



## **BBA Webinar**

# **Representing Veterans in Discharge Upgrades: The Alternate Path of a VA Character of Discharge Determination**

May 3<sup>rd</sup>, 2023  
12:00 – 1:30 p.m.

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3. Representing Veterans in VA Character of Discharge Determinations – PowerPoint (pg 4-14)
4. Legal Authorities and Recommended Resources (pg 15-16)
5. *Newman v. McDonough*, 35 Vet. App. 310 (2022) (pg 17-25)
6. *Reape v. McDonough*, Dkt. No. 19-4684 (Vet. App. Sept. 27, 2021) (unpublished) (pg 26-29)
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## **Representing Veterans in Discharge Upgrades: The Alternate Path of a VA Character of Discharge Determination**

Boston Bar Association | Wednesday, May 3, 2023 | 12:00 – 1:30 p.m.

### **Speaker Biographies:**

#### ***Matthew Handley***

*Equal Justice Works Fellow*

*National Veterans Legal Services Program*

Matthew Handley is an Equal Justice Works Fellow hosted by the National Veterans Legal Services Program and sponsored by Lockheed Martin Corporation. He is admitted to practice before the U.S. Court of Federal Claims and is a member of the Pennsylvania Bar. Matthew served on active duty in the U.S. Army from 2009–2018. After leaving the Army and prior to starting law school he worked as a Veterans Service Representative for the U.S. Department of Veterans Affairs processing claims for service-connected disability compensation. Throughout law school he engaged in a wide variety of supervised clinical practice representing veterans in state and federal court as well as before the VA and military records correction boards. Through his fellowship with NVLSP, Matthew works to organize a coordinated campaign of investigation, litigation, and advocacy to compel the military to stop wrongfully denying medical retirement benefits to qualifying veterans. Matthew is a graduate of Cedarville University (B.A., 2009), the University of Oklahoma (M.A., 2017), and Seton Hall University School of Law (J.D., 2022, magna cum laude).

#### ***Cynthia Johnson***

*Staff Attorney*

*National Veterans Legal Services Program*

Cynthia Johnson is a Staff Attorney in NVLSP's Litigation Division. She will spend time working with NVLSP's Nehmer Lawsuit Division and on other impact litigation at NVLSP. Prior to joining NVLSP, Ms. Johnson worked at CT Veterans Legal Center where she represented veterans through their VA Benefit claims for eleven years. She also taught a Veterans Benefit Advocacy Clinic at UCONN law for five years. Ms. Johnson is a graduate of UCONN Law School. She is a member of the Connecticut State Bar and admitted to practice before the CAVC.

***Margaret Kuzma***

*Attorney*

*Veterans Legal Clinic at the Legal Services Center of Harvard Law School*

Margaret Kuzma is an Attorney in the Veterans Legal Clinic at the Legal Services Center of Harvard Law School and a lead author of the *Military Discharge Upgrade Legal Practice Manual* (ABA, 2021). Previously, she directed the Veterans Inclusion Project and the Discharge Upgrade Practice at the Connecticut Veterans Legal Center. She has been a Visiting Clinical Lecturer with the Veterans Legal Services Clinic at Yale Law School, and she co-founded the Veterans Law Project at Quinnipiac University School of Law. Prior to becoming a public interest attorney, Ms. Kuzma ran the Sexual Assault Prevention and Response program for Fort Benning and U.S. Army Garrison Baumholder.

***Dana Montalto***

*Clinical Instructor and Lecturer-on-Law*

*Veterans Legal Clinic at the Legal Services Center of Harvard Law School*

Dana Montalto is a Senior Clinical Instructor and Lecturer-on-Law in the Veterans Legal Clinic at the Legal Services Center of Harvard Law School. She represents veterans with less-than-honorable discharges in seeking military discharge upgrades and federal and state veteran benefits. Dana founded the Veterans Justice Pro Bono Partnership, which connects veterans who wrongfully received less-than-honorable discharges with *pro bono* attorneys seeking to give back to those who served. She is one of the authors and editors of the *Military Discharge Upgrade Legal Practice Manual*, and she co-authored *With Malice Toward None: Revisiting the Historical & Legal Basis for Excluding Veterans from "Veteran" Services*, 122 Penn. St. L. Rev. 69 (2017). Dana is a graduate of Wellesley College and Yale Law School.



## **Representing Veterans in Discharge Upgrades: The Alternate Path of a VA Character of Discharge Determination**

Boston Bar Association | Wednesday, May 3, 2023 | 12:00 – 1:30 p.m.

12:00 – 12:05 Welcome

12:05 – 12:10 Recent Updates in Discharge Upgrade Law and Practice

12:10 – 12:30 Overview of VA Character of Discharge Determinations

*Margaret Kuzma, Veterans Legal Clinic, Legal Services Center of Harvard Law School*

12:30 – 1:30 VA Character of Discharge Practice: Panel Discussion

*Cynthia Johnson, National Veterans Legal Services Program*

*Matthew Handley, National Veterans Legal Services Program*

*Dana Montalto, Veterans Legal Clinic, Legal Services Center of Harvard Law School*



# REPRESENTING VETERANS IN DISCHARGE UPGRADES

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The Alternative Path of a VA Character  
of Discharge Determination

Veterans Justice Pro Bono Partnership

Boston Bar Association, May 2023

# Agenda

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- ❑ Updates on Discharge Upgrade Law and Practice
- ❑ Introduction to VA Character of Discharge Determination (COD) Practice
- ❑ Panel Discussion: Insights from Experts on VA COD Practice

# Updates: DRB Class Actions

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Three class action lawsuits against the Discharge Review Boards on behalf of post-9/11 servicemembers who received less-than-honorable discharges and experienced PTSD, TBI, MST, or other behavioral health conditions in service

- *Kennedy* Army DRB settlement approved April 2021
- *Manker* Navy/Marine Corps DRB settlement approved February 2022
- *Johnson* Air Force DRB settlement approved April 2023

More information: <https://law.yale.edu/clinics/vlsc>

# VA COD v. Discharge Upgrades

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Two Paths to Change Character of Service:

## 1. Discharge Upgrade

- Department of Defense (DOD) board
- Changes the DD214, OMPF
- Dispositive on VA\*

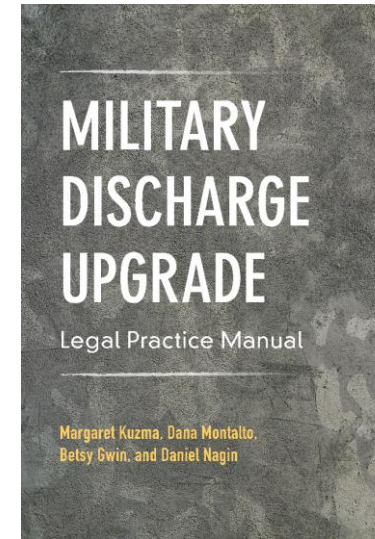
## 2. Character of Discharge Determination (COD)

- Department of Veteran Affairs (VA)
- Cannot change the military record
- *Not* dispositive on DOD

# VA COD Resources

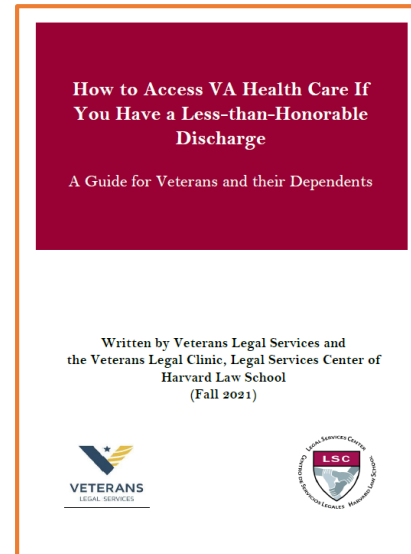


National Veterans  
Legal Services Program  
(NVLSP) Veterans  
Benefits Manual



Military Discharge  
Upgrade Legal  
Practice Manual

How to Access VA  
Health Care If You Have  
a Less-Than-Honorable  
Discharge: Self-Help  
Guide



And many more provided in  
your materials!

# VA COD – Eligibility Overview

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## Basic VA benefits:

- Healthcare \*
- Disability compensation
- Pension
- GI Bill\*\*
- Home loans

Eligibility Requirements: the individual must be a “veteran” under 38 U.S.C. 101 (2)

\* See materials for other possible ways to access

\*\* Some benefits have different eligibility standards, notably the Montgomery G.I. Bill and the Post-9/11 G.I. Bill education benefits

# VA Definition of “Veteran”

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The term “veteran” means a person who served in the active military, naval, or air service, and who was discharged or released therefrom ***under conditions other than dishonorable***. 38 U.S.C. 101(2)

- Character of discharge component
- Active service requirement
- No requirement of length of service or type of service (e.g., combat)

# VA Definition of “Veteran”

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VA uses the COD process to decide whether discharge was **“under other than dishonorable conditions”** or **“under dishonorable conditions”**

- VA internally calls these “Honorable for VA Purposes” (HVA) and “Dishonorable for VA Purposes” (DVA)

Veterans with final Honorable or General discharge statuses presumed to have been discharged under other than dishonorable conditions (38 CFR 3.12(a))

Veterans with Other Than Honorable, Bad Conduct, and Dishonorable discharges must go through COD—even if they have a prior Honorable term

# VA Definition of “Veteran”

## Statutory bars 38 USC 5303

- Conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities
- By reason of the sentence of a general court-martial
- Resignation by an officer for the good of the service
- Desertion
- Alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release
- AWOL of 180+ days without compelling circumstances

## Regulatory bars 38 CFR 3.12(d)

- Acceptance of an undesirable discharge to escape trial by general court-martial
- Mutiny or spying
- An offense involving moral turpitude. This includes, generally, conviction of a felony
- 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
- Homosexual acts involving aggravating circumstances

# COD Determination Process

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## Triggering a COD:

1. Apply for VA benefit
2. VA initiates COD and sends veteran Due Process Letter
3. Veteran can request a hearing
4. VA may request C&P exams
5. VA conducts COD review, applying regulations to specific facts
6. VA issues decision
7. Unfavorable COD decision appealed like any other VA issue

*Note: COD conducted first—before deciding whether veteran meets other eligibility criteria for the benefit*

# “Insanity Exception”

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- “Insanity” exception: 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,
  - [1] a more or less prolonged deviation from his normal method of behavior; or
  - [2] who interferes with the peace of society; or
  - [3] 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.
- Overcomes statutory and regulatory bars
- Not criminal law standard of “insanity”
- No requirement of causal nexus with conduct leading to discharge



## **Representing Veterans in Discharge Upgrades: The Alternate Path of a VA Character of Discharge Determination**

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### **Legal Authorities and Recommended Resources:**

#### Legal Authorities:

- Title 38, U.S.C. (38 U.S.C. § § ); Title 38, C.F.R. (38 C.F.R. § §)
- CAVC & BVA decisions available on WestLaw, Lexis, and on their respective websites
- Office of General Counsel Opinions: <https://www.va.gov/ogc/precedentopinions.asp>
- VA Adjudication Manual M21-1:  
[https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000073398/M21-1-Adjudication-Procedures-Manual-Table-of-Contents](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000073398/M21-1-Adjudication-Procedures-Manual-Table-of-Contents)

#### Secondary Sources:

- *Military Discharge Upgrade Legal Practice Manual*, Chapter 18: VA Character of Discharge Determinations: <https://www.americanbar.org/products/inv/book/410982321/>
- NVLSP *Veterans Benefits Manual* (available on Lexis):  
[https://store.lexisnexis.com/products/veterans-benefits-manual-skuSKU12734/details?gclid=CjwKCAjw9J2iBhBPEiwAErwpefcFADncKNIWiwqHM0o1VkyR-v7khTPtXx2FGPeDAz0quO9KuRwBnBoCcOgQAvD\\_BwE](https://store.lexisnexis.com/products/veterans-benefits-manual-skuSKU12734/details?gclid=CjwKCAjw9J2iBhBPEiwAErwpefcFADncKNIWiwqHM0o1VkyR-v7khTPtXx2FGPeDAz0quO9KuRwBnBoCcOgQAvD_BwE)

#### Helpful Sites and Self-Help Guides:

- Swords to Plowshares Self-Help Guides: <https://www.swords-to-plowshares.org/resources/self-help-guides>
- Accessing VA Health Care with an LTH Discharge Self-Help Guide:  
<https://www.legalservicescenter.org/a-self-help-guide-for-accessing-va-health-care/>
- Stateside Legal: <https://www.statesidelegal.org/>
- Veterans Law Library: <http://www.veteranslawlibrary.com/>

#### Reports and Law Review Articles:

- 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”: <https://www.swords-to-plowshares.org/research-publications/va-rulemaking-petition>
- Veterans Legal Clinic at the Legal Services Center of Harvard Law School, *Turned Away: How the VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges*: <https://www.legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf>
- Veterans Legal Clinic at the Legal Services Center of Harvard Law School, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*: <https://www.legalservicescenter.org/wp-content/uploads/Underserved.pdf>
- Stone, *Making the Best from a Mess: Mental Health, Misconduct, and the “Insanity Defense” I the VA Disability Compensation System*, 90 UMKC L. REV. 661 (2022)
- Adams & Montalto, *With Malice Toward None: Revisiting the Historical & Legal Basis for Excluding Veterans from “Veteran” Services*, 122 PENN. ST. L. REV. 69 (2017)
- Brooker & Seamone, *Beyond “T.B.D.”: 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 (2012)

#### Other Trainings:

- PLI Veterans training: <https://www.pli.edu/programs/A/advocating-for-veterans>
  - Six-hour on-demand VA benefit and discharge upgrade training. Can use three of the hours to satisfy the VA accreditation training requirement, if accredited before the training. More information at PLI and VA: <https://www.va.gov/ogc/accreditation.asp>

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 18-2015

JOEL NEWMAN, APPELLANT,

v.

DENIS MCDONOUGH,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided June 16, 2022)

*Rose Carmen Goldberg*, of San Francisco, California, for the appellant.

*James M. Byrne*, General Counsel; *Mary Ann Flynn*, Chief Counsel; *James B. Cowden*, Deputy Chief Counsel; and *Mark J. Villapando*, all of Washington, D.C., were on the brief for the appellee.

Before GREENBERG, TOTH, AND FALVEY, *Judges*.

PER CURIAM: Generally, former servicemembers are barred from receiving compensation for service-connected disabilities if they were discharged because they were absent without leave (AWOL) from their units for extended periods. 38 C.F.R. § 3.12(c)(6) (2021). There is an exception, however, for persons whom VA deems, per its definition, to have been insane at the time of the offense leading to discharge. 38 C.F.R. § 3.12(b). This case addresses the standard the Board must use when determining whether a veteran qualifies for the insanity exception.

Joel Newman, Marshall Newman's brother, appeals a 2018 Board decision that found Marshall Newman ineligible for compensation benefits due to the character of his discharge. During the pendency of his appeal, Marshall Newman passed away and now his brother Joel has been substituted as appellant. Marshall Newman acknowledged that he received an unfavorable discharge after he was AWOL from his Marine Corps unit during three intervals spanning more than 9,000 days from 1973 until 1999; nonetheless, he contended that he was eligible for veterans benefits because he was insane—as VA defines that term—when he first went AWOL. The Board disagreed and found that the evidence did not support such a finding. The appellant argues that the Board erred when it required his brother to prove his insanity by a preponderance of the evidence.

Both sides agree that the benefit of the doubt standard, codified at 38 U.S.C. § 5107(b), serves as the governing standard for evaluating whether a claimant meets VA's definition of insanity. We brought this case to panel to acknowledge this and put to rest any question about the standard of review when evaluating veteran status. Here, we state that—save perhaps in clear and unmistakable evidence cases as discussed later—the benefit of the doubt standard governs in all cases where VA must determine whether a claimant possesses veteran status. Because the Board failed to apply this standard here, we remand.

## I. BACKGROUND

Marshall Newman joined the Marine Corps in 1973 and went AWOL from his unit on three separate occasions. First, in 1974, he was convicted by civilian authorities of attempted housebreaking after leaving his unit and was incarcerated. Upon release, he was convicted at court-martial for his absence; however, he sought to remain with the Marines and was retained on active duty following his conviction. His second AWOL period occurred from January 1975 to June 1981. Shortly after returning, Mr. Newman ran off once again—his third AWOL period—and remained apart from his Marine unit for 15 years. Upon returning in 1999, he was discharged under other than honorable conditions.

In August 2012 Mr. Newman filed a compensation claim seeking service connection for a nervous condition. The regional office (RO) found him ineligible for VA benefits because he was discharged after having been AWOL for longer than 180 days and, therefore, was barred from receiving compensation under VA regulations. He appealed, arguing that he was insane and therefore exempt from the rule precluding compensation for servicemembers who were AWOL for more than 180 days. *See* 38 C.F.R. § 3.12(b). The Board denied his claim in 2016 and he appealed to this Court. In September 2017, Mr. Newman and the Secretary agreed to remand the case for the Board to explain whether a medical opinion was necessary to adjudicate the claim.

In February 2018 the Board issued the decision currently on appeal, finding that a medical opinion wasn't necessary. The decision concluded that his discharge barred him from receiving compensation benefits due to repeated absences from service. Next, it considered the two applicable exceptions—"compelling circumstances" and insanity—and stated that Mr. Newman needed to show by a preponderance of the evidence that he was insane at the time of the offenses that resulted in discharge. The Board determined that Mr. Newman did not qualify for either

exception. Thus, the Board ruled that Mr. Newman's discharge precluded him from establishing veteran status and so he was not eligible for compensation benefits. This appeal followed.

## II. ANALYSIS

### A. *The Legal Background of Veteran Status*

Character of discharge (COD) determinations play an integral role in the veterans benefits system as VA uses them to establish veteran status. *See* 38 U.S.C. § 101(2). Establishing veteran status is a prerequisite for receiving disability compensation and it is the claimant's burden to establish veteran status. *Donnellan v. Shinseki*, 24 Vet.App. 167, 172 (2010).

Our caselaw has shifted over time about the governing standard required to prove veteran status: Initially, we required potential claimants to prove veteran status—that is, eligibility for compensation benefits—by a preponderance of the evidence. So, in *Augilar v. Derwinski*, 2 Vet.App. 21, 23 (1991), we ruled that a claimant seeking to reopen a claim that had been denied for lack of veteran status had to first prove veteran status by a preponderance of the evidence. *Augilar* endorsed the view that Congress had reserved the more lenient "benefit of the doubt" standard for veterans and, thus, veteran status had to be proven before the standard could apply. This view prevailed for nearly a decade and was reaffirmed in *Laruan v. West*, 11 Vet.App. 80, 84, 85 (1998), which held that "unless a claimant first carries the initial burden of establishing status as a veteran or veteran status for the person upon whose military service the desired benefits are predicated, the laws administered by the Secretary and the resources of the VA are not applicable or available."

The U.S. Court of Appeals for the Federal Circuit in *D'Amico v. West*, 209 F.3d 1322, 1326-27 (Fed. Cir. 2000), noted that this Court's interpretation of 38 U.S.C. § 5108 (reopening claims) could be traced to *Augilar* and then overruled *Laruan* and its progeny, holding that the new and material evidence requirement in section 5108 applied to the reopening of claims that were disallowed for any reason, including because the claimant's veteran status was not established. It also found no support in the 1988 Veterans' Benefits Improvement Act legislative history for this Court's interpretation of 38 U.S.C. § 5107 (duty to assist for well-grounded claims and benefit of the doubt) and section 5108. *Id.* at 1327. But the Federal Circuit's holding did not fully settle the matter, as there remained uncertainty about whether it covered all veteran-status

questions or only attempts to reopen claims under section 5108 that had been denied for lack of veteran status.

Since then, our caselaw has offered mixed messages about the reach of the benefit of the doubt standard in evaluating veteran status. We applied the benefit of the doubt standard in cases such as *Frasure v. Principi*, 18 Vet.App. 379, 385 (2004), *Gardner v. Shinseki*, 22 Vet.App. 415, 421 n. 5 (2009) (citing *D'Amico* in a footnote for the proposition that it "overrul[ed] *Laruan* . . . and other cases holding that claimant[s] must show 'veteran' status by preponderance of evidence before benefitting from statutes reserved for veterans"), and *Donnellan*, 24 Vet.App. at 175 (holding that "the benefit of the doubt standard applies to the question of veteran status," where a national guardsman sought benefits based on aggravation of a preexisting disability during active duty for training (ACDUTRA)). But in *Robertson v. Shinseki*, 26 Vet.App. 169, 174 (2013), we reverted to the preponderance of the evidence standard when reviewing a Board decision finding no clear and unmistakable error (CUE) in a 1977 RO decision. *Id.* (citing *Holmes v. Brown*, 10 Vet.App. 38, 40 (1997), for the proposition that "[a] person seeking VA benefits must first establish by a preponderance of the evidence that the service member, upon whose service such benefits are predicated, has attained the status of veteran," which had cited *Aguilar* for that holding). Several of our cases since then have cited to *Robertson* and *Holmes* for the proposition that the preponderance of the evidence standard is appropriate for assessing a claimant's veteran status. *See, e.g., Key v. Wilkie*, 2020 WL 4932368, at \* 2 (Vet. App. Aug. 24, 2020); *Cristino v. McDonough*, 2021 WL 747745, at \* 3 (Vet. App. Feb. 26, 2021).

We called Mr. Newman's case to panel to acknowledge this discrepancy and put to rest any question about the standard of review when evaluating veteran status. We hold that the benefit of the doubt standard governs in all cases<sup>1</sup> where VA must determine whether a claimant possesses veteran status. This is so because to find otherwise would create different standards for different claimants. For example, in *Donnellan*, 24 Vet.App. at 175, the Court held that the benefit of the doubt standard applied to claimants trying to show injury on ACDUTRA and in *D'Amico*, 209 F.3d at 1326-27, the Federal Circuit found that claimants whose benefits were denied because they had not established veteran status could provide new and material evidence to reopen those claims, which is an evidentiary advantage similar to the benefit of doubt standard. To now hold that the preponderance of the evidence standard applies to Mr. Newman's situation—that is, where a

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<sup>1</sup> Perhaps with the exception of CUE, as discussed below.

claimant was on active duty, went AWOL, and was trying to show that he met the insanity exception—when precedent allows other claimants to satisfy less stringent burdens in pursuing their claims seems illogical. Further, *D'Amico*, 209 F.3d at 1326-27, provides helpful guidance in this matter given that the Federal Circuit noted that *Lauran's* finding—that the evidentiary benefit in section 5107 (benefit of the doubt) was reserved for those that had already met the initial burden of establishing veteran status—was not supported by the legislative history it cited. Finally, the Secretary concedes that the benefit of the doubt standard under section 5107 applies when determining whether veteran status has been established. October 2021 Notice of Change in Position at 1 (citing *Donnellan*, 24 Vet.App. at 174-75, and § 3.102, which provides that "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant").

And, as to *Robertson*, we note the specific context of that case, which involved CUE. The traditional practice has been to review CUE according to the caselaw extant at the time of the underlying decision and so *Robertson* employed the preponderance of the evidence standard in its CUE determination because that's how veteran status was established at the time of the prior decision at issue. See *Augilar*, 2 Vet.App. at 23. Of course, it must also be noted that the Supreme Court is currently reviewing the propriety of the Federal Circuit's caselaw holding that CUE cannot exist where the adjudicator interprets the law according to precedent that existed at the time of the prior decision but was later jettisoned. *George v. McDonough*, 991 F.3d 1227 (Fed. Cir. 2021), cert granted 142 S. Ct. 858 (Jan. 14, 2022). For now, we need only mention that CUE cases can present complications that are not germane here.

#### *B. Character of Discharge (COD) Determinations*

With that background in mind, we now turn to the current law surrounding COD determinations. VA and the Department of Defense (DoD) use different systems for classifying and categorizing discharges, although their respective terminologies are similar enough to cause a measure of confusion. The DoD issues five categories of discharge based on the character of a person's service: (1) honorable discharge; (2) general discharge; (3) other than honorable discharge; (4) bad conduct discharge; and (5) dishonorable discharge. 53A Am. Jur. 2d Military and Civil Defense § 159. The first three constitute administrative discharges, while the last two are punitive discharges and only issue after a conviction at court-martial.

VA has a very different system for characterizing discharge from DoD. Significantly, VA recognizes only *two categories* of discharge—dishonorable and other than dishonorable—when determining eligibility for VA benefits. The reason VA uses the ungainly phrase "other than dishonorable" is straightforward: Congress used this exact phrase to define the term "veteran," for purposes of eligibility for VA benefits. Specifically, 38 U.S.C. § 101(2) defines a veteran as any "person who served in the active military, naval, air, or space service and who was discharged or released under conditions other than dishonorable."

DoD's COD determination is not binding on VA, unless a veteran is discharged under honorable conditions, in which case veteran status is assured. *See* 38 C.F.R. § 3.12(a). For all other classifications, VA performs its own COD determinations by examining the underlying conduct that led to a veteran's discharge; in so doing, the Agency uses both statutory and regulatory provisions to determine whether a veteran's discharge was under conditions other than dishonorable. *See generally* 38 U.S.C. § 5303; 38 C.F.R. § 3.12.

Because VA relied on § 3.12 to find that Mr. Newman could not establish veteran status, our analysis will also focus on that regulation. Section 3.12, entitled Character of Discharge, reiterates that a dishonorable discharge bars former servicemembers from receiving benefits. Subsection (b) provides that "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." § 3.12(b). VA defines insanity, for COD determinations, as a person:

who, while not mentally defective or constitutionally psychopathic, . . . exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or interferes with the peace of society; or who has so departed . . . from the accepted standards of the community . . . 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) (2021).

And § 3.12(c)(6) bars the payment of benefits to former service members who were discharged for refusing to perform their duties, were sentenced to be discharged by a general court-martial, or resigned a commission as an officer for the good of the service. It further explains that benefits are unavailable for service members who were discharged for desertion or for being AWOL for at least 180 days unless "there are compelling circumstances to warrant the prolonged

unauthorized absence." § 3.12(c)(6)(i)-(iii) (listing factors for determining whether compelling circumstances exist to justify the servicemember's unauthorized absence).

Here, because the appellant's arguments focus on the insanity exception, Appellant's Brief (Br.) at 9-26, we will also focus our analysis on that exception. And we note that the appellant has the burden to show that his brother was insane at the time he committed the offense that led to his discharge. *See Struck v. Brown*, 9 Vet.App. 145, 153-54 (1996). However, he does not have to prove that insanity caused his brother to commit the act that led to his discharge. *Id.*

### *C. Application to Mr. Newman's Case*

Mr. Newman received an "other than honorable" discharge from the DoD. VA determined that he was barred from receiving benefits under § 3.12(c)(6) because he went AWOL for a period of greater than 180 days. For this reason, he could not receive benefits unless one of the two exceptions applies: insanity under § 3.12(b) or compelling circumstances under § 3.12(c)(6). The appellant claims that his brother's 1974 arrest for housebreaking demonstrates that he was insane at the time that he went AWOL. Further, he argues that the Board provided an inadequate statement of reasons or bases to support its determination that this behavior did not constitute an "interfere[ence] with the peace of society" as that phrase is used in VA's insanity definition.

The appellant first asserts that the Board applied the wrong standard when it determined that his brother was not insane when he went AWOL. Specifically, he contends that the Board required the veteran to prove his insanity by a preponderance of the evidence when it should have applied the more lenient "benefit of the doubt" standard. *See Donnellan*, 24 Vet.App. at 175 (explaining the difference between the standards).

While the Board acknowledged *Donnellan's* holding "that the benefit of the doubt standard applies to the question of veteran status," it did not apply that standard when it addressed Mr. Newman's claim that he was insane at the time he went AWOL. *See R.* at 7. Instead, it required Mr. Newman to "show by a preponderance of the evidence . . . that he was insane at the time of the offenses which resulted in his discharge from service." *R.* at 11 (citing *Struck*, 9 Vet.App. at 152-54). But, as stated, the benefit of the doubt standard, rather than the preponderance of the evidence standard, is the correct standard when determining whether a claimant has established veteran status. Remand is warranted where the Board applies an incorrect legal standard, so the Court vacates the Board's finding that Mr. Newman was not insane at any of the times that he was

AWOL or at any other times relevant to the character of his discharge, and remands the issue for readjudication. *See Delrio v. Wilkie*, 32 Vet.App. 232, 239-40 (2019).

#### *D. Reasons or Bases*

While remand is warranted for the Board to apply section 5107's benefit of the doubt standard, the Court also concludes that the Board's statement of reasons or bases is deficient with respect to the finding that Mr. Newman was not insane. The Board must support any material finding—which this clearly is, as his eligibility turns on it—with a statement of reasons or bases that informs the claimant of the precise reasons for its decisions and is sufficiently detailed to facilitate this Court's review. *Donnellan*, 24 Vet.App. at 171.

The Board's rationale focused exclusively on Mr. Newman's mental health history, concluding that the "evidence weighs against a finding that the Veteran has or has had a psychosis" and that the weight of the evidence does not establish a "longstanding or repeated mental disorder." R. at 12. Yet, as discussed, VA's definition of insanity does not focus solely on a claimant's mental health; neither of the Board's rationales appears in that definition. *See Beck v. West*, 13 Vet.App. 535, 539 (2000). Thus, the Board should have discussed whether Mr. Newman's 1974 housebreaking conviction constitutes evidence of "interfere[nce] with the peace of society," which is one of the standards set out in the relevant regulation. *See* § 3.54(a). Because it did not do so, the Board's statement is insufficient. *See Donnellan*, 24 Vet.App. at 171; *cf. Gardner*, 22 Vet.App. at 420-21 (vacating and remanding a Board decision that addressed common law insanity rather than VA's regulatory definition).

On remand the Board should evaluate whether Mr. Newman's 1974 housebreaking conviction establishes that he was insane, under VA's definition, using the benefit of the doubt standard in section 5107(b), when he went AWOL.

Additionally, per *Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009), the Board should consider the relevance of in-service notations of nervousness, dizziness, and depression, as well as difficulties breathing and sleeping, and that Mr. Newman reported that his "brain stays numb, out of balance." R. at 212 (November 1973); R. at 228-29 (June 1981); R. at 258-59, 553 (October 1999). The Board found that Mr. Newman had not submitted "any evidence whatsoever that he was insane or had any mental health issues at the times in which he decided to absent himself from the Marine Corps." R. at 11 (citing to September 2013, April 2016, and January 2018 private medical records). Later, when discussing whether he had a neurological issue, the Board

determined that September and November 1973 service treatment records showing a hyperventilation diagnosis and breathing problems when Mr. Newman got nervous were insufficient to show an in-service mental health problem or that he was insane at the time he went AWOL in January 1974. R. at 13. But the Board does not explain why the in-service symptom notations are insufficient to show a possible mental health problem. On remand, the Board should adequately discuss those symptoms.

Finally, the Secretary concedes that remand is warranted because Mr. Newman had identified private medical records and reported receiving Social Security benefits and the Board did not discuss the relevance of those records or whether they had a reasonable possibility of substantiating the claim. Secretary's Br. at 4-6 (also stating that, although VA was not required to obtain Mr. Newman's court-martial transcript, the appellant was free on remand to explain to the Board why this document was relevant). Thus, on remand the Board should consider the relevance of those private medical records and any records related to Social Security benefits he received, as well as Mr. Newman's court-martial transcript.

### **III. CONCLUSION**

Accordingly, the Board's February 15, 2018, decision is VACATED and REMANDED for readjudication consistent with this decision.

## Reape v. McDonough

United States Court of Appeals for Veterans Claims

September 27, 2021, Decided

No. 19-4684

### Reporter

2021 U.S. App. Vet. Claims LEXIS 1709 \*; 2021 WL 4395262

Hubert J. Reape, Appellant, v. Denis McDonough,  
Secretary of Veterans Affairs, Appellee.

**Notice:** DESIGNATED FOR ELECTRONIC  
PUBLICATION ONLY.

PURSUANT TO U.S. VET. APP. R. 30(a), THIS  
ACTION MAY NOT BE CITED AS PRECEDENT.

**Judges:** [\*1] Before GREENBERG, Judge.

**Opinion by:** GREENBERG

## Opinion

### MEMORANDUM DECISION

GREENBERG, *Judge*: U.S. Marine Corps veteran Hubert J. Reape appeals through counsel that part of a June 26, 2019, Board of Veterans' Appeals decision that found the character of the appellant's service is a bar to receiving VA benefits.<sup>1</sup> Record (R.) at 5-11. The appellant argues that the Board's conclusion that the appellant was discharged under dishonorable conditions violated [38 U.S.C. § 101\(2\)](#) as a matter of law and that the Board relied on an invalid regulation, [38 C.F.R. § 3.12\(d\)\(4\)](#), because it is contrary to [38 U.S.C. § 101\(2\)](#). Appellant's Brief at 8-30. For the following reasons, the Court will set aside that part of the June 2019 Board decision on appeal and remand the matter for readjudication.

I.

The Veterans Administration was established in 1930

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<sup>1</sup> The Board also granted the request to reopen the question whether the character of the appellant's service is a bar to receiving VA benefits. The Court will not disturb this favorable finding. See [Medrano v. Nicholson, 21 Vet.App. 165, 170 \(2007\)](#).

when Congress consolidated the Bureau of Pensions, the National Home for Disabled Volunteer Soldiers, and the U.S. Veterans' Bureau into one agency. [Act of July 3, 1930, ch. 863, 46 Stat. 1016](#). This Court was created with the enactment of the Veterans' Judicial Review Act (VJRA) in 1988. See *Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988)*. Before the VJRA, for nearly 60 years VA rules, regulations, and decisions lived in "splendid isolation," generally unconstrained by judicial review. See [Brown v. Gardner, 513 U.S. 115, 122, 115 S. Ct. 552, 130 L. Ed. 2d 462 \(1994\)](#) (Souter, J.).

Yet, the creation of a special [\*2] court solely for veterans is consistent with congressional intent as old as the Republic. Congress first sought judicial assistance in affording veterans relief when it adopted the Invalid Pensions Act of 1792, which provided "for the settlement of the claims of widows and orphans . . . and to regulate the claims to invalid pensions," for those injured during the Revolutionary War. *Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat. 243 (1792)* (repealed in part and amended by *Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)*). The act, though magnanimous, curtailed the power of the judiciary, by providing the Secretary of War the ability to withhold favorable determinations to claimants by circuit courts if the Secretary believed that the circuit court had erred in favor of the soldier based on "suspected imposition or mistake." See *id.*

Chief Justice John Jay<sup>2</sup> wrote a letter<sup>3</sup> to President

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<sup>2</sup> John Jay served as the first Secretary of State of the United States on an interim basis. II DAVID G. SAVAGE, *GUIDE TO THE U.S. SUPREME COURT* 872 (4th ed. (2004)). Although a large contributor to early U.S. foreign policy, Jay turned down the opportunity to assume this position full time. *Id.* at 872, 916. Instead, he accepted a nomination from President Washington to become the first Chief Justice of the Supreme Court on the day the position was created by the Judiciary Act of 1789. *Id.* Jay resigned his position in 1795 to become the second Governor of New York. *Id.* He was nominated to become Chief Justice of the Supreme Court again in December 1800, but he declined the appointment. *Id.*

George Washington on behalf of the Circuit Court for the District of New York<sup>4</sup> acknowledging that "the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress." See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436, 2 Dall. 409 (1792). Jay also noted that "judges desire to manifest, on all proper occasions and in every proper manner their high respect for the national legislature." [\*3] *Id.*

This desire to effect congressional intent favorable to veterans has echoed throughout the Supreme Court's decisions on matters that emanated from our Court. See *Shinseki v. Sanders*, 556 U.S. 396, 416, 129 S. Ct. 1696, 1709, 173 L. Ed. 2d 532 (2009) (Souter, J., dissenting) ("Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions"); see also *Henderson v. Shinseki*, 562 U.S. 428, 440, 131 S. Ct. 1197, 1205, 179 L. Ed. 2d 159 (2011) (declaring that congressional solicitude for veterans is plainly reflected in "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," and emphasizing that the provision "was enacted as part of the VJRA [because] that legislation was decidedly favorable to the veteran").

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<sup>3</sup>The Supreme Court never decided *Hayburn's Case*. See 2 U.S. (2 Dall.) 409, 409 (1792). The case was held over under advisement until the Court's next session and Congress adopted the Invalid Pensions Act of 1793, which required the Secretary of War, in conjunction with the Attorney General, to "take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States." **Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)**. *Hayburn's Case* has often been cited as an example of judicial restraint, see, e.g., *Tutun v. United States*, 270 U.S. 568, 46 S. Ct. 425, 70 L. Ed. 738 (1926), but Supreme Court historian Maeva Marcus has argued persuasively to the contrary. See Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 *Wis. L. Rev.* 527. After all, Jay's letter included by Dallas, the Court Reporter, in a note accompanying the decision to hold the matter under advisement, is nothing more than an advisory opinion that compelled Congress to change the law in order to make the judiciary the final voice on the review of a Revolutionary War veteran's right to pension benefits. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410, 1 L. Ed. 436, 2 Dall. 409 n.

<sup>4</sup>At this time, each Justice of the Supreme Court also served on circuit courts, a practice known as circuit riding. See RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (7th ed. 2015).

II.

Justice Alito<sup>5</sup> observed in *Henderson v. Shinseki* that our Court's scope of review is "similar to that of an Article III court reviewing agency action under the *Administrative Procedure Act*, 5 U.S.C. § 706." 562 U.S. at 432 n.2 (2011); see 38 U.S.C. § 7261. "The Court may hear cases by judges sitting alone or in panels, as determined [\*4] pursuant to procedures established by the Court." 38 U.S.C. § 7254. The statutory command that a single judge<sup>6</sup> may issue a binding decision is "unambiguous, unequivocal, and unlimited," see *Conroy v. Aniskoff*, 507 U.S. 511, 514, 113 S. Ct. 1562, 123 L. Ed. 2d 229 (1993). The Court's practice of treating panel decisions as "precedential" is unnecessary, particularly since the Court's adoption of class action litigation. See *Wolfe v. Wilkie*, 32 *Vet.App.* 1 (2019). We cite decisions from our Court merely for their guidance and persuasive value.

III.

The appellant served on active duty in the U.S. Marine Corps from June 1980 to September 1983, including deployment to Beirut, Lebanon. R. at 616 (DD Form 214). The appellant was awarded the Navy Unit Commendation and the Marine Corps Expeditionary Medal. *Id.*

While in service, the appellant received a total of 5 non-judicial punishments (NJPs). R. at 719. During basic training, the appellant was cited for "willfully

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<sup>5</sup>Justice Alito was born in Trenton, New Jersey. SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 4, 2020). He began his career as a law clerk, then became assistant U.S. attorney for the district of New Jersey before assuming multiple positions at the Department of Justice. *Id.* He then became a U.S. attorney for the district of New Jersey. *Id.* Before his nomination for the Supreme Court, he spent 16 years as a judge on the U.S. Court of Appeals for the Third Circuit. *Id.* In 2005, President George W. Bush chose Alito to replace retiring Supreme Court Justice Sandra Day O'Connor. *Id.*

<sup>6</sup>From 1989 to 1993, West (the publisher of this Court's decisions) published this Court's single-judge decisions in tables in hard-bound volumes of West's *Veterans Appeals Reporter*. Since 1993, West has published this Court's single-judge decisions electronically only. I believe the Court should publish all its decisions in print form. See, e.g., *Passaic Cty. Bar Ass'n v. Hughes*, 401 U.S. 1003, 91 S. Ct. 1229, 28 L. Ed. 2d 539 (1971).

disobey[ing]" his superior by lighting a cigarette and "failing to walk his post in a military manner." *Id.* The appellant received his second NJP for "fail[ing] to go at the time prescribed to his appointed place of duty" once aboard the U.S.S. *Ponce*. *Id.* The appellant received his [\*5] third and fourth NJPs for being absent from duty without authority from May 29, 1981, to May 31, 1981, and concealing brass knuckles. *Id.* Finally, on September 20, 1981, the appellant was cited for having knowledge that a fellow Marine possessed hashish and failing to report it. *Id.* The record includes a document that the appellant's conduct in service was rated as between a 4.0 and 4.6 on a scale from 1 to 5, with 5 signifying the most meritorious conduct. R. at 718. The appellant's highest rank in service was lance corporal. R. at 631.

In October 1982, the appellant deployed to Beirut. R. at 516. In May 1983, the appellant received a summary court-martial for "wrongful use of marijuana" was sentenced to 30 days of confinement and a forfeiture of \$100, and demoted to "the lowest enlisted pay grade." R. at 623. In August 1983, the appellant was "[r]ecommended for discharge under honorable/other than honorable conditions for reason of misconduct due to drug use." R. at 625.

IV.

In July 2010, the appellant pro se applied for VA disability benefits, R. at 901-07, but was denied in April 2011 because his discharge was "dishonorable for VA purposes." R. at 772.

V.

In June 2019, the Board found [\*6] the appellant's character of service to be a bar for benefits. R. 5-9. The Board found that the "weight of the evidence supports a finding that the appellant's discharge occurred as a result of willful and persistent misconduct." R. at 9. "[T]he appellant was not discharged because of a minor offense, but he was instead discharged as a result of a clear pattern of serious misconduct that fundamentally interfered with his military duty and ultimately resulted in his separation from service." *Id.* This appeal ensued.

VI.

A discharge for "willful and persistent misconduct" is considered a discharge under dishonorable conditions. See [38 C.F.R. § 3.12\(d\)\(4\) \(2021\)](#). "A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious." *Id.* The

U.S. Court of Appeals for the Federal Circuit has held that VA has authority to use its discretion in defining the phrase "conditions other than dishonorable" consistent with congressional purpose in delineating bars to benefits for former servicemembers. See [Garvey v. Wilkie, 972 F.3d 1333, 1337-40 \(Fed. Cir. 2021\)](#).

"Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons [\*7] or bases for those findings and conclusions, on all material issues of fact and law presented in the record." [38 U.S.C. § 7104\(d\)\(1\)](#). This statement of reasons or bases serves not only to help a claimant understand what has been decided, but also to ensure that VA decisionmakers do not exercise "naked and arbitrary power" in deciding entitlement to disability benefits. See [Yick Wo v. Hopkins, 118 U.S. 356, 366, 6 S. Ct. 1064, 30 L. Ed. 220 \(1886\)](#) (Matthews, J.).

VII.

The Court concludes that the Board provided an inadequate statement of reasons or bases for finding the appellant's character of discharge a bar to VA benefits. See [38 U.S.C. § 7104\(d\)\(1\)](#). The appellant was recommended for separation from service "due to drug abuse" after a *single* failed drug test. R. at 625. Yet the Board wrongly found that the appellant was discharged "as a result of a clear *pattern* of serious misconduct that fundamentally interfered with his military duty and ultimately resulted in his separation from service." R. at 9 (emphasis added). While the appellant did receive five NJPs for several offenses in service, these were not the basis of his discharge and therefore cannot demonstrate a pattern of serious misconduct. R. at 719. Rather, the NJPs are relevant to the question whether the appellant's service was otherwise [\*8] "honest, faithful and meritorious." See [38 C.F.R. § 3.12\(d\)\(4\)](#). Remand is required for the Board to provide an adequate statement of reasons or bases for the appellant's character of discharge determination. See [38 U.S.C. § 7104\(d\)\(1\)](#).

Because the Court is remanding the appellant's claim, it will not address his remaining arguments. See [Dunn v. West, 11 Vet.App. 462, 467 \(1998\)](#). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. See [Kay v. Principi, 16 Vet.App. 529, 534 \(2002\)](#). This matter is to be provided expeditious treatment. See [38 U.S.C. § 7112](#); see also [Hayburn's Case, 2 U.S. \(2 Dall.\) at 410, n.](#) ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a

short delay, and may be utterly ruined, by a long one.").

VIII.

For the foregoing reason, that part of the June 26, 2019, Board decision is SET ASIDE, and the matter is REMANDED for readjudication.

DATED: September 27, 2021

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**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM



# UNDERSERVED

**How the VA Wrongfully Excludes Veterans with Bad Paper**



*Prepared by the*  
**Veterans Legal Clinic**  
Legal Services Center of Harvard Law School

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## EXECUTIVE SUMMARY

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

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.<sup>2</sup>
- 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.<sup>3</sup>

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.<sup>4</sup> With the 1944 Act, Congress simplified the criteria so that one basic standard applied for all VA benefits and across all services.<sup>5</sup>

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.<sup>6</sup> The most recent veteran benefit legislation that Congress enacted before the G.I. Bill required a fully Honorable discharge for some benefits.<sup>7</sup> 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.<sup>8</sup> Congress specifically and forcefully rejected a proposal by certain military commanders that an Honorable discharge should be required to access benefits.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

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

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

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; health-care if they were disabled during service; vocational rehabilitation for people whose disabilities required them to learn new trades; income support for people whose careers were disrupted by wartime military service; education for people who did not have a civilian trade after several years of military service.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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."<sup>19</sup>

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,<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

**125,000**

**Number of Post-2001 veterans who cannot access basic VA services**

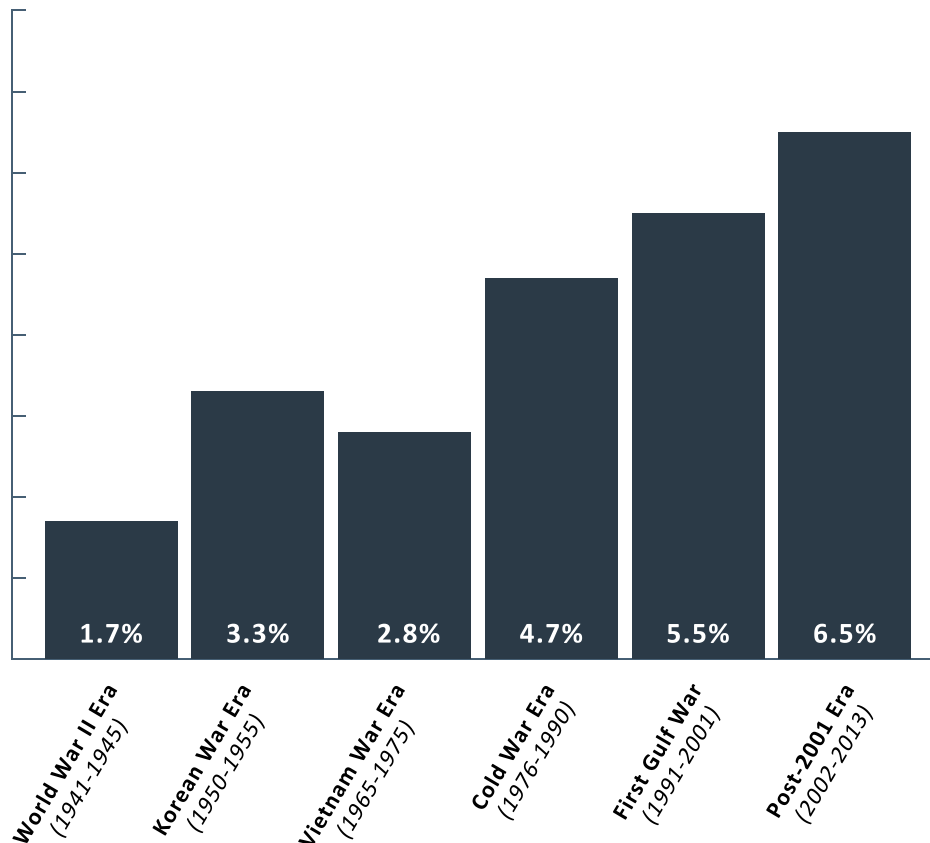
Although the G.I. Bill of Rights was intended to expand access to basic services, in practice the VA is turning away more veterans than ever before.

### **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.<sup>23</sup> 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 whose 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.<sup>24</sup>

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.

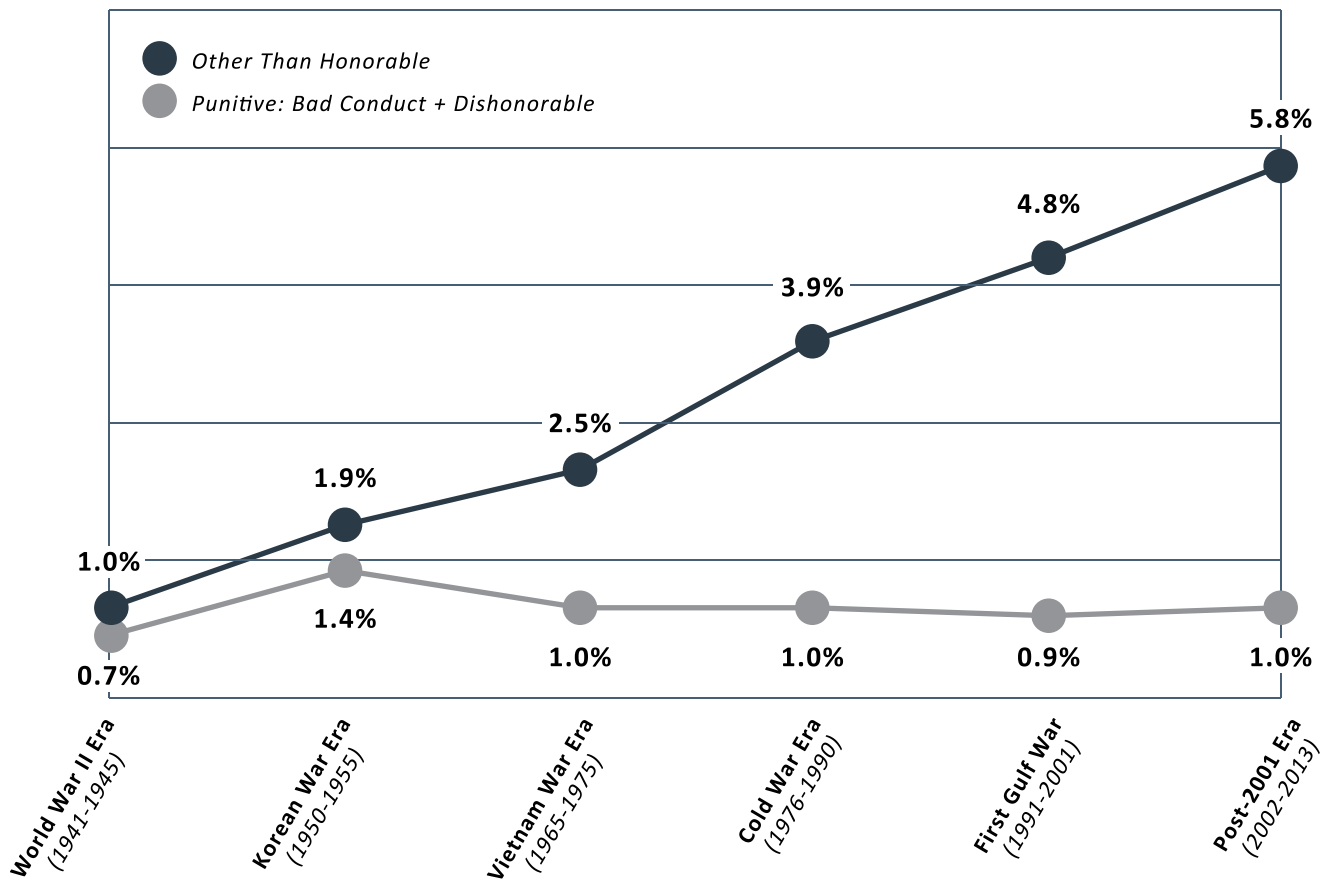
**90%**

*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**

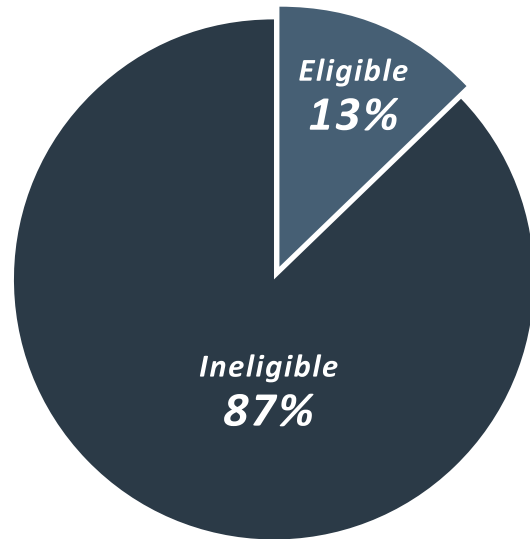


Long delays in completing COD reviews also contributes to the low rate of eligibility determinations. The COD review is highly burdensome on the agency and the veteran. It requires VA employees to gather extensive records, review those records and other evidence the veteran submits, and make detailed findings. Currently, the average time that the VA takes to complete the COD process is 1,200 days—more than three years.<sup>25</sup> 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.<sup>26</sup> In other words, 85% of veterans with bad-paper discharges who applied for some VA

### Board of Veterans’ Appeals Character of Discharge Determinations 1992-2015

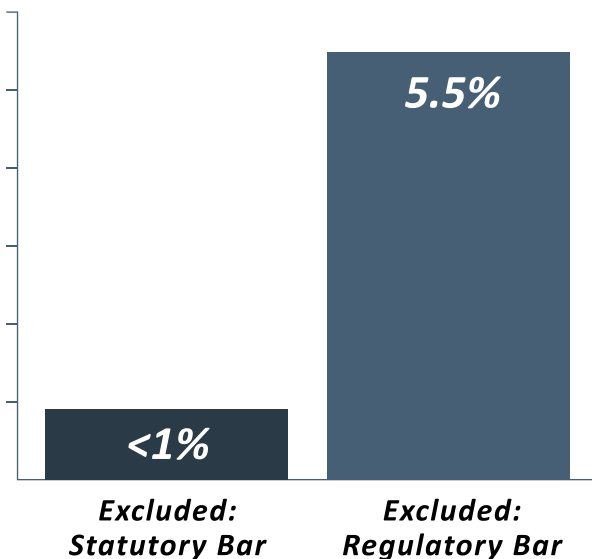


benefit have been told that their service was so “Dishonorable” that they forfeited all rights to almost every federal veteran benefit.

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

For example, DoD data reveal that, of all service members discharged after entry-level training in FY 2011, no more than 1% would be excluded from VA under a statutory bar. (See Appendix D). Yet, the VA excludes approximately 6.5% of service members discharged in FY 2011. The 5.5% difference is due entirely to the VA’s own discretionary regulations. In short, the VA excludes more than five times more veterans under its broad regulatory standards than Congress chose to exclude by statute.

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



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.<sup>27</sup>

### 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."<sup>28</sup> 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.<sup>29</sup>

**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.<sup>30</sup>

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.<sup>31</sup> 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.”<sup>32</sup> 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.<sup>33</sup>

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 where 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.”<sup>34</sup> 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.”<sup>35</sup>

**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 percent-

age-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.”<sup>36</sup>

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

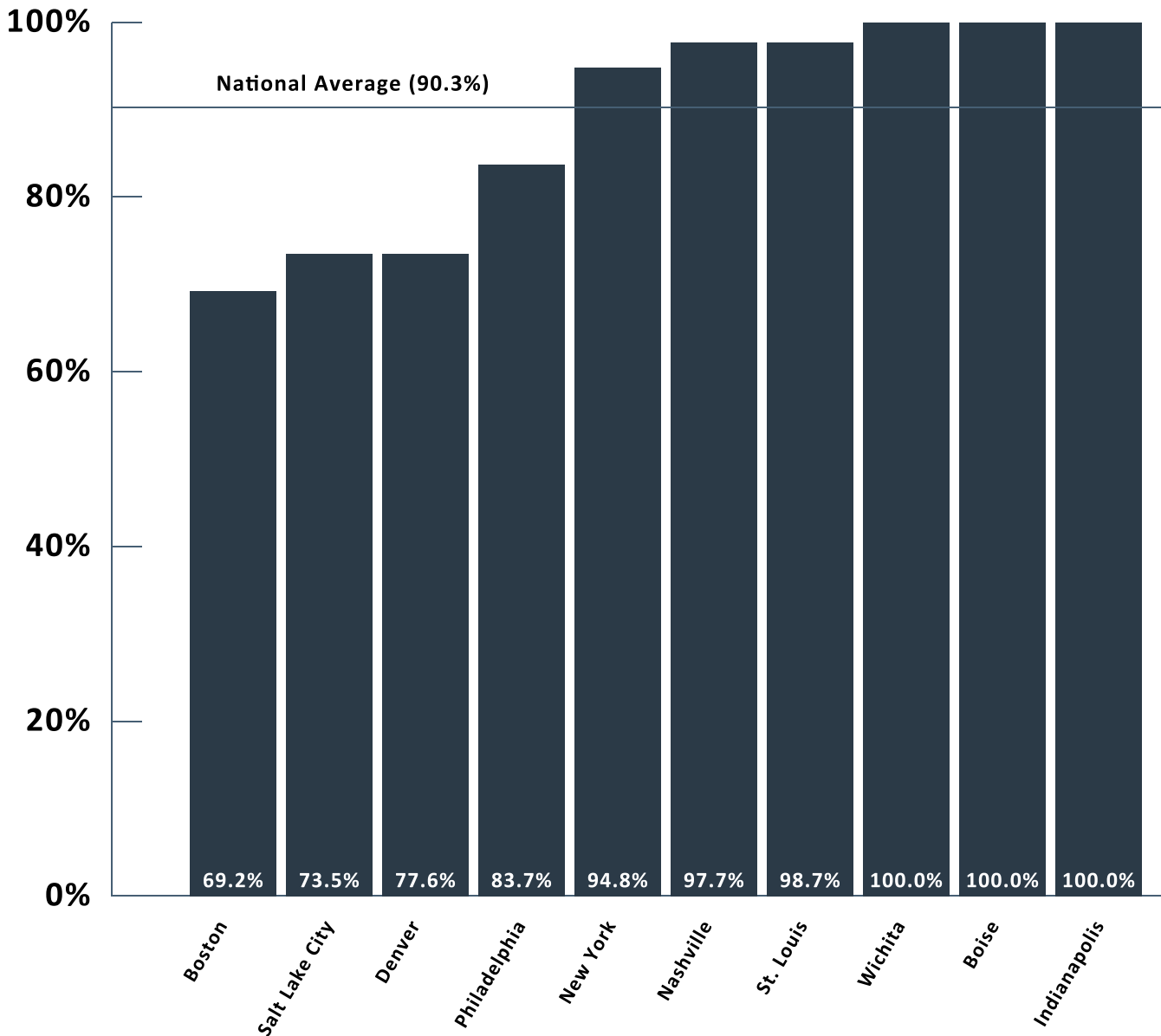
Judges. The BVA is located in Washington, D.C. and hears all appeals from across the country. Yet, which Veterans Law Judge hears the appeal significantly affects the likelihood that a veteran’s appeal will be granted.

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

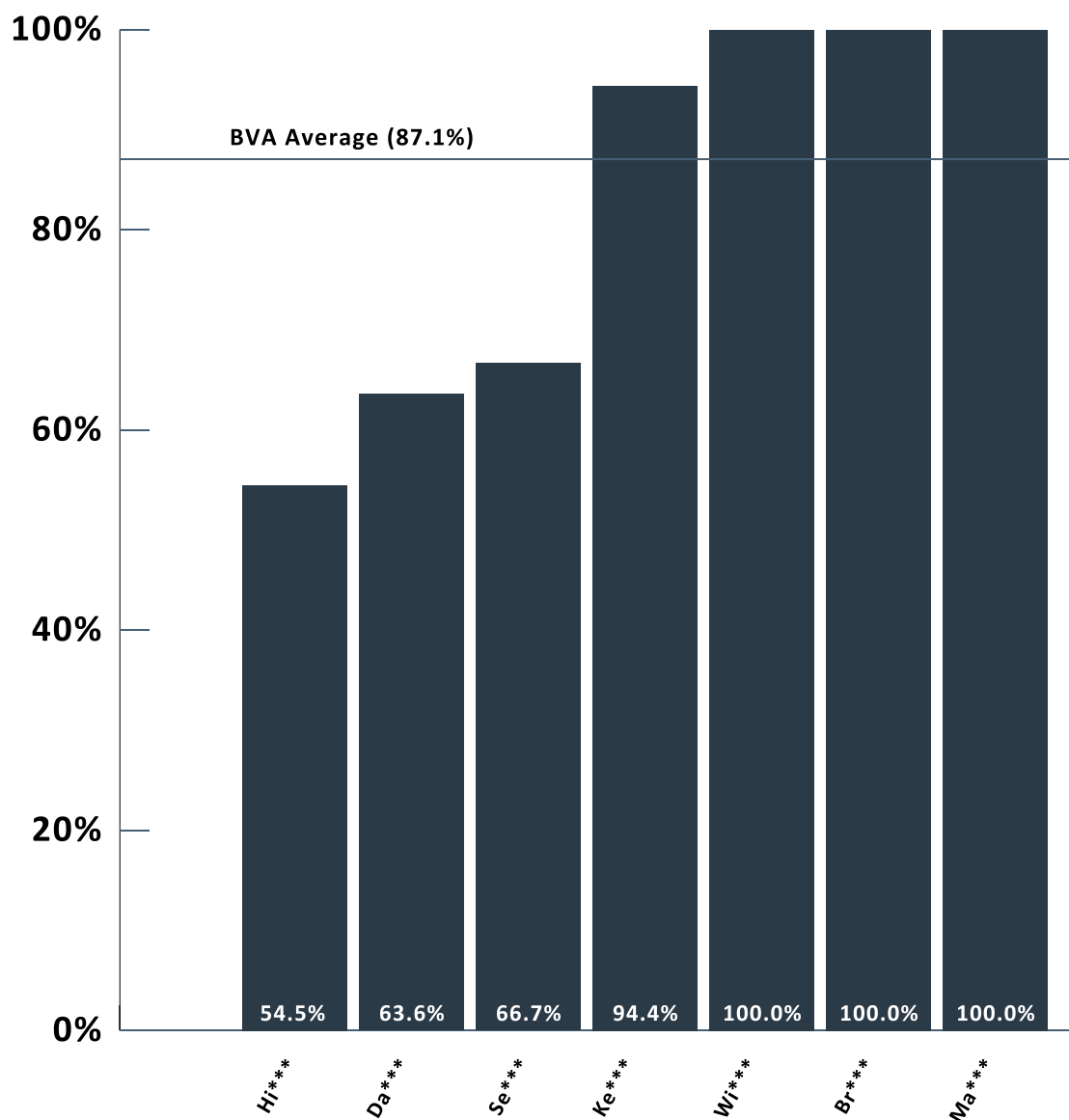
service is “dishonorable” and therefore disqualifying. However, some Veterans Law Judges deny 100% of the Character of Discharge appeals that they hear. In contrast, other Veterans Law Judges deny as few as 54.5% of such appeals. (See Table K.11).

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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.”<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup>

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.<sup>48</sup> While the suicide rate for those in VA care is falling, the rate for those veterans outside VA care is increasing.<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup>

## 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.<sup>8</sup> In San Diego, a 2014 survey found that 17.1% of unsheltered veterans had bad paper discharges.<sup>52</sup> In Houston, a 2014 survey found that 2 out of every 3 unsheltered veterans had bad-paper discharges.<sup>53</sup>

*2 out of 3*

*unsheltered veterans in Houston have  
bad paper discharges*

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

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

## 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.<sup>55</sup> 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.<sup>2</sup> 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<sup>57</sup>—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.<sup>58</sup> Thus, even a veteran who displayed “exemplary service” during the First Gulf

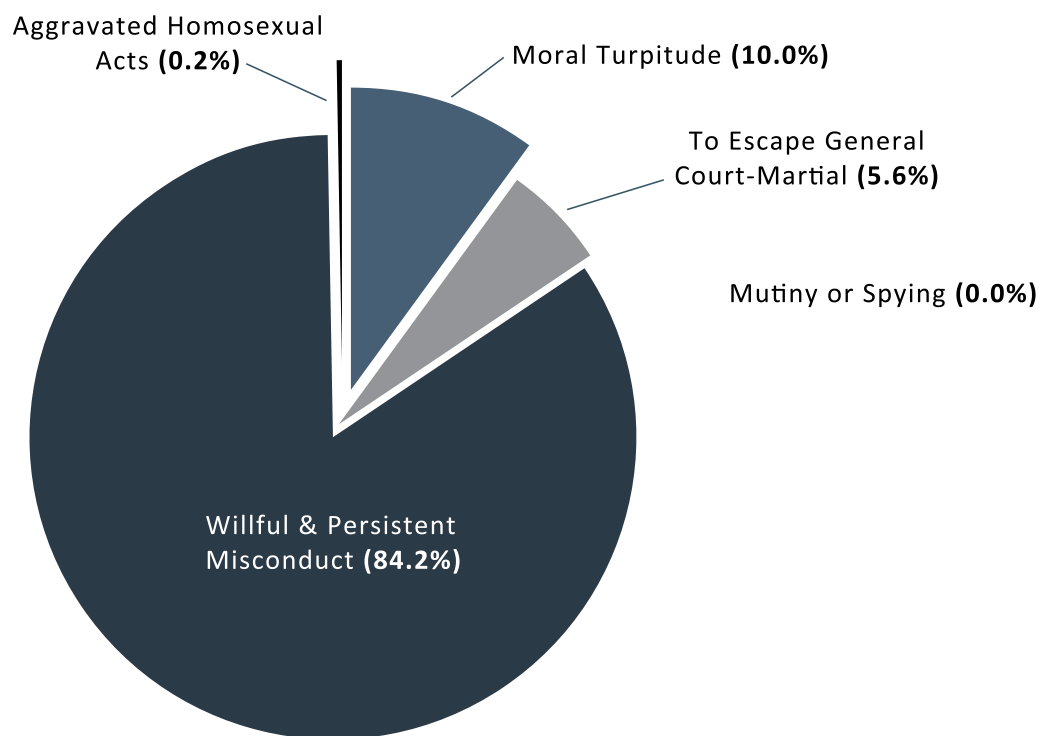
War was nevertheless considered to have served “dishonorably” because of a one week absence.<sup>59</sup> The VA’s narrow provision for mitigating factors is contrary to military law, which requires that military judges evaluate the circumstances surrounding the misconduct as well as a broad range of positive factors, including “good conduct,” “bravery,” “fidelity,” “efficiency,” and “courage.”<sup>60</sup>

***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.<sup>61</sup> Under military law, only absences of more than thirty days can lead to a Dishonorable discharge.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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.

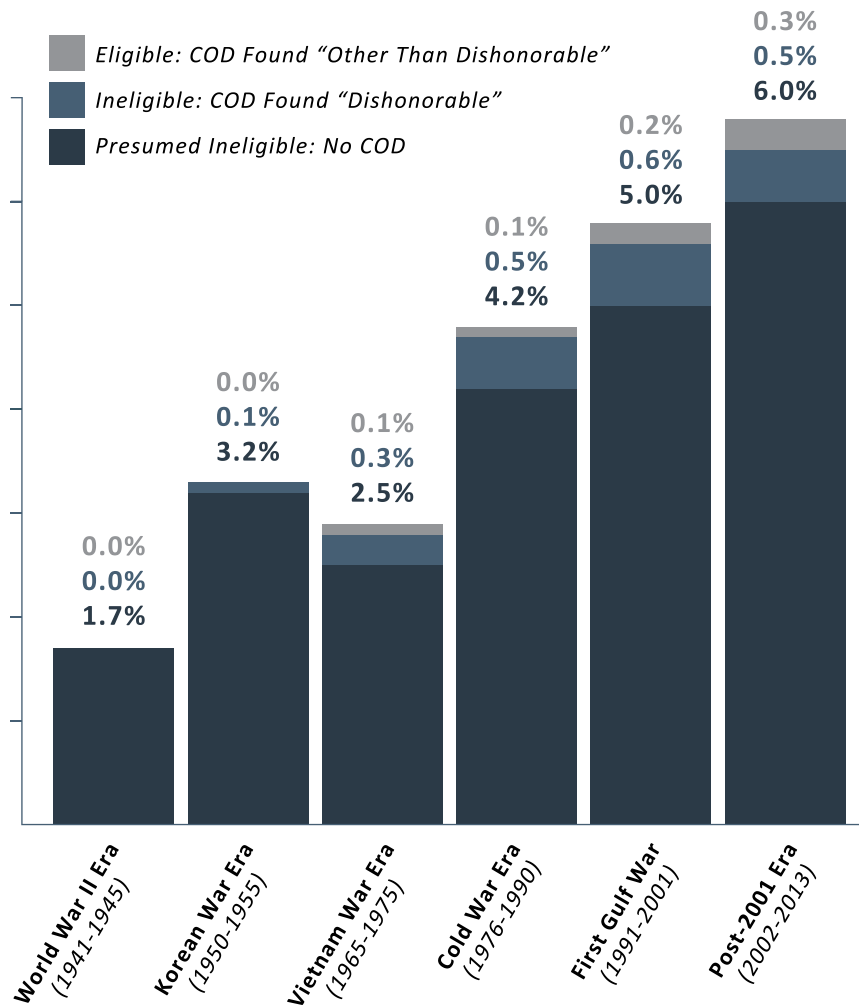
This is incompatible with statute and public expectations. Members of Congress stated publicly on the record that they intended for positive factors, such as combat or hardship service, to be weighed against any negative conduct. Military law requires that these factors be considered when deciding if service was “dishonorable.”<sup>66</sup> The VA itself states that it “considers . . . any mitigating or extenuating circumstances.”<sup>67</sup> 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.<sup>68</sup> 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.”<sup>69</sup> 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.<sup>70</sup>

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*<sup>71</sup> and the Supreme Court’s decisions in *Obergefell v. Hodges*<sup>72</sup> and *United States v. Windsor*.<sup>73</sup> 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.<sup>74</sup>

#### ***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.<sup>75</sup>

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.

## REFERENCES

- 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).
- 27** VA FOIA Response (on file with authors).
- 28** Gen. Accountability Office, Rep. No. FCP-80-13, Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Is Needed 29-33 (1980).
- 29** *Id.*
- 30** R.M. Highfill-McRoy, G.E. Larson, S. Booth-Kewley, C.F. Garland, Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines, BMC Psychiatry (2010).
- 31** 38 C.F.R. § 3.12(b).
- 32** See generally Amer. Psych. Ass’n, Diagnostic & Statistical Manual of Mental Disorders (5th ed. 2013).
- 33** Analysis of BVA decisions on file with authors.
- 34** Dep’t of Veterans Affairs, Claims for VA Benefits & Character of Discharge, at 5 (March 2014) [hereinafter VA COD Factsheet].
- 35** VA COD Factsheet, *supra* note 34, at 5.
- 36** 123 Cong. Rec. 1657 (1977) (statement of Sen. Hart).
- 37** Accounts and records of individual veterans (on file with authors).
- 38** For example, the VA’s website on this issue states: “To receive VA compensation benefits and services, the Veteran’s character of discharge or service must be under other than dishonorable conditions (e.g., honorable, under honorable conditions, general).” Applying for Benefits and Your

Character of Discharge, available at [http://www.benefits.va.gov/benefits/character\\_of\\_discharge.asp](http://www.benefits.va.gov/benefits/character_of_discharge.asp) (accessed March 19, 2016).

**39** Appendix G, *infra* page 50.

**40** As of September 2015, the average claim pending time for End Product that include Character of Discharge Determinations was over 600 days. This indicates that the time to completion is about 1,200 days.

**41** Pub. L. No. 78-346, 58 Stat. 284 § 301 (1944) (codified at 10 U.S.C. § 1553).

**42** Vietnam Veterans of America & National Veterans Council for Legal Redress, *Unfinished Business: Correcting “Bad Paper” for Veterans with PTSD 1*, 11 (2015); Alissa Figueroa, *A Losing Battle*, *Fusion* (2014).

**43** DOD FOIA Response (on file with authors); Army Review Board Agency, 2012 Annual Report (Nov. 2012); Army Review Boards Agency, 2011 Annual Report (Oct. 2011).

**44** *Unfinished Business*, *supra* note 42, at 1-2.

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

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

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

**48** Janet E. Kemp, *Veterans Health Admin., Suicide Rates in VA Patients Through 2011 with Comparisons with Other Americans and Other Veterans Through 2010* (Jan. 2014), [http://www.mentalhealth.va.gov/docs/suicide\\_data\\_report\\_update\\_january\\_2014.pdf](http://www.mentalhealth.va.gov/docs/suicide_data_report_update_january_2014.pdf).

**49** *Id.*

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

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

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

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

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

**55** 38 C.F.R. § 3.12(d). See Appendix A, *infra*, pages 39-41, for full text of the regulation.

**56** 38 C.F.R. §§ 3.1(n)(3), 3.301(c)(3).

**57** *Cropper v. Brown*, 6 Vet. App. 450, 452-53 (1994).

**58** Title Redacted by Agency, No. 03-09358 (Bd. Vet. App. June 19, 2009).

**59** Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

**60** Rule for Court-Martial 1001(c).

**61** Title Redacted by Agency, No. 96-01792 (Bd. Vet. App. Jan. 30, 1996).

**62** Manual for Courts-Martial, *Maximum Punishment Chart*, app. 12 (2012).

**63** Title Redacted by Agency, No. 04-04453 (Bd. Vet. App. Feb. 17, 2004).

**64** Manual for Courts-Martial, pt. V.1.e. (2012); Rules for Courts-Martial § 1005(d)(5); see also *Military Judges’ Benchbook*, Dep’t of Army Pamphlet 27-9, para. 2-5-13.

**65** VA COD Factsheet, *supra* note 34, at 5.

**66** Manual for Courts-Martial, pt. V.1.e. (2012); Rules for Courts-Martial § 1005(d)(5); see also *Military Judges’ Benchbook*, Dep’t of Army Pamphlet 27-9, para. 2-5-13.

**67** 38 C.F.R. § 3.12(d)(4).

**68** 38 C.F.R. § 3.12(c)(6).

**69** S. Rep. 97-387, *Eligibility for Veterans’ Benefits Pursuant to Discharge Upgradings*, at 355 (1977).

**70** 38 C.F.R. § 3.12(d)(5).

**71** *Don’t Ask, Don’t Tell Repeal Act of 2010*, Pub. L. No. 111-321, 124 Stat. 3515, 3516, 3517 (2011).

**72** *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

**73** *United States v. Windsor*, 133 S. Ct. 2675 (2013).

**74** 28 F.R. § 123 (1963) (codified at 38 C.F.R. § 3.12(a)).

**75** 38 C.F.R. § 3.12; see Dep’t of Veterans Affairs, *Adjudication Procedures Manual*, No. M21-1, pt. III.v.1.B.

## **ACKNOWLEDGEMENTS**

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

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## 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

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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 or 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

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

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

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         |
| <b>1950</b>  | 234,719          | 0             | 17,239        | 2,496        | 3,545         | 131,866        | 5,095         | 1,552         | 5,135         | 775          | 33,685         | 432           | 379          | 985          | 181        |
| <b>1951</b>  | 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        |
| <b>1952</b>  | 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         |
| <b>1953</b>  | 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         |
| <b>1954</b>  | 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         |
| <b>1955</b>  | 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        |
| <b>Total</b> | <b>2,643,645</b> | <b>76,076</b> | <b>56,172</b> | <b>9,592</b> | <b>19,259</b> | <b>855,238</b> | <b>36,052</b> | <b>15,676</b> | <b>19,819</b> | <b>1,534</b> | <b>383,130</b> | <b>10,253</b> | <b>6,487</b> | <b>8,349</b> | <b>621</b> |

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           |
| <b>Total</b> | <b>2,709,709</b> | <b>89,621</b> | <b>96,381</b> | <b>1,443</b> | <b>388</b> | <b>1,289,433</b> | <b>62,663</b> | <b>31,889</b> | <b>9,684</b> | <b>1,958</b> |

|              | 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         |
| <b>Total</b> | <b>1,431,323</b> | <b>57,790</b> | <b>26,607</b> | <b>13,424</b> | <b>241</b> | <b>457,997</b> | <b>22,844</b> | <b>13,709</b> | <b>11,072</b> | <b>569</b> |

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

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

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          |
| <b>Total</b> | <b>6,737,316</b>                     | <b>439,501</b> | <b>291,455</b> | <b>66,145</b> | <b>6,155</b> |

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         |
| <b>Total</b> | <b>833,560</b> | <b>53,714</b> | <b>25,208</b> | <b>2,297</b> | <b>650</b> | <b>505,984</b> | <b>33,500</b> | <b>2,566</b> | <b>4,261</b> | <b>633</b> |

|              | 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         |
| <b>Total</b> | <b>563,166</b> | <b>32,729</b> | <b>67,758</b> | <b>3,510</b> | <b>72</b> | <b>268,576</b> | <b>8,372</b> | <b>21,765</b> | <b>10,046</b> | <b>679</b> |

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         |
| <b>Total</b> | <b>583,612</b> | <b>81,997</b> | <b>32,973</b> | <b>1,648</b> | <b>271</b> | <b>297,295</b> | <b>27,973</b> | <b>1,787</b> | <b>2,421</b> | <b>273</b> |

|              | 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         |
| <b>Total</b> | <b>353,979</b> | <b>30,641</b> | <b>40,225</b> | <b>3,229</b> | <b>0</b> | <b>283,506</b> | <b>9,823</b> | <b>28,596</b> | <b>9,422</b> | <b>645</b> |

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 | <23             |
| Conscientious Objector who Refused to Perform Military Duties                | n/a             |
| Alien who Requests Release During Wartime                                    | <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%   |
| <b>Total</b>        | <b>999</b> |         |

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%   |
| <b>Total</b>        | <b>4,603</b> |         |

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%                        |
| <b>Total</b>                 | <b>155,416</b>            | <b>85%</b>                  | <b>15%</b>                 |

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      |
|--------------------------------|-----------|--------------|
| <b>Eligible</b>                |           | <b>93.5%</b> |
| <i>Presumed Eligible</i>       | 1,668,050 | 93.2%        |
| <i>Found Eligible by COD</i>   | 4,600     | 0.3%         |
| <b>Ineligible</b>              |           | <b>6.5%</b>  |
| <i>Found Ineligible by COD</i> | 8,700     | 0.5%         |
| <i>Presumed Ineligible</i>     | 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                     |                            |              |
|------------------------------|--------------------------|------------------------------|--------------|--------------------------------|----------------------------|--------------|
|                              | <i>Presumed Eligible</i> | <i>Found Eligible by COD</i> | <b>Total</b> | <i>Found Ineligible by COD</i> | <i>Presumed Ineligible</i> | <b>Total</b> |
| World War II (pre-1944 Act)  | 6,762,863                | 0                            | <b>98.1%</b> | n/a                            | 131,306                    | <b>1.9%</b>  |
| World War II (post-1944 Act) | 6,775,842                | 400                          | <b>98.3%</b> | 16                             | 117,911                    | <b>1.7%</b>  |
| Korean War Era               | 4,004,394                | 997                          | <b>96.7%</b> | 5,810                          | 130,707                    | <b>3.3%</b>  |
| Vietnam War Era              | 9,047,198                | 7,800                        | <b>97.2%</b> | 28,000                         | 232,180                    | <b>2.8%</b>  |
| Cold War Era ('76-'90)       | 7,176,727                | 9,680                        | <b>95.3%</b> | 34,630                         | 319,444                    | <b>4.7%</b>  |
| First Gulf War Era ('91-'01) | 2,285,138                | 5,500                        | <b>94.5%</b> | 13,769                         | 120,156                    | <b>5.5%</b>  |
| Post-2001 Era ('02-'13)      | 1,668,050                | 4,600                        | <b>93.5%</b> | 8,700                          | 108,190                    | <b>6.5%</b>  |

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%                  |
| <b>Total</b>    | <b>447</b> | <b>2692</b>      | <b>1464</b> | <b>4603</b> | <b>9.7%</b>                       | <b>90.3%</b>           |

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%                              |
| <b>Any Mental Health Condition</b>        | <b>71</b> | <b>362</b> | <b>433</b> | <b>16.4%</b>                                | <b>83.6%</b>                       |

**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%    |
| <b>Total</b>                          | <b>233</b> |         |

**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%                              |
| <i>All Veterans Who Did Not Deploy</i> | 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%                              |
| <i>All Veterans Who Claimed PTSD</i>       | 44      | 189    | 233   | 18.9%                                       | 81.1%                              |
| <i>All Veterans Who Did Not Claim PTSD</i> | 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%                              |
| <i>All Veterans Who Did Not Claim PTSD</i> | 85      | 681    | 766   | 11.1%                                       | 88.9%                              |

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

| Issue<br>BVA average: 87.1% | Granted | Denied | Total | Eligible: Percent<br>"Other Than Dishonorable" | Ineligible: Percent<br>"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<br>"Other Than Dishonorable" | Ineligible: Percent<br>"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%                             |
| Wj***                  | 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%                              |
| <b>Total: All VLJs</b> | <b>129</b> | <b>870</b> | <b>999</b> | <b>12.9%</b>                                | <b>87.1%</b>                       |

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.

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

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VA MEDICAL CENTER

# Turned Away

How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges



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### *Legal Disclaimer*

This report is neither a solicitation nor an offer to represent any individual concerning any legal problem. This report is not meant to constitute legal advice or legal services, nor is it intended to serve as a substitute for consulting with a lawyer. Individuals who have been denied access to veterans health care or other benefits are encouraged to consult with an attorney or non-attorney advocate.

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# I. EXECUTIVE SUMMARY

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Marine Corps veteran Dwayne Smith survived a deployment to Afghanistan, but almost did not make it through his transition back to civilian life when he returned stateside. Dwayne returned home with both Post-Traumatic Stress Disorder (PTSD) and a Traumatic Brain Injury (TBI)—the signature wounds of the wars in Iraq and Afghanistan. Yet, when Dwayne went to the Department of Veterans Affairs (VA) to get health care for his military injuries, VA turned him away. Why? Because when VA frontline staff looked at Dwayne’s discharge papers and saw that he had an Other Than Honorable discharge, they decided he would not get any VA care. Dwayne, who received his discharge after self-medicating to cope with PTSD and leaving his post when a family member was diagnosed with cancer, went on to seek help at multiple VA health care facilities. But each time, VA turned Dwayne away, in violation of the law. The law required that VA staff help Dwayne apply for health care and ensure that his application was properly reviewed and a written eligibility decision issued, including notice of appeal rights. It took more than five years and the assistance of a pro bono lawyer before Dwayne could apply and finally be approved for VA health care and benefits. Tragically, Dwayne is not alone—veterans with bad paper discharges get turned away by VA frontline staff every day without being allowed to apply for care.

Imagine trying to make an appointment with your doctor when you are sick, or your therapist when you are facing a mental health crisis, and the front desk staff tells you that they personally decided you cannot do so. For decades, that is what has happened to many thousands of former servicemembers with bad paper discharges when they attempted to seek care from VA. Importantly, an estimated 400,000 are currently at risk of being turned away from services they may be entitled to. Many frontline staff at VA health care facilities have improperly turned away former servicemembers seeking health care, telling them that they are ineligible due to their military discharge statuses—without even allowing them to apply. This is not just unfair, it is unlawful. VA must take immediate action to prevent this injustice from happening and to remedy past harms to servicemembers like Dwayne who went five years without the care he needed and deserved because VA failed to follow its own procedures.

Why are stories like Dwayne’s so common? Every servicemember is assigned a “character of service” or “discharge status” upon leaving military service. While most servicemembers receive Honorable discharge statuses, a substantial percentage—approximately 7 percent of veterans discharged since 1980—receive discharge statuses that are not Honorable, which are known as “bad paper.” Servicemembers usually get “bad paper” because of some alleged misconduct, though that misconduct frequently is minor, for a military-only offense, or not proved in any court. Studies also show that many servicemembers are separated with bad paper for misconduct related to a service-related mental or physical health condition or Military Sexual Trauma (MST).

Veterans with bad paper have higher rates of mental health conditions, suicide, homelessness, and unemployment.<sup>1</sup> Many have disabilities related to their service, which may in fact have led to their being discharged with bad paper. Many were discharged with bad paper under past discriminatory practices that targeted veterans because of their sexual

orientation or sexual identity. Veterans with bad paper therefore are some of the veterans most in need of VA's health care services—yet they are being wrongfully excluded from those services without due process.

A bad paper discharge affects whether and to what extent a former servicemember may be eligible for federal veterans benefits. For most benefits administered by VA, including health care, a bad paper discharge does not render a veteran categorically ineligible. Rather, it puts them in a “limbo” category that requires VA to conduct an individualized eligibility determination to decide whether the veteran was discharged under “dishonorable conditions” or “other than dishonorable conditions.” That determination process is itself beset by delays and inconsistent decisions.

But many veterans with bad paper report attempting to apply to VA for health care and simply being turned away. They are told by VA frontline staff that their discharge status makes them categorically ineligible for health care. Further, sometimes they are told to apply to the Department of Defense (DOD) to upgrade their discharge status, and to return to VA later if the discharge upgrade is successful. That DOD process typically is burdensome, is rarely successful, and takes years to resolve.

Every veteran—regardless of discharge status—has the right to apply to VA for health care. Every veteran has the right to receive a written decision on his or her application and information on how to appeal any denial.

Many veterans with bad paper are eligible for VA health care but are being wrongfully turned away. While there should be consequences for military misconduct, those consequences should not include being denied health care—especially if you have a service-related disability, are experiencing homelessness, or are dealing with the impact of MST, as so many veterans with bad paper are.

This report provides background information about why veterans get “bad paper” and about VA's health care eligibility standards and then documents, including through government data collected through Freedom of Information Act requests, how VA has been improperly turning away veterans with bad paper from receiving VA health care. The report concludes with recommendations about the steps VA must take to ensure that every veteran is afforded the right to apply for health care and to guarantee that no veteran is wrongly denied the care that the veteran needs and deserves.

The extensive research and investigation underlying this report, prepared on behalf of the veteran service organization OUTVETS, documents that the vast majority of veterans with bad paper are not currently enrolled in VA health care—many of them because they have been wrongly told by VA to just go away. For many veterans, this initial rejection leads them to end their search for care altogether. It is time for VA to stop this cycle of misinformation and stigma and to honor that every person who has served in the military has a right to apply for VA care.

## II. BACKGROUND

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### A. What is “Bad Paper”?

Upon separation from military service, every servicemember is assigned a “character of service.” The character of service is set forth on the Department of Defense Form 214 (“DD 214”), sometimes referred to as discharge papers, which is issued to every servicemember as the servicemember leaves the military and enters civilian life. The military currently uses the following designations for a servicemember’s character of service: Honorable, Under Honorable Conditions (General), Other Than Honorable, Bad Conduct, or Dishonorable.\*

Honorable, General, and Other Than Honorable characters of service are “administrative” discharges, meaning that the servicemember’s military command effectuated the discharge administratively and without a court-martial. This usually means the servicemember did not have the benefit of a court hearing to determine whether the discharge status was appropriate. Bad Conduct and Dishonorable discharges are “punitive” discharges because only a military court-martial can impose such status as punishment for a criminal conviction. A Bad Conduct discharge may be imposed through a special court-martial or a general court-martial; a Dishonorable discharge may be imposed only through a general court-martial. There are also some discharges that do not characterize an individual’s service and are therefore known as Uncharacterized discharges. These include Entry Level Separation and Void Enlistment.

An Honorable discharge is the only type of discharge that carries no stigma and imposes no impediments to the former servicemember’s ability to access veterans benefits, supports, and services.<sup>2</sup> The other characters of service—namely General, Other Than Honorable, Bad Conduct, and Dishonorable discharges—are stigmatizing to various degrees and can create substantial barriers to the former servicemember’s ability to access veterans benefits, supports, and services. Discharges such as these are known as “bad paper” discharges, because the harmful character of service is listed on each separating servicemember’s DD 214.†

As a note on terminology, there are many different definitions of who is a “veteran” under state and federal law or used by various veterans organizations. Many require that a former servicemember have a specific discharge status, usually Honorable or at least under honorable conditions. VA’s definition, as set forth in statute and regulation and described in detail below, requires that the discharge be under “other than dishonorable” conditions, which does include some former servicemembers with bad paper discharges.<sup>3</sup> For purposes of this report, we will use an inclusive definition of the term “veteran” that encompasses any person who has served at least one day of active duty military service, without regard to their discharge status.

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\* In place of a Dishonorable discharge, officers are given a Dismissal. OTH used to be known as Undesirable.

† Note that a “bad paper” discharge is not synonymous with a Bad Conduct Discharge (BCD). “Bad paper” refers to discharges that are not honorable, and for purposes of this report, specifically includes Other Than Honorable (formerly Undesirable), Bad Conduct, and Dishonorable discharges. The vast majority of veterans with bad paper—more than 80 percent of such veterans discharged since 1980—have administrative Other Than Honorable discharges.

Similarly, the term “bad paper” has multiple definitions. Some include all veterans with less-than-fully-Honorable discharges, and some include veterans with Honorable discharges who have stigmatizing information on their DD 214s or military records. For purposes of this report, the term “bad paper” includes only those veterans with Other Than Honorable, Bad Conduct, and Dishonorable discharge characterizations, the large majority of whom are veterans with administrative Other Than Honorable discharges.

## B. Why Do Servicemembers Get “Bad Paper”?

No single reason explains why servicemembers do not receive a fully Honorable discharge.

Some servicemembers exercise poor judgment and engage in misconduct without any mitigating circumstances. Other servicemembers, however, receive bad paper unjustly. Some had undiagnosed physical or mental health disabilities that contributed to behavior that was interpreted as unmitigated misconduct. Others may have been discharged with bad paper based on discriminatory policies, such as the now-repealed Don’t Ask, Don’t Tell (DADT) policy. Commanding officers at times are under pressure to be mission capable and ready, or to prepare for a deployment, leading to bad paper separations for servicemembers dealing with stresses or trauma, so that a new servicemember can replace them.<sup>4</sup>

**Military Sexual Trauma (MST)** is a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment that occurred while a veteran was serving on active duty, active duty for training, or inactive duty training. 38 U.S.C. § 1720D

Moreover, because the character of service assigned at discharge is determined by each servicemember’s chain of command, the issuance of bad paper can be arbitrary or influenced by personal philosophy or prejudice. So, too, are there disparities among the military branches in the frequency with which they issue bad paper and the reasons for which they do so. In short, a host of intersecting factors contribute to bad paper discharges, some of which are discussed in more detail below.

*Jeff developed PTSD and TBI during his deployment to Afghanistan, which caused him to experience suicidal ideations and engage in reckless behaviors when he returned from deployment. After being discharged other-than-honorably, Jeff continued experiencing suicidal ideations and went to the VA to get help—but the VA turned him away because of his bad paper discharge. Jeff then went to a civilian hospital emergency department, where he was briefly hospitalized and then discharged to the street. Months later, Jeff finally began receiving mental health treatment at a civilian outpatient clinic for veterans that does not discriminate on the basis of discharge status.*

### a. Post-Traumatic Stress Disorder & Traumatic Brain Injury

Many servicemembers receive bad paper due to behavior that stems from an undiagnosed mental health or physical condition, or the experience of trauma, or both. One recent study found that 16% of the servicemembers separated for misconduct from fiscal year 2011 through 2015 had been diagnosed with Post-

Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) during the two years prior to separation<sup>5</sup>, and many more servicemembers likely had PTSD or TBI but went undiagnosed or were misdiagnosed. PTSD and TBI are considered the signature wounds of the Iraq and Afghanistan conflicts and both conditions can significantly impair a person's ability to conform their behavior to the military's standards. In particular, the symptoms of PTSD can lead to behaviors that are misinterpreted by military commanders, which in turn can lead to a bad paper discharge.

Servicemembers, especially servicemembers who deploy to combat zones or who experience Military Sexual Trauma (MST), are at higher risk for PTSD.<sup>6</sup> Among the common symptoms of PTSD are sleep disorders, mood changes, reckless behavior, substance use, and isolation.<sup>7</sup> These same symptoms can contribute to behavior—such as failure to carry out duties, being chronically late, or not complying with policies—deemed inconsistent with the standards of military service.<sup>8</sup> Especially when a servicemember's PTSD is undiagnosed, a military command may discharge a servicemember with bad paper without any understanding of the true origin of the servicemember's conduct and without any consideration of the mitigating circumstances.<sup>9</sup>

This same troubling dynamic can occur for servicemembers who suffer from Traumatic Brain Injury (TBI). Just as military service can expose individuals to higher risks for PTSD, military service also poses higher risks for experiencing a TBI.<sup>10</sup> In a similar manner to football players experiencing the consequences of chronic concussions that may not initially be evident, even with advances in science and medical care, the military has failed to diagnose TBI in substantial numbers of servicemembers who served in the Iraq and Afghanistan conflicts.<sup>11</sup> Indeed, the military has long struggled to understand, diagnose, and properly treat what is now known as TBI and related conditions.<sup>12</sup>

*More than  
**100,000**  
servicemembers  
discharged because of  
LGBTQ status.*

TBI can produce symptoms similar to PTSD. TBI is associated with other symptoms as well, including difficulty remembering, concentrating and making decisions, slowness in thinking, speaking, and acting, and fatigue.<sup>13</sup> As in the case of PTSD, the symptoms of TBI can contribute to behaviors that military commanders deem to be misconduct and can prompt military commanders to discharge a servicemember with bad paper.<sup>14</sup> For example, from 2009 to 2015, the Army discharged with bad paper 22,000 soldiers who had deployed and been diagnosed with PTSD or TBI.<sup>15</sup>

## **b. Don't Ask, Don't Tell & Prior Policies Affecting LGBTQ Servicemembers**

The military has a long history of discriminating against servicemembers who either were or were perceived to be Lesbian, Gay, Bisexual, Transgender, or Queer (LGBTQ). That history of discrimination included the Don't Ask, Don't Tell (DADT) policy in place from 1994 to 2011, as well as predecessor policies that were even more harsh, and extends to the current ban on service by openly transgender individuals. Under DADT and prior policies, between the end of World War II and the repeal of DADT, over 100,000 servicemembers were discharged

with bad paper because of their actual or perceived LGBTQ status. In addition, thousands of LGBTQ servicemembers were discharged with bad paper for behaviors—interpreted as inexcusable misconduct—that stemmed from the trauma of having to conceal their sexual or gender identity or were discharged for pretextual reasons, such as minor misconduct, when the true cause was discrimination against them due to their LGBTQ status.<sup>16</sup> The nation’s history of discrimination against LGBTQ servicemembers is therefore another cause of bad paper discharges that is perpetuated when these veterans are turned away from VA without being allowed to apply.

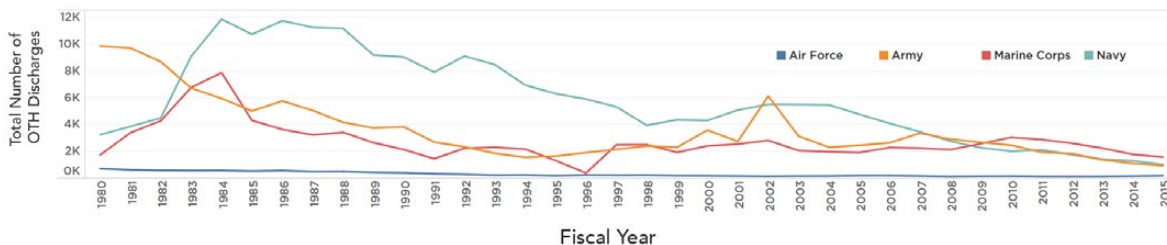
### c. Arbitrary & Disparate Imposition of Bad Paper Discharges

Individual military commands possess wide discretion to decide what conduct justifies a bad paper discharge. This is especially true with respect to the Other Than Honorable discharge, which is an administrative discharge that can be imposed by a command relatively swiftly, without substantial oversight, and with minimal procedural protections for the servicemember. The same conduct is often not treated consistently across military commands, resulting in disparate treatment of similarly situated servicemembers. Behavior that one chain of command may decide should lead to a servicemember’s discharge with bad paper, may not lead to any discharge—let alone a discharge with bad paper—under another command’s oversight, even though the conduct of the servicemembers is essentially identical. Moreover, investigations have repeatedly found racial disparities in the imposition of military punishment and bad paper discharges.<sup>17</sup> A 2017 study by Protect our Defenders showed that from 2006 to 2015, black soldiers were 61% more likely to face a general or special court-martial than white soldiers.<sup>18</sup>

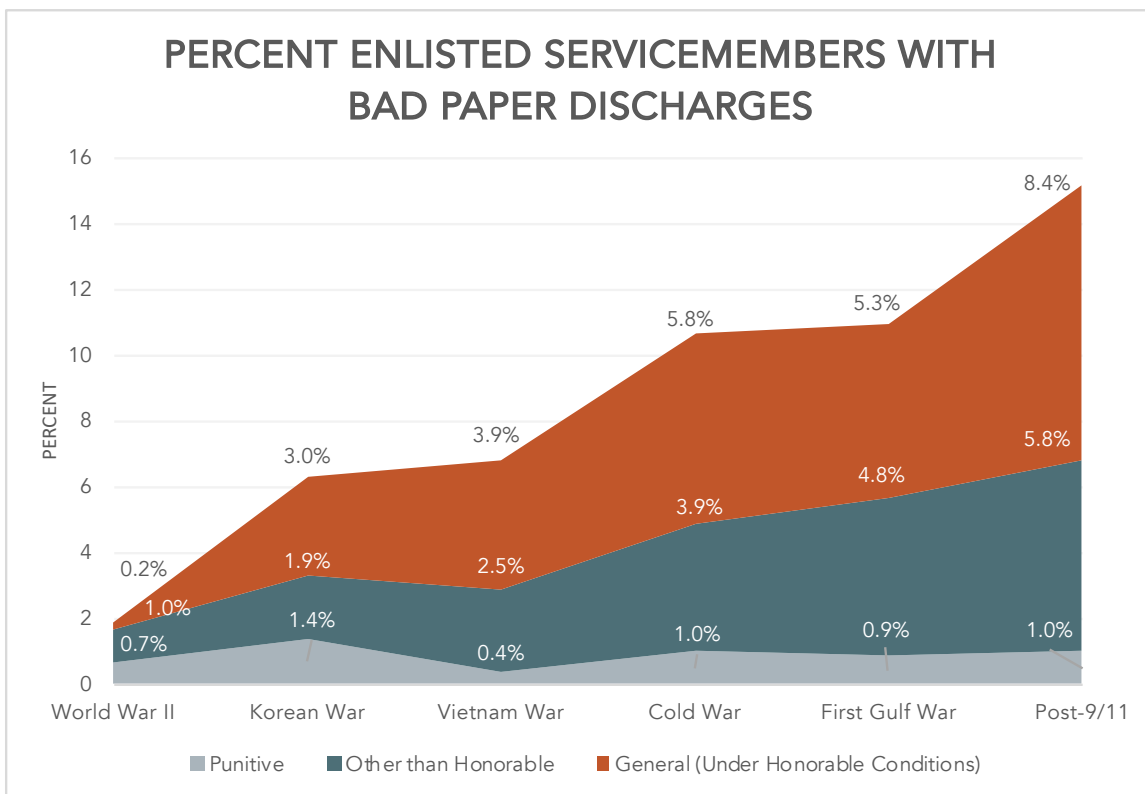
This disparity was confirmed by the Government Accountability Office, which found that servicemembers with similar service histories but in different service branches often received widely different discharge characterizations.<sup>19</sup> For the same misconduct, one might get an Honorable discharge, another a General discharge, and a third an Other Than Honorable discharge, merely because of their branch’s and command’s leadership culture. While each branch of service has its own mission and philosophy, whether a person chose to serve in the Army or the Navy, the Air Force or the Marine Corps should not affect whether that person can access health care after discharge.

The disparities caused by such arbitrariness have been compounded in at least two ways. First, the military has increasingly used administrative discharges to issue bad paper to servicemembers. Since World War II, the percentage of servicemembers who receive an Other Than Honorable discharge has increased by a factor of five.<sup>20</sup> Second, wide variation exists across the service branches in the percentage of servicemembers who receive Other Than Honorable discharges. The chart below demonstrates this wide variation over a 36-year period. For example, although the Marine Corps is by far the smallest service branch in terms of active duty personnel, it has by a wide margin accounted for at least 40% of the military’s Other Than Honorable discharges issued each fiscal year from 2010 to 2015. Meanwhile, the Air Force has generally accounted for well under 5% of the military’s Other than Honorable discharges issued during that same period.

### Administrative Other Than Honorable Discharges by Service Branch 1980-2015



Source: Department of Defense FOIA Response.



Source: Department of Defense FOIA response; Veterans Legal Clinic, *Underserved* (2016).

The increased use of administrative discharges and the disparate rates of bad paper discharges among the branches of service likely have complex origins. These trends may be driven, at least in part, by the transition from a conscription to an all-volunteer force, other changes in the overall size and structure of the military, and, of course, the unique culture and disciplinary philosophies of each branch of service.<sup>21</sup>

### C. How Many Veterans Have a Bad Paper Discharge?

Since 1980, more than 575,000 servicemembers have received an Other Than Honorable, Bad Conduct, or Dishonorable discharge—what this report calls a “bad paper” discharge—representing about 7% of those with characterized discharges. The vast majority—81%—

of those bad paper discharges are administrative Other Than Honorable discharges, not punitive discharges by court-martial, meaning these veterans never received a court process to determine whether the discharge characterization was appropriate, even though that characterization can carry a lifetime of consequences.

Additionally, more than 600,000 servicemembers since 1980 have received General discharge characterizations. While such discharges do not preclude access to most VA benefits, such as disability compensation and health care, they do impose a stigma, bar access to some benefits, and impede employment prospects.‡

## **D. The Myth of the Easy Discharge Upgrade**

A common myth in the military community is that a bad paper discharge can be easily changed once a servicemember joins the civilian world. This myth may account for why some servicemembers are willing to accept an Other Than Honorable discharge during the administrative separation process. It is true that the branches of service operate administrative boards—known as discharge review boards and boards for correction of military or naval records—and that these boards have the legal authority to upgrade a discharge that was previously imposed by the military. For example, these administrative boards have the authority to change the character of service on a veteran’s DD 214 from Other Than Honorable to Honorable and to correct other errors or injustices. However, it is inaccurate to say that the discharge review boards and boards for correction of records dispense such relief frequently or promptly.

Historically, the percentage rate of success before the boards is extremely low—in the single digits—with lower success rates for self-represented veterans, who make up the vast majority of petitioners to the boards due to a lack of free or affordable legal help. Although certain categories of petitioners, such as those who establish that they had unrecognized PTSD or TBI that contributed to the misconduct leading to discharge, have had higher rates of success in recent years, the odds of success remain low.<sup>22</sup> Paradoxically, the veteran may also need access to VA to establish a PTSD or TBI diagnosis.

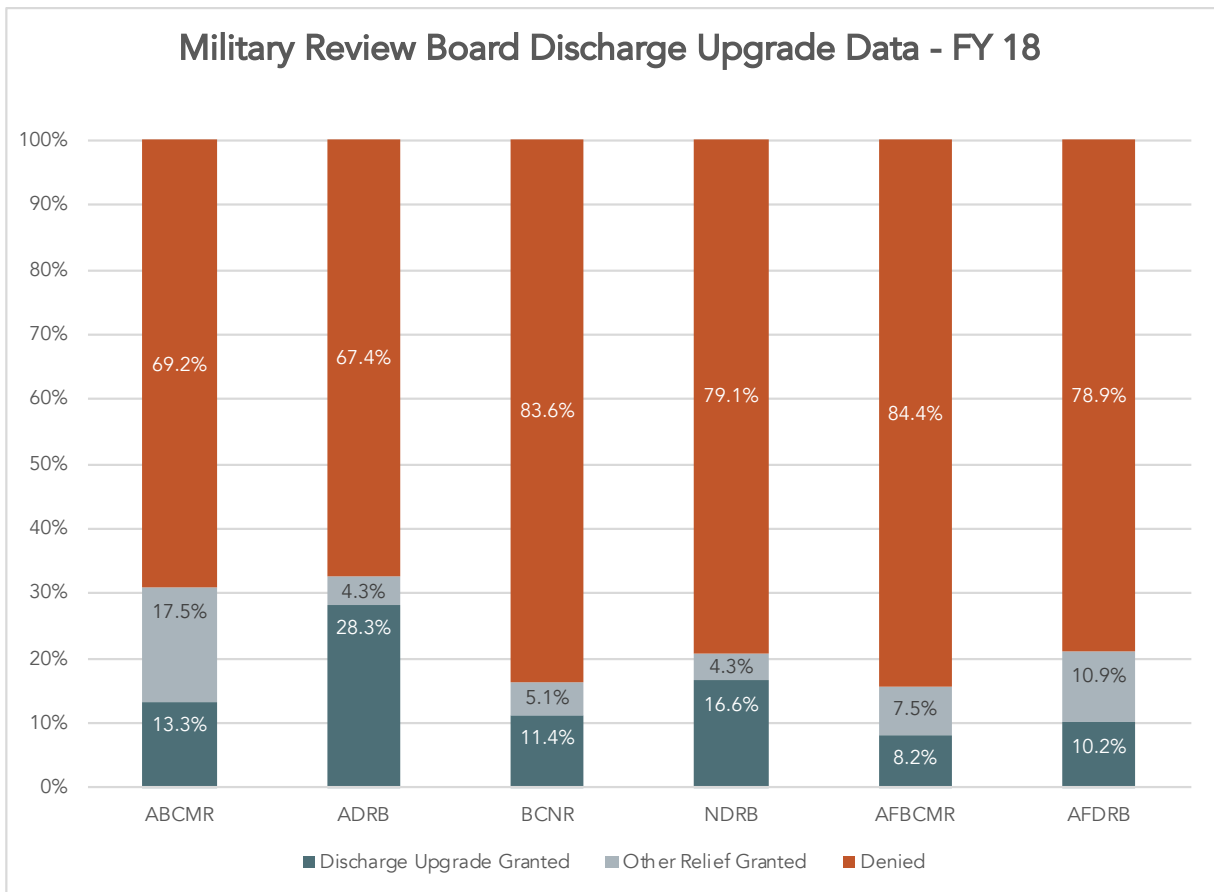
### **Percent of Veteran Applicants Granted a Discharge Upgrade - FY18**

|                |      |
|----------------|------|
| Army BCMR      | 13 % |
| Navy BCNR      | 11%  |
| Air Force BCMR | 8%   |

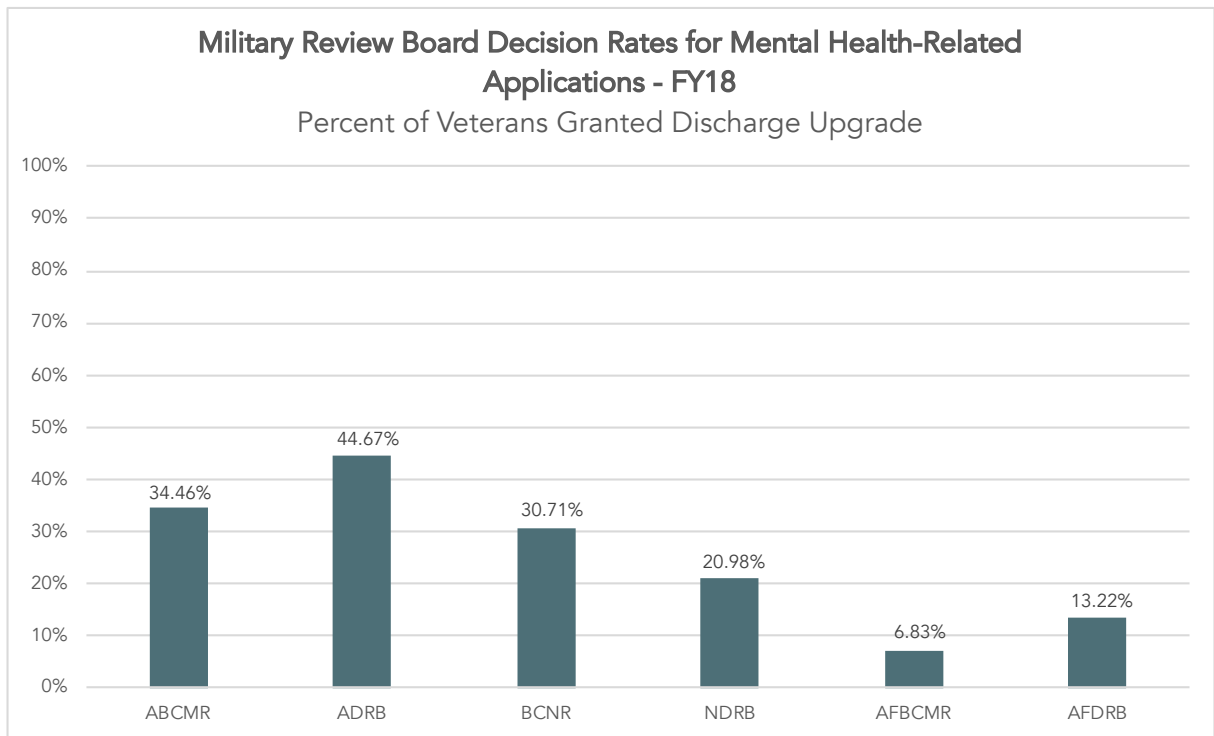
Petitioners can expect lengthy waits to receive a decision from these boards. The discharge review boards typically take 12 to 24 months to decide cases, and the boards for correction of records typically take 18 months to decide cases, though it frequently can take longer.

In sum, receiving a discharge upgrade is hardly certain or swift. Nor does the potential availability of a discharge upgrade excuse VA’s unlawful exclusion of eligible veterans from access to healthcare or compensate the veterans for the adverse health effects and financial expenses suffered while awaiting a discharge upgrade decision, as discussed below.

‡ For example, access to Post-9/11 G.I. Bill education benefits may require a fully Honorable discharge, depending on the particular circumstances of the veteran’s service and discharge.



Source: Boards of Review Reading Rooms Board Statistics. See Appendix for additional data.



Source: Boards of Review Reading Rooms Board Statistics.

### III. THE PROBLEM

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#### A. The Importance of VA Access

The Department of Veterans Affairs (VA) was created to be a single, central agency that could fulfill our nation’s obligation to provide care and support to our veterans. VA has three main components: the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the National Cemetery Administration (NCA). VBA is responsible for deciding whether veterans and their survivors and dependents are eligible for benefits, such as service-connected disability compensation, pension, vocational rehabilitation, and home loans, and for then providing those benefits. VBA also adjudicates whether a veteran with a bad paper discharge was discharged under “other than dishonorable” conditions, as discussed below. VHA manages medical centers and health care facilities across the country and is responsible for enrolling veterans in VA health care and medical benefits. NCA maintains federal veteran cemeteries.

VA is supposed to be non-adversarial and “veteran friendly.” It was specially designed to meet veterans’ needs, especially those arising out of military service. VA medical facilities, for example, offer expert care for medical issues that are more prevalent in the veterans community, such as those associated with amputations, TBI, and PTSD. VA has dedicated programs to reintegrate servicemembers into the civilian world and to address homelessness and suicide risk, which disproportionately affect the veteran population.

For veterans with bad paper, access to VA is particularly critical. Studies have shown that veterans with bad paper are three times more likely to experience suicidal ideation. However, veterans with bad paper who have recently accessed VA mental health services are no more likely than other veterans to experience suicidal ideation.<sup>23</sup> Thus being excluded from VA mental health care leaves veterans at much higher risk of suicide.



For those reasons, ensuring veterans’ access to VA services is essential to upholding the national duty to our veterans and in many cases, they are truly life-saving. Given that the primary way that veterans access VA services is through its health

care system, VA health care should receive priority attention to make sure that no veteran is wrongly denied access.

#### B. VA Obligations to Applicants

The law grants veterans certain rights and mandates that VA provide eligible veterans with certain benefits. Among other things, the law requires VA to provide any person seeking any veteran benefit with due process in the form of an application and instructions on how to apply.<sup>24</sup> VA also has a duty to assist—that is, VA has certain obligations to help applicants

with establishing eligibility, such as letting the veteran know what information VA needs to approve an application and helping the veteran obtain relevant evidence.<sup>25</sup> Further, VA must provide a written notice of any decision affecting benefits eligibility, along with information about how to appeal any unfavorable determination.<sup>26</sup>

### C. VA Eligibility Standards

Although the law provides a favorable legal standard and special procedural rights to help veterans prove their eligibility for benefits, there are numerous criteria that veterans must meet. That is, serving in the armed forces alone does not guarantee eligibility for VA benefits.

For VA health care, one eligibility criterion is a discharge under “other than *dishonorable*” conditions. By VA regulation, “other than dishonorable” status automatically includes veterans with Honorable and General discharge characterizations. It also can include some veterans with bad paper, depending on the nature of their service and the circumstances of their separation.

Moreover, veterans with bad paper may be eligible for full VA health care based on another enlistment that ended with an Honorable discharge, or they may be eligible for limited VA health care to treat service-connected disabilities or to provide evaluations or emergency treatment for mental health conditions.<sup>27</sup>

#### Examples of Potential VA Eligibility for Veterans with Bad Paper

1. VA finds veteran’s service is “other than dishonorable”
2. Veteran has a prior honorable discharge
3. Veteran not barred by statute can receive health care for service-connected disabilities
4. Veterans in need of emergency mental health treatment for up to 90 days
5. Mental health evaluation for veterans who engaged in or supported combat operations or who experienced MST
6. Vet Center readjustment and bereavement counseling

\* There are limits and additional eligibility requirements for each possibility listed. Not all veterans with bad paper can receive benefits.

Because VA health care eligibility is complicated, whether a particular veteran is ineligible often cannot—and should not—be determined by simply looking at the veteran’s DD 214. Thus, when a veteran with bad paper presents at a VA medical facility seeking to apply for VA health care, VA must follow a certain process to determine eligibility. Specifically, the following should occur:

1. VBA staff should fill out a Form 20-0986 (formerly Form 7131) and send it to VBA to conduct a Character of Discharge review
2. VBA staff should review the veteran’s military personnel and medical records and any other relevant records; solicit information and explanation from the veteran; and decide whether the veteran’s discharge was “other than dishonorable” and whether the veteran is otherwise barred by law from receiving benefits
3. VBA staff should inform VHA of its decision
4. VHA staff should inform the veteran of the decision, and if the veteran is eligible, help that veteran enroll in health care

|                               |              |
|-------------------------------|--------------|
| <b>VBA REGIONAL OFFICES</b>   | <b>57</b>    |
| <b>VHA MEDICAL FACILITIES</b> | <b>1,243</b> |

At present, the Character of Discharge review process can take a long time—two years, on average, as of 2016.<sup>28</sup> Under a July 2017 policy, VA aims to complete the process in ninety days if the veteran presents with an urgent mental health issue. However, while that process is ongoing, VA policy largely prevents the veteran from receiving other health care benefits or supportive services.<sup>29</sup> Moreover, the regulations VA applies during the review process are highly flawed—they are overbroad, vague, and fail to consider important factors like combat service or mental health conditions.<sup>30</sup>

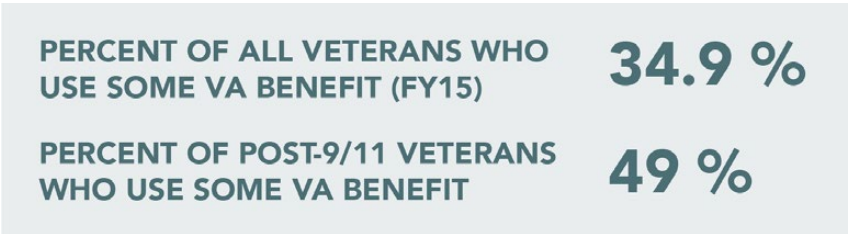
In sum, every person—regardless of military discharge status—has the right to apply for VA health care and to receive a written decision and notification of appeal rights, to ensure veterans are not wrongfully denied. A person with a bad paper discharge may be entitled to receive VA health care and other benefits under VA regulations and policies. There are processes that VA must follow and duties that VA owes to every former servicemember. Unfortunately, for thousands of veterans, from decades past to the present day, VA is turning them away without following these processes, and indeed without any consideration at all.

## IV. METHODOLOGY

The data underlying this report were collected in three main ways. First, numerous veterans who were wrongfully turned away from VA medical facilities based on their discharge status were interviewed and their records reviewed. In some cases, the veterans were accompanied by a veterans advocate in going to a VA facility to attempt to access health care benefits, or a veterans advocate worked on the veteran’s behalf to gain that veteran health care access. Second, other veterans advocates and legal aid attorneys submitted reports of numerous incidents of veterans being turned away from VA facilities whenever they witnessed or heard of such an event. This included instances where the advocate accompanied the veteran to a VA healthcare facility and

|   |               |
|---|---------------|
| <b>PERCENT OF ALL VETERANS WITH A SERVICE-CONNECTED DISABILITY (FY15)</b> | <b>21.8 %</b> |
| <b>PERCENT OF POST-9/11 VETERANS WITH A SERVICE-CONNECTED DISABILITY</b>  | <b>35.9 %</b> |

frontline staff still did not follow VA's own regulations. Third, data were obtained that relate to VA health care access and eligibility, as well as the size and demographics of the veteran population more generally, through Freedom of Information Act requests to the Department of Veterans Affairs and Department of Defense and through public data resources. The report further relies on and builds upon the work of other governmental and non-governmental organizations that have investigated issues that affect veterans with bad paper.



## V. FINDINGS AND ANALYSIS

### A. VHA Facilities Across the Country Deny Veterans Health Care Without Due Process or Proper Adjudication

As a basic matter of due process, every person seeking VA health care is entitled to apply, to have VA consider that person's application on the merits, and to receive a written decision. If the person seeks care at a VA medical facility and eligibility cannot immediately be determined, a VHA staff member must refer the person's application to the VBA for a determination as to whether the veteran is eligible.<sup>31</sup>

Yet, evidence shows that VA routinely denies potentially eligible veterans their right to apply for and receive critical health care benefits to which they may be entitled.

*VA routinely denies potentially eligible veterans their right to apply for and receive critical health care benefits to which they may be entitled.*

Numerous veterans reported presenting at VA medical facilities to seek care and being told by frontline staff that they were ineligible because of their discharge status. Most were not given any written decision but instead told orally that they were ineligible. Some were handed a denial letter that had incorrect eligibility information and that lacked information about their right to appeal the denial. Many were erroneously told that the only way to gain access to VA services was to obtain a discharge upgrade from the military review boards. In some cases, VHA staff did fill out a form to refer the veteran to the VBA for a Character of Discharge eligibility review, but no action was then taken on that referral and the veteran was provided no information about the referral or how to follow up.

Four examples illustrate different aspects of the problem:

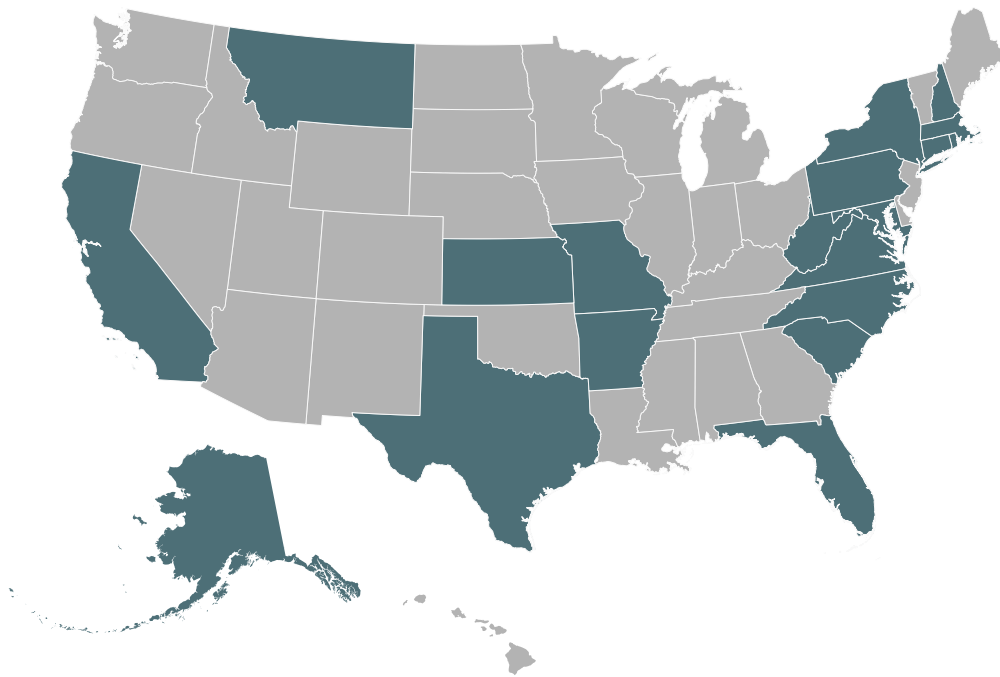
1. Kevin, an Air Force veteran honorably discharged from his first enlistment but later other-than-honorably discharged from a later enlistment, sought medical care from his local

VA medical facility when he first was discharged in the late 1980s. He was told that his discharge status made him ineligible, which left him feeling ashamed and with no place to turn. For more than twenty years, Kevin was excluded from the VA health care he earned through his service. After two decades, Kevin eventually tried again to apply for health care after losing his job and health insurance—and was again turned away. But he then returned after doing his own research about eligibility based on his first Honorable discharge, and VA finally allowed him to apply and eventually approved his application.

2. Jeff, a post-9/11 Army combat veteran diagnosed with PTSD and TBI, was at risk of homelessness and suicide when he sought VA health care shortly after being other-than-honorably discharged. After looking at Jeff's DD 214, a VA staff member told him he was not eligible and typed up a letter that said he needed an "Honorable or General" discharge status. Ultimately, with pro bono legal assistance, Jeff was approved for full VA health care benefits and granted a 100% service-connected disability rating for his deployment-related wounds. However, while waiting for VA's decision, Jeff went more than two years without access to VA care for his mental and physical wounds from service.
3. Robert, a Military Sexual Trauma survivor who received an Other Than Honorable discharge, sought mental health treatment at VA in 2019. The VA enrollment representative said that Robert would be eligible because of special eligibility rules for veterans who experienced MST and sent Robert to make an appointment at triage. However, the VA triage employee refused to schedule Robert for an appointment because of his OTH discharge. Only with the assistance of a pro bono attorney did VA eventually agree to grant Robert access to VA mental health treatment and schedule an appointment.
4. Dan, a post-9/11 Marine Corps combat veteran, went to a VA medical facility seeking health care and a VA eligibility officer filled out the Character of Discharge referral form. Dan himself gave a copy of that referral form to the local VA regional office. No action was taken on his application for more than a year. Finally, a pro bono legal advocate wrote numerous letters to VA, reached out to VA management, and scheduled an administrative hearing on Dan's character of discharge determination. After this extensive follow-up, VA granted Dan access to VA health care.

These reports of VA turning veterans away from medical care stretch back many years and originate from across the country. Veterans in more than a dozen states—and at multiple facilities in many states—were improperly told they were ineligible for benefits or were otherwise denied the right to apply. Importantly, for states from which there are no reports of veterans being turned away, one cannot conclude that no such turn-aways occurred; rather, this investigation was not able to reach out to veterans and veterans advocates in every state, and thus there are no reports of turn-aways from some states.

*Every person—regardless of military discharge status—has the right to apply for VA health care and to receive a written decision and notification of appeal rights.*



*Above: Veterans from states across the country reported being unlawfully turned away by VA when they sought health care. Reports of turn-aways came from states shaded teal in the above map.*

Veterans advocates across the country reported that veterans were turned away even when the advocate went with the veteran to the VHA health care facility to apply and explained the law's requirements to the eligibility staff. One advocate recalled an enrollment worker stating that, in more than twenty years of working at VA, she had never seen or heard of a 7131 Form—the form then used to ask that VBA make a character of discharge eligibility decision for a veteran with bad paper.

Although VA does maintain records of who is enrolled in VA health care, it has no record of veterans with bad paper who sought health care but were denied the opportunity to apply. By its very nature, the turn-away problem is one in which usually no record is created, and as a result no VA documentation exists. It is therefore impossible to know definitively how many veterans were wrongly denied care, where they are located, and when it occurred.

The pattern, however, is clear: VA's denial of care to veterans with bad paper discharges is national, persistent, and systemic. Its impact on some of our most vulnerable veterans can be harmful or even deadly.<sup>32</sup>

In 2018, in response to pressure from Congress and veterans organizations, VA created a new form by which VHA can request that VBA render a character of discharge eligibility determination for a veteran with bad paper. Unlike the previous 7131 Form used for such requests, the new 20-0986 form is specifically and only used for requesting character of discharge determinations, and the form gathers additional information. The new form also has one part for VHA to fill out when transmitting it to VBA, and a second part for VBA to respond with its determination.



**DEPARTMENT OF VETERANS AFFAIRS**  
Edith Nourse Rogers  
Veterans Memorial Hospital  
200 Springs Rd  
Bedford, MA 01730

August 18, 2015

**RE: Ineligible – Discharge – Other Than Honorable**

Dear

Thank you for your application for health benefits. After reviewing your discharge papers we have determined that you are ineligible for veteran's benefits due to that you were discharged "Other Than Honorable".

To be eligible for VA services the veteran must serve twenty-four consecutive months active service with an honorable, general, or under honorable condition discharge.

If you are looking for an up grade in your discharge you need to contact the Regional Office in Boston, MA at 800-827-1000 or you can contact your local VA Representative located in your town or city hall.

If you have any questions please contact the eligibility department at the Bedford Veterans Administration at 781-687-2275.

**[REDACTED]**  
Enrollment/Eligibility  
Edith Nourse Rogers  
Veterans Memorial Hospital

*Above: Denial letter VA provided to veteran with bad paper when he tried to get health care for deployment-related PTSD and TBI (emphasis and redactions added). The letter incorrectly states that a veteran must have an Honorable or General discharge to receive VA health care. In fact, a veteran with an Other Than Honorable discharge may be eligible for VA health care.*

The new form appears to have a better design and to increase the likelihood that VBA will provide a response to VHA regarding its eligibility decision. The form does not, however, solve all communication issues. For example, it is an internal form that is not filled out by or provided to the veteran, and so its utility relies on VHA staff knowing that the form exists and using it—a problem that is discussed further in the next section. Further, the creation of new internal forms does nothing to remedy the widespread misinformation on this issue. Despite the new form, veterans with bad paper continue to report being turned away when they seek VA health care.

As one example of the lack of clarity of VA's current materials about eligibility for veterans with bad paper discharges, one advocate reported that an Iraq combat veteran—who had a first Honorable period of service but a final Other Than Honorable discharge—stated that he had done his own research on VA's website and determined on that basis that he was not eligible for any VA care or benefits because of his final discharge status. Only after repeated assurances from the advocate that the veteran was unquestionably eligible for health care and potentially other benefits based on his first Honorable enlistment did the veteran agree to attempt to apply to VA.

In most—but not all—cases, if VA has wrongfully turned away a veteran, a veterans advocate can work with that veteran to solve that issue. The advocate can provide the veteran the correction application form, can assist the veteran in filing the application form, and can follow up with VA to ensure that VA processes the application and provides a written decision with notice of appeal rights. However, that corrects the issue for that individual veteran only—it does not solve the systemic problem for veterans being turned away from health care, and it does not fix the turn-away issue for the majority of veterans who never speak with an advocate who can help them. Moreover, just as no one should need a lawyer to apply for a driver's license or enroll their child in public school, a veteran should not need an advocate to apply for VA health care.

## ***B. VHA Staff Receive Incorrect or Inadequate Training and Guidance***

The training that VHA Staff receive about the eligibility criteria for accessing VA health care is often brief, legally incorrect, or otherwise inadequate. It is also often inconsistent state to state and facility to facility. None of the trainings or manuals examined provided step-by-step instructions for frontline health care eligibility workers on how to process an application from a veteran with bad paper. None included a clear statement that providing those veterans with applications is required by law.

*VA's denial of care to veterans with bad paper discharges is national, persistent, and systemic.*

Numerous training presentations contain errors that could lead to a veteran with bad paper wrongly being turned away. For example, one VHA presentation listed "qualifying characteristics of service" and "non-qualifying characteristics of service," and incorrectly



DEPARTMENT OF VETERANS AFFAIRS  
 El Paso VA Health Care System  
 5001 N. Piedras Street  
 El Paso, TX 79930-4211

In Reply Refer To: [Redacted]

[Redacted] 2014

Dear [Redacted]

Thank you for applying to the Department of Veterans Affairs Health Care System for medical care.

Veterans Affairs Regulations state that any person who originally entered active military service on or after September 7, 1980, does not qualify for medical benefits unless the following criteria are met.

- A. Completion of 24 months continuous active duty.
- B. Completion of the full period for which the person was called or ordered to active duty.
- C. Character of discharge from military service must be Honorable or General (Under Honorable Conditions).
- D. Possess a service-connected disability through the Department of Veterans Affairs.
- E. If military service is less than 24 months, can only be seen for service connected conditions applied for in Compensation & Pension.
- F. If military service is less than 24 months, can only be seen for service connected disabilities awarded if combined is 0%.

We regret to inform you that you are not eligible for medical care through the Veterans Affairs Health Care System, because of your OTH discharge.

If you receive care by the Veterans Affairs Health Care System or William Beaumont Army Medical Center, you will be billed for the full cost of the service provided in the amount of \$300.00. If you have incurred any service-connected injuries during your active duty service, you may file a claim for disabilities with the Veterans Benefits Administration and you may then reapply for medical benefits after any disability is awarded.

VA Form 4107 has been provided which list your procedural and appellate rights should you not agree with this decision. Should you have any questions regarding this matter, please contact a Health Benefits Advisor at (915)564-6100 ext. 6150.

[Redacted Signature]

[Redacted Signature]

Signature (HBA)

[Redacted] 2014  
 Date

[Redacted] 2014  
 Date

El Paso VAHCS  
 5001 N. Piedras Street  
 El Paso, TX 79930-4211  
 915-564-6100

Eastside El Paso Outpatient Clinic  
 2400 Trawood Drive, Suite 200  
 El Paso, TX 79936  
 915-217-2428

Las Cruces Outpatient Clinic  
 1635 Don Roser  
 Las Cruces, NM 88001  
 575-522-1241

Social Media:  
[www.el Paso.va.gov](http://www.el Paso.va.gov)  
[www.facebook.com/vael Paso](https://www.facebook.com/vael Paso)

Above: Letter provided to a veteran by the El Paso VA when he sought health care for deployment-related PTSD and TBI (emphasis and redactions added). The letter incorrectly states that an Honorable or General discharge is required to be eligible for VA health care. An El Paso VA training entitled "What Every VA Employee Needs to Know About Eligibility" included no information about character of discharge or VA health care eligibility for veterans with bad paper.

recorded an “Other than Honorable” discharge as categorically “non-qualifying.” In fact, a veteran with an Other Than Honorable discharge could be eligible for full or partial health care benefits. Other presentations that provided training about VA health care eligibility lacked any information about character of discharge or eligibility for veterans with bad paper.

VHA reference manuals similarly included incorrect information about the eligibility standards. For example, one manual included cartoon “thumbs up” and “thumbs down” symbols, listing an “OTH” discharge next to a “thumbs down,” which in addition to being incorrect further stigmatizes an “Other Than Honorable” discharge status.

In other cases, important manuals lacked substantive guidance about the eligibility rules or what a frontline VHA eligibility worker should do when a veteran with bad paper seeks to apply for health care. The national VHA Eligibility Determination Handbook, which is distributed to all VA health care facilities, fails to include instructions about the steps to help a veteran with bad paper apply for health care and receive a written determination. Rather, the Handbook lists the relevant statute and regulation and suggests that an Honorable or General discharge is required. It is concerning that there is no consistent, legally correct guidance on this issue across all VA facilities nationwide.

## Basic Eligibility Definition

- A Veteran meets basic eligibility requirements for VA healthcare, if they meet the following requirements:
  - One day of active duty service, if enlisted before 9/7/1980 or
  - 24 months of active duty service, if enlisted after 9/7/1980 or
  - Reservist or National Guard member activated under a Title 10 executive order for any period of time and completed the period that they were called up to serve or
  - Contracted for a 15 month enlistment (National Call to Service) “DD 214 narrative states “Completion of Service” or Expiration Term of Service (ETS)
  - Honorable or under honorable conditions character of discharge
  - 0% Service connected (SC) Non-compensable National Guard/Reservist

VETERAN HEALTH ADMINISTRATION 3

*Above: VHA training materials that incorrectly state that an honorable discharge is required for VA health care eligibility (emphasis added).*



**Veteran is defined as:** a person who served in the Active Military, Naval or Air Service and who Was discharged or released under conditions other than dishonorable (Active Duty / Reserves / National Guard)

**“Under Conditions Other than Dishonorable”** discharge is a “Good” discharge  
Honorable,  
Under Honorable Conditions (also known as: General)

Dishonorable discharges include: Dishonorable, Undesirable, Other than Honorable,  
Under Other than Honorable Conditions, Bad Conduct, Dishonorable for VA purposes

Above: Excerpt from Pittsburgh VAMC training manual which lists an incorrect standard for health care eligibility (emphasis added).

## **ELIGIBILITY CHECK LIST**

1. **CHECK I.D. / MATCH DD214**
2. **CHECK CHARACTER OF SERVICE**  (HONORABLE/GENERAL)  (OTH/DISHONORABLE)
3. **BRANCH OF REGULAR SERVICE (NO RESERVES OR NAT'L GUARD UNLESS CALLED TO ACTIVE DUTY OTHER THAN FOR TRAINING ONLY BY A FEDERAL ORDER AND COMPLETED THE FULL PERIOD FOR WHICH THEY WERE CALLED OR ORDERED TO ACTIVE DUTY)**
4. **LENGTH OF ACTIVE DUTY**
5. **DISCHARGE PAPERS**
6. **AWARD MEDALS**
7. **INCOME PROVIDED(IF NEEDED)**

Above: Excerpt from Pittsburgh VAMC training manual which lists an incorrect standard for health care eligibility (red emphasis added, yellow highlight in original).

c. **Character of Discharge Requirements.** In general, to qualify for VA health care benefits, an individual's discharge or release from service must be under conditions other than dishonorable. *NOTE: See 38 U.S.C. 101(2), 5303, and 38 CFR. 3.12 for general information on character of discharge requirements.*

Above: Excerpt of VHA Enrollment and Eligibility handbook that fails to offer meaningful guidance to VA staff on how to process the health care applications of veterans with bad paper discharges.

c. **Character of Discharge Requirements.** Unless an exception applies, to qualify for VA health care benefits, an individual's discharge or release from service must be under conditions other than dishonorable (Honorable, General, see 38 U.S.C. 101(2), 5303, and 38 CFR. 3.12). **NOTE:** *A discharge under honorable conditions satisfies this requirement. Some other discharges require VA to make a character of discharge determination in order to assess VA eligibility. VA Form 20-0986, Eligibility Determination for Character of Discharge (COD) Request, is the form completed by VA medical facility staff to request a character of service determination by the Veterans Benefits Administration (VBA). The form is available on the VA Forms Web site at <http://vaww.va.gov/vaforms/>. NOTE: This is an internal VA Web site that is not available to the public.*

*Above: Excerpt of VHA Enrollment and Eligibility handbook that includes misleading information and fails to offer meaningful guidance to VA staff on how to process the health care applications of veterans with bad paper discharges (emphasis added).*

The Handbook does have instructions relating to one subgroup of this population—veterans with Other Than Honorable discharges who are experiencing an emergency mental health crisis—regarding how to process them for temporary treatment. However, in the first year that the Handbook included these instructions, the total number of veterans with Other Than Honorable discharges who gained temporary access to care through this program was about 150—out of more than 500,000 potentially eligible veterans.<sup>33</sup> VA also has recently created some fact sheets and other resource materials about how veterans with bad paper may be able to access VA.<sup>34</sup> From this investigation and research, VHA facilities and their staff were rarely aware of those materials and did not reference them or have them on hand when veterans attempted to enroll in health care.

For those trainings that do provide correct information, the entire topic of access to VA for veterans with bad paper is usually addressed in one to two slides, and there is no clear statement emphasizing that such a veteran may be eligible for VA health care. It appears that the lack of detailed guidance and instruction from VHA and VBA about eligibility has led certain local VHA facilities to fill in that gap with their own manuals and instructions, which often contain inaccurate and misleading information. One advocate reported attending a VA training that addressed character of discharge health care eligibility rules: while the slides themselves did not contain any misinformation, the VA presenter erroneously stated that an Honorable or General discharge was required to be “VA health care eligible.”

*Former Secretary of VA Robert McDonald referenced “[those] veterans that got bad paper discharges that we in the VA can’t serve by law.”*

Address to the 2015 Veterans Court Conference

*Former VA Undersecretary of Health David Shulkin stated that VA was “prohibited by law from treating someone [with] what we call bad paper.”*

Senate Appropriations Committee Hearing 2016

The lack of information and the provision of misinformation to VA staff directly impacts the ability of veterans with bad paper to access health care. An uninformed or misinformed staff member may advise a veteran that it is not worth applying, that the only remedy is a discharge upgrade, or that there are no VA resources to provide support. The veteran then may go years—or perhaps an entire lifetime—without care that the veteran needs and to which the veteran is entitled by law.

*Larry served as a combat engineer in the Vietnam War. After being hit with a grenade that failed to explode, he developed both physical and mental wounds. He was discharged with an Other Than Honorable discharge for going absent without leave after returning to the United States. He was told that his OTH discharge made him completely ineligible for any VA benefits, and so for years he struggled on his own with undiagnosed and untreated Post-Traumatic Stress Disorder. Nearly 50 years after returning from Vietnam, with the assistance of pro bono counsel, Larry finally applied for VA health care and was approved.*



Photo: Larry during his deployment to Vietnam

### **C. VA's Turn-Away Problem Likely Disproportionately Impacts Veteran Subpopulations Including Navy and Marine Corps Veterans, Post-9/11 Veterans, Enlisted Veterans, and Veterans with PTSD or Other Service-Related Mental Health Conditions**

Historically, certain groups of servicemembers have been more likely to receive a bad paper discharge than others. These disparately affected groups include veterans who served in the Navy or Marine Corps, Post-9/11 veterans, veterans who enlisted, and veterans with service-related mental health conditions, such as PTSD.

#### **1. NAVY & MARINE CORPS VETERANS**

Some service branches discharge servicemembers with bad paper discharges (which are presumptively VA-ineligible) at a much higher rate than other branches. Of all Other Than Honorable, Bad Conduct, and Dishonorable discharges since 1980, almost half—45%—were issued by the Navy. The Marine Corps accounts for 24% of the presumptively VA-ineligible discharges over that same period of time, even though the Marine Corps is the smallest of the service branches. In contrast, the Army, which has the most personnel, accounts for 27% of presumptively ineligible discharges and the Air Force accounts for less than 5%.

These disparate discharge practices are long-standing. Past studies of the different branches' separation policies have attributed the disparity to the branches' different philosophies about how best to discipline and punish their troops, not to any differences in the actual conduct of the troops. In other words, it is often the case that an Airman and a Marine with similar service records could engage in the same behavior, but the Airman would be separated with a General discharge and be able to easily gain access to VA, while the Marine would get an Other Than Honorable discharge that would create barriers to

receiving any support from VA.

Discharges under DADT and similar prior policies illustrate well the disparate practices of the service branches. From 1980 to 2011—when DADT was repealed—42% of the discharges for “homosexuality” were issued by the Navy. 7% of the Navy’s discharges for “homosexuality” were characterized as Other Than Honorable. Similarly, 9.5% of the Marine Corps’ discharges for “homosexuality” were Other Than Honorable. In contrast, less than 3% of Soldiers and less than 1% of Airmen who were discharged for “homosexuality” received an Other Than Honorable characterization. They were much more likely to receive Honorable or General characterizations.

***2/3 of all veterans with bad paper discharges since 1980 served in the Navy or Marine Corps***

Because some service branches are handing out more bad paper discharges than others, a former Sailor or Marine who tries to obtain health care from VA is much more likely to be turned away than a former Soldier or Airman.

Rather than resolving these inter-service disparities and applying a consistent standard of conduct,

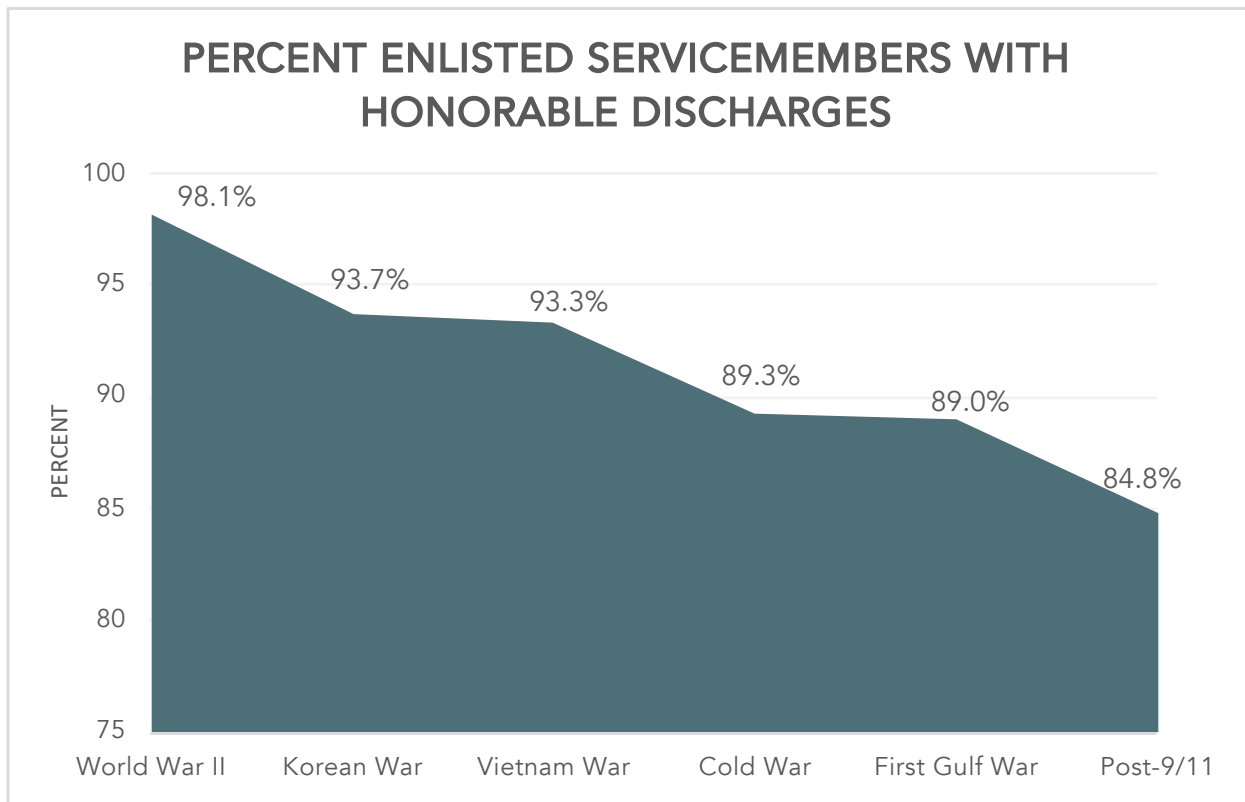
VA’s character of discharge review process exacerbates the problem. VA denies character-of-discharge claims by Marines at a higher rate than those of veterans from the other branches.<sup>35</sup>

## **2. POST-9/11 VETERANS**

The percentage of servicemembers discharged less-than-honorably has not remained steady over time. Rather, the percent of servicemembers receiving administrative General and Other Than Honorable discharges has significantly increased since World War II to the present, with a corresponding decrease in the percent of servicemembers receiving fully Honorable discharges. The percent of servicemembers receiving punitive discharges (Bad Conduct or Dishonorable) has been steadily low over that time period.

Focusing on enlisted servicemembers who completed at least six months in service, and thus received characterized discharges, the rate of servicemembers who received fully Honorable discharges has decreased from 98.1% during World War II, to 93.3% during the Vietnam War, to now only 84.8% in the post-9/11 era. Meanwhile, the rate of General discharges has increased from 0.2% (World War II) to 3.9% (Vietnam) to 8.4% (Post-9/11), and the rate of Other Than Honorable discharges has increased from 1% (World War II) to 2.5% (Vietnam) to 5.8% (Post-9/11). The punitive discharge rate averaged around 1% (between 0.4% and 1.4%) over that same period.

*Brian, a 17-year OEF/OIF Marine Corps veteran with multiple deployments and four Honorable discharges, sought VA health care after receiving an Other Than Honorable discharge for his final enlistment. Despite Brian’s Honorable discharges, which clearly entitled him to VA health care benefits, VA staff denied him all medical treatment when he first went to apply. Only with pro bono legal assistance was Brian able to eventually gain full access to VA health care.*



Source: Department of Defense FOIA response; Veterans Legal Clinic, *Underserved* (2016)

Post-9/11 veterans are thus disproportionately affected by bad paper discharges. They are also more likely to have multiple deployments than prior generations of veterans, while simultaneously being at the highest risk of being presumptively excluded from VA, given that 6.8% have Other Than Honorable or lower characterizations.

### 3. ENLISTED VETERANS

Servicemembers who enlist in the armed forces are much more likely to receive a bad paper discharge than officers or warrant officers. Of all the Other Than Honorable, Bad Conduct, and Dishonorable discharges since 1980, 99.8% were issued to enlisted servicemembers. While there are many more enlisted servicemembers than officers, which accounts for some of that disparity, the impact on enlisted servicemembers is disproportionate.

**99.8%** of veterans with bad paper were enlisted servicemembers, not officers

## 4. VETERANS WITH PTSD OR OTHER SERVICE-RELATED MENTAL HEALTH CONDITIONS

Many studies have established a strong correlation between a servicemember having a mental health condition, such as PTSD, and receiving a bad paper discharge.

Medical researchers have found that Marines who deployed to combat zones and were diagnosed with PTSD were 11 times more likely to be discharged for misconduct and 8 times more likely to be discharged for substance use, compared to Marines who did not deploy or were not diagnosed with a mental health condition.<sup>36</sup> Similarly, a study of Soldiers who were hospitalized in service for a mental health disorder were 9 times more likely to be discharged for misconduct than Soldiers hospitalized for a non-mental health condition.<sup>37</sup>

*John is a Navy veteran who served in Bosnia, where his experiences supporting bombing missions and witnessing others killed or injured in war led him to develop Post-Traumatic Stress Disorder, which contributed to him receiving an Other Than Honorable discharge. More than two decades later, with pro bono representation, he received a discharge upgrade to Honorable. However, when John went to VA to finally enroll in health care with the letter informing him of his upgraded discharge, VA turned him away—a VA eligibility representative and a VA patient advocate told him that he was not in the system because of his discharge status and they were unable to help him. Only later, after John repeatedly attempted to enroll, did VA finally acknowledge that he was eligible and approve his health care application.*

The Government Accountability Office found in a 2017 study that, of the servicemembers discharged for “misconduct” from fiscal years 2011 to 2015, 62% had been diagnosed with a mental health condition in the past two years.<sup>38</sup> Of those, 23%—almost one in four—received an Other Than Honorable discharge.<sup>39</sup> Medical researchers similarly have found that early discharge from the service, including because of misconduct, is a significant risk factor for post-service mental health conditions.<sup>40</sup> Indeed, those discharged for misconduct were more than twice as likely to be diagnosed with a mental health or substance use disorder.<sup>41</sup>

## VI. RECOMMENDATIONS AND CONCLUSIONS

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VA’s practice of turning away veterans with bad paper is a long-standing, national, and systemic problem that demands immediate action. The steps proposed below to address this issue are all within VA’s existing authority and capacity. No legislation is needed, nor are new regulations required. VA can and should move swiftly to implement the following proposals to ensure that going forward no veteran is wrongfully denied needed care and support.

## A. VA Must Improve its Training, Guidance & Oversight

VA currently provides very little training or guidance to its employees about bad paper discharges and how veterans with bad paper may establish eligibility for health care or other VA services. What trainings and guidance do exist often are inconsistent and contain misinformation. This lack of information and presence of misinformation directly harms veterans with bad paper who are seeking access to health care.

VA should create a comprehensive training on the many ways that a veteran with bad paper may establish eligibility for health care and other benefits. The training should be mandatory for all VA employees and should emphasize as the key point that veterans with bad paper—especially the large majority who have administrative Other Than Honorable characterizations—may be eligible for VA health care. The presumption should be one of potential eligibility, as opposed to the current status quo which is the opposite.

VA should design a special training directed specifically at frontline eligibility and enrollment staff that includes detailed instructions on how to process a health care application from a veteran with bad paper, and VA should require annual retraining. Another training should be designed for other frontline VHA staff, such as those in the Veterans Justice Outreach program and VA programs related to homelessness. All trainings should be standardized across VHA facilities nationwide, not created locally on an ad hoc basis. Regular trainings on enrollment standards are common in other government health care programs, such as Medicaid.

VHA should also update its Eligibility and Enrollment Handbook to provide detailed instructions to staff about how to process a health care application from a veteran with bad paper. These instructions must be detailed and concrete. They must also require the enrollment staff to provide clear and readily understandable information to the veteran about the process and the timeline for receiving a decision about health care eligibility. The information provided to the veteran should be accessible even if the veteran has limited education or a disability. The instructions in the Handbook must match the parallel instructions provided to VBA staff who are tasked with rendering the character of discharge eligibility determination.

All trainings and guidance should encourage staff to ask veterans who express any interest in or need for health care whether they require assistance in applying for VA health care, and should provide instructions about how to refer that veteran to available resources. VA must adopt a “no wrong door”

*Jeff, a post-9/11 Army combat veteran with PTSD and TBI who was unlawfully turned away, was eventually able to establish eligibility for VA with the help of a pro bono advocate and to then access mental health treatment and other supportive services. However, after Jeff moved to another state a few years later and had to re-enroll in VA health care, the VA eligibility staffer told him he was not eligible because of his OTH discharge and that giving him health care before was a “mistake.” Only with help from a pro bono attorney and further advocacy was Jeff’s VA eligibility re-established.*

## Other Reform Efforts Affecting Veterans with Bad Paper Discharges

### LITIGATION:

***Shepherd v. McHugh & Monk v. Mabus***: class action lawsuits on behalf of Vietnam veterans who developed PTSD during their service and received bad paper discharges, challenging the Department of Defense military review boards' systemic denial of their discharge upgrade applications, which suits led to the issuance of new Department of Defense guidance about granting "liberal consideration" to the discharge upgrade applications of such veterans.

***Kennedy v. Esper & Manker v. Spencer***: certified class action lawsuits on behalf of post-9/11 veterans who developed PTSD or other mental health conditions during their service and received bad paper discharges, challenging the Department of Defense military review boards' policies and practices in adjudicating their discharge upgrade applications.

### LEGISLATION:

**Honor Our Commitment Act**: federal legislation extended VA mental health evaluation and treatment to veterans with Other Than Honorable discharges who have served in a combat zone or area of hostilities, worked as a drone operator, or experienced MST.

**Albany County, New York**: municipal action extended county veteran benefits to any veteran discharged based on LGBT status.

**New York**: legislation extended state veteran benefits to veterans who received a bad paper discharges on the basis of their sexual orientation or gender identity or as a result of MST, PTSD, or TBI.

**Connecticut**: legislation extended state and municipal veteran benefits to veterans who received Other Than Honorable discharges as a result of PTSD, TBI, or MST.

**Nevada**: legislation provided that no veteran discharged because of LGBT status may be denied access to a state program or service for veterans if the veteran is otherwise qualified.

**Rhode Island**: legislation provided that any veteran with a General or Other Than Honorable discharge based on LGBT status can petition the state to have the discharge recorded as honorable and can receive state veteran benefits and rights.

### ADMINISTRATIVE ADVOCACY:

**Petition for Rulemaking to Amend 38 C.F.R. 3.12**: petition asking VA to update and revise its regulations about the standards under which veterans with bad paper discharges can access basic VA benefits such as health care and compensation, seeking to ensure that mitigating circumstances such as in-service mental health conditions are considered and that only severe misconduct results in exclusion.

**2016 Commission on Care Report**: commission of representatives from leading veteran service organizations, veterans advocacy groups, health care providers, and other stakeholders recommending that VA create a streamlined path to health care eligibility for certain veterans with Other Than Honorable discharges.

approach to connecting veterans with health care.

VA should log and track all veterans' requests to enroll in health care and the outcome of that request. The ability to ensure staff compliance with training and guidance depends upon having data to observe and measure.

A tracking system for VHA enrollment requests should help to ensure that the turn-away problem is resolved prospectively. However, for decades, VHA has been turning away veterans with bad paper and not tracking those encounters. The VA Inspector General should therefore initiate an investigation into past turn-aways to determine the issue's full scope, both currently and historically. This will best ensure that other remedial actions will be most successful and complete, so that no turned-away veteran is left outside of care.

### ***VA Must Improve its Training, Guidance & Oversight***

1. Create training about eligibility of veterans with bad paper for VA health care and other services.
2. Create special trainings on eligibility for VHA enrollment and eligibility staff and for VA outreach staff.
3. Promote a "no wrong door" approach to access VA health care.
4. Track all requests and decisions for health care enrollment.
5. Investigate and audit records to fully assess the scope of the turn-away problem, past and present.

### ***B. VA Must Improve Communication Between VHA & VBA and Between VA & Veterans***

Communications problems, both internal to VA and in VA's messages to veterans and the public, further impede the ability of veterans with bad paper to access VA health care.

Focusing first on the internal issues, as documented above, the health care eligibility and enrollment process breaks down at many points. For a significant number of a veterans who were orally told they were not eligible for VA health care, a 7131 Form to initiate a character of discharge review was filled out. However, VA staff neglected to transmit that form to VBA, or VBA never received it or did not act on it, or VBA did act on it and rendered a decision but then failed to inform VHA or the veteran of its decision. Both VBA and VHA must therefore improve the tracking and processing of health care applications from veterans with bad paper. Moreover, VBA and VHA must improve their computer systems and databases so that front-line eligibility workers can more quickly and accurately determine whether a veteran is eligible for limited or full services, for example on the basis of a prior honorable enlistment.

Externally, both VBA and VHA must create new letters, notices, and other resources to explain to veterans with bad paper what should happen and what is happening regarding their health care applications and eligibility determinations. When a veteran applies for health care, VA should provide the veteran a letter with a case number that explains the character of discharge determination process.

The letter should also notify the veteran of the legal standards that apply, the right to submit information and evidence in support of eligibility, the right to ask for a hearing, and the right to have assistance from a veteran service organization or veterans advocate.

*VA must adopt a “no wrong door” approach to connecting veterans with health care*

VHA and VBA must then make sure to notify the veteran once an eligibility determination is made and, if the veteran is found eligible, must assist the veteran in completing the eligibility and enrollment process. In any approval letter sent to the veteran, VBA should include a one-page form that clearly states that the veteran is eligible for VA health care and instruct the veteran to take the form to a VHA medical facility to complete the enrollment process and begin accessing health care.

With regard to external communications, VA should consider creating a separate application form to request a character of discharge determination and a Statement in Support of Claim Form specifically for character of discharge eligibility determinations. These forms should prompt the veteran for information that is especially relevant to that decision, such as whether there are any mitigating or extenuating circumstances that occurred in service, such as military sexual trauma or a mental health condition, or whether the veteran served multiple terms of service.

Another issue hampering effective communication with veterans is the length of time that it takes for VA to render a character of discharge eligibility determination, if VA ever does. One advocate reported that a veteran who first attempted to apply for VA health care in April 2013 did not receive a character of discharge determination until April 2016—three years later. When VA finally made that determination, the veteran did not get the notice because he had moved multiple times, which is not uncommon for this population of veterans who experience high rates of homelessness and unemployment. Compare this to another government health care program, Medicaid, where enrollment decisions usually take no more than 60 to 90 days and often can be made instantaneously.

Therefore, one important improvement that VA must undertake is decreasing the amount of time to render a character of discharge determination. This is especially important because, under current VA rules, veterans with bad paper generally cannot receive any health care services while their character of discharge decision is pending. Therefore, many veterans who are ultimately found eligible for VA health care nevertheless wait years without access to needed treatment. Reducing the amount of time that a veteran waits for a decision therefore is a key component to solving some of the turn-away problem. To accomplish this end, VBA should classify character of discharge determinations as “rating” claims—rather

than as deprioritized “non-rating” claims—and flag them for expedited processing if the veteran is homeless, at risk of suicide, experiencing extreme financial hardship, or facing other emergency circumstances.

### ***VA Must Improve Communication Between VHA & VBA and Between VA and Veterans***

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1. Improve communication pathways between VBA and VHA regarding character of discharge eligibility determinations.
2. Create new form letters and resource materials for veterans with bad paper about the VHA enrollment process and character of discharge eligibility rules.
3. Provide eligible veterans with instructions on how to complete the enrollment process.
4. Classify character of discharge determinations as rating claims and flag them if the veteran is facing emergency circumstances.

### ***C. VA Must Remedy Past Unlawful Turn-Aways by Conducting Outreach and Remediation Efforts***

For many years, VA has improperly turned away former servicemembers with bad paper who sought health care. Because VA has not kept records relating to those whom it has turned away, we cannot know the exact number who have been affected. With over 550,000 servicemembers having received bad paper since 1980, it would be no stretch to think that the number unlawfully turned away could be in the tens of thousands, and an estimated 400,000 are currently at risk of being turned away from needed care.

The veteran told by VA that a bad paper discharge renders that veteran ineligible is not the only person harmed by that misinformation; that veteran may tell other veterans, who then decide not even to try to seek care at VA perpetuating a damaging cycle of stigma and misunderstanding. Misinformation about VA eligibility for veterans with bad paper is rampant in the veterans community.

VA must ensure not only that no individual veteran is wrongly turned away from care in the future, but also that those veterans previously turned away are now given the opportunity to apply for care. The turn-away problem requires remediation that is both prospective and retrospective.

VA therefore must undertake extensive, concerted, and sustained efforts to ensure that all veterans and organizations that serve veterans know that having a bad paper discharge does not necessarily prevent a veteran from accessing VA health care and other VA services. VA must encourage all veterans to apply to VA for an eligibility determination—adopting a “no wrong door” approach.

VA’s outreach should include a sustained public information campaign, using both traditional media and social media outlets. New materials that provide a clearer and more direct message about all veterans’ right to apply for health care must be created.

Furthermore, VA should send letters to all veterans not currently enrolled in VHA notifying them of their right to apply for health care. The letter, of course, would not guarantee that the veteran would be found eligible. Some veterans are not eligible for health care, not only because of their character of discharge but potentially because of their brief period of time in service or not having a service-connected disability. However, the letter should provide correct information about the standards for health care eligibility and emphasize that having a bad paper discharge does not necessarily disqualify a veteran from receiving health care. Sending such a letter is within the capacity of VA, as demonstrated by the congressionally mandated letters sent out in 2018 regarding the implementation of the Honor Our Commitment Act, which addressed eligibility for mental and behavioral health treatment for certain veterans with Other Than Honorable discharges.

*Not long after being discharged, Dwayne, a post-9/11 Marine Corps veteran who served in Afghanistan, went to a VA hospital seeking treatment for Traumatic Brain Injury and Post-Traumatic Stress Disorder. VA staff told him that he could not get any health care because of his OTH discharge. A year later, Dwayne tried again at a different VA hospital, but again was told that he could not get any health care. Four years after that, now with help from a pro bono attorney, Dwayne finally gained access to VA health care and service-connected benefits. However, for more than six years, VA’s doors were shut to Dwayne, when he most needed mental health treatment and other services to transition back to civilian life. And when VA finally granted him access to health care, VA did not provide any remedy for or acknowledgment of having unlawfully excluded him for so long.*



In conducting its outreach, VA must partner with other stakeholders, including veterans service organizations, veteran community organizations, state and local departments of veterans services, and veterans advocates. These organizations are often deeply embedded in their communities and are best able to find veterans who may have been turned away and to encourage them to approach VA to try applying again. They are also a key ally in the effort to reverse the widespread misinformation concerning this topic.

VA must also partner with the Department of Defense, which has its own important role in addressing unlawful and inequitable bad paper discharges. VA and DOD can and should work together on reforming the separation, transition, and discharge upgrade standards

and procedures. While most of this report’s recommendations are focused on the actions VA must take, we also call on other organizations who serve veterans to do their part in ensuring that no veteran is wrongfully turned away from needed care. We all have a role to play in remedying this long-standing, systemic problem that has affected generations of veterans—and in making sure that no future generation suffers the same harm.

### **VA Must Remedy Past Unlawful Turn-Aways by Conducting Outreach and Remediation Efforts**

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1. Conduct public information campaign
2. Send letters to veterans not currently enrolled in VHA to notify them of eligibility standards and the right to apply for health care.
3. Partner with organizations that serve veterans to enhance outreach efforts.

## VII. APPENDIX

### REVIEW BOARD OUTCOMES FOR FY2018

#### Army Board for Correction of Military Records

| ABCMR Applications          | Applications Adjudicated | Discharge Upgrade Granted | Percent Discharge Upgrade Granted | Other Relief Granted | Percent Other Relief Granted | No Relief Granted | Percent No Relief Granted |
|-----------------------------|--------------------------|---------------------------|-----------------------------------|----------------------|------------------------------|-------------------|---------------------------|
| All Applications            | 548                      | 73                        | 13.3%                             | 96                   | 17.5%                        | 379               | 69.2%                     |
| Mental Health Applications  | 148                      | 51                        | 34.5%                             | 25                   | 16.9%                        | 72                | 48.7%                     |
| Sexual Assault Applications | 11                       | 7                         | 63.6%                             | 3                    | 27.3%                        | 1                 | 9.1%                      |
| All Other Applications      | 389                      | 15                        | 3.9%                              | 68                   | 17.5%                        | 306               | 78.7%                     |

*Note: The Department of Defense released information only about the first and second quarters of 2018 for the Army Discharge Review Board. Therefore, the above tables reflect online a half year's data.*

#### Army Discharge Review Board

| ADRB Applications           | Applications Adjudicated | Discharge Upgrade Granted | Percent Discharge Upgrade Granted | Other Relief Granted | Percent Other Relief Granted | No Relief Granted | Percent No Relief Granted |
|-----------------------------|--------------------------|---------------------------|-----------------------------------|----------------------|------------------------------|-------------------|---------------------------|
| All Applications            | 727                      | 206                       | 28.3%                             | 31                   | 4.3%                         | 180               | 24.8%                     |
| Mental Health Applications  | 300                      | 134                       | 44.7%                             | 13                   | 44.7%                        | 153               | 51.0%                     |
| Sexual Assault Applications | 17                       | 9                         | 52.9%                             | 3                    | 17.7%                        | 5                 | 29.4%                     |
| All Other Applications      | 410                      | 63                        | 15.4%                             | 15                   | 3.7%                         | 262               | 63.9%                     |

## Board for Correction of Naval Records

| BCNR Applications           | Applications Adjudicated | Discharge Upgrade Granted | Percent Discharge Upgrade Granted | Other Relief Granted | Percent Other Relief Granted | No Relief Granted | Percent No Relief Granted |
|-----------------------------|--------------------------|---------------------------|-----------------------------------|----------------------|------------------------------|-------------------|---------------------------|
| All Applications            | 1744                     | 198                       | 11.4%                             | 88                   | 5.1%                         | 1458              | 83.6%                     |
| Mental Health Applications  | 267                      | 82                        | 30.7%                             | 7                    | 2.6%                         | 178               | 66.7%                     |
| Sexual Assault Applications | 61                       | 21                        | 34.4%                             | 4                    | 6.6%                         | 36                | 59.0%                     |
| All Other Applications      | 1416                     | 95                        | 6.7%                              | 77                   | 5.4%                         | 1244              | 87.9%                     |

## Naval Discharge Review Board

| NDRB Applications           | Applications Adjudicated | Discharge Upgrade Granted | Percent Discharge Upgrade Granted | Other Relief Granted | Percent Other Relief Granted | No Relief Granted | Percent No Relief Granted |
|-----------------------------|--------------------------|---------------------------|-----------------------------------|----------------------|------------------------------|-------------------|---------------------------|
| All Applications            | 837                      | 139                       | 16.6%                             | 36                   | 4.3%                         | 662               | 79.1%                     |
| Mental Health Applications  | 286                      | 60                        | 21.0%                             | 14                   | 4.9%                         | 212               | 74.1%                     |
| Sexual Assault Applications | 25                       | 8                         | 32.0%                             | 2                    | 8.0%                         | 15                | 60.0%                     |
| All Other Applications      | 526                      | 71                        | 13.5%                             | 20                   | 3.8%                         | 435               | 82.7%                     |

## Air Force Board for Correction of Military Records

| AFCMR Applications          | Applications Adjudicated | Discharge Upgrade Granted | Percent Discharge Upgrade Granted | Other Relief Granted | Percent Other Relief Granted | No Relief Granted | Percent No Relief Granted |
|-----------------------------|--------------------------|---------------------------|-----------------------------------|----------------------|------------------------------|-------------------|---------------------------|
| All Applications            | 571                      | 47                        | 8.2%                              | 43                   | 7.5%                         | 482               | 84.4%                     |
| Mental Health Applications  | 161                      | 11                        | 6.8%                              | 26                   | 16.2%                        | 125               | 77.6%                     |
| Sexual Assault Applications | 24                       | 5                         | 20.8%                             | 4                    | 16.7%                        | 15                | 62.5%                     |
| All Other Applications      | 386                      | 31                        | 8.0%                              | 13                   | 3.4%                         | 342               | 88.6%                     |

## Air Force Discharge Review Board

| AFDRB Applications          | Applications Adjudicated | Discharge Upgrade Granted | Percent Discharge Upgrade Granted | Other Relief Granted | Percent Other Relief Granted | No Relief Granted | Percent No Relief Granted |
|-----------------------------|--------------------------|---------------------------|-----------------------------------|----------------------|------------------------------|-------------------|---------------------------|
| All Applications            | 384                      | 39                        | 10.2%                             | 42                   | 10.9%                        | 303               | 78.9%                     |
| Mental Health Applications  | 227                      | 30                        | 13.2%                             | 26                   | 11.5%                        | 171               | 75.3%                     |
| Sexual Assault Applications | 7                        | 3                         | 42.9%                             | 1                    | 14.3%                        | 3                 | 42.9%                     |
| All Other Applications      | 150                      | 6                         | 4.0%                              | 15                   | 10.0%                        | 129               | 86.0%                     |

Source: Department of Defense Boards of Review Reading Rooms, <http://boards.law.af.mil/stats.htm> (data downloaded Nov. 2019).

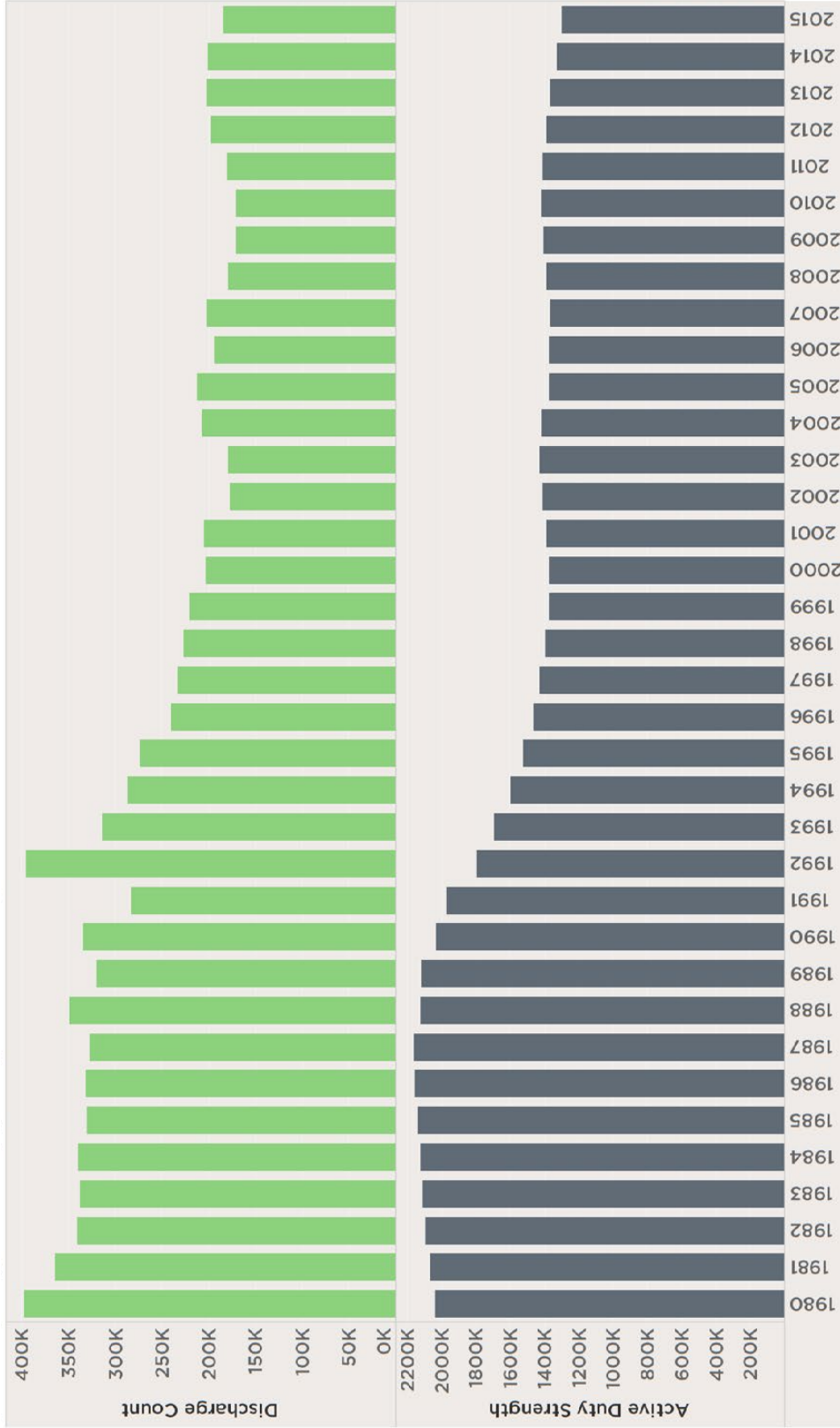
## DEPARTMENT OF DEFENSE SEPARATION DATA FY1980 TO FY2015

In response to a request under the Freedom of Information Act, the Department of Defense's Defense Manpower Data Center provided more than thirty years of data on servicemember separations. Key findings from that data are included in the charts on the following pages.

As a note on methodology, the data were cross-checked with other known data sources and with responses to parallel records requests to attempt to ensure accuracy. However, in many places, information was missing or internally inconsistent, and there were a significant number of "unknown" or blank entries. In such cases, clarification was sought from DOD, and some data entries were excluded as unreliable. Furthermore, important data—such as about race, ethnicity, and gender/sex—were not provided in response to requests.

# FY 1980-2015 Discharge & Active Duty Strength Data

(Air Force, Army, Marine Corps, & Navy Data Combined)



**Data Summary**

|          | Discharge Count | Active Duty Strength |
|----------|-----------------|----------------------|
| Average: | 258,619         | 1,653,121            |
| Median:  | 230,378         | 1,425,448            |
| Minimum: | 170,080         | 1,301,014            |
| Maximum: | 397,334         | 2,160,727            |

“Discharge Count” is the number of servicemembers who were discharged from active duty, excluding enlisted servicemembers who immediately returned to active duty service as officers.

“Active Duty Strength” is the number of servicemembers who were serving on active duty as of the final day of the given fiscal year.

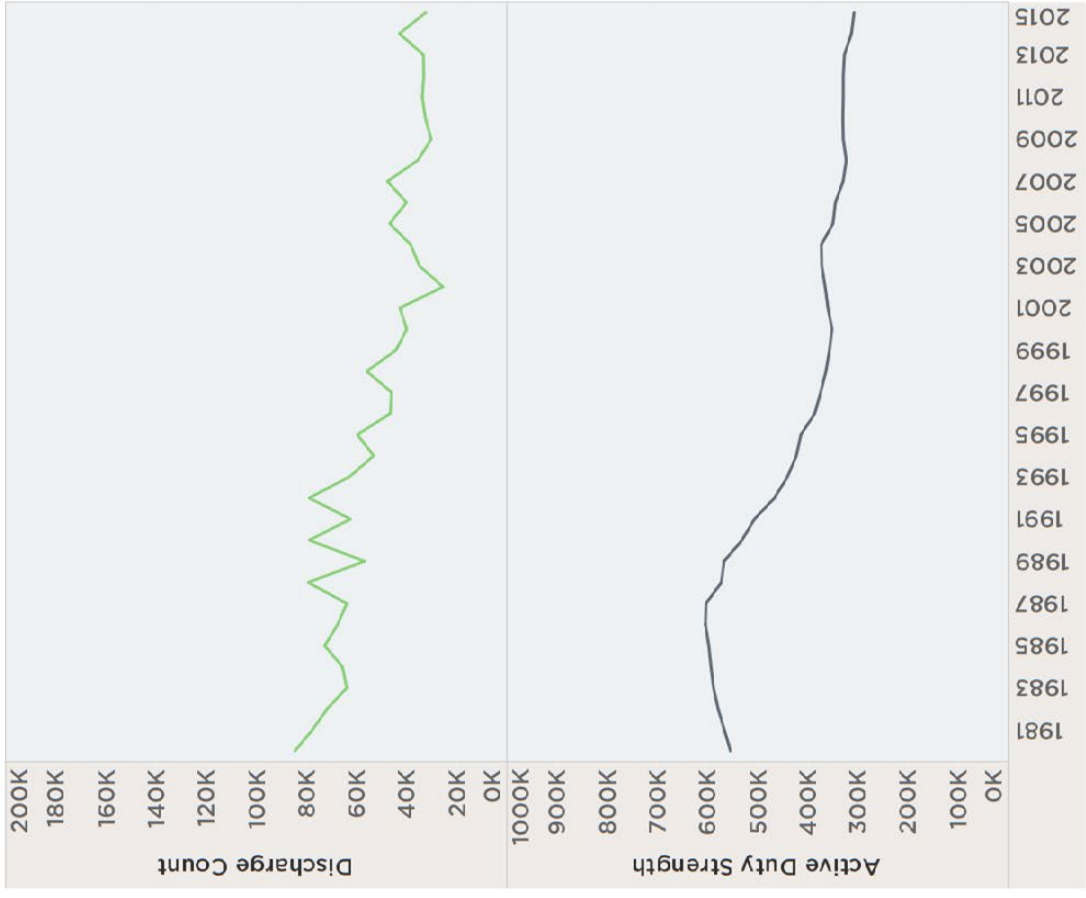
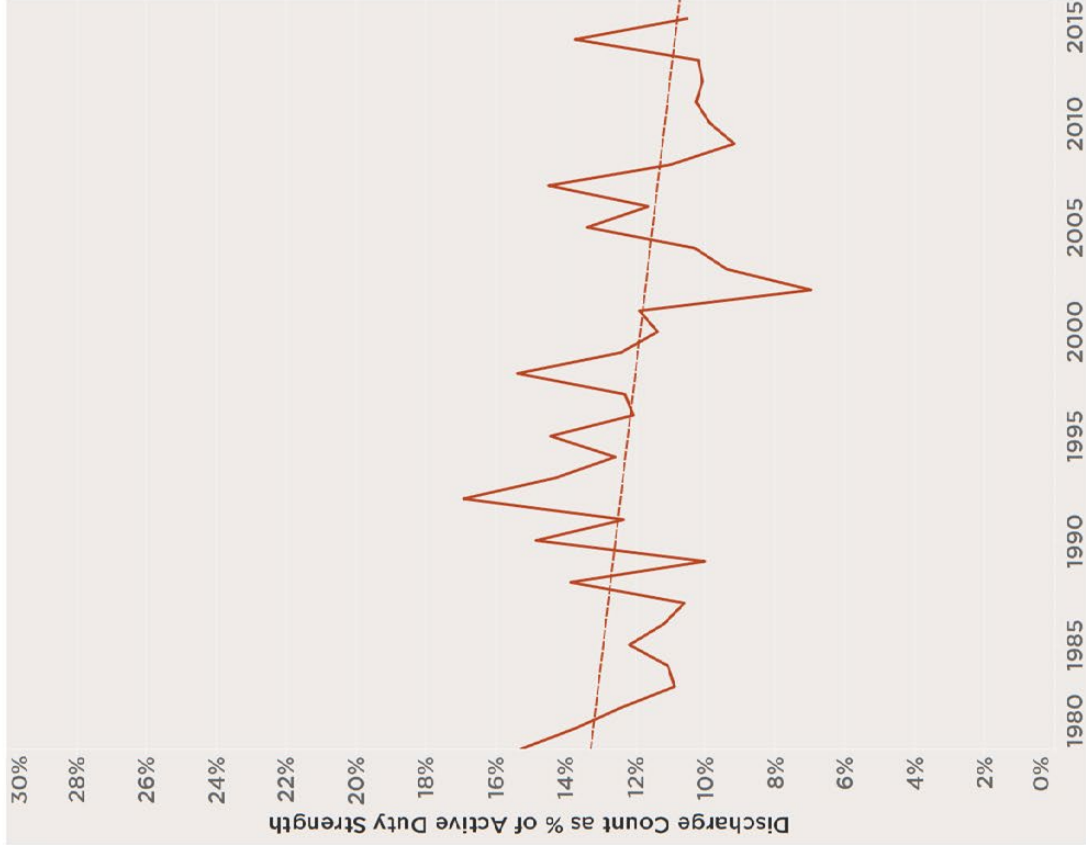
# FY 1980-2015 Discharge Count & Active Duty Strength by Branch



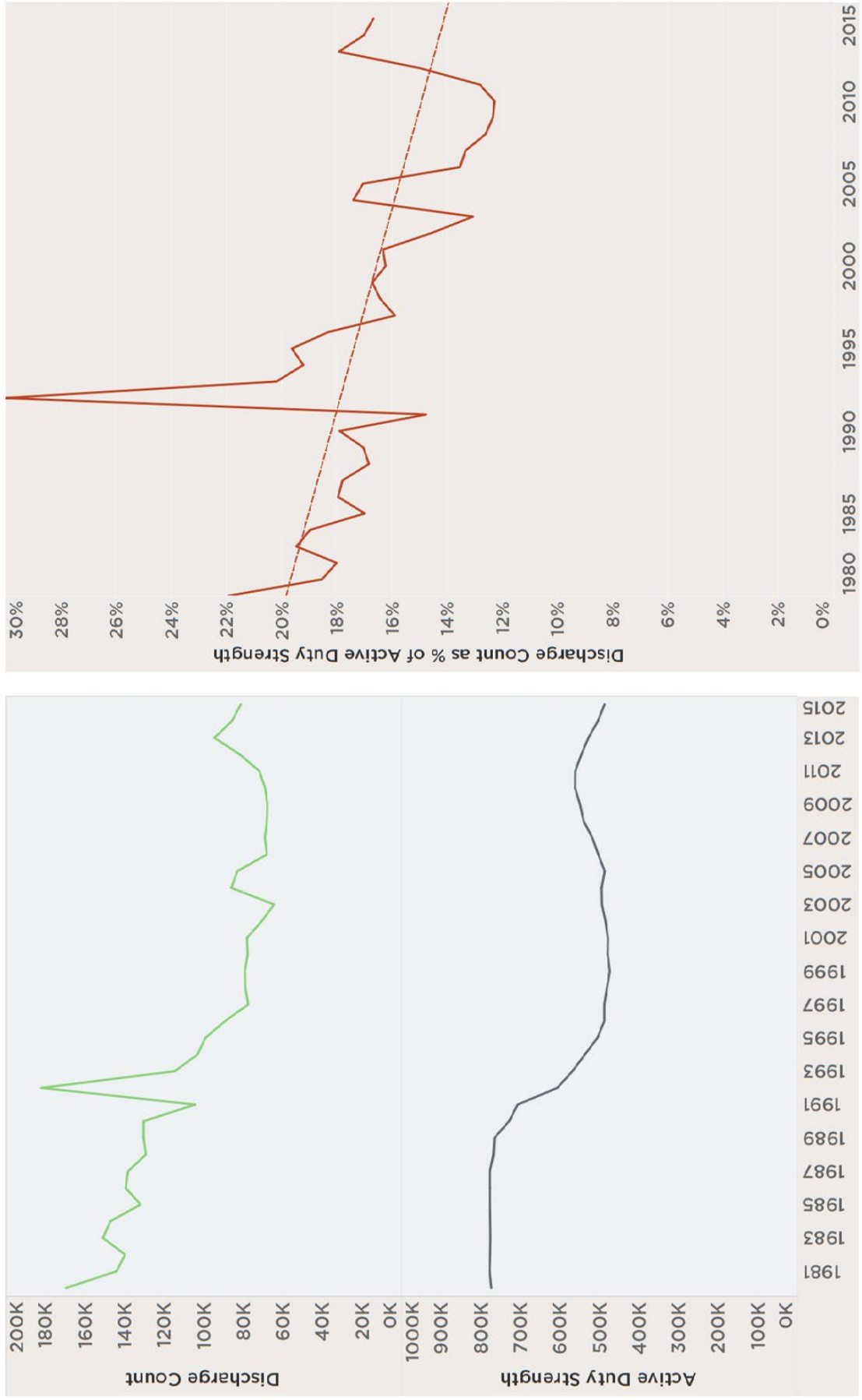
“Discharge Count as a % of Active Duty Strength” is “Discharge Count” divided by “Active Duty Strength” and shown as a percentage. This calculation provides context for the discharge count.

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 In FY 1980 through FY 2015, 9,310,285 total discharges occurred.

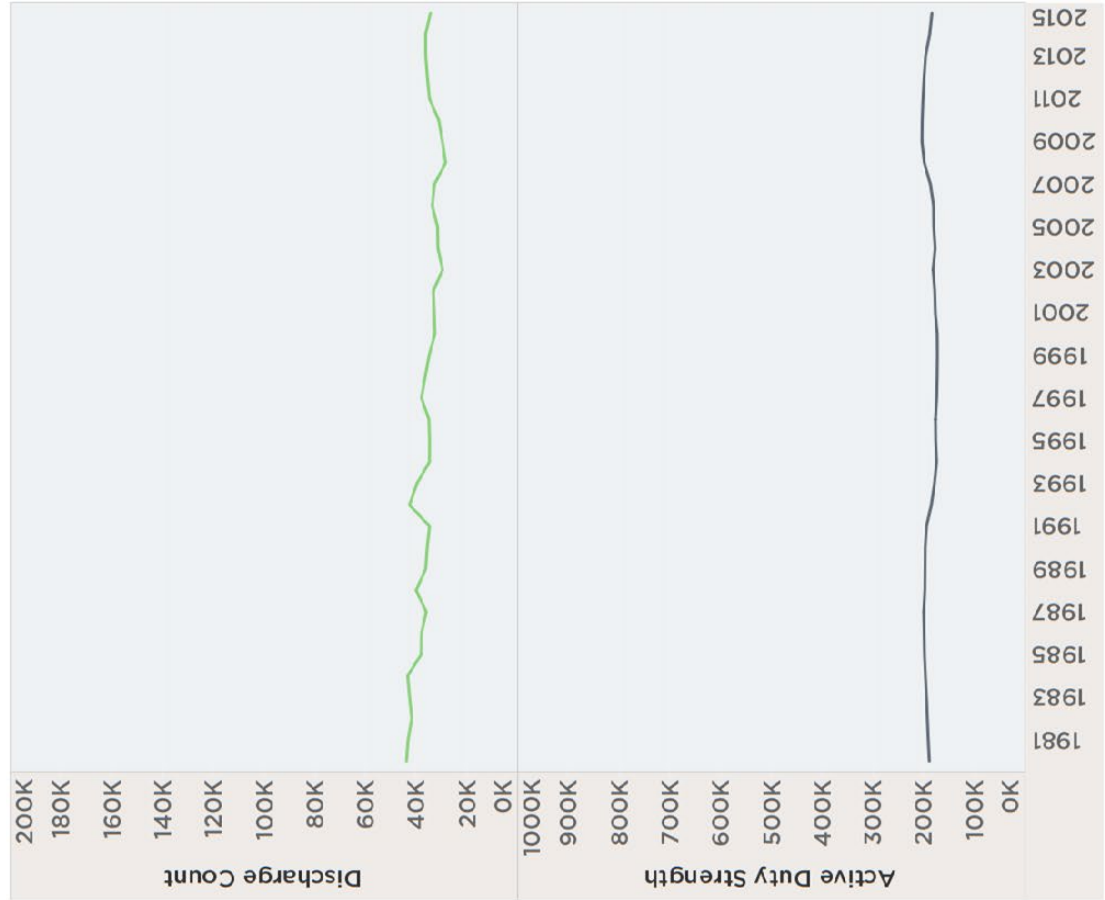
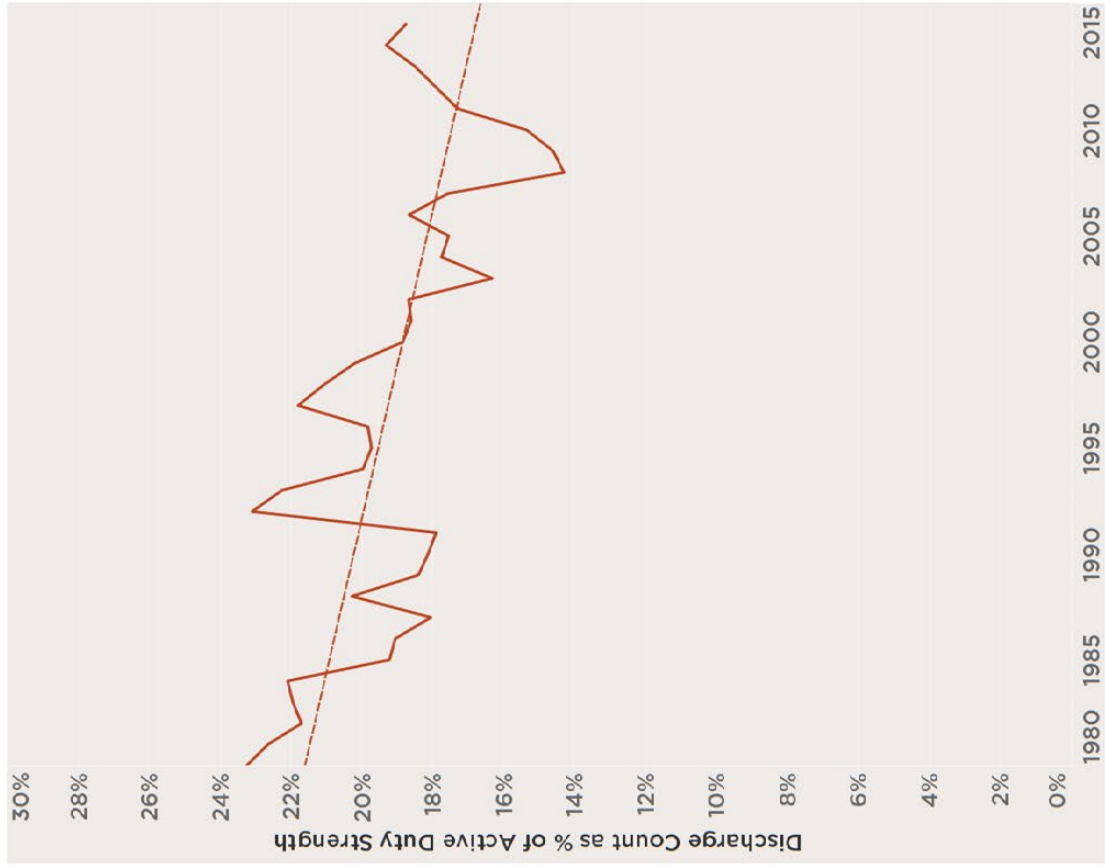
# Air Force FY 1980-2015 Discharge Count & Active Duty Strength



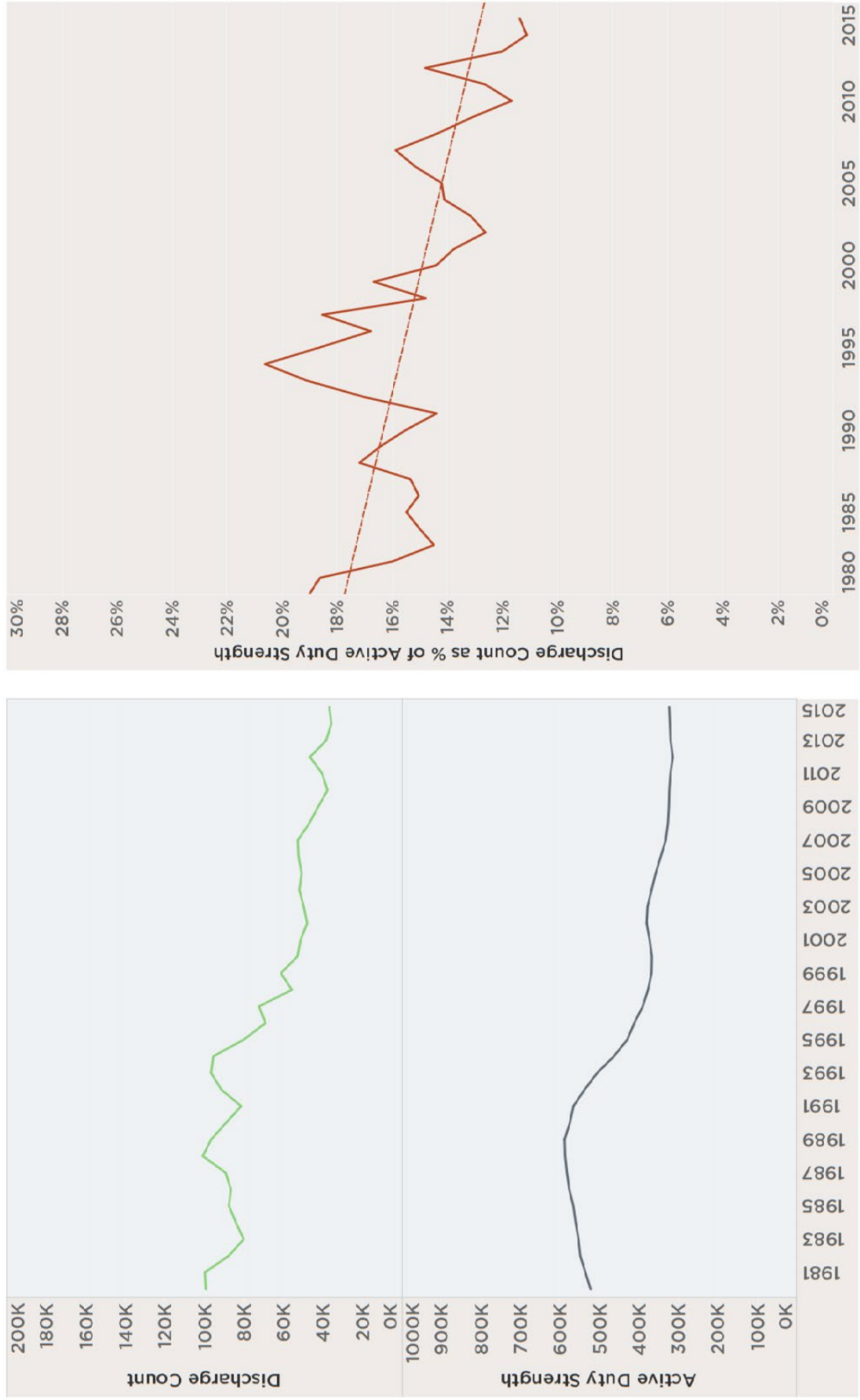
# Army FY 1980-2015 Discharge Count & Active Duty Strength



# Marine Corps FY 1980-2015 Discharge Count & Active Duty Strength

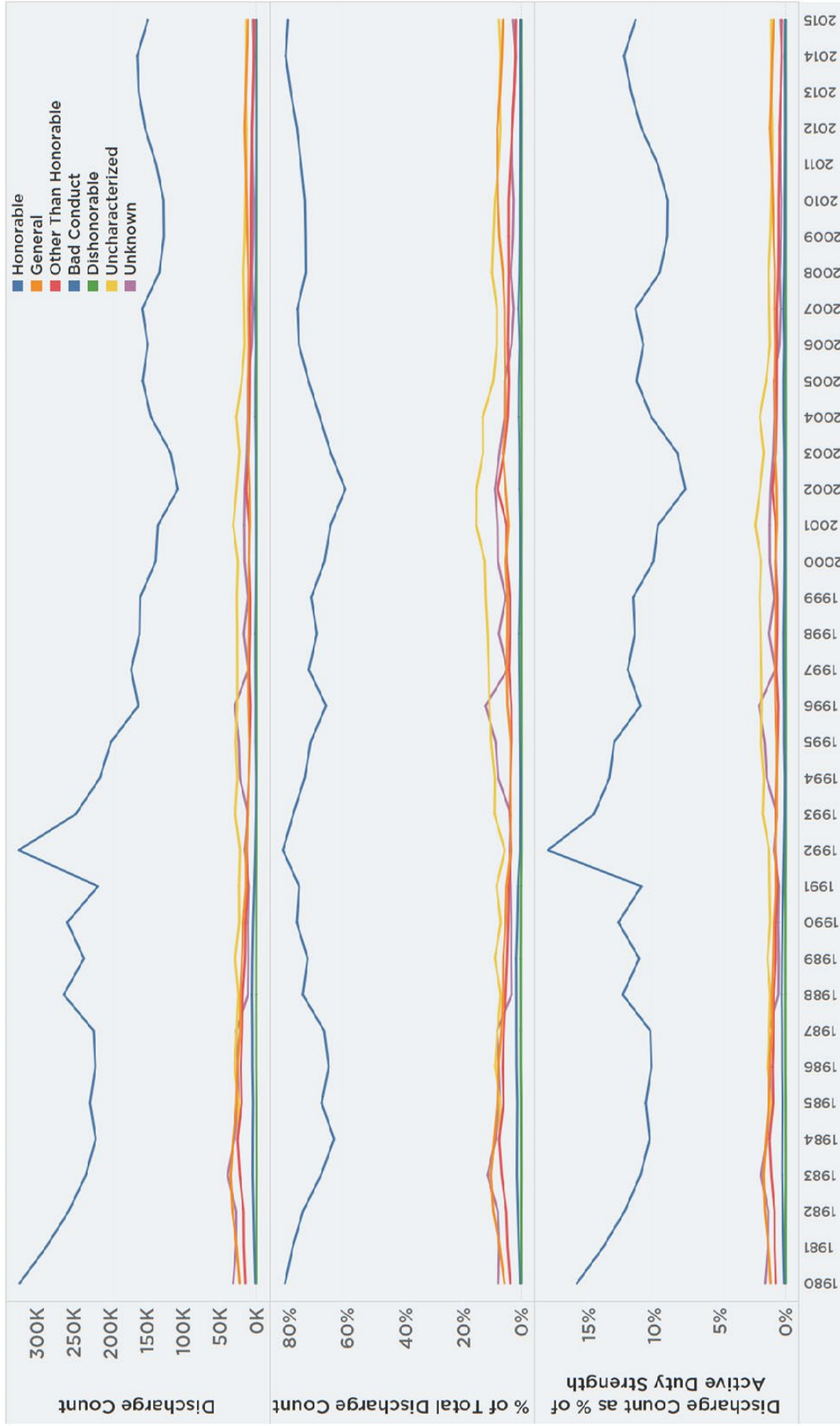


# Navy FY 1980-2015 Discharge Count & Active Duty Strength



# FY 1980-2015 Discharge by Character of Service

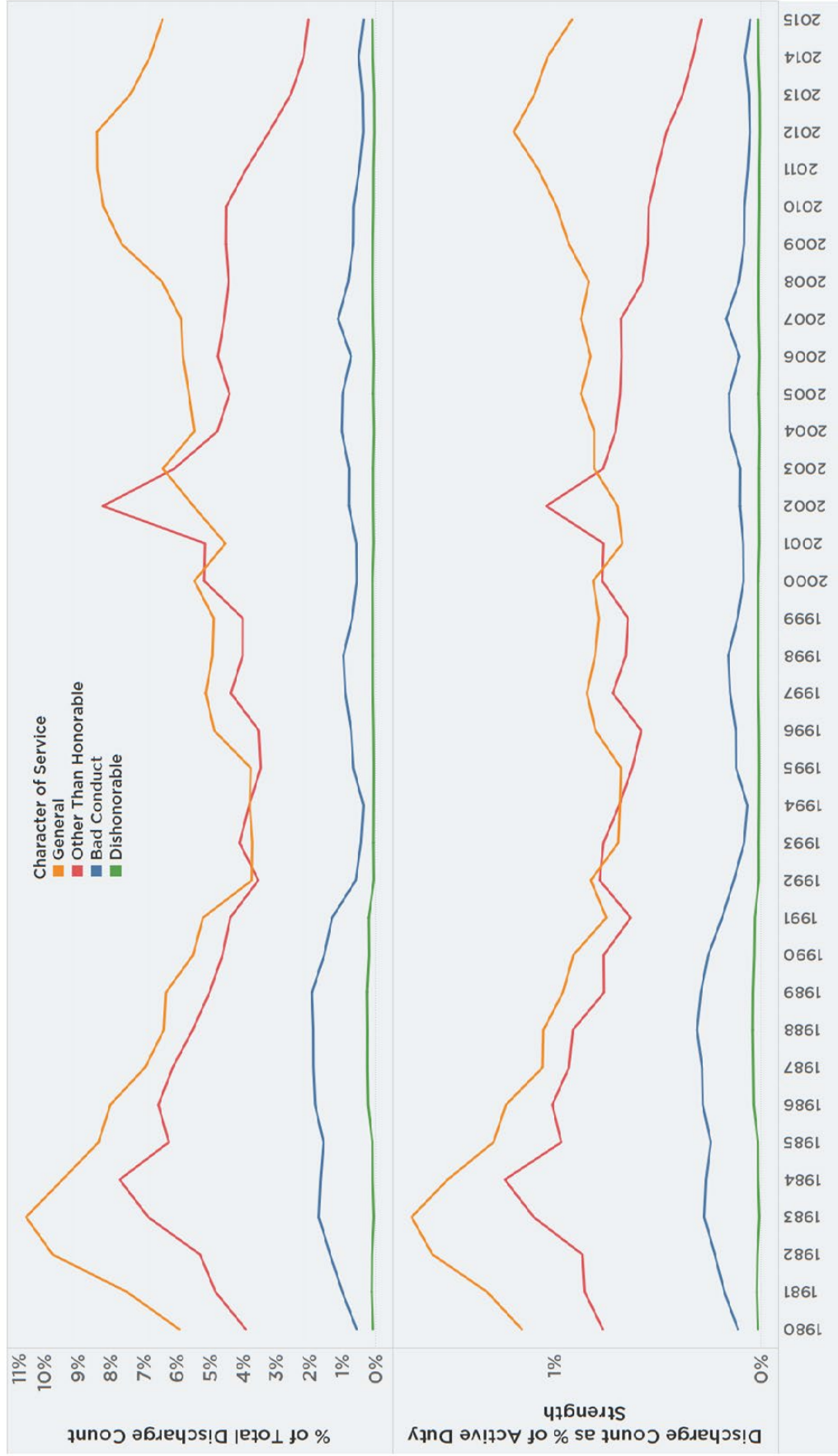
(Air Force, Army, Marine Corps, & Navy Data Combined)



Of the 9,310,285 discharges in FY 1980-2015, roughly 86 percent (7,995,647) are characterized—i.e., the character of service is known and is not listed as Uncharacterized. Of the characterized discharges, 93 percent (7,446,694) list a character of service that would lead to presumptive eligibility for VA benefits—i.e., Honorable (6,849,766) or General Under Honorable Conditions (596,928). There is no indication in the data that discharges related to presumptive ineligibility for VA benefits—i.e., Other than Honorable, Bad Conduct, or Dishonorable—increased during times of downsizing.

# FY 1980-2015 Less Than Fully Honorable Discharges

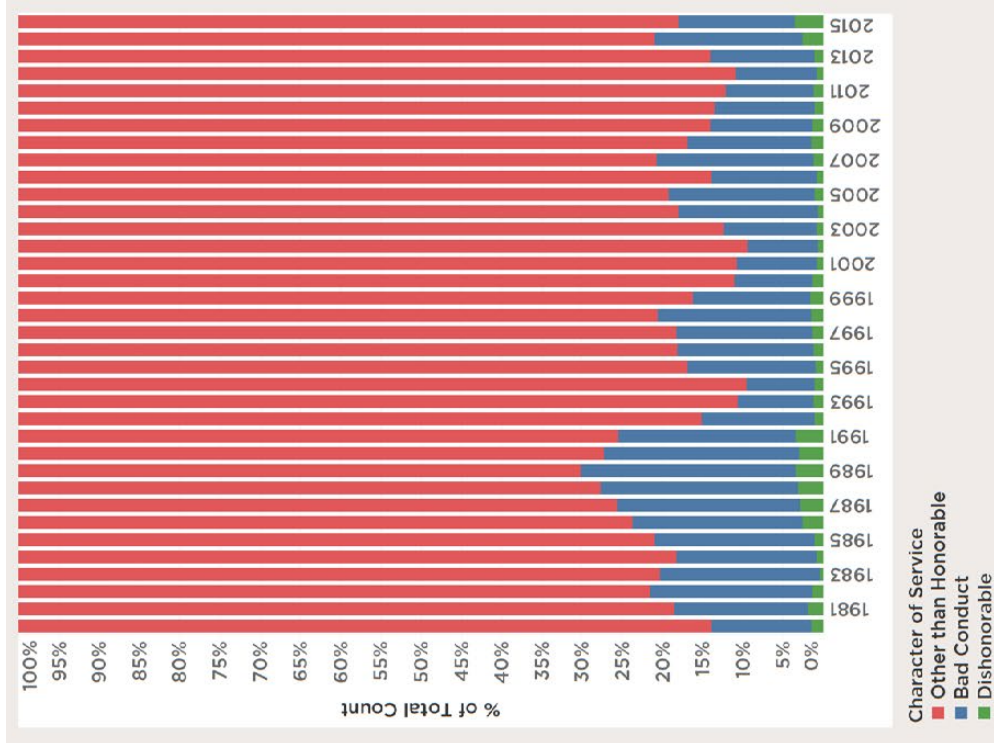
(Air Force, Army, Marine Corps, & Navy Data Combined)  
 Uncharacterized and Unknown Not Shown



# FY 1980-2015 Other Than Honorable, Bad Conduct, & Dishonorable Discharges

(Air Force, Army, Marine Corps, & Navy Data Combined)

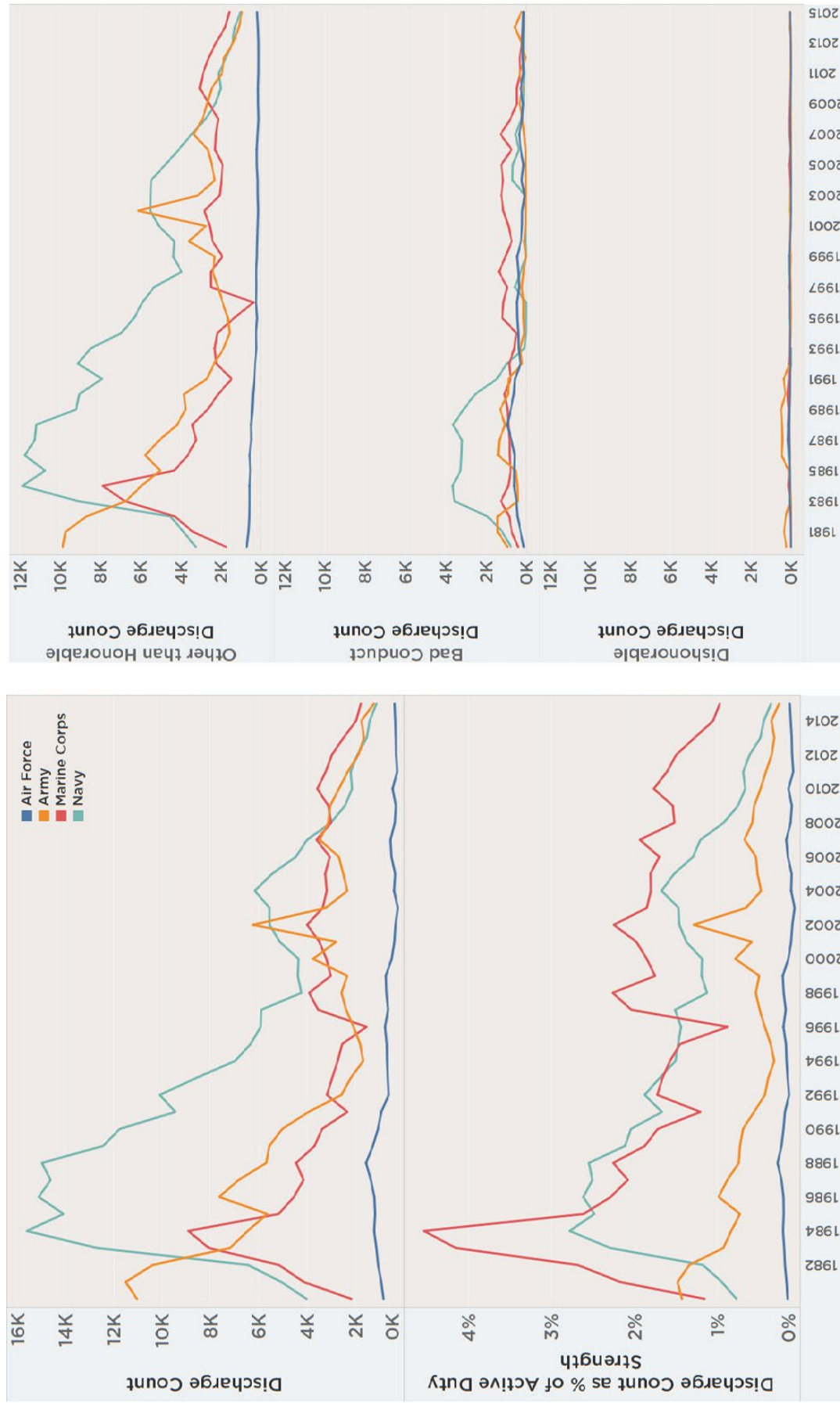
|                    | Other than Honorable | Bad Conduct   | Dishonorable | Grand Total    |
|--------------------|----------------------|---------------|--------------|----------------|
| 1980               | 15,560               | 2,242         | 272          | 18,074         |
| 1981               | 17,621               | 3,633         | 387          | 21,641         |
| 1982               | 18,071               | 4,653         | 330          | 23,054         |
| 1983               | 23,182               | 5,757         | 138          | 29,077         |
| 1984               | 26,293               | 5,617         | 268          | 32,178         |
| 1985               | 20,620               | 5,169         | 290          | 26,079         |
| 1986               | 21,735               | 6,029         | 725          | 28,489         |
| 1987               | 20,047               | 6,122         | 780          | 26,949         |
| 1988               | 19,293               | 6,549         | 822          | 26,664         |
| 1989               | 16,048               | 6,124         | 790          | 22,962         |
| 1990               | 15,425               | 5,160         | 633          | 21,218         |
| 1991               | 12,405               | 3,687         | 566          | 16,658         |
| 1992               | 13,982               | 2,330         | 168          | 16,480         |
| 1993               | 12,876               | 1,361         | 165          | 14,402         |
| 1994               | 10,935               | 1,024         | 132          | 12,091         |
| 1995               | 9,479                | 1,810         | 112          | 11,401         |
| 1996               | 8,451                | 1,756         | 122          | 10,329         |
| 1997               | 10,204               | 2,109         | 168          | 12,481         |
| 1998               | 9,103                | 2,184         | 173          | 11,460         |
| 1999               | 8,804                | 1,537         | 165          | 10,506         |
| 2000               | 10,508               | 1,139         | 168          | 11,815         |
| 2001               | 10,550               | 1,177         | 95           | 11,822         |
| 2002               | 14,606               | 1,416         | 109          | 16,131         |
| 2003               | 10,862               | 1,415         | 111          | 12,388         |
| 2004               | 9,914                | 2,107         | 74           | 12,095         |
| 2005               | 9,349                | 2,094         | 125          | 11,568         |
| 2006               | 9,237                | 1,419         | 79           | 10,735         |
| 2007               | 9,236                | 2,277         | 133          | 11,646         |
| 2008               | 7,930                | 1,461         | 144          | 9,535          |
| 2009               | 7,681                | 1,132         | 125          | 8,938          |
| 2010               | 7,677                | 1,112         | 92           | 8,881          |
| 2011               | 7,066                | 877           | 94           | 8,037          |
| 2012               | 6,328                | 718           | 51           | 7,097          |
| 2013               | 5,171                | 782           | 65           | 6,018          |
| 2014               | 4,348                | 1,006         | 144          | 5,498          |
| 2015               | 3,740                | 657           | 159          | 4,556          |
| <b>Grand Total</b> | <b>444,337</b>       | <b>95,642</b> | <b>8,974</b> | <b>548,953</b> |



Of the characterized discharges, around 7 percent (548,953) list a character of service that would lead to presumptive ineligibility for VA benefits—i.e., Other than Honorable, Bad Conduct, and Dishonorable. Most of those discharges have an Other Than Honorable character of service—81 percent (444,337). Seventeen percent (95,642) have a Bad Conduct character of service, and roughly two percent (8,974) have a Dishonorable character of service.

# FY 1980-2015 Discharges Leading to Presumptive VA Ineligibility

(excluding Uncharacterized discharges)



In comparison with the other branches, the Marine Corps often discharged a greater percentage of its servicemembers with characters of service that would lead to presumptive VA ineligibility.

## VIII. ENDNOTES

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- 1 Adi V. Fundlapalli et al., *Military Misconduct and Homelessness Among US Veterans Separated from Active Duty, 2001-2012*, *Journal of the American Medical Association* 314 (2015); Claire Hoffmire et al., *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans* *Am. J. Prev. Med.* 1,3 (2019); Sara Kintzle et al., *Exploring the Economic and Employment Challenges Facing U.S. Veterans: A Quantitative Study of Volunteers of America Service Providers and Veteran Clients* (May 2015).
- 2 However, some veterans with Honorable discharges may have other stigmatizing or personal information on their DD214s, such as a narrative reason of Personality Disorder.
- 3 38 U.S.C. § 101(2); 38 C.F.R § 3.12.
- 4 Ali R. Tayyeb & Jennifer Greenburg, “Bad Papers”: The Invisible and Increasing Costs of War for Excluded Veterans 9 (June 2017)
- 5 U.S. Gov’t Accountability Off., GA-17-260, *Actions Needed to Ensure Post-Traumatic Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations* 12 (2017)
- 6 Rajeev Ramchand et al., *Prevalence of, Risk Factors for, and Consequences of Posttraumatic Stress Disorder and Other Mental Health Problems in Military Populations Deployed to Iraq and Afghanistan*, *Current Psychiatry Reports* 17:37 (2015); Nancy Lutwak and Curt Dill, *Military Sexual Trauma Increases Risk of Post-Traumatic Stress Disorder and Depression Thereby Amplifying the Possibility of Suicidal Ideation and Cardiovascular Disease*, *Military Medicine*, 359-361 (April 2013).
- 7 Robert H. Pietrzak et al., *Functional Significance of a novel 7-factor model of DSM-5 PTSD Symptoms: Results from the National Health and Resilience in Veterans Study*, *Journal of Affective Disorders*, 522-26 (March 2015).
- 8 U.S. Gov’t Accountability Off., GA-17-260, *Actions Needed to Ensure Post-Traumatic Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations* 1 (2017) (“PTSD, TBI, and other mental and physical conditions can go unrecognized and unacknowledged by the military, family members, and society in general. Because these conditions can adversely affect servicemembers’ moods, thoughts, and behavior, they may lead to disciplinary infractions and subsequent separations for misconduct from the military.”).
- 9 *Id.*; Stephanie Smith Ledesma, *PTSD and Bad Paper Discharges: Why the Fairness to Soldiers Act is Too Little, Too Late*, *Elon L. Rev.*, 10:189, 198-206 (2018).
- 10 Ledesma, *supra* n. 5.
- 11 T. Christian Miller and Daniel Zwerdling, *Brain Injuries Remain Undiagnosed in Thousands of Soldiers*, *Pro Publica* (June 7, 2010), <https://www.propublica.org/article/brain-injuries-remain-undiagnosed-in-thousands-of-soldiers>.
- 12 E. Jones et al., *Shell Shock and Mild Traumatic Brain Injury: A Historical Review*, *Am J. Psychiatry* 1641-45 (2007).
- 13 Richard Bryant, *Post-Traumatic Stress Disorder vs Traumatic Brain Injury*, *Dialogues in Clinical Neuroscience*, 251-62 (Sept. 2011).
- 14 Ledesma, *supra* n. 6.
- 15 Daniel Zwerdling, *Thousands of Soldiers With Mental Health Disorders Kicked Out For “Misconduct”*, *NPR* (October 28, 2015) <https://www.npr.org/sections/thetwo-way/2015/10/28/452652731/thousands-of-soldiers-with-mental-health-disorders-kicked-out-for-misconduct>.
- 16 Brandon Alford & Shawna J. Lee, *Toward Complete Inclusion: Lesbian, Gay, Bisexual, and Transgender Military Service Members After Repeal of Don’t Ask, Don’t Tell*, 61 *Soc. Work* 257, 260 (2016).
- 17 See, e.g., Department of Defense, *Report of the Task Force on the Administration of Military Justice* (Nov. 1972).
- 18 Don Christensen et. al., *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities within the United States Military Justice System*, at ii (May 2017).

- 19 U.S. Gov't Accountability Off., FPCD-80-13, *Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review is Needed* (1980).
- 20 Veterans Legal Clinic, Legal Servs. Ctr. of Harvard Law Sch., *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper Discharges* 9 (2016), <https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf>
- 21 See Tayyeb & Greenburg, "Bad Papers" at 9, 14
- 22 See Chuck Hagel, Secretary of Defense, Memorandum, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (Sep. 3, 2014) ("Hagel Memorandum"); Brad Carson, Principal Deputy Under Secretary of Defense, Memorandum, Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) (Feb. 24, 2016) ("Carson Memorandum"); A.M. Kurta, Under Secretary of Defense, Memorandum, Clarifying Guidance to the Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (Aug. 25, 2017) ("Kurta Memorandum").
- 23 Claire Hoffmire et al. Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans *Am. J. Prev. Med* 1,3 (2019)
- 24 38 U.S.C. § 5102(a); 38 C.F.R. § 3.150.
- 25 38 U.S.C. § 5103A; 38 C.F.R. § 3.159.
- 26 38 U.S.C. § 5014.
- 27 38 U.S.C. §§ 101(2), 101(18); Pub. L. 95-126, 38 C.F.R. § 3.360. Under a VA policy effective July 2017, VA is authorized to provide 90 days of emergency care to veterans with Other Than Honorable discharges who are experiencing mental health crises. Press Release, U.S. Dep't of Veterans Affairs, VA Secretary Formalizes Expansion of Emergency Mental Health Care to Former Service Members with Other-Than-Honorable Discharges (June 27, 2017), <https://www.va.gov/OPA/pressrel/pressrelease.cfm?id=2923>. A recently enacted law also allows VA to provide mental health treatment to veterans with Other Than Honorable discharges who were diagnosed with a mental health condition during service or in the five years after discharge. 38 U.S.C. § 1712l.
- 28 Veterans Legal Clinic, *Underserved* at 11.
- 29 See 38 C.F.R. § 17.34.
- 30 VA is currently in the process of revising these substantive character of discharge regulations, 38 C.F.R. § 3.12.
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**OUTVETS** is a national nonpartisan, nonpolitical charitable organization dedicated to recognizing and honoring the contributions and sacrifices of LGBTQ veterans, active service members, and their families through social interaction, community service, and public awareness. Founded in 2014 on the anniversary of the repeal of Don't Ask, Don't Tell, OUTVETS's mission is to serve the community, educate the public about the sacrifices of LGBTQ service members, and provide its members with the camaraderie they experienced in service. For more information, go to [www.outvets.com](http://www.outvets.com).

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

**Veterans Legal Services (VLS)** promotes self-sufficiency, stability, and financial security for veterans in Massachusetts through comprehensive and accessible legal services. VLS's unique model of delivering services on-site at homeless shelters and service centers allows it to reach veterans who would otherwise go without the legal help they need. Our partnerships with shelters, courts, and supportive services providers enable VLS to make legal services accessible and collaborate with other professionals, ensuring the best chance of veteran success. For more information, go to [www.veteranslegalservices.org](http://www.veteranslegalservices.org).

# How to Access VA Health Care If You Have a Less-than-Honorable Discharge

A Guide for Veterans and their Dependents

Written by Veterans Legal Services and  
the Veterans Legal Clinic, Legal Services Center of  
Harvard Law School  
(Fall 2021)



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Disclaimer:

This guide is neither a solicitation nor an offer to represent you concerning any legal problem. This guide does not constitute legal advice and provides general information only. The information conveyed in this guide is not intended to and does not create an attorney-client relationship with you and the Veterans Legal Services (VLS) or Legal Services Center (LSC) or any attorney at VLS or LSC. Please be aware that unsolicited letters, facsimiles or emails do not create an attorney-client relationship. We will not have an attorney-client relationship with you until and unless you and VLS or LSC enter into a formal agreement of engagement.

### **Why do I need this guide?**

Access to health care is critically important for the mental and physical wellbeing of veterans. Many people who served in the military are eligible for care from the Department of Veterans Affairs (VA). There are multiple ways to apply for VA healthcare and many ways that anyone who served may be eligible, even if they received an other than honorable, bad conduct, or other “less-than-honorable discharge.”

All veterans, regardless of discharge status, should know that they have the right to apply for VA healthcare, to receive a written decision, and to appeal any denial. This guide discusses how to apply for VA healthcare, how to maximize the chances of being approved, and what options are available if you run into difficulty.

### **Are all former service members eligible for VA healthcare?**

No. There are many factors that affect who can get VA healthcare and other VA benefits. Some of these factors include length of service, when you served, the type of discharge you received, whether you were injured in service, and the type of care you need. Because there a lot of factors that affect eligibility for VA healthcare and also a lot of exceptions to the eligibility rules, everyone has the legal right to apply. They also have the right to receive a written decision about their eligibility and to appeal any decision with which they disagree.<sup>1</sup>

## How To Apply

### What is Right for You?

The first step is to decide which way of applying is right for you. VA offers four options:

➤ **Apply by Phone** 📞

- Call the VA toll-free hotline at (877) 222-8387, Monday through Friday, 0800 – 2000 eastern time.

➤ **Apply by Mail** ✉

- Fill out an Application for Health Benefits on VA Form 10-10EZ, which can be downloaded at <https://www.va.gov/vaforms/medical/pdf/10-10EZ-fillable.pdf>.
- Mail the completed form to:

Health Eligibility Center  
2957 Clairmont Rd., Suite 200  
Atlanta, GA 30329

➤ **Apply Online** 🖥

- Submit your application at <https://www.va.gov/health-care/apply/application/introduction>.
- VA says to expect that the online application takes approximately thirty minutes to fill out and that you will receive a decision in approximately one week. We have sometimes seen longer wait times for a decision.
- **Before starting an online application, it is helpful to have:**
  - Your Social Security number (required).
  - A copy of your discharge paperwork (DD 214).

- Basic personal financial information, including your income and the income of your spouse if you are married.
- Your most recent federal tax return.
- Your health insurance card if you have other health insurance, such as through a job, school, or spouse.

➤ **Apply in Person** 

- Visit a VA hospital or clinic.
- Go to front desk or information desk and state that you want to apply for VA healthcare.
- Although it is not required, it can be helpful to bring a completed and signed copy of the VA Form 10-10EZ at <https://www.va.gov/vaforms/medical/pdf/10-10EZ-fillable.pdf>.
- Not sure where to go? Find a VA healthcare facility at <https://www.va.gov/find-locations/>.

**This guide was created primarily to help you apply in person for VA healthcare.**

Every VA facility is different and so is every person you will talk to. Some will know more about veterans with less-than-honorable discharges than others. It is important you know your rights in the application process. These tips and Frequently Asked Questions may also be helpful for people applying online or in other ways. If you do choose to apply in person, we want you to know what to expect and what challenges may come up.

(Note: if you chose to apply by phone, online, or by mail, you should have received a written decision on your application. In that case, you may want to skip to the FAQs on page 10).

## Step-By-Step

### 1. Be Prepared: What to Know Before Visiting Your Local VA Healthcare Facility

#### ➤ **Collect Relevant Documents**

- It is not necessary to gather documents before going to a VA healthcare facility, but it may make the process easier.
- If you have a copy of your discharge paperwork (DD 214), bring it on the day of your visit. If you do not have a copy, VA healthcare facility staff should be able to look up your DD 214 for you.

#### ➤ **Know Your Rights**

- **Federal law requires that everyone be given the opportunity to apply** for VA health care and benefits.
- **Federal law requires that VA provide everyone the forms and instructions** necessary to submit an application.<sup>2</sup>
- **Federal law requires VA to assist everyone with their application** for VA health care and VA benefits.<sup>3</sup>



### 2. Be Proactive: Know What to do During Your Visit to a VA Healthcare Facility

#### ➤ **Consider Bringing a Friend or Family Member with You to VA When You Apply for Healthcare**

- Everyone can benefit from a friend or family member's support. It can also help you keep track of the details of your visit.

➤ **Ask to Apply & Know Your Rights**

- When you arrive, tell VA staff that you want to apply for VA healthcare
- If needed, tell VA staff that you have **(1) the right to apply** and **(2) the right to assistance** in applying.

➤ **Request a Review of Your Case**

- Ask VA staff to complete VA Form 20-0986 for you (which was formerly known as VA Form 10-7131). This is the form that VA uses to start the process of deciding whether someone with a less-than-honorable discharge is eligible for VA healthcare.
- Tell the VA staff member that **VA Form 20-0986 must be sent to the VA for review as quickly as possible.**
- Ask for a copy of the completed VA Form 20-0986 and proof that the Form was sent to the Veterans Benefits Administration Regional Office that covers your area.

➤ **Document Your Visit to VA**

- In case you later need to file an appeal, during or shortly after your visit you should write down:
  - The date of your visit.
  - The name and location of the VA healthcare facility.
  - The name of each VA staff person you spoke to.
  - Anything that VA staff tells you about your eligibility or the application process.



### 3. Be Persistent: What to do if You are Denied the Right to Apply for Health Care

#### ➤ **Don't Panic**

- If a VA staff member tells you that you are ineligible for VA healthcare before you have applied and gotten a written decision, know that you are not alone. Unfortunately, even though this is not supposed to happen, it sometimes does. Some VA staff are unaware of the law or are improperly trained.<sup>4</sup>
- Just because someone is turned away before getting a chance to apply for VA healthcare does not make it right or mean that you are ineligible. You have the right to apply for VA healthcare, and you may be eligible for VA healthcare after a review. That is why it is so important to get a written decision that can be read and appealed.

#### ➤ **Ask for On-Site Help**

- **Supervisors** may be more familiar with veterans' rights and proper procedures. They also may be able to provide you with the required forms and assistance.
- **Patient Advocates** are on-site at VA healthcare facilities as part of the Patient Advocacy Program and should be able to help you too.<sup>5</sup>
  - If, for whatever reason, the on-site Patient Advocate is not available, ***make sure to get their contact information*** and follow up with them after your visit.
- **VA Facility Directors** may also be able to help
  - You can ***submit a complaint in writing*** to the Director and should hear back by phone or letter.

➤ **Visit Another Facility**

- You are not required to apply for care at the VA healthcare facility closest to you. Depending on where you live, there may be other VA healthcare providers in your area where you could try to apply again and perhaps be successful. You can find VA healthcare facilities at <https://www.va.gov/find-locations/>.

➤ **Try Applying by Mail, Phone, or Online**

- If you are unable to apply in person at a VA healthcare facility, **you can apply by mail, by phone, or online.**

➤ **Report the Incident**

- Your right to apply and receive a written decision on your application is guaranteed by federal law.<sup>6</sup> **VA needs to know if its staff members are not respecting rights.**
- You can report violations of your right to apply for VA healthcare to the VA Office of the Inspector General (**OIG**) at <https://www.va.gov/oig/hotline/complainant-release-preference.asp>
  - You may file your complaint confidentially or anonymously if you want your name kept out of the process or kept from VA entirely.<sup>7</sup>

➤ **Seek Assistance Outside VA**

- There are many veterans advocates across the country who may be able to help you obtain VA healthcare.
- Free legal help may be available from law schools, nonprofits, legal bar associations, or others in your area. These legal services providers may be able to:

- Go with you to the VA healthcare facility to ensure your right apply is recognized and upheld.
  - Reach out to contacts at VA healthcare facility to ensure your application is properly processed.
  - Represent you in a legal case to make VA accept your application and issue a proper decision on your application for healthcare.
  - Find a provider at <https://statesidelegal.org/>.
- Your local Veterans Service Officer (VSO) may also be able to help you apply for VA healthcare and benefits.
  - Find your local VSO at <https://nvf.org/veteran-service-officers/>.

➤ **Spread the Word!**

- Unfortunately, **many people are unaware of their rights** when it comes to seeking VA healthcare or benefits.
- Make sure to let other veterans in your community know that they are entitled to apply and receive a decision about their VA benefit eligibility. Please share this guide with them.

## Frequently Asked Questions (FAQs)

### Q: Why can it be complicated to apply for VA healthcare?

A: It is not supposed to be complicated. Unfortunately, sometimes VA staff do not know or do not follow the law and will not let someone with a less-than-honorable discharge apply for healthcare. That is wrong. That is why this guide explains what you can do to make sure you are able to exercise your right to apply.

### Q: Is it true my discharge status has to be “Honorable” or “General (Under Honorable Conditions)” to get VA healthcare?

A: No. Someone with a less-than-honorable discharge, such as an other than honorable or bad conduct discharge, may still be eligible for VA healthcare. There are many paths to eligibility, such as:

- **Multiple Enlistments:** If you served multiple terms of enlistment and one of those enlistments ended in an Honorable or General discharge, you may be eligible for VA healthcare and other benefits based on that enlistment.
- **Character of Discharge Determination:** VA can review all the facts and circumstances of your service as part of a “Character of Discharge Determination.” VA can then decide that you are fully eligible for VA healthcare.
- **Service-Connected Disabilities:** If you received an other than honorable discharge, you may be eligible for VA healthcare to treat any service-connected physical or mental health disabilities.
- **Mental Healthcare:** If you have an other than honorable discharge and either (a) engaged in or supported combat operations or (b) experienced Military Sexual Trauma (MST) then you should be eligible for mental health treatment and evaluation at VA.
- **Emergency Care:** If you need emergency mental health treatment, VA can provide treatment for up to 90 days.

- **Vet Centers:** You may be able to get mental health, readjustment, or bereavement counseling from a VA Vet Center. You can find the nearest Vet Center online at [https://www.va.gov/find-locations/?facilityType=vet\\_center](https://www.va.gov/find-locations/?facilityType=vet_center).
- *Note:* These examples are just brief summaries and each veteran's circumstances may affect their eligibility. That is why it is so important to go apply and find out how the law applies to your specific circumstances.

### **Q: What is a Character of Discharge Determination?**

**A:** A Character of Discharge Determination is when VA looks at what happened during a veteran's service and the law that applies and then decides whether you are eligible for VA healthcare (and other VA benefits). VA will review your military personnel records and other evidence. Of course, sometimes military service records don't tell the whole story. You have the right to submit evidence as part of the review process and explain why you think VA should find you eligible. You have the right to speak directly to the staff member at VA who will decide your eligibility by asking for a hearing. If you disagree with what VA decides, you can appeal that decision, which could lead to VA approving your eligibility.

It can be helpful to have an advocate as part of the eligibility review process. You can refer to the advocacy resources listed above to see if you can get help with your case.

You can find information about Character of Discharge Determinations online at: <https://www.swords-to-plowshares.org/guides/va-character-of-service-determination-an-alternative-to-discharge-review>.

**Q: When is a Character of Discharge Determination supposed to happen?**

**A:** VA will only do a Character of Discharge Determination after you apply for VA healthcare or another VA benefit, such as service-connected disability compensation, VA pension, or a VA home loan. That is why it is important for VA staff to allow someone to apply when they seek healthcare or other benefits from VA. That is also why it is important to make sure that when you apply for VA healthcare, the VA staff member completes and sends the VA 20-0986 Form that starts the eligibility review process.

**Q: I was told I had to apply to the Department of Defense and get a discharge upgrade in order to be eligible for VA healthcare. Is that true?**

**A:** No. All people who served in the military—no matter their type of discharge—are entitled to apply for VA healthcare. And, as explained above, many people with an other than honorable, bad conduct, or other less-than-honorable discharge may be eligible for VA healthcare, even without a discharge upgrade.

**Q: Even though I don't first have to get a discharge upgrade from the Department of Defense to apply for VA healthcare, can I still apply for a discharge upgrade if I want?**

**A:** Yes. It is up to you if you also want to seek a discharge upgrade from the Department of Defense. You can find information about applying for a discharge upgrade online at <https://www.swords-to-plowshares.org/guides/upgrading-your-discharge>.

**Q: I received a favorable Character of Discharge Determination or Discharge Upgrade but VA still won't give me healthcare. What should I do?**

**A:** Start by presenting a copy of your VA Character of Discharge Determination or your new DD 214 to the staff at your local VA

healthcare facility. If that does not work, we urge you to contact one of the advocacy resources listed above. These organizations can help not just with your right to apply for VA healthcare, but also your right to receive VA healthcare after you are found eligible.

**Q: I am receiving emergency mental health treatment from VA as part of the 90-day eligibility program. But more than 90 days have passed and VA still hasn't completed its Character of Discharge Determination. Can I still get VA mental health treatment while I wait for a decision?**

**A:** Yes. You can still get mental health treatment until VA decides your Character of Discharge Determination. In emergency situations, VA is supposed to complete that process within 90 days, but that may not happen. Sometimes it can even take more than a year. You are entitled to receive treatment until VA completes the Character of Discharge Determination. If VA decides your Character of Discharge Determination in your favor, then you are also eligible for VA healthcare going forward.

In emergency mental health situations, if VA finds after a Character of Discharge Determination that you are not eligible, VA should try to help you find non-VA healthcare. For example, you may be able to get Medicaid coverage. VA could also send you a bill for the VA healthcare you had been receiving. You can apply for a waiver of those costs or file an appeal. Remember, you can seek legal help if you have any of these issues.

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<sup>1</sup> 38 U.S.C. § 501; 38 C.F.R. § 3.103

<sup>2</sup> 38 U.S.C. § 5102(a); 38 C.F.R. § 3.150.

<sup>3</sup> 38 U.S.C. § 5103A; 38 C.F.R. § 3.159.

<sup>4</sup> VETERANS LEGAL CLINIC AT THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL, ET AL., TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTHCARE TO VETERANS WITH BAD PAPER DISCHARGES 15 (2020).

<sup>5</sup> 38 U.S.C. § 7309A.

<sup>6</sup> 38 U.S.C. § 501; 38 C.F.R. § 3.103.

<sup>7</sup> DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, <https://www.va.gov/oig/hotline/complainant-release-preference.asp>



## VA ACCREDITATION PROGRAM

### HOW TO APPLY FOR VA ACCREDITATION AS AN ATTORNEY OR CLAIMS AGENT

## WHAT AN APPLICANT SHOULD KNOW ABOUT APPLYING FOR DEPARTMENT OF VETERANS AFFAIRS (VA) ACCREDITATION AS AN ATTORNEY OR CLAIMS AGENT

### What is the VA accreditation program?

- The VA accreditation program exists to ensure that Veterans and their family members receive appropriate representation on their VA benefits claims. VA accreditation is for the sole and limited purpose of preparing, presenting, and prosecuting claims before VA.

### When is VA accreditation required?

- An individual generally must first be accredited by VA to assist a claimant in the preparation, presentation, and prosecution of a claim for VA benefits—even without charge.<sup>1</sup> VA accredits three types of individuals for this purpose:
  - Representatives of VA-recognized veterans service organizations (VSO)<sup>2</sup>
  - Attorneys (accredited in their individual capacity, not through a law firm)
  - Claims agents (accredited in their individual capacity, not through an organization)

### How do I apply to become a VA-accredited attorney or claims agent?

#### **Step 1: > Complete VA Form 21a**

- Be sure to fill out all portions of the form.

#### **Step 2: > It is recommended that you attach any necessary documents to VA Form 21a**

- We recommend that you attach a recently dated certificate of good standing from all state bars, courts, or Federal or state agencies to which you are admitted. (This applies to both attorneys and claims agents).
- On VA Form 21a, if you answer “yes” to question 13A, 14A, 15A, 16, 17, 18, 20, 22, 23A or 24A, please attach a detailed explanation of the surrounding circumstances.

#### **Step 3: > Submit your VA Form 21a and any attachments to OGC (Please only choose 1 method of submission):**

- Mail: Office of the General Counsel (O22D), 810 Vermont Avenue, NW, Washington, DC20420.
- Fax: (202) 495-5457.

<sup>1</sup> VA regulations allow a one-time exception to this general rule, which allows VA to authorize a person to prepare, present, and prosecute one claim without accreditation. The assistance must be without cost to the claimant, is subject to the laws governing representation, and may not be used to evade the accreditation requirements.

<sup>2</sup> To apply for accreditation as a VSO representative, please contact the organization’s certifying official.

## FAQs

*Q1: How long will it take to process my application?*

*A1:* Attorney applications generally take between 60 to 120 days from submission. Because there are more steps involved with claim agent applications, those applications take, on average, 1 year to process.

*Q2: If I am accredited as an attorney or claims agent, what must I do to maintain my VA accreditation?*

*A2:* You must: (1) Complete 3 hours of qualifying continuing legal education (CLE) requirements during the first 12-month period following the date of initial accreditation by VA, and an additional 3 hours no later than 3 years from the date of your accreditation, and every 2 years thereafter; (2) Provide a copy of your training certificate or certify in writing to VA's Office of the General Counsel your completion of the qualifying CLE, including the CLE title, date, time, and provider; (3) Submit an annual certification of good standing for any court, bar, or Federal or State agency to which you are admitted to practice.

*Q3: Can I be accredited to help veterans with their claims if I am a federal employee?*

*A3:* No. An employee of the Federal government generally cannot provide representational services before VA. However, if you are currently serving in a Reserve component of the Armed Forces, you are not considered a Federal employee as long as you are not on active duty or active duty for training.

*Q4: May an accredited attorney or claims agent charge fees for preparing an initial VA claim?*

*A4:* No. An accredited attorney or claims agent may generally charge claimants a fee only **after** an agency of original jurisdiction (e.g., a VA regional office) has issued a decision on a claim, a notice of disagreement has been filed, and the attorney or agent has filed a power of attorney and a fee agreement with VA.

*Q5: If I advise veterans and their family members on VA benefit claims but do not file their applications for them, do I need to be accredited?*

*A5:* Yes. You must be accredited to aid in the preparation, presentation, or prosecution of a VA benefit claim. Advising a claimant on a specific benefit claim or directing the claimant on how to fill out the application, even if you never put pen to paper, is considered claims preparation.

*Q6: Can I use my VA accreditation to as a method to advertise or promote my other business interests?*

*A6:* No. VA accredits individuals solely for purposes of ensuring VA claimants receive responsible, qualified representation when preparing presenting and prosecuting claims before the Department. You may not use your VA accreditation for promoting any other businesses, including financial services, referral businesses, or homecare businesses. If VA determines that an accredited agent or attorney is using VA accreditation for an improper purpose, VA may suspend or cancel the individual's accreditation. VA may also collaborate with state law enforcement authorities in the event that it is suspected that the individual's actions may have implications under State laws.

*Q7: Are there standards of conduct that I must follow as an accredited individual?*

*A7:* Yes. You must abide by the standards of conduct listed in 38 C.F.R. § 14.632 and summarized on the fact sheet labeled "How to File a Complaint Regarding Representation."

*Q8: If I violate the standard of conduct or engage in any other unlawful or unethical conduct, what will happen?*

*A8:* If VA determines that an accredited individual has violated the standard of conduct, VA may suspend or cancel his or her accreditation. VA is authorized to report the suspension or cancellation of VA accreditation to other bar associations, courts, or agencies to which you are admitted as well as employing entities. In addition, VA may collaborate with state law enforcement authorities in the event that it is suspected that the individual's actions may have implications under State laws.

*Q9: What if I have questions regarding my VA accreditation?*

*A9:* You may submit inquiries regarding VA accreditation to [ogcaccrreditationmailbox@va.gov](mailto:ogcaccrreditationmailbox@va.gov).

**For More Information:** Visit the VA Office of the General Counsel website at:  
<http://www.va.gov/ogc/accreditation.asp>

Contact us: [www.va.gov](http://www.va.gov) 1-800-827-1000

