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NATIONAL VETERANS LEGAL SERVICES PROGRAM

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How the VA Wrongfully Excludes Veterans with Bad Paper

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EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

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

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

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

CONGRESS'S PLAN FOR AMERICA'S VETERANS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discharge Characterizations

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

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

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

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

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

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

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

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

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

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

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

HOW THE VA EXCLUDES VETERANS

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

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

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

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

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

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

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

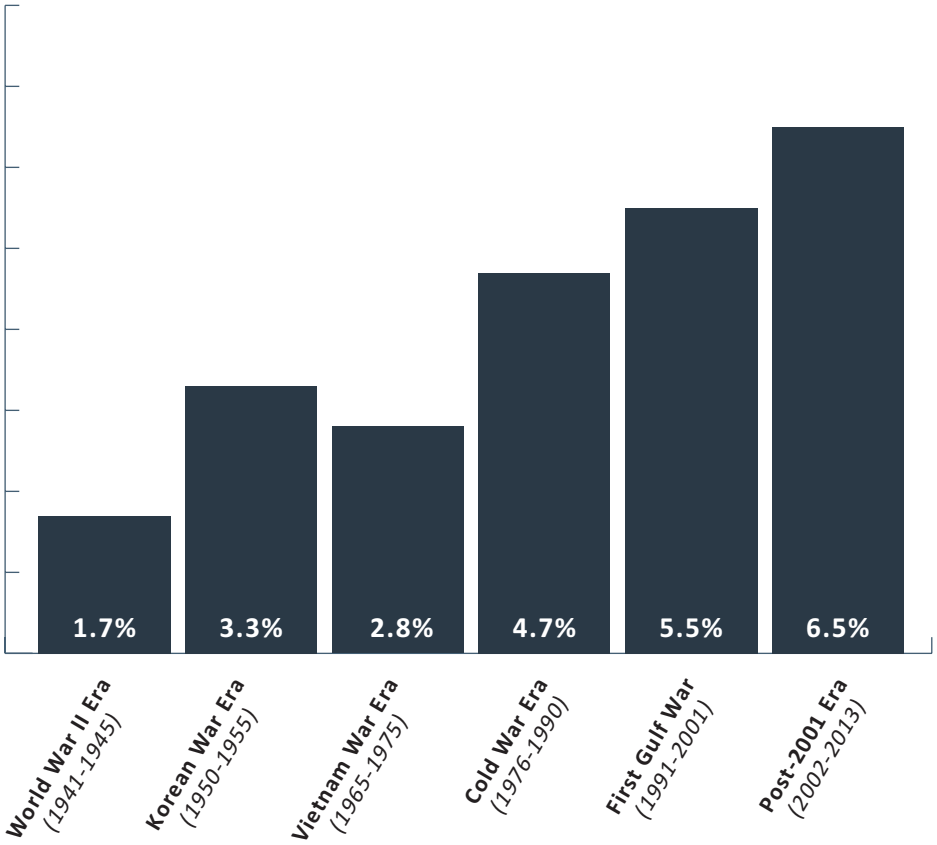
Although the G.I. Bill of Rights was intended to expand access to basic services, in practice the VA is turning away more veterans than ever before.

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

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

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

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



conduct results in an Other than Honorable discharge characterization.

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

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

Most Excluded Veterans Never Receive an Eligibility Evaluation from the VA

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

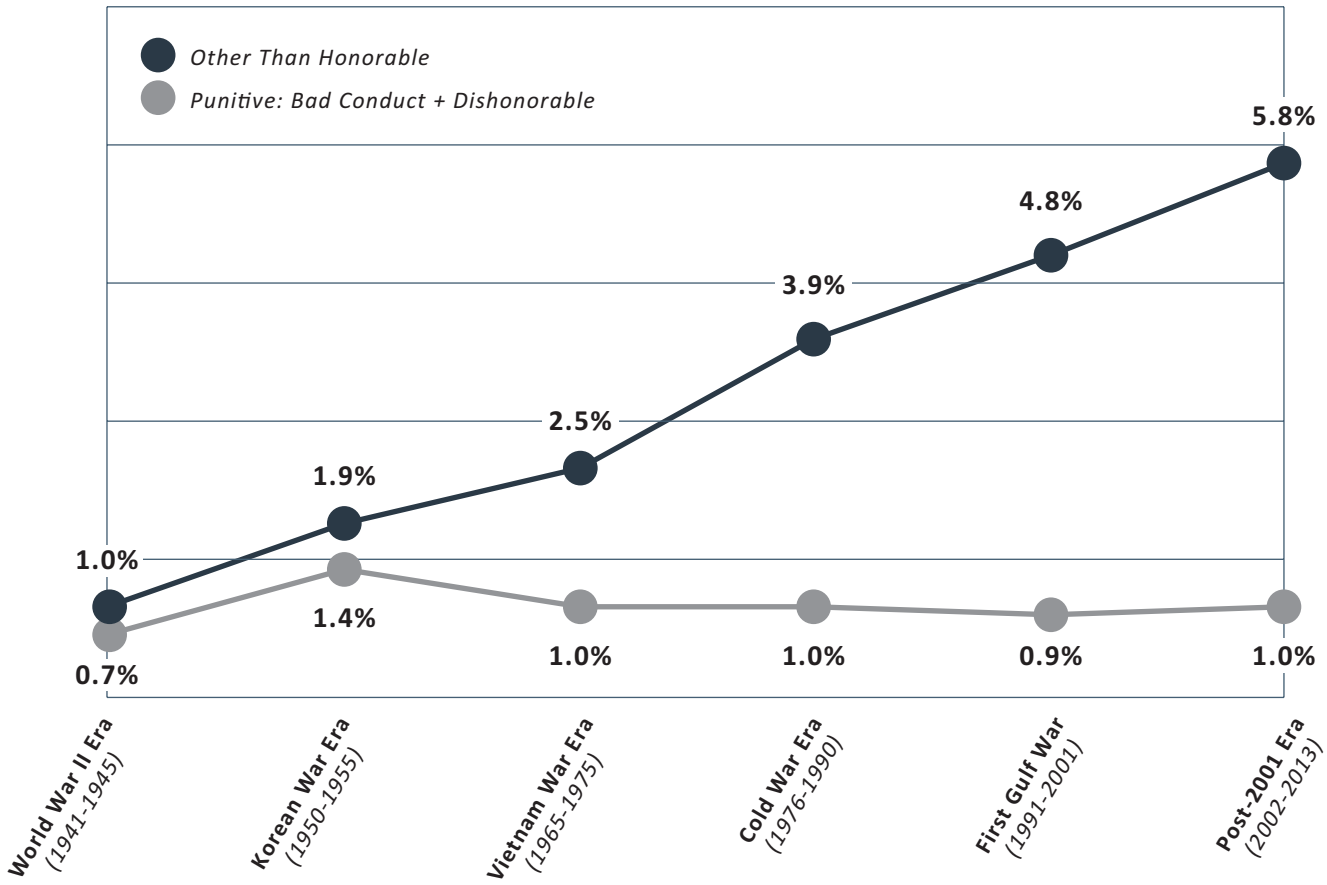
"veteran." In practice, the VA fails to initiate COD reviews when veterans request healthcare at a VA hospital or clinic. Nor does VA policy provide a path for an eligibility evaluation to occur when a veteran seeks homeless shelter services. Instead a Character of Discharge review occurs only when a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

90%

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

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

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



1,200 Days

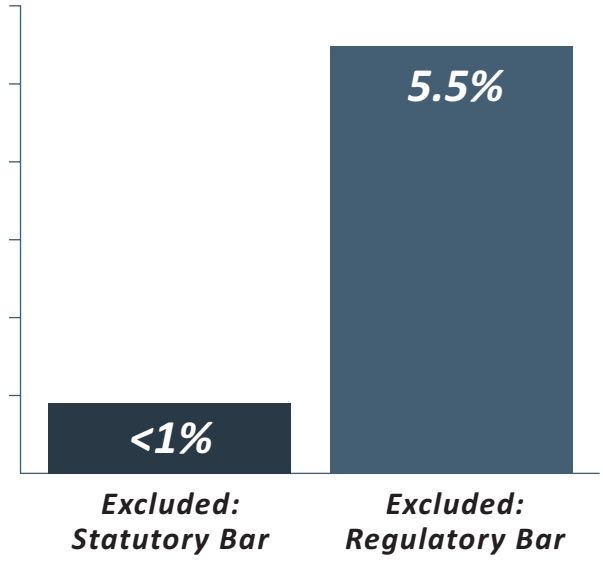
Average length of time for VA to conduct a Character of Discharge Determination

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

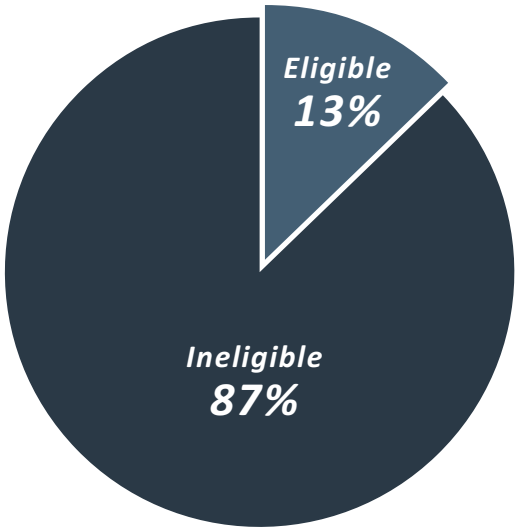
The VA's COD Regulations Deny Eligibility to the Large Majority of Veterans

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

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



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



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

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

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

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

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

VA Regulations Result in Unequal Exclusion Rates Between Branches

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

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

88%

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

98%

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

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

Enlisted Service Members Discharged as Percent of Characterized Discharges, FY11

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

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

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

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

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

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

T.W., Marine Corps, Vietnam

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

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

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

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

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

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

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

3 out of 4

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

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

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

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

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

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

13%

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

15%

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

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

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

8%

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

11%

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

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

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

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

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

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

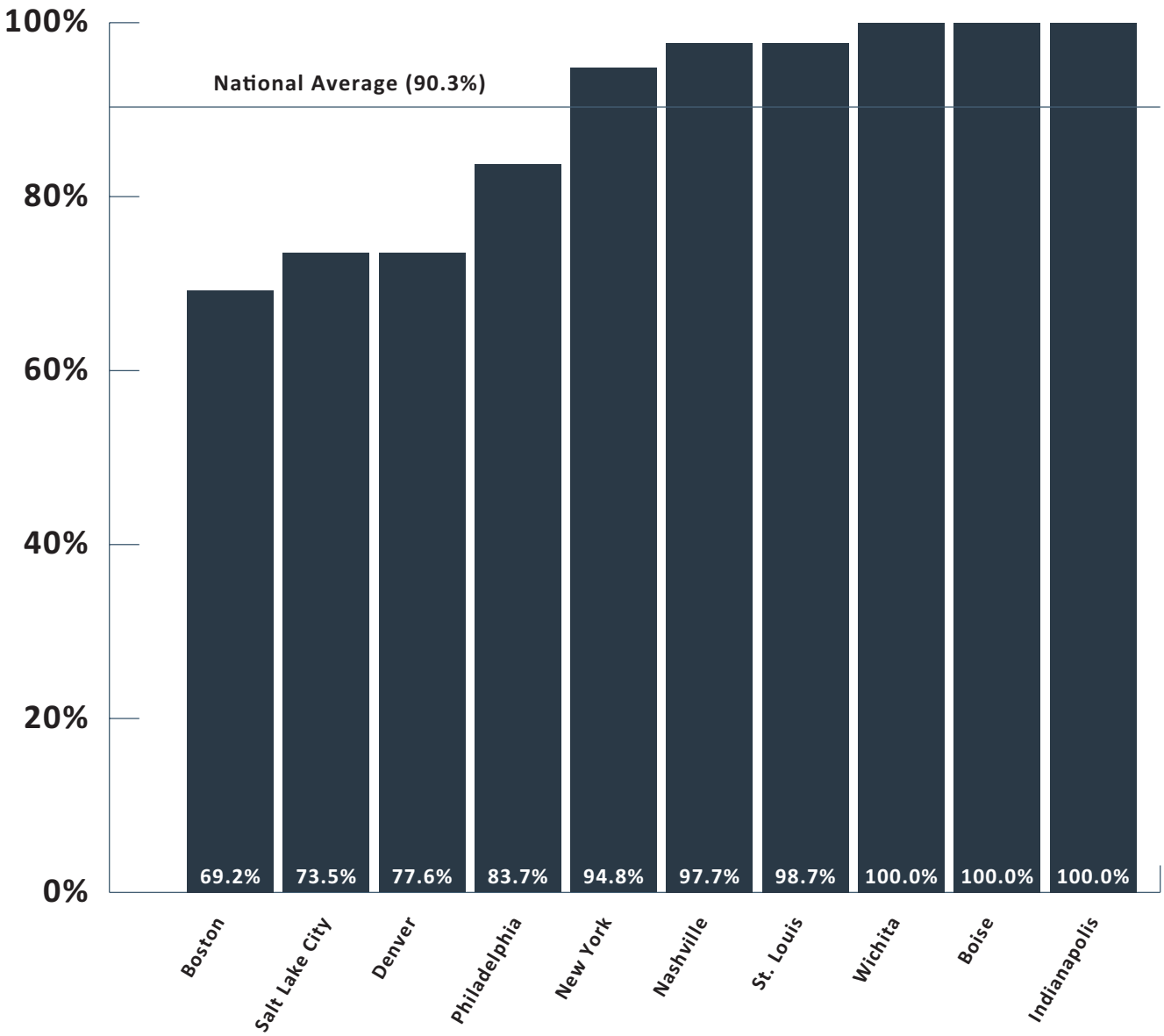
Those regional disparities are not new. In 1977, one member of Congress pointed out that "the Denver Regional Office has indicated that in the adjudication of cases of veterans with Other Than Honorable discharges in 1975, only 10 percent were ruled eligible for benefits" while the "Minnesota VA Regional

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

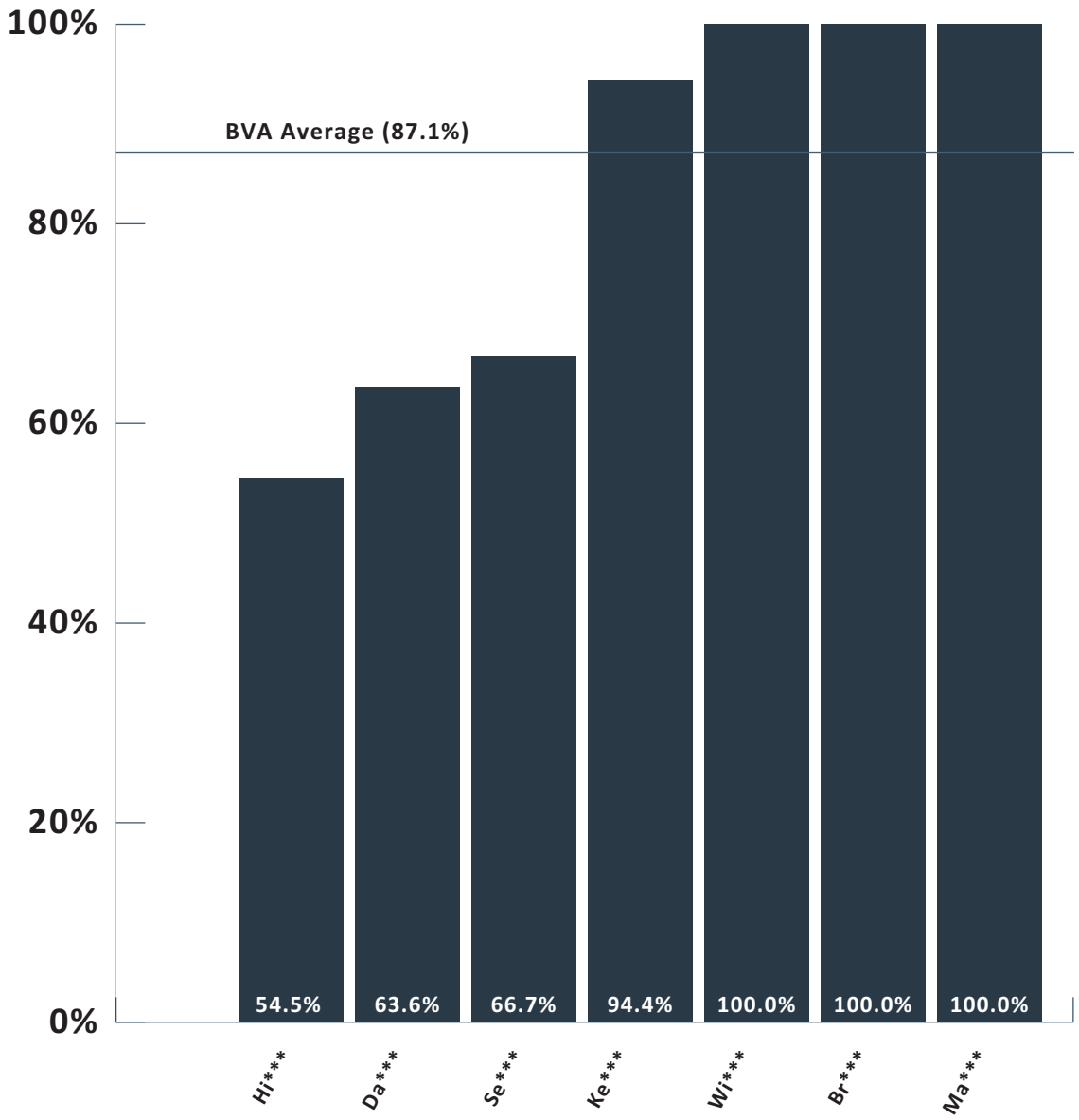
This wide variation in decision outcomes also appears in the differences between Veteran Law Judges. The BVA is located in Washington, D.C. and hears all appeals from across the country. Yet, which Veterans Law Judge hears the appeal significantly affects the likelihood that a veteran's appeal will be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

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

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



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



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

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

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

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

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

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

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

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

Representative White:

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

VA Associate General Counsel Warman:

We do have a regulation that is very general.

Representative White:

So there is great room for variance?

VA Associate General Counsel Warman:

Yes, there is.

1971 Hearing Before the House Armed Services Committee

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

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

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

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

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

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

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

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

T.H., Army, First Gulf War

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

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

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

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

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

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

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

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

THE CONSEQUENCES OF DENYING ACCESS TO VA

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

Mental Health & Suicide

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

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

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

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

> ***11x***
>
> ***increased likelihood that Marines who deployed to Iraq and were diagnosed with PTSD were discharged for misconduct***

Incarceration

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

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

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

Homelessness

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

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

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

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

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

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

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

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

49 Id.

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

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

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

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

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

WHAT'S WRONG WITH THE VA'S REGULATIONS

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

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

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

The VA's Regulatory Definition of "Dishonorable" Service

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

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

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

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

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

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

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

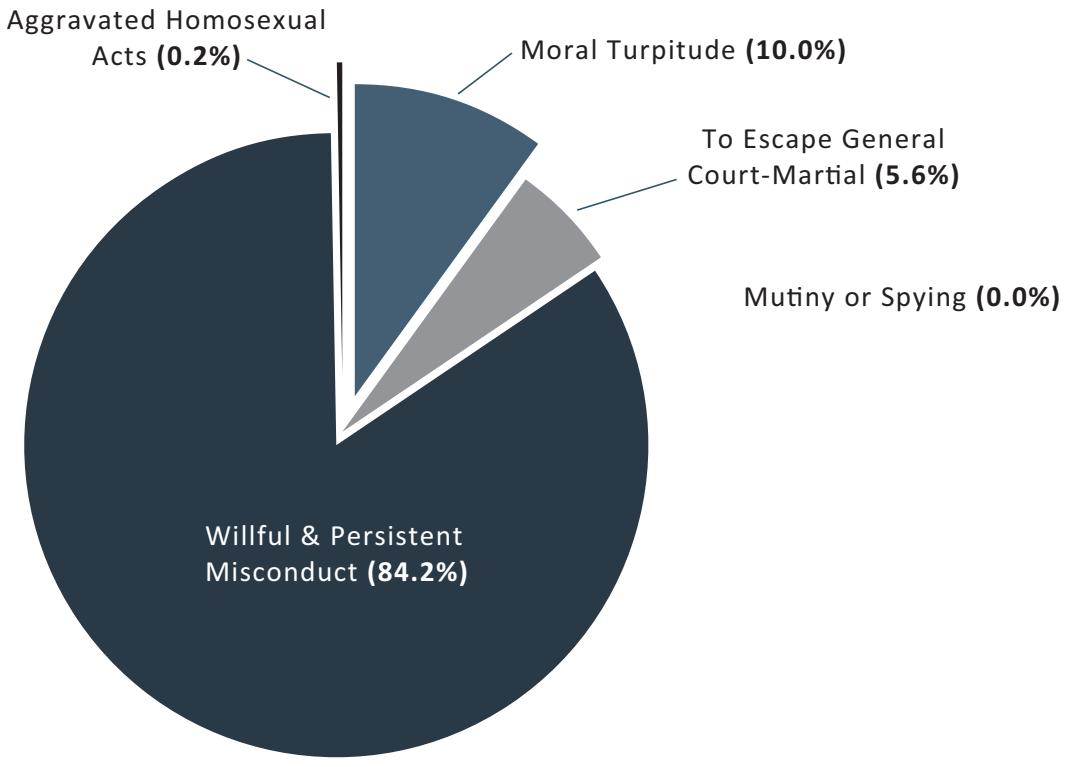
The regulation does permit limited consideration of mitigating circumstances: if the VA considers the misconduct "a minor offense" and the veteran's service was "otherwise honest, faithful, and meritorious." In practice, that exemption is very narrow because of the strict standards for what counts as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

J.E., Marine Corps, Post-2001

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

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

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



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

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

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

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

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

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

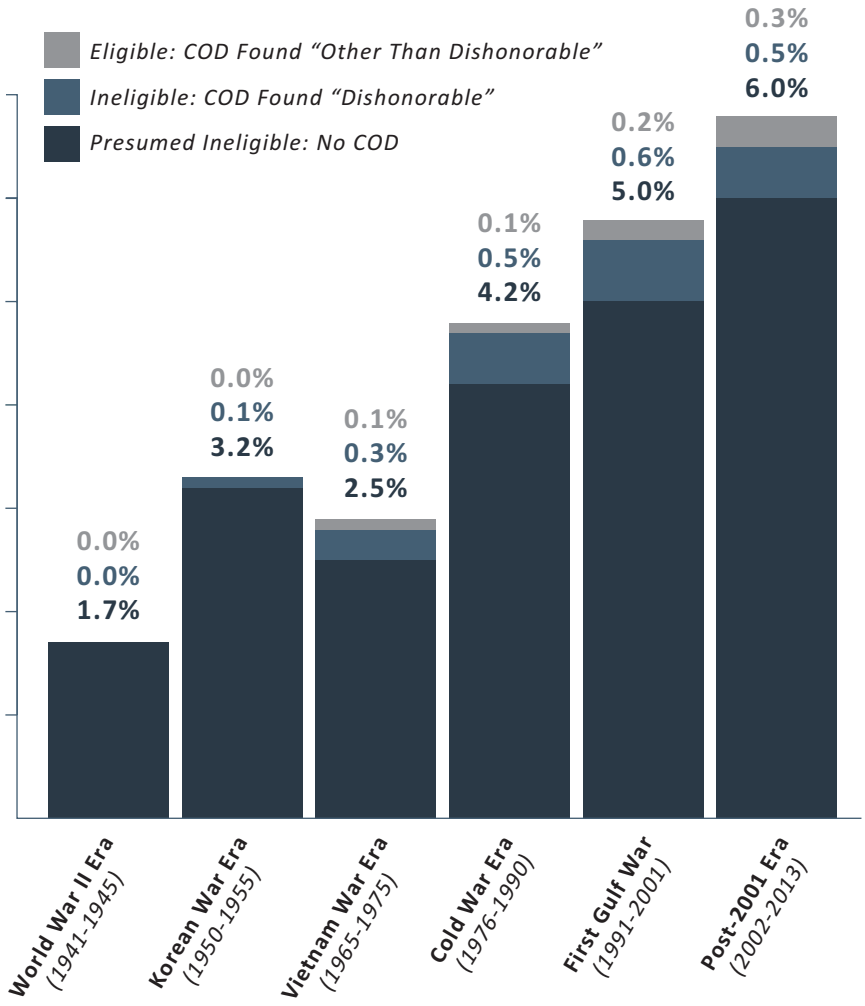
The data above show that the VA excludes veterans with combat service or hardship service from basic veteran services at nearly the same rate as others, indicating that these factors are not considered in COD decisions.

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

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

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

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



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

Vague Regulations Cause Widely Inconsistent Outcomes

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

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

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

The Aggravated Homosexual Conduct Bar Is Unlawfully Prejudicial

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

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

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

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

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

J.R., Marine Corps, Post-2001

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

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

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

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

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

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

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

RECOMMENDATIONS & CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

could access basic VA healthcare and rehabilitation services.

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

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

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

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

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

6. VA Staff Must Understand VA Eligibility & Procedures

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

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

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

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

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

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

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

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

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

APPENDIX

Appendix A: Current VA Regulations

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

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

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

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

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

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

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

(4) As a deserter.

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

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

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

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

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

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

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

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

(2) Mutiny or spying.

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

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

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

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

. . .

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

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

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

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

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

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

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

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

World War II Era: 1941 to 1945

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

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

Korean War Era: 1950 to 1955

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

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

1956 to 1964

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

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

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

Vietnam War Era: 1965 to 1975

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

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

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

Cold War Era: 1976 to 1990

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

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

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

First Gulf War Era: 1991 to 2001

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

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

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

Post-2001 Era: 2002 to 2013

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

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

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

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

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

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

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

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

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

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

EXPLANATION

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

Appendix E: Decisions of the Board of Veterans' Appeals

Total BVA Character of Discharge Determinations, 1992-2015

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

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

Appendix F: Decisions of the VA Regional Offices

Total VARO Character of Discharge Determinations in FY2013

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

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

Appendix G: Character of Discharge Determinations by Era of Service

Total VARO Character of Discharge Determinations by Selected Eras of Service

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

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

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

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

VA Eligibility for Post-2001 Veterans

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

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

Appendix I: VA Eligibility Status for Selected Eras of Service

VA Rate of Exclusion for Selected Eras of Service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

national average: 90.3%

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

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

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

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

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

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

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

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

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

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

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

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

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

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