Chairman Ulrich, Councilman Cabrera, Councilman Maisel, Councilman Vallone, Councilman Borelli, and Commissioner Sutton, my name is Rob Cuthbert. I am the Pro Bono Coordinator at the Urban Justice Center's Veteran Advocacy Project, where I manage the Discharge Upgrade Clinic, and I am also a United States Army veteran of Afghanistan and Iraq. It is a privilege to address you today, and I thank you for convening this hearing. Passage of this resolution would be an exemplary act of national leadership, and we ask the Council to voice its unanimous support of the Fairness for Veterans Act, with haste.

Veterans with less-than-fully-honorable discharges are our nation's most vulnerable veterans. They are thanked by the public, but shunned by employers, stripped of their GI Bill, and barred from VA hospitals. Veterans with less-than-fully-honorable discharges carry a risk of suicide that is nearly three times higher than that of the service member population as a whole.[1] Often injured by combat related trauma, sexual assault, or rape, many veterans with less-than-fully-honorable discharges suffer from Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI), then return home without resources to heal their wounds. Moreover, a less-than-fully-honorable discharge—also known as "bad paper"—is a life sentence. Without a discharge upgrade from a Department of Defense or Deparment of Homeland Security board of review, veterans carry it to their graves.

Our discharge upgrade clinic is one of the largest pro bono discharge upgrade programs for veterans with less-than-fully-honorable discharges in the United States and, the only clinic

[1] Philipps, Dave. "Study Finds No Link Between Military Suicide Rate and Deployments." *The New York Times*, The New York Times, 1 Apr. 2015, http://www.nytimes.com/2015/04/02/us/study-finds-no-link-between-military-suicide-rate-and-deployments.html?_r=0 Accessed 28 Oct. 2016

in New York City. I recruit, train, and mentor attorneys who, in our clinic, assist veterans with applications to the Boards of Review, which might include in-person hearings before the Boards in the Washington, DC metropolitan area. There are very few organizations in the United States that have the knowledge, expertise, resources, and commitment to competently complete a discharge upgrade application.

Veterans incur no cost for our services, which often include extensive investigation, arranging the expert evaluation and testimony of a forensic psychiatrist or psychologist, and physical travel to the Boards. However, there is such an immense need for detailed, expert, and thorough discharge upgrade work that we still have hundreds of veterans on our wait list for services, and nowhere in our area to which to refer them.

Nationally, this is the first public hearing on the Fairness for Veterans Act, and we are very proud that it is occurring, here, in New York City. Nationwide, let it be the first of many. Equity and due process for the hundreds of thousands of veterans with less-than-fully-honorable discharges is nothing less than a nascent civil rights issue.

To begin, I want the Council to know three things about the discharge upgrade process:

1. **There are <u>six</u> different kinds of discharges and anything less-than-fully-honorable leads to a loss of benefits;**
2. **The VA does <u>not</u> issue discharges and it does <u>not</u> grant upgrades; The Department of Defense and Department of Homeland Security issue discharges and grant upgrades;**

3. Discharge upgrades are difficult, resource intensive, and time consuming, but not impossible; Discharge upgrades change and save lives.

Although most people often make the mistake of referring to all less-than-fully-honorable discharges as "dishonorable," dishonorable discharges are extremely rare. It is the rough equivalent of a felony conviction. For context, from fiscal year 2000 to fiscal year 2013, the Department of Defense discharged 2.6 million people and less than one percent received dishonorable discharges.[2] Unfortunately, people use the term "dishonorable," when what they mean is a veteran with a less-than-fully-honorable discharge, including veterans who were discharged administratively. The term "dishonorable" should only be used when actualy discussing a dishonorable discharge that was given as a result of a general court martial.

Most discharges are given administratively, without a court-martial. Less-than-fully-honorable administrative discharges are 1) highly discretionary, 2) sometimes arbitrary or capricious, and 3) almost always given for misdemeanor-level misconduct— or less—for behavior that probably would not get you kicked out of CUNY. One-time drug use, minor acts of military misconduct, a military diagnosis of personality disorder or adjustment disorder, (and before the repeal of "Don't Ask, Don't Tell") being gay, these are some reasons that a veteran could receive an less-than-fully-honorable discharge. For example, a general (under honorable conditions) discharge sounds innocuous, but it strips a veteran of their GI Bill which in New York could allow them to graduate from Pace or St. John's tuition-debt free, and would have

[2] "The Veterans No One Talks About." *National Journal*, https://www.nationaljournal.com/s/620074/veterans-no-one-talks-about. Accessed 28 Oct. 2016 ; Table with discharge figures is missing from article, original table with a source citation of Department of Defense is on file with Urban Justice Center-Veteran Advocacy Project.

provided them with $130,896 [One Hundered and Thirty Thousand, Eight Hundred and Ninety Six dollars] in housing benefits over 36 months. Even worse: an other-than-honorable discharge leads to the loss of the GI Bill and VA health benefits.

I mentioned that between 2000 and 2013 there were approximately 2.6 million discharges. Approximately 294,000 of them, 11%, were administratively characterized as less-than-fully-honorable, in three years, the number has risen to 13%.[3] Over a decade and a half, more than one in ten of our youngest veterans have joined the ranks of the more than560,000 Vietnam veterans with less-than-fully-honorable discharges, and the hundreds of thousands of veterans from other service eras.[4]

After fifteen years of war, PTSD and TBI are the catalyst for many administrative discharges. Yet, in-service rehabilitative efforts lag and thousands of administrative discharges persist. Post-service discharge upgrades become one of the only potential sources of relief for these wounded veterans.

So few veterans' advocates work on discharge upgrades, that, often, discussions like this inappropriately become conversations about the VA. The only relief that the VA can grant a veteran with a less-than-fully-honorable discharge is a waiver into the healthcare and benefits system (and that's an important topic for another hearing). However, it is the Department of Defense and the Department of Homeland Security that are responsible for issuing discharges

[3] Phillips, Dave. "Veterans Want Past Discharges to Recognize Post-Traumatic Stress." *New York Times* , http://www.nytimes.com/2016/02/20/us/veterans-seek-greater-emphasis-on-ptsd-in-bids-to-upgrade-discharges.html. Accessed 28 Oct. 2016.

[4] Waters, Maxine, and Jonathan Shay. "Heal the 'Bad Paper' Veterans." *The New York Times*. New York Times, n.d. Web. 28 Oct. 2016. Originally Published 30 Jul. 1994

to its service members and granting discharge upgrades. To put it another way, in sum, the DoD or DHS issue a sentence of life without benefits, and the VA and other agencies are the executioners.

Discharge upgrades are possible, but very difficult. Not only are the rates of post-9/11 less-than-fully-honorable discharges very high, the numbers of discharge upgrades granted by the DoD for veterans of all service eras are very low. According to a study we conducted last year: in 2013, none of the DoD Discharge Review Boards exceeded an upgrade rate of approximately 10.4%- almost 90% of all applications failed.[5]

Before the highly discretionary Boards of Review, the burden of proof is placed entirely on the veteran. There are no automatic upgrades, and each veteran must apply to the Boards of Review individually, and after their administrative remedies have been exhausted, they have the right to petition in federal court.

Currently, to mitigate PTSD or TBI-related misconduct, a veteran would have to prove to a majority of board members that PTSD contributed to the behavior that caused the discharge, including providing proof that the veteran was suffering from PTSD at the time of the misconduct. Additionally, before some of the boards, if an applicant was deployed to war and claims that they suffered PTSD or TBI as a result of that deployment, there will be a voting member of the board who is "a clinical psychologist or psychiatrist, or a physician with training

[5] Nicholas Cawley and David Inkeles, "Relief Granted: Characterization Upgrades and Changes in Narrative Reason from the U.S. Department of Defense Discharge Review Boards in 2013," Urban Justice Center, Veteran Advocacy Project, on file at with Urban Justice Center-Veteran Advocacy Project; Note: Report does not take into account any decisions that may have been published by the Department of Defense that might have been posted to http://boards.law.af.mil/ after research on report was completed in Spring 2015.

on mental health issues connected with [PTSD or TBI]." Without assistance, how does a homeless, disabled veteran with PTSD or TBI prepare a persuasive application for a Board of Review?

The Boards of Review are understaffed and underfunded. But, their job is complicated by the unsupported and uninformed applications that they receive from thousands of veterans who are told by authorities—including VA staff members—to "just fill out a two page form for an upgrade," and send it to the Boards of Review supported neither by evidence nor legal argument.

A successful discharge upgrade application, with exhibits, looks like this. And, I know Kris Goldsmith of VVA has also brought an application here as well. Successful or unsuccessful, it requires 100-150 hours of work, if not more, and in this case, the testimony of a forensic psychologist—and, sometimes, a hearing in Washington, DC.

So, to reiterate:

1. **There are six different types of discharges and anything less-than-fully-honorable leads to a loss of benefits;**
2. **VA does not grant upgrades; That's DoD and DHS.**
3. **Discharge upgrades are difficult, but not impossible (and save lives).**

And that brings us to the Fairness for Veterans Act:

Even with competent counsel and robust applications, applications often fail. And, specifically, over the years, many of the PTSD-related upgrade applications of Vietnam veterans were being denied because of lack of medical evidence. Concurrent with a class action lawsuit

filed against the DoD, Secretary of Defense Chuck Hagel issued guidance to some of the Boards regarding veterans who were suffering from PTSD.

Hagel's guidance stated, in sum: service medical records of Vietnam veterans don't have evidence of PTSD, because PTSD did not exist as a diagnosis until 1980. So, liberal or special consideration should be given to medical evidence of PTSD when the Boards are mitigating minor acts of misconduct.

For some veterans, Hagel's guidance was an improvement. According to a study commissioned by Vietnam Veterans of America and the National Veterans Council for Legal Redress, in 2013, one board, the Army Board for Correction of Military Records only approved 3.7% of PTSD-related discharge upgrade applications, but in 2014-2015, after Hagel, the number of PTSD-related upgrades before the same Army board jumped to 45% of all applicants.[6] While this is progress, I will add that only 164 people applied.

Right now, it is unclear whether the improvement of Hagel's guidance will be expanded or sustained. Across all DoD-Boards, in the First Quarter and Second Quarter of 2016, only 693 veterans have applied and only 22.5% have received corrections.[7]

Even with improved upgrade rates, the current number of applications under Hagel is anemic. Hagel might have improved the odds for Veterans to one out of four applicants, but it

[6] Sundiata Sidibe and Francisco Unger, "Unfinished Business: Corrrecting 'Bad Paper' for Veterans with PTSD." Veterans Legal Services Clinic, Jerome N. Frank Legal Services Organization at Yale Law School. https://www.law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf P.2

[7] First Quarter 2016 and Second Quarter 2016 numbers were provided by the Department of Defense to Vietnam Veterans of America via the Yale Law School Veterans Legal Services Clinic, on file with Urban Justice Center-Veteran Advocacy Project.

did not improve outreach to thousands of eligible veterans, and, more importantly, it is not codified in law.

The Fairness for Veterans Act actually changes the law. It amends Title 10 of the United States Code to go beyond the liberal consideration of Hagel and to create a "a rebuttable presumption" in favor of the veteran that [PTSD or TBI] "materially contributed" to the circumstances of the discharge. The Fairness for Veterans Act is a profound, significant, and potentially enduring reform to the discharge upgrade process.

However, it only applies to one type of board: the Discharge Review Boards, that, with a 15-year statute of limitations, only serve post-9/11 veterans. So, without new consideration before the Discharge Review Boards, veterans from other eras might not benefit from the Fairness for Veterans Act, because they can't apply to that type of review board.

Therefore, without a doubt, the Fairness for Veterans Act should be expanded to all Boards of Review. And, furthermore, any chance of expansion of the Act will be increased by the support of this Council. Although this bipartisan bill passed unanimously in the Senate, the White House has not publically supported its passage or any improvements that could benefit veterans of all eras before the Boards of Review.

However, with the passage of the law, someone will have to locate the eligible veterans, encourage them to apply, collect relevant evidence—including evidence of PTSD—and then complete a competent, well-argued application, in a manner that preserves potential arguments for federal court.

But, to date, we have not seen effective outreach for two similarly targeted groups of veterans with less-than-fully-honorable discharges: 1) the 100,000 LGBTQI Veterans discharged pre-repeal of "Don't Ask, Don't Tell;"[8] and 2) the approximately 31,000 veterans, since 9/11 who were discharged on the basis of "Personality Disorder," many of whom were discharged illegally with the diagnosis, and many of whom were misdiagnosed with personality disorder after combat or sexual assault-induced PTSD or TBI.[9]

Ineffective applications hurt veterans and it is unclear who will be able to competently assist veterans who will benefit from the Fairness for Veterans Act. I will say that well-trained and well-resourced New York attorneys, especially the most resourced attorneys within the pro bono bar, are well-positioned to assist.

Again, passage of this resolution would be an exemplary act of national leadership, and the Veteran Advocacy Project asks the Council voice its unanimous support of the Fairness for Veterans Act, with haste.

Thank you for the opportunity to speak today.

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[8] Phillips, Dave. "Ousted as Gay, Aging Veterans Are Battling Again for Honorable Discharges ." *The New York Times* , 6 Sept. 2015, http://www.nytimes.com/2015/09/07/us/gay-veterans-push-for-honorable-discharges-they-were-denied.html. Accessed 28 Oct. 2016.

[9] Vietnam Veterans of America, "Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem." March 2012, https://www.law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf

NYC Veterans Alliance
www.nycveteransalliance.org

Testimony by Kristen L. Rouse
President & Founding Director
NYC Veterans Alliance

Hearing on
Resolution 1196 in Support of Fairness for Veterans Act

NYC Council Committee on Veterans

October 28, 2016

My name is Kristen L. Rouse. I am a veteran of the United States Army, I served three tours of duty in Afghanistan, and I live in Brooklyn. I am testifying on behalf of the more than 200 dues-paying members of the NYC Veterans Alliance, several of whom were discharged from the military under less-than-honorable conditions, also known as "bad paper" discharges.

In May of this year, the NYC Veterans Alliance presented Councilman Ulrich with a draft of a proposed resolution in support of Fairness for Veterans legislation, and we again urged you to push this forward in September when it came up again in Washington. We are pleased to see that this committee has at last taken up support of this important bill that proposes **critical help for veterans currently excluded from VA services and who are most at risk for homelessness, substance abuse, incarceration, and suicide.** We strongly support this resolution, and encourage all members of our community to voice their support both locally and nationally.

During my more than 22 combined years of service in the Army Reserve, Army National Guard, and Regular Army, I saw firsthand how any given unit or commander may subjectively choose to treat the behavior of a soldier deemed a "problem," even with the best of intentions. Commanders may be men and women of impeccable integrity, but most are simply not versed in the causes and treatment of mental health conditions, especially those related to traumatic stress, sexual assault, or other circumstances that may affect troops during their military service. The result is that service members are too often discharged unfairly under a less-than-honorable status that negatively impacts them for the rest of their lives. Simply put—**honorable service does not always result in an honorable discharge**. Our veterans, at a minimum, deserve proper review of their discharge circumstances and access to the help they need to continue on in their lives.

Since 2001, more than 300,000 troops—13% of our fighting force— have been discharged from the military with less-than-honorable discharges,[1] rendering them ineligible for many, if not all, veterans benefits and services, including VA healthcare. Three out of four veterans with bad paper discharges who served in combat and have post-traumatic stress disorder are denied eligibility by the VA.[2] Veterans with less-than-honorable discharges[3] are more likely to suffer from substance abuse issues,[4] become homeless,[5] become incarcerated,[6] and go for years without

[1] http://www.nytimes.com/2016/02/20/us/veterans-seek-greater-emphasis-on-ptsd-in-bids-to-upgrade-discharges.html?_r=1
[2] http://taskandpurpose.com/va-denying-benefits-vets-bad-paper-discharges-unprecedented-rates-report-finds/
[3] http://taskandpurpose.com/mental-health-care-bill-vets-no-one-talking/
[4] http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf
[5] https://works.bepress.com/dennis_culhane/185/
[6] http://afs.sagepub.com/content/33/3/337.abstract

treatment for the physical and mental wounds of war.[7] Veterans with bad paper discharges are three times more likely to die by suicide,[8] and preliminary evidence collected by VA suggests that there are decreased rates of suicide among veterans receiving VA health care as opposed to veterans who do not.[9]

The system is currently stacked against "bad paper" veterans. If veterans want to fight their discharge status, the burden of proof is on them to give evidence that their behavior was related to PTSD, traumatic brain injury, or military sexual trauma, which is often impossible to document.[10]

The Fairness for Veterans Act of 2016 (H.R. 4683 / S. 1567), a bipartisan bill sponsored by Representative Mike Coffman (R-CO) and Senator Gary Peters (D-MI), [11] and currently co-sponsored by more than 25 legislators, would create a presumption in favor of the combat veteran during the post-discharge appeals process, meaning that if a veteran was deployed to a combat zone and diagnosed by a mental healthcare professional as experiencing PTSD or TBI as a result of their deployment, the military's Discharge Review Boards (DRB) must consider this diagnosis with a rebuttable presumption in favor of the veteran.[12]

Fairness for Veterans would address medical evidence reviews in the case of a veteran who served in combat and was subsequently diagnosed for post-traumatic stress disorder or traumatic brain injury, or a veteran who has contested their discharge status in whole or in part because of post-traumatic stress disorder or traumatic brain injury related to combat or military sexual trauma.

Fairness for Veterans would also mandate the review of medical evidence of the Department of Veterans Affairs or a civilian health care provider presented by the veteran, and review the case with a rebuttable presumption in favor of the veteran that post-traumatic stress disorder or traumatic brain injury materially contributed to the circumstances resulting in a bad paper discharge.

For these reasons, we support in the strongest terms possible this resolution in support of the Fairness for Veterans Act, and we urge this committee to move on this without further delay.

On behalf of the NYC Veterans Alliance, I thank you for the opportunity to testify today. Pending your questions, this concludes my testimony.

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[7] https://www.fas.org/sgp/crs/misc/R43928.pdf
[8] http://www.ncbi.nlm.nih.gov/pubmed/25830941
[9] https://coffman.house.gov/media-center/press-releases/coffman-introduces-veteran-urgent-access-to-mental-healthcare-act
[10] http://taskandpurpose.com/these-vets-stormed-the-capitol-to-fight-for-service-members-the-pentagon-left-behind/
[11] https://www.congress.gov/bill/114th-congress/house-bill/4684?q=%7B%22search%22%3A%5B%22Veteran+Urgent+Access+Mental+Healthcare%22%5D%7D&resultIndex=2
[12] https://coffman.house.gov/media-center/press-releases/coffman-introduces-fairness-for-veterans-act

Statement of Jeremy Butler
Senior Military Fellow
of
Iraq and Afghanistan Veterans Of America
before the
New York City Council Committee on Veterans

October 28, 2016

Chairman Ulrich, and Distinguished Members of the Committee, on behalf of Iraq and Afghanistan Veterans of America (IAVA) and our 450,000 members,I would like to thank you for the opportunity to testify today in favor of Resolution 1196-2016 which calls for Congressional passage of the *Fairness for Veterans Act* (H.R. 4683/ S.1567).

I am the Senior Military Fellow at IAVA, a 16-year military veteran having served in Operation Iraqi Freedom, and a New Yorker.

After a dozen years, IAVA has become the preferred empowerment organization for post-9/11 veterans. While our members are spread throughout the nation, we are proud to say that our national headquarters is located here, in the great city of New York. Since its beginning IAVA has fought for and has been successful in advocating for policies that are able to meet the needs of today's veterans, and the Fairness for Veterans Act absolutely meets this criteria.

The *Fairness for Veterans Act* would require the Departments of Defense and Veterans Affairs (DoD and VA) to address the most vulnerable among our service members and veterans. These are the veterans that received an other than honorable - or "bad paper" discharge, in some cases because of an undiagnosed or untreated psychological injury. The *Fairness for Veterans Act* would ensure Discharge Review Boards give liberal consideration to petitions for changes to an other than honorable discharge status if the servicemember has PTSD, TBI, or related conditions in connection with their military service. It also extends the policy to military sexual trauma.

Swords to Plowshares recently estimated that there are over 125,000 post-9/11 veterans who have received an other than honorable discharge. This population often is left without access to VA benefits. The process by which they apply for review by the VA to determine their eligibility for services is lengthy, sometimes years, and the responsibility is on the veteran to initiate. Only 10 percent of those have received an

eligibility review. These veterans are at higher risk for suicide and homelessness, and often community programs that serve veterans hold the same eligibility criteria as the VA, so they don't qualify for those programs either. They need our help.

In 2014, IAVA launched the Campaign to Combat Suicide, focusing on the need to provide high quality, timely mental health care to veterans. The campaign was a response to the data at the time that 22 veterans a day die by suicide (current data suggests this number is 20 in 2014) and our own findings from IAVA's *7th Annual IAVA Member Survey* that 40 percent of respondents had considered suicide since joining the military and nearly half knew at least one post-9/11 veteran that had died by suicide. This is a challenging issue to address, but we know that identifying high risk populations, such as those with Other Than Honorable discharges, and helping them connect to services can have a large impact.

As a veteran I know that often the success of subordinates rests upon strong leadership. I've heard from IAVA members who have struggled through the issue of "bad paper" and I think to myself, "How did this happen? Where was the leadership when this person was in uniform?" A substantive answer to that question will have to wait for another place and time. I present the question here though to make a point that the possibility exists that many of these veterans may have simply gotten a raw deal. Today, IAVA is here to support a solution.

These veterans deserve the right to appeal their bad paper discharges to a Discharge Review Board in a way that ensures their injuries are considered. They deserve the care and benefits promised for their service. Passing the *Fairness for Veterans Act* (H.R. 4683/ S.1567) is a solid first step in righting this wrong .

Given the challenges of legislating in an election year, Congress must stay focused on continuing on caring for our veterans. The lives of our military and veterans do not grind to a halt as November approaches and neither should Congress when it comes to fulfilling commitment to those that have served.

Members of the Committee, thank you again for the opportunity to share IAVA's priorities with you here today. I look forward to answering any questions you may have.

Vietnam Veterans of America, Inc.

Angel Almedina Manhattan Chapter 126

October 28, 2016

I wish to thank the N.Y. City Council Veterans Committee for allowing me to speak before you today regarding my support and the support of Manhattan VVA Chapter #126 for Res. #1196 calling for the US Congress to pass and President Obama to sign into law the Fairness for Veterans Act of 2016.

As President of VVA Chapter #126 over the past 15 years, I have met fellow Veterans who have been deprived of their earned benefits because of having been given a less than honorable discharge.

In many instances these "Bad Paper" discharges are due to minor infractions committed by the Veteran such as being AWOL or late for formation. A majority of these less than honorable discharges come at the end of their enlistments and can be traced back to combat related deployments, PTSD and traumatic brain injuries.

A less than honorable discharge will deprive a Veteran of the much needed mental healthcare that they are entitled to as well as access to the VA Healthcare System.

At this time, I would like to take the opportunity to thank and acknowledge the City Council Veterans Committee for your support of the Veterans Court System. The establishing of Veterans Treatment Courts in Brooklyn and Manhattan under the N.Y.S. United Court System is due in no small part to the City Council's support. Many of the issues that Veterans Courts deal with are linked to the same issues that the Fairness for Veterans Act will address.

I also wish to thank the City Council for supporting Veterans Housing and Homeless programs as well as Veteran Vendors in the new N.Y.C. Vending Rules Program.

Further, I request the City Council to continue and increase your support for the N.Y.C. Junior ROTC programs in our public high schools.

Thank you.

Joseph G. Graham
President
VVA Chapter #126

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"The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive veterans of earlier wars were treated and appreciated by our nation." -- George Washington

EXECUTIVE SUMMARY

As a result of the systemic under-diagnosis of post-traumatic stress disorder (PTSD), traumatic brain injury (TBI) and other service-related physical and mental health illnesses and injuries such as military sexual trauma (MST), thousands of service members have been unjustly discharged from the United States armed forces in a manner that makes them ineligible for veterans' benefits. Due to their physical and psychological symptoms and the nature of their separation from the military, veterans with "less-than-honorable" discharges are often socially isolated from the military and veterans community, and are more likely to be homeless,[1] suffer from substance abuse,[2] go without treatment for physical and mental injuries,[3] become incarcerated,[4] and die by suicide.[5]

Although rules vary by service branch, most enlisted troops who have served fewer than six years can be administratively separated by their commanders without the right to a hearing prior to their discharge.[6] According to data from the Military One Source 2013 Demographics Report, over 40% of active-duty troops fall within this category of having fewer than six years in service. [7] In 2014, the Department of Defense (DoD) released records indicating that 13% of post-9/11

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[1] Gundlapalli, Adi V., Jamison D. Fargo, Stephen Metraux, Marjorie E. Carter, Matthew H. Samore, Vincent Kane, and Dennis P. Culhane. "Military Misconduct and Homelessness Among US Veterans Separated From Active Duty, 2001-2012." *JAMA* 314, no. 8 (2015): 832.

[2] Tanielian, Terri, and Lisa H. Jaycox. "Invisible Wounds of War Psychological and Cognitive Injuries,Their Consequences, and Services to Assist Recovery: Summary." *Center for Military Health Policy Research*, 2008. doi:10.1037/e527612010-001

[3] Moulta-Ali, Umar, and Sadath Viranga Panangala. "Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility." *Congressional Research Service*, March 6, 2015. https://www.fas.org/sgp/crs/misc/R43928.pdf.

[4] Armed Forces & Society Volume 33 Number 3 April 2007 337-350 © 2007 Inter-University Seminar on Armed Forces and Society.

[5] Reger, Mark A., Derek J. Smolenski, Nancy A. Skopp, Melinda J. Metzger-Abamukang, Han K. Kang, Tim A. Bullman, Sondra Perdue, and Gregory A. Gahm. "Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation From the US Military." *JAMA Psychiatry* 72, no. 6 (2015): 561. doi:10.1001/jamapsychiatry.2014.3195.

[6] Army Regulation 635–200, 13–8b, http://www.apd.army.mil/jw2/xmldemo/r635_200/head.asp

[7] Military One Source, 2013 Demographics Report http://download.militaryonesource.mil/12038/MOS/Reports/2013-Demographics-Report.pdf

veterans, roughly 318,000, received a less-than-honorable discharge between fiscal years (FY) 2000–2013.[8] Since January 2009, the Army has separated at least 22,000 combat veterans who had been diagnosed with mental health disabilities or TBI for alleged misconduct, despite reforms intended to halt the administrative separations of veterans suffering from service-related conditions.[9]

All veterans who suffer from service-related physical and mental illnesses, injuries and disorders, who have less-than-honorable discharges should be granted the right to a fair, evidence-based discharge appeal process. This process should fully consider the affected veterans' entire medical history, giving special consideration to diagnoses for conditions which began during the time in service, but were diagnosed after separation. This will allow them to obtain the benefits designed to help returning troops recover and successfully transition back into civilian society. Efforts should be made not only to reform the discharge review process for those who apply to review boards in the future, but also to seek out all of those veterans who are eligible in a way that fully educates them on how to file a successful claim. Veterans who were previously denied relief by the boards under obsolete standards should be made eligible for a new review, and provided the appropriate materials that would help them to file a successful claim.

[8] Carney, Jordain. "The Veterans No One Talks About." National Journal. September 14, 2014. Accessed December 21, 2015. http://www.nationaljournal.com/defense/2014/09/14/Veterans-No-One-Talks-About?mref=scroll

[9] Zwerdling, Daniel. "Missed Treatment: Soldiers With Mental Health Issues Dismissed For 'Misconduct'" NPR. December 4, 2015. Accessed December 21, 2015. http://www.npr.org/2015/10/28/451146230/missed-treatment-soldiers-with-mental-health-issues-dismissed-for-misconduct.

BACKGROUND: WHY DOES THIS HAPPEN?

In an effort to quickly remove service members who maintain a "non-deployable" status due to illness or injury, rather than endure the lengthy process of medical retirement, the military has instead improperly used administrative discharges in a manner that has denied service members the economic, educational and medical support to which they should be entitled. These administrative discharges typically fall under the broad categories of "preexisting conditions," "convenience of the government" or "misconduct" and have resulted in veterans' discharge characterizations being below "Honorable." "Less-than-honorable" discharges limit or eliminate the federal and state benefits available to veterans upon separation from the military,[10] which are critical to their reintegration into society after their service. Instructors at the United States Army Judge Advocate General's School, wrote in the Winter 2012 issue of *Military Law Review* that "enough data now exist to conclude that *the military has essentially criminalized mental illness in many instances*—and a very predictable type of mental illness at that [emphasis added]."[11]

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[10] Types of military discharges include: Honorable Discharge, General Under Honorable Conditions Discharge, Other Than Honorable (OTH) Discharge, Bad Conduct Discharge, Dishonorable Discharge, and Entry-Level Separation. Honorable, General, OTH discharges and Entry-Level Separations can be issued administratively my military commanders without the service-member having an opportunity to formally appeal the discharge before it is processed. Bad Conduct and Dishonorable discharges can only be issued as a result of a Court Martial. Honorable discharges are the most commonly issued type of discharge for troops who have served a full term of service or are medically retired. Veterans with General discharges are automatically eligible for all VA benefits with the exception of "GI Bill" educational assistance programs. Eligibility for VA benefits for veterans with Other Than Honorable discharges is determined by the "character of service" listed on discharge paperwork. Veterans who receive a Bad Conduct discharge as a result of a General Court Martial, and veterans with Dishonorable Discharges are excluded from all VA benefits, by law. Veterans with OTH and Bad Conduct Discharges as a result of a Special Court Martial can apply for a "characterization of discharge review" through the VA appeals board in order to petition for increased access to benefits. Moulta-Ali, Umar, and Sadath Viranga Panangala. "Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility." *Congressional Research Service*, March 6, 2015. https://www.fas.org/sgp/crs/misc/R43928.pdf.

[11] Brooker, John W., Major, Evan R. Seamone, Major, and Leslie C. Rogall, Ms. "BEYOND "T.B.D.": UNDERSTANDING VA'S EVALUATION OF A FORMER SERVICEMEMBER'S BENEFIT ELIGIBILITY FOLLOWING INVOLUNTARY OR PUNITIVE DISCHARGE FROM THE ARMED FORCES." *Military Law Review* 214 (2012): n. pag. Print.

According to the VA, as many as 20% of Iraq and Afghanistan veterans have experienced PTSD, and up to 30% of Vietnam veterans have suffered from PTSD at some point in their lives.[12] Veterans with less-than-honorable discharges are often referred to as having received "bad paper" discharges.

The designation of administrative discharges when rehabilitation or medical retirement would have been more appropriate spans all generations of veterans, especially for veterans who served before the diagnosis of PTSD was included in the third edition of the Diagnostic Statistical Manual (DSM-III) by the American Psychiatric Association in 1980.[13] In times of active military conflict when the operations tempo is high, commanders have an incentive to use relatively quick and easy administrative separations to remove non-deployable service members so that they can receive new, deployable troops into the unit. In times when the military is forced to downsize due to congressional budgeting, administrative discharges become a common tool that commanders utilize to help them reach their lower target numbers.

Many commanders and troops, despite counseling requirements and judge advocate general officers being involved in discharge proceedings, wrongfully believe that less-than-honorable discharges are automatically upgraded to Honorable after a period of six months. Therefore, the assumption is that a punitive discharge is a temporary punishment, and that the veteran will be made eligible for VA benefits without even needing to file an appeal. This belief is so common that the Army Discharge Review Board has had to address the issue on its website by clarifying

[12] Friedman, Matthew J., MD, PhD. "PTSD: National Center for PTSD." PTSD History and Overview -. Accessed December 22, 2015. http://www.ptsd.va.gov/professional/PTSD-overview/ptsd-overview.asp.

[13] Izzo, Rebecca. "In Need of Correction: How the Army Board for Correction of Military Records Is Failing Veterans with PTSD." *The Yale Law Journal* 123, no. 5 (March 2014). Accessed January 31, 2016. http://www.yalelawjournal.org/comment/in-need-of-correction-how-the-army-board-for-correction-of-military-records-is-failing-veterans-with-ptsd.

to potential applicants that "there is no automatic upgrade of a discharge after six months or any other time period."[14] Troops who believe the automatic upgrade to be true may choose not to defend themselves, seek representation, or seek redress until it is too late. Commanders who believe this to be true may not be able to fully consider the effects on the individual for whom they are recommending a discharge.

The long-term damage done to veterans who are inappropriately discharged is often hidden from their former commanders, due to the nature of separation isolating the affected veterans. The Department of Defense has a financial incentive to use administrative separations to discharge service members, and to maintain the characterization of discharge for veterans with less-than-honorable discharges, as both medical retirement and regular retirement impose costs on the DoD budget for the lifetime of the veteran. By avoiding the practice of issuing medical or regular retirement, the DoD is completely absolved from the responsibility of caring for the veteran.[15] Veterans who after receiving a less-than-honorable discharge are granted a retroactive medical retirement date may be entitled to backpay that is paid by the Defense Finance and Accounting System (DFAS).[16]

TYPES OF REVIEW BOARDS: WHAT MAKES THEM DIFFERENT?

Each branch of the military has two types of review boards that have the ability to upgrade discharges. Each has its own limitations and authorized powers. The Discharge Review Board

[14] Army Review Boards Agency. "Army Discharge Review Board." Army Discharge Review Board - Frequently Asked Questions. Accessed December 21, 2015. http://arba.army.pentagon.mil/adrb-faq.cfm.
[15] Kors, Joshua. "How Specialist Town Lost His Benefits." The Nation. March 29, 2007. Accessed December 21, 2015. http://www.thenation.com/article/how-specialist-town-lost-his-benefits/.
[16] Army Review Boards Agency. "The Army Board for Correction of Military Records - Frequently Asked Questions." Army Board for Corrections of Military Records - Frequently Asked Questions. Accessed December 21, 2015. http://arba.army.pentagon.mil/abcmr-faq.cfm.

(DRB) is the first level at which a veteran can appeal, if the veteran has been discharged within the previous 15 years, and without having been discharged due to a general court-martial. The purpose of the review by the DRB is to:

> *... determine if the discharge was granted in a proper manner, i.e. in accordance with regulatory procedures in effect at the time, and that it was equitable, i.e. giving consideration to current policy, mitigating facts, and the total record [emphasis added]. The objective of the Army Discharge Review Board (ADRB) is to examine an applicant's administrative discharge and to change the characterization of service and/or the reason for discharge based on standards of equity or propriety...The ADRB is not authorized to revoke any discharge, to reinstate any person who has been separated from the Army, or to recall any person to active duty. Bad-conduct discharges given as a result of a special court-martial may be upgraded only on the basis of clemency.*[17]

At this time, most post-9/11 veterans who have received less-than-honorable discharges are eligible to appeal to the DRBs. The applicant may request from the DRBs a change in reason for discharge, or a change in character of discharge.[18] While the character of discharge — Honorable, General Under Honorable Conditions, Other Than Honorable, Bad Conduct Discharge and Dishonorable Discharge — is what determines eligibility for veterans benefits, the *reason* for discharge can also have a tremendous impact on the life of the veteran.[19] Reasons for discharge such as "Homosexual Conduct" or "Personality Disorder" (PD) can stigmatize a veteran and make it difficult to fully integrate back into civilian life since employers frequently request the veteran's DD-214 (discharge paperwork) during the hiring process.[20]

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[17] Army Review Boards Agency. "Army Discharge Review Board." Army Discharge Review Board - Overview. Accessed December 21, 2015. http://arba.army.pentagon.mil/adrb-overview.cfm.

[18] ibid.

[19] U.S. Congressional Research Service. Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility (R43928; March 6, 2015), by Umar Moulta-Ali and Sidath Viranga Panangala. Text from: Congressional Research Digital Collection; Accessed: December 21, 2015

[20] Ader, :Melissa, Robert Cuthbert, Kendall Hoechst, Zachary Strassburger, and Michael Wisnie. "Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem." *Veterans Legal Services Clinic, Inc.*, March 2012. Accessed December 21, 2015. http://www.vva.org/PPD-Documents/WhitePaper.pdf.

Generations that served prior to Sept. 11, 2001, and those who were discharged as a result of a general court-martial, must apply to the Boards for Correction of Military Records or Board for Correction of Naval Records (BCM/NR).[21]

> *The Army Board for Correction of Military Records (ABCMR) is the highest level of administrative review within the Department of the Army with the mission to correct errors in or remove injustices from Army military records...When necessary, advisory opinions are obtained from other Army staff elements. If an advisory opinion is obtained, it will be referred to the applicant for comment before the application is further considered. In some cases, administrative corrections can be made based on the records and advisory opinions without the need for a Board decision. If the application cannot be resolve [sic] administratively, the Board staff will prepare a brief for the Board's consideration. The Board will render a decision which is final and binding on all Army officials and government organizations [emphasis added]. When directed, corrections will be made to the record and related corrective actions will be taken by the responsible Army or government organization. Applicants may request reconsideration of a Board decision within one year of a decision if they can provide new relevant evidence that was not considered by the Board.*[22]

BCM/NRs are the last available level of appeal under the DoD. While they are authorized to retroactively medically retire a veteran — a process that will initiate back pay for lost benefits — veterans are not able to seek damages from the BCM/NRs.[23] The backlog of cases varies, and is currently estimated to be at least 12 months with an additional 3-4 months for DFAS to issue pay adjustments.[24]

CORRECTING DISCHARGES: AN UNREASONABLE BURDEN

[21] Chu, David S.C., Under Secretary of Defense (Personnel and Readiness). "Discharge Review Board (DRB) Procedures and Standards." *DoD Instruction 1332.28; April 4, 2004 (see Also DTM-10-22)*, April 4, 2004. Accessed December 21, 2015. http://www.dtic.mil/whs/directives/corres/pdf/133228p.pdf.
[22] Army Review Boards Agency. "Army Board for Corrections of Military Records." Army Board for Corrections of Military Records - Overview. Accessed December 21, 2015. http://arba.army.pentagon.mil/abcmr-overview.cfm
[23] Army Review Boards Agency. "Army Board for Corrections of Military Records." Army Board for Corrections of Military Records - Frequently Asked Questions. Accessed December 21, 2015. http://arba.army.pentagon.mil/abcmr-faq.cfm
[24] ibid.

Correcting a less-than-honorable discharge is typically a multi-year process that often requires the applicant to seek assistance from private doctors and an attorney in order to gather and present evidence of existing service-related disabilities so that he or she can file an appeal.[25] Retaining a lawyer and hiring doctors to diagnose and treat PTSD and TBI can be cost prohibitive, especially considering that a less-than-honorable discharge negatively impacts employment prospects for the affected veteran, and can eliminate VA access and disqualify them from much-needed disability compensation. As a result of sequestration, DRBs and BCM/NRs only operate in the Washington, D.C. metro area, so veterans, witnesses and lawyers may need to travel in order to participate in a personal hearing.[26] The overall success rate for veterans applying for PTSD-based discharge upgrades at the Army BCMR was as low as 3.7% recently, even among a self-selecting group of veterans who were confident that they had solid evidence to receive a discharge upgrade.[27] For veterans suffering from PTSD and TBI, this difficult process, which more often than not results in a denial of relief, can exacerbate symptoms. This is especially dangerous for veterans who are ineligible to receive treatment for their conditions due to their discharge status.

DRBs and BCM/NRs are administrative review panels, not investigative bodies, and are permitted to change the characterization of service and/or the reason for discharge based on

[25] Army Review Boards Agency. "Army Board for Correction of Military Records." Applicant's Guide to Applying to the Army Board for Corrections of Military Records. Accessed December 21, 2015. http://arba.army.pentagon.mil/documents/ABCMR%20Applications%20Guide%2020141203.doc

[26] Yale Law School Veterans Legal Services Clinic, "Addressing the Military Correction Boards' Unfair Treatment of Vietnam Veterans with PTSD," on file with author.

[27] Sidibe, Sundiata, and Francisco Unger. "Unfinished Business: Correcting "Bad Paper" for Veterans with PTSD. The Defense Department's Adjudication of Discharge Upgrade Applications One Year Since Its September 2014 PTSD Directive" (2015): n. pag. *Yale Law School, Reports & Manuals*. Veterans Legal Services Clinic, Sept. 2015. Web. 22 Dec. 2015.

"standards of equity or propriety."[28] Until 2014, DRBs were not required to include a mental health professional (or a physician with special training on mental health), even in cases in which combat-related PTSD and TBI were claimed as primary mitigating factors.[29] (This requirement is the letter of the law; explained below.) BCM/NRs are required only to include the *opinion* of a clinical psychiatrist or psychologist when a veteran has been diagnosed with a mental health disorder during his or her time in service, though a mental health professional is not required to be a voting member of BCM/NRs in cases involving mental health illnesses or injuries.[30] For veterans who are diagnosed with a mental health disorder after their time in service, it is unclear if they receive the same protections. This is especially important for those who served before 1980, when the DSM-III first included PTSD as a legitimate diagnosis.[31] Therefore, the vast majority of Vietnam-era veterans could not have been properly diagnosed during their time in service.

HISTORY OF BAD PAPER: THE VIETNAM ERA

The use of administrative discharges peaked during the Vietnam War, with as many as 560,000 veterans receiving less-than-honorable discharges during that time.

> *Three hundred thousand of these were General Discharges, which have no effect on most benefits but carry a grave stigma and often have adverse effects on employment. The remaining 260,000 were "bad paper" discharges -- wither Other than Honorable (also sometimes termed Undesirable), Bad Conduct, or Dishonorable Discharges. These veterans were "simply cut off from any government help at all, and not even eligible for a civil service job."*[32]

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[28] Army Review Boards Agency. "Army Board for Corrections of Military Records." Army Board for Corrections of Military Records - Overview. Accessed December 21, 2015. http://arba.army.pentagon.mil/abcmr-overview.cfm

[29] Public Law No: 113-291, Section 521; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015

[30] 10 U.S. Code § 1552

[31] Izzo, Rebecca. "In Need of Correction: How the Army Board for Correction of Military Records Is Failing Veterans with PTSD." *The Yale Law Journal* 123, no. 5 (March 2014). Accessed December 21, 2015. http://www.yalelawjournal.org/comment/in-need-of-correction-how-the-army-board-for-correction-of-military-records-is-failing-veterans-with-ptsd.

[32] ibid.

Veterans with less-than-honorable discharges are not only cut off from Department of Veterans Affairs (VA) benefits, but also from services provided by other federal agencies and many state-provided benefits. Although unemployment insurance rules vary state by state, many veterans who receive bad paper discharges are excluded from eligibility for unemployment insurance, which further compounds difficulties associated with integrating back into civilian society.[33] Many Vietnam veterans faced discrimination upon their return to the United States due to their participation in an unpopular war, and those who were branded with a less-than-honorable discharge likely faced further difficulties in finding gainful employment. Although the psychological effects of participation in war have been documented since as early as Homer's Odyssey, it wasn't until 1980 that the DSM-III included the nomenclature "Post-Traumatic Stress Disorder" to fully recognize problematic symptoms of returning war veterans as a legitimate illness. Physical and psychological symptoms that were for hundreds of years casually referred to with terms such as "soldier's heart" or "shell shock" suddenly were recognized as mental illness that was no longer the fault of the individual who suffered the lasting effects of war. Doctor Matthew J. Friedman provides an explanation of the effect that the updated DSM had on perception by the medical community of those who have experienced trauma:

> *From an historical perspective, the significant change ushered in by the PTSD concept was the stipulation that the etiological agent was outside the individual (i.e., a traumatic event) rather than an inherent individual weakness (i.e., a traumatic neurosis). The key to understanding the scientific basis and clinical expression of PTSD is the concept of "trauma."*[34]

[33] Department of Veterans Affairs. "Office of Public Affairs." Federal Benefits for Veterans, Dependents and Survivors -. Accessed December 22, 2015. http://www.va.gov/opa/publications/benefits_book.asp.
[34] Friedman, Matthew J., MD, PhD. "PTSD: National Center for PTSD." PTSD History and Overview -. Accessed December 22, 2015. http://www.ptsd.va.gov/professional/PTSD-overview/ptsd-overview.asp.

When the leading diagnostic manual was updated to show that PTSD symptoms were not the fault of the veterans who were psychologically impacted by war, the military should have enacted immediate reforms to administrative discharge proceedings. Unfortunately, it took over three decades for Congress to demand that the DoD execute policies designed to effectively protect troops who were disabled as a result of their service.[35]

HISTORY OF IMPROPER DIAGNOSES: THE POST-9/11 ERA

In 2007–2010, congressional investigations and The Nation magazine revealed that the U.S. military had illegally used separations based on PD to deny benefits to injured and PTSD-stricken troops.[36] This congressional oversight review revealed that the diagnosis of PD, which is characterized as a preexisting condition, was inappropriate in many cases.[37,38,39,40] Preexisting conditions are non-compensable disabilities for which a service member can not be medically retired, because they are not considered resulting directly from military service. The Nation reported that "[T]he military is purposely misdiagnosing soldiers… and it's doing so for one reason: to cheat them out of a lifetime of disability and medical benefits, thereby saving

[35] Public Law No: 111-84 Section 512; OCT. 28, 2009 National Defense Authorization Act for Fiscal Year 2010
[36] Kors, Joshua. "How Specialist Town Lost His Benefits." The Nation. March 29, 2007. Accessed December 21, 2015. http://www.thenation.com/article/how-specialist-town-lost-his-benefits/.
[37] Ader, :Melissa, Robert Cuthbert, Kendall Hoechst, Zachary Strassburger, and Michael Wishnie. "Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem." *Veterans Legal Services Clinic, Inc.*, March 2012. Accessed December 21, 2015. http://www.vva.org/PPD-Documents/WhitePaper.pdf.
[38] Government Accountability Office. "Defense Health Care Additional Efforts Needed to Ensure Compliance with Personality Disorder Separation Requirements." *United States Government Accountability Office*, October 2008. Accessed December 22, 2015. doi:10.1007/springerreference_34767.
[39] Draper, Debra A. "House Committee on Veterans' Affairs." House Committee on Veterans' Affairs. September 15, 2010. Accessed December 22, 2015. http://archives.veterans.house.gov/hearings/Testimony.aspx?TID=3192&Newsid=2266&Name=+Debra+A.+Draper%2C+Ph.D.%2C+M.S.H.A.
[40] United States Government Accountability Office. "Defense Health Care: Better Tracking and Oversight Needed of Servicemember Separations for Non-Disability Mental Conditions." *Defense Health Care: Better Tracking and Oversight Needed of Servicemember Separations for Non- Disability Mental Conditions*, February 2015. Accessed January 22, 2015. http://www.gao.gov/assets/670/668519.pdf.

billions in expenses."[41] Although the investigation by The Nation focused only on the Army, the problem exposed by The Nation is endemic to each of the branches of service.

In light of these revelations and congressional pressure, the Army updated its policy, significantly reducing the number of soldiers diagnosed with and discharged due to PD. Although the Army never admitted that previous diagnoses were improper, discharges due to PD dropped by 75% between 2008 and 2009. Despite this shift, military doctors thereafter began diagnosing more troops with adjustment disorder (AD), which is also characterized as a preexisting condition.[42]

AD symptoms overlap with PTSD and PD; these include fighting, reckless driving, financial irresponsibility, poor work performance, and self-medicating or destructive behavior such as excessive drinking, drug use, or attempting suicide.[43] When service members experience any of these symptoms, commanders can wrongfully interpret these symptoms as willful misconduct by the affected service member, and quickly remove the service member with a punitive or administrative discharge. Rather than attempt to rehabilitate and medically treat veterans as required by military regulations, the military more often finds it cheaper and administratively more convenient to abandon them in their time of greatest need.[44]

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[41] Kors, Joshua. "How Specialist Town Lost His Benefits." The Nation. March 29, 2007. Accessed December 21, 2015. http://www.thenation.com/article/how-specialist-town-lost-his-benefits/.

[42] Ader, :Melissa, Robert Cuthbert, Kendall Hoechst, Zachary Strassburger, and Michael Wisnie. "Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem." *Veterans Legal Services Clinic, Inc.*, March 2012. Accessed December 21, 2015. http://www.vva.org/PPD-Documents/WhitePaper.pdf.

[43] *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*. Washington, D.C.: American Psychiatric Association, 2013.

[44] Kors, Joshua. "How Specialist Town Lost His Benefits." The Nation. March 29, 2007. Accessed December 21, 2015. http://www.thenation.com/article/how-specialist-town-lost-his-benefits/.

In 2006, 1,453 troops were discharged for AD from all service branches. By 2009, that number had grown to 3,844 — an increase of 165%.[45] Although there was a change in the nomenclature associated with certain discharges, the actual practice of inappropriately discharging troops who had suffered psychological impairment during and as a result of their time in service continued. Therefore, many of these troops were administratively discharged after being found "unfit for service due to a preexisting condition," despite having years of honorable service before their symptoms manifested themselves. AD and PD are considered by the military to be mental health conditions that exist before entry into military service, unlike PTSD and TBI, which are considered to be the result of combat or trauma incurred as a result of military service, and therefore, are considered "service-connected" injuries. By misclassifying a service member as having an AD or PD, the military was determining that there had been a preexisting condition even if, in fact, the condition developed during the service member's time in the military and because of events that affected the service member during the course of it.

The implication for medical benefits is significant with regard to discharges related to preexisting conditions: Veterans with service-connected conditions are entitled to VA medical benefits while *service members with preexisting conditions are not entitled to any benefits* for those conditions. As reported in August 2010 in Army Times:

> *According to the psychiatric manual used to diagnose mental health issues, the DSM-IV, Adjustment Disorder occurs when someone has difficulty dealing with a life event, such as a new job or a divorce, or after someone has been exposed to a traumatic event. The symptoms can be the same as for PTSD: flashbacks, nightmares, sleeplessness, irritability, anger and avoidance. According to military and Veterans Affairs Department policy, if those symptoms last longer than six months, the diagnosis should be changed to PTSD. With a PTSD diagnosis, a person may be*

[45] Kennedy, Kelly. "Discharges for Adjustment Disorder Soar." Army Times. August 12, 2010. Accessed December 22, 2015. http://archive.armytimes.com/article/20100812/NEWS/8120325/Discharges-adjustment-disorder-soar.

medically retired with an honorable discharge, a disability rating of at least 50 percent, and medical care.[46]

Subsequent to these studies, the Army has recently taken positive steps to protect service members from receiving improper diagnoses of PD, AD, or malingering. In an April 2012 memorandum titled "Policy Guidance on the Assessment and Treatment of Post-Traumatic Stress Disorder (PTSD)," Medical Command Chief of Staff Herbert A. Coley instructed Army commanders and medical personnel to carefully screen soldiers with a deployment history for PTSD before branding them with a lesser diagnosis.[47] Following the VA's recognition of AD as a compensable disability, in October 2013, Army Chief of Staff John M. McHugh instructed Army commanders and medical personnel to recommend soldiers receiving a diagnosis of AD to a Medical Evaluation Board (MEB).[48] MEBs are specialized boards that can recommend medical retirement for soldiers who have a diagnosis which interferes with their job performance. Medical retirement typically entitles soldiers to a pension and an honorable discharge, which grants full eligibility for veterans benefits.

In keeping with this new protocol, legislation such as "The Servicemembers Mental Health Review Act" sought to review the more than 31,000 discharges received by veterans due to PD or AD between 2001 and 2013, to determine whether they were suffering from PTSD.[49]

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[46] ibid.

[47] Coley, Herbert A., Medical Command Chief of Staff. "Policy Guidance on the Assessment and Treatment of Post-Traumatic Stress Disorder (PTSD)" *OTSG/MEDCOM Policy Memo 12-035; April 10, 2012*, Accessed December 22, 2015. http://cdn.govexec.com/media/gbc/docs/pdfs_edit/042312bb1.pdf

[48] Kime, Patricia. "Adjustment Disorder May Now Net Disability Pay." Army Times. October 11, 2013. Accessed December 22, 2015. http://archive.armytimes.com/article/20131011/NEWS/310110027/Adjustment-disorder-may-now-net-disability-pay.

[49] The Servicemembers Mental Health Review Act, H.R. 975, 113th Cong. (2013). This bill did not pass.

However, the bill failed to protect veterans who received those diagnoses of PD or AD after having deployed and who were then administratively or punitively discharged with another narrative reason for separation, such as "misconduct" or "convenience of the government." The bill stated:

> *The Government Accountability Office has found that the regulatory compliance of the Department of Defense in separating members of the Armed Forces on the basis of a Personality Disorder or Adjustment Disorder was as low as 40 percent between 2001 and 2007.*[50]

Noting the adverse consequences that the bill sought to remedy, Army Times reported that "Not only are those veterans denied benefits, but the diagnoses also appear on their discharge papers, which can stigmatize them and make it harder to find civilian employment."[51] By virtue of this legislation, affected veterans would be able to present testimony from psychiatrists and psychologists to the Physical Disability Board of Review to petition for a correction of military records and the benefits of a medical retirement. However, the bill failed to pass in the 113th Congress.

Legislation such as the Servicemembers Mental Health Review Act are a great start. However, as indicated above, it would have failed to aid thousands of PTSD-afflicted veterans who have received the diagnoses of PD or AD after having deployed and who have fallen victim to other forms of administrative discharges, such as "misconduct" or "convenience of the government." It is for this reason that new, more comprehensive legislation should be proposed to clarify that the review procedures should apply equally to all discharged service members who received a diagnosis of PD or AD, especially for those whose symptoms became problematic only after

[50] ibid.
[51] Maze, Rick. "Bill Would Review Discharges for Possible PTSD." Army Times. March 6, 2013. Accessed December 22, 2015. http://archive.armytimes.com/article/20130306/NEWS/303060347/Bill-would-review-discharges-possible-PTSD.

having deployed to combat zones. This would also allow service members with either diagnosis to submit testimony from psychologists and psychiatrists that supports a more accurate diagnosis of PTSD or TBI making them eligible for a change of discharge.

MILITARY SEXUAL TRAUMA: BETRAYAL WITHIN THE BRANCHES

Those who suffer from MST face complex mental, emotional and physical difficulties as a result of hostile actions not by the enemy, but often their own military superiors and colleagues. Military sexual trauma is defined as:

> *... psychological trauma, which in the judgement of a VA mental health professional, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the Veteran was serving on active duty, active duty for training, or inactive duty for training.*[52]

Sexual harassment is further defined under the same law as "repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character."[53] The victim need not be in uniform, on base or working when the incident occurred in order to meet the VA's definition; only on military orders. The identity of the perpetrator, whether military, civilian, or foreign national, also does not matter.

MST is incredibly common for military veterans. According to the VA, 25% of women veterans and 1% of male veterans report incidents that meet the criteria for MST.[54] Women in the military

[52] Title 38 U.S. Code 1720D
[53] ibid.
[54] Department of Veterans Affairs. *Military Sexual Trauma General Fact Sheet*. QuickSeries Publishing, 2015. Accessed December 22, 2015. http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf.

are often assumed to be the only survivors of MST; however, because there are so many more men who serve in the military, the figures above reveal that there are a tremendous number of survivors among both sexes. MST is an "experience," not a diagnosis, and not all service members who experience MST suffer any symptoms. Some, however, may exhibit symptoms that make a diagnosis such as severe PTSD appropriate.[55]

MST can affect veterans in a variety of ways, ranging from temporary symptoms that do not significantly impact the individual's life, to debilitating and life-altering effects that could qualify a service member for medical retirement if rehabilitation is determined by commanders to not be feasible. According to the VA:

> *Although posttaumatic [sic] stress disorder (PTSD) is commonly associated with MST, it is not the only diagnosis that can result from MST. For example, VA medical record data indicate that in addition to PTSD, the diagnoses most frequently associated with MST among users of VA health care are depression and other mood disorders, and substance use disorders.*[56]

What complicates the issue of MST for many survivors is that the traumatizing experience may involve a person or people whom the survivor works with on a daily basis, and as a result, professional relationships may be a source of long-lasting conflict.

The "Department of Defense Fiscal Year 2014 Annual Report on Sexual Assault in the Military" concludes that despite recent improvements, "more must be done to eliminate the crimes that constitute sexual assault and implement culture change."[57] The DoD estimates that only 25% of incidents are reported. The rising rate of reported incidents of MST indicates a growing trust

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[55] Department of Veterans Affairs. "Disability Compensation for Conditions Related to Military Sexual Trauma (MST)." April 2015. Accessed December 22, 2015. http://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/MST.pdf.

[56] Department of Veterans Affairs. *Military Sexual Trauma General Fact Sheet*. QuickSeries Publishing, 2015. Accessed December 22, 2015. http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf.

[57] Carson, Brad, Acting Under Secretary of Defense. *Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2014*. Department of Defense, 2015. Accessed December 22, 2015. http://sapr.mil/public/docs/reports/FY14_Annual/FY14_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

among MST survivors in the system to protect them after reporting crimes; however, studies indicate that service members are still 12 times more likely to suffer from retaliation after reporting an assault than seeing their offenders convicted.[58]

DON'T ASK, DON'T TELL REPEAL: INCREASED BURDEN ON REVIEW BOARDS

As many as 114,000 service members were discharged for being gay between World War II and 2011, when the repeal of the military's "Don't Ask, Don't Tell" (DADT) policy was enacted.[59] While the repeal of DADT makes most of these veterans eligible for the honorable discharge and correction to the narrative of separation they deserve, the sheer number of veterans whose cases need to be processed dramatically increases the burden of the review boards. Veterans discharged due to their sexual orientation as far back as the 1950s have struggled without access to VA benefits, and as they age, access to health care becomes ever more critical.

Many veterans discharged because of their sexual orientation who are eligible for discharge upgrades may have difficulty finding the necessary paperwork for an appeal, especially after decades of dealing with the stigma and shame associated with their discharge.[60] While bills such as the Restore Honor to Service Members Act of 2015 would codify into law an appropriate level of fairness and consistency for review board applicants impacted by policies that discriminated against troops according to their sexual orientation, it does nothing to streamline the process so that these reviews become automatic for the affected veterans.[61] According to a briefing prepared

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[58] Darehshori, Sara. "Embattled." Human Rights Watch. May 18, 2015. Accessed December 22, 2015. https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military.

[59] Burke, Matthew M. "Senate Bill Would Provide Clean Service Records for Discharged Gay, Lesbian Troops." Stars and Stripes. February 12, 2014. Accessed December 22, 2015. http://www.stripes.com/senate-bill-would-provide-clean-service-records-for-discharged-gay-lesbian-troops-1.267291.

[60] Philipps, Dave. "Ousted as Gay, Aging Veterans Are Battling Again for Honorable Discharges." The New York Times. September 06, 2015. Accessed December 22, 2015. http://www.nytimes.com/2015/09/07/us/gay-veterans-push-for-honorable-discharges-they-were-denied.html.

[61] Restore Honor to Service Members Act, S. 1766, 114th Cong. (2015).

by the Army Review Board Agency (ARBA), the ARBA's 14 component boards are authorized to have only 132 personnel (116 civilians and 16 military) to process an average of over 22,600 cases per year.[62] Without additional funding and manpower, the increase in the caseload for review boards that has resulted from the repeal of DADT will increase backlogs and delays for all veterans who are appealing discharges, including those suffering from PTSD, TBI, MST, and other service-related conditions.

RECENT REFORMS AND ATTEMPTS AT REFORM

The Military Mental Health Review Board Improvement Act became law as part of the National Defense Authorization Act of 2015.[63,64] This law requires that Boards for Corrections of Military Records receive opinions from mental health professionals, and that Discharge Review Boards include mental health professionals in any appeals related to a veteran's PTSD or TBI.

The original House version of the Clay Hunt Suicide Prevention for American Veterans Act (SAV Act), proposed by Congressman Tim Walz included the following provision to address this issue:

> *[This Act requires] a board reviewing the discharge or dismissal of a former member of the Armed Forces whose application for relief is based at least in part on post-traumatic stress disorder or traumatic brain injury related to military operations or sexual trauma, to: (1) review the medical evidence from the VA or a civilian health provider that is presented by the former member; and (2) review the case, with a presumption of administrative irregularity, and place the burden on the VA or DOD to prove, by a preponderance of the evidence, that no error or injustice occurred.*[65]

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[62] Army Review Board Agency Brief, pdf. Fiscal Year 2015 brief on file with author and available for download at http://arba.army.pentagon.mil/Overview.cfm

[63] S. 2217, 113th Cong. (2014). This bill was enacted as section 521 of the National Defense Authorization Act of 2015, Public Law 113-291.

[64] Section 521, Public Law 113-291.

[65] H.R.5059, 113th Cong., as introduced by Congressman Tim Walz (2014). This version failed to pass, and a similar bill of the same name was introduced as H.R.203, the "Clay Hunt SAV Act" in January 2015 without the

This provision was stripped from the bill before the final version passed because it mandated a review of discharges and was so broad that it might have repercussions outside of the intended discharge review cases, and the resulting Congressional Budget Office score made the bill cost prohibitive. The SAV Act passed after it was reintroduced without this provision in January 2015.[66]

This provision has since been modified so that it may be able to pass while maintaining the spirit of the original Clay Hunt SAV Act in the new bill S.1567 (114th Congress) by Senator Gary Peters.[67] This bill would accomplish two noble goals that are applicable to today's understanding of the effects of invisible injuries: It would shift the burden of proof in favor of the veteran in cases involving PTSD and TBI; and, it would for the first time provide veterans who are MST survivors the same considerations before DRBs as those who suffer from PTSD and TBI as a result of contingency operations. This bill does not, however, impact the BCM/NRs. As a result, older generations of veterans would not be afforded the same considerations as newer veterans.

CONCLUSION AND RECOMMENDATIONS

The Military Discharge Review Board Reform bill, S.1567 offers an opportunity for the Senate Armed Services Committee to hold hearings and call for investigations into the Discharge Review Process. If the Armed Services Committee determines that further reforms are necessary,

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provision related to discharge review boards. The Clay Hunt Suicide Prevention for American Veterans Act was enacted as as Public Law 114-2 on February 12, 2015..

[66] Public Law No: 114-2, 114th Cong., the Clay Hunt SAV Act (2015).

[67] S.1567, 114th Cong., Introduced by Senator Gary Peters. "*This bill addresses medical evidence reviews in the case of: (1) a former member of the Armed Forces who was deployed in a contingency operation and subsequently diagnosed as suffering from post-traumatic stress disorder or traumatic brain injury as a consequence of such deployment, or (2) a former member whose application for relief from the terms of his or her military discharge is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury related to combat or military sexual trauma. Any board of review shall: review medical evidence of the Department of Veterans Affairs or a civilian health care provider presented by the former member; and review the case with a rebuttable presumption in favor of the former member that post-traumatic stress disorder or traumatic brain injury materially contributed to the circumstances resulting in the discharge of a lesser characterization."*

S.1567 can be amended accordingly; or new, more comprehensive legislation can be introduced. Veterans who suffer from invisible injuries that are related to their service deserve better treatment than they are currently receiving from the review boards. These veterans should given the opportunity to heal the wounds they suffered as a result of their service. Recommendations for improving the discharge review process are described below.

1. For applicants with a service-related diagnosis of PTSD or TBI, or a reported MST experience, DRBs should review cases with "a rebuttable presumption in favor of the former member that PTSD or TBI [or MST-related condition] materially contributed to the circumstances resulting in the discharge of a lesser characterization," as outlined in S.1567, 114th Congress. In the interest of fairness and equal treatment for all generations of veterans, this bill should be amended so that it applies not only to the DRBs, but also the BCM/NRs. This would ensure that the change would apply to veterans discharged at any time, and not just those who were discharged in the previous 15 years.

2. Congress should authorize increased staff levels for the review boards agencies to ensure that every veteran applicant is guaranteed the right to due process. Although these are administrative review boards, and not investigative bodies or courts of law, every effort should be made to ensure that each case is reviewed carefully and thoroughly, so that all evidence presented in the appeal is fully considered.

3. Congress should require that the review boards agencies publish information about the "training on mental health issues connected with PTSD or traumatic brain injury (as applicable),

or special training on mental health disorders" that is required for physicians on boards of review. This training is mandated by the Military Mental Health Review Board Improvement Act, which passed as Section 521 of Public Law No: 113-291.

4. Attorneys and veteran service organizations that assist veterans with discharge upgrade appeals should be fairly compensated by the DoD for their services in support of veterans during discharge appeals. The demand for these services far exceeds the supply of available; properly trained attorneys and veteran service officers, and the amount of time these difficult cases take creates a disincentive for lawyers to provide pro bono services to veterans who are in the greatest need of help.

5. Veterans with less-than-honorable discharges who have been exposed to events while in service that could reasonably be expected to cause MST, PTSD, TBI or other service-related conditions, should be granted limited, free access to the VA for purposes related to diagnosing, treating and establishing evidence of service-related illnesses and injuries.

6. Veterans who file for discharge review appeals with service-related illnesses and injuries suggested as mitigating factors, who have not included proof of a diagnosis, should be contacted with instructions on how to be screened by the VA in order to receive a diagnosis.

6. b. The review board agencies should make every reasonable effort to ensure that applicants are represented by veteran service officers or qualified attorneys who offer services at no cost to the veteran for all appeals.

7. The Washington, D.C.-based review boards should be accessible via secure online video at satellite locations so that veterans can appear "virtually" for personal hearings. Many veterans have difficulty articulating a legal argument in writing for the review boards, and their personal testimony can be invaluable for their case. Allowing for virtual appearance before the boards would grant equal access to veterans across the country, as the current boards result in significant travel and lodging costs to the veteran applicant, witnesses and legal representatives when personal hearings are granted.

8. Online "reading rooms" that are utilized by lawyers for research related to the history of discharge appeals and records corrections are not currently meeting federal standards for accessibility and searchability. This drastically increases the costs to attorneys who choose to represent veterans in discharge appeal cases, and discourages lawyers from offering pro bono services. The DoD should immediately work to meet federal website standards so that attorneys and veterans' representatives can more easily prepared for discharge appeals.

9. Over 114,000 veterans discharged because of their sexual orientation under "Don't Ask, Don't Tell" and similar policies are eligible for upgrades, but are forced into the backlog of discharge appeals and corrections of military records. The DoD should create a separate pipeline to upgrade discharges for these veterans so that DRBs and BCM/NRs are not inundated with cases that do not require a close review.

10. In September 2014, former Secretary of Defense Chuck Hagel issued a memorandum instructing BCM/NRs to apply "liberal consideration" to cases related to PTSD for Vietnam veterans. This change should be codified into law in a way that applies equally to veterans of all generations, and also so that the change is made permanent. Although the Hagel memo focused on BCM/NRs, the instruction should also be applied to DRBs.

11. Congress should instruct the DoD to engage in a public outreach campaign, in partnership with veteran service organizations, to make clear all reforms to the discharge review process. The Armed Services Committee Senate Report 113-176 states:

> *The committee expects that boards for review of discharge or dismissal would consider a new application for relief by a former servicemember when the member's prior application was denied by a board whose membership did not include a clinical psychologist or psychiatrist, or a physician with additional training and experience as required by this provision.*[68]

The DoD should actively seek to encourage veterans who were denied relief by the review boards prior to the reforms to reapply under the new standards. The DoD should provide the affected veterans instructions on how to obtain free representation and assistance so that their appeals include all of the evidence necessary for the review boards to make a fully informed decision.

Throughout training, recruits new to the military are told inspirational stories about heroic veterans who have lived by the Warrior Ethos, for the purpose of instilling a sense of duty and loyalty to those with whom they serve. Chief among these decorated heroes are examples such as

[68] S. Rep. No. 113th-176 (2014). Print.

Audie Murphy, who became a hero during World War II for having placed himself in harm's way, time after time, in order to protect his brothers in combat.[69] The Warrior Ethos teaches:

> *I will always place the mission first.*
> *I will never accept defeat.*
> *I will never quit.*
> *I will never leave a fallen comrade.*

After returning for war, Murphy "broke the taboo" of speaking about the long-lasting after effects of war — what was termed "battle fatigue" in his time — and what would later come to be known as PTSD.[70] As the most decorated soldier in U.S. history, he recognized that service to our nation continued long after leaving the battlefield. It is time that Congress, the administration, and the military review boards enact reforms to the discharge review process so that they honor the Warrior Ethos — so that *no veteran is left behind*.

The numbers of troops who suffer from invisible injuries who have been separated for misconduct and under other administrative conditions has been rising at an alarming rate as the military downsizes after over a decade of fighting two wars.[71] Thirteen percent of post-9/11 veterans, roughly 318,000, fall within this category of troops who are barred from veterans benefits.[72] Research published in the Journal of the American Medical Association has shown that veterans who receive less-than-honorable discharges are more likely to die by suicide.[73] In

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[69] "THE AUDIE L. MURPHY MEMORIAL WEBSITE." *America's Most Decorated World War II Combat Soldier*. Audie Murphy Research Foundation, 1996. Web. 24 Dec. 2015.

[70] *ibid.*

[71] Philipps, David. "Other than Honorable Series" *Other than Honorable*. Colorado Springs Gazette, 19-21 May 2013, 7 October 2013. Web. 24 Dec. 2015.

[72] Carney, Jordain. "The Veterans No One Talks About." National Journal. September 14, 2014. Accessed December 21, 2015. http://www.nationaljournal.com/defense/2014/09/14/Veterans-No-One-Talks-About?mref=scroll

[73] Reger, Mark A., Derek J. Smolenski, Nancy A. Skopp, Melinda J. Metzger-Abamukang, Han K. Kang, Tim A. Bullman, Sondra Perdue, and Gregory A. Gahm. "Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation From the US Military." *JAMA Psychiatry* 72, no. 6 (2015): 561. doi:10.1001/jamapsychiatry.2014.3195.

2012, the VA released a suicide data report indicating that as many as 22 veterans die by suicide every day in the United States.[74] What makes this figure even more disturbing, is that it was created using data only from veterans who have registered with the VA for services.[75] Veterans who receive other-than-honorable discharges often do not attempt to register with the VA, and according to a report by the Congressional Research Service, those with dishonorable discharges are not even considered veterans.[76]

To ensure that our nation honors all veterans for their sacrifices, Congress should work with administration to enact immediate, permanent reforms to the military review board agencies, and apply equally to all generations of veterans. All reforms to the review boards should be fully funded, and review boards should authorize additional training and staff so that backlogs do not leave veterans waiting for unreasonable amounts of time for a fair hearing. Congress should keep in mind that this issue isn't only one of honoring the sacrifices of veterans, but one of the future of our national security.

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[74]Kemp, Janet, and Robert Bossarte. *Suicide Data Report: 2012*. Washington, DC: Department of Veterans Affairs, Mental Health Services, Suicide Prevention Program, 2013. *VA*. Department of Veterans Affairs, 1 Feb. 2013. Web. 24 Dec. 2015.

[75] Basu, Moni. "Why Suicide Rate among Veterans May Be More than 22 a Day - CNN.com." *CNN*. Cable News Network, 14 Nov. 2014. Web. 24 Dec. 2015.

[76] Szymendera, Scott D. "Who Is a "Veteran"?—Basic Eligibility for Veterans' Benefits." *Congressional Research Service* R42324 (2015): n. pag. *Crs.gov*. Congressional Research Service, 15 Aug. 2015. Web. 24 Dec. 2015.

New References:

1. MST increases suicide rate 200% for women, +70% for men. MST was reported by 1.1 percent of men and 21.2 percent of women.
    a. Article: http://www.reuters.com/article/us-health-sextrauma-veterans-suicide-idUSKCN0UY2XK
    b. Original source: http://www.sciencedirect.com/science/article/pii/S0749379715007035

HUMAN RIGHTS WATCH

MAY 19, 2016

Booted

Lack of Recourse for Wrongfully Discharged US Military Rape Survivors

Summary

MAY 19, 2016

US: Raped in Military – Then Punished

Unjust Discharges Cause Lasting Harm

APRIL 28, 2016

Dispatches: A Glimmer of Hope for US Military Rape Victims

Juliet Simmons was drugged and raped in her US Air Force barracks in August 2007. She reported her assault through the proper channels, though her first sergeant made it clear he did not believe her. Although she continued to do her job, got outstanding performance evaluations, and passed her required tests, she was sent for an appointment with an Air Force mental health provider and told she was being discharged for a "Personality Disorder not specified." Though she appealed, and provided 27 letters from officers and enlisted service members in support of allowing her to stay in the Air Force, she was administratively discharged six days later with a General Under Honorable Conditions discharge. Later, Simmons tried to resume her military career but has been unable to do so due to her type of Air Force discharge.

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Amy Quinn joined the Navy in 2002 when she was age 19 out of a sense of duty following the 9/11 attacks on the United States. She initially thrived, performing well and receiving awards. Her trouble started after she rejected the advances of her master chief. After that, others told her he was looking for her to make a mistake so he could kick her out of "his" Navy. When a Navy technician later raped her, she did not report for fear of what would happen since she was already labeled a troublemaker. Later, on deployment, when she fell asleep in a chair due to medications she was taking, her shipmates sprayed her body with aircraft cleaner and set her on fire with a lighter. Her fire-retardant clothing protected her from physical injury, but the perpetrators were only given an oral reprimand and, when she complained to a supervisor, she was told she was overreacting. After being transferred to a different unit, she was verbally harassed and her breast was groped by a first class petty officer. After her request for a transfer was refused, she was ordered to work the night shift with the same officer. When she refused, she was ordered by her superior to spend six to eight hours standing at attention each day. A few days later, she was discharged for having a "Personality Disorder," the first she had heard of it. She was told this discharge was a favor, the only way to get what she wanted—to be away from the ship—and that it would not have any ramification. Later, potential employers rejected her for jobs in security and law enforcement because, even though her discharge was honorable, they could not hire someone whose papers said "Personality Disorder."[1]

***

Tom O'Brien was gang-raped by three male soldiers while he was on his second tour of duty in the Army in 1982. The soldiers threatened to kill him if he reported. Afterwards, he coped by drinking heavily and as a result was so drunk he failed to report to base. He was then court-martialed for being Absent Without Leave (AWOL) and received a Bad Conduct discharge. In the following years, he continued to drink heavily and was repeatedly arrested. Efforts to get benefits from the US Department of Veterans Affairs (VA) for post-traumatic stress disorder (PTSD) failed because the sexual trauma that caused the PTSD occurred during a period of service determined to be dishonorable.[2]

***

Based on over 270 in-person and telephone interviews, examination of documents that US government agencies produced in response to public record requests, and data analysis, this report covers the impact of "bad discharges" on military personnel who were separated from the military after reporting a sexual assault. It looks at the lasting impact of bad discharges on sexual assault victims and the remedies available to correct any injustice.

Over the past several years, in response to public pressure, the US military has made a concerted effort to improve how it handles sexual assault cases. Many of the reforms have provided important additional resources and protections for service members who are sexually assaulted while in service. Other policy changes have made it more difficult to quickly dismiss service members for mental health conditions.

Thousands of United States service members, who lost their military careers after reporting a sexual assault, live with stigmatizing discharge papers.

However, virtually nothing has been done to address the ongoing harm done to thousands of veterans who reported sexual assault before reforms took place and lost their military careers as a result of improper administrative discharges.

"Personality Disorder" discharges—a term used to describe a mental health condition that can disqualify someone from military service—were once "the fastest and easiest way to get rid of someone" in the military.[3] The use of personality disorder discharges declined dramatically in 2010 after government studies revealed proper procedures were often not followed. Nonetheless, these, and other types of questionable mental health discharges, are still in use and they comprise part of the discharges examined in this report because of the continuing harm suffered by veterans who received these discharges and have no recourse to correct their records.

Moreover, the reforms have not fixed every type of problematic discharge from the military for sexual assault survivors. Many were discharged with a less than honorable discharge (also known as "bad paper") for misconduct related to their sexual assaults, which can exclude veterans from virtually all benefits. In the course of reporting a sexual assault, the victim may reveal conduct that is prohibited under the Uniform Code of Military Justice (such as adultery or fraternization), which may lead to a discharge. Prior to 2011, male service members in particular risked being thrown out of service for homosexual conduct for reporting rape by a male, even though the conduct was non-consensual. Symptoms of trauma may also impact performance and lead to a misconduct discharge. All of these types of discharges can create lasting harm and are nearly impossible to remedy.

Veterans are required to show their discharge papers at virtually every juncture: when seeking employment, applying to school, trying to get health care at the VA, applying for a home loan or housing assistance, even for getting a veteran license plate or a discount at a gym. Because the vast majority of veterans are discharged honorably (over 85 percent), a less than honorable discharge is deeply stigmatizing and may result in discrimination, as the services themselves warn departing service members.

Bad Discharges

The profound toll these discharges take on veterans and their families is clear: "bad paper"—as any discharge that is less than honorable is known—has been correlated with high suicide rates, homelessness, and imprisonment.[4] Those with "Personality Disorder" or other mental health discharges must live with the additional stigma of being labelled—sometimes erroneously—"mentally ill."

> **Why should I be discharged because I was raped? I did what I was supposed to do. Had I never come forward I truly believe I would still be in the Air Force. "**
>
> **A1C Juliet Simmons, November 2012**

Characterization of discharge also has an enormous impact on access to veterans' benefits. Benefits are crucial to reintegration after leaving service, particularly for those who have experienced trauma and may need support. Having a less than honorable discharge may mean no access to benefits such as education assistance, service-connected disability compensation, pension, health care, vocational rehabilitation, re-employment protection, or home loans.[5]

It may also exclude a veteran from a wide range of state benefits, such as employment preferences, vocational training, or housing assistance. It also diminishes the status of those who served in other ways: veterans with a less than honorable discharge are not permitted to wear their uniforms or receive a military burial. Veterans discharged honorably for personality disorder or for another pre-existing mental health condition may also be denied benefits if they were in service for fewer than 24 months at the time of discharge, which is frequently the case.[6]

In contrast, service members who are injured or become ill while on active duty (including those who are unable to perform their duties because of PTSD) may be eligible for military disability retirement, which carries no stigma and could entitle them to lifetime retirement pay and health insurance for themselves and their dependents.

Despite the high stakes for veterans, there is little meaningful opportunity to appeal a bad discharge (also called applying for an "upgrade"). US service members are prohibited by longstanding Supreme Court precedent from suing the military for injuries or harm that "arise out of or are in the course of activity incident to service."[7]

> **T]he Navy discarded me like a piece of scrap iron or less; truthfully, this ordeal continues to haunt me … I am a broken man. "**
>
> **Navy seaman apprentice Ken Olsen, given an Other Than Honorable Discharge after reporting a shipmate sexually assaulted him, October 2012**

Veterans must rely on administrative remedies to correct injustices to their records, but those structures are overwhelmed and regularly fail the veterans they are meant to serve. The vast majority of applicants seeking to alter their discharge status (well over 90 percent and in some years as high as 99 percent) are rejected, often without meaningful review or opportunity to be heard by the military board charged with reviewing their applications. Some military lawyer practitioners refuse to take these cases because they are viewed as a waste of time. Judicial oversight is virtually non-existent because the courts give special deference to military decisions.

Mental Health or Misconduct Discharges

In recent years, media have drawn public attention to the military practice of administratively discharging combat veterans with PTSD for "Personality Disorder" (PD) or misconduct stemming from PTSD, thus denying them access to benefits to which they are entitled.

> **That hurt equal or more than the assault, people I was willing to die for didn't take me seriously. "**
>
> **Corporal Andrea Warnock, administratively discharged after reporting a sexual assault, March 2014**

The Department of Veterans Affairs only provides disability benefits for disabilities resulting from diseases or injuries incurred or aggravated while in service. PDs are characterized by deeply ingrained maladaptive patterns of behavior that typically appear by adolescence and therefore are not considered service-related. Because a PD usually arises before joining the military, it disqualifies a person from service. If PD is diagnosed after service has begun and a doctor determines it renders the service member unfit for duty, a service member with fewer than eight years of service may be discharged without benefits because PD is considered a pre-existing condition, even if it is diagnosed during the course of service.

Accurately diagnosing PD is difficult and requires, at a minimum, conducting multiple interviews with a patient. Its symptoms can be similar to those of PTSD and for that reason professional guidelines warn doctors about diagnosing those who have been exposed to trauma with PD. Yet between FY 2001 and FY 2010, over 31,000 service members (a disproportionate number of them female) were discharged on grounds of personality disorder, often after only a single cursory interaction with a doctor.

Public concern led to reforms and the number of PD discharges plummeted. Yet the military has failed to retroactively review and correct the potentially erroneous discharges already handed out. As a result, thousands of veterans are living with discharge papers that may deny them benefits and subject them to stigmatization. Moreover, sexual assault survivors still regularly report being administratively separated for "Personality Disorder."

Repercussions of being labelled with a psychiatric disorder can include plummeting self-confidence, loss of a job, failure to get custody of one's children, inability to get security clearances, loss of credibility in criminal proceedings, and deprivation of rights to make decisions about medical and legal affairs.[8]

Other types of discharges continue even as PD discharges have decreased. Discharges for other types of non-disability mental health conditions and misconduct have been on the rise.[9] Yet similar concerns exist that some service members may be being unfairly penalized with bad discharges for conduct arising from their response to a traumatic event, including sexual assault.

PTSD symptoms, such as an exaggerated startle response, an inability to control reflexive behavior, irritability, or attraction to high risk behavior, may also lead to misconduct or difficulty in performing at work.[10] PTSD is associated with substance abuse that can result in discharge. Yet military command may not see these disciplinary infractions as symptoms of mental illness. As a result, those service members may receive bad discharges for misconduct and, as a result of the bad discharge, never get the assistance they need because they are ineligible for veterans' services.

Public awareness of this problem has been raised in the context of combat veterans. However, similar awareness has not occurred for sexual assault survivors, despite the fact that they face similar problems. PTSD is more prevalent among sexual assault survivors than among combat veterans: an estimated one in three sexual assault survivors experience PTSD, as opposed to a 10 to 18 percent prevalence rate of PTSD for combat veterans.[11]

Need for Protections

Human Rights Watch recognizes that trauma may negatively impact a survivor's performance or lead to misconduct that the military is justified in addressing. The military also has particular battle-readiness needs and fitness for duty requirements that may make it less adaptable to meeting victims' needs than most other institutions.

However, processes do exist to separate those who are unable to stay in service for medical reasons. Protections should be in place to ensure that discretion to administratively dismiss service members is not abused, is not exercised in a way that tramples the rights of individual service members, and if an unfair discharge is made, there is actual redress to fix the problem.

I was told that if I wanted butterflies and unicorns that I should have been a preschool teacher. "

A young enlisted Coast Guard seaman who reported ubiquitous porn on her office's desktops, February 2013

Some protections do exist for service members who are being administratively separated (such as the right to consult with counsel and submit a statement), though few take advantage of them. Deeply traumatized and often very young service members may not be in any condition to make such an important decision in the aftermath of a sexual assault. Many are so traumatized that when their superior officer raises the possibility of a discharge they do not fully comprehend the characterization of the separation and would "take anything just to get out."[12] Others are reluctant to question their superiors' decision. All too often they fail to appreciate the consequences of a bad discharge or mistakenly believe that it will be easy to upgrade later.

As one Navy survivor said,

> I was 18 years old, was a mental mess, and was terrified to be back aboard [the ship] any longer than I had to. I wasn't protected, I wasn't helped, I wasn't safe from any type of harm!! So how did I actually know what I was signing or even in fact what an OTH [Other Than Honorable] discharge was to mean? How was I to know that from all the sexual attacks that I had to suffer and the harassment, assaults, threats to my life and safety that for all these years the [discharge would be] a huge factor to how I lived and how my life ended up?[13]

The inherent inequity in the discharge process makes it even more important that post-discharge mechanisms offer a meaningful opportunity for a hearing and impartial review to correct any injustice that might occur. Unfortunately, our investigation found that existing mechanisms for remedying injustices after discharge fall far short and have not been addressing the problems that our research has found.

Unfair Process, Little Recourse

The military's response to concerns about past wrongful discharges has been to leave correction of injustices to the respective branch's Discharge Review Board (DRB) or Board for Correction of Military Records (BCMR), which were created by Congress in 1946.[14] However, well over 90 percent of those applying to the Boards are rejected with almost no opportunity to be heard or meaningful review. Data provided by the Navy in response to a public records request show that between January 2009 and December 2012 the BCNR granted upgrades to just 1 percent of the 4,189 Other Than Honorable discharges it reviewed.[15] Because of the low likelihood of success, a military law expert described the Boards as "a virtual graveyard."[16]

Sexual assault survivors who seek a record change through the service Boards face various hurdles that severely limit their due process rights. Under US law, when a property or liberty interest is at stake, basic due process requires notice and an opportunity to be heard before an impartial tribunal. Liberty interests may be implicated "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing" as long as it is accompanied by loss of a tangible benefit, such as employment opportunities. Denial of government benefits is considered a property interest entitling a claimant to a hearing.

Though service members with bad discharges have their benefits and reputations at stake, their cases are afforded very limited review. BCMRs virtually never have hearings, a complete record of proceedings is not created, and cases are decided by civilians with no oversight from an administrative law judge.

Given the broad jurisdiction of the boards to review all errors in a service member's record, it is not surprising they receive thousands of applications a year. In 2012 alone, the Department of Defense (DOD) BCMRs for the Army, Navy, Air Force, and Marines received 36,638 applications for record corrections. Statutory deadlines requiring the BCMRs to complete 90 percent of their cases within 10 months create enormous pressure to move cases quickly.[17] Nearly half are closed administratively without Board review for reasons that may be opaque to the applicant.[18] Information provided by the Boards to Human Rights Watch indicates all the BCMRs combined held two personal appearance hearings in five years, despite deciding tens of thousands of cases during that time.[19]

Applicants must therefore rely on the Boards to consider fully their written submissions and evidence when making a decision. Lawyers for veterans say their cases often include "personal statements, affidavits, briefs, and hundreds of documents."[20] Yet Board members often spend only a few minutes deciding a case and may reach a decision without actually reading the submitted material.

In response to public records requests, the Army and Navy BCMRs indicated that Board members do not review cases in advance of their sessions and rely heavily on military staff to decide cases. The information sheet provided to Army BCMR members informs them that when they arrive in the Board conference room, "[t]here are usually about 90 cases divided into three stacks by potential decision—Grant, Partial Grant, and Deny."[21]

The Army BCMR often decides 80 cases in a half day of sitting.[22] Nor do the other Boards spend significant time on deliberations. It is estimated that the Army Board averages three minutes and 45 seconds per case, and the Navy averages six minutes and forty-five seconds per case.[23] For the Air Force, deliberations average five to six minutes, though they do receive some material before the session, unlike the Army and Navy. Given what is at stake and the amount of information to be considered, that is woefully inadequate.

Decisions cannot be arbitrary,[24] and Boards must treat similar cases consistently, or explain why they are not doing so. However, according to information provided to Human Rights Watch by the Boards, they make little effort to consider prior rulings when deciding cases unless an applicant raises a specific case. This is difficult to do because Defense Department BCMR decisions are published in rudimentary electronic reading rooms in different formats without indices, making it hard for applicants or their lawyers to find cases on which to base their arguments. The Navy and Coast Guard no longer post sexual assault cases in the reading room. The Army does so only with the victim's consent.[25]

The potential for arbitrariness makes judicial oversight all the more important. However, few cases make it that far. Lawyers say by the time their client gets the BCMR decision, they are frustrated and do not want to go to court.[26] Hiring a lawyer to appeal is costly, and the chances of success are very low.

As a result, very few applicants challenge Board decisions in court. According to the Air Force BCMR, between 2009 and 2013, an average of 9 applicants per year—fewer than 0.5 percent of cases decided by the Air Force BCMR—sought judicial review. Of the 46 cases that received judicial review between 2009 and 2013, no decision was vacated, reversed, or modified. Eight cases were remanded and only two of those remands resulted in relief for the applicant. The remaining cases were denied after remand.[27] Winning a Board challenge on appeal is also extremely unlikely for the Army.

Between 2008 and 2013, out of tens of thousands of decisions, only 56 Army BCMR cases were remanded by federal courts resulting in partial relief for six applicants and granting of full relief to six others.[28] In short, judicial oversight of BCMR cases is so negligible and deferential as to be nearly non-existent, providing little incentive for Boards to create credible decisions that can withstand scrutiny.

Related Content

MAY 19, 2016 | News Release

US: Raped in Military – Then Punished

APRIL 28, 2016 | Dispatches

Dispatches: A Glimmer of Hope for US Military Rape Victims

When members of the US military report a sexual assault up their chain of command, they often experience terrible retaliation from other military personnel. But a bill introduced into the US Senate today could help stem this harmful practice.

Sara Darehshori
Senior Counsel, US Program

MAY 19, 2016 | Witness

Witness: Raped in the US Military, Retaliated Against for Life

Key Recommendations

Human Rights Watch recommends that the US government adopt the following measures to assist and provide redress to US service members and veterans who are survivors of sexual assault who were wrongfully discharged (more detailed recommendations appear in Chapter VII of this report):

- Congress create a right to a hearing before the Boards for Correction for Military Records for applicants who have not had an opportunity to be heard at the Discharge Review Boards
- Congress require the BCMRs to summarize and index all decisions (including cases involving sexual assault) by subject to enable applicants to search for cases to support their claims
- The Secretary of Defense instruct the Boards to give special consideration to upgrade requests from victims of sexual assault who have experienced PTSD and to put in place evidentiary requirements for proving a sexual assault consistent with standards used by the Department of Veterans Affairs
- The Secretary of Defense develop a working group with representatives from each service's Board, military lawyers, and veterans' advocacy groups to study standards for granting relief, determine best practices and procedures, and make recommendations for uniform standards and procedures to be included in revised Defense Department instructions

- The Secretary of Defense issue a directive creating a presumption in favor of changing the reason for discharge from personality disorder to "Completion of Service" in cases where the victim has experienced trauma and has not otherwise been diagnosed with personality disorder by an independent physician

Methodology

This report is based primarily on more than 270 in-person and telephone interviews conducted between October 2013 and February 2016, as well as documents provided to Human Rights Watch in response to public record requests.

Interviews were conducted with 163 sexual assault survivors from all branches of the US Armed Forces, including the Coast Guard and National Guard. We reviewed written accounts from an additional 52 survivors. We also reviewed supporting documentation provided by some of the survivors interviewed.

Twenty-two of the survivors interviewed were male, though this does not reflect the demographics of sexual assault victims in the US military. Because the population of service members is disproportionately male, there are more male victims of unwanted sexual contact than female, though men report at much lower rates.[29]

We also considered written accounts by more than 50 survivors. Victims interviewed for this report span a wide range of years—going back to the Vietnam War era in the 1960s. Their experiences of retaliation after sexual assault and characterization of their discharge may differ from the current state of affairs since the military has undertaken extensive reforms in the past three years. However, their stories are important to understanding the unfairness of the harm service members experience as a result of their discharges—harm that continues to the present.

The issues documented in this report arose repeatedly in our interviews with survivors across the military services. However, we did not attempt to conduct a representative sampling of military sexual assault survivors. Moreover, this is not a randomized study and this report's findings cannot be generalized to the military population as a whole. Given the sensitive nature of the topic and confidentiality concerns expressed by many interviewees, many survivors' names and other identifying details have been withheld. Survivors and other interviewees who requested confidentiality have been randomly assigned pseudonyms in this report.

This report covers the impact of "bad discharges" on military personnel who were separated from the military after reporting a sexual assault. In order to minimize further trauma, Human Rights Watch did not focus our interviews or investigations on the underlying assault.

The discharges described in this report occurred from as long ago as 1966 to as recently as 2015. The military has undertaken a number of reforms in its handling of sexual assaults, particularly since 2008. The experiences of survivors in recent years is, for the most part, improved and we would hope that some of the more extreme incidents described in this report would not happen today. What has not improved, however, is the military's responsiveness to survivors who may be suffering from the repercussions of previous policies, especially through wrongful discharges. Moreover, as described in the Human Rights Watch report *Embattled: Retaliation against Sexual Assault Survivors in the US Military,* problems with retaliation against survivors persist.[30]

Thus while certain types of discharges from the military described in this report, such as those due to personality disorder or homosexual conduct, are used less frequently than before, or banned completely, we included some description of these types of discharges for the context they provide.

Survivors were located using several methods: Human Rights Watch launched a Facebook page in October 2013 describing the project and providing a point of contact for those willing to be interviewed. A number of survivors we interviewed posted information about our research on private military sexual trauma support pages or referred other survivors to us. In addition, nongovernmental groups who support survivors, including Protect Our Defenders (POD), Service Women's Action Network (SWAN), and the Military Rape Crisis Center, referred victims to us and/or, with the survivor's consent, provided their written accounts of their experiences. We also reviewed audio interviews done by StoryCorps as a part of its Veterans Listening Project and in-depth statements included in the "Fort Hood Report," a joint project by Iraq Veterans Against the War, Civilian-Soldier Alliance and Under the Hood Café and Outreach Center, and the International Human Rights Clinic at Harvard Law School. On October 10, 2014, Human Rights Watch placed a print ad in *Stars and Stripes* newspaper.[31] A similar online ad ran on *Military Times* websites intermittently between October 6 and October 19, 2014. Special Victim Counsel and Victims' Legal Counsel also referred clients to us.

In addition to interviews with survivors, Human Rights Watch conducted over 100 interviews with: experts in military law, current and former uniformed and civilian victim advocates, experts in military response to sexual trauma, military law practitioners, members of nongovernmental organizations that work with or advocate on behalf of service members, service members who are not victims, parents of veterans, Special Victim Counsel and Victims' Legal Counsel, members of the Department of Defense Inspector General's office, Sexual Assault Prevention and Response Coordinators, Sexual Harassment and Assault Response Program personnel, judge advocates, rape crisis center personnel from four rape crisis centers located near military bases, trauma counselors, Vet Center staff, a former Army Review Boards staff member, a former Board for Correction of Naval Records staff member, and five members of the Sexual Assault Prevention and Response Office at the Department of Defense (SAPRO). We also visited five Vet Centers across the country. Human Rights Watch repeatedly attempted to meet with current staff of the BCMRs but they canceled the meetings and would not reschedule.

Most interviews were conducted individually and in private. Group interviews were conducted with Navy Victims' Legal Counsel and Air Force Special Victim Counsel (including their Sexual Assault Prevention and Response (SAPR) policy advisor), members of the Department of Defense Inspector General's office whistleblower reprisal unit,

SAPRO, staff from two rape crisis centers, one group of seven women veterans in New York City, and one legal services organization. One survivor had her lawyer on the line for a telephone interview; another survivor, who was interviewed multiple times, had a counselor with her for one of her interviews. No incentive or remuneration was offered to interviewees.

In addition to interviews, we submitted document requests under the US Freedom of Information Act (FOIA) to the Offices of the Inspector General for the Department of Defense, Navy, Marine Corps, Coast Guard, Air Force, and Army; Boards for Correction of Military Records for the Army, Air Force, and Coast Guard and the Board for Correction of Naval Records; the Office of the Secretary of Defense and Joint Staff; the Army National Guard; the Air National Guard; and the Departments of the Air Force, Army, Navy, Marine Corps, and Coast Guard.[32]

At time of writing, Human Rights Watch received responses from all the Boards for Correction of Military Records and Inspectors General. Though the Army, Navy, and Air Force provided a limited number of documents and data, neither the services nor the Defense Department provided substantive responses to most of our requests by the time of publication.

As part of our research, we also reviewed extensive publicly available information about military sexual assault including, but not limited to, reports and transcripts of the Response Systems Panel and the Judicial Proceedings Panel, the responses provided by the branches to the Panel's requests for information and testimony before the Panels, academic articles, Government Accountability Office reports, publications by experts on psychological disorders and administrative law, congressional testimony by military officers, experts, and victims, complaints from lawsuits, military sexual assault training materials, Department of Defense Instructions, documents provided to Vietnam Veterans of America by the Department of Defense as a result of their lawsuit regarding personality disorder discharges, and nongovernmental and Task Force reports on sexual assault in the military.

In addition, on behalf of Human Rights Watch, several law firms coded all cases in the Defense Department Boards for Correction reading room that contained the search terms "personality disorder" and "adjustment disorder." The search (conducted on August 9, 2013) resulted in 3,615 cases, of which 2,002 were coded and analyzed for this report. The remaining 1,613 cases were duplicates, Discharge Review Board cases, or cases that were reviewed and found to have had no relation to either personality disorder or adjustment disorder. The Coast Guard was not included in our analysis as they have too few cases that meet our criteria (the Coast Guard BCMR considered only two PD cases between 2009 and 2013). The Coast Guard was also not included in the 2008 Government Accountability Office report examining personality disorder discharges.

On March 22, 2016, Human Rights Watch provided Secretary of Defense Ashton B. Carter with a summary of the findings of this report and requested his response. The Defense Department response is attached to this report as an appendix.

A note on terminology:

Many survivors' groups, support service organizations, and others working on sexual violence strongly prefer the term "survivor" to "victim." "Survivor" implies greater empowerment, agency, and resilience, and many individuals do not want to be labeled solely as "victims." This is often important to their healing process and sense of identity. That said,

some individuals feel “victim” better conveys their experience of having been the target of violent crime. In recognition of these differing views, this report uses both terms.

Throughout the report, we reference survivors’ most senior rank while in service, though they may have left service by the time of our interview or prior to publication of this report.

We use the term “Post-Traumatic Stress Disorder” (or PTSD) in this report because it is the medical diagnosis used by the military and Department of Veterans Affairs, though we recognize some prefer to reference it as “Post-Traumatic Stress” or “sexual assault trauma” in order to destigmatize what many believe is an appropriate response to trauma.

Three survivors interviewed for this report are transgender. To minimize confusion, they are referenced as the gender they publicly identified as at the time of their assault.

Other military terminology and abbreviations are set out in the glossary. Common abbreviations will be spelled out in the first use of each chapter.

Glossary

Term	Definition
Adjustment Disorder	The development of marked distress or significant impairment in functioning in response to a stressor. It can often resemble post-traumatic stress disorder (PTSD). This is sometimes used as grounds for an administrative discharge.
Administrative Punishment/ Administrative Action	The least severe form of command action; it can range from verbal counseling to a written reprimand and demotion.
Administrative Separation or Discharge	Early termination of military service based upon conduct on the part of the service member.
Article 15	Non-judicial punishment administered by a commander for UCMJ offenses as an alternative to a court-martial.
Absent Without Leave (AWOL)	Away from military duties without notice or permission. Also known as Unauthorized Absence (UA).

Term	Definition
Boards for Correction of Military Records	Ultimate administrative authority responsible for correcting errors and removing injustices in military records. Each branch has a designated board.
Board for Correction of Naval Records	Ultimate administrative authority responsible for correcting errors and removing injustices in Navy and Marine Corps records.
Captain's Mast	The term for non-judicial punishment in the Navy, similar to Article 15 punishments. Also called an Admiral's Mast depending on the level of the commander conducting the disciplinary hearing.
Chaptered Out	The process of being administratively separated or discharged.
Collateral Misconduct	Victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident.
Court Martial	Military trial proceedings.
Discharge	Order issued on the termination of a service member's military service. Forms of discharge include: Honorable (the quality of the member's service generally met standards of acceptable conduct); General Under Honorable Conditions Discharge (denoting that significant negative aspects of the service member's conduct outweighed positive aspects of conduct); Under Other Than Honorable Conditions (based on a pattern of misconduct that constitutes a significant departure from conduct expected from service members or one or more acts of misconduct); Bad Conduct Discharge (adjudged by a general or special court-martial); Dishonorable Discharge (a person has been adjudged by a general court martial). The categorization of discharge impacts ability to get benefits from the Department of Veterans Affairs and may impact the ability to find employment or re-enlist.
Discharge Review Board	A panel designated by each service that has the authority to review discharges.
DOD	Department of Defense
GAO	Government Accountability Office, an independent, nonpartisan agency that works for Congress, which investigates how the federal government spends taxpayer dollars.
GOMOR	General Officer Memorandum of Reprimand
Integrated Disability Evaluation System (IDES)	Medical retirement process, which provides additional protections for service members such as multiple opportunities to appeal or rebut medical evaluations or determinations regarding fitness for duty
Involuntary Separation	Also known as an administrative discharge, being released from active duty under other than adverse conditions.
Judge Advocate (JAG)	A military attorney who is an officer of the Judge Advocate General's Corps of the Army, Navy, Air Force, Marine Corps, and the United States Coast Guard who is designated as a judge advocate.
Judicial Proceedings Panel	Panel created by the Secretary of Defense at the direction of Congress to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault cases and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 for the purpose of developing recommendations for improvements to such proceedings.
LOR	Letter of reprimand; a more formal letter of admonishment included in the personnel record of a service member. They may be held locally for a limited time period or put in the service member's permanent record.
Medical Review Board Process	The Medical Review Board Process is a process by which a service member may be administratively separated or retired from the military when they have a medical condition (including a mental health condition) that render them unfit for service. A medical evaluation board assesses fitness for continued duty. If the service member is not fit for duty because of injuries sustained or exacerbated in service, they may be eligible for benefits. The process may be initiated by a service member who voluntarily seeks medical care or by a commander who believes the member is unfit for service and refers them for an examination.
Military Sexual Trauma (MST)	Sexual assault or repeated, threatening sexual harassment that occurs while in the military.

Term	Definition
NJP	Non-judicial punishment under the Uniform Code of Military Justice, also known as an Article 15, or Captain's Mast.
NCIS	Naval Criminal Investigative Services, responsible for investigation of serious criminal offenses in the Navy.
NCO	Non-Commissioned Officer
NVLSP	National Veterans Legal Services Program
Personality Disorder	Considered a pre-existing mental condition, characterized by deeply ingrained maladaptive patterns of behavior that typically appear by adolescence.
PTSD or PTS	Post-Traumatic Stress Disorder, also known at Post-Traumatic Stress
Restricted Reporting	A process used by a service member to report or disclose that they are the victim of a sexual assault to specified officials on a requested confidential basis. Under these circumstances, the victim's report and any identifying details provided to healthcare personnel, the SARC, or a victim advocate, will not be reported to law enforcement to initiate the official investigative process unless the victim consents or an established exception is exercised under Defense Department regulations. Restricted reporting applies to service members and their military dependents 18 years of age or older.
Response Systems to Adult Sexual Assault Crime Panel	Panel created by the Secretary of Defense at the direction of Congress in 2013 in order to conduct a 12-month independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses for the purposes of developing recommendations regarding how to improve the effectiveness of such systems.
ROTC	Reserve Officer Training Corps
Sexual Assault	Intentional sexual contact, characterized by the use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. Sexual assault includes rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (oral or anal sex), or attempts to commit these offenses.
SAPR	Sexual Assault Prevention and Response
SAPRO	Sexual Assault Prevention and Response Office; serves as the DOD's single point of authority, accountability, and oversight for the Sexual Assault and Prevention and Response Program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the Inspectors General, respectively.
SARC	Sexual Assault Response Coordinator. The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault, tracks the services provided to a victim of sexual assault from the initial report through the final disposition and resolution.
SVC	Special Victims' Counsel in the Army and Air Force. The Special Victim Counsel Program was created by the Services and mandated by Congress to support victims of sexual assault and enhance their rights within the military justice system while neither causing unreasonable delay nor infringing upon the rights of the accused. An SVC's primary duty is to represent client's rights and interests during the investigation and court-martial process. In general, SVC services include, but are not limited to, accompanying and advising the victim during interviews, examinations, and hearings, advocating to government counsel and commanders on behalf of the victim, and advising the victim on collateral civil matters which stem from the alleged sexual assault.
Traumatic Brain Injury	A brain injury acquired when a bump, blow, jolt or other head injury causes damage to the brain
Uniform Code of Military Justice (UCMJ)	Uniform Code of Military Justice; federal law enacted by Congress serving as foundation for military law for all branches of the military.
Unrestricted Reporting	A process a service member uses to disclose, without requesting confidentiality or restricted reporting, that they are the victim of a sexual assault. Under these circumstances, the victim's report and any details provided to healthcare personnel, the SARC, a victim advocate, command authorities, or persons are reportable to law enforcement and may be used to initiate the official investigative process.
Veteran	Any person who served for any length of time in any military service branch
VA	Department of Veterans Affairs; government-run system that provides a variety of benefits to eligible military veterans.
VHA	Veterans Health Administration

Term	Definition
Victims' Legal Counsel (VLC)	Victims' Legal Counsel in the Marine Corps and Navy that is equivalent to the Special Victim Counsel in the Army, Air Force, and Coast Guard. See SVC above.

Ranks

AIR FORCE

ENLISTED	(IN ASCENDING ORDER)
Amn	Airman (E-2)
A1C	Airman First Class (E-3)
SrA	Senior Airman (E-4)
SSgt	Staff Sergeant (E-5)
TSgt	Technical Sergeant (E-6)
MSgt	Master Sergeant (E-7)
SMSgt	Senior Master Sergeant (E-8)
1stSgt2	E-8 First Sergeant (E-8)
CMSgt	Chief Master Sergeant (E-9)
1stSgt3	E-9 First Sergeant (E-9)
CCM	Command Chief Master Sergeant (E-9)

OFFICERS	(IN ASCENDING ORDER)
2d Lt	Second Lieutenant (O-1)
1st Lt	First Lieutenant (O-2)
Capt	Captain (O-3)
Maj	Major (O-4)
Lt Col	Lieutenant Colonel (O-5)
Col	Colonel (O-6)
Brig Gen	Brigadier General (O-7)
Maj Gen	Major General (O-8)
Lt Gen	Lieutenant General (O-9)
Gen	General (O-10)

ARMY

ENLISTED	(IN ASCENDING ORDER)
PV2	Private (E-2)
PFC	Private First Class (E-3)
SPC	Specialist (E-4)
CPL	Corporal (E-4)
SGT	Sergeant (E-5)
SSG	Staff Sergeant (E-6)
SFC	Sergeant First Class (E-7)
MSG	Master Sergeant (E-8)
1SG	First Sergeant (E-8)
SGM	Sergeant Major (E-9)
CSM	Command Sergeant Major (E-9)

OFFICERS	(IN ASCENDING ORDER)
2LT	Second Lieutenant (O-1)
1LT	First Lieutenant (O-2)
CPT	Captain (O-3)
MAJ	Major (O-4)
LTC	Lieutenant Colonel (O-5)
COL	Colonel (O-6)
MG	Major General (O-8)
LTG	Lieutenant General (O-9)
GEN	General (O-10)

COAST GUARD

ENLISTED	(IN ASCENDING ORDER)
SR	Seaman Recruit (E-1)
SA	Seaman Apprentice (E-2)
SN	Seaman (E-3)
FN	Fireman (E-3)
PO3	Petty Officer 3rd Class (E-4)
PO2	Petty Officer 2nd Class (E-5)
PO1	Petty Officer 1st Class (E-6)
CPO	Chief Petty Officer (E-7)
SCPO	Senior Chief Petty Officer (E-8)
MCPO	Master Chief Petty Officer (E-9)
CMDCM	Command Master Chief PO (E-9)
AMCPO	Area Command Master Chief PO (E-9)

OFFICERS	(IN ASCENDING ORDER)
ENS	Ensign (O-1)
LTJG	Lieutenant Junior Grade (O-2)
LT	Lieutenant (O-3)
LCDR	Lieutenant Commander (O-4)
CDR	Commander (O-5)
CAPT	Captain (O-6)
RDML	Rear Admiral (O-7)
RADM	Rear Admiral (O-8)
VADM	Vice Admiral (O-9)
ADM	Admiral (O-10)

MARINE CORPS

ENLISTED	PRIVATE (E-1)
PFC	Private First Class (E-2)
LCpl	Lance Corporal (E-3)
Cpl	Corporal (E-4)
Sgt	Sergeant (E-5)
SSgt	Staff Sergeant (E-6)
GySgt	Gunnery Sergeant (E-7)
MSgt	Master Sergeant (E-8)
1stSgt	First Sergeant (E-8)
MGySgt	Master Gunnery Sergeant (E-9)
SgtMaj	Sergeant Major (E-9)

OFFICERS	
2ndLt	Second Lieutenant (O-1)
1stLt	First Lieutenant (O-2)
Capt	Captain (O-3)
Maj	Major (O-4)
LtCol	Lieutenant Colonel (O-5)
Col	Colonel (O-6)
BGen	Brigadier General (O-7)
MajGen	Major General (O-8)
LtGen	Lieutenant General (O-9)
Gen	General (O-10)

NAVY

ENLISTED	
SA	Seaman Apprentice (E-2)
SN	Seaman (E-3)
PO3	Petty Officer 3rd Class (E-4)
PO2	Petty Officer 2nd Class (E-5)
PO1	Petty Officer 1st Class (E-6)
CPO	Chief Petty Officer (E-7)
SCPO	Senior Chief Petty Officer (E-8)
MCPO	Master Chief Petty Officer (E-9)
CMDCM	Command Master Chief Petty Officer (E-9)
FLTCM/FORCM	Fleet/Force Master Chief Petty Officer (E-9)

OFFICERS	
ENS	Ensign (O-1)
LTJG	Lieutenant Junior Grade (O-2)
LT	Lieutenant (O-3)
LCDR	Lieutenant Commander (O-4)
CDR	Commander (O-5)
CAPT	Captain (O-6)
RDML	Rear Admiral (O-7)
RADM	Rear Admiral (O-8)
VADM	Vice Admiral (O-9)
ADM	Admiral (O-10)

I. Background

Discharged from the Military after Reporting a Sexual Assault

Military personnel who report a sexual assault frequently find that their military career is the biggest casualty.

Our interviews suggest that all too often superior officers choose to expeditiously discharge sexual assault victims rather than support their recovery and help them keep their position. Very few sexual assault survivors we spoke to managed to stay in service. Expressing a view repeated by others, one victims' lawyer said, "A lot of clients are out [of the military]" after reporting sexual assault.[33] Navy VLCs told Human Rights Watch that helping sexual assault survivors with discharges was a regular part of their practice.[34] A psychiatrist who has appeared as an expert witness in more than 40 courts-martial told a Defense Department Panel, "I am yet to meet a victim of sexual assault who reports that she is looking forward to her future military career."[35]

Though some survivors manage to stay in service until the end of their enlistment period, and others are medically discharged due to trauma or injuries sustained during their attacks or prefer to leave service, many victims report facing an involuntary discharge from service—an administrative separation—after reporting an assault.[36]

An administrative discharge or separation is an early termination of service based upon a service member's conduct. It is involuntary if the separation is initiated by command. A lawyer who works with service members facing involuntary discharge described it as a "retrauma."[37]

How one leaves service, the characterization of discharge received, and the narrative reason for ending service that appears on discharge papers, have an enormous impact on a veteran's ability to access benefits and reintegrate into society.

In the military, discharges (whether voluntary or not) are classified in one of the following categories:[38]

- Honorable (the quality of the member's service generally meets standards of acceptable conduct);
- General Under Honorable Conditions (significant negative aspects of the member's conduct outweigh positive aspects of conduct);
- General Under Other Than Honorable Conditions (based on a pattern of misconduct that constitutes a significant departure from conduct expected from service members or one or more acts of misconduct);
- Bad Conduct (adjudged by a general or special court-martial);
- Dishonorable (a person has been adjudged by a general court-martial).

The vast majority of those who leave service (over 85 percent) are honorably discharged.[39] Veterans with anything less than an honorable discharge are considered to have "bad paper."

Bad paper impacts health care, disability benefits, education, and other forms of support that may be crucial for recovery and reintegration into the civilian world. Veterans with bad paper may face adverse consequences from employers and may not qualify for a range of assistance offered to veterans by states or employers or even service organizations (such as the American Legion or Veterans of Foreign Wars) that help veterans. Generous education benefits offered after 9/11 to encourage service members to enlist only apply if the service member is honorably discharged. Only those with Honorable or General Under Honorable Conditions discharges are eligible for immigration benefits connected to service. Bad paper is also linked with other devastating harm: veterans with bad paper are twice as likely to commit suicide and far more likely to end up homeless or in prison.[40]

Honorably discharged veterans may also be saddled with problematic discharge papers. Many service members Human Rights Watch interviewed indicated they were administratively discharged on grounds of "Personality Disorder" (PD) after reporting their assault and that this discharge, unbeknown to them at the time, had far-reaching negative consequences, even though their discharge was often classified as honorable and would not normally be considered "bad paper." While these types of discharges have declined in recent years, the negative repercussions continue to haunt service members due to the military's lack of willingness to offer meaningful redress.

Between FY 2001 and FY 2010, over 31,000 veterans were discharged on grounds of personality disorder. A disproportionate number of those discharged were women. ”

Between FY 2001 and FY 2010, over 31,000 veterans were discharged on grounds of personality disorder. A disproportionate number of those discharged were women.[41] A 2008 Government Accountability Office (GAO) report found that proper procedures were not followed in many of these cases and that potentially thousands of people were misdiagnosed and wrongfully administratively discharged.[42]

In at least some cases, the service member may have had Post-Traumatic Stress Disorder and been eligible for medical retirement, which is honorable, does not carry any stigma, and has greater access to benefits.[43] Moreover, the medical retirement process (the Integrated Disability Evaluation System (IDES)) provides greater protections for service members, as they have multiple opportunities to appeal or rebut medical evaluations or determinations regarding fitness for duty.[44]

Following the GAO report, the criteria for discharging a service member on the grounds of “Personality Disorder” were made more stringent, particularly for those who served in combat. **Although use of this type of discharge has declined dramatically since 2009, military sexual assault victims are still given this and other questionable mental health diagnosies.**[45]

We include older cases in our analysis too because thousands of people are still living with the stigma and negative consequences of being wrongly labeled with mental health problems. Moreover, misdiagnosis means veterans may not be entitled to severance or disability benefits. An unexpected early administrative discharge, even if fully honorable, can affect ability to access education and health benefits, the VA’s home loan guarantee, and may require repayment of enlistment bonuses because the enlistment period is incomplete. Thus many people discharged for PD continue to suffer the ill consequences of their discharge.

Though public exposure of the problems with PD discharges (particularly as used against combat veterans who may have had PTSD) has led to reform, nothing has been done to correct the discharge papers of the thousands of people who may have received wrongful PD discharges. Instead, the Defense Department has instructed those who think they have received erroneous discharges to seek to have them changed through their respective services’ administrative bodies—the Discharge Review Boards and the Boards for Correction of Military Records.[46]

Survivors with less than honorable discharges face even greater challenges accessing benefits. Many service member survivors of sexual assault received the double label of PD and General Under Honorable Conditions discharges.

Sexual assault survivors who engaged in misconduct either at the time of the offense (such as underage drinking) or after the assault due to trauma (such as taking an unauthorized leave (AWOL) to flee their perpetrators) may be saddled with an Other Than Honorable discharge, which may make them ineligible for any veterans benefits at all.

Under current discharge review mechanisms, little can be done to improve their discharge status after they have left service.

As with PD cases, the only mechanisms available to upgrade discharge characterization—the Discharge Review Boards and the Boards for Correction of Military Records (BCMRs)—offer victims virtually no opportunity to be heard and little probability of success. This will be discussed in detail below.

Commanders are allowed to involuntarily discharge service members to maintain the readiness and discipline of their unit. Because this is seen as necessary to ensure the readiness of the forces, commanders have a great deal of discretion in deciding who should be separated, the basis of the separation, and the characterization of the discharge.

Administrative separations can be justified on many grounds including pregnancy, parenthood, hardship, failing a drug or alcohol rehab program, misconduct, or, until 2011, homosexuality. The procedures for each branch are slightly different, but in general the commanding officer makes a recommendation for separation that is reviewed and approved by a separating authority higher in the chain of command.

When the service member is being discharged for misconduct (or a pattern of misconduct), there may be a requirement that the commander counsel the service member and attempt rehabilitation before recommending a discharge. The service member must be notified in writing of the recommendation for discharge and informed of their rights.[47]

Service members often have little voice in this process. Procedural safeguards do exist for service members being administratively separated: they can submit statements on their own behalf, consult with legal counsel prior to separation, and obtain copies of their separation packet.[48] Service members with more than six years of service or those with an Other Than Honorable characterization of service may request a hearing before an administrative board. The Defense Department now allows enlisted service members who make an unrestricted report of sexual assault and face involuntary separation afterwards to request high-level review of the grounds for their separation.[49]

In practice, these safeguards are rarely utilized or effective.[50] The GAO found that in the over 300 PD cases it reviewed in 2008, only 11 percent of service members submitted statements on their own behalf, all of whom were separated. Only 32 percent of files indicated the service member asked to speak with an attorney; not one eligible service member had an administrative hearing.[51]

Service members generally may acquiesce to a PD or bad discharge for a number of reasons. They are often very young and very junior enlisted personnel. The vast majority of PD discharges (80 percent) are enlisted service members with fewer than four years of service; 49 percent were discharged within one year.[52]

For those who suffered trauma because of a sexual assault, many may not be in any condition to make such an important decision. They may have already experienced significant retaliation or had their credibility questioned. Some may be so eager to leave service (and often proximity to their perpetrators) that they are willing to take an adverse discharge if it means getting home sooner.

DD Form 214

Service members receive a certificate of release at the end of their service, the Department of Defense Form 214 (DD-214), that verifies their service and summarizes their career, including awards, records of service or training, and characterization of service. The form is used to obtain benefits from the Department of Veterans Affairs and other organizations that help veterans. It is also often requested by employers to verify military service, particularly if they are granting a preference to veterans. The form may be used to determine eligibility for interment in a VA cemetery or military honors at the time of death.

In addition to summarizing a service member's career, the form contains a code indicating whether a person is eligible for re-enlistment and contains a space for a narrative reason for separation. The re-enlistment code (from RE 1 through RE 4, with three and four not being eligible for re-enlistment) not only impacts the service member's ability to re-enlist in the military, but also determines eligibility for civil service jobs and security clearance. The narrative reason for separation can also impact employment opportunities. Having "Personality Disorder," "Unacceptable Conduct," or "Misconduct" appear on a DD-214 can be a significant barrier to resuming life as a civilian.

SPECIAL ADDITIONAL INFORMATION *(For use by authorized agencies only)*		
23. TYPE OF SEPARATION DISCHARGE	24. CHARACTER OF SERVICE *(Include upgrades)* HONORABLE	
25. SEPARATION AUTHORITY AR 635-200, PARA 5-13	26. SEPARATION CODE JFX	27. REENTRY CODE 3
28. NARRATIVE REASON FOR SEPARATION PERSONALITY DISORDER		
29. DATES OF TIME LOST DURING THIS PERIOD *(YYYYMMDD)* NONE		30. MEMBER REQUESTS COPY 4 *(Initials)* [redacted]

DD FORM 214-AUTOMATED, FEB 2000 PREVIOUS EDITION IS OBSOLETE. GENERATED BY TRANSPROC SERVICE-2

DD-214 (discharge papers) for a soldier with an honorable discharge for Personality Disorder. The form must be shown to prove veteran status.

Many are so traumatized that when their superior officer raises the possibility of a discharge they do not pay attention to the characterization of service and would "take anything just to get out."[53] All too often they fail to appreciate the consequences of a bad discharge or have the mistaken belief that it would not be difficult to upgrade later.

Denial of Benefits

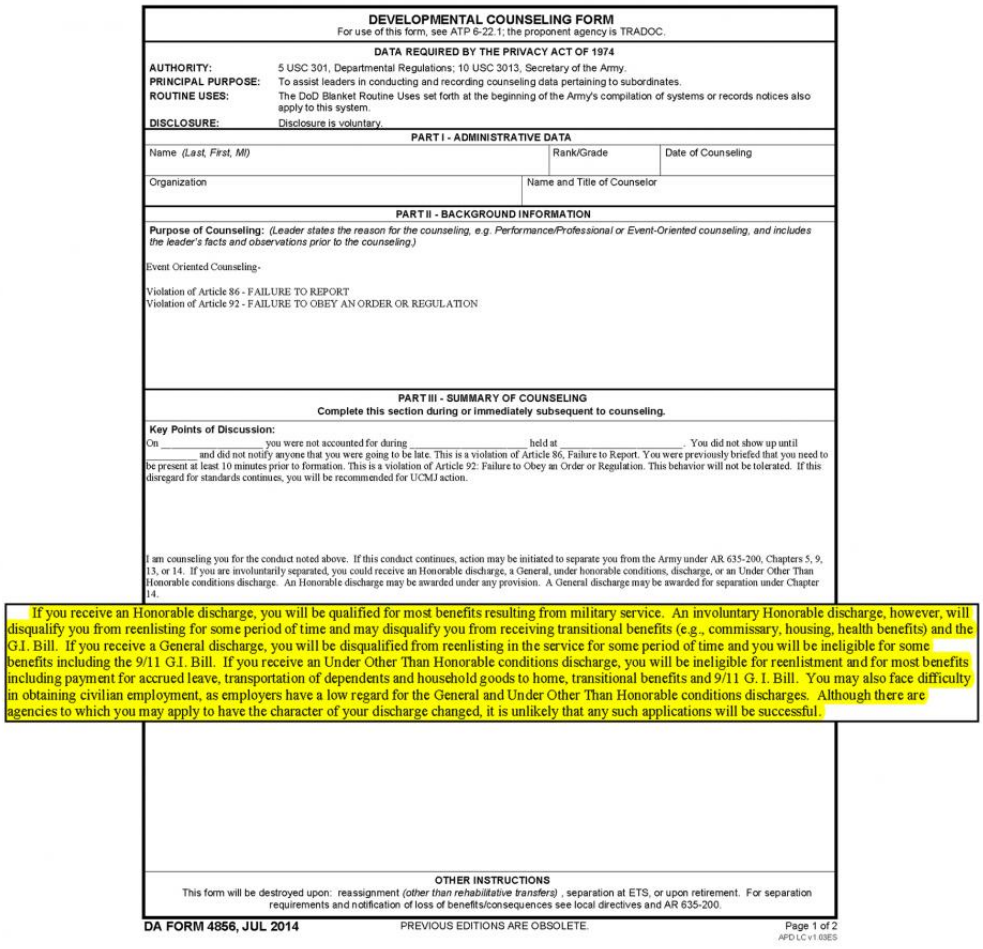
Characterization of discharge has an enormous impact on a veteran's eligibility to receive benefits. Service members might believe, or even be told, that having an honorable discharge means they are entitled to all veterans' benefits. However, an involuntary discharge, even if labeled as honorable (which is common for PD discharges), may mean a victim is ineligible for services to which they might otherwise be entitled. As an Army form states, "An involuntary honorable Discharge … will disqualify you from reenlistment for some period of time and may disqualify you from receiving transitional benefits (e.g., commissary, housing, health benefits) and the Montgomery GI Bill [education benefits]."[54]

Nearly half of all PD discharges (49 percent) between 2002 and 2007 occurred within the service members first year of service.[55] Leaving before 24 months, or before the end of the agreed-upon term for enlistment if it is fewer than 24 months, even if the departure from the military is involuntary, makes service members ineligible for VA benefits (with the exception of care specifically relating to trauma from military sexual assault or harassment) unless they are discharged for a disability or can show they have a service-connected disability.[56]

Until the veteran can prove they meet this requirement, which may take years, they have no access to any of these services. Personality disorder itself is, by definition, not considered service-connected. Advocates who work with veterans raise concerns that veterans who seek help at a VA hospital are told they are not eligible for services, but not told that they could become eligible if they file a compensation claim for disabilities.[57] Thus many do not know that they may be able to get health care despite having fewer than two years of service.

Service members with less than fully honorable discharges face additional challenges. As military forms warn departing service members, "In addition you could face difficulty in obtaining civilian employment as employers have a low regard for General and Under Other Than Honorable Conditions discharges."[58]

Those with General Under Honorable Conditions discharges are not eligible for education benefits, which are extremely important for reintegration. Some state benefits may also be denied to those who have less than fully honorable discharges. General Under Honorable Conditions discharges also do not afford service members the same administrative protections as other discharges. Unlike an Other Than Honorable discharge, General Under Honorable Conditions discharges can be made without referral to a Board of Inquiry. Though a service member may submit a statement or documents in support of a rebuttal for a General Under Honorable Conditions discharge, there is no right to a hearing.



DEVELOPMENTAL COUNSELING FORM
For use of this form, see ATP 6-22.1; the proponent agency is TRADOC.

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301, Departmental Regulations; 10 USC 3013, Secretary of the Army.
PRINCIPAL PURPOSE: To assist leaders in conducting and recording counseling data pertaining to subordinates.
ROUTINE USES: The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems or records notices also apply to this system.
DISCLOSURE: Disclosure is voluntary.

PART I - ADMINISTRATIVE DATA

Name *(Last, First, MI)* | Rank/Grade | Date of Counseling
Organization | Name and Title of Counselor

PART II - BACKGROUND INFORMATION

Purpose of Counseling: *(Leader states the reason for the counseling, e.g. Performance/Professional or Event-Oriented counseling, and includes the leader's facts and observations prior to the counseling.)*

Event Oriented Counseling-

Violation of Article 86 - FAILURE TO REPORT
Violation of Article 92 - FAILURE TO OBEY AN ORDER OR REGULATION

PART III - SUMMARY OF COUNSELING
Complete this section during or immediately subsequent to counseling.

Key Points of Discussion:
On _____ you were not accounted for during _____ held at _____. You did not show up until _____ and did not notify anyone that you were going to be late. This is a violation of Article 86, Failure to Report. You were previously briefed that you need to be present at least 10 minutes prior to formation. This is a violation of Article 92: Failure to Obey an Order or Regulation. This behavior will not be tolerated. If this disregard for standards continues, you will be recommended for UCMJ action.

I am counseling you for the conduct noted above. If this conduct continues, action may be initiated to separate you from the Army under AR 635-200, Chapters 5, 9, 13, or 14. If you are involuntarily separated, you could receive an Honorable discharge, a General, under honorable conditions, discharge, or an Under Other Than Honorable conditions discharge. An Honorable discharge may be awarded under any provision. A General discharge may be awarded for separation under Chapter 14.

If you receive an Honorable discharge, you will be qualified for most benefits resulting from military service. An involuntary Honorable discharge, however, will disqualify you from reenlisting for some period of time and may disqualify you from receiving transitional benefits (e.g., commissary, housing, health benefits) and the G.I. Bill. If you receive a General discharge, you will be disqualified from reenlisting in the service for some period of time and you will be ineligible for some benefits including the 9/11 G.I. Bill. If you receive an Under Other Than Honorable conditions discharge, you will be ineligible for reenlistment and for most benefits including payment for accrued leave, transportation of dependents and household goods to home, transitional benefits and 9/11 G. I. Bill. You may also face difficulty in obtaining civilian employment, as employers have a low regard for the General and Under Other Than Honorable conditions discharges. Although there are agencies to which you may apply to have the character of your discharge changed, it is unlikely that any such applications will be successful.

OTHER INSTRUCTIONS
This form will be destroyed upon: reassignment *(other than rehabilitative transfers)* , separation at ETS, or upon retirement. For separation requirements and notification of loss of benefits/consequences see local directives and AR 635-200.

DA FORM 4856, JUL 2014 PREVIOUS EDITIONS ARE OBSOLETE. Page 1 of 2
APD LC v1.03ES

The Worst Administrative Discharge: "Other Than Honorable"

The worst discharge characterization commanders can use to administratively separate a service member from the military is Under Other Than Honorable Conditions. An Other Than Honorable discharge is given when misconduct "constitutes a significant departure from the conduct expected of Soldiers in the Army."[59]

An Other Than Honorable discharge makes veterans ineligible for many benefits, including, in most cases, access to health care and VA compensation.[60] In addition, Other Than Honorable discharges are ineligible for payment for accrued leave, unemployment benefits after separation, federal veteran hiring preference, wearing a military uniform, burial rights, commissary access, relocation assistance, military family housing, and educational assistance, and will generally be unable to get jobs requiring a security clearance.[61]

Veterans with misconduct discharges are also often excluded from a range of important services from the state or from aid organizations including homeless shelters, tuition benefits, or programs offering employers incentives to hire veterans.[62] Moreover, many organizations that provide assistance to veterans do not provide services to people with DD-214s that "are less than stellar."[63] Some veterans' service groups, such as the American Legion and Veterans of Foreign Wars, are only open to those who were honorably discharged.

Veterans with Other Than Honorable discharges may be eligible for VA benefits if the VA reviews their service individually and determines they left with a discharge "under conditions other than dishonorable." However, in practice **the vast majority of bad discharges** (**89 percent since 2001**) **are never reviewed by the Department of Veterans Affairs.** nly 4 percent of misconduct discharges are granted VA eligibility.[64]

Bad Administrative Discharge vs. Medical Discharge

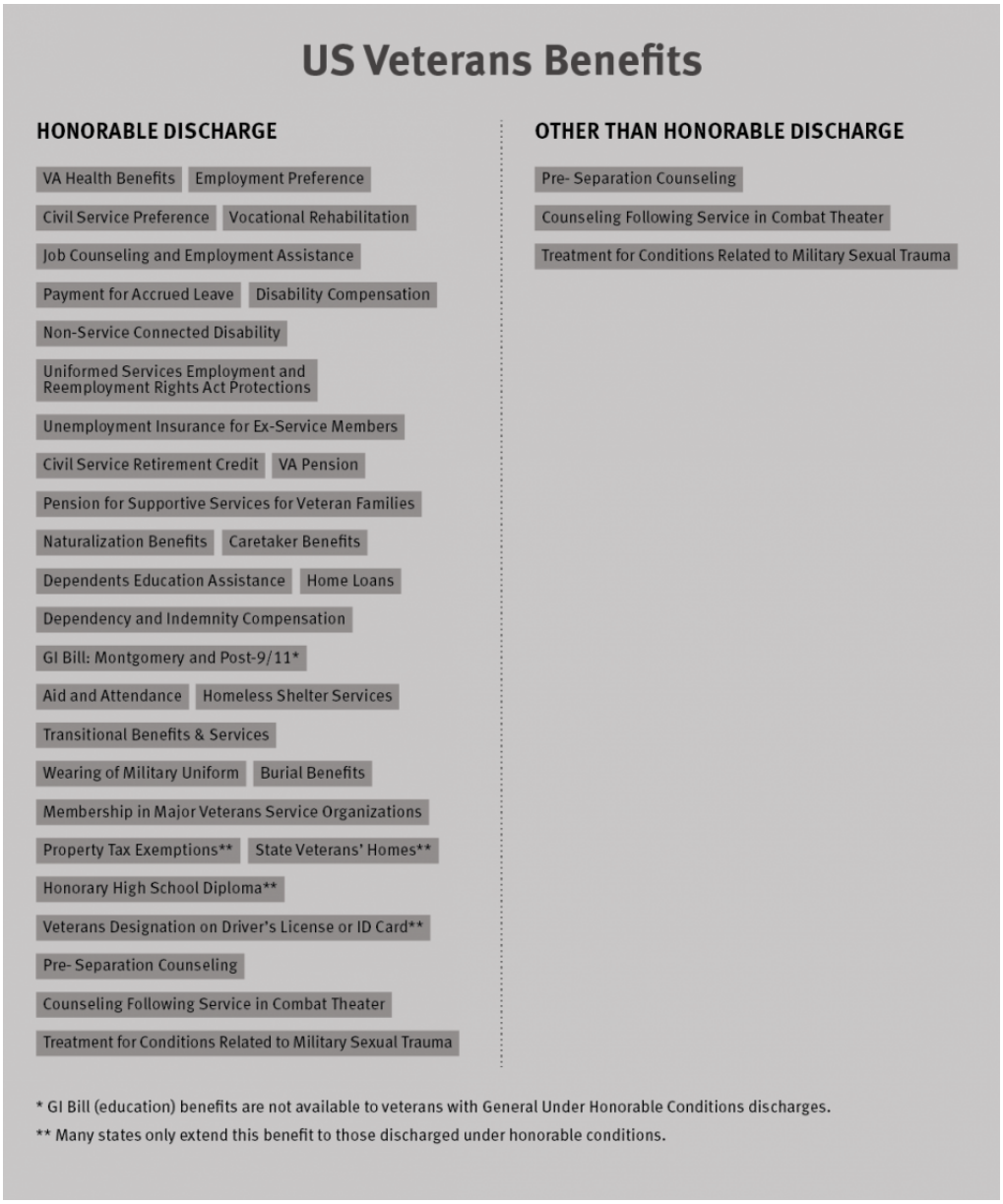
For service members—whether sexual assault survivors or those who had PTSD and might otherwise be qualified for medical retirement—the sacrifice in taking a bad administrative discharge instead of fighting for a medical discharge may be enormous.

Veterans who are medically retired have no stigma attached to their papers and can receive military disability pay and access to health care for the entire family. They are also fully eligible for post-9/11 GI Bill education benefits and are not required to repay any part of their re-enlistment bonus. Moreover, the medical retirement process (IDES) provides far more procedural protections for service members.

Integrated Disability Evaluation System

If a physician finds a service member has a condition that may permanently interfere with their ability to serve on active duty, the physician may refer them to a Medical Evaluation Board. The Medical Evaluation Board is comprised of at least two doctors who evaluate whether or not the service member's medical condition allows them to continue to serve in their position. The Medical Evaluation Board's findings are referred to a Physical Evaluation Board that formally determines if the service member is fit to stay in service and whether they are eligible for disability compensation. Throughout the process, VA Military Service Coordinators and Physical Evaluation Board Liaison Officers "help guide and counsel service members to ensure they are aware of their options and required decisions." Service members may request a hearing if they disagree with the Physical Evaluation Board's findings and have multiple opportunities to rebut or appeal decisions by the Boards.[65]

The differences in benefits for those with Honorable and Other Than Honorable discharges is illustrated below:



II. Personality Disorder Discharges

> I defy any of you not to have mental consequences if you were raped and harassed repeatedly and even set on fire, while management looked the other way and just laughed.
>
> —Testimony of Amy Quinn before the Judicial Proceedings Panel on Sexual Assault in the Military, May 19, 2015

Personality Disorders

Commanders can justify early separation on grounds of an "other designated physical or mental condition" that does not amount to a disability (such as sleepwalking or chronic seasickness or airsickness). This category also includes mental health conditions "sufficiently severe that the Soldier's ability to effectively perform military duties is significantly impaired."[66] Until 2009, this provision was frequently used to discharge people on the grounds of "Personality Disorder."

According to the American Psychological Association's *Diagnostic and Statistical Manual of Mental Disorders*, personality disorders (PDs) are characterized by deeply ingrained maladaptive patterns of behavior.[67] A personality disorder typically appears by the time one reaches adolescence and causes long-term difficulties in personal relationships or in functioning in society.[68]

Because having a PD renders one ineligible for military service, the military screens applicants for PD before their enlistment. Prior to entering service, all applicants undergo a multistep medical screening process. Medical prescreening forms ask if the applicant has ever sought mental health help. In addition, during the physical medical examination the applicant is asked a series of questions about mental health as part of their medical history. As a result, 1,018 potential recruits were rejected for personality disorders in FY 2009 and 1,161 applicants were rejected for PD in FY 2010.[69]

If PD is diagnosed after service has begun and a doctor determines it renders the service member unfit for duty, a service member with fewer than eight years of service may be discharged without benefits because PD is considered a pre-existing condition, even if it is diagnosed during the course of service. This is because veterans are only eligible for disability benefits for disabilities incurred or aggravated during military service.

A Difficult Diagnosis

The process of an administrative discharge on mental health grounds is initiated when a commander orders a service member to undergo a mental health examination.

Accurately diagnosing PD is difficult. The American Psychiatric Association's (APA) manual requires clinicians to establish that the traits indicating personality disorder were evident by early adulthood; are stable over time and in different situations; and are different from other mood or anxiety disorders such as Post-Traumatic Stress Disorder (PTSD). In order to do this properly, they recommend clinicians evaluate the stability of personality traits by conducting more than one interview with the patient spaced out over time.[70]

Proper PD diagnosis is particularly difficult following trauma, including sexual assault. Some symptoms of a personality disorder—irritability, feelings of detachment or estrangement from others, and aggressiveness—are similar to symptoms of PTSD. Approximately 30 percent of sexual assault survivors experience PTSD.[71]

The significant difference between PD and PTSD is that PTSD arises following a traumatic event whereas PD is a longstanding condition with symptoms appearing in early adolescence. According to the APA, in order to distinguish between the two, it is necessary to get an in-depth personal and medical history from the service member that is ideally corroborated by family and friends.[72]

The VA also advises clinicians to consult with family or others with knowledge of the individual prior to service when considering a PD diagnosis because PD, PTSD, and Traumatic Brain Injury share common symptoms.[73] The *Diagnostic and Statistical Manual of Mental Disorders* also suggests that if personality changes appear after a person has been exposed to extreme stress, "a diagnosis of Post-Traumatic Stress Disorder should be considered."[74] One expert said it is "a rule of thumb amongst psychiatrists" not to diagnose someone with PD in the middle of a traumatic experience.[75] Unlike PD, service members diagnosed with PTSD as a result of a traumatic event incurred while in service are eligible for service-connected disability compensation.

Interviews with survivors, as well as information gathered by the Government Accountability Office, indicate that **the type of in-depth exam required for proper diagnosis often did not occur for service member survivors of sexual assault before PD discharges were made.**

Many sexual assault survivors were slapped with a PD label after minimal interaction with a doctor. For example, Leila Kennedy told Human Rights Watch that after she reported her rape by a senior non-commissioned officer in 1999, her commander restricted her to her barracks and she was not allowed to be around men without a female escort. When she complained that she was being punished, her commander ordered her to counseling. After a five-minute consultation she was diagnosed with Personality Disorder and her out-processing began. She was able to appeal with assistance from civilian doctors who argued that a PD diagnosis could not be made in five minutes.[76]

Richard Wheeler, who was gang-raped and sodomized with a broomstick in 1980, was forced out of the military fewer than two weeks after his assault. He was involuntarily discharged by his commander for personality disorder by a doctor whom he said met with him for 20 to 30 minutes.[77]

A week after being declared fit for service by a civilian psychiatrist in 2007, a military doctor diagnosed MAJ Tess Hayes with personality disorder after one session because she "kept talking about her case."[78] The doctor recommended she be involuntarily discharged from the National Guard for PD after 23 years of service.[79]

Seaman Ariana Perez said after one less-than-30-minute consultation with a Navy psychiatrist in Japan, he told her she was going back to the United States. She said, "Oh, I am getting a new job?" and he told her, "No, you are getting discharged for Personality Disorder." When she asked what that was, he said her "personality doesn't suit the needs of the Navy."[80]

An Army Board for Correction of Military Records case also describes a victim who was given a PD diagnosis the same day her commander requested an evaluation. Within three weeks she was discharged after almost eight years of honorable service. At the time of her discharge she was being treated for PTSD due to rape and sexual harassment.[81]

PD vs. PTSD Discharge

Data show use of PD as a ground for discharge escalated significantly in all branches (except the Navy, which had already been using it extensively) between 2002 and 2007.[82] More than half of the survivors we interviewed who left service between 2000 and 2008 told us they had been diagnosed with PD.

An experienced Air Force Sexual Assault Response Coordinator (SARC) said, "I would swear mental health gets paid for denying PTSD claims" after witnessing cases in which the military diagnosed survivors with personality disorder but civilian doctors diagnosed the patient with PTSD.[83] An Airman who was diagnosed with PTSD after his assault in 2011 said, "When I asked for a medboard (medical retirement) they started doing Personality Disorder tests."[84]

PD does not have greater prevalence among females. However, between 2000 and 2010, the services discharged women for PD at rates nearly double what would be expected given the proportion of women in service. "

Though we were unable through public records requests to obtain data on the number of sexual assault survivors who received PD discharges, available military data does show that female service members were disproportionately discharged for PD. Research in the general population shows **PD does not have greater prevalence among females.**[85] **However, between 2000 and 2010, the services discharged women for PD at rates nearly double what would be expected given the proportion of women in service.** Women accounted for between 25 and 31 percent of PD/AD separations despite constituting only 15 percent of all active duty forces.[86]

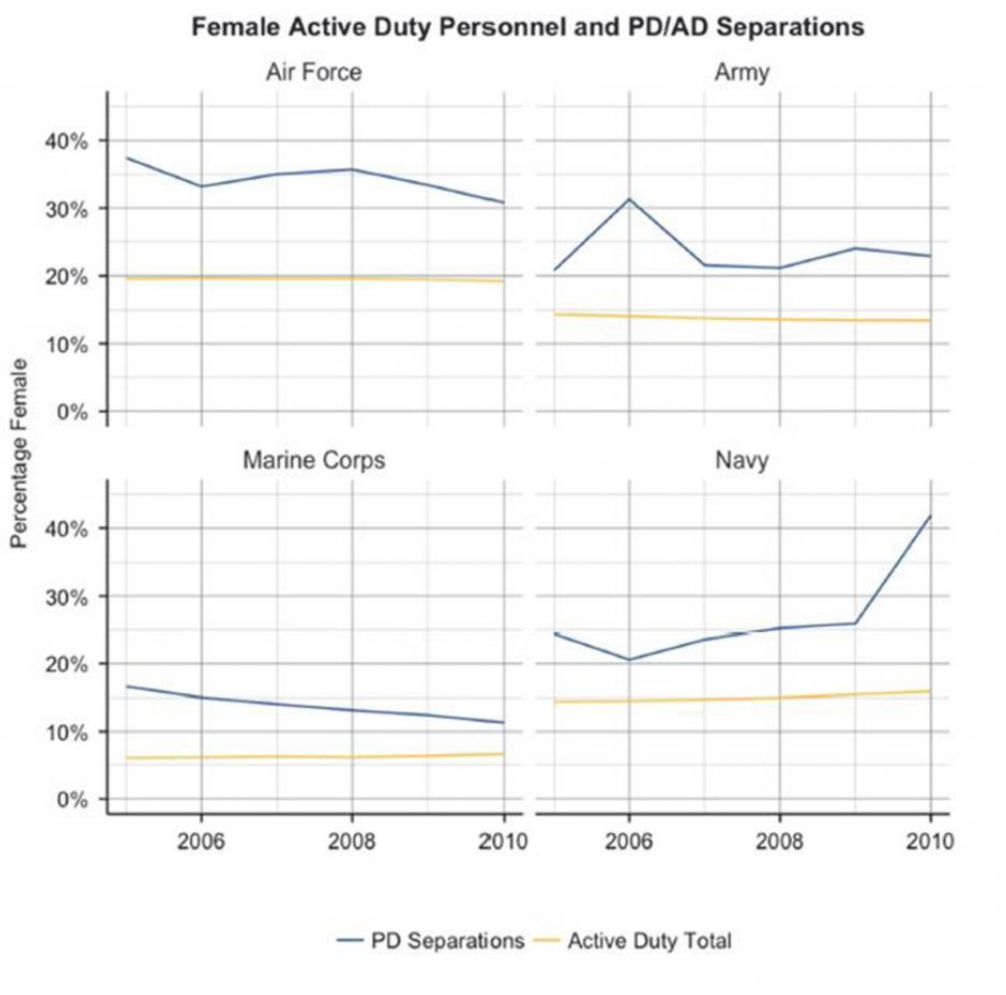


Chart made by Human Rights Watch using data provided in response to FOIA request.
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Chart made by Human Rights Watch using data provided in response to FOIA request. © 2016 Human Rights Watch

Though the overall number of PD discharges has dropped, service members still report being diagnosed with PD after reporting a sexual assault.[87]

Prior to reforms, there were misplaced incentives operating on commanders and medical staff to prefer a PD diagnosis to PTSD. Commanders preferred PD because, in contrast to PTSD, it was a diagnosis that allowed for quick dismissals and the deployment of a healthy replacement. In contrast, PTSD is considered service-connected and requires a medical board's assessment, a process that can take two years. During that time, the commander cannot get a healthy replacement for the soldier being considered for medical retirement. Similarly, doctors may face pressure to minimize service members' diagnoses to discharge troubled service members quickly and minimize benefits.

An Army psychologist was captured on tape saying, "Not only myself, but all the clinicians up here are being pressured to not diagnose PTSD." He and a recently retired Army psychiatrist indicated that their commanders encouraged them to diagnose service members with other disorders that would reduce their benefits.[88]

SPC Haynes told us how hard it is to overcome a commander's request for a mental health discharge. After she reported being raped and sodomized in 2006, her commander ordered her to undergo a mental health evaluation to see whether she was fit for service. A judge advocate was able to help her fight the discharge but a month later she was again referred to mental health. This time the therapist said she was fit to serve. However, her commander referred her to mental health a third time. The doctor said, "This is the third time I have seen your 5-17 (other designated physical or mental health condition) paperwork. Clearly they want you out." This time the JAG was told to stay out of it and she was chaptered out of the service for "5-17." In 2010, the ABCMR denied her request to change her records. [89]

An Army Surgeon General review of Army PD discharges in 2007 found no soldier had been improperly dismissed with PD. However, reviewers did not interview soldiers, doctors, or soldiers' families in making their findings.[90] In 2010, the Army again asserted that no service member had been inappropriately discharged and the DOD asserted that pre-2008 discharges were not characterized by widespread and systematic error, but they have not released information about how the review was conducted.

PFC Patricia Watson joined the Marines after the 9/11 attacks. After reporting her rape, she says her superiors branded her a "troublemaker" and a "liar." They singled her out for non-judicial punishment for adultery (because her assailant was married) and fraternization. The nurse she went to for STD tests lectured her about drinking and unprotected sex. Her assailant spread rumors about her. When she later rejected the advances of a sergeant she was singled out for abuse in formation. For example when she had pink eye, in front of the formation, one corporal said loudly to another, "Do you want to know how you get pink eye? You let a guy jizz in your eye."

Her superiors started looking for things she had done wrong and yelled at her all the time. Soon everyone thought she was a "shitbag" soldier and she began feeling suicidal. At night, she was harassed in her room. On the way to a new shop building, a lance corporal started masturbating in the car and told her to "show me your tits." After she refused to get in the car with him again, he tampered with her vehicle, putting her life at risk. When she got pregnant later with her husband, she was accused of doing so to get out of her duties and the harassment got worse. She was made to scrub floors repeatedly with a toothbrush. After confiding to a midwife that she was having difficulty and was depressed, she was referred to a therapist on base. When she told him about the rape, he said, "They are most likely to try to administratively discharge you." A few months later, while on maternity leave, she got notice she was being discharged. Only after all the out-processing was complete did she see she had been discharged on grounds of personality disorder. Watson said, "I didn't know what it meant but didn't like it and knew I didn't have it … For a long time I thought something was wrong with me. I thought it must be true. I never thought people would lie."[91] She had no notice she had been diagnosed with PD and no counseling. She later tried to get her discharge upgraded, but was rejected. She has had a hard time getting a job and believes it relates to her discharge papers. Though she was diagnosed with PTSD, the PD label made it hard for her to get benefits or counseling linked to PTSD.[92]

Reforms

After the GAO reported in October 2008 that the branches' compliance rates for requirements in discharging based on PD varied greatly (from 40 to 98 percent) depending on the installation, the military was required to report to Congress on compliance with DOD requirements for PD separations.

Additional safeguards were put in place to protect service members, including a requirement that service members be counseled in writing that personality disorder does not qualify as a disability and that evidence be provided to indicate that the service member is unable to function effectively because of a personality disorder. DOD also added new requirements to ensure that enlisted service members who have served in imminent danger areas have further safeguards against being wrongly diagnosed with PD.[93]

Specifically, as of August 28, 2008, PD diagnoses for those who have served in dangerous areas must be corroborated by a psychiatrist or higher-ranking mental health professional, the diagnosis must be endorsed by the Surgeon General of the respective branch, and it must address whether or not PTSD or other mental health conditions are present.[94] In 2011, these additional procedural requirements were expanded to encompass all other non-disability mental health conditions used as a basis of administrative discharge.

Though the requirements for corroboration, surgeon general endorsement, and addressing PTSD would not apply to sexual assault victims who did not serve in combat zones, a provision was enacted that allows service members who make an unrestricted report of sexual assault and face involuntary discharge within a year of their report to request high-level review of the grounds for separation.[95]

After these stricter safeguards were put in place, the number of PD discharges dropped dramatically across the board. For example, the Army had 1,078 PD discharges in 2007 but only 17 in 2010; the Navy went from 854 PD discharges in 2008 to 237 in 2010.[96]

Nonetheless, advocates still report seeing victims administratively separated for PD when a medical separation for PTSD may be more appropriate, and they have expressed concern that abuse of non-disability mental health discharges are also continuing in other forms. For example, the number of discharges given for another non-disability mental health condition, adjustment disorder (discussed further below), rose significantly after 2007.[97]

Moreover, in February 2015 the GAO raised concerns that the military services are not effectively monitoring compliance with DOD requirements for other non-disability mental health separations and, as a result, military services may not be affording service members the protections intended by the revised policies.[98]

Harm Caused by a Personality Disorder Discharge

An erroneous mental health discharge has been described as the "ultimate retaliation."[99] Apart from loss of benefits, being labeled as having personality disorder is deeply stigmatizing and can have devastating consequences.

By wrongfully applying this label to some sexual assault survivors in the course of discharging them, and subsequently failing to respond to requests to correct the records, the military has unnecessarily subjected survivors to a range of life-altering repercussions.

In addition to repercussions already mentioned, in criminal proceedings for the underlying assault, a PD diagnosis may cast doubt on the reliability of the victim and make prosecutions more difficult. As one veteran told us, "After I was given that [PD diagnosis], everything else I did had less credibility."[100] One Army victim with a PD discharge says she was told she could not testify against her accused rapists during their court-martial because of her "mental health condition."[101]

The lack of credibility may impact access to health care. Physical illnesses may be ignored as something fabricated or imagined by a person with a mental health condition. Service members told Human Rights Watch that they had a hard time getting VA benefits due to a perceived lack of credibility when PD appears on their papers. A veteran reported her

benefits were denied for PTSD because she had been diagnosed with PD.[102] Others said that they believed the VA downgraded or delayed their benefits as a result of having PD on their papers.

> SA Tia Christopher was in advanced language training when she was raped by a fellow seaman. She initially opted not to report her rape in March 2001 after a friend warned her, "If you want a career and don't want to be labeled a troublemaker, just deal with it." However, her assailant was stalking her and eventually it became too difficult to cope. When Christopher spoke to her commanding officer, he told her she "asked for it" and asked her if she "thought it was funny" since she was the third report that week. Witnesses to the crime who came forward to corroborate her account got in trouble for underage drinking, despite having been told they would not be punished. Over the remaining six months of her career she was isolated, humiliated by her command (for example, a senior petty officer asked her to "lift up [her] shirt and show [her] big titties"), and ordered not to talk about the case. She described what happened after the assault as so much worse than the rape itself. That summer, Christopher attempted suicide and her command decided to process her out of service. While she was awaiting her final out-processing, she was made to clean the men's bathroom with other seamen who were in trouble, including one who was a suspect in a sexual assault. She was also forced to remain in the room in which she was raped despite requests to change rooms. Although she had no history of mental health problems prior to service, Christopher received an honorable discharge with a narrative reason of personality disorder. Her command told her she was not a veteran and would not receive benefits. It took a long time before she sought care for her PTSD.[103]

Moreover, depending on the year, between 25 and 46 percent of PD/Adjustment Disorder (AD) discharges were characterized as something other than honorable, which greatly impacts benefits as discussed above.[104]

Although PD diagnoses are harder to come by now and overall military handling of sexual assault has improved since many of these discharges occurred, the various ways in which a PD label on discharge papers continues to harm survivors are described in more detail below. It is important to understand the magnitude of these harms because they continue unaddressed as long as the military fails to provide meaningful opportunity to review wrongful PD discharges (and other discharges), discussed in more detail in Chapter V.

Shame

Survivors of sexual assault often described the personal devastation and shame they felt at being labeled as having a personality disorder. Service members feel they have been labeled "damaged goods" and their "identity and self-worth as once proud warriors destroyed."[105] Some choose to hide the fact that they were in service rather than have to show their DD-214.[106]

The following are some of the emotional harms described to Human Rights Watch by survivors with PD discharges:

- Cathleen Perkins joined the Army in 1989 to escape a difficult home life and also to make her family proud. She thought by joining the Army she could make a difference. After two years of service during which she was often ill with a stomach ailment, was repeatedly assaulted, and treated like a "whore" by her peers ("We used to have prostitutes, now we have you"), her supervisor gave her notice of discharge. When she got her papers, she learned her separation was on the basis of "Personality Disorder." The diagnosis was made after a 10-minute discussion with a psychiatrist. When she was being processed out, in Delaware, she was denied a ribbon and told, "We save the ribbons for the real heroes, soldiers." Corporal Perkins was devastated and felt like she "was a piece of trash to them.... It was bad enough to be booted out, but the lack of dignity made it much worse."[107] Over the past 25 years, she has felt intense shame and stigma from the diagnosis. Her family says, "See, it's not

just me that thinks you're fucked up," and still uses it as an excuse to abuse her. She said it "latches on to your heart and crushes you—destroys you." She will not claim a veteran's preference for jobs because she does not want to show her discharge papers saying she has a personality disorder. Corporal Perkins applied to correct her records in 1992 "just for her sense of self" and because she wanted to be treated fairly. She was denied.[108]

- Third Class Petty Officer Carroll reported sexual harassment by her supervisor to her lieutenant in 1992. The next day she was ordered to get a mental health evaluation. When she objected, she was told she would get a dishonorable discharge for making a false allegation of sexual harassment if she did not go. Six months later when she reported for duty she was told to go to the divisional support person to sign discharge papers. She had no idea she had been diagnosed with personality disorder and has not been diagnosed with it since. Though she was able to get an honorable discharge, she described the DD-214 narrative that labeled her as having PD as a "stain" and "the greatest sting, biggest embarrassment" and dreads trying to explain it to potential employers. [109] She once defaced her form to hide it from a potential employer. She has been diagnosed with PTSD.[110]

- Amy Quinn, who was raped three times in the Navy and set on fire by her peers, also received a PD discharge in January 2005. She said the greatest impact of "being stuck with the false personality disorder diagnosis" has been psychological—she says, "It took me ten years to get myself together after the personal torture I experienced on that ship." She has always thought, "What was wrong with me?" and is disappointed that her Navy career, which she hoped to last a lifetime, ended prematurely.[111]

- An Army veteran, Eva Washington, said, "It is bad enough to go through military sexual trauma, but to be discredited and labeled is difficult to overcome and causes so much damage. PD is another level of betrayal because it is so stigmatizing.... People think there is something wrong with me and don't realize it was a label just stuck on people." She has found that even within the military sexual trauma community, there is shame attached to the PD diagnosis.[112]

Eva Washington after finishing boot camp in 2000. She was raped repeatedly while in training for Army Intelligence and given a Personality Disorder discharge without having a medical diagnosis.

- Brian Lewis, a Navy veteran, says he carries his discharge "as an official and permanent symbol of shame, on top of the trauma of the physical attack, the retaliation and its aftermath."[113]

- PFC Burns says that after 13 years, she still cries when she sees her discharge papers because she finds it so shameful.[114]

- Seaman Perez said she was devastated by her personality disorder discharge when it happened in 1994 and still feels shame to this day because it made her feel she "was not good enough for the Navy."[115]

- Shirley Lawson was assaulted a week before graduating from Lackland Air Force in 1979. She decided not to report because she thought she would be leaving soon and worried she would not be believed. However, when she moved on to Tech School, she could not put the assault behind her. She felt like she was still treated like a "mattress" and was continually harassed. When later she got pregnant with her husband, she was sent in for a psychological evaluation that resulted in an administrative separation in 1981 for "apathy, defective personality, unsuitable." She says she was fit when she started, and now she is humiliated whenever she has to show her DD-214 for veterans' benefits, jobs, even veterans' discounts.[116]

Eva Washington said she was a top student who left for boot camp two days after graduating from high school in 2000. She enlisted both because she wanted to serve her country and because her family could not pay for college. Because of her test scores, she was selected to do intelligence work. After excelling in boot camp and training, she was encouraged to have a military career. Her superiors said they would nominate her for West Point and her future seemed assured. Her plans were cut short, however, after her date to the Marine Corps ball raped her, beating her badly so her battle buddy (assigned partner) reported the assault to her chain of command. She was taken to a hospital where she was interviewed by civilian and military authorities. Her assailant was questioned but no prosecution was pursued. When she returned from emergency leave, she "got the message loud and clear. I needed to keep quiet, deal with it and move on."

In the ensuing months, she went from star soldier to target for retaliation. She received multiple disciplinary notices (article 15s) for behavior ranging from "failure to soldierize" (for having a pale pink, not peach, manicure, or for having boxers over her military underwear, or for wearing lip gloss) to failure to obey direct orders (for wearing an extra item of clothing). Before reporting the rape, the same lip gloss and nail polish were not a problem. At night, a drill sergeant would repeatedly come into her room while she was sleeping and stand over her bed in order to intimidate her. He made comments about her breasts and used excessive hazing techniques in order to punish her. Private Washington told her father about the harassment. He called their congressman who then called her supervisor who called her into his office. She was ordered to tell the congressman, in front of her superiors, that nothing was wrong.

After that, Washington was singled out for even more abuse. It was clear to her they wanted her out of service. West Point was taken off the table. She was confronted in the bathroom and threatened by friends of her assailant who warned her not to talk about what happened. She was taken out of her room in the middle of the night repeatedly for extra physical training, she believes in retaliation for speaking out. She was raped two more times, which she did not report because she feared more retaliation. The culture was such that they could "smoke the hell out of you any time and have you do push-ups and sit-ups until you throw up. If you complained, it got worse." Also, she said, "Once you are singled out people stay away from you to avoid also being subjected to additional hazing." Eventually she agreed to marry someone she barely knew in order to change housing in a desperate effort to avoid hazing at night, though they still did not allow her to leave the barracks. She said the military made it clear she "was property of the US military." She said, "My enemy wore the same uniform as me."[117]

One Friday about six months after the second rape, she was taken to a storage room and told she would be given an honorable discharge. Her drill sergeant ordered her to sign some papers and put her on a flight out that afternoon. She had no idea what was on the papers but was told she had no choice since she could not be reclassified, as she had requested, to avoid her assailant. They cut up her ID and gave her a plane ticket (the cost of which they then took out of her pay). She did not look at the paperwork until a long time later. Only then did she realize she had been given a "Personality Disorder" as a narrative on her discharge papers and would not be allowed to reenlist. She still did not know what it meant and had no history of mental health problems.

She found out what it meant after she was thrown out of Reserve Officers Training Corps (ROTC) in a university near her home. Despite a 4.15 grade point average and a clean bill of health from the military, several months into the ROTC program she was pulled aside by its leader and told she had a black mark on her record and could not participate any longer. Both civilian and VA doctors have confirmed she had PTSD and never had PD. However, she is afraid to go to the Boards to change her record because of the "amount it would rip apart my life. I don't want to do it until I know I have support from Congress." Since her discharge she has been homeless at times and has had difficulty in getting a job because of the PD label on her paperwork. Once government employers see her paperwork, she loses job interviews. [118]

Eva Washington after finishing boot camp in 2000. She was raped repeatedly while in training for Army Intelligence and given a Personality Disorder discharge without having a medical diagnosis.

Medical Care

Service members discharged with PD, which is considered a pre-existing condition, may not believe they are eligible for VA care so they often do not even try to get it, which may carry long-term costs. Some survivors are even told by their command that they are not veterans and will not receive health care.[119] As a veterans' service organization testified,

> Veterans come to Swords to Plowshares in financial and psychological crisis, many believe that they are not eligible for VA care and benefits because personality disorders, as a pre-existing condition is not service connectable. Even with the help of our legal and social services staff, this status causes significant delays in care, causing unnecessary exacerbation of their symptoms … [T]he cost in suffering, poverty, and the shame inflicted on warriors is immeasurable.[120]

Even for those who do seek help at the VA, being mislabeled with PD may have insidious consequences. Survivors told Human Rights Watch that they were denied medical care because doctors said their injuries were "all in their head."[121] Moreover, it may impact available treatment. A counselor who works with veterans told Human Rights Watch that she has found other "old school" counselors refuse to allow those with personality disorder in their records into group therapy sessions because "they will go after each other."[122] While those properly diagnosed with PD may require special consideration in their medical care, the military's failure to properly diagnose PD has ongoing ramifications for veterans in the VA system.

Brian Lewis was the top junior ROTC class in his battalion when he joined the Navy out of high school in 1997. Three years later he was raped at knifepoint by a senior non-commissioned officer. He reported it to the chain of command but he was told not to report it to Naval Criminal Investigative Service (NCIS) because the assailant was "mission critical"—he held an important position. Over the course of the following year, Brian suffered from severe PTSD and was put on limited duty and began the process for medical retirement. While he was preparing to go, he saw in his paperwork that he had been given a PD diagnosis in addition to PTSD. After he complained about his treatment through several channels, his doctor changed his diagnosis from PTSD to personality disorder, claiming that he "manifested immediate danger." Despite having gone through extensive psychological testing previously for work on a submarine and showing no sign of PD, within a few weeks he was out of service with a General Under Honorable Conditions discharge for "Personality Disorder." He described his discharge as "soul crushing."[123] Although the VA also diagnosed him with PTSD as a result of his rape shortly after his discharge, the Board for Corrections refused to change his discharge classification. He told Human Rights Watch he carries his discharge "as an official and permanent symbol of shame, on top of the trauma of the physical attack, the retaliation and its aftermath."[124] Before entering college, he had to discuss his diagnosis with the disability services people at school. He also had to submit his discharge papers to financial aid and again explain what happened. Now a law student, he worries about how it will impact his bar admission and employment opportunities. Because he was not medically retired, his partner lost health and education benefits.[125]

Below are some experiences survivors described to Human Rights Watch in which they felt their discharge papers impacted their care:

- Cathleen Perkins had trouble getting her Krohn's disease diagnosed because doctors did not believe her complaints after seeing PD on her record. She suffered in great pain for years before her complaints were taken seriously.[126]

- A lance corporal in the Marines who was depressed after two sexual assaults was diagnosed with "histrionic personality disorder." When she later had a bad reaction to dye during a medical test, the doctor insinuated she was lying, which her mother believes stemmed from the PD diagnosis. The dye caused kidney failure.[127] She was later diagnosed with PTSD and Traumatic Brain Injury resulting from her assault.

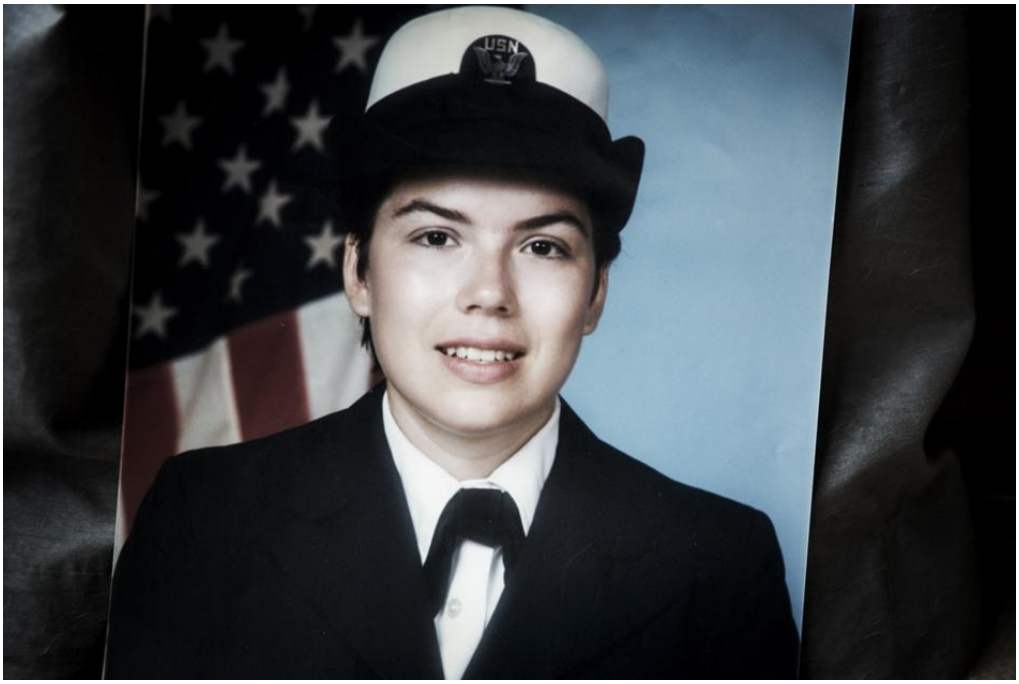
- An Air Force veteran, Josie Weber, said when she was treated for cancer she was put on "danger watch" because of her personality disorder diagnosis.[128]

- It took Audrey Dixon seven years of appeals for her to get benefits from the VA, which she attributes to the PD diagnosis. In the meantime, she paid for counseling herself. Doctors diagnosed her with PTSD and depression, which she thinks may have been avoided if she had gotten help immediately.

- Though PFC Patricia Watson was diagnosed with both PTSD and PD, she says the PD label made it hard for her to get benefits or counseling linked to PTSD.[129]

- Sergeant Ross, a survivor of military sexual assault, said of her discharge papers, "When I read 'personality disorder,' I collapsed in tears." She felt PD made her even less credible when she tried to get benefits from the Army. "It was hard to be treated that way by an organization I put my heart into.... Not recognizing it is the worst thing they do to victims."[130]

- Ruth Moore was raped in the Navy twice in 1987. Unable to get help, her life spiraled downward after contracting an STD due to the assaults. She attempted suicide and was discharged from service with a personality disorder. "Outprocessing" advised her to waive all claims to the VA as she would get health care through her active duty spouse. Over the next six years she struggled with relationships and had a hard time holding jobs because she did not trust male supervisors. Increasingly she showed symptoms of PTSD, but she was repeatedly denied help from the VA where administrators told her they could not help her because personality disorder is a pre-existing condition.[131] Eventually, Moore met a Military Sexual Trauma Coordinator who listened to her at another VA hospital. Her psychiatrist and counselor determined Moore did not have a personality disorder. With their help, and that of a senator, she was ultimately able to get adequate benefits—23 years after leaving service. She says, "If I had been treated promptly and received benefits in a timely manner, back at the time of my discharge, my life would have been much different. I would not have had to endure homelessness and increased symptomology to the point where I was suicidal ... and I firmly believe that I would have been able to develop better coping and social skills."[132]



Ruth Moore as a Navy Seaman in 1987. After being raped twice in service she was given a Personality Disorder discharge and had to fight for 23 years to get benefits.

Nina Carr joined the Air Force in 1981 to escape poverty and get an education. In 1983, she had top secret clearance and was assigned to communications. She loved her work. When her boss took an inappropriate interest in her, she complained to a chaplain and to a senior officer who told her to "go along with it" because "that is how it works." After that, Carr told Human Rights Watch, she was reprimanded and lost a promotion twice. Her supervisor scheduled her for a 12-hour overnight shift alone in a vault with him. That night he raped her. After the assault she went to a local clinic for a rape kit and medical attention. They called her supervisor and he told them she was psychotic. She was taken in a straitjacket to Lackland air base where she was held in a hospital for 115 days without her belongings and without notifying her family while they made an effort to dishonorably discharge her. After her mother reached out to Congress, Carr was given an honorable discharge with a "Personality Disorder" narrative—which was factually inconsistent, since with "top secret clearance" she could not have had a pre-existing mental health issue. Later when she had severe endometriosis (a condition in which tissue grows outside the uterus) and needed medical care, she was initially ignored by the VA because of her "mental health issues."

When the surgery went badly and she tried to raise her concerns, she said she was told by the surgeon, "You just have mental health issues. Get over it." As a result she had to have multiple surgeries and now has chronic debilitating health problems and is fully physically disabled. Although she is frustrated with being unfairly discredited by her discharge papers, she has not sought to revise them because she is "tired and doesn't want another battle" on top of her struggles with the VA.[133]

Jobs

Because an administrative discharge for a pre-existing condition may leave people without retirement pay and ineligible for benefits, returning to civilian employment is all the more important. However, many employers ask to see a veteran's discharge papers before hiring them and that can be the end of the road for many who have bad papers.

For some positions—particularly in security or law enforcement, but also for civil service positions—a PD label may be disqualifying. Jobs that require security clearance may also be unavailable to those with mental health discharges. Even for jobs that are not restricted, the stigma of a mental health label may make employers reluctant to take a chance on an applicant. Survivors report that even after having a positive interview, job offers would fall through once employers saw the DD-214. Some survivors said they simply stopped applying for jobs as a veteran because they were embarrassed about their papers.[134]

Roseanne Henderson was assaulted in 2007 by her Navy recruiter at age 18 and then harassed when she was at sea. After complaining, she was told by command, "If we send you back on a ship this will happen again…. You'd be better off serving your country as a Navy wife." During her discharge process, her supervisor promised her a medal and said she would have no problem finding work, which was important as she was poor and did not have family. When she got her DD-214, she saw the discharge was honorable but the narrative said PD. She said, "Now I can't even get a security job."[135] She was told she had personality disorder because she was emotionally unstable after her rape. Roseanne said, "It's like if someone said because your car was broken into, we are going to take away your future. Except it was my body."[136] Roseanne also got only half of her GI Bill benefits. She attempted to change her discharge narrative at the BCNR but, despite submitting medical documents indicating she never had PD, was denied.[137]

Several other survivors told Human Rights Watch that they had difficulty finding employment as a result of having PD on their discharge papers:

- As a result of PD, Ruth Moore is ineligible to hold any state or government position. Civil service jobs are also out of reach.[138]

- Eva Washington said she believes her inability to get a job stems from the PD label on her paperwork. Once government employers see her paperwork, she loses job interviews. She has to explain her discharge—and her rape—when she applies for jobs.[139]

- Diana Gonzalez, who deployed as part of an all-male unit that took part in Desert Shield in the Persian Gulf in 1990, was given a PD discharge after struggling with PTSD following a gang rape by other soldiers in her barracks. When she looked for jobs, she had to give prospective employers her DD-214 so they could get credit for hiring a veteran. However, she found employers would not call her back once they saw her papers.[140]

- Samantha Drake said she was subject to nearly constant harassment and bullying after her roommates reported —against her wishes—that she had been sexually assaulted at a party off base. At the time, she was in Power School in training for the Navy's nuclear program. She said that in class, her peers would make an effort to get instructors to talk about rats and make rat noises in reference to her because they believed she made up the assault to get out of trouble for drinking at a party. The strain of the harassment eventually got to her and during her next level of training she faked a suicide attempt in order to get out of service. She was processed out quickly and only saw it was on the basis of PD when she was signing her discharge papers but she did not know what it meant. Later it affected her return to civilian life. She described positive job interviews that would not result in an offer after the employer looked into her background. She too was diagnosed with PTSD and has never had a PD diagnosis. She said the PD discharge "ruined my life."[141]

- Private First Class Burns was raped and sodomized by a fellow Marine while at work in 2000 shortly after entering service. She said he threatened to ruin her career if she reported so she did not. However, after being raped a second time at gunpoint by a member of the military police, she confided in an officer she trusted. Almost immediately, she was sent to a Naval hospital to meet with a psychiatric intern. After three meetings she was given a diagnosis of personality disorder and PTSD and was quickly processed out. She only learned of the PD when she was leaving. At that point she also learned her discharge was "General Under Honorable Conditions" though she had been told it would be honorable.[142] She told Human Rights Watch she has found it hard to get a job ever since. For one job, she was not able to get security clearance to carry a weapon.[143]

Amy Quinn told Human Rights Watch she joined the Navy in 2002 as soon as she finished high school. She decided to enlist out of a sense of duty following the 9/11 attacks. In boot camp she was one of the top four in her class and received the "shipmate" award for the person who most exemplified the ideal shipmate. She said her trouble started after she rejected the advances of her master chief. After that, others told her he was looking for her to make a mistake so he could kick her out of "his" Navy. She was raped but did not report for fear of what would happen since she was already labeled a troublemaker. Later, on deployment, due to sedatives she had been given to help her cope with the news that her brother had been shot, she fell asleep on a chair during a meeting.

Her shipmates sprayed her body with aircraft cleaner and set her on fire with a lighter. She survived without serious injury due to her fire-retardant gear, but the perpetrators were only given an oral reprimand and she was told she was overreacting. Her supervisor switched her to a different unit but she was put on a night shift with a first class petty officer who groped her breast and said in his country her "clit would be cut off." Her complaints about harassment went nowhere. She requested an audience with superiors on November 26, 2004, and listed her grievances for the record and asked for a transfer. Instead, she was ordered to work the night shift with the subject of her complaints. She refused and was punished as a result. She said for five days she had to stand at attention in front of the maintenance shop six to eight hours a day with breaks only to eat or use the bathroom.

A sympathetic senior enlisted person told her to speak to the chaplain. She did. The next day she was told to pack her things. She was sent to the Temporary Processing Unit in Norfolk. At first they did not have her papers, but when they found them and saw she had made complaints, she was told she was not welcome there. She was discharged a few days later. Initially the characterization was General but she fought for an Honorable Discharge, though the narrative reason was "Personality Disorder." Her command told her they were doing her a favor and that it was the only way to get what she wanted—to be away from the ship. Her command also assured her that the discharge would not have any ramifications. Later, potential employers rejected her for jobs in security and law enforcement because even though her discharge was honorable, they could not hire someone whose papers said "Personality Disorder."[144]

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Audrey Dixon joined the Navy in 1999 when she had just turned 18 years old. She loved the Navy and enthusiastically volunteered for everything from the Special Olympics to funeral duty and as a result received multiple awards. She was studying to be a sonar technician and "living life up" when a sailor came into her room and attempted to rape her. She managed to escape and reported it to her command. It turned out he was suspected to be a serial offender. Four days after the investigation began he appeared in the barracks room and chased her when she fled. In the following weeks, she was no longer able to sleep in her room. She felt withdrawn and no longer volunteered for extra duties. Instead of sending her to mental health for counseling, she was told to go to the chaplain.

Ultimately she took strong Motrin in an attempted suicide that she described as a cry for help. Not long after, she was given a "General Under Honorable Conditions" discharge with a PD narrative in October 2001. At the time she was given her papers, she saw "General Under Honorable Conditions" and thought it was okay. She said she didn't understand the implications of getting the "Personality Disorder" narrative. When she tried to get a job working on submarine manufacturing, she found that she could not get sufficient security clearance because of the personality disorder label and therefore couldn't work on certain projects. She also had to pay back part of her enlistment bonus. It took seven years of appeals for her to get benefits from the VA, which she attributes to the personality disorder diagnosis. In the meantime, she paid for counseling out of her own pocket. Doctors have diagnosed her with PTSD and depression, which she thinks may have been avoided if she had gotten help immediately. She said, "I wanted to stay in the military. I just wanted help. I had all these dreams."[145]

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Diana Gonzalez joined the Army in 1988. She said that after reporting being drugged and assaulted by other soldiers, she was initially threatened with charges of adultery because she was married. Ultimately her perpetrators were punished, but in the process her battalion commander made it clear he would end her career for "pulling down his reputation." She was harassed and abused by her peers who said "she got what she deserved." After Iraq invaded Kuwait in 1990, Gonzalez was sent to Saudi Arabia. There she continued to suffer from harassment and also began to have health problems, including PTSD from the assault as well as physical injuries from hauling sandbags in Saudi Arabia. Eventually her commander viewed her as a problem and wanted her out of service. She was discharged honorably at the end of 1991. However, when she got her discharge papers she saw the narrative reason was "borderline personality disorder" and that she was prohibited from re-entering service. She said when she saw it she thought, "I'm not crazy. What are they talking about?" She did not realize what the DD-214 meant until she had a hard time finding work later. She told Human Rights Watch she has "struggled for two decades with this 'diagnosis.'" Later she was diagnosed with PTSD, not PD. At the time of her discharge, she was told her discharge was "not appealable" and so she has not tried to change it. [146]

Enlistment Bonus

An administrative discharge for personality disorder may require the service member to repay part of their enlistment bonus. Five out of the six separation codes for personality disorder require the service member to repay any unearned portion of their bonus.[147]

Service members told us of their surprise when they received a letter telling them they owed the military money not long after being forced out of service against their will.[148] For many, repaying the bonus is a significant financial hardship. One rape survivor from the Navy was given 30 days' notice to repay a nearly $5,000 enlistment bonus. By the time she got the letter due to a change in address, she only had a week to gather the funds.[149]

Other Consequences

Survivors reported other unanticipated negative consequences that resulted from their PD diagnoses and discharges, ranging from losing custody of their children to being thrown out of school. Service members also report daily humiliations such as having to show and explain their DD-214 form to get a veterans' license plate or a discounted gym membership.[150]

Sergeant Colleen Bushnell had a promising military career until she reported a sexual assault after seven years of service in 2004. She said she had risen through the ranks quickly and, in recognition of her high performance, she was selected to be an instructor in her specialty for the Department of Defense. After the person she accused committed suicide, her Air Force unit made it clear Bushnell was persona non-grata. She said her performance reviews went from stellar to poor. She was ostracized, blamed for the death, and harassed. Ultimately, she became depressed and attempted suicide and was given a PD discharge despite having no prior history of a mental health condition and having excelled in school prior to joining the Air Force. Bushnell successfully fought the PD discharge but the diagnosis remained in her paperwork and ultimately had serious repercussions. She lost custody of and all physical access to her two children because she did not have the funds to prove to the court that she was misdiagnosed, and her ex-husband successfully used it against her in custody proceedings to show she was unfit. She can now only communicate with her children by mail. [151]

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Hillary Stevens joined the military in 2004 at age 18. She loved her specialty and said, “I was going to be a lifer, make a career out of it.” She said that changed in September 2005 when she was brutally raped off base by a veteran. She was a virgin at the time and was devastated. She had to report the assault to her superiors since she missed morning formation because she was still being treated in a hospital emergency room. Had she not reported, she would have risked being found Absent Without Leave (AWOL). Following her report, she was harassed by her chain of command. She said about reporting: “It’s like being assaulted again.” She told Human Rights Watch that her supervisor told her if she followed through on criminal charges, she would be dishonorably discharged. Her superiors told her she had a “vivid imagination.” In despair, she attempted suicide. After treatment for a suicide attempt, Stevens returned to her unit and was informed she would be discharged. She thought it was a medical discharge and that she would be eligible for benefits. Later she learned that though the discharge was honorable, she was not getting benefits and had been discharged on grounds that she had a “Personality Disorder.” She said she had no idea what it meant and had never met the doctor who signed the paper saying she had a borderline personality disorder. She only recalled meeting with a military psychologist for 30 minutes during which time he avoided discussion about the assault and told her she was not adapting to military life due to her self-harming behavior. When informed of the discharge, Stevens asked to see a lawyer but was told if she was unwilling to accept her diagnosis, she would be dishonorably discharged. Within one month of her assault, Stevens was discharged from the Army. [152]

After her discharge, Stevens had a serious accident and broke her leg. While in a wheelchair, she slipped and injured her spine and also lost bowel and bladder control. When she sought help at the VA Hospital in Indiana, she was told it was “in her head” because they had seen her papers indicating she had personality disorder. She also believes the papers adversely impacted her benefits’ claim because they thought she was exaggerating her disabilities. Later, a counselor diagnosed her with PTSD.[153]

The “Personality Disorder” label had other negative consequences. Stevens had to turn in her discharge papers for everything from veterans’ license plates to job applications to getting a discount at the gym. She stopped applying for jobs as a veteran because she was embarrassed about her papers. After enrolling in college she said she was unexpectedly called into the Dean’s office. The dean had her DD-214 papers in front of her and told her she was a “disgrace to the university” and expelled her from the school.[154] Veterans are required to submit DD-214s to schools to verify their veteran status. Stevens said that her papers came to the Dean’s attention after she requested extra time to take tests due to Traumatic Brain Injury.[155]

Stevens first learned of the Board for Correction of Military Record’s existence in 2013. It was then she attempted to have her DD-214 changed. Her initial effort to have her discharge changed at the Army BCMR was denied in July 2013 in a decision that misstated the record.[156] With help from pro bono lawyers, she appealed the decision and in March 2015 the narrative reason for her discharge was changed to “Secretarial Authority.”[157]

III. Adjustment Disorder and Other Mental Health Discharges

Adjustment Disorder Discharges

As discussed above, because DOD requires service members to be physically and psychologically suitable for military service, a commander can involuntarily separate a service member if they have any mental health condition that interferes with their ability to function.

If the mental health condition was not incurred or aggravated while in service (or is not considered a disability), it is considered a non-disability mental health condition and the service member is ineligible for disability benefits unless they can prove it is connected to service.[158]

While PD discharges have declined in recent years, advocates and counsel have expressed concern that abuse of non-disability mental health discharges are continuing under another name—primarily "Adjustment Disorder."[159] Fear of being separated in this way is such that survivors told Human Rights Watch they were afraid to seek mental health services because they thought if they did they would get a mental health discharge.[160]

According to the National Institutes of Health, Adjustment Disorder (AD) is a group of symptoms (such as stress, feeling sad or hopeless, and physical symptoms) that can occur after a stressful life event.[161] The symptoms must develop within three months of the onset of the stressor and resolve within six months of the termination of the stressor. As with PD, for a service member to be separated for AD, AD must interfere with the performance of their duties. AD was not considered a disability entitling a veteran to benefits until 2013. Symptoms of AD are very similar to those of PTSD.[162] However, AD is an easier and less costly diagnosis as it does not entitle veterans to benefits. A 2008 email from a VA doctor inadvertently disclosed to a journalist, for example, says:

Given that we are having more and more compensation seeking veterans, I'd like to suggest that you refrain from giving a diagnosis of PTSD straight out. Consider a diagnosis of Adjustment Disorder, R/O PTSD. Additionally, we really don't or have time to do the extensive testing that should be done to determine PTSD.[163]

According to a study done for the Vietnam Veterans of America by the Veterans Legal Services Clinic at Yale Law School, the number of AD discharges in some military branches has dramatically increased. For example, Air Force AD discharges increased from 102 in 2007 to 668 in 2010, the most recent year for which data are available; Coast Guard AD discharges went from 57 in 2009 to 109 in 2010.[164]

Those discharged with AD include rape victims. Survivors told Human Rights Watch they were diagnosed with adjustment disorder and recommended for administrative discharge after complaining about sexual assault.[165]

In one case, a Navy lieutenant commander who had received several awards for service and had 17 years in service was recommended for an AD discharge after being sexually assaulted. A service member testified before the Senate Armed Services Committee that she was raped while on deployment in Iraq. When she attempted to report, she was threatened with adultery charges because the perpetrator was married. When she followed up upon returning to the US in May 2012, she said, "[I] tried to pursue it then, I told my squad leader at the time … and the next thing ya know I get told they are chaptering me out on adjustment disorder."[166]

A lawyer who represents service members told Human Rights Watch that she had two rape victims referred to her in 2015 who are currently fighting AD discharges.[167] One client was diagnosed with AD after a short command-directed evaluation with a doctor. The lawyer said the stress of possible discharge itself added to the symptoms making an AD diagnosis almost a "self-fulfilling prophecy."[168]

Other Mental Health Discharges

Other mental health conditions may also be being used improperly to administratively separate survivors.

A January 2014 DOD policy lists eight separation requirements for non-disability mental health condition discharges: written notice; formal counseling concerning deficiencies and an opportunity to overcome those deficiencies; evidence that the service member is unable to function effectively because of the non-disability mental health condition; diagnosis by an authorized mental health provider; and the service member must be notified that their condition does not qualify as a disability. For those who serve in imminent danger areas, the diagnosis must also be corroborated by a peer, be endorsed by the surgeon general, and include an assessment of whether the service member has PTSD or another mental health condition.

A February 2015 GAO report raised concerns that the military services are not effectively monitoring compliance with DOD requirements for non-disability mental health separations and as a result military services may not be affording service members the protections intended by the revised policies.[169]

The GAO found it is difficult to track compliance because DOD and three of the services do not use codes to specify the reason a service member is separated for a "condition, not a disability" making it impossible to know whether service members are separated for a physical or mental condition. Moreover, the Defense Department does not monitor the discharges to determine if their requirements for non-disability mental health separations are being followed.[170] The GAO also found DOD's review of the service's compliance reports with PD discharge standards inadequate because the reports were inconsistent and incomplete and moreover indicated three services were still non-compliant with some of the requirements when DOD decided to end the monitoring in 2012.[171]

Service members report other hasty non-disability mental health discharges. For example, a Navy seaman wrote that in 2010, "I was drugged and raped. I couldn't take it anymore and when I tried to report it, I was instead sent to a mental hospital and discharged for having 'depressed mood.'"[172]

Corporal Warnock also sought help after a sexual assault while deployed in Kandahar in November 2008. She was sent to a psychiatric ward and a month later administratively discharged for "other designated physical or mental conditions" for her anxiety and depression. She believes she would have been able to recover if she had been treated better by the military. "That hurt equal or more than the assault, people I was willing to die for didn't take me seriously."[173]

Without better tracking and oversight it will be difficult to determine whether mental health discharges are being improperly used.

But even ensuring compliance with DOD requirements may not be enough to protect the careers of service members who report sexual assaults. Other broad reasons, such as "failure to adapt," are sometimes used by commanders to discharge service members and it is not clear if these categories afford any meaningful protection for those who believe their discharge is unfair.

Seaman Bertzikis was assaulted in the Coast Guard on May 30, 2006. She was based at a small station in Vermont and decided to report because she did not feel safe living across the hall from her perpetrator. When she told her chief he said, "For your own protection, we don't have a holding facility so we are going to lock you in a closet while we investigate." She was in a closet for "what felt like forever."[174] Her chief then told her and her perpetrator to "work it out" because they were "supposed to all get along."[175] Eventually, Coast Guard Investigative Services (CGIS) launched an investigation and Bertzikis was transferred to Boston. There she was assigned to sit in a cubicle with nothing to do. When CGIS closed the case, they threatened her with false reporting charges. Her peers were told not to talk to her or they would be accused of rape. A group of the assailant's friends cornered her on base, accusing her of being a snitch, and tried to rip her uniform off. A passerby stopped them but Seaman Bertzikis was told not to report or she would be labeled a troublemaker who complains about everything. Meanwhile papers were initiated for her to be medically discharged, but instead her commander administratively discharged her for "failing to adapt to military life," a description that has meant she has to explain the circumstances of her discharge and assault repeatedly when using her papers to get veterans' benefits. She was 24 years old and had wanted to stay in the service that she loved.[176]

In 2014, DOD instituted a policy affording rape victims the right to have their discharge reviewed if they believe it was unfair and in retaliation for reporting a rape. DOD has not collected information on whether that policy has been implemented, so it is difficult to know to what extent service members have been willing to challenge their separations.[177]

A young enlisted seaman in the Coast Guard reported in 2013 that her office was "porno central":

> Every computer's screensaver and desktop photo showed porn. I reported it. I was told that if I wanted butterflies and unicorns that I should have been a preschool teacher. I was told that this is the Coast Guard.... Shortly after things went downhill. I was viewed as a troublemaker.... I am always reminded that I might be kicked out for failure to adopt [sic] to military life. I have completed all of my qualifications. I have not had any disciplinary problems. Because I have a problem that others view porn and because I do not laugh at rape "jokes" I am the one that is allegedly not able to stay in the Coast Guard.... It scares me though that I might be out of a career because others are breaking Coast Guard policies.[178]

IV. Misconduct Discharges

As discussed above, an Other Than Honorable discharge is the worst characterization of an administrative separation and makes veterans ineligible for many benefits, including, in most cases, access to health care and VA compensation.[179] It is also deeply stigmatizing. The repercussions of bad paper may be extensive and impact not only the veteran but also their families and communities. Veterans outside VA care are 30 percent more likely to commit suicide than those in VA care.[180] Overall, veterans with less than honorable discharges commit suicide twice as often as veterans with Honorable or General Under Honorable Conditions discharges. They also face discrimination when seeking employment.

"Bad paper" (a less than honorable discharge) may result from minor disciplinary infractions (such as being late to formation a couple of times), a pattern of misconduct (which requires at least two instances of misconduct during an enlistment period), commission of a serious offense (which could range from drug use to refusing to obey an order), or a civilian conviction.

Sexual assault survivors are susceptible to misconduct discharges for a number of reasons. In the course of reporting a sexual assault, the victim may reveal conduct that is prohibited under the Uniform Code of Military Justice (such as adultery or fraternization), which may lead to a discharge for misconduct. Prior to changes to "Don't Ask Don't Tell," male service members in particular risked being thrown out of service for homosexual conduct after reporting rape by a male, even though the conduct was non-consensual. No guideline or regulation exists prohibiting commanders from discharging service members for misconduct that came to their attention in the course of reporting a more serious offense. On the contrary, officers are discouraged from overlooking misconduct in the interests of maintaining order and discipline.

Second, superiors may view sexual assault survivors as troublemakers and no longer want them in their units. Commanders who are looking can easily find reasons to discipline service members who are out of favor. Many service members reported being singled out for discipline for minor infractions following a sexual assault report in an effort, they believe, to create a record justifying a misconduct discharge.

Third, survivors may engage in misconduct following the assault as a result of the trauma. The prevalence of PTSD among sexual assault survivors is high—approximately 30 percent of sexual assault survivors experience PTSD.[181] Over 70 percent of the 156 survivors Human Rights Watch interviewed said they had experienced PTSD at some point. PTSD symptoms, such as an exaggerated startle response, an inability to control reflexive behavior, irritability, or attraction to high-risk behavior, may lead to misconduct or difficulty in performing at work.[182] In fact, interference with social and occupational functioning is a primary measure of the severity of PTSD.[183] PTSD is associated with substance abuse, which can result in discharge. Drugs used to treat PTSD may induce fatigue and also interfere with job performance. Yet command may not see the disciplinary infractions as symptoms of a mental health condition or may not view it as related to in-service trauma. The victim may also not yet have been diagnosed with PTSD.

Survivors discharged for misconduct or substance abuse without ever being diagnosed with PTSD may never get the care they need because they are ineligible for veterans' services. Survivors may behave in ways that are inconsistent with military requirements for other reasons as well—several survivors of sexual assault told Human Rights Watch that they left their bases without authorization (Absent Without Leave—AWOL) because they feared further attacks by their perpetrators. As a result they have had to live with an Other Than Honorable discharge and often went for years without assistance for their trauma.

Between FY 2000 and 2013, more than 125,000 service members received Other Than Honorable Discharges. "

The problem is not limited to sexual assault survivors. Combat veterans in particular are susceptible to PTSD. One study found that Marines with PTSD from combat were 11 times more likely to receive misconduct discharges than those without a psychiatric diagnosis

and eight times as likely to receive a substance abuse discharge.[184] **Between FY 2000 and 2013, more than 125,000 service members received Other Than Honorable Discharges.** A Pulitzer Prize-winning 2013 *Colorado Springs Gazette* investigation found a surge in misconduct discharges at posts with the most combat troops.[185]

Though PD discharges have been the subject of reform, military discharge policy for misconduct still does not take into account behavior that may have resulted from mental health conditions.

Discharged after Collateral Charges

As discussed in Human Rights Watch's previous report, *Embattled*, a broad range of activities are punishable in the military that are not considered criminal in the civilian environment. Adultery, fraternization (an officer is prohibited from socializing with an enlisted member), underage drinking, and "conduct unbecoming an officer" (a broad array of improper behavior), are all punishable crimes under the Uniform Code of Military Justice (UCMJ).

In the course of reporting an assault, a victim may face bringing their own misconduct to the attention of superiors that would otherwise have been unknown. Consequences of reporting even minor misconduct can be devastating. Victims may themselves face criminal charges or receive administrative reprimands. Either could ultimately end their career and result in a misconduct discharge.[186] As a Coast Guard SVC testified:

The biggest challenge I have dealt with is working with clients with collateral misconduct issues. In the current personnel environment, the Coast Guard is very unforgiving when it comes to misconduct.... I have had victims who have been faced with a very difficult decision of seeking justice for what has happened to them or preserving their

careers.[187]

An Air Force SVC told us that "force shaping" pressures (the need to reduce the size of particular units or branches of the military) means disciplinary actions have more significance—"If you have an LOR [a formal letter of reprimand in your record] you can't survive it."[188]

Current guidelines allow a delay for punishment, but not immunity, for collateral misconduct. Commanders have "discretion to defer action on alleged collateral misconduct by the sexual assault victims … until final disposition of the sexual assault case."[189] Commanders are also advised to "take into account the trauma to the victim and respond appropriately so as to encourage reporting of sexual assault and the continued cooperation of the victim."[190] However, the deferment of punishment does not alleviate victims' concerns that their careers will be over if they implicate themselves in misconduct.

Accounts of Sexual Assault Survivors with Bad Discharges Due to Collateral Misconduct

Human Rights Watch interviewed several service members who were threatened with court-martial for collateral misconduct, or were otherwise discharged with an Other Than Honorable status, due to alleged misconduct arising in conjunction with their sexual assaults, including the following:[191]

- SPC Cindy Bates was violently raped four times one night in 2004 while deployed in Kuwait. Despite having physical evidence of injuries, she was accused of false reporting. Within three weeks she was being out-processed in Germany for misconduct due to the alleged false report. Her rape kit was thrown away. She was able to have her discharge upgraded to General Under Honorable Conditions from Other Than Honorable because the unit commander who discharged her did not get the proper approval for a misconduct discharge.[192] However, the experience was devastating. She tried to kill herself three times with pills and knives. She wrote of her experience: "I don't want anyone to pay like I have."[193]

- Leah Wells was sexually assaulted four times while in the Navy in 2004 and 2005. Initially she did not report because she feared retaliation. After the fourth assault, she was so distressed her work began to suffer, so her supervisors started asking questions. When she disclosed the abuse, she was taken to a female superior who yelled at Wells for losing her composure (military bearing) and not properly addressing an officer by rank while describing her assaults. Afterwards, she was sent to a locked compartment and put on suicide watch, despite not having said anything about harming herself. Two days later, she was referred to Captain's Mast on charges of sexual misconduct because all sexual contact was prohibited on the ship. She was found guilty on two counts, both relating to rapes she had disclosed during the proceedings. As punishment, she was put on restriction, demoted to E-1 (the lowest rank), given extra duty (with her perpetrator), and lost half a month's pay. She was kicked off the ship and within three weeks discharged under General Under Honorable Conditions for "misconduct." When she saw the DD-214 she initially refused to sign because she had done nothing wrong, but her superior told her she had no choice and that if she disagreed she could appeal to a Discharge Review Board later. Because of her discharge, she has been rejected from government jobs. She was overwhelmed and said she did not feel strong enough to try to change her discharge papers until recently.[194]

- Katelyn Butler was charged with misconduct after reporting a sexual assault while deployed in Iraq. Though cleared of charges, her career was over and "pattern of misconduct" appeared on her discharge papers as the

reason for separating because she had been subject to a misconduct board hearing. As a result she lost federal retirement (due to a stipulation about misconduct) and says she was ineligible for most jobs that interested her.[195] While she was awaiting her hearing, she was forced to stay in her room and to be accompanied so as to "protect her" from further assaults. However, the person assigned to escort her raped her, constituting her second sexual assault in the military, saying, "I picked you because I knew command wouldn't believe you."[196]

Lance Corporal Stacey Thompson, 19, was drugged and raped in 1999. After going to a nightclub she began to feel ill. A sergeant said he would help her home since she was barely conscious. Instead he took her to a different barracks and raped her. After her assault she sought medical treatment and was prescribed Tylenol with codeine to help with pain from her injuries. Not long after, she was told by investigators she would be charged with seven counts of possession of a controlled substance based, she believes, on her prescription and statements of people who saw her the night she was raped. She was given the choice of an Other Than Honorable discharge or a court-martial with charges that could result in life imprisonment. After contemplating suicide, she opted for the discharge. She said she never had legal advice to explain the consequences of her discharge and believed, "You really just had to sign…. My worst day was not the day I was raped, it was the retaliation. I considered suicide because of the retaliation, not the rape." Because she left service in just under two years, she "lost the ability to call myself a veteran." She was unable to get jobs because of the Other Than Honorable characterization. She said she "stopped trying" after she was told the third time she was not eligible for a position.[197] In December 2015 she was able to get her discharge changed to honorable by the Navy Discharge Review Board after submitting a 120-page package (which included letters of support from three current senators), but she found the process re-traumatizing and "horrible" and said "no one should have to go through that."[198]

For male victims, prior to 2011, reporting a sexual assault was fraught with additional peril: they risked being prosecuted or separated for homosexual conduct. Several male survivors told Human Rights Watch that they were discharged with bad paper after reporting sexual assault:

- Jack Williams grew up in a military family and signed up for the Air Force as soon as he could at age 18. While in basic training in Lackland in 1966, the assistant drill instructor ordered him into his office at night where he choked him until he was unconscious and sexually assaulted him. The assistant drill sergeant continued to brutalize and threaten him. After the third assault, Jack tried to hang himself and was found unconscious in the bathroom. While he was in the hospital getting treatment for kidney damage, the base commander and his captains told him he would be discharged. When Williams refused to sign the papers, the officers told him he would be court-martialed for homosexual conduct. They said, "Even if we walked in and the sergeant was hilt high in you, you couldn't prove you didn't entice him, that you didn't ask for it." They told him he would "go to Leavenworth [military prison] and then get a bad conduct discharge after serving four years." Williams said that at 18, "I did not know anything, but I knew a bad conduct discharge was worse than a scarlet letter."[199] He gave up his dreams of following his father and uncle into service. When he later tried to get counseling at the VA, he said he was told, "You are trying to pull the same BS you did in the service." For 50 years he has suffered from severe emotional and physical injuries he believes resulted from his assault.[200]

- A Navy Seaman Apprentice said that after reporting that his shipmate sexually assaulted him in 1983, he found out he was getting discharged because he was "not fit for Naval service" despite having no recent or serious disciplinary infractions. At the time, he had seven months left in his enlistment and he was certain he would receive an honorable discharge. Instead he was given an Other Than Honorable discharge. He says, "As I look back on the incident I have at times cursed myself for speaking up and reporting what happened but … I thought I was doing the right thing…. I cannot even begin to express how this entire ordeal has affected my life; it won't go away and I still struggle with self-esteem and trust and the entire myriad of symptoms victims of sexual assault suffer…. The Navy discarded me like a piece of scrap iron or less; truthfully, this ordeal continues to haunt me … I am a broken man."[201]

From Victim to Target

Army Lieutenant Gray says after reporting sexual harassment by a senior officer while deployed in Iraq in 2009, her superiors were initially supportive. They relieved the commander of his position after she filed a report and turned over inappropriate emails.[202] Three months later, however, the focus changed and she became the subject of the investigation rather than her harasser. She was told, “This is someone’s career on the line.”[203] Her character was attacked and her friends were questioned about whether she “partied.” A witness to the harassment told Human Rights Watch, “She had a case but they turned it around to make it seem like she was a bad person.”[204] The officer said they had a consensual relationship and that she lied to investigators. Lieutenant Gray feared further investigation into her personal life would result in a possible discharge due to the Don't Ask Don't Tell policy and so accepted a formal reprimand for falsehoods that "served to minimize [her] own participation in an inappropriate relationship.”[205] She was threatened with a charge of making false official statements if she testified against her harasser, yet she was reprimanded for not appearing at his hearing. Not long after, she was discharged for conduct unbecoming an officer.

Lieutenant Gray was third generation military in her family and was the top cadet coming out of officer basic training. She had planned to have a career in the military. Her evaluations said she had “unlimited potential and will be an excellent staff officer” and described her as “outstanding,” recommending she be promoted ahead of her peers as “her direct efforts have made a lasting impact on our Battalion’s readiness for its upcoming deployment in support of the Global War on Terrorism.”[206] She earned the status of “top lieutenant” in the General Support Aviation Battalion.[207] Instead of realizing her potential, after three years she was terminated with a General Under Honorable Conditions discharge. As a result it was harder for her to get officer transition services as she is given lower priority than those with an honorable discharge. She has to constantly explain her discharge papers saying “unacceptable conduct,” all of which have limited her job options. She cannot apply for several government positions. Later the Army sent her a memo informing her she owed the military $4,000 for her education.[208]

When she went to the Discharge Review Board to try to upgrade her discharge, a Board member repeatedly interrupted Gray and yelled at her for waiting three days before reporting the first time her assailant made inappropriate remarks to her. Her lawyer, who was not allowed to speak on her behalf, found the proceedings at the DRB “appalling” and said “it was like a whole new assault” on her client, who was reduced to tears after the hearing.[209] Although regulations require support for applicants with PTSD, no one was there. It was apparent the DRB had not fully read the file. When the decision came, denying her request (despite telling Lieutenant Gray and her lawyer they believed the harassment did occur), it incorrectly said no witness was called and that she had not submitted material on her post-discharge activity.[210] The decision made no mention of Gray’s inability to defend herself against accusations of a consensual relationship because of “Don’t Ask, Don’t Tell.”

Discharges after a Pattern of Misconduct

LT Gray at Basic Officer Leader Course II in January 2008.
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The US military disciplinary system provides a spectrum of administrative disciplinary options for commanders to ensure good order and discipline. These options, in order of increasing severity and formality, include oral counseling, formal letters of counseling,[211] letters of reprimand (LOR) or General Officer Memorandum of Reprimand (GOMOR), and non-judicial punishments (also known as Article 15s, or Captain's Mast, depending on the branch).

These forms of discipline may be used to justify an administrative discharge. If a service member has two incidents of misconduct during an enlistment period, they can be administratively discharged for a pattern of misconduct. The misconduct can be minor or more serious and the incidents do not need to be of the same nature.

For many service members who spoke with Human Rights Watch, these disciplinary actions became a routine part of life after they reported sexual assault or harassment. In some cases, they asserted that the allegations of misbehavior made against them had no basis in fact. In others, behavior that had previously been tolerated or failings that were routinely overlooked suddenly drew swift condemnation.

In this way, commanders may begin building a record that can end a sexual assault survivor's career. As one senior master sergeant said, "There was never any support for females who reported. You took it or suffered. If you did report it, you were scrutinized or chastised in everything you did. You didn't deploy because you were a problem."[212]

Several survivors reported to Human Rights Watch an over attentiveness to minor issues (nitpicking over nothing) following a report of sexual harassment or assault leading to an administrative discharge:

- After reporting a sexual assault in 2014, Airman Garcia started accumulating paper for things such as having dirty dishes in the sink (despite having previously reported a clogged drain) and for being late (despite being on crutches and even though others who showed up late were not reprimanded). When she disputed the Letter of Reprimand for the dishes, she was told by her supervisor that she was "playing the victim." Her first sergeant told her, "With all your paperwork, you are going to be a civilian soon." She found out that there has been a move to administratively separate her.[213]

- After reporting a rape, Lieutenant Chen's supervisors investigated her for conduct unbecoming an officer and "everything they could think of." In the meantime, they also held up her evaluation, which meant she could not be considered for promotion at the appropriate time. As a result, she was slated for discharge and involuntarily removed from service.[214]

- Whitney Patterson was raped when she was tasked with taking her command sergeant major to the airport in 2006. She initially did not report the assault, but when he continued harassing her she decided she had to say something. After reporting, her life was a "living hell.... If I coughed, I received a negative counseling. In one day, I received six negative counselings. My security clearance and NCOER was denied processing." After 19 years and six months of service she was being processed out of the military involuntarily. She was able to hire a lawyer and fight her out-processing in order to make it to retirement.[215] However, she said, "I did not receive a retirement award, ceremony, NCOER, or have a security clearance. In other words, the way I [en]visioned leaving the military with the honors I deserved for being a great Soldier/NCO were taken away for reporting a predator. You can say I was being harassed and assaulted over and over again by the leaders who were suppose[d] to be trained to defend and protect me."[216]

I feel I wish I had screamed and he had shot me. Nothing is worth this. "

- Seaman Bailey was raped at gunpoint while she was injured and serving in the Navy in 2011. She was medically evacuated to San Diego from Guam after a suicide attempt. While there, she was assigned temporary duty in an area (weather) outside of her specialty (aviation electronics). Her superior officer resented her many medical appointments and started cancelling them. When she went to see the doctors, she was charged with malingering. Her medical discharge process was stopped and instead she was given a General Under Honorable Conditions discharge "for serious offense misconduct" in December 2013. She says every time she seeks help, she has to show her papers and has to live with that every day. She even wishes she had been given a personality

disorder diagnosis instead and ultimately says of her rapist: "I feel I wish I had screamed and he had shot me. Nothing is worth this."[217] Her effort to change the discharge failed.

Misconduct Discharges for Survivors with PTSD

A strong correlation exists between PTSD, substance abuse, and persistent misconduct.[218] Some offenses—such as alcohol or drug use, angry outbursts, or showing up late for formation—may be symptoms of PTSD. Yet these offenses may be grounds for a separation that leaves the soldier without lifelong benefits or care.

In a Pulitzer Prize-winning series of articles in 2013, the *Colorado Springs Gazette* investigated use of misconduct discharges against combat veterans with PTSD stemming from combat-related experiences. The same scrutiny has not been applied to sexual assault victims though prevalence of PTSD among sexual assault victims is high.

We recognize that trauma resulting from sexual assault may negatively impact a survivor's performance or lead to misconduct that the military is justified in addressing. The military also has particular battle-readiness needs and fitness for duty requirements that may make it less adaptable to meeting victims' needs than most other institutions.

However, processes do exist to discharge service members with medical needs who are unfit for service and more care needs to be taken to ensure service members are not unfairly discharged and saddled with "bad paper" as a result of mental health conditions brought on by trauma incurred during service, whether from combat or from sexual assault —or both.

Shelby Willis told Human Rights Watch she loved the Air Force after joining in 1989 at age 17. She made close friends and felt it gave her a more adult perspective on how "others matter and deserve freedom." In 1990, after she was assigned to a new base, she noticed her stand-in supervisor started paying her extra attention both on and off base in a way that made her uncomfortable. At first she laughed it off, but later it escalated and he followed her off base and tried to kiss her. When she rejected him, he started saying her performance was bad and giving her write-ups, but still suggested they hang out together. When she threatened to tell he said, "They're never going to believe you. You haven't proven yourself."

She said that when she complained to her new supervisor about inappropriate touching, the supervisor told her his predecessor supervisor was "a gentleman" and threatened her with false reporting. Both she and her previous supervisor were given reprimands. Meanwhile, her work was sabotaged after hours and her supervisor started writing her up for infractions. Willis said, "The more they [supervisors] did nothing, the more confident he was that I was new and seen as a troublemaker and he had been around and people would believe him." She said that when she was up on a tall ladder in a warehouse a few months later, he gave her a box and told her to put it on a high shelf. While her arms were full, he pulled her down from the ladder onto the concrete floor, fracturing her tailbone. He told her she "was a loudmouth bitch" and had caused him a lot of trouble. He pulled her hair, spit on her face, and hit her before raping her. She bit on his penis until he bled, and she threw up, allowing her to get away. She went straight to her captain's office but even with the physical evidence of the blood and vomit, the captain did not believe her. Instead, the supervisor gave Willis extra duty cleaning the men's bathroom, which was isolated, making her fearful. She still had to work with the perpetrator for the next few months.

She started getting letters of reprimand for infractions like not saluting. Her request to transfer was denied because it would "take a year to discipline" her first. When she was finally moved across base, word had travelled, and she was called a "tease" and a "nigger lover." In August 1990 she was given a General Under Honorable Conditions discharge for a "pattern of misconduct." She said they were "looking for a reason to get rid" of her, though she had "hopes for a career." She said if she had received a medical discharge, "I would have been able to get therapy and would be much farther along than I am now. My entire life would be different."[219]

Survivors and their families told Human Rights Watch of a number of situations in which the military mishandled a rape victim's PTSD symptoms, sometimes resulting in tragic consequences:

- Lauren Morris struggled with anxiety and PTSD after her rape in the Navy in 2010. Her commander ordered her to go to a drug and alcohol counseling program. There she did not receive treatment for PTSD but was instead made to discuss the reason for her drinking in a co-ed counseling group. After she yelled at a member of the group who made a rape "joke" and who happened to have a higher rank, she got in trouble. She was dismissed from the program 24 hours prior to its completion, after the program counselors told her she was being considered a "treatment failure" because she needed treatment for the assault and that alcohol was not the main issue. As a result of not finishing alcohol treatment, however, she was automatically designated for administrative separation.[220]

- An Army combat veteran, Staff Sergeant Turner was chaptered out of service and lost benefits she desperately needed as a single mother after being involved in a bar fight, despite the fact that aggression is a symptom of PTSD and at the time of the incident she was being treated for PTSD following harassment and stalking by her first sergeant.[221]

- In the immediate aftermath of Airman First Class King's sexual assault in 2011, he had PTSD and his work suffered. He was late to work because he was unable to sleep at night, experienced anxiety attacks in his office, and had angry outbursts. As a result, his supervisor regularly disciplined him and told him he would be kicked out if he did not change his ways. He felt he had to disclose his sexual assault to his supervisor in order to defend himself (he had previously reported confidentially) and explain his symptoms, though ultimately his performance evaluation still suffered, making him non-competitive for promotion and he is now leaving service.[222]

- Coast Guard Seaman Recruit Walter was sexually assaulted and sodomized by a petty officer in 2001. Although her assailant was convicted and sent to the brig, she was ostracized by her classmates and teachers, given poor work assignments meant for those in trouble, and was singled out for punishment for infractions. To cope with the stress, Walter began drinking. She was ordered to attend alcohol rehab (including an Alcoholics Anonymous meeting with her assailant) or be discharged from the military. After rehab, she was nevertheless forced out of the Navy. She had to pay back her bonus, lost her college fund and GI benefits, and she cannot receive any veteran benefit or land board grant because of her Other Than Honorable discharge. She said, "I have a hard time being patriotic to a country that could not stand up for me when I needed it most. I will never let my children serve in the military for fear that the same would happen to them."[223]

Carri Goodwin joined the Marines in 2007 when she was 18 years old. In the short time she was in service, her recruiter assaulted her and a higher-ranking service member beat and sodomized her after ordering her to report to him after work. After reporting her assaults, she still had to work with her assailant. Her journal indicated her peers "all took the assailant's side" and said, "Don't talk to her. She will say you raped her." Her assailant taunted her with emails saying he gave her AIDS. She was not allowed to go on leave because they feared she would go AWOL.

After reporting, her superiors kept finding things she did wrong and she was regularly put on restriction. She coped with her isolation by drinking alcohol. She was also on prescription medication for her PTSD. She was suicidal at times and had difficulties when she was sent to alcohol rehabilitation programs. Her superiors disciplined her for drinking while underage, missing formation, leaving her appointed place of duty, reporting while under the influence of alcohol, breaking restriction, and failure to obey an order. As a result, she was discharged Under Other Than Honorable Conditions for misconduct.[224] Five days after getting home in 2009, at age 20, she was found dead in a car after mixing alcohol and Zoloft, a drug for treatment of depression, PTSD, and other mental health conditions.[225] Because of her misconduct discharge, her father cannot bury her remains in a military cemetery and is unable to honor her by framing her discharge papers. His seven-year effort to upgrade her discharge because of the rapes and PTSD has failed.[226] Only if her papers are fixed and she gets a proper burial does her father believe he can bring closure to her ordeal.[227]

Gary Noling holding a photo of his daughter Carri Goodwin, a rape victim who died of acute alcohol intoxication less than a week after receiving an Other Than Honorable discharge from theMarines. Because of her discharge, her father has been unable to secure a military burial for her remains.

Absent Without Leave (AWOL)

Human Rights Watch spoke with a number of sexual assault survivors who fled their duty bases without authorization (or deserted if they left for over 30 days) to avoid repeated attacks and as a result were threatened with a prison sentence if they did not agree to an Other Than Honorable discharge.

Under the Manual for Courts-Martial, after 30 days' absence, service members could face a maximum penalty of dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to five years (or even the death penalty in times of war).[228] If the service member is absent for more than 180 days, Congress requires the

Department of Veterans Affairs to exclude them from benefits unless "compelling circumstances" justify the absence.s [229]

Another veteran who had an Other Than Honorable discharge after being AWOL told Human Rights Watch he was physically removed from a VA hospital when he went there seeking help.[230]

Survivors report suffering from PTSD, homelessness, alcohol abuse, and a lifetime of destroyed relationships. Of those we interviewed, the few who have tried to have their discharges changed at the Board for Correction of Military Records failed.

Below are accounts survivors told Human Rights Watch of Other Than Honorable or Dishonorable discharges received for being AWOL:

- William Minnix joined the Air Force in 1973 at age 17 so that he could "be proud and serve his country." While he was at Tech School he was repeatedly raped by higher-ranked service members. When he could not take it anymore, he fled the base. After a month he decided to turn himself in to avoid upsetting his parents. When he went back to base he attempted to report the rapes. The assaults were not investigated, but Airman First Class Minnix was stripped of his rank and, after a short unofficial hearing, given an Other Than Honorable discharge for going AWOL. He felt his "life and career was taken away from me." His sisters disowned him and he began to believe he was a bad person because he was never able to fulfill his dream of an Air Force career. The shame haunted him for years. For 40 years he felt like a criminal, and only after attempting suicide was he able to get the help he needed.[231] Minnix denies he was in service rather than show his DD-214. His effort to upgrade to a General Under Honorable Conditions discharge failed.

- Tom O'Brien was gang raped by three male soldiers while he was on his second tour of duty in 1982. The soldiers threatened to kill him if he reported. Afterwards, he coped by drinking heavily and was so drunk he failed to report to base. As a result, he was court-martialed for being AWOL and received a Bad Conduct discharge. In the following years, he continued to drink heavily and was repeatedly arrested. Efforts to get benefits from the VA for PTSD failed. The VA decision said that because the sexual trauma/stressor causing PTSD occurred during the period of service determined to be dishonorable, his benefits were denied.[232]

Heath Phillips as a 17-year-old Navy Seaman in 1988. He was later given an Other Than Honorable discharge after fleeing his ship to avoid his rapists, and struggled for over 20 years to get medical benefits.

- Rick Tringale told Human Rights Watch he was brutally gang raped in February 1986 during basic training. He got medical attention but did not admit to doctors what really caused his injuries. To the rest of his unit, he acted as if nothing happened. Over the next several months, he managed to channel his trauma into work though he started taking enormous risks, acted on suicidal impulses, and eventually went AWOL in September of that year. A few months later, he was arrested. During questioning, he disclosed he had been raped. Tringale

said his interviewer turned off the tape recorder and said, in effect, "If you want to go with this story, I have to put you in the brig with a rapist and murderer who will rape and kill you by the time you get permission to go to the latrine." He was talked into accepting an Other Than Honorable discharge in lieu of facing criminal charges and going to the brig. He was told (erroneously) that after a year the discharge would be automatically upgraded to General Under Honorable Conditions.[233] In the years following his discharge, he struggled with PTSD and was homeless and living in his car. His attempts to get mental health assistance from the VA were unsuccessful because his Other Than Honorable discharge made him ineligible for care.[234]

- A Marine wrote that after his roommate and his two friends raped him while he was asleep, he fled his base in fear the next day "always hiding, always afraid that I would go to jail for desertion. [A] few years went by and I was picked up and reprocessed out with a less than honorable discharge. Yes, it has certainly caused a lot of problems in my life."[235]

Heath Phillips was a 126-pound, 17-year-old when he enlisted in the Navy in 1988. All he ever wanted was to have a military career. On his 17th birthday he joined the first branch that would accept him. Initially boot camp went well and he was treated like a favored kid brother. However, when Phillips reported to his first ship he found he was a day early because of a holiday weekend. Phillips told Human Rights Watch that some shipmates invited him to spend the weekend with them. After drinking with them, he blacked out and woke up to find himself being sexually assaulted by three men. They threatened to kill him if he reported them, but he did.

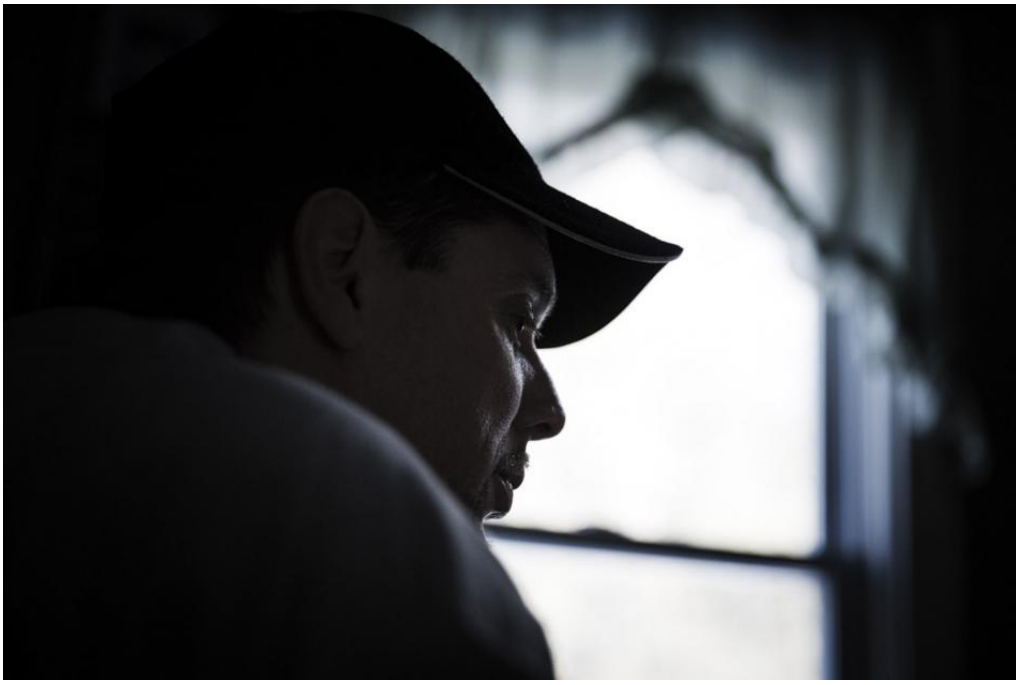
A few days later Phillips was attacked again in the middle of the night. He reported again and was told he was a liar and that that didn't happen in the ship and that he was a "sissy." Soon the attacks became a regular occurrence.[236] He eventually attempted suicide and went AWOL but he reported the assaults to his congressman while he was in hiding. While he was AWOL he met a counselor who diagnosed him with PTSD from sexual assaults. When he was returned to his ship he was considered a rat and singled out for more abuse—his room was destroyed, shipmates urinated or defecated on his property, and he began being attacked at night. Eventually he was assaulted by three shipmates, one of whom jammed the handle of a toilet bowl brush inside his anus. He blacked out several times. He said that when he sought medical help—beaten up, bloody, and swollen—the infirmary told him he probably was developing hemorrhoids and should take a day off. He had no place else to turn for medical attention. His command continued to consider him a liar.

As the ship was about to leave for the Mediterranean, he decided to run because he feared being trapped on the ship for months with his assailants with no way to escape. He turned himself in and was sent to the brig where his lawyer gave him the choice of six months' confinement or an Other Than Honorable discharge in lieu of court-martial. Phillips said:

> At this point in my life after being subjected to countless sexual assaults, beatings, threats, humiliation, in constant fear, a total basket case, I would have signed a deal with the devil himself to escape the torture I kept getting while on board the ship.[237]

Following his discharge, Phillips drank heavily, had difficulties holding jobs and maintaining relationships, and engaged in self-destructive behavior. Because of his discharge, the VA would not help him. His marriage ended. Only after 20 years did he learn about Military Sexual Trauma counseling at the VA.

Heath's efforts to upgrade his discharge because of his assaults were rejected because he had consulted with a lawyer at the time of his discharge. The Boards denied his request for an upgrade twice, despite evidence of assault and PTSD while he was in service.[238]



Heath Phillips was given an Other Than Honorable discharge in 1993 after fleeing his ship to avoid repeated sexual assaults. He has been unable to have his discharge overturned and as a result struggled to get healthcare and benefits for over 20 years.

V. Lack of Legal Protections

> There is no day in court for soldiers.
>
> —Tom Devine, legal director, Government Accountability Project, Washington, D.C., October 2014

When confronted with questions about thousands of possibly unfair discharges, the US Defense Department has repeatedly stated it "encourages all former Service members who believe that their discharges were incorrectly characterized or processed to request adjudication through their respective Military Department's Discharge Review Board."[239]

While it is true that these Boards provide an avenue to former service members to correct their records, as the Defense Department well knows they offer little to no hope of success and, particularly for the Boards for Correction of Military Records, virtually no opportunity to be heard. One practitioner described the Boards as "broken, ridiculous, and awful," language repeated by other lawyers who have handled such cases.[240]

The Boards for Correction offer virtually no hearing to applicants. The nearly absolute lack of hearings underscores the importance of meaningful review of records by Board members. Unfortunately, the BCMRs' review of service members' applications for record changes appears woefully inadequate. Most cases are not reviewed by the Boards at all. Army and Navy Board members do not receive case files in advance of a session. Dozens of cases are decided within a few hours. Little to no effort is made to consider previous decisions for consistency. Judicial oversight is virtually non-existent.

The Boards

Protections for service members who are sexually assaulted are limited under existing US law. By longstanding Supreme Court precedent, service members are prohibited from suing the military for injuries or harm that "arise out of or are in the course of activity incident to service."[241] This includes violations of their constitutional rights.[242]

A lawyer said of a prospective client who had been raped while in service and wanted to pursue a tort claim against the military: "It broke my heart to tell this lady, 'I'm sorry. There's not a damn thing you can do about it.'"[243]

One rationale for barring members of the armed forces from bringing suit is the existence of alternative compensation systems—namely, veterans' benefits.[244] Yet, as discussed above, for some victims reporting their sexual assault and being subsequently discharged in a less than honorable status meant being denied access to benefits.

For service members who believe they were wrongfully discharged or dispute the characterization of service, their only recourse is with their service's Discharge Review Board (DRB) or Board for Correction of Military Records (BCMR).

The Discharge Review Boards have authority to upgrade discharges (unless the discharge stems from a general court-martial) and to change the narrative reason for a discharge. DRBs have limited ability to change re-enlistment codes,[245] recommend medical retirement or medical discharge, reinstate people in service, or make other changes to the records of service members. They have primary jurisdiction for 15 years after the service member's discharge date, so those seeking to change their characterization of service (from Other Than Honorable to Honorable, for example) or narrative reason for discharge (to remove personality disorder or misconduct) must go to the Discharge Review Boards first if they have been out of service for fewer than 15 years. DRBs are comprised of five members with the senior line officer acting as the presiding officer.[246] Decisions by the DRBs can be appealed to the BCMR.

The Boards for Correction of Military Records are the ultimate administrative authority responsible for correcting errors and removing injustices in military records. In addition to reviewing DRB cases, they have the ability to remove disciplinary actions, grant disability retirement benefits, show that medals should have been awarded, remove problems that prevent a service member from receiving VA benefits, reinstate a veteran to military service, and generally correct military records as "necessary to correct an error or remove an injustice."[247]

Thus service members with PD discharges who believe they should have been medically separated must go to the BCMRs for referral to a medical evaluation board. BCMRs are also the exclusive remedy for veterans discharged more than 15 years ago.[248] Board members are typically civilians in the branches who have agreed to serve on Boards as a collateral duty subject to their availability. Three panel members sitting in an executive session (usually for a half day) make determinations on applications.[249]

Administrative Dead End

The BCMRs provide little prospect of relief for those with bad discharges. Military law practitioners interviewed by Human Rights Watch expressed extreme frustration with the

Boards. Some refuse to take clients' cases to the Boards because they consider it a "waste of time."[250] **Another military law expert described the BCMRs as "a virtual graveyard."**[251] He estimated 3 to 6 percent of the hundreds of upgrade cases he has seen succeeded.[252] Even military documents acknowledge that efforts to upgrade discharges are all but certain to fail. One warns service members, "Although agencies exist to which you may apply to upgrade a less than Honorable Discharge, it is unlikely that such application will be successful."[253]

Various data analyses bear this out. **Data provided by the Navy in response to a public records request show that between January 2009 and December 2012 the BCNR granted upgrades to just 1 percent of the 4,189 Other Than Honorable discharges it reviewed**.[254] General Discharge upgrade requests had a 4 percent success rate.[255] A Yale law clinic review of publicly available records for the Army BCMR found that between 1998 and 2013, 4.6 percent of the 371 Vietnam veterans with Other Than Honorable discharges who applied for an upgrade succeeded.[256] Human Rights Watch's analysis of DOD BCMR cases available in the BCMR reading rooms as of August 2013 involving sexual assault victims found that only 5.6 percent were granted the full relief sought. A journalist also reviewed 389 Army BCMR cases from 2001-2012 in which veterans were seeking medical discharge or a change in reason for discharge and found that 5 percent of requests were granted and in only 2 percent of cases was a medical evaluation ordered. Only one PD case was sent for a medical evaluation that could result in a medical retirement.[257] Newer cases show a similar pattern.

Although agencies exist to which you may apply to upgrade a less than Honorable Discharge, it is unlikely that such application will be successful. "

The DRBs do not offer much more hope for the applicants. An analysis of discharge upgrade cases since 2013 done by the Urban Justice Center found fewer than 10 percent of upgrade cases before the Department of Defense DRBs succeeded in getting relief.[258] In some cases examined by Human Rights Watch, even when an upgrade is granted, the narrative reason for separation (for example, personality disorder) may not be changed, thereby leaving the stigma in place.

In order to get an upgrade, applicants must overcome the Board's deference to command and presumption that the discharge was correct. As the Navy DRB points out on its website, "the Department of the Navy, in issuing a discharge will always presume it was correct in that action" and so the burden is on the applicant to provide "clear and substantial evidence" of error.[259] This is a high burden to overcome.

The prospects for success have improved in only one area recently. On September 3, 2014, Secretary of Defense Chuck Hagel issued a memorandum directing the BCMRs to grant "liberal consideration" to veterans seeking to upgrade Other Than Honorable discharges who showed symptoms of PTSD (not PD) during service that might have mitigated the misconduct underlying the discharge classification.[260] On February 24, 2016, the Acting Under Secretary of Defense for Personnel and Readiness provided supplemental guidance to the Boards requiring waiver of time limits for consideration of cases related to PTSD or Traumatic Brain Injury, and requiring de novo review, upon request, for cases considered without benefit of the September 2014 memorandum.

An assessment of implementation of this change done by the Yale Veterans' Legal Services Clinic found that the overall grant rate for PTSD-based discharges for the Army BCMR increased substantially from 3.7 percent in 2013 to 45 percent in the period after the memo was released.[261] The bulk of the cases (97 percent) were upgraded from Other Than Honorable to General Under Honorable Conditions. The number of cases submitted to the Boards following the memorandum also increased from an average of 39 cases a year between 1998 and 2013 to approximately five times that number for the year following the release of the memo. However, the clinic found that due to limited outreach, the overall numbers are still low compared to the potentially tens of thousands of eligible veterans.[262]

While this is a positive development for a subset of veterans who may have been discharged for PTSD-related misconduct, the guidance does not make any recommendation for consideration of medical retirement and it specifically is "not applicable to cases involving pre-existing conditions which are determined not to have been incurred or aggravated while in military service."[263]

The memo instructs the Boards to give "special consideration" to VA determinations documenting PTSD or PTSD-related conditions connected to military service.[264] However, many with bad discharges do not have access to VA services, which is often their primary reason for seeking the upgrade. Therefore they may not benefit from the memo at all.

Moreover, no clear guidance has been given with respect to handling of claims in relation to sexual assault. None of the BCMRs indicated they had any guideline for handling of sexual assault cases in response to our document requests as of late 2013 and early 2014.

In the 2015 National Defense Authorization Act (NDAA), Congress directed the services to instruct the BCMRs "to give due consideration to the psychological and physical aspects of the individual's experience in connection with the sex-related offense; and to determine what bearing such experience may have had on the circumstances surrounding

the individual's discharge or separation from the Armed Forces."[265] Congress also directed the Boards to establish a confidential review process allowing victims of sex-related offenses to challenge their discharge "on the grounds that the terms or characterization were adversely affected by the individual being the victim of such an offense."[266]

Human Rights Watch has been able to find only one response to this provision of the NDAA: an August 6 directive from the Secretary of the Army that repeats the language in the statute. In response to questions by the DOD Judicial Proceedings Panel on whether a separate procedure has been established as required by Congress, the Air Force indicated its proceedings are already confidential so it does not make any special exception for sexual assault cases.

The Navy and Coast Guard said they no longer post sexual assault cases in the reading room; the Army does so only with the victim's consent.[267] The decision not to publish sexual assault cases, which seems to be the primary result of the congressional directive, may have the unintended consequence of making it more difficult for other victims to find precedent on which to rely. All decisions posted in reading rooms are redacted before publication, so applicants are never identified.

It is difficult to determine whether these provisions of the NDAA have benefitted survivors at all. Both the Air Force and Navy submitted information to the Judicial Proceedings Panel indicating the burden remains on the applicant to prove there was a sexual assault before they give "due consideration" to the effect on the applicant.[268]

Thus, a burden remains on the applicant to prove a sexual assault, which may be insurmountable, particularly if the victim did not report to authorities. A former Board for Correction of Naval Records staff member said he believed it would be unlikely for Board members to accept an uncorroborated claim of sexual assault.[269]

A lawyer who works with veterans on upgrades also found DRBs deny claims if there is no proof of sexual assault other than the veteran's statements. Though there are some instances where they will accept a veteran's statements as true, it is rarely sufficient to overcome the "presumption of government regularity."[270]

The vast majority of survivors do not officially report a sexual assault (in some years, the estimated reporting rate is less than 10 percent; even with recent improvements only an estimated one in four service members report).[271] Cases before the BCMRs may involve assaults from decades ago where proof will be difficult to come by. Yet no instruction exists to grant a presumption in the applicant's favor. In recognition of this problem and "[t]o ensure all available evidence supporting these claims is considered," the Department of Veterans Affairs relaxed its evidentiary standard for disability claims related to military sexual trauma in 2002:

> Because military service records may lack corroborating evidence that a stressful event occurred, VA regulations make clear that evidence from non-military sources may be used to corroborate the Veteran's account of the MST [military sexual trauma]. Further, when direct evidence of an MST is not available, VA may request a medical opinion to consider a Veteran's account and any 'markers' to corroborate the occurrence of the MST event as related to current PTSD symptoms.[272]

The BCMRs and DRBs should adopt the same standards as the VA in cases of MST.

Underutilization of Boards

Though thousands of service members may have been wrongfully discharged, very few apply for a discharge upgrade or a change in narrative reason for separation. Our 2013 search of the DOD BCMR reading rooms from October 1998 found only 444 cases of sexual assault victims who applied to the BCMR for a record change out of potentially tens of thousands of victims.[273] A representative from the Government Accountability Office testified that fewer than 1 percent of the 371 PD cases her office reviewed went to a Discharge Review Board to challenge the reason for separation.[274]

There are several reasons why service members do not go to Boards. Many veterans are simply unaware they exist. Veterans told Human Rights Watch that they learned of the Boards' existence only 13 or 15 years after leaving service, sometimes stumbling upon information about them by chance.[275] As a former Army DRB member said, "Who knows about the BCMRs anyway? The average soldier doesn't know about it."[276]

At a DOD panel, representatives from the BCMRs testified that they mainly rely on their websites and word of mouth to educate service members about the BCMR process.[277] The Army also provides training for military legal staff on BCMR processes.[278]

Those who know about the Boards may know their odds of success are low. Some Army counseling forms state, "While you can apply to the Discharge Review Board or Army Board for Correction of Military Records to upgrade the character of your service, it is unlikely that you will be successful," or, "It is very difficult to upgrade a less than honorable discharge." Personal experience may confirm those warnings: a survivor with a PD discharge told Human Rights Watch, "I thought about going to the Boards but don't know of anyone who has been successful [even though] I work with a lot of [veterans] in my job."[279]

Several survivors told us they were reluctant to reopen the trauma of their sexual assault for military boards that are likely to side with the military. For example, despite the terrible impact a PD discharge has had on her life, Eva Washington said she is afraid to go to the Boards to try to change her record because of the "amount it would rip apart my life."[280] A male victim with an Other Than Honorable discharge who has been desperate for health care told Human Rights Watch, "I can't do the forms. I get stuck in my head reliving events and get traumatized again."[281]

Some survivors were exhausted by the VA claims process and could not face another administrative ordeal. An Air Force veteran with a "defective personality" discharge said of her decision not to try to get the BCMR to change her record: "I never petitioned to get it changed. It was just too much for me after my C and P [Compensation and Pension exam by the Department of Veterans Affairs]."[282] One victim with an Other Than Honorable discharge who did go to the DRB to change her record said, "I can't put into words how hard it was." She became suicidal again for the first time in years while awaiting the decision, an experience her therapist described as retraumatizing though she ultimately succeeded in changing her discharge.[283]

A lawyer who has worked full time with veterans for five years explains that rape victims are unlikely to submit to the process because they fear not being believed. Rape victims often do not have a record of their assault (even if they reported).[284] The risk of devastation is real. An Army sergeant whose case was rejected by the Boards because she reported her assault confidentially said having the Board "stand behind a report saying that they didn't believe you were raped … was victimizing, it was unnecessary, it was degrading.... I don't trust this process at all."[285]

In addition, the Board applications are complicated, and the vast majority proceed without legal assistance.[286] Many veterans do not have the means to hire a lawyer, and applicants are not entitled to recover fees associated with the cost of changing an error or injustice in their records.[287]

A former BCNR staff member estimated that between 1 and 5 percent of discharge cases he saw in his 25 years were represented by counsel.[288] Without a lawyer, forms may not be completed correctly and cases may not be coherently presented, which may result in a case being closed. BCMR staff members may administratively close a case if it is missing forms or information, lacks a signature or social security number, is unclear about relief sought, submits the wrong forms, or if no military records are available.[289]

According to the Air Force, 19 percent of its cases in 2014 were administratively closed or closed because they were "nonviable."[290] Avoiding rejection of an application by seeking help from the Boards' staff may be difficult. When Human Rights Watch attempted to reach the Boards to request an interview, two of the BCNR telephone numbers we could find were out of service and the third had a full voicemail. The Army BCMR telephone number refers callers to the website only. We were unable to find a phone number online for the Air Force BCMR.[291]

There are additional complications even when a veteran does obtain legal assistance. Records necessary to present a case are difficult to obtain. A coordinator of pro bono (free) services for veterans said in many cases, it can take up to a year to obtain records. By that time, the pro bono lawyers who have volunteered to assist may no longer have room in their schedules or have left their firms.[292] Although Boards themselves are supposed to obtain military records for applicants, they may not do so.[293] Moreover, as discussed above, sexual assault victims may have difficulty demonstrating they were raped. Many (especially male victims) do not report. Those who have reported, particularly if it was several years ago, say they have had difficulty locating reports of the assault, which handicaps them significantly before the Boards.[294]

Even for the rare case that makes it to the Boards and is successful, the victory may not always be satisfying. One veteran who had her PD narrative changed to "Secretarial Authority" said, "They ruined my career and my life … I got no apology. I got nothing."[295]

Lack of Due Process

Sexual assault survivors who seek a record change through the service Boards face various hurdles that severely limit their due process rights.[296] Under US law, when a property or liberty interest is at stake, due process requires notice and an opportunity to be heard before an impartial tribunal.[297] Liberty interests may be implicated "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing"[298] as long as it is accompanied by loss of a tangible benefit, such as employment opportunities.[299] Denial of government benefits is considered a property interest entitling a claimant to a hearing.[300]

Although the property and reputational stakes may be high for service members or veterans seeking to correct a discharge, their due process rights are markedly curtailed. Courts have found that service members do not have a property interest in military service since they serve "at the pleasure of the President."[301] As discussed below, service members have no right to a hearing before the BCMRs and may have to travel long distances to Washington, D.C. to exercise their right to an in-person hearing before a DRB;[302] Board members spend little, and perhaps no, time

reviewing material submitted by applicants; inadequate access to prior Board decisions hampers applicants' ability to research their claims and apply precedent; Boards themselves do not have uniform practices across the services or precedent to benefit from (apart from what an applicant might call to their attention)—which increases the chances of arbitrary decision making; and federal judicial oversight of Board decisions is minimal.

Twenty years ago, Congress expressed concern about "the perception among service members that the boards [BCMRs] have become lethargic and unresponsive, and have abdicated their independence to the uniformed service staffs."[303] As a result the 1996 National Defense Authorization Act directed the Defense Department to prepare a comprehensive review of the Boards' make-up and procedures with an eye towards standardizing procedures to improve their effectiveness and responsiveness.[304]

The DOD report described a number of concerns, many of which persist today. In 2006, Congress enacted legislation setting clearance targets for the BCMRs.[305] The Boards are now required to clear 90 percent of their applications within 10 months. All cases must be cleared within 18 months unless they receive a waiver from a military department Secretary. Given the enormous caseloads of the Boards (which can exceed 20,000 per year for the Army and are regularly over 13,000 for the Navy), creating strict deadlines without a corresponding allocation of additional resources likely only exacerbates the problems of over-reliance on staff and the inability of applicants to have a thorough consideration of their cases. It also creates incentives to quickly dispose of cases administratively if forms are not filed correctly. One veteran told Human Rights Watch she was warned repeatedly to "be careful because they are looking for mistakes in the file so they can just say no."[306] All of these issues are discussed further below.

Virtually No Opportunity to be Heard

There is no right to a hearing before the BCMRs and service members have virtually no opportunity to appear before the Boards. The BCMRs retain sole discretion to grant hearing requests. This rarely happens. For minor record corrections, such as changing a date or other simple administrative errors, this may not be an issue. But the standard also applies to matters such as discharge upgrades where a great deal is at stake.

In response to Human Rights Watch's public information requests, **the Army BCMR provided information indicating that one hearing had been held between 2009 and 2013, though a three-member panel decides approximately 9,000 cases per year.**[307] **The Navy BCMR held no hearing during that time period though it closed 24,127 cases in that period.**[308] **The Air Force had one personal appearance hearing between July 2006 and July 2013, though the Board decided over 2,000 cases per year.**[309] **The Coast Guard had no personal appearance hearing between 2009 and 2013.**[310]

The actual frequency of hearings may be far lower. According to one report, the Coast Guard has not had a hearing in 10 years; the Navy has not held a hearing in 20 years.[311]

Human Rights Watch was unable to determine through an examination of cases in the reading room or public records requests the number of applicants who requested a BCMR hearing, but according to the 1996 DOD report, at that time the services estimated that between 10 (Navy) and 50 (Army) percent of applicants requested formal hearings.[312]

Applicants have good reason to request a personal appearance. A former staff member for the Board for Correction of Naval Records described the importance of a personal appearance before the DRB as "huge" and possibly "the difference between getting an upgrade or not."[313] The figures bear that out: those who appear before the DRBs are much more likely to prevail in their cases. An overview of discharge upgrade cases before the DRBs in the 1980s shows that the percentage of discharge cases approved by Boards doubled or tripled or more if the applicant made a personal appearance. For example, in 1988, 7.5 percent of Air Force cases in which there was no personal appearance were approved compared to 23 percent of cases approved in which the applicant appeared.[314] A former Army DRB member recalled participating in cases in which the DRBs voted to deny relief after reviewing the written record, but changed their mind after hearing the applicant in a personal appearance.[315]

While the DRBs have traditionally provided applicants with the right to a hearing, that window has diminished. The Navy and Army no longer have a traveling DRB, though Army hearings may be held via teleconference from regional bases. Apparently for cost reasons, the Navy DRB stopped having hearings across the country at least 20 years ago.[316]

If an Army or Navy applicant wants to appear personally and present evidence, they (or their lawyer) must travel to Arlington, Virginia or the Washington, D.C. Navy Yard. For those who live far away, the costs associated with a personal appearance may be prohibitive. A Navy veteran said she did not request a DRB hearing because she could not afford flights and lodging.[317] As a coordinator of pro bono services for veterans said, "If you are low income or homeless, it is very difficult to afford the costs associated with a hearing."[318]

For those seeking medical retirement or other corrections to their records that can only be made by a BCMR or whose discharge occurred more than 15 years ago (such as a change to re-enlistment code), there is no right—and virtually no opportunity—to have a hearing.

Administrative Staff

Congress created the Boards to provide independent civilian review of errors or injustices in military records. However, a significant proportion of cases are closed by staff members without ever being submitted to the Boards for consideration despite the requirement that the civilian Board, not staff members, adjudicate claims.

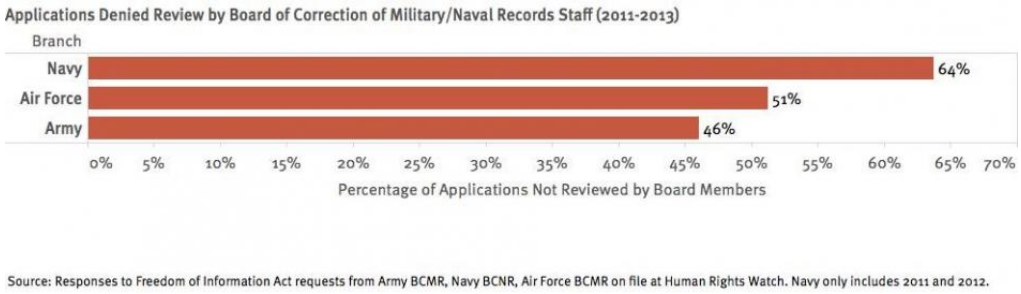
Staff members are allowed to return applications in limited circumstances. For example, Army regulations allow its BCMR staff to return an application without action only if the applicant fails to complete and sign the application; all other administrative remedies have not been exhausted; the BCMR does not have jurisdiction to grant the requested relief; or if no new evidence was submitted with a request for reconsideration.[319]

Navy documents show it accepted for further consideration fewer than half of all applications submitted for correction between 2009 and 2012.[320] In 2014, 43 percent of Air Force cases were referred by staff to the BCMR.[321]

Not all of these failures to consider cases raise concerns. Some cases may not end up being referred to the Boards because the service granted the relief requested before the Boards considered the applications. The Air Force BCMR testified that 39 percent of its closed cases in FY 2014 were closed for this reason.[322] Other cases may be legitimately administratively closed because they are missing documentation or for technical reasons (such as lacking a signature) or request relief the Board does not offer.[323]

However, lawyers for veterans are concerned that the staff members are also closing cases based on insufficient evidence without presenting the cases to the Boards.[324] A class action lawsuit against the Army BCMR describes cases in which applicants' discharge upgrades were denied by staff members without Board review because the applications did not "contain any documentation to support [their] request[s]." No explanation was provided as to why the supporting materials provided by the applicants were insufficient.[325] The Army BCMR denial letters also said applicants "must provide all Army medical treatment records" to substantiate their requests, despite stated policy indicating the Boards themselves will request military records.[326]

In sum, the reasons for administrative closures are not entirely clear. What is clear is that the application process is sufficiently opaque that a significant portion of applicants are unable to access it easily and may never receive the civilian review of their claims to which they are entitled.



Source: Responses to Freedom of Information Act requests from Army BCMR, Navy BCNR, Air Force BCMR on file at Human Rights Watch. Navy only includes 2011 and 2012.

Inadequate Time Spent Reviewing Cases

Even the cases that do reach the Boards may not receive full and fair review by panel members. Applicants seeking discharge upgrades or medical discharges may include extensive documentation. Veterans have provided Human Rights Watch with copies of their applications that include not only their military records but also criminal investigative files, extensive medical records, briefs, statements, letters from family, friends, and professionals, and detailed expert reports on trauma totaling hundreds of pages.[327] Lawyers for veterans say their cases often include "personal statements, affidavits, briefs, and hundreds of documents."[328]

Yet, based on information provided by the Boards in response to public information requests, Board members often spend only a few minutes deciding a case and often reach a decision without actually reading the submitted material, instead relying on a summary prepared by staff.

Cursory review is particularly problematic for service members who may be incapacitated and unable to put together a thorough application.[329]

In response to public records requests, the Army and Navy BCMRs indicated that Board members do not review cases in advance of their sessions. The BCNR said, "The first time they [Board members] see a case is on the day it is presented to them."[330] Similarly, the information sheet provided to Army BCMR members informs them that when they arrive in the Board conference room, "There are usually about 90 cases divided into three stacks by potential decision—Grant, Partial Grant, and Deny."[331]

The Boards often decide 80 cases in a half day. In effect, according to attorneys specializing in military law, they act as "yes men, yes women" to the analysts who prepare the draft decisions rather than independent reviewers. "

The files "range in sizes from 5-10 pages up to a wrapped bundle with several folders of 30-40 pages each."[332] Although the case file is available to Board members, the Army BCMR says "[t]here is no requirement as to what the Board member must view" and they view "as much of the case files as they need to make an informed and judicious decision."[333] Each Army case comes with a "draft decisional document" prepared by an analyst that expedites decision making. **The boards often decide 80 cases in a half day.**[334] **In effect, according to attorneys specializing in military law, they act as "yes men, yes women" to the analysts who prepare the draft decisions rather than independent reviewers.**[335]

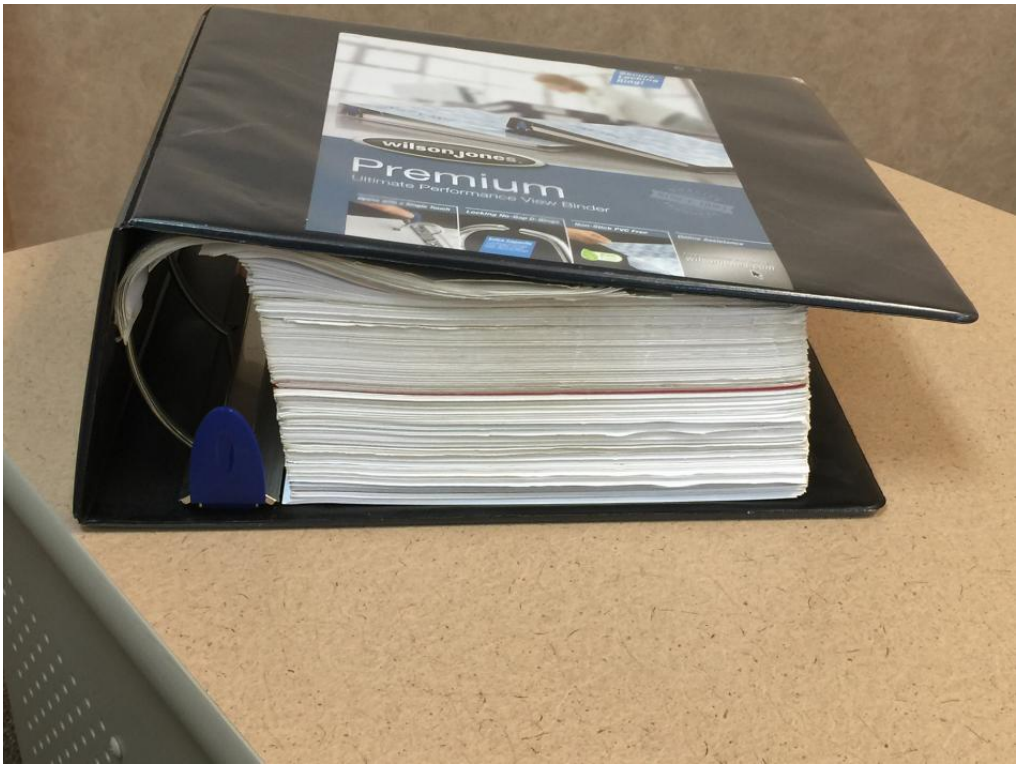
While the Army BCMR has the heaviest case load, the other Boards do not spend a great deal of time on deliberations either. The Navy BCNR meets Monday to Thursday from about 9 a.m. to lunch time.[336] While they did not provide data indicating the average number of applications decided each day in response to our record request, in 2009 they decided an average of 407 cases per month or approximately 34 cases per three-hour session.[337] Staff members brief Board members orally on each case before providing the application and supporting documents to Board members.

A former staff member said most of the time the Board votes on the written summary and oral presentation prepared by the staff member and there is no need for the underlying documents.[338] **After the Board votes, the BCNR staff prepare a decision that is not generally provided to Board members before it is sent out.**[339] **This means BCNR Board members neither draft nor review their decisions and generally do not even see the documents provided by the applicants.**

While there may be cases in which the correction is minor or administrative and does not require deliberation, the time in which cases are decided does not allow for a full consideration of evidence in the more complex cases. "

The Air Force Boards meet two to three times a week for two to three hours a session. The deputy executive director of the Air Force BCMR indicated that typically 30 cases are decided in a session.[340] However, the Air Force does provide Board members with a draft "record of proceedings" and information a week prior to a Board session.[341] The information is presented in "an analyzed and distilled fashion" so it is unclear whether the Board members receive access to the entire file.[342]

Based on the data, it is estimated that Army and Navy Board members spend an average of three minutes and 45 seconds and six minutes and 45 seconds per case.[343] For the Air Force, deliberations average five to six minutes. The Coast Guard, with its smaller case load, considers five to ten cases per three-hour session.[344]



A sexual assault survivor's application for a discharge upgrade with the Board for Correction for Naval Records.
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Given what is at stake and the often considerable information to be reviewed, this would appear to be woefully inadequate. **While there may be cases in which the correction is minor or administrative and does not require deliberation, the time in which cases are decided does not allow for a full consideration of evidence in the more complex cases.** Between 2009 and 2012, over 40 percent of the Navy Review Board's cases were discharge reviews.[345]

Moreover, the practice of relying on summaries and draft decisions prepared by staff members is problematic. A 1996 DOD report on the Boards stated that the consequence of this practice is:

> [P]anel members generally have little time to delve into the details of cases. Thus, their exercise of independent judgment can be significantly influenced by the summarized information and advice provided by the staff. It is not unusual, therefore, that panel members rarely disagree with the examiner's proposed decision. This procedure raises an appearance that panel members merely act as a 'rubber stamp' for the examiner.[346]

Although DOD recommended that this practice (and that of not having panel members review decisional documents after Board action for review) be re-examined, after 20 years the practice remains in place. Over-reliance on Board staff jeopardizes the role of the Board as an independent "honest broker."[347] As Congress once said, "If these boards become extensions of the military staffs, they will have lost their sole reason for existence."[348]

After the Board votes, the BCNR staff prepare a decision that is not generally provided to Board members before it is sent out.[346] This means BCNR Board members neither draft nor review their decisions and generally do not even see the documents provided by the applicants. "

Poor Access to Prior Cases

Although Boards have a great deal of discretion in making their determinations, it is not completely unfettered. In order to avoid arbitrariness, Boards should treat similar cases consistently, or explain as warranted why they are not doing so.

A federal district court requiring remand of an Army BCMR decision rejected the Board's contention that it is not bound by precedent because it is a board of equity, stating, "[i]t is axiomatic that '[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.'"[349] The court also stated that "the need to consider relevant precedent becomes especially acute when a plaintiff has pointed to a specific prior decision as very similar to his own situation."[350]

Nonetheless, the Boards make little effort to consider prior rulings when deciding cases. Moreover, because of the way prior decisions are made available in online reading rooms, it is very difficult for applicants, their lawyers, or even Board staff members to find other cases on which they can base arguments. Digests of prior decisions are not compiled or maintained by the BCMRs.

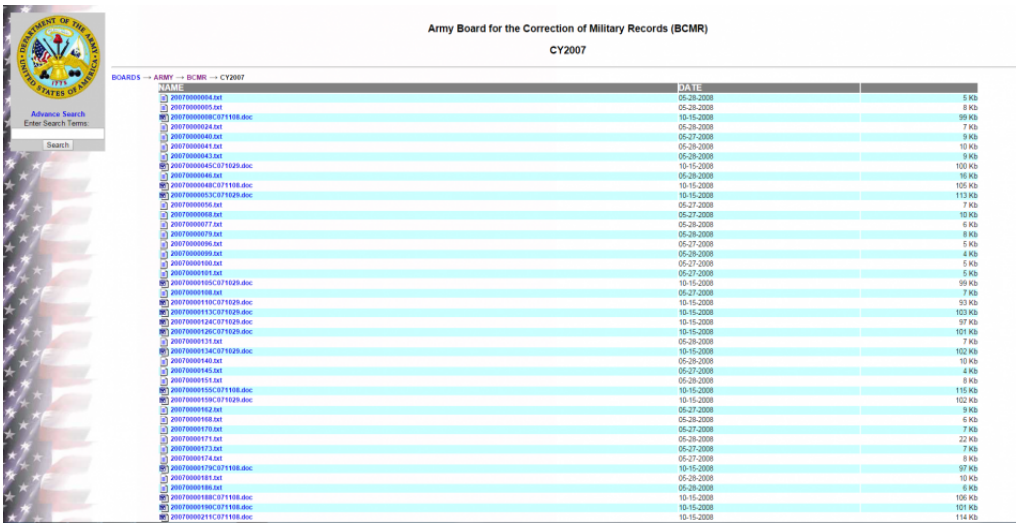
In response to public information requests about use of precedent, the Air Force BCMR said it refers to prior decisions only "if a case is cited as precedent by an applicant and/or counsel."[351] Neither the Navy nor the Air Force BCMRs have any "system for classifying or indexing an application according to the factual or legal issues presented for its consideration."[352] Although the Army claimed "attorney client privilege" and did not respond to our request, in response to an earlier records request it said it "makes its decisions on the individual merits of each case."[353] A former Board staff member told Human Rights Watch that applicants rarely cite cases in part because it is "awfully hard" to find old cases, as the existence of reading rooms is "not widely known" and they are "not particularly user friendly." Moreover, he himself saved cases he had worked on in the event he needed to reference a prior decision, but that helped only slightly.[354] The Boards, like applicants, search the online reading rooms if they want to review past decisions.[355] Only the Coast Guard indicated that staff members and Board members often considered prior cases when adjudicating applications.[356]

The reliance on reading rooms to find relevant cases is problematic because the reading rooms as they currently exist are virtually unusable. Military law practitioners describe the reading rooms as “egregious” and “dysfunctional” and say searching it is a “massive burden on everyone.”[357]

Federal regulations require the BCMRs and DRBs to make all their decisions publicly available.[358] Moreover, decisions are required to be indexed “in a useable and concise form so as to enable the public to identify those cases similar in issue together with the circumstances under and/or reasons for which the Board and/or Secretary have granted or denied relief.”[359] In this way, applicants and their lawyers should be able to search for cases to determine applicable standards and present their arguments accordingly.

However, in reality, the reading rooms are very basic, consisting of a list of case numbers. Except for the Coast Guard, which has a bare-bones indexing system, none of the services indexes their cases at all. Thus, as a pro bono coordinator said, “If you need an upgrade case, it is not indexed so you can’t find it.”[360] If lawyers find the reading rooms unworkable, then it must be even more challenging for the vast majority of applicants who are left to their own devices.

The search mechanism that exists is also rudimentary. Cases are posted in different formats (pdf, rtf, doc, txt), which makes searching and printing even more difficult and time consuming. Not all cases are posted. As discussed above, the Coast Guard and Navy no longer post decisions relating to sexual assault claims. Reading rooms have also been shut down for months at a time.[361] Given the potential importance of being able to reference prior decisions in making a claim, the difficulty in finding relevant cases is a serious handicap.



Screen shot of the Army Board for Correction of Military Records (BCMR) reading room.

Poor-Quality Decisions

Given the lack of reliance on precedent, it is not surprising that military law practitioners say there is little consistency in decisions.[362] Lawyers who spoke to Human Rights Watch have gone so far as to describe some decisions as “crazy”[363] and one described a decision that seemed to indicate the Board “does not understand their

own regulations" as they misstated the process for a mental health discharge.[364]

For informal adjudication, Boards are required to render decisions that set forth a "brief statement of the grounds for denial" sufficient to enable courts to understand the basis for the decision and determine whether it complies with the usual standards for judicial review.[365]

Although many cases from the reading rooms seemed to summarize the evidence presented by the applicant and address the arguments presented, it is difficult to determine if the applicants' arguments were fully considered without reading the underlying material.

In cases in which Human Rights Watch was able to review both the Board decision and the materials presented to the panel for consideration, we found Naval Board decisions that did not address the substantive claims made by the applicants but instead appeared to be form letters.

For example, Heath Phillips, who at age 18 was given an Other Than Honorable discharge after fleeing his ship to escape repeated sexual assaults by peers, attempted twice to get the BCNR to upgrade his discharge in order to enable him to get the health care assistance he needed from the VA. His lawyer submitted evidence showing that Phillips was diagnosed with PTSD from sexual trauma at the time he was AWOL. He also submitted military records establishing that Phillips had been subject to sexual harassment while in service. Although Phillips had agreed to an Other Than Honorable discharge in lieu of a court-martial after consulting with a judge advocate, his lawyer pointed out that "the decision making ability of a frightened 17 year-old suffering from PTSD, and facing the immediate prospect of going back into the company of shipmates whom had tormented him, must be called into question."[366] The BCNR denied his 2010 upgrade request in a two-page formulaic letter that made no reference to military sexual trauma and simply said Phillips had been AWOL, consulted with an attorney, and received the "benefit of [his] bargain" when the request for a discharge in lieu of a court-martial was granted.[367]

In 2012, with the assistance of an attorney, Phillips applied for reconsideration. The Board again denied his application in a two-page letter that was very similar to the first decision. Neither the sexual assault nor the diagnosis of PTSD was referenced in the decision and it is unclear if they were considered at all.[368]

Similarly, when Brian Lewis sought to have his PD narrative changed, the Board decision, which is less than a page and contains mostly boilerplate language, references neither the PD nor the sexual assault that was the basis for the request. It simply discounted the VA diagnosis of PTSD because fitness and disability determinations made by the armed forces are fixed at the date of separation (though a PTSD diagnosis had, in Brian's case, been made prior to separation).[369]

The mixed quality of decisions and the potential uneven application of standards make it all the more important that cases be subject to judicial review.

Minimal Judicial Oversight

Board decisions are subject to minimal external oversight. Although Board decisions are reviewable in federal court, very few cases are brought to court and relief is rarely granted.

While lawyers who spoke to Human Rights Watch described Board decisions as arbitrary and in some cases plainly erroneous, few bring cases to court. Lawyers say by the time their client gets the BCMR decision, they are frustrated and do not want to go to court.[370] Moreover, the expense of hiring a lawyer to bring a complaint (which some estimate at a minimum to be between $5,000 and $15,000 over and above anything paid to have representation before the Boards) is a significant barrier to challenging decisions for many veterans.[371] The cost is particularly hard to justify because the chance of success is extremely low.

Federal courts generally grant broad deference to agency action, only overturning a decision if it is "arbitrary, capricious, an abuse of discretion," or otherwise contrary to law.[372] However, for BCMRs, the courts use an "unusually deferential application" of this standard. Courts are reluctant to second-guess military decisions about "how best to allocate military personnel in order to serve the security needs of the Nation," describing the task as "inherently unsuitable to the judicial branch."[373]

Because the Secretary is not legally required to correct even an undisputed error or injustice in a personnel record, the reviewing court's authority to upset a determination by the secretary is substantially restricted.[374] The standard is so high that the Court of Appeals for the District of Columbia Circuit said, "Perhaps only the most egregious decisions may be prevented under such a deferential standard of review," and further indicated of judicial review, "[I]t is not for us but for Congress to say whether the game is worth the candle."[375]

Many have concluded it is not worth it. Very few challenge Board decisions in court. According to the Air Force BCMR, between 2009 and 2013, an average of nine applicants per year—or fewer than 0.5 percent of cases decided by the Air Force BCMR—sought judicial review. Of the 46 cases that received judicial review between 2009 and 2013, no decisions were vacated, reversed, or modified. Eight cases were remanded and only two of those remands resulted in relief for the applicant. The remaining cases were denied after remand.[376] The figures are similar for the Army. Between 2008 and 2013, out of tens of thousands of decisions, only 56 cases were remanded by federal courts resulting in partial relief for six applicants and granting of relief to five others.[377]

In short, judicial oversight of BCMR cases is so negligible as to be nearly non-existent, providing little incentive for Boards to make credible decisions that can withstand scrutiny.

VI. Human Rights Obligations

The US government has an obligation under international human rights law to protect the rights of sexual assault survivors in the military, including those who have been wrongfully discharged from the services. As a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States committed to ensure that those who report torture or other cruel, inhuman or degrading treatment or punishment "are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."[378]

In 2014, the United Nations Committee against Torture, the expert body charged with monitoring compliance with the convention, reminded the US government of its obligation to ensure those protections for complainants reporting military sexual assault.[379]

In addition, international law affords victims the right to an effective remedy for violations of their rights, including sexual assault.[380] Recognizing the ways that retaliation can interfere with victims' access to a remedy under human rights law, international best practices on the treatment of victims obligate governments to "[take] measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation."[381]

Protecting victims from retaliation requires providing them with a meaningful opportunity for redress for harm that has come to them as a result of seeking justice for sexual assault. This includes the right to a fair hearing for any loss of property or liberty.

As a party to the International Covenant on Civil and Political Rights (ICCPR), the US is obligated to ensure that "[i]n the determination … of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[382]

The Human Rights Committee, which interprets and oversees compliance with the ICCPR, has noted that fair and public hearing requirements are "based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights."[383] Thus, in addition to applying to criminal and civil judicial proceedings, the right to a fair and impartial hearing applies to "equivalent notions in the area of administrative law" such as termination of civil servants and determination of the pension rights of soldiers.[384]

The ICCPR also contains the right to equality before the law. The Human Rights Committee has said, "The right to equality before courts and tribunals also ensures equality of arms."[385] The principle of "equality of arms"is inherent in the concept of a fair hearing and applies to civil as well as to criminal cases.[386] A fair balance between the parties requires that each party be afforded a reasonable opportunity to present their case.

The responsibility to ensure equality of arms and fairness of hearings lies with the US government to ensure that service members and veterans have the same rights as others.

Recommendations

To the Secretary of Defense

To Improve Transparency about the Boards

- Conduct effective outreach to inform service members and veterans about administrative remedies available to correct records.
- Publish clear guidelines by which applications are evaluated and place these guidelines in DD Forms 149 and 293.
- Adopt measures to ensure all Board decisions (including cases involving sexual assault) are indexed, summarized, and published in a database that is uniformly searchable by keywords, unlike the current reading rooms.
- Develop methods to identify the number of service members separated for non-disability mental health conditions and oversight mechanisms to monitor separations for non-disability mental health conditions to ensure they comply with Defense Department regulations, as per the Government Accountability Office recommendations.
- Require that services provide sexual assault victims with legal consultation (either their victim's counsel or defense counsel) prior to an administrative discharge and require that waiving that consultation be done in the presence of defense or victims' counsel.

To Improve Board Practices

- Develop a working group with representatives from each service's Board, civilian lawyers, and veterans' organizations to study standards for granting relief, determine best practices and procedures, and make recommendations for uniform standards and procedures to be included in revised Defense Department instructions. Reforms should include at a minimum:
    - Eliminating the one-year time limit for reconsideration
    - Requiring entire case files to be provided to Board members in advance of dates on which they are sitting
    - Ending the staff practice of providing decisional documents containing recommendations for proposed decisions to Board members prior to case review
    - Developing materials to make the process more understandable to applicants, and include these procedural descriptions in DD Forms 149 and 293
    - Notifying applicants that they can include testimony in their applications
    - Providing standard and more extensive training to Board Members
- Provide for audio or video conference hearings by the Boards for Correction and Discharge Review Boards.
- Adopt measures to ensure Boards are obtaining medical and military records on behalf of applicants as required by regulation.
- Amend regulations and instructions to require the Boards to consider trauma or mental illness a mitigating factor in requests for discharge upgrades, changes to narrative reasons for discharges, or re-enlistment codes.
- Require the Boards to refer victims who assert mental health claims but do not have access to VA care to the Department of Veterans Affairs for a medical evaluation by VA professionals who are trained in the area of the mental health condition raised.
- Require expedited production of records to veterans who intend to file claims before the Discharge Review Boards or the Boards for Correction of Military Records (60 days) if such an application will request an upgrade, medical retirement, or change in re-enlistment code.
- Adopt measures to ensure those involved with decisions about discharge categorization (supervisors and judge advocates including SVCs) are trained on the consequences of different discharge characterizations on benefits.
- Require Boards to notify applicants of deficiencies in their applications and inform them of what additional evidence is required to substantiate a claim.

To Redress Harm to Sexual Assault Survivors

- Instruct Boards for Correction to change "Personality Disorder" narrative reason for discharges to "Completion of Service" for applicants with a personality disorder discharge who experienced trauma and have not be diagnosed with a personality disorder since leaving service.

- Expand the September 2014 and February 2016 guidance on considering upgrade requests by veterans claiming PTSD to clarify that special consideration of PTSD claims should be extended to all sexual assault survivors.

- Require liberal consideration of expert opinions from sexual assault specialists for Boards for Correction cases in which the applicant is seeking relief with respect to adverse action relating to a sexual assault.

- Create evidentiary standards for proving to the Boards that a sexual assault occurred that include a broad range of "markers" showing a traumatic event occurred to substantiate a claim, in line with the standards adopted by the US Department of Veterans Affairs.

To the US Congress

Include in the National Defense Authorization Act measures that:

Strengthen the Administrative Review Process

- Provide applicants the right to a hearing before the Boards for Correction of Military Records if the applicant has otherwise not had a hearing.

- Require the Boards for Correction and Discharge Review Boards to allow video or audio hearings.

- Reinstate traveling Discharge Review Boards for the Navy and Army to allow meaningful access to veterans who seek a personal appearance.

- Require adequate training for new Board members to include training on Post-Traumatic Stress Disorder.

- Allow veterans who succeed in their claims before the Boards to recover reasonable legal fees to increase access to legal services, as is done for Equal Employment Opportunity cases.

- When sexual assault is raised as an issue in a complaint before the Boards for Correction or Discharge Review Boards, require an advisory opinion on trauma arising from sexual assault.

- Direct the Secretary of Defense to create a working group, including Board representatives, military lawyers and veterans' groups, to study best practices and recommend standardized procedures for service Boards.

- Establish full time, permanent Board members assigned for a fixed number of years, to review all cases where there is an application for an upgrade, medical retirement, or change of re-enlistment code.

Improve Transparency and Oversight of Boards

- Enforce the requirement that Boards publish, summarize, and index all decisions (including cases involving sexual assault) so that they are searchable and accessible.

- Require mandatory publicly available annual reports by each service Board on performance to improve transparency and uniformity.

- Require judicial review of military board decisions to be consistent with that required by the Administrative Procedure Act for those of any other federal agency without the additional "unusual deference" reserved for the military.

Increase Protection against Improper Discharges of Traumatized Service Members

- Expand statutory protections for PTSD or other mental health conditions (e.g. depression) stemming from a traumatic event that occurred in service to include mental health experts and expedited decision making for all Board cases involving trauma, including trauma resulting from sexual assault, and provide personnel dedicated to reviewing these trauma-related cases.

- Extend protections for non-disability mental health discharges that exist for combat veterans to those who have experience other forms of trauma, including sexual assault.

- Require the services to suspend administrative separation procedures and refer cases for potential medical evaluation through the medical retirement process (Integrated Disability Evaluation System) when a service member has a diagnosis of a medical condition related to sexual harassment or sexual assault (such as PTSD or depression).

Provide Redress to Wrongfully Discharged Service Members

- Codify a presumption for veterans with documented PTSD that the PTSD contributed materially to discharge classification.

- Codify evidentiary standards to allow a broad range of "markers" for proving to the Boards that a sexual assault or traumatic event occurred to substantiate a claim, in line with the standards adopted by the US Department of Veterans Affairs.

- Create a specialized panel to expeditiously review cases in which veterans claim to have been wrongfully discharged following a report of sexual assault. The panel should include members with expertise on military sexual trauma.

To the Department of Veterans Affairs

- Issue instructions to medical staff to be cautious about relying on personality disorder diagnoses by services to ensure that medical care is not compromised.

- Conduct outreach to inform service members and veterans about administrative remedies available to correct records.

- Conduct extensive outreach to notify both VA staff and veterans with Other Than Honorable discharges that those with such discharges may be entitled to a positive Character of Discharge by the Department of Veterans

Affairs.

- Adopt regulations authorizing tentative eligibility for health care for service members pending adjudication of Character of Discharge.
- Authorize eligibility for support services other than health care, including housing services, for former service members receiving health care related to military sexual trauma.

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Region / Country United States

Topic Women's Rights, Sexual Violence and Rape

Swords to Plowshares

VETS HELPING VETS SINCE 1974

NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

UNDERSERVED

How the VA Wrongfully Excludes Veterans with Bad Paper

LSC — Legal Services Center — Centro de Servicios Legales — Harvard Law School

Prepared by the

Veterans Legal Clinic

Legal Services Center of Harvard Law School

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EXECUTIVE SUMMARY

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

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

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

The VA has failed to heed Congress' 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' criteria. VA regulations cause the exclusion of an additional 5.5% of all service members.
- Three out of four 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.

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' 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' 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

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*		

benefits intended to reward excellent service. The 1944 G.I. Bill of Rights provided services to compensate, indemnify, or offset actual losses experienced by service members: compensation if a disability limited a person's ability to work; healthcare if they were disabled during service; vocational rehabilitation for people whose disabilities required them to learn new trades; income support for people whose careers were disrupted by wartime military service; education for people who did not have a civilian trade after several years of military service.[16] Those benefits were not intended as rewards for good performance—they were basic services to make up for actual losses or harms experienced while in the military. Congress sought to withhold such support for actual injuries in only the most severe cases of misconduct. In contrast, Congress established higher eligibility standards for benefits intended to reward exceptional service, such as the federal veteran hiring preference and Montgomery G.I. Bill education benefit. Those benefits require a discharge Under Honorable Conditions or a fully Honorable discharge.

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

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

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

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

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

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

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

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

HOW THE VA EXCLUDES VETERANS

This report provides data to evaluate whether the VA has been true to Congress' 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***

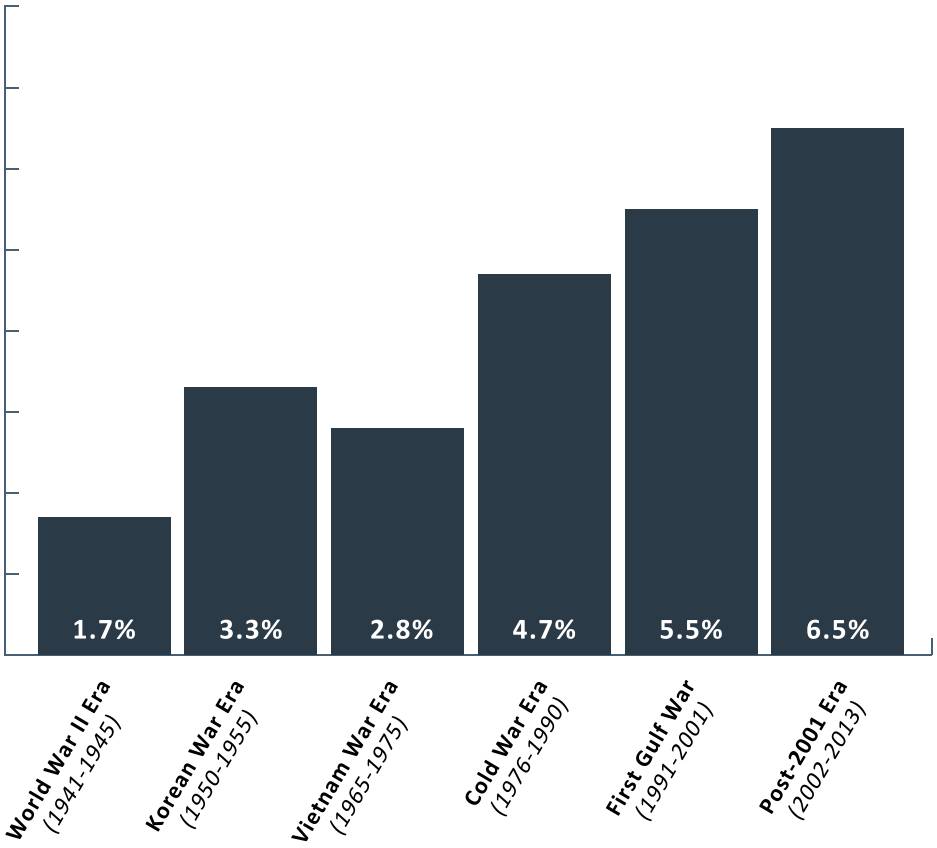
Although the G.I. Bill of Rights was intended to expand access to basic services, in practice the VA is turning away more veterans than ever before.

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: about 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]

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.

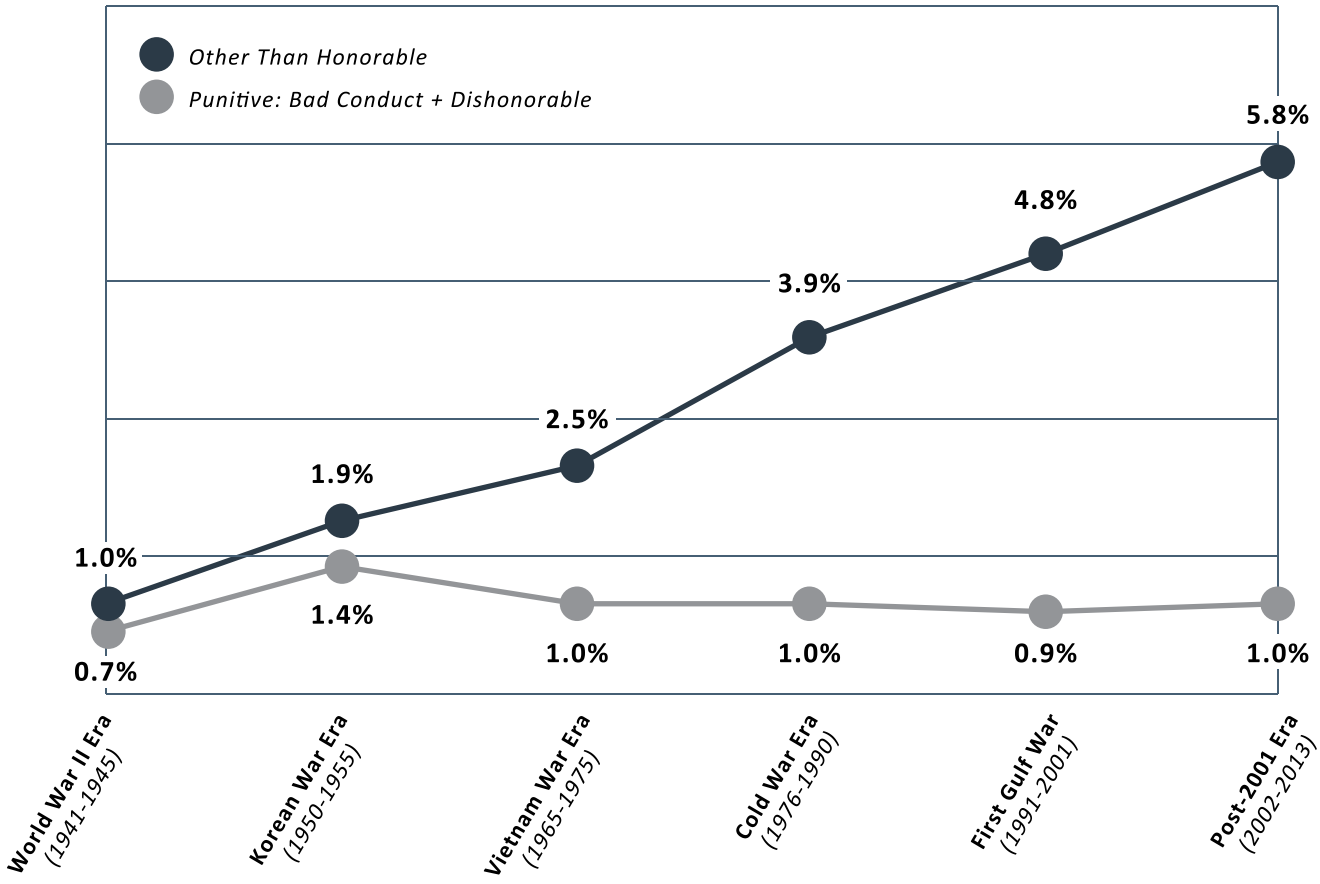
90%

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

1,200 Days

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

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

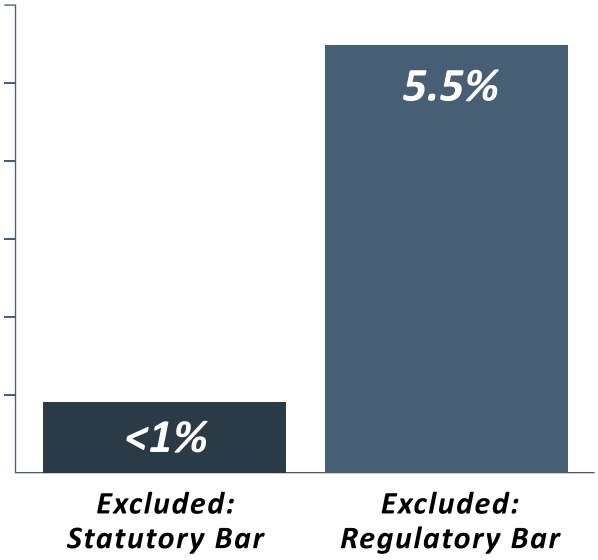


Long delays in completing COD reviews also contributes to the low rate of eligibility determinations. The COD review is highly burdensome on the agency and the veteran. It requires VA employees to gather extensive records, review those records and other evidence the veteran submits, and make detailed 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.

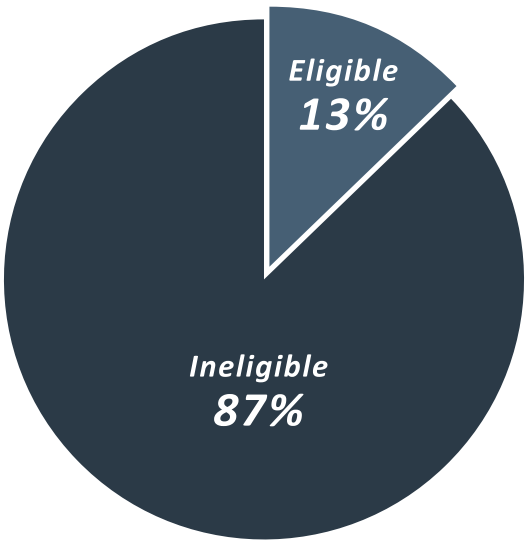
The VA's COD Regulations Deny Eligibility to the Large Majority of Veterans

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: 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.

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



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 two out of every three 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 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]

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%

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' 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 two out of every three 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% 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]

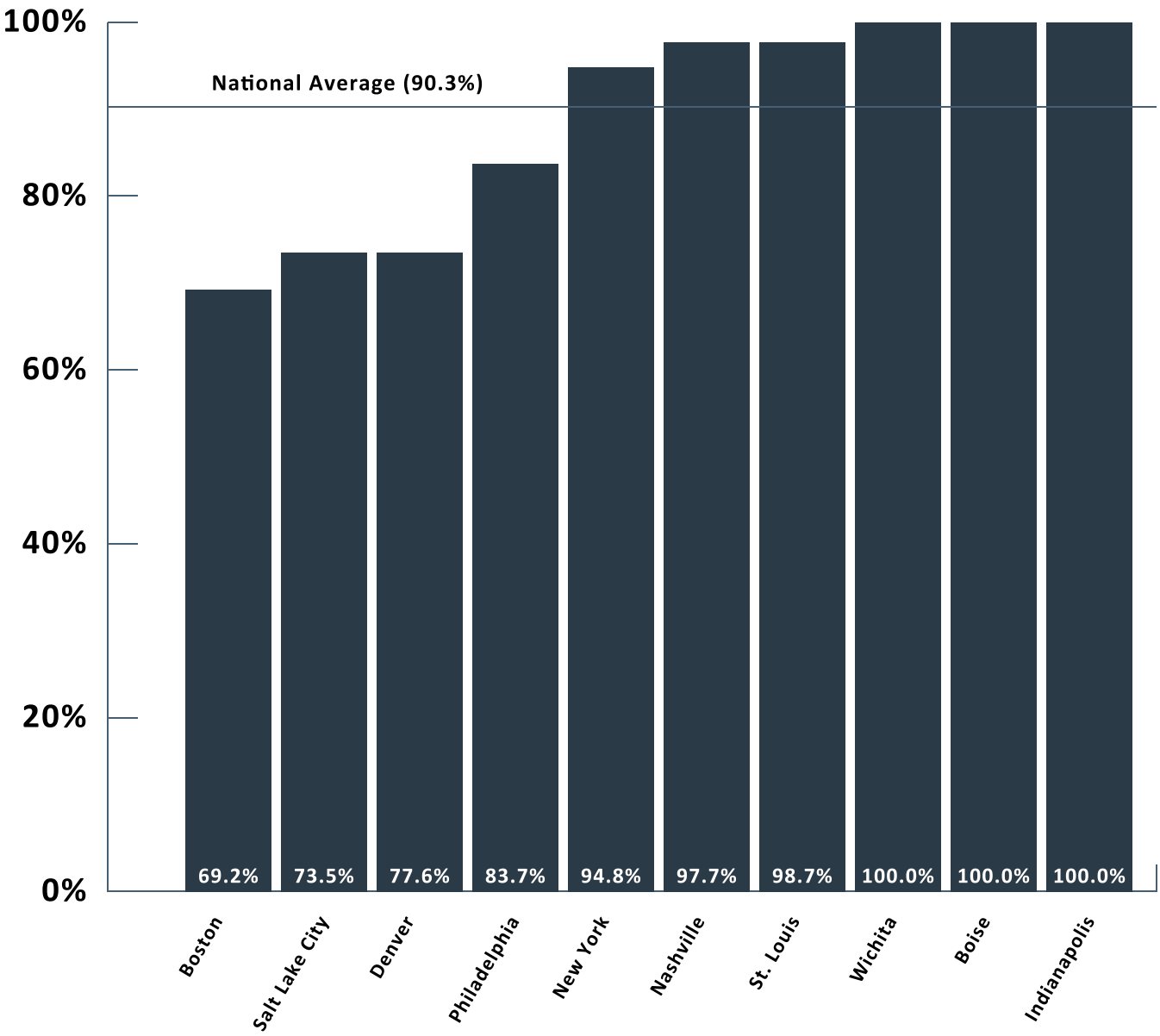
This wide variation in decision outcomes also appears in the differences between Veteran Law

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.

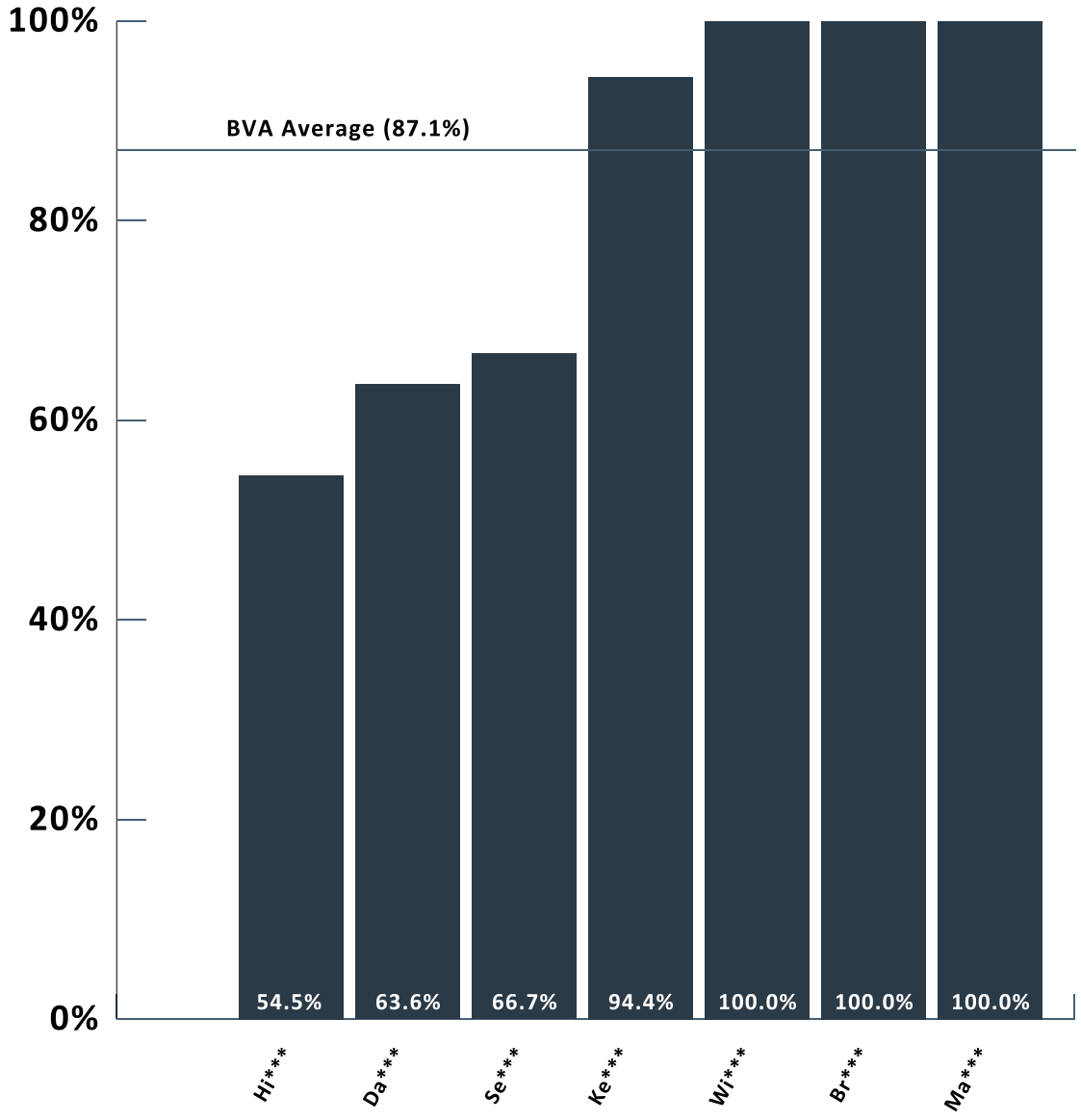
An analysis of BVA decisions from 1992 to 2015 reveals that, overall, Veterans Law Judges deny 87% of Character of Discharge appeals—that is, they uphold the Regional Office's finding that the veteran's service is "dishonorable" and therefore disqualifying. However, some Veterans Law Judges deny 100% 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).

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

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



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 10 to 18 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]

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.

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.

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.

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. Counterintuitively, the VA's regulations create a suicide pipeline: the veterans most at risk of suicide are the ones most likely to be turned away from effective suicide prevention treatment.

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

Incarceration

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

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

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

Homelessness

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

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

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

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

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' 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' 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' 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' 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.

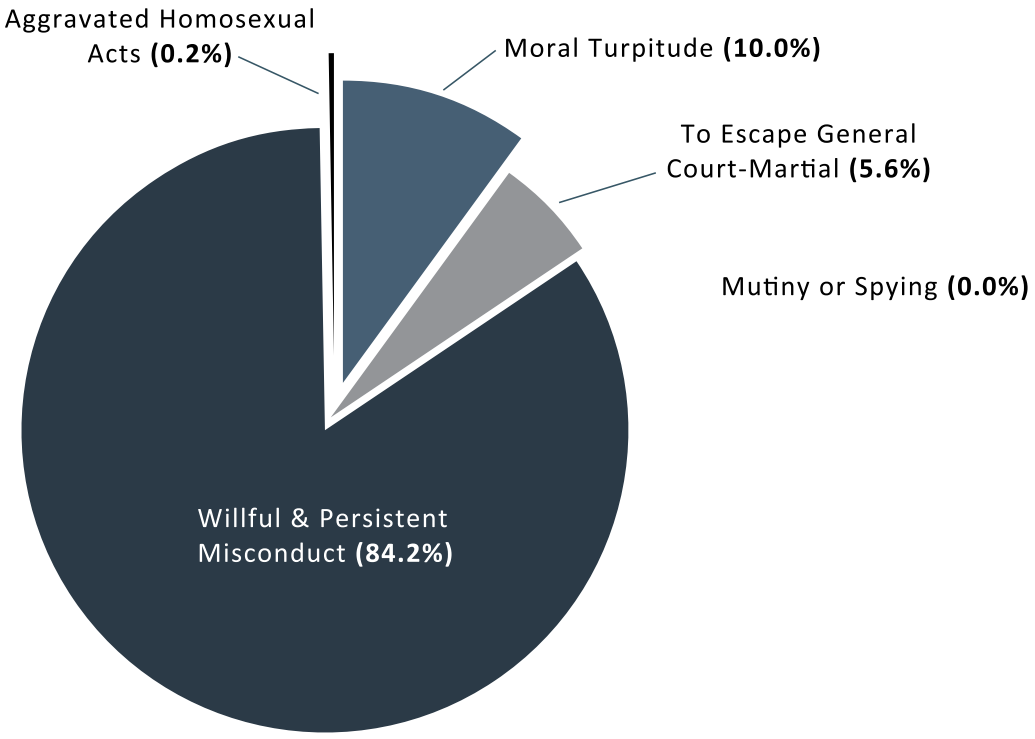
The regulation does permit limited consideration of mitigating circumstances: if the VA considers the misconduct "a minor offense" and the veteran's service was "otherwise honest, faithful, and meritorious." In practice, that exemption is very narrow because of the strict standards for what counts as "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' 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

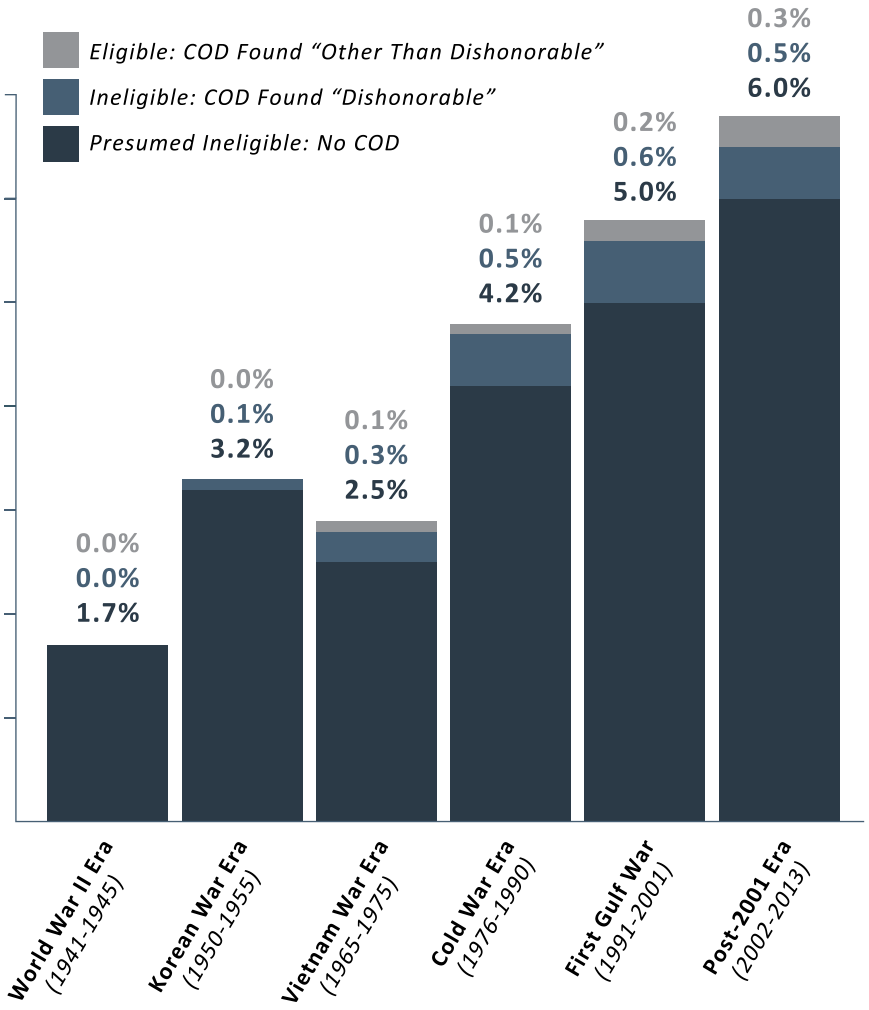
The data above show that the VA excludes veterans with combat service or hardship service from basic veteran services at nearly the same rate as others, indicating that these factors are not considered in COD decisions.

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 a 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' 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.

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' 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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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).

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.

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).

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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.

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

APPENDIX

Appendix A: Current VA Regulations

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

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

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

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

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

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

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

(4) As a deserter.

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

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

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

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

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

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

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

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

(2) Mutiny or spying.

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

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

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

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

. . .

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

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

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

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

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

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

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

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

World War II Era: 1941 to 1945

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

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

Korean War Era: 1950 to 1955

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

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

1956 to 1964

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

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

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

Vietnam War Era: 1965 to 1975

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

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

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

Cold War Era: 1976 to 1990

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

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

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

First Gulf War Era: 1991 to 2001

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

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

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

Post-2001 Era: 2002 to 2013

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

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

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

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

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

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

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

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

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

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

EXPLANATION

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

Appendix E: Decisions of the Board of Veterans' Appeals

Total BVA Character of Discharge Determinations, 1992-2015

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

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

Appendix F: Decisions of the VA Regional Offices

Total VARO Character of Discharge Determinations in FY2013

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

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

Appendix G: Character of Discharge Determinations by Era of Service

Total VARO Character of Discharge Determinations by Selected Eras of Service

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

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

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

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

VA Eligibility for Post-2001 Veterans

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

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

Appendix I: VA Eligibility Status for Selected Eras of Service

VA Rate of Exclusion for Selected Eras of Service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

national average: 90.3%

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNFINISHED BUSINESS

CORRECTING "BAD PAPER" FOR VETERANS WITH PTSD

The Defense Department's Adjudication of Discharge Upgrade Applications One Year Since Its September 2014 PTSD Directive

Prepared for

Vietnam Veterans of America
National Veterans Council for Legal Redress

by

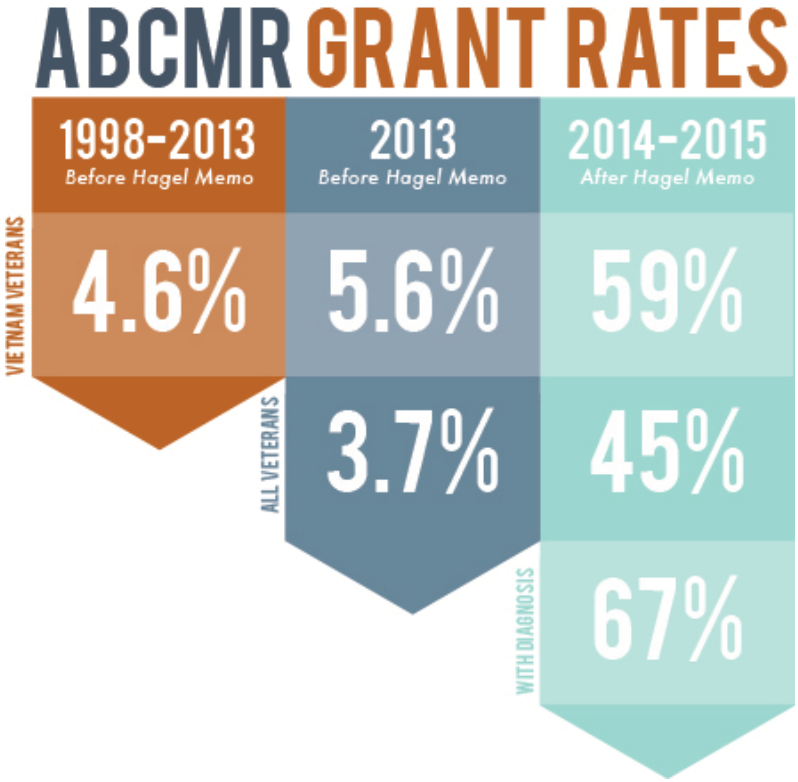
Sundiata Sidibe & Francisco Unger
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization at Yale Law School

Executive Summary

Veterans who receive less than fully honorable discharges can apply to administrative boards established by Congress for a review of their discharge status. These boards may upgrade a discharge status that is erroneous or unjust. A former service member's discharge status is hugely consequential, as those with Other Than Honorable or Bad Conduct Discharges (also known collectively as "bad paper") are generally ineligible for education, housing, employment, disability, and burial benefits from the U.S. Department of Veterans Affairs (VA), and in many cases even healthcare. Bad paper can also make it difficult for veterans to secure private employment and subject them to lingering stigma and shame.

Unfortunately, for decades, these record correction boards have failed to function as intended by Congress. They refused to permit veterans to appear before them personally, failed to disclose information about the boards' work, and most importantly, engaged in a near-categorical refusal to correct the discharge status of veterans suffering from post-traumatic stress disorder (PTSD), denying more than 95% of such applications from Vietnam veterans in the last 15 years. In September 2014, following criticism by veterans' organizations and the media, congressional scrutiny led by Senator Richard Blumenthal, and class-action litigation, Secretary of Defense Chuck Hagel ordered the boards to grant "liberal consideration" to applications from veterans with PTSD. This "PTSD Upgrade Memo" also required the boards to create a comprehensive public messaging campaign to inform veterans who have long suffered the stigma of bad paper of this new opportunity for redress. The PTSD Upgrade Memo sought to provide a legitimate chance at obtaining a record correction for hundreds of thousands of veterans who had received bad paper discharges when the effects of PTSD were unknown, as in the Vietnam War, or not fully understood.

To monitor implementation of the PTSD Upgrade Memo, Vietnam Veterans of America (VVA) and the National Veterans Council for Legal Redress (NVCLR) requested records from the Department of Defense (DOD) in December 2014 and June 2015. When DOD failed to disclose these records, the organizations brought suit under the Freedom of Information Act. Eventually, during the course of litigation, the Army released hundreds of pages of records. The Navy, which adjudicates applications for both the Navy and the Marines, and the Air Force have disclosed few responsive records. This report is based on the records newly-obtained by VVA and NVCLR and presents the first detailed look at compliance with the adjudication and outreach requirements of the PTSD Upgrade Memo.



Key Findings

Since Secretary Hagel issued the PTSD Upgrade Memo in September 2014:

- The overall grant rate for all veterans applying for PTSD-based discharge upgrades at the Army Board for the Correction of Military Records (ABCMR) has risen more than twelve-fold from 3.7% in 2013 to 45%.
- The grant rate for Vietnam veterans applying for PTSD-based discharge upgrades at the ABCMR has increased more than ten-fold from 5.6% in 2013 to 59%.
- Vietnam veterans are the most numerous applicants (67%) and have a higher grant rate at the ABCMR (59%) than veterans of other conflicts.
- The ABCMR granted 67% of applications by a veteran with a PTSD diagnosis (74/110) and 0% of applications by a veteran claiming to suffer PTSD but without medical records establishing that diagnosis (0/54).
- Total PTSD upgrade decisions across the military's record correction boards have increased from approximately 39 per year to approximately five times that number.
- Tens of thousands of eligible veterans appear not to have submitted applications.
- DOD has conducted little or no meaningful public outreach, a finding consistent with the low numbers of new applications when compared to the number of eligible veterans.
- Of upgrades awarded by the ABCMR, 97% have been to General Under Honorable Conditions (72/74) and 3% have been to Honorable (2/74).

Recommendations

To ensure compliance with the PTSD Upgrade Memo's twin requirements of "liberal consideration" in adjudications and comprehensive outreach to eligible veterans, Congress should enact legislation that:

1) Codifies the presumption of an upgrade for those with a medical diagnosis of PTSD.
2) Directs the boards to refer veterans for mental health evaluations when their applications assert evidence of PTSD without a formal diagnosis, so that veterans without access to health care can still receive a fair adjudication.
3) Requires that a mental health professional serve on any board reviewing the application of a veteran asserting PTSD, traumatic brain injury, or other service-related mental health conditions.
4) Requires the DOD to implement a vigorous outreach program to identify eligible veterans and advise them how to apply for discharge upgrades successfully.
5) Directs the boards to release regular annual reports summarizing their application determinations in order to ensure accountability and transparency.

Background

The service branches discharged roughly 260,000 Vietnam veterans with "bad paper"—i.e. an Undesirable Discharge (UD), which was later renamed an Other Than Honorable (OTH) discharge; a Bad Conduct Discharge (BCD); or a Dishonorable Discharge (DD)—stemming from misconduct during their service.[1] Many thousands more service members have received bad paper since then. A service member who receives an OTH, BCD, or DD is generally ineligible to receive VA benefits, including education, housing, employment, disability compensation, burial benefits, and, in many cases, even healthcare.[2] These former service members often face intense stigma, and in addition to their ineligibility for a wide range of VA benefits, they confront lifelong barriers to private employment[3] and even membership in some veterans' service organizations. Many veterans with bad paper suffer unemployment and homelessness.

Until 1980, PTSD was not recognized as a medical diagnosis. After 1980, some Vietnam and other veterans who realized that their undiagnosed PTSD symptoms had contributed to the misconduct resulting in their bad discharge applied for discharge upgrades to the administrative boards established by Congress to correct an error or injustice in a service member's discharge.[4] The record correction boards rejected these applications on a near-categorical basis, however. Between 1998 and 2013, for example, the ABCMR reviewed 371 upgrade applications from Vietnam veterans with an OTH asserting PTSD, and granted upgrades for only 4.6% of them.[5] Moreover, the boards almost universally refused to permit veterans to appear before them for in-person hearings, denying them more comprehensive process to make their claims.[6]

In recent years and during contemporary conflicts, veterans' advocates and the armed service branches have paid greater attention to how PTSD contributes to misconduct that might result in a bad paper discharge. Tens of thousands of former service members had undiagnosed PTSD at the time of their discharge; in fact, a major study conducted by the VA estimates that 30.9% of Vietnam veterans have had PTSD in their lifetime.[7]

Since at least the early 1990s, the record correction boards' near-categorical rejection of applications by Vietnam veterans with undiagnosed PTSD has received criticism from veterans' organizations and the public and become the subject of congressional scrutiny, led by Senator Richard Blumenthal (D-CT) and the Senate Armed Services Committee.[8] In March 2014, VVA, NVCLR, and five individual veterans filed a proposed nation-wide class-action lawsuit on behalf of Vietnam veterans with PTSD who received an OTH.[9]

In response, in September 2014, then-Secretary of Defense Chuck Hagel directed the boards to reform their practices. Specifically, he issued the PTSD Upgrade Memo, which ordered the boards to give "liberal consideration" to PTSD-based applications for discharge upgrades. The Memo also required military boards to create a comprehensive public messaging campaign to inform veterans of this new opportunity. Since the branches had historically failed to acknowledge the legitimacy of PTSD-based claims, the Upgrade Memo laid the groundwork for a radical change in how PTSD-based claims would be assessed. It also promised to encourage tens of thousands of veterans who had received bad discharges as a result of PTSD to apply to the boards in order to correct this injustice.

In order to monitor service branches' implementation of the PTSD Upgrade Memo and outreach efforts, VVA and NVCLR filed a series of Freedom of Information Act requests seeking policy documents and statistical data regarding PTSD upgrade applications and the outreach efforts mandated by Secretary Hagel. After DOD refused to produce timely, responsive records, in May 2015 the organizations brought suit in U.S. District Court for the District of Connecticut to enforce the public's right of access to this information.[10] In addition, in May 2015 the Senate Armed Services Committee directed DOD to report statistical information regarding PTSD-based discharge applications since the Memo was issued.[11] DOD delivered its report in August 2015, stating that it had received 201 PTSD-based discharge upgrade applications as of that date, and of those that had been adjudicated, the boards granted upgrades in 38% of the cases.[12] However, DOD's report lumped together the statistics of all three branches and disclosed no information about the grounds on which 62% of the applications were denied, making it difficult to evaluate each branch's individual performance. Nor did the report provide much insight into the boards' criteria or DOD's outreach efforts.

DOD'S REPORT LUMPED TOGETHER THE STATISTICS OF ALL THREE BRANCHES AND DISCLOSED NO INFORMATION ABOUT THE GROUNDS ON WHICH 62% OF THE APPLICATIONS WERE DENIED

In response to the FOIA lawsuit filed by VVA and NVCLR, the Army produced hundreds of records. Crucially, these records included a substantial number of decisions on PTSD upgrade applications issued by the ABCMR since issuance of the PTSD Upgrade Memo. The Navy and

the Air Force refused to produce similar documents from their respective boards, the Board for the Correction of Naval Records (BCNR) and the Air Force Board for the Correction of Military Records (AFBCMR), claiming that a manual search of their largely un-digitized records would be unduly burdensome.[13]

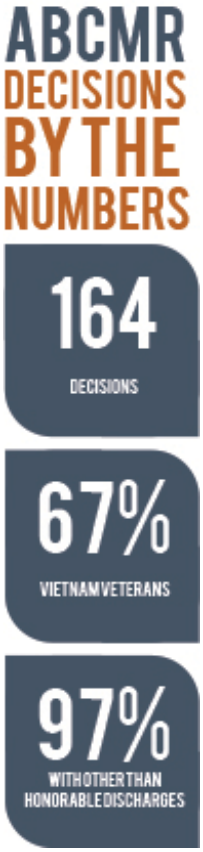
This report summarizes the results of the relevant ABCMR decisions, as well as the authors' own manual search of online databases maintained by the BCNR and AFBCMR. This report thus represents a first look at how the PTSD Upgrade Memo has been implemented, based on the records disclosed by the DOD to date as a result of the FOIA lawsuit.

Findings and Analysis

1. The Army (ABCMR)

The Army provided by far the most comprehensive response to NVCLR and VVA's FOIA requests, disclosing, most importantly, copies of 164 post-PTSD Upgrade Memo decisions on PTSD-based discharge upgrade applications. Of these decisions, 74 resulted in discharge upgrades (45%). This grant rate represents a substantial improvement over the historically low grant rates for PTSD-based applications. (As noted above, between 1998 and 2013, the ABCMR granted only 4.6% of discharge upgrade applications from Vietnam veterans with an OTH who asserted PTSD).[14]

The 164 PTSD-based decisions released by the Army also represent a substantial increase in its annual PTSD-based applications from years past. In the year following the PTSD Upgrade Memo, it has adjudicated over five times the historical average of annual PTSD-based applications to all military boards combined.[15]



Examination of these decisions demonstrates that the ABCMR requires successful applications to make three showings: (1) a credible diagnosis of PTSD by a competent medical expert; (2) that an applicant was subjected to the "ordeals of war," or to trauma during service that could have plausibly caused PTSD; and (3) some indication that the applicant's misconduct is reasonably traceable to PTSD (in other words, the ABCMR looks for a causal nexus). These factors mean that ABCMR denials generally found that an application lacked a PTSD diagnosis, failed to show that PTSD was caused or exacerbated by a combat-related incident, or involved discharges due to misconduct that was not plausibly traced to PTSD.

Out of the 90 applications denied in this set of ABCMR cases, the Board stated that 54 (60%) lacked a credible PTSD diagnosis altogether. When the Board found that applicants had provided a PTSD diagnosis from a "competent medical authority," the ABCMR tended to grant the upgrade request. Of 110 such applications, 74 (67%) resulted in grants. Conversely, all 54 applications that the ABCMR concluded lacked a credible PTSD diagnosis were denied.

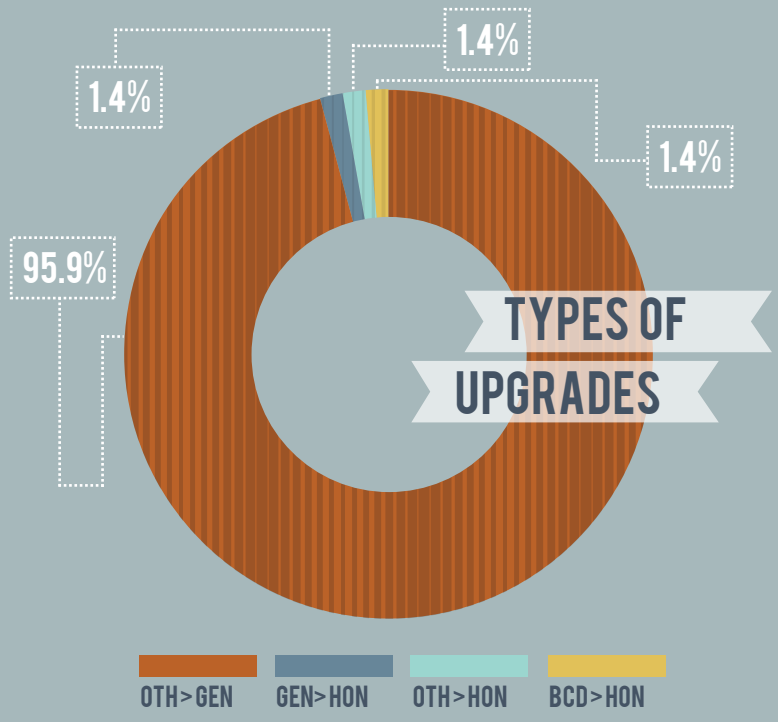
BY THE NUMBERS

The Army Board for Corrections of Military Records (ABCMR) is the only Board that provided copies of its post-Hagel Memo PTSD-based discharge upgrade decisions. These charts break down the ABCMR numbers.

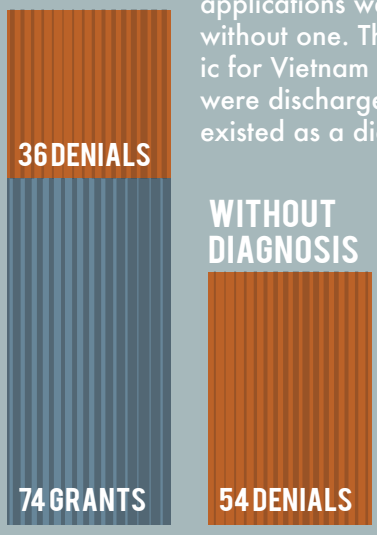
90 DENIALS

74 GRANTS

AFTER IMPLEMENTATION



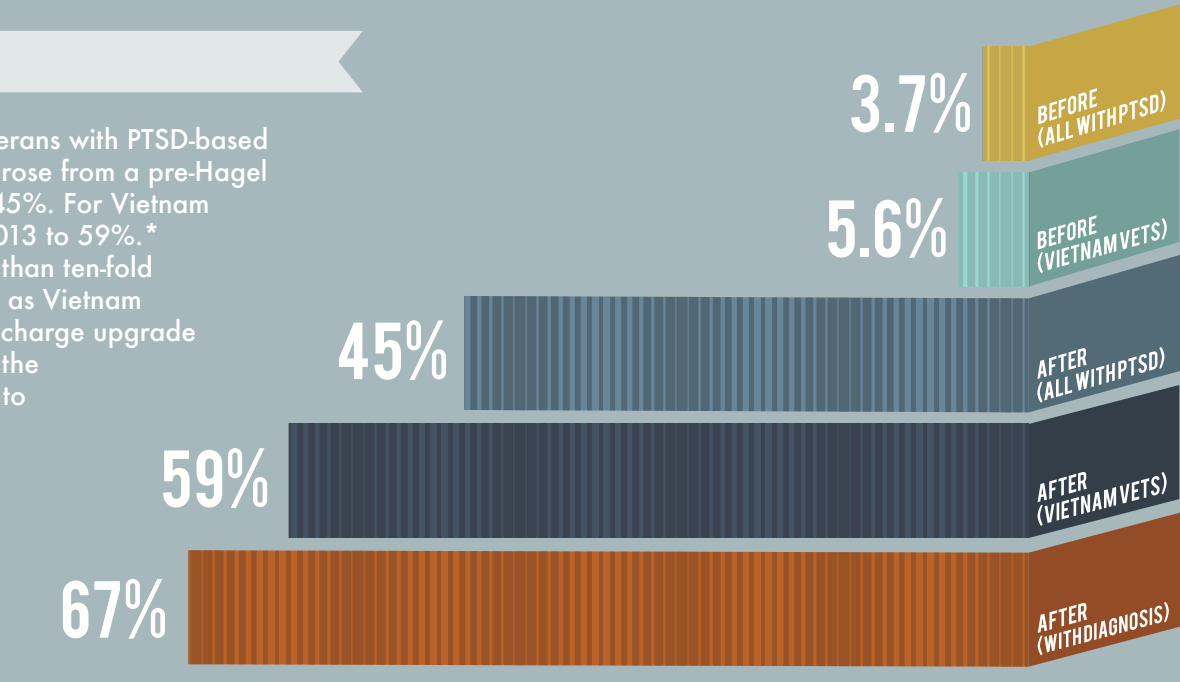
DIAGNOSED v. UNDIAGNOSED



Having a credible PTSD diagnosis is often decisive. No applications were granted without one. This is problematic for Vietnam veterans, who were discharged before PTSD existed as a diagnosis.

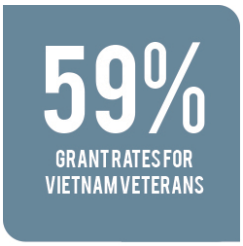
BEFORE & AFTER

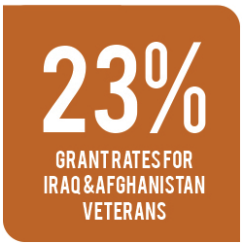
The overall grant rate for all veterans with PTSD-based discharge upgrade applications rose from a pre-Hagel Memo rate of 3.7% in 2013 to 45%. For Vietnam veterans, it rose from 5.6% in 2013 to 59%.* Although this constitutes a more than ten-fold increase for all veterans, as well as Vietnam veterans, the total number of discharge upgrade applications remains low due to the Department of Defense's failure to conduct public outreach to the tens of thousands eligible veterans.



*The 2013 numbers are based on a review by the Veterans Legal Services Clinic at Yale Law School of all ABCMR decisions available on the ABCMR website for that year.

As to the degree of upgrades granted in successful cases, 96% of grants were from an OTH/UD to General (71/74). Only 2 out of 74 grants resulted in an upgrade to Honorable (HON), and the ABCMR upgraded one BCD to General.





Vietnam veterans comprised a majority of PTSD-related discharge upgrade applications (67%) and also enjoyed a substantially higher grant rate (59%) compared to the general 45% grant rate for all applicants. The grant rate for Vietnam veterans was significantly higher than that for veterans of other wars. For example, veterans of Afghanistan and Iraq had a 23% grant rate.

This discrepancy may be explained by the ABCMR's greater willingness to accept belated PTSD diagnoses from Vietnam veterans than from veterans of more recent wars. The Board reasoned that as PTSD was not a known condition during the Vietnam War, soldiers could not possibly have been diagnosed with PTSD during their service. In the Afghanistan and Iraq conflicts, which came after the recognition of PTSD as a medical condition, the ABCMR tended to reason that if the soldier truly had PTSD during service, he or she would have been diagnosed by the military. This reasoning is potentially problematic, as the full extent of PTSD's effects on behavior has only recently become better understood, delayed-onset PTSD may not manifest during service, and while improved, the Army's procedures for identifying soldiers with PTSD remain imperfect.

The most common reason given by the ABCMR when denying an application was the lack of a PTSD diagnosis, which accounted for 60% of the Board's denials. In a minority of denials, the ABCMR stated that the applicant's misconduct was too severe or extensive to warrant an upgrade. Such misconduct included rape, attempted murder or threats to kill, the use of certain drugs (e.g. heroin, cocaine, amphetamines), theft, and assault. The Board also generally held that misconduct it considered premeditated was presumptively unrelated to PTSD. In evaluating whether PTSD derived from an applicant's service, the ABCMR generally did not question applicants' stories, particularly when the applicant served in areas of intense conflict. The Board tended to recognize that Vietnam veterans, especially, were subjected to the "ordeals of war."

2. The Navy and Marines (BCNR)

The Navy oversees records corrections for both the Navy and the Marines. Like the Army, Marines supplied ground troops in Vietnam and other conflicts, making them account for a significant portion of the military's PTSD diagnoses.

The Navy has produced almost no records regarding implementation of the PTSD Upgrade Memo in response to the FOIA requests submitted by VVA and NVCLR. In other words, it has produced no statistics or copies of decisions related to post-PTSD Upgrade Memo PTSD-based applications for discharge upgrades. (Though it did provide comprehensive data on pre-PTSD Upgrade Memo applications to the BCNR). It has insisted that to search for and disclose records for PTSD-based discharge upgrade cases or statistics would be "unduly burdensome."

The Navy's refusal to search for or release responsive records remains the subject of litigation. Nevertheless, a limited manual search of the non-digitized online BCNR database (a significant percentage of its contents cannot be searched electronically) yielded a rough estimate of post-PTSD Upgrade Memo grant rates of PTSD-based applications.

This non-exhaustive manual review of BCNR decisions posted online identified 12 post-PTSD Upgrade Memo PTSD-based discharge upgrade decisions. Of these, BCNR granted 33% (4/12). This rate, assuming it is indicative of the BCNR's general post-Memo statistical trend, could represent a significant improvement when compared with the BCNR's extremely low recent grant rate for OTH/UD applications, based on PTSD or otherwise. According to one of the few FOIA documents that the BCNR did release, the Board granted only 5% of all requests for an upgrade from OTH/UD in 2000-12, whether that application was based on PTSD or any other ground.[16] Until the Navy makes its records and relevant statistics more accessible to the public, however, it will remain difficult to conduct a more comprehensive and accurate assessment of the branch's performance regarding PTSD-based claims.

3. The Air Force (AFBCMR)

The Air Force, like the Navy, contended that a search of AFBCMR records for PTSD-based discharge upgrade cases or statistics would be "unduly burdensome" given that its records remain largely un-digitized. That position remains subject to litigation. A manual search of the AFBCMR's online database did not turn up a sufficient number of post-PTSD Upgrade Memo PTSD-based discharge upgrade cases to yield an estimated grant rate. Of 3 PTSD cases identified, the AFBCMR denied 2 and granted 1, albeit on the basis of an equity claim rather than consideration of the applicant's PTSD.

The Air Force's minimal response to NVCLR and VVA's FOIA requests leaves unresolved the question of whether, and to what degree, the Air Force has complied with the PTSD Upgrade Memo. PTSD-based discharge upgrade cases appear to be far less prevalent in the Air Force, however, than in the other two branches.

4. Total volume of applications

It appears that in the wake of the PTSD Upgrade Memo, the number of PTSD-based applications to the boards has increased several-fold. It is difficult to calculate the extent of the increase with precision because no board disclosed records showing the annual rate of PTSD-based discharge upgrade applications in the years before issuance of the PTSD Upgrade Memo. Nevertheless, it is possible to estimate the pre-Memo rate of all PTSD-based applications by extrapolating from a prior study, which identified 375 PTSD-based decisions on applications in the years 1998-2013, but which counted only Vietnam veterans with an OTH/UD.[17] The current analysis of post-Memo decisions by the ABCMR shows that non-Vietnam veterans made 33% of the applications. Applying this ratio to the pre-Memo period would suggest that the boards decided an additional 188 PTSD applications by non-Vietnam veterans in the 1998-2013 period, for an estimated total of 563 PTSD decisions on applications by veterans with an OTH/UD. In addition, the current analysis of post-Memo decisions by the ABCMR shows that 3% were made

by veterans with a discharge status other than OTH/UD. Applying this ratio to the pre-Memo period would suggest that the boards decided an additional 17 applications by veterans with a discharge status other than OTH/UD. This analysis yields an estimate that the boards collectively decided 580 PTSD-based applications from 1998-2013, including veterans from any conflict and with any discharge status. This yields an annual rate of approximately 39 PTSD-based decisions in the 15 years before Secretary Hagel issued the PTSD Upgrade Memo.

The data from the post-Hagel period shows a significant increase in the number of applications. DOD's August 2015 report to the Senate Armed Services Committee (SASC) reports that the boards collectively received 201 PTSD-based applications since issuance of the Upgrade Memo. This report's analysis of FOIA disclosures and BCNR online resources for approximately the same period covered by 2015 SASC report identifies 179 board decisions. Taken together, these figures indicate that PTSD-based applications to the boards have increased from approximately 39 per year to approximately 200 per year, approximately a five-fold increase.

5. Outreach

The branches' responses to FOIA requests asking for all records related to the outreach directed by Secretary Hagel were meager and suggest that DOD's outreach efforts have been perfunctory and inadequate. Concerning its outreach, the Army disclosed internal emails related to its outreach strategy (which involved, for example, sending a single letter to Veterans Service Organizations and Military Service Organizations in January 2015 as well as the publication of a few articles publicizing the PTSD Upgrade Memo in Army periodicals),[18] but these emails gave no indication of any large-scale outreach effort. The Navy, for its part, stated that it did not possess any relevant records. The Air Force provided two short internal emails discussing its outreach strategy, as well as a one-page "Public Affairs Engagement Plan" including plans to publish a series of articles in military publications related to the PTSD Upgrade Memo and a plan to include application procedures and Frequently Asked Questions sections on the Air Force Veteran information webpage specifically aimed at veterans with PTSD.[19] It is not clear from the Air Force FOIA response that any such articles were actually published or that slightly tweaking its webpage has actually resulted in meaningful outreach to eligible veterans. None of the branches produced any documentation suggesting that its outreach efforts under the PTSD Upgrade Memo have been adequate or sufficiently prioritized.

DOD's 2015 report to the Senate Armed Services Committee also listed a series of modest initiatives, including: a brief initial public announcement; a single press interview given by a DOD official to *The Military Times*; a briefing (not well-defined in the report) to Veterans Service Organizations; a single speech given by the President of the NDRB to 30 civilian attorneys in Baltimore as part of the Maryland State Bar's continuing legal education program, followed by a single briefing of 50 civilian attorneys working with the Urban Justice Center's Veteran Advocacy Project in New York City; and a direct outreach effort by the VA, working in tandem with the DOD Physical Disability Board of Review (PDBR), to 5,100 veterans eligible to

apply to the PDBR -- a different body from the record corrections boards, which have jurisdiction to upgrade the discharge status of former service members.[20]

The branches' underwhelming FOIA responses to requests for all records pertaining to outreach efforts, the low number of new applications, and DOD's own account of its piecemeal and inadequate outreach efforts, demonstrate that DOD is not doing nearly enough to identify and contact all eligible veterans. As such, it is failing to comply with the requirements of the PTSD Upgrade Memo.

Conclusions and Recommendations

The results of this FOIA release present two diverging stories. The first is one of optimism for veterans with bad paper who currently seek discharge upgrades through the ABCMR. The Army's comprehensive disclosure of recent PTSD-based discharge upgrade decisions reveals a substantial rise in grant rates since September 2014. As described, veterans today who apply through the ABCMR for discharge upgrades are ten times more likely to receive an upgrade than veterans who applied prior to Secretary Hagel's directive, and those who apply with evidence of a diagnosis of PTSD are fifteen times more likely to succeed than before the directive. This new probability of success makes it even more critical for the Army and DOD to conduct significant coordinated outreach efforts so that eligible veterans know that discharge upgrades are possible, particularly if they possess a PTSD diagnosis.

Despite this demonstrated improvement, these results also reveal the tremendous work that must still be done to ensure that veterans with PTSD and less than honorable discharges receive the upgrades and benefits to which they are legally entitled. The Army's release highlights several obstacles to board reform, accountability, and transparency. Further, the release exposes the ABCMR's failure to adequately enable veterans to prepare applications that are more likely to be successful upon review. These obstacles, and their proposed solutions, are described below.

1. Legislation should codify a presumption of record correction for veterans with documented PTSD so that boards continue to improve their handling of PTSD-related discharge upgrade applications.

Since Secretary Hagel's directive, the ABCMR has approved PTSD-based discharge upgrade applications for Vietnam veterans at a rate almost ten times higher than previously, increasing from 5.6% for Vietnam veterans with PTSD in 2013 to 59%. The ABCMR grant rate increased even more dramatically for veterans who submitted a documented PTSD diagnosis to 67%. These figures confirm the powerful effect of Secretary Hagel's issuance of the Memo and also indicate how egregiously the Board mishandled PTSD-related applications in the past. The ABCMR has clearly modified its internal methods for reviewing applications from veterans with OTHs/UDs and BCDs when they include a PTSD diagnosis. However, further action is needed to ensure that veterans with PTSD consistently and *continually* receive special and liberal consideration by the boards. To solidify and promote the positive trend, Congress should enact legislation that (1) provides for a presumption of record correction for veterans with documented PTSD and (2) codifies liberal standards of consideration for evidence of PTSD.

2. Boards should refer veterans for mental health evaluations when their applications assert evidence of PTSD without a formal diagnosis so that veterans without access to health care may still successfully apply.

Only veterans with a formal diagnosis of PTSD successfully received discharge upgrades from the ABCMR. Undiagnosed veterans who asserted symptoms of PTSD were uniformly unsuccessful (0/54 at the ABCMR). Critically, veterans with bad paper face two obstacles to obtaining a formal diagnosis. First, it was impossible for a Vietnam veteran to be formally diagnosed with PTSD during and immediately after the war because PTSD did not exist as a recognized condition until 1980. Second, many veterans with OTHs and all veterans with BCDs are prohibited from accessing healthcare at VA hospitals or clinics, meaning these veterans cannot readily access mental health evaluations. Without the ability to seek out and acquire a diagnosis from a VA physician or other provider, these veterans face a major barrier to upgrading their discharges and receiving the benefits required for employment, education, housing, and healthcare.

To ensure that veterans have the opportunity to obtain a PTSD diagnosis, boards across the branches should refer discharge upgrade applicants to the Department of Veterans Affairs or another medical provider for a medical evaluation when veterans describe PTSD symptoms without a formal diagnosis. The medical evaluation would then be included with the veteran's overall application. If the evaluation produces a positive diagnosis for the disease, that veteran could then receive the special consideration required by the DOD.

3. A mental health professional should serve on the boards when reviewing applications where veterans assert PTSD, traumatic brain injury, and other service-connected mental health conditions.

No mental health professional participates in or consults for these boards when upgrade applications are reviewed. To empower the boards to better review upgrade petitions submitted by veterans with mental health conditions, a psychologist or psychiatrist must serve on the correction board when applicants raise PTSD and other mental health claims. Congress currently requires mental health professions to sit on Discharge Review Boards (DRBs) under 10 U.S.C. § 1553(d)(1) when applicants assert PTSD and traumatic brain injuries (TBIs). Extending this requirement to boards would allow older veterans who are time-barred from DRBs, as well as veterans appealing DRB decisions, to receive the same statutory due process as other veterans when submitting upgrade applications.

Notably, PTSD is only one of the many mental health conditions suffered by veterans in the United States. If the boards improperly denied nearly all PTSD-related discharge applications submitted prior to September 2014—applications which otherwise should have been approved—the boards likely mishandle upgrade applications submitted by veterans with other mental health conditions. As discussed above, veterans are typically barred from mental health care at VA hospitals and clinics when they receive bad paper discharges, meaning veterans often go undiagnosed and unable to substantiate mental health-related claims asserted in petitions for discharge upgrades. Without significant reform within these boards, veterans with TBIs and

psychological disorders will be unsuccessful in acquiring discharge upgrades and the attending benefits they deserve.

4. The DOD must implement a coordinated outreach program to ensure that veterans know how to apply for discharge upgrades successfully, particularly in light of the ABCMR's compliance with the liberal consideration standard.

Hundreds of thousands of veterans have an OTH/UD or BCD – approximately 260,000 from the Vietnam War alone. A third or more of these veterans have service-related PTSD. Yet the records disclosed by DOD in this FOIA litigation reveal that it has taken almost no steps to comply with Secretary Hagel's requirement that it develop a messaging and outreach campaign. Moreover, DOD own records reveal how infrequently veterans pursue upgrades through the boards. According to the 2015 SASC report, only 201 veterans applied to the boards since Secretary Hagel issued the PTSD Upgrade Memo. This small number of applicants strongly suggests that the DOD has failed to identify veterans with bad paper, inform them of the September 2014 directive, or communicate how they apply.

The DOD, its component branches, and the VA should engage in significant coordinated outreach efforts to identify eligible veterans and help them to submit applications to the boards. Critically, the DOD should also articulate how veterans can be successful when they submit petitions for upgrades. The ABCMR uniformly denied veterans without diagnoses of PTSD (0/54 granted). Accordingly, the DOD and VA should inform veterans that to secure a PTSD-based upgrade, they are strongly advised to first obtain a mental health examination and a diagnosis of PTSD.

Further, the DOD can direct the boards to implement other reforms that will enable veterans to advocate for themselves upon applying. Boards should offer in-person or video-conference correction board hearings, which Congress already requires of DRBs under 10 U.S.C. § 1553(c). Finally, Congress should promote access to legal services by permitting prevailing veterans to recover attorneys' fees.

5. Boards should release regular annual reports summarizing their application determinations in order to ensure accountability and transparency.

VVA and NVCLR submitted their FOIA requests because the boards provided no clear mechanism for determining how veterans could successfully apply for discharge upgrades. The boards do not publish statistics related to who submits applications, whether these applications are denied or approved, and why certain applications are more successful than others. Further, the boards provide no meaningful transparency with regards to their internal regulation and deliberations, effectively shielding themselves from scrutiny from the DOD, Congress, and the public. In each of the past two years, the Senate Armed Services Committee, at the initiative of Senator Blumenthal, has required some reporting by the boards in its committee report on the National Defense Authorization Act.[21] Without more detailed information, however, veterans

and their advocates lack the tools to compile and submit successful petitions for upgrade. Moreover, Congress and legal advocates cannot hold boards accountable for consistent mistreatment and mishandling of upgrade applications. Thus, Congress should compel boards to issue annual reports on discharge upgrade approvals and denials, including details regarding applications based on TBI, PTSD, and other mental health conditions.

Notably, this report itself is insufficient in its characterization of how all three branches adjudicate petitions for discharge upgrades through correction boards. Due to the Navy and Air Force's refusal to provide determinations made by their respective boards, it is impossible to meaningfully evaluate whether the Navy or Air Force are adequately complying with Secretary Hagel's directives to give PTSD-related applications liberal consideration. In effect, the Navy and Air Force's refusal to release decisions, or to make decisions genuinely accessible and searchable, was a refusal to be held accountable. To ensure that upgrade applications submitted by veterans with documented PTSD are treated fairly into the future, Congress should require board accountability through legislated reporting requirements.

REFERENCES

[1] Rebecca Izzo, *In Need of Correction: How the Army Board for Correction of Military Records Is Failing Veterans with PTSD*, 123 YALE L.J. 1587, 1588 (2014).
[2] U. Moulta-Ali & S.V. Panangala, *Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility*, Cong. Res. Serv. (2015). Notably, veterans with a Bad Conduct Discharge (BCD) may not receive healthcare at a VA hospital. Those veterans with an OTH may receive VA healthcare if they receive a favorable character of discharge determination from the VA to receive other benefits, such as disability compensation. *See Veterans Discharge Upgrade Manual*, CONN. VETERANS LEGAL CTR. 9 (2011), http://ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-2011.pdf.
[3] *Id*.
[4] Izzo, *supra* note 1, at 1587, 1591-92.
[5] This figure was developed through independent research conducted by Yale Law School students using the Department of Defense's public records dating back to 1993, available at http://boards.law.af.mil.
[6] Eugene R. Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, 65 ADMIN. L. REV. 499, 502 (2013) ("[T]he boards rarely exercise their power to conduct evidentiary hearings. The Army Board for Correction of Military Records conducted no live hearings in fiscal year 2012. The BCNR has not conducted one in the last twenty years. The Coast Guard board has not conducted one in the last ten years.").
[7] PTSD: National Center for PTSD, *How Common is PTSD?*, U.S DEP'T FOR VETERANS AFFAIRS, (2015), http://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp. The Center for PTSD also reported rates of PTSD for veterans in other military theaters. Of veterans serving in operations Iraqi Freedom and Enduring Freedom, about 11-20% have PTSD in a given year. Of veterans who served in the Gulf War (Desert Storm), about 12% have PTSD in a given year.
[8] *See* REPORT OF THE SENATE ARMED SERV. COMM. ON THE NAT'L DEFENSE AUTHORIZATION ACT, S. REP. No. 113-176, at 106-07 (2014); *see also* REPORT OF THE SENATE ARMED SERV. COMM. ON THE NAT'L DEFENSE AUTHORIZATION ACT, S. REP. No. 114-49, at 136-37 (2015).
[9] Complaint, *Monk v. Mabus*, No. 3:14-cv-260-WWE (D. Conn. filed Mar. 3, 2014), ECF No. 1.
[10] *Vietnam Veterans of America et al. v. Dept. of Defense*, No. 3:15-cv-658-VAB (D. Conn. filed May 4, 2015).
[11] *See supra* note 8, S. REP. No. 114-49, at 136-37; *see also Review of Petitions for Review of Discharge or Dismissal from the Armed Forces of Veterans With Mental Health Issues Connected with Post-Traumatic Stress Disorder or Traumatic Brain Injury*, DEP'T OF DEFENSE (August 24, 2015) [hereinafter *Review of Petitions for Review*].
[12] *See Review of Petitions for Review*, *supra* note 11.
[13] The Navy did provide comprehensive pre-PTSD Upgrade Memo statistics on applications to the BCNR in its original FOIA response. *See* Navy Interim FOIA Response (February 13, 2015). (Containing, among other documents, BCNR Annual Report January 1980 to December 1989 (Pg. 7); BCNR Annual Report, January 1990 to

December 1999 (Pg. 9); BCNR Annual Report, January 2000 to December 2012 (Pg. 11). Each of these reports includes detailed statistics on applications to the board, BCNR grant rates, and breakdowns according to the nature of the claim.

[14] This figure was developed through independent research conducted by Yale Law School students using the Department of Defense's public records dating back to 1993, available at http://boards.law.af.mil.

[15] *See infra* Part 4: Total Volume of Applications.

[16] *See supra* note 13.

[17] This figure was developed through independent research conducted by Yale Law School students using the Department of Defense's public records dating back to 1993, available at http://boards.law.af.mil.

[18] *See* Army Interim FOIA Response (March 17, 2015), FOIA FA-15-0089, at 13, 222, 227.

[19] *See* Air Force Interim FOIA Response (September 18, 2015), VVA AF 024, at 24.

[20] *See Review of Petitions for Review*, *supra* note 11. It is not at all clear how many of these individuals had PTSD-related claims. According to the report, 1,845 responded with applications for review of their cases, a vastly greater number than the 201 PTSD-related discharge upgrade cases the DOD reported in 2015 to SASC.

[21] *Report: Department of Defense Review of Vietnam Veteran Post Traumatic Stress Disorder Cases*, DEP'T OF DEFENSE (November 2014); *Review of Petitions for Review*, *supra* note 11.

December 19, 2015

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

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

Dear Secretary McDonald,

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

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

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

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

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

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

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

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

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

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

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

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

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

Michael Blecker
Executive Director
Swords to Plowshares

Barton Stichman
Joint Executive Director
National Veterans Legal Services Program

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

Drew Ensign
Latham & Watkins LLP

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

PETITION FOR RULEMAKING

TO AMEND

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

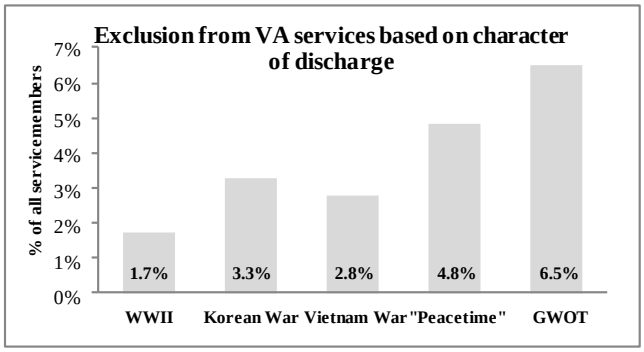
REGULATIONS INTERPRETING 38 U.S.C. § 101(2)

REQUIREMENT FOR SERVICE "UNDER CONDITIONS OTHER THAN DISHONORABLE"

I. EXECUTIVE SUMMARY

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

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



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

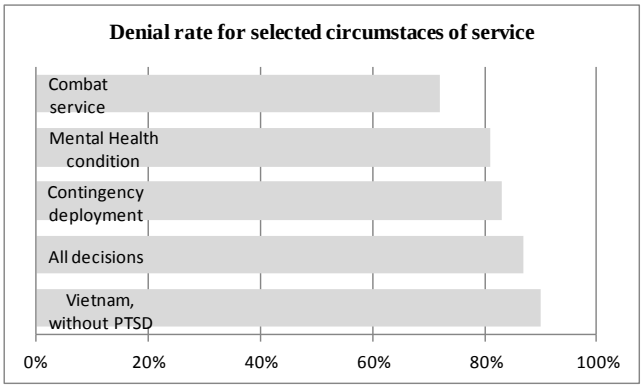
[1] The term "service members" will be used throughout the petition to refer to all individuals who served in the armed forces at any point in their lives, not merely those currently serving, and including both those who meet the statutory definition of "veteran" and those who do not.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] 38 U.S.C. § 101(2).

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

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

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

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

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

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

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

[5] 38 U.S.C. § 101(2).

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

[7] 38 U.S.C. § 501.

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

[9] Id. at 218 n.4.

[10] 38 U.S.C. § 5303(a), (b), (c).

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

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

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

38 U.S.C. § 5303(a), (b), (c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[19] See Table 1 below and accompanying text.

[20] See Table 11 below and accompanying text.

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

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

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

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

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

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

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

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

[25] Pub. L. No. 78-346, § 1503.

[26] Id. § 300.

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

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

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

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

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

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

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

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

And:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Guidance in Statute

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Guidance from Legislative History

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

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

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

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

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

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

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

3. Guidance from military practice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Congress's skepticism about the fairness of administrative discharge characterizations is still valid today. Unlike punitive discharges, where judicial proceedings ensure some degree of consistency and fairness, administrative discharge regulations permit widely divergent outcomes based on the same circumstances. Consider the case of a single positive drug test: one commander could refer the service member to a special court-martial which could sentence a Bad Conduct discharge under UCMJ Article 112a; another commander could withdraw the court-martial referral and convene an administrative separation board in lieu of court-martial, which generally receives an Other Than Honorable discharge;[109] another commander could refer the service member to rehabilitation, and if the person uses drugs again the commander could

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[106] House Hearings on 1944 Act, *supra* note 28, at 415, 417.
[107] Id. at 419-20.
[108] This does not refer to the "benefit of the doubt rule," 38 U.S.C. § 5107. That rule is an instruction to the VA for how to evaluate uncertain facts against clear eligibility criteria. Nor does this refer to 'Gardner's Rule' of statutory construction, where ambiguity in legislation should be construed in veterans' favor. Brown v. Gardner, 513 U.S. 115, 118 (1994). Here, the congressional standard is already clear, and Congress referred to the "benefit of the doubt" only to explain why it set its clear standard as liberally as it did. The VA does not need to apply any "benefit of the doubt" in order to arrive at a liberal eligibility standard, because Congress incorporated its "benefit of the doubt" into clear statutory instructions.
[109] DODI 1332.14, Enclosure 3 ¶ 11.b.

pursue an administrative separation for Drug Rehabilitation Failure, which generally receives an Honorable or General characterization;[110] and finally another commander could impose non-judicial punishment and permit the service member to complete their service. This degree of command discretion in administrative separation proceedings permits wide discrepancies in how individuals are treated based on race,[111] their mental health condition,[112] leaders' personalities,[113] history of sexual assault,[114] or other factors. The uneven application of administrative discharge standards is clearly apparent in discharge rates between military branches. While services' punitive discharge rates are generally similar, varying between 0.3% in the Navy and 1.1% in the Marine Corps, their use of administrative discharges varies tremendously. The use of administrative disparity is *20-fold*: between 0.5% in the Air Force and 10% in the Marine Corps.

Table 5: Discharge characterizations, FY2011

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
Army	81%	15%	3%	0.6%	0.1%
Navy	85%	8%	7%	0.3%	0.0%
Air Force	89%	10%	0.5%	0.5%	0.0%
Marine Corps	86%	3%	10%	1.0%	0.1%
Total	**84%**	**10%**	**5%**	**1%**	**0.1%**

This difference between services is due to administrative policies, not individual merit. The Government Accountability Office has done a thorough study on discharge characterization

[110] Id., Enclosure 3 ¶ 8.b.

[111] M.R. Walker, An Analysis of Discipline Rates Among Racial/Ethnic Groups in the U.S. Military, Fiscal Years 1987-1991 (1992); Def. Equal Opportunity Mgmt. Inst., Dep't of Def., Report of the Task Force on the Administration of Military Justice in the Armed Forces (1972). Racial disparities in discharge characterizations still exist.

[112] Combat veteran Marines with PTSD diagnoses are 11 times more likely to be discharged for misconduct. R.M. Highfill-McRoy, G.E. Larson, S. Booth-Kewley, C.F. Garland, Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines, BMC Psychiatry (Oct. 25, 2010).

[113] For a discussion of how command philosophies result in differing outcomes for equivalent facts, see Gen. Accountability Office, Rep. No. FCP-80-13, Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Is Needed (1980) [hereinafter GAO Report].

[114] See Human Rights Watch, Embattled: Retaliation Against Sexual Assault Survivors in the US Military (2015).

disparities between services.[115] It documented that this range of discharge practices reflects differences in leadership and management styles, not degrees of "honor" in different services:

> Simply stated, different people get different discharges under similar circumstances, and the type of discharge an individual gets may have little to do with his behavior and performance on active duty.[116]

The GAO compared discharges of Marines and Airmen with the same misconduct history, service length, and performance history, and found that the Air Force was 13 times more likely than the Marine Corps to give a discharge under honorable conditions.[117] Military leaders justified their practices with unit-level considerations, not individual merit: some believed that expeditious termination was in the best interest of the services, while others believed that maximizing punishment helped reinforce unit discipline.[118]

The clear implication of an "other than dishonorable" standard is that Congress intended service members with characterizations higher than "dishonorable" to retain eligibility. This includes those who were administratively separated for misconduct with Other Than Honorable discharges, a non-punitive characterization two steps above "dishonorable." While Congress anticipated that some people in this category would receive those characterizations in error, exclusion of those service members was meant to be the exception rather than the rule.

E. The clear intent of Congress to exclude only service members whose conduct merits a dishonorable characterization advances the statute's purpose and goal.

The purpose of the statute was to support the "readjustment" of people leaving the military.[119] The services created in the bill were intended to compensate, indemnify, or offset actual losses experienced by service members: compensation if a disability limits a service member's ability to work; health care if they were disabled during service; vocational rehabilitation for those whose disabilities require them to learn new trades; income support for those whose careers were disrupted by wartime military service; education for those who do not

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[115] GAO Report, *supra* note 113. While that study is now 35 years old, the disparities between services' discharge characterizations has only widened since that time, indicating that its findings are still valid.
[116] Id. at ii.
[117] Id. at 29-33.
[118] Id. at 32.
[119] Pub. L. No. 78-346, 58 Stat. 284 (1944).

have a civilian trade after several years of military service. These were not rewards for good performance, they were basic services to make up for actual losses or harms experienced while in the military.

Because the services were intended to help readjust from actual harms or losses, it is appropriate that Congress should withhold that support only in the most severe cases of misconduct. The question is not whether a service member performed so well that they earned a reward, but whether they performed to poorly that they should forfeit care and support services. As one of the House drafters explained:

> "[A service member] gets an unfavorable discharge, and yet he may have been just as dislocated as anyone else. He may be just as needy of the help and the benefits that are provided under this act."[120]

The House Committee on Military Affairs reaffirmed this position two years later:

> Every soldier knows that many men, even in his own company, had poor records, but no on ever heard of a soldier protesting that only the more worthy should receive general veterans' benefits. "This man evaded duty, he has been a 'gold bricker,' he was hard to live with, yet he was a soldier. He wore the uniform. He is one of us." So they feel. Soldiers would rather some man got more than he deserves than that any soldier should run a chance of getting less than he deserves.[121]

Legislators also justified the expansive eligibility standard in terms of social cost. If the government does not correct for these actual losses experienced during service, then worse outcomes are likely to follow.[122] A Senator explained that purpose this way:

> We might save some of these men. . . . We may reclaim these men but if we blackball them and say that they cannot have [veteran services] we will confirm them in their evil purposes.[123]

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[120] House Hearings on 1944 Act, *supra* note 28, at 416.
[121] House of Representatives Committee on Military Affairs Report No. 1510, 79th Congress 2d Session, "Investigation of the National War Effort" (January 30, 1946) at 9.
[122] For a discussion of the social costs that result from military criminalization of behavioral health problems, see Evan R. Seamone, et al., Moving Upstream: Why Rehabilitative Justice in Military Discharge Proceedings Serves a Public Health Interest, 104 Am. J. Public Health 1805 (Oct. 2014).
[123] 90 Cong. Rec. 3077 (1944).

By creating a "dishonorable" standard, Congress decided that forfeiture of these readjustment services should be rare. This ensured fairness to service members who have in fact made sacrifices for the military, and it minimized the social cost that may result from abandoning veterans who need services.

Congress created other benefits that it intended only as a reward for exceptional performance, and for these benefits it created a higher eligibility standard. The 1984 Montgomery G.I. Bill was intended to incentivize enlistment and reward good service, rather than offset actual losses.[124] Congress created an elevated eligibility standard for that benefit, requiring a fully Honorable discharge characterization of service.[125] Similarly, Congress limits unemployment benefits[126] and Federal veteran hiring preferences[127] to those discharged under honorable conditions. These elevated standards are appropriate where the purpose of the benefit it to induce and reward good service.

Congress specifically rejected the idea that readjustment services should be given only as rewards for good service. The chief of the Bureau of Naval Personnel had requested that services only be provided to veterans discharged under honorable conditions, so that they could be used as rewards for good service:

> [Under the "other than dishonorable" standard] benefits will be extended to those persons who will have been given bad-conduct and undesirable discharges. This might have a detrimental effect on morale by removing the incentive to maintain a good service record.[128]

He requested that Congress adopt an "honorable conditions" standard, and that request was formally considered both in committee and by the full Senate at floor debates. Congress rejected this request. The Senator who sponsored the bill was a former Army Colonel and future judge

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[124] "The purpose of this chapter are ... to promote and assist the All Volunteer Force Concept of the Armed Forces by establishing a new program of educational assistance based upon service on active duty .... to aid in the recruitment and retention of highly qualified personnel." 38 U.S.C. § 1401(2) (1985) (as enacted by Pub. L. No. 98-525, § 702(a)(1) (Oct. 19, 1984), now codified as 38 U.S.C. § 3001(4) (2015)).

[125] 38 U.S.C. § 3011(a)(3) (2015). Other education benefits since then have also used the Honorable discharge characterization standard.

[126] 5 U.S.C. § 8521(a)(1)(A).

[127] Id. § 3304(f)(1).

[128] 90 Cong. Rec. 3077 (1944).

on the U.S. Court of Appeals for the D.C. Circuit. He summarized the drafting committee's response as follows:

> I am very familiar with the objections raised by Admiral Jacobs. In my opinion, they are some of the most stupid, short-sighted objections which could possibly be raised. They were objections that were considered very carefully both in the subcommittee on veterans affairs and in the Finance committee and in the full committee itself.[129]

Faced with a request to limit eligibility to veterans discharged under honorable conditions, Congress rejected this in the strongest possible terms.

In sum, Congress provided several justifications for expanding eligibility for readjustment services so that they only exclude those who showed dishonorable conduct. First, the services respond to actual harms or losses, and support for these disabilities or opportunity costs should be withheld only reluctantly. Second, service is inherently praise-worthy and every service member has earned at least some gratitude from the nation. Third, military commanders' administrative decisions are highly uneven, and so guaranteeing that all deserving veterans receive timely services means serving some who might not be as deserving. Finally, our society suffers when military veterans are denied mental health or other services, and it is in everyone's interest that these needs be met. The purpose of the 1944 G.I. Bill was to correct, compensate, or indemnify actual losses incurred by those who served our nation's armed forces, and narrow or burdensome eligibility criteria would frustrate that purpose if they prevented deserving service members from accessing services they need.

F. Neither Congress nor the Courts have endorsed the VA's interpretation of this statute

Congressional intent may be inferred when Congress endorses an agency's interpretation. In this case, Congress has repeatedly re-enacted the same statutory language as originally adopted in 1944. Ordinarily this might suggest that Congress agrees with the VA's interpretation of the statute. However, two facts contradict this.

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[129] Id. at 3076-77 (emphasis added).

First, neither of the two Congressional committees with jurisdiction over this statute have ever held a hearing on it. Witnesses periodically raise the issue,[130] and occasionally the issue arises tangentially to a different matter under investigation,[131] but neither Committee has directly investigated it in a hearing. The most closely-related hearings were those held in 1977 to discuss special discharge upgrade programs that had changed characterizations for certain Vietnam-era veterans. Those hearings resulted in legislation that prohibited the VA from granting eligibility to people who received those discharge upgrades unless they were also found eligible under existing "other than dishonorable" standards.[132] However, none of the hearings discussed the adequacy of the VA's standards. Instead, the legislators' interest was to avoid unequal treatment for different wartime eras. In fact, they specifically encouraged the VA to adopt more inclusive standards. The House Report on the bill stated:

> One of the most disturbing aspects of the special discharge review program is the singling out of a limited class of former military personnel as the beneficiaries of favorable treatment. . . . [T]he President could partially remove one of the greatest injustices in the program by providing that the same criteria for upgrading the discharges of this special class of service persons as a matter of equity be made available to veterans of all periods of war. [133]

Not only did Congress not endorse the VA's standards at the time, they invited the Executive to expand eligibility more broadly. It has not done so.

Second, public and official statements by the VA have misrepresented its practices in critical aspects. As discussed in detail in Section IV.E below, official communications to the Senate Veterans Affairs Committee in 2013[134] and the House Minority Leader in 2015[135] both

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[130] See, e.g., Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs, 103d Cong. 116 (1994) (written testimony of Jonathan Shay, M.D., Ph.D.); Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents: A Community Perspective: Hearing Before the H. Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs, House of Representatives, 103d Cong. 106 (1993) (written testimony of Warren Quinlan, New England Shelter for Homeless Veterans).

[131] See, e.g., Hearing on S. 1307 Before the S. Comm. on Veterans Affairs Eligibility for Veterans' Benefits Pursuant to Discharge Upgrading, 95th Cong. 344 et seq. (1977).

[132] Pub. L. No. 95-126, § 4, 91 Stat. 1106, 1108 (1977).

[133] H. Rep. No. 96-580, at 13 (1977), *reproduced in* Hearing on S. 1307 Before the S. Comm. on Veterans Affairs Eligibility for Veterans' Benefits Pursuant to Discharge Upgrading, 95th Cong. 597 (1977).

[134] Attached herein as Appendix B.

[135] Attached herein as Appendix C.

made significant, substantive errors in describing how it implements this statute. Under these conditions, Congressional approval cannot be inferred from Congressional silence.

Nor have the Courts ever endorsed the VA's interpretation of this statute. No court has ever passed on the interpretive questions raised by this Petition. Instead, the only remotely related case decided merely that the VA had authority to promulgate regulations that could exclude service members with discharge characterizations other than dishonorable *at all*.[136] The Federal Circuit did not address the limits of the VA's authority to do so, only deciding that the Department was not categorically barred from disqualifying former servicemembers with discharge characterization better than dishonorable. Petitioners do not dispute that the VA has that authority. But, as explained above, the VA may only lawfully exercise that authority where the conduct at issue would have justified a dishonorable discharge.

The VA's interpretation of this statute is unlikely to receive deferential treatment. Courts defer to Agency interpretations of statutory terms only when Congress delegated interpretive authority,[137] when the text, context and history of the statute leave doubt as to Congressional intent,[138] and when the Agency proposes a permissible interpretation of the statute.[139] Here, Congress has provided the VA with a specific standard that has existing meaning under law, the Department squarely lacks authority to adopt a different standard.[140] Furthermore, the text, context and history of the statute provide clear guidance—in some cases numerical standards[141]—on what that standard should be. If any ambiguity remains, courts will resolve that doubt in favor of the former service member. The Supreme Court has long ago recognized that the "solicitude of Congress" to service members requires courts and agencies to

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[136] Camarena v Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683 (Fed. Cir. July 7, 1995).
[137] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).
[138] Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984).
[139] Id.
[140] The VA's authority to define "dishonorable conditions" is further eroded by the fact that the DOD, a different agency, has principal responsibility for administering that standard. The VA does not have the technical expertise that typically justifies Chevron deference. A similar situation exists under immigration statutes, where the Bureau of Immigration Affairs must decide some cases based in part on criminal histories. Because the BIA does not adjudicate criminal offenses, Courts have held that the BIA has no special administrative competence to define criminal law terms and the BIA's regulatory interpretations of those terms deserve no special deference. See, e.g., Marmolejo-Campos v. Holder, 558 F.3d 903, 907-8 (9th Cir. 2009).
[141] I.e., the standard for how long an absence without leave should justify exclusion, 38 U.S.C. § 5303(a).

interpret veteran legislation generously.[142] That is particularly true here as the relevant question is whether the government will recognize a veteran's service at all.[143] Such a grave decision cannot be made without express Congressional instruction, and the VA would be acting outside its authority to create new exclusions that Congress did not provide.

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[142] Henderson v. Shinseki, 562 U.S. 428, 440-1 (2011) (explaining "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); see also Kirkendall v. Dep't of the Army, 479 F.3d 830, 844 (Fed. Cir. 2007) (en banc) (applying the "canon that veterans' benefits statutes should be construed in the veteran's favor").

[143] This canon was applied to the question of whether a service member's conduct forfeits eligibility for basic veteran benefits in Wellman v. Wittier, 259 F.2d 163 (D.C. Cir. 1953). A 1943 Act barred veteran benefits to former service members "shown by evidence satisfactory to the Administrator of Veterans' Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States." 57 Stat. 554, 555 (1943). The VA terminated benefit eligibility to a WWII veteran who was found to have "rendered assistance to an enemy of the United States" based on his participation in Community Party activities in Michigan during the Korean conflict. The Court held that "while [the statute] authorizes a determination by the Administrator upon 'evidence satisfactory to' him, his ruling … is not simply discretionary with him. If it depends upon an erroneous interpretation of the law, it may be subject to review by the courts." Wellman at 167-68. The Court found that the VA's interpretation of the statue was invalid because it imputed a more exclusive standard than Congress had expressly provided. "The strict interpretation necessary as to so drastic a forfeiture statute … requires that it be limited in its application to the specific grounds spelled out by Congress, with clear proof of the overt acts relied upon. Thus, if the Administrator has exceeded his authority in the determination he makes, his ruling becomes arbitrary or capricious in the legal sense. He may not deny a right which the statute creates, except for validly and legally sufficient grounds." Id.

III. CURRENT REGULATIONS

The VA has defined the term "dishonorable conditions" with three regulations. One regulation, 38 C.F.R 3.12(a), defines what service members will require an individual review prior to receiving services. A second regulation, 38 C.F.R 3.12(d), lists conduct that shows "dishonorable" service. A third regulation, 38 C.F.R 3.12(b), rebuts a "dishonorable" characterization where mental health problems rise to the level of "insanity." In addition, VA policies have created an implied requirement for "honorable" service. The following sections describe these standards and how they are applied.

A. Requirement for individual review: 38 C.F.R. § 3.12(a)

VA regulations first divide service members into two broad groups: those that it treats as presumptively eligible, and those that require individual review of conduct prior to recognition as a "veteran." Nothing in statute instructs the VA to automatically include or exclude anybody, and discharge characterizations mean different things in each service,[144] so in principle the VA could require individual character of discharge reviews for every service member. But that would be highly inefficient, and the VA has reasonably adopted a rule providing presumptive eligibility in many instances.

The VA's current regulations waive pre-eligibility review for service members with "Honorable" and "General Under Honorable Conditions" discharge characterizations. This is accomplished by 38 C.F.R. § 3.12(a):

> A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

The use of the phrase "is binding" might suggest that this requirement is imposed by statute or caselaw. It is not. The VA adopted this regulation in 1964 voluntarily, without any statutory obligation to do so.[145]

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[144] See Section IV.H below for a discussion of differences between discharge characterizations in different branches.

[145] This rule was added in 28 Fed. Reg. 123 (Jan. 4, 1963). Compare 38 C.F.R § 3.12 (1963) with 38 C.F.R § 3.12 (1964). The authority for that rule making was the Secretary's general authority to make rules of adjudication, 38 U.S.C. § 501(a), not any specific Congressional mandate.

This rule does not guarantee eligibility for these service members. Veterans Health Administration (VHA) eligibility staff and Veterans Benefits Administration (VBA) rating officials typically approve eligibility for service members with Honorable and General characterizations without further evaluation,[146] but this does not guarantee eligibility. The regulation only waives the regulatory bars, not the statutory bars, because the VA does not have the authority to waive statutory criteria. Thus, a service member who violated a statutory bar, but who nevertheless received a General or Honorable characterization at discharge[147] or from a Discharge Review Board,[148] is ineligible for VA services, notwithstanding the VA's waiver of individual review under 38 C.F.R 3.12(a). Furthermore, Congress has prohibited the VA from binding itself to discharge characterizations issued by certain Vietnam-era discharge review programs.[149] For these reasons, 38 C.F.R 3.12(a) does not guarantee eligibility for people with Honorable and General discharges. Instead, it creates presumptive eligibility so that they may receive services without a prior eligibility review. If the VA later identifies that the person's eligibility is in question, it will conduct a review and terminate eligibility if required. This is a practical measure to ensure that services for the large percentage of eligible veterans are not delayed because of concerns about the few who are ineligible.

> ***Josh Redmyer.*** *Marine rifleman with over seven years of service. After four years of service and three combat tours to Iraq and Afghanistan, he started using drugs to self-medicate symptoms of PTSD and received an OTH discharge. His drug use and behavior problems led to divorce from his wife and separation from children. He sought PTSD treatment from the VA and was turned away because of his discharge. An independent advocate helped him start an eligibility application. Although the duration of his service makes it likely that he will become eligibility for VA benefits, the VA will not provide services until it completes its COD review, typically a 3-year process.*

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[146] Adjudication Procedures Manual, M21-1MR pt. III.v.1.B.5.c (a formal finding to determine veteran status is not required for Honorable and General discharge characterizations) [hereinafter Adjudication Procedures Manual]; Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (2009) (a Character of Discharge review is not required for Honorable and General discharge characterizations).

[147] See, e.g., Title Redacted by Agency, No. 10-32 746 (Bd. Vet. App. Dec. 7, 2012) (ordering a remand for a conscientious objector with an Honorable discharge characterization do determine whether the service member is barred from VA services by the statutory bar at 38 U.S.C. § 3505(a), 38 C.F.R. § 3.12(c)(1)).

[148] Discharge characterizations provided by Discharge Review Boards do not waive statutory bars. 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(f), (g)). Discharge characterizations provided by Boards for Correction of Military (Naval) Records do waive statutory bars. 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(e).

[149] 38 U.S.C. § 5303(e) (1977); 38 C.F.R 3.12(h); Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.9.

In contrast, the regulation prohibits most services from being provided to people with Other Than Honorable, Bad Conduct, or Dishonorable characterizations until they receive an individual review—a process that the VA calls a "Character of Discharge Determination" (COD).[150] The procedure for reviewing conduct is highly burdensome on both the VA and the service member. For the VA, it requires a separate adjudication based on a close reading of a full service record and any other evidence that the service member submits. The VA is unequipped to actually adjudicate all of these claims: although the VA requires eligibility review for about 7,000 service members discharged each year,[151] the VA only completes reviews for about 4,600 per year.[152] For the service member, it creates a major delay to receiving services. The average length of pending claims is currently 600 days,[153] indicating that the average time to complete one of these claims is almost four years.

The obstacles are even greater for service members seeking health care. Whereas the VBA routinely commences an eligibility review whenever a less-than-honorably discharged service member files a claim for compensation or pension, the hospital facilities of the VHA do not. Instead, the VHA regularly turns away such service members when they seek health care and treatment and does not initiate a COD Determination at all. Indeed, the VHA amended its Eligibility Determination Handbook in April of this year to remove instructions about how to initiate an eligibility determination.[154] In its place, the Handbook now refers generally to the "other than dishonorable" requirement but does not instruct staff to request an eligibility determination. VHA staff are left piecing together disparate regulations to figure out, for example, how to start that service member's enrollment process and whether he or she may be eligible based on a prior term of service.[155] As a result, there is a de facto denial of health care for deserving service members; they will be denied by default and may believe—incorrectly—that they are categorically ineligible.

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[150] See Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.
[151] See Table 20 below and accompanying text.
[152] See Table 17 below and accompanying text.
[153] As of September 2015, the average claim pending time for End Product that include character of discharge decisions was over 600 days. This indicates that the time to completion is about 1,200 days.
[154] Compare Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (Nov. 5, 2009) with Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(c) (Apr. 3, 2015).
[155] Cf. 38 U.S.C. §§ 5100, 5102, 5107; 38 C.F.R. §§ 3.150, 17.34, 17.36(d)(1).

Even if the VHA does initiate an eligibility review, present policies prohibit VHA medical centers from providing tentative eligibility for health care while COD review is underway. When an application for health care is filed and eligibility cannot immediately be established, current regulations allow a VA facility to provide care based on "tentative eligibility" to those who will "probably" be found eligible.[156] But the regulation limits "tentative eligibility" to emergency circumstances and recently discharged service members, and implementing guidance excludes less-than-honorably discharged veterans from receiving tentative eligibility.[157] Some service members may be granted "humanitarian care," but this is only available for emergency treatment, it is provided at the hospital's discretion, it may be revoked at any time, and the service member must pay for any services provided.[158] Service members in that situation, even ones who may ultimately be found eligible, are simply unable to receive timely health care from the VA.

E. I. *Army sniper who earned the Combat Infantryman Badge in Iraq. After one year in Iraq, he received an OTH discharge after a series of 4 arguments with his supervisor on one day. He was denied VA eligibility three times, until an attorney assisted him and a Senator intervened on his behalf.*

K. E. *Served the Navy for five years, but a positive drug test and an off-duty citation for public drunkenness led to an OTH discharge. He is now homeless in San Francisco but unable to access VA health care.*

B. Definition of conduct rising to the level of "dishonorable conditions" of service: 38 C.F.R 3.12(d)

VA regulations describe what conduct shows "dishonorable conditions" as follows:

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

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[156] 38 C.F.R. § 17.34.

[157] Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(b) (Nov. 5, 2009); 38 C.F.R. § 17.34; 38 FR 28140, 28141 (May 14, 2013) (explaining that only Honorable and General discharges qualify for tentative eligibility because those are the only cases where eligibility "probably will be established").

[158] 38 U.S.C. § 1784; 38 C.F.R. § 17.101.

> (1) Acceptance of an undesirable discharge to escape trial by general court-martial.
>
> (2) Mutiny or spying.
>
> (3) An offense involving moral turpitude. This includes, generally, conviction of a felony.
>
> (4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.
>
> (5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

There are no data as to which bases are most frequently applied in Regional Office decisions. However, an analysis of all Board of Veterans' Appeals (BVA) decisions on this issue between 1992 and 2015 shows that the "willful and persistent misconduct" element is the basis for 84% of "dishonorable conditions" decisions by BVA judges.

Table 6: Denials based on regulatory bars in BVA decisions, 1992-2015[159]

38 C.F.R. § 3.12(d) criteria	Percentage
(1) OTH discharge in lieu of GCM	6%
(2) Mutiny or spying	0%
(3) Moral Turpitude	10%
(4) Willful and Persistent Misconduct	84%
(5) Aggravated Homosexual Acts	0.2%

[159] Source: analysis of 999 BVA decisions issued between 1992 and 2015, on file with author. These figures do not include decisions where eligibility was denied based on the statutory bars, nor decisions where eligibility was denied without a specific factual finding under 38 C.F.R. § 3.12(c) or (d).

1. Willful and persistent misconduct

The "willful and persistent misconduct" bar is the most common basis for denial because it is an extremely expansive and vague standard. It plausibly encompasses almost all conduct that would lead to any form of misconduct discharge.

The VA has defined "willful misconduct" to include intentional action that is known to violate any rule, or reckless action that has a probability of doing so.[160] It does not require that the conduct have led to a court-martial or even a non-judicial punishment. The only substantive limitation is that "misconduct" does not include "mere technical violation of police regulations,"[161] and it does not include "isolated and infrequent use of drugs."[162] If the misconduct is "a minor offense" then the adjudicator may consider whether overall quality of service mitigates the misconduct, as discussed below, but this does not mean that "minor" misconduct is ignored. Even minor offenses constitute "willful misconduct" that can be a basis for finding "dishonorable" service. For example, BVA decisions have justified eligibility denial in part on absences as short as 2 hours and 18 minutes,[163] and 30 minutes.[164]

> ***J. E.*** *Marine with two Iraq deployments who was diagnosed with PTSD while still in service. He was cited for talking to his sergeant with a toothpick in his mouth, and was then discharged for a single positive drug test. Denied VA eligibility for "willful and persistent misconduct."*

The term "persistent" only means multiple incidents of misconduct, or misconduct that lasts more than one day. It may mean any sequence of any misconduct citations, even if they are not related to each other and even if they are spread out over time. For example, "willful and persistent misconduct" was found for a service member who had a non-judicial punishment in 1998 for off-duty alcohol use, a second non-judicial punishment in 1999 for visiting an unauthorized location, and a discharge in 2001 for a positive drug test.[165] The term "persistent"

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[160] 38 C.F.R. § 3.1(n)(1) ("Willful misconduct means an act involving conscious wrongdoing or known prohibited action … (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.").
[161] 38 C.F.R. § 3.1(n)(3).
[162] 38 C.F.R. § 3.301(c)(3).
[163] Title Redacted by Agency, No. 12-19246 (Bd. Vet. App. May 5, 2015).
[164] Title Redacted by Agency, No. 96-01792 (Bd. Vet. App. Jan. 30, 1996).
[165] Title Redacted by Agency, No. 04-04453 (Bd. Vet. App. Feb. 17, 2004).

has also been interpreted by some Veterans Law Judges to mean a single absence without leave lasting more than a day, effectively depriving the "persistent" term of genuine force.[166] Although other decisions have applied the "persistent" standard more narrowly,[167] the regulation permits a very expansive interpretation of this term.

The regulation provides a limited opportunity to consider the quality of overall service as a mitigating factor if discharge resulted from "a minor offense." The Court of Appeals for Veterans Claims (CAVC) has interpreted "a minor offense" to mean only misconduct that does not "interfere[] with … military duties."[168] Because most military misconduct relates to military duties in some way, this exception is very limited. In practice, the standard for "minor offense" varies widely. One decision found that an absence of one week was "not minor," [169] while another concluded that an unauthorized absence for 5 months was "minor."[170] If misconduct was not "minor," then there is no opportunity to consider overall service. For example, one BVA decision noted "exemplary service" during the first Persian Gulf War, but denied eligibility because the underlying misconduct, absence without leave of one week, was "not minor." [171] Even when the misconduct is found to be "minor," the regulation allows it to be mitigated only by service that is "meritorious." That is a very high standard. The VA does not consider all military service as inherently meritorious: even combat service is not meritorious because that is simply the required service of an infantryman and thus not "deserving praise or reward."[172] Even many years of proficient service cannot be considered as a potential mitigating factor.

In combination, the imprecise and expansive standards for the terms "willful," "persistent," "minor" and "meritorious" permit almost any disciplinary problems to be considered "willful and persistent misconduct." The VA trains its staff to apply the regulation according to this highly exclusive standard. For example, its training materials on this topic state

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[166] See, e.g., Title Redacted by Agency, No. 00-23 239, Bd. Vet. App. (Bd. Vet. App. Sept. 11, 2001) ("[B]ecause he spent 45 days of his service time in an AWOL status, the offense essentially occurred 45 times, i.e. once for each day he was gone, it is persistent.").

[167] For example, some decisions have found that an absence without leave is not "persistent" if its duration was less than 6% of the total service period. Title Redacted by Agency, No. 0108534 (Bd. Vet. App. Mar. 22, 2001) (finding 117 days of AWOL, which constituted 5.8% of the claimant's service, not to be willful and persistent).

[168] See, e.g., Cropper v. Brown, 6 Vet. App. 450, 452-3 (1994).

[169] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

[170] Title Redacted by Agency, No. 06-19120 (Bd. Vet. App. July 7, 2006).

[171] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

[172] See, e.g., Title Redacted by Agency, No. 0309368 (Bd. Vet. App. June 19, 2009).

that "willful and persistent misconduct" is present when there are "multiple failures to be at appointed place."[173]

> ***Orlando Tso***. *Marine rifleman who developed a drinking problem after being encouraged to join in violent and drunken hazing activities in his unit. He went to over 100 AA meetings over the course of two years, but was arrested for drinking under the influence and was given an OTH discharge after 3 years of service. Denied VA eligibility.*

2. Moral turpitude

Internal VA materials provide some additional definition of the term "moral turpitude." The M21-1 "Adjudication Procedures Manual" defines "moral turpitude" as "a willful act committed without justification or legal excuse [that] violates accepted moral standards and would likely cause harm or loss of a person or property."[174] The Manual refers to VA General Counsel Precedential Opinion 6-87, discussing the definition of "moral turpitude," but the M21-1 Manual incorrectly states the Precedential Opinion's holding, which defines "moral turpitude" as conduct that "gravely violates accepted moral standards."[175] The M21-1 omits the "gravely" qualifier, failing to capture high standard of misconduct implied by the term "turpitude." The VA has proposed a new definition that further dilutes the term by removing any reference to community standards at all. The proposed Part 5 Rewrite Project would define the moral turpitude as conduct that is "unlawful, willful, committed without justification or legal excuse … which a reasonable person would expect to cause harm or loss to person or property."[176] This proposed definition removes any reference to misconduct of an amoral character, departing significantly from accepted military, criminal, and civil caselaw that limits "moral turpitude" to offenses that involve some fraudulent, base, or depraved conduct with intent to harm a person.[177]

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[173] Character of Discharge Determination Trainee Handouts, at 7 (July 2012) (on file with authors).
[174] Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.3.c.
[175] VA Gen. Counsel Precedential Op. 6-87 (Feb. 5, 1988).
[176] 78 Fed. Reg. 71,042, 71,172 (Nov. 27, 2013) (proposed rule to be codified at 38 C.F.R. § 5.30(f)(3)).
[177] See John Brooker, Evan Seamone, and Leslie Rogall, Beyond TBD: Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary Or Punitive Discharge From The Armed Forces, 214 Mil. L. Rev. 1, 171 et seq. (2012) (hereinafter "Beyond TBD").

3. Aggravated homosexual conduct

This regulatory bar singles out one class of service members based on their sexual orientation, and excludes them for conduct that might not be used to exclude other service members with heterosexual orientation. This definition notably has not changed since (1) the repeal of "Don't Ask, Don't Tell" and (2) the Supreme Court's decisions in *Obergefell v. Hodges*, 135 S.Ct. 2071 (2015) and *United States v. Windsor* 133 S.Ct. 2675 (2013).

4. Absence of provision for considering extenuating factors

This regulatory paragraph contains no provision for considering extenuating or mitigating factors. The text of the regulation simply states that a discharge is considered to be "under dishonorable conditions" when any of the listed conduct is shown, without giving an opportunity to consider other factors. The "willful and persistent misconduct" bar includes a limited provision for considering overall service, as discussed above, but this does not apply to any other bars.

> ***Stephen Raimand***. *Combat veteran with multiple OIF and OEF deployments. He took unauthorized absence when his wife, who had eight miscarriages, threatened to commit suicide if he went on another deployment. He returned voluntarily and was sentenced to a Bad Conduct discharge. His nightmares sometimes make him vomit in the morning and he cannot drive a car safely. The VA labels him a "non-veteran" and denies all services.*

This contrasts with other provisions, where the VA has adopted a comprehensive analysis of extenuating circumstances. The VA adopted a list of factors that might mitigate the statutory bar against services to those who were absent without leave for more than 180 days. This list of mitigating factors considers hardship service conditions, disabilities, personal stressors, age, and educational background.[178] But the VA did not extend that standard to its regulatory definition of

[178] 38 U.S.C. § 5303(a) states that an absence without leave of 180 days or more will bar services "unless warranted by compelling circumstances." The VA has defined that term at 38 C.F.R. § 3.12(c)(6): "The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence. (i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation. (ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be

"dishonorable conditions," and the CAVC has held that this omission prohibits the VA from considering these factors under its "dishonorable conditions" analysis.[179] Therefore no regulatory provision allows adjudicators to consider these extenuating factors in their eligibility decisions.

The following Board of Veterans' Appeals decision provides an example of how these considerations are formally excluded from the analysis under the VA's regulatory bars:

> The governing law and regulations do not provide for any mitigating factors in determining whether actions that are not minor offenses are willful and persistent misconduct. Therefore, assuming that the appellant now suffers from PTSD, his in-service marital problems and any PTSD are irrelevant.[180]

Similarly, the VA denied eligibility to another service member based on one fight with a noncommissioned officer and a single one-week absence, despite significant external pressures such as a PTSD diagnosis in service, "exemplary" service during the first Persian Gulf war, and having three family members murdered within the prior two years.[181]

> ***Richard Running***. *Army combat medic during invasion of Iraq, cited for "discipline, dedication, and bravery" under fire. Started to self-medicate with drugs after his return, leading to OTH discharge. He was unable to keep a job for more than 6 months after service, started to use drugs more, and ended up incarcerated. The VA labels him a "non-veteran" and denies eligibility.*

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evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began. (iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities."

[179] Winter v. Principi, 4 Vet. App. 29, 32 (1993).

[180] E.g., Title Redacted by Agency, No. 12-36342 (Bd. Vet. App. Oct. 19, 2012) ("The governing law and regulations do not provide for any mitigating factors in determining whether actions that are not minor.").

[181] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

C. Rebuttal of "dishonorable conditions" in cases of "insanity" - 38 C.F.R. § 3.12(b)

VA regulations provide only one opportunity to consider whether mental health mitigates the discipline issues that led to discharge. Congress created an exception to the statutory bars in cases where the service member was "insane" at the time of the misconduct,[182] and the VA extended that exception to its regulatory bars as well.[183]

Although the VA adopted a regulatory definition of "insanity" that could potentially reach a range of mental and behavioral health issues,[184] the VA Office of General Counsel issued a Precedential Opinion that interprets the term to require a very high degree of mental impairment.[185] In practice, Veteran Law Judges applying the Precedential Opinion's holding characterize the "insanity" exception as "more or less synonymous with psychosis,"[186] and "akin to the level of incompetency generally supporting appointment of a guardian."[187] The VA has proposed to formalize this narrow interpretation by changing its regulatory definition of "insanity" to conform with the standard for criminal insanity, requiring such "defect of reason" that the person did not "know or understand the nature or consequence of the act, or that what he or she was doing was wrong."[188]

> ***Ted Wilson***. *Marine rifleman with two purple hearts and four campaign ribbons for service in Vietnam. He was sent to combat while still 17 years old, and had a nervous breakdown and suicide attempt before his 18th birthday. He was sent back to Vietnam for a second tour involuntarily, and had a third nervous breakdown that led to an AWOL and an OTH discharge. Denied Compensation for PTSD because of his discharge.*

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[182] 38 U.S.C. § 5303(b).
[183] 38 C.F.R. § 3.12(b).
[184] "Definition of insanity. An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides." 38 C.F.R 3.354(a). The Court of Appeals of Veterans Claims has held that this definition is lower than the criminal insanity standard used in the Model Penal Code. See Gardner v Shinseki, 22 Vet. App. 415 (2009).
[185] VA Gen. Counsel Precedential Op. 20-97 (May 22, 1997).
[186] E.g., Title redacted by agency, No. 10-16336 (Bd. Vet. App. May 3, 2010).
[187] E.g., Title redacted by agency, No. 15-19246 (Bd. Vet. App. May 5, 2015).
[188] 71 Fed. Reg. 16,464, 16,468 (Mar. 31, 2006).

The narrow scope of the "insanity" exception results in limited application to behavioral health issues such as PTSD and TBI. From 1992 to 2015, the Board of Veterans' Appeals denied eligibility to 88% of service members who claimed PTSD. The BVA granted eligibility to only 3% of claimants on the basis of an "insanity" finding; 10% were granted eligibility for other reasons. For 24% of claimants with PTSD, the "insanity" exception was not even considered.

Table 7: Results of "insanity" determinations by the BVA in cases where PTSD was claimed[189]

	% of cases involving PTSD
Eligibility denied – not "insane"	63%
Eligibility denied – "insanity" not considered	24%
Eligibility granted – "insane"	3%
Eligibility granted – other reasons	10%

Three features of the regulation limit the applicability of the "insanity" exception. First, it requires that a medical doctor state that the veteran was "insane" in service,[190] even though this is not a clinically approved diagnostic term.[191] In our experience, this has made doctors reluctant to give medical opinions on this issue. Second, service members must self-identify as "insane," which is unlikely to occur in cases of behavioral health problems such as PTSD or TBI. Third, in practice the VA rarely interprets the term "insanity" as broadly as regulation allows. Veteran Law Judges typically define the term "insanity" narrowly to include only psychoses or inability to comprehend one's actions.[192] This interpretation excludes cognitive and behavioral health problems often associated with post-traumatic or operational stress that leads to misconduct discharges.

One BVA decision illustrates why the "insanity" exception has only limited applicability:

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[189] Data on file with authors.

[190] Whether a person is "insane" is a medical question that must be established by competent medical opinion. See Zang v. Brown, 8 Vet. App. 246, 254-55 (1995).

[191] Medical opinions relating to mental health must apply the diagnostic criteria of the Diagnostic and Statistical Manual 5th Edition. 38 C.F.R § 4.125(a). "Insane" is not a diagnosis in the DSM-5, nor in prior editions.

[192] E.g., Title Redacted by Agency, No. 1004564 (Bd. Vet. App. 2010) ("Generally, the predicate for insane behavior within the meaning of VA law and regulations is a persistent morbid condition of the mind characterized by a derangement of one or more of the mental faculties to the extent that the individual is unable to understand the nature, full import and consequences of his acts, such that he is a danger to himself or others.").

> Initially, the Board points out there is no claim or evidence that the appellant was insane at the time of the offenses in question that resulted in his OTH discharge. The appellant has not produced any evidence from a qualified medical doctor who has expressed an opinion that he was insane prior to, during, or after his period of AWOL.… Additionally, when asked during the Board hearing, the appellant stated he was not insane. He did say that he had been harassed and that he might have been suffering from the symptoms and manifestations of PTSD, but he was not insane.[193]

Because of these limitations, the "insanity" exception is rarely used in practice.

D. Implied requirement for "honorable" service

Some eligibility decisions have mistakenly adopted an "honorable service" requirement. Nothing in statute or regulation requires "honorable" service. Instead, statute and regulation only require that "dishonorable" service be excluded, and military law has long established that some service is less than "honorable" without being "dishonorable."[194] Nevertheless, VA adjudicators routinely state that "only veterans with honorable service are eligible for VA benefits"[195] and deny eligibility when service was "not honorable for VA purposes." Some BVA decisions also explicitly adopt an "honorable service" standard, as in the following example: "[the service member's misconduct] was not consistent with the honest, faithful, and meritorious service for which veteran's benefits are granted. Moreover, the other incidents of misconduct reflect an ongoing pattern of disciplinary offenses which were not of an honorable nature."[196]

> ***Terrance Harvey***. *Army soldier who earned the Combat Infantryman Badge for service in the First Gulf War. On his return he started experiencing post-traumatic stress symptoms and attempted suicide. He was denied leave to be with his family, but left anyway. After a 60 day absence he returned and was given an OTH discharge. He was denied services for 20 years until an attorney helped him get a discharge upgrade; his VA eligibility application was never decided.*

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[193] Title Redacted by Agency, No. 1008205 (Bd. Vet. App. 2010).
[194] See Section II.D above.
[195] See sample COD decision included as Appendix A.
[196] Title Redacted by Agency, No. 06-39238 (Bd. Vet. App. Dec. 18, 2006).

Two elements of the regulatory scheme produce this outcome. First, the regulatory definition of "dishonorable conditions" is so expansive that almost any misconduct that justifies a discharge would also justify a "dishonorable conditions" finding.[197] This is evident from the standards themselves, which provide so little substantive limitation on what conduct might be considered "dishonorable." It is also shown by the decision rates: in FY2013, the VA found that service members were ineligible in 90% of all cases it reviewed.[198] A regulatory scheme that excludes up to 90% of service members with intermediate discharges cannot be measuring "dishonorable" service, it is measuring "honorable" service.

The second feature of VA policy that encourages the use of an implied "honorable conditions" standard is that the VA's internal designation for eligible service is "Honorable for VA Purposes." A service member with a discharge characterization that is not presumptively eligible under 38 C.F.R. § 3.12(a)—those with Other Than Honorable, Bad Conduct, or Dishonorable discharge characterizations—is labeled "Dishonorable for VA Purposes" in VA's eligibility databases.[199] If the Character of Discharge review is favorable, their status will be changed to "Honorable for VA Purposes."[200] This terminology suggests that service members must show that their service was "honorable." Although this designation is administrative, it has been adopted by numerous adjudicators, for example Veterans Law Judges who state "when a service member receives discharge under other than honorable circumstances, VA must decide whether the character of such discharge is honorable or dishonorable."[201] This binary analysis is inconsistent with statute. The 1944 statute does not require that service be "honorable", it only requires that it be better than "dishonorable." Nor does the statute create new definitions of the terms honorable and dishonorable "for VA purposes." Instead, the statute requires the VA to exclude service that was "dishonorable" according to existing military law standards. The mischaracterization of service eligibility in the VA's eligibility database likely contributes to incorrect application of eligibility criteria.

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[197] The authorized bases for a non-punitive administrative discharge for misconduct are provided in DODI 1332.14 ¶ 10(a) (2014).
[198] VA FOIA Request, on file.
[199] The VHA eligibility database is Hospital Inquiry (HINQ); the VBA eligibility database is Beneficiary Identification and Records Locator Subsystem (BIRLS).
[200] See Adjudication Procedures Manual *supra* note 146 pt. III.v.1.A.4.e.
[201] E.g., Title Redacted by Agency, No. 15-19246 (Bd. Vet. App. May 5, 2015).

IV. THE CURRENT REGULATORY SCHEME IS UNJUST, INCOMPATIBLE WITH STATUTORY OBLIGATIONS, AND UNDULY BURDENSOME ON BOTH VETERANS AND THE VA

A. VA regulations are excluding current-era service members at a higher rate than at any other period in the nation's history

More service members are excluded from the VA's care and support than Congress intended, more than the American public would expect, and more than at any point in history. This is due entirely to the VA's discretionary eligibility regulations.

Overall, the VA decides that service was "dishonorable" in the vast majority of cases in which it conducts a COD review. In FY 2013, VA Regional Offices found service "dishonorable" in 90% of all cases (see Table 8). Board of Veterans' Appeals decisions since 1992 have found service "dishonorable" in 87% of its cases (see Table 9). The average for all decisions, from all eras, was 85% "dishonorable" (see Table 10).

Table 8: Character of Discharge decision outcomes at Regional Offices, FY2013[202]

Outcome	Number of decisions	%
Ineligible ("dishonorable")	4,156	90%
Eligible ("other than dishonorable")	447	10%
Total	**4,603**	

Table 9: Character of Discharge decision outcomes by the BVA, 1992-2015[203]

Outcome	Number of decisions	%
Ineligible ("dishonorable")	870	87%
Eligible ("other than dishonorable")	129	13%
Total	**999**	

[202] FOIA request to the VA on file with authors.
[203] Analysis of BVA decisions on file with authors.

Table 10: Character of Discharge decision outcomes based on era of service[204]

	Number of decisions	"Dishonorable"
WWII	3,600	89%
Korean War	6,807	85%
Vietnam War	35,800	78%
"Peacetime"	44,310	78%
Gulf War	19,269	71%
Post-2001	13,300	65%
Total[205]	**155,416**	**85%**

Those figures do not paint a full picture, however, because the number of people actually excluded from VA services also depends on the percentage of veterans who *require* a review and the percentage who *receive* one. Table 11 shows that the actual exclusion rate for current-era veterans is 6.5% of all service members who completed entry level training.[206] This occurs because, first, the VA presumes ineligibility for the 6.8% of all service members with characterizations less than General, including the large number of people with non-punitive, administrative discharges characterized as Other Than Honorable; and then, second, the VA has completed COD reviews for only 10% of those presumptively ineligible service members (see Table 10). This leaves 6% of all Post-9/11 veterans ineligible for VA services by default, because the VA requires a review but has not conducted it. While the VA has granted eligibility to 35% of current-era veterans whose service it has reviewed, this only amounts to an additional 0.3% of all service members since so few have received a review. The bottom line is that 6.5% of current era veterans who seek health care, housing or other services will be turned away.

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[204] Telephone interview with Stacy Vazquez, Director, Interagency Strategic Initiatives, Department of Veterans Affairs (June 16, 2014). Data accurate as of May, 2013.

[205] This figure is greater than the sum of each era listed above because it includes service members discharged outside those periods, such as between the Korean War period and the Vietnam War period.

[206] Service members discharged during entry level training typically received an "Uncharacterized" discharge. This petition does not address the regulations that govern this type of discharge. 38 C.F.R § 3.12(k).

Table 11: Current VA eligibility status of post-2001 service members who completed entry level training[207]

	Number	% of service members
Recognized as a "veteran"		***93.5%***
Presumed eligible (Honorable or General)	1,668,050	93.2%
Found "other than dishonorable" by COD	4,600	0.3%
Not recognized as a "veteran"		***6.5%***
Found "dishonorable" by COD	8,700	0.5%
Presumed ineligible (OTH, BCD or DD, and no COD has occurred)	108,190	6%

This is the highest exclusion rate that has ever existed. Although the VA is granting eligibility to current era veterans at a somewhat higher rate than previously (see Table 10), the VA is requiring eligibility reviews for more service members than ever before. Even when eligibility was only provided to servicemembers with fully Honorable discharge characterizations, as was the case in the Second World War period immediately prior to enactment of the current standards,[208] the exclusion rate was only 2% because 98% received "Honorable" characterizations. We have determined exclusion rates for years since then, where data is available. Table 12 summarizes that analysis.

[207] DOD FOIA Response 14-0557; telephone interview of Stacy Vazquez, Director, Interagency Strategic Initiatives, VA of Veterans Affairs on June 16, 2014.

[208] See Table 3 above and accompanying text. Prior to the 1944 statute, each benefit for veterans of each wartime period had different eligibility criteria. However the most recent eligibility laws enacted prior to WWII had required "honorable."

Table 12: Exclusion rates for selected periods of service[209]

	Recognized as "veteran"			Not recognized as "veteran"		
	Presumed eligible[210]	Found eligible by COD[211]	**Total**	Found ineligible by COD[212]	Presumed ineligible, no COD	**Total**
WWII ('41-'45)[213] *Pre-1944 standard*	6,762,863	0	**98%**		131,306	**1.9%**
Post-1944 standard	6,775,842	400	**98%**	16	117,911	**1.7%**
Korean War[214] ('50-'55)	4,004,394	997	**97%**	5,810	130,707	**3.3%**
Vietnam War[215] ('65-'75)	9,047,198	7,800	**97%**	28,000	232,180	**2.8%**
"Peacetime"[216] (76-90)	6,857,655	44,310	**96%**	34,630	277,111	**4.3%**
GWOT[217] ('02-'13)	1,668,050	4,600	**93%**	8,700	108,190	**6.5%**

The goal of the G.I. Bill of Rights was to expand access to veteran services for service members—the data show that the regulations do exactly the opposite. A dishonorable discharge characterization was and remains a rare punishment. By adopting "other than dishonorable conditions" as its eligibility standard, Congress deliberately chose to exclude people only rarely.

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[209] Complete discharge characterization data is not available for 1946-1950 and 1991-2000; COD rates are not available for 1956-1960.

[210] Service members who received characterizations other than Honorable, General Under Honorable Conditions, or Under Honorable Conditions.

[211] Telephone interview with Stacy Vazquez, Director, Interagency Strategic Initiatives, Department of Veterans Affairs, June 16, 2014.

[212] Id.

[213] Staff of H. Comm. on Veterans' Affairs, Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, Hearing Before the Committee on Veterans' Affairs on S. 1307 and Related Bills, Rep. No. 97-887, at 600-01 (Comm. Print 1977).

[214] Staff of H. Comm. on Armed Servs., Administrative Discharge Procedures and Discharge Review, Hearings on H.R. 52 Before the Subcommittee on Military Personnel of the Committee on Armed Services, Rep. No. 95-79, at 198-205 (Comm. Print 1975).

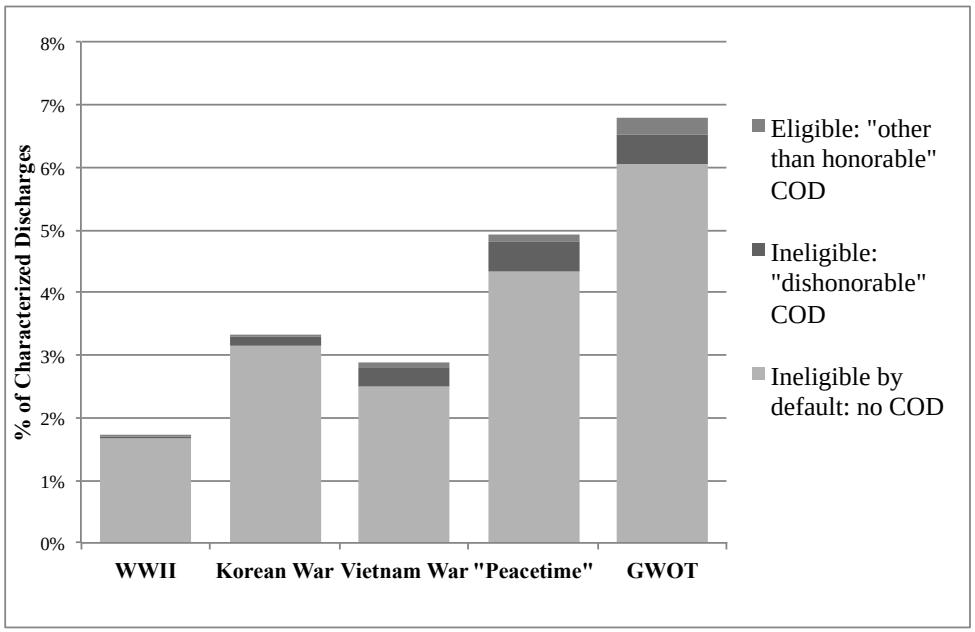
[215] Id.

[216] U.S. Census Bureau, Statistical Abstract of the United States, at Table 622 – Discharges of Enlisted Personnel, by Type: 1965 to 1979 (1980); U.S. Census Bureau, Statistical Abstract of the United States, at Table 561 – Discharges, Desertion and Absent-Without-Authority Rates for Military Personnel: 1970 to 1988 (1988); DOD FOIA Request No. 09-F-1815, Administrative Separations by Character of Service and Reason. Punitive discharge rates for 1981, 1999 and 2000 were interpolated from adjacent years' rates.

[217] DOD FOIA Response 14-0557.

This was a more inclusive standard than had prevailed in prior veteran benefit laws, and Congress knew that its new standard would expand eligibility. The Congressional record provides multiple examples of legislators explicitly acknowledging and justifying this decision, as recognized by the Federal Circuit's binding interpretation of the statute as a "liberalizing" rule.[218] The VA's current regulations violate Congress's intent by transforming that less stringent standard into a more restrictive standard, increasing more than three-fold the share of service members that are unable to receive veteran services.

Figure 1: Service members excluded from VA benefits, selected periods[219]



The historical increase in exclusion rates is due largely to the fact that VA regulations have not adapted to changes in how military branches use the administrative discharge system. When the statute was enacted, the military justice system prioritized retention and retraining.[220] Half of the soldiers who were sentenced to a dishonorable discharge by general court-martial

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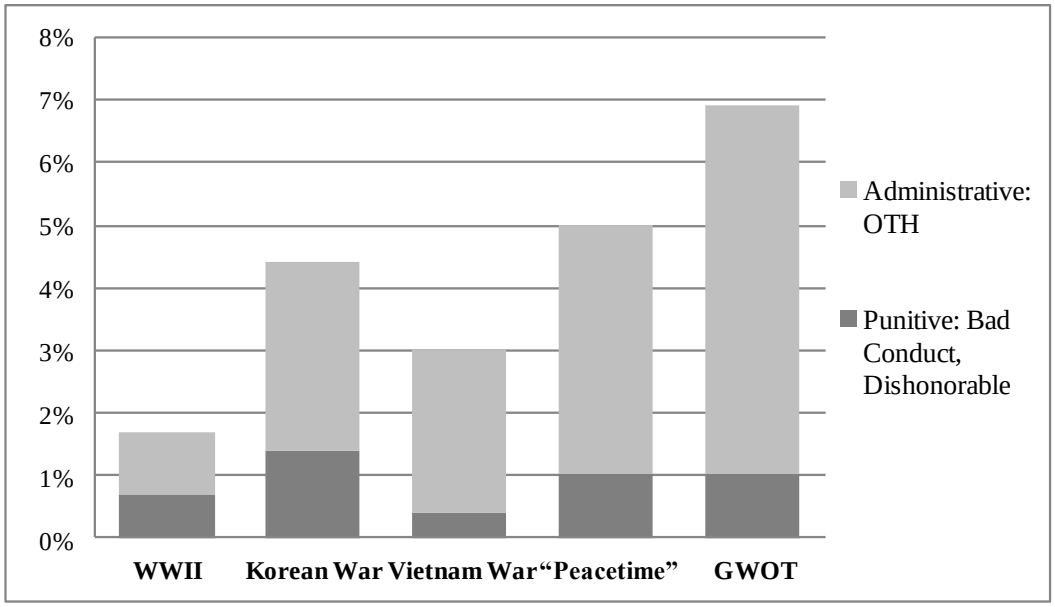
[218] "The current language of the statute derives from the Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284-301 (1944). In this enactment, Congress liberalized the discharge eligibility requirement to give the VA greater discretion in determining whether an individual's discharge was issued under 'dishonorable conditions.'" Camarena v. Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683, at *8 (Fed. Cir. July 7, 1995) (emphasis added).

[219] Sources: see Table 12.

[220] For a discussion of the history of rehabilitation and retention policies in the military, see Evan R. Seamone, Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism, 208 Mil. L. Rev 1, 40 et seq. (2011).

during WWII had their sentences suspended so that they could go on to earn an Honorable discharge.[221] Over time, the military services gradually adopted more exclusive standards. A major change happened after 1975, when the draft was repealed and the military shifted to an all-volunteer force. The professionalized volunteer military has adopted low- or zero-tolerance policies,[222] even for issues like off-duty driving while intoxicated that have no direct bearing on military service,[223] resulting in more frequent administrative separations for conduct that does not approach dishonorable characterization. Current-era veterans are not more dishonorable than those of prior eras: the rate of punitive discharges for misconduct has stayed nearly the same throughout this period (see Figure 2). Instead, administrative discharges for misconduct have increased simply because the military is more likely to discharge service members for minor or moderate discipline problems.

Figure 2: Separations related to discipline, by type, selected periods[224]



[221] Id. at 78.

[222] See, e.g., Navy Alcohol and Drug Abuse Prevention and Control, OPNAVINST 5350.4D ¶ 6.h (June 4, 2009) ("Navy's policy on drug abuse is 'zero tolerance.' Navy members determined to be using, possessing, promoting, manufacturing, or distributing drugs and/or drug abuse paraphernalia ... shall be disciplined as appropriate and processed for [Administrative Separation] as required.").

[223] See, e.g., C.H. Oliver, Marine Heavy Helicopter Squadron 362 Commanding Officer's Driving Under the Influence (DUI) Policy, http://www.1stmaw.marines.mil/Portals/65/Docs/MAG-24/HMH-362/HMH-362%20DUI%20Policy.docx (last accessed Dec. 16, 2015).

[224] See Table 12 above for data sources.

This increase in separations for minor or moderate misconduct has caused the VA's presumptive ineligibility standard to depart dramatically from Congress's intended standard. This is shown both by the aggregate exclusion data cited above, and by comparing the VA's regulatory exclusion criteria with the statutory exclusion criteria. Congress explained that it intended to discharge only service members whose misconduct was of similar severity to what it listed in its statutory bars.[225] While Congress recognized that the actual exclusion rate might be higher than the statutory exclusion rate, they should be similar. They are not. For discharges in FY2011, the statutory bars require exclusion of 1% of service members.[226] This is similar to the historical punitive discharge rate, confirming that the incidence of misconduct that Congress intended to exclude has not changed. But the VA's presumptive ineligibility standard now excludes an additional 5.5% over the number excluded by statute. This represents an extreme departure from statutory guidance.

The VA has dramatically increased the exclusion of service members, despite Congressional intent to expand access to readjustment services. This is the result of the VA's presumptive exclusion of servicemembers with administrative, non-punitive discharges for misconduct, a category that Congress intended to receive eligibility and that the military branches have increasingly relied upon to manage minor discipline issues. To reach the exclusion rates that Congress intended, and the exclusion standard that Congress intended, the VA will need to admit most or all veterans with Other Than Honorable characterizations.

B. The regulations are an impermissible interpretation of statute because they do not adopt military "dishonorable" discharge standards

The VA only has authority to adopt rules implementing the Servicemen's Readjustment Act of 1944 that are reasonable interpretations of statute. Regulations "must always "give effect to the unambiguously expressed intent of Congress."[227] Here, Congress has unambiguously circumscribed VA authority to exclude service members to those whose conduct merited a dishonorable discharge characterization.[228] The VA's current regulations exceed the

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[225] See Section II.C.1 above.
[226] See Table 1 above and accompanying text above.
[227] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014) (citation omitted).
[228] See Part II.A above.

Department's authority because they exclude service members whose conduct would not merit a dishonorable discharge characterization.

Part II.B of this Petition described the conduct that merits a dishonorable discharge characterization under standards in place when Congress enacted this statute and under current standards. It was a penalty reserved for the most severe misconduct. The authorities discussed in that section identified three factors that determine when a dishonorable characterization may be warranted:

> Based on the nature of the offense: cases of rejection of military authority, crimes of moral turpitude, or civilian felonies;
>
> Based on repeated discipline problems: where there were at least three convictions for misconduct within one year; and
>
> Not where mitigating factors are present: mitigating factors include duration of service, quality of service, hardship conditions of service, disabilities, age, education level, extenuating circumstances.

Three features of the current regulation are incompatible with this statutory standard: (1) the "willful and persistent" bar as written and as applied denies eligibility based on conduct that would not justify a dishonorable characterization; (2) the regulation does not permit consideration of mitigating factors, including overall service, for the vast majority of cases; and (3) the regulations presume dishonorable conduct for non-punitive, administrative discharges for misconduct.

1. The "willful and persistent misconduct" bar encompasses conduct that would never qualify for a dishonorable characterization.

The exclusion for "willful and persistent" misconduct is by far the most common basis for denying eligibility[229]—and it departs grossly from military-law standards for the types of repeated misconduct that would justify a dishonorable characterization. Its use renders the entire scheme defective.

As discussed in Section III.B.1 above, the primary elements of the regulation—willfulness and persistence—include no substantive minimum standard of misconduct. It can be

[229] See Table 6 above.

triggered by issues as minor as reprimands for arriving late to formation,[230] and can involve unrelated offenses spread out over the course of many years. It does not exclude minor misconduct, although it does allow minor misconduct to be offset by otherwise exceptional performance. Its definition of "minor" only requires the VA to overlook conduct that does not "interfere with military duties."

In contrast, military law strictly limits when a dishonorable characterization may be provided based on repeated low-level misconduct.[231] The 2012 Manual for Courts-Martial authorizes a dishonorable characterization when there have been three convictions within the prior year. This standard limits both the severity and the timing of misconduct that might justify a dishonorable characterization. Under military law, as interpreted by the Supreme Court, an offense that leads to a non-judicial punishment (UCMJ Article 15) is a minor offense. Therefore the requirement for three court-martial convictions ensures that minor offenses cannot lead to a dishonorable characterization. Its requirement for those convictions to arise within one year prevents service members from being judged "dishonorable" based on isolated mistakes over the course of several years. The 1943 Manual for Court-Martial permitted a dishonorable characterization after three convictions where each offense was eligible for a dishonorable characterization or after five offenses where each offense was not eligible for a dishonorable characterization. The VA's original regulatory standard for "dishonorable conditions" adopted this standard by only considering misconduct that had resulted in a court-martial conviction.

The incompatibility between the "willful and persistent" regulatory bar and its authorizing statute is shown most clearly by how the regulation treats periods of absence without leave. Congress stated explicitly in the legislative history, and implicitly in the structure of the statute, that the "dishonorable conditions" standard should exclude behavior similar to what it listed in its statutory bars.[232] In the statutory bars, Congress provided a specific standard for how much absence without leave was sufficiently severe to forfeit eligibility: at least 180 days, and even then it can be overlooked if the absence was warranted by compelling circumstances.[233] In

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[230] Character of Discharge Determination Trainee Handouts, at 7 (July 2012) (on file).
[231] See Section II.C.3 above.
[232] See Section II.C.1 above.
[233] 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c)(6).

doing so, Congress itself drew the line between AWOL that was severe enough to merit separation, and conduct that was severe enough to also warrant forfeiture of readjustment services. The statute speaks clearly "to the precise question at issue," and the VA "must give effect to the unambiguously expressed intent of Congress."[234] Indeed, as the Supreme Court has explained, "[i]t is hard to imagine a statutory term less ambiguous than … precise numerical thresholds."[235] Yet the CAVC has interpreted the "willful and persistent" regulatory standard to be satisfied with periods of absence without leave of only thirty days, [236] and the BVA has found an absense of one week to be willful and persistent[237]—entirely eclipsing the statutory 180-day standard. By "replac[ing] those numbers with others of its own choosing, [the VA has gone] well beyond the 'bounds of its statutory authority.'"[238]

Rather than adopt the military standard for a "dishonorable" characterization, the "willful and persistent" regulation more closely replicates the standard for an Other Than Honorable characterization: a non-punitive, administrative discharge *two* levels above "Dishonorable." The lowest criteria that can justify an Other Than Honorable characterization under military regulation is "Minor Disciplinary Infractions: A pattern of misconduct consisting solely of minor disciplinary infractions."[239] Like the "willful and persistent" regulation, this does not require that misconduct rise above the level of minor misconduct, it does not require any court-martial proceedings, it does not require that the offenses occur within any specific timeframe, and it can result in a higher characterization if service was "honest and faithful … [and] the positive aspects of the enlisted Service member's conduct or performance of duty outweigh negative aspects."[240] By hewing closely to the lowest standard for an Other Than Honorable characterization, the "willful and persistent" regulation plausibly excludes every service member with an Other Than Honorable characterization. This standard is facially incompatible with Congressional intent to

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[234] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[235] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014).
[236] See, e.g., Winter v. Principi, 4 Vet. App. 29, 32 (1993).
[237] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).
[238] Id. (citation omitted).
[239] DoDI 1332.14, Enclosure 3 ¶ 10.a.1 (Jan. 27, 2014).
[240] Id., Enclosure 4 ¶ 3.b.2.b (referenced by Enclosure 3 ¶ 10.c).

expand eligibility to service members with administrative, non-punitive discharges for misconduct.[241]

There are certainly VA adjudicators who produce fair outcomes by inferring substantive standards that do not exist in the regulations. They may disregard discipline issues in the record, or conclude that certain discipline issues are insufficient to justify exclusion. For example, one Veterans Law Judge explained why he was granting eligibility to a servicemember with several absences, including an absence of eighteen days:

> It is apparent that the appellant was out of place in a military environment, and it was entirely appropriate that he be administratively separated from service because of this. However, his conduct in service was not so egregious that he should be disqualified from receiving VA benefits.[242]

This is exactly the analysis that led Congress to create its "other than dishonorable" standard: some misconduct justifies separation but does not justify withholding readjustment services. However, the Veterans Law Judge made this argument to explain an outcome that the regulations did not require, or potentially even permit. Data on decision outcomes show that this type of exceptional analysis does not happen often. Numerous BVA decisions have denied eligibility due to similar or less severe misconduct because they followed the regulations as written—as, for example, the case of a veteran with "exceptional" service in the Persian Gulf, a PTSD diagnosis in service, and multiple deaths in his family, due to a one-week unauthorized absence.[243] While the first example granting eligibility is a correct application of statute, the second example denying eligibility is a correct application of the regulation—but a violation of the statute. A regulation that is facially incompatible with its organic statute is not remedied because adjudicators sometimes construe, or outright misapply, the regulation in a manner that it renders it lawful.

Data on VA decisions support this analysis. In FY2013, VA Regional Offices denied eligibility to 90% of people with characterizations less than "under honorable conditions"; the denial rate for all appeals since 1992 is 87%. Rather than exclude the people who should have

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[241] *See* Section II.D above.
[242] Title Redacted by Agency, No. 02-07752 (Bd. Vet. App. July 12, 2002).
[243] Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. August 18, 1997).

received a dishonorable characterization, the VA is only including the people who should have received an honorable characterization. This is antithetical to Congress's statutory instruction.

2. The regulatory definition of "dishonorable conditions" does not consider mitigating circumstances such as overall service, extenuating circumstances, or the service member's age.

Military law permits a dishonorable characterization only after considering a broad range of mitigating factors, to include age, education, personal circumstances, work performance, quality and duration of service, and health factors.[244] Because the regulatory standard permits almost none of these to be considered for most service members, it is an impermissible interpretation of the governing statute. [245]

The regulation permits only one factor to be considered in mitigation—overall quality of service—and it permits this to be considered only for the "willful and persistent" regulatory bar, only when the "willful and persistent" misconduct consisted of "a minor offense."[246] This limited scope for any mitigating conditions departs significantly from the standard under military law which requires a consideration of a wide range of mitigating factors before imposing a dishonorable characterization. It also departs from Congressional intent as shown in the examples given by legislators of conduct that they believed should result in eligibility.

The failure of regulations to account for mitigating circumstances is shown by how combat deployments fail to influence the outcome of Character of Discharge decisions. Congress specifically stated that combat veterans should receive veteran services even if they are guilty of unexcused absence, violations of military regulations and substance abuse.[247] Under current regulations, however, contingency and combat deployments appear to have little influence on whether service is considered "other than dishonorable."

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[244] See Section II.C.3 above.
[245] See Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2013) ("[A]n agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." (quotation marks, citation and alteration omitted)).
[246] See Section III.B.4 above.
[247] House Hearings on 1944 Act, *supra* note 28, at 417.

Table 13: Results of BVA COD decisions for service members with selected contingency deployments[248]

	% "dishonorable"
All service members	87%
Vietnam deployment	85%
Any combat service	77%
OIF/OEF deployment	65%

Vietnam deployments have had no statistically significant impact on BVA evaluations of service quality. Combat service and post-9/11 deployments had only marginal effects: two out of every three service members with OEF/OIF deployments, and three out of every four with combat service, were so "dishonorable" under existing regulations that they forfeit recognition as a "veteran." This contradicts the express intention of Congress, to say nothing of public expectations for how the VA should treat former service members.

The results are even more striking if mental health is removed from the analysis. Cases where mental health may have contributed to behavior deserve special consideration, discussed in Section IV.C below. However, an assessment of overall service should take into account hardship service, even if it does not result in a mental disability. Setting aside cases where the service member claimed that PTSD was a factor, the data shows that hardship service had almost no impact on BVA eligibility decisions, and in some cases *hardship service made the BVA less likely to grant eligibility*.

Table 14: Results of BVA COD decisions for selected service members who did not claim existence of PTSD[249]

	% "dishonorable"
Vietnam deployment	92%
All service members	89%
Combat service	85%
OIF/OEF deployment	70%

[248] Analysis of all Board of Veterans' Appeals decisions between 1992 and 2015, downloaded from U.S. Dep't of Veterans Affairs, The Board of Veterans' Appeals Decision Search Results, http://www.index.va.gov/search/va/bva.jsp on September 10, 2015.
[249] Id.

The absence of mitigating factors within the VAs' discretionary criteria contrasts with the existence of mitigating factors under one of the statutory bars. Congress barred services to those who were absent without leave for more than 180 days unless the absence was "warranted by compelling circumstances."[250] The VA defined "compelling circumstances" by regulation, instructing adjudicators to look at the age, judgment, education level, service history, and health conditions of the service member to decide whether "compelling circumstances" existed, and to consider those circumstances from the perspective of the service member at that time.[251] The VA did not extend this "compelling circumstances" analysis to its regulatory bars; as a result, the VA is prohibited from considering those factors when deciding whether conduct was "dishonorable."[252]

Some VA adjudicators, recognizing the injustice and inconsistency of the regulatory scheme, take mitigating factors into account even though regulations do not permit it. For example, one Veterans Law Judge felt compelled to evaluate mitigating circumstances "in an effort of fairness":

> The Board notes that the "compelling circumstances" exception does not apply to 38 C.F.R. § 3.12(d)(4). Even so, as it appears that his February 1970 to October 1970 AWOL offense was a primary reason for his separation, the Board will, in an effort of fairness, review the record to determine whether the appellant's AWOL was based on "compelling circumstances" as understood by VA.[253]

Although adjudicators should be commended on applying the spirit of the law, rather than the letter of the regulation, the spontaneous goodwill of adjudicators does not remedy facially impermissible regulations. At best, it creates arbitrary and inconsistent outcomes, itself a regulatory deficiency discussed in section IV.D below.

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[250] 38 U.S.C. § 5303(a)
[251] 38 C.F.R § 3.12(c)(6)(i), (i), (iii).
[252] Winter v. Principi, 4 Vet. App. 29 (1993).
[253] Title Redacted by Agency, No. 09-30611 (Bd. Vet. App. Aug. 14, 2009).

3. The regulations flip the presumption of eligibility, improperly excluding more and more service members over time

Congress instructed the VA to grant eligibility to service members with intermediate characterizations—less than Honorable but better than Dishonorable—unless that characterization was granted due to an error or omission by the military.[254] In effect, Congress presumed that intermediate characterizations were properly issued and then authorized the VA to rebut the presumption.[255] The VA's regulations reverse this. It has created a rebuttable presumption of *ineligibility* for characterizations that Congress decided should generally be *eligible*, turning Congressional intent on its head.

This presumption exist both in law and in fact. It exists in law because servicemembers with Other Than Honorable discharges—administrative, non-punitive discharges for conduct that did not result in a court-martial—are classified as "Dishonorable for VA Purposes" unless and until they successfully show that their service was "Honorable for VA Purposes."[256] A veteran with an OTH discharge, even one that is disabled, that served multiple enlistments, that deployed to combat, is ineligible until he or she proves eligibility. The presumption also exists in fact, because denial rates of 90%, and reaching 100% in some Regional Offices, show that the VA places a high burden of proof on service members to overcome an assumption of ineligibility.

The effect of this error was relatively minor when military services did not use administrative, non-punitive discharges as frequently as they do today. As discussed in section IV.A above, at the time of the enactment of the G.I. Bill, it was relatively uncommon for military services to give administrative discharges for minor or moderate misconduct. Because military service used this discharge characterization rarely, the VA's reversed presumption impacted relatively few people. Over time, and particularly after the end of the draft, the use of Other Than Honorable discharges to separate people for minor or moderate misconduct has increased dramatically, now representing twice as many service members as in 1964, and six times as many as in 1944. Now, nearly 6% of all service members receive administrative, non-punitive

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[254] See Section II.B above.
[255] See Section II.D above.
[256] See Section III.D above.

discharges for misconduct, and the effect of the reversed presumption has ballooned. That controverts statutory intent and therefore must be revised.

C. The regulations fail to account for behavioral health issues such as PTSD or TBI

A dishonorable discharge characterization can only be issued after considering whether mental health conditions mitigate the misconduct. It is deeply unfair to exclude service members for behavior that is symptomatic of mental health conditions acquired in service.

It is well established that PTSD and operational stress can lead to behavior changes that military commanders incorrectly attribute to misconduct alone. PTSD, TBI, and Major Depression produce behavioral dysfunction through an exaggerated startle response, inability to control reflexive behavior, irritability, attraction to high-risk behavior, or substance abuse.[257] Some treatments induce fatigue or lethargy that also interfere with basic functioning. In fact, interference with social and occupational functioning is a primary measure of the severity of these conditions.[258] For service members on active duty, these behavioral disorders may result in infractions of unit discipline, and military services often do not treat these disciplinary infractions as symptoms of mental health risk: a 2005 study of Marines who deployed to Iraq showed that those diagnosed with PTSD were eleven times more likely to get misconduct discharges than those who did not have a diagnosis.[259] Recent press reports provide many examples of service members with early mental health trauma where their behavior in service was managed as a discipline problem rather than a mental health problem.[260] Service members

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[257] James et al., Risk-Taking Behaviors and Impulsivity Among Veterans With and Without PTSD and Mild TBI, Mil. Med., 179, 4:357 (2014); Elbogen et al., Violent Behavior and Post-Traumatic Stress Disorder in US Iraq and Afghanistan Veterans, British J. Psychiatry, 204, 368-75 (2014); Tateno et al., Clinical Correlates of Aggressive Behavior After Traumatic Brain Injury, J. Neuropsychiatry & Clinical Neurosciences (2003).

[258] See General Ratings Formula for Mental Disorders, 38 C.F.R. § 4.150 (2009).

[259] R.M. Highfill-McRoy et al., *supra* note 112.

[260] Jeremy Schwartz, "Bad Paper" Discharges Can Stymie Veterans' Health Care: Diagnosed with Post-Traumatic Stress Disorder Before He Was Kicked Out of Marines for Failing a Drug Test Without Counseling, Austin Statesman Oct. 3, 2010; Dave Philipps, Other than Honorable, Colorado Springs Gazette, May 19, 2013; Hal Bernton, Troubled Veterans Left Without Health-Care Benefits, Seattle Times, Aug. 11, 2013; Quil Lawrence, Veterans and Other than Honorable Discharges, Nat'l Pub. Radio (2013); Daniel Zwerdling, Missed Treatment: Soldiers with Mental Health Issues Dismissed for "Misconduct", Nat'l Pub. Radio (Dec. 4, 2015).

"at mental health risk" are 32% more likely to be separated from service within a year of deployment than service members not "at mental health risk."[261]

The current regulatory scheme does not take into consideration the types of mental and behavioral health problems that are most likely to cause disciplinary issues leading to discharge. The regulatory scheme provides only one opportunity for considering mental health as a mitigating factor, the "insanity" exception. As discussed above,[262] the "insanity" exception is inadequate because (1) it requires medical personnel and service members to characterize behavior as "insane," something that is not supported by psychological practice and is not common for people to do; and (2) the "insanity" exception as applied by Veteran Law Judges is so stringent that it in practice excludes the types of behavioral health problems commonly associated with PTSD, TBI, and operational stress: irritability, aggressiveness, self-medication with alcohol or drugs, self-harm or risk-seeking behavior. As a result, the "insanity" exception does not adequately account for common behavioral health problems that often explain in-service misconduct. The BVA found that the service member was "insane" in only 3% of cases where PTSD was claimed; in 24% of PTSD-related claims no "insanity" determination was made at all.[263]

Because the regulatory provision for "insanity" is so narrow, mental health appears to have little effect on eligibility decision outcomes. In cases where the service member alleged the existence of some mental health condition, the BVA found "dishonorable" service 84% of the time, which is scarcely different from the global average of 87% for all COD decisions.[264] The rates for specific conditions, including PTSD, are similar. The rate in cases of TBI is lower, however it still shows that three out of every four service members whose misconduct may be attributed to TBI are nevertheless denied eligibility.

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[261] C.S. Milliken, J.L. Auchterlonie & C.W. Hoge, Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning from the Iraq War, J. Am. Med. Ass'n (2007).
[262] See Section III.C above.
[263] See Table 7 above and accompanying text.
[264] This includes PTSD, TBI, schizophrenia, schizoaffective disorder, personality disorder, adjustment disorder, depression and anxiety.

Table 15: BVA COD decision rates for service members who allege selected mental health conditions, 1994-2015

Claimed mental health condition	Percent "dishonorable"
Average for all COD decisions	87%
Personality Disorder or Adjustment Disorder	84%
Any Mental Health condition	84%
Post-Traumatic Stress Disorder	81%
Traumatic Brain Injury	72%

The inadequacy of current regulations is even more clear when mental health is combined with hardship deployment or combat service. BVA decisions found that service was "dishonorable" for nearly 3 out of every 4 combat veterans with PTSD. That exceptionally high rate of disqualification not only violates Congress's intent but is also exceedingly poor public policy. Those are the veterans *most* in need of the mental health and medical services Congress intended to provide. And leaving so much service-acquired PTSD untreated poses risks both to the former service members and to the public at large.[265]

Table 16: BVD COD decision rates for service members who allege PTSD, 1994-2015

	Percent "dishonorable"
With combat service	73%
Contingency deployment[266] without combat service	93%

In some of these cases the mental health condition was identified only by self-reported symptomology, not a medical opinion. Thus, some of these claimed conditions may not in fact have existed at the time of misconduct. However, if even a fraction of these assertions were correct, and if the regulations were taking those conditions into account, then there would be a

[265] See Evan R. Seamone, Dismantling America's Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces, 37 Nova L. Rev. 479 (2013).

[266] Includes Vietnam, Grenada, Somalia, Iraq, and Afghanistan. Does not include Korea, because it was not possible to reliably distinguish wartime deployments to Korea from peacetime deployments.

substantial difference in exclusion rates for people claiming mental health conditions. There is not.

This is inconsistent with other VA regulations that relate to PTSD and behavior change. The VA recognizes that PTSD can lead to behavior changes including substance abuse, conflicts with colleagues, and avoidance of colleagues or work spaces.[267] In fact, a veteran can use evidence of this type of discipline problem as proof that they acquired PTSD in service in order to show service-connection for purposes of disability benefits.[268] Perversely, if those symptoms were so severe that the discipline problems led to an administrative separation for misconduct, the VA would likely characterize the service as "dishonorable" and deny eligibility. Similarly, the VA recognizes that mental health problems can present a "compelling circumstance" that would exonerate a violation of the statutory bar in cases of AWOL longer than 180 days,[269] but if that resulted in an absence of *less than* 180 days then VA regulations do not consider mental health and eligibility would most likely be denied. That result is neither permissible nor rational.

In order to remedy these deficiencies, the VA should adopt a provision providing for consideration of mental health as potential mitigation apart from the "insanity" exception, specifically instruct adjudicators to consider behavioral health issues and operational stress, and consider a medical opinion to be probative but not required.

D. Overbroad and vague regulations produce inconsistent outcomes

The regulations' broad and vague criteria produce profoundly inconsistent results. The degree of variation is so broad that the standards must be considered impermissibly arbitrary and capricious.

The sections above provided examples of contradictory results relating to what constitutes "minor" offense, how long of an absence is "persistent," whether the "insanity" exception is invoked when a person claims a mental health condition, and how severe misconduct must be to justify exclusion.[270] Inconsistency in individual decisions is most clear in

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[267] 38 C.F.R § 3.304(f)(5).
[268] Id.
[269] 38 C.F.R § 3.12(c)(6)(ii).
[270] See Section III above.

cases of absence without leave, because the severity of the offense is quantifiable and therefore comparable. There are extreme variations in outcomes: for example, one BVA decision has found that an unauthorized absence of more than 500 days is not "willful and persistent misconduct,"[271] but another BVA decision has found that an absence of only 32 days was "willful and persistent misconduct."[272] Veterans' advocates also see wide and unexplainable differences in how cases are decided, in particular wide variation in how mental health, drug use, and extenuating circumstances are accounted for, if at all.

The VA has formally acknowledged this inconsistency. In hearings before the House Armed Services Committee, which was considering changes to DOD administrative discharge rules, a VA General Counsel representative discussed how the VA treats different characterizations. The General Counsel representative acknowledged that its regulations were producing inconsistent results:

> [Congressman] White: Does the Veterans' Administration codify the criteria at all for these to be determined judgments or are these strictly human judgments?
>
> [VA Associate General Counsel] Warman: We do have a regulation that is very general.
>
> White: So there is a great room for variance?
>
> Warman: Yes, there is.[273]

The VA General Counsel made a similar statement to the House Veterans Affairs Committee in 1977 when trying to explain what kinds of conduct would result in a denial of eligibility:

> One of the problems that we have frankly is that these terms are very broad and very imprecise."[274]

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[271] Title Redacted by Agency, No. 12-32892 (Bd. Vet. App. Sept. 24, 2012).
[272] Winter v. Principi, 4 Vet. App. 29, 32 (1993).
[273] Staff of H. Comm. on Armed Servs. , Hearings on H.R. 523 to Limit the Separation of Members of the Armed Forces under Conditions Other Than Honorable, Rep. No. 92-23, at 6009-10 (Comm. Print 1971).
[274] Staff of S. Comm. on Veterans Affairs, Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, Rep. No. 97-387, at 355 (1977) (quoting statement by VA Gen. Counsel McMichael to the H. Comm. on Veterans Affairs).

But the VA has not done anything in the subsequent four decades to remedy this acknowledged problem.

Arbitrariness is also shown by wide differences between Regional Offices. In FY2013, Regional Offices adjudicated 4,603 COD decisions, and found that service was "other than dishonorable" in 10% of cases.[275] However, in the Los Angeles Regional office this figure was 0%. In Muskogee it was 2%, in San Diego it was 18%, in Boston it was 31%. These regional disparities have persisted for decades.[276]

Table 17: Selected Regional Office COD decisions, FY2013[277]

Regional Office	Number of COD decisions	% found "dishonorable"
Los Angeles	80	100%
Muskogee	100	98%
Nashville	132	98%
Cleveland	125	95%
St. Petersburg	400	91%
Average		***90%***
Buffalo	139	86%
Philadelphia	258	84%
San Diego	99	82%
Boston	39	69%
All	4,603	90%

Similarly, published decisions by the Board of Veterans' Appeals show a wide disparity in outcomes between adjudicators. Looking only at decisions by members of the Board who have decided over ten such cases, the rate of "dishonorable" findings ranges from 55% to 100%.

[275] FOIA response, available on file with the authors.
[276] See 123 Cong. Rec. 1657 (1977) (statement of Sen. Hart) ("For example, the Denver Regional Office has indicated that in the adjudication of other-than-honorable discharge cases in 1975, only 10 percent were ruled eligible for benefits. The Minnesota VA Regional Office, on the other hand, ruled that 25 percent of those veterans with other-than-honorable discharges were eligible for VA benefits.").
[277] FOIA response, available on file with the authors.

Table 18: Outcomes of COD decisions by selected members of the Board of Veterans' Appeals, 1990-2015

Judge	% "dishonorable"
Ma***	100%
Br***	100%
Wi***	100%
Pe***	94%
La***	91%
Br***	90%
Average	***87%***
Ph***	85%
Du***	82%
Se***	67%
Da***	64%
Hi***	55%

The appeal process does not remedy these inconsistencies. The CAVC has jurisdiction to evaluate questions of law, but only has jurisdiction to evaluate questions of fact for "clear error."[278] It must accept any "plausible" factual determination by the BVA. Nor can the Federal Circuit review factual findings at all.[279] The most common basis for a "dishonorable" finding, the willful and persistent regulatory bar, is a factual standard that the CAVC cannot overturn unless the BVA result is "implausible."[280] Appellate review has thus failed to refine and remedy the prevailing standards and instead has enabled enormous disparities persist for decades.

This degree of inconsistency does not reflect error or bad faith on the part of Regional Offices or Veterans Law Judges. Instead, it is the product of the regulation's vagueness and lack of appropriate standards. Because the regulations fail to account for essential considerations, such as mitigation, overall service, and severity of conduct, adjudicators are left to impute threshold standards or impute mitigation analysis by simply overlooking certain behavior, when

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[278] 38 U.S.C. § 7261(a)(4).
[279] 38 U.S.C. § 7292(d)(2).
[280] "The BVA's determination whether a discharge is based on willful and persistent misconduct is a matter of fact which the Court reviews under the 'clearly erroneous' standard of review. Under this standard if there is a plausible basis in the record for the factual determinations of the BVA the Court cannot overturn them." Stringham v. Brown, 8 Vet. App. 445, 447-48 (1995) (internal quotations and citations omitted).

the facts of a claim are overwhelming. While this produces some appropriate outcomes, it does so rarely and inconsistently.

The VA can remedy this arbitrariness by providing clear severity standards, by mandating evaluation of overall service, and requiring consideration of mitigating factors. Relying on individual adjudicators to impute such standards, in violation of the text of the regulations, is neither lawful nor reliable.

E. The regulations are inconsistent with the VA's public and official commitments

The VA's public and official communications incorrectly describe its Character of Discharge regulations. Contrary to the plain text of its regulations and the actual practice of its adjudicators, these public commitments state that behavioral health, overall service, mitigating circumstances, and hardship service are all taken into account, and that service members can receive interim health care while eligibility is decided. Those assurances are not borne out in practice.

The table on the following page compares the actual practice discussed above with public and official statements by the VA from three sources: its public fact sheet "Claims For VA Benefits And Character Of Discharge: General Information"[281]; a presentation delivered by VA staff to the Senate Veteran Affairs Committee on May 5, 2014, "Impact of Military Discharges on Establishing Status as a Veteran for Title 38 Disability and/or Healthcare Benefits";[282] and a letter from Undersecretary for Benefits Allison Hickey to House Minority Leader Nancy Pelosi on July 31, 2015.[283]

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[281] U.S. Dep't of Veterans Affairs, Claims for VA Benefits and Character of Discharge (Mar. 2014), http://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf [hereinafter COD Fact Sheet]
[282] Included with this Petition as Attachment B [hereinafter SVAC Presentation].
[283] Included with this Petition as Attachment C [hereinafter Pelosi Letter].

Table 19: Comparison of public and official statements with actual practice on selected issues

Issue	"VA COD Fact Sheet" [i]	Official statements	Actual practice
Are mental health conditions such as PTSD and TBI taken into account?	"[T]he impact of disabilities may be considered during the analysis of any mitigating or extenuating circumstances that may have contributed to the discharge."	"VA considers medical issues, such as PTSD and TBI." (SVAC Presentation [ii]) "VA may consider behavioral health issues, specifically PTSD." (Pelosi Letter [iii])	Mental health is considered only if service members state that they were "insane" and obtain a medical opinion diagnosing "insanity." [iv] PTSD has very little effect on decision outcomes. [v]
Is the quality of prior service accounted for, including hardship service such as combat deployments?	"VA considers… performance and accomplishments during service … and character of service preceding the incidents resulting in discharge."	"VA weighs the reason for separation against the overall nature of the quality of service." (Pelosi Letter)	The quality of prior service is considered only under one of the exclusions and only when the misconduct was "minor." [vi] Combat is not inherently "meritorious" and has little effect on decision outcomes. [vii]
Is the length of service accounted for?	"VA considers…. length of service."		There is no criteria for considering length of prior service.
Are mitigating factors taken into account?	"VA considers … any mitigating or extenuating circumstances."	"VA considers … any mitigating factors." (SVAC Presentation) "VA weighs the reason for separation against … any mitigating factors, including those related to AWOL for periods exceeding 180 days." (Pelosi Letter)	The only mitigating factors that may be considered are "insanity" and overall service when misconduct was "minor." The "compelling circumstances" related to absence without leave for more than 180 days may not be applied to any regulatory bars. [viii]
Can service members obtain tentative eligibility for health care?		"[A] former Service member may be provided health care at a VA medical facility based on a tentative eligibility determination in emergency circumstances." (Pelosi letter)	VA regulations prohibit granting tentative eligibility to service members when the pending eligibility issue relates to character of discharge. [ix]

[i] Available at http://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf. [ii] Attachment B. [iii] Attachment C. [iv] See section III.C. [v] See section IV.C. [vi] See section III.B.1. [vii] See section IV.B.2. [viii] See section III.B.4. [ix] See section III.A.

F. VA regulations prevent the VA from serving homeless, suicidal or justice-involved service members

The category of presumptively-ineligible service members includes people at elevated risk of suicide, homelessness and incarceration. The denial of medical and mental health care, housing assistance, disability compensation and vocational rehabilitation for these vulnerable veterans is particularly troubling.

1. Veteran Suicide

The past few years have revealed an epidemic of veteran suicide,[284] and the government has rightly prioritized addressing this crisis. Congress passed legislation this year expanding services to veterans,[285] the VA has created additional suicide-prevention outreach and counseling services, and the President has acknowledged the moral imperative of supporting service members at mental health risk:

> Every community, every American, can reach out and do more with and for our veterans. This has to be a national mission. As a nation, we should not be satisfied -- will not be satisfied -- until every man and woman in uniform, every veteran, gets the help that they need to stay strong and healthy.[286]

The VA's character of discharge regulations prevent it from achieving this goal. The most effective response to veteran suicide is bringing those at mental health risk into VA care: veterans outside of VA care have a 30% higher rate of suicide than those under VA care.[287] Yet the VA turns away veterans who are at highest risk of suicide: service members discharged for misconduct are twice as likely to commit suicide as those with Honorable or General discharges.[288] This happens because behavioral dysfunction that is symptomatic of early mental health problems is often treated as misconduct by military commands and managed through

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[284] Alan Zarembo, Detailed Study Confirms High Suicide Rate Among Recent Veterans, L.A. Times, Jan. 15, 2015.
[285] Clay Hunt Suicide Prevention for American Veterans Act, Pub. L. No. 114-2, 129 Stat. 30 (2015).
[286] White House, Remarks by the President at Signing of the Clay Hunt SAV Act (Feb. 12, 2015).
[287] Janet E. Kemp, Veterans Health Admin., Suicide Rates in VA Patients Through 2011 with Comparisons with Other Americans and Other Veterans Through 2010 (Jan. 2014), http://www.mentalhealth.va.gov/docs/suicide_data_report_update_january_2014.pdf.
[288] M.A. Reger et al., Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the US Military, J. Am. Med. Ass'n Psychiatry (2015).

administrative separations.[289] The VA's regulations have created a suicide pipeline: the people most at risk of suicide are the ones most likely to be turned away from the most effective suicide prevention care.

2. Veteran Homelessness

Swords to Plowshares operates veteran homeless shelters funded by the VA and by other sources. Approximately 15% of its occupancy is former service members who are excluded from VA services due to their discharge characterization. Other veteran homeless shelter providers have said informally that they have similar levels of occupants that are ineligible for VA services based on character of discharge.[290] Because these characterizations only represent up to 5% of all characterized discharges, we estimate that service members with these discharges are at least twice as likely to be homeless.[291]

This prevents the VA from eliminating veteran homelessness. One of President Obama's major policy goals, in which he is joined by mayors and governors across the country, is ending veteran homelessness. The only program that provides permanent housing support, and therefore an essential part of the effort to end chronic homelessness, is the HUD-VASH program, which combines the value of a Section 8 housing voucher with the wrap-around support of VA social work and health care services. That program employs VA's health care eligibility standard and funnels eligibility determinations through VHA. For service members with Other Than Honorable discharges, who may be health care-eligible based on a service-connected disability or pursuant to a Character of Discharge Review, there is no clear path for that individual to apply for HUD-VASH, undergo an eligibility determination, and gain access to that program. As a result of VA's restrictive policies regarding eligibility and applications, national efforts to end veteran homelessness are hampered.

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[289] See Section IV.C.

[290] Research shows that veterans separated for misconduct are much more likely to be homeless. Of the subset of veterans eligible for VHA services, 5.6% were separated for misconduct – but they make up 25.6% of the homeless veteran population at first VHA encounter. Adi V. Gundlapalli et al., Military Misconduct & Homelessness Among US Veterans Separated from Active Duty 2001-2012, 314 J. Am. Med. Ass'n 832 (Aug. 2015).

[291] The VA's policy for eligibility in its GPD program has changed at least twice since January 2014. In its current practice, it is granting eligibility to some service members that are not eligible for VA benefits according to the criteria discussed in this document. More information on the evolution and current status of GPD eligibility is available from the author.

3. Veteran Incarceration

According to the Bureau of Justice Statistics, 23.2% of service members in prison, and 33.2% of service members in jail, have discharge characterizations less than General, indicating that they are presumptively ineligible for VA services.[292] The corresponding figure in the non-incarcerated population is 7%, indicating that the risk of incarceration for this group is three times the risk for other former service members.

The VA's eligibility criteria prevent it from helping veterans avoid incarceration. The VA's Veteran Justice Outreach workers, who support diversionary Veteran Justice Courts, are only able to work with VA-eligible veterans. If a local veteran's court is unable to connect a defendant with non-VA services, then they may not be able to take advantage of that treatment court. In San Francisco, 27% of veterans who are eligible to participate in the veteran's treatment court are not VA-eligible.[293] The city obtained separate funding to ensure that these veterans can take advantage of the opportunity provided by the veteran treatment court, one of the only jurisdictions in the country to do so. In other cities, these service members may not be able to participate in the diversionary court and are more likely to be incarcerated.

G. The procedures to obtain an individual review are extremely burdensome on service members and on the VA

Whereas VA regulations waive eligibility review for service members with Honorable and General discharge characterizations,[294] service members with other discharge characterizations must undergo a years-long adjudication that compares their individual service to the statutory and regulatory bars. During that period, the service member is unable to access care or support through VA because agency regulations preclude "tentative eligibility" for such

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[292] DOJ Bureau of Justice Statistics Special Report, Veterans in Prison and Jail, 2011–12 (Dec. 2015).

[293] S.F. Cty. Sup. Ct., San Francisco Collaborative Courts Veteran Justice Court Fact Sheet (Aug. 2015), http://www.sfsuperiorcourt.org/sites/default/files/images/VeteransJusticeCourtFACT%20SHEETAugust2015.pdf.

[294] 38 C.F.R § 3.12(a); Adjudication Procedures Manual pt. III.v.1.B.5.c. Service members with these characterizations enjoy a rebuttable presumption of honorable service. That presumption may be rebutted in cases when a service member received a misconduct discharge but then received a discharge upgrade from the Secretary of Defense based on certain "amnesty" or "automatic" discharge upgrade programs implemented in the 1970s. Congress mandated that the VA may not base its eligibility determination on a DOD discharge characterization issued under those circumstances. 38 U.S.C. § 5303(e); 38 C.F.R § 3.12(k). The VA must apply the usual character of service review standards as described in this document. If the VA finds that the service member does not pass the statutory or discretionary bars, their service will be found Dishonorable for VA Purposes and they will be ineligible for most or all benefits.

veterans.[295] Sometimes, the adjudication process never even commences because service members are provided misinformation and the regulations do not give VA staff concise, helpful instructions.

In practice, the large majority of veterans placed in the presumptively ineligible category never receive an eligibility evaluation from the VA. Of the 121,490 service members discharged since 2001 in that group, the VA has completed reviews for only 13,300, or 10.9%.[296] That means that about nine out of every ten veterans discharged for misconduct are denied VA eligibility without even receiving an evaluation.

There are three main reasons for why so few receive eligibility evaluations. First, in our experience, most veterans seeking health care are never considered for eligibility. VA hospitals and clinics are probably the most prominent, well-known, accessible points of entry for veterans interested in service-related benefits. When a service member with a discharge characterization less than Honorable or General goes to a VHA facility, various legal provisions counsel that VA should ask him or her about enrolling in health care; provide an application and instructions on how to apply for benefits; initiate an eligibility review; and make a written determination as to eligibility.[297] Yet, time and time again, we have seen that hospital eligibility and enrollment staff simply turn away these service members outright without providing an application or instructions and without initiating a request for eligibility review. The judgment as to ineligibility is made solely on the basis of the assigned character of service, without reference to the governing regulations or consideration of other bases for eligibility--which include a prior term of service or health care for a service-connected injury for those with Other Than Honorable discharges.[298] The failure to refer directly decreases the number of eligibility reviews conducted, and secondarily reduces the likelihood that such a veteran will apply again later or elsewhere.

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[295] See Section III.A above.
[296] See Table 10 above and accompanying text.
[297] See 38 U.S.C. §§ 5100, 5102, 5104, 5107; 38 C.F.R. §§ 3.150, 17.36. See also Eligibility Determinations VHA Handbook 1601A.02 ¶ 6(3)(c) (Nov. 5, 2009); VA Health Care, No. IB 10-448, Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits (Dec. 2011), http://www.va.gov/healthbenefits/assets/documents/publications/ib10-448.pdf.
[298] See Pub. L. No. 95-126, § 2, 91 Stat. 1106, 1107-08 (1977); see generally Eligibility Determinations, VHA Handbook 1601A.02 ¶ 5.

Second, veterans seeking homeless housing services from the VA have no method for requesting an evaluation of eligibility. For example, The Grant and Per Diem (GPD) program is implemented by grantees, not by the VA itself. GPD providers must confirm veteran eligibility through the local VHA "GPD Liaison" within three days of the client's admission.[299] The GPD Liaison's role is limited to verifying eligibility status, not adjudicating eligibility.[300] In practice, the Liaisons report that a service member is ineligible if he or she lacks a Honorable or General Discharge without conducting any individualized COD analysis.

Third, veterans are often misinformed about the fact that they may be eligible for benefits and therefore never apply. The misperception that service members without Honorable or General discharges are categorically ineligible is widespread, and even occasionally promoted by the VA's own statements. In addition to the example discussed above of VHA eligibility staff turning people away, the VA's website incorrectly states that service members with discharge characterizations less than Other Than Honorable are only eligible for insurance programs.[301] Finally, the low rates of successful eligibility reviews contribute to this misperception of ineligibility.

Even now, the law is clear that any person who served may be eligible for some benefits. What is unclear is how to initiate, navigate, and adjudicate that eligibility review process. Whether the review process starts presently depends on whether the veteran applies for service-connected compensation or pension or for housing or health care, and whether the person he or she talks to has the right information. The process of getting health care is particularly burdensome for veterans as well as staff. A recent change to the VHA Handbook worsened the problem by removing the most instructive direction to Enrollment Staff about how to process applications by such veterans in accordance with governing law.[302] Instead, staff apparently have

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[299] VHA Handbook 1162.01(1), Grant and Per Diem Program Program ¶ 12(*l*) (July 12, 2013).
[300] Id. ¶ 6(e)(2).
[301] The VA's benefits website states, for example: "Specific Benefit Program Character of Discharge Requirements: Discharge Requirements for Compensation Benefits: To receive VA compensation benefits and services, the Veteran's character of discharge or service must be under other than dishonorable conditions (e.g., honorable, under honorable conditions, general)." U.S. Dep't of Veterans Affairs, Applying for Benefits and Your Character of Discharge, http://www.benefits.va.gov/benefits/character_of_discharge.asp (last updated May 19, 2015).
[302] Compare Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (Nov. 5, 2009) with Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(c) (Apr. 3, 2015).

to piece together various laws, regulations, and guidance to figure out how to initiate a review, make a determination, and inform the veteran of that decision.

What is more, there is scant guidance regarding veterans seeking health care for service-connected injuries, including those related to combat and Military Sexual Trauma.[303] It is important to remember that Congress specifically provided that service members discharged under Other Than Honorable conditions—even those whose service is adjudicated "dishonorable"—are eligible for a health care benefits package to treat their service connected injuries. Current regulations do not implement that critical statutory mandate, leaving veterans and VHA staff without sufficient guidance.

Even when an eligibility review does commence, the process is long and onerous—for the VA as well as for the veteran. The administrative burden of adjudication is high. Regional Offices place eligibility evaluations in the Administrative Decision lane, where, compared to other claims, adjudication takes twice as long to complete.[304] The average processing time is 1,200 days—nearly four years long.[305] During that adjudication, the VA must send out multiple notices seeking information and providing opportunities for submission of evidence and hearings. Veterans may respond to those notices and expend energy collecting various records, reports, and statements. Given the correlation between a less-than-fully-Honorable discharge and conditions such as homelessness, incarceration, and suicide, the burden of responding fully and in a timely manner to those notices is quite high. In the meantime, those veterans are barred from receiving tentative eligibility for health care. Given the high rates of suicidal ideation, Post-Traumatic Stress, and other mental health conditions among this population,[306] any delay in or denial of care can have a serious impact on service members, their families and communities.

Because of these numerous obstacles, most veterans have not received an eligibility review. If the VA were to do so now, organizational overload could result. Between 2001 and

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[303] See Pub. L. No. 95-126, § 2, 91 Stat. 1106, 1107-08 (1977); 38 U.S.C. § 1720D; Military Sexual Trauma (MST) Programming, VHA Directive 2010-033 (July 14, 2010).
[304] Data from the VA ASPIRE Dashboard.
[305] In September 2015, the average claim age was approximately 600 days. This indicates that the average time to complete is about 1,200 days.
[306] See Section H below; R.M. Highfill-McRoy et al., *supra* note 112; R.A. Kukla et al., Contractual Report of Findings from the National Vietnam Veterans' Readjustment Study: Volumes 1-4 (1988).

2013, 121,490 service members received discharges that will require pre-eligibility review because of 38 C.F.R. § 3.12(a).[307] That means that, on average, more than 10,000 veterans each year require VA eligibility reviews before they can obtain services. The VA has only adjudicated one in ten of these, suggesting that the VA would be simply incapable of actually adjudicating them all.

H. The regulations unfairly disadvantage service members from certain military branches

The current regulations privilege some service branches over others by creating a presumption of ineligibility for service members with administrative discharges under Other Than Honorable conditions. This perpetuates one of the problems that the statute was intended to ameliorate: unfair exclusion of service members based on based on military policy decisions that have nothing to do with the former service member's actual service.

The current regulations effectively impose an "honorable conditions" standard. This is accomplished by providing presumptive eligibility to all service members with "Honorable" or "General" characterizations[308] and by adopting highly exclusive standards that deny eligibility to almost all of the remaining service members. For example, for post-2001 veterans, the VA currently recognizes "other than dishonorable" service for 100% of the service members with Honorable and General characterizations, but denies eligibility for 96.5% of the service members with other characterizations.[309]

This standard produces unfair outcomes because each service has different standards for administrative discharges. The first three discharge characterizations—Honorable, General, and Other Than Honorable—are all administrative, non-punitive discharges. The Secretary of Defense has issued guidance on how service commanders should use these characterizations.[310] But that guidance delegates wide discretion to services and to commanders to choose whether to seek discharge, what basis for discharge to adopt, and what characterization to provide. Punitive discharges—Bad Conduct and Dishonorable—are governed by the Uniform Code of Military

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[307] See Table 11 above.
[308] 38 C.F.R. § 3.12(a).
[309] See Section III.D above.
[310] DODI 1332.14 (2014).

Justice and are therefore subject to uniform procedural and substantive standards. Punitive discharge rates vary between 0.3% in the Navy and 1.1% in the Marine Corps. In contrast, administrative discharges provide very little safeguards for consistency between services or between commanders, resulting in a *20-fold* variance between military branches: between 0.5% in the Air Force and 10% in the Marine Corps.

Table 20: Discharge characterizations, FY2011

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
Army	81%	15%	3%	0.6%	0.1%
Navy	85%	8%	7%	0.3%	0.0%
Air Force	89%	10%	0.5%	0.5%	0.0%
Marine Corps	86%	3%	10%	1.0%	0.1%
Total	**84%**	**10%**	**5%**	**1%**	**0.1%**

This difference between services is due to administrative policies, not individual merit. The Government Accountability Office has done a thorough study on discharge characterization disparities between services.[311] It documented that this range of discharge practices reflects differences in leadership and management styles, not degrees of "honor" in different services:

> Simply stated, different people get different discharges under similar circumstances, and the type of discharge an individual gets may have little to do with his behavior and performance on active duty.[312]

The GAO compared discharges of Marines and Airmen with the same misconduct history, service length, and performance history, and found that the Air Force was 13 times more likely to give a discharge under honorable conditions than the Marines.[313] Military leaders justified their practices with unit-level considerations, not individual merit: some believed that expeditious termination was in the best interest of the services, while others believed that maximizing punishment helped reinforce unit discipline.[314]

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[311] GAO Report, *supra* note 113.
[312] Id. at ii.
[313] Id. at 29-33.
[314] Id. at 32.

Because the VA's regulations rely so heavily on the distinction between Other Than Honorable and General administrative discharges, and because different services have very different standards for each of these, there are major disparities in VA eligibility between services. For service members discharged between 2001 and 2013, 12% of Marines would get turned away from a VA hospital if they sought care after leaving the service, but the equivalent figure for Airmen is only 1.7%.

Table 21: DOD discharge characterizations and initial VA eligibility by service branch, 2001-2013

	Presumptively VA-eligible			**Presumptively VA-ineligible**			
	Honorable	General	Total	OTH	BCD	Dishonorable	Total
USAF	90%	8%	98%	1%	0.7%	0.08%	1.7%
Army	84%	11%	95%	5%	0.2%	0.04%	5%
All branches	**85%**	**8%**	**93%**	**6%**	**0.9%**	**0.07%**	**7%**
Navy	82%	7%	89%	10%	0.7%	0.00%	11%
USMC	85%	3%	88%	9%	2.9%	0.19%	12%

Knowing that the Marine Corps gives more severe discharge characterizations than other services, and has done so for over half a century, the VA should be expected to grant eligibility to Marines at a higher rate than for other services when it conducts individual COD review. This expectation is also reasonable given that, for the current wartime period at least, the Marine Corps has endured harder conditions of service than most,[315] and given that Congress has singled out combat veterans for special consideration.[316] But—contrary to those expectations—this is not the case. In truth, VA COD decisions exclude Marines *at a higher rate* than any other military personnel. Far from ameliorating disparities, the current system is making them worse.

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[315] "The ground forces, composed predominantly of personnel from both the Army and the Marine Corps, have borne the brunt of the conflict." RAND Ctr. for Military Health Policy Research, Invisible Wounds of War: Psychological & Cognitive Injuries, Consequences, & Services to Assist Recovery 23 (Terri Tanielian & Lisa H. Jaycox eds. 2008). The death rate for Marines in Iraq was more than twice that of any other service branch, and 23 times that for Airmen, as of 2007. Emily Buzzell & Samuel H. Preston, Mortality of American Troops in the Iraq War, 33 Population & Dev. Rev. 555, 557 (2007).

[316] E.g., Combat-Related Special Compensation, an increased compensation payment for disabilities that resulted from combat, Pub. L. 110-181, ¶ 641, 122 Stat. 3 (Jan. 28, 2008).

Table 22: Board of Veterans' Appeals COD decisions by military service branch, 1990-2015

	"Other than dishonorable"
Navy	16%
Not specified	15%
Average	13%
USAF	12%
Army	12%
USMC	7%

Congress enacted a single, uniform standard for eligibility and gave the VA responsibility for individualized, independent review of conduct precisely to avoid the injustices that result from unequal treatment by the military services. The current VA regulations simply perpetuate—and in some cases actually exacerbate—those disparities. The VA does so by giving enormous, and typically controlling, weight to the discharge characterization even though they mean vastly different things between the services.

I. The Regulation Unlawfully Discriminates Against Homosexual Conduct

The VA's current regulations continue to enable it to deny benefits to claimants whose military discharge or release was for "homosexual acts involving aggravating circumstances or other factors affecting the performance of duties."[317] This rule singles out gay service members for special, disfavored treatment and is plainly unlawful in light of recent Congressional actions and court decisions. The VA has known since at least 2004 that this provision was outdated and inappropriate. In 2004 the VA issued a notice of proposed rulemaking that would have stricken the word "homosexual" in favor of the all-inclusive "sexual," noting that "all of the sexual offenses listed in this paragraph are egregious no matter who commits them."[318] The VA has failed for more than a decade to finalize that proposed rule, however—a delay that has long since become unlawful.

The unequal treatment of claimants discharged for homosexual acts is contrary to Congressional intent in enacting a repeal of the prior "Don't Ask, Don't Tell" ("DADT") policy.

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[317] 38 C.F.R. § 3.12(d)(5).
[318] Service Requirements for Veterans, 69 Fed. Reg. 4820 (Jan. 30, 2004).

Through that enactment, Congress clearly intended to eliminate differential treatment between heterosexual and homosexual conduct. Moreover, the VA's unequal treatment of homosexual conduct clearly violates the Fifth Amendment's guarantee of due process, which incorporates the requirements of the Equal Protection Clause. In 2013, the Supreme Court struck down the Defense of Marriage Act ("DOMA"), which denied federal benefits to same-sex couples, as an "unconstitutional … deprivation of liberty … protected by the Fifth Amendment of the Constitution."[319]

J. The government cost associated with increased eligibility would be largely offset by reductions in non-veteran entitlement programs and health care savings

Increasing the number of eligible veterans would increase direct costs to the VA, but the net cost to the Government would be offset by reductions in other entitlement programs and savings associated with more cost-effective health care delivery. An initial estimate shows that a 1% increase in eligibility may result in a net per capita expenditure increase of only 0.3%.

Benefits eligibility rules provide a starting point for analyzing how different programs would be affected. Expanding "veteran" eligibility does not create eligibility for the G.I. Bill, one of the more expensive VA benefits, nor for unemployment benefits. There would not be a significant increase in overhead costs, because the overall percentages concerned are relatively small. The services that are most likely to see a cost increase as a result of an expansion of eligibility are Health care, Compensation and Pension.

- Health care: Net government savings. It is not likely that service members with stable employer-paid insurance will migrate to VA health care as a result of this change. The service members who are likely to adopt VA health care are those on Medicare or Medicaid. VA health care is known to be about 21% more cost-effective than Medicare and Medicaid.[320] Therefore each increased dollar in VA health care services represents a total government savings of about $0.20.

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[319] See generally Obergefell v. Hodges, 135 S.Ct. 2071 (2015); United States v. Windsor, 133 S.Ct. 2675 (2013) (striking down Defense of Marriage Act ("DOMA"), which denied federal benefits to same-sex couples, as an "unconstitutional … deprivation of liberty … protected by the Fifth Amendment of the Constitution.").

[320] See Congressional Budget Office, Comparing the Costs of the Veterans' Health Care System with Private-Sector Costs, at 5 (Dec. 2014).

- Pension: Small net government cost increase. The eligibility criteria for VA Pension are similar to the criteria for Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI).[321] It is very likely that any service member who will become eligible for Pension is already receiving SSI/SSDI. Because those benefits cannot be received concurrently, the increase in Pension utilization will be offset by a reduction in SSDI/SSDI utilization.[322] There will be a net increase in government cost only to the extent that VA Pension provides more money than the SSI/SSDI benefit. SSI amounts vary by location, and SSDI amounts vary by work history; in California in 2015, veterans on SSI typically receive about $850, and veterans on SSDI typically receive about $950. This is only marginally below the current Pension rate of $1,072. Therefore each dollar increase in the Pension benefit only represents a net government cost increase of about $0.15.

- Compensation: Net increase in government cost. Service-connected disability compensation would be offset by reductions to SSI, although it is not possible to estimate how may new recipients are now receiving SSI.

Using these cost estimates as an illustrative guide, and assuming that utilization of these services would be the same as for currently-eligible servicemembers, the following table estimates the increased VA cost and net government cost for each 1% increase in the eligible veteran population.

[321] The "total disability" requirement for VA Pension is presumptively satisfied if the claimant is receiving SSI or SSDI. Brown v. Derwinski, 2 Vet. App. 444, 448 (1992).
[322] 38 C.F.R. § 3.262(f).

Table 23: Initial cost model for one-percent increase in eligibility ($ millions, 2010 baseline)

	Baseline expenditure [323]	VA cost increase from 1% eligibility increase		Net per capita government cost from 1% eligibility increase	
Compensation	37,960	1%	38,340	1%	38,340
Pension	9,941	1%	10,040	0.15%	11,432
Health Care	46,923	1%	47,392	-0.21%	46,829
Other	13,937	0%	13,937	0%	96,601
Total	**108,761**	**0.9%**	**109,709**	**0.3%**	**38,340**

Therefore while a 1% increase in eligibility would result in a 0.9% increase in direct costs to the VA, the net government per capita cost would only increase by 0.3%.

This does not include indirect savings that would result from veteran-specific care, better homelessness services, increased access to prison diversion programs, and other support services. VA health care is more effective at treating veteran-related health problems[324] and VHA users typically use more preventative care,[325] resulting in better health outcomes. Improved health outcomes result in lower lifetime health costs [326] and improved downstream effects on employment, housing, and family well-being.[327] Veterans in VA homelessness services also report better health outcomes than veterans in non-VA homeless services.[328] Prison diversion programs enable long-term employment and financial stability. The benefits of these positive downstream effects will accrue not only to veterans individually but also to the VA, to local veteran-focused organizations, and to veterans' family members and communities.

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[323] Expenditure data from U.S. Census Bureau, Statistical Abstract of the United States, at Table 523 – Veterans Benefits--Expenditures by Program and Compensation for Service-Connected Disabilities: 1990 to 2010 (2012).

[324] For example, the suicide rate of veterans under VHA care is 50% less than the suicide rate for veterans outside of VHA care. I. Katz, Suicide Among Veterans in 16 States, 2005 to 2008: Comparisons Between Utilizers and Nonutilizers of Veterans Health Administration (VHA) Services Based on Data From the National Death Index, the National Violent Death Reporting System, and VHA, Am. J. Pub. Health (Mar. 2, 2012).

[325] Because VHA has low out-of-pocket costs and because many of VHA's enrollees belong to those affected groups, the Congressional Budget Office (CBO) has found that "there may be some offsetting savings over the longer run." Congressional Budget Office, Comparing the Costs of the Veterans' Health Care System with Private-Sector Costs, at 3 (Dec. 2014).

[326] "VHA is more likely than private insurers to capture those longer-term savings" because veterans stay in the VA health care system. Id.

[327] See Ctrs. for Disease Control & Prevention, The Power of Prevention (2009).

[328] Byrne et al., Health Services Use Among Veterans Using VA and Mainstream Homeless Services, World Med. & Health Policy Vol. 5(4), 347–361 (2013).

V. EXPLANATION OF PROPOSED AMENDMENTS TO ALIGN VA REGULATIONS WITH STATUTORY AUTHORITY, OFFICIAL COMMITMENTS, AND PUBLIC EXPECTATIONS FOR THE FAIR TREATMENT OF VETERANS

This section proposes changes that will align VA practice with its statutory obligations, its official commitments, and public expectations. All of the changes proposed below are within the VA's rulemaking authority.

Summary of proposed changes:

- *Changes to 38 C.F.R. § 3.12(d).* Adopt a definition for "dishonorable conditions" that excludes service members based only on severe misconduct and that considers mitigating circumstances such as behavioral health, hardship service, overall service, and extenuating circumstances.

- *Changes to 38 C.F.R. § 3.12(a).* Reduce the number of service members that are presumptively ineligible by only requiring prior review for those with punitive discharges or discharge in lieu of court-martial.

- *Changes to 38 C.F.R. § 17.34.* Provide tentative eligibility for health care to all who were administratively discharged, who probably have a service-connected injury, or who probably honorably completed an earlier term of service pending eligibility review.

- *Changes to 38 C.F.R. § 17.36.* Ensure that service members seeking health care receive an eligibility review.

The full text of proposed regulations are attached. This Part provides justification for the suggested language.

A. Standards for "dishonorable conditions" – 38 C.F.R. § 3.12(d)

We propose to amend this paragraph with three major changes: (1) in the header paragraph, state that a "dishonorable conditions" finding is only appropriate for severe misconduct; (2) change the itemized forms of disqualifying conduct so that they are based on equivalent standards used in military law; and (3) add a section that lists mitigating circumstances, adopting standards applied in military law and similar VA regulations.

1. The header paragraph should instruct adjudicators to only deny eligibility based on severe misconduct

The current header paragraph states:

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

We propose to replace the header paragraph with this text:

> (d) The VA may find that a separation was under dishonorable conditions only if overall service warranted a Dishonorable discharge characterization. This is the case if discharge resulted from any of the conduct listed in paragraph (1), and that if that misconduct outweighs the mitigating factors listed in paragraph (2). Administrative discharges are not under dishonorable conditions unless evidence in the record indicates that a dishonorable discharge was merited and that the better discharge was issued for reasons unrelated to the service member's character.

The legislative history makes clear that Congress only wanted to exclude service members whose conduct would have justified a Dishonorable discharge characterization.[329] The current regulations do not contain any instruction that limits exclusion to cases of severe misconduct.[330] In particular, the overbroad standards result in the exclusion of most service members with administrative, non-punitive discharges for misconduct,[331] a level of service the Congress specifically intended to include in eligibility for basic veteran services.[332] Furthermore, the absence of substantive conduct standards has contributed to widely inconsistent decision outcomes.[333]

The proposed header paragraph remedies this deficiency this with three statements. First, it conveys the express language of Congress that exclusion should only occur for service members whose conduct would merit a dishonorable characterization. Second, it instructs the adjudicator to balance the enumerated forms of negative conduct against enumerated forms of mitigating circumstances, discussed below. Third, in order to avoid improperly excluding those whose conduct was below honorable but better than dishonorable, a category that Congress intended to receive eligibility, it explains that administrative discharges generally do not indicate dishonorable conditions.

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[329] See Section II.B above.
[330] See Section III.B.1 above.
[331] See Section IV.A above.
[332] See Section II.D above.
[333] See Section IV.D above.

2. The definitions of disqualifying conduct should adopt specific standards imported from military law

We propose to retain the same categories of disqualifying conduct that currently exist, but provide more specific standards that conform with military law criteria for dishonorable characterizations.

Discharge to escape trial by general court-martial

The current paragraph states:

> Acceptance of an undesirable discharge to escape trial by general court-martial

We propose to replace this paragraph with the following text:

> Acceptance of a discharge to avoid trial by general court-martial. Avoidance of a trial by general court-martial is shown by documentation that charges had been referred to a general court-martial by a general court-martial convening authority.

This change clarifies the existing standard by explaining the evidence required under military law to show that the matter had been placed under general court-martial jurisdiction. A charge sheet alone does not indicate that a general court-martial has been recommended, because the matter could be referred to a special or summary court-martial. We have seen cases where a person is excluded on this regulation when charge sheets have been proffered but no general court-martial recommendation has been made. This amendment would clarify the correct analysis that adjudicators must make to apply the existing standard.

Mutiny or spying

No proposed changes.

Moral Turpitude

The current paragraph states:

> An offense involving moral turpitude. This includes, generally, conviction of a felony.

We propose to replace this paragraph with this text:

> An offense involving moral turpitude. Moral turpitude is conduct that involves fraud, or conduct that gravely violates moral standards and involves the intent to harm another person.

This change replaces a vague term with a more specific definition derived from extensive caselaw on this question. We note that the Office of General Counsel has produced a Precedential Opinion on the definition of "moral turpitude."[334] However, the holdings of that Opinion have not been incorporated into the regulation or the training materials on this topic, and it has been inaccurately incorporated into the Adjudication Procedures Manual used by front-line adjudicators.[335] Therefore the Precedential Opinion has little impact on most decisions. We also note that the definition of moral turpitude proposed in the Part 5 Manual Rewrite does not adopt the standards of the Precedential Opinion.[336]

We propose a concise but specific definition that is based on the existing caselaw on this question, and that is consistent with the standards provided in the Precedential Opinion. The most extensive body of legal analysis on this question can be found in immigration law, where Congress has mandated certain responses when non-citizens commit "crimes involving moral turpitude."[337] The 9th Circuit Court of Appeals has produced certain guidelines for determining whether a crime involves moral turpitude. "[T]he federal generic definition of a [crime involving moral turpitude] is a crime involving fraud or conduct that (1) is vile, base, or depraved and (2) violates accepted moral standards … [and (3)] 'almost always involve[s] an intent to harm someone.'"[338] Turpitude does not encompass "all offenses against accepted rules of social conduct."[339] Rather, "[o]nly truly unconscionable conduct surpasses the threshold of moral turpitude."[340] Crimes against property that do not involve fraud are generally not considered crimes of moral turpitude.[341]

The Precedential Opinion adopted the term "gravely violates moral standards," in place of the 9th Circuit's phrase "vile, base or depraved conduct that violates accepted moral

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[334] VA Gen. Counsel Precedential Op. 06-87 (1987).
[335] See Section III.B.2 above.
[336] Id.
[337] 8 U.S.C. § 1227(a)(2)(A)(i).
[338] Saavedra-Figueroa v. Holder, 625 F.3d 621, 626 (9th Cir. 2010) (citation omitted).
[339] Robles-Urrea v. Holder, 678 F.3d 702, 708 (9th Cir. 2012).
[340] Turijan v. Holder, 744 F.3d 617, 621 (9th Cir. 2014) (citation omitted).
[341] See Rodriguez-Herrera v. INS, 52 F.3d 238, 240 n.5 (9th Cir. 1995).

standards." We propose to adopt the Precedential Opinion's phrasing for ease of administration. However we believe that it is important to reassert the principle, omitted from the Part 5 Manual Rewrite, that crimes against property are not moral turpitude unless they involve fraud. Therefore the combined proposed language derives from the 9th Circuit caselaw, but is condensed as: fraud, or conduct that gravely violates moral standards and that involves the intent to harm another person.

Repeated offenses ("willful and persistent misconduct")

The current paragraph states:

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

We propose:

> Three or more separate incidents of serious misconduct that occurred within one year of each other. Misconduct is serious when it is punishable by at least one year of confinement under the Uniform Code of Military Justice.

We propose this language because it is specific, predictable, and derived from military law. The current language deviates greatly from the corresponding standard in military law, produces inconsistent results, and results in the exclusion of service members that congress intended for the VA to include.[342]

We recognize that the purpose of this regulation is to identify people who have engaged in a series of acts of misconduct where no individual act justifies a dishonorable characterization, but where the accumulation of misconduct shows a rejection of military authority amounting to dishonorable character. However, the current regulation fails to achieve this purpose. Its language is so expansive that almost any series of discipline problems is a plausible basis for exclusion.[343] It fails to distinguish truly dishonorable conduct from conduct that is merely

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[342] See Section IV.B.1 above.
[343] See Section III.D above.

improper and that justifies a lesser punishment. Like a dishonorable characterization, a finding of "dishonorable conditions" should be rare, and most forms of misconduct do not justify it. This distinction exists in military law, it existed for the Congress that wrote the law, and a correct regulatory interpretation of the statute must incorporate it.[344]

Military law contains a clear standard for when repeated, less-than-severe misconduct might justify a dishonorable characterization. The Manual for Courts-Martial in place at the time Congress enacted the statute instructed a dishonorable characterization for repeated offenses that did not involve moral turpitude only if there had been five prior convictions for minor offenses.[345] Current regulations allow for a dishonorable characterization for repeated offenses if there have been three convictions within the past year.[346] Non-judicial military punishment is only available for minor offenses, as determined by the military commander.[347] Because misconduct that results in a non-judicial punishment is not serious misconduct, it cannot be the basis for a dishonorable characterization. The original regulations adopted by the VA respected this principle by only considering misconduct that resulted in a conviction.[348]

Our proposed regulation would adopt the current military law standard but omit the requirement for court-martial convictions. The proposed language would find "dishonorable conditions" if within one year prior to discharge there had been three documented cases of misconduct that was eligible for at least one year of confinement, regardless of whether that conduct was actually punished by court-martial. This would avoid cases where service members are excluded because of misconduct that occurred long before discharge, or for misconduct that was too minor by military standards to contribute to a finding of dishonorable character.

Our proposed language removes this paragraph's mitigating circumstances exception. We do this for two reasons. First, the mitigating circumstances exception in the current regulation is far narrower than what is required by statute, what the VA has officially committed to, and what the public expects.[349] It is only available in limited circumstances; the only

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[344] See Section II.D above.
[345] MCM 1943 ¶ 104c(B).
[346] RCM 1003(d)(1).
[347] MCM 2012 pt. V.1.e.
[348] 11 Fed. Reg. 8729, 8731 (Aug. 13, 1946).
[349] See Section IV.B.2 above.

mitigating factor is quality of service, without considering mental health, operational stress, duration of service, or extenuating circumstances; and the standard for quality of service is far too high, not even considering combat service as inherently "meritorious." Second, because military law requires that mitigating factors be considered prior to all dishonorable characterizations,[350] we have proposed below to include a comprehensive mitigating analysis element that applies to all categories of disqualifying conduct. This makes a limited mitigation exception in this paragraph superfluous.

Sexual misconduct

The current paragraph states:

> Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

We propose to eliminate this section.

A conduct prohibition that singles out homosexual conduct is unconstitutional.[351] Preserving the regulation without its discriminatory content is unnecessary. The aggravating circumstances listed in this regulation are likely encompassed within the "moral turpitude" prohibition, or are subject to general courts-martial, and are therefore superfluous; if not, then the conduct not "dishonorable" and should not be a basis for denying veteran service.

Furthermore, the purpose of this regulation was to discriminate against homosexual conduct, and without its discriminatory purpose there is no reason to retain it in any form. The regulation originally targeted "homosexual acts or tendencies,"[352] was then limited to "homosexual acts,"[353] and was then limited to "aggravated" homosexual acts.[354] Now that the

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[350] See Section II.C.3 above.
[351] See Section IV.I above.
[352] 11 Fed. Reg. at 8,731.
[353] 28 Fed. Reg. 123 (Jan. 4, 1963).

underlying conduct is permitted, there is no reason to retain the limiting factors as a stand-alone prohibition. A simplified regulation would omit this paragraph entirely.

3. The regulations should require adjudicators to consider mitigating circumstances

There is no provision in regulation requiring consideration of mitigating factors.

We propose to add the following paragraph:

> (2) The severe punishment of a dishonorable characterization is not justified where extenuating circumstances explain or mitigate the misconduct. The Secretary must consider any information that would justify a reduction in the severity of punishment. The following circumstances may show that service was not dishonorable
>
> > (i) The individual contributed substantial favorable service to the nation. A determination of favorable service to the nation will consider:
> >
> > > (A) The duration and quality of service prior to the misconduct that resulted in discharge, and
> > >
> > > (B) Whether the service included hardship conditions, such as overseas deployment.
> >
> > (ii) The person's state of mind at the time of misconduct was adversely affected by mental or physical disabilities or operational stress.
> >
> > (iii) The person's actions were explained by extenuating circumstances, taking into consideration the person's age, maturity, and intellectual capacity.

We propose this language to harmonize the regulation with military law, other VA regulations, the VA's commitments, and public expectations. The current regulatory definition of "dishonorable conditions" does not include a general provision for considering mitigating circumstances.[355] This is inconsistent with military law, where a dishonorable characterization is only justified after consideration of a full range of mitigating circumstances.[356] Nor is the

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[354] 45 Fed. Reg. 2318 (Jan. 11, 1980).
[355] See Section III.B.4 above.
[356] See Section II.C.3 above.

current regulation consistent with the VA's own regulations. The VA has adopted a list of mitigating circumstances that may excuse an absence of over 180 days, as required by a statutory bar, but it has not applied these mitigating circumstances to absences that are less than 180 days and therefore subject to review under its regulatory bars.[357] This produces the perverse outcome where the VA is more lenient on more severe misconduct.

We propose a list of mitigating circumstances that incorporates terms from military law and from other VA regulations. The Military Judges' Benchbook provides model sentencing instructions that list the following mitigating factors: age, family/domestic difficulties, good military character, financial difficulties, mental/behavioral condition, personality disorder, physical impairment, addiction, education, and performance evaluations.[358] The VA's regulations defining "compelling circumstances" for the purposes of mitigating an unauthorized absence of more than 180 days lists the following factors: duration and character of service prior to absence, service of such quality that it is of benefit to the nation, family emergencies or obligations, obligations or duties owed to third parties, age, cultural background, educational level, judgmental maturity, hardship or suffering incurred during overseas service, combat wounds, and other service-incurred or aggravated disabilities.[359]

The proposed regulation adopts these factors from military law and VA regulations and groups them under three headers: factors that show favorable service to the nation; factors relating to the veteran's state of mind, as determined by their mental and physical health; and extenuating circumstances. The only term in the proposed regulation that is not adopted directly from existing military and VA sources is the factor considering "operational stress." "Operational stress" is similar to the consideration of "hardship … incurred during overseas service" that is listed among the "compelling circumstances" factors. We propose to add this term because the military services have recently recognized "operational stress" as a distinct phenomenon, particularly in the current era of repeated deployments, that can justifiably result in behavior changes among otherwise honorable service members.[360] It is important that the VA's

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[357] See Section IV.B.2 above.
[358] See, e.g., Military Judges' Benchbook, DA Pam 27-9 ¶ 2-5-13.
[359] 38 C.F.R § 3.12(c)(6)(i, ii, iii).
[360] U.S. Dep't of the Army, Field Manual 4-02.51 (FM 8-51): Combat and Operational Stress Control (2006). ("Soldiers, however good and heroic, under extreme combat stress may also engage in misconduct."). U.S. Dep't

regulations reflect current understanding and terminology for how the demands of military service may explain behavior changes.

We do not propose to retain the language that currently exists in the "willful and persistent misconduct" bar, whereby some misconduct is mitigated where service is "otherwise honest, faithful and meritorious." While these are certainly positive qualities, these terms are not mitigating factors under military law. Moreover, those terms have been interpreted by Veteran Law Judges as imposing a much higher standard for mitigation than exists under military law or under other VA regulations. For example, adjudicators have found that even combat service is not "meritorious" enough to benefit from this exception, if the service member did not also earn awards for valor.[361] By only rewarding exceptional performance, it fails to acknowledge that military service is inherently beneficial to the nation. A proper mitigation analysis must give some credit to the fact of service, and to the duration of proficient service. This "meritorious" standard departs so significantly from military law and congressional intent that it must be replaced.

B. Which service members require individual review – 38 C.F.R. § 3.12(a)

We propose to amend this paragraph so that individual review is not required for people who are very unlikely to be excluded based on revised standards. The current paragraph states:

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

We propose the following text that replaces the final sentence:

> If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C.

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of the Navy & U.S. Marine Corps, Combat and Operational Stress Control: NTTP 1-15M, MCRP: 6-11C (Dec. 2010) (identifying behavior that characteristically results from operational stress, including "losses of control," "intense and uncharacteristic anger," and "sudden outbursts of rage").

[361] See Section III.B.1 above.

> § 101(2)). An administrative discharge shall be a discharge under conditions other than dishonorable unless it is issued in lieu of court-martial. Administrative discharges issued in lieu of court-martial, Dishonorable discharges, and Bad Conduct Discharges must be reviewed under the criteria in paragraph (d) in order to determine whether the separation was under dishonorable conditions.

This change will ensure that people who are not at risk of being found "dishonorable" are able to access care and services without requiring an individual review by the VA.

The VA is currently excluding more veterans than at any point in the nation's history, more than three times as many people as were being excluded when the current "liberalizing" law was enacted.[362] This is not because service members are behaving worse, or because VA adjudicators are evaluating them more severely. It is solely because the VA's regulations set aside an increasing share of service members that require adjudication—many more than behaved "dishonorably," and many more than the VA can actually adjudicate.[363] It is both impractical and contrary to statue for the VA to require eligibility adjudications for categories of service members that Congress specifically intended to receive eligibility.

It is also unjust. All of these men and women served the nation, and it is shameful for them to be left without health care for disabilities, without housing if they are homeless, without income support if they are unable to work. The injustice is most acute for service members denied eligibility despite having served under hardship conditions. Over 33,000 service members discharged since 2001 served on a contingency deployment and yet received a discharge characterization that the VA treats as presumptively ineligible.[364] Because the VA has granted eligibility to only 4,600 veterans of this era,[365] there are probably over 30,000 service members who deployed to contingency operations since 2001 but who are currently ineligible for VA services.

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[362] See Table 10 above.
[363] See Section IV.A above.
[364] DOD FOIA Response 14-0557.
[365] See Table 10 above.

Table 24: Selected discharge characterizations of service members who deployed to contingency operations, 2001-2014[366]

Characterization	
Presumptively VA-ineligible	**33,977**
Other Than Honorable	29,364
Bad Conduct	4,265
Dishonorable	348

The dramatically increasing rate of exclusion from VA services results from the military's increasing use of administrative separations to deal with discipline issues that previously led to retention, retaining, and Honorable or General characterizations.[367] The use of the discharge characterization has increased from less than 1% of all discharges to 5.5%.[368] Because Congress instructed the VA to exclude these service members only on an exceptional basis, and because this represents such a large portion of all service members, it is no longer appropriate for the VA to presume ineligibility for all of them. In order to approach the rate of exclusion intended by Congress, and the standards it intended, the VA must recognize eligibility for a large number of these people separated for non-punitive administrative discharges.

As for people with General and Honorable discharges—some of whom may prove to be ineligible, but all of whom can receive services prior to eligibility determinations—the VA should identify additional categories of discharges that are very likely to be found eligible and who will not require eligibility review.

We propose to limit pre-eligibility reviews to people with punitive discharges (Bad Conduct or Dishonorable) and Other Than Honorable discharges issued in lieu of court-martial. This is an easily-administered standard that would ensure prompt eligibility for large numbers of people who are not at risk of exclusion.

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[366] DOD FOIA Response 14-0557.
[367] See Section II.D above.
[368] See Figure 2.

DOD instructions allow administrative discharges for misconduct under two scenarios: where the discharge is "In lieu of court-martial"[369] and where there is generic "Misconduct"[370] that the commander did not see fit to refer to court-martial. The first category includes cases where court-martial charges have been alleged, a preliminary investigation has occurred, and the service member, under advice from defense counsel, has admitted guilt and requested separation. [371] When this occurs, the separation documentation clearly states "Discharge in Lieu of Court Martial." This is a category that may involve serious misconduct, including conduct that is morally turpitudinous or that might have been referred to a general court-martial. It is therefore proper for the VA to require an individual evaluation for these service members to determine whether their conduct was in fact dishonorable.

In contrast, the second category of misconduct that might lead to an Other Than Honorable discharge does not likely involve conduct at risk of exclusion under "dishonorable" standards. DOD Instructions list several types of conduct that might justify separation under the generic "Misconduct" paragraph, including "Minor disciplinary infractions," [372] and "Pattern of misconduct … consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline."[373] This includes the types of misconduct that justify separation but that do not show "dishonorable" service, and which Congress instructed the VA to grant eligibility. They are all, moreover, situations where the commander, considering all mitigating and extenuating factors, decided not to convene a court-martial. In order to conform with statutory instructions, and in order to grant eligibility in a fair and efficient manner, the VA should not withhold eligibility for these service members pending individual review.

For ease of administration, we do not propose listing and categorizing all possible bases for administrative discharges. There are several designations that might appear on a DD214 when generic "Misconduct" was the basis for discharge. Military branches might use different terms for similar situations. Instead, we propose to set aside administrative discharges issued in lieu of court-martial, and to waive individual review for all others.

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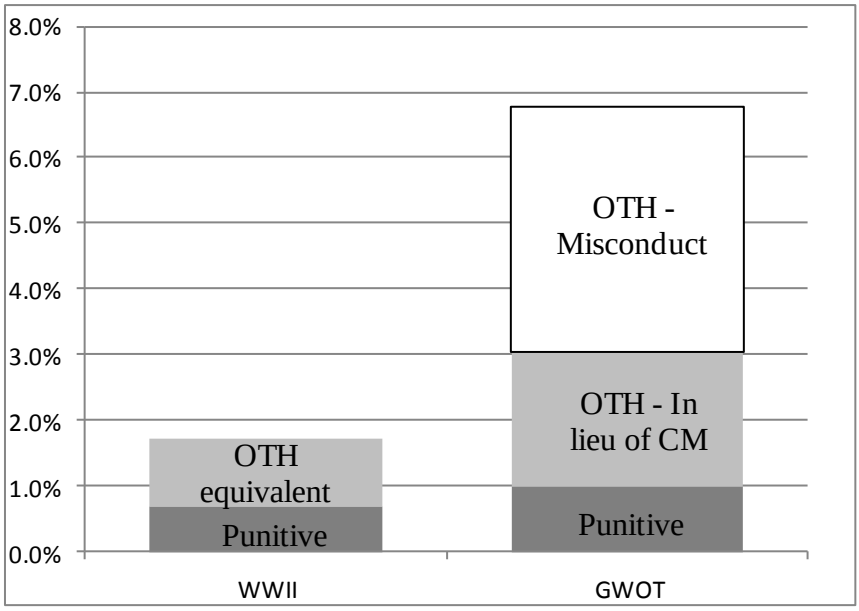
[369] DODI 1332.14, Enclosure 3 ¶ 11.
[370] Id., Enclosure 3 ¶ 10.
[371] Id., Enclosure 3 ¶ 11.c.
[372] Id., Enclosure 3 ¶ 10.a.1.
[373] Id., Enclosure 3 ¶ 10.a.2.

This category of service members—with administrative, non-punitive discharges for general misconduct that did not involve court-martial charges—represent 3.8% of all service members, and over half of post-2001 the service members currently excluded from VA services. Allowing presumptive eligibility for these service members would reduce overall exclusion rates from 6.8% to 3%, much closer to the 1944 rate of 1.9% that Congress thought was too high when it enacted the current statute. The remaining 3% of service members include those with punitive discharges and those given administrative discharges in lieu of court-martial. This category of veteran would not be eligible for VA services unless a COD review finds that their service was other than dishonorable under the standards in 38 C.F.R. 3.12(d).

Figure 3: Types of discharges leading to presumptive VA exclusion[374]



C. Tentative eligibility for health care - 38 C.F.R. § 17.34.

We propose to expand tentative eligibility to include all service members who will probably be found eligible for health care and to include instructions for Enrollment and

[374] DOD FOIA request, 14-10057. Staff of H. Comm. on Veterans' Affairs, Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings, Hearing Before the Committee on Veterans' Affairs on S. 1307 and Related Bills, Rep. No. 97-887, at 600-01 (Comm. Print 1977).

Eligibility Staff on initiating the Character of Discharge Review process. The current regulations read, in whole:

> Subject to the provisions of §§ 17.36 through 17.38, when an application for hospital care or other medical services, except outpatient dental care, has been filed which requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized without further delay if it is determined that eligibility for care probably will be established. Tentative eligibility determinations under this section, however, will only be made if:
>
> > (a) In emergencies. The applicant needs hospital care or other medical services in emergency circumstances, or
> >
> > (b) Based on discharge. The application is filed within 6 months after date of discharge under conditions other than dishonorably, and for a veteran who seeks eligibility based on a period of service that began after September 7, 1980, the veteran must meet the applicable minimum service requirements under 38 U.S.C. § 5303A.

We propose to replace this with the following:

> Subject to the provisions of §§ 17.36 through 17.38, when any person has filed, or expressed an intent to file, an application for hospital care or other medical services, except outpatient dental care, or has expressed an interest in hospital care or medical services or concerns that indicate the need for care or treatment and that person's application requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized if it is determined that eligibility for care probably will be established.
>
> (a) Tentative eligibility determinations under this section, however, will only be made under the following circumstances:
>
> > (1) In emergencies. When the applicant needs hospital care or other medical services in emergency circumstances, those services may be provided based on tentative eligibility;
> >
> > (2) Based on discharge. When adjudication as to character of discharge is required, tentative eligibility will be provided to any applicant who has an Other Than Honorable characterization, who served more than four years, or who served more than one enlistment. For an applicant who seeks eligibility based on a period of service that began after September 7, 1980, the applicant

> must meet the applicable minimum service requirements under 38 U.S.C. § 5303A; or
>
> (3) Based on length of service. When any applicant does not meet applicable minimum service requirements under 38 U.S.C. § 5303A, tentative eligibility will be provided if the applicant was released for medical or health reasons, including medical discharge or retirement, condition not a disability, or other physical or mental health conditions.

Broadly, the expressed purpose of the current regulation is to allow the VA to provide medical care to all who are eligible or likely eligible without delay. It seeks to accomplish that goal by granting eligibility immediately if possible, and by granting "tentative eligibility" where eligibility "probably" will be established. The current proxies for probable eligibility are (a) emergencies and (b) discharge within the last six months where the discharge is "under conditions other than dishonorable" and any minimum service requirement is met.

Change is needed for three primary reasons. First, the current regulation is opaque and provides scant guidance to front-line staff. Whether a service member was discharged other-than-dishonorably and whether a service member meets any minimum service requirement is presently a complex adjudicatory process. Greater clarity and specificity would be helpful to describe whether a service member is probably eligible. Second, the proxies chosen do not adequately predict probable eligibility. As one example, they do not evaluate whether a service member completed a first or prior term of service on which eligibility can be based. Third, adoption of the proposals detailed above will increase access to the VA for service members with Other Than Honorable discharges, and their eligibility for VHA services is therefore probable. That has the added benefit of ensuring that other-than-honorably discharged service members with combat-related or Military Sexual Trauma-related health conditions are not wrongfully denied medical benefits for those service-connected injuries, to which they are entitled by law.

[375] Congress has recognized the "strong moral obligation of the Federal Government to provide treatment for service-connected disabilities."[376]

Accordingly, the proposed regulation implements two new proxies for probable eligibility. The first grants tentative eligibility to those service members with Other Than Honorable discharges, for the reasons explained above, and to service members where facts indicate that they completed at least one term of service. The second, which applies where the service member does not appear to meet minimum service requirements, grants tentative eligibility to those who appear to have service-connected injuries based on available facts.

It is possible that some who are granted tentative eligibility will later be found ineligible after a more careful review. However, the VA should take the policy of being over-inclusive, rather than underinclusive—a policy that Congress clearly supports.[377] The denial of prompt treatment to a service member in need has long-term consequences. It is better to give service members the benefit of the doubt and provide support for a period of time while adjudication is ongoing. If ultimately the service member is not eligible, then the VA can cease providing services.

Finally, we propose that any hospital or medical care provided during the tentative eligibility period is not charged to the applicant. The VA may, of course, bill other insurers. However, so as not to deter service members from seeking necessary care based on the specter of potential charges, the best policy is to waive costs during tentative eligibility.

We also propose to add the following subsections to the regulation, in order to describe necessary procedures for satisfying this regulation's goal.

> (b) When a person files an application for hospital care or other medical services, or has expressed an interest in hospital care or medical services, and an adjudication as to service connection or a determination as to any

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[375] Pub. L. 113-146 (as amended by Pub. L. 113- 175, Pub. L. 113-235); see VHA Directive 2010-033, Military Sexual Trauma (MST) Programming (July 14, 2010); IB 10-448 Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits (Nov. 2014).

[376] S. Comm. on Veterans' Affairs, Eligibility for Veterans Benefits Pursuant to Vietnam Era Discharge Upgrading, report to accompany S. 1307, 95th Cong., 1st sess., at 18 (June 28, 1977).

[377] See, e.g., House Hearings on 1944 Act, *supra* note 28 at 415 ("[W]e are trying to give the veteran the benefit of the doubt, because we think he deserves it.").

> other eligibility prerequisite is required, a request for an administrative decision regarding eligibility shall promptly be made to the appropriate VA Regional Office, or to the VA Health Eligibility Center.
>
> (c) Applicants provided tentative eligibility shall promptly be notified in writing if they are found ineligible and furnished notice of rights of appeal.

The current regulation, written in the passive voice, fails to provide clear instructions to VHA staff and does not fully implement VA's broad mandate to provide rehabilitation and treatment services to those who have served. It passively refers to applications that have been filed, without here specifying how an applicant can obtain that application and submit it. Similarly, this regulation does not provide instructions to VHA staff about initiating a Character of Discharge Review for service members who seek health care for whom eligibility cannot immediately be established. Moreover, the regulation does not reflect the reality that when veterans go to VA health facilities they ask for treatment, not applications. That is, they say that they need counseling, medications, or housing, not an enrollment form.

To effectively implement this regulation, the proposed introductory paragraph triggers the tentative eligibility determination process not only when an application is filed, but also when a person expresses an intent to file an application, expresses interest in hospital or medical care, or expresses concern that indicates a need for care or treatment. This pragmatic, expansive language parallels the federal regulations for the Supplemental Nutrition Assistance Program (SNAP, commonly known as "food stamps"), which instruct staff to "encourage" to apply any person who "expresses interest in obtaining food stamp assistance or expresses concerns which indicate food insecurity."[378] The VA has a similar—indeed greater—obligation to ensure that all veterans get the care and treatment that they need and should adopt a similar stance of encouraging to apply all those who are interested.

Proposed subsection (b) then instructs VHA staff to request an administrative decision to the VA Regional Office or the VA Health Eligibility Center, and subsection (c) requires notice of any determinations and rights of appeal to service members. As discussed above, 90% of service members who require eligibility determinations never even obtain a review. Clearer instructions

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[378] 7 C.F.R. § 273.2(c)(2).

may help remedy the widespread phenomena of less-than-honorably discharged veterans being denied by default and of being turned away without adjudication. Practical guidance on required procedures will help VA staff efficiently and correctly process applications.

D. Changes to health care enrollment procedures – 38 C.F.R. § 17.36(d).

We propose revising the regulations to offer clearer guidance to VA staff and to embrace a more veteran-friendly enrollment process. We propose inserting short additions to the existing regulations, as underlined below:

> (d) Enrollment and disenrollment process—
>
> (1) Application for enrollment. Any person may apply to be enrolled in the VA healthcare system at any time. Enrollment staff shall encourage any person who expresses an interest in obtaining hospital care, medical services, or other benefits or who expresses concerns that indicate an interest in benefits to file an application. Upon request made in person or in writing by any person applying for or expressing an intent to apply for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form and instructions will be furnished. For enrollment in VA healthcare, the appropriate application form is the VA Form 10–10EZ. Any person who wishes to be enrolled must apply by submitting a VA Form 10–10EZ to a VA medical facility or via an Online submission at https://www.1010ez.med.va.gov/sec/vha/1010ez/.
>
> (2) Action on application. Upon receipt of a completed VA Form 10–10EZ, a VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will accept a veteran as an enrollee upon determining that the veteran is in a priority category eligible to be enrolled as set forth in § 17.36(c)(2). Upon determining that a veteran is not in a priority category eligible to be enrolled, the VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will inform the applicant that the applicant is ineligible to be enrolled. If eligibility is in question based on character of service, a request for an administrative decision regarding eligibility shall be made to the appropriate VA Regional Office, or the VA Health Eligibility Center, using a VA Form 7131.

The proposed regulations seek to implement a number of VA's goals, including clear guidance to applicants and staff and ease of access for service members. To those ends, the proposal includes more detailed instruction for VA staff. For example, it instructs staff to provide the appropriate application form, a 10-10EZ, to any person who expresses an interest in health care and detail where to request a Character of Discharge Review if needed. The requirements for process and adjudication currently exist in disparate provisions of law, regulations, and guidance, but a concise and direct provision here would be most useful. Moreover, in accordance with VA's mission of caring for all veterans, the proposal urges VA staff to encourage individuals to apply for health care if any interest in or need for treatment is expressed. The additional language will work to ensure that all those who are eligible receive the support and treatment that they deserve.

VI. CONCLUSION

We propose changes to the regulations implementing the VA's statutory requirement to exclude service members separated under "dishonorable conditions." We believe that the current regulations do not reflect public expectations, are inconsistent with the VA's official and external commitments, and violate the statute they implement. These problems are not the product of bad faith or systemic error on the part of VA adjudicators, but rather regulations that are outdated and inconsistent with Congressional intent. These improper standards have produced the highest rate of veteran exclusion for any era, denying access to 125,000 service members discharged since 2001, including about 30,000 who had deployed to contingency operations. The VA's regulations prevent it from successfully serving the veteran population, in particular those most at risk of suicide, homelessness and incarceration. We hope that the VA will recognize the opportunity it has to expand services to deserving veterans while correcting the legal infirmities of the present regulations.

VII. PROPOSED AMENDMENTS

38 C.F.R. § 3.12(d)

d. The VA may find that a separation was under dishonorable conditions only if the conduct leading to discharge would have justified a Dishonorable discharge characterization. This includes service members with Dishonorable discharges, and service members with other discharge characterizations whose conduct would have justified that characterization. An administrative discharge generally indicates that a Dishonorable characterization was not justified.

1. A discharge or release for any of the following types of misconduct was under dishonorable conditions unless circumstances exist that mitigate the misconduct:
    i. Acceptance of a discharge to avoid trial by general court-martial. Avoidance of a trial by general court-martial is shown by documentation that charges had been referred to a general court-martial by a general court-martial convening authority.
    ii. Mutiny or spying
    iii. An offense involving moral turpitude. Moral turpitude is conduct that involves fraud, depravity, or a violation of moral standards with an intent to harm another person. Offenses of moral turpitude are: Treason, Rape, Sabotage, Espionage, Murder, Arson, Burglary, Kidnapping, Assault with a Dangerous Weapon, and the attempt of any of these offenses.
    iv. Three or more separate incidents of serious misconduct that occurred within one year of each other. Misconduct is serious when it is punishable by at least one year of incarceration under the Uniform Code of Military Justice.
2. The severe punishment of a Dishonorable characterization is not justified where extenuating circumstances explain or mitigate the misconduct. The Secretary must consider any information that would justify a less severe punishment. The following circumstances may show that service was not dishonorable:
    i. The individual contributed substantial favorable service to the nation. A determination of favorable service to the nation will consider:
        1. The duration and quality of service prior to the misconduct that resulted in discharge, and
        2. Whether the person's service included hardship conditions, such as overseas deployment.
    ii. The person's state of mind at the time of misconduct was adversely affected by mental or physical disabilities or operational stress.
    iii. The person's actions were explained by extenuating circumstances, taking into consideration the person's age, maturity, and intellectual capacity.

38 C.F.R. § 3.12(a)

a. If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. § 101(2)). An administrative discharge shall be a discharge under conditions other than dishonorable unless it is issued in lieu of court-martial. Discharges issued by court-martial or issued in lieu of court-martial must be reviewed under the criteria in paragraph (d) in order to determine whether the separation was under dishonorable conditions.

38 C.F.R. § 17.34

Subject to the provisions of §§ 17.36 through 17.38, when any person has filed, or expressed an intent to file, an application for hospital care or other medical services, except outpatient dental care, or has

expressed an interest in hospital care or medical services or concerns that indicate the need for care or treatment and that person's application requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized if it is determined that eligibility for care probably will be established.

a. Tentative eligibility determinations under this section, however, will only be made under the following circumstances:
    1. In emergencies. When the applicant needs hospital care or other medical services in emergency circumstances, those services may be provided based on tentative eligibility;
    2. Based on discharge. When adjudication as to character of discharge is required, tentative eligibility will be provided to any applicant who has an Other Than Honorable characterization, who served more than four years, or who served more than one enlistment. For an applicant who seeks eligibility based on a period of service that began after September 7, 1980, the applicant must meet the applicable minimum service requirements under 38 U.S.C. § 5303A; or
    3. Based on length of service. When any applicant does not meet applicable minimum service requirements under 38 U.S.C. § 5303A, tentative eligibility will be provided if the applicant was released for medical or health reasons, including medical discharge or retirement, condition not a disability, or other physical or mental health conditions.
b. When a person files an application for hospital care or other medical services and an adjudication as to service connection or a determination as to any other eligibility prerequisite is required, a request for an administrative decision regarding eligibility shall promptly be made to the appropriate VA Regional Office, or to the VA Health Eligibility Center.
c. Applicants provided tentative eligibility shall promptly be notified in writing if they are found ineligible and furnished notice of rights of appeal.
d. Any hospital care or other medical services provided during the period of tentative eligibility shall be free of charge to the applicant.

38 C.F.R. § 17.36 Enrollment—provision of hospital and outpatient care to veterans

a. Enrollment and disenrollment process—
    1. Application for enrollment. Any person may apply to be enrolled in the VA healthcare system at any time. Enrollment staff shall encourage any person who expresses an interest in obtaining hospital care, medical services, or other benefits or who expresses concerns that indicate an interest in benefits to file an application. Upon request made in person or in writing by any person applying for or expressing an intent to apply for benefits under the laws administered by the VA of Veterans Affairs, the appropriate application form and instructions will be furnished. For enrollment in VA healthcare, the appropriate application form is the VA Form 10–10EZ. Any person who wishes to be enrolled must apply by submitting a VA Form 10–10EZ to a VA medical facility or via an Online submission at https://www.1010ez.med.va.gov/sec/vha/1010ez/.
    2. Action on application. Upon receipt of a completed VA Form 10–10EZ, a VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will accept a veteran as an enrollee upon determining that the veteran is in a priority category eligible to be enrolled as set forth in § 17.36(c)(2). Upon determining that a veteran is not in a priority category eligible to be enrolled, the VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will

inform the applicant that the applicant is ineligible to be enrolled. If eligibility is in question based on character of service, a request for an administrative decision regarding eligibility shall be made to the appropriate VA Regional Office, or the VA Health Eligibility Center, using a VA Form 7131.

VIII. APPENDIXES

A. Sample Regional Office Decision Letter

DEPARTMENT OF VETERANS AFFAIRS

JUN 23 2015

In Reply Refer To: 343/212/TH

[redacted]
1060 HOWARD ST
SAN FRANCISCO, CA 94103

Dear Mr. [redacted]:

We made a decision regarding your discharge from military service. Every effort was made to see that your claim received complete consideration.

This letter tells you what we decided, how we reached our decision and what evidence we used to reach our decision. We have also included information on what you can do if you don't agree with our decision, and who to contact if you have questions or need assistance

What We Decided

We decided that your military service for the period December 15, 2003 through August 19, 2008 isn't honorable for VA purposes. You and your dependents aren't eligible for any VA benefits for this period of military service. Only veterans with honorable service are eligible for VA benefits.

You are not eligible for health care benefits under Chapter 17, Title 38 for any disabilities determined to be service connected.

Evidence Used to Decide Your Claim

In making our decision, we used the following evidence:

- Facts and circumstances and DD214 as provided by the military service department
- VA Due Process Letter of 03-25-2011
- Responses to our due process letter and Buddy Statements received on 05-30-2012 and 01-17-2014
- VA Form 21-526EZ received on 1-12-2015

What You Should Do If You Disagree With Our Decision

If you do not agree with our decision, please download and complete VA Form 21-0958, "Notice of Disagreement". You can download the form at http://www.va.gov/vaforms <http://www.va.gov/vaforms> or you can call us at 1-800-827-1000. You have one year from he date of this letter to appeal the decision. The enclosed VA Form 4107(C), "Your Rights to Appeal Our Decision," explains your right to appeal.

[redacted]

You can also ask the Service Department to change the character of discharge or you can apply for a correction of military records. To request a change, use the enclosed DD Form 293, Application for the Review of Discharge or Dismissal from the Armed Forces of the United States. To apply for correction, use the enclosed DD Form 149, Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552. Send the completed form to the proper address on the back of the form.

If You Have Questions or Need Assistance

If you have any questions, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711.
Use the Internet	Send electronic inquiries through the Internet at https://iris.va.gov.
Write	VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached *Where to Send Your Written Correspondence*.

In all cases, be sure to refer to your VA file number [redacted].

If you are looking for general information about benefits and eligibility, you should visit our website at https://www.va.gov, or search the Frequently Asked Questions (FAQs) at https://iris.va.gov.

We sent a copy of this letter to your representative, Swords to Plowshares, Veterans Rights Org, Inc., whom you can also contact if you have questions or need assistance.

Sincerely yours,

RO Director
VA Regional Office

Enclosure(s): VA Form 4107
DD Form 149
DD Form 293
Where to Send Your Written Correspondence

Cc: Swords to Plowshares

B. Presentation to Senate Veterans Affairs Committee, May 2014

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 Disability and/or Healthcare Benefits

VETERANS BENEFITS ADMINISTRATION May 2014 U.S. Department of Veterans Affairs

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits

- **Does VHA work with VBA regarding an individual's eligibility for VA benefits, or does VHA explain to an individual that they have to contact VBA to resolve eligibility status?**
  - VHA will complete VA Form 10-7131 with all available information before forwarding it to VBA for an eligibility status decision.
- **What about for a Veteran who has not applied for service-connected disability yet, and doesn't plan to, but who would potentially qualify in a different enrollment category at VHA?**
  - VBA currently makes all determinations regarding veteran status. Even if the Veteran is only applying for VA health care, the determination of Veteran status under 38 U.S.C. 101(2) is sent to VBA for adjudication before VHA can determine health care enrollment.

VETERANS BENEFITS ADMINISTRATION 4

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits

- Veterans must be discharged under other than dishonorable conditions to be eligible for VA disability and health care benefits.
  - VA considers honorable and general (under honorable conditions) discharges to be issued "under conditions other than dishonorable," for purposes of establishing Veteran status under 38 U.S.C.§101(2)
  - An individual who does not receive an honorable or general discharge *may* still receive treatment at a VA medical facility, unless the individual is subject to one of the statutory bars to benefits listed in the statute in 38 U.S.C. 5303. In such cases, VA makes an administrative determination as to whether the Servicemember's service was "under conditions other than dishonorable." 38. C.F.R. §3.12
  - VA considers medical issues, such as PTSD and TBI, with military service records when making such determinations.

VETERANS BENEFITS ADMINISTRATION

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits

- **If a Veteran is temporarily enrolled, is there a time limit for VHA to provide health care?**
  - The Veteran is given a tentative eligibility for health care until a final determination is made for those who apply within 6 months of discharge. Those who apply more than 6 months after discharge are provided emergency care only until the [veteran's eligibility status under 38 U.S.C. § 101(2)] is adjudicated.
- **Do we give the Veteran a 6 month treatment period while the discharge is reviewed, 9 months, how long? Do we know how long the discharge review takes at VBA?**
  - We will continue to provide health care until VBA adjudicates the Veteran's [eligibility status].

VETERANS BENEFITS ADMINISTRATION 5

Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits

- **If an individual requests healthcare at a VHA facility, and the system shows a military discharge that is potentially disqualifying, what are the next steps? What does VHA do?**
  - When an individual presents or applies for VA health care benefits and has a potentially disqualifying military discharge, VHA takes the following steps:
    - VA eligibility staff may register the individual and place the health care benefits application in a Pending Verification Status.
  - Send a request for an administrative decision regarding the character of service for VA health care purposes to the local VA Regional Office (VARO) using VA Form 7131.

VETERANS BENEFITS ADMINISTRATION 3

Statutory Bar to Benefits

- A dishonorable discharge, or a discharge under the conditions listed below, is a statutory bar to VA benefits (38 U.S.C. § 5303):
  - As a conscientious objector who refused to perform military duty, wear the uniform, or comply with a lawful order
  - Discharge by reason of a general court-martial
  - Resignation by an officer for the good of the service
  - As a deserter
  - As an alien during a period of hostilities, where it is affirmatively shown that the former Servicemember requested his or her release
  - By reason of discharge under other-than-honorable (OTH) conditions; or issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days

VETERANS BENEFITS ADMINISTRATION

Non Statutory Bars to Benefits

- For Veterans with non statutory bars to benefits, including other-than-honorable, bad conduct, and certain uncharacterized discharges, VA must determine whether the Veteran is eligible for VA benefits (38 C.F.R. §3.12)
  - VA considers the available evidence, including the overall nature of the quality of service, and considers any mitigating factors when determining eligibility status.

Homeless Registry Review

- The review of the Homeless Registry from the names identified by VBA of Veterans who have applied for benefits and have negative discharges shows the following information. Please note, the total numbers are for all years VA has collected data.
- VA has an internal discharge review process where approximately 160,000 have been reviewed to determine if a Veteran will be regarded as having an honorable discharge for VA health care and benefits. Of that total about 14,200 are also listed on the homeless registry. Approximately, 1,700 of the homeless Veterans were granted Chapter 17 health care access in the VBA Character of Discharge process.

Veterans Status Eligibility Determination Process

- VAROs verify the Veteran's character of discharge with the service department review the facts, circumstances, and all other evidence of record to determine if the discharge is under conditions other than dishonorable.
- VA does not make character of discharge determinations and cannot change an existing DoD character of discharge determination.
- When determining Veteran status, VA provides due process as follows:
  - Provide a written notice of its intent to decide the status eligibility
  - Allow 60 days for the individual to respond to the notice and provide evidence or statements pertaining the decision.
  - Provide a hearing if requested
  - Allow the individual the right to representation
  - VA will assist individuals in obtaining third-party evidence to support their claim.

Physical Disability Board Review

- The *Wounded Warrior Act* was signed into law on January 28, 2008. It established a process called Physical Disability Board of Review (PDBR) ,which provides Veterans who were medically separated between September 11, 2001 and December 31, 2009, the opportunity to request a review of their Department of Defense (DoD) adjudicated disability rating(s) to ensure accuracy and fairness.
- VA has an extensive local effort that is ongoing with Department of Defense to let homeless Veterans who are eligible for Physical Disability Board of Reviews (PDBR) know about their eligibility and assist with completing the DoD applications.

Administrative Decision and Notification to Veteran

- VA documents its findings in an administrative decision that is sent to the Veteran.
  - The administrative decision outlines the evidence used to make the determination, and notifies Veterans of their right to an appeal if the decision is unfavorable.
- VA will provide benefits if there is a distinctly separate period of service which qualifies the Veteran for benefits. In such cases, benefits can only be provided based on the period of service that was determined to have been under [conditions other than dishonorable.]

Physical Disability Board Review (Cont.)

- DoD recently provided the Department of Veterans Affairs (VA) with a list of approximately 73,000 Veterans who are eligible for PDBR consideration and who may or may not have previously accessed VA services. The Veterans Health Administration (VHA) has cross-referenced with the National Homeless Veteran Registry to determine if there are Veterans on the list who have accessed VA health care. The results indicate that VHA has assisted approximately 6,500 (almost 9 percent) of the PDBR Veterans through the local VA homeless programs. VHA was able to determine that over 85 percent of these homeless and at-risk Veterans are assigned to a Patient Aligned Care Team.

Veterans Integrated Service Network

- On March 18, 2014, VHA issued guidance to all of the Veterans Integrated Service Network and VA medical center staff across the country to notify homeless and at-risk Veterans of their eligibility for PDBR and provide them with the appropriate letter and forms. In approximately 25 percent of the cases reviewed by the PDBR (as of December 2011), the applicant's Military Service Department has found the applicant eligible for a disability retirement and has awarded this to the applicant. This means many of our homeless Veterans could have additional benefits and a financial source available to assist with securing stable housing and supporting their families, thus ultimately helping VA achieve the goal of ending homelessness among Veterans.

C. Letter from VBA Undersecretary to Congresswoman Pelosi, July 31, 2015

THE UNDER SECRETARY OF VETERANS AFFAIRS FOR BENEFITS
WASHINGTON, D.C. 20420
July 31, 2015

The Honorable Nancy Pelosi
U.S. House of Representatives
Washington, DC 20515

Dear Congresswoman Pelosi:

Thank you for your July 6, 2015, letter regarding criteria the Department of Veterans Affairs (VA) uses to determine whether a former Servicemember is entitled to VA benefits or healthcare based upon character of discharge. I am responding on behalf of the Department.

Generally, to be eligible for VA disability, health care, and burial benefits, a Veteran must be discharged under "conditions other than dishonorable."[1] Please refer to 38 U.S.C. § 101(2). VA considers honorable and general discharges (both of which would be considered discharges under honorable conditions) as being issued under conditions other than dishonorable for VA benefit purposes. For all other discharges (such as "other than honorable" discharges), VA makes a factual determination as to whether the discharge is considered to be under conditions other than dishonorable for VA purposes.

Section 3.12 of title 38, C.F.R., outlines VA's character of discharge determination process. When a factual determination is needed, VA first reviews whether the reason for discharge is a statutory bar to benefits under 38 U.S.C. § 5303. Examples of statutory bars to benefits include:

- Resignation of an officer for the good of the service,
- Discharge due to conviction by a general court martial,
- Absence without official leave for 180 days or more, and
- A conscientious objector who refused to wear the uniform.

If a Servicemember's reason for discharge is one of the statutory bars to benefits, section 5303 requires VA to find the Servicemember's discharge disqualifying for VA purposes, unless he or she was considered insane at the time of the circumstances leading to the discharge. If a Servicemember's reason for separation is not a statutory bar to benefits, VA weighs the reason for separation against the overall nature of the quality of service and any mitigating factors, including those related to absence without leave for periods exceeding 180 days.

Typically, VA makes a character of discharge determination only after it receives a claim for benefits, which may be a request for medical treatment received at a VA medical facility, or a compensation or pension application received at a VA regional office. VA

[1] Educational benefits generally require an honorable discharge.

regional office personnel are charged with the responsibility of making character of discharge determinations in claims for both health care and benefit programs. However, prior to this determination, a former Servicemember may be provided health care at a VA medical facility based on a tentative eligibility determination in emergency circumstances. With regard to compensation or pension applications, VA cannot make a final decision regarding entitlement to benefits until the character of discharge issue is resolved.

Before making any final determination on a former Servicemember's character of discharge, VA requests verification of the facts and circumstances surrounding the incident(s) resulting in an "other-than-honorable" discharge from the appropriate service department. VA then reviews all available evidence of record, including the reason for separation, precipitating circumstances, the quality and length of service, and other mitigating factors to determine whether the discharge is under conditions other than dishonorable for VA purposes. VA may consider behavioral health issues, specifically post-traumatic stress disorder (PTSD), when making a character-of-discharge determination. VA documents its determination in an administrative decision and sends it to the former Servicemember. Following this decision, even if VA determines that a Servicemember's character of discharge does not qualify him or her for other types of VA benefits, the Servicemember may still be entitled to treatment at a VA medical facility for any disabilities determined to be service connected, unless the Servicemember is subject to one of the statutory bars to benefits specified in section 5303. Please also refer to 38 C.F.R. § 3.360.

Administrative character-of-discharge decisions are subject to random quality assurance review at the local regional office level by experienced VA claim processors and nationally by quality assurance personnel. For the 12-month period ending May 31, 2015, VA's national claim-based accuracy rate for benefit entitlement decisions (which includes character of discharge decisions) was 91.6 percent. The accuracy of decisions completed by California's three regional offices was 91.2 percent for the same period.

Beyond VA's character of discharge determination process, former Servicemembers may also seek to have a Department of Defense (DoD) Discharge Review Board upgrade their less-than-honorable discharge or to have a DoD Board for Correction of Military or Naval Records revise their service records to change the service department's characterization of service. Changes to a former Servicemember's characterization of service, made by these Boards, are typically binding on VA. Such Boards are subject to 2014 guidance from former Secretary of Defense Charles Hagel, directing a "very liberal" standard for considering character of discharge upgrades when PTSD is a factor. During transition assistance briefings, DoD explains character of discharges to Servicemembers who are completing their military service. Information

about DoD's discharge-upgrade process is available on VA's website located at: *www.benefits.va.gov/benefits/character_of_discharge.asp*, as well as through VA's national call centers and regional office public contact activities.

VA is deeply committed to ensuring every eligible Veteran receives the maximum amount of benefits and care to which he or she is entitled. Should a Veteran requiring assistance come to your attention, particularly when entitlement is uncertain based upon character of service, we will readily assist in any way possible. Should you have further questions, please have your staff contact Ms. Mandy Hartman, Congressional Relations Officer, at (202) 461-6416, or by email at Mandy.Hartman@va.gov.

Thank you for your continued support of our mission.

Sincerely,

Allison A. Hickey

Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem

Prepared for

Vietnam Veterans of America
VVA Connecticut Greater Hartford Chapter 120
VVA Southern Connecticut Chapter 251
VVA Connecticut Chapter 270
and VVA Connecticut State Council

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Executive Summary

March 2012

New documents recently released by Department of Defense to Vietnam Veterans of America (VVA), VVA Connecticut State Council, and VVA Connecticut Chapters 120, 251 and 270 under the Freedom of Information Act (FOIA) confirm that the United States Military has a systemic personality disorder discharge problem. This problem stems from illegal violations of Department of Defense Instruction (DoDI) 1332.14, which governs the discharge of service members for personality disorder.[1]

The DoD FOIA documents show that from Fiscal Year (FY) 2001 to FY 2010, the military separated more than 31,000 service members on the basis of alleged diagnoses of personality disorder (PD). Personality disorders are a class of mental health disorders characterized by individuals' inflexible, socially inappropriate behaviors across diverse situations. By definition, PD cannot be caused by any other major psychiatric disorder, a medical disorder, or substance abuse.

According to DoDI 1332.14, personality disorder is not incompatible with military service. For a service member to receive a PD discharge, PD must interfere with the execution of his or her duties. DoD considers PD a pre-existing condition and service members discharged on that basis cannot receive disability benefits or other benefits, including health care, for symptoms that are considered part of their PD.

Since FY01, both the Government Accountability Office (GAO) and DoD have identified hundreds of discharges in violation of DoDI 1332.14. This Instruction is intended to protect service members, and a substantial number of these discharges may be based on a substantive misdiagnosis, where the underlying wound, if any, may actually be post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI). Because the military has refused to release records regarding the scope and nature of its PD discharges, VVA, VVA Connecticut State Council and VVA Connecticut Chapters 120, 251 and 270 initiated two FOIA lawsuits to better understand the PD issue and to develop solutions to redress this large number of wrongful discharges. The findings from records obtained by these groups to date are presented below for the first time.

In 2008, based on a review of several hundred cases, the Government Accountability Office (GAO) concluded that hundreds, if not thousands, of illegal PD discharges may have occurred since FY01. Additionally, DoD admits that it diagnosed PD for at least some service members who might actually be suffering from PTSD or TBI. Even after congressional and media attention prompted the military to strengthen its PD discharge regulations and attempt to lower its non-compliance rates, one internal review concluded that in 2008-09, only "8.9% [of PD discharges] were processed properly …This does not paint a pretty picture."[2]

Analysis of the records obtained by VVA, VVA Connecticut State Council and VVA Connecticut Chapters 120, 251 and 270 offers the broadest study to date of the U.S. Military's personality disorder discharge problem. For the first time, a longitudinal analysis is possible from FY01 to FY10 using records VVA has obtained through ongoing litigation.[3]

Although this study uses aggregate numbers, it accounts for over 31,000 service members discharged from FY01 to FY10. The GAO's most detailed examination used individual PD discharge packets from several military installations that accounted for only 371 total service members from FY02 to FY07.

In this study, VVA has identified three significant issues. **1)** From FY08 to FY10, illegal PD discharges continued, including a significant number in war zones, possibly preventing the swift diagnosis and treatment of PTSD or TBI; **2)** In several service branches, a decline in PD discharges after congressional and media scrutiny in 2007-08 has been matched by significant numbers of discharges based on an alleged "adjustment disorder" (AD); and **3)** Although the number of PD discharges appears to be declining, the military has failed to take meaningful action to review and correct the wrongful discharge of as many as 31,000 service members since 2001.

Key Findings

- Over 31,000 service members were discharged on the alleged ground of a PD between FY01 and FY10, nearly 20% more than the 26,000 PD discharges estimated by GAO for the period 2001-07.
- Among the active duty services, the Navy administered the most PD discharges in FY01-10, 9,159 service members, and the Coast Guard administered the fewest, 837 service members.
- Within the reserve services for which VVA has obtained records, the Navy Reserve administered the most PD discharges since FY01, separating 391 service members, and the Air Force Reserve administered the fewest, separating 106 service members.
- The data VVA has acquired from FY01 to FY09 show that the Air Force has had the highest rate of PD discharges, 2.73% of all Air Force discharges, and the Army has had the lowest rate, 1.22%.
- The highest rate of active duty PD discharges in any year for which VVA has data is the Air Force in 2006, with 3.78% of all of its discharges. Discharge rates dropped after 2008, and in 2009 the Army had the lowest rate of active duty PD discharges, 0.44% of all of its discharges.
- After media and congressional attention to the high rate of PD discharges in 2007-08, the number of PD discharges across all branches plummeted, from an average of 3,849 service members per year in the period 2001-07 to only 907 service members per year in the period 2008-10.
- The Army made the greatest progress in absolute terms, reducing its PD discharges from an average of 984 per year in 2002-07 to 311 per year in 2008-10. The Coast Guard made the least progress, from an average of 93 annual PD discharges in 2002-07 to 91 per year in 2008-10.
- Internal reviews by the DoD services for FY08-10 found hundreds of illegal PD discharges.
- From FY01 to FY10, the Army had never discharged more than 1,086 soldiers for PD, but from FY08 to FY10, while PD numbers dropped; the Army discharged more than 2,000 soldiers for AD per fiscal year.
- In the same period in which PD discharges declined, the military discharged a substantial number of persons on the alleged ground of an adjustment disorder (AD). In FY08-10 the Army discharged 6,492 service members for AD; in FY09-10 the Coast Guard made 166 AD discharges; and in FY07-10 the Air Force made 1,821 AD discharges.
- Air Force PD discharges dropped from 840 in FY07 to 77 in FY10, while Air Force AD discharges rose from 102 in FY07 to 668 in FY10.
- Within the Army, the number of AD discharges for service members who served in IDP areas rose rapidly, from 346 in FY08, to 475 in FY09, and 767 in FY10. By FY10, 37% of all Army AD discharges (767 of 2,033) were of service members who had served in a war zone.

Background

Introduction

The United States Military has a personality disorder discharge problem. From FY01 to the present, the military has separated more than 31,000 service members with an alleged diagnosis of personality disorder (PD). To date, examinations of these PD separations by the Government Accountability Office (GAO), Department of Defense (DoD) and VVA has found that many of them were in violation of Department of Defense Instruction 1332.14, which governs lawful PD discharges and establishes important protections against wrongful discharge of service members. In 2008, while in the Senate, both President Obama and Vice President Biden asked DoD to establish a special discharge review program and set a temporary moratorium on the use of PD discharges.[4] Because at least hundreds of PD discharges since 2001 have been done in violation of DoD 1332.14, they are illegal. However, the military has refused to correct or otherwise atone for these wrongful discharges. This is especially important because many service members wrongfully diagnosed with PD may in fact be suffering from Traumatic Brain Injury (TBI) and/or Post-traumatic Stress Disorder (PTSD). Because a personality disorder is considered to be a pre-existing condition by the Department of Veterans Affairs (VA), however, those wrongfully discharged with a PD diagnosis face substantial obstacles to obtaining medical care, disability compensation and other benefits for the underlying PTSD or TBI.

Personality and Adjustment Disorders

Personality disorder presents as chronic symptoms that impair an individual's social interactions, with inflexible behaviors, unrealistic expectations, and inappropriate emotional engagement. Traditionally, PD is difficult to diagnose, requiring multiple sessions with a psychologist or psychiatrist. These sessions may also include psychiatric diagnostic testing. Interviews with those who have known a patient for a long period of time, such as family members, are often used as evidence to evaluate whether a patient has PD.[5]

In the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, PD is characterized as an Axis II disorder. Types of Axis II personality disorders include Paranoid, Antisocial, and Borderline PD. People with personality disorders may experience difficulties in cognition, emotiveness, interpersonal functioning or control of impulses. A diagnosis of PD requires ruling out Axis I mental health disorders such as depression, anxiety, or bipolar disorders, other medical causes of the behavior, and substance abuse.[6]

PD is not incompatible with military service, so for a service member to be separated on the basis of PD, the PD must interfere with the discharge of their duties. Per DoDI 1332.14, the service member must be counseled and given the opportunity to correct behavior that is interfering with his or her duties.[7]

Service members discharged for PD face numerous obstacles. Veterans discharged for PD cannot receive disability retirement pay from DoD for illnesses that have been incorrectly diagnosed as PD, and are much less likely to receive service-connected disability compensation from the Department of Veterans Affairs (VA).[8] Veterans may have to repay reenlistment bonuses, which may put them in debt.

Finally, veterans face the stigma of a PD diagnosis that is clearly annotated on their discharge paperwork, making it difficult to find employment since prospective employers frequently request that paperwork.

Adjustment disorder (AD) is a condition caused by an abnormal response to stress. The symptoms must develop within three months of the onset of the stressor. According to the DSM-IV, AD must resolve within six months of the termination of the stressor.[9] AD is not incompatible with military service. For a service member to be separated on the basis of AD, the AD must interfere with the discharge of his or her duties.[10] In the military, VVA believes that health care professionals may be using PD and AD interchangeably to expedite a service member's separation from the military.

Personality Disorder Discharge Regulations Before 2008

Before FY08, according to DoDI 1332.14, a psychiatrist or psychologist could recommend separation for PD if an examination concluded that 1) a service member had PD and 2) the disorder was so severe that the member's ability to perform his or her duties was significantly impaired.[11]

Because PD is not, in itself, incompatible with military service, DoD regulations prohibit discharge on this basis if the cause of separation was actually due to unsatisfactory performance or misconduct.[12] In other words, if PD was the reason that a service member was unable to perform his or her duties, then separation is authorized. If a service member was doing a poor job, unrelated to PD, PD could not be the reason used to separate him or her from service.[13]

DoDI 1332.14 also mandated that a service member who was recommended for separation because of PD had to be notified and counseled prior to separation.

The GAO Reports 2008-2010

After a congressional request in 2008, GAO examined 371 records of service members discharged for PD. Within this small sample, ***the GAO found overwhelming evidence that the military was illegally separating service members for PD***.

In violation of DoDI 1332.14, between 22% and 60% of soldiers in the sample were not actually diagnosed by a psychologist or psychiatrist with PD that interfered with their ability to function in the military, and up to 60% of service members never received formal counseling about their PD before they were separated from military service. The GAO concluded that "the military services have not established a way to determine whether the commanders with separation authority are ensuring that DoD's key separation requirements are met, and DoD does not have reasonable assurance that its requirements have been followed."[14]

In response to these findings, in 2008, the GAO recommended that DoD develop a system to ensure that PD separations are conducted in accordance with DoD's requirements and also to monitor the military services' compliance with DoD's PD separation requirements.

GAO returned to PD discharges in 2010 and concluded that while DoD had made some changes in response to the 2008 GAO report, it was unclear if any of the changes had actually been realized within DoD. The military services'

FY08 compliance reports showed they were still overwhelmingly non-compliant. Unable to look at the FY09 or FY10 compliance reports, GAO was unable to determine if these reports would continue to be published, but reiterated the importance of DoD fully implementing the 2008 PD recommendations.[15]

The Pentagon's Response to Congress, the GAO and the Media

In January 2009, David S. C. Chu, Undersecretary of Defense for Personnel and Readiness, directed DoD service branches to report on their compliance with "DoD PD separation guidance contained in 1332.14 for PD separations during [FY08 and FY09]."[16] Chu's successor, Clifford L. Stanley, expanded the mandate, stating "[I]t is clear that compliance reporting should continue through FY12."[17] Each DoD service branch was ordered to base its report "on a random sampling of at least 10% of all PD separations for your respective military department for the designated FY."[18] Both the FY08 and FY09 samples showed DoD-wide, systemic problems with PD separation procedures. However, by FY10, on paper, all DoD services were approaching 100% compliance with PD regulations.[19]

In addition to required increased compliance reporting, DoD revised and strengthened the protections of DoD 1332.14. These changes govern PD discharges from mid-FY08 to the present, though most service branches did not implement the new regulations until late FY08. The revised regulations added that a Ph.D.-level psychologist or psychiatrist's diagnosis of PD must be "corroborated by a peer or higher-level mental health professional and endorsed by the Surgeon General of the Military Department concerned" for service-members serving in Hostile Fire and Imminent Danger Pay areas (IDP areas).[20] All service members in Afghanistan, or who served in Iraq, were considered to be in an IDP area.[21] In addition, a PD diagnosis must now address PTSD and other mental health concerns. If service-related PTSD is diagnosed, a separation for PD is not authorized. The PD diagnosis must also address TBI and symptoms that may be indicative of TBI.

In the revised DoDI 1332.14, PD is still not incompatible with military service. But, service members are expected to function effectively in the military environment. If a service member's ability to perform his or her duties is significantly impaired, as of FY08, there must be "appropriate counseling," and observations of specific problems from sources such as peers and supervisors must be documented in the counseling or personnel records.[22] The impaired behavior must be shown to be persistent. It must interfere with a service member's assignment or duty. The behavior must also be shown to have continued despite the service member having being counseled and given an opportunity to overcome the deficiencies.[23] Personality disorder cannot be used if separation is actually due to unsatisfactory performance or misconduct. Finally, the service member must be told that personality disorder is not a disability and PD by itself will not qualify a service member for disability benefits.[24]

Application of these stricter safeguards may have contributed to the decline in PD discharges since 2008.

Findings and Analysis

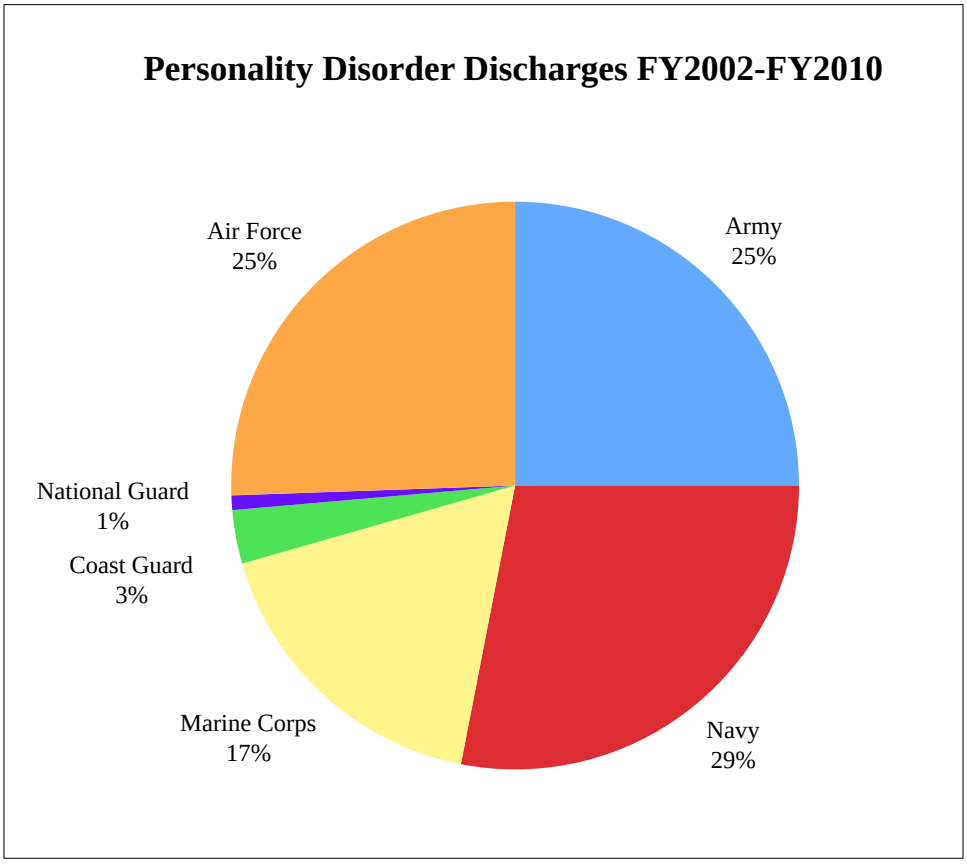
Concerned that the Department of Defense had failed to address the of tens of thousands of service members wrongfully discharged since 2001, even as it had strengthened protections against such abuses prospectively, VVA submitted Freedom of Information Act (FOIA) requests to DoD, the Department of Homeland Security (DHS) and the VA for records related to PD and AD.[25] In response to the initial FOIA request, DoD, DHS and VA provided a small set of responsive documents.

VVA sought to expand the GAO's investigation by looking at the thousands of PD discharges that occurred from FY01 to the present, rather than a 371-person sample from FY02 to FY07. A fuller understanding of the scope and details of these discharges will allow Congress, the agencies, and veterans' organizations to better craft appropriate responses to redress these tens of thousands of wrongful discharges. Documents released to date are available on the VVA website at http://www.vva.org/ppd.html. In addition, VVA has sought to understand the cause of the substantial number of AD discharges since 2008.

PD Discharges from FY02 to FY07

Records obtained in FOIA litigation by VVA offer the first opportunity to examine aggregate PD totals from FY01 to FY10. Although the GAO looked at 371 files at several bases from FY02 to FY07 and discovered systemic illegality, this is the first comprehensive picture of the high numbers of PD discharges from FY02 to FY07. Media attention, congressional hearings, and the GAO investigation appear to have prompted a steep decline in PD discharges after FY07.

Figure 1: Personality Disorder Discharges FY2002-FY2010



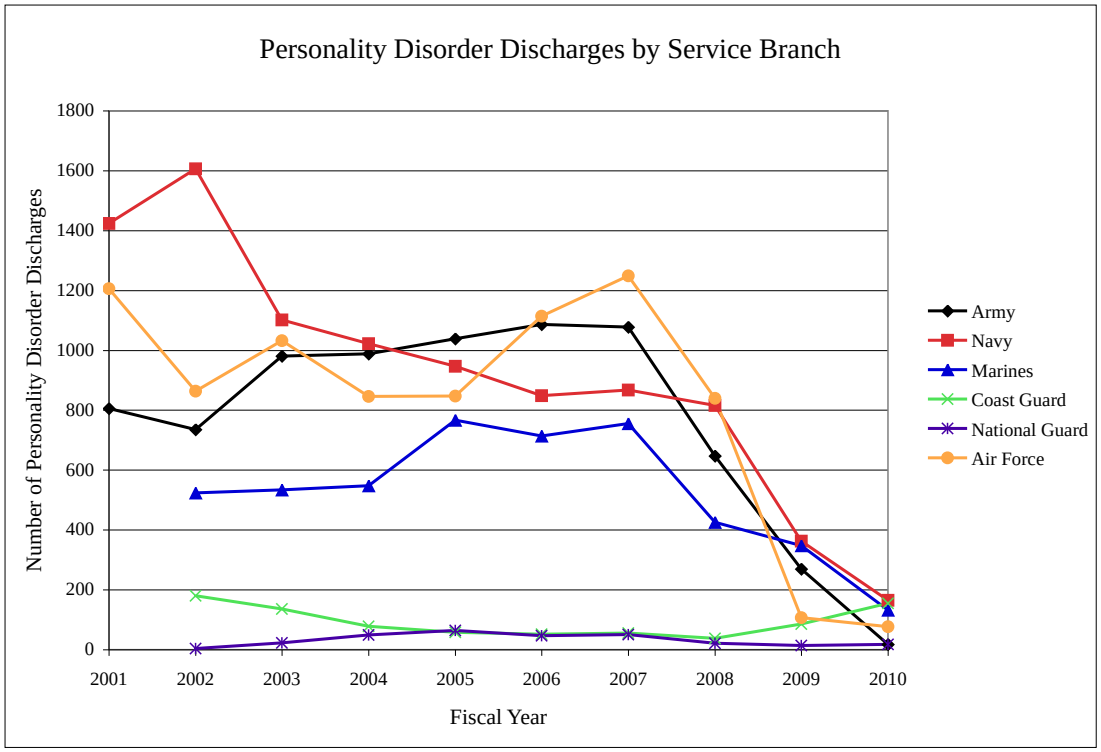
Annual discharges by service branch are set out above in Figure 1 and below in Table 1 and Figure 2. Figure 1 depicts which services were responsible for the more than 27,000 PD discharges that occurred between 2002-2010. Table 1 and Figure 2 both show the year-by-year PD discharge trends by service branch.

Table 1: Personality Disorder Discharge Totals by Fiscal Year (FY)

FY	Army	Navy	Marine Corps	Coast Guard	National Guard	Air Force
2001	805	1424	*	*	*	1206
2002	734	1606	524	180	4	863
2003	980	1102	534	136	23	1032
2004	988	1022	547	78	49	846
2005	1038	946	767	58	64	847
2006	1086	848	714	52	47	1114
2007	1078	867	755	55	50	1249
2008	647	816	425	38	21	840
2009	270	363	348	85	14	107
2010	17	165	132	155	18	77

*Full 2001 numbers were not released by DoD and DHS.

Figure 2: Personality Disorder Discharges by Service Branch



In FY02, the Army discharged 734 service members with PD, and by FY07 the number rose to 1,078. This marked a 46.8% increase in PD discharges within the Army. Similarly, from FY02 to FY07, in the Marine Corps PD discharges rose from 524 to 755 (44% increase), and in the Air Force PD discharges rose from 863 to 1,249 (44.7% increase). Nor were the Reserve components immune from this trend. In the same period, Navy Reserve PD discharges rose from 26 to 65, Marine Corps Reserve PD discharges rose from 20 to 40, and in the Army National Guard PD discharges rose from 4 to 50.

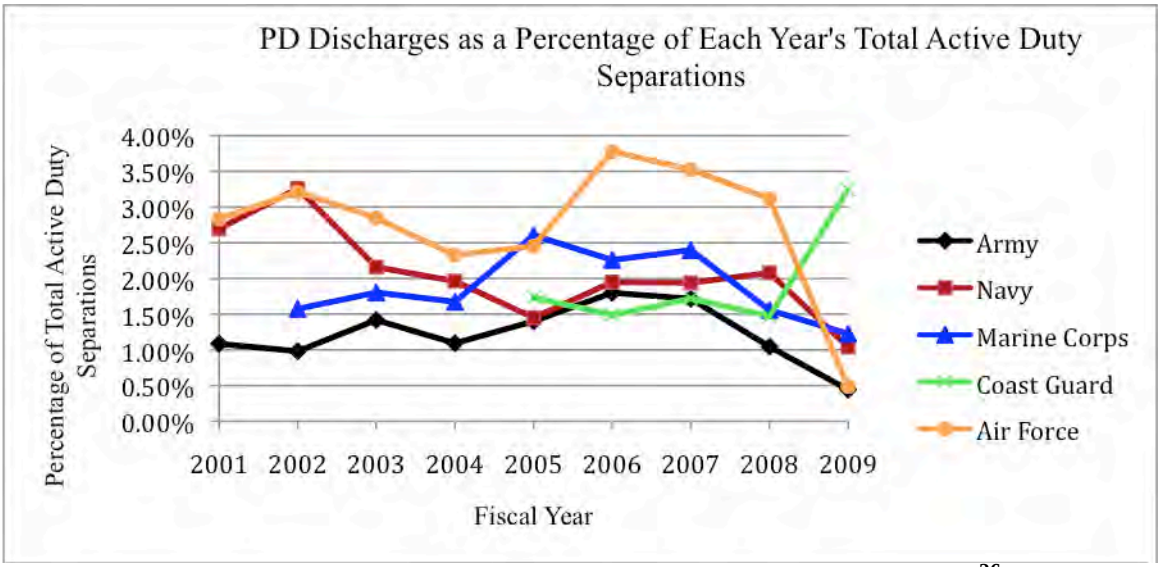


Figure 3: PD Discharges as a Percentage of Total Discharges[26]

The military has not conducted an internal audit of the FY02 to FY07 PD discharges. After the 2008 GAO investigation, the military chose to investigate PD discharges from FY08 onward, ignoring the illegal FY02 to FY07 PD discharges uncovered by the GAO. The spike in PD discharges circa FY07 shows that while service members were being discharged illegally for PD as evidenced by the GAO report, PD discharges continued to rise in most of the service branches.

To date, the military has taken no meaningful steps to redress the illegal discharge of tens of thousands of service members from FY01 to FY07.

PD Discharges from FY08 to FY10

After the GAO investigation, each service began to take a sample of no less than 10% of the PD discharges for each fiscal year to evaluate compliance rates. Though its FOIA requests and litigation, VVA has obtained internal DoD numbers from FY08 to FY10. The self-reported numbers show illegal PD discharges occurring through FY10, apparently at a lower rate than in the FY01 to FY07 period. Nevertheless, significant non-compliance continued. In a record released to VVA by the DoD, a Navy review of FY08 to FY09 PD discharges concluded that " [o]f the cases reviewed, only 34 or 8.9% were processed properly in accordance with DODI 1332.14 …This does not paint a pretty picture."[27]

Only in FY10 did the Army, Navy, Marine Corps and Air Force begin to approach a 100% compliance rate.[28]

As of August 2008, per DoDI 1332.14, a legal PD separation must meet eight requirements. Five requirements apply to all service members and three apply only to service members who have served in an IDP area. Any discharge that does not comply with all eight requirements is by definition an illegal discharge. DoD internal numbers for the Army, Navy, Marine Corps and Air Force reveal how often in a sample fiscal year each requirement was met. Compliance rates for each service branch in 2008-10 are set forth in Table 2. The numbers show that once the service branches began to follow their own rules, the rate of PD discharges fell significantly.

Table 2: Compliance Requirements by Fiscal Year and Service Branch[29]

Service Branch	Compliance Requirement	FY 2008 Compliance	FY 2009 Compliance	FY 2010 Compliance
Army	Formal Counseling	65%	70%	100%
Army	Psychiatrist or Ph.D.	72%	92%	100%
Army	Severe	82%	92%	100%
Army	Written Notification	83%	100%	100%
Army	Advised Not a Disability	0%	100%	100%
Army	Corroborated	0%	62%	100%
Army	Comorbidity	0%	62%	100%
Army	Endorsed	0%	62%	100%
Navy	Formal Counseling	7%	30%	100%
Navy	Psychiatrist or Ph.D.	99%	100%	100%
Navy	Severe	7%	100%	100%
Navy	Written Notification	100%	100%	100%
Navy	Advised Not a Disability	0%	11%	48%
Navy	Corroborated	33%	0%	100%
Navy	Comorbidity	50%	100%	100%
Navy	Endorsed	0%	100%	100%
Marine Corps	Formal Counseling	80%	85%	100%
Marine Corps	Psychiatrist or Ph.D.	83%	85%	100%
Marine Corps	Severe	71%	79%	100%
Marine Corps	Written Notification	88%	100%	100%
Marine Corps	Advised Not a Disability	90%	24%	71%
Marine Corps	Corroborated	33%	100%	100%
Marine Corps	Comorbidity	50%	100%	100%
Marine Corps	Endorsed	0%	0%	100%
Air Force	Formal Counseling	67%	91%	91%
Air Force	Psychiatrist or Ph.D.	97%	100%	100%
Air Force	Severe	97%	100%	100%
Air Force	Written Notification	97%	100%	100%
Air Force	Advised Not a Disability	0%	76%	56%
Air Force	Corroborated	0%	78%	100%
Air Force	Comorbidity	0%	78%	92%
Air Force	Endorsed	0%	78%	92%

The First Five Requirements

1. Formal counseling of a PD diagnosis, and evidence that a service member was given an "adequate opportunity to improve his or her behavior" prior to separation on the basis of PD.

In FY08, no service branch sample had 100% compliance for formal counseling and the opportunity to improve. Notably, only 7% of the Navy packets met this requirement, indicating that 93% of the PD discharges in the Navy sample were illegal. In FY09, no service branch sample had 100% compliance. By FY10, almost every DoD service branch self-reported 100% compliance for formal counseling and the opportunity to improve.[30]

2. A PD diagnosis that was made by a psychiatrist or Ph.D.-level psychologist.

In FY08, no sample had 100% compliance for PD diagnosis from a psychiatrist or Ph.D.-level psychologist. Notably, 28% of the soldiers diagnosed by the Army with PD were given illegal discharges and did not have the benefit of consultation with a psychiatrist or Ph.D -level psychologist. In FY09, only the Navy and Air Force self-reported 100% compliance. By FY10, almost every service self-reported 100% compliance for diagnoses made by a psychiatrist or Ph.D.-level psychologist.[31]

3. A statement from a psychiatrist or a Ph.D.-level psychologist that a service member's disorder was so severe that the member's ability to function effectively in the military environment was significantly impaired.

In FY08, no sample had 100% compliance with the inclusion of professional judgment that due to PD, a service member could not perform his or her duties. Notably, in FY08 only 7% of the Navy packets met this requirement. In FY09, the Navy and the Air Force self-reported 100% compliance. By FY10, almost every service self-reported 100% compliance for diagnoses made by a psychiatrist or Ph.D.-level psychologist.[32]

4. Member received written notification of his or her impending separation based on PD diagnoses.

In FY08, only the Navy had 100% compliance with the legal requirement that a service member receive written notification that he or she was being given a PD discharge. In FY09 and FY10 every service self-reported 100% compliance for written notification of a PD discharge.[33]

5. Member was advised that the diagnosis of a personality disorder does not qualify as a disability.

In FY08, the Army, Navy and Air Force reported 0% compliance with the legal requirement that service members must be advised that PD is not a disability. In FY09, only the Army reported 100% compliance. In FY10, the Army remained at 100% for informing service members that PD was not a disability, but the Navy was at 48%, the Marine Corps was at 71% and the Air Force was at 56%.[34]

The Three Imminent Danger Pay Area Requirements

If a service member has served in an Imminent Danger Pay (IDP) area, and was separated from service on the basis of PD, than a PD discharge packet must meet an additional three requirements.[35]

1. Show evidence that a PD diagnosis was corroborated by a peer psychiatrist or Ph.D.-level psychologist or higher level mental health professional.

In FY08, the Army and Air Force reported 0% compliance with the legal requirement of corroborated diagnosis, and the Navy and Marine Corps were at 33%. In FY09, only the Marine Corps reported 100%. In FY10, every service self-reported 100% compliance with corroborated diagnosis.[36]

2. Address PTSD or other mental illness co-morbidity.

In FY08, the Army and Air Force reported 0% compliance with the legal requirement of addressing PTSD or other mental illness co-morbidity, and the Navy and Marine Corps were at 50%. In FY09, only the Marine Corps and Navy reported 100%. In FY10, every service, with the exception of the Air Force self-reported 100% compliance with addressing PTSD or other mental illness co-morbidity.[37]

3. Have the endorsement of the Surgeon General of the military department concerned prior to discharge.

In FY08, every service reported 0% compliance with the legal requirement of having the endorsement of the Surgeon General of the military department concerned. In FY09, only the Navy self-reported 100%. In FY10, every service, with the exception of the Air Force, self-reported 100% compliance with having the endorsement of their Surgeon General

In sum, DoD's own internal reviews indicated that substantial numbers of service members received PD discharges from FY08 to FY10 in violation of applicable regulations intended to protect service members. ***DoD has taken no meaningful steps to redress the wrongful discharges of these thousands of service members***.[38]

Substantial Numbers of Adjustment Disorder Discharges in FY08 to FY10

From FY08 to FY10, the overall number of PD discharges began to drop, and PD compliance rates improved throughout DoD.[39] However, the military recorded substantial numbers of AD discharges in the same period.[40] The most complete set of AD numbers provided to VVA came from the Air Force, and they cover only FY 07 to FY10. Numbers for adjustment disorder discharges are set forth in Table 3 and Figure 4.

Table 3: Adjustment Disorder Discharge Totals by Fiscal Year

Fiscal Year	Army	Coast Guard	Air Force
2007	*	*	102
2008	2,032	*	303
2009	2,427	57	748
2010	2,033	109	668

* DoD and DHS have not released numbers for these years or for other branches.

In FY08, the Air Force separated 840 service members with personality disorder. In FY09 the number of PD discharges dropped to 107, and continued to decrease to 77 in FY10.[41] Thus, in the Air Force between FY08 and FY10 there was an 87.2% decrease in personality disorder discharges.

However, in the Air Force from FY07 to FY10, adjustment disorder discharges rose at a high rate. In FY07, the Air Force separated 102 service members on the basis of adjustment disorder. In FY08 the number increased to 303, then rose to 748 in FY09, before it slightly decreased to 668 in FY10. The Air Force had a 555% increase in adjustment disorder from FY07 to FY10.[42]

From FY01 to FY10, the Army had never discharged more than 1,086 soldiers in a given year for PD, yet from FY08 to FY10, while PD numbers dropped, the Army routinely discharged more than 2,000 soldiers for AD. Within the Army, the number of AD discharges for service members who served in IDP areas also rose rapidly, from 346 in FY08, to 475 in FY09, to 767 in FY10. By FY10, service members who had served in a war zone received 37% of all AD discharges (767 of 2,033).[43]

Unlike personality disorder discharges, adjustment disorder procedures were neither the subject of the 2008 GAO investigation nor the centerpiece of congressional hearings that year. To date there has been no examination of the use of AD discharges, and it is unclear whether AD has simply replaced PD as a tool for illegally separating service members.

Recommendations

- The Department of Defense should release to Congress and the public complete and accurate PD and AD discharge numbers from FY01 to the present.

- The Secretary of Defense should appoint a panel of senior officers, enlisted men and women, and Surgeons General—along with colleagues from the Coast Guard, which falls under the auspices of the Department of Homeland Security—to review each of the more than 31,000 personality disorder discharges executed since 2001, and the unknown number of adjustment disorder discharges occurring in the same period. It must identify illegal discharges and correct the records of service members with PTSD and TBI, who were incorrectly diagnosed with PD and AD and have therefore been denied benefits they earned by serving their nation in uniform.

- Adjustment Disorder regulations in DoDI 1332.14 should be revised to mirror the current regulations for PD.

References

[1] Department of Defense Instruction (DoDI) 1332.14 was issued in prior versions as Department of Defense Directive (DoDD) 1332.14. This report uses "DoDI 1332.14" throughout, but may refer to versions of 1332.14 that were titled "DoDD 1332.14." This distinction is made in the endnotes.
[2] Memorandum from CAPT Falardeau, L.O., to Chief of Naval Personnel (Undated) (11-L-0109 VVA (Navy) 321) (on file with authors).
[3] *Vietnam Veterans of America v. U.S. Dept. of Defense*, No. 3:10-cv-1972 (D.Conn.).
[4] Letter from David S.C. Chu to Senator Obama (Feb. 5, 2008). (11-L-0109 VVA (OUSD P&R) 971) (on file with authors). Letter from David S. C. Chu to Senator Biden (Feb. 5, 2008) (11-L-0109 VVA (OUSD P&R) 982) (on file with authors).
[5] Randy K. Ward, *Assessment and Management of Personality Disorders*, 70 AM. FAM. PHYSICIAN 1505 (2004).
[6] AMERICAN PSYCHIATRIC ASSOCIATION. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (2000).
[7] *See* Department of Defense Directive 1332.14 (Dec. 21, 1993) (11-L-0109 VVA (OUSD P&R) 73, 91) (on file with authors) [hereinafter DoDD 1332.14 (Dec. 21, 1993)] ("Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records"); Department of Defense Instruction 1332.14 (Aug. 28, 2008) (11-L-0109 VVA (OUSD P&R) 170,180-81) [hereinafter DODI 1332.14 (Aug. 28, 2008)] (stating as a revised version that "As such, observed behavior of specific deficiencies should be documented in appropriate counseling or personnel records and include history from sources such as supervisors, peers, and others, as necessary to establish that the behavior is persistent, interferes with assignment to or performance of duty, and has continued after the Service member was counseled and afforded an opportunity to overcome the deficiencies").
[8] DODI 1332.14 (Aug. 28, 2008) at 180 ("For personality disorders, the member will also be counseled that the diagnosis of a personality disorder does not qualify as a disability.").
[9] AMERICAN PSYCHIATRIC ASSOCIATION. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (2000).
[10] DoDD 1332.14 (Dec. 21, 1993) at 91; DODI 1332.14 (Aug. 28, 2008) at 180-81.
[11] DoDD 1332.14 (Dec. 21, 1993) at 91 ("Separation on the basis of personality disorder is authorized only if a diagnosis by a psychiatrist or a psychologist, completed in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired"); DODI 1332.14 (Aug. 28, 2008) at 180-81 ("Separation on the basis of personality disorder is authorized only if a diagnosis by a psychiatrist or PhD-level psychologist utilizing the Diagnostic and Statistical Manual of Mental Disorders …and in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired").
[12] DoDD 1332.14 (Dec. 21, 1993) at 91 ("Separation for personality disorder is not appropriate… …if separation is warranted on the basis of unsatisfactory performance"); And DODI 1332.14 (Aug. 28, 2008) at 180-81 ("Separation for personality disorder is not appropriate nor should it be pursued when separation is warranted on the basis of unsatisfactory performance or misconduct").
[13] *Id*.
[14] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-31, DEFENSE HEALTH CARE: ADDITIONAL EFFORTS NEEDED TO ENSURE COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (2008).
[15] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1013T, DEFENSE HEALTH CARE: STATUS OF EFFORTS TO ADDRESS LACK OF COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (2010).
[16] Memorandum from David S.C. Chu to Secretaries of the Military Departments (Jan. 14, 2009) (11-L-0109 VVA (OUSD P&R) 230) (on file with authors).
[17] Memorandum from Clifford Stanley to Secretaries of the Military Departments (Sept. 10, 2010) (11-L-0109 VVA (OUSD P&R) 252-53) (on file with authors).
[18] *Id.*

[19] Undersecretary Stanley resigned in October 2011, in the midst of an investigation of what the National Journal called "allegations of gross mismanagement and abuse of power." *See* Sara Sorcher, *Pentagon's Embattled Personnel Official Resigns*, GOV'T EXECUTIVE (Oct. 27, 2011) *available at* http://www.govexec.com/defense/2011/10/pentagons-embattled-personnel-official-resigns/35258/ (last accessed Mar. 9, 2012).
[20] DODI 1332.14 (Aug. 28, 2008) at 180-81.
[21] Designated Hostile Fire or Imminent Danger Pay Areas, *in* DOD FINANCIAL MANAGEMENT REGULATION 10-6 (2011), *available at* http://comptroller.defense.gov/fmr/07a/07a_10.pdf (last accessed Mar. 9, 2012); *2011 Imminent Danger Pay*, ARMY TIMES (Jan. 6 ,2011), *available at* http://www.armytimes.com/news/2011/01/military-dangerpay-010611/ (last accessed Mar. 8, 2012)
[22] Designated Hostile Fire of Imminent Danger Pay Areas, *supra* note 21.
[23] *Id.*
[24] *Id.*
[25] The FOIA requesters were Vietnam Veterans of America (VVA), Connecticut Greater Hartford Chapter 120 of VVA, Southern Connecticut Chapter 251 of VVA, Connecticut Chapter 270 of VVA, and the Connecticut State Council of VVA.
[26] Total discharge data from DEP'T OF DEFENSE, 2001 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 32; DEP'T OF DEFENSE, 2002 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 31; DEP'T OF DEFENSE, 2003 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 34; DEP'T OF DEFENSE, 2004 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 35; Erik Skavin, *As Separation Rates Plummet, Military Getting More Selective*, STARS & STRIPES (Nov. 22, 2009), *available at* http://www.stripes.com/news/as-separation-rates-plummet-military-getting-more-selective-1.96679 (last accessed Mar. 10, 2012).
[27] Memorandum from Capt. L.O. Falardeau to Chief of Naval Personnel (Undated) (11-L-0109 VVA (Navy) 321) (on file with authors).
[28] Personality Disorder Separations – FY 08 (11-L-0109 VVA (OUSD P&R) 232-233) (on file with authors).
[29] FY 10 – Personality Disorder Separation Policy Compliance Report (11-L-0109 VVA (OUSD P&R) 956-57) (on file with authors).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Active Duty, Reserve, and Guard Disorder Separations By Fiscal Year, Disorder Category, Service Component, and Ever Deployed Status (11-L-0109 VVA (OUSD P&R) 273)(on file with authors); ARNG "Personality Disorder" Discharges (Jan. 2011) (11-L-0109 VVA (NGB) 324) (on file with authors); [Coast Guard] Active Duty, Reserves, & Active Duty & Reserves (Enclosure 1, 4.18.2011Enc.1-2.pdf) (on file with authors); FY94-FY04 Active-Duty Army Enlisted Separations (11-L-0109 VVA (Army) 367) (on file with authors); FY05-FY09 Active-Duty Army Enlisted Separations (11-L-0109 VVA (Army) 368) (on file with authors); USMC Personality Disorder Discharges (11-L-0109 VVA (USMC) 1) (on file with authors).
[40] Active Duty/Reserve/Guard Separations Under Personality Disorders & Adjustment Disorders (11-L-0109 VVA (OUSD P&R) 255, 269-73) (on file with authors); Active Duty Separations from FY 01 through FY 10 (11-L-0109 VVA (AF) 934) (on file with authors); Information Paper: Screening of Personality and Adjustment Disorder Discharges (Oct. 25, 2010) (11-L-0109 VVA (Army) 361, 363) (on file with authors).
[41] Active Duty Transaction and RCCPDS Transaction, Active Duty, Reserve, and Guard Disorder Separations (11-L-0109 VVA (OUSD P&R) 273) (on file with authors).
[42] *Id.*
[43] Unsigned Memorandum on Screening of Personality and Adjustment Disorder Discharges (Undated) (11-L-0109 VVA Army 363) (on file with authors).

Disorder in the Coast Guard: The United States Coast Guard's Illegal Personality and Adjustment Disorder Discharges

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EXECUTIVE SUMMARY

For the past decade, the Coast Guard has routinely violated procedures intended to protect service members from erroneous discharges for personality disorder (PD) and adjustment disorder (AD). As a result, hundreds of service members have been assigned serious diagnoses that may allow the U.S. Department of Veterans Affairs (VA) to deny them benefits and may subject them to stigma in post-service life, without full information on why they received the diagnosis or their right to appeal.

Vietnam Veterans of America, VVA Connecticut Chapters 120, 251, and 270, and VVA Connecticut State Council (collectively "VVA") requested documents under the Freedom of Information Act to better understand the United States Armed Forces' use of PD and AD discharges. When the Coast Guard declined to release the records sought within statutory deadlines, VVA filed two federal lawsuits seeking the information. In both lawsuits, the Coast Guard initially denied that VVA should have access to individual service records and refused to release them.

Eventually after more litigation, and nearly two years after filing its initial complaint, VVA reached a settlement, pursuant to which the Coast Guard agreed to release thousands of pages of previously-withheld records. Analysis of these records confirms that the branch fails to adhere to its own regulations in processing PD and AD discharges, denying protection to its members. As a result, large numbers of Coast Guard members have been unlawfully discharged.

To remedy these wrongs, VVA recommends a targeted intervention at the Cape May Training Center, identification and correction of past errors, and preventive action going forward

KEY FINDINGS

- The vast majority of AD and PD discharges failed to comply with Coast Guard regulations. 255 of a random sample of 265 discharges analyzed violated regulations in some way.
- Combined, one hundred percent of the AD and PD discharges from FY 2001 to FY 2005 as well as FY 2008 and FY 2012 in some way violated Coast Guard regulations. Peak compliance in FY 2007 was only 30.0%.
- Since 2009, use of AD discharges in the Coast Guard has risen substantially.

BACKGROUND

Introduction

As early as 2007, media reports brought to light the emerging concern that the military may purposely misdiagnose soldiers in order to cheat them out of a lifetime of benefits, thereby saving billions in expenses.[1] In 2008 the Government Accountability Office (GAO) issued a report presenting overwhelming evidence that the

U.S. military had illegally separated thousands of service members on the basis of an alleged personality disorder.[2] In order to better understand whether the Department of Defense (DoD) and the Department of Homeland Security (DHS) had fully addressed the GAO's recommendations for fixing the problem, VVA expanded GAO's investigation and filed a Freedom of Information Act request with DoD, DHS, and the Department of Veterans Affairs (VA) for records related to PD discharges. Equally concerned that becoming the focus of congressional and media scrutiny might have led DoD and DHS to increase the use of illegal AD discharges to compensate for a decrease in PD discharges, VVA also requested records related to AD.

The first set of documents released by DoD, DHS, and VA were analyzed in VVA's March 2012 report, *Casting Troops Aside*: *The United States Military's Illegal Personality Disorder Discharge Problem*.[3] After VVA filed two federal lawsuits[4], the U.S. Coast Guard, a component of DHS, settled VVA's claims against it and agreed to release additional documents. These documents include the separation paperwork for a random sample of individual service members discharged on the basis of PD or AD, with personally identifying and medical information redacted.[5] The Coast Guard provided a random sample of 265 of these anonymized "separation packets." Although this report only describes observations within this subset of AD and PD discharges the Coast Guard provided, it assumes that any trends within it would generalize to the rest of the Coast Guard's AD and PD discharges.

Improper AD and PD discharges hurt the men and women who have dedicated themselves to the serving their country. An erroneous discharge by the Coast Guard can damage their lives in multiple ways. For example, veterans discharged with PD cannot receive disability retirement pay from DoD for illnesses like post-traumatic stress disorder or traumatic brain injury that have been incorrectly diagnosed as PD. These veterans are also much less likely to receive service-connected disability compensation from VA. Moreover, veterans face stigma because the diagnosis is clearly annotated on their discharge records, making it hard to find employment from employers who request this paperwork.

These ramifications are serious. In recognition of the significant adverse consequences of a PD discharge, the Coast Guard has promulgated regulations to protect its members from erroneous discharges.[6] The Coast Guard's violation of these regulations render the discharges illegal.

The records analyzed in this paper demonstrate that the Coast Guard has been denying service members these essential regulatory protections and illegally discharging members for the past decade. This is unacceptable. A more complete understanding of how the Coast Guard uses AD and PD discharges will allow Congress, military services, VA, and veterans' organizations to redress the consequences of a decade of illegal discharges and prevent them from continuing unchecked for an additional decade.

Personality and Adjustment Disorders

Personality disorders are associated with enduring patterns of inner experience and behavior that deviate from cultural expectations. These patterns must be inflexible and cause distress and functional impairment. In order to diagnose PD, multiple interviews spaced over time are

often necessary. It is often necessary for the psychiatrist to gather information about the individual's behavior from outside sources, such as family members, since the individual may not recognize his or her pattern of deviant thoughts and behaviors as an issue.[7]

The *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-V*)[8] recognizes ten specific personality disorders, including Paranoid, Antisocial, and Borderline. People with personality disorders may experience difficulties in cognition, affectivity, interpersonal functioning, or control of impulses. A diagnosis of PD requires ruling out other mental health disorders, such as depression, anxiety, or bipolar disorders, and the effects of substance abuse or other medical conditions, such as head trauma.[9] Coast Guard regulations state that personality disorders are "disqualifying for appointment, enlistment, and induction."[10]

By contrast, the *DSM-IV*-TR, published in 2000, defined adjustment disorder as a condition caused by abnormal response to stress. The symptoms must have developed within three months of the onset of the stressor. AD must have resolved within six months of the termination of the stressor. AD was a residual category for individuals that had clinically significant symptoms but do not fall into a single category.[11]

The medical community crafted the definition of AD in the *DSM-IV-TR* to be vague in order to provide a "diagnostic niche" for mental health care providers to intervene in clinically significant cases that do not present a specific mental health condition. However, the medical community revisited the definition and use of adjustment disorders, and the *DSM-V* now considers adjustment disorders a "heterogeneous array of stress-response syndromes" rather than a catch-all category for clinic cases that do not meet the criteria of specific health conditions.[12] Adjustment disorders are now considered a spectrum of stress-response syndromes with PTSD on one extreme end and AD on the mild end. The general diagnostic criteria—abnormal response to a specific stressor with an onset of no more than three months following the stressor and resolution within six months of termination of stressor—remain.[13] The majority of the diagnoses reviewed in this paper occurred before AD was officially re-conceptualized in the *DSM-V* in 2013; however, discussions throughout the psychiatric community on AD disorders began several years earlier.[14]

The Coast Guard Medical Manual states that adjustment disorders "are generally treatable and not usually grounds for separation" unless they persist or treatment is likely to be prolonged or non-curative.[15]

AD and PD are serious diagnoses that carry with them significant stigma. They also impact Coast Guard members' eligibility for benefits following their discharge.

Commandant Instruction's Requirements

Because of the seriousness of these diagnoses and their negative ramifications, it is essential that the Coast Guard protect its members from the damages of improper and erroneous AD or PD discharges. A number of regulations are in place that, if followed properly, should inform members of the reason for their discharge and the information necessary for appeal. If the Coast Guard does not follow its own regulations, then the discharge is improper. Although the data set in this study covers more than a ten-year period, the relevant

Coast Guard Instruction has not significantly changed in content during this time.[16] Coast Guard discharges may be either "characterized" or "uncharacterized." This classification is independent of the standard for discharge, which may be honorable, general, under other than honorable conditions, bad conduct, or dishonorable.

There are fourteen formal reasons for discharge, one of which is "unsuitability." AD and PD discharges are included in the category of unsuitability.[17] Unsuitability discharges may be characterized or uncharacterized.[18] Uncharacterized discharges are authorized for all members separated at the entry level who have fewer than 180 days active service.[19] Only the Commander and Commanding Officer at the Cape May Training Center have the authority to give a member an uncharacterized discharge because it is the only location where new recruits with less than 180 days of service are trained.[20] All uncharacterized discharges, therefore, come from Cape May.

Commandant's Instruction M1000.4 describes the binding requirements affecting discharges for unsuitability. First, as is true for any discharge involving psychiatric considerations, a psychiatrist must examine the individual and write a report including "a statement whether the individual was and is mentally capable both to distinguish right from wrong and adhere to the right and has the mental capacity to understand the action being contemplated in his or her case."[21]

Next, the Instruction requires that an individual be provided with the following documentation:

(1) letter notifying the member of the reason(s) for administrative; processing and of his or her rights
(2) if applicable, member's declaration or waiver of opportunity to consult with counsel;
(3) member's signed statement of awareness, statement on his or her behalf, or refusal to make a statement;
(4) medical report;
(5) copy of Enlisted Employee Review and current Enlisted Employee Review Member Counseling Receipt;
(6) summary of military offenses; and
(7) any other pertinent comments or recommendations.

Finally, there are two special requirements affecting certain subsets of discharges. Coast Guardsmen in their first term of enlistment may request a waiver of an AD or PD discharge under the "Second Chance Program," and members with more than eight years of service are entitled to appear before an Administrative Separation Board.

Collectively, these regulations should provide service members with detailed information about the reasons for their discharge and the rights and remedies available to them. Unfortunately, the Coast Guard has denied this information to most members discharged for AD and PD.

FINDINGS AND ANALYSIS

VVA sued DHS in two federal lawsuits seeking records related to AD and PD discharges.[22] DHS agreed to settle VVA's claims by producing 31.5% of the total personality disorder discharge separation packets (approximately 265) from October 1, 2001 to December 31, 2010.[23] DHS agreed to provide certain records from each packet without disclosing personally identifying information.[24]

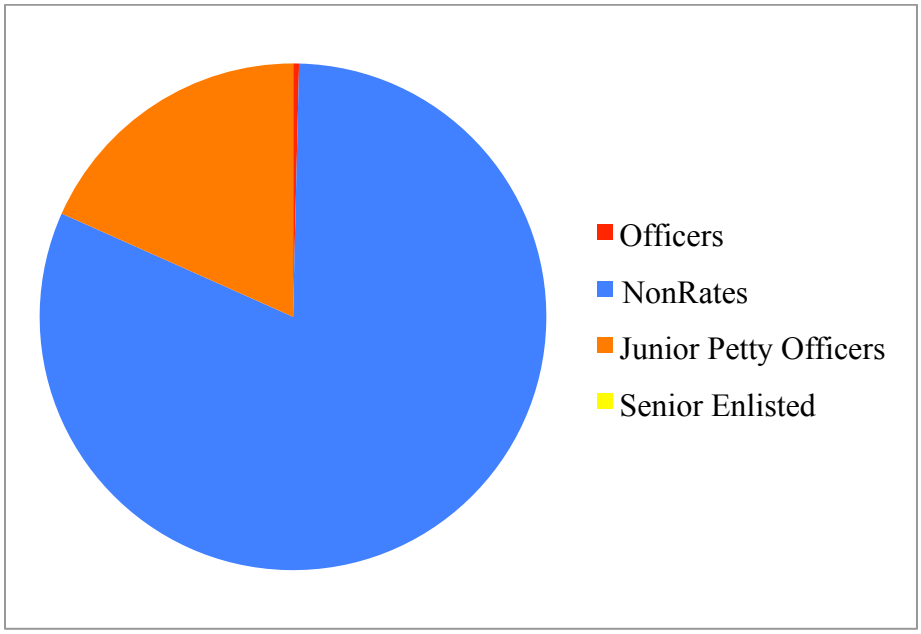
Method

Each separation packet was analyzed and, where available, the following data was extracted in order to assess compliance with the Commandant's Instruction:

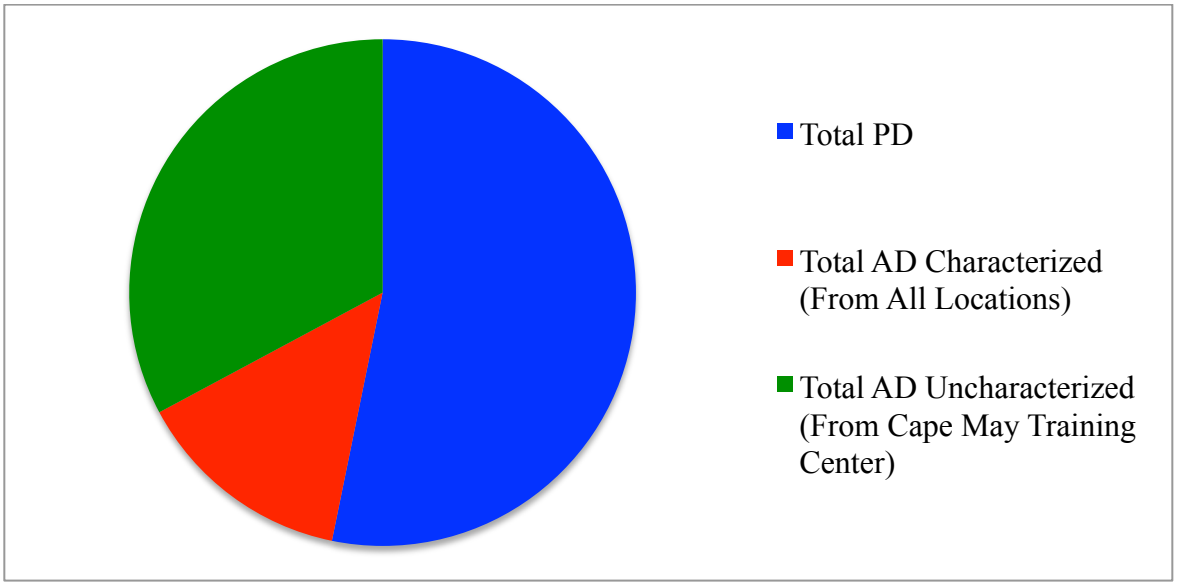
- Rank/pay grade
- Rate/specialization
- Length of service that service period
- Sea service that service period
- Date of separation
- Characterization of service
- Separation narrative
- Separation code
- Re-entry code
- Presence of:
  - redacted medical records,
  - memorandum notifying individual of rights,
  - signed endorsement acknowledging rights,
  - military offenses, and
  - employee review summary.

If a memorandum notifying an individual of his or her rights had redactions in the list of enclosures, this report errs on the side of inclusivity and gives the Coast Guard the benefit of the doubt that those enclosures included all required documents, such as the employee review summary.

Percentage of Total AD/PD Discharges from FY 2001 to FY 2012 by Pay Grade Group



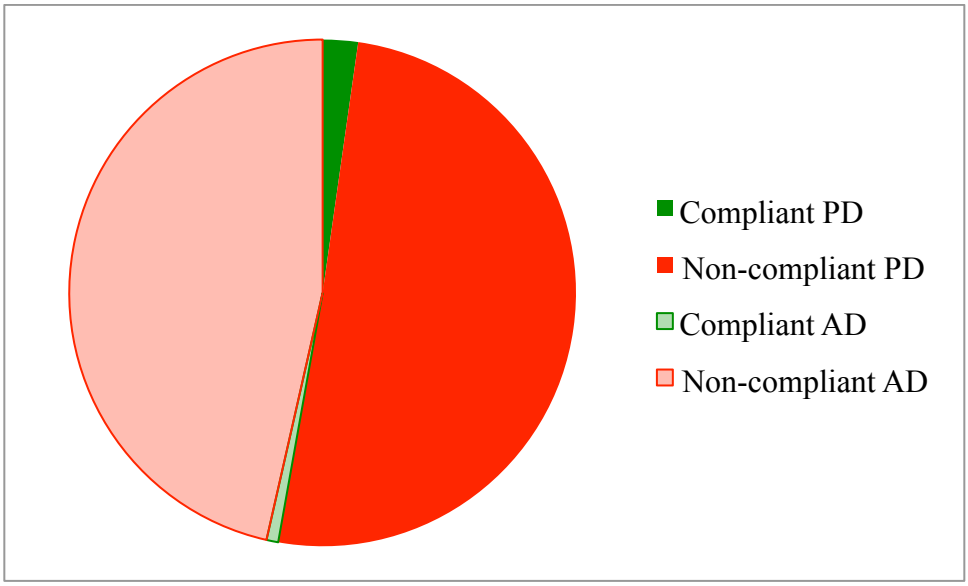
Percentage of Total Discharges by Diagnosis and Characterization



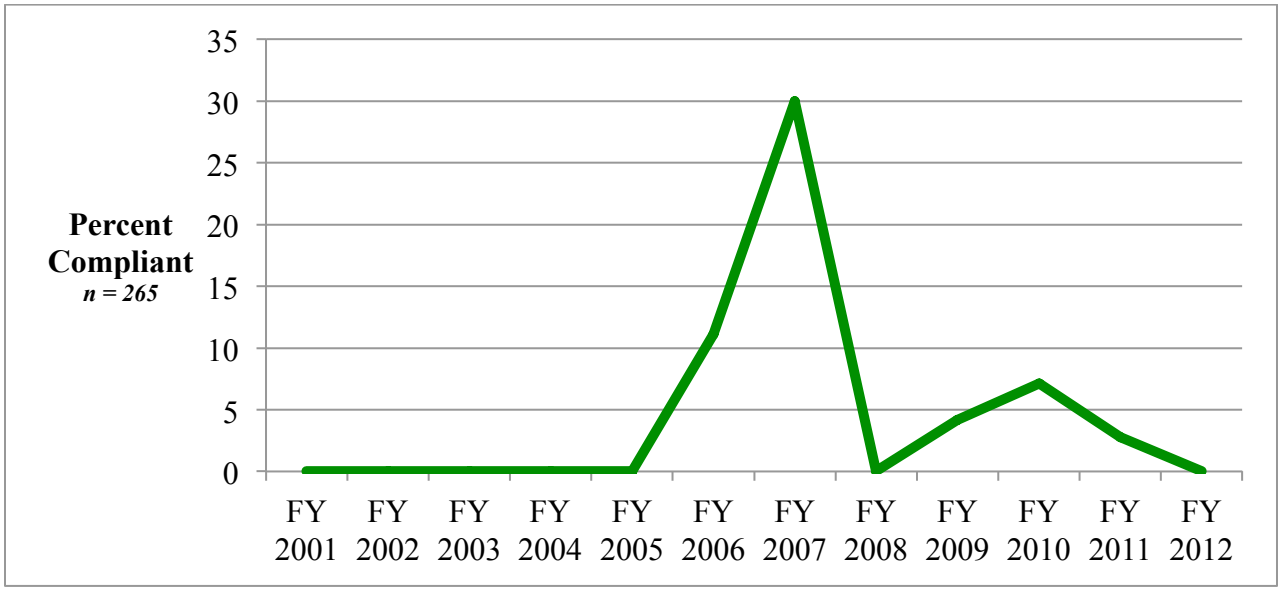
Compliance with Commandant's Instruction's Requirements

As described above, all discharges must comply with the Commandant's Instruction M1000.4. The requirements are described below, followed by an assessment of compliance within the sample for each requirement.

Percentage of Total Discharges by Diagnosis and Compliance



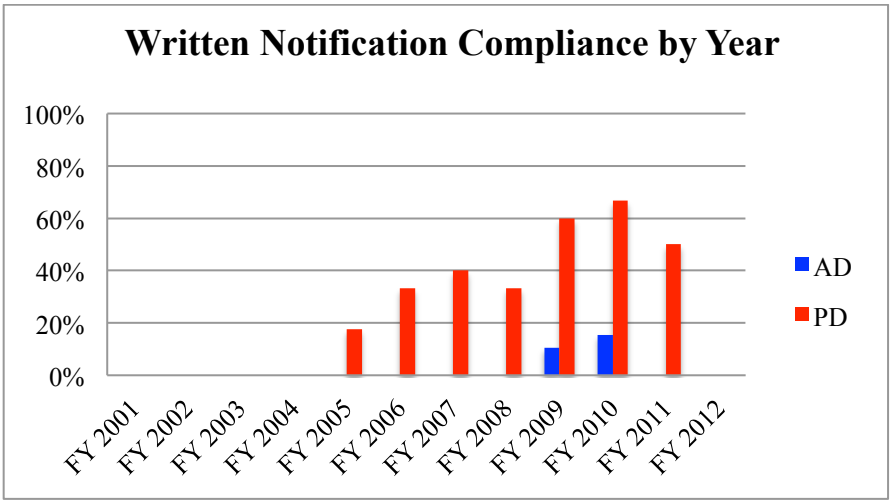
Overall Compliance with All of the Commandant's Instruction's Requirements Over Time



1. Requirement: Notification of Commanding Officer's intent to seek an AD or PD discharge, and rights afforded to the individual.[25]

Discussion: Coast Guardsmen have a right to know that they are being discharged because of a diagnosis of AD or PD and to make a written statement. They also have a right to consult with a military attorney if the commanding officer seeks to award a general discharge instead of an honorable discharge.[26] Notification must be in writing.[27]

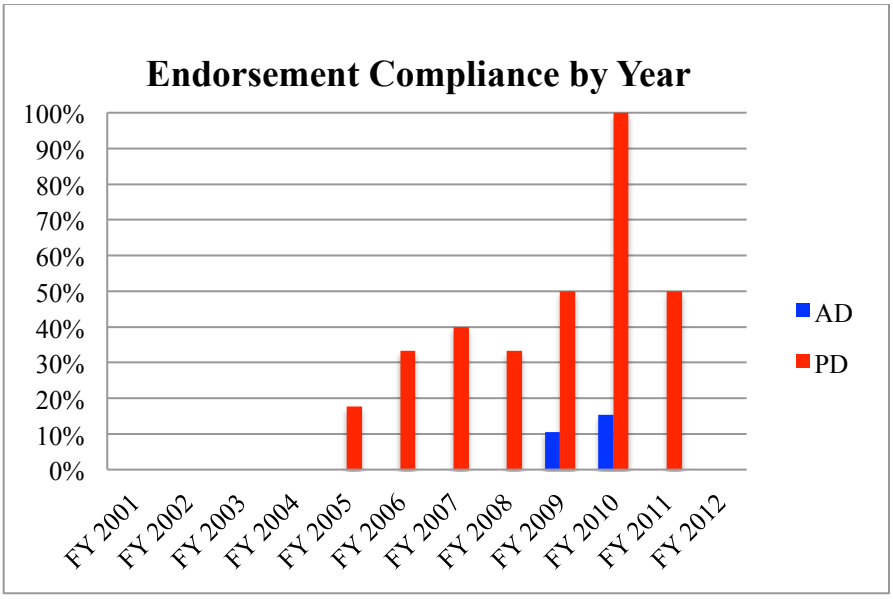
Analysis: From FY 2001 to FY 2012, the Coast Guard never had 100% compliance with this requirement. Overall from FY 2001 to FY 2012 in the sample the Coast Guard had a 9.85% compliance rating in AD and PD discharges. Unfortunately 90.15% of the time Coast Guard personnel did not take the time to include documentation notifying Coast Guardsmen of their rights.



2. Requirement: Endorsement by the individual being discharged, acknowledging that the individual understands his or her rights.[28]

Discussion: Coast Guardsmen must acknowledge in writing that they have been made aware of their rights. If an individual wishes to make a statement, then that statement will be included in the separation packet. If he or she does not wish to make a statement then the individual will so indicate in the endorsement section of the notification memorandum. If an individual is entitled to an attorney and wishes to speak to one, then the individual must also so indicate in the endorsement section.[29]

Analysis: Similar to the case of the Notification requirement, overall from FY 2001 to FY 2012 the Coast Guard had a 9.05% compliance rating in AD and PD discharges in the sample. This is not surprising, because the Endorsement Acknowledging Notification of Rights is usually the second page of the same document notifying the individual of their rights. Unfortunately 90.95% of the time, the separation packets produced by the Coast Guard indicate that members were not notified of their rights.



3. Requirement: Provision of a copy of the Enlisted Employee Review and a copy of the Enlisted Employee Review Counseling Receipt.[30]

Discussion: Enlisted personnel are given employee reviews on a semi-annual or annual basis depending on their rank. Enlisted personnel receive scores on a 1-7 scale in a variety of leadership and proficiency criteria that vary from pay grade to pay grade; one being the lowest and seven the highest.[31]

Analysis: The Coast Guard did not specifically agree to provide Enlisted Employee Review Counseling Receipts, therefore they cannot be tracked.[32] The

separation packets did, however, include Enlisted Employee Review Summaries. Two packets in the sample had a printout of the Summary of Enlisted Employee Review. Six packets listed the summaries as Enclosures in the Separation Memorandum and twelve more had Enclosure sections that were redacted. Even giving the Coast Guard the benefit of the doubt and assuming that the memorandums that included redacted enclosures listed Employee Review Summary and all Enclosures were actually submitted with the memorandums, the records disclosed indicate the Coast Guard has a compliance rate of only 7.58%.

4. Requirement: Separation Memorandum/Message.[33]

Discussion: Normally, in order to give a member of the Coast Guard an AD or PD discharge, unit commanders must send documentation to their superiors, who will then authorize the discharge.[34] A small percentage of unit commanders have the authority to issue AD or PD discharges without authorization from a superior, but these commanders must still send the documentation to the Commander.[35] Additionally PD discharges may be transmitted by For Official Use Only Message,[36] while AD discharges must be transmitted by Memorandum.[37]

Analysis: The Coast Guard did not specifically agree to provide Separation Memorandums. However, often when a separation packet included a medical record and documentation that an individual was notified of their rights, it also included a Separation Memorandum.[38]

5. Requirement: Diagnosis of AD or PD by a psychiatrist, not by a PhD level psychologist or PhD level clinical social worker.[39]

Discussion: Unlike other military services that require a probationary period to give members a chance to improve their performance, the Coast Guard does not require a probationary period for anyone administratively discharged for AD or PD.[40] Although a diagnosis by a PhD level psychologist or clinical social worker is sufficient to discharge Coast Guardsmen through the Physical Disability Evaluation System (PDES),[41] members diagnosed with AD or PD must be discharged administratively.[42] The Coast Guard's administrative regulations state that members discharged for unsuitability as a result of AD or PD must be examined by a psychiatrist.[43]

The Coast Guard released existing medical records, redacted in their entirety except for the letterhead identifying them as medical records. From the available data there is no way to evaluate the quality of the diagnosis, or whether the diagnosis was based on an adequate longitudinal history.[44] Nor is it possible to tell the qualifications of individual making a diagnosis. This report instead tracks the presence or absence of redacted medical records without being able to tell who made the diagnosis.

Analysis: Due to the limitations inherent in redacted medical records, this requirement was not taken into account when assessing overall compliance.

Special Requirements

If in the first term of enlistment;

Requirement: Notification of Second Chance Program.

Analysis: Coast Guardsmen in their first term of enlistment may request a waiver

of an AD or PD discharge under the "Second Chance Program."[45] However since the length of the first term enlistment varies by individual, it is difficult to determine who is eligible for the Second Chance Program. At the very least, every individual with fewer than two years of service is probably entitled to the second chance program. 108 individuals in the sample met this criterion. 15 separation packets included notification of the Second Chance Program. This translates to 13.88% of individuals who were potentially eligible. Since many members have initial enlistment longer than two years (indeed members who were notified of the second chance program have over two years of service) 13.88% should be considered an upper bound, to a figure that is most likely quite lower.

If over eight years of service;

Requirement: Entitled to Administrative Separation Board[46]

Analysis: Four observed enlisted personnel were entitled to Administrative Separation Boards. According to the records disclosed by the Coast Guard, only one of them was advised of this right.

Tables 1 and 2 below present the data underlying the summary graphs throughout this report.

Table 1: Compliant AD Discharges

FY	Med. Records	Written Notification	Endorsement / Statement
2005	0.00%	0.00%	0.00%
2006	*	*	*
2007	*	*	*
2008	*	*	*
2009	10.52%	10.52%	10.52%
2010	12.82%	15.38%	15.38%
2011	0.00%	0.00%	0.00%
2012	0.00%	0.00%	0.00%

* Indicates that there were no discharges that year in the sample.

Table 2: Compliant PD Discharges

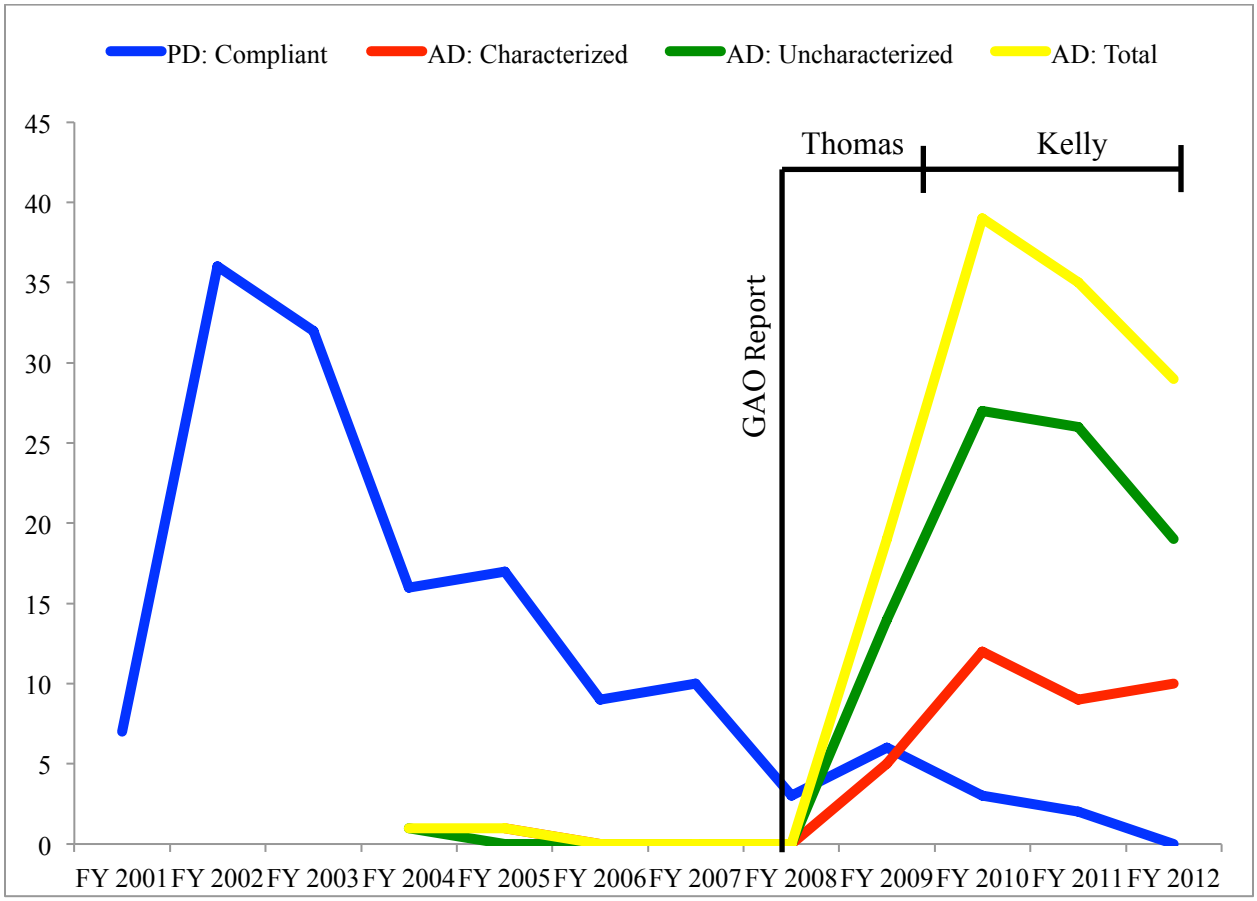
FY	Med. Records	Written Notification	Endorsement / Statement
2001	0.00%	0.00%	0.00%
2002	0.00%	0.00%	0.00%
2003	0.00%	0.00%	0.00%
2004	0.00%	0.00%	0.00%
2005	17.64%	17.64%	17.64%
2006	33.33%	33.33%	33.33%
2007	40.00%	40.00%	40.00%
2008	33.33%	33.33%	33.33%
2009	50.00%	60.00%	50.00%
2010	66.67%	66.67%	100.00%
2011	50.00%	50.00%	50.00%
2012	*	*	*

* Indicates that there were no discharges that year in the sample.

Longitudinal Findings

Compliant PD discharges peaked in 2002 and declined thereafter. Total AD discharges both characterized and uncharacterized increased after the 2008 GAO report. As described above, all uncharacterized discharges come from Training Center Cape May. This period of increase began when Captain Cari Batson Thomas was Commanding Officer of Cape May. Discharges then began to decrease somewhat when Captain Bill Kelly succeeded as Commanding Officer at Cape May. The rate of AD discharges during the tenure of Captain Bill Prestige, current Commanding Officer at Cape May, remains to be seen.

Total Number of Discharges Per Year By Type



Overall Compliance

These data demonstrate an abysmal record of compliance with all requirements of AD and PD discharges. The Coast Guard followed proper procedure in only 9 of the 265 AD/PD discharge cases that we analyzed. One hundred percent of the AD and PD discharges from every year but FY 2006 and FY 2007 failed to comply with Coast Guard regulations in some way. The Coast Guard achieved peak compliance in FY 2007 with 30.0%.

RECOMMENDATIONS

For whatever reason, the Coast Guard has dramatically increased its use of AD discharges since 2008. The majority of AD discharges in the sample were uncharacterized and therefore originated at Training Center Cape May. The command cadre of Cape May, including the new Commanding Officer, Capt. Prestige, should engage in a targeted intervention to train personnel at the base to cease illegally discharging recruits.

Many AD discharges also came from other units outside of Cape May. The Coast Guard should identify illegal discharges and correct the records of members wrongfully separated.

APPENDIX A – Sample Separation Packet

/TION: NOT TO BE USED FOR .NTIFICATION PURPOSES | THIS IS AN IMPORTANT RECORD. SAFEGUARD IT. | ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle):

2. DEPARTMENT, COMPONENT AND BRANCH: HOMELAND SECURITY: USCG

3. SOCIAL SECURITY NUMBER:

4.a. GRADE, RATE OR RANK: SN

b. PAY GRADE: E3

5. DATE OF BIRTH (YYYYMMDD):

6. RESERVE OBLIGATION TERMINATION DATE (YYYYMMDD):

7.a. PLACE OF ENTRY INTO ACTIVE DUTY:

b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known):

8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND:

b. STATION WHERE SEPARATED:

9. COMMAND TO WHICH TRANSFERRED:

10. SGLI COVERAGE [ ] NONE · **AMOUNT:** $400,000

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years).

NA
X X X X X X X X X X X X X X X X X X X X X X X
X X X X X X X X X X X X X X X X X X X X X X X
X X X X X X X X X X X X X X X X X X X X X X X
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12. RECORD OF SERVICE	YEAR(S)	MONTH(S)	DAY(S)
a. DATE ENTERED AD THIS PERIOD	2006		
b. SEPARATION DATE THIS PERIOD	2010		
c. NET ACTIVE SERVICE THIS PERIOD	03		
d. TOTAL PRIOR ACTIVE SERVICE	00		
e. TOTAL PRIOR INACTIVE SERVICE	00		
f. FOREIGN SERVICE	00		
g. SEA SERVICE	00		
h. EFFECTIVE DATE OF PAY GRADE	2007		

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)

(; FIRST GOOD CONDUCT MEDAL FOR PERIOD ENDING 11;
X X X X X X X X X X X X X X X X X X X X X X X
X X X X X X X X X X X X X X X X X X X X X X X

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)

ENLISTED PROFESSIONAL MILITARY, (1/DAYS) 2008; CIVIAL RIGHTS/HUMMAN RELATIONS AWARENESS SEXUAL HARASSMENT PREVENTION, (1/DAYS) 2006;
X X X X X X X X X X X X X X X X X X X X X X X

15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERAN'S EDUCATIONAL ASSISTANCE PROGRAM [ ] YES [ ] NO

b. HIGH SCHOOL GRADUATE OR EQUIVALENT [X] YES [ ] NO

16. DAYS ACCRUED LEAVE PAID 23.5

17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION [ ] YES [ ] NO

18. REMARKS

PLACE OF BIRTH:
ADVISED OF REQUIREMENT FOR SELECTIVE SERVICE REGISTRATION.
DD FORM 256 CG ISSUED.
MGIB INFO: MEMBER'S INITIAL SERVICE CONTRACT WAS FOR FOUR YEARS.
X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X
X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X
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The information contained herein is subject to computer matching within the Department of Defense or with any other effected Federal or non-federal agency for verification purposes and to determine eligibility for and/or continued compliance with the requirements of a Federal benefit program.

19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code):

b. NEAREST RELATIVE (Name and address - include Zip Code):

20. MEMBER REQUESTS COPY 6 BE SENT TO DIRECTOR OF VETERAN AFFAIRS [ ] YES [ ] NO

21. SIGNATURE OF MEMBER BEING SEPARATED:

22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature):

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION: DISCHARGE

24. CHARACTER OF SERVICE (Include upgrades): HONORABLE

25. SEPARATION AUTHORITY: COMDTINS 1000.6 12-B-16

26. SEPARATION CODE: JFY

27. REENTRY CODE: RE3G

28. NARRATIVE REASON FOR SEPARATION: ADJUSTMENT DISORDER

29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD): TL: NONE

30. MEMBER REQUESTS COPY 4 Initials

DD FORM 214, FEB 2000 | PREVIOUS EDITION IS OBSOLETE. | SERVICE - 2

Department of Homeland Security
U.S. Coast Guard
Direct Access

STANDARD TRAVEL ORDER

/2010

0 Unk U Seq: 1686705

Period of Travel: /2010 /2010 Blanket Orders: Termination DSC

For Medical Travel:

Remain Overnight (RON):
0 days at

Primary Mode of Travel: Car **Govt. Credit Card Holder** X

Commercial Carrier (Own expense, subj to reimbursement)

Government Procured Transportation

X Authorized Private Owned Conveyance (POC) $0

Direct Access Centrally Scheduled Training:

Report To:	Nature Duty	Duty Type	From	To	Revisit
	Separation		/2010		N

USA ( ) - Position:

Per Diem Rate (estimated):

Authorized Rental Car: Upgrade: Lodging: $0 M&IE: $0

Quarters:

Messing: to:

Auth. Local Travel (taxi, bus, etc.):

Accounting:

Travel Order No	Acct String	Agency	Reg	Approp	Lim	Fund	Lvl	Pg	Elm	Cost Ctr	Obj Cl	Estimate
1210G80PSR3B3000	2P001299210SR780402104	2	P	001	299	21	0	SR		78040	2104	$3,000.00

TAC code for personal property shipment: ZSRC
TAC code for transportation and storage of POV:ZVSC
TAC code to be used for Non-Temporary-Storage if authorized: ZNSC

Remarks/Comments/Additional Instructions

A. MEMBER HAS COMPLETED AT LEAST 90% OF THE INITIAL PERIOD OF OBLIGATED SERVICE
B. TYPE OF DISCHARGE: HONORABLE
C. REENLISTMENT CODE: RE-3-G
D. MEMBER IS NOT ENTITLED TO TRANSITION ASSISTANCE BENEFITS; SEPARATION CODE: JFY
E. PLACE ENTERED ACTIVE DUTY (PLEAD):
F. HOME OF RECORD (HOR):
G. MEMBER TO USE 1 PRIVATELY OWNED CONVEYANCES.
1. POC INFO:
H. OFFICIAL DISTANCE FROM TO IS 652 MILES
I. AUTHORIZED 80% (MALT) MILGE FROM LAST PDS TO HOR OR PLEAD:
1. 652 (MILES) X .165 X 01(NUMBER OF POC) X %80 = $86.06.
J. IAW JFTR U5630, DISLOCATION ALLOWANCE IS NOT AUTHORIZED TO THE LAST PDS.
K. IAW JFTR U5705-B, TEMPORARY LODGING EXPENSE IS NOT AUTHORIZED WHEN LEAVING ACTIVE DUTY.
L. AUTHORIZED SHIPMENT OF HOUSEHOLD GOODS AT PAY GRADE E-3 AT WITH OUT DEPENDENT RATE, IAW JFTR CHAPTER 5.
M. IN ACCORDANCE WITH THE JOINT FEDERAL TRAVEL REGULATIONS (JFTR) U5360 (G) YOU HAVE 180 DAYS FOLLOWING YOUR SEPARATION DATE TO SHIP YOUR HHG AND/OR STORE YOUR HHG AT GOVERNMENT EXPENSE. IN CASES OF EXTREME HARDSHIPS CASES (MEDICAL, LEGAL ISSUES), AN EXTENSION OF TIME LIMIT MAY BE AUTHORIZED/APPROVED BY COMDT (CG-1222). REQUESTS MUST BE SUBMITTED BEFORE THE 181ST DAY FOLLOWING SEPARATION, OTHERWISE ENTITLEMENT EXPIRES ON THE 181ST DAY. IF YOU HAVE HHGÂ¿S IN STORAGE, YOU MUST AGREE TO PAY ALL COSTS FOR

Except as noted orders are authorized and directed. Proceed and report to the places and in the order listed. Deviations should not be made without prior written or verbal orders from proper authority.

Official's Signature Date Traveler's Signature Date

Department of Homeland Security U.S. Coast Guard Direct Access	**STANDARD TRAVEL ORDER**				06/22/2010
	2013221	0 [redacted]	Unk	U	Seq: 1686705
	000516 [redacted]		[redacted]		[redacted]
Period of Travel: [redacted]/2010	[redacted]2010	Blanket Orders:	Termination		DSC

STORAGE FOR ANY PERIOD IN EXCESS OF THE AUTHORIZED STORAGE PERIOD. CLAIMS FOR SEPARATING USCG PERSONNEL, PLEASE SUBMIT AN ONLINE EFT APPLICATION (HTTPS://WWW.FINCEN.USCG.MIL/SECURE/ENROLLMENT_FORM.HTM) AFTER THE EFFECTIVE DATE OF YOUR RETIREMENT OR SEPARATION. YOU MUST OBTAIN COUNSELING FROM THE NEAREST TRANSPORTATION OFFICE IF YOU ARE PERFORMING A PERSONAL PROCUREMENT MOVE (PPM, FORMERLY DITY MOVE). FAILING TO COMPLY WITH SERVICE REQUIREMENTS MAY LIMIT PAYMENT OR RESULT IN COMPLETE DENIAL OF YOUR CLAIM.

N. YOU ARE DIRECTED TO SUBMIT A TRAVEL CLAIM TO PPC (TVL) WITH IN 3 DAYS AFTER COMPLETION OF THE TRAVEL UNDER THESE ORDERS. IF YOU DECIDE TO CANCEL THESE ORDERS YOU ARE PERSONALLY LIABLE FOR THE REPAYMENT OF ANY FUNDS EXPENDED IN ACCORDANCE WITH THESE ORDERS.

O. MAILING ADDRESS AFTER SEPARATION:

[redacted]

Except as noted orders are authorized and directed. Proceed and report to the places and in the order listed. Deviations should not be made without prior written or verbal orders from proper authority.

[redacted] USCG, BYDIR

Official's Signature Date Traveler's Signature Date

Home > Develop Workforce > Plan Careers > Use > **CG Member Info** New Window

Background | Career Summ | Contact Info | Cg Depend Benef | Detailer Comments

Name: **Empl Rcd#:** 0 **EmplID:** Docs

Personal Information

Job Code: **Rank:** SN E3 Regular **Status:** Active

DeptID: **Location:**

Position: DUTY **Birth Location:**

Ad Base Dt: /2008 **Rotation Dt:** **Exp Loss Dt:** 2014 **Birth:** /1985

Mar Status. **Citizenship:** Native **Country:**USA

Sex: Male **JobFamily Entry Dt:** **Exp AD Term Dt:** /2012

Points Start Date (PSD): 2006

Ethnic Category: Not Hispanic or Latino **Ethnic Grp:** [redacted] Reserve Info Mbr Career Info

Clearance Information

Agency: **SCI Eligible:**

Investigate Type: **Interim:** None

Investigate Date: **Interim Date:**

Clearance: **Last Updt:** /2008

Clearance Granted: Call SECCEN

SF312 Date:

Save | Return to Search | Next tab

Background | Career Summ | Contact Info | Cg Depend Benef | Detailer Comments | Mbr and Cmd Comments | Address History

DEPARTMENT OF HOMELAND SECURITY U.S. COAST GUARD System Generated	SEPARATION AUTHORIZATION			
Emplid:	Name: A	Rank: SN	Effective Date: /2010	Member Submit: /2010
Deptid: S	Dept Name:		Last Day of Active Duty l/2010	
Request Type: Enlisted Separation	Request Status: Approved		Request Source: Unit	
	Entered By: l		Date: !/2010	

SEPARATION INFORMATION

Article/Law: 12-B-16 Unsuitability	
Sep/Ret Type: Adjustment Disorder	
DD 214: JFY Adjustment Disorder	
Character of Service: Honorable	Pay Type Code:

THIS SEPARATION ACTION HAS BEEN AUTHORIZED PURSUANT TO CGPSC-EPM WRITTEN DECISION AND IS ISSUED BY . . . , - BY DIRECTION OF

DISCHARGE MEMBER NO LATER THAN EFFECTIVE DATE INDICATED ABOVE WITH HONORABLE DISCHARGE BY REASON OF UNSUITABILITY ADJUSTMENT DISORDER UNDER ARTICLE 12.B.16 PERSMAN PROVIDED NO DISCIPLINARY ACTION PENDING.

INDICATE CODE JFY IN BLOCK 26 OF DD FORM 214CG. IN ACCORDANCE WITH COMDTINST M1900.4D, BLOCK 28 SHALL ONLY INDICATE DISCHARGE FOR ADJUSTMENT DISORDER.

ASSIGN REENLISTMENT CODE RE-3.

MEMBER SHALL SURRENDER UNIFORM UPON DISCHARGE.

IF APPLICABLE, ANY UNEARNED ENLISTMENT OR SELECTIVE REENLISTMENT BONUS PORTION WILL NOT BE RECOUPED.

ADVISE COMMANDER, PERSONNEL SERVICE CENTER EPM-1 IF DISCHARGE NOT EFFECTED BY DATE INDICATED ABOVE.

PLACE COPY OF THIS AUTHORIZATION ORDER IN MEMBER'S PDR.

1

DEPARTMENT OF HOMELAND SECURITY U.S. COAST GUARD System Generated	SEPARATION AUTHORIZATION			
Emplid:	Name:	Rank: SN	Effective Date: /2010	Member Submit: /2010
Deptid:	Dept Name:		Last Day of Active Duty: /2010	
Request Type: Enlisted Separation	Request Status: In Process		Request Source: Unit	
	Entered By:		Date: /2010	

SEPARATION INFORMATION

Article/Law: 12-B-16 Unsuitability	
Sep/Ret Type: Adjustment Disorder	
DD 214: JFY Adjustment Disorder	
Character of Service: Honorable	Pay Type Code:

THIS SEPARATION ACTION HAS BEEN AUTHORIZED PURSUANT TO CGPSC-EPM WRITTEN DECISION AND IS ISSUED - BY DIRECTION OF CENTER.

DISCHARGE MEMBER NO LATER THAN EFFECTIVE DATE INDICATED ABOVE WITH HONORABLE DISCHARGE BY REASON OF UNSUITABILITY ADJUSTMENT DISORDER UNDER ARTICLE 12.B.16 PERSMAN PROVIDED NO DISCIPLINARY ACTION PENDING.

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ADVISE COMMANDER, PERSONNEL SERVICE CENTER EPM-1 IF DISCHARGE NOT EFFECTED BY DATE INDICATED ABOVE.

PLACE COPY OF THIS AUTHORIZATION ORDER IN MEMBER'S PDR.

1

1910

2010

FIRST ENDORSEMENT on memo 1910 of 2010

From:

To:

Subj: DISCHARGE OF

1. SN is eligible for retention under the Second Chance Policy and has not requested due consideration.

2. , has recommended that be separated from the Coast Guard with an Honorable Discharge for diagnosis of an adjustment disorder. I concur with recommendation.

3. discharge package is hereby forwarded to you for appropriate action.

#

Copy:

3/9

U.S. Department of Homeland Security

United States Coast Guard

1910

2010

MEMORANDUM

From:

Reply to Attn of:

To:

Subj: RECOMMENDATION FOR DISCHARGE

Ref: (a) Personnel Manual, COMDTINST M1000.6 (series), Article 12.B.16
(b) Administrative Discharge Procedure and Second Chance Policy, LANTAREAINST 1910.1A

1. I recommend that , USCG, be separated from the U. S. Coast Guard with an Honorable Discharge pursuant to the provisions of reference (a) for unsuitability due to diagnosis of an adjustment disorder. Final discharge determination and character of discharge resides with n-1).

2. My recommendation is based on the member's diagnosis of adjustment disorder with mixed disturbance of emotions and conduct (309.4), dysthymic disorder, and borderline traits by

3. was notified of and acknowledged my intent to initiate discharge proceedings and the reason for that action on / 2010. submitted a two page statement, which is enclosed with this recommendation.

4. is eligible but does not request a waiver under the Second Chance Review Program. I do not recommend retaining under the Second Chance Program, as the psychiatrist's report indicates individuals with this condition are "maladapted to Naval Service due to reasons of personality and/or mental capacity, rarely complete their enlistment successfully, and often tie up command resources during their remaining time in service"; therefore, I believe he will never be fit for full duty.

5. All documents required by reference (a) and (b) are forwarded as enclosures.

#

Enclosure: (1) My memo 1910 of 2010; Notification of Intent to Discharge
(2) Member's Acknowledgement & Exercise of Rights
(3) Member's memo 1910 of / 2010: Statement for Pending Discharge
(4) Member's Employee Review Summary
(5) Chronological Record of Medical Care, SF 600
(6) Member's Individual Development Plan
(7) Executive Officer Narrative
(8) CG-3307 dtd 2009
(9) CG-3307 dtd 2007
(10) Summary of Military Offenses - NONE

U.S. Department of Homeland Security

United States Coast Guard

1910
2010

MEMORANDUM

From:

Reply to
Attn of:

To: SN

Subj: NOTIFICATION OF INTENT TO DISCHARGE

Ref: (a) Personnel Manual, COMDTINST M1000.6A, Chapter 12.B.16
(b) Administrative Discharge Procedures and Second Chance Policy, MLCLANTINST 1910.1

1. This is to inform you that I have initiated action to discharge you from the U. S. Coast Guard pursuant to the provisions of reference (a) due to unsuitability.

2. The reason for my action is that during an examination performed at you were diagnosed with an adjustment disorder.

3. I intend to recommend an honorable discharge. The decision on your discharge and the type of discharge you will receive rests solely with (

4. You have the following rights, as further detailed in reference (a), which I encourage you to review.

a. You may submit a statement on your behalf. Any statement you provide must be submitted within five (5) working days of today's date. Should you choose to submit a statement, I will forward that statement to the separation authority as an enclosure to my discharge recommendation.

b. You may disagree with my recommendation to discharge you from the Coast Guard; if so, your rebuttal will be forwarded with my recommendation.

#

Enclosures: (1) Acknowledgement and Election Form
(2) Exercise of Rights Form

ENCLOSURE(1)

From:

To:

Subj: NOTIFICATION OF INTENT TO DISCHARGE

Ref: (a) Your 1910 memo of 2010
(b) Personnel Manual, COMDTINST M1000.6 (series), 12.B.16
(c)

1. I have read your memo in reference (a) and have had all of my questions satisfactorily answered. I acknowledge notification of my proposed discharge and have 5 working days to respond; any responses are due by 2010. If I require clerical assistance, it will be provided by y . The basis of this separation is unsuitability per Article 12.B.16, reference (b), of which I have been provided a photocopy.

Circle election or applicable statement and initial each entry below.

1. **I DID** or **I DID NOT** receive an enlistment bonus upon entering the USCG.
Entered USCG on: 2006 (active duty).

2. **General Statement Regarding my Proposed Discharge** *(initial and complete one):*

___ I will attach my ____ page statement regarding this discharge no later than the due date above.

Or

____ I waive my right to submit a statement regarding this discharge.

3. ___ **I DO** or **I DO NOT** request a Second Chance Discharge Waiver. Following reference (c), if I request Second Chance, I must prepare a 1 or 2 page justification memo by the submission date above. If I do not provide the memo, I will not be considered for Second Chance. My memo will explain the circumstances surrounding my proposed discharge, how I plan to correct my performance deficiencies and prevent reoccurrence, and explain why my case warrants exceptional consideration for retention. I will attach details and supporting documentation, to include: My Individual Development Plan (IDP), admin entries, awards/recognition items, and other items that describe my goals, performance, progress and results.

4. ____ As applicable: If a General Discharge is recommended by the command, the following counseling is required: I understand that if I receive a General Discharge under Honorable Conditions that I may expect to encounter prejudice in civilian life. I hereby acknowledge I have been provided an opportunity to consult with NPMU USCG, a lawyer.

5. ___ **I DO** or **DO NOT** object to discharge from the U.S. Coast Guard.

	1/2010		2010
Signature/Printed Name	Date	Witness Signature	Date

ENCLOSURE(2)

U.S. Department of Homeland Security

United States Coast Guard

1910

2010

MEMORANDUM

From:

Reply to Attn of:

To:
Thru:

Subj: STATEMENT FOR PENDING DISCHARGE

Ref: (a) Coast Guard Personnel Manual, COMDTINST M1000.6A, Ch. 12.B.16
(b) Administrative Discharge Procedures and Second Chance Policy, MLCLANTINST1910.1

[redacted] STATEMENT FOR PENDING DISCHARGE [redacted] 1910

[redacted]

[redacted]

[redacted]

Employee Review Summary

EmplID:

Empl Rcd Nbr: 0 Regular SN E3

Position: DUTY

Refresh Summary

DeptID:

Employee Review Summary

Enlisted Marks | OER Summary | As of Date

Rank	Eff Date	Type	Lead Sum	Prof Sum	Perf Sum	Mil Sum	Lead	Prof	Perf	Mil	Con	Rec
SN	2010	Regular	15	25	27	16	4434	553444	545454	664	S	R
SN	2008	Regular	25	38	34	18	6766	766766	665566	666	S	R
SN	/2007	Regular	25	35	35	17	6667	666656	666575	656	S	R

Return to Search

ENCLOSURE(4)

[redacted]

HEALTH RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

Patient: [redacted] Date: 2010 1116 EDT Appt Type: ESTB

[redacted]

[redacted]

[redacted]

HEALTH RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

Patient: [redacted] Date: 2010 1116 EDT Appt Type: [redacted]

[redacted]

[redacted]

[redacted]

HEALTH RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

Patient: [redacted] Date: 2010 1116 EDT Appt Type: ESTB

[redacted]

[redacted]

[redacted]

HEALTH RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

Patient: [redacted] Date: 2010 1116 EDT Appt Type: ESTB

[redacted]

[redacted]

HEALTH RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

Patient: [redacted] Date: 2010 1116 EDT Appt Type: ESTB

[redacted]

[redacted]

HEALTH RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

Patient: [redacted] Date: 2010 1116 EDT Appt Type: EBTS

[redacted]

[redacted]

HEALTH RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

Patient: [redacted] Date: 2010 1116 EDT Appt Type: EMTS

[redacted]

[redacted]

[redacted]

HEALTH RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

Patient: [redacted] Date: 2010 1116 EDT Appt Type: ESTB

[redacted]

U.S. Department of Homeland Security

United States Coast Guard

1910

2010

MEMORANDUM

From: RD

Reply to Attn of:

To:

Subj: EXECUTIVE OFFICER'S NARRATIVE FOR DISCHARGE OF USCG

Ref: (a) Personnel Manual, COMDTINST M1000.6 (series), Article 12.B.16
(b) Administrative Discharge Procedure and Second Chance Policy, LANTAREAINST 1910.1A

1. The following is a narrative of performance leading to recommendation for discharge, submitted in accordance with refs (a) and (b).

Date	Performance Bullet
2009	was notified that he would receive a

[redacted] ,E 1910

OF [redacted] 2010

[redacted]y 2010 [redacted] notified of and acknowledged Commanding Officer's intent to recommend discharge for unsuitability. [redacted] on exercised his right to submit a statement (Encl 1, 2).

#

2

APPENDIX B – Settlement Agreement

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VIETNAM VETERANS OF AMERICA CONNECTICUT GREATER HARTFORD CHAPTER 120, VIETNAM VETERANS OF AMERICA, VIETNAM VETERANS OF AMERICA SOUTHERN CONNECTICUT CHAPTER 251, VIETNAM VETERANS OF AMERICA CONNECTICUT CHAPTER 270, and VIETNAM VETERANS OF AMERICA CONNECTICUT STATE COUNCIL,	
Plaintiffs,	Civil Action Nos.: 3:10-cv-1972(AWT)
v.	3:11-cv-2009(AWT)
UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, and UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,	November 29, 2012
Defendants.	

STIPULATION OF SETTLEMENT AND PROPOSED ORDER

WHEREAS, plaintiffs Vietnam Veterans of America Connecticut Greater Hartford Chapter 120, Vietnam Veterans of America, Vietnam Veterans of America Southern Connecticut Chapter 251, Vietnam Veterans of America Connecticut Chapter 270, and Vietnam Veterans of America Connecticut State Council (collectively, "Plaintiffs") filed a complaint in this matter seeking the release of certain documents by, *inter alia*, United States Department of Homeland Security ("DHS") pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"); and

WHEREAS the allegations in the complaint concern, *inter alia*, FOIA requests sent by Plaintiffs to the Department of Homeland Security, on October 29, 2010, February 21, 2011 and March 7, 2011, requesting various records held by DHS relating to the use by the Coast Guard of

personality disorder discharges and adjustment disorder or readjustment disorder discharges to discharge service members since October 1, 2001; and

WHEREAS, the parties have reached a mutually satisfactory resolution of the claims presented against DHS;

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, as follows:

1. The Coast Guard will provide a randomly selected sample of 31.5% of the total personality disorder discharge separation packets for the period from October 1, 2001 to December 31, 2010 (264 estimated packets). The random sample will be generated by using the "randomizer" function in Microsoft Excel. Specifically, the Coast Guard will create a spreadsheet containing a column of the employee identification numbers of all Coast Guard service members discharged for personality disorder during the relevant time period. The Coast Guard will populate a second column using Excel's "randomize" function by entering "=rand()" in each cell. Using the Excel "sort" function, both columns will then be sorted in either ascending or descending order by the "randomize" column. The first 264 employee identification numbers on this list will then be used to pull the random sample of separation packets. The employee identification numbers will not be provided to Plaintiffs.

2. A "separation packet," as used in paragraph 1, shall exclude records of court-martial proceedings and medical history unrelated to compliance with Section 12.B.16. of the Coast Guard Personnel Manual, and shall include records comparable to pages 1-3, 6-8, and 11-12 of the sample separation packet provided to Plaintiffs by the Coast Guard on August 9, 2011 and attached hereto as Exhibit A. A "separation packet," as used in paragraph 1, shall include DD-214 forms, with the following boxes unredacted:

a. 2 (Department Component and Branch);

c. 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) (All Periods of Service) – the Coast Guard will not withhold any of the following:

Good Conduct Medal
National Defense Service Medal
Commandant's Letter of Commendation
Overseas Service Medal;

d. 18 (Remarks) – the Coast Guard will not withhold: names and dates of operations, campaigns or deployments in which the service member has participated; the annotation of any reenlistments; discharge for physical disability information, to include the memorialized right for a service member to file a disability claim, whether a service member filed a related disability claim, and the amount of severance received as the result of either disability claim; what type of discharge certificate was issued (e.g., DD 256 CG, DD 257 CG, DD 259 CG, DD 260 CG or equivalent forms); and information arising as a continuation for entries in blocks 11, 13, and 14 that may not be redacted per this settlement agreement.

4. The Coast Guard will not charge search, duplication, or other fees to Plaintiffs. Plaintiffs will not seek attorneys' fees or costs incurred in this litigation against DHS or its component, the Coast Guard. The remaining Defendants reserve their right to charge search, duplication, or other fees to Plaintiffs, as permitted by law, and Plaintiffs reserve the right to seek attorneys' fees and costs as to those other Defendants, as permitted by law.

5. DHS will retain a record of the social security numbers of (a) the service members whose separation packets are given to the Plaintiffs and (b) a random sample of 10% of service members discharged in each year in 2008-10 on the basis of adjustment disorder.

6. The Coast Guard will provide 90 separation packets within 90 days of the effective date of this Stipulation; another 90 separation packets within 90 days thereafter; and the remaining 84 separation packets within 90 days thereafter, such that all 264 separation packets will be provided within 270 days of effective date of this Stipulation.

7. This Stipulation shall not constitute an admission on the part of DHS, the Coast Guard and/or the United States that any document or data identified as responsive to the

Plaintiffs' FOIA requests is subject to disclosure under the FOIA. Moreover, nothing contained herein shall be construed as prejudicing, impeding, or limiting in any way DHS's and the Coast Guard's authority to make any determinations with respect to any aspect of Plaintiffs' FOIA requests, including but not limited to any determination regarding the withholding of any responsive document, or portion thereof, pursuant to 5 U.S.C.§ 552(b) and all other applicable laws and regulations.

8. Concurrent with the execution of this Settlement Agreement, Plaintiffs' counsel shall seek the dismissal of Plaintiffs' claims against DHS with prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) by filing a Stipulation of Dismissal with Prejudice in this case and in *Vietnam Veterans of America Connecticut Greater Hartford Chapter 120 v. Department of Defense*, 3:11-cv-2009 (D. Conn.) ("*VVA II*"), each side to bear its own fees and costs. Plaintiffs' claims against the remaining Defendants, the U.S. Departments of Defense and Veterans Affairs, are unaffected by this Stipulation.

9. The Court shall maintain jurisdiction of this matter solely to monitor and enforce if necessary the parties' compliance with the terms of this Stipulation. Any future application for attorneys' fees based on any action to enforce the provisions of this Agreement may not be predicated upon any acts of the Defendants or findings of this Court that occurred prior to the signing of this Proposed Order by the Court.

10. Upon the execution of this Stipulation, Plaintiffs hereby release and forever discharge DHS, the Coast Guard, and their successor, the United States of America, from any and all claims under FOIA that Plaintiffs assert or could have asserted in this litigation or in *VVA II*, or which hereinafter could be asserted by reason of, or with respect to, or in connection with, or which arise out of, the FOIA requests on which this action and *VVA II* are based or any other

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VIETNAM VETERANS OF AMERICA CONNECTICUT GREATER HARTFORD CHAPTER 120, et al. Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, and UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, Defendants.	Civil Action No.: 3:10-cv-1972(AWT) 3:11-cv-2009(AWT) November 29, 2012

ORDER

Based upon the Stipulation of the parties, Plaintiffs' claims against the Defendant U.S. Department of Homeland Security are DISMISSED WITH PREJUDICE as of the date of this order. The Court shall maintain jurisdiction of this matter solely to monitor the parties' compliance with the terms of this order.

SO ORDERED.

Dated: November ____, 2012

HON. ALVIN W. THOMPSON
UNITED STATES DISTRICT JUDGE

REFERENCES

[1] *See, e.g.*, Joshua Kors, *How Specialist Town Lost His Benefits*, THE NATION, Apr. 9, 2007.
[2] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-31, DEFENSE HEALTH CARE: ADDITIONAL EFFORTS NEEDED TO ENSURE COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (2008).
[3] MELISSA ADER ET AL., VIETNAM VETERANS OF AM., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY'S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM (Mar.2012), *available at* http://www.vva.org/PPD-Documents/WhitePaper.pdf.
[4] Vietnam Veterans of Am. v. U.S. Dep't of Def., 3:10-cv-01972-AWT (D. Conn. Dec. 15, 2010); Vietnam Veterans of Am. v. U.S. Dep't of Def., 3:11-cv-02009-AWT (D. Conn. Dec. 27, 2011).
[5] *See* Appendix B.
[6] *See* U.S. DEP'T OF HOMELAND SECURITY, U.S. COAST GUARD, COMMANDANT INSTRUCTION M1000.4, MILITARY SEPARATIONS (Sept. 29, 2011) [hereinafter COMDTINST M1000.4].
[7] AM. PSYCHIATRIC ASS'N, *Section II: General Personality Disorder, Diagnostic Features*, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-V (2013), *available at* http://dsm.psychiatryonline.org//content.aspx?bookid=556&sectionid=41101784.
[8] Most of the diagnoses that we review in this report occurred before the release of the *DSM-V*, when psychiatrists were relying on the *DSM IV-TR*. Although the *DSM-V* has introduced an alternative model for evaluation of PD in Section III of the guide, the criteria for personality disorders in Section II remains unchanged. *See* Mark Moran, *DSM Section Contains Alternative Model for Evaluation of PD*, PSYCHIATRIC NEWS (May 3, 2013), http://dsm.psychiatryonline.org/newsArticle.aspx?articleid=1685439&RelatedWidgetArticles=true.
[9] AM. PSYCHIATRIC ASS'N, *Section II: General Personality Disorder, Criteria*, *in* DSM-V, *supra* note 4, *available at* http://dsm.psychiatryonline.org//content.aspx?bookid=556&sectionid=41101784.
[10] U.S. DEP'T OF HOMELAND SECURITY, U.S. COAST GUARD, COMMANDANT INSTRUCTION M6000.1E, COAST GUARD MED. MANUAL, at chp.5.B.1 (Apr. 29, 2011) [hereinafter COMDTINST M6000.1E].
[11] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (2000).
[12] AM. PSYCHIATRIC ASS'N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5, at 9 (2013), http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf
[13] AM. PSYCHIATRIC ASS'N, *Section II: Trauma and Stressor-Related Disorders, Adjustment Disorder, Criteria*, *in* DSM-V, *supra* note 4, http://dsm.psychiatryonline.org/content.aspx?bookid=556&sectionid=41101771#103438574.
[14] AM. PSYCHIATRIC ASS'N, HIGHLIGHTS OF CHANGES, *supra* note 9, at 9.
[15] U.S DEP'T OF HOMELAND SECURITY, COMDTINST M6000.1E, *supra* note 7, at chp.5.B.2.

[16] *See* CH-35 to Personnel Manual, COMDTINST M1000.6A, March 5, 2002; CH-36 to Personnel Manual, COMDTINST M1000.6A, May 14, 2002; CH-37 to Personnel Manual, COMDTINST M1000.6A, Oct. 21, 2002; CH-38 to Personnel Manual, COMDTINST M1000.6A, Nov. 12, 2002; Personnel Manual, COMDTINST M1000.6A, April 23, 2010 (with changes 1-42). These documents are on file with the authors.
[17] U.S. DEP'T OF HOMELAND SECURITY, COMDTINST M1000.4, *supra* note 3, at 1.B.15.b.
[18] *Id.* at 1.B.2.
[19] *Id.* at 1.B.19.a.
[20] *Id.* at 1.B.19.b.
[21] *Id*. at 1.B.15.h.2.
[22] *See* Complaint, Vietnam Veterans of Am. v. U.S. Dep't of Def., 3:11-CV-2009-WWE (D. Conn Dec. 27, 2011); Complaint, Vietnam Veterans of Am. v. U.S. Dep't of Def., 3:10-CV-1972-AWT (D. Conn. Dec 15, 2010).
[23] *See* Appendix B. Notwithstanding the language of the settlement agreement, the separation packets actually produced by DHS included both PD and AD packets, and covered records up to 2012.
[24] *See* Appendix B; *see also* Order, Vietnam Veterans of Am. v. U.S. Dep't of Def., 3:10-cv-01972-AWT, ECF. No. 63.
[25] U.S. DEP'T OF HOMELAND SECURITY, COMDTINST M1000.4, *supra* note 3, at 1.B.9, 1.B.15.d.,
[26] *Id*. at 1.B.15.d.3.
[27] *Id.* at 1.B.15.d.
[28] *Id.* at 1.B.9.e.2.
[29] *Id.*
[30] U.S. DEP'T OF HOMELAND SECURITY, COMDTINST M1000.4, *supra* note 3, at 1.B.9.e.4.d.
[31]. U.S. DEP'T OF HOMELAND SECURITY, U.S. COAST GUARD, ENLISTED EMPLOYEE REVIEW WORKSHEET, CG 3788B (JULY 2012), *available at* http://www.uscg.mil/forms/cg/CG_3788B.pdf
[32] *See supra* note 23.
[33] U.S. DEP'T OF HOMELAND SECURITY, COMDTINST M1000.4, *supra* note 3, at 1.B.15.j.
[34] *Id.*
[35] *Id.* at 1.B.15.j, 1.B.15.e.
[36] *Id*. at 1.B.15.k. .
[37] *Id*.
[38] There is one additional requirement, the Summary of Military Offenses. The summary is often contained in the Separation Memorandum but the Coast Guard did not agree to produce this data specifically. However, it nevertheless did so in some packets. In total, the sample contained seventeen Separation Memorandums with either a summary of offenses in the enclosures or redacted enclosures. Giving the Coast Guard the benefit of the doubt for redactions, it had a compliance rate of 6.44%.
[39] U.S. DEP'T OF HOMELAND SECURITY, COMDTINST M1000.4, *supra* note 3, at 1.B.15.h.2

[40] *Id.* at 1.B.15.c

[41] *See* U.S DEP'T OF HOMELAND SECURITY, COMDTINST M6000.1E, *supra* note 7, at 5.B.1.b.

[42] *See id*. at 5.B.2; 5.B.3.

[43] *See* U.S. DEP'T OF HOMELAND SECURITY, COMDTINST M1000.4, *supra* note 3, at 1.B.15.h.2

[44] *See* Sample Packet in App. A.

[45] U.S. DEP'T OF HOMELAND SECURITY, COMDTINST M1000.4, *supra* note 3, at 1.B.1.a.

[46] U.S. DEP'T OF HOMELAND SECURITY, COMDTINST M1000.4, *supra* note 3, at 1.B.5.c.

STATEMENT OF TODD HASKINS
CHAIRMAN,
NEW YORK CITY VETERANS ADVISORY BOARD

BEFORE

THE NEW YORK CITY COUNCIL VETERANS COMMITTEE

TOPIC: Res. 1196 – Calling on the United States Congress to pass, and the President sign into law the Fairness for Veterans Act of 2016

CITY HALL

COMMITTEE ROOM

NEW YORK, NEW YORK

October 28th, 2016

Chairman Ulrich, Council Member Vallone, committee members and distinguished guests, my name is Todd Haskins and I speak on behalf of the NYC Veterans Advisory Board as its Chairman. As you know the Advisory Board consists of 11 board members who are appointed by both the Mayor and the Speaker of the City Council whose mission is to advise the Commissioner on all matters pertaining to Veterans in New York City and to report annually directly to the Mayor and the Speaker.

I come before you today to voice the Veteran Advisory board's support for City Council Resolution 1196 urging Congress to pass, and the President to sign into law H.R. 4683/S.1567, the Fairness for Veterans Act.

As stated in our annual report to the Mayor and the Speaker, our recommendation to New York City is to establish the most comprehensive and effective local veteran policies in the nation. We believe fundamentally that veterans make great citizens and attracting them to New York City will improve the lives of all New Yorkers. It is with this belief in mind that we have recommended that veteran policies and programs be prioritized and aligned with supporting veterans continued service as citizens - veterans are truly our country's leading renewable resource. I can think of no legislation that is more aligned with this framework.

According to the Defense Manpower Data Center, more than 615,000 Army, Navy, Air Force and Marine veterans transitioned with less-than-honorable discharges from 1990-2015. Further, it has been estimated that more than 125,000 Post-9/11 veterans are denied access to Department of Veterans Affairs (VA) health care, including mental health services due to the nature of their discharges.

Separation is often determined by a service member's Commanding Officer who is rarely qualified to assess one's mental health and those decisions determine the services for which the individual qualifies as a veteran. Service members with well-documented medical histories have been improperly discharged with "personality disorders" rather than receiving a medical discharge or being retained for treatment and rehabilitation.

The Fairness for Veterans Act, which is supported by the majority of veteran organizations, will revise the current discharge process to require the review of medical evidence for a service member who was diagnosed with PTSD or TBI as a result of a deployment and whose application for relief from the terms of military discharge include a PTSD or TBI related to combat or Military Sexual Trauma (MST). The act also requires a review board to evaluate each case with a presumption in favor of the veteran in cases where PTSD, TBI or MST were present and resulted in a lesser discharge. These changes would restore benefits that would allow deserving veterans in need to seek treatment which would support their ability to continue their service as citizens.

We must ensure that our nations most vulnerable receive the care, treatment and benefits they both earned and deserve. The Fairness for Veterans Act ensures that combat veterans, whose condition should have been considered prior to their discharge, receive due consideration in their post-discharge appeals. This is a common sense piece of legislation.

The board thanks our Queens board member and National VVA President John Rowan for bringing this issue to the forefront and we look forward to seeing this resolution pass the City Council and the United States Congress.

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: John Rowan Pres. Vietnam Vets. of America

Address: 82-42 Penelope Ave.

I represent: Vietnam Veterans of America

Address: 82-42 Penelope Ave Middle Village NY 11379

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Adam Hudson

Address: 53 Broadway 2nd Brooklyn 11249

I represent: NYC Veterans Alliance

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Joseph Graham

Address: 59-45 56 Ave Maspeth, NY

I represent: VVA Chapter #126

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Kristofer Goldsmith

Address: 1150 4th St SW #601, Washington DC 20024

I represent: High Ground Veterans Advocacy

Address: 2560 Kingston Ave, Brooklyn

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. Ft Res. No. 1196

☒ in favor ☐ in opposition

Date: 10/28/16

(PLEASE PRINT)

Name: JOE BELLO

Address: _____

I represent: VAB SEC (FOLLOW-UP) CHAIR

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☑ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Robert Cuthbert - Urban Justice Center - Veteran Advocacy Project

Address: 40 Rector St. 9th Flor. NY, NY 10006

I represent: Urban Justice Center - Veteran Advocacy Project

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 1196-2016

☒ in favor ☐ in opposition

Date: 28 OCT 16

(PLEASE PRINT)

Name: Jeremy Butler

Address: 360 Riverside Drive # 2AA NY, NY 10025

I represent: Iraq + Afghanistan Veterans of America (IAVA)

Address: 119 West 40th Street 14th floor NY, NY 10018

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 1196

☑ in favor ☐ in opposition

Date: 10/28/2016

(PLEASE PRINT)

Name: Todd Haskins

Address: 120 west 127 St

I represent: NYC VAB

Address: 346 Broadway 10013

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 1196

☒ in favor ☐ in opposition

Date: 28 OCT 2016

(PLEASE PRINT)

Name: Kristen Rouse

Address: Brooklyn, NY

I represent: NYC Veterans Alliance

Address: PO Box 532 NY NY 10159

Please complete this card and return to the Sergeant-at-Arms