

**RIN 2900–AQ95**

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

**RESPONSE OF  
THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND  
SWORDS TO PLOWSHARES  
TO THE  
SEPTEMBER 9, 2021 REQUEST FOR INFORMATION**



**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM



VETS HELPING VETS SINCE 1974

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## **I. EXECUTIVE SUMMARY**

The Department of Veterans Affairs (“VA”) has a historic opportunity to correct decades of statutory misinterpretation that have excluded far too many veterans from receiving the benefits that they need and deserve. The current regulatory bars at 38 C.F.R. § 3.12 have contributed to the higher rates of homelessness, suicide, unemployment, and untreated mental health conditions among the less-than-honorably discharged veterans population, with a disproportionate impact on veterans of color, LGBTQ+ veterans, Post-9/11 era veterans, and veterans who experienced combat or Military Sexual Trauma. VA’s Proposed Rule, though improved in some ways, would unfortunately continue this pattern of improper and inequitable exclusion. We call on VA to issue a final rule that removes the unlawful regulatory bars and upholds its sacred mission to care for those who have been wounded in service to our country.

Swords to Plowshares and the National Veterans Legal Service Program (“NVLSP”, and together, the “Petitioners”) submit these comments in response to the Request for Information issued by the Department of Veterans Affairs on September 9, 2021 (the “Request for Information”).<sup>1</sup> These comments supplement the comments submitted by Petitioners on September 8, 2020<sup>2</sup> in response to the Proposed Rule issued on July 10, 2020 (“Proposed Rule”).<sup>3</sup> In addition, Petitioners Renée Burbank of NVLSP and Maureen Siedor of Swords to Plowshares, and counsel for Petitioners Dana Montalto of the Veterans Legal Clinic at the Legal Services Center of Harvard Law School, each spoke during VA’s listening sessions regarding the Proposed

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<sup>1</sup> Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, Request for Information, 86 Fed. Reg. 50513 (Sept. 9, 2021).

<sup>2</sup> Comments of Petitioners, AQ95-Proposed Rule (filed Sept. 8, 2020), <https://www.regulations.gov/comment/VA-2020-VBA-0018-0061> (“Petitioners’ Comments”).

<sup>3</sup> Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41471 (proposed Jul. 10, 2020).

Rule and the Request for Information held on October 5 and 6, 2021 (the “Listening Sessions”). The oral comments presented during the Listening Sessions are attached as Exhibits 2, 3, and 4, respectively.

VA’s current regulations unlawfully prevent former service members who received less-than-honorable discharges from obtaining critical VA benefits—everything from health care to education, disability compensation, and employment training—for which they are otherwise qualified.<sup>4</sup> The result of this denial is that veterans must challenge their character of discharge to gain eligibility, enduring an often lengthy and complicated adjudication and having no access to benefits during this process. The process is so opaque and arduous that some veterans are excluded from VA benefits entirely as they cannot navigate the character of discharge procedures.

To address the failures of the Character of Discharge (“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”). On May 27, 2016, VA granted the Petition and initiated rulemaking. On July 10, 2020, more than five years after Petitioners submitted their initial petition for rulemaking, VA issued its Proposed Rule. And now, after yet another year has passed, VA published the Request for Information, seeking answers to questions that were addressed in a fulsome manner in the opening round of comments by numerous organizations, including Petitioners.

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<sup>4</sup> 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”).

As those opening comments make clear, VA’s Proposed Rule falls short and, in many respects, violates congressional directives and statutory mandates. The Proposed Rule fails to recognize that Congress requires VA to exclude from benefits only those veterans who received, or should have received, a Dishonorable discharge.<sup>5</sup> Moreover, the Proposed Rule contains vague and ill-defined terms and legal standards that will result in inconsistent, arbitrary, delayed, and unlawful COD determinations. The opening comments overwhelmingly support Petitioners’ view that VA should amend its Proposed Rule and adopt a final version of Section 3.12 that is both consistent with Congressional mandates and far more practicable to administer, implementing the following standards:

- Presume eligibility of all administratively discharged veterans, except those discharged in lieu of court-martial;<sup>6</sup>
- 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;<sup>7</sup> and

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<sup>5</sup> 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.”).

<sup>6</sup> Comments of Veterans Healthcare Policy Institute, AQ95—Proposed Rule (filed Sept. 8, 2020) at 6, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0055> (“VHPI Comments”) (“[t]he VA should finalize regulations that presume administrative separations are honorable for VA purposes unless they were in lieu of Court Martial. Only those with punitive discharges, or were to receive punitive discharges, should be subjected to an eligibility review, as Congress intended.”); Comments of the Homeless Advocacy Project, AQ95—Proposed Rule (filed Sept. 8, 2020) at 1-2, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0071> (“HAP Comments”) (arguing that VA’s continuation of the presumption of ineligibility for “bad paper” discharges is “contradictory to Congress’ intent” and harms those veterans “most in need of the VA’s support.”); Comments of New York Legal Assistance Group, AQ95—Proposed Rule (filed Sept. 4, 2020) at 1-2, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0029> (“NYLAG Comments”) (“Congress intended that VA exclude only *dishonorably* discharged servicemembers,” and that a presumption of ineligibility for OTH discharges “needlessly overburdens VA adjudicators.” They request VA presume that benefits are payable to veterans discharged “under conditions other than dishonorable,” except in the cases of “punitive discharge,” a discharge in lieu of general court-martial, or a “bar to benefits as enumerated by 38 U.S.C. § 5303.”).

<sup>7</sup> See Comments of Sens. Richard Blumenthal, Jon Tester, and Sherrod Brown, AQ95—Proposed Rule (filed Sept. 3, 2020) at 3, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0028> (“Sen. Blumenthal, et al. Comments”) (“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 than the military standard and did not give VA any authority to do so”); Comments of National Veterans

- Require holistic consideration of compelling circumstances in all cases.<sup>8</sup>

Despite the clarity in the existing record, Petitioners welcome the opportunity to speak further on the questions raised by VA in the Request for Information. Petitioners address each question and sub-question as posed on the four topics of compelling circumstances, willful and persistent misconduct, moral turpitude, and benefit eligibility. Petitioners refer VA to our prior comment in this proceeding and the attached proposed draft regulation, the latter of which incorporates Petitioners' positions in this comment.

What must be stated up front is that VA cannot both tinker with the definition of moral turpitude or create a simple equation for persistent misconduct (questions A and B) and also establish a fair and just character of discharge adjudicatory system (question D.3). The only way to ensure that the COD review system does not reinforce systemic discrimination against marginalized veterans is to enact systemic changes to this regulatory scheme. Placing the burden on veterans to prove that they suffered discrimination based on race, sex, gender identity, sexual orientation, mental health condition, disability, or other characteristic or experience such that they

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Council for Legal Redress & Connecticut Veterans Legal Center, AQ95—Proposed Rule (filed Sept. 8, 2020) at 2-4, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0057> (“NVCLR & CVLC Comments”) (“[Congress] ‘other than dishonorable’ standard was deliberately less restrictive than the standards of prior laws, and Congress expressly designed it to include veterans who received less-than-honorable discharges” and “Congress intended that VA’s authority extend only to correcting the rare circumstance where a servicemember should have, but did not, receive a Dishonorable discharge” and “Congress both rejected and overwrote that pre-existing law in enacting the 1944 G.I. Bill and its ‘other than dishonorable’ eligibility standard. VA’s reinstatement of those standards in regulation exceeds its authority and violates fundamental principles of administrative law”).

<sup>8</sup> Comments of Vietnam Veterans of America, AQ95—Proposed Rule (filed Sept. 8, 2020) at 3, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0066> (“VVA Comments”) (recommending that the VA “amend the proposed rules to unequivocally indicate that the listed impairments [under ‘compelling circumstances’] is not an exclusive list and that other impairments raised will and should be considered.”); Comments of Inner City Law Center, AQ95—Proposed Rule (filed Sept. 8, 2020) at 1-2, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0063> (“ICLC Comments”) (with respect to Section 3.12(e)(2)(i), which enumerates several mental conditions that would mitigate a period of prolonged AWOL or other misconduct, the VA should “explicitly declare that it is leaving room for uncommon or heretofore unknown mental health conditions by stating that the enumerated list [in § 3.12(e)(2)(i)] is non-exhaustive.”).

should have access to VA benefits will necessarily leave many of these veterans out in the cold—unable to access the supportive services to which they are entitled by law. VA can and must do better.

## II. RESPONSE TO THE REQUEST FOR INFORMATION

### A. Compelling Circumstances

#### 1. **What conditions, symptoms, or circumstances if any, should VA consider when determining the impact of mental impairment at the time of the prolonged AWOL or misconduct?**

Service members diagnosed with mental health conditions are at significantly heightened risk for a less-than-honorable discharge. For example, one study of Marine Corps Iraq combat veterans found that those diagnosed with Post-Traumatic Stress Disorder (“PTSD”) were 11 times more likely to be discharged for misconduct and 8 times more likely to be discharged for substance use.<sup>9</sup> It is of utmost import that VA create a fair and broad rule for considering mental health as a mitigating factor. Specifically, VA should issue a final rule that refers broadly to mental health conditions that existed at the time of the conduct leading to discharge, including any condition that was not diagnosed until after the member’s discharge.<sup>10</sup> VA’s proposed list of mitigating mental health conditions should be broadened and reframed to be more inclusive.<sup>11</sup>

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<sup>9</sup> 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.

<sup>10</sup> Memorandum from A.M. Kurta, the Under Sec’y of Defense for Personnel and Readiness, Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment ¶¶ 4-6 (Aug. 25, 2017), <https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf> (“Evidence may come from sources other than a veteran’s service record . . . Evidence may also include changes in behavior; requests for transfer to another military duty assignment; deterioration in work performance; inability of the individual to conform their behavior to the expectations of a military environment; substance abuse . . . Evidence of misconduct, including any misconduct underlying a veteran’s discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.”).

<sup>11</sup> See Petitioners’ Comments at Section III(C)(6)(d).

As discussed in our prior comment, Petitioners frequently have witnessed COD adjudicators disqualify veterans if the veteran's condition is not on an enumerated list.<sup>12</sup> Among other advocacy groups, the National Veterans Council for Legal Redress and Connecticut Veterans Legal Center share the Petitioners' concern, particularly regarding the additional administrative burden and cost that making difficult COD determinations would pose on adjudicators who are not experts in mental health conditions.<sup>13</sup> Moreover, many studies have established that service members are often misdiagnosed or undiagnosed in service, meaning an exhaustive list of conditions could be unduly exclusionary.<sup>14</sup> As we made clear previously, under the current proposal, many qualified service members will be excluded from benefits to which they are entitled simply because they do not meet the rigid set of conditions in VA's Proposed Rule.<sup>15</sup>

More broadly, VA should consider any and all applicable compelling circumstances, including, but not limited to, mental impairment at the time of the conduct leading to discharge, in all VA eligibility determinations. As discussed in our prior comment, a holistic view of all circumstances is required in COD determinations, rather than strict standards that exclude

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<sup>12</sup> *Id.*

<sup>13</sup> NVCLR & CVLC Comments at 6 (“[T]he proposed modifications to the regulatory bars in § 3.12(d) would create a complicated and highly technical standard that will increase the administrative burden on [the] VA” and will “likely to lead to disparate outcomes for veterans across different Regional Offices and Board of Veterans’ Appeals Board Members.” Specifically, “[t]he Proposed Rule will require a level of expertise in military law that most Veterans Service Representatives, Board Members, and other VA staff do not possess, which will lead to erroneous and incorrect decisions.” Hence, the VA “should remove all regulatory bars and rely on the statutory bars expressly set forth by Congress.”); *see also* Sen. Blumenthal, et al. Comments at 3 (“VA staff will still bear a huge administrative burden of sifting through every veteran with an OTH discharge’s Official Military Personnel Files (OPMF) to see if these regulations are met. The funds used for this process would be better spent on providing care and benefits to more veterans”).

<sup>14</sup> *See* Petitioners’ Comments at section III(C)(6)(d) (citing *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.”)).

<sup>15</sup> *Id.*



information to service members’ detriment.<sup>16</sup> Presentations during the Listening Sessions support this notion, with one leading veterans’ advocate pointing out that medical and circumstantial evidence is often not available in a COD determination, particularly years after the fact and that other markers of a mental health condition, such as alleged misbehavior, must still be evaluated.<sup>17</sup> Such practice would accord with the approach of the Department of Defense military review boards, which look to unauthorized absences, alcohol and substance use, and unexplained behavioral changes, among other factors, as markers of a mental health condition.<sup>18</sup>

Overall, the compelling circumstances listed in the Proposed Rule do capture important factors that should always be considered and Petitioners broadly agree with the factors VA proposes to include, but the Proposed Rule remains underinclusive.

Petitioners continue to strongly support the creation of a “compelling circumstances” consideration in the rule and appreciate the breadth of factors that VA proposes to include.<sup>19</sup> 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 representing veterans in COD reviews, we have far too often represented veteran clients denied eligibility on the basis of misconduct for which there were clearly evident explanations. Numerous advocacy groups for veterans have found that bars to eligibility may be

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<sup>16</sup> See generally, Petitioners’ Comments.

<sup>17</sup> See, e.g., Coco Culhane, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021). All references to, and quotes from, oral presentations during the Listening Sessions are drawn from summaries or transcriptions prepared by Petitioners. An official transcript of the Listening Sessions has not been released as of the date of this submission.

<sup>18</sup> Memorandum from A.M. Kurta, the Under Sec’y of Defense for Personnel and Readiness, Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment ¶¶ 4-6 (Aug. 25, 2017), <https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf>.

<sup>19</sup> Petitioners’ Comments at section III(C).

the result of sexual assault and harassment, discrimination, mental health conditions, or other mitigating circumstances that do not fall neatly into the VA’s enumerated categories.<sup>20</sup> VA should require its adjudicators to listen to and consider the broader context of a veteran’s service record and afford veterans the opportunity to access needed benefits. Among others, the New York State Division of Veterans’ Services also support this broader approach to review of a service member’s circumstances.<sup>21</sup> Furthermore, the Ohio Veterans’ Task Force, among others, agrees with Petitioners that limiting compelling circumstances to certain misconduct is too narrow and that such language should be deleted.<sup>22</sup>

Critically, not only the list of “mental impairments” but also the entire category of “compelling circumstances” should be framed as a non-exhaustive list so that the totality of the

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<sup>20</sup> See Comments of the Minority Veterans of America, AQ95—Proposed Rule (filed Sept. 4, 2020) <https://www.regulations.gov/comment/VA-2020-VBA-0018-0031> (“MVA Comments”) (“For too long, veterans have been denied their rightfully earned benefits due to irregularities and ambiguities in terminology definitions and applications, as related to regulatory and statutory bars. This impact and subsequent categorical denial of VA benefits has disproportionately fallen on combat veterans and veterans that were subjected to sexual assault and identity-based discrimination and attacks during their service, many of whom experience post-traumatic stress as a result of their lived experiences.”); NVCLR & CVLC Comments at 11 (arguing that “the majority of veterans receive less-than-honorable discharges for conduct that does not rise to the level of dishonorable conduct, and in many cases, there are mitigating and extenuating circumstances that explain the misconduct, such as a mental health condition related to combat service or Military Sexual Trauma.”); ICLC Comments at 1-2 (with respect to Section 3.12(e)(2)(i), which enumerates several mental conditions that would mitigate a period of prolonged AWOL or other misconduct and stating that the enumerated list [in § 3.12(e)(2)(i)] is non-exhaustive.” In addition, regarding Section 3.12(e)(2)(iv), “[s]exual harassment must be included, in addition to abuse and assault” because “[t]he current construction burdens the veteran with the unenviable task of attempting to argue that harassment they experienced in service constitutes abuse or assault.”).

<sup>21</sup> Comments of the New York State Division of Veterans’ Services, AQ95—Proposed Rule (filed Aug. 25, 2020) at 4, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0026> (“NYS DVS Comments”) (“there must be some mechanism in place to ensure adjudicators provide thorough reviews of the veteran’s full military and medical records to ensure that veterans are not penalized and stigmatized for actions or outcomes that were not their fault”).

<sup>22</sup> Comments of the Ohio Veterans’ Law Task Force, AQ95—Proposed Rule (filed Sept. 8, 2020) at 8-9, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0070> (“Ohio Veterans’ Law Task Force Comments”) (arguing that under “compelling circumstances,” the VA should “delet[e] language that only refers to AWOLs, and add several categories of ‘compelling circumstances’ that a VA adjudicator must consider,” including “discrimination/harassment; personal trauma; military sexual trauma; mental health conditions; self-medication with drugs; coercive/aggressive recruiting that permitted an unqualified member to enlist; and interpersonal violence.”); Comments of Charlotte Center for Legal Advocacy, AQ95—Proposed Rule (filed Sept. 8, 2020) at 4, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0074> (“Charlotte Center For Legal Advocacy Comments”) (same).

circumstances is weighed when rendering eligibility determinations. This is supported by Vietnam Veterans of America in addition to others.<sup>23</sup> Veterans should always be allowed to present mitigating and extenuating circumstances not explicitly included on the “compelling circumstances” list, and VA should be required to consider them.<sup>24</sup> As set out in our prior comment, this includes service members discharged in lieu of general court-martial, as denying them compelling circumstances consideration is arbitrary, unreasonable, and harmful.<sup>25</sup> Other commenters agree, finding VA’s “bright line” denial of such consideration in these circumstances to be damaging to service members and unjust.<sup>26</sup>

As discussed by the National Organization of Veterans’ Advocates and others, service members also experience significant disparities in the COD determinations.<sup>27</sup> The Proposed Rule does little to prevent these disparities from persisting and in many cases may exacerbate them. For example, if the compelling circumstances consideration is not extended to service members

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<sup>23</sup> VVA Comments at 3 (recommending that VA “amend the proposed rules to unequivocally indicate that the listed impairments [under ‘compelling circumstances’] is not an exclusive list and that other impairments raised will and should be considered.”); Comments of Public Counsel’s Center for Veterans’ Advancement, AQ95—Proposed Rule (filed Sept. 7, 2020) at 9-10, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0050> (“Public Counsel’s CVA Comments”) (same); ICLC Comments, at 1-2 (same).

<sup>24</sup> Public Counsel’s CVA Comments at 9-10 (warning that the definition of “mental impairment” in the “compelling circumstances” exception “may unintentionally exclude veterans with other mitigating clinical impairments.”); Comments of the Veteran Advocacy Project, AQ95—Proposed Rule (filed Sept. 8, 2020) at 3, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0075> (“VAP Comments”) (believing that the current expansion of the “compelling circumstances” exception creates a “strong possibility” that VA adjudicators will only approve COD changes for “those factors made explicit.”).

<sup>25</sup> Petitioners’ Comments at Section III(C)(6)(b).

<sup>26</sup> See NYS DVS Comments at 5 (“numerous documented circumstances exist where service members have been forced into signing off on an other-than-honorable discharge because they were not properly informed of their rights or because they were facing retaliation”); Charlotte Center For Legal Advocacy Comments at 4 (requesting VA to extend the “compelling circumstances” exception to all COD determinations, including those discharges in lieu of general court-martial. They argue that VA’s current “bright-line exclusion” is inconsistent with VA’s own stated reason for the “compelling circumstances” exception and “ignores the veteran’s totality of service.”).

<sup>27</sup> See Comments of the National Organization of Veterans’ Advocates, Inc., AQ95—Proposed Rule (filed Sept. 8, 2020) at 1-2, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0056> (“NOVA Comments”) (arguing that there are “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”).

discharged in lieu of trial by general court-martial, this will adversely and arbitrarily affect former Soldiers because the Army uses such “Chapter 10” discharges much more than other branches.<sup>28</sup> Thus, service members who committed the same misconduct could be addressed under different administrative separation procedures based on the branch and VA could then reinforce that disparity for similarly situated veterans, which is arbitrary and capricious.<sup>29</sup> Simplifying the COD determination process and reframing Section 3.12(a) to presume eligibility for veterans, rather than ineligibility, could help alleviate some of the disparate outcomes.

2. **VA proposed to consider, as a factor in a “compelling circumstances” analysis, “Sexual abuse/assault.” Should VA employ a different or additional term for this category, such as “Military Sexual Trauma (MST)”?** Also, should VA include language reminding adjudicators to look beyond service records to corroborate the account of an in-service personal assault, as provided in 38 CFR 3.304(f)(5)?

Sadly, every year thousands of service members experience sexual assault and harassment, and many of them are discharged because of retaliation or a related mental health condition. In addition, thousands of service members have experienced other forms of harassment, attacks, or discrimination. It is important, therefore, that VA take full account of veterans’ lived experiences. Military Sexual Trauma (“MST”) is the appropriate term to adopt rather than sexual abuse/assault, which is too narrow. The term “sexual abuse/assault” fails to accord due consideration to members who experienced sexual harassment, which the term “MST” would capture, as well as excludes others who experienced injurious harassment and attacks.<sup>30</sup>

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<sup>28</sup> FOIA data (on file with Legal Services Center of Harvard Law School).

<sup>29</sup> Petitioners’ Comments at n. 38.

<sup>30</sup> *Id.*; see also 38 U.S.C. § 1166(c)(2) for definition of MST.

As stated in our prior comment, we fully agree that VA and the military should find ways to support and assist MST survivors and hold individuals who perpetrate sex crimes responsible.<sup>31</sup> One of the primary ways to do so will be to include MST in the analysis of compelling circumstances. The National Organization of Veterans' Advocates, among others, agrees with the Petitioners' analysis and advocates that MST should be the operative term, in addition to a host of other factors that are relevant to any determination of "compelling circumstances."<sup>32</sup>

However, the term "MST" is itself too narrow and fails to address the many forms of gender-based violence or physical, emotional, and sexual abuse that many service members experience. During the Listening Sessions, others reiterated the importance of considering MST as broadly as possible, stressing that survivors suffer both physical and emotional injuries, are often dissuaded from discussing MST within their command, and the recurrence of MST as a significant factor in survivors going AWOL to escape abuse.<sup>33</sup>

As discussed in Petitioners' prior comment, in addition to revising the "compelling circumstance" term to MST, VA should also include Intimate Partner Violence ("IPV") as a mitigating factor.<sup>34</sup> Each year, thousands of service members report experiencing IPV at the hands

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<sup>31</sup> *Id.* at Section III(C)(5).

<sup>32</sup> See NOVA Comments at 3 (arguing that the VA should "broaden 'sexual abuse and assault' under subsection (e)(2)(iv) to specifically include all military sexual trauma (MST), including sexual harassment and intimate partner violence," and "add a separate item under subsection (e)(2) to allow for consideration of discrimination, to include on the bases of race, color, national origin, religion, sex, gender identi[t]y (including gender expression), sexual orientation, disability or perceived disability, age, marital status, family/parental status, political beliefs, or reprisal or retaliation for involvement in prior reporting activity").

<sup>33</sup> See, e.g., Kathleen Silvia, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021); Coco Culhane, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021); Juliet Taylor, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021); Mikayla Pentecost, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021).

<sup>34</sup> Petitioners' Comments at Section III(C)(5).

of their military or civilian partners.<sup>35</sup> Given the prevalence of IPV and the potential harms such as a heightened risk of developing PTSD or another mental health condition, barriers to accessing support and treatment, and limited routes to reporting the violence, other veterans' advocacy groups agree that IPV should be included in any "compelling circumstances analysis."<sup>36</sup> There are significant similarities between MST and IPV survivors, as both may respond in a way that could be misinterpreted as "misconduct" and lead to less-than-honorable discharge and therefore VA should expressly consider IPV as a "compelling circumstance."

Furthermore, 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.<sup>37</sup> Several other organizations agree, citing numerous instances of discrimination within the military that led to bad paper discharges and explaining that VA should allow veterans to present discrimination as a reason that mitigates or explains allegations of in-service misconduct.<sup>38</sup>

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<sup>35</sup> 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>.

<sup>36</sup> NYLAG Comments at 5 (arguing that IPV should be considered a "compelling circumstance" in addition to sexual harassment); NOVA Comments at 3 (same).

<sup>37</sup> Petitioners' Comments at Section III(C)(4)-(5).

<sup>38</sup> NYS DVS Comments at 3 ("VA should recognize that incidents historically deemed 'willful and persistent misconduct' may actually be the products of discrimination, coercion, mistreatment, misdiagnosis, or other intentional or unintentional injustice to the discharged veteran"); Ohio Veterans' Law Task Force Comments at 1, 8-9 ("[s]ince the Vietnam War, researchers have found that Veterans of color disproportionately receive bad discharges." And arguing that under "compelling circumstances," the VA should "delet[e] language that only refers to AWOLs, and add several categories of 'compelling circumstances' that a VA adjudicator must consider," including "discrimination/harassment; personal trauma; military sexual trauma; mental health conditions; self-medication with drugs; coercive/aggressive recruiting that permitted an unqualified member to enlist; and interpersonal violence Charlotte Center For Legal Advocacy Comments at 4 (same); MVA Comments ("For too long, veterans have been denied their rightfully earned benefits due to irregularities and ambiguities in terminology definitions and applications, as related to regulatory and statutory bars. This impact and subsequent categorical denial of VA benefits has

To the second part of VA’s question, the Petitioners urge VA to enable adjudicators to look beyond service records to corroborate any account of assault, harassment, or discrimination—not just accounts of personal assault narrowly addressed by 38 C.F.R. § 3.304(f)(5). Service records are generally created and maintained by a member’s command and may exclude pertinent information, including about an in-service personal assault, MST, or other adverse personal experience. The Veterans Healthcare Policy Institute supports this proposition, noting that service members often lack vital documentation within their record of harm suffered during their service.<sup>39</sup> Looking outside of the service record would also provide an independent check against superiors who choose to exclude information regarding an assault from a service record to escape liability.

Altogether, MST, IPV, and discrimination should be broadly considered alongside any other “compelling circumstances,” including relevant information outside of a service record, in order to capture the breadth of harm that may impact members’ conduct in service.

## **B. Willful and Persistent Misconduct**

- 1. Should VA proceed with a distinction between “minor misconduct” and “more serious misconduct” when evaluating whether misconduct is persistent? Should VA define what is considered “serious misconduct?” Should VA only consider an action to be “misconduct” if it actually caused harm to a person or property or should VA consider all misconduct, regardless of severity, in its determination?**

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disproportionately fallen on combat veterans and veterans that were subjected to sexual assault and identity-based discrimination and attacks during their service, many of whom experience post-traumatic stress as a result of their lived experiences.”); NOVA Comments at 3 (arguing that the VA should “broaden ‘sexual abuse and assault’ under subsection (e)(2)(iv) to specifically include all military sexual trauma (MST), including sexual harassment and intimate partner violence,” and “add a separate item under subsection (e)(2) to allow for consideration of discrimination, to include on the bases of race, color, national origin, religion, sex, gender identi[t]y (including gender expression), sexual orientation, disability or perceived disability, age, marital status, family/parental status, political beliefs, or reprisal or retaliation for involvement in prior reporting activity”).

<sup>39</sup> VHPI Comments at 3 (“[m]ilitary culture in all branches holds that those who seek mental health care are weak and unreliable,” many OTH veterans “get into trouble with the military and are given bad paper without ever having the benefit of the medical care they need while in uniform.” As a result, many OTH veterans lack proper documentation of any physical or mental issues they faced while serving and thus cannot present any mitigating evidence to a VA adjudicator.); Matt Handley, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (explaining that VSRs need to review thousands of documents to assess a full service record).

**Should VA consider extenuating circumstances that may have led to or impacted the “misconduct” at issue?**

The willful and persistent misconduct bar should be eliminated entirely because it exceeds Congress’s grant of authority to VA.<sup>40</sup> Furthermore, it is arbitrary and capricious and discriminatory.

As an initial matter, for all regulatory bars, it is essential that the “misconduct” being evaluated is solely the misconduct that actually led to discharge. VA adjudicators cannot consider any instances of misconduct not cited as the basis for separation, for reasons laid out in our initial comment.<sup>41</sup> This is both legally required—because the statutory text refers to the conditions for which the member was “discharged or released” and because of principles of due process—and practical—because it reduces the burden on adjudicators who need only locate the separation packet, rather than comb through an entire service record.<sup>42</sup> In its final rule, VA should clarify the regulatory language such that solely the misconduct that led to discharge is weighed in barring veterans from benefits.

As to the willful and persistent misconduct bar itself, others agree with Petitioners that “minor misconduct” is ill-defined and the definition can lead to a willful and persistent bar for which service members never would have been—and indeed were not—discharged

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<sup>40</sup> Petitioners’ Comments at Section III(C)(4), n.73 (citing *Garvey v. Wilkie*, No. 2020-1128, 2020 WL 5048433 (Fed. Cir. Aug. 27, 2020)); HAP Comments at 3-4 (calls for the provision regarding “willful and persistent misconduct” to be “eliminated in its entirety” or limited only to those veterans discharged “for repeated acts of severe misconduct.” They believe that the “reliance on minor misconduct as a basis for barring benefits . . . is inequitable” and, if the VA continues to consider minor misconduct, the VA should “remove and replace” its “less accurate and more restrictive definition of ‘persistent’”).

<sup>41</sup> Petitioners’ Comments at Section III(C)(1).

<sup>42</sup> Matt Handley, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (stating that VA is trying to create bright-line rules to help adjudicators, but such bright-line rules may create an easy out for a VSR to deny benefits).



Dishonorably.<sup>43</sup> Indeed, as we and others have explained, the rule operates to exclude a service member for misconduct that never could have led to a Dishonorable discharge because such punishment is not permitted for those offenses.<sup>44</sup> For example, a Dishonorable discharge is not authorized for two unauthorized absences of less than one day, but such conduct would be deemed “dishonorable” under VA’s current and proposed willful and persistent misconduct bar.

As recently recognized by the Federal Circuit, Congress made explicit in enacting the G.I. Bill of Rights that only serious misconduct should be a bar to receiving benefits; withholding benefits only to former service members whose misconduct was “not less serious than those giving occasion to dishonorable discharge by court-martial,” even if their discharge was not Dishonorable.<sup>45</sup> The Proposed Rule would continue VA’s practice of penalizing minor misconduct, running contrary to this clear Congressional instruction. For example, while the statutory bar to benefits requires an AWOL period of at least 180 days before a claimant is deemed to have separated under dishonorable conditions, VA’s Proposed Rule would exclude a claimant for an AWOL period of fewer than 180 days in direct contradiction to the statutory scheme.

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<sup>43</sup> See, Sen. Blumenthal, et al. Comments at 2 (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”). See NYLAG Comments at 5 (opposing VA’s “bright-line definitions” of “willful and persistent conduct;” specifically, they believe that two instances of minor misconduct is not “willful and persistent.”); William L. Boudreau, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (“As a junior officer in the Marine Corps, the understanding of the ‘willful and persistent’ standard is so low that it essentially has no effect on conduct within the military. Removing them would not get rid of any deterrent effect.”); Caleb R. Stone, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (“‘Willful and persistent’ cannot be consistently applied”).

<sup>44</sup> See Petitioners’ Comments at Section III(C)(4); NYS DVS Comments at 3 (“VA should recognize that incidents historically deemed ‘willful and persistent misconduct’ may actually be the products of discrimination, coercion, mistreatment, misdiagnosis, or other intentional or unintentional injustice to the discharged veteran”); see Sen. Blumenthal, et al. Comments at 2-3 (arguing that the willful and persistent standard can encompass almost any disciplinary problem); VAP Comments at 2 (arguing that the VA’s definition of “persistent” is “too severe”).

<sup>45</sup> *Garvey v. Wilkie*, 972 F. 3d 1333, 1339 (Fed. Cir. 2020) (citing S. Rep. No. 78-755, at 15S. Rep. No. 78-755, at 15).

If VA decides to retain the “willful and persistent” standard, the language would continue to be interpreted and applied far too broadly and require further clarification of what constitutes such misconduct. As discussed in our previous comment, VA’s definition of these terms places few limits on what is willful or persistent and any sequence of misconduct citations, regardless of whether they are related, of similar character, or occurred close in time, qualifies as “persistent,” which will likely lead to arbitrary and unjust decision-making.<sup>46</sup> U.S. Senators and many advocacy groups have argued the same, that VA’s Proposed Rule offers imprecise and expansive standards that permit almost any disciplinary problems to be considered “willful and persistent misconduct.”<sup>47</sup> As Petitioners have discussed previously, 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 excluding veterans from VA if the Proposed Rule remains in its current form.<sup>48</sup>

As Petitioners stated previously, if VA chooses to employ the “willful and persistent misconduct” phrasing—which it should not—then the language should be severely constructed. Petitioners propose a time frame of one year and requiring multiple instances of similar and related misconduct.<sup>49</sup> 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

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<sup>46</sup> Petitioners’ Comments at Section III(C)(4); *see, e.g. Reape v. McDonough*, No. 19-4684, 2021 U.S. App. Vet. Claims LEXIS 1709 (U.S. Ct. App. Vet. Cl., Sept. 27, 2021) (the court found that a Marine should not have been denied benefits despite meeting VA’s “willful and persistent” threshold for dishonorable conduct given the minor infractions the veteran received while in service and the high level of quality of his service).

<sup>47</sup> Sen. Blumenthal, et al. Comments at 2-3 (arguing that the willful and persistent standard can encompass almost any disciplinary problem); VAP Comments at 2 (same); Ohio Veterans’ Law Task Force Comments at 5-7 (same).

<sup>48</sup> Petitioners’ Comments at Section III(C)(4) & n.72 (citing Ex. 1, *Underserved*, at 23); Matt Handley, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (stating that VA is trying to create bright-line rules to help adjudicators, but such bright-line rules may create an easy out for a VSR to deny benefits).

<sup>49</sup> *Id.* at Section III(C)(4).

ensue. By its plain language, the willful and persistent misconduct bar excludes veterans for conduct that could not, and in fact did not, result in a Dishonorable discharge.

To the final sub-question, as made clear during the Listening Sessions, VA should consider the totality of circumstances for willful and persistent conduct, and create simpler guidelines to ensure greater fairness.<sup>50</sup> Broad consideration of any and all mitigating or positive factors is required by statute and congressional intent.

We therefore strongly urge VA to remove the willful and persistent misconduct bar in its entirety, and, if not, to implement the changes outlined herein and in our previous comment regarding duration, separate acts, and volume of conduct.

- 2. Some commenters requested that VA clarify the number of incidents required to constitute willful and persistent misconduct. How many instances over what period of time should be considered persistent? Should the totality of the circumstances be considered in addition to the number of incidents when determining misconduct to be willful and persistent?**

VA's proposed definition of "persistent" as conduct "that is ongoing over a period of time" or "that recurs on more than one occasion" is flawed and, as discussed in our prior comment, contrary to both commonsense and dictionary definitions of the word "persistent."<sup>51</sup> As we have said, 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 to be meaningfully "persistent."<sup>52</sup> Several other advocacy groups agree with Petitioners and have commented that such conduct should include at least three instances and

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<sup>50</sup> See, e.g., Coco Culhane, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021); Alden Pinkham, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021).

<sup>51</sup> Petitioners' Comments at Section III(C)(4).

<sup>52</sup> *Id.*

criticizing the term “persistent” as VA has constructed it.<sup>53</sup> Such amended definition is more accurate to the word and faithful to VA’s statutory mandate.

Again, the totality of circumstances should always be considered in evaluating willful and persistent misconduct. Similar to how “compelling circumstances” should be considered in all cases of alleged misconduct, Petitioners advocate for a holistic approach in all manner related to character of discharge. The willful and persistent misconduct standard is only meaningful if the misconduct is contextualized within the service member’s experience, including traumatic experiences such as MST or discrimination that may have contributed to the conduct that is being punished.

### **C. Moral Turpitude**

- 1. VA regulation currently does not define moral turpitude, but states in 38 CFR 3.12(d)(3) that it includes “generally, conviction of a felony.” VA’s proposed rule would define moral turpitude as a “willful act that gravely violates accepted moral standards and would be expected to cause harm or loss to person or property.” Should VA revise this proposed definition, and if so, how?**

VA’s Proposed Rule on moral turpitude is overbroad and untethered from any military legal principles, in violation of the statute and VA’s authority. In addition, as we stated in our

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<sup>53</sup> See NOVA Comments at 2 (arguing that if the “willful and persistent misconduct” bar cannot be removed entirely, the regulation should at the very least “require three or more separate incidents within one year that are severe and could have led to a Dishonorable discharge”); Ohio Veterans’ Law Task Force Comments at 5-7 (“VA’s definition of “persistent” misconduct is vague and should therefore be removed.” Arguing that both the legal and plain definitions of the term “persistent” or phrases involving the term “persistent” suggest at least three instances of misconduct, contrary to the present regulations. And the regulations’ focus on AWOL, combined with the definition of “persistent,” could lead to the absurd result that one servicemember with a single AWOL would be granted benefits, while another servicemember with two AWOLs of fewer total days would be denied benefits. In short, “[t]he VA’s proposed definition of ‘persistent’ will gravely impact vulnerable veterans who committed relatively minor misconduct or were unfairly targeted by their command Public Counsel’s CVA Comments at 5 (recommending that the definition of “willful and persistent conduct” only include “severe and repeated misconduct” and calls considering two minor instances of misconduct “willful and persistent” “a harmful overreach”); VVA Comments at 3 (suggesting deleting the “willful and persistent” misconduct section as being inconsistent with Congressional intent, but should that section remain, advocating for limiting “willful and persistent” misconduct to “serious misconduct that is frequent (three or more separate incidents within a year)”)).

previous comment, the phrase “moral turpitude” is inherently vague and will lead to inconsistent and arbitrary decision making and thus, should be removed entirely.<sup>54</sup> Furthermore, here—as with all regulatory and statutory bars—VA can only exclude a veteran based on misconduct that actually led to discharge as noticed in the separation packet or court-martial conviction.<sup>55</sup>

Many organizations and advocacy groups agree with Petitioners, including the New York State Division of Veterans’ Services, which states that “VA should clarify which offenses could be considered serious or morally turpitudinous due to ambiguity.”<sup>56</sup> Several former service members and veterans’ advocates also demonstrated during the Listening Sessions that the “moral turpitude” standard is inherently flawed, even with the Proposed Rule’s amendments.<sup>57</sup>

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<sup>54</sup> Petitioners’ Comments at Section III(C)(3) (“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. In the 1946 COD regulation, VA excluded veterans for not just offenses of moral turpitude that resulted in court-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.”).

<sup>55</sup> *Supra*, section B(1).

<sup>56</sup> *See*, NYS DVS Comments at 4 (arguing that VA should clarify which offenses could be considered serious or morally turpitudinous due to ambiguity); *see* Sen. Blumenthal, et al. Comments at 2-3 (“the changes regarding the definition of moral turpitude are still unacceptably vague” because “[t]here will likely be significant confusion and differing judgements as to what constitutes moral turpitude, especially since it may include conduct that does not result in prosecution or conviction”); Ohio Veterans’ Law Task Force Comments at 4-5 (“The VA should... eliminate th[e] [moral turpitude] standard or at least “restrict this section to acts of violence, a uniform moral wrong.” Specifically, the VA could define acts of “moral turpitude” as “conduct that causes serious bodily harm to another person.”); Public Counsel’s CVA Comments at 7 (requesting that the definition of “moral turpitude” be “further defined to avoid ongoing ambiguity” and include “range of descriptive conduct.”); *see* HAP Comments at 5-7 (requesting the VA to eliminate the “entirely unworkable” provision regarding “moral turpitude” because its “vague definition” will lead to “unintended results.” Arguing that the omission of “without justification or legal excuse” in the definition of moral turpitude “improperly broadens” the definition. And, recommending that the VA “propose specific offenses for which a veteran could be barred from receiving benefits, thereby “eliminate[ing] the subjective and discretionary nature of the review process.”); NYLAG Comments at 12 (Arguing that the proposed rule “must be clear as to what misconduct is to be considered ‘serious.’” Therefore, they call on VA to remove the “amorphous” “moral turpitude” regulatory bar or “explicitly define” such offenses “as those with an element of ‘intentional violence.’”).

<sup>57</sup> *See, e.g.*, Alden Pinkham, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (arguing that the proposed definition of moral turpitude is “just as vague” as the existing definition); Bruce Carruthers, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (arguing that moral turpitude is a “moving target” in our diverse and changing society and that what is acceptable as moral to

While Petitioners maintain that the “moral turpitude” bar should be removed entirely due to inherent ambiguity, if it must remain then the proposed definition from VA’s Proposed Rule is still flawed. Substantively, VA’s proposed definition of “moral turpitude” as a “willful act that gravely violates accepted moral standards and would be expected to cause harm or loss to person or property” encompasses behavior that does not meet the high standard of “dishonorable.” As discussed in our previous comment, “moral turpitude” does not exist as a concept in military law and so there is no armed forces case law or practice to draw on in formulating a reasonable and appropriate standard, suggesting its use by VA here is inappropriate.<sup>58</sup>

VA’s proposed definition sweeps far more broadly than doctrines from other bodies of U.S. law and impermissibly expands the legally accepted and commonsense definition of “moral turpitude” to behavior that must not warrant a Dishonorable discharge.<sup>59</sup> VA’s proposed definition of moral turpitude encompasses accidental and reckless acts and permits VA to assess an offense using an objective standard that does not take into account the former service member’s actual intent or state of mind.<sup>60</sup> Others agree with the Petitioners that VA’s definition of moral turpitude should remove “harm or loss to . . . property” and that a more useful standard would be to enumerate certain violent offenses, rather than present a subjective standard.<sup>61</sup>

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one may be moral turpitude to another); Greg Gagne, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (“A lot of the types of misconduct that get people to that result are not crimes of moral turpitude. They’re usually people [having trouble adjusting] to a very extreme situation”).

<sup>58</sup> Petitioners’ Comments at Section III(C)(3).

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

<sup>60</sup> *Id.*

<sup>61</sup> VVA Comments at 2 (advocating that “the definition of ‘moral turpitude’ include an ‘intent’ requirement and should not include a loss to property” and suggesting that VA “specifically list the acts that it would deem to qualify as an offense involving moral turpitude to decrease ambiguity and inconsistent application of this section.”); Ohio Veterans’ Law Task Force Comments at 4-5 (same); Public Counsel’s CVA Comments at 7 (same); NOVA Comments at 2 (same); Charlotte Center For Legal Advocacy Comments at 3 (same).

If VA chooses to retain a moral turpitude bar—which it should not—Petitioners advocate that a proper definition of moral turpitude in accord with existing legal doctrines would encompass only “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 correctly limited to truly egregious and intentional behavior—and behavior that may actually warrant a Dishonorable discharge. Furthermore, Petitioners and others noted that rape and aggravated sexual assault could be listed under Section 3.12(d)(3) as a “morally turpitudinous” offense.<sup>62</sup>

If VA decides not to remove this bar as it should, then, rather than providing a “moral turpitude” definition, VA should replace the phrase “moral turpitude” with a list of offenses that constitute “moral turpitude” as that term is properly defined.<sup>63</sup> Then the bar would exclude former service members who were convicted 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. This would be more just and preferable to the current proposals regarding “moral turpitude.”

#### **D. Benefit Eligibility**

- 1. Some commenters recommended that VA only apply statutory bars to benefits (those enumerated in 38 U.S.C. 5303(a)); others expressed concerns about how such an approach would affect military order and discipline. How (if at all) would removing the regulatory bars affect military order and discipline?**

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<sup>62</sup> See Petitioners’ Comments at Section III(C)(3); *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”); NOVA Comments at 2 (arguing that the VA should “specifically define actions that are considered an offense involving moral turpitude” and limit those actions to the following: rape, sexual assault, murder, arson, burglary, kidnapping, assault with a dangerous weapon, treason, sabotage, and the attempt of any of these offenses”).

<sup>63</sup> Petitioners’ Comments at Section III(C)(3); Charlotte Center For Legal Advocacy Comments at 3 (requesting that VA’s definition of “moral turpitude” be amended to be “more precise,” including an “exhaustive list of crimes” that would meet the definition); *see infra* n. 56.

Congress expressly tasked VA with caring for former service members in their post-service lives, not with imposing discipline, which is the purview of the service branches themselves. In crafting its new regulation, VA should focus on its own mission to “care for those who have borne the battle.” A final rule that removed all regulatory bars would best allow VA to fulfill that mission.

In adopting the “other than dishonorable” eligibility standard, Congress had at the front of its mind VA’s sacred duty to support those wounded in uniform. Harry Colmery, former American Legion National Commander and drafter of the 1944 G.I. Bill of Rights, testified to Congress that a service member who gets an unfavorable discharge “may have been just as dislocated as anyone else” and “just as needy of the help and the benefits that are provided under [the G.I. Bill].”<sup>64</sup> He further explained that:

[T]his is no reflection upon the services, but frankly we do not care to have the Army and the Navy be the arbiter and primarily pass directly in judgment on whether or not the men who serve the colors derive the benefits granted by the Congress. We prefer to have that done by the Veterans’ Administration acting under the supervision of the Congress . . .<sup>65</sup>

By giving VA an eligibility standard distinct from the characters of service assigned by the military, Congress sought to decouple the separate missions of the military and VA: the military could use less-than-honorable discharges to impose discipline, while VA would provide rehabilitation, treatment, and care to support less-than-honorably discharged veterans in their post-service lives. It is therefore contrary to Congressional intent for VA to exclude veterans from benefits as a means of imposing military discipline.

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<sup>64</sup> *World War Veterans’ Legislation: Hearings on H.R. 3917 and S. 1767 Before the H. Comm. on World War Veterans’ Legislation*, 78<sup>th</sup> Cong. 418, 420 (1944) at 416.

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



In any event, removing the regulatory bars would have no effect on military order and discipline. In general, it is well-recognized that vague future punishments have little or no deterrent effect on behavior.<sup>66</sup> In this instance, the deterrent effect of potentially losing access to VA benefits is even more attenuated, as service members typically have no knowledge of non-military sanctions for their behavior. As illustrated in the Listening Sessions, the former service members who spoke, unanimously agreed with Petitioners that military order and discipline would not be affected based on their experience in the military.<sup>67</sup> The COD process and VA benefit eligibility rules are unknown to most service members; service members are largely unaware of the impact that their in-service conduct or discharge status will affect their post-service benefits.<sup>68</sup> A vague, uncertain potential that in-service misconduct could lead to benefits exclusion cannot have any conceivable deterrent effect.

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<sup>66</sup> See, e.g., Aaron Chalfin and Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55(1) J. OF ECON. LIT. 5, 38 (Mar. 2017) (concluding that, in an assessment of existing empirical research on criminal deterrence, “individuals respond to the incentives that are the most immediate and salient”); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100(3) J. CRIM. L. & CRIMINOLOGY 765, 821 (Summer 2010) (arguing that, under rational choice theory, “[c]riminal deterrence may have its limits precisely because the legal costs are far removed in time and people find it difficult to feel the pain of the longer-term consequences of their actions”).

<sup>67</sup> See, e.g., John Brooker, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (former service member and JAG, “Never once have I seen a commander lever the regulatory bars explicitly or implicitly as [an issue of military discipline.]”); Stephen Kennedy, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (former service member, “Having served as a lower enlisted soldier, I can tell you, I had no idea what the regulatory or statutory bars to VA benefits were. What I cared about was those to my right and my left. That was a far greater incentive.”); Greg Gagne, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (former service member and military defense counsel, “I’ve done hundreds of cases. I can tell you very confidently that when people are in the positions that they find themselves in when receiving an OTH, the last thing on their minds is VA benefits. Frankly, dishonorable discharge or punitive discharge is not even on their minds.”); Dr. Erin McBurney, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (former service member, “Most active duty [service members] have little or no knowledge of VA regulations and practice.”); Sean Pentecost, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (former service member, “I strongly believe that removing the regulatory bars will have no effect on good order and discipline. . . Changes to the COD process will be largely unknown to the active duty community.”).

<sup>68</sup> Sen. Blumenthal, et al. Comments at 1 (arguing that often service members agree to discharge in lieu of court-martial without knowing the effect it has on their VA eligibility and criticizing this process as not have “strong due process protections for veterans”).

Additionally, and as stated repeatedly in Petitioners' initial comment and the comments of others cited herein, experiences such as MST, IPV, discrimination, in-service mental health conditions, and other factors are a significant contributor to what is deemed military misconduct. Good order and discipline thus are undermined by punishing veterans who are themselves the victims of abuse and misconduct or whose conduct is adversely impacted by impaired judgment or constrained circumstances.

Limiting benefits exclusion to the statutory bars would allow for a greater number of service members to receive critical, life-saving benefits, while continuing to bar those who committed serious, unmitigated misconduct. This upholds Congress's intent and, as explained below, would best create a fair, just, and equitable rule for accessing VA benefits.

**2. Some commenters suggested that granting benefits to those with less than honorable discharges denigrates others' honorable service. How (if at all) would extending VA benefits eligibility denigrate others' honorable service?**

VA's role is to provide support to veterans in their post-service lives, not to sit in moral judgment of their character and worth as an individual. Thus, as answered in the prior question, VA should focus on its mission of care. It is critical to understand what a character of discharge determination does and does not do: it does not change the character of service on a veteran's discharge paperwork to "Honorable," which is the sole purview of the Department of Defense. It does assess eligibility for benefits based on a standard that Congress wrote to expressly include many less-than-honorably discharged veterans. This leads to two points. First, that VA's rules and processes do nothing to confer or remove "honor" from any veteran's service. Only the action of military commanders and Department of Defense military review boards can do so. Second, that Congress decided in 1944 to grant eligibility for basic benefits to veterans with less-than-honorable discharges, and those veterans should have access now. Anyone who perceives VA's

rulemaking today as changing the status quo misunderstands what the law is and the fact that some veterans with less-than-honorable discharges already receive benefits.

In any event, as so many veterans described during the Listening Sessions, granting benefits to those with less-than-honorable discharges does not denigrate anyone else's honorable service.<sup>69</sup> Indeed, veterans who spoke during the Listening Sessions felt profoundly the opposite, making clear that denying healthcare, supportive services, and disability benefits to other veterans "cheapened" and "dishonored" their honorable service and violated their oaths to "never leave a fallen comrade."<sup>70</sup> VA benefits are an important way that service members are cared for after serving their country; they are not intended as a measure of the value of a service member's life.

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<sup>69</sup> See generally, John Brooker, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (former service member and JAG, arguing that providing a former service member with veteran status and with benefits such as healthcare does not denigrate his honorable service.); Bradford Adams, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (same); Matt Handley, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (same); Greg Gagne, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (same); Richard Gudis, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (same); Juliet Taylor, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (same); William L. Boudreau, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (same); Kristopher Goldsmith, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (same); Dr. Erin McBurney, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (same); Karl Behrendt, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (same).

<sup>70</sup> See, e.g., John Brooker, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (former service member and JAG, arguing it is "patently inhumane" to say that providing another veteran with basic needs such as healthcare denigrates one's own service. "The idea that denying any veteran the ability to eat or access healthcare denigrates my service is patently false."); Bradford Adams, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (former service member, "My honorable service is denigrated by seeing VA deny recognition to anyone who served. I'm not honored by homelessness, denial of medical care, by poverty. This does not honor my service. It does not return to me anything I have lost."); Matt Handley, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (former service member, "As a former noncommissioned officer, I find that sentiment to be extremely disconcerting and misguided. What would truly denigrate my honorable service would be to leave those comrades behind to suffer from poverty, homelessness, and lack of access to healthcare while I enjoy the benefits of my discharge."); Greg Gagne, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (In response to this question regarding denigration of honorable service, "I can understand that argument, but when you have the exposure to the system at this level, you realize that it is not that cut-and-dry"); Kristopher Goldsmith, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) ("Every branch beats into you that you never leave a fallen comrade. I understand that there are some veterans who have left comments in the administrative record indicating that providing healthcare to another vet denigrates their service; those folks, respectfully, have forgotten their oath and what it means to serve."); Dr. Erin McBurney, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) ("Veterans benefits are not a reward - they are services designed to save lives and enable the transition from military service to healthy and productive civilian lives."); Juliet Taylor, *VA*

First, VA should act with humility, remembering that it is the American people who have “grant[ed]” benefits to our veterans, and VA’s job is merely to distribute those benefits in keeping with its statutory obligations. Congress set the standard for granting benefits to our veterans and VA has no role in assessing the virtue of that standard.

And second, even if VA were to take it upon itself to determine whether “extending VA benefits eligibility denigrate others’ honorable service,” it is plain that distributing benefits to one deserving veteran has no effect on the honor imparted to other veterans. Plainly spoken, feeding someone who is hungry has no effect on the hunger of another who has already eaten. Congress did not ask VA to ration benefits, giving access only to the most selfless or the most decorated. The lifesaving and life-changing benefits that VA delivers are not a medal to be awarded. Rather, VA benefits are a commitment from the American people to those who served when others did not. Imparting VA benefits, as instructed by Congress, brings neither honor nor dishonor to our veterans. It brings only hope, care, and the thanks of a grateful nation.

**3. VA is committed to ensuring that its character of discharge regulations reflect the principles of fairness, inclusion, and justice that our Service members and our Nation deserves. What specific changes can be made to the proposed rule for fairly adjudicating the benefits eligibility of historically disadvantaged and vulnerable populations?**

To ensure that VA’s character of discharge regulations reflect the principles of fairness, inclusion, and justice, VA must implement substantial changes to its character of discharge regulations and processes. The current and proposed regulations disproportionately exclude

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*Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (As an honorably discharged veteran who went through the process of COD, I believe that caring for all of our veterans, including OTH veterans, is the right thing to do.” “It does greater honor to all who have served than the VA’s current system.” “This does not impact my service. I am a veteran, woman veteran, an immigrant, and I was deployed, and based on my work in the community, I think the system is unfair and should be revised to be compassionate. You should go back to the drawing board.”); *see also*, U.S. Army, “Soldier’s Creed”, <https://www.army.mil/values/soldiers.html> (last visited Oct. 7, 2021) (“I am a warrior and a member of a team...I will never leave a fallen comrade.”).

veterans of color, LGBTQ+ veterans, post-9/11 veterans, veterans with mental health conditions, and veterans who experienced combat or Military Sexual Trauma.<sup>71</sup> These are all populations who are at heightened need for VA’s supportive services. They have already suffered marginalization and should not be further excluded from the rights and benefits to which they are entitled.

VA should begin creating a more just and equitable system by presuming eligibility for benefits—rather than presuming ineligibility—for all administratively discharged veterans, who need help and are at significant risk of suicide, homelessness, and incarceration. There is broad support for granting an assumption of eligibility rather than the reverse, which has led to significant denial of benefits and other harmful outcomes for former service members.<sup>72</sup> Through the 1944 G.I. Bill, Congress granted veterans—including those less-than-honorably discharged—the “benefit of the doubt.” A presumption of eligibility upholds that purpose.<sup>73</sup> VA’s current and

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<sup>71</sup> See generally LEGAL SERVICES CORPORATION, 2021 REPORT OF THE VETERANS TASK FORCE 24–28 (2021); VETERANS LEGAL SERVICES, TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTH CARE TO VETERANS WITH BAD PAPER DISCHARGES 4–7 (2020) (“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.”); VETERANS LEGAL CLINIC AT THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL, DO ASK, DO TELL, DO JUSTICE: PURSUING JUSTICE FOR LGBTQ MILITARY VETERANS 2 (Apr. 19-20, 2018) (“To this day, thousands of LGBTQ veterans are still denied access to essential veterans services—with dire consequences for their mental and physical health, financial wellbeing, and peace of mind.”); SWORDS TO PLOWSHARES, NATIONAL VETERANS LEGAL SERVICES PROGRAM, AND VETERANS LEGAL CLINIC AT THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL, UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 2 (Mar. 2016) (“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.”); HUMAN RIGHTS WATCH, BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS (May 19, 2016).

<sup>72</sup> Comments of the National Coalition for Homeless Veterans, AQ95—Proposed Rule (filed Sept. 4, 2020) <https://www.regulations.gov/comment/VA-2020-VBA-0018-0030> (“NCHV Comments”) (arguing that “[v]eterans should be presumed eligible for VA health care unless proven otherwise” including those who are waiting for a character of discharge decision); Comments of Veterans Legal Services, AQ95—Proposed Rule (file Sept. 7, 2020) at 3, <https://www.regulations.gov/comment/VA-2020-VBA-0018-0069> (requesting that VA “reframe” its regulations to “assume eligibility” and to “find exceptions whenever possible.”); VVA Comments at 2 (strongly supporting Petitioners’ proposals, including ending a requirement of a COD review for veterans with OTH discharges and instead presume those veterans eligible for benefits).

<sup>73</sup> Petitioners’ Comments at Section III(A).

proposed framework flips the presumption that Congress intended, in violation of the statute.<sup>74</sup> VA should now adopt a presumption of eligibility under Section 3.12(a).<sup>75</sup> As discussed at length in Petitioners’ previous comment, comments from other parties, and oral presentations during the Listening Sessions, giving veterans the benefit of the doubt and presuming eligibility would foster far greater justice and inclusion than would occur under the Proposed Rule.<sup>76</sup>

Among the many reasons to create a presumption of eligibility for administratively discharged veterans, service members discharged other-than-honorably are three times more likely to experience suicidal ideation than those with Honorable or General discharges.<sup>77</sup> Several other commenters have presented evidence that veterans who are denied benefits, or at risk of losing

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<sup>74</sup> *Id.* at Section III(A)–(B); *see also* Sen. Blumenthal, et al. Comments at 3 (same); NVCLR & CVLC Comments at 2-4 (same).

<sup>75</sup> *See* Sen. Blumenthal, et al. Comments at 4 (“[v]eterans should be presumed eligible for VA health care unless proven otherwise”); NVCLR & CVLC Comments at 1 (recommending “presum[ing] eligibility for all veterans with administrative discharges—including those with Other Than Honorable discharge characterizations—and exclude only those former servicemembers who should have received or actually did receive a Dishonorable discharge”).

<sup>76</sup> *See* Petitioners’ Comments; Sen. Blumenthal, et al. Comments at 4 (“[v]eterans should be presumed eligible for VA health care unless proven otherwise”); NVCLR & CVLC Comments at 1 (recommending “presum[ing] eligibility for all veterans with administrative discharges—including those with Other Than Honorable discharge characterizations—and exclude only those former servicemembers who should have received or actually did receive a Dishonorable discharge”); Juliet Taylor, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (“We know that disparities in military justice cause veterans of color, those with mental disabilities, LGBTQ, etc., to be treated inequitably by the military justice system, and they are more likely to get OTH discharges”); Garry Monk, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (“I have seen many veterans with OTH discharges because their commander did not like them or discriminated against them because of their color or otherwise, but who served right alongside someone who received an honorable discharge.”); Matt Handley, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (“I would urge the VA to consider the recommendation made by many of the commentators on the proposed rule to abandon the regulatory bars entirely and deny benefits only to those who are precluded by the statutory bars.”); Alden Pinkham, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 5, 2021) (arguing that removing the regulatory bars will help provide equity for vulnerable and historically marginalized veterans); Stephen Kennedy, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (arguing that a systematic review of discharges shows no qualitative or quantitative differences between veterans with honorable and OTH discharges); Michael Taub, *VA Character of Discharge Listening Session on RIN 2900-AQ95 Proposed Rule* (Oct. 6, 2021) (“The short but honest answer to this question is that the only way to ensure fairness in the COD process is eliminating the [willful and persistent] regulatory bar.”).

<sup>77</sup> Claire A. Hoffmire et al., *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans*, 56 AM. J. PREV. MED. 727, 727-80 (2019).

their benefits, are at greater risk of suicidal ideation.<sup>78</sup> These increased risks can be eliminated if such veterans have access to VA health care. As the Veterans Healthcare Policy Institute pointed out, “[r]econfiguring an eligibility scheme that only potentially excludes those with punitive discharges, or those who could have received punitive discharges, will create a more just system,” and, moreover, for veterans with Other Than Honorable discharges, “access to VA is particularly critical . . . . [because] . . . veterans with bad paper who have recently accessed VA mental health services are no more likely than other veterans to experience suicidal ideation.”<sup>79</sup> Yet, VA’s current presumption of ineligibility prevents or dangerously delays most of these veterans from getting the life-saving help they so desperately need.

Justice would also demand that VA properly fulfill its mission of helping veterans recover from homelessness or preventing them from becoming homeless in the first place.<sup>80</sup> The current presumption of ineligibility also prevents VA from helping veterans avoid incarceration or have a successful reentry into the community, with this population also suffering from increased rates of homelessness and mental health conditions.<sup>81</sup>

Several suggestions throughout this comment, our previous comment, and the Petition have suggestions for how VA can broaden eligibility and limit bars to benefits only to cases where circumstances would warrant a Dishonorable discharge. Such changes, even more than the

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<sup>78</sup> NCHV Comments (“Bad paper status veterans are seven times more likely to become homeless and are two times more likely to commit suicide.”); Public Counsel’s CVA Comments at 2-3 (stating the “consequences of an unfavorable discharge” are “higher rates of suicidality, homelessness, under-employment or non-employment,” among other things, and arguing that VA’s COD process should be “on the forefront of veteran inclusion.”); VAP Comments at 1 (arguing that veterans are particularly vulnerable to homelessness, suicide, and crime); VHPI Comments at 5 (“Studies have shown that veterans with bad paper are three times more likely to experience suicidal ideation.”).

<sup>79</sup> VHPI Comments at 4-5.

<sup>80</sup> 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).

<sup>81</sup> *Id.*

suggested adjustments to certain adjudicatory schemes, definitions, and language of the character of discharge regulations, would have a profound impact on the application of justice and fairness for our former service members.

Furthermore, expanding the “compelling circumstances” considerations to include a broad range of positive and mitigating factors furthers the goal of a just and inclusive system. For reasons explained above and in our initial comment, VA should expand its list of “compelling circumstances” to also include experiences of sexual harassment, intimate partner violence, and discrimination and to be non-exhaustive so that veterans can have their own individual circumstances fully weighed.<sup>82</sup>

Relatedly, no veteran should be prevented from presenting a “compelling circumstance,” as the Proposed Rule does by excluding veterans discharged in lieu of general court-martial from such consideration. Doing so draws an arbitrary and irrational line that will disproportionately impact Army veterans, who are more likely to be discharged under such a “Chapter 10” plea bargain. As explained in our initial comment,<sup>83</sup> veterans with similar in-service experiences and conduct will be treated differently in VA’s proposed scheme. This will lead to unjust outcomes and unlawful exclusion.

Finally, as stated at the start of this comment, the only path to a systemically just character of discharge review process is through systemic reform that fundamentally changes the rules and procedures. Mere edits to the text of the regulatory bars at Section 3.12(d) will allow injustice to persist and leave veterans unlawfully excluded from benefits they need and deserve.

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<sup>82</sup> Petitioners’ Comments at Section III(C)(6)(a), (d).

<sup>83</sup> *Id.* at Section III(C)(6)(b).



### **III. CONCLUSION**

Petitioners appreciate VA's efforts to clarify the regulatory bars to benefits based on COD, but further reform is needed. As set forth above and in Petitioners' opening comments, VA's Proposed Rule is arbitrary and capricious and contrary to Congressional intent, and the Proposed 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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October 12, 2021

#### **IV. 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](http://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](http://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 Military Discharge Upgrade Legal Practice Manual, a recently published 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.

## **Exhibit 1: 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.

**Exhibit 2: Listening Session Comments of Renée Burbank, National Veterans Legal  
Services Program**



**NVLSP**

NATIONAL VETERANS LEGAL SERVICES PROGRAM

## **Oral Comments on VA's Regulatory Bars to Benefits**

**Based on Character of Discharge**

**Presented by:**

**Renee Burbank,**

**Director of Litigation**

**National Veterans Legal Services Program (NVLSP)**

**Oct. 5, 2021**



## **Introduction**

Good morning my name is Renee Burbank, and I am the Director of Litigation at the National Veterans Legal Services Program, or NVLSP. For 40 years, NVLSP has worked to ensure our nation fulfills its moral duty to care for our veterans. Each year, NVLSP assists thousands of veterans and active-duty personnel to obtain the benefits to which they are entitled.

First, thank you. NVLSP sincerely appreciates that VA is taking this rulemaking with the seriousness it deserves. The Department of Veterans Affairs has a historic opportunity to correct a rule that has kept far too many veterans from receiving the benefits that they need and deserve. The current regulatory bars at 38 C.F.R. § 3.12 contribute to the higher rates of homelessness, suicide, unemployment, and untreated mental health conditions among less-than-honorably discharged veterans. Improving the character of discharge rule is not simply legally the right thing to do; it will save lives.

Nevertheless, VA's Proposed Rule, though improved, does not do enough. When Congress enacted the "other than dishonorable" eligibility standard in the G.I. Bill of 1944, it had at the front of its mind VA's duty to support those wounded in uniform, and expressly tasked VA with caring for former service members in their post-service lives, not imposing discipline. The proposed Rule should conform to that Congressional intent and purpose.

NVLSP, along with its partner Swords to Plowshares, intends to submit additional written comments in response to VA's September 9<sup>th</sup> Federal Register Notice. I therefore will focus my oral comments today on just two points: First, I urge VA to expand how veterans can establish compelling circumstances. Second, VA should remove its willful and persistent bar entirely because it is unlawful as well as arbitrary, capricious, and discriminatory.

### **A. Compelling Circumstances**

NVLSP strongly supports VA creating a compelling circumstances consideration in its character of discharge determinations, but we are concerned that, by creating a dispositive list of factors to consider, VA's proposed rule is still too narrow.

To take just one example, in its topic A.2 in the Sept 9 Federal Register notice, VA asks whether it should expand its proposed "sexual abuse / assault" category to "military sexual trauma" or another term. MST is broader than abuse / assault, and therefore a better choice, but

MST does not include all types of assault and harassment that VA should consider. Other types of sexual violence or personal trauma and harassment should be explicitly included, including intimate partner violence and assault, harassment, or hazing based on race, religion, color, sexual orientation or gender identity, or disability as well as sex.

NVLSP also agrees that adjudicators should and must look beyond service records to corroborate accounts of compelling circumstances, but the language of 3.304(f)(5), by its terms, applies only to veterans claiming PTSD based on a personal assault.

Section 3.12 should not be so limited. Several of the proposed “compelling circumstances” categories would regularly require evidence not apparent in a member’s service records. For example, the “duress, coercion, or desperation” factor and “family obligations or obligations to a third party” factor would presumably require looking outside service records in most cases. Therefore, the expansive evidentiary rule in section 3.304(f)(5) should apply to all determinations evaluating compelling circumstances, but the specific list of possible evidentiary sources in 3.304(f)(5) is not broad enough. The Proposed Rule should direct adjudicators that all factors in the proposed 3.12I(2) can be corroborated through evidence from sources other than the veteran’s service records, and that *any* credible information from *any* source must be considered.

## **B. Willful and Persistent Misconduct**

Next, VA also seeks comments on its proposed changes to the “willful and persistent misconduct” bar. That bar is the most common way VA excludes former service members from VA benefits. As VA works to improve the Rule, therefore, fixing the willful and persistent misconduct bar is critical.

Title 38 defines a veteran for VA purposes as a service member “who was discharged or released therefrom under conditions other than dishonorable.” Therefore, any regulatory bar based on that definition must relate to the reason a service member was discharged. The statute therefore requires that VA’s “willful and persistent” misconduct standard be restricted so that VA considers only serious misconduct, for which the veteran was actually discharged, that should have but did not lead to a dishonorable discharge.

Take, for example, a fact pattern that matches the experience of too many less-than-honorably discharged service members. A service member serves well and capably enough for a number of years. Then, after failing a single drug test, they are discharged with an other-than-

honorable characterization. Rather than simply assessing whether that drug use should bar the service member from VA benefits, VA's proposed rule would have the adjudicator root through their entire service record to find and judge misconduct that the Department of Defense did not see fit to discharge the veteran for. If the record reflects a variety of non-judicial punishments over a span of a couple years for incidents like being late to their post of duty or being disorderly – incidents that their chain of command specifically did not believe warranted discharge of any kind and which could not result in a dishonorable discharge in any event – the veteran now risks a negative character of discharge determination.

VA adjudicators are not trained in the Uniform Code of Military Justice. Their job is to fulfill VA's mission to care for veterans, not to judge and decide appropriate punishment. The willful and persistent misconduct standard is unworkable, unfair, and unlawful. VA should remove it entirely.

### **Conclusion**

In conclusion, NVLSP urges VA to conform its proposed rule to Congress's original intent and purpose to care for as many of our veterans as possible and to exclude service members only when they were discharged the most serious misconduct and no mitigating circumstances exist.

I thank you for your time.

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**Exhibit 3: Listening Session Comments of Maureen Siedor, Swords to Plowshares**



VETS HELPING VETS SINCE 1974

## Intro

Thank you. My name is Mo Siedor, and I'm the Legal Director at Swords to Plowshares. We are a community-based non-profit dedicated to serving the homeless, low-income and at-risk veterans in the San Francisco Bay Area. Each year, our team of attorneys at Swords assists over 500 veterans and nearly half of them have a less than honorable discharge. As such, we have helped a large volume of clients navigate the Character of Discharge process.

Seeing the VA regularly issue incorrect and unjust decisions in these cases was our impetus to petition the VA, along with The National Veterans Legal Services Program, for rulemaking regarding its COD regulations. Our petition was the culmination of **an extensive** amount of data collection, deep historical legal research, numerous conversations with advocates across the country, and our considerable experience directly representing clients in COD cases.

Given my time limit today, I want to focus my comments on the requests for information pertaining to Moral Turpitude and Benefit Eligibility.

## Moral Turpitude

To begin, the **proposed** definition of moral turpitude is overboard and vague, and will likely lead to inconsistent and arbitrary decision making. This bar should be removed entirely.

I want to provide some examples to illuminate how in practice this proposed definition might be applied –

- Take the relatively common reason our clients are kicked out of the military – testing positive for marijuana use. Under the proposed language, an adjudicator in locations where recreational marijuana has been legal for many years – such as Denver or LA – this behavior would likely not rise to the level of a “grave violation” of moral standards and wouldn't be **seen** as harmful, while in a more conservative jurisdiction where marijuana use is still a crime – such as Little Rock or Wichita -- an adjudicator could reasonably conclude the opposite. In fact, at Swords, we had a client whose only misconduct was a single positive drug test, and the Muskogee RO denied his COD on moral turpitude grounds.
- This vague definition also gives room for an adjudicator - with a strong belief that taking one's own life is immoral - to deny a veteran access to benefits because of a suicide attempt in service.
- We had a client at Swords who lost friends in an IED explosion in Iraq and while still on that deployment, he shot himself in the chest and was discharged with an Other than Honorable. Two months ago, the VA denied his COD. It is inconceivable that Congress intended the VA to turn someone away from treatment and help for being suicidal, but both the current and proposed regulations would allow for that outcome.

One could argue that training the adjudicators on what constitutes moral turpitude would remedy these issues, but – as documented in our petition and comment -- a review of vast inconsistency in

these decisions based on Regional Office or which BVA judge is assigned makes it hard to feel confident that training would solve the problem.

When devising a federal benefits system, the language employed must ensure a consistent outcome regardless of the office adjudicating the claim or the individual assigned to make the decision. However, these vague definitions, all but guarantee inconsistent outcomes for claimants. And it's important to remember that the decisions VA is making can mean life or death for many of our clients. They are determining whether someone will receive mental health care, prescription medications, social worker support and case management, and disability income to help pay their basic needs.

VA adjudicators are a diverse group, living in a very diverse nation. The proposed definition does not adequately account for these differences.

### **Benefits Eligibility:**

Next, regarding part D - benefits eligibility - the VA asks how removing the regulatory bars would impact military order and discipline. I have been representing clients in CODs since 2014, and I have personally met with hundreds of veterans wanting legal help related to a less than honorable discharge. Of those conversations, I can remember only one time— it was at a legal clinic at the Menlo Park VA – when a client came to me asking for help with a COD. It was memorable because I was so surprised that he knew about the process at all.

Clients come to us regularly requesting help with a discharge upgrade because they think that's the only avenue to getting help from VA. In my experience, former servicemembers – and even many employees within VA -- generally do not know about this process, let alone what the regulatory bars say or don't say.

Given this, I can't imagine how removing them would have any impact on military order and discipline. The DOD has an entire system – including their own judiciary and legal code - to handle disciplinary issues, and they do a fine job of maintaining military order. VA should focus on its own mission to “care for those who have borne the battle.”

### **Question D2:**

To the second question of whether extending benefits to those with less than honorable discharges will denigrate the service of others: Many veterans have already answered this question in the listening session, so I will limit my response to this one point – the COD process already exists. Any analysis as to whether this negatively impacts those with honorable discharges is ultimately irrelevant. There are currently veterans with less than honorable discharges who already get VA benefits because of Congressional mandate. Again, the focus needs to stay on how to improve the existing COD process so that it is more equitable and consistent with Congressional intent.

### **Conclusion:**

Lastly – I want to conclude with some brief thoughts on the VA's general inquiry with this Request for Information. One of the main challenges we face as advocates is a lack of understanding by VA adjudicators of the COD regulations. In interactions at hearings, on calls with Higher Level

Review Officers, and in the language of the decision letters – it is commonplace that the regulations governing this process are misstated, misunderstood, and misapplied.

I want to share some examples from **just the last few months** from our work at Swords-

- I had a client who was diagnosed with mouth cancer on active duty. Part of his cheek had to be removed. He tested positive one time for marijuana use and received an OTH discharge. The VA's decision letter cited only that single non-judicial punishment yet denied his COD under the "willful & persistent misconduct" bar.
- We had another client who received an NJP early on in service for underaged drinking right before his combat deployment to Iraq. Two years later - after he was back stateside – he tested positive once for marijuana, and -- in the 14 pages of discharge paperwork -- the only misconduct cited was that positive drug test. At the COD hearing, the adjudicator conceded on the record that the regulation states that the VA is only allowed to consider the misconduct for which our client was quote "discharged or released because", per 3.12(d). Nevertheless, the adjudicator told us that he was still going to count earlier NJP in the willful & persistent misconduct analysis because that's how they "were trained to do it."
- Lastly, an adjudicator recently called an attorney on my team to tell her that the COD hearing she'd requested for her client wasn't going to make a difference in his case, that we were wasting her time and ours, and the only way he would ever get anything from VA was with a discharge upgrade. We looped in the Under Secretary for Benefits' Office, got the adjudicator removed from his claim, and within weeks we had a new hearing in which the client prevailed in his COD and is now receiving 70% service-connection for combat-related PTSD.

The proposed regulations do not address **these problems**.

The VA is asking for us to help figure out how many incidents over how many months or years, what types of sexual abuse should or shouldn't be considered mitigation, what symptoms should and shouldn't be considered when assessing mental impairment during an AWOL?

With all due respect, the VA is missing the forest for the trees --

- Adding more categories of minor versus serious misconduct based on the UCMJ will lead to confusion;
- Leaving it up to adjudicators to parse out what is a "grave" vs "not grave" moral violation will not help;
- Allowing compelling circumstances to be applied – but only some compelling circumstances – and only to some bars and not others - VA is all but guaranteeing we will continue to see inconsistent, unfair, and unlawful outcomes.

It is an impossible ask of these adjudicators to apply these convoluted rules after a just brief review of someone's military file and make a moral judgment on the character of their military service.

The beauty of the statutory bars is that, for the most part, they are simple yes or no questions, and they provide simple guidance to adjudicators.

If the VA is going to continue to have regulatory bars - the overarching goal must be to make the rules as simple as possible, as clear as possible, to limit the discretion of adjudicators, and to comport them with Congressional intent. We implore VA to keep this in mind.

The veterans in need of CODs are some of the most vulnerable and most in need of VA help as you have heard today and yesterday. Congress intended VA to give those who served the benefit of the doubt and wrote the statutory bars to reflect that intention. The VA has gone awry of that intent with these proposed regulations that will exclude many veterans who very much deserve and have earned the VA's help.

Thank you.



**Exhibit 4: Listening Session Comments of Dana Montalto, Veterans Legal Clinic,  
Legal Services Center of Harvard Law School**



Dana Montalto  
Clinical Instructor & Lecturer-on-Law  
Veterans Legal Clinic

Listening Session Testimony  
Wednesday, October 6, 2021

Good morning. My name is Dana Montalto. I am a Clinical Instructor at the Veterans Legal Clinic at the Legal Services Center of Harvard Law School, where I provide pro bono representation to veterans in state and federal veterans and military law matters and teach law school students through the actual practice of law.

In this role, I have helped many veterans who received less-than-honorable discharges navigate the character of discharge review process. I have also had the privilege of working on behalf of Swords to Plowshares and the National Veterans Legal Services Program to seek to reform the regulations at 38 C.F.R. 3.12.

This work on behalf of both individuals and veterans organizations led me to dig into the history of VA's other than dishonorable standard that Congress enshrined in law as part of the 1944 GI Bill of Rights. I will share a bit of that history now, which bears directly on question A regarding compelling circumstances; questions B & C regarding the phrasing of certain regulatory bars; and question D1 about VA's mission.

After World War I, our government failed to properly care for returning servicemembers. There was no centralized, comprehensive benefits and health care program to assist World War I veterans in their transition, and as a result, they suffered untreated wounds and mass unemployment. This ultimately led a Bonus Army of tens of thousands of veterans to walk across the country and march on Washington to demand fair and adequate treatment.

While the government eventually agreed to provide some assistance, for many, it was too little, too late. Importantly, many veterans—including those who did not have Honorable discharges—were excluded.

The World War II Era Congress knew of that recent history when, in 1944, it began making a plan for the 16 million returning servicemembers and chose to make an extensive set of benefits—

health care, disability compensation, education, home loans—available to them to help them reintegrate into and succeed in their civilian lives.

Congress thought carefully about whether veterans who did not have fully Honorable discharges (such as those with Other Than Honorable discharges) should be eligible for these benefits and considered a range of options.

In the end, Congress adopted the position proposed by Harry Colmery, former national commander of the American Legion, who originally drafted the 1944 G.I. Bill: that standard was eligibility for all former servicemembers who were discharged under “other than dishonorable” conditions—which expressly can include veterans who received less-than-honorable discharges.

When Congress settled on this standard, it knew about servicemembers who experienced “combat stress” or “shell shock”, or who started drinking to deal with war wounds, and who then were kicked out less-than-honorably because of related misconduct. And Congress thought that while it may be appropriate for them not to be in the military anymore, that the government still should care for these veterans.

As Harry Colmery explained: “we use [the language ‘under conditions other than dishonorable’] because we are seeking to protect the veteran against injustice . . . we are trying to give the veteran the benefit of the doubt, because we think he is entitled to it.”

Some argued against this standard and sought instead to reserve VA benefits only to those with Honorable discharges. But Congress deliberately chose otherwise.

It is important to remember that nearly half of members of Congress at that time had served in uniform. So they made this decision not because they did not understand military life, but instead because they understood it better than most.

This history and the plain text of the “other than dishonorable” standard must inform VA’s character of discharge regulations. But the current regulations and proposed rule fail to heed that history and text.

First, on Question A regarding mental impairment, it is notable that in hearings and testimony on the G.I. Bill, Congress did not use the technical language of the psychiatric profession. Rather, they discussed “combat stress” and “shell shock”. They referred to behaviors symptomatic of a mental health condition like alcohol and substance use and absences from duty. This broad understanding of mental health and how it manifests in service should be reflected in VA’s final rule.

Second, on Questions B & C, before the 1944 G.I. Bill was enacted, certain statutes and regulations barred VA benefits to former servicemembers who were discharged for “any offense involving moral turpitude” or “willful and persistent misconduct, of which he was found guilty by court-martial”. With full knowledge of those existing bars, Congress explicitly chose not to include them in the 1944 G.I. Bill; instead, Congress chose a totally new standard—the “other than dishonorable” conditions standard, which was intended as a liberalizing reform that would expand

access. For VA to then reinstate even broader versions of those “moral turpitude” and “willful and persistent misconduct” bars in regulation and used them to exclude veterans for the past decades violates fundamental principles of administrative law and directly contradicts Congress’s wishes. Those bars must be removed.

Relatedly, Congress nowhere expressed a desire to limit the consideration of mitigating circumstances to only certain veterans. Indeed, by utilizing the military term of art “dishonorable”—which invokes the balancing of aggravating and mitigating factors inherent in military sentencing determinations—Congress incorporated a requirement that compelling circumstances be factored into all eligibility determinations. Thus, where Question B asks whether a “totality of the circumstances” should be considered, the answer is yes.

Third, and finally, on Question D1, in its debates about the “other than dishonorable” eligibility standard, Congress explained why it thought that VA should make the eligibility determination, not the service branches. Congress saw the military and VA as having different missions: the military had to defend the nation, maintaining good order and discipline; VA must support veterans in their post-service lives. Congress thought that the person deciding whether a veteran should be able to get treatment for the wounds of war should be someone far removed from the heat of battle. Congress deliberately decoupled the military-assigned character of discharge from VA’s eligibility determinations because the military is responsible for discipline, whereas VA is responsible for care.

And indeed, I have heard from so many VA staff—including those responsible for health care enrollment, outreach, homelessness prevention, and benefits adjudication—that they truly want to provide care to all who served our country, regardless of discharge status, but feel trapped by the overly restrictive character of discharge regulations currently in place.

And I have seen firsthand the life-changing impact that breaking through these eligibility rules and gaining access to VA’s robust, holistic supportive services can have on an individual veteran’s life.

You have a unique opportunity to change the lives of so many veterans by reforming these regulations. I ask you to do so to uphold the original intent of the World War II Era Congress who never again wanted to leave a generation of veterans behind.

Thank you to everyone at VA for taking the time now to review and update these regulations and for listening to my testimony today.