'55)	4,004,394	997	**97%**	5,810	130,707	**3.3%**
Vietnam War[215] ('65-'75)	9,047,198	7,800	**97%**	28,000	232,180	**2.8%**
"Peacetime"[216] (76-90)	6,857,655	44,310	**96%**	34,630	277,111	**4.3%**
GWOT[217] ('02-'13)	1,668,050	4,600	**93%**	8,700	108,190	**6.5%**

The goal of the G.I. Bill of Rights was to expand access to veteran services for service members—the data show that the regulations do exactly the opposite. A dishonorable discharge characterization was and remains a rare punishment. By adopting "other than dishonorable conditions" as its eligibility standard, Congress deliberately chose to exclude people only rarely.

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[209] Complete discharge characterization data is not available for 1946-1950 and 1991-2000; COD rates are not available for 1956-1960.

[210] Service members who received characterizations other than Honorable, General Under Honorable Conditions, or Under Honorable Conditions.

[211] Telephone interview with Stacy Vazquez, Director, Interagency Strategic Initiatives, Department of Veterans Affairs, June 16, 2014.

[212] Id.

[213] Staff of H. Comm. on Veterans' Affairs, Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, Hearing Before the Committee on Veterans' Affairs on S. 1307 and Related Bills, Rep. No. 97-887, at 600-01 (Comm. Print 1977).

[214] Staff of H. Comm. on Armed Servs., Administrative Discharge Procedures and Discharge Review, Hearings on H.R. 52 Before the Subcommittee on Military Personnel of the Committee on Armed Services, Rep. No. 95-79, at 198-205 (Comm. Print 1975).

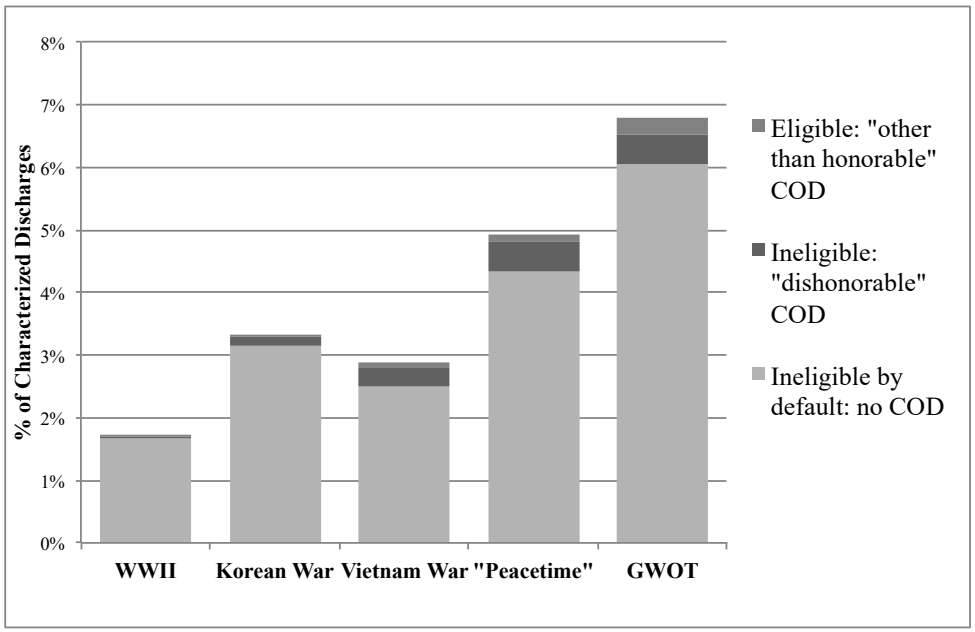
[215] Id.

[216] U.S. Census Bureau, Statistical Abstract of the United States, at Table 622 – Discharges of Enlisted Personnel, by Type: 1965 to 1979 (1980); U.S. Census Bureau, Statistical Abstract of the United States, at Table 561 – Discharges, Desertion and Absent-Without-Authority Rates for Military Personnel: 1970 to 1988 (1988); DOD FOIA Request No. 09-F-1815, Administrative Separations by Character of Service and Reason. Punitive discharge rates for 1981, 1999 and 2000 were interpolated from adjacent years' rates.

[217] DOD FOIA Response 14-0557.

This was a more inclusive standard than had prevailed in prior veteran benefit laws, and Congress knew that its new standard would expand eligibility. The Congressional record provides multiple examples of legislators explicitly acknowledging and justifying this decision, as recognized by the Federal Circuit's binding interpretation of the statute as a "liberalizing" rule.[218] The VA's current regulations violate Congress's intent by transforming that less stringent standard into a more restrictive standard, increasing more than three-fold the share of service members that are unable to receive veteran services.

Figure 1: Service members excluded from VA benefits, selected periods[219]



The historical increase in exclusion rates is due largely to the fact that VA regulations have not adapted to changes in how military branches use the administrative discharge system. When the statute was enacted, the military justice system prioritized retention and retraining.[220] Half of the soldiers who were sentenced to a dishonorable discharge by general court-martial

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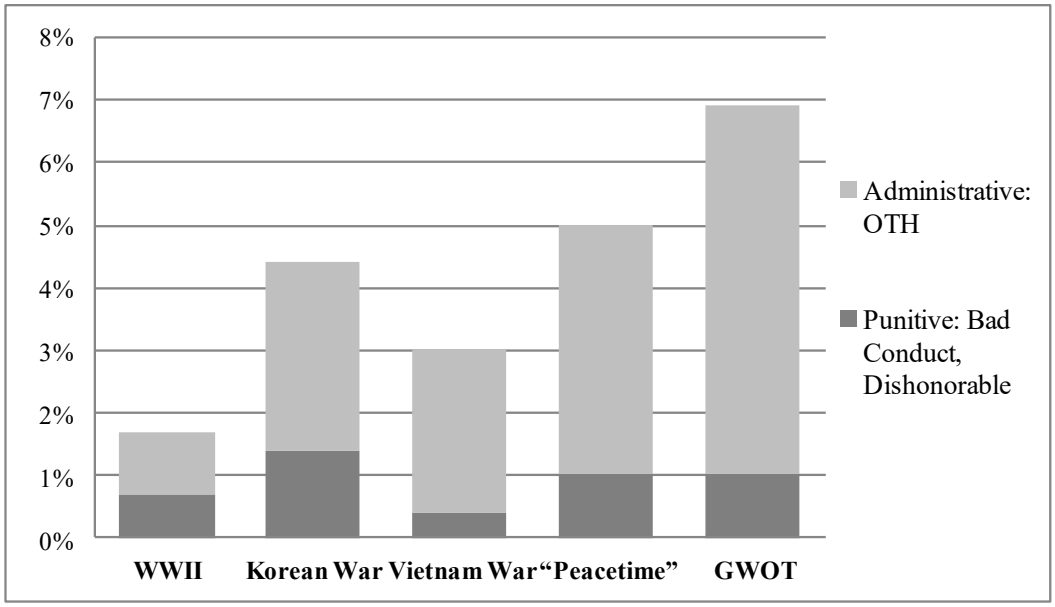
[218] "The current language of the statute derives from the Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284-301 (1944). In this enactment, Congress liberalized the discharge eligibility requirement to give the VA greater discretion in determining whether an individual's discharge was issued under 'dishonorable conditions.'" Camarena v. Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683, at *8 (Fed. Cir. July 7, 1995) (emphasis added).

[219] Sources: see Table 12.

[220] For a discussion of the history of rehabilitation and retention policies in the military, see Evan R. Seamone, Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism, 208 Mil. L. Rev 1, 40 et seq. (2011).

during WWII had their sentences suspended so that they could go on to earn an Honorable discharge.[221] Over time, the military services gradually adopted more exclusive standards. A major change happened after 1975, when the draft was repealed and the military shifted to an all-volunteer force. The professionalized volunteer military has adopted low- or zero-tolerance policies,[222] even for issues like off-duty driving while intoxicated that have no direct bearing on military service,[223] resulting in more frequent administrative separations for conduct that does not approach dishonorable characterization. Current-era veterans are not more dishonorable than those of prior eras: the rate of punitive discharges for misconduct has stayed nearly the same throughout this period (see Figure 2). Instead, administrative discharges for misconduct have increased simply because the military is more likely to discharge service members for minor or moderate discipline problems.

Figure 2: Separations related to discipline, by type, selected periods[224]



[221] Id. at 78.

[222] See, e.g., Navy Alcohol and Drug Abuse Prevention and Control, OPNAVINST 5350.4D ¶ 6.h (June 4, 2009) ("Navy's policy on drug abuse is 'zero tolerance.' Navy members determined to be using, possessing, promoting, manufacturing, or distributing drugs and/or drug abuse paraphernalia ... shall be disciplined as appropriate and processed for [Administrative Separation] as required.").

[223] See, e.g., C.H. Oliver, Marine Heavy Helicopter Squadron 362 Commanding Officer's Driving Under the Influence (DUI) Policy, http://www.1stmaw.marines.mil/Portals/65/Docs/MAG-24/HMH-362/HMH-362%20DUI%20Policy.docx (last accessed Dec. 16, 2015).

[224] See Table 12 above for data sources.

This increase in separations for minor or moderate misconduct has caused the VA's presumptive ineligibility standard to depart dramatically from Congress's intended standard. This is shown both by the aggregate exclusion data cited above, and by comparing the VA's regulatory exclusion criteria with the statutory exclusion criteria. Congress explained that it intended to discharge only service members whose misconduct was of similar severity to what it listed in its statutory bars.[225] While Congress recognized that the actual exclusion rate might be higher than the statutory exclusion rate, they should be similar. They are not. For discharges in FY2011, the statutory bars require exclusion of 1% of service members.[226] This is similar to the historical punitive discharge rate, confirming that the incidence of misconduct that Congress intended to exclude has not changed. But the VA's presumptive ineligibility standard now excludes an additional 5.5% over the number excluded by statute. This represents an extreme departure from statutory guidance.

The VA has dramatically increased the exclusion of service members, despite Congressional intent to expand access to readjustment services. This is the result of the VA's presumptive exclusion of servicemembers with administrative, non-punitive discharges for misconduct, a category that Congress intended to receive eligibility and that the military branches have increasingly relied upon to manage minor discipline issues. To reach the exclusion rates that Congress intended, and the exclusion standard that Congress intended, the VA will need to admit most or all veterans with Other Than Honorable characterizations.

B. The regulations are an impermissible interpretation of statute because they do not adopt military "dishonorable" discharge standards

The VA only has authority to adopt rules implementing the Servicemen's Readjustment Act of 1944 that are reasonable interpretations of statute. Regulations "must always "give effect to the unambiguously expressed intent of Congress."[227] Here, Congress has unambiguously circumscribed VA authority to exclude service members to those whose conduct merited a dishonorable discharge characterization. [228] The VA's current regulations exceed the

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[225] See Section II.C.1 above.
[226] See Table 1 above and accompanying text above.
[227] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014) (citation omitted).
[228] See Part II.A above.

Department's authority because they exclude service members whose conduct would not merit a dishonorable discharge characterization.

Part II.B of this Petition described the conduct that merits a dishonorable discharge characterization under standards in place when Congress enacted this statute and under current standards. It was a penalty reserved for the most severe misconduct. The authorities discussed in that section identified three factors that determine when a dishonorable characterization may be warranted:

> Based on the nature of the offense: cases of rejection of military authority, crimes of moral turpitude, or civilian felonies;
>
> Based on repeated discipline problems: where there were at least three convictions for misconduct within one year; and
>
> Not where mitigating factors are present: mitigating factors include duration of service, quality of service, hardship conditions of service, disabilities, age, education level, extenuating circumstances.

Three features of the current regulation are incompatible with this statutory standard: (1) the "willful and persistent" bar as written and as applied denies eligibility based on conduct that would not justify a dishonorable characterization; (2) the regulation does not permit consideration of mitigating factors, including overall service, for the vast majority of cases; and (3) the regulations presume dishonorable conduct for non-punitive, administrative discharges for misconduct.

1. The "willful and persistent misconduct" bar encompasses conduct that would never qualify for a dishonorable characterization.

The exclusion for "willful and persistent" misconduct is by far the most common basis for denying eligibility[229]—and it departs grossly from military-law standards for the types of repeated misconduct that would justify a dishonorable characterization. Its use renders the entire scheme defective.

As discussed in Section III.B.1 above, the primary elements of the regulation—willfulness and persistence—include no substantive minimum standard of misconduct. It can be

[229] See Table 6 above.

triggered by issues as minor as reprimands for arriving late to formation,[230] and can involve unrelated offenses spread out over the course of many years. It does not exclude minor misconduct, although it does allow minor misconduct to be offset by otherwise exceptional performance. Its definition of "minor" only requires the VA to overlook conduct that does not "interfere with military duties."

In contrast, military law strictly limits when a dishonorable characterization may be provided based on repeated low-level misconduct.[231] The 2012 Manual for Courts-Martial authorizes a dishonorable characterization when there have been three convictions within the prior year. This standard limits both the severity and the timing of misconduct that might justify a dishonorable characterization. Under military law, as interpreted by the Supreme Court, an offense that leads to a non-judicial punishment (UCMJ Article 15) is a minor offense. Therefore the requirement for three court-martial convictions ensures that minor offenses cannot lead to a dishonorable characterization. Its requirement for those convictions to arise within one year prevents service members from being judged "dishonorable" based on isolated mistakes over the course of several years. The 1943 Manual for Court-Martial permitted a dishonorable characterization after three convictions where each offense was eligible for a dishonorable characterization or after five offenses where each offense was not eligible for a dishonorable characterization. The VA's original regulatory standard for "dishonorable conditions" adopted this standard by only considering misconduct that had resulted in a court-martial conviction.

The incompatibility between the "willful and persistent" regulatory bar and its authorizing statute is shown most clearly by how the regulation treats periods of absence without leave. Congress stated explicitly in the legislative history, and implicitly in the structure of the statute, that the "dishonorable conditions" standard should exclude behavior similar to what it listed in its statutory bars.[232] In the statutory bars, Congress provided a specific standard for how much absence without leave was sufficiently severe to forfeit eligibility: at least 180 days, and even then it can be overlooked if the absence was warranted by compelling circumstances.[233] In

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[230] Character of Discharge Determination Trainee Handouts, at 7 (July 2012) (on file).
[231] See Section II.C.3 above.
[232] See Section II.C.1 above.
[233] 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c)(6).

doing so, Congress itself drew the line between AWOL that was severe enough to merit separation, and conduct that was severe enough to also warrant forfeiture of readjustment services. The statute speaks clearly "to the precise question at issue," and the VA "must give effect to the unambiguously expressed intent of Congress."[234] Indeed, as the Supreme Court has explained, "[i]t is hard to imagine a statutory term less ambiguous than … precise numerical thresholds."[235] Yet the CAVC has interpreted the "willful and persistent" regulatory standard to be satisfied with periods of absence without leave of only thirty days,[236] and the BVA has found an absense of one week to be willful and persistent[237]—entirely eclipsing the statutory 180-day standard. By "replac[ing] those numbers with others of its own choosing, [the VA has gone] well beyond the 'bounds of its statutory authority.'"[238]

Rather than adopt the military standard for a "dishonorable" characterization, the "willful and persistent" regulation more closely replicates the standard for an Other Than Honorable characterization: a non-punitive, administrative discharge *two* levels above "Dishonorable." The lowest criteria that can justify an Other Than Honorable characterization under military regulation is "Minor Disciplinary Infractions: A pattern of misconduct consisting solely of minor disciplinary infractions."[239] Like the "willful and persistent" regulation, this does not require that misconduct rise above the level of minor misconduct, it does not require any court-martial proceedings, it does not require that the offenses occur within any specific timeframe, and it can result in a higher characterization if service was "honest and faithful … [and] the positive aspects of the enlisted Service member's conduct or performance of duty outweigh negative aspects."[240] By hewing closely to the lowest standard for an Other Than Honorable characterization, the "willful and persistent" regulation plausibly excludes every service member with an Other Than Honorable characterization. This standard is facially incompatible with Congressional intent to

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[234] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[235] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014).
[236] See, e.g., Winter v. Principi, 4 Vet. App. 29, 32 (1993).
[237] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).
[238] Id. (citation omitted).
[239] DoDI 1332.14, Enclosure 3 ¶ 10.a.1 (Jan. 27, 2014).
[240] Id., Enclosure 4 ¶ 3.b.2.b (referenced by Enclosure 3 ¶ 10.c).

expand eligibility to service members with administrative, non-punitive discharges for misconduct.[241]

There are certainly VA adjudicators who produce fair outcomes by inferring substantive standards that do not exist in the regulations. They may disregard discipline issues in the record, or conclude that certain discipline issues are insufficient to justify exclusion. For example, one Veterans Law Judge explained why he was granting eligibility to a servicemember with several absences, including an absence of eighteen days:

> It is apparent that the appellant was out of place in a military environment, and it was entirely appropriate that he be administratively separated from service because of this. However, his conduct in service was not so egregious that he should be disqualified from receiving VA benefits.[242]

This is exactly the analysis that led Congress to create its "other than dishonorable" standard: some misconduct justifies separation but does not justify withholding readjustment services. However, the Veterans Law Judge made this argument to explain an outcome that the regulations did not require, or potentially even permit. Data on decision outcomes show that this type of exceptional analysis does not happen often. Numerous BVA decisions have denied eligibility due to similar or less severe misconduct because they followed the regulations as written—as, for example, the case of a veteran with "exceptional" service in the Persian Gulf, a PTSD diagnosis in service, and multiple deaths in his family, due to a one-week unauthorized absence.[243] While the first example granting eligibility is a correct application of statute, the second example denying eligibility is a correct application of the regulation—but a violation of the statute. A regulation that is facially incompatible with its organic statute is not remedied because adjudicators sometimes construe, or outright misapply, the regulation in a manner that it renders it lawful.

Data on VA decisions support this analysis. In FY2013, VA Regional Offices denied eligibility to 90% of people with characterizations less than "under honorable conditions"; the denial rate for all appeals since 1992 is 87%. Rather than exclude the people who should have

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[241] *See* Section II.D above.
[242] Title Redacted by Agency, No. 02-07752 (Bd. Vet. App. July 12, 2002).
[243] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. August 18, 1997).

received a dishonorable characterization, the VA is only including the people who should have received an honorable characterization. This is antithetical to Congress's statutory instruction.

2. The regulatory definition of "dishonorable conditions" does not consider mitigating circumstances such as overall service, extenuating circumstances, or the service member's age.

Military law permits a dishonorable characterization only after considering a broad range of mitigating factors, to include age, education, personal circumstances, work performance, quality and duration of service, and health factors.[244] Because the regulatory standard permits almost none of these to be considered for most service members, it is an impermissible interpretation of the governing statute. [245]

The regulation permits only one factor to be considered in mitigation—overall quality of service—and it permits this to be considered only for the "willful and persistent" regulatory bar, only when the "willful and persistent" misconduct consisted of "a minor offense."[246] This limited scope for any mitigating conditions departs significantly from the standard under military law which requires a consideration of a wide range of mitigating factors before imposing a dishonorable characterization. It also departs from Congressional intent as shown in the examples given by legislators of conduct that they believed should result in eligibility.

The failure of regulations to account for mitigating circumstances is shown by how combat deployments fail to influence the outcome of Character of Discharge decisions. Congress specifically stated that combat veterans should receive veteran services even if they are guilty of unexcused absence, violations of military regulations and substance abuse.[247] Under current regulations, however, contingency and combat deployments appear to have little influence on whether service is considered "other than dishonorable."

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[244] See Section II.C.3 above.
[245] See Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2013) ("[A]n agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." (quotation marks, citation and alteration omitted)).
[246] See Section III.B.4 above.
[247] House Hearings on 1944 Act, *supra* note 28, at 417.

Table 13: Results of BVA COD decisions for service members with selected contingency deployments[248]

	% "dishonorable"
All service members	87%
Vietnam deployment	85%
Any combat service	77%
OIF/OEF deployment	65%

Vietnam deployments have had no statistically significant impact on BVA evaluations of service quality. Combat service and post-9/11 deployments had only marginal effects: two out of every three service members with OEF/OIF deployments, and three out of every four with combat service, were so "dishonorable" under existing regulations that they forfeit recognition as a "veteran." This contradicts the express intention of Congress, to say nothing of public expectations for how the VA should treat former service members.

The results are even more striking if mental health is removed from the analysis. Cases where mental health may have contributed to behavior deserve special consideration, discussed in Section IV.C below. However, an assessment of overall service should take into account hardship service, even if it does not result in a mental disability. Setting aside cases where the service member claimed that PTSD was a factor, the data shows that hardship service had almost no impact on BVA eligibility decisions, and in some cases *hardship service made the BVA less likely to grant eligibility*.

Table 14: Results of BVA COD decisions for selected service members who did not claim existence of PTSD[249]

	% "dishonorable"
Vietnam deployment	92%
All service members	89%
Combat service	85%
OIF/OEF deployment	70%

[248] Analysis of all Board of Veterans' Appeals decisions between 1992 and 2015, downloaded from U.S. Dep't of Veterans Affairs, The Board of Veterans' Appeals Decision Search Results, http://www.index.va.gov/search/va/bva.jsp on September 10, 2015.
[249] Id.

The absence of mitigating factors within the VAs' discretionary criteria contrasts with the existence of mitigating factors under one of the statutory bars. Congress barred services to those who were absent without leave for more than 180 days unless the absence was "warranted by compelling circumstances."[250] The VA defined "compelling circumstances" by regulation, instructing adjudicators to look at the age, judgment, education level, service history, and health conditions of the service member to decide whether "compelling circumstances" existed, and to consider those circumstances from the perspective of the service member at that time.[251] The VA did not extend this "compelling circumstances" analysis to its regulatory bars; as a result, the VA is prohibited from considering those factors when deciding whether conduct was "dishonorable."[252]

Some VA adjudicators, recognizing the injustice and inconsistency of the regulatory scheme, take mitigating factors into account even though regulations do not permit it. For example, one Veterans Law Judge felt compelled to evaluate mitigating circumstances "in an effort of fairness":

> The Board notes that the "compelling circumstances" exception does not apply to 38 C.F.R. § 3.12(d)(4). Even so, as it appears that his February 1970 to October 1970 AWOL offense was a primary reason for his separation, the Board will, in an effort of fairness, review the record to determine whether the appellant's AWOL was based on "compelling circumstances" as understood by VA.[253]

Although adjudicators should be commended on applying the spirit of the law, rather than the letter of the regulation, the spontaneous goodwill of adjudicators does not remedy facially impermissible regulations. At best, it creates arbitrary and inconsistent outcomes, itself a regulatory deficiency discussed in section IV.D below.

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[250] 38 U.S.C. § 5303(a)
[251] 38 C.F.R § 3.12(c)(6)(i), (i), (iii).
[252] Winter v. Principi, 4 Vet. App. 29 (1993).
[253] Title Redacted by Agency, No. 09-30611 (Bd. Vet. App. Aug. 14, 2009).

3. The regulations flip the presumption of eligibility, improperly excluding more and more service members over time

Congress instructed the VA to grant eligibility to service members with intermediate characterizations—less than Honorable but better than Dishonorable—unless that characterization was granted due to an error or omission by the military.[254] In effect, Congress presumed that intermediate characterizations were properly issued and then authorized the VA to rebut the presumption.[255] The VA's regulations reverse this. It has created a rebuttable presumption of *ineligibility* for characterizations that Congress decided should generally be *eligible*, turning Congressional intent on its head.

This presumption exist both in law and in fact. It exists in law because servicemembers with Other Than Honorable discharges—administrative, non-punitive discharges for conduct that did not result in a court-martial—are classified as "Dishonorable for VA Purposes" unless and until they successfully show that their service was "Honorable for VA Purposes."[256] A veteran with an OTH discharge, even one that is disabled, that served multiple enlistments, that deployed to combat, is ineligible until he or she proves eligibility. The presumption also exists in fact, because denial rates of 90%, and reaching 100% in some Regional Offices, show that the VA places a high burden of proof on service members to overcome an assumption of ineligibility.

The effect of this error was relatively minor when military services did not use administrative, non-punitive discharges as frequently as they do today. As discussed in section IV.A above, at the time of the enactment of the G.I. Bill, it was relatively uncommon for military services to give administrative discharges for minor or moderate misconduct. Because military service used this discharge characterization rarely, the VA's reversed presumption impacted relatively few people. Over time, and particularly after the end of the draft, the use of Other Than Honorable discharges to separate people for minor or moderate misconduct has increased dramatically, now representing twice as many service members as in 1964, and six times as many as in 1944. Now, nearly 6% of all service members receive administrative, non-punitive

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[254] See Section II.B above.
[255] See Section II.D above.
[256] See Section III.D above.

discharges for misconduct, and the effect of the reversed presumption has ballooned. That controverts statutory intent and therefore must be revised.

C. The regulations fail to account for behavioral health issues such as PTSD or TBI

A dishonorable discharge characterization can only be issued after considering whether mental health conditions mitigate the misconduct. It is deeply unfair to exclude service members for behavior that is symptomatic of mental health conditions acquired in service.

It is well established that PTSD and operational stress can lead to behavior changes that military commanders incorrectly attribute to misconduct alone. PTSD, TBI, and Major Depression produce behavioral dysfunction through an exaggerated startle response, inability to control reflexive behavior, irritability, attraction to high-risk behavior, or substance abuse.[257] Some treatments induce fatigue or lethargy that also interfere with basic functioning. In fact, interference with social and occupational functioning is a primary measure of the severity of these conditions.[258] For service members on active duty, these behavioral disorders may result in infractions of unit discipline, and military services often do not treat these disciplinary infractions as symptoms of mental health risk: a 2005 study of Marines who deployed to Iraq showed that those diagnosed with PTSD were eleven times more likely to get misconduct discharges than those who did not have a diagnosis.[259] Recent press reports provide many examples of service members with early mental health trauma where their behavior in service was managed as a discipline problem rather than a mental health problem.[260] Service members

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[257] James et al., Risk-Taking Behaviors and Impulsivity Among Veterans With and Without PTSD and Mild TBI, Mil. Med., 179, 4:357 (2014); Elbogen et al., Violent Behavior and Post-Traumatic Stress Disorder in US Iraq and Afghanistan Veterans, British J. Psychiatry, 204, 368-75 (2014); Tateno et al., Clinical Correlates of Aggressive Behavior After Traumatic Brain Injury, J. Neuropsychiatry & Clinical Neurosciences (2003).

[258] See General Ratings Formula for Mental Disorders, 38 C.F.R. § 4.150 (2009).

[259] R.M. Highfill-McRoy et al., *supra* note 112.

[260] Jeremy Schwartz, "Bad Paper" Discharges Can Stymie Veterans' Health Care: Diagnosed with Post-Traumatic Stress Disorder Before He Was Kicked Out of Marines for Failing a Drug Test Without Counseling, Austin Statesman Oct. 3, 2010; Dave Philipps, Other than Honorable, Colorado Springs Gazette, May 19, 2013; Hal Bernton, Troubled Veterans Left Without Health-Care Benefits, Seattle Times, Aug. 11, 2013; Quil Lawrence, Veterans and Other than Honorable Discharges, Nat'l Pub. Radio (2013); Daniel Zwerdling, Missed Treatment: Soldiers with Mental Health Issues Dismissed for "Misconduct", Nat'l Pub. Radio (Dec. 4, 2015).

"at mental health risk" are 32% more likely to be separated from service within a year of deployment than service members not "at mental health risk."[261]

The current regulatory scheme does not take into consideration the types of mental and behavioral health problems that are most likely to cause disciplinary issues leading to discharge. The regulatory scheme provides only one opportunity for considering mental health as a mitigating factor, the "insanity" exception. As discussed above,[262] the "insanity" exception is inadequate because (1) it requires medical personnel and service members to characterize behavior as "insane," something that is not supported by psychological practice and is not common for people to do; and (2) the "insanity" exception as applied by Veteran Law Judges is so stringent that it in practice excludes the types of behavioral health problems commonly associated with PTSD, TBI, and operational stress: irritability, aggressiveness, self-medication with alcohol or drugs, self-harm or risk-seeking behavior. As a result, the "insanity" exception does not adequately account for common behavioral health problems that often explain in-service misconduct. The BVA found that the service member was "insane" in only 3% of cases where PTSD was claimed; in 24% of PTSD-related claims no "insanity" determination was made at all.[263]

Because the regulatory provision for "insanity" is so narrow, mental health appears to have little effect on eligibility decision outcomes. In cases where the service member alleged the existence of some mental health condition, the BVA found "dishonorable" service 84% of the time, which is scarcely different from the global average of 87% for all COD decisions.[264] The rates for specific conditions, including PTSD, are similar. The rate in cases of TBI is lower, however it still shows that three out of every four service members whose misconduct may be attributed to TBI are nevertheless denied eligibility.

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[261] C.S. Milliken, J.L. Auchterlonie & C.W. Hoge, Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning from the Iraq War, J. Am. Med. Ass'n (2007).
[262] See Section III.C above.
[263] See Table 7 above and accompanying text.
[264] This includes PTSD, TBI, schizophrenia, schizoaffective disorder, personality disorder, adjustment disorder, depression and anxiety.

Table 15: BVA COD decision rates for service members who allege selected mental health conditions, 1994-2015

Claimed mental health condition	Percent "dishonorable"
Average for all COD decisions	87%
Personality Disorder or Adjustment Disorder	84%
Any Mental Health condition	84%
Post-Traumatic Stress Disorder	81%
Traumatic Brain Injury	72%

The inadequacy of current regulations is even more clear when mental health is combined with hardship deployment or combat service. BVA decisions found that service was "dishonorable" for nearly 3 out of every 4 combat veterans with PTSD. That exceptionally high rate of disqualification not only violates Congress's intent but is also exceedingly poor public policy. Those are the veterans *most* in need of the mental health and medical services Congress intended to provide. And leaving so much service-acquired PTSD untreated poses risks both to the former service members and to the public at large.[265]

Table 16: BVD COD decision rates for service members who allege PTSD, 1994-2015

	Percent "dishonorable"
With combat service	73%
Contingency deployment[266] without combat service	93%

In some of these cases the mental health condition was identified only by self-reported symptomology, not a medical opinion. Thus, some of these claimed conditions may not in fact have existed at the time of misconduct. However, if even a fraction of these assertions were correct, and if the regulations were taking those conditions into account, then there would be a

[265] See Evan R. Seamone, Dismantling America's Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces, 37 Nova L. Rev. 479 (2013).

[266] Includes Vietnam, Grenada, Somalia, Iraq, and Afghanistan. Does not include Korea, because it was not possible to reliably distinguish wartime deployments to Korea from peacetime deployments.

substantial difference in exclusion rates for people claiming mental health conditions. There is not.

This is inconsistent with other VA regulations that relate to PTSD and behavior change. The VA recognizes that PTSD can lead to behavior changes including substance abuse, conflicts with colleagues, and avoidance of colleagues or work spaces.[267] In fact, a veteran can use evidence of this type of discipline problem as proof that they acquired PTSD in service in order to show service-connection for purposes of disability benefits.[268] Perversely, if those symptoms were so severe that the discipline problems led to an administrative separation for misconduct, the VA would likely characterize the service as "dishonorable" and deny eligibility. Similarly, the VA recognizes that mental health problems can present a "compelling circumstance" that would exonerate a violation of the statutory bar in cases of AWOL longer than 180 days,[269] but if that resulted in an absence of *less than* 180 days then VA regulations do not consider mental health and eligibility would most likely be denied. That result is neither permissible nor rational.

In order to remedy these deficiencies, the VA should adopt a provision providing for consideration of mental health as potential mitigation apart from the "insanity" exception, specifically instruct adjudicators to consider behavioral health issues and operational stress, and consider a medical opinion to be probative but not required.

D. Overbroad and vague regulations produce inconsistent outcomes

The regulations' broad and vague criteria produce profoundly inconsistent results. The degree of variation is so broad that the standards must be considered impermissibly arbitrary and capricious.

The sections above provided examples of contradictory results relating to what constitutes "minor" offense, how long of an absence is "persistent," whether the "insanity" exception is invoked when a person claims a mental health condition, and how severe misconduct must be to justify exclusion.[270] Inconsistency in individual decisions is most clear in

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[267] 38 C.F.R § 3.304(f)(5).
[268] Id.
[269] 38 C.F.R § 3.12(c)(6)(ii).
[270] See Section III above.

cases of absence without leave, because the severity of the offense is quantifiable and therefore comparable. There are extreme variations in outcomes: for example, one BVA decision has found that an unauthorized absence of more than 500 days is not "willful and persistent misconduct,"[271] but another BVA decision has found that an absence of only 32 days was "willful and persistent misconduct."[272] Veterans' advocates also see wide and unexplainable differences in how cases are decided, in particular wide variation in how mental health, drug use, and extenuating circumstances are accounted for, if at all.

The VA has formally acknowledged this inconsistency. In hearings before the House Armed Services Committee, which was considering changes to DOD administrative discharge rules, a VA General Counsel representative discussed how the VA treats different characterizations. The General Counsel representative acknowledged that its regulations were producing inconsistent results:

> [Congressman] White: Does the Veterans' Administration codify the criteria at all for these to be determined judgments or are these strictly human judgments?
>
> [VA Associate General Counsel] Warman: We do have a regulation that is very general.
>
> White: So there is a great room for variance?
>
> Warman: Yes, there is.[273]

The VA General Counsel made a similar statement to the House Veterans Affairs Committee in 1977 when trying to explain what kinds of conduct would result in a denial of eligibility:

> One of the problems that we have frankly is that these terms are very broad and very imprecise."[274]

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[271] Title Redacted by Agency, No. 12-32892 (Bd. Vet. App. Sept. 24, 2012).
[272] Winter v. Principi, 4 Vet. App. 29, 32 (1993).
[273] Staff of H. Comm. on Armed Servs. , Hearings on H.R. 523 to Limit the Separation of Members of the Armed Forces under Conditions Other Than Honorable, Rep. No. 92-23, at 6009-10 (Comm. Print 1971).
[274] Staff of S. Comm. on Veterans Affairs, Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, Rep. No. 97-387, at 355 (1977) (quoting statement by VA Gen. Counsel McMichael to the H. Comm. on Veterans Affairs).

But the VA has not done anything in the subsequent four decades to remedy this acknowledged problem.

Arbitrariness is also shown by wide differences between Regional Offices. In FY2013, Regional Offices adjudicated 4,603 COD decisions, and found that service was "other than dishonorable" in 10% of cases.[275] However, in the Los Angeles Regional office this figure was 0%. In Muskogee it was 2%, in San Diego it was 18%, in Boston it was 31%. These regional disparities have persisted for decades.[276]

Table 17: Selected Regional Office COD decisions, FY2013[277]

Regional Office	Number of COD decisions	% found "dishonorable"
Los Angeles	80	100%
Muskogee	100	98%
Nashville	132	98%
Cleveland	125	95%
St. Petersburg	400	91%
Average		***90%***
Buffalo	139	86%
Philadelphia	258	84%
San Diego	99	82%
Boston	39	69%
All	4,603	90%

Similarly, published decisions by the Board of Veterans' Appeals show a wide disparity in outcomes between adjudicators. Looking only at decisions by members of the Board who have decided over ten such cases, the rate of "dishonorable" findings ranges from 55% to 100%.

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[275] FOIA response, available on file with the authors.

[276] See 123 Cong. Rec. 1657 (1977) (statement of Sen. Hart) ("For example, the Denver Regional Office has indicated that in the adjudication of other-than-honorable discharge cases in 1975, only 10 percent were ruled eligible for benefits. The Minnesota VA Regional Office, on the other hand, ruled that 25 percent of those veterans with other-than-honorable discharges were eligible for VA benefits.").

[277] FOIA response, available on file with the authors.

Table 18: Outcomes of COD decisions by selected members of the Board of Veterans' Appeals, 1990-2015

Judge	% "dishonorable"
Ma***	100%
Br***	100%
Wi***	100%
Pe***	94%
La***	91%
Br***	90%
Average	***87%***
Ph***	85%
Du***	82%
Se***	67%
Da***	64%
Hi***	55%

The appeal process does not remedy these inconsistencies. The CAVC has jurisdiction to evaluate questions of law, but only has jurisdiction to evaluate questions of fact for "clear error."[278] It must accept any "plausible" factual determination by the BVA. Nor can the Federal Circuit review factual findings at all.[279] The most common basis for a "dishonorable" finding, the willful and persistent regulatory bar, is a factual standard that the CAVC cannot overturn unless the BVA result is "implausible."[280] Appellate review has thus failed to refine and remedy the prevailing standards and instead has enabled enormous disparities persist for decades.

This degree of inconsistency does not reflect error or bad faith on the part of Regional Offices or Veterans Law Judges. Instead, it is the product of the regulation's vagueness and lack of appropriate standards. Because the regulations fail to account for essential considerations, such as mitigation, overall service, and severity of conduct, adjudicators are left to impute threshold standards or impute mitigation analysis by simply overlooking certain behavior, when

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[278] 38 U.S.C. § 7261(a)(4).
[279] 38 U.S.C. § 7292(d)(2).
[280] "The BVA's determination whether a discharge is based on willful and persistent misconduct is a matter of fact which the Court reviews under the 'clearly erroneous' standard of review. Under this standard if there is a plausible basis in the record for the factual determinations of the BVA the Court cannot overturn them." Stringham v. Brown, 8 Vet. App. 445, 447-48 (1995) (internal quotations and citations omitted).

the facts of a claim are overwhelming. While this produces some appropriate outcomes, it does so rarely and inconsistently.

The VA can remedy this arbitrariness by providing clear severity standards, by mandating evaluation of overall service, and requiring consideration of mitigating factors. Relying on individual adjudicators to impute such standards, in violation of the text of the regulations, is neither lawful nor reliable.

E. The regulations are inconsistent with the VA's public and official commitments

The VA's public and official communications incorrectly describe its Character of Discharge regulations. Contrary to the plain text of its regulations and the actual practice of its adjudicators, these public commitments state that behavioral health, overall service, mitigating circumstances, and hardship service are all taken into account, and that service members can receive interim health care while eligibility is decided. Those assurances are not borne out in practice.

The table on the following page compares the actual practice discussed above with public and official statements by the VA from three sources: its public fact sheet "Claims For VA Benefits And Character Of Discharge: General Information"[281]; a presentation delivered by VA staff to the Senate Veteran Affairs Committee on May 5, 2014, "Impact of Military Discharges on Establishing Status as a Veteran for Title 38 Disability and/or Healthcare Benefits";[282] and a letter from Undersecretary for Benefits Allison Hickey to House Minority Leader Nancy Pelosi on July 31, 2015.[283]

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[281] U.S. Dep't of Veterans Affairs, Claims for VA Benefits and Character of Discharge (Mar. 2014), http://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf [hereinafter COD Fact Sheet]
[282] Included with this Petition as Attachment B [hereinafter SVAC Presentation].
[283] Included with this Petition as Attachment C [hereinafter Pelosi Letter].

Table 19: Comparison of public and official statements with actual practice on selected issues

Issue	"VA COD Fact Sheet" [i]	Official statements	Actual practice
Are mental health conditions such as PTSD and TBI taken into account?	"[T]he impact of disabilities may be considered during the analysis of any mitigating or extenuating circumstances that may have contributed to the discharge."	"VA considers medical issues, such as PTSD and TBI." (SVAC Presentation [ii]) "VA may consider behavioral health issues, specifically PTSD." (Pelosi Letter [iii])	Mental health is considered only if service members state that they were "insane" and obtain a medical opinion diagnosing "insanity." [iv] PTSD has very little effect on decision outcomes. [v]
Is the quality of prior service accounted for, including hardship service such as combat deployments?	"VA considers… performance and accomplishments during service … and character of service preceding the incidents resulting in discharge."	"VA weighs the reason for separation against the overall nature of the quality of service." (Pelosi Letter)	The quality of prior service is considered only under one of the exclusions and only when the misconduct was "minor." [vi] Combat is not inherently "meritorious" and has little effect on decision outcomes. [vii]
Is the length of service accounted for?	"VA considers…. length of service."		There is no criteria for considering length of prior service.
Are mitigating factors taken into account?	"VA considers … any mitigating or extenuating circumstances."	"VA considers … any mitigating factors." (SVAC Presentation) "VA weighs the reason for separation against … any mitigating factors, including those related to AWOL for periods exceeding 180 days." (Pelosi Letter)	The only mitigating factors that may be considered are "insanity" and overall service when misconduct was "minor." The "compelling circumstances" related to absence without leave for more than 180 days may not be applied to any regulatory bars. [viii]
Can service members obtain tentative eligibility for health care?		"[A] former Service member may be provided health care at a VA medical facility based on a tentative eligibility determination in emergency circumstances." (Pelosi letter)	VA regulations prohibit granting tentative eligibility to service members when the pending eligibility issue relates to character of discharge. [ix]

[i] Available at http://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf. [ii] Attachment B. [iii] Attachment C. [iv] See section III.C. [v] See section IV.C. [vi] See section III.B.1. [vii] See section IV.B.2. [viii] See section III.B.4. [ix] See section III.A.

F. VA regulations prevent the VA from serving homeless, suicidal or justice-involved service members

The category of presumptively-ineligible service members includes people at elevated risk of suicide, homelessness and incarceration. The denial of medical and mental health care, housing assistance, disability compensation and vocational rehabilitation for these vulnerable veterans is particularly troubling.

1. Veteran Suicide

The past few years have revealed an epidemic of veteran suicide,[284] and the government has rightly prioritized addressing this crisis. Congress passed legislation this year expanding services to veterans,[285] the VA has created additional suicide-prevention outreach and counseling services, and the President has acknowledged the moral imperative of supporting service members at mental health risk:

> Every community, every American, can reach out and do more with and for our veterans. This has to be a national mission. As a nation, we should not be satisfied -- will not be satisfied -- until every man and woman in uniform, every veteran, gets the help that they need to stay strong and healthy.[286]

The VA's character of discharge regulations prevent it from achieving this goal. The most effective response to veteran suicide is bringing those at mental health risk into VA care: veterans outside of VA care have a 30% higher rate of suicide than those under VA care.[287] Yet the VA turns away veterans who are at highest risk of suicide: service members discharged for misconduct are twice as likely to commit suicide as those with Honorable or General discharges.[288] This happens because behavioral dysfunction that is symptomatic of early mental health problems is often treated as misconduct by military commands and managed through

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[284] Alan Zarembo, Detailed Study Confirms High Suicide Rate Among Recent Veterans, L.A. Times, Jan. 15, 2015.
[285] Clay Hunt Suicide Prevention for American Veterans Act, Pub. L. No. 114-2, 129 Stat. 30 (2015).
[286] White House, Remarks by the President at Signing of the Clay Hunt SAV Act (Feb. 12, 2015).
[287] Janet E. Kemp, Veterans Health Admin., Suicide Rates in VA Patients Through 2011 with Comparisons with Other Americans and Other Veterans Through 2010 (Jan. 2014), http://www.mentalhealth.va.gov/docs/suicide_data_report_update_january_2014.pdf.
[288] M.A. Reger et al., Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the US Military, J. Am. Med. Ass'n Psychiatry (2015).

administrative separations.[289] The VA's regulations have created a suicide pipeline: the people most at risk of suicide are the ones most likely to be turned away from the most effective suicide prevention care.

2. Veteran Homelessness

Swords to Plowshares operates veteran homeless shelters funded by the VA and by other sources. Approximately 15% of its occupancy is former service members who are excluded from VA services due to their discharge characterization. Other veteran homeless shelter providers have said informally that they have similar levels of occupants that are ineligible for VA services based on character of discharge.[290] Because these characterizations only represent up to 5% of all characterized discharges, we estimate that service members with these discharges are at least twice as likely to be homeless.[291]

This prevents the VA from eliminating veteran homelessness. One of President Obama's major policy goals, in which he is joined by mayors and governors across the country, is ending veteran homelessness. The only program that provides permanent housing support, and therefore an essential part of the effort to end chronic homelessness, is the HUD-VASH program, which combines the value of a Section 8 housing voucher with the wrap-around support of VA social work and health care services. That program employs VA's health care eligibility standard and funnels eligibility determinations through VHA. For service members with Other Than Honorable discharges, who may be health care-eligible based on a service-connected disability or pursuant to a Character of Discharge Review, there is no clear path for that individual to apply for HUD-VASH, undergo an eligibility determination, and gain access to that program. As a result of VA's restrictive policies regarding eligibility and applications, national efforts to end veteran homelessness are hampered.

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[289] See Section IV.C.

[290] Research shows that veterans separated for misconduct are much more likely to be homeless. Of the subset of veterans eligible for VHA services, 5.6% were separated for misconduct – but they make up 25.6% of the homeless veteran population at first VHA encounter. Adi V. Gundlapalli et al., Military Misconduct & Homelessness Among US Veterans Separated from Active Duty 2001-2012, 314 J. Am. Med. Ass'n 832 (Aug. 2015).

[291] The VA's policy for eligibility in its GPD program has changed at least twice since January 2014. In its current practice, it is granting eligibility to some service members that are not eligible for VA benefits according to the criteria discussed in this document. More information on the evolution and current status of GPD eligibility is available from the author.

3. Veteran Incarceration

According to the Bureau of Justice Statistics, 23.2% of service members in prison, and 33.2% of service members in jail, have discharge characterizations less than General, indicating that they are presumptively ineligible for VA services.[292] The corresponding figure in the non-incarcerated population is 7%, indicating that the risk of incarceration for this group is three times the risk for other former service members.

The VA's eligibility criteria prevent it from helping veterans avoid incarceration. The VA's Veteran Justice Outreach workers, who support diversionary Veteran Justice Courts, are only able to work with VA-eligible veterans. If a local veteran's court is unable to connect a defendant with non-VA services, then they may not be able to take advantage of that treatment court. In San Francisco, 27% of veterans who are eligible to participate in the veteran's treatment court are not VA-eligible.[293] The city obtained separate funding to ensure that these veterans can take advantage of the opportunity provided by the veteran treatment court, one of the only jurisdictions in the country to do so. In other cities, these service members may not be able to participate in the diversionary court and are more likely to be incarcerated.

G. The procedures to obtain an individual review are extremely burdensome on service members and on the VA

Whereas VA regulations waive eligibility review for service members with Honorable and General discharge characterizations, [294] service members with other discharge characterizations must undergo a years-long adjudication that compares their individual service to the statutory and regulatory bars. During that period, the service member is unable to access care or support through VA because agency regulations preclude "tentative eligibility" for such

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[292] DOJ Bureau of Justice Statistics Special Report, Veterans in Prison and Jail, 2011–12 (Dec. 2015).

[293] S.F. Cty. Sup. Ct., San Francisco Collaborative Courts Veteran Justice Court Fact Sheet (Aug. 2015), http://www.sfsuperiorcourt.org/sites/default/files/images/VeteransJusticeCourtFACT%20SHEETAugust2015.pdf.

[294] 38 C.F.R § 3.12(a); Adjudication Procedures Manual pt. III.v.1.B.5.c. Service members with these characterizations enjoy a rebuttable presumption of honorable service. That presumption may be rebutted in cases when a service member received a misconduct discharge but then received a discharge upgrade from the Secretary of Defense based on certain "amnesty" or "automatic" discharge upgrade programs implemented in the 1970s. Congress mandated that the VA may not base its eligibility determination on a DOD discharge characterization issued under those circumstances. 38 U.S.C. § 5303(e); 38 C.F.R § 3.12(k). The VA must apply the usual character of service review standards as described in this document. If the VA finds that the service member does not pass the statutory or discretionary bars, their service will be found Dishonorable for VA Purposes and they will be ineligible for most or all benefits.

veterans.[295] Sometimes, the adjudication process never even commences because service members are provided misinformation and the regulations do not give VA staff concise, helpful instructions.

In practice, the large majority of veterans placed in the presumptively ineligible category never receive an eligibility evaluation from the VA. Of the 121,490 service members discharged since 2001 in that group, the VA has completed reviews for only 13,300, or 10.9%.[296] That means that about nine out of every ten veterans discharged for misconduct are denied VA eligibility without even receiving an evaluation.

There are three main reasons for why so few receive eligibility evaluations. First, in our experience, most veterans seeking health care are never considered for eligibility. VA hospitals and clinics are probably the most prominent, well-known, accessible points of entry for veterans interested in service-related benefits. When a service member with a discharge characterization less than Honorable or General goes to a VHA facility, various legal provisions counsel that VA should ask him or her about enrolling in health care; provide an application and instructions on how to apply for benefits; initiate an eligibility review; and make a written determination as to eligibility.[297] Yet, time and time again, we have seen that hospital eligibility and enrollment staff simply turn away these service members outright without providing an application or instructions and without initiating a request for eligibility review. The judgment as to ineligibility is made solely on the basis of the assigned character of service, without reference to the governing regulations or consideration of other bases for eligibility--which include a prior term of service or health care for a service-connected injury for those with Other Than Honorable discharges.[298] The failure to refer directly decreases the number of eligibility reviews conducted, and secondarily reduces the likelihood that such a veteran will apply again later or elsewhere.

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[295] See Section III.A above.
[296] See Table 10 above and accompanying text.
[297] See 38 U.S.C. §§ 5100, 5102, 5104, 5107; 38 C.F.R. §§ 3.150, 17.36. See also Eligibility Determinations VHA Handbook 1601A.02 ¶ 6(3)(c) (Nov. 5, 2009); VA Health Care, No. IB 10-448, Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits (Dec. 2011), http://www.va.gov/healthbenefits/assets/documents/publications/ib10-448.pdf.
[298] See Pub. L. No. 95-126, § 2, 91 Stat. 1106, 1107-08 (1977); see generally Eligibility Determinations, VHA Handbook 1601A.02 ¶ 5.

Second, veterans seeking homeless housing services from the VA have no method for requesting an evaluation of eligibility. For example, The Grant and Per Diem (GPD) program is implemented by grantees, not by the VA itself. GPD providers must confirm veteran eligibility through the local VHA "GPD Liaison" within three days of the client's admission.[299] The GPD Liaison's role is limited to verifying eligibility status, not adjudicating eligibility.[300] In practice, the Liaisons report that a service member is ineligible if he or she lacks a Honorable or General Discharge without conducting any individualized COD analysis.

Third, veterans are often misinformed about the fact that they may be eligible for benefits and therefore never apply. The misperception that service members without Honorable or General discharges are categorically ineligible is widespread, and even occasionally promoted by the VA's own statements. In addition to the example discussed above of VHA eligibility staff turning people away, the VA's website incorrectly states that service members with discharge characterizations less than Other Than Honorable are only eligible for insurance programs.[301] Finally, the low rates of successful eligibility reviews contribute to this misperception of ineligibility.

Even now, the law is clear that any person who served may be eligible for some benefits. What is unclear is how to initiate, navigate, and adjudicate that eligibility review process. Whether the review process starts presently depends on whether the veteran applies for service-connected compensation or pension or for housing or health care, and whether the person he or she talks to has the right information. The process of getting health care is particularly burdensome for veterans as well as staff. A recent change to the VHA Handbook worsened the problem by removing the most instructive direction to Enrollment Staff about how to process applications by such veterans in accordance with governing law.[302] Instead, staff apparently have

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[299] VHA Handbook 1162.01(1), Grant and Per Diem Program Program ¶ 12(*l*) (July 12, 2013).
[300] Id. ¶ 6(e)(2).
[301] The VA's benefits website states, for example: "Specific Benefit Program Character of Discharge Requirements: Discharge Requirements for Compensation Benefits: To receive VA compensation benefits and services, the Veteran's character of discharge or service must be under other than dishonorable conditions (e.g., honorable, under honorable conditions, general)." U.S. Dep't of Veterans Affairs, Applying for Benefits and Your Character of Discharge, http://www.benefits.va.gov/benefits/character_of_discharge.asp (last updated May 19, 2015).
[302] Compare Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (Nov. 5, 2009) with Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(c) (Apr. 3, 2015).

to piece together various laws, regulations, and guidance to figure out how to initiate a review, make a determination, and inform the veteran of that decision.

What is more, there is scant guidance regarding veterans seeking health care for service-connected injuries, including those related to combat and Military Sexual Trauma.[303] It is important to remember that Congress specifically provided that service members discharged under Other Than Honorable conditions—even those whose service is adjudicated "dishonorable"—are eligible for a health care benefits package to treat their service connected injuries. Current regulations do not implement that critical statutory mandate, leaving veterans and VHA staff without sufficient guidance.

Even when an eligibility review does commence, the process is long and onerous—for the VA as well as for the veteran. The administrative burden of adjudication is high. Regional Offices place eligibility evaluations in the Administrative Decision lane, where, compared to other claims, adjudication takes twice as long to complete.[304] The average processing time is 1,200 days—nearly four years long.[305] During that adjudication, the VA must send out multiple notices seeking information and providing opportunities for submission of evidence and hearings. Veterans may respond to those notices and expend energy collecting various records, reports, and statements. Given the correlation between a less-than-fully-Honorable discharge and conditions such as homelessness, incarceration, and suicide, the burden of responding fully and in a timely manner to those notices is quite high. In the meantime, those veterans are barred from receiving tentative eligibility for health care. Given the high rates of suicidal ideation, Post-Traumatic Stress, and other mental health conditions among this population,[306] any delay in or denial of care can have a serious impact on service members, their families and communities.

Because of these numerous obstacles, most veterans have not received an eligibility review. If the VA were to do so now, organizational overload could result. Between 2001 and

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[303] See Pub. L. No. 95-126, § 2, 91 Stat. 1106, 1107-08 (1977); 38 U.S.C. § 1720D; Military Sexual Trauma (MST) Programming, VHA Directive 2010-033 (July 14, 2010).
[304] Data from the VA ASPIRE Dashboard.
[305] In September 2015, the average claim age was approximately 600 days. This indicates that the average time to complete is about 1,200 days.
[306] See Section H below; R.M. Highfill-McRoy et al., *supra* note 112; R.A. Kukla et al., Contractual Report of Findings from the National Vietnam Veterans' Readjustment Study: Volumes 1-4 (1988).

2013, 121,490 service members received discharges that will require pre-eligibility review because of 38 C.F.R. § 3.12(a).[307] That means that, on average, more than 10,000 veterans each year require VA eligibility reviews before they can obtain services. The VA has only adjudicated one in ten of these, suggesting that the VA would be simply incapable of actually adjudicating them all.

H. The regulations unfairly disadvantage service members from certain military branches

The current regulations privilege some service branches over others by creating a presumption of ineligibility for service members with administrative discharges under Other Than Honorable conditions. This perpetuates one of the problems that the statute was intended to ameliorate: unfair exclusion of service members based on based on military policy decisions that have nothing to do with the former service member's actual service.

The current regulations effectively impose an "honorable conditions" standard. This is accomplished by providing presumptive eligibility to all service members with "Honorable" or "General" characterizations[308] and by adopting highly exclusive standards that deny eligibility to almost all of the remaining service members. For example, for post-2001 veterans, the VA currently recognizes "other than dishonorable" service for 100% of the service members with Honorable and General characterizations, but denies eligibility for 96.5% of the service members with other characterizations.[309]

This standard produces unfair outcomes because each service has different standards for administrative discharges. The first three discharge characterizations—Honorable, General, and Other Than Honorable—are all administrative, non-punitive discharges. The Secretary of Defense has issued guidance on how service commanders should use these characterizations.[310] But that guidance delegates wide discretion to services and to commanders to choose whether to seek discharge, what basis for discharge to adopt, and what characterization to provide. Punitive discharges—Bad Conduct and Dishonorable—are governed by the Uniform Code of Military

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[307] See Table 11 above.
[308] 38 C.F.R. § 3.12(a).
[309] See Section III.D above.
[310] DODI 1332.14 (2014).

Justice and are therefore subject to uniform procedural and substantive standards. Punitive discharge rates vary between 0.3% in the Navy and 1.1% in the Marine Corps. In contrast, administrative discharges provide very little safeguards for consistency between services or between commanders, resulting in a *20-fold* variance between military branches: between 0.5% in the Air Force and 10% in the Marine Corps.

Table 20: Discharge characterizations, FY2011

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
Army	81%	15%	3%	0.6%	0.1%
Navy	85%	8%	7%	0.3%	0.0%
Air Force	89%	10%	0.5%	0.5%	0.0%
Marine Corps	86%	3%	10%	1.0%	0.1%
Total	**84%**	**10%**	**5%**	**1%**	**0.1%**

This difference between services is due to administrative policies, not individual merit. The Government Accountability Office has done a thorough study on discharge characterization disparities between services.[311] It documented that this range of discharge practices reflects differences in leadership and management styles, not degrees of "honor" in different services:

> Simply stated, different people get different discharges under similar circumstances, and the type of discharge an individual gets may have little to do with his behavior and performance on active duty.[312]

The GAO compared discharges of Marines and Airmen with the same misconduct history, service length, and performance history, and found that the Air Force was 13 times more likely to give a discharge under honorable conditions than the Marines.[313] Military leaders justified their practices with unit-level considerations, not individual merit: some believed that expeditious termination was in the best interest of the services, while others believed that maximizing punishment helped reinforce unit discipline.[314]

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[311] GAO Report, *supra* note 113.
[312] Id. at ii.
[313] Id. at 29-33.
[314] Id. at 32.

Because the VA's regulations rely so heavily on the distinction between Other Than Honorable and General administrative discharges, and because different services have very different standards for each of these, there are major disparities in VA eligibility between services. For service members discharged between 2001 and 2013, 12% of Marines would get turned away from a VA hospital if they sought care after leaving the service, but the equivalent figure for Airmen is only 1.7%.

Table 21: DOD discharge characterizations and initial VA eligibility by service branch, 2001-2013

	Presumptively VA-eligible			Presumptively VA-ineligible			
	Honorable	General	Total	OTH	BCD	Dishonorable	Total
USAF	90%	8%	98%	1%	0.7%	0.08%	1.7%
Army	84%	11%	95%	5%	0.2%	0.04%	5%
All branches	**85%**	**8%**	**93%**	**6%**	**0.9%**	**0.07%**	**7%**
Navy	82%	7%	89%	10%	0.7%	0.00%	11%
USMC	85%	3%	88%	9%	2.9%	0.19%	12%

Knowing that the Marine Corps gives more severe discharge characterizations than other services, and has done so for over half a century, the VA should be expected to grant eligibility to Marines at a higher rate than for other services when it conducts individual COD review. This expectation is also reasonable given that, for the current wartime period at least, the Marine Corps has endured harder conditions of service than most,[315] and given that Congress has singled out combat veterans for special consideration.[316] But—contrary to those expectations—this is not the case. In truth, VA COD decisions exclude Marines *at a higher rate* than any other military personnel. Far from ameliorating disparities, the current system is making them worse.

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[315] "The ground forces, composed predominantly of personnel from both the Army and the Marine Corps, have borne the brunt of the conflict." RAND Ctr. for Military Health Policy Research, Invisible Wounds of War: Psychological & Cognitive Injuries, Consequences, & Services to Assist Recovery 23 (Terri Tanielian & Lisa H. Jaycox eds. 2008). The death rate for Marines in Iraq was more than twice that of any other service branch, and 23 times that for Airmen, as of 2007. Emily Buzzell & Samuel H. Preston, Mortality of American Troops in the Iraq War, 33 Population & Dev. Rev. 555, 557 (2007).

[316] E.g., Combat-Related Special Compensation, an increased compensation payment for disabilities that resulted from combat, Pub. L. 110-181, ¶ 641, 122 Stat. 3 (Jan. 28, 2008).

Table 22: Board of Veterans' Appeals COD decisions by military service branch, 1990-2015

	"Other than dishonorable"
Navy	16%
Not specified	15%
Average	13%
USAF	12%
Army	12%
USMC	7%

Congress enacted a single, uniform standard for eligibility and gave the VA responsibility for individualized, independent review of conduct precisely to avoid the injustices that result from unequal treatment by the military services. The current VA regulations simply perpetuate—and in some cases actually exacerbate—those disparities. The VA does so by giving enormous, and typically controlling, weight to the discharge characterization even though they mean vastly different things between the services.

I. The Regulation Unlawfully Discriminates Against Homosexual Conduct

The VA's current regulations continue to enable it to deny benefits to claimants whose military discharge or release was for "homosexual acts involving aggravating circumstances or other factors affecting the performance of duties."[317] This rule singles out gay service members for special, disfavored treatment and is plainly unlawful in light of recent Congressional actions and court decisions. The VA has known since at least 2004 that this provision was outdated and inappropriate. In 2004 the VA issued a notice of proposed rulemaking that would have stricken the word "homosexual" in favor of the all-inclusive "sexual," noting that "all of the sexual offenses listed in this paragraph are egregious no matter who commits them."[318] The VA has failed for more than a decade to finalize that proposed rule, however—a delay that has long since become unlawful.

The unequal treatment of claimants discharged for homosexual acts is contrary to Congressional intent in enacting a repeal of the prior "Don't Ask, Don't Tell" ("DADT") policy.

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[317] 38 C.F.R. § 3.12(d)(5).
[318] Service Requirements for Veterans, 69 Fed. Reg. 4820 (Jan. 30, 2004).

Through that enactment, Congress clearly intended to eliminate differential treatment between heterosexual and homosexual conduct. Moreover, the VA's unequal treatment of homosexual conduct clearly violates the Fifth Amendment's guarantee of due process, which incorporates the requirements of the Equal Protection Clause. In 2013, the Supreme Court struck down the Defense of Marriage Act ("DOMA"), which denied federal benefits to same-sex couples, as an "unconstitutional … deprivation of liberty … protected by the Fifth Amendment of the Constitution."[319]

J. The government cost associated with increased eligibility would be largely offset by reductions in non-veteran entitlement programs and health care savings

Increasing the number of eligible veterans would increase direct costs to the VA, but the net cost to the Government would be offset by reductions in other entitlement programs and savings associated with more cost-effective health care delivery. An initial estimate shows that a 1% increase in eligibility may result in a net per capita expenditure increase of only 0.3%.

Benefits eligibility rules provide a starting point for analyzing how different programs would be affected. Expanding "veteran" eligibility does not create eligibility for the G.I. Bill, one of the more expensive VA benefits, nor for unemployment benefits. There would not be a significant increase in overhead costs, because the overall percentages concerned are relatively small. The services that are most likely to see a cost increase as a result of an expansion of eligibility are Health care, Compensation and Pension.

- Health care: Net government savings. It is not likely that service members with stable employer-paid insurance will migrate to VA health care as a result of this change. The service members who are likely to adopt VA health care are those on Medicare or Medicaid. VA health care is known to be about 21% more cost-effective than Medicare and Medicaid.[320] Therefore each increased dollar in VA health care services represents a total government savings of about $0.20.

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[319] See generally Obergefell v. Hodges, 135 S.Ct. 2071 (2015); United States v. Windsor, 133 S.Ct. 2675 (2013) (striking down Defense of Marriage Act ("DOMA"), which denied federal benefits to same-sex couples, as an "unconstitutional … deprivation of liberty … protected by the Fifth Amendment of the Constitution.").

[320] See Congressional Budget Office, Comparing the Costs of the Veterans' Health Care System with Private-Sector Costs, at 5 (Dec. 2014).

- Pension: Small net government cost increase. The eligibility criteria for VA Pension are similar to the criteria for Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI).[321] It is very likely that any service member who will become eligible for Pension is already receiving SSI/SSDI. Because those benefits cannot be received concurrently, the increase in Pension utilization will be offset by a reduction in SSDI/SSDI utilization.[322] There will be a net increase in government cost only to the extent that VA Pension provides more money than the SSI/SSDI benefit. SSI amounts vary by location, and SSDI amounts vary by work history; in California in 2015, veterans on SSI typically receive about $850, and veterans on SSDI typically receive about $950. This is only marginally below the current Pension rate of $1,072. Therefore each dollar increase in the Pension benefit only represents a net government cost increase of about $0.15.

- Compensation: Net increase in government cost. Service-connected disability compensation would be offset by reductions to SSI, although it is not possible to estimate how may new recipients are now receiving SSI.

Using these cost estimates as an illustrative guide, and assuming that utilization of these services would be the same as for currently-eligible servicemembers, the following table estimates the increased VA cost and net government cost for each 1% increase in the eligible veteran population.

[321] The "total disability" requirement for VA Pension is presumptively satisfied if the claimant is receiving SSI or SSDI. Brown v. Derwinski, 2 Vet. App. 444, 448 (1992).
[322] 38 C.F.R. § 3.262(f).

Table 23: Initial cost model for one-percent increase in eligibility ($ millions, 2010 baseline)

	Baseline expenditure [323]	VA cost increase from 1% eligibility increase		Net per capita government cost from 1% eligibility increase	
Compensation	37,960	1%	38,340	1%	38,340
Pension	9,941	1%	10,040	0.15%	11,432
Health Care	46,923	1%	47,392	-0.21%	46,829
Other	13,937	0%	13,937	0%	96,601
Total	**108,761**	**0.9%**	**109,709**	**0.3%**	**38,340**

Therefore while a 1% increase in eligibility would result in a 0.9% increase in direct costs to the VA, the net government per capita cost would only increase by 0.3%.

This does not include indirect savings that would result from veteran-specific care, better homelessness services, increased access to prison diversion programs, and other support services. VA health care is more effective at treating veteran-related health problems[324] and VHA users typically use more preventative care,[325] resulting in better health outcomes. Improved health outcomes result in lower lifetime health costs [326] and improved downstream effects on employment, housing, and family well-being.[327] Veterans in VA homelessness services also report better health outcomes than veterans in non-VA homeless services.[328] Prison diversion programs enable long-term employment and financial stability. The benefits of these positive downstream effects will accrue not only to veterans individually but also to the VA, to local veteran-focused organizations, and to veterans' family members and communities.

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[323] Expenditure data from U.S. Census Bureau, Statistical Abstract of the United States, at Table 523 – Veterans Benefits--Expenditures by Program and Compensation for Service-Connected Disabilities: 1990 to 2010 (2012).

[324] For example, the suicide rate of veterans under VHA care is 50% less than the suicide rate for veterans outside of VHA care. I. Katz, Suicide Among Veterans in 16 States, 2005 to 2008: Comparisons Between Utilizers and Nonutilizers of Veterans Health Administration (VHA) Services Based on Data From the National Death Index, the National Violent Death Reporting System, and VHA, Am. J. Pub. Health (Mar. 2, 2012).

[325] Because VHA has low out-of-pocket costs and because many of VHA's enrollees belong to those affected groups, the Congressional Budget Office (CBO) has found that "there may be some offsetting savings over the longer run." Congressional Budget Office, Comparing the Costs of the Veterans' Health Care System with Private-Sector Costs, at 3 (Dec. 2014).

[326] "VHA is more likely than private insurers to capture those longer-term savings" because veterans stay in the VA health care system. Id.

[327] See Ctrs. for Disease Control & Prevention, The Power of Prevention (2009).

[328] Byrne et al., Health Services Use Among Veterans Using VA and Mainstream Homeless Services, World Med. & Health Policy Vol. 5(4), 347–361 (2013).

V. EXPLANATION OF PROPOSED AMENDMENTS TO ALIGN VA REGULATIONS WITH STATUTORY AUTHORITY, OFFICIAL COMMITMENTS, AND PUBLIC EXPECTATIONS FOR THE FAIR TREATMENT OF VETERANS

This section proposes changes that will align VA practice with its statutory obligations, its official commitments, and public expectations. All of the changes proposed below are within the VA's rulemaking authority.

Summary of proposed changes:

- *Changes to 38 C.F.R. § 3.12(d).* Adopt a definition for "dishonorable conditions" that excludes service members based only on severe misconduct and that considers mitigating circumstances such as behavioral health, hardship service, overall service, and extenuating circumstances.

- *Changes to 38 C.F.R. § 3.12(a).* Reduce the number of service members that are presumptively ineligible by only requiring prior review for those with punitive discharges or discharge in lieu of court-martial.

- *Changes to 38 C.F.R. § 17.34.* Provide tentative eligibility for health care to all who were administratively discharged, who probably have a service-connected injury, or who probably honorably completed an earlier term of service pending eligibility review.

- *Changes to 38 C.F.R. § 17.36*. Ensure that service members seeking health care receive an eligibility review.

The full text of proposed regulations are attached. This Part provides justification for the suggested language.

A. Standards for "dishonorable conditions" – 38 C.F.R. § 3.12(d)

We propose to amend this paragraph with three major changes: (1) in the header paragraph, state that a "dishonorable conditions" finding is only appropriate for severe misconduct; (2) change the itemized forms of disqualifying conduct so that they are based on equivalent standards used in military law; and (3) add a section that lists mitigating circumstances, adopting standards applied in military law and similar VA regulations.

1. The header paragraph should instruct adjudicators to only deny eligibility based on severe misconduct

The current header paragraph states:

> A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

We propose to replace the header paragraph with this text:

> (d) The VA may find that a separation was under dishonorable conditions only if overall service warranted a Dishonorable discharge characterization. This is the case if discharge resulted from any of the conduct listed in paragraph (1), and that if that misconduct outweighs the mitigating factors listed in paragraph (2). Administrative discharges are not under dishonorable conditions unless evidence in the record indicates that a dishonorable discharge was merited and that the better discharge was issued for reasons unrelated to the service member's character.

The legislative history makes clear that Congress only wanted to exclude service members whose conduct would have justified a Dishonorable discharge characterization.[329] The current regulations do not contain any instruction that limits exclusion to cases of severe misconduct.[330] In particular, the overbroad standards result in the exclusion of most service members with administrative, non-punitive discharges for misconduct,[331] a level of service the Congress specifically intended to include in eligibility for basic veteran services.[332] Furthermore, the absence of substantive conduct standards has contributed to widely inconsistent decision outcomes.[333]

The proposed header paragraph remedies this deficiency this with three statements. First, it conveys the express language of Congress that exclusion should only occur for service members whose conduct would merit a dishonorable characterization. Second, it instructs the adjudicator to balance the enumerated forms of negative conduct against enumerated forms of mitigating circumstances, discussed below. Third, in order to avoid improperly excluding those whose conduct was below honorable but better than dishonorable, a category that Congress intended to receive eligibility, it explains that administrative discharges generally do not indicate dishonorable conditions.

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[329] See Section II.B above.
[330] See Section III.B.1 above.
[331] See Section IV.A above.
[332] See Section II.D above.
[333] See Section IV.D above.

2. The definitions of disqualifying conduct should adopt specific standards imported from military law

We propose to retain the same categories of disqualifying conduct that currently exist, but provide more specific standards that conform with military law criteria for dishonorable characterizations.

Discharge to escape trial by general court-martial

The current paragraph states:

> Acceptance of an undesirable discharge to escape trial by general court-martial

We propose to replace this paragraph with the following text:

> Acceptance of a discharge to avoid trial by general court-martial. Avoidance of a trial by general court-martial is shown by documentation that charges had been referred to a general court-martial by a general court-martial convening authority.

This change clarifies the existing standard by explaining the evidence required under military law to show that the matter had been placed under general court-martial jurisdiction. A charge sheet alone does not indicate that a general court-martial has been recommended, because the matter could be referred to a special or summary court-martial. We have seen cases where a person is excluded on this regulation when charge sheets have been proffered but no general court-martial recommendation has been made. This amendment would clarify the correct analysis that adjudicators must make to apply the existing standard.

Mutiny or spying

No proposed changes.

Moral Turpitude

The current paragraph states:

> An offense involving moral turpitude. This includes, generally, conviction of a felony.

We propose to replace this paragraph with this text:

> An offense involving moral turpitude. Moral turpitude is conduct that involves fraud, or conduct that gravely violates moral standards and involves the intent to harm another person.

This change replaces a vague term with a more specific definition derived from extensive caselaw on this question. We note that the Office of General Counsel has produced a Precedential Opinion on the definition of "moral turpitude."[334] However, the holdings of that Opinion have not been incorporated into the regulation or the training materials on this topic, and it has been inaccurately incorporated into the Adjudication Procedures Manual used by front-line adjudicators.[335] Therefore the Precedential Opinion has little impact on most decisions. We also note that the definition of moral turpitude proposed in the Part 5 Manual Rewrite does not adopt the standards of the Precedential Opinion.[336]

We propose a concise but specific definition that is based on the existing caselaw on this question, and that is consistent with the standards provided in the Precedential Opinion. The most extensive body of legal analysis on this question can be found in immigration law, where Congress has mandated certain responses when non-citizens commit "crimes involving moral turpitude."[337] The 9th Circuit Court of Appeals has produced certain guidelines for determining whether a crime involves moral turpitude. "[T]he federal generic definition of a [crime involving moral turpitude] is a crime involving fraud or conduct that (1) is vile, base, or depraved and (2) violates accepted moral standards … [and (3)] 'almost always involve[s] an intent to harm someone.'"[338] Turpitude does not encompass "all offenses against accepted rules of social conduct."[339] Rather, "[o]nly truly unconscionable conduct surpasses the threshold of moral turpitude."[340] Crimes against property that do not involve fraud are generally not considered crimes of moral turpitude.[341]

The Precedential Opinion adopted the term "gravely violates moral standards," in place of the 9th Circuit's phrase "vile, base or depraved conduct that violates accepted moral

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[334] VA Gen. Counsel Precedential Op. 06-87 (1987).
[335] See Section III.B.2 above.
[336] Id.
[337] 8 U.S.C. § 1227(a)(2)(A)(i).
[338] Saavedra-Figueroa v. Holder, 625 F.3d 621, 626 (9th Cir. 2010) (citation omitted).
[339] Robles-Urrea v. Holder, 678 F.3d 702, 708 (9th Cir. 2012).
[340] Turijan v. Holder, 744 F.3d 617, 621 (9th Cir. 2014) (citation omitted).
[341] See Rodriguez-Herrera v. INS, 52 F.3d 238, 240 n.5 (9th Cir. 1995).

standards." We propose to adopt the Precedential Opinion's phrasing for ease of administration. However we believe that it is important to reassert the principle, omitted from the Part 5 Manual Rewrite, that crimes against property are not moral turpitude unless they involve fraud. Therefore the combined proposed language derives from the 9th Circuit caselaw, but is condensed as: fraud, or conduct that gravely violates moral standards and that involves the intent to harm another person.

Repeated offenses ("willful and persistent misconduct")

The current paragraph states:

> Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

We propose:

> Three or more separate incidents of serious misconduct that occurred within one year of each other. Misconduct is serious when it is punishable by at least one year of confinement under the Uniform Code of Military Justice.

We propose this language because it is specific, predictable, and derived from military law. The current language deviates greatly from the corresponding standard in military law, produces inconsistent results, and results in the exclusion of service members that congress intended for the VA to include.[342]

We recognize that the purpose of this regulation is to identify people who have engaged in a series of acts of misconduct where no individual act justifies a dishonorable characterization, but where the accumulation of misconduct shows a rejection of military authority amounting to dishonorable character. However, the current regulation fails to achieve this purpose. Its language is so expansive that almost any series of discipline problems is a plausible basis for exclusion.[343] It fails to distinguish truly dishonorable conduct from conduct that is merely

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[342] See Section IV.B.1 above.
[343] See Section III.D above.

improper and that justifies a lesser punishment. Like a dishonorable characterization, a finding of "dishonorable conditions" should be rare, and most forms of misconduct do not justify it. This distinction exists in military law, it existed for the Congress that wrote the law, and a correct regulatory interpretation of the statute must incorporate it.[344]

Military law contains a clear standard for when repeated, less-than-severe misconduct might justify a dishonorable characterization. The Manual for Courts-Martial in place at the time Congress enacted the statute instructed a dishonorable characterization for repeated offenses that did not involve moral turpitude only if there had been five prior convictions for minor offenses.[345] Current regulations allow for a dishonorable characterization for repeated offenses if there have been three convictions within the past year.[346] Non-judicial military punishment is only available for minor offenses, as determined by the military commander.[347] Because misconduct that results in a non-judicial punishment is not serious misconduct, it cannot be the basis for a dishonorable characterization. The original regulations adopted by the VA respected this principle by only considering misconduct that resulted in a conviction.[348]

Our proposed regulation would adopt the current military law standard but omit the requirement for court-martial convictions. The proposed language would find "dishonorable conditions" if within one year prior to discharge there had been three documented cases of misconduct that was eligible for at least one year of confinement, regardless of whether that conduct was actually punished by court-martial. This would avoid cases where service members are excluded because of misconduct that occurred long before discharge, or for misconduct that was too minor by military standards to contribute to a finding of dishonorable character.

Our proposed language removes this paragraph's mitigating circumstances exception. We do this for two reasons. First, the mitigating circumstances exception in the current regulation is far narrower than what is required by statute, what the VA has officially committed to, and what the public expects.[349] It is only available in limited circumstances; the only

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[344] See Section II.D above.
[345] MCM 1943 ¶ 104c(B).
[346] RCM 1003(d)(1).
[347] MCM 2012 pt. V.1.e.
[348] 11 Fed. Reg. 8729, 8731 (Aug. 13, 1946).
[349] See Section IV.B.2 above.

mitigating factor is quality of service, without considering mental health, operational stress, duration of service, or extenuating circumstances; and the standard for quality of service is far too high, not even considering combat service as inherently "meritorious." Second, because military law requires that mitigating factors be considered prior to all dishonorable characterizations,[350] we have proposed below to include a comprehensive mitigating analysis element that applies to all categories of disqualifying conduct. This makes a limited mitigation exception in this paragraph superfluous.

Sexual misconduct

The current paragraph states:

> Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

We propose to eliminate this section.

A conduct prohibition that singles out homosexual conduct is unconstitutional.[351] Preserving the regulation without its discriminatory content is unnecessary. The aggravating circumstances listed in this regulation are likely encompassed within the "moral turpitude" prohibition, or are subject to general courts-martial, and are therefore superfluous; if not, then the conduct not "dishonorable" and should not be a basis for denying veteran service.

Furthermore, the purpose of this regulation was to discriminate against homosexual conduct, and without its discriminatory purpose there is no reason to retain it in any form. The regulation originally targeted "homosexual acts or tendencies,"[352] was then limited to "homosexual acts,"[353] and was then limited to "aggravated" homosexual acts.[354] Now that the

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[350] See Section II.C.3 above.
[351] See Section IV.I above.
[352] 11 Fed. Reg. at 8,731.
[353] 28 Fed. Reg. 123 (Jan. 4, 1963).

underlying conduct is permitted, there is no reason to retain the limiting factors as a stand-alone prohibition. A simplified regulation would omit this paragraph entirely.

3. The regulations should require adjudicators to consider mitigating circumstances

There is no provision in regulation requiring consideration of mitigating factors.

We propose to add the following paragraph:

> (2) The severe punishment of a dishonorable characterization is not justified where extenuating circumstances explain or mitigate the misconduct. The Secretary must consider any information that would justify a reduction in the severity of punishment. The following circumstances may show that service was not dishonorable
>
> > (i) The individual contributed substantial favorable service to the nation. A determination of favorable service to the nation will consider:
> >
> > > (A) The duration and quality of service prior to the misconduct that resulted in discharge, and
> > >
> > > (B) Whether the service included hardship conditions, such as overseas deployment.
> >
> > (ii) The person's state of mind at the time of misconduct was adversely affected by mental or physical disabilities or operational stress.
> >
> > (iii) The person's actions were explained by extenuating circumstances, taking into consideration the person's age, maturity, and intellectual capacity.

We propose this language to harmonize the regulation with military law, other VA regulations, the VA's commitments, and public expectations. The current regulatory definition of "dishonorable conditions" does not include a general provision for considering mitigating circumstances.[355] This is inconsistent with military law, where a dishonorable characterization is only justified after consideration of a full range of mitigating circumstances.[356] Nor is the

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[354] 45 Fed. Reg. 2318 (Jan. 11, 1980).
[355] See Section III.B.4 above.
[356] See Section II.C.3 above.

current regulation consistent with the VA's own regulations. The VA has adopted a list of mitigating circumstances that may excuse an absence of over 180 days, as required by a statutory bar, but it has not applied these mitigating circumstances to absences that are less than 180 days and therefore subject to review under its regulatory bars.[357] This produces the perverse outcome where the VA is more lenient on more severe misconduct.

We propose a list of mitigating circumstances that incorporates terms from military law and from other VA regulations. The Military Judges' Benchbook provides model sentencing instructions that list the following mitigating factors: age, family/domestic difficulties, good military character, financial difficulties, mental/behavioral condition, personality disorder, physical impairment, addiction, education, and performance evaluations.[358] The VA's regulations defining "compelling circumstances" for the purposes of mitigating an unauthorized absence of more than 180 days lists the following factors: duration and character of service prior to absence, service of such quality that it is of benefit to the nation, family emergencies or obligations, obligations or duties owed to third parties, age, cultural background, educational level, judgmental maturity, hardship or suffering incurred during overseas service, combat wounds, and other service-incurred or aggravated disabilities.[359]

The proposed regulation adopts these factors from military law and VA regulations and groups them under three headers: factors that show favorable service to the nation; factors relating to the veteran's state of mind, as determined by their mental and physical health; and extenuating circumstances. The only term in the proposed regulation that is not adopted directly from existing military and VA sources is the factor considering "operational stress." "Operational stress" is similar to the consideration of "hardship … incurred during overseas service" that is listed among the "compelling circumstances" factors. We propose to add this term because the military services have recently recognized "operational stress" as a distinct phenomenon, particularly in the current era of repeated deployments, that can justifiably result in behavior changes among otherwise honorable service members.[360] It is important that the VA's

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[357] See Section IV.B.2 above.
[358] See, e.g., Military Judges' Benchbook, DA Pam 27-9 ¶ 2-5-13.
[359] 38 C.F.R § 3.12(c)(6)(i, ii, iii).
[360] U.S. Dep't of the Army, Field Manual 4-02.51 (FM 8-51): Combat and Operational Stress Control (2006). ("Soldiers, however good and heroic, under extreme combat stress may also engage in misconduct."). U.S. Dep't

regulations reflect current understanding and terminology for how the demands of military service may explain behavior changes.

We do not propose to retain the language that currently exists in the "willful and persistent misconduct" bar, whereby some misconduct is mitigated where service is "otherwise honest, faithful and meritorious." While these are certainly positive qualities, these terms are not mitigating factors under military law. Moreover, those terms have been interpreted by Veteran Law Judges as imposing a much higher standard for mitigation than exists under military law or under other VA regulations. For example, adjudicators have found that even combat service is not "meritorious" enough to benefit from this exception, if the service member did not also earn awards for valor.[361] By only rewarding exceptional performance, it fails to acknowledge that military service is inherently beneficial to the nation. A proper mitigation analysis must give some credit to the fact of service, and to the duration of proficient service. This "meritorious" standard departs so significantly from military law and congressional intent that it must be replaced.

B. Which service members require individual review – 38 C.F.R. § 3.12(a)

We propose to amend this paragraph so that individual review is not required for people who are very unlikely to be excluded based on revised standards. The current paragraph states:

> If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. § 101(2)). A discharge under honorable conditions is binding on the VA of Veterans Affairs as to character of discharge.

We propose the following text that replaces the final sentence:

> If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C.

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of the Navy & U.S. Marine Corps, Combat and Operational Stress Control: NTTP 1-15M, MCRP: 6-11C (Dec. 2010) (identifying behavior that characteristically results from operational stress, including "losses of control," "intense and uncharacteristic anger," and "sudden outbursts of rage").

[361] See Section III.B.1 above.

> § 101(2)). An administrative discharge shall be a discharge under conditions other than dishonorable unless it is issued in lieu of court-martial. Administrative discharges issued in lieu of court-martial, Dishonorable discharges, and Bad Conduct Discharges must be reviewed under the criteria in paragraph (d) in order to determine whether the separation was under dishonorable conditions.

This change will ensure that people who are not at risk of being found "dishonorable" are able to access care and services without requiring an individual review by the VA.

The VA is currently excluding more veterans than at any point in the nation's history, more than three times as many people as were being excluded when the current "liberalizing" law was enacted.[362] This is not because service members are behaving worse, or because VA adjudicators are evaluating them more severely. It is solely because the VA's regulations set aside an increasing share of service members that require adjudication—many more than behaved "dishonorably," and many more than the VA can actually adjudicate.[363] It is both impractical and contrary to statue for the VA to require eligibility adjudications for categories of service members that Congress specifically intended to receive eligibility.

It is also unjust. All of these men and women served the nation, and it is shameful for them to be left without health care for disabilities, without housing if they are homeless, without income support if they are unable to work. The injustice is most acute for service members denied eligibility despite having served under hardship conditions. Over 33,000 service members discharged since 2001 served on a contingency deployment and yet received a discharge characterization that the VA treats as presumptively ineligible.[364] Because the VA has granted eligibility to only 4,600 veterans of this era,[365] there are probably over 30,000 service members who deployed to contingency operations since 2001 but who are currently ineligible for VA services.

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[362] See Table 10 above.
[363] See Section IV.A above.
[364] DOD FOIA Response 14-0557.
[365] See Table 10 above.

Table 24: Selected discharge characterizations of service members who deployed to contingency operations, 2001-2014[366]

Characterization	
Presumptively VA-ineligible	**33,977**
Other Than Honorable	29,364
Bad Conduct	4,265
Dishonorable	348

The dramatically increasing rate of exclusion from VA services results from the military's increasing use of administrative separations to deal with discipline issues that previously led to retention, retaining, and Honorable or General characterizations.[367] The use of the discharge characterization has increased from less than 1% of all discharges to 5.5%.[368] Because Congress instructed the VA to exclude these service members only on an exceptional basis, and because this represents such a large portion of all service members, it is no longer appropriate for the VA to presume ineligibility for all of them. In order to approach the rate of exclusion intended by Congress, and the standards it intended, the VA must recognize eligibility for a large number of these people separated for non-punitive administrative discharges.

As for people with General and Honorable discharges—some of whom may prove to be ineligible, but all of whom can receive services prior to eligibility determinations—the VA should identify additional categories of discharges that are very likely to be found eligible and who will not require eligibility review.

We propose to limit pre-eligibility reviews to people with punitive discharges (Bad Conduct or Dishonorable) and Other Than Honorable discharges issued in lieu of court-martial. This is an easily-administered standard that would ensure prompt eligibility for large numbers of people who are not at risk of exclusion.

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[366] DOD FOIA Response 14-0557.
[367] See Section II.D above.
[368] See Figure 2.

DOD instructions allow administrative discharges for misconduct under two scenarios: where the discharge is "In lieu of court-martial"[369] and where there is generic "Misconduct"[370] that the commander did not see fit to refer to court-martial. The first category includes cases where court-martial charges have been alleged, a preliminary investigation has occurred, and the service member, under advice from defense counsel, has admitted guilt and requested separation. [371] When this occurs, the separation documentation clearly states "Discharge in Lieu of Court Martial." This is a category that may involve serious misconduct, including conduct that is morally turpitudinous or that might have been referred to a general court-martial. It is therefore proper for the VA to require an individual evaluation for these service members to determine whether their conduct was in fact dishonorable.

In contrast, the second category of misconduct that might lead to an Other Than Honorable discharge does not likely involve conduct at risk of exclusion under "dishonorable" standards. DOD Instructions list several types of conduct that might justify separation under the generic "Misconduct" paragraph, including "Minor disciplinary infractions," [372] and "Pattern of misconduct … consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline."[373] This includes the types of misconduct that justify separation but that do not show "dishonorable" service, and which Congress instructed the VA to grant eligibility. They are all, moreover, situations where the commander, considering all mitigating and extenuating factors, decided not to convene a court-martial. In order to conform with statutory instructions, and in order to grant eligibility in a fair and efficient manner, the VA should not withhold eligibility for these service members pending individual review.

For ease of administration, we do not propose listing and categorizing all possible bases for administrative discharges. There are several designations that might appear on a DD214 when generic "Misconduct" was the basis for discharge. Military branches might use different terms for similar situations. Instead, we propose to set aside administrative discharges issued in lieu of court-martial, and to waive individual review for all others.

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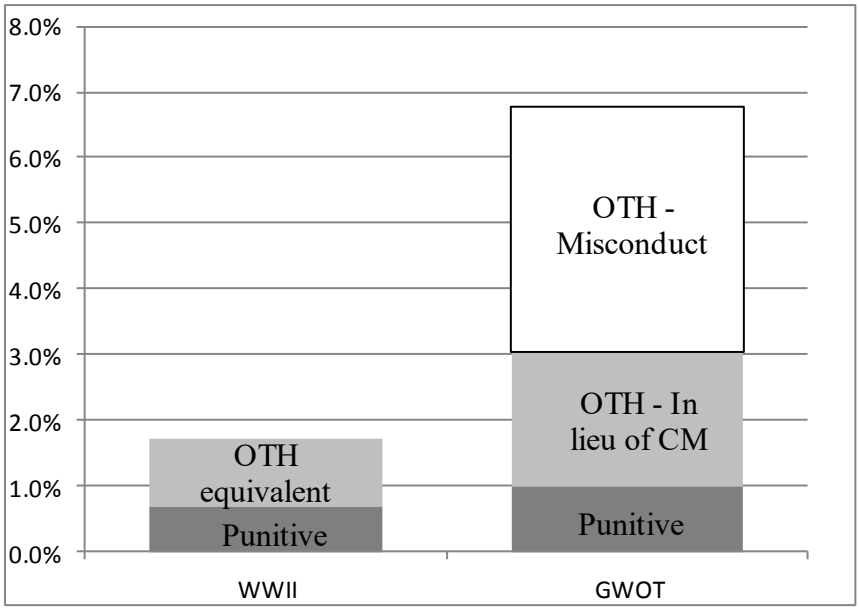
[369] DODI 1332.14, Enclosure 3 ¶ 11.
[370] Id., Enclosure 3 ¶ 10.
[371] Id., Enclosure 3 ¶ 11.c.
[372] Id., Enclosure 3 ¶ 10.a.1.
[373] Id., Enclosure 3 ¶ 10.a.2.

This category of service members—with administrative, non-punitive discharges for general misconduct that did not involve court-martial charges—represent 3.8% of all service members, and over half of post-2001 the service members currently excluded from VA services. Allowing presumptive eligibility for these service members would reduce overall exclusion rates from 6.8% to 3%, much closer to the 1944 rate of 1.9% that Congress thought was too high when it enacted the current statute. The remaining 3% of service members include those with punitive discharges and those given administrative discharges in lieu of court-martial. This category of veteran would not be eligible for VA services unless a COD review finds that their service was other than dishonorable under the standards in 38 C.F.R. 3.12(d).

Figure 3: Types of discharges leading to presumptive VA exclusion[374]



C. Tentative eligibility for health care - 38 C.F.R. § 17.34.

We propose to expand tentative eligibility to include all service members who will probably be found eligible for health care and to include instructions for Enrollment and

[374] DOD FOIA request, 14-10057. Staff of H. Comm. on Veterans' Affairs, Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, Hearing Before the Committee on Veterans' Affairs on S. 1307 and Related Bills, Rep. No. 97-887, at 600-01 (Comm. Print 1977).

Eligibility Staff on initiating the Character of Discharge Review process. The current regulations read, in whole:

> Subject to the provisions of §§ 17.36 through 17.38, when an application for hospital care or other medical services, except outpatient dental care, has been filed which requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized without further delay if it is determined that eligibility for care probably will be established. Tentative eligibility determinations under this section, however, will only be made if:
>
> > (a) In emergencies. The applicant needs hospital care or other medical services in emergency circumstances, or
> >
> > (b) Based on discharge. The application is filed within 6 months after date of discharge under conditions other than dishonorably, and for a veteran who seeks eligibility based on a period of service that began after September 7, 1980, the veteran must meet the applicable minimum service requirements under 38 U.S.C. § 5303A.

We propose to replace this with the following:

> Subject to the provisions of §§ 17.36 through 17.38, when any person has filed, or expressed an intent to file, an application for hospital care or other medical services, except outpatient dental care, or has expressed an interest in hospital care or medical services or concerns that indicate the need for care or treatment and that person's application requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized if it is determined that eligibility for care probably will be established.
>
> (a) Tentative eligibility determinations under this section, however, will only be made under the following circumstances:
>
> > (1) In emergencies. When the applicant needs hospital care or other medical services in emergency circumstances, those services may be provided based on tentative eligibility;
> >
> > (2) Based on discharge. When adjudication as to character of discharge is required, tentative eligibility will be provided to any applicant who has an Other Than Honorable characterization, who served more than four years, or who served more than one enlistment. For an applicant who seeks eligibility based on a period of service that began after September 7, 1980, the applicant

> must meet the applicable minimum service requirements under 38 U.S.C. § 5303A; or
>
> (3) Based on length of service. When any applicant does not meet applicable minimum service requirements under 38 U.S.C. § 5303A, tentative eligibility will be provided if the applicant was released for medical or health reasons, including medical discharge or retirement, condition not a disability, or other physical or mental health conditions.

Broadly, the expressed purpose of the current regulation is to allow the VA to provide medical care to all who are eligible or likely eligible without delay. It seeks to accomplish that goal by granting eligibility immediately if possible, and by granting "tentative eligibility" where eligibility "probably" will be established. The current proxies for probable eligibility are (a) emergencies and (b) discharge within the last six months where the discharge is "under conditions other than dishonorable" and any minimum service requirement is met.

Change is needed for three primary reasons. First, the current regulation is opaque and provides scant guidance to front-line staff. Whether a service member was discharged other-than-dishonorably and whether a service member meets any minimum service requirement is presently a complex adjudicatory process. Greater clarity and specificity would be helpful to describe whether a service member is probably eligible. Second, the proxies chosen do not adequately predict probable eligibility. As one example, they do not evaluate whether a service member completed a first or prior term of service on which eligibility can be based. Third, adoption of the proposals detailed above will increase access to the VA for service members with Other Than Honorable discharges, and their eligibility for VHA services is therefore probable. That has the added benefit of ensuring that other-than-honorably discharged service members with combat-related or Military Sexual Trauma-related health conditions are not wrongfully denied medical benefits for those service-connected injuries, to which they are entitled by law.

[375] Congress has recognized the "strong moral obligation of the Federal Government to provide treatment for service-connected disabilities."[376]

Accordingly, the proposed regulation implements two new proxies for probable eligibility. The first grants tentative eligibility to those service members with Other Than Honorable discharges, for the reasons explained above, and to service members where facts indicate that they completed at least one term of service. The second, which applies where the service member does not appear to meet minimum service requirements, grants tentative eligibility to those who appear to have service-connected injuries based on available facts.

It is possible that some who are granted tentative eligibility will later be found ineligible after a more careful review. However, the VA should take the policy of being over-inclusive, rather than underinclusive—a policy that Congress clearly supports. [377] The denial of prompt treatment to a service member in need has long-term consequences. It is better to give service members the benefit of the doubt and provide support for a period of time while adjudication is ongoing. If ultimately the service member is not eligible, then the VA can cease providing services.

Finally, we propose that any hospital or medical care provided during the tentative eligibility period is not charged to the applicant. The VA may, of course, bill other insurers. However, so as not to deter service members from seeking necessary care based on the specter of potential charges, the best policy is to waive costs during tentative eligibility.

We also propose to add the following subsections to the regulation, in order to describe necessary procedures for satisfying this regulation's goal.

> (b) When a person files an application for hospital care or other medical services, or has expressed an interest in hospital care or medical services, and an adjudication as to service connection or a determination as to any

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[375] Pub. L. 113-146 (as amended by Pub. L. 113- 175, Pub. L. 113-235); see VHA Directive 2010-033, Military Sexual Trauma (MST) Programming (July 14, 2010); IB 10-448 Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits (Nov. 2014).

[376] S. Comm. on Veterans' Affairs, Eligibility for Veterans Benefits Pursuant to Vietnam Era Discharge Upgrading, report to accompany S. 1307, 95th Cong., 1st sess., at 18 (June 28, 1977).

[377] See, e.g., House Hearings on 1944 Act, *supra* note 28 at 415 ("[W]e are trying to give the veteran the benefit of the doubt, because we think he deserves it.").

> other eligibility prerequisite is required, a request for an administrative decision regarding eligibility shall promptly be made to the appropriate VA Regional Office, or to the VA Health Eligibility Center.
>
> (c) Applicants provided tentative eligibility shall promptly be notified in writing if they are found ineligible and furnished notice of rights of appeal.

The current regulation, written in the passive voice, fails to provide clear instructions to VHA staff and does not fully implement VA's broad mandate to provide rehabilitation and treatment services to those who have served. It passively refers to applications that have been filed, without here specifying how an applicant can obtain that application and submit it. Similarly, this regulation does not provide instructions to VHA staff about initiating a Character of Discharge Review for service members who seek health care for whom eligibility cannot immediately be established. Moreover, the regulation does not reflect the reality that when veterans go to VA health facilities they ask for treatment, not applications. That is, they say that they need counseling, medications, or housing, not an enrollment form.

To effectively implement this regulation, the proposed introductory paragraph triggers the tentative eligibility determination process not only when an application is filed, but also when a person expresses an intent to file an application, expresses interest in hospital or medical care, or expresses concern that indicates a need for care or treatment. This pragmatic, expansive language parallels the federal regulations for the Supplemental Nutrition Assistance Program (SNAP, commonly known as "food stamps"), which instruct staff to "encourage" to apply any person who "expresses interest in obtaining food stamp assistance or expresses concerns which indicate food insecurity."[378] The VA has a similar—indeed greater—obligation to ensure that all veterans get the care and treatment that they need and should adopt a similar stance of encouraging to apply all those who are interested.

Proposed subsection (b) then instructs VHA staff to request an administrative decision to the VA Regional Office or the VA Health Eligibility Center, and subsection (c) requires notice of any determinations and rights of appeal to service members. As discussed above, 90% of service members who require eligibility determinations never even obtain a review. Clearer instructions

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[378] 7 C.F.R. § 273.2(c)(2).

may help remedy the widespread phenomena of less-than-honorably discharged veterans being denied by default and of being turned away without adjudication. Practical guidance on required procedures will help VA staff efficiently and correctly process applications.

D. Changes to health care enrollment procedures – 38 C.F.R. § 17.36(d).

We propose revising the regulations to offer clearer guidance to VA staff and to embrace a more veteran-friendly enrollment process. We propose inserting short additions to the existing regulations, as underlined below:

> (d) Enrollment and disenrollment process—
>
> (1) Application for enrollment. Any person may apply to be enrolled in the VA healthcare system at any time. Enrollment staff shall encourage any person who expresses an interest in obtaining hospital care, medical services, or other benefits or who expresses concerns that indicate an interest in benefits to file an application. Upon request made in person or in writing by any person applying for or expressing an intent to apply for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form and instructions will be furnished. For enrollment in VA healthcare, the appropriate application form is the VA Form 10–10EZ. Any person who wishes to be enrolled must apply by submitting a VA Form 10–10EZ to a VA medical facility or via an Online submission at https://www.1010ez.med.va.gov/sec/vha/1010ez/.
>
> (2) Action on application. Upon receipt of a completed VA Form 10–10EZ, a VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will accept a veteran as an enrollee upon determining that the veteran is in a priority category eligible to be enrolled as set forth in § 17.36(c)(2). Upon determining that a veteran is not in a priority category eligible to be enrolled, the VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will inform the applicant that the applicant is ineligible to be enrolled. If eligibility is in question based on character of service, a request for an administrative decision regarding eligibility shall be made to the appropriate VA Regional Office, or the VA Health Eligibility Center, using a VA Form 7131.

The proposed regulations seek to implement a number of VA's goals, including clear guidance to applicants and staff and ease of access for service members. To those ends, the proposal includes more detailed instruction for VA staff. For example, it instructs staff to provide the appropriate application form, a 10-10EZ, to any person who expresses an interest in health care and detail where to request a Character of Discharge Review if needed. The requirements for process and adjudication currently exist in disparate provisions of law, regulations, and guidance, but a concise and direct provision here would be most useful. Moreover, in accordance with VA's mission of caring for all veterans, the proposal urges VA staff to encourage individuals to apply for health care if any interest in or need for treatment is expressed. The additional language will work to ensure that all those who are eligible receive the support and treatment that they deserve.

VI. CONCLUSION

We propose changes to the regulations implementing the VA's statutory requirement to exclude service members separated under "dishonorable conditions." We believe that the current regulations do not reflect public expectations, are inconsistent with the VA's official and external commitments, and violate the statute they implement. These problems are not the product of bad faith or systemic error on the part of VA adjudicators, but rather regulations that are outdated and inconsistent with Congressional intent. These improper standards have produced the highest rate of veteran exclusion for any era, denying access to 125,000 service members discharged since 2001, including about 30,000 who had deployed to contingency operations. The VA's regulations prevent it from successfully serving the veteran population, in particular those most at risk of suicide, homelessness and incarceration. We hope that the VA will recognize the opportunity it has to expand services to deserving veterans while correcting the legal infirmities of the present regulations.

VII. PROPOSED AMENDMENTS

38 C.F.R. § 3.12(d)

d. The VA may find that a separation was under dishonorable conditions only if the conduct leading to discharge would have justified a Dishonorable discharge characterization. This includes service members with Dishonorable discharges, and service members with other discharge characterizations whose conduct would have justified that characterization. An administrative discharge generally indicates that a Dishonorable characterization was not justified.

1. A discharge or release for any of the following types of misconduct was under dishonorable conditions unless circumstances exist that mitigate the misconduct:
    i. Acceptance of a discharge to avoid trial by general court-martial. Avoidance of a trial by general court-martial is shown by documentation that charges had been referred to a general court-martial by a general court-martial convening authority.
    ii. Mutiny or spying
    iii. An offense involving moral turpitude. Moral turpitude is conduct that involves fraud, depravity, or a violation of moral standards with an intent to harm another person. Offenses of moral turpitude are: Treason, Rape, Sabotage, Espionage, Murder, Arson, Burglary, Kidnapping, Assault with a Dangerous Weapon, and the attempt of any of these offenses.
    iv. Three or more separate incidents of serious misconduct that occurred within one year of each other. Misconduct is serious when it is punishable by at least one year of incarceration under the Uniform Code of Military Justice.
2. The severe punishment of a Dishonorable characterization is not justified where extenuating circumstances explain or mitigate the misconduct. The Secretary must consider any information that would justify a less severe punishment. The following circumstances may show that service was not dishonorable:
    i. The individual contributed substantial favorable service to the nation. A determination of favorable service to the nation will consider:
        1. The duration and quality of service prior to the misconduct that resulted in discharge, and
        2. Whether the person's service included hardship conditions, such as overseas deployment.
    ii. The person's state of mind at the time of misconduct was adversely affected by mental or physical disabilities or operational stress.
    iii. The person's actions were explained by extenuating circumstances, taking into consideration the person's age, maturity, and intellectual capacity.

38 C.F.R. § 3.12(a)

a. If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. § 101(2)). An administrative discharge shall be a discharge under conditions other than dishonorable unless it is issued in lieu of court-martial. Discharges issued by court-martial or issued in lieu of court-martial must be reviewed under the criteria in paragraph (d) in order to determine whether the separation was under dishonorable conditions.

38 C.F.R. § 17.34

Subject to the provisions of §§ 17.36 through 17.38, when any person has filed, or expressed an intent to file, an application for hospital care or other medical services, except outpatient dental care, or has

expressed an interest in hospital care or medical services or concerns that indicate the need for care or treatment and that person's application requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized if it is determined that eligibility for care probably will be established.

a. Tentative eligibility determinations under this section, however, will only be made under the following circumstances:
    1. In emergencies. When the applicant needs hospital care or other medical services in emergency circumstances, those services may be provided based on tentative eligibility;
    2. Based on discharge. When adjudication as to character of discharge is required, tentative eligibility will be provided to any applicant who has an Other Than Honorable characterization, who served more than four years, or who served more than one enlistment. For an applicant who seeks eligibility based on a period of service that began after September 7, 1980, the applicant must meet the applicable minimum service requirements under 38 U.S.C. § 5303A; or
    3. Based on length of service. When any applicant does not meet applicable minimum service requirements under 38 U.S.C. § 5303A, tentative eligibility will be provided if the applicant was released for medical or health reasons, including medical discharge or retirement, condition not a disability, or other physical or mental health conditions.
b. When a person files an application for hospital care or other medical services and an adjudication as to service connection or a determination as to any other eligibility prerequisite is required, a request for an administrative decision regarding eligibility shall promptly be made to the appropriate VA Regional Office, or to the VA Health Eligibility Center.
c. Applicants provided tentative eligibility shall promptly be notified in writing if they are found ineligible and furnished notice of rights of appeal.
d. Any hospital care or other medical services provided during the period of tentative eligibility shall be free of charge to the applicant.

38 C.F.R. § 17.36 Enrollment—provision of hospital and outpatient care to veterans

a. Enrollment and disenrollment process—
    1. Application for enrollment. Any person may apply to be enrolled in the VA healthcare system at any time. Enrollment staff shall encourage any person who expresses an interest in obtaining hospital care, medical services, or other benefits or who expresses concerns that indicate an interest in benefits to file an application. Upon request made in person or in writing by any person applying for or expressing an intent to apply for benefits under the laws administered by the VA of Veterans Affairs, the appropriate application form and instructions will be furnished. For enrollment in VA healthcare, the appropriate application form is the VA Form 10–10EZ. Any person who wishes to be enrolled must apply by submitting a VA Form 10–10EZ to a VA medical facility or via an Online submission at https://www.1010ez.med.va.gov/sec/vha/1010ez/.
    2. Action on application. Upon receipt of a completed VA Form 10–10EZ, a VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will accept a veteran as an enrollee upon determining that the veteran is in a priority category eligible to be enrolled as set forth in § 17.36(c)(2). Upon determining that a veteran is not in a priority category eligible to be enrolled, the VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will

inform the applicant that the applicant is ineligible to be enrolled. If eligibility is in question based on character of service, a request for an administrative decision regarding eligibility shall be made to the appropriate VA Regional Office, or the VA Health Eligibility Center, using a VA Form 7131.

VIII. APPENDIXES

A. Sample Regional Office Decision Letter

DEPARTMENT OF VETERANS AFFAIRS

JUN 23 2015

In Reply Refer To: 343/212/TH

[redacted]
1060 HOWARD ST
SAN FRANCISCO, CA 94103

Dear Mr. [redacted]:

We made a decision regarding your discharge from military service. Every effort was made to see that your claim received complete consideration.

This letter tells you what we decided, how we reached our decision and what evidence we used to reach our decision. We have also included information on what you can do if you don't agree with our decision, and who to contact if you have questions or need assistance

What We Decided

We decided that your military service for the period December 15, 2003 through August 19, 2008 isn't honorable for VA purposes. You and your dependents aren't eligible for any VA benefits for this period of military service. Only veterans with honorable service are eligible for VA benefits.

You are not eligible for health care benefits under Chapter 17, Title 38 for any disabilities determined to be service connected.

Evidence Used to Decide Your Claim

In making our decision, we used the following evidence:

- Facts and circumstances and DD214 as provided by the military service department
- VA Due Process Letter of 03-25-2011
- Responses to our due process letter and Buddy Statements received on 05-30-2012 and 01-17-2014
- VA Form 21-526EZ received on 1-12-2015

What You Should Do If You Disagree With Our Decision

If you do not agree with our decision, please download and complete VA Form 21-0958, "Notice of Disagreement". You can download the form at http://www.va.gov/vaforms <http://www.va.gov/vaforms> or you can call us at 1-800-827-1000. You have one year from he date of this letter to appeal the decision. The enclosed VA Form 4107(C), "Your Rights to Appeal Our Decision," explains your right to appeal.

[redacted]

You can also ask the Service Department to change the character of discharge or you can apply for a correction of military records. To request a change, use the enclosed DD Form 293, Application for the Review of Discharge or Dismissal from the Armed Forces of the United States. To apply for correction, use the enclosed DD Form 149, Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552. Send the completed form to the proper address on the back of the form.

If You Have Questions or Need Assistance

If you have any questions, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711.
Use the Internet	Send electronic inquiries through the Internet at https://iris.va.gov.
Write	VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached *Where to Send Your Written Correspondence*.

In all cases, be sure to refer to your VA file number [redacted]

If you are looking for general information about benefits and eligibility, you should visit our website at https://www.va.gov, or search the Frequently Asked Questions (FAQs) at https://iris.va.gov.

We sent a copy of this letter to your representative, Swords to Plowshares, Veterans Rights Org, Inc., whom you can also contact if you have questions or need assistance.

Sincerely yours,

RO Director
VA Regional Office

Enclosure(s): VA Form 4107
DD Form 149
DD Form 293
Where to Send Your Written Correspondence

Cc: Swords to Plowshares

B. Presentation to Senate Veterans Affairs Committee, May 2014

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 Disability and/or Healthcare Benefits

VETERANS BENEFITS ADMINISTRATION May 2014 U.S. Department of Veterans Affairs

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits

- **Does VHA work with VBA regarding an individual's eligibility for VA benefits, or does VHA explain to an individual that they have to contact VBA to resolve eligibility status?**
  - VHA will complete VA Form 10-7131 with all available information before forwarding it to VBA for an eligibility status decision.
- **What about for a Veteran who has not applied for service-connected disability yet, and doesn't plan to, but who would potentially qualify in a different enrollment category at VHA?**
  - VBA currently makes all determinations regarding veteran status. Even if the Veteran is only applying for VA health care, the determination of Veteran status under 38 U.S.C. 101(2) is sent to VBA for adjudication before VHA can determine health care enrollment.

VETERANS BENEFITS ADMINISTRATION 4

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits

- Veterans must be discharged under other than dishonorable conditions to be eligible for VA disability and health care benefits.
  - VA considers honorable and general (under honorable conditions) discharges to be issued "under conditions other than dishonorable," for purposes of establishing Veteran status under 38 U.S.C.§101(2)
  - An individual who does not receive an honorable or general discharge *may* still receive treatment at a VA medical facility, unless the individual is subject to one of the statutory bars to benefits listed in the statute in 38 U.S.C. 5303. In such cases, VA makes an administrative determination as to whether the Servicemember's service was "under conditions other than dishonorable." 38. C.F.R. §3.12
  - VA considers medical issues, such as PTSD and TBI, with military service records when making such determinations.

VETERANS BENEFITS ADMINISTRATION

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits

- **If a Veteran is temporarily enrolled, is there a time limit for VHA to provide health care?**
  - The Veteran is given a tentative eligibility for health care until a final determination is made for those who apply within 6 months of discharge. Those who apply more than 6 months after discharge are provided emergency care only until the [veteran's eligibility status under 38 U.S.C. § 101(2)] is adjudicated.
- **Do we give the Veteran a 6 month treatment period while the discharge is reviewed, 9 months, how long? Do we know how long the discharge review takes at VBA?**
  - We will continue to provide health care until VBA adjudicates the Veteran's [eligibility status].

VETERANS BENEFITS ADMINISTRATION 5

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits

- **If an individual requests healthcare at a VHA facility, and the system shows a military discharge that is potentially disqualifying, what are the next steps? What does VHA do?**
  - When an individual presents or applies for VA health care benefits and has a potentially disqualifying military discharge, VHA takes the following steps:
    - VA eligibility staff may register the individual and place the health care benefits application in a Pending Verification Status.
  - Send a request for an administrative decision regarding the character of service for VA health care purposes to the local VA Regional Office (VARO) using VA Form 7131.

VETERANS BENEFITS ADMINISTRATION 3

Statutory Bar to Benefits

- A dishonorable discharge, or a discharge under the conditions listed below, is a statutory bar to VA benefits (38 U.S.C. § 5303):
  - As a conscientious objector who refused to perform military duty, wear the uniform, or comply with a lawful order
  - Discharge by reason of a general court-martial
  - Resignation by an officer for the good of the service
  - As a deserter
  - As an alien during a period of hostilities, where it is affirmatively shown that the former Servicemember requested his or her release
  - By reason of discharge under other-than-honorable (OTH) conditions; or issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days

VETERANS BENEFITS ADMINISTRATION

Non Statutory Bars to Benefits

- For Veterans with non statutory bars to benefits, including other-than-honorable, bad conduct, and certain uncharacterized discharges, VA must determine whether the Veteran is eligible for VA benefits (38 C.F.R. §3.12)
  - VA considers the available evidence, including the overall nature of the quality of service, and considers any mitigating factors when determining eligibility status.

Homeless Registry Review

- The review of the Homeless Registry from the names identified by VBA of Veterans who have applied for benefits and have negative discharges shows the following information. Please note, the total numbers are for all years VA has collected data.
- VA has an internal discharge review process where approximately 160,000 have been reviewed to determine if a Veteran will be regarded as having an honorable discharge for VA health care and benefits. Of that total about 14,200 are also listed on the homeless registry. Approximately, 1,700 of the homeless Veterans were granted Chapter 17 health care access in the VBA Character of Discharge process.

Veterans Status Eligibility Determination Process

- VAROs verify the Veteran's character of discharge with the service department review the facts, circumstances, and all other evidence of record to determine if the discharge is under conditions other than dishonorable.
- VA does not make character of discharge determinations and cannot change an existing DoD character of discharge determination.
- When determining Veteran status, VA provides due process as follows:
  - Provide a written notice of its intent to decide the status eligibility
  - Allow 60 days for the individual to respond to the notice and provide evidence or statements pertaining the decision.
  - Provide a hearing if requested
  - Allow the individual the right to representation
  - VA will assist individuals in obtaining third-party evidence to support their claim.

Physical Disability Board Review

- The *Wounded Warrior Act* was signed into law on January 28, 2008. It established a process called Physical Disability Board of Review (PDBR) ,which provides Veterans who were medically separated between September 11, 2001 and December 31, 2009, the opportunity to request a review of their Department of Defense (DoD) adjudicated disability rating(s) to ensure accuracy and fairness.
- VA has an extensive local effort that is ongoing with Department of Defense to let homeless Veterans who are eligible for Physical Disability Board of Reviews (PDBR) know about their eligibility and assist with completing the DoD applications.

Administrative Decision and Notification to Veteran

- VA documents its findings in an administrative decision that is sent to the Veteran.
  - The administrative decision outlines the evidence used to make the determination, and notifies Veterans of their right to an appeal if the decision is unfavorable.
- VA will provide benefits if there is a distinctly separate period of service which qualifies the Veteran for benefits. In such cases, benefits can only be provided based on the period of service that was determined to have been under [conditions other than dishonorable.]

Physical Disability Board Review (Cont.)

- DoD recently provided the Department of Veterans Affairs (VA) with a list of approximately 73,000 Veterans who are eligible for PDBR consideration and who may or may not have previously accessed VA services. The Veterans Health Administration (VHA) has cross-referenced with the National Homeless Veteran Registry to determine if there are Veterans on the list who have accessed VA health care. The results indicate that VHA has assisted approximately 6,500 (almost 9 percent) of the PDBR Veterans through the local VA homeless programs. VHA was able to determine that over 85 percent of these homeless and at-risk Veterans are assigned to a Patient Aligned Care Team.

Veterans Integrated Service Network

- On March 18, 2014, VHA issued guidance to all of the Veterans Integrated Service Network and VA medical center staff across the country to notify homeless and at-risk Veterans of their eligibility for PDBR and provide them with the appropriate letter and forms. In approximately 25 percent of the cases reviewed by the PDBR (as of December 2011), the applicant's Military Service Department has found the applicant eligible for a disability retirement and has awarded this to the applicant. This means many of our homeless Veterans could have additional benefits and a financial source available to assist with securing stable housing and supporting their families, thus ultimately helping VA achieve the goal of ending homelessness among Veterans.

C. Letter from VBA Undersecretary to Congresswoman Pelosi, July 31, 2015

THE UNDER SECRETARY OF VETERANS AFFAIRS FOR BENEFITS
WASHINGTON, D.C. 20420

July 31, 2015

The Honorable Nancy Pelosi
U.S. House of Representatives
Washington, DC 20515

Dear Congresswoman Pelosi:

Thank you for your July 6, 2015, letter regarding criteria the Department of Veterans Affairs (VA) uses to determine whether a former Servicemember is entitled to VA benefits or healthcare based upon character of discharge. I am responding on behalf of the Department.

Generally, to be eligible for VA disability, health care, and burial benefits, a Veteran must be discharged under "conditions other than dishonorable."[1] Please refer to 38 U.S.C. § 101(2). VA considers honorable and general discharges (both of which would be considered discharges under honorable conditions) as being issued under conditions other than dishonorable for VA benefit purposes. For all other discharges (such as "other than honorable" discharges), VA makes a factual determination as to whether the discharge is considered to be under conditions other than dishonorable for VA purposes.

Section 3.12 of title 38, C.F.R., outlines VA's character of discharge determination process. When a factual determination is needed, VA first reviews whether the reason for discharge is a statutory bar to benefits under 38 U.S.C. § 5303. Examples of statutory bars to benefits include:

- Resignation of an officer for the good of the service,
- Discharge due to conviction by a general court martial,
- Absence without official leave for 180 days or more, and
- A conscientious objector who refused to wear the uniform.

If a Servicemember's reason for discharge is one of the statutory bars to benefits, section 5303 requires VA to find the Servicemember's discharge disqualifying for VA purposes, unless he or she was considered insane at the time of the circumstances leading to the discharge. If a Servicemember's reason for separation is not a statutory bar to benefits, VA weighs the reason for separation against the overall nature of the quality of service and any mitigating factors, including those related to absence without leave for periods exceeding 180 days.

Typically, VA makes a character of discharge determination only after it receives a claim for benefits, which may be a request for medical treatment received at a VA medical facility, or a compensation or pension application received at a VA regional office. VA

[1] Educational benefits generally require an honorable discharge.

regional office personnel are charged with the responsibility of making character of discharge determinations in claims for both health care and benefit programs. However, prior to this determination, a former Servicemember may be provided health care at a VA medical facility based on a tentative eligibility determination in emergency circumstances. With regard to compensation or pension applications, VA cannot make a final decision regarding entitlement to benefits until the character of discharge issue is resolved.

Before making any final determination on a former Servicemember's character of discharge, VA requests verification of the facts and circumstances surrounding the incident(s) resulting in an "other-than-honorable" discharge from the appropriate service department. VA then reviews all available evidence of record, including the reason for separation, precipitating circumstances, the quality and length of service, and other mitigating factors to determine whether the discharge is under conditions other than dishonorable for VA purposes. VA may consider behavioral health issues, specifically post-traumatic stress disorder (PTSD), when making a character-of-discharge determination. VA documents its determination in an administrative decision and sends it to the former Servicemember. Following this decision, even if VA determines that a Servicemember's character of discharge does not qualify him or her for other types of VA benefits, the Servicemember may still be entitled to treatment at a VA medical facility for any disabilities determined to be service connected, unless the Servicemember is subject to one of the statutory bars to benefits specified in section 5303. Please also refer to 38 C.F.R. § 3.360.

Administrative character-of-discharge decisions are subject to random quality assurance review at the local regional office level by experienced VA claim processors and nationally by quality assurance personnel. For the 12-month period ending May 31, 2015, VA's national claim-based accuracy rate for benefit entitlement decisions (which includes character of discharge decisions) was 91.6 percent. The accuracy of decisions completed by California's three regional offices was 91.2 percent for the same period.

Beyond VA's character of discharge determination process, former Servicemembers may also seek to have a Department of Defense (DoD) Discharge Review Board upgrade their less-than-honorable discharge or to have a DoD Board for Correction of Military or Naval Records revise their service records to change the service department's characterization of service. Changes to a former Servicemember's characterization of service, made by these Boards, are typically binding on VA. Such Boards are subject to 2014 guidance from former Secretary of Defense Charles Hagel, directing a "very liberal" standard for considering character of discharge upgrades when PTSD is a factor. During transition assistance briefings, DoD explains character of discharges to Servicemembers who are completing their military service. Information

about DoD's discharge-upgrade process is available on VA's website located at: *www.benefits.va.gov/benefits/character_of_discharge.asp*, as well as through VA's national call centers and regional office public contact activities.

VA is deeply committed to ensuring every eligible Veteran receives the maximum amount of benefits and care to which he or she is entitled. Should a Veteran requiring assistance come to your attention, particularly when entitlement is uncertain based upon character of service, we will readily assist in any way possible. Should you have further questions, please have your staff contact Ms. Mandy Hartman, Congressional Relations Officer, at (202) 461-6416, or by email at Mandy.Hartman@va.gov.

Thank you for your continued support of our mission.

Sincerely,

Allison A. Hickey

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 3

AUGUST 22, 2016 LETTER SUBMITTED BY THE DISABLED AMERICAN VETERANS

National Service & Legislative Headquarters
807 Maine Avenue, S.W.
Washington, D.C. 20024-2410
Phone (202) 554-3501
Fax (202) 554-3581
www.dav.org

FULFILLING OUR PROMISES
TO THE MEN AND WOMEN WHO SERVED

August 22, 2016

The Honorable Robert McDonald
Secretary
Department of Veterans Affairs
810 Vermont Ave, NW
Washington, DC, 20401

Dear Secretary McDonald:

I am writing on behalf of DAV, a congressionally chartered national veterans service organization with 1.3 million members, all of whom were injured or made ill as a result of wartime active duty in the United States armed forces. DAV is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity.

We have reviewed a December 19, 2015 petition requesting amendment to regulations restricting eligibility for VA benefits based on conduct in service. The petition was generated by Swords to Plowshares, the Legal Services Center of Harvard Law School, the National Veterans Legal Services Program and Latham & Watkins LLP. The petition calls for this amendment to enable VA to reach more veterans who deserve the essential and life-saving services that the VA provides. I have enclosed a copy of the petition for your review.

At our most recent National Convention, held in Atlanta, Georgia, July 31 to August 3, 2016, our members adopted a resolution for a more liberal review of other-than-honorable discharges for purposes of receiving VA benefits and health care services in cases of former service members whose post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), military sexual trauma (MST) or other trauma contributed to their administrative discharge characterized as other than honorable. We recognize that injuries and illnesses sustained as a result of active service can bear heavily on a service member's character of discharge and subsequent access to Department of Veterans Affairs (VA) benefits and services. For these reasons DAV supports this petition.

Providing those ill and injured former service members who possess a less than honorable discharge with a more humane discharge review process would afford them a potential opportunity to mitigate any Department of Defense administrative determinations in instances in which PTSD, TBI or MST was a contributing factor. We ask for your positive consideration of the petition so the VA may expedite a review and amendment of its regulation.

Thank you for your constant and diligent efforts to ensure the adequate care of America's ill and injured veterans and their families.

Sincerely,

GARRY J. AUGUSTINE
Executive Director
Washington Headquarters

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 4

MAY 24, 2016 PETITION FOR RULEMAKING TO AMEND REGULATIONS INTERPRETING 38 U.S.C. § 101(2) SUBMITTED BY THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

SYRACUSE UNIVERSITY
COLLEGE OF LAW

May 24, 2016

The Honorable Robert A. McDonald
Secretary of U.S. Department of Veterans Affairs
810 Vermont Avenue
Washington, DC 20420

Re: Petition for Rulemaking to Amend Regulations Interpreting 38 U.S.C. § 101(2)

Dear Secretary McDonald:

We are deeply troubled by recent reports that hundreds of thousands of veterans are unable to access basic support services from the Department of Veterans Affairs (VA) and are therefore left without the care that they need and deserve. We write now in support of the Petition for Rulemaking to Amend Regulations Interpreting 38 U.S.C. § 101(2) submitted by Swords to Plowshares, the National Veterans Legal Services Program, Latham & Watkins LLP, and the Veterans Legal Clinic at the Legal Services Center of Harvard Law School. The revised rules that they propose are practical, they accord with the law's requirements, and—most importantly—they grant access to veterans who are often in greatest need of VA's help.

As a law school clinic that serve veterans, we have worked with many veterans who received bad-paper discharges. We have heard from them the challenges that many face after they leave the service in getting treatment for service-related injuries, in finding stable employment, and in maintaining housing.

Most notably, one of our first cases at the Syracuse Veterans Legal Clinic was veteran, Joseph Schillaci, who was discharged in 2013 due to an opioid addiction stemming directly from his time in service. Mr. Schillaci had an umbilical hernia and was prescribed hydrocodone and oxycodone after his surgery. He became addicted to this medications. After recognizing this addiction in the military, he entered a substance abuse program. His counselor recommended he continue treatment in TRISAF at Trippler Army Medical Center at his duty station in Honolulu, Hawaii. TRISAF attempted to send Mr. Schillaci to a treatment program in California, but his Unit refused. Subsequent to seeking treatment, Mr. Schillaci had to submit a sample to his unit for urinalysis. The results of this test were positive for painkillers, and Administrative Separation procedures were implemented for Mr. Schillaci. Mr. Schillaci received an other than honorable discharge.

When Mr. Schillaci came home from the Army, his addiction continued. Mr. Schillaci and his family hoped to get him into VA treatment, but he was turned down immediately. Mr. Schillaci, with the help of his mother, filed for character of service determination to obtain medical care during the summer of 2013. As they waited for a decision for treatment, Mr.

Schillaci's addiction continued to worsen. He committed a burglary and grand larceny to support his addiction. Mr. Schillaci was convicted in 2014 and continues to serve his sentence in a New York state prison. It was not until May 2015 that the VA determined that Mr. Schillaci's service was honorable for VA purposes.

We can only speculate on what the outcome for Mr. Schillaci would have been, if the VA would have granted access to basic healthcare while it made its eligibility determination so that he could have received prompt treatment for service-related injuries. We hope that for future generations of veterans, we will not have to speculate.

We have attached letters from both Joseph Schillaci and Cathy Schillaci. Thank you for your efforts to address this critical matter.

Very Respectfully,

Yelena Duterte
Director of Veterans Legal Clinic
Syracuse University College of Law

cc Leigh A. Bradley, General Counsel

My name is Joseph Schillaci and I am writing in hopes of upgrading my "Other that Honorable Discharge". I feel that I was not given a fair chance to recover from a physical addiction after being injured on the job during my service. I joined the Army in October of 2009 and arrived at my Unit at Schofield Barracks in April of 2010. Shortly after my arrival I was injured in my motor pool with an umbilical hernia. I went to go see the doctor and was put on opiate pain killers. I was scheduled to for surgery over a month later. By this time I had been through 3 different pain killers including oxycodone, tramadol, and hydrocodone. The doctors had me on the oxycodone after the surgery for over a month. By that time I was physically addicted to the drugs. I tried to function but I could not do so on a daily basis. Once I could not get the substance from the doctor I went elsewhere to get the meds that I was addicted to get by day to day. I found that I could not function to my best ability at work and I was spending all my money to feed my habit and I was becoming more and more unreliable at work and unable to complete simple task required by my unit. I admitted myself in the Army Substance abuse Program but that was not sufficient. My Counselor recommended a day treatment called TRISAF at Trippler Army Medical Center at Honolulu, HI. I attended 3 weeks in the program and failed a urine test. The counselor at TRISAF decided I needed a higher level of care which would be an in house treatment in California. My Unit would be responsible for the travel and everything else would be taken care of. My company rejected the proposal. They did acknowledge that I had a serious problem that I could not handle on my own. My counselor was very unhappy with this decision. At this point in time, my counselor and I sat down and put together a letter which included all the facts in the situation, the level of care that I needed at that point in time, and that my Company would not move forward with any treatment. This important document was to allow me to get help from the VA after I was discharge from the Army for drug use. Unfortunately, this document came up missing from my move from Hawaii to New York so I was unable to present it to the VA. This document is in my medical files from TRISAF. I have been working on retrieving my medical paperwork from the Army from two different sources for almost 2 years, and just received them on February 10, 2015. I am asking for the assistance that has been denied to me over and over since I have left the Military. I am struggling to keep myself on the right path and this upgraded discharge would open up so many doors for me become a successful citizen of our society.

I am sincerely so sorry for not being able to defeat this addiction on my own or with the help the TRISARF program gave me. It was not the level of care that I needed at that time. Please take note the deleted note at the end of the Medical Papers that James Donovan wrote on Oct 22 2012. He was very distraught that they were not going to give me the treatment that I needed. James Donovan was made to rewrite his summary by his supervisor because his first summary was too strong in his disagreement to what they were doing.

I am throwing myself on your mercy.

Joseph Schillaci

Name of Veteran: Joseph James Schillaci
Social Security # [redacted]
File # [redacted]
Reference [redacted]

Dear Sirs,

I am writing in reference to my son, Joseph James Schillaci, who served in the Army and was discharge as "Other than Honorable" on April 5th 2013. He served 3 years, 5 months and 14 days.

My son Joseph returned home from service with an opiate addiction. We did not know this at first. After he was home for a while, maybe a month, he despondently told of his addiction to opiates and how he wanted and needed to get help. He told us of all the times he was prescribed pain meds for his surgery and other injuries sustained while in the service. He knew he was addicted and, in all conscience, voluntarily turned himself in for help.(1) He was put into a 6 week, day treatment rehabilitation at the Tripler Medical Center in the program called TRISARF. Rehab for opiates requires much more time for recovery than most other drugs and relapse is actually normal in opiate addiction. It hijacks the brain and those changes in the brain can take up to 2 years to recover. So the 6 week program was just the beginning of his recovery. His counselor from the TRISARF program wanted to send my son to an in house rehab in California for continued treatment. From what I understand, Joseph's Unit would not pay for the transportation to this facility and so he was given his discharge. His counselor was very upset that they were not providing Joseph with the help he desperately needed for the "disease of addiction"(2) that he had acquired while in service to his country. This counselor, James Donovan, wrote **a letter** on Joseph's behalf stating that he would be able to get treatment when he arrived home from the VA and that his commanding officers had signed this document.

Once we knew of the problem, I immediately contacted the VA and asked them for help. I told them of this letter but I was told that the letter means nothing. I was told that because of his discharge that he was not eligible for any help at all. We filed documents in the spring or summer of 2013 to get his medical records and **this letter**. We just received his medical records with the help of Jason Phelps, Director of Veterans Outreach and Jim O'Rourke, Veterans Service Officer, who have been working in earnest to help. During this time we had a son who was addicted to Opiates and with no place to get the help he needed.

We tried hard to get Joseph into treatment. The system we have in place in this country is not optimal for a drug addict who needs help. He was turned away from the VA. He was also turned away from numerous facilities due to the fact that insurance would not pay for it. No matter what course we tried, we were turned away.

This country is having a major epidemic with addiction due in part to the overabundance of opiate prescriptions being written. I understand that our military has also seen opiate

prescriptions as a major problem and has tried to rectify the problem, but the damage was already done. There is a banner at the VA here in Rome, New York stating opiate prescriptions may no longer be safe and that they would be finding alternatives for pain management.(3) I am very happy that they are now acknowledging this and making the changes that are needed for our soldiers. I know that my son is not the only soldier that came away from service to our country addicted.

I have learned much from my son's addiction and I have taken a role in the organization of Drugfree.org. I have been trained as a support counselor for parents who need help with their children who are caught up in this world of addiction. I have been well educated. Addiction to opiates is not something to be taken lightly and requires tremendous amount of therapy along with medical supervision. Relapse is a normal in recovery. The fear of overdose was always part of our nightmares.

Although my son is in prison, he is doing well and is trying very hard to change his path to a good one. He is an honest and a loving son. We could not be more proud of the strength he has found in his recovery. He is in the process of signing up for college and doing well while serving his time. His commitment to family is everything and he talks of nothing but improving himself and proving to everyone his worth. He has served his country well and deserves to be recognized for that service. I would be forever grateful if you would consider upgrading his discharge to "Honorable", as it will give him the help and means he needs to continue to move forward.

I have attached publications in order to help show that my son was not given the treatment that is needed for addiction to the opiates that the doctors in the Army gave him, while in service to his country.

Sincerely,

Cathy Schillaci

http://www.apd.army.mil/jw2/xmldemo/r600_88/main.asp

(1)7-3. Voluntary (self) identification

a. Voluntary (self) ID **is the most desirable method** of discovering alcohol or other drug abuse. **Command policies will encourage Soldiers and civilian corps members to volunteer for assistance and will avoid actions that would discourage these individuals from seeking help.** Normally Soldiers with an alcohol or other drug problem should seek help from their unit commander; however, they may initially request help from their installation ASAP, a MTF, a chaplain, or any officer or NCO in their chain of command. If a Soldier initially seeks help from an activity or individual other than his or her unit commander, the individual contacted should immediately notify the Soldier's unit commander and installation ADCO. The Limited Use policy will apply when Soldiers seek help from any of the listed personnel or organizations.

(2) Addiction is **defined** as a chronic, relapsing brain **disease** that is characterized by compulsive drug seeking and use, despite harmful consequences. It is considered a brain **disease** because drugs change the brain; they change its structure and how it works.Sep 15, 2014
The Science of Drug Abuse and Addiction: The Basics ...
www.drugabuse.gov/.../science-drug-abus...
National Institute on Drug Abuse

(3) http://www.drugabuse.gov/publications/drugfacts/substance-abuse-in-military

As stated from our government publication from the site listed above: In 2008, 11 percent of service members reported misusing prescription drugs, up from 2 percent in 2002 and 4 percent in 2005. Most of the prescription drugs misused by service members are opioid pain medications.

The greater availability of these medications and increases in prescriptions for them may contribute to their growing misuse by service members. **Pain reliever prescriptions written by military physicians quadrupled between 2001 and 2009—to almost 3.8 million.**

http://www.apd.army.mil/jw2/xmldemo/r600_85/main.asp

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 5

MAY 25, 2016 PETITION FOR RULEMAKING TO AMEND REGULATIONS INTERPRETING 38 U.S.C. § 101(2) SUBMITTED BY THE HOMELESS ADVOCACY PROJECT

HAP
HOMELESS ADVOCACY PROJECT
"...helping to break the cycle of poverty and homelessness."

1429 Walnut Street, 15th Floor
Philadelphia, PA 19102
(215) 523-9595
(800) 837-2672
Fax: (215) 523-9599
Email: info@haplegal.org
www.homelessadvocacyproject.org

May 25, 2016

The Honorable Robert A. McDonald
Secretary of U.S. Department of Veterans Affairs
810 Vermont Avenue
Washington, DC 20420

Re: Petition for Rulemaking to Amend Regulations Interpreting 38 U.S.C. § 101(2)

Dear Secretary McDonald:

On behalf of the Homeless Advocacy Project (HAP), a non-profit organization that provides free legal services to homeless veterans in Philadelphia, we write to express our concern over the Department of Veterans Affairs' (VA) improper denial of VA health care and compensation and pension benefits (hereinafter "disability benefits") to former service members with Other Than Honorable (OTH) or Bad Conduct Discharges (BCD). By working closely with homeless veterans who experience the daily challenges of extreme poverty, Post-Traumatic Stress Disorder, self-medication with drugs or alcohol, and debilitating service-related physical injuries, HAP attorneys have firsthand knowledge of the profound impact caused by the VA's denial of VA health care and disability benefits.

In our experience, veterans with OTHs or BCDs rarely succeed in their quest for VA health care or disability benefits. There are two reasons for this phenomenon. Most commonly, veterans with OTHs or BCDs apply for health care or disability benefits but are told by VA personnel that that they are not eligible for benefits unless their discharge is upgraded. In this scenario, the veteran is not even offered an application to apply for benefits. The second, less common scenario involves veterans who *do* submit an application for disability or health care benefits, but (1) the RO either denies the claim with boilerplate language after a Character of Discharge (COD) Determination is supposedly conducted or (2) in the case of the VAMC, the veteran is denied verbally by an employee who is unaware of the process of initiating a COD analysis and unfamiliar with VA Form 7131 (below).

Unfortunately, this pattern of *unconditionally* denying potentially eligible veterans access to VA benefits has persisted irrespective of who is supervising or staffing the VAMC Eligibility Department or local RO. Moreover, the efforts of HAP attorneys to resolve these issues on an individual basis have at times taken years to resolve, with the veteran remaining homeless, hungry, and without basic health care in the interim.

Below is one recent example of a veteran who was denied access to VA health care by local eligibility representatives in violation of VA regulations and procedures. The experience of this veteran is representative of a longstanding and systemic problem that extends far beyond the veterans who have been represented by HAP attorneys.[1]

Veteran 1

Veteran 1 served his full enlistment period in the United States Army but received an OTH. Prior to connecting with HAP, Veteran 1 went to the Philadelphia VAMC to receive treatment for a severe service-related leg service. The veteran had zero income, struggled with public transportation, used a cane and a brace, and still had difficulty walking even one city block.

Given his injury and the ongoing pain it caused, veteran 1 attempted to enroll in VA health care at the VAMC and scheduled an appointment with a primary care physician. While waiting to meet with the doctor, a nurse came into the waiting area and told Veteran 1 that he was not eligible for VA health care benefits due to his discharge and therefore could not be seen by the doctor.

After Veteran 1 met with a HAP attorney and described how he was turned away from treatment at the VAMC, the attorney called the Health Eligibility Center (HEC) in Atlanta to confirm the procedure for veterans with OTHs who are trying the access health care benefits. The HEC eligibility representative explained the procedure consistent with a recent VA handout, which attempted to clarify VHA's internal procedures for veterans with OTHs.[2]

After her conversation with the HEC, the HAP attorney sent Veteran 1 back to the VAMC Eligibility Department with a copy of the handout. The HAP attorney highlighted the relevant portions of the handout and provided VA form 7131. Veteran 1 returned to Eligibility and provided the VA representative with the handout and form. Rather than process the veteran's application to enroll in VA health care, which would presumably initiate the COD process, the eligibility representative informed the veteran that his discharge disqualified him from VA health care and that he needed a discharge upgrade. Because the eligibility representative was unfamiliar with VA form 7131 and never heard of a COD Determination, she sent him hobbling across town to speak with a representative of the (RO), where he was similarly told that his only option was to apply for a discharge upgrade.

Conclusion

We are deeply troubled by recent reports that hundreds of thousands of veterans are unable to access basic support services from the Department of Veterans Affairs (VA) and are therefore left without the care that they need and deserve. Their denial of services mimics Veteran 1's denial above. As such, we write now in support of the Petition for Rulemaking to Amend Regulations Interpreting 38

[1] HAP attorneys have been in contact with advocates around the country who express similar concerns of potentially eligible veteran being summarily denied VA health care by eligibility staff at their local VHA facility.

[2] According to the handout, "If an individual presents or makes an application for VA health care benefits and has an 'other than honorable' discharge,...A request for an administrative decision regarding the character of service for VA health care purposes must be made to the local VA Regional Office (VARO). This request may be submitted using a VA Form 7131, Exchange of Beneficiary Information and Request for Administrative and Adjudicative Action." VBA contemplates the receipt of Form 7131 from a VHA facility. Specifically, M21-1MR notes, "Medical facilities may request information from ROs when a character of discharge determination is required for health care eligibility purposes. Upon receipt of an application for treatment from a Veteran with an 'other than honorable' discharge, the VHA facility initiates a VA Form 10-7131, advising the SOJ as to what information is required." See VA Handout IB 10-448 (Nov. 2014), elaborating on VHA Handbook 1601 A.02 ¶ 5(c); M21-1MR, Part III, Subpart v, Chapter 7, Section A.7.

U.S.C. § 101(2) submitted by Swords to Plowshares, the National Veterans Legal Services Program, Latham & Watkins LLP, and the Veterans Legal Clinic at the Legal Services Center of Harvard Law School. The revised rules that they propose are practical, they accord with the law's requirements, and—most importantly—they grant access to veterans who are often in greatest need of VA's help.

As a legal aid organization that has been serving homeless veterans for nearly 15 years, we have worked with countless veterans who received bad-paper discharges. We have heard from them the challenges that many face after they leave the service in getting treatment for service-related injuries, in finding stable employment, and in maintaining housing. We have witnessed the barriers that they confront trying to access support from the VA: the limited paths to initiate a Character of Discharge review; the overly broad disqualification criteria; and the widespread misconception that they are categorically ineligible. While some of us have been able to help veterans successfully navigate the VA eligibility system, all of us know that there are many more veterans whom we were not able to help—or whom we will never meet—and who greatly need the VA's basic services.

The data presented in the Petition bring a new perspective to our anecdotal experiences. We now know that 6.5% of Post-9/11 veterans are currently ineligible for healthcare, homelessness services, and disability compensation from the VA, and that 90% of Post-9/11 veterans have never even received a Character of Discharge review. We now know that veterans are disqualified on the basis of minor misconduct that never could have resulted in a dishonorable discharge, and that whether the veteran served in combat or suffered from a mental health condition has little to no impact on the VA's eligibility determination.

These are systemic problems, and they call for systemic solutions. The Petition for Rulemaking presents sensible and sound proposals for how to improve the current regulations. The Petition better accords with Congress's original intent, reduces the administrative burden on the VA, and enhances access to basic service for veterans who deserve our nation's support. We therefore urge the VA to revise its Character of Discharge regulations.

As Secretary, you have demonstrated a strong commitment to ensuring that all veterans can access the care and support to which they are entitled. We trust that you will take action to align the VA's regulations to law and sound policy.

Thank you for your efforts to address this critical matter.

Sincerely,

Michael Taub, Esq.
The Homeless Advocacy Project

Alie Muolo, Esq.
The Homeless Advocacy Project

cc: Leigh A. Bradley, General Counsel

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 6

FEBRUARY 21, 2017 LETTER IN SUPPORT OF RULEMAKING PETITION SUBMITTED BY THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

Paralyzed Veterans of America

801 18th Street NW
Washington DC 20006-3517
(O) 202.872.1300
(TTY) 202.416.7622
(F) 202.785.4452
www.pva.org

Chartered by the Congress of the United States

February 21, 2017

The Honorable David Shulkin
Secretary of Veterans Affairs
Department of Veterans Affairs
810 Vermont Ave, NW
Washington, DC, 20401

Dear Secretary Shulkin:

We write in support of the Rulemaking Petition submitted by Swords to Plowshares, the National Veterans Legal Services Program, the Veterans Legal Clinic at the Legal Services Center of Harvard Law School, and Latham & Watkins LLP.

This change would more accurately reflect congressional intent that only those who served, "dishonorably," be excluded from VA care and benefits.

PVA believes there is overwhelming evidence that the effects of war can cause psychological harm, drastically changing the personality and behavior of service members. Sometimes those effects manifest and adversely affect the terms of the veteran's discharge. It is a poor irony and ultimately unjust to withhold care for an injury incurred during service solely because that injury provoked or caused the actions which led to their discharge classification. While most commanders are dedicated and caring leaders, many do not have the intimate knowledge of a service member's behavior prior to the trauma they experienced during military service. Other leaders may even find it "expedient" to rapidly discharge an individual to rid themselves of a problem in the unit. Too often these discharges are determined without regard to the cause of the altered behavior. Having an effective mechanism to review eligibility in a deliberate and fair manner can ensure that veterans deserving of care for injuries incurred as a result of their service are not denied.

Ill and injured service members with less than honorable discharges need a humane discharge review process to mitigate any Department of Defense administrative determinations in instances in which PTSD, TBI, or MST was a contributing factor.

We ask for your positive consideration of this Rulemaking Petition so that the VA may expedite the review and amendment of its regulation.

Sincerely,

Sherman Gillums
Executive Director

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 7

MARCH 2, 2017 LETTER IN SUPPORT OF RULEMAKING PETITION SUBMITTED BY PROTECT OUR DEFENDERS

Protect Our Defenders

March 2, 2017

The Honorable Secretary David Shulkin
Department of Veterans Affairs
810 Vermont Ave NW
Washington, D.C. 20401

Dear Secretary Shulkin,

I am writing to express our organization's strong support for the Petition for Rulemaking to revise the agency's regulations that currently restrict eligibility for benefits through the Department of Veteran's Affairs (VA) for individuals discharged with an "other than honorable" discharge status.

It is Protect Our Defender's strong belief that this determination should take into consideration mental health and other trauma, and to account for extenuating circumstances in setting standards for eligibility and access to care.

POD regularly works with veterans who experienced sexual trauma while serving and who were subsequently discharged with a service characterization of "other than honorable" in the aftermath of their assaults. This can be absolutely devastating for survivors, who, in addition to coping with the trauma of their rape or sexual assault, lose both their career and, in many cases due to their discharge status, are denied access to further treatment and care.

As research by both the Department of Defense (DOD) and the RAND Corporation has recently shown, the majority (62%) of military sexual assault survivors experience retaliation, and this can take the form of a retaliatory, other than honorable discharge. A 2016 DOD Inspector General report found that one-third of service members who report sexual assault are discharged, typically within seven months of making a report, and these survivors receive "other than honorable" discharge characterizations more often than service members as a whole. At the same time, obtaining a discharge upgrade from the Boards of Correction can be difficult and time consuming, with low chances of success.

In light of these facts and the critical, often life-saving need for care, we urge the department to follow the Petition's recommendations to allow for more flexibility and consideration of mitigating factors such as trauma and mental health concerns in determining eligibility for benefits, and to provide for tentative eligibility to prevent lapses in care.

Adopting the petition's proposals would help ensure the Department upholds its duty to care for those veterans who suffered trauma while serving our country.

Sincerely,
Miranda Petersen

Executive Director
Protect Our Defenders

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 8

JULY 25, 2017 LETTER FROM THE NATIONAL ORGANIZATION OF VETERANS' ASSOCIATES IN SUPPORT OF RULEMAKING PETITION SUBMITTED BY NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA)
1775 Eye Street, NW, Suite 1150
Washington, DC 20006
1-877-4VETADVOCATES
www.vetadvocates.org

Secretary David J. Shulkin
United States Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420

July 25, 2017

RE: Character of discharge regulations

Dear Secretary Shulkin:

At the request of the National Veterans Legal Services Program, Swords to Plowshares, and the Veterans Legal Clinic, Legal Services Center of Harvard Law School, the National Organization of Veterans' Advocates, Inc. (NOVA) joins those who have voiced their support for the Petition for Rulemaking to amend VA's character of discharge regulations. We applaud VA's granting of the petition and agreement to amend these regulations.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 500 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from the Department of Veterans Affairs (VA), and works to develop and encourage high standards of service and representation for all persons seeking VA benefits. NOVA members represent veterans before all levels of VA's disability claims process, as well as before United States Court of Appeals for Veterans Claims and United Court of Appeals for the Federal Circuit.

NOVA members frequently represent veterans who have been denied compensation, pension, and healthcare benefits as a result of VA's treatment of those with "bad paper" discharges. Many of these individuals are the veterans most in need of assistance due to mental health conditions and traumatic brain injuries manifested in service, which in turn led to behaviors that resulted in "Other Than Honorable" or OTH discharges. This problem is compounded by the

broad disparities in treatment of veterans between the various VA Regional Offices across the country, where employees interpret and apply the current, overly-broad regulations with disparate outcomes. When a veteran is denied eligibility and fails to receive the necessary treatment for the conditions caused by service, further problems can develop in the forms of homelessness, criminal behavior, and suicide.

The parties to the Petition for Rulemaking,[1] as well as the authors of Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper,[2] have elaborated on the problems with the current regulations. Chief among these are (1) the regulatory bars to eligibility which go beyond those enumerated by Congress; (2) the overly broad definition and application of "willful and persistent misconduct"; (3) no consideration of mental health conditions outside of "insanity"; (4) a failure to consider mitigating factors; (5) unlawful singling out of a class of veterans due to homosexual conduct; and (6) a general presumption of ineligibility for those with OTH discharges.

NOVA agrees with the recommendations and proposed changes offered in the above-referenced documents and urges VA to incorporate them into its amended regulations. These recommendations include, but are not limited to, the following:

- VA should only bar veterans whose misconduct resulted in, or should have resulted in, a dishonorable discharge.
- VA should allow for consideration of the mitigating and positive factors of a veteran's service.
- VA should account for in-service mental health conditions that do not rise to the level of "insanity" and consider whether the condition led to the misconduct resulting in discharge.
- VA should not require prior eligibility reviews for those who received an administrative OTH discharge.
- VA should provide tentative healthcare eligibility to veterans with OTH discharges.

See Petition for Rulemaking at 86-105; UNDERSERVED at 29-32.

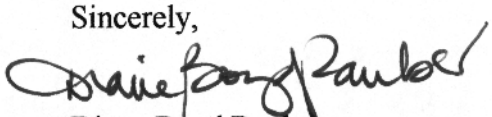
---

[1] *Petition for Rulemaking to Amend 38 C.F.R. §§ 3.12(a), 3.12(d), 17.34, 17.36(d)*(December 19, 2015)(submitted by representatives of Swords to Plowshares; National Veterans Legal Services Program; Veterans Legal Clinic, Legal Services Center of Harvard Law School; and Latham & Watkins, LLP).

[2] Veterans Legal Clinic, Legal Services Center of Harvard Law School, UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER (2016).

Thank you for your consideration. Should you require additional information, please do not hesitate to contact me at 202.587.5708 or drauber@vetadvocates.org.

Sincerely,



Diane Boyd Rauber
Executive Director

cc: Laurine Carson
Assistant Director, Procedures
Acting Assistant Director, Policy Staff
Compensation Service, VBA

David J. Barrans, Esq.
Chief Counsel, Benefits Law Group
VA Office of General Counsel

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 9

MAY 26, 2020 LETTER OF LAW SCHOOL, LEGAL AID, AND *PRO BONO* ADVOCATES FOR VETERANS IN SUPPORT OF PETITION FOR RULEMAKING TO AMEND REGULATIONS INTERPRETING 38 U.S.C. § 101(2)

May 26, 2016

The Honorable Robert A. McDonald
Secretary of U.S. Department of Veterans Affairs
810 Vermont Avenue
Washington, DC 20420

Re: Letter of Law School, Legal Aid, and *Pro Bono* Advocates for Veterans in Support of Petition for Rulemaking to Amend Regulations Interpreting 38 U.S.C. § 101(2)

Dear Secretary McDonald:

We are deeply troubled by recent reports that hundreds of thousands of veterans are unable to access basic support services from the Department of Veterans Affairs (VA) and are therefore left without the care that they need and deserve. We write now in support of the Petition for Rulemaking to Amend Regulations Interpreting 38 U.S.C. § 101(2) submitted by Swords to Plowshares, the National Veterans Legal Services Program, Latham & Watkins LLP, and the Veterans Legal Clinic at the Legal Services Center of Harvard Law School. The revised rules that they propose are practical, they accord with the law's requirements, and—most importantly—they grant access to veterans who are often in greatest need of VA's help.

As members of law school clinics, legal aid organizations, and public interest groups that serve veterans, we have worked with many veterans who received bad-paper discharges. We have heard from them the challenges that many face after they leave the service in getting treatment for service-related injuries, in finding stable employment, and in maintaining housing. We have witnessed the barriers that they confront trying to access support from the VA: the limited paths to initiate a Character of Discharge review; the overly broad disqualification criteria; and the widespread misconception that they are categorically ineligible. While some of us have been able to help veterans successfully navigate the VA eligibility system, all of us know that there are many more veterans whom we were not able to help—or whom we will never meet—and who greatly need the VA's basic services.

The data presented in the Petition bring a new perspective to our anecdotal experiences. We now know that 6.5% of Post-9/11 veterans are currently ineligible for healthcare, homelessness services, and disability compensation from the VA, and that 90% of Post-9/11 veterans have never even received a Character of Discharge review. We now know that veterans are disqualified on the basis of minor misconduct that never could have resulted in a dishonorable discharge, and that whether the veteran served in combat or suffered from a mental health condition has little to no impact on the VA's eligibility determination.

These are systemic problems, and they call for systemic solutions. The Petition for Rulemaking presents sensible and sound proposals for how to improve the current regulations. The Petition better accords with Congress's original intent, reduces the administrative burden on the VA, and enhances access to basic service for veterans who deserve our nation's support. We therefore urge the VA to revise its Character of Discharge regulations.

As Secretary, you have demonstrated a strong commitment to ensuring that all veterans can access the care and support to which they are entitled. We trust that you will take action to align the VA's regulations to law and sound policy.

Thank you for your efforts to address this critical matter.

Sincerely,

David Addlestone
Author of American Veterans & Servicemembers Survival Guide, Former Co-Executive Director, National Veterans Legal Services Program

Katelyn B. Atwood
Vermont Poverty Law Fellow & Staff Attorney, Vermont Veterans Legal Assistance Project, South Royalton Legal Clinic*

Antoinette Balta
President & Co-Founder
Veterans Legal Institute*

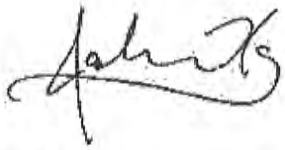
Amber Baylor
Visiting Assistant Professor of Law & Director, Veterans Law Clinic, Widener University Delaware Law School*

Coco Culhane
Founder & Director, Veteran Advocacy Project, Urban Justice Center

Yulanda Curtis
Clinical Teaching Fellow, Veterans Legal Clinic, University of Michigan Law School*

Leigh G. Horvath
Legal Administrator, Lewis B. Puller, Jr. Veterans Benefits Clinic, William & Mary Law School*

Kristine A. Huskey
Assistant Clinical Professor & Director, Veterans' Advocacy Law Clinic, James E. Rogers College of Law, University of Arizona*

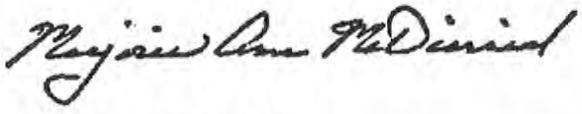


Joshua Kay
Director, Veterans Legal Clinic, University of Michigan Law School*

Lori Pierce Lewis
Clinic Fellow, Veterans' Advocacy Law Clinic, James E. Rogers College of Law, University of Arizona*

Jason Manne
Adjunct Professor of Law & Director, Veterans Practicum, University of Pittsburgh School of Law*

Hugh B. McClean
Visiting Assistant Professor & Director, Bob Parsons Veterans Advocacy Clinic, University of Baltimore School of Law*



Marjorie Anne McDiarmid
Professor of Law, Director of Clinical Program, West Virginia University College of Law*

Liam McGivern
Attorney, Veterans Advocacy Project, Legal Services of Greater Miami, Inc.*

Margaret Middleton
Executive Director & Co-Founder, Connecticut Veterans Legal Center

Robert F. Muth
Adjunct Professor of Law & Managing Attorney, Veterans Legal Clinic, University of San Diego School of Law*

Jennifer D. Oliva
Associate Professor, Director, Veterans Advocacy Clinic, West Virginia University College of Law*

Anna S. Richardson
Executive Director & Chief Counsel, Veterans Legal Services

Patricia E. Roberts
Clinical Professor of Law & Director,
Lewis B. Puller, Jr. Veterans Benefits
Clinic, William & Mary Law School*

Kenneth Schorr
Executive Director, Legal Services of
Southern Piedmont

Evan Seamone
Professor, Mississippi College
School of Law

Stacey-Rae Simcox
Associate Professor of Legal Skills & Director,
Veterans Advocacy Clinic, Stetson University
College of Law*

Ryan P. Sullivan
Assistant Professor of Law, Civil Clinic,
University of Nebraska College of Law*

Elizabeth Tarloski
Visiting Professor of Practice, Lewis B. Puller,
Jr. Veterans Benefits Clinic, William & Mary
Law School*

Steve Virgil
Executive Director of Experiential
Education & Clinical Professor of Law,
Veterans Legal Clinic, Wake Forest
University School of Law*

Michael J. Wishnie
William O. Douglas Clinical Professor of
Law & Director, Veterans Legal Services
Clinic, Yale Law School*

cc Leigh A. Bradley, General Counsel

*In their individual capacities. Institutional affiliations listed for identification purposes only.

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 10

MARCH 5, 2020 LETTER REGARDING RULEMAKING TO AMEND REGULATIONS INTERPRETING 38 U.S.C. § 5102(A), 5103A, 5014, AND 1720I SUBMITTED BY MEMBERS OF THE UNITED STATES SENATE

United States Senate
WASHINGTON, DC 20510

March 5, 2020

The Honorable Robert Wilkie
Secretary of Veterans Affairs
U.S. Department of Veterans' Affairs
810 Vermont Avenue, NW
Washington, D.C. 20420

Dear Secretary Wilkie:

We write today to request that the Department of Veterans' Affairs (VA) take immediate action to comply with 38 U.S.C §§ 5102(a), 5103A, 5014 and 1720I, by allowing veterans with Other Than Honorable, or bad paper, discharges to apply for VA health care. A study published today, entitled *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges*, systematically demonstrates what countless anecdotes have indicated: VA is turning away veterans who may be entitled to care.[1] With an estimated 20 veterans dying by suicide per day, VA cannot turn away veterans who may be in mental health crisis.[2]

The study includes reports of veterans being turned away in eighteen states, including Connecticut, Montana, Massachusetts, California, Virginia, Kansas, West Virginia, Arkansas, North Carolina, Alaska, Florida, New York, and Texas.[3] As you know, under current law, every single veteran seeking VA health care is entitled to apply and have VA consider their application. VA cannot turn away veterans who are reaching out for care and benefits without due process and proper adjudication. However, this study demonstrates that VA routinely denies potentially eligible veterans the right to even apply for benefits.

More than 575,000 of veterans discharged since 1980 have a status that is Other Than Honorable, and 81% of these decisions were administrative; meaning that there was no court-martial or other judicial process to determine whether they were appropriate.[4] Many of these veterans are suffering from Traumatic Brain Injury, Post Traumatic Stress Disorder, or Military Sexual Trauma. Particularly considering that these veterans have higher rates of mental health conditions and suicide, VA must not turn them away before a rigorous process to determine if they are eligible for care.

---

[1] OUTVETS, *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges* (Cambridge: MA, Legal Service Center of Harvard Law School, 2020), 1-2.
[2] Department of Veterans Affairs, "Veteran Suicide Data," https://www.mentalhealth.va.gov/suicide_prevention/data.asp (accessed March 4, 2020).
[3] OUTVETS, *Turned Away*, 15.
[4] Ibid.

Veterans Health Administration staff also receive incorrect or inadequate training and guidance on this issue, as determined in this study.[5] It is encouraging that VA has added instructions on how to process Other Than Honorable discharge veterans for temporary access to care, and created some resource materials about how veterans may be able to access VA.[6] Alarmingly, the study showed that most staff were not aware of these materials and so did not reference them when veterans attempted to enroll.[7] This lack of information and sometimes, misinformation, directly impacts the ability of veterans to access health care.

We recommend that VA have a standardized, comprehensive plan to train frontline employees who are processing requests for care from veterans with bad paper discharges with step-by-step guidance.VA should also review and update all current training and guidance, including the Eligibility and Enrollment Handbook, for incorrect, misleading or vague language, and provide specific, accurate language that presumes eligibility for veterans.

We further recommend that VA outline a process for veterans to request a character of discharge determination and be able to supply evidence for this claim, as well as request a hearing and have assistance for the claim by a Veterans Service Organization or other accredited representative. We encourage VA to decide these claims within a reasonable timeframe. VA should also implement a tracking system for VHA enrollment requests to ensure that the turn-away problem is resolved prospectively, and reach out to veterans who have previously been turned away.

There is a mental health crisis in our communities and in the VA system. VA cannot continue to turn away veterans who may qualify for health care without a deliberative and fair process to consider their claims. As this study states, "VA's denial of care to veterans with bad paper discharges is national, persistent, and systemic. Its impact on some of our most vulnerable veterans can be harmful or even deadly."[8] We look forward to your response and continuing to work with you to remedy the problems highlighted in this important study.

Sincerely,

RICHARD BLUMENTHAL
United States Senate

JON TESTER
United States Senate

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[5] Ibid., 13-21.
[6] Department of Veterans Affairs, Veterans Health Administration, *Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits,* IB 10-448, Veterans Health Administration (Washington, DC, 2017) https://www.va.gov/healthbenefits/resources/publications/IB10-448_other_than_honorable_discharges5_1 7.pdf; Department of Veterans Affairs, Veterans Benefits Administration, *Claims for VA Benefits & Character Of Discharge: General Information*, Benefits Assistance Service(Washington, DC, 2014) https://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf.
[7] OUTVETS, *Turned Away*, 21.
[8] OUTVETS, *Turned Away*, 15.

ELIZABETH WARREN
United States Senate

EDWARD J. MARKEY
United States Senate

SHERROD BROWN
United States Senate

KAMALA D. HARRIS
United States Senate

COMMENTS OF THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND SWORDS TO PLOWSHARES

EXHIBIT 11

TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTH CARE TO VETERANS WITH BAD PAPER DISCHARGES

Turned Away

How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges

VETERANS
LEGAL SERVICES

OUTVETS
PRIDE HONOR SACRIFICE
BOSTON

LEGAL SERVICES CENTER
LSC
CENTRO DE SERVICIOS LEGALES HARVARD LAW SCHOOL

ACKNOWLEDGEMENTS

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Legal Disclaimer

This report is neither a solicitation nor an offer to represent any individual concerning any legal problem. This report is not meant to constitute legal advice or legal services, not is it intended to serve as a substitute for consulting with a lawyer. Individuals who have been denied access to veterans health care or other benefits are encouraged to consult with an attorney or non-attorney advocate.

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I. EXECUTIVE SUMMARY

Marine Corps veteran Dwayne Smith survived a deployment to Afghanistan, but almost did not make it through his transition back to civilian life when he returned stateside. Dwayne returned home with both Post-Traumatic Stress Disorder (PTSD) and a Traumatic Brain Injury (TBI)—the signature wounds of the wars in Iraq and Afghanistan. Yet, when Dwayne went to the Department of Veterans Affairs (VA) to get health care for his military injuries, VA turned him away. Why? Because when VA frontline staff looked at Dwayne's discharge papers and saw that he had an Other Than Honorable discharge, they decided he would not get any VA care. Dwayne, who received his discharge after self-medicating to cope with PTSD and leaving his post when a family member was diagnosed with cancer, went on to seek help at multiple VA health care facilities. But each time, VA turned Dwayne away, in violation of the law. The law required that VA staff help Dwayne apply for health care and ensure that his application was properly reviewed and a written eligibility decision issued, including notice of appeal rights. It took more than five years and the assistance of a pro bono lawyer before Dwayne could apply and finally be approved for VA health care and benefits. Tragically, Dwayne is not alone—veterans with bad paper discharges get turned away by VA frontline staff every day without being allowed to apply for care.

Imagine trying to make an appointment with your doctor when you are sick, or your therapist when you are facing a mental health crisis, and the front desk staff tells you that they personally decided you cannot do so. For decades, that is what has happened to many thousands of former servicemembers with bad paper discharges when they attempted to seek care from VA. Importantly, an estimated 400,000 are currently at risk of being turned away from services they may be entitled to. Many frontline staff at VA health care facilities have improperly turned away former servicemembers seeking health care, telling them that they are ineligible due to their military discharge statuses—without even allowing them to apply. This is not just unfair, it is unlawful. VA must take immediate action to prevent this injustice from happening and to remedy past harms to servicemembers like Dwayne who went five years without the care he needed and deserved because VA failed to follow its own procedures.

Why are stories like Dwayne's so common? Every servicemember is assigned a "character of service" or "discharge status" upon leaving military service. While most servicemembers receive Honorable discharge statuses, a substantial percentage—approximately 7 percent of veterans discharged since 1980—receive discharge statuses that are not Honorable, which are known as "bad paper." Servicemembers usually get "bad paper" because of some alleged misconduct, though that misconduct frequently is minor, for a military-only offense, or not proved in any court. Studies also show that many servicemembers are separated with bad paper for misconduct related to a service-related mental or physical health condition or Military Sexual Trauma (MST).

Veterans with bad paper have higher rates of mental health conditions, suicide, homelessness, and unemployment.[1] Many have disabilities related to their service, which may in fact have led to their being discharged with bad paper. Many were discharged with bad paper under past discriminatory practices that targeted veterans because of their sexual

orientation or sexual identity. Veterans with bad paper therefore are some of the veterans most in need of VA's health care services—yet they are being wrongfully excluded from those services without due process.

A bad paper discharge affects whether and to what extent a former servicemember may be eligible for federal veterans benefits. For most benefits administered by VA, including health care, a bad paper discharge does not render a veteran categorically ineligible. Rather, it puts them in a "limbo" category that requires VA to conduct an individualized eligibility determination to decide whether the veteran was discharged under "dishonorable conditions" or "other than dishonorable conditions." That determination process is itself beset by delays and inconsistent decisions.

But many veterans with bad paper report attempting to apply to VA for health care and simply being turned away. They are told by VA frontline staff that their discharge status makes them categorically ineligible for health care. Further, sometimes they are told to apply to the Department of Defense (DOD) to upgrade their discharge status, and to return to VA later if the discharge upgrade is successful. That DOD process typically is burdensome, is rarely successful, and takes years to resolve.

Every veteran—regardless of discharge status—has the right to apply to VA for health care. Every veteran has the right to receive a written decision on his or her application and information on how to appeal any denial.

Many veterans with bad paper are eligible for VA health care but are being wrongfully turned away. While there should be consequences for military misconduct, those consequences should not include being denied health care—especially if you have a service-related disability, are experiencing homelessness, or are dealing with the impact of MST, as so many veterans with bad paper are.

This report provides background information about why veterans get "bad paper" and about VA's health care eligibility standards and then documents, including through government data collected through Freedom of Information Act requests, how VA has been improperly turning away veterans with bad paper from receiving VA health care. The report concludes with recommendations about the steps VA must take to ensure that every veteran is afforded the right to apply for health care and to guarantee that no veteran is wrongly denied the care that the veteran needs and deserves.

The extensive research and investigation underlying this report, prepared on behalf of the veteran service organization OUTVETS, documents that the vast majority of veterans with bad paper are not currently enrolled in VA health care—many of them because they have been wrongly told by VA to just go away. For many veterans, this initial rejection leads them to end their search for care altogether. It is time for VA to stop this cycle of misinformation and stigma and to honor that every person who has served in the military has a right to apply for VA care.

II. BACKGROUND

A. *What is "Bad Paper"?*

Upon separation from military service, every servicemember is assigned a "character of service." The character of service is set forth on the Department of Defense Form 214 ("DD 214"), sometimes referred to as discharge papers, which is issued to every servicemember as the servicemember leaves the military and enters civilian life. The military currently uses the following designations for a servicemember's character of service: Honorable, Under Honorable Conditions (General), Other Than Honorable, Bad Conduct, or Dishonorable.*

Honorable, General, and Other Than Honorable characters of service are "administrative" discharges, meaning that the servicemember's military command effectuated the discharge administratively and without a court-martial. This usually means the servicemember did not have the benefit of a court hearing to determine whether the discharge status was appropriate. Bad Conduct and Dishonorable discharges are "punitive" discharges because only a military court-martial can impose such status as punishment for a criminal conviction. A Bad Conduct discharge may be imposed through a special court-martial or a general court-martial; a Dishonorable discharge may be imposed only through a general court-martial. There are also some discharges that do not characterize an individual's service and are therefore known as Uncharacterized discharges. These include Entry Level Separation and Void Enlistment.

An Honorable discharge is the only type of discharge that carries no stigma and imposes no impediments to the former servicemember's ability to access veterans benefits, supports, and services.[2] The other characters of service—namely General, Other Than Honorable, Bad Conduct, and Dishonorable discharges—are stigmatizing to various degrees and can create substantial barriers to the former servicemember's ability to access veterans benefits, supports, and services. Discharges such as these are known as "bad paper" discharges, because the harmful character of service is listed on each separating servicemember's DD 214.†

As a note on terminology, there are many different definitions of who is a "veteran" under state and federal law or used by various veterans organizations. Many require that a former servicemember have a specific discharge status, usually Honorable or at least under honorable conditions. VA's definition, as set forth in statute and regulation and described in detail below, requires that the discharge be under "other than dishonorable" conditions, which does include some former servicemembers with bad paper discharges.[3] For purposes of this report, we will use an inclusive definition of the term "veteran" that encompasses any person who has served at least one day of active duty military service, without regard to their discharge status.

* In place of a Dishonorable discharge, officers are given a Dismissal. OTH used to be known as Undesirable.

† Note that a "bad paper" discharge is not synonymous with a Bad Conduct Discharge (BCD). "Bad paper" refers to discharges that are not honorable, and for purposes of this report, specifically includes Other Than Honorable (formerly Undesirable), Bad Conduct, and Dishonorable discharges. The vast majority of veterans with bad paper—more than 80 percent of such veterans discharged since 1980—have administrative Other Than Honorable discharges.

Similarly, the term "bad paper" has multiple definitions. Some include all veterans with less-than-fully-Honorable discharges, and some include veterans with Honorable discharges who have stigmatizing information on their DD 214s or military records. For purposes of this report, the term "bad paper" includes only those veterans with Other Than Honorable, Bad Conduct, and Dishonorable discharge characterizations, the large majority of whom are veterans with administrative Other Than Honorable discharges.

B. Why Do Servicemembers Get "Bad Paper"?

No single reason explains why servicemembers do not receive a fully Honorable discharge. Some servicemembers exercise poor judgment and engage in misconduct without any mitigating circumstances. Other servicemembers, however, receive bad paper unjustly. Some had undiagnosed physical or mental health disabilities that contributed to behavior that was interpreted as unmitigated misconduct. Others may have been discharged with bad paper based on discriminatory policies, such as the now-repealed Don't Ask, Don't Tell (DADT) policy. Commanding officers at times are under pressure to be mission capable and ready, or to prepare for a deployment, leading to bad paper separations for servicemembers dealing with stresses or trauma, so that a new servicemember can replace them.[4]

Military Sexual Trauma (MST) is a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment that occurred while a veteran was serving on active duty, active duty for training, or inactive duty training. 38 U.S.C. § 1720D

Moreover, because the character of service assigned at discharge is determined by each servicemember's chain of command, the issuance of bad paper can be arbitrary or influenced by personal philosophy or prejudice. So, too, are there disparities among the military branches in the frequency with which they issue bad paper and the reasons for which they do so. In short, a host of intersecting factors contribute to bad paper discharges, some of which are discussed in more detail below.

Jeff developed PTSD and TBI during his deployment to Afghanistan, which caused him to experience suicidal ideations and engage in reckless behaviors when he returned from deployment. After being discharged other-than-honorably, Jeff continued experiencing suicidal ideations and went to the VA to get help—but the VA turned him away because of his bad paper discharge. Jeff then went to a civilian hospital emergency department, where he was briefly hospitalized and then discharged to the street. Months later, Jeff finally began receiving mental health treatment at a civilian outpatient clinic for veterans that does not discriminate on the basis of discharge status.

a. Post-Traumatic Stress Disorder & Traumatic Brain Injury

Many servicemembers receive bad paper due to behavior that stems from an undiagnosed mental health or physical condition, or the experience of trauma, or both. One recent study found that 16% of the servicemembers separated for misconduct from fiscal year 2011 through 2015 had been diagnosed with Post-

Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) during the two years prior to separation[5], and many more servicemembers likely had PTSD or TBI but went undiagnosed or were misdiagnosed. PTSD and TBI are considered the signature wounds of the Iraq and Afghanistan conflicts and both conditions can significantly impair a person's ability to conform their behavior to the military's standards. In particular, the symptoms of PTSD can lead to behaviors that are misinterpreted by military commanders, which in turn can lead to a bad paper discharge.

Servicemembers, especially servicemembers who deploy to combat zones or who experience Military Sexual Trauma (MST), are at higher risk for PTSD.[6] Among the common symptoms of PTSD are sleep disorders, mood changes, reckless behavior, substance use, and isolation.[7] These same symptoms can contribute to behavior—such as failure to carry out duties, being chronically late, or not complying with policies—deemed inconsistent with the standards of military service.[8] Especially when a servicemember's PTSD is undiagnosed, a military command may discharge a servicemember with bad paper without any understanding of the true origin of the servicemember's conduct and without any consideration of the mitigating circumstances.[9]

This same troubling dynamic can occur for servicemembers who suffer from Traumatic Brain Injury (TBI). Just as military service can expose individuals to higher risks for PTSD, military service also poses higher risks for experiencing a TBI.[10] In a similar manner to football players experiencing the consequences of chronic concussions that may not initially be evident, even with advances in science and medical care, the military has failed to diagnose TBI in substantial numbers of servicemembers who served in the Iraq and Afghanistan conflicts.[11] Indeed, the military has long struggled to understand, diagnose, and properly treat what is now known as TBI and related conditions.[12]

More than ***100,000*** *servicemembers discharged because of LGBTQ status.*

TBI can produce symptoms similar to PTSD. TBI is associated with other symptoms as well, including difficulty remembering, concentrating and making decisions, slowness in thinking, speaking, and acting, and fatigue.[13] As in the case of PTSD, the symptoms of TBI can contribute to behaviors that military commanders deem to be misconduct and can prompt military commanders to discharge a servicemember with bad paper.[14] For example, from 2009 to 2015, the Army discharged with bad paper 22,000 soldiers who had deployed and been diagnosed with PTSD or TBI.[15]

b. Don't Ask, Don't Tell & Prior Policies Affecting LGBTQ Servicemembers

The military has a long history of discriminating against servicemembers who either were or were perceived to be Lesbian, Gay, Bisexual, Transgender, or Queer (LGBTQ). That history of discrimination included the Don't Ask, Don't Tell (DADT) policy in place from 1994 to 2011, as well as predecessor policies that were even more harsh, and extends to the current ban on service by openly transgender individuals. Under DADT and prior policies, between the end of World War II and the repeal of DADT, over 100,000 servicemembers were discharged

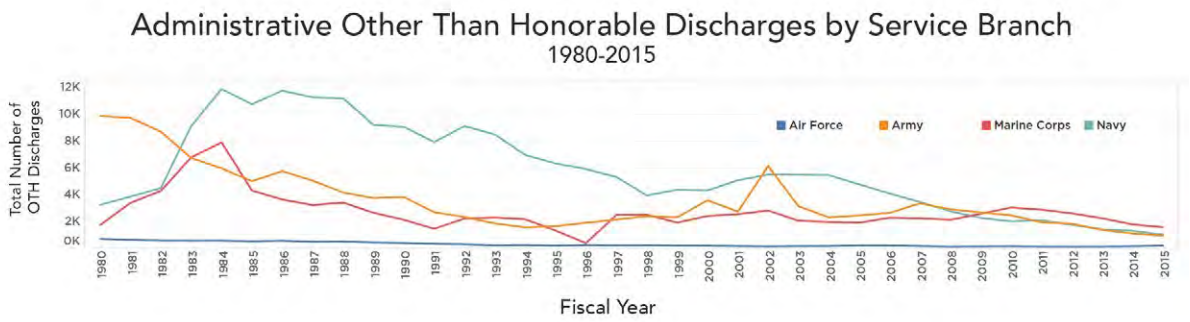
with bad paper because of their actual or perceived LGBTQ status. In addition, thousands of LGBTQ servicemembers were discharged with bad paper for behaviors—interpreted as inexcusable misconduct—that stemmed from the trauma of having to conceal their sexual or gender identity or were discharged for pretextual reasons, such as minor misconduct, when the true cause was discrimination against them due to their LGBTQ status.[16] The nation's history of discrimination against LGBTQ servicemembers is therefore another cause of bad paper discharges that is perpetuated when these veterans are turned away from VA without being allowed to apply.

c. Arbitrary & Disparate Imposition of Bad Paper Discharges

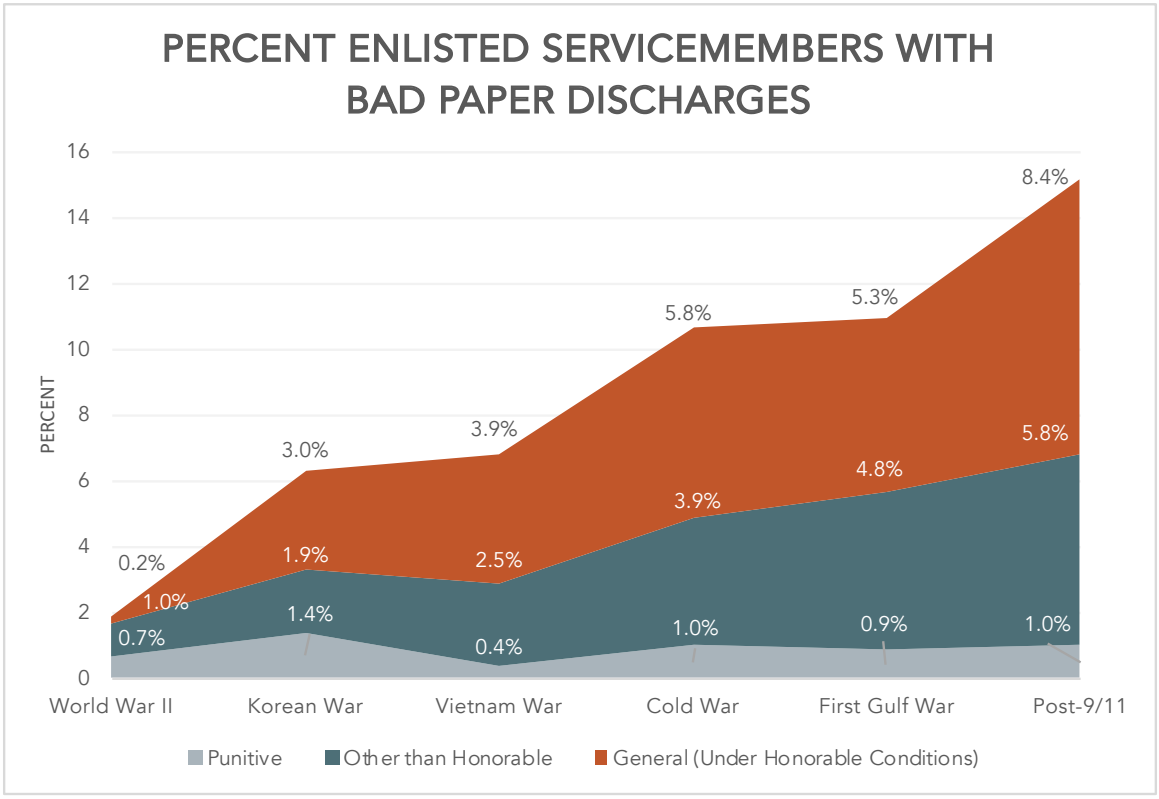
Individual military commands possess wide discretion to decide what conduct justifies a bad paper discharge. This is especially true with respect to the Other Than Honorable discharge, which is an administrative discharge that can be imposed by a command relatively swiftly, without substantial oversight, and with minimal procedural protections for the servicemember. The same conduct is often not treated consistently across military commands, resulting in disparate treatment of similarly situated servicemembers. Behavior that one chain of command may decide should lead to a servicemember's discharge with bad paper, may not lead to any discharge—let alone a discharge with bad paper—under another command's oversight, even though the conduct of the servicemembers is essentially identical. Moreover, investigations have repeatedly found racial disparities in the imposition of military punishment and bad paper discharges.[17] A 2017 study by Protect our Defenders showed that from 2006 to 2015, black soldiers were 61% more likely to face a general or special court-martial than white soldiers.[18]

This disparity was confirmed by the Government Accountability Office, which found that servicemembers with similar service histories but in different service branches often received widely different discharge characterizations.[19] For the same misconduct, one might get an Honorable discharge, another a General discharge, and a third an Other Than Honorable discharge, merely because of their branch's and command's leadership culture. While each branch of service has its own mission and philosophy, whether a person chose to serve in the Army or the Navy, the Air Force or the Marine Corps should not affect whether that person can access health care after discharge.

The disparities caused by such arbitrariness have been compounded in at least two ways. First, the military has increasingly used administrative discharges to issue bad paper to servicemembers. Since World War II, the percentage of servicemembers who receive an Other Than Honorable discharge has increased by a factor of five.[20] Second, wide variation exists across the service branches in the percentage of servicemembers who receive Other Than Honorable discharges. The chart below demonstrates this wide variation over a 36-year period. For example, although the Marine Corps is by far the smallest service branch in terms of active duty personnel, it has by a wide margin accounted for at least 40% of the military's Other Than Honorable discharges issued each fiscal year from 2010 to 2015. Meanwhile, the Air Force has generally accounted for well under 5% of the military's Other than Honorable discharges issued during that same period.



Source: Department of Defense FOIA Response.



Source: Department of Defense FOIA response; Veterans Legal Clinic, Underserved (2016).

The increased use of administrative discharges and the disparate rates of bad paper discharges among the branches of service likely have complex origins. These trends may be driven, at least in part, by the transition from a conscription to an all-volunteer force, other changes in the overall size and structure of the military, and, of course, the unique culture and disciplinary philosophies of each branch of service.[21]

C. How Many Veterans Have a Bad Paper Discharge?

Since 1980, more than 575,000 servicemembers have received an Other Than Honorable, Bad Conduct, or Dishonorable discharge—what this report calls a "bad paper" discharge—representing about 7% of those with characterized discharges. The vast majority—81%—

of those bad paper discharges are administrative Other Than Honorable discharges, not punitive discharges by court-martial, meaning these veterans never received a court process to determine whether the discharge characterization was appropriate, even though that characterization can carry a lifetime of consequences.

Additionally, more than 600,000 servicemembers since 1980 have received General discharge characterizations. While such discharges do not preclude access to most VA benefits, such as disability compensation and health care, they do impose a stigma, bar access to some benefits, and impede employment prospects.‡

D. The Myth of the Easy Discharge Upgrade

A common myth in the military community is that a bad paper discharge can be easily changed once a servicemember joins the civilian world. This myth may account for why some servicemembers are willing to accept an Other Than Honorable discharge during the administrative separation process. It is true that the branches of service operate administrative boards—known as discharge review boards and boards for correction of military or naval records—and that these boards have the legal authority to upgrade a discharge that was previously imposed by the military. For example, these administrative boards have the authority to change the character of service on a veteran's DD 214 from Other Than Honorable to Honorable and to correct other errors or injustices. However, it is inaccurate to say that the discharge review boards and boards for correction of records dispense such relief frequently or promptly.

Historically, the percentage rate of success before the boards is extremely low—in the single digits—with lower success rates for self-represented veterans, who make up the vast majority of petitioners to the boards due to a lack of free or affordable legal help. Although certain categories of petitioners, such as those who establish that they had unrecognized PTSD or TBI that contributed to the misconduct leading to discharge, have had higher rates of success in recent years, the odds of success remain low.[22] Paradoxically, the veteran may also need access to VA to establish a PTSD or TBI diagnosis.

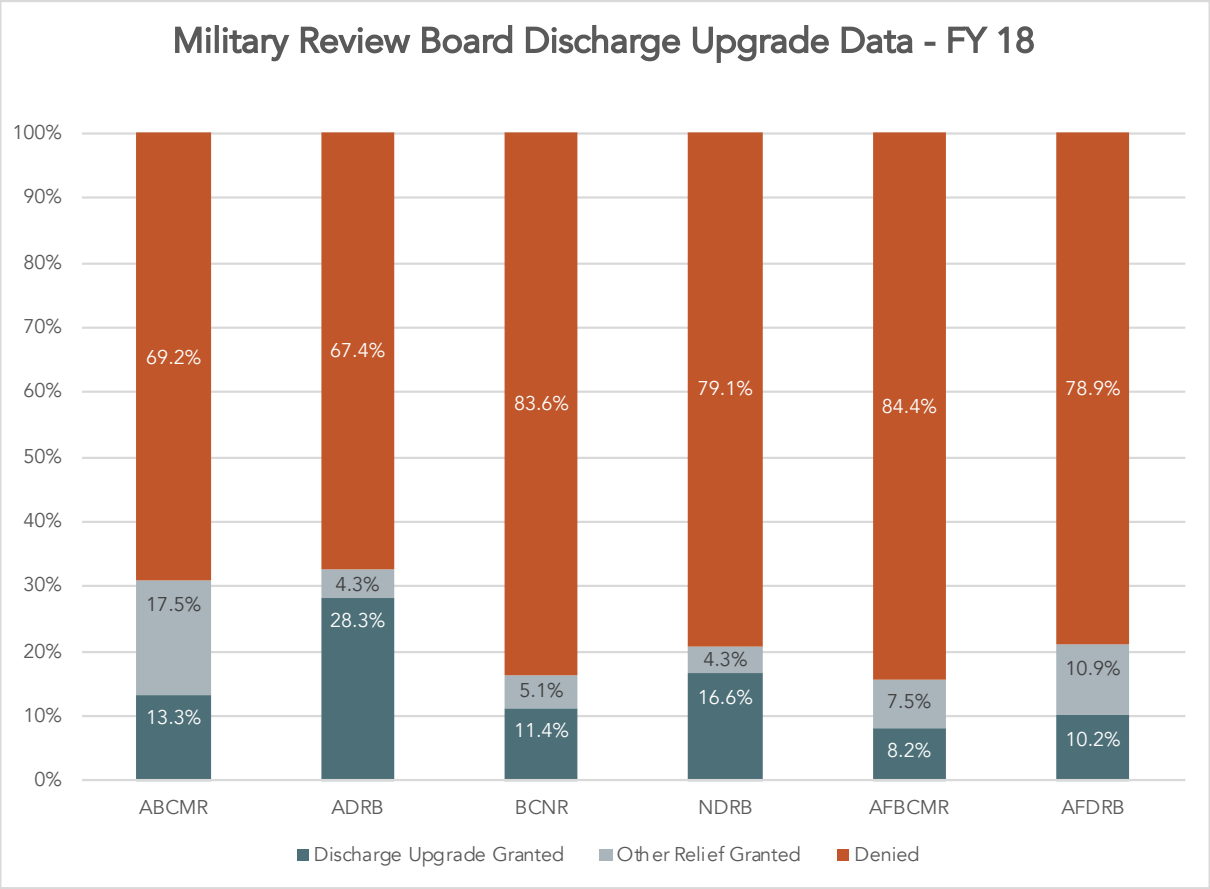
Percent of Veteran Applicants Granted a Discharge Upgrade - FY18

Army BCMR	13 %
Navy BCNR	11%
Air Force BCMR	8%

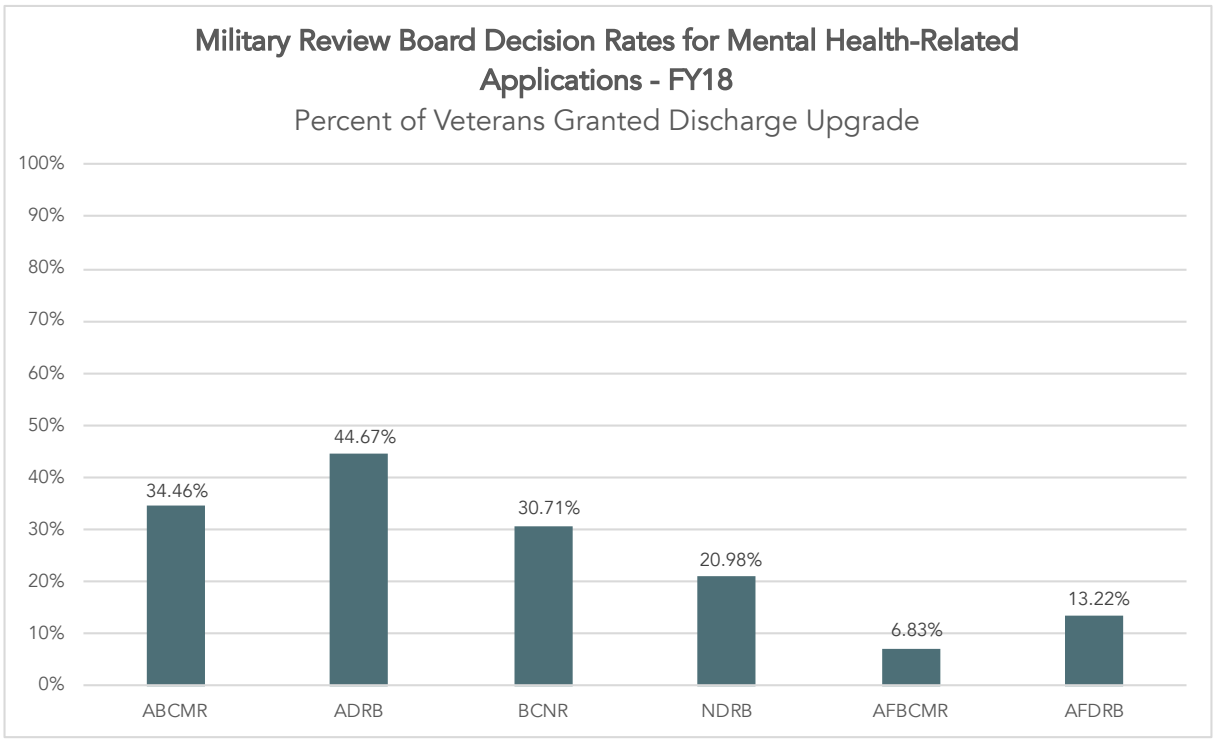
Petitioners can expect lengthy waits to receive a decision from these boards. The discharge review boards typically take 12 to 24 months to decide cases, and the boards for correction of records typically take 18 months to decide cases, though it frequently can take longer.

In sum, receiving a discharge upgrade is hardly certain or swift. Nor does the potential availability of a discharge upgrade excuse VA's unlawful exclusion of eligible veterans from access to healthcare or compensate the veterans for the adverse health effects and financial expenses suffered while awaiting a discharge upgrade decision, as discussed below.

‡ For example, access to Post-9/11 G.I. Bill education benefits may require a fully Honorable discharge, depending on the particular circumstances of the veteran's service and discharge.



Source: Boards of Review Reading Rooms Board Statistics. See Appendix for additional data.



Source: Boards of Review Reading Rooms Board Statistics.

III. THE PROBLEM

A. *The Importance of VA Access*

The Department of Veterans Affairs (VA) was created to be a single, central agency that could fulfill our nation's obligation to provide care and support to our veterans. VA has three main components: the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the National Cemetery Administration (NCA). VBA is responsible for deciding whether veterans and their survivors and dependents are eligible for benefits, such as service-connected disability compensation, pension, vocational rehabilitation, and home loans, and for then providing those benefits. VBA also adjudicates whether a veteran with a bad paper discharge was discharged under "other than dishonorable" conditions, as discussed below. VHA manages medical centers and health care facilities across the country and is responsible for enrolling veterans in VA health care and medical benefits. NCA maintains federal veteran cemeteries.

VA is supposed to be non-adversarial and "veteran friendly." It was specially designed to meet veterans' needs, especially those arising out of military service. VA medical facilities, for example, offer expert care for medical issues that are more prevalent in the veterans community, such as those associated with amputations, TBI, and PTSD. VA has dedicated programs to reintegrate servicemembers into the civilian world and to address homelessness and suicide risk, which disproportionately affect the veteran population.

For veterans with bad paper, access to VA is particularly critical. Studies have shown that veterans with bad paper are three times more likely to experience suicidal ideation. However, veterans with bad paper who have recently accessed VA mental health services are no more likely than other veterans to experience suicidal ideation.[23] Thus being excluded from VA mental health care leaves veterans at much higher risk of suicide.

NUMBER OF VETERANS USING VA HEALTH CARE (FY15)	6 million
PERCENT OF VETERANS WITH SERVICE-CONNECTED DISABILITIES ENROLLED IN VA HEALTH CARE	92.7 %

For those reasons, ensuring veterans' access to VA services is essential to upholding the national duty to our veterans and in many cases, they are truly life-saving. Given that the primary way that veterans access VA services is through its health care system, VA health care should receive priority attention to make sure that no veteran is wrongly denied access.

B. *VA Obligations to Applicants*

The law grants veterans certain rights and mandates that VA provide eligible veterans with certain benefits. Among other things, the law requires VA to provide any person seeking any veteran benefit with due process in the form of an application and instructions on how to apply.[24] VA also has a duty to assist—that is, VA has certain obligations to help applicants

with establishing eligibility, such as letting the veteran know what information VA needs to approve an application and helping the veteran obtain relevant evidence.[25] Further, VA must provide a written notice of any decision affecting benefits eligibility, along with information about how to appeal any unfavorable determination.[26]

C. VA Eligibility Standards

Although the law provides a favorable legal standard and special procedural rights to help veterans prove their eligibility for benefits, there are numerous criteria that veterans must meet. That is, serving in the armed forces alone does not guarantee eligibility for VA benefits.

For VA health care, one eligibility criterion is a discharge under "other than *dishonorable*" conditions. By VA regulation, "other than dishonorable" status automatically includes veterans with Honorable and General discharge characterizations. It also can include some veterans with bad paper, depending on the nature of their service and the circumstances of their separation.

Moreover, veterans with bad paper may be eligible for full VA health care based on another enlistment that ended with an Honorable discharge, or they may be eligible for limited VA health care to treat service-connected disabilities or to provide evaluations or emergency treatment for mental health conditions.[27]

Examples of Potential VA Eligibility for Veterans with Bad Paper

1. VA finds veteran's service is "other than dishonorable"
2. Veteran has a prior honorable discharge
3. Veteran not barred by statute can receive health care for service-connected disabilities
4. Veterans in need of emergency mental health treatment for up to 90 days
5. Mental health evaluation for veterans who engaged in or supported combat operations or who experienced MST
6. Vet Center readjustment and bereavement counseling

* There are limits and additional eligibility requirements for each possibility listed. Not all veterans with bad paper can receive benefits.

Because VA health care eligibility is complicated, whether a particular veteran is ineligible often cannot—and should not—be determined by simply looking at the veteran's DD 214. Thus, when a veteran with bad paper presents at a VA medical facility seeking to apply for VA health care, VA must follow a certain process to determine eligibility. Specifically, the following should occur:

1. VHA staff should fill out a Form 20-0986 (formerly Form 7131) and send it to VBA to conduct a Character of Discharge review
2. VBA staff should review the veteran's military personnel and medical records and any other relevant records; solicit information and explanation from the veteran; and decide whether the veteran's discharge was "other than dishonorable" and whether the veteran is otherwise barred by law from receiving benefits
3. VBA staff should inform VHA of its decision
4. VHA staff should inform the veteran of the decision, and if the veteran is eligible, help that veteran enroll in health care

VBA REGIONAL OFFICES	57
VHA MEDICAL FACILITIES	1,243

At present, the Character of Discharge review process can take a long time—two years, on average, as of 2016.[28] Under a July 2017 policy, VA aims to complete the process in ninety days if the veteran presents with an urgent mental health issue. However, while that process is ongoing, VA policy largely prevents the veteran from receiving other health care benefits or supportive services.[29] Moreover, the regulations VA applies during the review process are highly flawed—they are overbroad, vague, and fail to consider important factors like combat service or mental health conditions.[30]

In sum, every person—regardless of military discharge status—has the right to apply for VA health care and to receive a written decision and notification of appeal rights, to ensure veterans are not wrongfully denied. A person with a bad paper discharge may be entitled to receive VA health care and other benefits under VA regulations and policies. There are processes that VA must follow and duties that VA owes to every former servicemember. Unfortunately, for thousands of veterans, from decades past to the present day, VA is turning them away without following these processes, and indeed without any consideration at all.

IV. METHODOLOGY

The data underlying this report were collected in three main ways. First, numerous veterans who were wrongfully turned away from VA medical facilities based on their discharge status were interviewed and their records reviewed. In some cases, the veterans were accompanied by a veterans advocate in going to a VA facility to attempt to access health care benefits, or a veterans advocate worked on the veteran's behalf to gain that veteran health care access. Second, other veterans advocates and legal aid attorneys submitted reports of numerous incidents of veterans being turned away from VA facilities whenever they witnessed or heard of such an event. This included instances where the advocate accompanied the veteran to a VA healthcare facility and

PERCENT OF ALL VETERANS WITH A SERVICE-CONNECTED DISABILITY (FY15)	21.8 %
PERCENT OF POST-9/11 VETERANS WITH A SERVICE-CONNECTED DISABILITY	35.9 %

frontline staff still did not follow VA's own regulations. Third, data were obtained that relate to VA health care access and eligibility, as well as the size and demographics of the veteran population more generally, through Freedom of Information Act requests to the Department of Veterans Affairs and Department of Defense and through public data resources. The report further relies on and builds upon the work of other governmental and non-governmental organizations that have investigated issues that affect veterans with bad paper.

PERCENT OF ALL VETERANS WHO USE SOME VA BENEFIT (FY15)	34.9 %
PERCENT OF POST-9/11 VETERANS WHO USE SOME VA BENEFIT	49 %

V. FINDINGS AND ANALYSIS

A. VHA Facilities Across the Country Deny Veterans Health Care Without Due Process or Proper Adjudication

As a basic matter of due process, every person seeking VA health care is entitled to apply, to have VA consider that person's application on the merits, and to receive a written decision. If the person seeks care at a VA medical facility and eligibility cannot immediately be determined, a VHA staff member must refer the person's application to the VBA for a determination as to whether the veteran is eligible.[31]

Yet, evidence shows that VA routinely denies potentially eligible veterans their right to apply for and receive critical health care benefits to which they may be entitled.

VA routinely denies potentially eligible veterans their right to apply for and receive critical health care benefits to which they may be entitled.

Numerous veterans reported presenting at VA medical facilities to seek care and being told by frontline staff that they were ineligible because of their discharge status. Most were not given any written decision but instead told orally that they were ineligible. Some were handed a denial letter that had incorrect eligibility information and that lacked information about their right to appeal the denial. Many were erroneously told that the only way to gain access to VA services was to obtain a discharge upgrade from the military review boards. In some cases, VHA staff did fill out a form to refer the veteran to the VBA for a Character of Discharge eligibility review, but no action was then taken on that referral and the veteran was provided no information about the referral or how to follow up.

Four examples illustrate different aspects of the problem:

1. Kevin, an Air Force veteran honorably discharged from his first enlistment but later other-than-honorably discharged from a later enlistment, sought medical care from his local

VA medical facility when he first was discharged in the late 1980s. He was told that his discharge status made him ineligible, which left him feeling ashamed and with no place to turn. For more than twenty years, Kevin was excluded from the VA health care he earned through his service. After two decades, Kevin eventually tried again to apply for health care after losing his job and health insurance—and was again turned away. But he then returned after doing his own research about eligibility based on his first Honorable discharge, and VA finally allowed him to apply and eventually approved his application.

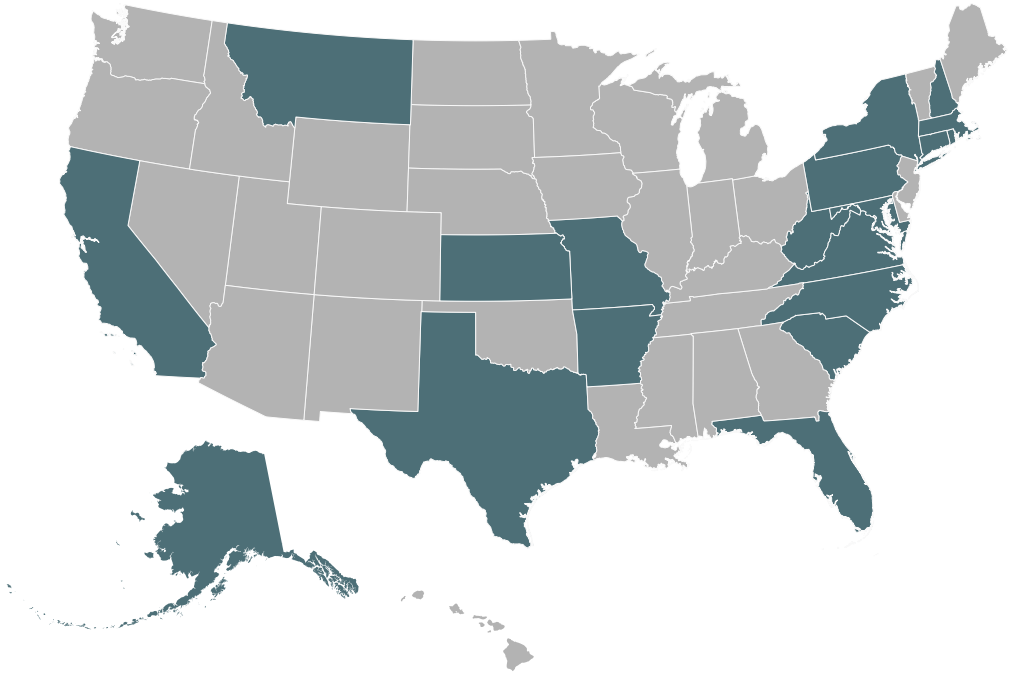
2. Jeff, a post-9/11 Army combat veteran diagnosed with PTSD and TBI, was at risk of homelessness and suicide when he sought VA health care shortly after being other-than-honorably discharged. After looking at Jeff's DD 214, a VA staff member told him he was not eligible and typed up a letter that said he needed an "Honorable or General" discharge status. Ultimately, with pro bono legal assistance, Jeff was approved for full VA health care benefits and granted a 100% service-connected disability rating for his deployment-related wounds. However, while waiting for VA's decision, Jeff went more than two years without access to VA care for his mental and physical wounds from service.

3. Robert, a Military Sexual Trauma survivor who received an Other Than Honorable discharge, sought mental health treatment at VA in 2019. The VA enrollment representative said that Robert would be eligible because of special eligibility rules for veterans who experienced MST and sent Robert to make an appointment at triage. However, the VA triage employee refused to schedule Robert for an appointment because of his OTH discharge. Only with the assistance of a pro bono attorney did VA eventually agree to grant Robert access to VA mental health treatment and schedule an appointment.

4. Dan, a post-9/11 Marine Corps combat veteran, went to a VA medical facility seeking health care and a VA eligibility officer filled out the Character of Discharge referral form. Dan himself gave a copy of that referral form to the local VA regional office. No action was taken on his application for more than a year. Finally, a pro bono legal advocate wrote numerous letters to VA, reached out to VA management, and scheduled an administrative hearing on Dan's character of discharge determination. After this extensive follow-up, VA granted Dan access to VA health care.

These reports of VA turning veterans away from medical care stretch back many years and originate from across the country. Veterans in more than a dozen states—and at multiple facilities in many states—were improperly told they were ineligible for benefits or were otherwise denied the right to apply. Importantly, for states from which there are no reports of veterans being turned away, one cannot conclude that no such turn-aways occurred; rather, this investigation was not able to reach out to veterans and veterans advocates in every state, and thus there are no reports of turn-aways from some states.

Every person—regardless of military discharge status—has the right to apply for VA health care and to receive a written decision and notification of appeal rights.



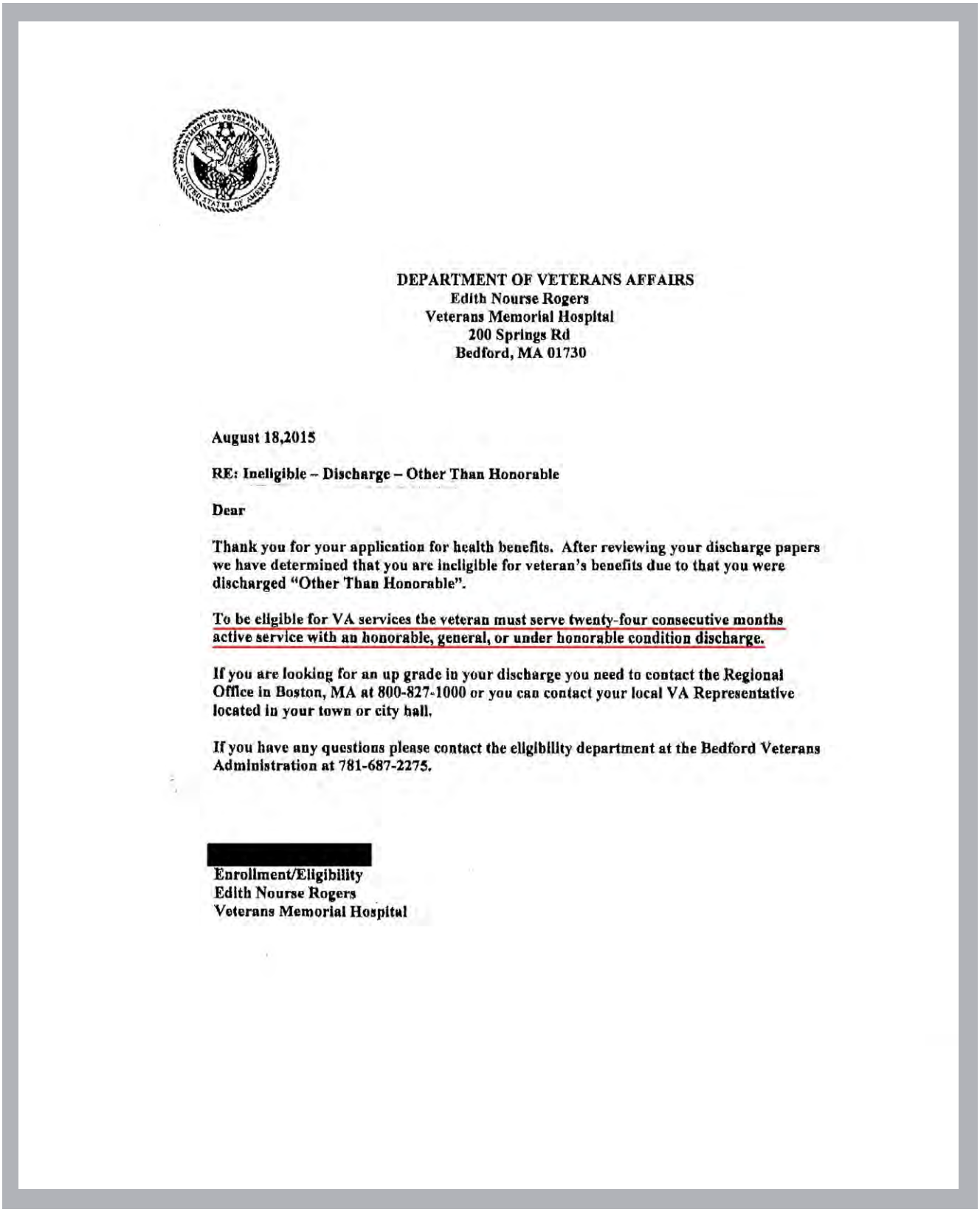
Above: Veterans from states across the country reported being unlawfully turned away by VA when they sought health care. Reports of turn-aways came from states shaded teal in the above map.

Veterans advocates across the country reported that veterans were turned away even when the advocate went with the veteran to the VHA health care facility to apply and explained the law's requirements to the eligibility staff. One advocate recalled an enrollment worker stating that, in more than twenty years of working at VA, she had never seen or heard of a 7131 Form—the form then used to ask that VBA make a character of discharge eligibility decision for a veteran with bad paper.

Although VA does maintain records of who is enrolled in VA health care, it has no record of veterans with bad paper who sought health care but were denied the opportunity to apply. By its very nature, the turn-away problem is one in which usually no record is created, and as a result no VA documentation exists. It is therefore impossible to know definitively how many veterans were wrongly denied care, where they are located, and when it occurred.

The pattern, however, is clear: VA's denial of care to veterans with bad paper discharges is national, persistent, and systemic. Its impact on some of our most vulnerable veterans can be harmful or even deadly.[32]

In 2018, in response to pressure from Congress and veterans organizations, VA created a new form by which VHA can request that VBA render a character of discharge eligibility determination for a veteran with bad paper. Unlike the previous 7131 Form used for such requests, the new 20-0986 form is specifically and only used for requesting character of discharge determinations, and the form gathers additional information. The new form also has one part for VHA to fill out when transmitting it to VBA, and a second part for VBA to respond with its determination.



DEPARTMENT OF VETERANS AFFAIRS
Edith Nourse Rogers
Veterans Memorial Hospital
200 Springs Rd
Bedford, MA 01730

August 18,2015

RE: Ineligible – Discharge – Other Than Honorable

Dear

Thank you for your application for health benefits. After reviewing your discharge papers we have determined that you are ineligible for veteran's benefits due to that you were discharged "Other Than Honorable".

To be eligible for VA services the veteran must serve twenty-four consecutive months active service with an honorable, general, or under honorable condition discharge.

If you are looking for an up grade in your discharge you need to contact the Regional Office in Boston, MA at 800-827-1000 or you can contact your local VA Representative located in your town or city hall.

If you have any questions please contact the eligibility department at the Bedford Veterans Administration at 781-687-2275.

[redacted]
Enrollment/Eligibility
Edith Nourse Rogers
Veterans Memorial Hospital

Above: Denial letter VA provided to veteran with bad paper when he tried to get health care for deployment-related PTSD and TBI (emphasis and redactions added). The letter incorrectly states that a veteran must have an Honorable or General discharge to receive VA health care. In fact, a veteran with an Other Than Honorable discharge may be eligible for VA health care.

The new form appears to have a better design and to increase the likelihood that VBA will provide a response to VHA regarding its eligibility decision. The form does not, however, solve all communication issues. For example, it is an internal form that is not filled out by or provided to the veteran, and so its utility relies on VHA staff knowing that the form exists and using it—a problem that is discussed further in the next section. Further, the creation of new internal forms does nothing to remedy the widespread misinformation on this issue. Despite the new form, veterans with bad paper continue to report being turned away when they seek VA health care.

As one example of the lack of clarity of VA's current materials about eligibility for veterans with bad paper discharges, one advocate reported that an Iraq combat veteran—who had a first Honorable period of service but a final Other Than Honorable discharge—stated that he had done his own research on VA's website and determined on that basis that he was not eligible for any VA care or benefits because of his final discharge status. Only after repeated assurances from the advocate that the veteran was unquestionably eligible for health care and potentially other benefits based on his first Honorable enlistment did the veteran agree to attempt to apply to VA.

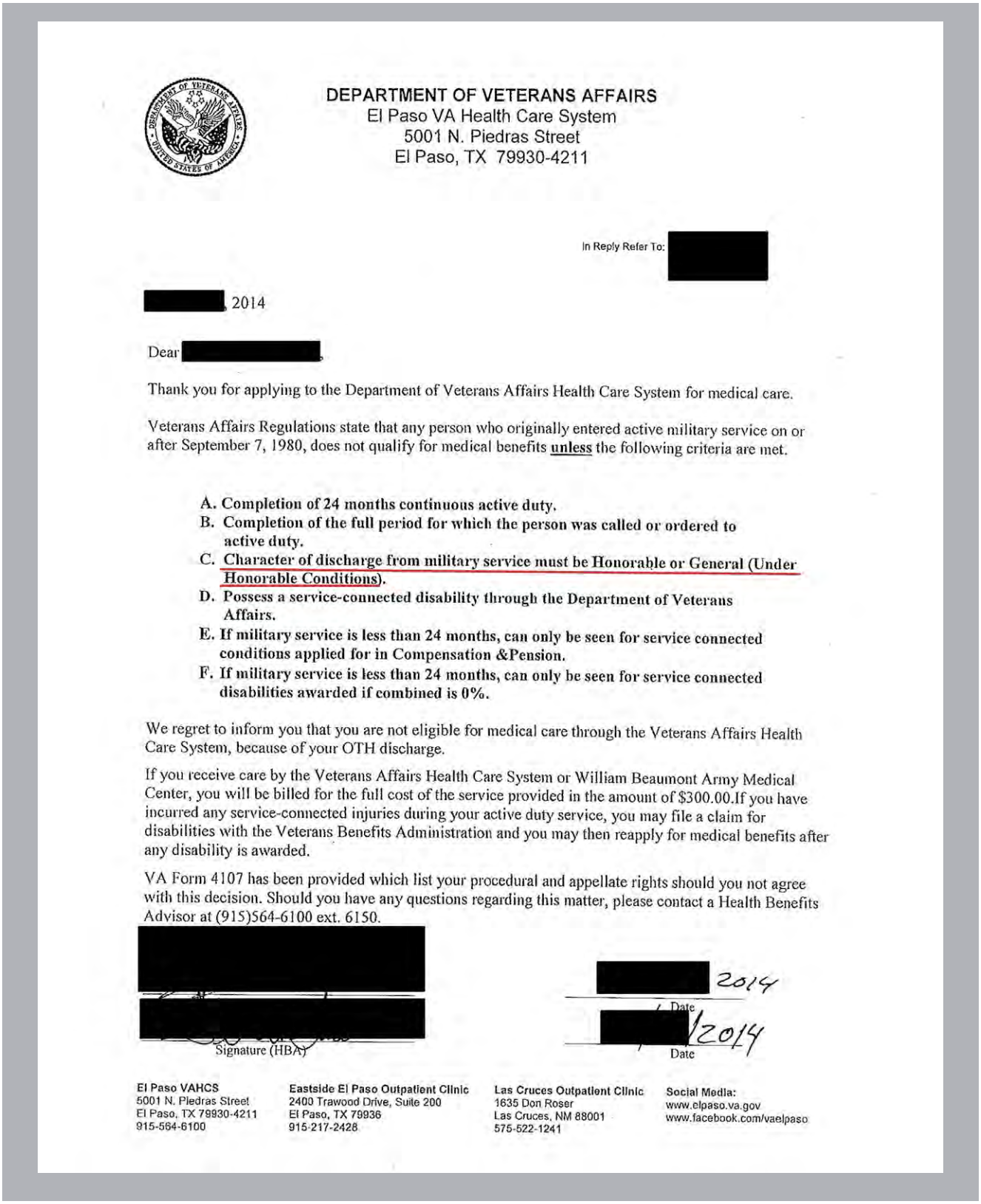
In most—but not all—cases, if VA has wrongfully turned away a veteran, a veterans advocate can work with that veteran to solve that issue. The advocate can provide the veteran the correction application form, can assist the veteran in filing the application form, and can follow up with VA to ensure that VA processes the application and provides a written decision with notice of appeal rights. However, that corrects the issue for that individual veteran only—it does not solve the systemic problem for veterans being turned away from health care, and it does not fix the turn-away issue for the majority of veterans who never speak with an advocate who can help them. Moreover, just as no one should need a lawyer to apply for a driver's license or enroll their child in public school, a veteran should not need an advocate to apply for VA health care.

B. VHA Staff Receive Incorrect or Inadequate Training and Guidance

VA's denial of care to veterans with bad paper discharges is national, persistent, and systemic.

The training that VHA Staff receive about the eligibility criteria for accessing VA health care is often brief, legally incorrect, or otherwise inadequate. It is also often inconsistent state to state and facility to facility. None of the trainings or manuals examined provided step-by-step instructions for frontline health care eligibility workers on how to process an application from a veteran with bad paper. None included a clear statement that providing those veterans with applications is required by law.

Numerous training presentations contain errors that could lead to a veteran with bad paper wrongly being turned away. For example, one VHA presentation listed "qualifying characteristics of service" and "non-qualifying characteristics of service," and incorrectly



DEPARTMENT OF VETERANS AFFAIRS
El Paso VA Health Care System
5001 N. Piedras Street
El Paso, TX 79930-4211

In Reply Refer To: [redacted]

[redacted], 2014

Dear [redacted],

Thank you for applying to the Department of Veterans Affairs Health Care System for medical care.

Veterans Affairs Regulations state that any person who originally entered active military service on or after September 7, 1980, does not qualify for medical benefits **unless** the following criteria are met.

A. Completion of 24 months continuous active duty.
B. Completion of the full period for which the person was called or ordered to active duty.
C. Character of discharge from military service must be Honorable or General (Under Honorable Conditions).
D. Possess a service-connected disability through the Department of Veterans Affairs.
E. If military service is less than 24 months, can only be seen for service connected conditions applied for in Compensation &Pension.
F. If military service is less than 24 months, can only be seen for service connected disabilities awarded if combined is 0%.

We regret to inform you that you are not eligible for medical care through the Veterans Affairs Health Care System, because of your OTH discharge.

If you receive care by the Veterans Affairs Health Care System or William Beaumont Army Medical Center, you will be billed for the full cost of the service provided in the amount of $300.00.If you have incurred any service-connected injuries during your active duty service, you may file a claim for disabilities with the Veterans Benefits Administration and you may then reapply for medical benefits after any disability is awarded.

VA Form 4107 has been provided which list your procedural and appellate rights should you not agree with this decision. Should you have any questions regarding this matter, please contact a Health Benefits Advisor at (915)564-6100 ext. 6150.

[redacted]
Signature (HBA)

[redacted] 2014
Date

[redacted] 12014
Date

El Paso VAHCS
5001 N. Piedras Street
El Paso, TX 79930-4211
915-564-6100

Eastside El Paso Outpatient Clinic
2400 Trawood Drive, Suite 200
El Paso, TX 79936
915-217-2428

Las Cruces Outpatient Clinic
1635 Don Roser
Las Cruces, NM 88001
575-522-1241

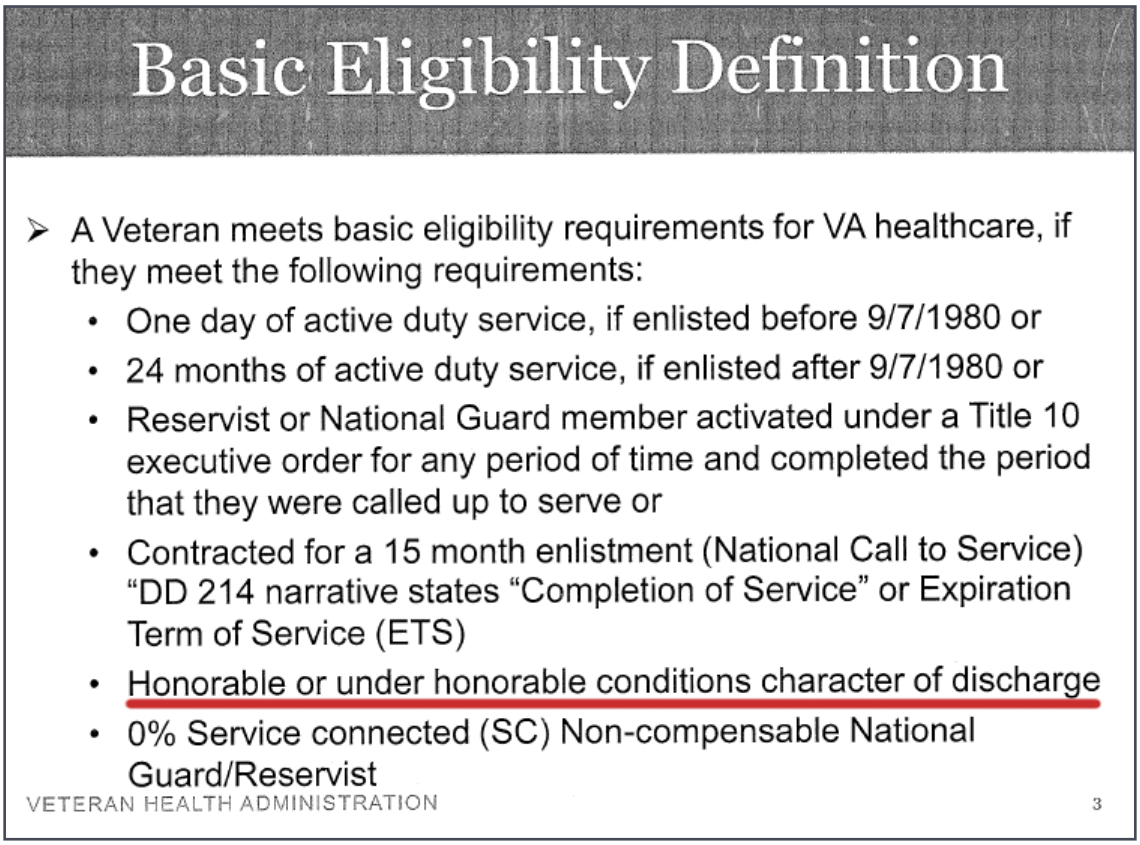
Social Media:
www.elpaso.va.gov
www.facebook.com/vaelpaso

Above: *Letter provided to a veteran by the El Paso VA when he sought health care for deployment-related PTSD and TBI (emphasis and redactions added). The letter incorrectly states that an Honorable or General discharge is required to be eligibile for VA health care. An El Paso VA training entitled "What Every VA Employee Needs to Know About Eligibility" included no information about character of discharge or VA health care eligibility for veterans with bad paper.*

recorded an "Other than Honorable" discharge as categorically "non-qualifying." In fact, a veteran with an Other Than Honorable discharge could be eligible for full or partial health care benefits. Other presentations that provided training about VA health care eligibility lacked any information about character of discharge or eligibility for veterans with bad paper.

VHA reference manuals similarly included incorrect information about the eligibility standards. For example, one manual included cartoon "thumbs up" and "thumbs down" symbols, listing an "OTH" discharge next to a "thumbs down," which in addition to being incorrect further stigmatizes an "Other Than Honorable" discharge status.

In other cases, important manuals lacked substantive guidance about the eligibility rules or what a frontline VHA eligibility worker should do when a veteran with bad paper seeks to apply for health care. The national VHA Eligibility Determination Handbook, which is distributed to all VA health care facilities, fails to include instructions about the steps to help a veteran with bad paper apply for health care and receive a written determination. Rather, the Handbook lists the relevant statute and regulation and suggests that an Honorable or General discharge is required. It is concerning that there is no consistent, legally correct guidance on this issue across all VA facilities nationwide.



Above: *VHA training materials that incorrectly state that an honorable discharge is required for VA health care eligibility (emphasis added).*

Veteran is defined as: a person who served in the Active Military, Naval or Air Service and who
Was discharged or released under conditions other than dishonorable
(Active Duty / Reserves / National Guard)

"Under Conditions *Other than Dishonorable*" discharge is a "Good" discharge
Honorable,
Under Honorable Conditions (also known as: General)

Dishonorable discharges include: Dishonorable, Undesirable, Other than Honorable,
Under Other than Honorable Conditions, Bad Conduct, Dishonorable for VA purposes

Above: Excerpt from Pittsburgh VAMC training manual which lists an incorrect standard for health care eligibility (emphasis added).

ELIGIBILITY CHECK LIST

1. **CHECK I.D. / MATCH DD214**
2. **CHECK CHARACTER OF SERVICE** (HONORABLE/GENERAL) (OTH/DISHONORABLE)
3. **BRANCH OF REGULAR SERVICE** (NO RESERVES OR NAT'L GUARD UNLESS CALLED TO ACTIVE DUTY OTHER THAN FOR TRAINING ONLY BY A FEDERAL ORDER AND COMPLETED THE FULL PERIOD FOR WHICH THEY WERE CALLED OR ORDERED TO ACTIVE DUTY)
4. **LENGTH OF ACTIVE DUTY**
5. **DISCHARGE PAPERS**
6. **AWARD MEDALS**
7. **INCOME PROVIDED(IF NEEDED)**

Above: *Excerpt from Pittsburgh VAMC training manual which lists an incorrect standard for health care eligibility (red emphasis added, yellow highlight in original).*

c. **Character of Discharge Requirements.** In general, to qualify for VA health care benefits, an individual's discharge or release from service must be under conditions other than dishonorable. ***NOTE:*** *See 38 U.S.C. 101(2), 5303, and 38 CFR. 3.12 for general information on character of discharge requirements.*

Above: *Excerpt of VHA Enrollment and Eligibility handbook that fails to offer meaningful guidance to VA staff on how to process the health care applications of veterans with bad paper discharges.*

c. **Character of Discharge Requirements.** Unless an exception applies, to qualify for VA health care benefits, an individual's discharge or release from service must be under conditions other than dishonorable (Honorable, General, see 38 U.S.C. 101(2), 5303, and 38 CFR. 3.12). ***NOTE:*** *A discharge under honorable conditions satisfies this requirement. Some other discharges require VA to make a character of discharge determination in order to assess VA eligibility. VA Form 20-0986, Eligibility Determination for Character of Discharge (COD) Request, is the form completed by VA medical facility staff to request a character of service determination by the Veterans Benefits Administration (VBA). The form is available on the VA Forms Web site at http://vaww.va.gov/vaforms/.* ***NOTE:*** *This is an internal VA Web site that is not available to the public.*

Above: *Excerpt of VHA Enrollment and Eligibility handbook that includes misleading information and fails to offer meaningful guidance to VA staff on how to process the health care applications of veterans with bad paper discharges (emphasis added).*

The Handbook does have instructions relating to one subgroup of this population—veterans with Other Than Honorable discharges who are experiencing an emergency mental health crisis—regarding how to process them for temporary treatment. However, in the first year that the Handbook included these instructions, the total number of veterans with Other Than Honorable discharges who gained temporary access to care through this program was about 150—out of more than 500,000 potentially eligible veterans.[33] VA also has recently created some fact sheets and other resource materials about how veterans with bad paper may be able to access VA.[34] From this investigation and research, VHA facilities and their staff were rarely aware of those materials and did not reference them or have them on hand when veterans attempted to enroll in health care.

For those trainings that do provide correct information, the entire topic of access to VA for veterans with bad paper is usually addressed in one to two slides, and there is no clear statement emphasizing that such a veteran may be eligible for VA health care. It appears that the lack of detailed guidance and instruction from VHA and VBA about eligibility has led certain local VHA facilities to fill in that gap with their own manuals and instructions, which often contain inaccurate and misleading information. One advocate reported attending a VA training that addressed character of discharge health care eligibility rules: while the slides themselves did not contain any misinformation, the VA presenter erroneously stated that an Honorable or General discharge was required to be "VA health care eligible."

Former Secretary of VA Robert McDonald referenced "[those] veterans that got bad paper discharges that we in the VA can't serve by law."

Address to the 2015 Veterans Court Conference

Former VA Undersecretary of Health David Shulkin stated that VA was "prohibited by law from treating someone [with] what we call bad paper."

Senate Appropriations Committee Hearing 2016

The lack of information and the provision of misinformation to VA staff directly impacts the ability of veterans with bad paper to access health care. An uninformed or misinformed staff member may advise a veteran that it is not worth applying, that the only remedy is a discharge upgrade, or that there are no VA resources to provide support. The veteran then may go years—or perhaps an entire lifetime—without care that the veteran needs and to which the veteran is entitled by law.

Larry served as a combat engineer in the Vietnam War. After being hit with a grenade that failed to explode, he developed both physical and mental wounds. He was discharged with an Other Than Honorable discharge for going absent without leave after returning to the United States. He was told that his OTH discharge made him completely ineligible for any VA benefits, and so for years he struggled on his own with undiagnosed and untreated Post-Traumatic Stress Disorder. Nearly 50 years after returning from Vietnam, with the assistance of pro bono counsel, Larry finally applied for VA health care and was approved.

Photo: Larry during his deployment to Vietnam

C. VA's Turn-Away Problem Likely Disproportionately Impacts Veteran Subpopulations Including Navy and Marine Corps Veterans, Post-9/11 Veterans, Enlisted Veterans, and Veterans with PTSD or Other Service-Related Mental Health Conditions

Historically, certain groups of servicemembers have been more likely to receive a bad paper discharge than others. These disparately affected groups include veterans who served in the Navy or Marine Corps, Post-9/11 veterans, veterans who enlisted, and veterans with service-related mental health conditions, such as PTSD.

1. NAVY & MARINE CORPS VETERANS

Some service branches discharge servicemembers with bad paper discharges (which are presumptively VA-ineligible) at a much higher rate than other branches. Of all Other Than Honorable, Bad Conduct, and Dishonorable discharges since 1980, almost half—45%—were issued by the Navy. The Marine Corps accounts for 24% of the presumptively VA-ineligible discharges over that same period of time, even though the Marine Corps is the smallest of the service branches. In contrast, the Army, which has the most personnel, accounts for 27% of presumptively ineligible discharges and the Air Force accounts for less than 5%.

These disparate discharge practices are long-standing. Past studies of the different branches' separation policies have attributed the disparity to the branches' different philosophies about how best to discipline and punish their troops, not to any differences in the actual conduct of the troops. In other words, it is often the case that an Airman and a Marine with similar service records could engage in the same behavior, but the Airman would be separated with a General discharge and be able to easily gain access to VA, while the Marine would get an Other Than Honorable discharge that would create barriers to

receiving any support from VA.

Discharges under DADT and similar prior policies illustrate well the disparate practices of the service branches. From 1980 to 2011—when DADT was repealed—42% of the discharges for "homosexuality" were issued by the Navy. 7% of the Navy's discharges for "homosexuality" were characterized as Other Than Honorable. Similarly, 9.5% of the Marine Corps' discharges for "homosexuality" were Other Than Honorable. In contrast, less than 3% of Soldiers and less than 1% of Airmen who were discharged for "homosexuality" received an Other Than Honorable characterization. They were much more likely to receive Honorable or General characterizations.

***2/3** of all veterans with bad paper discharges since 1980 served in the Navy or Marine Corps*

Because some service branches are handing out more bad paper discharges than others, a former Sailor or Marine who tries to obtain health care from VA is much more likely to be turned away than a former Soldier or Airman.

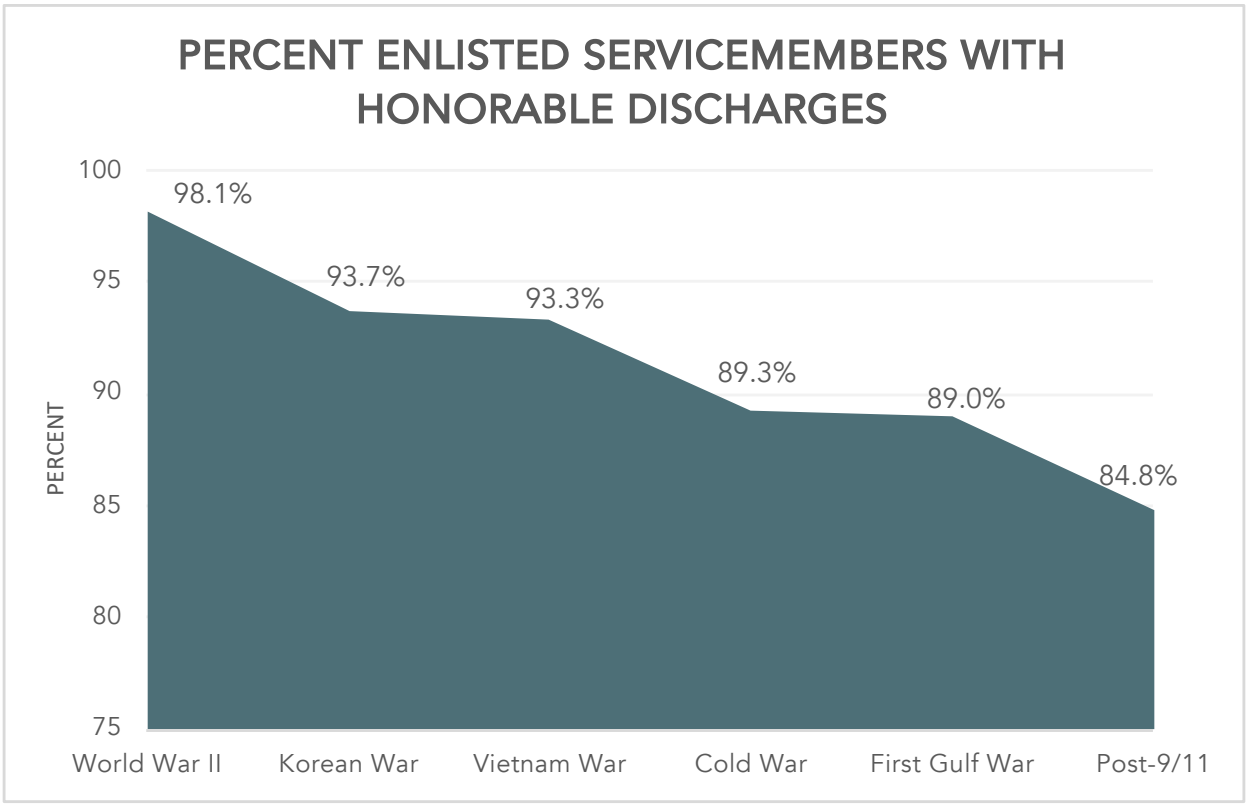
Rather than resolving these inter-service disparities and applying a consistent standard of conduct, VA's character of discharge review process exacerbates the problem. VA denies character-of-discharge claims by Marines at a higher rate than those of veterans from the other branches.[35]

2. POST-9/11 VETERANS

The percentage of servicemembers discharged less-than-honorably has not remained steady over time. Rather, the percent of servicemembers receiving administrative General and Other Than Honorable discharges has significantly increased since World War II to the present, with a corresponding decrease in the percent of servicemembers receiving fully Honorable discharges. The percent of servicemembers receiving punitive discharges (Bad Conduct or Dishonorable) has been steadily low over that time period.

Focusing on enlisted servicemembers who completed at least six months in service, and thus received characterized discharges, the rate of servicemembers who received fully Honorable discharges has decreased from 98.1% during World War II, to 93.3% during the Vietnam War, to now only 84.8% in the post-9/11 era. Meanwhile, the rate of General discharges has increased from 0.2% (World War II) to 3.9% (Vietnam) to 8.4% (Post-9/11), and the rate of Other Than Honorable discharges has increased from 1% (World War II) to 2.5% (Vietnam) to 5.8% (Post-9/11). The punitive discharge rate averaged around 1% (between 0.4% and 1.4%) over that same period.

Brian, a 17-year OEF/OIF Marine Corps veteran with multiple deployments and four Honorable discharges, sought VA health care after receiving as Other Than Honorable discharge for his final enlistment. Despite Brian's Honorable discharges, which clearly entitled him to VA health care benefits, VA staff denied him all medical treatment when he first went to apply. Only with pro bono legal assistance was Brian able to eventually gain full access to VA health care.



Source: Department of Defense FOIA response; Veterans Legal Clinic, Underserved (2016)

Post-9/11 veterans are thus disproportionately affected by bad paper discharges. They are also more likely to have multiple deployments than prior generations of veterans, while simultaneously being at the highest risk of being presumptively excluded from VA, given that 6.8% have Other Than Honorable or lower characterizations.

3. ENLISTED VETERANS

Servicemembers who enlist in the armed forces are much more likely to receive a bad paper discharge than officers or warrant officers. Of all the Other Than Honorable, Bad Conduct, and Dishonorable discharges since 1980, 99.8% were issued to enlisted servicemembers. While there are many more enlisted servicemembers than officers, which accounts for some of that disparity, the impact on enlisted servicemembers is disproportionate.

***99.8%** of veterans with bad paper were enlisted servicemembers, not officers*

4. VETERANS WITH PTSD OR OTHER SERVICE-RELATED MENTAL HEALTH CONDITIONS

Many studies have established a strong correlation between a servicemember having a mental health condition, such as PTSD, and receiving a bad paper discharge.

Medical researchers have found that Marines who deployed to combat zones and were diagnosed with PTSD were 11 times more likely to be discharged for misconduct and 8 times more likely to be discharged for substance use, compared to Marines who did not deploy or were not diagnosed with a mental health condition.[36] Similarly, a study of Soldiers who were hospitalized in service for a mental health disorder were 9 times more likely to be discharged for misconduct than Soldiers hospitalized for a non-mental health condition.[37]

> *John is a Navy veteran who served in Bosnia, where his experiences supporting bombing missions and witnessing others killed or injured in war led him to develop Post-Traumatic Stress Disorder, which contributed to him receiving an Other Than Honorable discharge. More than two decades later, with pro bono representation, he received a discharge upgrade to Honorable. However, when John went to VA to finally enroll in health care with the letter informing him of his upgraded discharge, VA turned him away—a VA eligibility representative and a VA patient advocate told him that he was not in the system because of his discharge status and they were unable to help him. Only later, after John repeatedly attempted to enroll, did VA finally acknowledge that he was eligible and approve his health care application.*

The Government Accountability Office found in a 2017 study that, of the servicemembers discharged for "misconduct" from fiscal years 2011 to 2015, 62% had been diagnosed with a mental health condition in the past two years.[38] Of those, 23%—almost one in four—received an Other Than Honorable discharge.[39] Medical researchers similarly have found that early discharge from the service, including because of misconduct, is a significant risk factor for post-service mental health conditions.[40] Indeed, those discharged for misconduct were more than twice as likely to be diagnosed with a mental health or substance use disorder.[41]

VI. RECOMMENDATIONS AND CONCLUSIONS

VA's practice of turning away veterans with bad paper is a long-standing, national, and systemic problem that demands immediate action. The steps proposed below to address this issue are all within VA's existing authority and capacity. No legislation is needed, nor are new regulations required. VA can and should move swiftly to implement the following proposals to ensure that going forward no veteran is wrongfully denied needed care and support.

A. VA Must Improve its Training, Guidance & Oversight

VA currently provides very little training or guidance to its employees about bad paper discharges and how veterans with bad paper may establish eligibility for health care or other VA services. What trainings and guidance do exist often are inconsistent and contain misinformation. This lack of information and presence of misinformation directly harms veterans with bad paper who are seeking access to health care.

VA should create a comprehensive training on the many ways that a veteran with bad paper may establish eligibility for health care and other benefits. The training should be mandatory for all VA employees and should emphasize as the key point that veterans with bad paper—especially the large majority who have administrative Other Than Honorable characterizations—may be eligible for VA health care. The presumption should be one of potential eligibility, as opposed to the current status quo which is the opposite.

VA should design a special training directed specifically at frontline eligibility and enrollment staff that includes detailed instructions on how to process a health care application from a veteran with bad paper, and VA should require annual retraining. Another training should be designed for other frontline VHA staff, such as those in the Veterans Justice Outreach program and VA programs related to homelessness. All trainings should be standardized across VHA facilities nationwide, not created locally on an ad hoc basis. Regular trainings on enrollment standards are common in other government health care programs, such as Medicaid.

VHA should also update its Eligibility and Enrollment Handbook to provide detailed instructions to staff about how to process a health care application from a veteran with bad paper. These instructions must be detailed and concrete. They must also require the enrollment staff to provide clear and readily understandable information to the veteran about the process and the timeline for receiving a decision about health care eligibility. The information provided to the veteran should be accessible even if the veteran has limited education or a disability. The instructions in the Handbook must match the parallel instructions provided to VBA staff who are tasked with rendering the character of discharge eligibility determination.

All trainings and guidance should encourage staff to ask veterans who express any interest in or need for health care whether they require assistance in applying for VA health care, and should provide instructions about how to refer that veteran to available resources. VA must adopt a "no wrong door"

Jeff, a post-9/11 Army combat veteran with PTSD and TBI who was unlawfully turned away, was eventually able to establish eligibility for VA with the help of a pro bono advocate and to then access mental health treatment and other supportive services. However, after Jeff moved to another state a few years later and had to re-enroll in VA health care, the VA eligibility staffer told him he was not eligible because of his OTH discharge and that giving him health care before was a "mistake." Only with help from a pro bono attorney and further advocacy was Jeff's VA eligibility re-established.

Other Reform Efforts Affecting Veterans with Bad Paper Discharges

LITIGATION:

Shepherd v. McHugh & Monk v. Mabus: class action lawsuits on behalf of Vietnam veterans who developed PTSD during their service and received bad paper discharges, challenging the Department of Defense military review boards' systemic denial of their discharge upgrade applications, which suits led to the issuance of new Department of Defense guidance about granting "liberal consideration" to the discharge upgrade applications of such veterans.

Kennedy v. Esper & Manker v. Spencer: certified class action lawsuits on behalf of post-9/11 veterans who developed PTSD or other mental health conditions during their service and received bad paper discharges, challenging the Department of Defense military review boards' policies and practices in adjudicating their discharge upgrade applications.

LEGISLATION:

Honor Our Commitment Act: federal legislation extended VA mental health evaluation and treatment to veterans with Other Than Honorable discharges who have served in a combat zone or area of hostilities, worked as a drone operator, or experienced MST.

Albany County, New York: municipal action extended county veteran benefits to any veteran discharged based on LGBT status.

New York: legislation extended state veteran benefits to veterans who received a bad paper discharges on the basis of their sexual orientation or gender identity or as a result of MST, PTSD, or TBI.

Connecticut: legislation extended state and municipal veteran benefits to veterans who received Other Than Honorable discharges as a result of PTSD, TBI, or MST.

Nevada: legislation provided that no veteran discharged because of LGBT status may be denied access to a state program or service for veterans if the veteran is otherwise qualified.

Rhode Island: legislation provided that any veteran with a General or Other Than Honorable discharge based on LGBT status can petition the state to have the discharge recorded as honorable and can receive state veteran benefits and rights.

ADMINISTRATIVE ADVOCACY:

Petition for Rulemaking to Amend 38 C.F.R. 3.12: petition asking VA to update and revise its regulations about the standards under which veterans with bad paper discharges can access basic VA benefits such as health care and compensation, seeking to ensure that mitigating circumstances such as in-service mental health conditions are considered and that only severe misconduct results in exclusion.

2016 Commission on Care Report: commission of representatives from leading veteran service organizations, veterans advocacy groups, health care providers, and other stakeholders recommending that VA create a streamlined path to health care eligibility for certain veterans with Other Than Honorable discharges.

approach to connecting veterans with health care.

VA should log and track all veterans' requests to enroll in health care and the outcome of that request. The ability to ensure staff compliance with training and guidance depends upon having data to observe and measure.

A tracking system for VHA enrollment requests should help to ensure that the turn-away problem is resolved prospectively. However, for decades, VHA has been turning away veterans with bad paper and not tracking those encounters. The VA Inspector General should therefore initiate an investigation into past turn-aways to determine the issue's full scope, both currently and historically. This will best ensure that other remedial actions will be most successful and complete, so that no turned-away veteran is left outside of care.

VA Must Improve its Training, Guidance & Oversight

1. Create training about eligibility of veterans with bad paper for VA health care and other services.
2. Create special trainings on eligibility for VHA enrollment and eligibility staff and for VA outreach staff.
3. Promote a "no wrong door" approach to access VA health care.
4. Track all requests and decisions for health care enrollment.
5. Investigate and audit records to fully assess the scope of the turn-away problem, past and present.

B. VA Must Improve Communication Between VHA & VBA and Between VA & Veterans

Communications problems, both internal to VA and in VA's messages to veterans and the public, further impede the ability of veterans with bad paper to access VA health care.

Focusing first on the internal issues, as documented above, the health care eligibility and enrollment process breaks down at many points. For a significant number of a veterans who were orally told they were not eligible for VA health care, a 7131 Form to initiate a character of discharge review was filled out. However, VA staff neglected to transmit that form to VBA, or VBA never received it or did not act on it, or VBA did act on it and rendered a decision but then failed to inform VHA or the veteran of its decision. Both VBA and VHA must therefore improve the tracking and processing of health care applications from veterans with bad paper. Moreover, VBA and VHA must improve their computer systems and databases so that front-line eligibility workers can more quickly and accurately determine whether a veteran is eligible for limited or full services, for example on the basis of a prior honorable enlistment.

Externally, both VBA and VHA must create new letters, notices, and other resources to explain to veterans with bad paper what should happen and what is happening regarding their health care applications and eligibility determinations. When a veteran applies for health care, VA should provide the veteran a letter with a case number that explains the character of discharge determination process. The letter should also notify the veteran of the legal standards that apply, the right to submit information and evidence in support of eligibility, the right to ask for a hearing, and the right to have assistance from a veteran service organization or veterans advocate.

VA must adopt a "no wrong door" approach to connecting veterans with health care

VHA and VBA must then make sure to notify the veteran once an eligibility determination is made and, if the veteran is found eligible, must assist the veteran in completing the eligibility and enrollment process. In any approval letter sent to the veteran, VBA should include a one-page form that clearly states that the veteran is eligible for VA health care and instruct the veteran to take the form to a VHA medical facility to complete the enrollment process and begin accessing health care.

With regard to external communications, VA should consider creating a separate application form to request a character of discharge determination and a Statement in Support of Claim Form specifically for character of discharge eligibility determinations. These forms should prompt the veteran for information that is especially relevant to that decision, such as whether there are any mitigating or extenuating circumstances that occurred in service, such as military sexual trauma or a mental health condition, or whether the veteran served multiple terms of service.

Another issue hampering effective communication with veterans is the length of time that it takes for VA to render a character of discharge eligibility determination, if VA ever does. One advocate reported that a veteran who first attempted to apply for VA health care in April 2013 did not receive a character of discharge determination until April 2016—three years later. When VA finally made that determination, the veteran did not get the notice because he had moved multiple times, which is not uncommon for this population of veterans who experience high rates of homelessness and unemployment. Compare this to another government health care program, Medicaid, where enrollment decisions usually take no more than 60 to 90 days and often can be made instantaneously.

Therefore, one important improvement that VA must undertake is decreasing the amount of time to render a character of discharge determination. This is especially important because, under current VA rules, veterans with bad paper generally cannot receive any health care services while their character of discharge decision is pending. Therefore, many veterans who are ultimately found eligible for VA health care nevertheless wait years without access to needed treatment. Reducing the amount of time that a veteran waits for a decision therefore is a key component to solving some of the turn-away problem. To accomplish this end, VBA should classify character of discharge determinations as "rating" claims—rather

than as deprioritized "non-rating" claims—and flag them for expedited processing if the veteran is homeless, at risk of suicide, experiencing extreme financial hardship, or facing other emergency circumstances.

VA Must Improve Communication Between VHA & VBA and Between VA and Veterans

1. Improve communication pathways between VBA and VHA regarding character of discharge eligibility determinations.
2. Create new form letters and resource materials for veterans with bad paper about the VHA enrollment process and character of discharge eligibility rules.
3. Provide eligible veterans with instructions on how to complete the enrollment process.
4. Classify character of discharge determinations as rating claims and flag them if the veteran is facing emergency circumstances.

C. VA Must Remedy Past Unlawful Turn-Aways by Conducting Outreach and Remediation Efforts

For many years, VA has improperly turned away former servicemembers with bad paper who sought health care. Because VA has not kept records relating to those whom it has turned away, we cannot know the exact number who have been affected. With over 550,000 servicemembers having received bad paper since 1980, it would be no stretch to think that the number unlawfully turned away could be in the tens of thousands, and an estimated 400,000 are currently at risk of being turned away from needed care.

The veteran told by VA that a bad paper discharge renders that veteran ineligible is not the only person harmed by that misinformation; that veteran may tell other veterans, who then decide not even to try to seek care at VA perpetuating a damaging cycle of stigma and misunderstanding. Misinformation about VA eligibility for veterans with bad paper is rampant in the veterans community.

VA must ensure not only that no individual veteran is wrongly turned away from care in the future, but also that those veterans previously turned away are now given the opportunity to apply for care. The turn-away problem requires remediation that is both prospective and retrospective.

VA therefore must undertake extensive, concerted, and sustained efforts to ensure that all veterans and organizations that serve veterans know that having a bad paper discharge does not necessarily prevent a veteran from accessing VA health care and other VA services. VA must encourage all veterans to apply to VA for an eligibility determination—adopting a "no wrong door" approach.

VA's outreach should include a sustained public information campaign, using both traditional media and social media outlets. New materials that provide a clearer and more direct message about all veterans' right to apply for health care must be created.

Furthermore, VA should send letters to all veterans not currently enrolled in VHA notifying them of their right to apply for health care. The letter, of course, would not guarantee that the veteran would be found eligible. Some veterans are not eligible for health care, not only because of their character of discharge but potentially because of their brief period of time in service or not having a service-connected disability. However, the letter should provide correct information about the standards for health care eligibility and emphasize that having a bad paper discharge does not necessarily disqualify a veteran from receiving health care. Sending such a letter is within the capacity of VA, as demonstrated by the congressionally mandated letters sent out in 2018 regarding the implementation of the Honor Our Commitment Act, which addressed eligibility for mental and behavioral health treatment for certain veterans with Other Than Honorable discharges.

Not long after being discharged, Dwayne, a post-9/11 Marine Corps veteran who served in Afghanistan, went to a VA hospital seeking treatment for Traumatic Brain Injury and Post-Traumatic Stress Disorder. VA staff told him that he could not get any health care because of his OTH discharge. A year later, Dwayne tried again at a different VA hospital, but again was told that he could not get any health care. Four years after that, now with help from a pro bono attorney, Dwayne finally gained access to VA health care and service-connected benefits. However, for more than six years, VA's doors were shut to Dwayne, when he most needed mental health treatment and other services to transition back to civilian life. And when VA finally granted him access to health care, VA did not provide any remedy for or acknowledgment of having unlawfully excluded him for so long.

In conducting its outreach, VA must partner with other stakeholders, including veterans service organizations, veteran community organizations, state and local departments of veterans services, and veterans advocates. These organizations are often deeply embedded in their communities and are best able to find veterans who may have been turned away and to encourage them to approach VA to try applying again. They are also a key ally in the effort to reverse the widespread misinformation concerning this topic.

VA must also partner with the Department of Defense, which has its own important role in addressing unlawful and inequitable bad paper discharges. VA and DOD can and should work together on reforming the separation, transition, and discharge upgrade standards

and procedures. While most of this report's recommendations are focused on the actions VA must take, we also call on other organizations who serve veterans to do their part in ensuring that no veteran is wrongfully turned away from needed care. We all have a role to play in remedying this long-standing, systemic problem that has affected generations of veterans—and in making sure that no future generation suffers the same harm.

VA Must Remedy Past Unlawful Turn-Aways by Conducting Outreach and Remediation Efforts

1. Conduct public information campaign
2. Send letters to veterans not currently enrolled in VHA to notify them of eligibility standards and the right to apply for health care.
3. Partner with organizations that serve veterans to enhance outreach efforts.

VII. APPENDIX

REVIEW BOARD OUTCOMES FOR FY2018

Army Board for Correction of Military Records

ABCMR Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	548	73	13.3%	96	17.5%	379	69.2%
Mental Health Applications	148	51	34.5%	25	16.9%	72	48.7%
Sexual Assault Applications	11	7	63.6%	3	27.3%	1	9.1%
All Other Applications	389	15	3.9%	68	17.5%	306	78.7%

Note: *The Department of Defense released information onlly about the first and second quarters of 2018 for the Army Discharge Review Board. Therefore, the above tables reflect online a half year's data.*

Army Discharge Review Board

ADRB Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	727	206	28.3%	31	4.3%	180	24.8%
Mental Health Applications	300	134	44.7%	13	44.7%	153	51.0%
Sexual Assault Applications	17	9	52.9%	3	17.7%	5	29.4%
All Other Applications	410	63	15.4%	15	3.7%	262	63.9%

Board for Correction of Naval Records

BCNR Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	1744	198	11.4%	88	5.1%	1458	83.6%
Mental Health Applications	267	82	30.7%	7	2.6%	178	66.7%
Sexual Assault Applications	61	21	34.4%	4	6.6%	36	59.0%
All Other Applications	1416	95	6.7%	77	5.4%	1244	87.9%

Naval Discharge Review Board

NDRB Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	837	139	16.6%	36	4.3%	662	79.1%
Mental Health Applications	286	60	21.0%	14	4.9%	212	74.1%
Sexual Assault Applications	25	8	32.0%	2	8.0%	15	60.0%
All Other Applications	526	71	13.5%	20	3.8%	435	82.7%

Air Force Board for Correction of Military Records

AFCMR Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	571	47	8.2%	43	7.5%	482	84.4%
Mental Health Applications	161	11	6.8%	26	16.2%	125	77.6%
Sexual Assault Applications	24	5	20.8%	4	16.7%	15	62.5%
All Other Applications	386	31	8.0%	13	3.4%	342	88.6%

Air Force Discharge Review Board

AFDRB Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	384	39	10.2%	42	10.9%	303	78.9%
Mental Health Applications	227	30	13.2%	26	11.5%	171	75.3%
Sexual Assault Applications	7	3	42.9%	1	14.3%	3	42.9%
All Other Applications	150	6	4.0%	15	10.0%	129	86.0%

Source: Department of Defense Boards of Review Reading Rooms, http://boards.law.af.mil/stats.htm (data downloaded Nov. 2019).

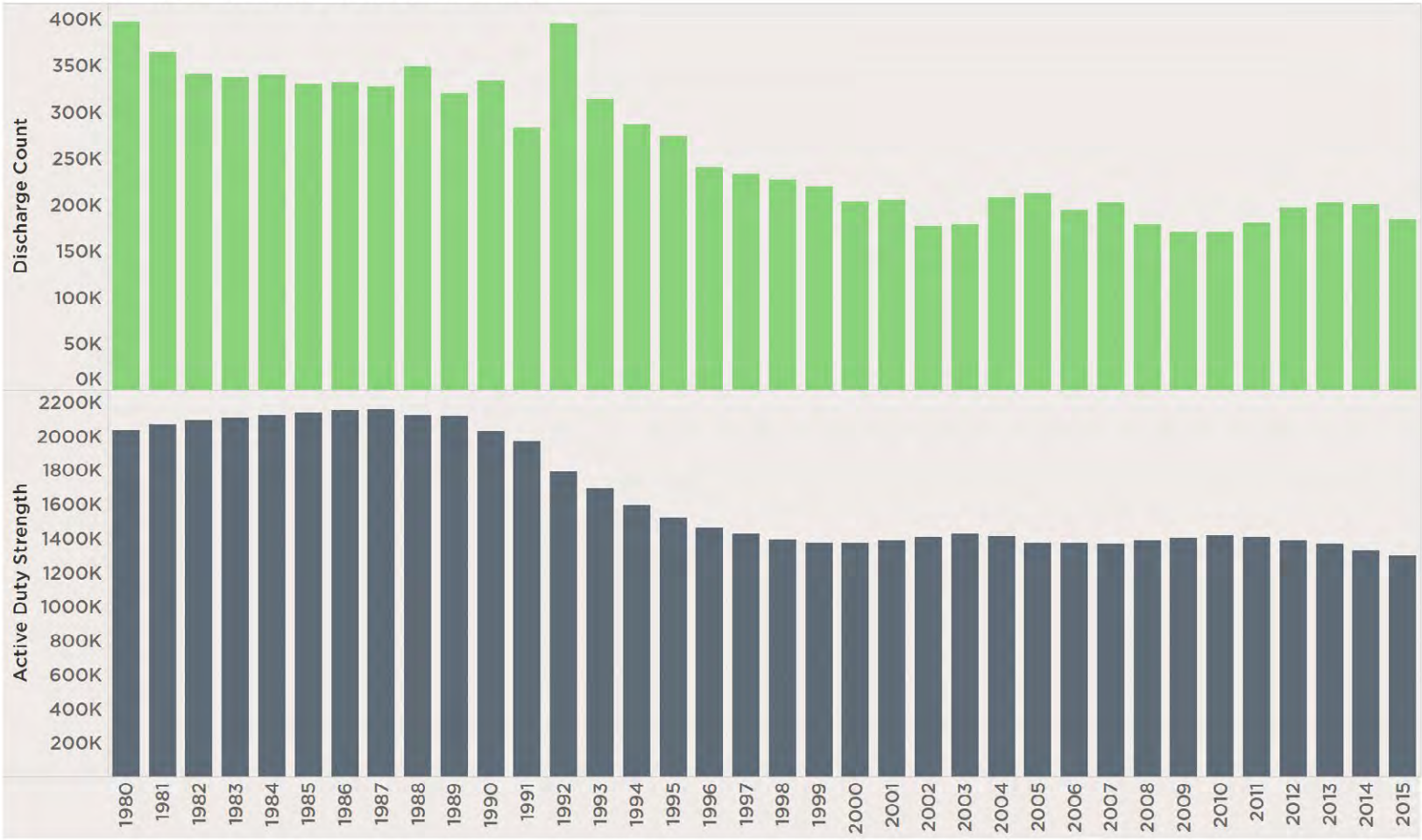
DEPARTMENT OF DEFENSE SEPARATION DATA FY1980 TO FY2015

In response to a request under the Freedom of Information Act, the Department of Defense's Defense Manpower Data Center provided more than thirty years of data on servicemember separations. Key findings from that data are included in the charts on the following pages.

As a note on methodology, the data were cross-checked with other known data sources and with responses to parallel records requests to attempt to ensure accuracy. However, in many places, information was missing or internally inconsistent, and there were a significant number of "unknown" or blank entries. In such cases, clarification was sought from DOD, and some data entries were excluded as unreliable. Furthermore, important data—such as about race, ethnicity, and gender/sex—were not provided in response to requests.

FY 1980-2015 Discharge & Active Duty Strength Data

(Air Force, Army, Marine Corps, & Navy Data Combined)

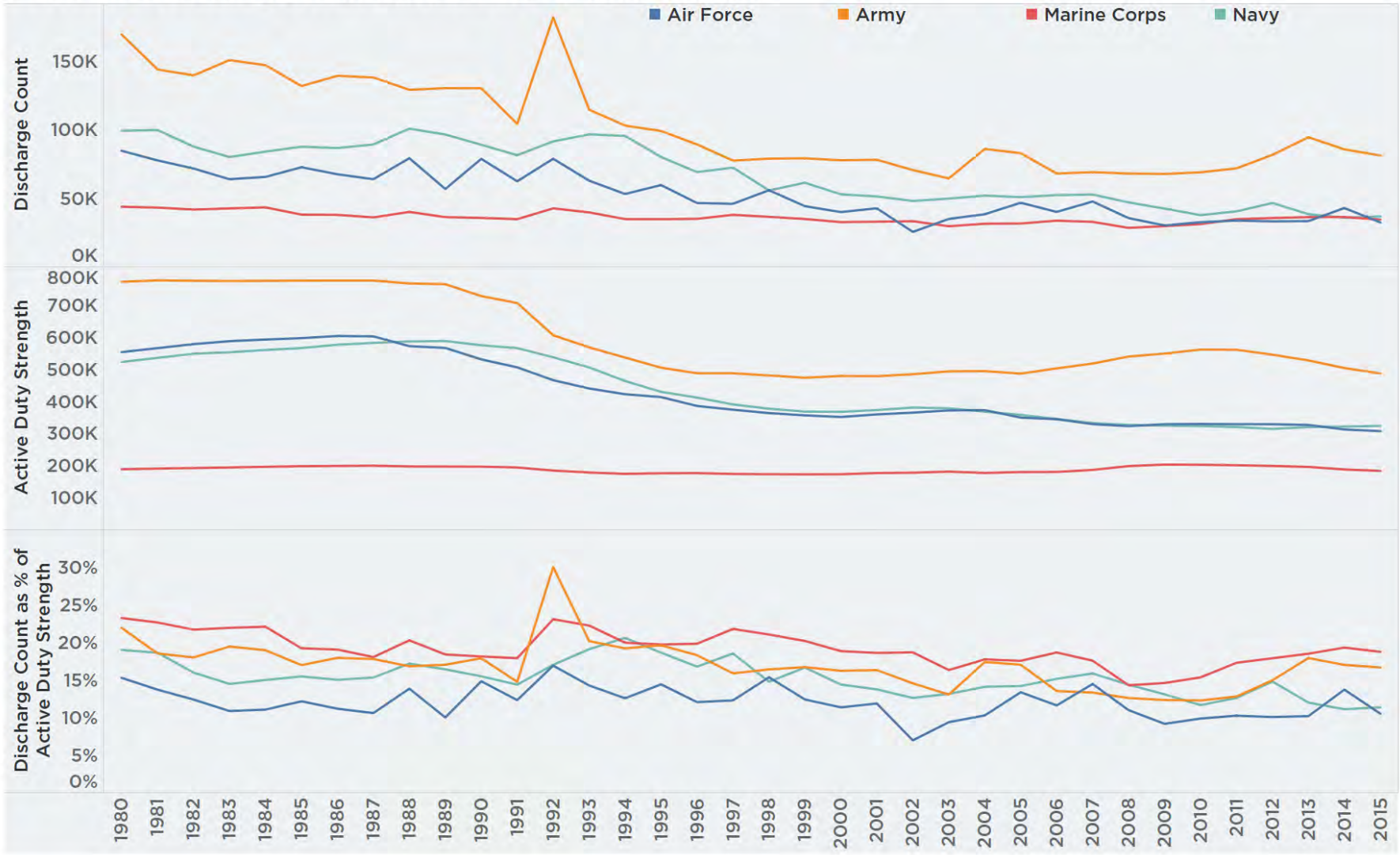


"**Discharge Count**" is the number of servicemembers who were discharged from active duty, excluding enlisted servicemembers who immediately returned to active duty service as officers.

"**Active Duty Strength**" is the number of servicemembers who were serving on active duty as of the final day of the given fiscal year.

Data Summary	Discharge Count	Active Duty Strength
Average:	258,619	1,653,121
Median:	230,378	1,425,448
Minimum:	170,080	1,301,014
Maximum:	397,334	2,160,727

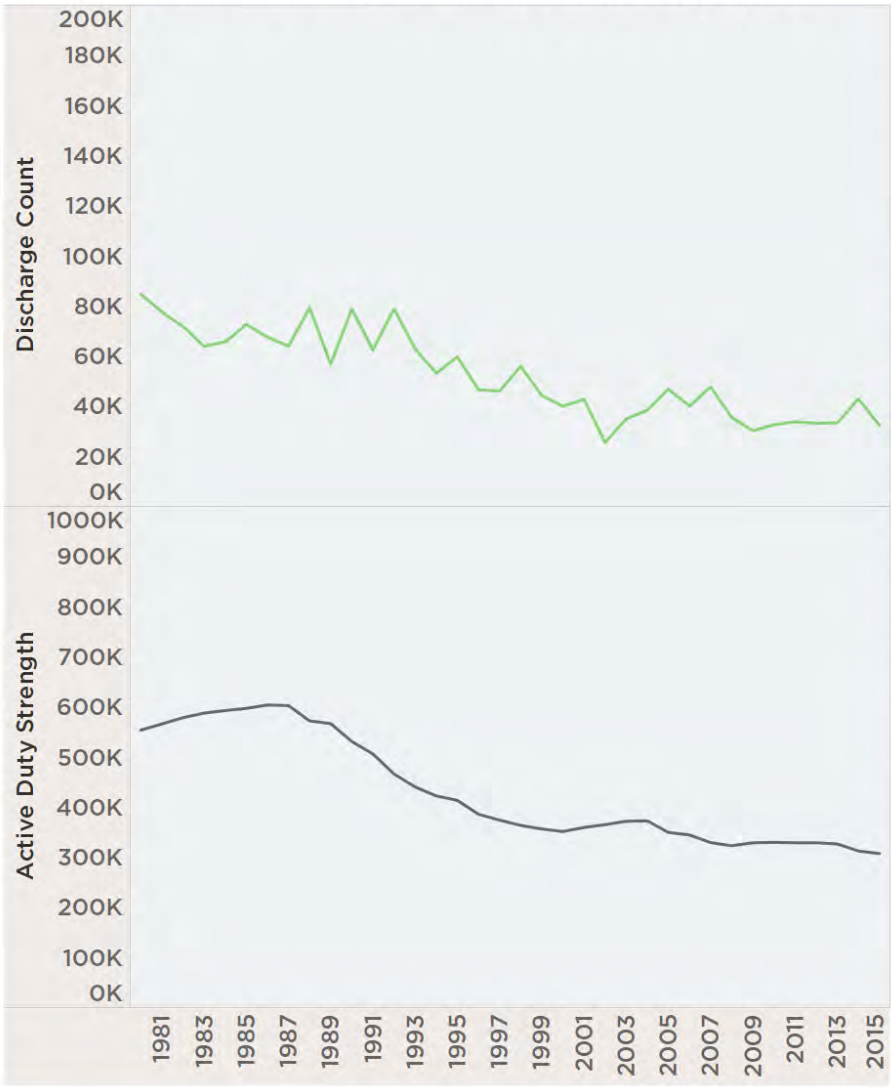
FY 1980-2015 Discharge Count & Active Duty Strength by Branch

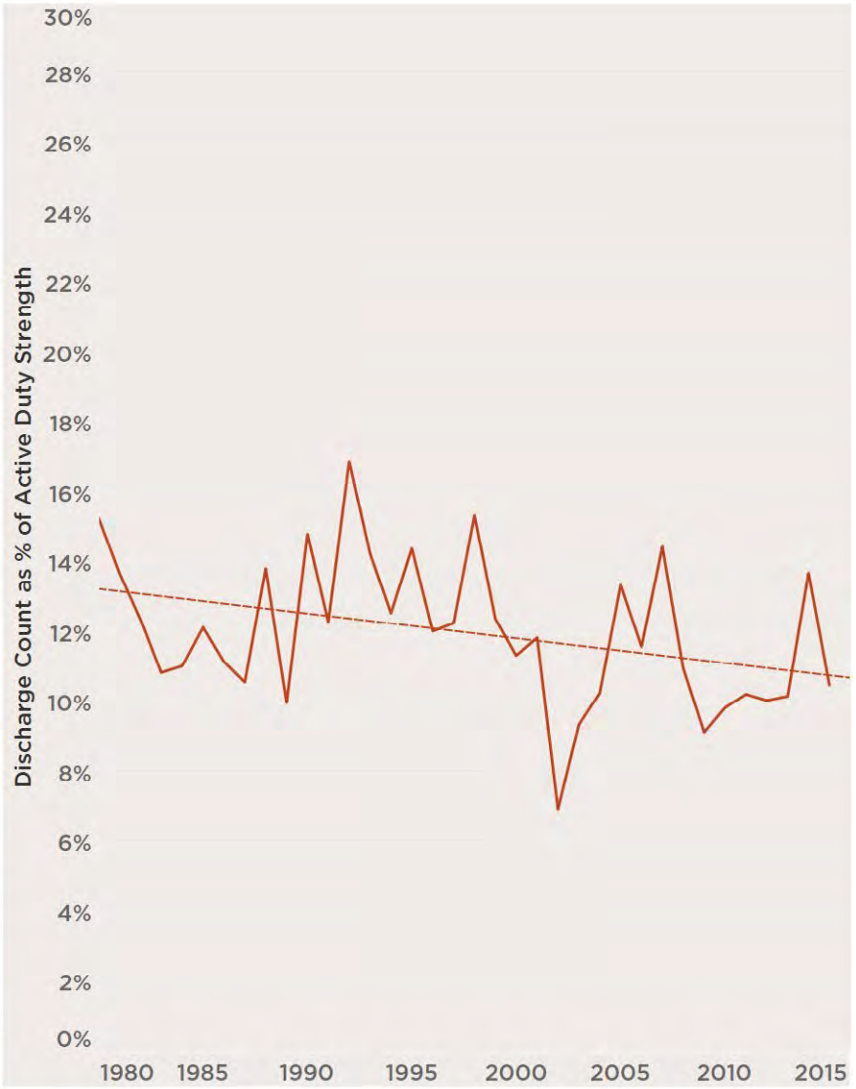


"Discharge Count as a % of Active Duty Strength" is "Discharge Count" divided by "Active Duty Strength" and shown as a percentage. This calculation provides context for the discharge count.

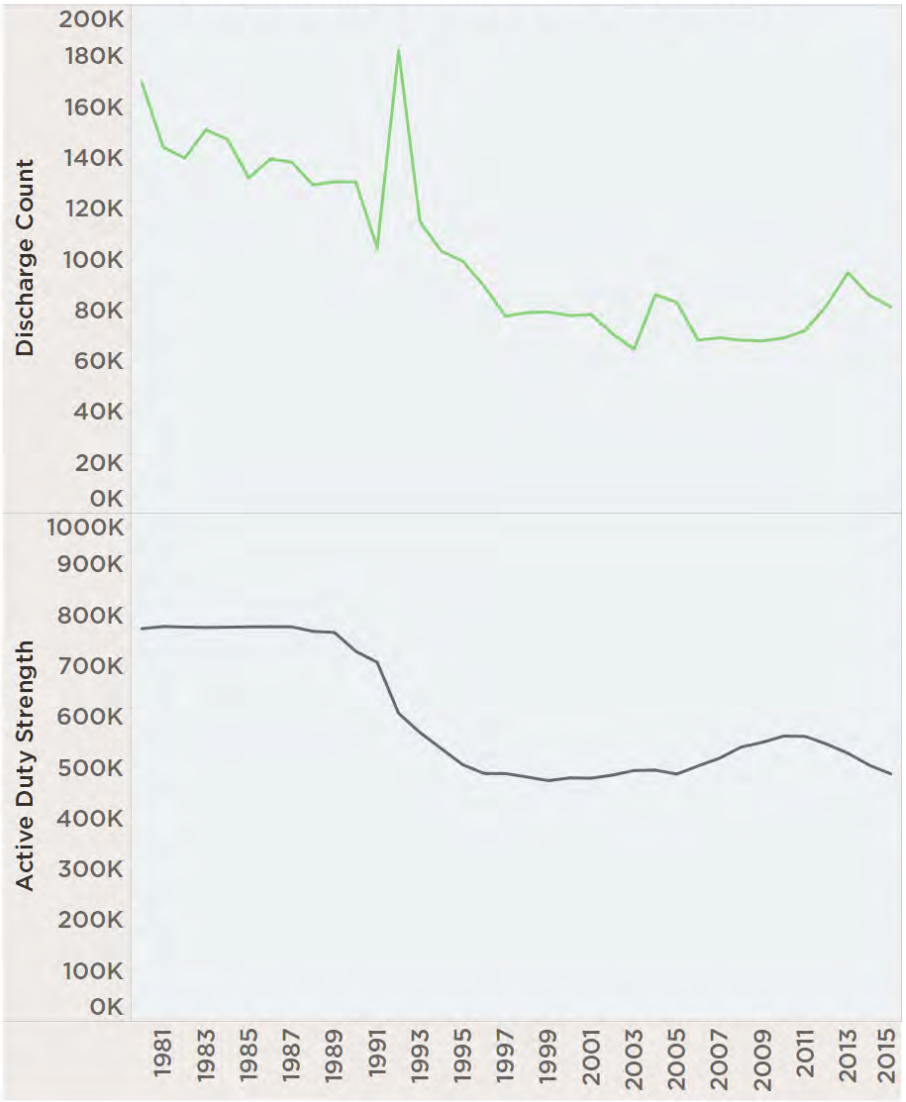
In FY 1980 through FY 2015, 9,310,285 total discharges occurred.

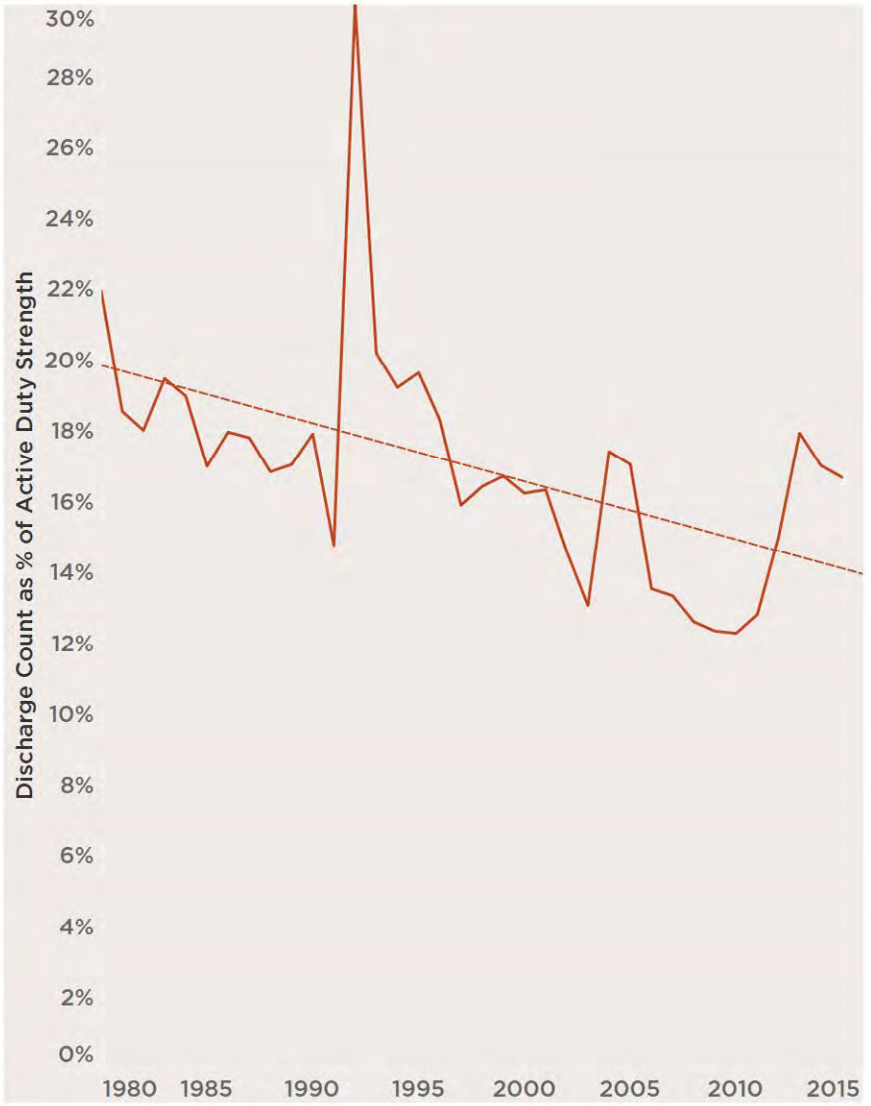
Air Force FY 1980-2015 Discharge Count & Active Duty Strength



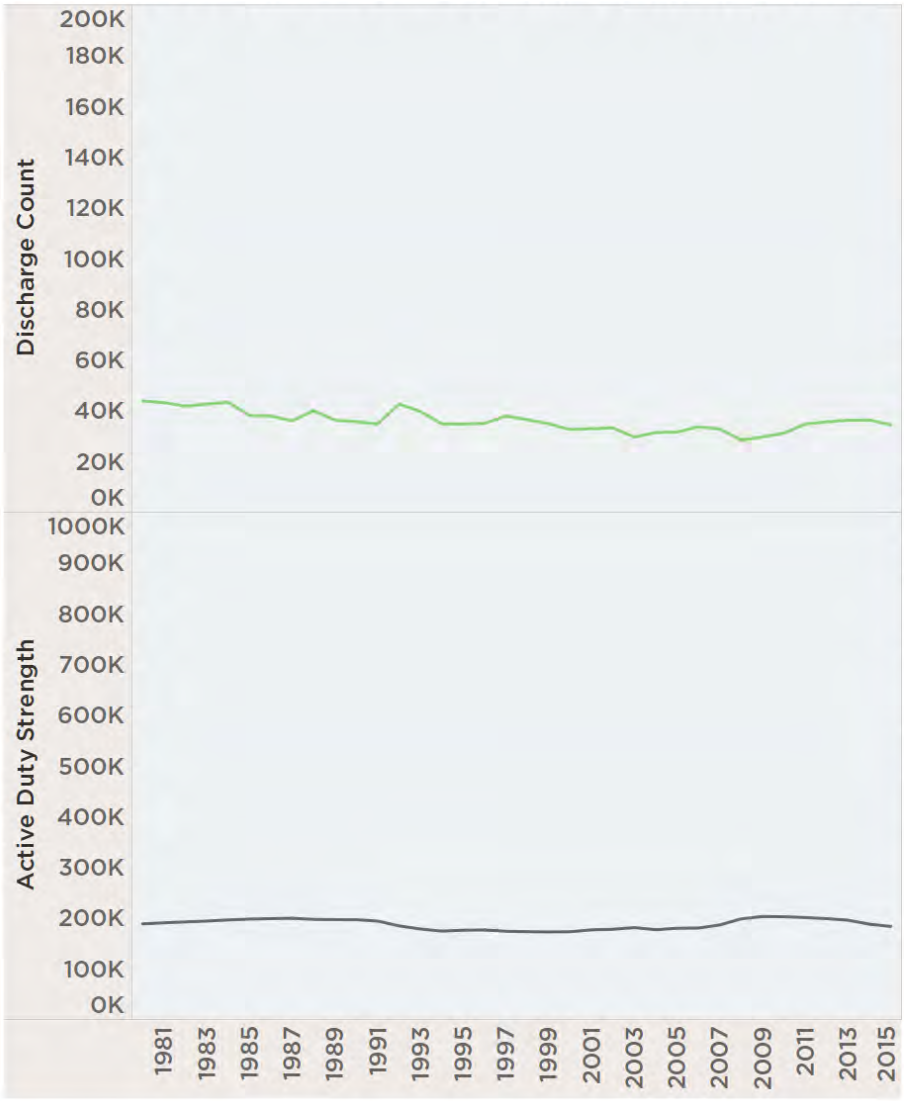


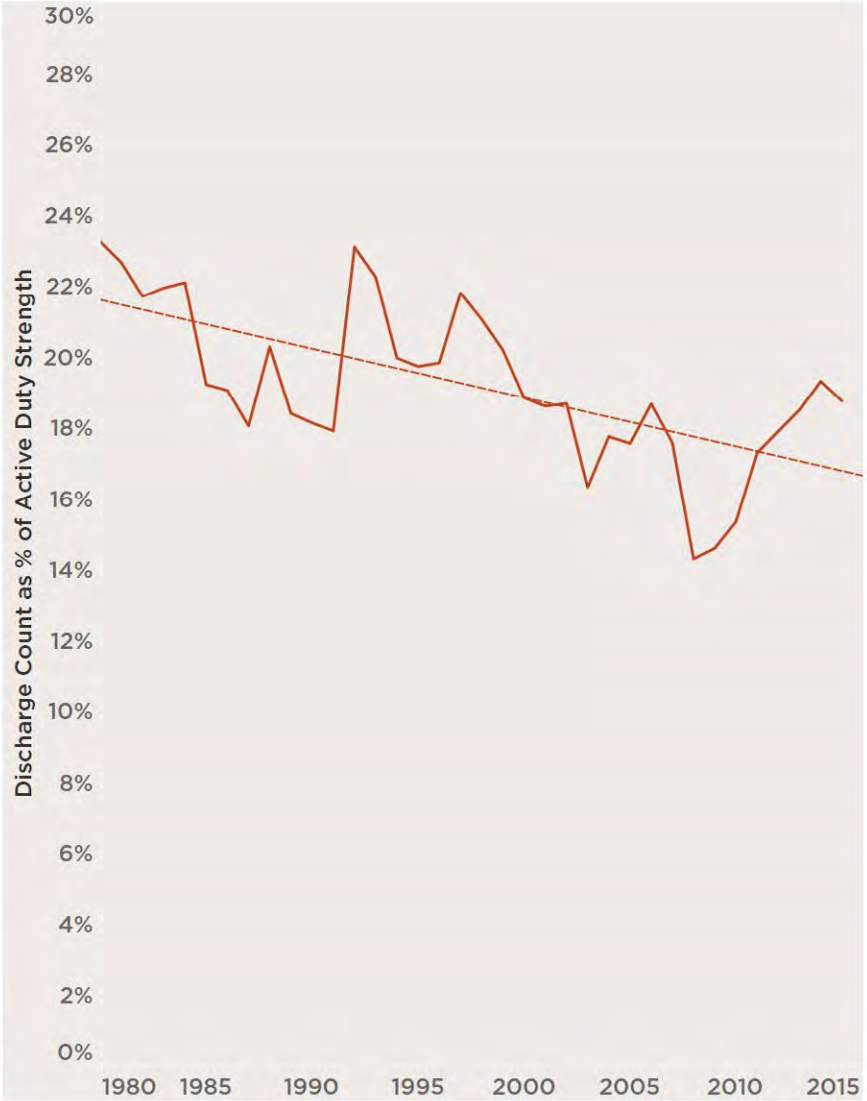
Army FY 1980-2015 Discharge Count & Active Duty Strength



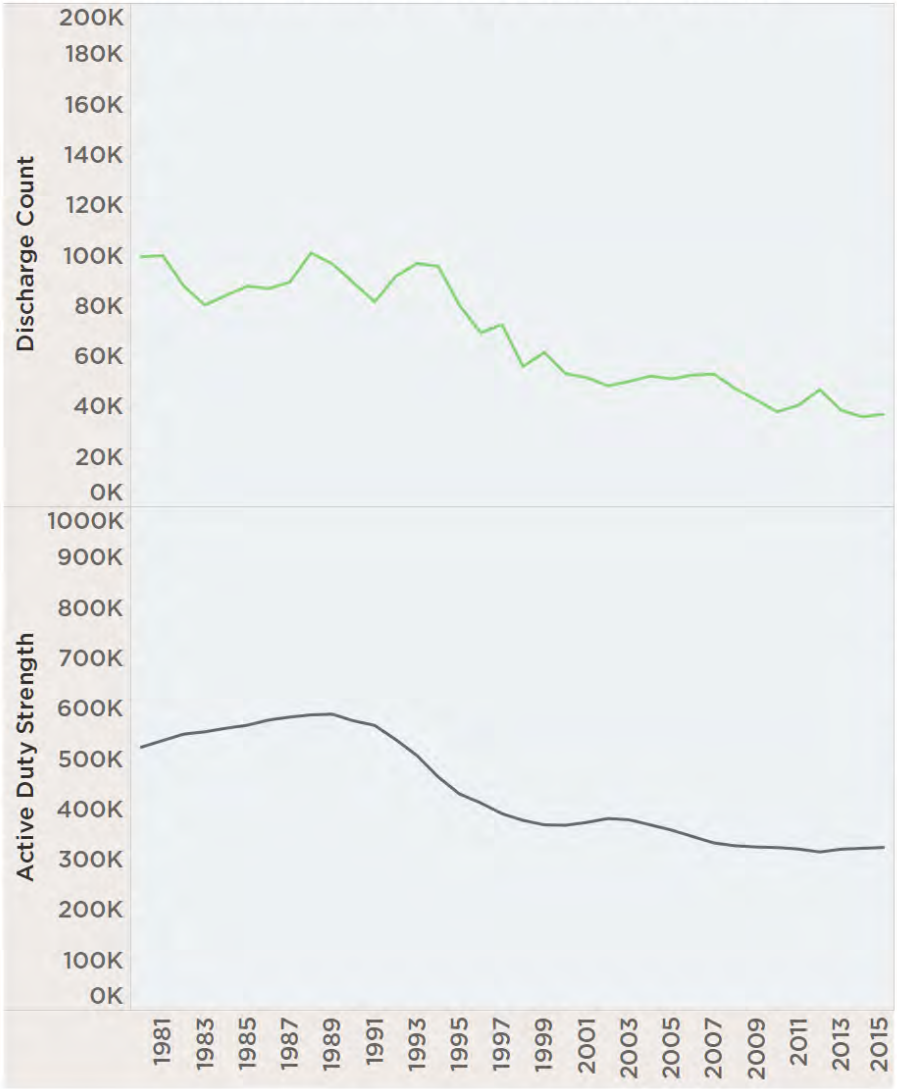


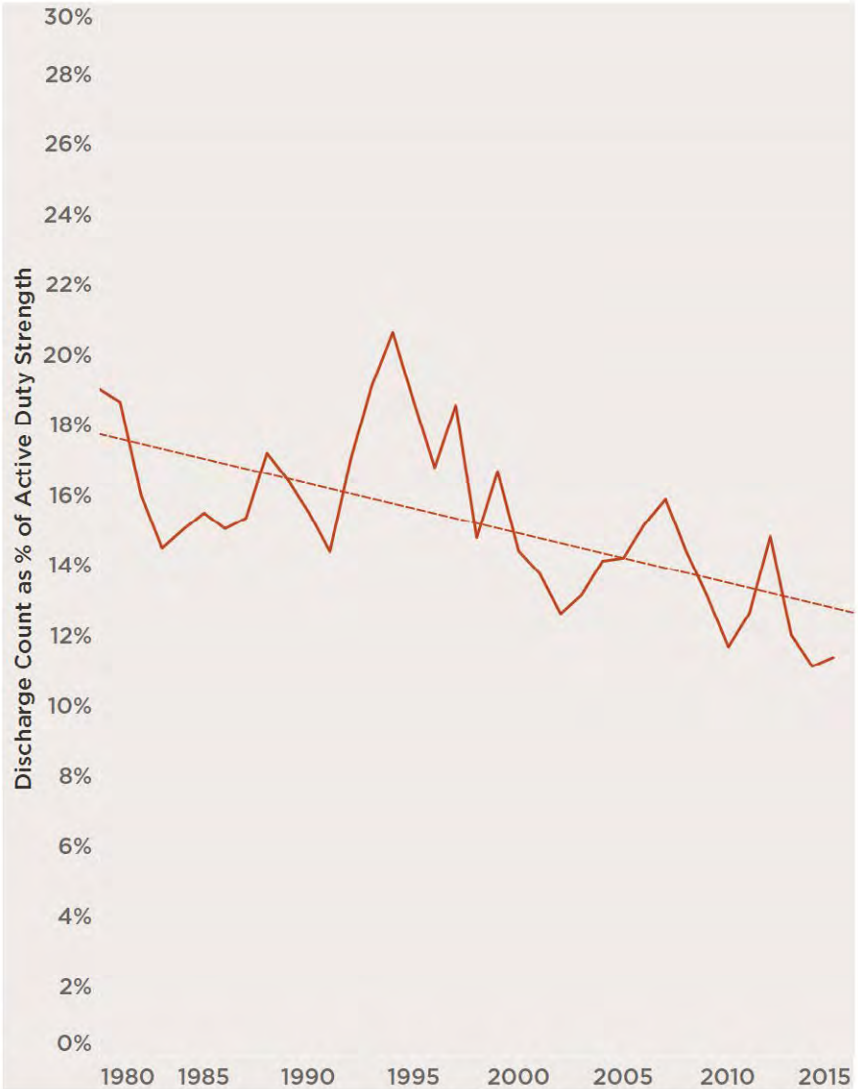
Marine Corps FY 1980-2015 Discharge Count & Active Duty Strength





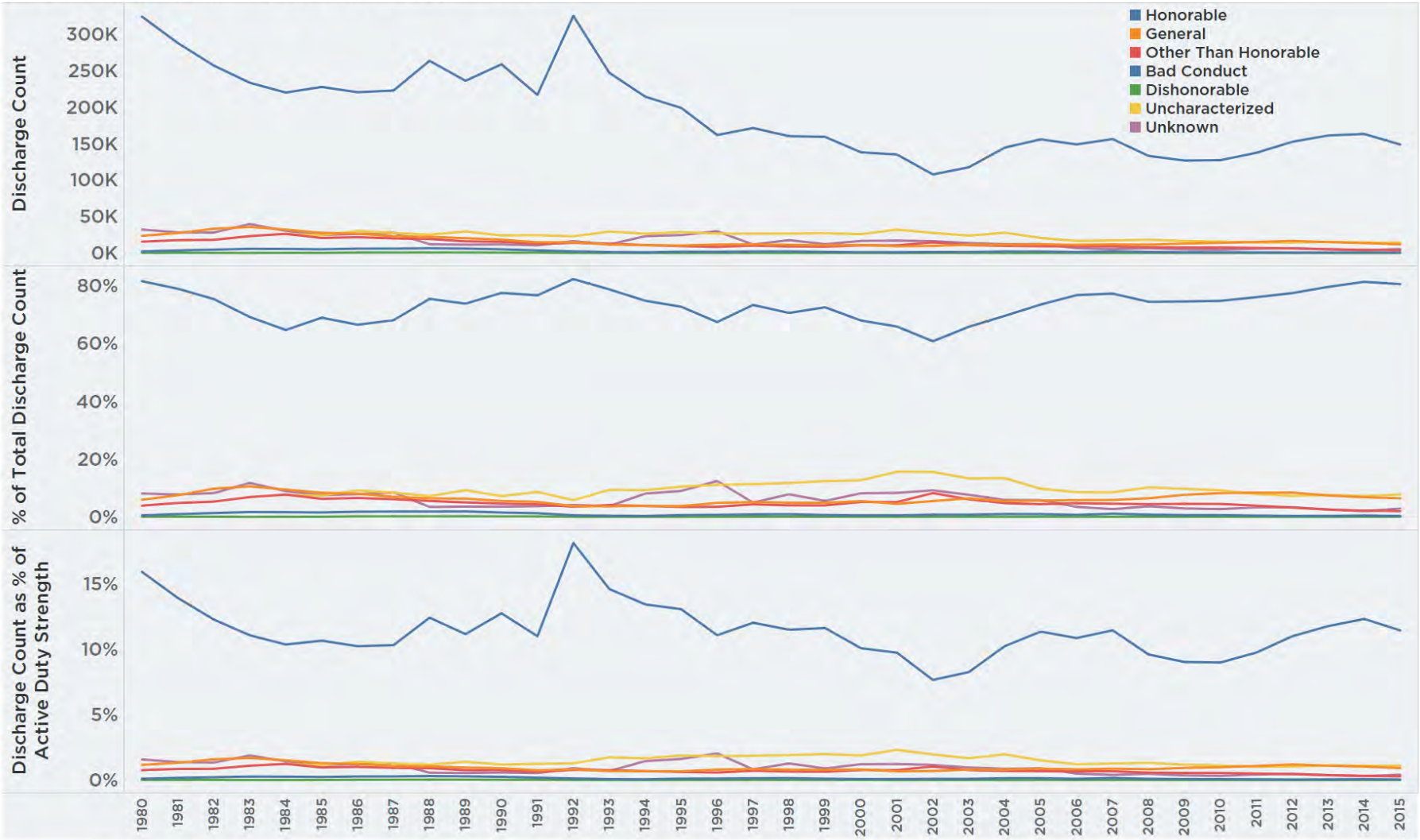
Navy FY 1980-2015 Discharge Count & Active Duty Strength





FY 1980-2015 Discharge by Character of Service

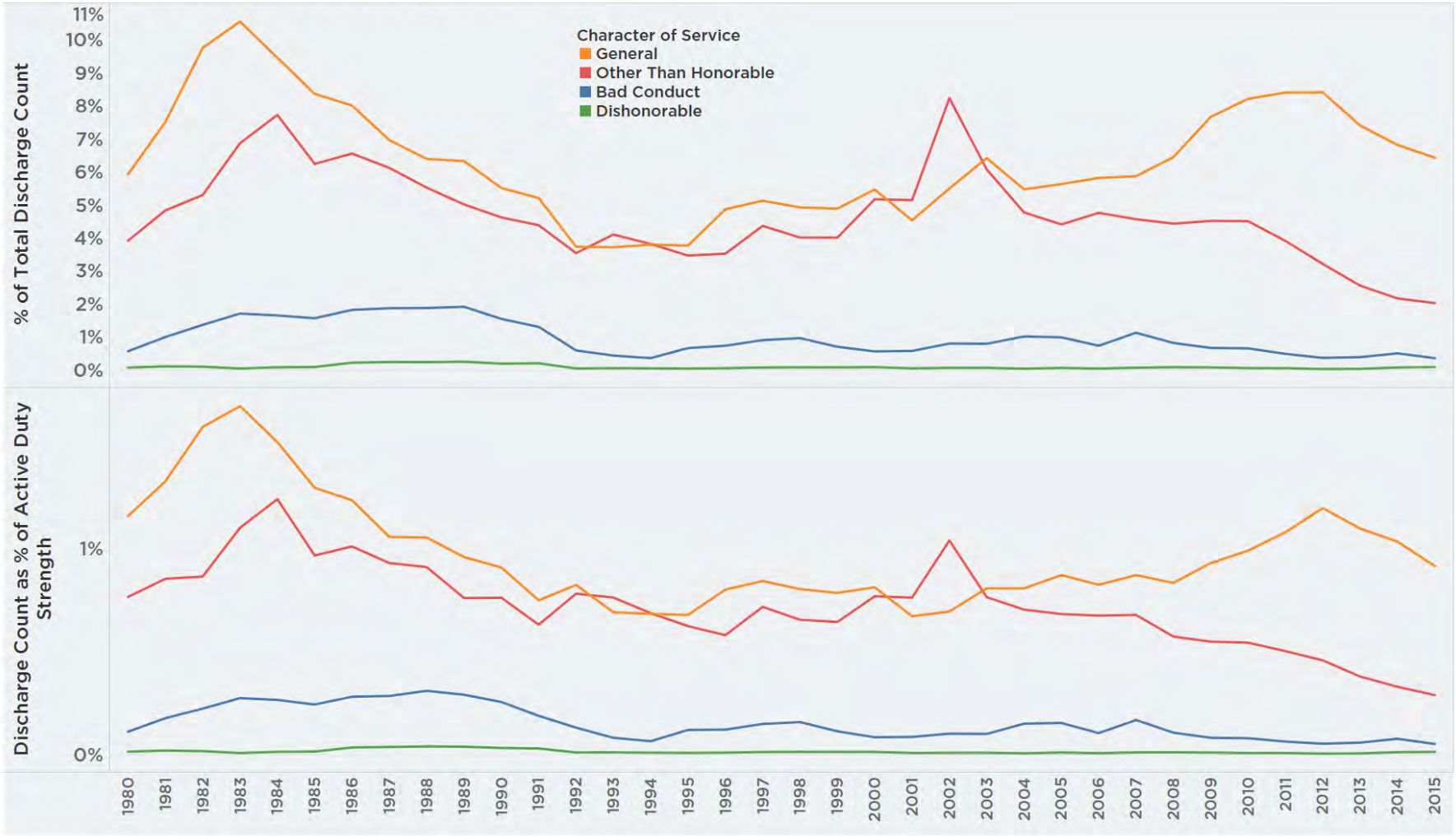
(Air Force, Army, Marine Corps, & Navy Data Combined)



Of the 9,310,285 discharges in FY 1980-2015, roughly 86 percent (7,995,647) are characterized—i.e., the character of service is known and is not listed as Uncharacterized. Of the characterized discharges, 93 percent (7,446,694) list a character of service that would lead to presumptive *eligibility* for VA benefits—i.e., Honorable (6,849,766) or General Under Honorable Conditions (596,928). There is no indication in the data that discharges related to presumptive *ineligibility* for VA benefits—i.e., Other than Honorable, Bad Conduct, or Dishonorable—increased during times of downsizing.

FY 1980-2015 Less Than Fully Honorable Discharges

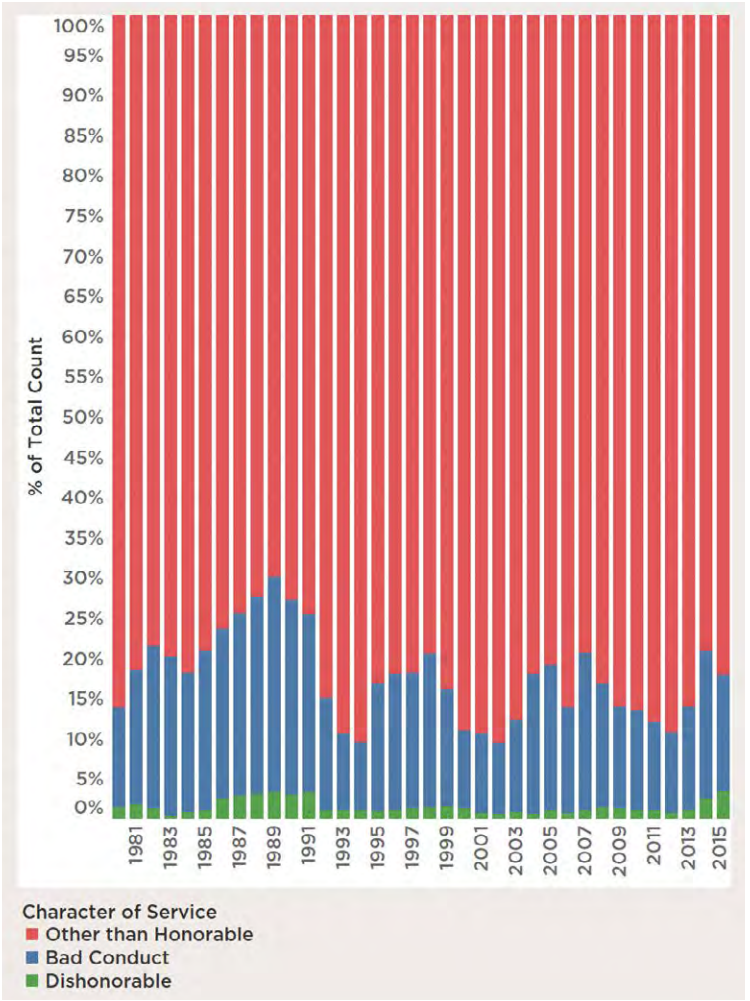
(Air Force, Army, Marine Corps, & Navy Data Combined)
Uncharacterized and Unknown Not Shown



FY 1980-2015 Other Than Honorable, Bad Conduct, & Dishonorable Discharges

(Air Force, Army, Marine Corps, & Navy Data Combined)

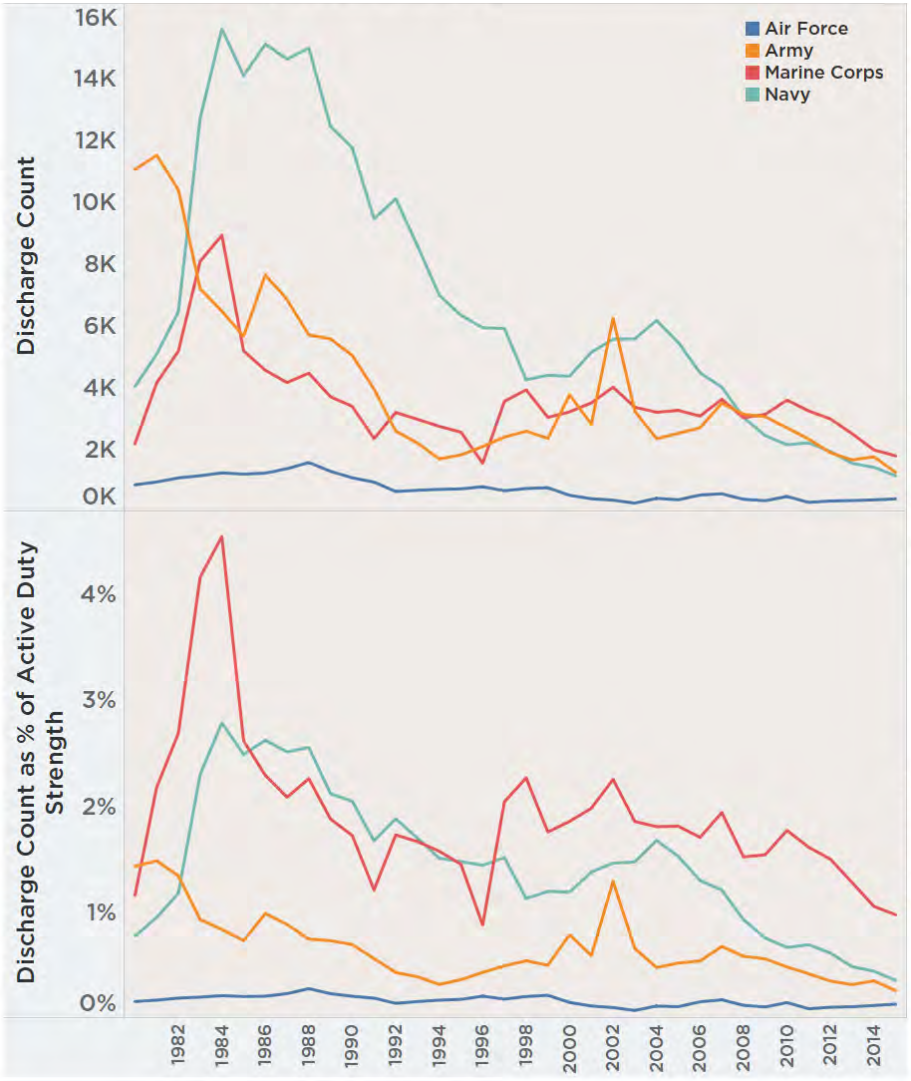
	Other than Honorable	Bad Conduct	Dishonorable	Grand Total
1980	15,560	2,242	272	18,074
1981	17,621	3,633	387	21,641
1982	18,071	4,653	330	23,054
1983	23,182	5,757	138	29,077
1984	26,293	5,617	268	32,178
1985	20,620	5,169	290	26,079
1986	21,735	6,029	725	28,489
1987	20,047	6,122	780	26,949
1988	19,293	6,549	822	26,664
1989	16,048	6,124	790	22,962
1990	15,425	5,160	633	21,218
1991	12,405	3,687	566	16,658
1992	13,982	2,330	168	16,480
1993	12,876	1,361	165	14,402
1994	10,935	1,024	132	12,091
1995	9,479	1,810	112	11,401
1996	8,451	1,756	122	10,329
1997	10,204	2,109	168	12,481
1998	9,103	2,184	173	11,460
1999	8,804	1,537	165	10,506
2000	10,508	1,139	168	11,815
2001	10,550	1,177	95	11,822
2002	14,606	1,416	109	16,131
2003	10,862	1,415	111	12,388
2004	9,914	2,107	74	12,095
2005	9,349	2,094	125	11,568
2006	9,237	1,419	79	10,735
2007	9,236	2,277	133	11,646
2008	7,930	1,461	144	9,535
2009	7,681	1,132	125	8,938
2010	7,677	1,112	92	8,881
2011	7,066	877	94	8,037
2012	6,328	718	51	7,097
2013	5,171	782	65	6,018
2014	4,348	1,006	144	5,498
2015	3,740	657	159	4,556
Grand Total	444,337	95,642	8,974	548,953

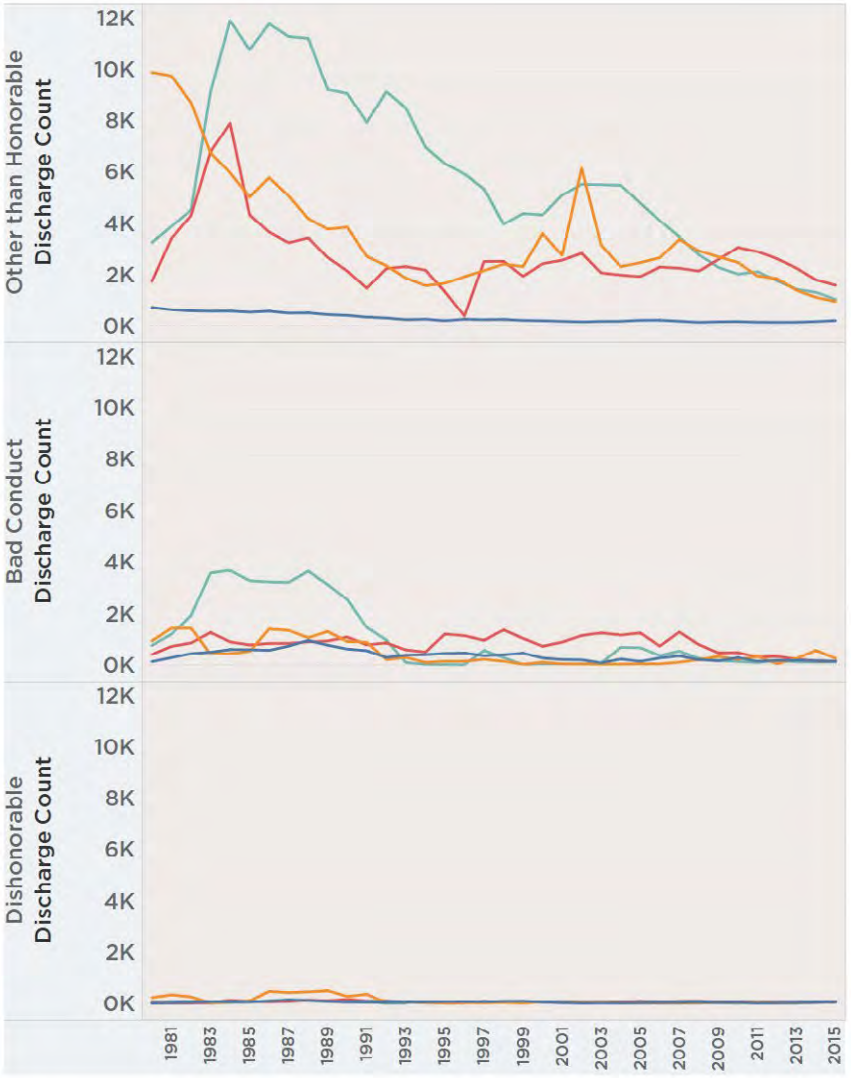


Of the characterized discharges, around 7 percent (548,953) list a character of service that would lead to presumptive ineligibility for VA benefits–i.e., Other than Honorable, Bad Conduct, and Dishonorable. Most of those discharges have an Other Than Honorable character of service–81 percent (444,337). Seventeen percent (95,642) have a Bad Conduct character of service, and roughly two percent (8,974) have a Dishonorable character of service.

FY 1980-2015 Discharges Leading to Presumptive VA Ineligibility

(excluding Uncharacterized discharges)





In comparison with the other branches, the Marine Corps often discharged a greater percentage of its servicemembers with characters of service that would lead to presumptive VA ineligibility.

VIII. ENDNOTES

1 Adi V. Fundlapalli et al., Military Misconduct and Homelessness Among US Veterans Separated from Active Duty, 2001-2012, Journal of the American Medical Association 314 (2015); Claire Hoffmire et al., Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans Am. J. Prev. Med 1,3 (2019); Sara Kintzle et al., Exploring the Economic and Employment Challenges Facing U.S. Veterans: A Quantitative Study of Volunteers of America Service Providers and Veteran Clients (May 2015).

2 However, some veterans with Honorable discharges may have other stigmatizing or personal information on their DD214s, such as a narrative reason of Personality Disorder.

3 38 U.S.C. § 101(2); 38 C.F.R § 3.12.

4 Ali R. Tayyeb & Jennifer Greenburg, "Bad Papers": The Invisible and Increasing Costs of War for Excluded Veterans 9 (June 2017)

5 U.S. Gov't Accountability Off., GA-17-260, *Actions Needed to Ensure Post-Traumatic Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations* 12 (2017)

6 Rajeev Ramchand *et al., Prevalence of, Risk Factors for, and Consequences of Postraumatic Stress Disorder and Other Mental Health Problems in Military Populations Deployed to Iraq and Afghanistan,* Current Psychiatry Reports 17:37 (2015); Nancy Lutwak and Curt Dill, *Military Sexual Trauma Increases Risk of Post-Traumatic Stress Disorder and Depression Thereby Amplifying the Possibility of Suicidal Ideation and Cardiovascular Disease*, Military Medicine, 359-361 (April 2013).

7 Robert H. Pietrzak *et al., Functional Significance of a novel 7-factor model of DSM-5 PTSD Symptoms: Results from the National Health and Resilience in Veterans Study,* Journal of Affective Disorders, 522-26 (March 2015).

8 U.S. Gov't Accountability Off., GA-17-260, *Actions Needed to Ensure Post-Traumatic Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations* 1 (2017) ("PTSD, TBI, and other mental and physical conditions can go unrecognized and unacknowledged by the military, family members, and society in general. Because these conditions can adversely affect servicemembers' moods, thoughts, and behavior, they may lead to disciplinary infractions and subsequent separations for misconduct from the military.").

9 *Id.*; Stephanie Smith Ledesma, *PTSD and Bad Paper Discharges: Why the Fairness to Soldiers Act is Too Little, Too Late*, Elon L. Rev., 10:189, 198-206 (2018).

10 Ledesma, *supra n. 5.*

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27 38 U.S.C. §§ 101(2), 101(18); Pub. L. 95-126, 38 C.F.R. § 3.360. Under a VA policy effective July 2017, VA is authorized to provide 90 days of emergency care to veterans with Other Than Honorable discharges who are experiencing mental health crises. Press Release, U.S. Dep't of Veterans Affairs, VA Secretary Formalizes Expansion of Emergency Mental Health Care to Former Service Members with Other-Than-Honorable Discharges (June 27, 2017), https://www.va.gov/OPA/pressrel/pressrelease.cfm?id=2923. A recently enacted law also allows VA to provide mental health treatment to veterans with Other Than Honorable discharges who were diagnosed with a mental health condition during service or in the five years after discharge. 38 U.S.C. § 1712I.

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OUTVETS is a national nonpartisan, nonpolitical charitable organization dedicated to recognizing and honoring the contributions and sacrifices of LGBTQ veterans, active service members, and their families through social interaction, community service, and public awareness. Founded in 2014 on the anniversary of the repeal of Don't Ask, Don't Tell, OUTVETS's mission is to serve the community, educate the public about the sacrifices of LGBTQ service members, and provide its members with the camaraderie they experienced in service. For more information, go to www.outvets.com.

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