

**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)**

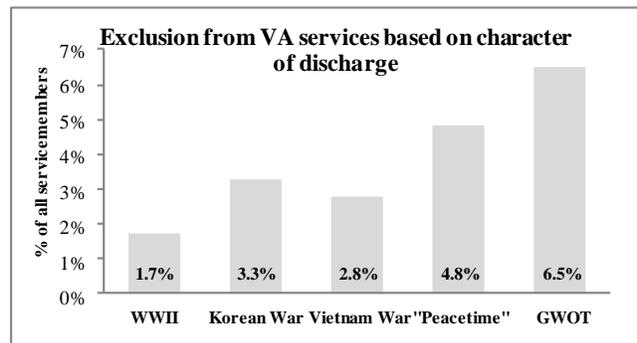
**REQUIREMENT FOR SERVICE “UNDER CONDITIONS OTHER THAN DISHONORABLE”**

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## I. EXECUTIVE SUMMARY

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

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



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

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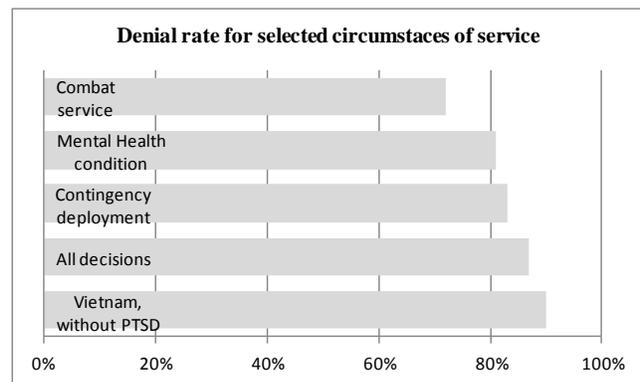
<sup>1</sup> The term “service members” will be used throughout the petition to refer to all individuals who served in the armed forces at any point in their lives, not merely those currently serving, and including both those who meet the statutory definition of “veteran” and those who do not.

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

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

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

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



- **Duration and quality of service.** The VA's standards do not consider duration of service, and consider quality of service only in limited circumstances. When quality of service is considered, it applies a high standard that does not treat combat service as inherently meritorious. VA appeals decisions denied eligibility to 77% of claimants who had combat service.
- **Hardship service.** The VA's standards do not consider whether the person's service included hardship conditions such as overseas deployment. VA appeals decisions denied eligibility to 83% of those who served in Vietnam, Iraq, Afghanistan or other contingency operations.

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

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

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

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

- Standards of review. Adopt standards for "dishonorable conditions" that consider severity of misconduct, overall quality of service, behavioral health, and other mitigating factors.
- Scope of review. Require individual evaluation only for service members with punitive discharges and those with administrative discharges issued in lieu of court-martial.
- Access to health care. Instruct VA medical centers to initiate eligibility reviews for service members who require it, and to provide tentative eligibility.

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

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

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

### **A. The statute gives the VA limited discretion to deny “veteran status” to service members separated under “dishonorable conditions”**

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

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<sup>2</sup> See Section II.A below, discussing 38 U.S.C. § 5303(a) and 38 U.S.C. § 101(2).

<sup>3</sup> 38 U.S.C. § 101(2).

<sup>4</sup> *E.g.*, *id.* § 101(13) (“The term ‘compensation’ means a monthly payment made by the Secretary to a veteran because of ... .”); *id.* § 101(14) (“The term ‘pension’ means a monthly or other periodic payment made to a veteran because of ... .”); *id.* § 1710(a)(1)(A) (“The Secretary shall furnish hospital care and medical services which the Secretary determines to be needed to any veteran for a service-connected disability ... .”); *id.* §

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

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

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

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

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

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

<sup>5</sup> 38 U.S.C. § 101(2).

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

<sup>7</sup> 38 U.S.C. § 501.

<sup>8</sup> Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009).

<sup>9</sup> Id. at 218 n.4.

<sup>10</sup> 38 U.S.C. § 5303(a), (b), (c).

- For an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence;
- By resignation by an officer for the good of the service;
- By seeking discharge as an alien during a period of hostilities.

38 U.S.C. § 5303(a), (b), (c).

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

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

Table 1). That amounts to only 1% of all enlisted service members discharged after entry level training.<sup>13</sup>

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<sup>11</sup> 38 C.F.R. § 3.12(d). The content of this regulation is explained in section **Error! Reference source not found.** below.

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

<sup>13</sup> This excludes uncharacterized discharges. Discharge data was obtained by a DOD FOIA request, see Table 20 below.

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

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

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

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

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

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

<sup>17</sup> This data is not reported by the DOD. Available information suggests it likely is a very small number.

<sup>18</sup> See Section IV below for a discussion of the outcomes of current regulatory standards.

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

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

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

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

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

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<sup>19</sup> See

Table 1 below and accompanying text.

<sup>20</sup> See Table 11 below and accompanying text.

<sup>21</sup> “Ambiguity is a creature not of definitional possibilities but of statutory context.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citing *King v. St. Vincent’s Hospital*, 502 U. S. 215, 221 (1991)).

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

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

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

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

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

<sup>23</sup> Pub. L. No. 78-346, 58 Stat. 284 (1944).

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

<sup>25</sup> Pub. L. No. 78-346, § 1503.

<sup>26</sup> Id. § 300.

<sup>27</sup> S. Rep. No. 78-755, at 15 (1944) (emphasis added).

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

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

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

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

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

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

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

And:

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

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

<sup>29</sup> H. Rep. No. 78-1418, at 17 (1944) (emphasis added).

<sup>30</sup> S. Rep. No. 78-755, at 15 (emphasis added).

<sup>31</sup> House Hearings on 1944 Act, *supra* note 28, at 419.

<sup>32</sup> 90 Cong. Rec. 3077 (1944).

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

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

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

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

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

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

<sup>35</sup> 90 Cong. Rec. 3076 (1944).

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

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

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

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<sup>38</sup> E.g., health care benefits after 1933. Pub. L. No. 73-2, 48 Stat. 8 (1933) and Veterans’ Bureau Regulation No. 6 (March 21, 1933).

<sup>39</sup> E.g., vocational rehabilitation services following WWI. Pub. L. No. 66-11, 41 Stat. 158 (1919).

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

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

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

<sup>43</sup> E.g., service-connected disability payments prior to WWI. Pub. L. 37-166, 12 Stat. 566 (1862).

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

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

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

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

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

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

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<sup>44</sup> H. Rep. No. 79-1510, at 8 (1946) (emphasis added).

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

This finding is supported by a detailed Staff Report by the Commission.<sup>46</sup>

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

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

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

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<sup>45</sup> President’s Comm’n of Veteran Pensions (Bradley Comm’n), Findings and Recommendations: Veterans’ Benefits in the United States 394 (emphasis added).

<sup>46</sup> Bradley Commission Staff Report, *supra* note 28, at 9.

<sup>47</sup> No. 94-7102, 1995 U.S. App. LEXIS 16683, at \*8 (Fed. Cir. July 7, 1995) (emphasis added).

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

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

*1. Guidance in Statute*

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

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

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

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

<sup>50</sup> “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Hibbs v. Winn*, 542 U. S. 88, 101 (2004) (citation omitted).

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

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

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

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

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

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

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<sup>52</sup> S. Rep. No. 78-755, at 15 (1944) (emphasis added).

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

## 2. *Guidance from Legislative History*

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

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

Conduct that should result in forfeiture of eligibility	Conduct that should not result in forfeiture of eligibility
<ul style="list-style-type: none"> <li>• Desertion<sup>53</sup></li> <li>• Murder<sup>54</sup></li> <li>• Larceny<sup>55</sup></li> <li>• Civilian incarceration<sup>56</sup></li> <li>• Substance abuse (“chronic drunkenness”) not associated with a wartime disability<sup>57</sup></li> <li>• Shirking (“the gold-brickers, the coffee-coolers, the skulkers”)<sup>58</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Discharge for AWOL that did not involve desertion<sup>59, 60</sup></li> <li>• Conviction of civilian offenses that did not result in incarceration<sup>61</sup></li> <li>• Conviction by special court-martial<sup>62</sup></li> <li>• Violations of military regulations<sup>63</sup></li> <li>• Substance abuse (“chronic drunkenness”) associated with a wartime disability<sup>64</sup></li> </ul>

<sup>53</sup> Id. at 15.

<sup>54</sup> 90 Cong. Rec. 3076-77 (1944).

<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> H. Rep. No. 1624, at 26 (1944).

<sup>59</sup> House Hearings on 1944 Act, *supra* note 28, at 190.

<sup>60</sup> Id. at 417

<sup>61</sup> Id. at 415.

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Id.

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

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

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

### 3. *Guidance from military practice*

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

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

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

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<sup>65</sup> House Hearings on 1944 Act, *supra* note 28, at 417.

<sup>66</sup> 90 Cong. Rec. 3076-77 (1944).

<sup>67</sup> Camarena v. Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683, at (Fed. Cir. July 7, 1995) (emphasis added).

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

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

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

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<sup>68</sup> Rules for Court Martial 1003(b)(8)(B) (2012) [hereinafter RCM].

<sup>69</sup> Office of the Judge Advocate Gen. of the Army, “A Manual for Courts-Martial”, at 97 et seq. (Apr. 20, 1943).

<sup>70</sup> See, e.g., United States v. Rivera, 45 C.M.R. 582, 584 n.3 (A.C.M.R. 1972) (possession of 8.2 milligrams of heroin that could have resulted in 10 years’ confinement is a minor offense); United States v. Hendrickson, 10 M.J. 746, 749 (N.C.M.R. 1981) (a 13-day unauthorized absence is a minor offense); Turner v. Dep’t of Navy, 325 F.3d 310, 315 (D.C. Cir. 2003) (indecent assault was a minor offense, taking into account seven years of prior good service).

<sup>71</sup> Manual for Courts-Martial ¶ 103(a) (1943) [hereinafter MCM 1943].

<sup>72</sup> RCM 1003(b)(8)(B). See also United States v. Mahoney, 27 C.M.R. 898, 901 (N.B.R. 1959).

<sup>73</sup> Cited in Evan R. Seamone, Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism, 208 Mil. L. Rev. 1, 56 (Summer 2011); see also MCM 1943 ¶ 87b, “[T]he reviewing authority should, in the exercise of his sound discretion, suspend the execution of the dishonorable discharge, to the end that the offender may have an opportunity to redeem himself in the military service unless it was an offense of moral turpitude.”

<sup>74</sup> MCM 1943 ¶ 87b. See also United States v. Mahoney, 27 C.M.R. 898, 901 (N.B.R. 1959).

<sup>75</sup> Id. ¶ 104c.

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

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

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<sup>76</sup> Manual for Courts-Martial ¶ 1003(d) (2012) [hereinafter MCM 2012].

<sup>77</sup> Id. pt. V.1.e. (An otherwise serious offense under this rule may still be considered minor based on “the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, [and] record and experience.”); RCM 1005(d)(5) (“Instructions on sentence shall include: A statement that the members should consider all matters in extenuation, mitigation and aggravation.”)

<sup>78</sup> MCM 2012 pt. V.1.e. See, e.g., Military Judges’ Benchbook, DA Pam 27-9 ¶ 2-5-13.

<sup>79</sup> MCM 2012 pt. V.1.e.

<sup>80</sup> Middendorf v. Henry, 425 U.S. 25, 31-32 (1976) (in determining whether an offense is “minor,” the adjudicator will first question whether it was the subject of Article 15—nonjudicial—punishment, as “Article 15 punishment, conducted personally by the accused’s commanding officer, is an administrative method of dealing with the most minor offenses”).

<sup>81</sup> 11 Fed. Reg. 8731 (Aug. 13, 1946).

<sup>82</sup> William Blake, Punishment Aspects of a Bad Conduct Discharge, 1952 JAG J. 1, 5 (1952).

<sup>83</sup> Id. at 8-9.

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

#### 4. *Synthesis of guidance on standards for “dishonorable” characterization*

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

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

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

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

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<sup>84</sup> The Bad Conduct discharge had been used in the Navy and Marine Corps since the 18th century, but was not adopted by the Army and the Air Force until the enactment of The Uniform Code of Military Justice, Pub. L. 81-506, 64 Stat. 107 (1950).

<sup>85</sup> 1 William Winthrop, Military Law and Precedents 848-49 (2d ed. 1896).

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

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

**D. Administrative discharges for misconduct generally do not indicate “dishonorable conditions.”**

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

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

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

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<sup>86</sup> UCMJ art. 56a.

<sup>87</sup> “It is DOD Policy that ... Separation promotes the readiness of the Military Services by providing an orderly means to Evaluate the suitability of persons to serve in the enlisted ranks of the Military Services based on their ability to meet required performance, conduct, and disciplinary standards.” U.S. Dep’t of Def., DOD Instruction 1332.14 – Enlisted Administrative Separations ¶ 3.a.1. (Jan. 27, 2014) [hereinafter DODI 1332.14].

<sup>88</sup> Id., Enclosure 3 ¶ 1.

<sup>89</sup> Id., Enclosure 3 ¶ 3.a.4.

<sup>90</sup> Id., Enclosure 4 ¶ 3.a.1.a.

<sup>91</sup> Id., Enclosure 3 ¶ 10.

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

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

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

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<sup>92</sup> *Id.*, Enclosure 3 ¶ 10.c.

<sup>93</sup> *Id.*, Enclosure 4 ¶ 3.b.2.c.1.a.

<sup>94</sup> *Id.*, Enclosure 3 ¶ 10.a.1.

<sup>95</sup> *Id.*, Enclosure 3 ¶ 10.a.2.

<sup>96</sup> *Id.*

<sup>97</sup> *E.g.*, “[A] Chapter 10 [administrative discharge for misconduct] is administrative and non-punitive.” *United States v. Smith*, 912 F.2d 322, 324 (9th Cir. 1990); “An undesirable discharge does not involve punishment. It reflects only that the military has found the particular individual unfit or unsuitable for further service.” *Pickell v. Reed*, 326 F. Supp. 1086, 1089-90 (N.D. Cal.), *aff’d*, 446 F.2d 898 (9th Cir.), *cert. denied*, 404 U.S. 946 (1971).

<sup>98</sup> See RCM 306(c), advising separation as one of several methods for disposing of misconduct through administrative action rather than punishment.

<sup>99</sup> 1 William Winthrop, *Military Law and Precedents* 848-49 (2d ed. 1896) (describing the use of the “Without Honor” characterization by the Army).

<sup>100</sup> See Section II.B above.

discharges by name, barring eligibility for “an ‘undesirable discharge,’ separation ‘for the good of the service,’ an ‘ordinary discharge’ (unless under honorable conditions) or other form of discharge not specifically an honorable discharge.”<sup>101</sup> By revoking this standard, the 1944 bill clearly intended to create eligibility for these characterizations.

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

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

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<sup>101</sup> 38 C.F.R. § 2.0164 (1938).

<sup>102</sup> See Section II.B above.

<sup>103</sup> This is consistent with the presumption of regularity that governs VA interpretations of DOD actions. “The ‘presumption of regularity’ supports official acts of public officers. In the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties. United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926).” Butler v Principi, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

<sup>104</sup> 90 Cong. Rec. 4348 (1944); 90 Cong. Rec. 4454 (1944).

<sup>105</sup> 90 Cong. Rec. 4454 (1944).

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

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

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

Congress gave this “benefit of the doubt” by extending eligibility to people with administrative discharges less than “under honorable conditions.”<sup>108</sup> This intent is only effectuated when most or all administrative discharges for misconduct receive eligibility.

Congress's skepticism about the fairness of administrative discharge characterizations is still valid today. Unlike punitive discharges, where judicial proceedings ensure some degree of consistency and fairness, administrative discharge regulations permit widely divergent outcomes based on the same circumstances. Consider the case of a single positive drug test: one commander could refer the service member to a special court-martial which could sentence a Bad Conduct discharge under UCMJ Article 112a; another commander could withdraw the court-martial referral and convene an administrative separation board in lieu of court-martial, which generally receives an Other Than Honorable discharge;<sup>109</sup> another commander could refer the service member to rehabilitation, and if the person uses drugs again the commander could

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<sup>106</sup> House Hearings on 1944 Act, *supra* note 28, at 415, 417.

<sup>107</sup> Id. at 419-20.

<sup>108</sup> This does not refer to the “benefit of the doubt rule,” 38 U.S.C. § 5107. That rule is an instruction to the VA for how to evaluate uncertain facts against clear eligibility criteria. Nor does this refer to ‘Gardner’s Rule’ of statutory construction, where ambiguity in legislation should be construed in veterans’ favor. Brown v. Gardner, 513 U.S. 115, 118 (1994). Here, the congressional standard is already clear, and Congress referred to the “benefit of the doubt” only to explain why it set its clear standard as liberally as it did. The VA does not need to apply any “benefit of the doubt” in order to arrive at a liberal eligibility standard, because Congress incorporated its “benefit of the doubt” into clear statutory instructions.

<sup>109</sup> DODI 1332.14, Enclosure 3 ¶ 11.b.

pursue an administrative separation for Drug Rehabilitation Failure, which generally receives an Honorable or General characterization;<sup>110</sup> and finally another commander could impose non-judicial punishment and permit the service member to complete their service. This degree of command discretion in administrative separation proceedings permits wide discrepancies in how individuals are treated based on race,<sup>111</sup> their mental health condition,<sup>112</sup> leaders' personalities,<sup>113</sup> history of sexual assault,<sup>114</sup> or other factors. The uneven application of administrative discharge standards is clearly apparent in discharge rates between military branches. While services' punitive discharge rates are generally similar, varying between 0.3% in the Navy and 1.1% in the Marine Corps, their use of administrative discharges varies tremendously. The use of administrative disparity is *20-fold*: between 0.5% in the Air Force and 10% in the Marine Corps.

**Table 5: Discharge characterizations, FY2011**

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
<b>Army</b>	81%	15%	3%	0.6%	0.1%
<b>Navy</b>	85%	8%	7%	0.3%	0.0%
<b>Air Force</b>	89%	10%	0.5%	0.5%	0.0%
<b>Marine Corps</b>	86%	3%	10%	1.0%	0.1%
<b>Total</b>	<b>84%</b>	<b>10%</b>	<b>5%</b>	<b>1%</b>	<b>0.1%</b>

This difference between services is due to administrative policies, not individual merit. The Government Accountability Office has done a thorough study on discharge characterization

<sup>110</sup> *Id.*, Enclosure 3 ¶ 8.b.

<sup>111</sup> M.R. Walker, *An Analysis of Discipline Rates Among Racial/Ethnic Groups in the U.S. Military, Fiscal Years 1987-1991* (1992); Def. Equal Opportunity Mgmt. Inst., Dep't of Def., *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (1972). Racial disparities in discharge characterizations still exist.

<sup>112</sup> Combat veteran Marines with PTSD diagnoses are 11 times more likely to be discharged for misconduct. R.M. Highfill-McRoy, G.E. Larson, S. Booth-Kewley, C.F. Garland, *Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines*, *BMC Psychiatry* (Oct. 25, 2010).

<sup>113</sup> For a discussion of how command philosophies result in differing outcomes for equivalent facts, see Gen. Accountability Office, Rep. No. FCP-80-13, *Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Is Needed* (1980) [hereinafter *GAO Report*].

<sup>114</sup> See Human Rights Watch, *Embattled: Retaliation Against Sexual Assault Survivors in the US Military* (2015).

disparities between services.<sup>115</sup> It documented that this range of discharge practices reflects differences in leadership and management styles, not degrees of “honor” in different services:

Simply stated, different people get different discharges under similar circumstances, and the type of discharge an individual gets may have little to do with his behavior and performance on active duty.<sup>116</sup>

The GAO compared discharges of Marines and Airmen with the same misconduct history, service length, and performance history, and found that the Air Force was 13 times more likely than the Marine Corps to give a discharge under honorable conditions.<sup>117</sup> Military leaders justified their practices with unit-level considerations, not individual merit: some believed that expeditious termination was in the best interest of the services, while others believed that maximizing punishment helped reinforce unit discipline.<sup>118</sup>

The clear implication of an “other than dishonorable” standard is that Congress intended service members with characterizations higher than “dishonorable” to retain eligibility. This includes those who were administratively separated for misconduct with Other Than Honorable discharges, a non-punitive characterization two steps above “dishonorable.” While Congress anticipated that some people in this category would receive those characterizations in error, exclusion of those service members was meant to be the exception rather than the rule.

**E. The clear intent of Congress to exclude only service members whose conduct merits a dishonorable characterization advances the statute's purpose and goal.**

The purpose of the statute was to support the “readjustment” of people leaving the military.<sup>119</sup> The services created in the bill were intended to compensate, indemnify, or offset actual losses experienced by service members: compensation if a disability limits a service member’s ability to work; health care if they were disabled during service; vocational rehabilitation for those whose disabilities require them to learn new trades; income support for those whose careers were disrupted by wartime military service; education for those who do not

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<sup>115</sup> *GAO Report*, *supra* note 113. While that study is now 35 years old, the disparities between services’ discharge characterizations has only widened since that time, indicating that its findings are still valid.

<sup>116</sup> *Id.* at ii.

<sup>117</sup> *Id.* at 29-33.

<sup>118</sup> *Id.* at 32.

<sup>119</sup> Pub. L. No. 78-346, 58 Stat. 284 (1944).

have a civilian trade after several years of military service. These were not rewards for good performance, they were basic services to make up for actual losses or harms experienced while in the military.

Because the services were intended to help readjust from actual harms or losses, it is appropriate that Congress should withhold that support only in the most severe cases of misconduct. The question is not whether a service member performed so well that they earned a reward, but whether they performed so poorly that they should forfeit care and support services. As one of the House drafters explained:

“[A service member] gets an unfavorable discharge, and yet he may have been just as dislocated as anyone else. He may be just as needy of the help and the benefits that are provided under this act.”<sup>120</sup>

The House Committee on Military Affairs reaffirmed this position two years later:

Every soldier knows that many men, even in his own company, had poor records, but no 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.<sup>121</sup>

Legislators also justified the expansive eligibility standard in terms of social cost. If the government does not correct for these actual losses experienced during service, then worse outcomes are likely to follow.<sup>122</sup> A Senator explained that purpose this way:

We might save some of these men. . . . We may reclaim these men but if we blackball them and say that they cannot have [veteran services] we will confirm them in their evil purposes.<sup>123</sup>

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<sup>120</sup> House Hearings on 1944 Act, *supra* note 28, at 416.

<sup>121</sup> House of Representatives Committee on Military Affairs Report No. 1510, 79<sup>th</sup> Congress 2d Session, “Investigation of the National War Effort” (January 30, 1946) at 9.

<sup>122</sup> For a discussion of the social costs that result from military criminalization of behavioral health problems, *see* Evan R. Seamone, et al., Moving Upstream: Why Rehabilitative Justice in Military Discharge Proceedings Serves a Public Health Interest, 104 Am. J. Public Health 1805 (Oct. 2014).

<sup>123</sup> 90 Cong. Rec. 3077 (1944).

By creating a “dishonorable” standard, Congress decided that forfeiture of these readjustment services should be rare. This ensured fairness to service members who have in fact made sacrifices for the military, and it minimized the social cost that may result from abandoning veterans who need services.

Congress created other benefits that it intended only as a reward for exceptional performance, and for these benefits it created a higher eligibility standard. The 1984 Montgomery G.I. Bill was intended to incentivize enlistment and reward good service, rather than offset actual losses.<sup>124</sup> Congress created an elevated eligibility standard for that benefit, requiring a fully Honorable discharge characterization of service.<sup>125</sup> Similarly, Congress limits unemployment benefits<sup>126</sup> and Federal veteran hiring preferences<sup>127</sup> to those discharged under honorable conditions. These elevated standards are appropriate where the purpose of the benefit is to induce and reward good service.

Congress specifically rejected the idea that readjustment services should be given only as rewards for good service. The chief of the Bureau of Naval Personnel had requested that services only be provided to veterans discharged under honorable conditions, so that they could be used as rewards for good service:

[Under the “other than dishonorable” standard] benefits will be extended to those persons who will have been given bad-conduct and undesirable discharges. This might have a detrimental effect on morale by removing the incentive to maintain a good service record.<sup>128</sup>

He requested that Congress adopt an “honorable conditions” standard, and that request was formally considered both in committee and by the full Senate at floor debates. Congress rejected this request. The Senator who sponsored the bill was a former Army Colonel and future judge

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<sup>124</sup> “The purpose of this chapter are ... to promote and assist the All Volunteer Force Concept of the Armed Forces by establishing a new program of educational assistance based upon service on active duty .... to aid in the recruitment and retention of highly qualified personnel.” 38 U.S.C. § 1401(2) (1985) (as enacted by Pub. L. No. 98-525, § 702(a)(1) (Oct. 19, 1984), now codified as 38 U.S.C. § 3001(4) (2015)).

<sup>125</sup> 38 U.S.C. § 3011(a)(3) (2015). Other education benefits since then have also used the Honorable discharge characterization standard.

<sup>126</sup> 5 U.S.C. § 8521(a)(1)(A).

<sup>127</sup> *Id.* § 3304(f)(1).

<sup>128</sup> 90 Cong. Rec. 3077 (1944).

on the U.S. Court of Appeals for the D.C. Circuit. He summarized the drafting committee's response as follows:

I am very familiar with the objections raised by Admiral Jacobs. In my opinion, they are some of the most stupid, short-sighted objections which could possibly be raised. They were objections that were considered very carefully both in the subcommittee on veterans affairs and in the Finance committee and in the full committee itself.<sup>129</sup>

Faced with a request to limit eligibility to veterans discharged under honorable conditions, Congress rejected this in the strongest possible terms.

In sum, Congress provided several justifications for expanding eligibility for readjustment services so that they only exclude those who showed dishonorable conduct. First, the services respond to actual harms or losses, and support for these disabilities or opportunity costs should be withheld only reluctantly. Second, service is inherently praise-worthy and every service member has earned at least some gratitude from the nation. Third, military commanders' administrative decisions are highly uneven, and so guaranteeing that all deserving veterans receive timely services means serving some who might not be as deserving. Finally, our society suffers when military veterans are denied mental health or other services, and it is in everyone's interest that these needs be met. The purpose of the 1944 G.I. Bill was to correct, compensate, or indemnify actual losses incurred by those who served our nation's armed forces, and narrow or burdensome eligibility criteria would frustrate that purpose if they prevented deserving service members from accessing services they need.

**F. Neither Congress nor the Courts have endorsed the VA's interpretation of this statute**

Congressional intent may be inferred when Congress endorses an agency's interpretation. In this case, Congress has repeatedly re-enacted the same statutory language as originally adopted in 1944. Ordinarily this might suggest that Congress agrees with the VA's interpretation of the statute. However, two facts contradict this.

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<sup>129</sup> Id. at 3076-77 (emphasis added).

First, neither of the two Congressional committees with jurisdiction over this statute have ever held a hearing on it. Witnesses periodically raise the issue,<sup>130</sup> and occasionally the issue arises tangentially to a different matter under investigation,<sup>131</sup> but neither Committee has directly investigated it in a hearing. The most closely-related hearings were those held in 1977 to discuss special discharge upgrade programs that had changed characterizations for certain Vietnam-era veterans. Those hearings resulted in legislation that prohibited the VA from granting eligibility to people who received those discharge upgrades unless they were also found eligible under existing “other than dishonorable” standards.<sup>132</sup> However, none of the hearings discussed the adequacy of the VA’s standards. Instead, the legislators’ interest was to avoid unequal treatment for different wartime eras. In fact, they specifically encouraged the VA to adopt more inclusive standards. The House Report on the bill stated:

One of the most disturbing aspects of the special discharge review program is the singling out of a limited class of former military personnel as the beneficiaries of favorable treatment. . . . [T]he President could partially remove one of the greatest injustices in the program by providing that the same criteria for upgrading the discharges of this special class of service persons as a matter of equity be made available to veterans of all periods of war.<sup>133</sup>

Not only did Congress not endorse the VA’s standards at the time, they invited the Executive to expand eligibility more broadly. It has not done so.

Second, public and official statements by the VA have misrepresented its practices in critical aspects. As discussed in detail in Section IV.E below, official communications to the Senate Veterans Affairs Committee in 2013<sup>134</sup> and the House Minority Leader in 2015<sup>135</sup> both

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<sup>130</sup> See, e.g., Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans’ Affairs, 103d Cong. 116 (1994) (written testimony of Jonathan Shay, M.D., Ph.D.); Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents: A Community Perspective: Hearing Before the H. Subcomm. on Oversight and Investigations of the Comm. on Veterans’ Affairs, House of Representatives, 103d Cong. 106 (1993) (written testimony of Warren Quinlan, New England Shelter for Homeless Veterans).

<sup>131</sup> See, e.g., Hearing on S. 1307 Before the S. Comm. on Veterans Affairs Eligibility for Veterans’ Benefits Pursuant to Discharge Upgrading, 95th Cong. 344 et seq. (1977).

<sup>132</sup> Pub. L. No. 95-126, § 4, 91 Stat. 1106, 1108 (1977).

<sup>133</sup> H. Rep. No. 96-580, at 13 (1977), reproduced in Hearing on S. 1307 Before the S. Comm. on Veterans Affairs Eligibility for Veterans’ Benefits Pursuant to Discharge Upgrading, 95th Cong. 597 (1977).

<sup>134</sup> Attached herein as Appendix B.

<sup>135</sup> Attached herein as Appendix C.

made significant, substantive errors in describing how it implements this statute. Under these conditions, Congressional approval cannot be inferred from Congressional silence.

Nor have the Courts ever endorsed the VA's interpretation of this statute. No court has ever passed on the interpretive questions raised by this Petition. Instead, the only remotely related case decided merely that the VA had authority to promulgate regulations that could exclude service members with discharge characterizations other than dishonorable *at all*.<sup>136</sup> The Federal Circuit did not address the limits of the VA's authority to do so, only deciding that the Department was not categorically barred from disqualifying former servicemembers with discharge characterization better than dishonorable. Petitioners do not dispute that the VA has that authority. But, as explained above, the VA may only lawfully exercise that authority where the conduct at issue would have justified a dishonorable discharge.

The VA's interpretation of this statute is unlikely to receive deferential treatment. Courts defer to Agency interpretations of statutory terms only when Congress delegated interpretive authority,<sup>137</sup> when the text, context and history of the statute leave doubt as to Congressional intent,<sup>138</sup> and when the Agency proposes a permissible interpretation of the statute.<sup>139</sup> Here, Congress has provided the VA with a specific standard that has existing meaning under law, the Department squarely lacks authority to adopt a different standard.<sup>140</sup> Furthermore, the text, context and history of the statute provide clear guidance—in some cases numerical standards<sup>141</sup>—on what that standard should be. If any ambiguity remains, courts will resolve that doubt in favor of the former service member. The Supreme Court has long ago recognized that the “solicitude of Congress” to service members requires courts and agencies to

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<sup>136</sup> Camarena v Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683 (Fed. Cir. July 7, 1995).

<sup>137</sup> United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

<sup>138</sup> Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984).

<sup>139</sup> Id.

<sup>140</sup> The VA's authority to define “dishonorable conditions” is further eroded by the fact that the DOD, a different agency, has principal responsibility for administering that standard. The VA does not have the technical expertise that typically justifies Chevron deference. A similar situation exists under immigration statutes, where the Bureau of Immigration Affairs must decide some cases based in part on criminal histories. Because the BIA does not adjudicate criminal offenses, Courts have held that the BIA has no special administrative competence to define criminal law terms and the BIA's regulatory interpretations of those terms deserve no special deference. See, e.g., Marmolejo-Campos v. Holder, 558 F.3d 903, 907-8 (9th Cir. 2009).

<sup>141</sup> I.e., the standard for how long an absence without leave should justify exclusion, 38 U.S.C. § 5303(a).

interpret veteran legislation generously.<sup>142</sup> That is particularly true here as the relevant question is whether the government will recognize a veteran's service at all.<sup>143</sup> Such a grave decision cannot be made without express Congressional instruction, and the VA would be acting outside its authority to create new exclusions that Congress did not provide.

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<sup>142</sup> Henderson v. Shinseki, 562 U.S. 428, 440-1 (2011) (explaining “the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.”); see also Kirkendall v. Dep't of the Army, 479 F.3d 830, 844 (Fed. Cir. 2007) (en banc) (applying the “canon that veterans' benefits statutes should be construed in the veteran's favor”).

<sup>143</sup> This canon was applied to the question of whether a service member's conduct forfeits eligibility for basic veteran benefits in Wellman v. Wittier, 259 F.2d 163 (D.C. Cir. 1953). A 1943 Act barred veteran benefits to former service members “shown by evidence satisfactory to the Administrator of Veterans' Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States.” 57 Stat. 554, 555 (1943). The VA terminated benefit eligibility to a WWII veteran who was found to have “rendered assistance to an enemy of the United States” based on his participation in Community Party activities in Michigan during the Korean conflict. The Court held that “while [the statute] authorizes a determination by the Administrator upon 'evidence satisfactory to' him, his ruling ... is not simply discretionary with him. If it depends upon an erroneous interpretation of the law, it may be subject to review by the courts.” Wellman at 167-68. The Court found that the VA's interpretation of the statute was invalid because it imputed a more exclusive standard than Congress had expressly provided. “The strict interpretation necessary as to so drastic a forfeiture statute ... requires that it be limited in its application to the specific grounds spelled out by Congress, with clear proof of the overt acts relied upon. Thus, if the Administrator has exceeded his authority in the determination he makes, his ruling becomes arbitrary or capricious in the legal sense. He may not deny a right which the statute creates, except for validly and legally sufficient grounds.” Id.

### III. CURRENT REGULATIONS

The VA has defined the term “dishonorable conditions” with three regulations. One regulation, 38 C.F.R 3.12(a), defines what service members will require an individual review prior to receiving services. A second regulation, 38 C.F.R 3.12(d), lists conduct that shows “dishonorable” service. A third regulation, 38 C.F.R 3.12(b), rebuts a “dishonorable” characterization where mental health problems rise to the level of “insanity.” In addition, VA policies have created an implied requirement for “honorable” service. The following sections describe these standards and how they are applied.

#### A. Requirement for individual review: 38 C.F.R. § 3.12(a)

VA regulations first divide service members into two broad groups: those that it treats as presumptively eligible, and those that require individual review of conduct prior to recognition as a “veteran.” Nothing in statute instructs the VA to automatically include or exclude anybody, and discharge characterizations mean different things in each service,<sup>144</sup> so in principle the VA could require individual character of discharge reviews for every service member. But that would be highly inefficient, and the VA has reasonably adopted a rule providing presumptive eligibility in many instances.

The VA’s current regulations waive pre-eligibility review for service members with “Honorable” and “General Under Honorable Conditions” discharge characterizations. This is accomplished by 38 C.F.R. § 3.12(a):

A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

The use of the phrase “is binding” might suggest that this requirement is imposed by statute or caselaw. It is not. The VA adopted this regulation in 1964 voluntarily, without any statutory obligation to do so.<sup>145</sup>

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<sup>144</sup> See Section IV.H below for a discussion of differences between discharge characterizations in different branches.

<sup>145</sup> This rule was added in 28 Fed. Reg. 123 (Jan. 4, 1963). Compare 38 C.F.R § 3.12 (1963) with 38 C.F.R § 3.12 (1964). The authority for that rule making was the Secretary’s general authority to make rules of adjudication, 38 U.S.C. § 501(a), not any specific Congressional mandate.

This rule does not guarantee eligibility for these service members. Veterans Health Administration (VHA) eligibility staff and Veterans Benefits Administration (VBA) rating officials typically approve eligibility for service members with Honorable and General characterizations without further evaluation,<sup>146</sup> but this does not guarantee eligibility. The regulation only waives the regulatory bars, not the statutory bars, because the VA does not have the authority to waive statutory criteria. Thus, a service member who violated a statutory bar, but who nevertheless received a General or Honorable characterization at discharge<sup>147</sup> or from a Discharge Review Board,<sup>148</sup> is ineligible for VA services, notwithstanding the VA's waiver of individual review under 38 C.F.R 3.12(a). Furthermore, Congress has prohibited the VA from binding itself to discharge characterizations issued by certain Vietnam-era discharge review programs.<sup>149</sup> For these reasons, 38 C.F.R 3.12(a) does not guarantee eligibility for people with Honorable and General discharges. Instead, it creates presumptive eligibility so that they may receive services without a prior eligibility review. If the VA later identifies that the person's eligibility is in question, it will conduct a review and terminate eligibility if required. This is a practical measure to ensure that services for the large percentage of eligible veterans are not delayed because of concerns about the few who are ineligible.

***Josh Redmyer.** Marine rifleman with over seven years of service. After four years of service and three combat tours to Iraq and Afghanistan, he started using drugs to self-medicate symptoms of PTSD and received an OTH discharge. His drug use and behavior problems led to divorce from his wife and separation from children. He sought PTSD treatment from the VA and was turned away because of his discharge. An independent advocate helped him start an eligibility application. Although the duration of his service makes it likely that he will become eligible for VA benefits, the VA will not provide services until it completes its COD review, typically a 3-year process.*

<sup>146</sup> Adjudication Procedures Manual, M21-1MR pt. III.v.1.B.5.c (a formal finding to determine veteran status is not required for Honorable and General discharge characterizations) [hereinafter Adjudication Procedures Manual]; Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (2009) (a Character of Discharge review is not required for Honorable and General discharge characterizations).

<sup>147</sup> See, e.g., Title Redacted by Agency, No. 10-32 746 (Bd. Vet. App. Dec. 7, 2012) (ordering a remand for a conscientious objector with an Honorable discharge characterization do determine whether the service member is barred from VA services by the statutory bar at 38 U.S.C. § 3505(a), 38 C.F.R. § 3.12(c)(1)).

<sup>148</sup> Discharge characterizations provided by Discharge Review Boards do not waive statutory bars. 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(f), (g)). Discharge characterizations provided by Boards for Correction of Military (Naval) Records do waive statutory bars. 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(e).

<sup>149</sup> 38 U.S.C. § 5303(e) (1977); 38 C.F.R 3.12(h); Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.9.

In contrast, the regulation prohibits most services from being provided to people with Other Than Honorable, Bad Conduct, or Dishonorable characterizations until they receive an individual review—a process that the VA calls a “Character of Discharge Determination” (COD).<sup>150</sup> The procedure for reviewing conduct is highly burdensome on both the VA and the service member. For the VA, it requires a separate adjudication based on a close reading of a full service record and any other evidence that the service member submits. The VA is unequipped to actually adjudicate all of these claims: although the VA requires eligibility review for about 7,000 service members discharged each year,<sup>151</sup> the VA only completes reviews for about 4,600 per year.<sup>152</sup> For the service member, it creates a major delay to receiving services. The average length of pending claims is currently 600 days,<sup>153</sup> indicating that the average time to complete one of these claims is almost four years.

The obstacles are even greater for service members seeking health care. Whereas the VBA routinely commences an eligibility review whenever a less-than-honorably discharged service member files a claim for compensation or pension, the hospital facilities of the VHA do not. Instead, the VHA regularly turns away such service members when they seek health care and treatment and does not initiate a COD Determination at all. Indeed, the VHA amended its Eligibility Determination Handbook in April of this year to remove instructions about how to initiate an eligibility determination.<sup>154</sup> In its place, the Handbook now refers generally to the “other than dishonorable” requirement but does not instruct staff to request an eligibility determination. VHA staff are left piecing together disparate regulations to figure out, for example, how to start that service member’s enrollment process and whether he or she may be eligible based on a prior term of service.<sup>155</sup> As a result, there is a de facto denial of health care for deserving service members; they will be denied by default and may believe—incorrectly—that they are categorically ineligible.

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<sup>150</sup> See Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.

<sup>151</sup> See Table 20 below and accompanying text.

<sup>152</sup> See Table 17 below and accompanying text.

<sup>153</sup> As of September 2015, the average claim pending time for End Product that include character of discharge decisions was over 600 days. This indicates that the time to completion is about 1,200 days.

<sup>154</sup> Compare Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (Nov. 5, 2009) with Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(c) (Apr. 3, 2015).

<sup>155</sup> Cf. 38 U.S.C. §§ 5100, 5102, 5107; 38 C.F.R. §§ 3.150, 17.34, 17.36(d)(1).

Even if the VHA does initiate an eligibility review, present policies prohibit VHA medical centers from providing tentative eligibility for health care while COD review is underway. When an application for health care is filed and eligibility cannot immediately be established, current regulations allow a VA facility to provide care based on “tentative eligibility” to those who will “probably” be found eligible.<sup>156</sup> But the regulation limits “tentative eligibility” to emergency circumstances and recently discharged service members, and implementing guidance excludes less-than-honorably discharged veterans from receiving tentative eligibility.<sup>157</sup> Some service members may be granted “humanitarian care,” but this is only available for emergency treatment, it is provided at the hospital’s discretion, it may be revoked at any time, and the service member must pay for any services provided.<sup>158</sup> Service members in that situation, even ones who may ultimately be found eligible, are simply unable to receive timely health care from the VA.

***E. I.** Army sniper who earned the Combat Infantryman Badge in Iraq. After one year in Iraq, he received an OTH discharge after a series of 4 arguments with his supervisor on one day. He was denied VA eligibility three times, until an attorney assisted him and a Senator intervened on his behalf.*

***K. E.** Served the Navy for five years, but a positive drug test and an off-duty citation for public drunkenness led to an OTH discharge. He is now homeless in San Francisco but unable to access VA health care.*

**B. Definition of conduct rising to the level of “dishonorable conditions” of service: 38 C.F.R 3.12(d)**

VA regulations describe what conduct shows “dishonorable conditions” as follows:

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

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<sup>156</sup> 38 C.F.R. § 17.34.

<sup>157</sup> Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(a); 38 C.F.R. § 17.34; 78 FR 28140, 28141 (May 14, 2013) (explaining that only Honorable and General discharges qualify for tentative eligibility because those are the only cases where eligibility “probably will be established”).

<sup>158</sup> 38 U.S.C. § 1784; 38 C.F.R. § 17.101.

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

(2) Mutiny or spying.

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

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

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

There are no data as to which bases are most frequently applied in Regional Office decisions. However, an analysis of all Board of Veterans' Appeals (BVA) decisions on this issue between 1992 and 2015 shows that the "willful and persistent misconduct" element is the basis for 84% of "dishonorable conditions" decisions by BVA judges.

**Table 6: Denials based on regulatory bars in BVA decisions, 1992-2015<sup>159</sup>**

38 C.F.R. § 3.12(d) criteria	Percentage
(1) OTH discharge in lieu of GCM	6%
(2) Mutiny or spying	0%
(3) Moral Turpitude	10%
(4) Willful and Persistent Misconduct	84%
(5) Aggravated Homosexual Acts	0.2%

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<sup>159</sup> Source: analysis of 999 BVA decisions issued between 1992 and 2015, on file with author. These figures do not include decisions where eligibility was denied based on the statutory bars, nor decisions where eligibility was denied without a specific factual finding under 38 C.F.R. § 3.12(c) or (d).

*1. Willful and persistent misconduct*

The “willful and persistent misconduct” bar is the most common basis for denial because it is an extremely expansive and vague standard. It plausibly encompasses almost all conduct that would lead to any form of misconduct discharge.

The VA has defined “willful misconduct” to include intentional action that is known to violate any rule, or reckless action that has a probability of doing so.<sup>160</sup> It does not require that the conduct have led to a court-martial or even a non-judicial punishment. The only substantive limitation is that “misconduct” does not include “mere technical violation of police regulations,”<sup>161</sup> and it does not include “isolated and infrequent use of drugs.”<sup>162</sup> If the misconduct is “a minor offense” then the adjudicator may consider whether overall quality of service mitigates the misconduct, as discussed below, but this does not mean that “minor” misconduct is ignored. Even minor offenses constitute “willful misconduct” that can be a basis for finding “dishonorable” service. For example, BVA decisions have justified eligibility denial in part on absences as short as 2 hours and 18 minutes,<sup>163</sup> and 30 minutes.<sup>164</sup>

***J. E.** Marine with two Iraq deployments who was diagnosed with PTSD while still in service. He was cited for talking to his sergeant with a toothpick in his mouth, and was then discharged for a single positive drug test. Denied VA eligibility for “willful and persistent misconduct.”*

The term “persistent” only means multiple incidents of misconduct, or misconduct that lasts more than one day. It may mean any sequence of any misconduct citations, even if they are not related to each other and even if they are spread out over time. For example, “willful and persistent misconduct” was found for a service member who had a non-judicial punishment in 1998 for off-duty alcohol use, a second non-judicial punishment in 1999 for visiting an unauthorized location, and a discharge in 2001 for a positive drug test.<sup>165</sup> The term “persistent”

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<sup>160</sup> 38 C.F.R. § 3.1(n)(1) (“Willful misconduct means an act involving conscious wrongdoing or known prohibited action ... (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.”).

<sup>161</sup> 38 C.F.R. § 3.1(n)(3).

<sup>162</sup> 38 C.F.R. § 3.301(c)(3).

<sup>163</sup> Title Redacted by Agency, No. 12-19246 (Bd. Vet. App. May 5, 2015).

<sup>164</sup> Title Redacted by Agency, No. 96-01792 (Bd. Vet. App. Jan. 30, 1996).

<sup>165</sup> Title Redacted by Agency, No. 04-04453 (Bd. Vet. App. Feb. 17, 2004).

has also been interpreted by some Veterans Law Judges to mean a single absence without leave lasting more than a day, effectively depriving the “persistent” term of genuine force.<sup>166</sup> Although other decisions have applied the “persistent” standard more narrowly,<sup>167</sup> the regulation permits a very expansive interpretation of this term.

The regulation provides a limited opportunity to consider the quality of overall service as a mitigating factor if discharge resulted from “a minor offense.” The Court of Appeals for Veterans Claims (CAVC) has interpreted “a minor offense” to mean only misconduct that does not “interfere[] with ... military duties.”<sup>168</sup> Because most military misconduct relates to military duties in some way, this exception is very limited. In practice, the standard for “minor offense” varies widely. One decision found that an absence of one week was “not minor,”<sup>169</sup> while another concluded that an unauthorized absence for 5 months was “minor.”<sup>170</sup> If misconduct was not “minor,” then there is no opportunity to consider overall service. For example, one BVA decision noted “exemplary service” during the first Persian Gulf War, but denied eligibility because the underlying misconduct, absence without leave of one week, was “not minor.”<sup>171</sup> Even when the misconduct is found to be “minor,” the regulation allows it to be mitigated only by service that is “meritorious.” That is a very high standard. The VA does not consider all military service as inherently meritorious: even combat service is not meritorious because that is simply the required service of an infantryman and thus not “deserving praise or reward.”<sup>172</sup> Even many years of proficient service cannot be considered as a potential mitigating factor.

In combination, the imprecise and expansive standards for the terms “willful,” “persistent,” “minor” and “meritorious” permit almost any disciplinary problems to be considered “willful and persistent misconduct.” The VA trains its staff to apply the regulation according to this highly exclusive standard. For example, its training materials on this topic state

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<sup>166</sup> See, e.g., Title Redacted by Agency, No. 00-23 239, Bd. Vet. App. (Bd. Vet. App. Sept. 11, 2001) (“[B]ecause he spent 45 days of his service time in an AWOL status, the offense essentially occurred 45 times, i.e. once for each day he was gone, it is persistent.”).

<sup>167</sup> For example, some decisions have found that an absence without leave is not “persistent” if its duration was less than 6% of the total service period. Title Redacted by Agency, No. 0108534 (Bd. Vet. App. Mar. 22, 2001) (finding 117 days of AWOL, which constituted 5.8% of the claimant’s service, not to be willful and persistent).

<sup>168</sup> See, e.g., Cropper v. Brown, 6 Vet. App. 450, 452-3 (1994).

<sup>169</sup> Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

<sup>170</sup> Title Redacted by Agency, No. 06-19120 (Bd. Vet. App. July 7, 2006).

<sup>171</sup> Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

<sup>172</sup> See, e.g., Title Redacted by Agency, No. 0309368 (Bd. Vet. App. June 19, 2009).

that “willful and persistent misconduct” is present when there are “multiple failures to be at appointed place.”<sup>173</sup>

***Orlando Tso.*** Marine rifleman who developed a drinking problem after being encouraged to join in violent and drunken hazing activities in his unit. He went to over 100 AA meetings over the course of two years, but was arrested for drinking under the influence and was given an OTH discharge after 3 years of service. Denied VA eligibility.

## 2. Moral turpitude

Internal VA materials provide some additional definition of the term “moral turpitude.” The M21-1 “Adjudication Procedures Manual” defines “moral turpitude” as “a willful act committed without justification or legal excuse [that] violates accepted moral standards and would likely cause harm or loss of a person or property.”<sup>174</sup> The Manual refers to VA General Counsel Precedential Opinion 6-87, discussing the definition of “moral turpitude,” but the M21-1 Manual incorrectly states the Precedential Opinion’s holding, which defines “moral turpitude” as conduct that “gravely violates accepted moral standards.”<sup>175</sup> The M21-1 omits the “gravely” qualifier, failing to capture high standard of misconduct implied by the term “turpitude.” The VA has proposed a new definition that further dilutes the term by removing any reference to community standards at all. The proposed Part 5 Rewrite Project would define the moral turpitude as conduct that is “unlawful, willful, committed without justification or legal excuse ... which a reasonable person would expect to cause harm or loss to person or property.”<sup>176</sup> This proposed definition removes any reference to misconduct of an amoral character, departing significantly from accepted military, criminal, and civil caselaw that limits “moral turpitude” to offenses that involve some fraudulent, base, or depraved conduct with intent to harm a person.<sup>177</sup>

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<sup>173</sup> Character of Discharge Determination Trainee Handouts, at 7 (July 2012) (on file with authors).

<sup>174</sup> Adjudication Procedures Manual *supra* note 146 pt. III.v.1.B.3.c.

<sup>175</sup> VA Gen. Counsel Precedential Op. 6-87 (Feb. 5, 1988).

<sup>176</sup> 78 Fed. Reg. 71,042, 71,172 (Nov. 27, 2013) (proposed rule to be codified at 38 C.F.R. § 5.30(f)(3)).

<sup>177</sup> See John Brooker, Evan Seamone, and Leslie Rogall, Beyond TBD: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary Or Punitive Discharge From The Armed Forces, 214 Mil. L. Rev. 1, 171 et seq. (2012) (hereinafter “Beyond TBD”).

### 3. *Aggravated homosexual conduct*

This regulatory bar singles out one class of service members based on their sexual orientation, and excludes them for conduct that might not be used to exclude other service members with heterosexual orientation. This definition notably has not changed since (1) the repeal of “Don’t Ask, Don’t Tell” and (2) the Supreme Court’s decisions in *Obergefell v. Hodges*, 135 S.Ct. 2071 (2015) and *United States v. Windsor* 133 S.Ct. 2675 (2013).

### 4. *Absence of provision for considering extenuating factors*

This regulatory paragraph contains no provision for considering extenuating or mitigating factors. The text of the regulation simply states that a discharge is considered to be “under dishonorable conditions” when any of the listed conduct is shown, without giving an opportunity to consider other factors. The “willful and persistent misconduct” bar includes a limited provision for considering overall service, as discussed above, but this does not apply to any other bars.

***Stephen Raimand.*** *Combat veteran with multiple OIF and OEF deployments. He took unauthorized absence when his wife, who had eight miscarriages, threatened to commit suicide if he went on another deployment. He returned voluntarily and was sentenced to a Bad Conduct discharge. His nightmares sometimes make him vomit in the morning and he cannot drive a car safely. The VA labels him a “non-veteran” and denies all services.*

This contrasts with other provisions, where the VA has adopted a comprehensive analysis of extenuating circumstances. The VA adopted a list of factors that might mitigate the statutory bar against services to those who were absent without leave for more than 180 days. This list of mitigating factors considers hardship service conditions, disabilities, personal stressors, age, and educational background.<sup>178</sup> But the VA did not extend that standard to its regulatory definition of

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<sup>178</sup> 38 U.S.C. § 5303(a) states that an absence without leave of 180 days or more will bar services “unless warranted by compelling circumstances.” The VA has defined that term at 38 C.F.R. § 3.12(c)(6): “The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence. (i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation. (ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be

“dishonorable conditions,” and the CAVC has held that this omission prohibits the VA from considering these factors under its “dishonorable conditions” analysis.<sup>179</sup> Therefore no regulatory provision allows adjudicators to consider these extenuating factors in their eligibility decisions.

The following Board of Veterans’ Appeals decision provides an example of how these considerations are formally excluded from the analysis under the VA’s regulatory bars:

The governing law and regulations do not provide for any mitigating factors in determining whether actions that are not minor offenses are willful and persistent misconduct. Therefore, assuming that the appellant now suffers from PTSD, his in-service marital problems and any PTSD are irrelevant.<sup>180</sup>

Similarly, the VA denied eligibility to another service member based on one fight with a noncommissioned officer and a single one-week absence, despite significant external pressures such as a PTSD diagnosis in service, “exemplary” service during the first Persian Gulf war, and having three family members murdered within the prior two years.<sup>181</sup>

***Richard Running.*** Army combat medic during invasion of Iraq, cited for “discipline, dedication, and bravery” under fire. Started to self-medicate with drugs after his return, leading to OTH discharge. He was unable to keep a job for more than 6 months after service, started to use drugs more, and ended up incarcerated. The VA labels him a “non-veteran” and denies eligibility.

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evaluated in terms of the person’s age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person’s state of mind at the time the prolonged AWOL period began. (iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.”

<sup>179</sup> *Winter v. Principi*, 4 Vet. App. 29, 32 (1993).

<sup>180</sup> *E.g., Title Redacted by Agency*, No. 12-36342 (Bd. Vet. App. Oct. 19, 2012) (“The governing law and regulations do not provide for any mitigating factors in determining whether actions that are not minor.”).

<sup>181</sup> *Title Redacted by Agency*, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

**C. Rebuttal of “dishonorable conditions” in cases of “insanity” - 38 C.F.R. § 3.12(b)**

VA regulations provide only one opportunity to consider whether mental health mitigates the discipline issues that led to discharge. Congress created an exception to the statutory bars in cases where the service member was “insane” at the time of the misconduct,<sup>182</sup> and the VA extended that exception to its regulatory bars as well.<sup>183</sup>

Although the VA adopted a regulatory definition of “insanity” that could potentially reach a range of mental and behavioral health issues,<sup>184</sup> the VA Office of General Counsel issued a Precedential Opinion that interprets the term to require a very high degree of mental impairment.<sup>185</sup> In practice, Veteran Law Judges applying the Precedential Opinion’s holding characterize the “insanity” exception as “more or less synonymous with psychosis,”<sup>186</sup> and “akin to the level of incompetency generally supporting appointment of a guardian.”<sup>187</sup> The VA has proposed to formalize this narrow interpretation by changing its regulatory definition of “insanity” to conform with the standard for criminal insanity, requiring such “defect of reason” that the person did not “know or understand the nature or consequence of the act, or that what he or she was doing was wrong.”<sup>188</sup>

***Ted Wilson.*** Marine rifleman with two purple hearts and four campaign ribbons for service in Vietnam. He was sent to combat while still 17 years old, and had a nervous breakdown and suicide attempt before his 18<sup>th</sup> birthday. He was sent back to Vietnam for a second tour involuntarily, and had a third nervous breakdown that led to an AWOL and an OTH discharge. Denied Compensation for PTSD because of his discharge.

<sup>182</sup> 38 U.S.C. § 5303(b).

<sup>183</sup> 38 C.F.R. § 3.12(b).

<sup>184</sup> “Definition of insanity. An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.” 38 C.F.R. 3.354(a). The Court of Appeals of Veterans Claims has held that this definition is lower than the criminal insanity standard used in the Model Penal Code. See Gardner v Shinseki, 22 Vet. App. 415 (2009).

<sup>185</sup> VA Gen. Counsel Precedential Op. 20-97 (May 22, 1997).

<sup>186</sup> E.g., Title redacted by agency, No. 10-16336 (Bd. Vet. App. May 3, 2010).

<sup>187</sup> E.g., Title redacted by agency, No. 15-19246 (Bd. Vet. App. May 5, 2015).

<sup>188</sup> 71 Fed. Reg. 16,464, 16,468 (Mar. 31, 2006).

The narrow scope of the “insanity” exception results in limited application to behavioral health issues such as PTSD and TBI. From 1992 to 2015, the Board of Veterans’ Appeals denied eligibility to 88% of service members who claimed PTSD. The BVA granted eligibility to only 3% of claimants on the basis of an “insanity” finding; 10% were granted eligibility for other reasons. For 24% of claimants with PTSD, the “insanity” exception was not even considered.

**Table 7: Results of “insanity” determinations by the BVA in cases where PTSD was claimed<sup>189</sup>**

	<b>% of cases involving PTSD</b>
<b>Eligibility denied – not “insane”</b>	63%
<b>Eligibility denied – “insanity” not considered</b>	24%
<b>Eligibility granted – “insane”</b>	3%
<b>Eligibility granted – other reasons</b>	10%

Three features of the regulation limit the applicability of the “insanity” exception. First, it requires that a medical doctor state that the veteran was “insane” in service,<sup>190</sup> even though this is not a clinically approved diagnostic term.<sup>191</sup> In our experience, this has made doctors reluctant to give medical opinions on this issue. Second, service members must self-identify as “insane,” which is unlikely to occur in cases of behavioral health problems such as PTSD or TBI. Third, in practice the VA rarely interprets the term “insanity” as broadly as regulation allows. Veteran Law Judges typically define the term “insanity” narrowly to include only psychoses or inability to comprehend one’s actions.<sup>192</sup> This interpretation excludes cognitive and behavioral health problems often associated with post-traumatic or operational stress that leads to misconduct discharges.

One BVA decision illustrates why the “insanity” exception has only limited applicability:

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<sup>189</sup> Data on file with authors.

<sup>190</sup> Whether a person is “insane” is a medical question that must be established by competent medical opinion. See Zang v. Brown, 8 Vet. App. 246, 254-55 (1995).

<sup>191</sup> Medical opinions relating to mental health must apply the diagnostic criteria of the Diagnostic and Statistical Manual 5th Edition. 38 C.F.R § 4.125(a). “Insane” is not a diagnosis in the DSM-5, nor in prior editions.

<sup>192</sup> E.g., Title Redacted by Agency, No. 1004564 (Bd. Vet. App. 2010) (“Generally, the predicate for insane behavior within the meaning of VA law and regulations is a persistent morbid condition of the mind characterized by a derangement of one or more of the mental faculties to the extent that the individual is unable to understand the nature, full import and consequences of his acts, such that he is a danger to himself or others.”).

Initially, the Board points out there is no claim or evidence that the appellant was insane at the time of the offenses in question that resulted in his OTH discharge. The appellant has not produced any evidence from a qualified medical doctor who has expressed an opinion that he was insane prior to, during, or after his period of AWOL... Additionally, when asked during the Board hearing, the appellant stated he was not insane. He did say that he had been harassed and that he might have been suffering from the symptoms and manifestations of PTSD, but he was not insane.<sup>193</sup>

Because of these limitations, the “insanity” exception is rarely used in practice.

#### **D. Implied requirement for “honorable” service**

Some eligibility decisions have mistakenly adopted an “honorable service” requirement. Nothing in statute or regulation requires “honorable” service. Instead, statute and regulation only require that “dishonorable” service be excluded, and military law has long established that some service is less than “honorable” without being “dishonorable.”<sup>194</sup> Nevertheless, VA adjudicators routinely state that “only veterans with honorable service are eligible for VA benefits”<sup>195</sup> and deny eligibility when service was “not honorable for VA purposes.” Some BVA decisions also explicitly adopt an “honorable service” standard, as in the following example: “[the service member’s misconduct] was not consistent with the honest, faithful, and meritorious service for which veteran's benefits are granted. Moreover, the other incidents of misconduct reflect an ongoing pattern of disciplinary offenses which were not of an honorable nature.”<sup>196</sup>

***Terrance Harvey.*** Army soldier who earned the Combat Infantryman Badge for service in the First Gulf War. On his return he started experiencing post-traumatic stress symptoms and attempted suicide. He was denied leave to be with his family, but left anyway. After a 60 day absence he returned and was given an OTH discharge. He was denied services for 20 years until an attorney helped him get a discharge upgrade; his VA eligibility application was never decided.

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<sup>193</sup> Title Redacted by Agency, No. 1008205 (Bd. Vet. App. 2010).

<sup>194</sup> See Section II.D above.

<sup>195</sup> See sample COD decision included as Appendix A.

<sup>196</sup> Title Redacted by Agency, No. 06-39238 (Bd. Vet. App. Dec. 18, 2006).

Two elements of the regulatory scheme produce this outcome. First, the regulatory definition of “dishonorable conditions” is so expansive that almost any misconduct that justifies a discharge would also justify a “dishonorable conditions” finding.<sup>197</sup> This is evident from the standards themselves, which provide so little substantive limitation on what conduct might be considered “dishonorable.” It is also shown by the decision rates: in FY2013, the VA found that service members were ineligible in 90% of all cases it reviewed.<sup>198</sup> A regulatory scheme that excludes up to 90% of service members with intermediate discharges cannot be measuring “dishonorable” service, it is measuring “honorable” service.

The second feature of VA policy that encourages the use of an implied “honorable conditions” standard is that the VA’s internal designation for eligible service is “Honorable for VA Purposes.” A service member with a discharge characterization that is not presumptively eligible under 38 C.F.R. § 3.12(a)—those with Other Than Honorable, Bad Conduct, or Dishonorable discharge characterizations—is labeled “Dishonorable for VA Purposes” in VA’s eligibility databases.<sup>199</sup> If the Character of Discharge review is favorable, their status will be changed to “Honorable for VA Purposes.”<sup>200</sup> This terminology suggests that service members must show that their service was “honorable.” Although this designation is administrative, it has been adopted by numerous adjudicators, for example Veterans Law Judges who state “when a service member receives discharge under other than honorable circumstances, VA must decide whether the character of such discharge is honorable or dishonorable.”<sup>201</sup> This binary analysis is inconsistent with statute. The 1944 statute does not require that service be “honorable”, it only requires that it be better than “dishonorable.” Nor does the statute create new definitions of the terms honorable and dishonorable “for VA purposes.” Instead, the statute requires the VA to exclude service that was “dishonorable” according to existing military law standards. The mischaracterization of service eligibility in the VA’s eligibility database likely contributes to incorrect application of eligibility criteria.

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<sup>197</sup> The authorized bases for a non-punitive administrative discharge for misconduct are provided in DODI 1332.14 ¶ 10(a) (2014).

<sup>198</sup> VA FOIA Request, on file.

<sup>199</sup> The VHA eligibility database is Hospital Inquiry (HINQ); the VBA eligibility database is Beneficiary Identification and Records Locator Subsystem (BIRLS).

<sup>200</sup> See Adjudication Procedures Manual *supra* note 146 pt. III.v.1.A.4.e.

<sup>201</sup> E.g., Title Redacted by Agency, No. 15-19246 (Bd. Vet. App. May 5, 2015).

**IV. THE CURRENT REGULATORY SCHEME IS UNJUST, INCOMPATIBLE WITH STATUTORY OBLIGATIONS, AND UNDULY BURDENSOME ON BOTH VETERANS AND THE VA**

**A. VA regulations are excluding current-era service members at a higher rate than at any other period in the nation’s history**

More service members are excluded from the VA’s care and support than Congress intended, more than the American public would expect, and more than at any point in history. This is due entirely to the VA’s discretionary eligibility regulations.

Overall, the VA decides that service was “dishonorable” in the vast majority of cases in which it conducts a COD review. In FY 2013, VA Regional Offices found service “dishonorable” in 90% of all cases (see Table 8). Board of Veterans’ Appeals decisions since 1992 have found service “dishonorable” in 87% of its cases (see Table 9). The average for all decisions, from all eras, was 85% “dishonorable” (see Table 10).

*Table 8: Character of Discharge decision outcomes at Regional Offices, FY2013<sup>202</sup>*

<b>Outcome</b>	<b>Number of decisions</b>	<b>%</b>
<b>Ineligible (“dishonorable”)</b>	4,156	90%
<b>Eligible (“other than dishonorable”)</b>	447	10%
<b>Total</b>	<b>4,603</b>	

*Table 9: Character of Discharge decision outcomes by the BVA, 1992-2015<sup>203</sup>*

<b>Outcome</b>	<b>Number of decisions</b>	<b>%</b>
<b>Ineligible (“dishonorable”)</b>	870	87%
<b>Eligible (“other than dishonorable”)</b>	129	13%
<b>Total</b>	<b>999</b>	

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<sup>202</sup> FOIA request to the VA on file with authors.

<sup>203</sup> Analysis of BVA decisions on file with authors.

**Table 10: Character of Discharge decision outcomes based on era of service<sup>204</sup>**

	Number of decisions	“Dishonorable”
<b>WWII</b>	3,600	89%
<b>Korean War</b>	6,807	85%
<b>Vietnam War</b>	35,800	78%
<b>“Peacetime”</b>	44,310	78%
<b>Gulf War</b>	19,269	71%
<b>Post-2001</b>	13,300	65%
<b>Total<sup>205</sup></b>	<b>155,416</b>	<b>85%</b>

Those figures do not paint a full picture, however, because the number of people actually excluded from VA services also depends on the percentage of veterans who *require* a review and the percentage who *receive* one. Table 11 shows that the actual exclusion rate for current-era veterans is 6.5% of all service members who completed entry level training.<sup>206</sup> This occurs because, first, the VA presumes ineligibility for the 6.8% of all service members with characterizations less than General, including the large number of people with non-punitive, administrative discharges characterized as Other Than Honorable; and then, second, the VA has completed COD reviews for only 10% of those presumptively ineligible service members (see Table 10). This leaves 6% of all Post-9/11 veterans ineligible for VA services by default, because the VA requires a review but has not conducted it. While the VA has granted eligibility to 35% of current-era veterans whose service it has reviewed, this only amounts to an additional 0.3% of all service members since so few have received a review. The bottom line is that 6.5% of current era veterans who seek health care, housing or other services will be turned away.

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<sup>204</sup> Telephone interview with Stacy Vazquez, Director, Interagency Strategic Initiatives, Department of Veterans Affairs (June 16, 2014). Data accurate as of May, 2013.

<sup>205</sup> This figure is greater than the sum of each era listed above because it includes service members discharged outside those periods, such as between the Korean War period and the Vietnam War period.

<sup>206</sup> Service members discharged during entry level training typically received an “Uncharacterized” discharge. This petition does not address the regulations that govern this type of discharge. 38 C.F.R § 3.12(k).

**Table 11: Current VA eligibility status of post-2001 service members who completed entry level training<sup>207</sup>**

	Number	% of service members
<b><i>Recognized as a “veteran”</i></b>		<b>93.5%</b>
Presumed eligible (Honorable or General)	1,668,050	93.2%
Found “other than dishonorable” by COD	4,600	0.3%
<b><i>Not recognized as a “veteran”</i></b>		<b>6.5%</b>
Found “dishonorable” by COD	8,700	0.5%
Presumed ineligible (OTH, BCD or DD, and no COD has occurred)	108,190	6%

This is the highest exclusion rate that has ever existed. Although the VA is granting eligibility to current era veterans at a somewhat higher rate than previously (see Table 10), the VA is requiring eligibility reviews for more service members than ever before. Even when eligibility was only provided to servicemembers with fully Honorable discharge characterizations, as was the case in the Second World War period immediately prior to enactment of the current standards,<sup>208</sup> the exclusion rate was only 2% because 98% received “Honorable” characterizations. We have determined exclusion rates for years since then, where data is available. Table 12 summarizes that analysis.

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<sup>207</sup> DOD FOIA Response 14-0557; telephone interview of Stacy Vazquez, Director, Interagency Strategic Initiatives, VA of Veterans Affairs on June 16, 2014.

<sup>208</sup> See Table 3 above and accompanying text. Prior to the 1944 statute, each benefit for veterans of each wartime period had different eligibility criteria. However the most recent eligibility laws enacted prior to WWII had required “honorable.”

**Table 12: Exclusion rates for selected periods of service<sup>209</sup>**

	Recognized as “veteran”			Not recognized as “veteran”		
	Presumed eligible <sup>210</sup>	Found eligible by COD <sup>211</sup>	Total	Found ineligible by COD <sup>212</sup>	Presumed ineligible, no COD	Total
<b>WWII</b> ('41-'45) <sup>213</sup>						
<i>Pre-1944 standard</i>	6,762,863	0	<b>98%</b>		131,306	<b>1.9%</b>
<i>Post-1944 standard</i>	6,775,842	400	<b>98%</b>	16	117,911	<b>1.7%</b>
<b>Korean War</b> <sup>214</sup> ('50-'55)	4,004,394	997	<b>97%</b>	5,810	130,707	<b>3.3%</b>
<b>Vietnam War</b> <sup>215</sup> ('65-'75)	9,047,198	7,800	<b>97%</b>	28,000	232,180	<b>2.8%</b>
<b>“Peacetime”</b> <sup>216</sup> (76-90)	6,857,655	44,310	<b>96%</b>	34,630	277,111	<b>4.3%</b>
<b>GWOT</b> <sup>217</sup> ('02-'13)	1,668,050	4,600	<b>93%</b>	8,700	108,190	<b>6.5%</b>

The goal of the G.I. Bill of Rights was to expand access to veteran services for service members—the data show that the regulations do exactly the opposite. A dishonorable discharge characterization was and remains a rare punishment. By adopting “other than dishonorable conditions” as its eligibility standard, Congress deliberately chose to exclude people only rarely.

<sup>209</sup> Complete discharge characterization data is not available for 1946-1950 and 1991-2000; COD rates are not available for 1956-1960.

<sup>210</sup> Service members who received characterizations other than Honorable, General Under Honorable Conditions, or Under Honorable Conditions.

<sup>211</sup> Telephone interview with Stacy Vazquez, Director, Interagency Strategic Initiatives, Department of Veterans Affairs, June 16, 2014.

<sup>212</sup> *Id.*

<sup>213</sup> Staff of H. Comm. on Veterans’ Affairs, Eligibility for Veterans’ Benefits Pursuant to Discharge Upgradings, Hearing Before the Committee on Veterans’ Affairs on S. 1307 and Related Bills, Rep. No. 97-887, at 600-01 (Comm. Print 1977).

<sup>214</sup> Staff of H. Comm. on Armed Servs., Administrative Discharge Procedures and Discharge Review, Hearings on H.R. 52 Before the Subcommittee on Military Personnel of the Committee on Armed Services, Rep. No. 95-79, at 198-205 (Comm. Print 1975).

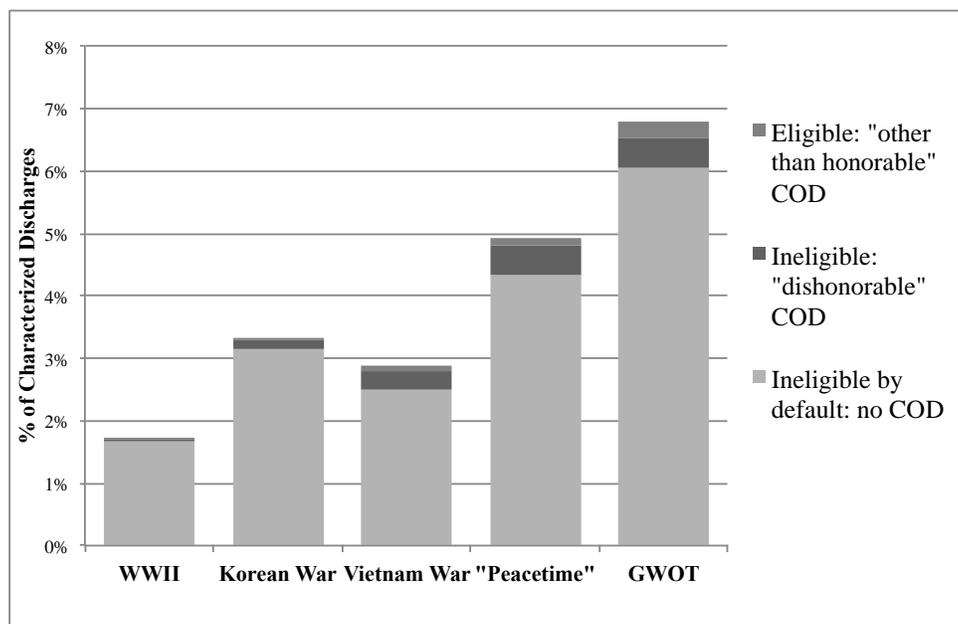
<sup>215</sup> *Id.*

<sup>216</sup> U.S. Census Bureau, Statistical Abstract of the United States, at Table 622 – Discharges of Enlisted Personnel, by Type: 1965 to 1979 (1980); U.S. Census Bureau, Statistical Abstract of the United States, at Table 561 – Discharges, Desertion and Absent-Without-Authority Rates for Military Personnel: 1970 to 1988 (1988); DOD FOIA Request No. 09-F-1815, Administrative Separations by Character of Service and Reason. Punitive discharge rates for 1981, 1999 and 2000 were interpolated from adjacent years’ rates.

<sup>217</sup> DOD FOIA Response 14-0557.

This was a more inclusive standard than had prevailed in prior veteran benefit laws, and Congress knew that its new standard would expand eligibility. The Congressional record provides multiple examples of legislators explicitly acknowledging and justifying this decision, as recognized by the Federal Circuit's binding interpretation of the statute as a "liberalizing" rule.<sup>218</sup> The VA's current regulations violate Congress's intent by transforming that less stringent standard into a more restrictive standard, increasing more than three-fold the share of service members that are unable to receive veteran services.

**Figure 1: Service members excluded from VA benefits, selected periods<sup>219</sup>**



The historical increase in exclusion rates is due largely to the fact that VA regulations have not adapted to changes in how military branches use the administrative discharge system. When the statute was enacted, the military justice system prioritized retention and retraining.<sup>220</sup> Half of the soldiers who were sentenced to a dishonorable discharge by general court-martial

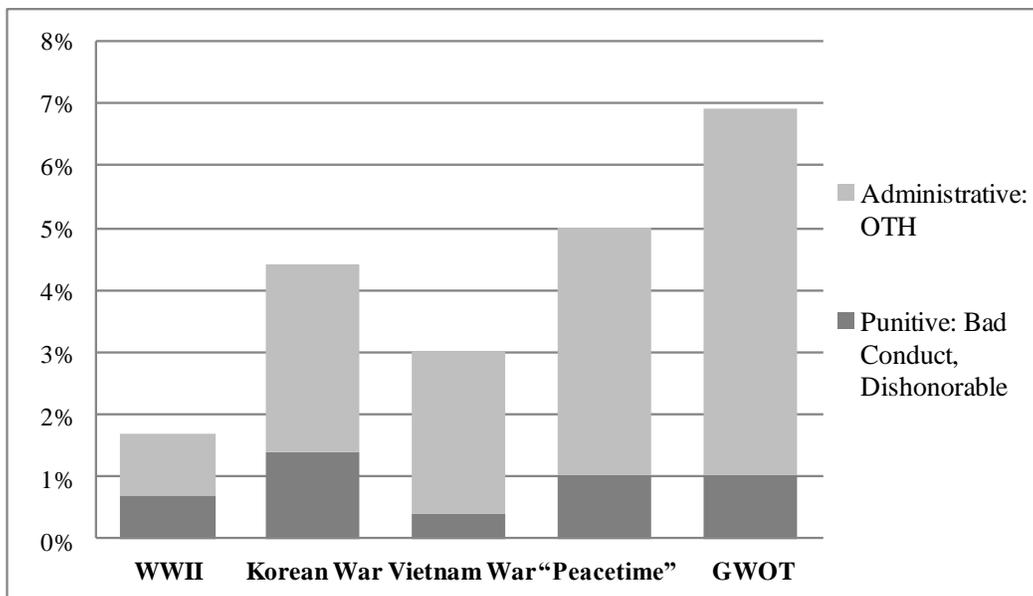
<sup>218</sup> "The current language of the statute derives from the Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284-301 (1944). In this enactment, Congress liberalized the discharge eligibility requirement to give the VA greater discretion in determining whether an individual's discharge was issued under 'dishonorable conditions.'" Camarena v. Brown, No. 94-7102, 1995 U.S. App. LEXIS 16683, at \*8 (Fed. Cir. July 7, 1995) (emphasis added).

<sup>219</sup> Sources: see Table 12.

<sup>220</sup> For a discussion of the history of rehabilitation and retention policies in the military, see Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 Mil. L. Rev 1, 40 et seq. (2011).

during WWII had their sentences suspended so that they could go on to earn an Honorable discharge.<sup>221</sup> Over time, the military services gradually adopted more exclusive standards. A major change happened after 1975, when the draft was repealed and the military shifted to an all-volunteer force. The professionalized volunteer military has adopted low- or zero-tolerance policies,<sup>222</sup> even for issues like off-duty driving while intoxicated that have no direct bearing on military service,<sup>223</sup> resulting in more frequent administrative separations for conduct that does not approach dishonorable characterization. Current-era veterans are not more dishonorable than those of prior eras: the rate of punitive discharges for misconduct has stayed nearly the same throughout this period (see Figure 2). Instead, administrative discharges for misconduct have increased simply because the military is more likely to discharge service members for minor or moderate discipline problems.

**Figure 2: Separations related to discipline, by type, selected periods<sup>224</sup>**



<sup>221</sup> *Id.* at 78.

<sup>222</sup> See, e.g., Navy Alcohol and Drug Abuse Prevention and Control, OPNAVINST 5350.4D ¶ 6.h (June 4, 2009) (“Navy’s policy on drug abuse is ‘zero tolerance.’ Navy members determined to be using, possessing, promoting, manufacturing, or distributing drugs and/or drug abuse paraphernalia ... shall be disciplined as appropriate and processed for [Administrative Separation] as required.”).

<sup>223</sup> See, e.g., C.H. Oliver, Marine Heavy Helicopter Squadron 362 Commanding Officer’s Driving Under the Influence (DUI) Policy, <http://www.1stmaw.marines.mil/Portals/65/Docs/MAG-24/HMH-362/HMH-362%20DUI%20Policy.docx> (last accessed Dec. 16, 2015).

<sup>224</sup> See Table 12 above for data sources.

This increase in separations for minor or moderate misconduct has caused the VA's presumptive ineligibility standard to depart dramatically from Congress's intended standard. This is shown both by the aggregate exclusion data cited above, and by comparing the VA's regulatory exclusion criteria with the statutory exclusion criteria. Congress explained that it intended to discharge only service members whose misconduct was of similar severity to what it listed in its statutory bars.<sup>225</sup> While Congress recognized that the actual exclusion rate might be higher than the statutory exclusion rate, they should be similar. They are not. For discharges in FY2011, the statutory bars require exclusion of 1% of service members.<sup>226</sup> This is similar to the historical punitive discharge rate, confirming that the incidence of misconduct that Congress intended to exclude has not changed. But the VA's presumptive ineligibility standard now excludes an additional 5.5% over the number excluded by statute. This represents an extreme departure from statutory guidance.

The VA has dramatically increased the exclusion of service members, despite Congressional intent to expand access to readjustment services. This is the result of the VA's presumptive exclusion of servicemembers with administrative, non-punitive discharges for misconduct, a category that Congress intended to receive eligibility and that the military branches have increasingly relied upon to manage minor discipline issues. To reach the exclusion rates that Congress intended, and the exclusion standard that Congress intended, the VA will need to admit most or all veterans with Other Than Honorable characterizations.

**B. The regulations are an impermissible interpretation of statute because they do not adopt military “dishonorable” discharge standards**

The VA only has authority to adopt rules implementing the Servicemen's Readjustment Act of 1944 that are reasonable interpretations of statute. Regulations “must always “give effect to the unambiguously expressed intent of Congress.”<sup>227</sup> Here, Congress has unambiguously circumscribed VA authority to exclude service members to those whose conduct merited a dishonorable discharge characterization.<sup>228</sup> The VA's current regulations exceed the

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<sup>225</sup> See Section II.C.1 above.

<sup>226</sup> See Table 1 above and accompanying text above.

<sup>227</sup> Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014) (citation omitted).

<sup>228</sup> See Part II.A above.

Department's authority because they exclude service members whose conduct would not merit a dishonorable discharge characterization.

Part II.B of this Petition described the conduct that merits a dishonorable discharge characterization under standards in place when Congress enacted this statute and under current standards. It was a penalty reserved for the most severe misconduct. The authorities discussed in that section identified three factors that determine when a dishonorable characterization may be warranted:

Based on the nature of the offense: cases of rejection of military authority, crimes of moral turpitude, or civilian felonies;

Based on repeated discipline problems: where there were at least three convictions for misconduct within one year; and

Not where mitigating factors are present: mitigating factors include duration of service, quality of service, hardship conditions of service, disabilities, age, education level, extenuating circumstances.

Three features of the current regulation are incompatible with this statutory standard: (1) the “willful and persistent” bar as written and as applied denies eligibility based on conduct that would not justify a dishonorable characterization; (2) the regulation does not permit consideration of mitigating factors, including overall service, for the vast majority of cases; and (3) the regulations presume dishonorable conduct for non-punitive, administrative discharges for misconduct.

*1. The “willful and persistent misconduct” bar encompasses conduct that would never qualify for a dishonorable characterization.*

The exclusion for “willful and persistent” misconduct is by far the most common basis for denying eligibility<sup>229</sup>—and it departs grossly from military-law standards for the types of repeated misconduct that would justify a dishonorable characterization. Its use renders the entire scheme defective.

As discussed in Section III.B.1 above, the primary elements of the regulation—willfulness and persistence—include no substantive minimum standard of misconduct. It can be

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<sup>229</sup> See Table 6 above.

triggered by issues as minor as reprimands for arriving late to formation,<sup>230</sup> and can involve unrelated offenses spread out over the course of many years. It does not exclude minor misconduct, although it does allow minor misconduct to be offset by otherwise exceptional performance. Its definition of “minor” only requires the VA to overlook conduct that does not “interfere with military duties.”

In contrast, military law strictly limits when a dishonorable characterization may be provided based on repeated low-level misconduct.<sup>231</sup> The 2012 Manual for Courts-Martial authorizes a dishonorable characterization when there have been three convictions within the prior year. This standard limits both the severity and the timing of misconduct that might justify a dishonorable characterization. Under military law, as interpreted by the Supreme Court, an offense that leads to a non-judicial punishment (UCMJ Article 15) is a minor offense. Therefore the requirement for three court-martial convictions ensures that minor offenses cannot lead to a dishonorable characterization. Its requirement for those convictions to arise within one year prevents service members from being judged “dishonorable” based on isolated mistakes over the course of several years. The 1943 Manual for Court-Martial permitted a dishonorable characterization after three convictions where each offense was eligible for a dishonorable characterization or after five offenses where each offense was not eligible for a dishonorable characterization. The VA’s original regulatory standard for “dishonorable conditions” adopted this standard by only considering misconduct that had resulted in a court-martial conviction.

The incompatibility between the “willful and persistent” regulatory bar and its authorizing statute is shown most clearly by how the regulation treats periods of absence without leave. Congress stated explicitly in the legislative history, and implicitly in the structure of the statute, that the “dishonorable conditions” standard should exclude behavior similar to what it listed in its statutory bars.<sup>232</sup> In the statutory bars, Congress provided a specific standard for how much absence without leave was sufficiently severe to forfeit eligibility: at least 180 days, and even then it can be overlooked if the absence was warranted by compelling circumstances.<sup>233</sup> In

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<sup>230</sup> Character of Discharge Determination Trainee Handouts, at 7 (July 2012) (on file).

<sup>231</sup> See Section II.C.3 above.

<sup>232</sup> See Section II.C.1 above.

<sup>233</sup> 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c)(6).

doing so, Congress itself drew the line between AWOL that was severe enough to merit separation, and conduct that was severe enough to also warrant forfeiture of readjustment services. The statute speaks clearly “to the precise question at issue,” and the VA “must give effect to the unambiguously expressed intent of Congress.”<sup>234</sup> Indeed, as the Supreme Court has explained, “[i]t is hard to imagine a statutory term less ambiguous than ... precise numerical thresholds.”<sup>235</sup> Yet the CAVC has interpreted the “willful and persistent” regulatory standard to be satisfied with periods of absence without leave of only thirty days,<sup>236</sup> and the BVA has found an absence of one week to be willful and persistent<sup>237</sup>—entirely eclipsing the statutory 180-day standard. By “replac[ing] those numbers with others of its own choosing, [the VA has gone] well beyond the ‘bounds of its statutory authority.’”<sup>238</sup>

Rather than adopt the military standard for a “dishonorable” characterization, the “willful and persistent” regulation more closely replicates the standard for an Other Than Honorable characterization: a non-punitive, administrative discharge *two* levels above “Dishonorable.” The lowest criteria that can justify an Other Than Honorable characterization under military regulation is “Minor Disciplinary Infractions: A pattern of misconduct consisting solely of minor disciplinary infractions.”<sup>239</sup> Like the “willful and persistent” regulation, this does not require that misconduct rise above the level of minor misconduct, it does not require any court-martial proceedings, it does not require that the offenses occur within any specific timeframe, and it can result in a higher characterization if service was “honest and faithful ... [and] the positive aspects of the enlisted Service member’s conduct or performance of duty outweigh negative aspects.”<sup>240</sup> By hewing closely to the lowest standard for an Other Than Honorable characterization, the “willful and persistent” regulation plausibly excludes every service member with an Other Than Honorable characterization. This standard is facially incompatible with Congressional intent to

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<sup>234</sup> Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

<sup>235</sup> Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014).

<sup>236</sup> See, e.g., Winter v. Principi, 4 Vet. App. 29, 32 (1993).

<sup>237</sup> Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. Aug. 18, 1997).

<sup>238</sup> Id. (citation omitted).

<sup>239</sup> DoDI 1332.14, Enclosure 3 ¶ 10.a.1 (Jan. 27, 2014).

<sup>240</sup> Id., Enclosure 4 ¶ 3.b.2.b (referenced by Enclosure 3 ¶ 10.c).

expand eligibility to service members with administrative, non-punitive discharges for misconduct.<sup>241</sup>

There are certainly VA adjudicators who produce fair outcomes by inferring substantive standards that do not exist in the regulations. They may disregard discipline issues in the record, or conclude that certain discipline issues are insufficient to justify exclusion. For example, one Veterans Law Judge explained why he was granting eligibility to a servicemember with several absences, including an absence of eighteen days:

It is apparent that the appellant was out of place in a military environment, and it was entirely appropriate that he be administratively separated from service because of this. However, his conduct in service was not so egregious that he should be disqualified from receiving VA benefits.<sup>242</sup>

This is exactly the analysis that led Congress to create its “other than dishonorable” standard: some misconduct justifies separation but does not justify withholding readjustment services. However, the Veterans Law Judge made this argument to explain an outcome that the regulations did not require, or potentially even permit. Data on decision outcomes show that this type of exceptional analysis does not happen often. Numerous BVA decisions have denied eligibility due to similar or less severe misconduct because they followed the regulations as written—as, for example, the case of a veteran with “exceptional” service in the Persian Gulf, a PTSD diagnosis in service, and multiple deaths in his family, due to a one-week unauthorized absence.<sup>243</sup> While the first example granting eligibility is a correct application of statute, the second example denying eligibility is a correct application of the regulation—but a violation of the statute. A regulation that is facially incompatible with its organic statute is not remedied because adjudicators sometimes construe, or outright misapply, the regulation in a manner that it renders it lawful.

Data on VA decisions support this analysis. In FY2013, VA Regional Offices denied eligibility to 90% of people with characterizations less than “under honorable conditions”; the denial rate for all appeals since 1992 is 87%. Rather than exclude the people who should have

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<sup>241</sup> See Section II.D above.

<sup>242</sup> Title Redacted by Agency, No. 02-07752 (Bd. Vet. App. July 12, 2002).

<sup>243</sup> Title Redacted by Agency, No. 97-28543 (Bd. Vet. App. August 18, 1997).

received a dishonorable characterization, the VA is only including the people who should have received an honorable characterization. This is antithetical to Congress's statutory instruction.

2. *The regulatory definition of "dishonorable conditions" does not consider mitigating circumstances such as overall service, extenuating circumstances, or the service member's age.*

Military law permits a dishonorable characterization only after considering a broad range of mitigating factors, to include age, education, personal circumstances, work performance, quality and duration of service, and health factors.<sup>244</sup> Because the regulatory standard permits almost none of these to be considered for most service members, it is an impermissible interpretation of the governing statute.<sup>245</sup>

The regulation permits only one factor to be considered in mitigation—overall quality of service—and it permits this to be considered only for the "willful and persistent" regulatory bar, only when the "willful and persistent" misconduct consisted of "a minor offense."<sup>246</sup> This limited scope for any mitigating conditions departs significantly from the standard under military law which requires a consideration of a wide range of mitigating factors before imposing a dishonorable characterization. It also departs from Congressional intent as shown in the examples given by legislators of conduct that they believed should result in eligibility.

The failure of regulations to account for mitigating circumstances is shown by how combat deployments fail to influence the outcome of Character of Discharge decisions. Congress specifically stated that combat veterans should receive veteran services even if they are guilty of unexcused absence, violations of military regulations and substance abuse.<sup>247</sup> Under current regulations, however, contingency and combat deployments appear to have little influence on whether service is considered "other than dishonorable."

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<sup>244</sup> See Section II.C.3 above.

<sup>245</sup> See Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2013) ("[A]n agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." (quotation marks, citation and alteration omitted)).

<sup>246</sup> See Section III.B.4 above.

<sup>247</sup> House Hearings on 1944 Act, *supra* note 28, at 417.

**Table 13: Results of BVA COD decisions for service members with selected contingency deployments<sup>248</sup>**

	% “dishonorable”
All service members	87%
Vietnam deployment	85%
Any combat service	77%
OIF/OEF deployment	65%

Vietnam deployments have had no statistically significant impact on BVA evaluations of service quality. Combat service and post-9/11 deployments had only marginal effects: two out of every three service members with OEF/OIF deployments, and three out of every four with combat service, were so “dishonorable” under existing regulations that they forfeit recognition as a “veteran.” This contradicts the express intention of Congress, to say nothing of public expectations for how the VA should treat former service members.

The results are even more striking if mental health is removed from the analysis. Cases where mental health may have contributed to behavior deserve special consideration, discussed in Section IV.C below. However, an assessment of overall service should take into account hardship service, even if it does not result in a mental disability. Setting aside cases where the service member claimed that PTSD was a factor, the data shows that hardship service had almost no impact on BVA eligibility decisions, and in some cases *hardship service made the BVA less likely to grant eligibility*.

**Table 14: Results of BVA COD decisions for selected service members who did not claim existence of PTSD<sup>249</sup>**

	% “dishonorable”
Vietnam deployment	92%
All service members	89%
Combat service	85%
OIF/OEF deployment	70%

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<sup>248</sup> Analysis of all Board of Veterans’ Appeals decisions between 1992 and 2015, downloaded from U.S. Dep’t of Veterans Affairs, [The Board of Veterans’ Appeals Decision Search Results](http://www.index.va.gov/search/va/bva.jsp), <http://www.index.va.gov/search/va/bva.jsp> on September 10, 2015.

<sup>249</sup> Id.

The absence of mitigating factors within the VAs' discretionary criteria contrasts with the existence of mitigating factors under one of the statutory bars. Congress barred services to those who were absent without leave for more than 180 days unless the absence was "warranted by compelling circumstances."<sup>250</sup> The VA defined "compelling circumstances" by regulation, instructing adjudicators to look at the age, judgment, education level, service history, and health conditions of the service member to decide whether "compelling circumstances" existed, and to consider those circumstances from the perspective of the service member at that time.<sup>251</sup> The VA did not extend this "compelling circumstances" analysis to its regulatory bars; as a result, the VA is prohibited from considering those factors when deciding whether conduct was "dishonorable."<sup>252</sup>

Some VA adjudicators, recognizing the injustice and inconsistency of the regulatory scheme, take mitigating factors into account even though regulations do not permit it. For example, one Veterans Law Judge felt compelled to evaluate mitigating circumstances "in an effort of fairness":

The Board notes that the "compelling circumstances" exception does not apply to 38 C.F.R. § 3.12(d)(4). Even so, as it appears that his February 1970 to October 1970 AWOL offense was a primary reason for his separation, the Board will, in an effort of fairness, review the record to determine whether the appellant's AWOL was based on "compelling circumstances" as understood by VA.<sup>253</sup>

Although adjudicators should be commended on applying the spirit of the law, rather than the letter of the regulation, the spontaneous goodwill of adjudicators does not remedy facially impermissible regulations. At best, it creates arbitrary and inconsistent outcomes, itself a regulatory deficiency discussed in section IV.D below.

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<sup>250</sup> 38 U.S.C. § 5303(a)

<sup>251</sup> 38 C.F.R. § 3.12(c)(6)(i), (i), (iii).

<sup>252</sup> *Winter v. Principi*, 4 Vet. App. 29 (1993).

<sup>253</sup> Title Redacted by Agency, No. 09-30611 (Bd. Vet. App. Aug. 14, 2009).

3. *The regulations flip the presumption of eligibility, improperly excluding more and more service members over time*

Congress instructed the VA to grant eligibility to service members with intermediate characterizations—less than Honorable but better than Dishonorable—unless that characterization was granted due to an error or omission by the military.<sup>254</sup> In effect, Congress presumed that intermediate characterizations were properly issued and then authorized the VA to rebut the presumption.<sup>255</sup> The VA’s regulations reverse this. It has created a rebuttable presumption of *ineligibility* for characterizations that Congress decided should generally be *eligible*, turning Congressional intent on its head.

This presumption exist both in law and in fact. It exists in law because servicemembers with Other Than Honorable discharges—administrative, non-punitive discharges for conduct that did not result in a court-martial—are classified as “Dishonorable for VA Purposes” unless and until they successfully show that their service was “Honorable for VA Purposes.”<sup>256</sup> A veteran with an OTH discharge, even one that is disabled, that served multiple enlistments, that deployed to combat, is ineligible until he or she proves eligibility. The presumption also exists in fact, because denial rates of 90%, and reaching 100% in some Regional Offices, show that the VA places a high burden of proof on service members to overcome an assumption of ineligibility.

The effect of this error was relatively minor when military services did not use administrative, non-punitive discharges as frequently as they do today. As discussed in section IV.A above, at the time of the enactment of the G.I. Bill, it was relatively uncommon for military services to give administrative discharges for minor or moderate misconduct. Because military service used this discharge characterization rarely, the VA’s reversed presumption impacted relatively few people. Over time, and particularly after the end of the draft, the use of Other Than Honorable discharges to separate people for minor or moderate misconduct has increased dramatically, now representing twice as many service members as in 1964, and six times as many as in 1944. Now, nearly 6% of all service members receive administrative, non-punitive

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<sup>254</sup> See Section II.B above.

<sup>255</sup> See Section II.D above.

<sup>256</sup> See Section III.D above.

discharges for misconduct, and the effect of the reversed presumption has ballooned. That controverts statutory intent and therefore must be revised.

**C. The regulations fail to account for behavioral health issues such as PTSD or TBI**

A dishonorable discharge characterization can only be issued after considering whether mental health conditions mitigate the misconduct. It is deeply unfair to exclude service members for behavior that is symptomatic of mental health conditions acquired in service.

It is well established that PTSD and operational stress can lead to behavior changes that military commanders incorrectly attribute to misconduct alone. PTSD, TBI, and Major Depression produce behavioral dysfunction through an exaggerated startle response, inability to control reflexive behavior, irritability, attraction to high-risk behavior, or substance abuse.<sup>257</sup> Some treatments induce fatigue or lethargy that also interfere with basic functioning. In fact, interference with social and occupational functioning is a primary measure of the severity of these conditions.<sup>258</sup> For service members on active duty, these behavioral disorders may result in infractions of unit discipline, and military services often do not treat these disciplinary infractions as symptoms of mental health risk: a 2005 study of Marines who deployed to Iraq showed that those diagnosed with PTSD were eleven times more likely to get misconduct discharges than those who did not have a diagnosis.<sup>259</sup> Recent press reports provide many examples of service members with early mental health trauma where their behavior in service was managed as a discipline problem rather than a mental health problem.<sup>260</sup> Service members

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<sup>257</sup> James et al., Risk-Taking Behaviors and Impulsivity Among Veterans With and Without PTSD and Mild TBI, *Mil. Med.*, 179, 4:357 (2014); Elbogen et al., Violent Behavior and Post-Traumatic Stress Disorder in US Iraq and Afghanistan Veterans, *British J. Psychiatry*, 204, 368-75 (2014); Tateno et al., Clinical Correlates of Aggressive Behavior After Traumatic Brain Injury, *J. Neuropsychiatry & Clinical Neurosciences* (2003).

<sup>258</sup> See General Ratings Formula for Mental Disorders, 38 C.F.R. § 4.150 (2009).

<sup>259</sup> R.M. Highfill-McRoy et al., *supra* note 112.

<sup>260</sup> Jeremy Schwartz, "Bad Paper" Discharges Can Stymie Veterans' Health Care: Diagnosed with Post-Traumatic Stress Disorder Before He Was Kicked Out of Marines for Failing a Drug Test Without Counseling, *Austin Statesman* Oct. 3, 2010; Dave Philipps, Other than Honorable, *Colorado Springs Gazette*, May 19, 2013; Hal Bernton, Troubled Veterans Left Without Health-Care Benefits, *Seattle Times*, Aug. 11, 2013; Quil Lawrence, Veterans and Other than Honorable Discharges, *Nat'l Pub. Radio* (2013); Daniel Zwerdling, Missed Treatment: Soldiers with Mental Health Issues Dismissed for "Misconduct", *Nat'l Pub. Radio* (Dec. 4, 2015).

“at mental health risk” are 32% more likely to be separated from service within a year of deployment than service members not “at mental health risk.”<sup>261</sup>

The current regulatory scheme does not take into consideration the types of mental and behavioral health problems that are most likely to cause disciplinary issues leading to discharge. The regulatory scheme provides only one opportunity for considering mental health as a mitigating factor, the “insanity” exception. As discussed above,<sup>262</sup> the “insanity” exception is inadequate because (1) it requires medical personnel and service members to characterize behavior as “insane,” something that is not supported by psychological practice and is not common for people to do; and (2) the “insanity” exception as applied by Veteran Law Judges is so stringent that it in practice excludes the types of behavioral health problems commonly associated with PTSD, TBI, and operational stress: irritability, aggressiveness, self-medication with alcohol or drugs, self-harm or risk-seeking behavior. As a result, the “insanity” exception does not adequately account for common behavioral health problems that often explain in-service misconduct. The BVA found that the service member was “insane” in only 3% of cases where PTSD was claimed; in 24% of PTSD-related claims no “insanity” determination was made at all.<sup>263</sup>

Because the regulatory provision for “insanity” is so narrow, mental health appears to have little effect on eligibility decision outcomes. In cases where the service member alleged the existence of some mental health condition, the BVA found “dishonorable” service 84% of the time, which is scarcely different from the global average of 87% for all COD decisions.<sup>264</sup> The rates for specific conditions, including PTSD, are similar. The rate in cases of TBI is lower, however it still shows that three out of every four service members whose misconduct may be attributed to TBI are nevertheless denied eligibility.

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<sup>261</sup> C.S. Milliken, J.L. Auchterlonie & C.W. Hoge, Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning from the Iraq War, *J. Am. Med. Ass’n* (2007).

<sup>262</sup> See Section III.C above.

<sup>263</sup> See Table 7 above and accompanying text.

<sup>264</sup> This includes PTSD, TBI, schizophrenia, schizoaffective disorder, personality disorder, adjustment disorder, depression and anxiety.

**Table 15: BVA COD decision rates for service members who allege selected mental health conditions, 1994-2015**

Claimed mental health condition	Percent “dishonorable”
Average for all COD decisions	87%
Personality Disorder or Adjustment Disorder	84%
Any Mental Health condition	84%
Post-Traumatic Stress Disorder	81%
Traumatic Brain Injury	72%

The inadequacy of current regulations is even more clear when mental health is combined with hardship deployment or combat service. BVA decisions found that service was “dishonorable” for nearly 3 out of every 4 combat veterans with PTSD. That exceptionally high rate of disqualification not only violates Congress’s intent but is also exceedingly poor public policy. Those are the veterans *most* in need of the mental health and medical services Congress intended to provide. And leaving so much service-acquired PTSD untreated poses risks both to the former service members and to the public at large.<sup>265</sup>

**Table 16: BVA COD decision rates for service members who allege PTSD, 1994-2015**

	Percent “dishonorable”
With combat service	73%
Contingency deployment <sup>266</sup> without combat service	93%

In some of these cases the mental health condition was identified only by self-reported symptomology, not a medical opinion. Thus, some of these claimed conditions may not in fact have existed at the time of misconduct. However, if even a fraction of these assertions were correct, and if the regulations were taking those conditions into account, then there would be a

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<sup>265</sup> See Evan R. Seamone, Dismantling America’s Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces, 37 *Nova L. Rev.* 479 (2013).

<sup>266</sup> Includes Vietnam, Grenada, Somalia, Iraq, and Afghanistan. Does not include Korea, because it was not possible to reliably distinguish wartime deployments to Korea from peacetime deployments.

substantial difference in exclusion rates for people claiming mental health conditions. There is not.

This is inconsistent with other VA regulations that relate to PTSD and behavior change. The VA recognizes that PTSD can lead to behavior changes including substance abuse, conflicts with colleagues, and avoidance of colleagues or work spaces.<sup>267</sup> In fact, a veteran can use evidence of this type of discipline problem as proof that they acquired PTSD in service in order to show service-connection for purposes of disability benefits.<sup>268</sup> Perversely, if those symptoms were so severe that the discipline problems led to an administrative separation for misconduct, the VA would likely characterize the service as “dishonorable” and deny eligibility. Similarly, the VA recognizes that mental health problems can present a “compelling circumstance” that would exonerate a violation of the statutory bar in cases of AWOL longer than 180 days,<sup>269</sup> but if that resulted in an absence of *less than* 180 days then VA regulations do not consider mental health and eligibility would most likely be denied. That result is neither permissible nor rational.

In order to remedy these deficiencies, the VA should adopt a provision providing for consideration of mental health as potential mitigation apart from the “insanity” exception, specifically instruct adjudicators to consider behavioral health issues and operational stress, and consider a medical opinion to be probative but not required.

#### **D. Overbroad and vague regulations produce inconsistent outcomes**

The regulations’ broad and vague criteria produce profoundly inconsistent results. The degree of variation is so broad that the standards must be considered impermissibly arbitrary and capricious.

The sections above provided examples of contradictory results relating to what constitutes “minor” offense, how long of an absence is “persistent,” whether the “insanity” exception is invoked when a person claims a mental health condition, and how severe misconduct must be to justify exclusion.<sup>270</sup> Inconsistency in individual decisions is most clear in

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<sup>267</sup> 38 C.F.R § 3.304(f)(5).

<sup>268</sup> Id.

<sup>269</sup> 38 C.F.R § 3.12(c)(6)(ii).

<sup>270</sup> See Section **Error! Reference source not found.** above.

cases of absence without leave, because the severity of the offense is quantifiable and therefore comparable. There are extreme variations in outcomes: for example, one BVA decision has found that an unauthorized absence of more than 500 days is not “willful and persistent misconduct,”<sup>271</sup> but another BVA decision has found that an absence of only 32 days was “willful and persistent misconduct.”<sup>272</sup> Veterans’ advocates also see wide and unexplainable differences in how cases are decided, in particular wide variation in how mental health, drug use, and extenuating circumstances are accounted for, if at all.

The VA has formally acknowledged this inconsistency. In hearings before the House Armed Services Committee, which was considering changes to DOD administrative discharge rules, a VA General Counsel representative discussed how the VA treats different characterizations. The General Counsel representative acknowledged that its regulations were producing inconsistent results:

[Congressman] White: Does the Veterans’ Administration codify the criteria at all for these to be determined judgments or are these strictly human judgments?

[VA Associate General Counsel] Warman: We do have a regulation that is very general.

White: So there is a great room for variance?

Warman: Yes, there is.<sup>273</sup>

The VA General Counsel made a similar statement to the House Veterans Affairs Committee in 1977 when trying to explain what kinds of conduct would result in a denial of eligibility:

One of the problems that we have frankly is that these terms are very broad and very imprecise.<sup>274</sup>

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<sup>271</sup> Title Redacted by Agency, No. 12-32892 ( Bd. Vet. App. Sept. 24, 2012).

<sup>272</sup> Winter v. Principi, 4 Vet. App. 29, 32 (1993).

<sup>273</sup> Staff of H. Comm. on Armed Servs. , Hearings on H.R. 523 to Limit the Separation of Members of the Armed Forces under Conditions Other Than Honorable, Rep. No. 92-23, at 6009-10 (Comm. Print 1971).

<sup>274</sup> Staff of S. Comm. on Veterans Affairs, Eligibility for Veterans’ Benefits Pursuant to Discharge Upgradings, Rep. No. 97-387, at 355 (1977) (quoting statement by VA Gen. Counsel McMichael to the H. Comm. on Veterans Affairs).

But the VA has not done anything in the subsequent four decades to remedy this acknowledged problem.

Arbitrariness is also shown by wide differences between Regional Offices. In FY2013, Regional Offices adjudicated 4,603 COD decisions, and found that service was “other than dishonorable” in 10% of cases.<sup>275</sup> However, in the Los Angeles Regional office this figure was 0%. In Muskogee it was 2%, in San Diego it was 18%, in Boston it was 31%. These regional disparities have persisted for decades.<sup>276</sup>

**Table 17: Selected Regional Office COD decisions, FY2013<sup>277</sup>**

Regional Office	Number of COD decisions	% found “dishonorable”
Los Angeles	80	100%
Muskogee	100	98%
Nashville	132	98%
Cleveland	125	95%
St. Petersburg	400	91%
<b>Average</b>		<b>90%</b>
Buffalo	139	86%
Philadelphia	258	84%
San Diego	99	82%
Boston	39	69%
All	4,603	90%

Similarly, published decisions by the Board of Veterans’ Appeals show a wide disparity in outcomes between adjudicators. Looking only at decisions by members of the Board who have decided over ten such cases, the rate of “dishonorable” findings ranges from 55% to 100%.

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<sup>275</sup> FOIA response, available on file with the authors.

<sup>276</sup> See 123 Cong. Rec. 1657 (1977) (statement of Sen. Hart) (“For example, the Denver Regional Office has indicated that in the adjudication of other-than-honorable discharge cases in 1975, only 10 percent were ruled eligible for benefits. The Minnesota VA Regional Office, on the other hand, ruled that 25 percent of those veterans with other-than-honorable discharges were eligible for VA benefits.”).

<sup>277</sup> FOIA response, available on file with the authors.

**Table 18: Outcomes of COD decisions by selected members of the Board of Veterans' Appeals, 1990-2015**

<b>Judge</b>	<b>% "dishonorable"</b>
<b>Ma***</b>	100%
<b>Br***</b>	100%
<b>Wi***</b>	100%
<b>Pe***</b>	94%
<b>La***</b>	91%
<b>Br***</b>	90%
<b>Average</b>	<b>87%</b>
<b>Ph***</b>	85%
<b>Du***</b>	82%
<b>Se***</b>	67%
<b>Da***</b>	64%
<b>Hi***</b>	55%

The appeal process does not remedy these inconsistencies. The CAVC has jurisdiction to evaluate questions of law, but only has jurisdiction to evaluate questions of fact for "clear error."<sup>278</sup> It must accept any "plausible" factual determination by the BVA. Nor can the Federal Circuit review factual findings at all.<sup>279</sup> The most common basis for a "dishonorable" finding, the willful and persistent regulatory bar, is a factual standard that the CAVC cannot overturn unless the BVA result is "implausible."<sup>280</sup> Appellate review has thus failed to refine and remedy the prevailing standards and instead has enabled enormous disparities persist for decades.

This degree of inconsistency does not reflect error or bad faith on the part of Regional Offices or Veterans Law Judges. Instead, it is the product of the regulation's vagueness and lack of appropriate standards. Because the regulations fail to account for essential considerations, such as mitigation, overall service, and severity of conduct, adjudicators are left to impute threshold standards or impute mitigation analysis by simply overlooking certain behavior, when

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<sup>278</sup> 38 U.S.C. § 7261(a)(4).

<sup>279</sup> 38 U.S.C. § 7292(d)(2).

<sup>280</sup> "The BVA's determination whether a discharge is based on willful and persistent misconduct is a matter of fact which the Court reviews under the 'clearly erroneous' standard of review. Under this standard if there is a plausible basis in the record for the factual determinations of the BVA the Court cannot overturn them." *Stringham v. Brown*, 8 Vet. App. 445, 447-48 (1995) (internal quotations and citations omitted).

the facts of a claim are overwhelming. While this produces some appropriate outcomes, it does so rarely and inconsistently.

The VA can remedy this arbitrariness by providing clear severity standards, by mandating evaluation of overall service, and requiring consideration of mitigating factors. Relying on individual adjudicators to impute such standards, in violation of the text of the regulations, is neither lawful nor reliable.

**E. The regulations are inconsistent with the VA's public and official commitments**

The VA's public and official communications incorrectly describe its Character of Discharge regulations. Contrary to the plain text of its regulations and the actual practice of its adjudicators, these public commitments state that behavioral health, overall service, mitigating circumstances, and hardship service are all taken into account, and that service members can receive interim health care while eligibility is decided. Those assurances are not borne out in practice.

The table on the following page compares the actual practice discussed above with public and official statements by the VA from three sources: its public fact sheet "Claims For VA Benefits And Character Of Discharge: General Information"<sup>281</sup>; a presentation delivered by VA staff to the Senate Veteran Affairs Committee on May 5, 2014, "Impact of Military Discharges on Establishing Status as a Veteran for Title 38 Disability and/or Healthcare Benefits";<sup>282</sup> and a letter from Undersecretary for Benefits Allison Hickey to House Minority Leader Nancy Pelosi on July 31, 2015.<sup>283</sup>

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<sup>281</sup> U.S. Dep't of Veterans Affairs, Claims for VA Benefits and Character of Discharge (Mar. 2014), [http://www.benefits.va.gov/BENEFITS/docs/COD\\_Factsheet.pdf](http://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf) [hereinafter COD Fact Sheet]

<sup>282</sup> Included with this Petition as Attachment B [hereinafter SVAC Presentation].

<sup>283</sup> Included with this Petition as Attachment C [hereinafter Pelosi Letter].

**Table 19: Comparison of public and official statements with actual practice on selected issues**

<b>Issue</b>	<b>“VA COD Fact Sheet”<sup>i</sup></b>	<b>Official statements</b>	<b>Actual practice</b>
<b>Are mental health conditions such as PTSD and TBI taken into account?</b>	“[T]he impact of disabilities may be considered during the analysis of any mitigating or extenuating circumstances that may have contributed to the discharge.”	“VA considers medical issues, such as PTSD and TBI.” (SVAC Presentation <sup>ii</sup> )  “VA may consider behavioral health issues, specifically PTSD.” (Pelosi Letter <sup>iii</sup> )	Mental health is considered only if service members state that they were “insane” and obtain a medical opinion diagnosing “insanity.” <sup>iv</sup> PTSD has very little effect on decision outcomes. <sup>v</sup>
<b>Is the quality of prior service accounted for, including hardship service such as combat deployments?</b>	“VA considers... performance and accomplishments during service ... and character of service preceding the incidents resulting in discharge.”	“VA weighs the reason for separation against the overall nature of the quality of service.” (Pelosi Letter)	The quality of prior service is considered only under one of the exclusions and only when the misconduct was “minor.” <sup>vi</sup> Combat is not inherently “meritorious” and has little effect on decision outcomes. <sup>vii</sup>
<b>Is the length of service accounted for?</b>	“VA considers... length of service.”		There is no criteria for considering length of prior service.
<b>Are mitigating factors taken into account?</b>	“VA considers ... any mitigating or extenuating circumstances.”	“VA considers ... any mitigating factors.” (SVAC Presentation)  “VA weighs the reason for separation against ... any mitigating factors, including those related to AWOL for periods exceeding 180 days.” (Pelosi Letter)	The only mitigating factors that may be considered are “insanity” and overall service when misconduct was “minor.” The “compelling circumstances” related to absence without leave for more than 180 days may not be applied to any regulatory bars. <sup>viii</sup>
<b>Can service members obtain tentative eligibility for health care?</b>		“[A] former Service member may be provided health care at a VA medical facility based on a tentative eligibility determination in emergency circumstances.” (Pelosi letter)	VA regulations prohibit granting tentative eligibility to service members when the pending eligibility issue relates to character of discharge. <sup>ix</sup>

<sup>i</sup> Available at [http://www.benefits.va.gov/BENEFITS/docs/COD\\_Factsheet.pdf](http://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf). <sup>ii</sup> Attachment B. <sup>iii</sup> Attachment C. <sup>iv</sup> See section III.C. <sup>v</sup> See section IV.C. <sup>vi</sup> See section III.B.1. <sup>vii</sup> See section IV.B.2. <sup>viii</sup> See section III.B.4. <sup>ix</sup> See section III.A.

**F. VA regulations prevent the VA from serving homeless, suicidal or justice-involved service members**

The category of presumptively-ineligible service members includes people at elevated risk of suicide, homelessness and incarceration. The denial of medical and mental health care, housing assistance, disability compensation and vocational rehabilitation for these vulnerable veterans is particularly troubling.

*1. Veteran Suicide*

The past few years have revealed an epidemic of veteran suicide,<sup>284</sup> and the government has rightly prioritized addressing this crisis. Congress passed legislation this year expanding services to veterans,<sup>285</sup> the VA has created additional suicide-prevention outreach and counseling services, and the President has acknowledged the moral imperative of supporting service members at mental health risk:

Every community, every American, can reach out and do more with and for our veterans. This has to be a national mission. As a nation, we should not be satisfied -- will not be satisfied -- until every man and woman in uniform, every veteran, gets the help that they need to stay strong and healthy.<sup>286</sup>

The VA's character of discharge regulations prevent it from achieving this goal. The most effective response to veteran suicide is bringing those at mental health risk into VA care: veterans outside of VA care have a 30% higher rate of suicide than those under VA care.<sup>287</sup> Yet the VA turns away veterans who are at highest risk of suicide: service members discharged for misconduct are twice as likely to commit suicide as those with Honorable or General discharges.<sup>288</sup> This happens because behavioral dysfunction that is symptomatic of early mental health problems is often treated as misconduct by military commands and managed through

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<sup>284</sup> Alan Zarembo, Detailed Study Confirms High Suicide Rate Among Recent Veterans, L.A. Times, Jan. 15, 2015.

<sup>285</sup> Clay Hunt Suicide Prevention for American Veterans Act, Pub. L. No. 114-2, 129 Stat. 30 (2015).

<sup>286</sup> White House, Remarks by the President at Signing of the Clay Hunt SAV Act (Feb. 12, 2015).

<sup>287</sup> 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).

<sup>288</sup> M.A. Reger et al., Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the US Military, J. Am. Med. Ass'n Psychiatry (2015).

administrative separations.<sup>289</sup> The VA's regulations have created a suicide pipeline: the people most at risk of suicide are the ones most likely to be turned away from the most effective suicide prevention care.

## 2. *Veteran Homelessness*

Swords to Plowshares operates veteran homeless shelters funded by the VA and by other sources. Approximately 15% of its occupancy is former service members who are excluded from VA services due to their discharge characterization. Other veteran homeless shelter providers have said informally that they have similar levels of occupants that are ineligible for VA services based on character of discharge.<sup>290</sup> Because these characterizations only represent up to 5% of all characterized discharges, we estimate that service members with these discharges are at least twice as likely to be homeless.<sup>291</sup>

This prevents the VA from eliminating veteran homelessness. One of President Obama's major policy goals, in which he is joined by mayors and governors across the country, is ending veteran homelessness. The only program that provides permanent housing support, and therefore an essential part of the effort to end chronic homelessness, is the HUD-VASH program, which combines the value of a Section 8 housing voucher with the wrap-around support of VA social work and health care services. That program employs VA's health care eligibility standard and funnels eligibility determinations through VHA. For service members with Other Than Honorable discharges, who may be health care-eligible based on a service-connected disability or pursuant to a Character of Discharge Review, there is no clear path for that individual to apply for HUD-VASH, undergo an eligibility determination, and gain access to that program. As a result of VA's restrictive policies regarding eligibility and applications, national efforts to end veteran homelessness are hampered.

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<sup>289</sup> See Section IV.C.

<sup>290</sup> Research shows that veterans separated for misconduct are much more likely to be homeless. Of the subset of veterans eligible for VHA services, 5.6% were separated for misconduct – but they make up 25.6% of the homeless veteran population at first VHA encounter. Adi V. Gundlapalli et al., *Military Misconduct & Homelessness Among US Veterans Separated from Active Duty 2001-2012*, 314 J. Am. Med. Ass'n 832 (Aug. 2015).

<sup>291</sup> The VA's policy for eligibility in its GPD program has changed at least twice since January 2014. In its current practice, it is granting eligibility to some service members that are not eligible for VA benefits according to the criteria discussed in this document. More information on the evolution and current status of GPD eligibility is available from the author.

### 3. *Veteran Incarceration*

According to the Bureau of Justice Statistics, 23.2% of service members in prison, and 33.2% of service members in jail, have discharge characterizations less than General, indicating that they are presumptively ineligible for VA services.<sup>292</sup> The corresponding figure in the non-incarcerated population is 7%, indicating that the risk of incarceration for this group is three times the risk for other former service members.

The VA's eligibility criteria prevent it from helping veterans avoid incarceration. The VA's Veteran Justice Outreach workers, who support diversionary Veteran Justice Courts, are only able to work with VA-eligible veterans. If a local veteran's court is unable to connect a defendant with non-VA services, then they may not be able to take advantage of that treatment court. In San Francisco, 27% of veterans who are eligible to participate in the veteran's treatment court are not VA-eligible.<sup>293</sup> The city obtained separate funding to ensure that these veterans can take advantage of the opportunity provided by the veteran treatment court, one of the only jurisdictions in the country to do so. In other cities, these service members may not be able to participate in the diversionary court and are more likely to be incarcerated.

#### **G. The procedures to obtain an individual review are extremely burdensome on service members and on the VA**

Whereas VA regulations waive eligibility review for service members with Honorable and General discharge characterizations,<sup>294</sup> service members with other discharge characterizations must undergo a years-long adjudication that compares their individual service to the statutory and regulatory bars. During that period, the service member is unable to access care or support through VA because agency regulations preclude "tentative eligibility" for such

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<sup>292</sup> DOJ Bureau of Justice Statistics Special Report, *Veterans in Prison and Jail, 2011–12* (Dec. 2015).

<sup>293</sup> S.F. Cty. Sup. Ct., *San Francisco Collaborative Courts Veteran Justice Court Fact Sheet* (Aug. 2015),

<http://www.sfsuperiorcourt.org/sites/default/files/images/VeteransJusticeCourtFACT%20SHEETAugust2015.pdf>.

<sup>294</sup> 38 C.F.R. § 3.12(a); *Adjudication Procedures Manual* pt. III.v.1.B.5.c. Service members with these characterizations enjoy a rebuttable presumption of honorable service. That presumption may be rebutted in cases when a service member received a misconduct discharge but then received a discharge upgrade from the Secretary of Defense based on certain "amnesty" or "automatic" discharge upgrade programs implemented in the 1970s. Congress mandated that the VA may not base its eligibility determination on a DOD discharge characterization issued under those circumstances. 38 U.S.C. § 5303(e); 38 C.F.R. § 3.12(k). The VA must apply the usual character of service review standards as described in this document. If the VA finds that the service member does not pass the statutory or discretionary bars, their service will be found Dishonorable for VA Purposes and they will be ineligible for most or all benefits.

veterans.<sup>295</sup> Sometimes, the adjudication process never even commences because service members are provided misinformation and the regulations do not give VA staff concise, helpful instructions.

In practice, the large majority of veterans placed in the presumptively ineligible category never receive an eligibility evaluation from the VA. Of the 121,490 service members discharged since 2001 in that group, the VA has completed reviews for only 13,300, or 10.9%.<sup>296</sup> That means that about nine out of every ten veterans discharged for misconduct are denied VA eligibility without even receiving an evaluation.

There are three main reasons for why so few receive eligibility evaluations. First, in our experience, most veterans seeking health care are never considered for eligibility. VA hospitals and clinics are probably the most prominent, well-known, accessible points of entry for veterans interested in service-related benefits. When a service member with a discharge characterization less than Honorable or General goes to a VHA facility, various legal provisions counsel that VA should ask him or her about enrolling in health care; provide an application and instructions on how to apply for benefits; initiate an eligibility review; and make a written determination as to eligibility.<sup>297</sup> Yet, time and time again, we have seen that hospital eligibility and enrollment staff simply turn away these service members outright without providing an application or instructions and without initiating a request for eligibility review. The judgment as to ineligibility is made solely on the basis of the assigned character of service, without reference to the governing regulations or consideration of other bases for eligibility--which include a prior term of service or health care for a service-connected injury for those with Other Than Honorable discharges.<sup>298</sup> The failure to refer directly decreases the number of eligibility reviews conducted, and secondarily reduces the likelihood that such a veteran will apply again later or elsewhere.

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<sup>295</sup> See Section III.A above.

<sup>296</sup> See Table 10 above and accompanying text.

<sup>297</sup> See 38 U.S.C. §§ 5100, 5102, 5104, 5107; 38 C.F.R. §§ 3.150, 17.36. See also Eligibility Determinations VHA Handbook 1601A.02 ¶ 6(3)(c) (Nov. 5, 2009); VA Health Care, No. IB 10-448, Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits (Dec. 2011), <http://www.va.gov/healthbenefits/assets/documents/publications/ib10-448.pdf>.

<sup>298</sup> See Pub. L. No. 95-126, § 2, 91 Stat. 1106, 1107-08 (1977); see generally Eligibility Determinations, VHA Handbook 1601A.02 ¶ 5.

Second, veterans seeking homeless housing services from the VA have no method for requesting an evaluation of eligibility. For example, The Grant and Per Diem (GPD) program is implemented by grantees, not by the VA itself. GPD providers must confirm veteran eligibility through the local VHA “GPD Liaison” within three days of the client’s admission.<sup>299</sup> The GPD Liaison’s role is limited to verifying eligibility status, not adjudicating eligibility.<sup>300</sup> In practice, the Liaisons report that a service member is ineligible if he or she lacks a Honorable or General Discharge without conducting any individualized COD analysis.

Third, veterans are often misinformed about the fact that they may be eligible for benefits and therefore never apply. The misperception that service members without Honorable or General discharges are categorically ineligible is widespread, and even occasionally promoted by the VA’s own statements. In addition to the example discussed above of VHA eligibility staff turning people away, the VA’s website incorrectly states that service members with discharge characterizations less than Other Than Honorable are only eligible for insurance programs.<sup>301</sup> Finally, the low rates of successful eligibility reviews contribute to this misperception of ineligibility.

Even now, the law is clear that any person who served may be eligible for some benefits. What is unclear is how to initiate, navigate, and adjudicate that eligibility review process. Whether the review process starts presently depends on whether the veteran applies for service-connected compensation or pension or for housing or health care, and whether the person he or she talks to has the right information. The process of getting health care is particularly burdensome for veterans as well as staff. A recent change to the VHA Handbook worsened the problem by removing the most instructive direction to Enrollment Staff about how to process applications by such veterans in accordance with governing law.<sup>302</sup> Instead, staff apparently have

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<sup>299</sup> VHA Handbook 1162.01(1), Grant and Per Diem Program Program ¶ 12(l) (July 12, 2013).

<sup>300</sup> Id. ¶ 6(e)(2).

<sup>301</sup> The VA’s benefits website states, for example: “Specific Benefit Program Character of Discharge Requirements: Discharge Requirements for Compensation Benefits: To receive VA compensation benefits and services, the Veteran’s character of discharge or service must be under other than dishonorable conditions (e.g., honorable, under honorable conditions, general).” U.S. Dep’t of Veterans Affairs, Applying for Benefits and Your Character of Discharge, [http://www.benefits.va.gov/benefits/character\\_of\\_discharge.asp](http://www.benefits.va.gov/benefits/character_of_discharge.asp) (last updated May 19, 2015).

<sup>302</sup> Compare Eligibility Determination, VHA Handbook 1601A.02 ¶ 6(c) (Nov. 5, 2009) with Eligibility Determination, VHA Handbook 1601A.02 ¶ 5(c) (Apr. 3, 2015).

to piece together various laws, regulations, and guidance to figure out how to initiate a review, make a determination, and inform the veteran of that decision.

What is more, there is scant guidance regarding veterans seeking health care for service-connected injuries, including those related to combat and Military Sexual Trauma.<sup>303</sup> It is important to remember that Congress specifically provided that service members discharged under Other Than Honorable conditions—even those whose service is adjudicated “dishonorable”—are eligible for a health care benefits package to treat their service connected injuries. Current regulations do not implement that critical statutory mandate, leaving veterans and VHA staff without sufficient guidance.

Even when an eligibility review does commence, the process is long and onerous—for the VA as well as for the veteran. The administrative burden of adjudication is high. Regional Offices place eligibility evaluations in the Administrative Decision lane, where, compared to other claims, adjudication takes twice as long to complete.<sup>304</sup> The average processing time is 1,200 days—nearly four years long.<sup>305</sup> During that adjudication, the VA must send out multiple notices seeking information and providing opportunities for submission of evidence and hearings. Veterans may respond to those notices and expend energy collecting various records, reports, and statements. Given the correlation between a less-than-fully-Honorable discharge and conditions such as homelessness, incarceration, and suicide, the burden of responding fully and in a timely manner to those notices is quite high. In the meantime, those veterans are barred from receiving tentative eligibility for health care. Given the high rates of suicidal ideation, Post-Traumatic Stress, and other mental health conditions among this population,<sup>306</sup> any delay in or denial of care can have a serious impact on service members, their families and communities.

Because of these numerous obstacles, most veterans have not received an eligibility review. If the VA were to do so now, organizational overload could result. Between 2001 and

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<sup>303</sup> See Pub. L. No. 95-126, § 2, 91 Stat. 1106, 1107-08 (1977); 38 U.S.C. § 1720D; Military Sexual Trauma (MST) Programming, VHA Directive 2010-033 (July 14, 2010).

<sup>304</sup> Data from the VA ASPIRE Dashboard.

<sup>305</sup> In September 2015, the average claim age was approximately 600 days. This indicates that the average time to complete is about 1,200 days.

<sup>306</sup> See Section H below; R.M. Highfill-McRoy et al., *supra* note 112; R.A. Kukla et al., Contractual Report of Findings from the National Vietnam Veterans' Readjustment Study: Volumes 1-4 (1988).

2013, 121,490 service members received discharges that will require pre-eligibility review because of 38 C.F.R. § 3.12(a).<sup>307</sup> That means that, on average, more than 10,000 veterans each year require VA eligibility reviews before they can obtain services. The VA has only adjudicated one in ten of these, suggesting that the VA would be simply incapable of actually adjudicating them all.

#### **H. The regulations unfairly disadvantage service members from certain military branches**

The current regulations privilege some service branches over others by creating a presumption of ineligibility for service members with administrative discharges under Other Than Honorable conditions. This perpetuates one of the problems that the statute was intended to ameliorate: unfair exclusion of service members based on based on military policy decisions that have nothing to do with the former service member's actual service.

The current regulations effectively impose an “honorable conditions” standard. This is accomplished by providing presumptive eligibility to all service members with “Honorable” or “General” characterizations<sup>308</sup> and by adopting highly exclusive standards that deny eligibility to almost all of the remaining service members. For example, for post-2001 veterans, the VA currently recognizes “other than dishonorable” service for 100% of the service members with Honorable and General characterizations, but denies eligibility for 96.5% of the service members with other characterizations.<sup>309</sup>

This standard produces unfair outcomes because each service has different standards for administrative discharges. The first three discharge characterizations—Honorable, General, and Other Than Honorable—are all administrative, non-punitive discharges. The Secretary of Defense has issued guidance on how service commanders should use these characterizations.<sup>310</sup> But that guidance delegates wide discretion to services and to commanders to choose whether to seek discharge, what basis for discharge to adopt, and what characterization to provide. Punitive discharges—Bad Conduct and Dishonorable—are governed by the Uniform Code of Military

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<sup>307</sup> See Table 11 above.

<sup>308</sup> 38 C.F.R. § 3.12(a).

<sup>309</sup> See Section III.D above.

<sup>310</sup> DODI 1332.14 (2014).

Justice and are therefore subject to uniform procedural and substantive standards. Punitive discharge rates vary between 0.3% in the Navy and 1.1% in the Marine Corps. In contrast, administrative discharges provide very little safeguards for consistency between services or between commanders, resulting in a *20-fold* variance between military branches: between 0.5% in the Air Force and 10% in the Marine Corps.

**Table 20: Discharge characterizations, FY2011**

	Honorable	General	Other Than Honorable	Bad Conduct	Dishonorable
<b>Army</b>	81%	15%	3%	0.6%	0.1%
<b>Navy</b>	85%	8%	7%	0.3%	0.0%
<b>Air Force</b>	89%	10%	0.5%	0.5%	0.0%
<b>Marine Corps</b>	86%	3%	10%	1.0%	0.1%
<b>Total</b>	<b>84%</b>	<b>10%</b>	<b>5%</b>	<b>1%</b>	<b>0.1%</b>

This difference between services is due to administrative policies, not individual merit. The Government Accountability Office has done a thorough study on discharge characterization disparities between services.<sup>311</sup> It documented that this range of discharge practices reflects differences in leadership and management styles, not degrees of “honor” in different services:

Simply stated, different people get different discharges under similar circumstances, and the type of discharge an individual gets may have little to do with his behavior and performance on active duty.<sup>312</sup>

The GAO compared discharges of Marines and Airmen with the same misconduct history, service length, and performance history, and found that the Air Force was 13 times more likely to give a discharge under honorable conditions than the Marines.<sup>313</sup> Military leaders justified their practices with unit-level considerations, not individual merit: some believed that expeditious termination was in the best interest of the services, while others believed that maximizing punishment helped reinforce unit discipline.<sup>314</sup>

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<sup>311</sup> GAO Report, *supra* note 113.

<sup>312</sup> *Id.* at ii.

<sup>313</sup> *Id.* at 29-33.

<sup>314</sup> *Id.* at 32.

Because the VA's regulations rely so heavily on the distinction between Other Than Honorable and General administrative discharges, and because different services have very different standards for each of these, there are major disparities in VA eligibility between services. For service members discharged between 2001 and 2013, 12% of Marines would get turned away from a VA hospital if they sought care after leaving the service, but the equivalent figure for Airmen is only 1.7%.

**Table 21: DOD discharge characterizations and initial VA eligibility by service branch, 2001-2013**

	Presumptively VA-eligible			Presumptively VA-ineligible			
	Honorable	General	Total	OTH	BCD	Dishonorable	Total
<b>USAF</b>	90%	8%	98%	1%	0.7%	0.08%	1.7%
<b>Army</b>	84%	11%	95%	5%	0.2%	0.04%	5%
<b>All branches</b>	<b>85%</b>	<b>8%</b>	<b>93%</b>	<b>6%</b>	<b>0.9%</b>	<b>0.07%</b>	<b>7%</b>
<b>Navy</b>	82%	7%	89%	10%	0.7%	0.00%	11%
<b>USMC</b>	85%	3%	88%	9%	2.9%	0.19%	12%

Knowing that the Marine Corps gives more severe discharge characterizations than other services, and has done so for over half a century, the VA should be expected to grant eligibility to Marines at a higher rate than for other services when it conducts individual COD review. This expectation is also reasonable given that, for the current wartime period at least, the Marine Corps has endured harder conditions of service than most,<sup>315</sup> and given that Congress has singled out combat veterans for special consideration.<sup>316</sup> But—contrary to those expectations—this is not the case. In truth, VA COD decisions exclude Marines *at a higher rate* than any other military personnel. Far from ameliorating disparities, the current system is making them worse.

<sup>315</sup> “The ground forces, composed predominantly of personnel from both the Army and the Marine Corps, have borne the brunt of the conflict.” RAND Ctr. for Military Health Policy Research, *Invisible Wounds of War: Psychological & Cognitive Injuries, Consequences, & Services to Assist Recovery* 23 (Terri Tanielian & Lisa H. Jaycox eds. 2008). The death rate for Marines in Iraq was more than twice that of any other service branch, and 23 times that for Airmen, as of 2007. Emily Buzzell & Samuel H. Preston, *Mortality of American Troops in the Iraq War*, 33 *Population & Dev. Rev.* 555, 557 (2007).

<sup>316</sup> E.g., Combat-Related Special Compensation, an increased compensation payment for disabilities that resulted from combat, Pub. L. 110-181, ¶ 641, 122 Stat. 3 (Jan. 28, 2008).

**Table 22: Board of Veterans' Appeals COD decisions by military service branch, 1990-2015**

	"Other than dishonorable"
Navy	16%
Not specified	15%
Average	13%
USAF	12%
Army	12%
USMC	7%

Congress enacted a single, uniform standard for eligibility and gave the VA responsibility for individualized, independent review of conduct precisely to avoid the injustices that result from unequal treatment by the military services. The current VA regulations simply perpetuate—and in some cases actually exacerbate—those disparities. The VA does so by giving enormous, and typically controlling, weight to the discharge characterization even though they mean vastly different things between the services.

### **I. The Regulation Unlawfully Discriminates Against Homosexual Conduct**

The VA's current regulations continue to enable it to deny benefits to claimants whose military discharge or release was for "homosexual acts involving aggravating circumstances or other factors affecting the performance of duties."<sup>317</sup> This rule singles out gay service members for special, disfavored treatment and is plainly unlawful in light of recent Congressional actions and court decisions. The VA has known since at least 2004 that this provision was outdated and inappropriate. In 2004 the VA issued a notice of proposed rulemaking that would have stricken the word "homosexual" in favor of the all-inclusive "sexual," noting that "all of the sexual offenses listed in this paragraph are egregious no matter who commits them."<sup>318</sup> The VA has failed for more than a decade to finalize that proposed rule, however—a delay that has long since become unlawful.

The unequal treatment of claimants discharged for homosexual acts is contrary to Congressional intent in enacting a repeal of the prior "Don't Ask, Don't Tell" ("DADT") policy.

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<sup>317</sup> 38 C.F.R. § 3.12(d)(5).

<sup>318</sup> Service Requirements for Veterans, 69 Fed. Reg. 4820 (Jan. 30, 2004).

Through that enactment, Congress clearly intended to eliminate differential treatment between heterosexual and homosexual conduct. Moreover, the VA's unequal treatment of homosexual conduct clearly violates the Fifth Amendment's guarantee of due process, which incorporates the requirements of the Equal Protection Clause. In 2013, the Supreme Court struck down the Defense of Marriage Act ("DOMA"), which denied federal benefits to same-sex couples, as an "unconstitutional ... deprivation of liberty ... protected by the Fifth Amendment of the Constitution."<sup>319</sup>

**J. The government cost associated with increased eligibility would be largely offset by reductions in non-veteran entitlement programs and health care savings**

Increasing the number of eligible veterans would increase direct costs to the VA, but the net cost to the Government would be offset by reductions in other entitlement programs and savings associated with more cost-effective health care delivery. An initial estimate shows that a 1% increase in eligibility may result in a net per capita expenditure increase of only 0.3%.

Benefits eligibility rules provide a starting point for analyzing how different programs would be affected. Expanding "veteran" eligibility does not create eligibility for the G.I. Bill, one of the more expensive VA benefits, nor for unemployment benefits. There would not be a significant increase in overhead costs, because the overall percentages concerned are relatively small. The services that are most likely to see a cost increase as a result of an expansion of eligibility are Health care, Compensation and Pension.

- Health care: Net government savings. It is not likely that service members with stable employer-paid insurance will migrate to VA health care as a result of this change. The service members who are likely to adopt VA health care are those on Medicare or Medicaid. VA health care is known to be about 21% more cost-effective than Medicare and Medicaid.<sup>320</sup> Therefore each increased dollar in VA health care services represents a total government savings of about \$0.20.

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<sup>319</sup> See generally Obergefell v. Hodges, 135 S.Ct. 2071 (2015); United States v. Windsor, 133 S.Ct. 2675 (2013) (striking down Defense of Marriage Act ("DOMA"), which denied federal benefits to same-sex couples, as an "unconstitutional ... deprivation of liberty ... protected by the Fifth Amendment of the Constitution.").

<sup>320</sup> See Congressional Budget Office, Comparing the Costs of the Veterans' Health Care System with Private-Sector Costs, at 5 (Dec. 2014).

- Pension: Small net government cost increase. The eligibility criteria for VA Pension are similar to the criteria for Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI).<sup>321</sup> It is very likely that any service member who will become eligible for Pension is already receiving SSI/SSDI. Because those benefits cannot be received concurrently, the increase in Pension utilization will be offset by a reduction in SSDI/SSDI utilization.<sup>322</sup> There will be a net increase in government cost only to the extent that VA Pension provides more money than the SSI/SSDI benefit. SSI amounts vary by location, and SSDI amounts vary by work history; in California in 2015, veterans on SSI typically receive about \$850, and veterans on SSDI typically receive about \$950. This is only marginally below the current Pension rate of \$1,072. Therefore each dollar increase in the Pension benefit only represents a net government cost increase of about \$0.15.
- Compensation: Net increase in government cost. Service-connected disability compensation would be offset by reductions to SSI, although it is not possible to estimate how many new recipients are now receiving SSI.

Using these cost estimates as an illustrative guide, and assuming that utilization of these services would be the same as for currently-eligible servicemembers, the following table estimates the increased VA cost and net government cost for each 1% increase in the eligible veteran population.

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<sup>321</sup> The “total disability” requirement for VA Pension is presumptively satisfied if the claimant is receiving SSI or SSDI. Brown v. Derwinski, 2 Vet. App. 444, 448 (1992).

<sup>322</sup> 38 C.F.R. § 3.262(f).

**Table 23: Initial cost model for one-percent increase in eligibility (\$ millions, 2010 baseline)**

	Baseline expenditure <sup>323</sup>	VA cost increase from 1% eligibility increase		Net per capita government cost from 1% eligibility increase	
<b>Compensation</b>	37,960	1%	38,340	1%	38,340
<b>Pension</b>	9,941	1%	10,040	0.15%	11,432
<b>Health Care</b>	46,923	1%	47,392	-0.21%	46,829
<b>Other</b>	13,937	0%	13,937	0%	96,601
<b>Total</b>	<b>108,761</b>	<b>0.9%</b>	<b>109,709</b>	<b>0.3%</b>	<b>38,340</b>

Therefore while a 1% increase in eligibility would result in a 0.9% increase in direct costs to the VA, the net government per capita cost would only increase by 0.3%.

This does not include indirect savings that would result from veteran-specific care, better homelessness services, increased access to prison diversion programs, and other support services. VA health care is more effective at treating veteran-related health problems<sup>324</sup> and VHA users typically use more preventative care,<sup>325</sup> resulting in better health outcomes. Improved health outcomes result in lower lifetime health costs<sup>326</sup> and improved downstream effects on employment, housing, and family well-being.<sup>327</sup> Veterans in VA homelessness services also report better health outcomes than veterans in non-VA homeless services.<sup>328</sup> Prison diversion programs enable long-term employment and financial stability. The benefits of these positive downstream effects will accrue not only to veterans individually but also to the VA, to local veteran-focused organizations, and to veterans' family members and communities.

<sup>323</sup> Expenditure data from U.S. Census Bureau, *Statistical Abstract of the United States*, at Table 523 – Veterans Benefits--Expenditures by Program and Compensation for Service-Connected Disabilities: 1990 to 2010 (2012).

<sup>324</sup> For example, the suicide rate of veterans under VHA care is 50% less than the suicide rate for veterans outside of VHA care. I. Katz, *Suicide Among Veterans in 16 States, 2005 to 2008: Comparisons Between Utilizers and Nonutilizers of Veterans Health Administration (VHA) Services Based on Data From the National Death Index, the National Violent Death Reporting System, and VHA*, *Am. J. Pub. Health* (Mar. 2, 2012).

<sup>325</sup> Because VHA has low out-of-pocket costs and because many of VHA's enrollees belong to those affected groups, the Congressional Budget Office (CBO) has found that "there may be some offsetting savings over the longer run." Congressional Budget Office, *Comparing the Costs of the Veterans' Health Care System with Private-Sector Costs*, at 3 (Dec. 2014).

<sup>326</sup> "VHA is more likely than private insurers to capture those longer-term savings" because veterans stay in the VA health care system. *Id.*

<sup>327</sup> See Ctrs. for Disease Control & Prevention, *The Power of Prevention* (2009).

<sup>328</sup> Byrne et al., *Health Services Use Among Veterans Using VA and Mainstream Homeless Services*, *World Med. & Health Policy* Vol. 5(4), 347–361 (2013).

**V. EXPLANATION OF PROPOSED AMENDMENTS TO ALIGN VA REGULATIONS WITH STATUTORY AUTHORITY, OFFICIAL COMMITMENTS, AND PUBLIC EXPECTATIONS FOR THE FAIR TREATMENT OF VETERANS**

This section proposes changes that will align VA practice with its statutory obligations, its official commitments, and public expectations. All of the changes proposed below are within the VA's rulemaking authority.

Summary of proposed changes:

- *Changes to 38 C.F.R. § 3.12(d).* Adopt a definition for “dishonorable conditions” that excludes service members based only on severe misconduct and that considers mitigating circumstances such as behavioral health, hardship service, overall service, and extenuating circumstances.
- *Changes to 38 C.F.R. § 3.12(a).* Reduce the number of service members that are presumptively ineligible by only requiring prior review for those with punitive discharges or discharge in lieu of court-martial.
- *Changes to 38 C.F.R. § 17.34.* Provide tentative eligibility for health care to all who were administratively discharged, who probably have a service-connected injury, or who probably honorably completed an earlier term of service pending eligibility review.
- *Changes to 38 C.F.R. § 17.36.* Ensure that service members seeking health care receive an eligibility review.

The full text of proposed regulations are attached. This Part provides justification for the suggested language.

**A. Standards for “dishonorable conditions” – 38 C.F.R. § 3.12(d)**

We propose to amend this paragraph with three major changes: (1) in the header paragraph, state that a “dishonorable conditions” finding is only appropriate for severe misconduct; (2) change the itemized forms of disqualifying conduct so that they are based on equivalent standards used in military law; and (3) add a section that lists mitigating circumstances, adopting standards applied in military law and similar VA regulations.

1. *The header paragraph should instruct adjudicators to only deny eligibility based on severe misconduct*

The current header paragraph states:

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

We propose to replace the header paragraph with this text:

(d) The VA may find that a separation was under dishonorable conditions only if overall service warranted a Dishonorable discharge characterization. This is the case if discharge resulted from any of the conduct listed in paragraph (1), and that if that misconduct outweighs the mitigating factors listed in paragraph (2). Administrative discharges are not under dishonorable conditions unless evidence in the record indicates that a dishonorable discharge was merited and that the better discharge was issued for reasons unrelated to the service member's character.

The legislative history makes clear that Congress only wanted to exclude service members whose conduct would have justified a Dishonorable discharge characterization.<sup>329</sup> The current regulations do not contain any instruction that limits exclusion to cases of severe misconduct.<sup>330</sup> In particular, the overbroad standards result in the exclusion of most service members with administrative, non-punitive discharges for misconduct,<sup>331</sup> a level of service the Congress specifically intended to include in eligibility for basic veteran services.<sup>332</sup> Furthermore, the absence of substantive conduct standards has contributed to widely inconsistent decision outcomes.<sup>333</sup>

The proposed header paragraph remedies this deficiency this with three statements. First, it conveys the express language of Congress that exclusion should only occur for service members whose conduct would merit a dishonorable characterization. Second, it instructs the adjudicator to balance the enumerated forms of negative conduct against enumerated forms of mitigating circumstances, discussed below. Third, in order to avoid improperly excluding those whose conduct was below honorable but better than dishonorable, a category that Congress intended to receive eligibility, it explains that administrative discharges generally do not indicate dishonorable conditions.

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<sup>329</sup> See Section II.B above.

<sup>330</sup> See Section III.B.1 above.

<sup>331</sup> See Section IV.A above.

<sup>332</sup> See Section II.D above.

<sup>333</sup> See Section IV.D above.

*2. The definitions of disqualifying conduct should adopt specific standards imported from military law*

We propose to retain the same categories of disqualifying conduct that currently exist, but provide more specific standards that conform with military law criteria for dishonorable characterizations.

**Discharge to escape trial by general court-martial**

The current paragraph states:

Acceptance of an undesirable discharge to escape trial by general court-martial

We propose to replace this paragraph with the following text:

Acceptance of a discharge to avoid trial by general court-martial. Avoidance of a trial by general court-martial is shown by documentation that charges had been referred to a general court-martial by a general court-martial convening authority.

This change clarifies the existing standard by explaining the evidence required under military law to show that the matter had been placed under general court-martial jurisdiction. A charge sheet alone does not indicate that a general court-martial has been recommended, because the matter could be referred to a special or summary court-martial. We have seen cases where a person is excluded on this regulation when charge sheets have been proffered but no general court-martial recommendation has been made. This amendment would clarify the correct analysis that adjudicators must make to apply the existing standard.

**Mutiny or spying**

No proposed changes.

**Moral Turpitude**

The current paragraph states:

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

We propose to replace this paragraph with this text:

An offense involving moral turpitude. Moral turpitude is conduct that involves fraud, or conduct that gravely violates moral standards and involves the intent to harm another person.

This change replaces a vague term with a more specific definition derived from extensive caselaw on this question. We note that the Office of General Counsel has produced a Precedential Opinion on the definition of “moral turpitude.”<sup>334</sup> However, the holdings of that Opinion have not been incorporated into the regulation or the training materials on this topic, and it has been inaccurately incorporated into the Adjudication Procedures Manual used by front-line adjudicators.<sup>335</sup> Therefore the Precedential Opinion has little impact on most decisions. We also note that the definition of moral turpitude proposed in the Part 5 Manual Rewrite does not adopt the standards of the Precedential Opinion.<sup>336</sup>

We propose a concise but specific definition that is based on the existing caselaw on this question, and that is consistent with the standards provided in the Precedential Opinion. The most extensive body of legal analysis on this question can be found in immigration law, where Congress has mandated certain responses when non-citizens commit “crimes involving moral turpitude.”<sup>337</sup> The 9<sup>th</sup> Circuit Court of Appeals has produced certain guidelines for determining whether a crime involves moral turpitude. “[T]he federal generic definition of a [crime involving moral turpitude] is a crime involving fraud or conduct that (1) is vile, base, or depraved and (2) violates accepted moral standards ... [and (3)] ‘almost always involve[s] an intent to harm someone.’”<sup>338</sup> Turpitude does not encompass “all offenses against accepted rules of social conduct.”<sup>339</sup> Rather, “[o]nly truly unconscionable conduct surpasses the threshold of moral turpitude.”<sup>340</sup> Crimes against property that do not involve fraud are generally not considered crimes of moral turpitude.<sup>341</sup>

The Precedential Opinion adopted the term “gravely violates moral standards,” in place of the 9<sup>th</sup> Circuit’s phrase “vile, base or depraved conduct that violates accepted moral

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<sup>334</sup> VA Gen. Counsel Precedential Op. 06-87 (1987).

<sup>335</sup> See Section III.B.2 above.

<sup>336</sup> Id.

<sup>337</sup> 8 U.S.C. § 1227(a)(2)(A)(i).

<sup>338</sup> Saavedra-Figueroa v. Holder, 625 F.3d 621, 626 (9th Cir. 2010) (citation omitted).

<sup>339</sup> Robles-Urrea v. Holder, 678 F.3d 702, 708 (9th Cir. 2012).

<sup>340</sup> Turijan v. Holder, 744 F.3d 617, 621 (9th Cir. 2014) (citation omitted).

<sup>341</sup> See Rodriguez-Herrera v. INS, 52 F.3d 238, 240 n.5 (9th Cir. 1995).

standards.” We propose to adopt the Precedential Opinion’s phrasing for ease of administration. However we believe that it is important to reassert the principle, omitted from the Part 5 Manual Rewrite, that crimes against property are not moral turpitude unless they involve fraud. Therefore the combined proposed language derives from the 9<sup>th</sup> Circuit caselaw, but is condensed as: fraud, or conduct that gravely violates moral standards and that involves the intent to harm another person.

**Repeated offenses (“willful and persistent misconduct”)**

The current paragraph states:

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

We propose:

Three or more separate incidents of serious misconduct that occurred within one year of each other. Misconduct is serious when it is punishable by at least one year of confinement under the Uniform Code of Military Justice.

We propose this language because it is specific, predictable, and derived from military law. The current language deviates greatly from the corresponding standard in military law, produces inconsistent results, and results in the exclusion of service members that congress intended for the VA to include.<sup>342</sup>

We recognize that the purpose of this regulation is to identify people who have engaged in a series of acts of misconduct where no individual act justifies a dishonorable characterization, but where the accumulation of misconduct shows a rejection of military authority amounting to dishonorable character. However, the current regulation fails to achieve this purpose. Its language is so expansive that almost any series of discipline problems is a plausible basis for exclusion.<sup>343</sup> It fails to distinguish truly dishonorable conduct from conduct that is merely

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<sup>342</sup> See Section IV.B.1 above.

<sup>343</sup> See Section III.D above.

improper and that justifies a lesser punishment. Like a dishonorable characterization, a finding of “dishonorable conditions” should be rare, and most forms of misconduct do not justify it. This distinction exists in military law, it existed for the Congress that wrote the law, and a correct regulatory interpretation of the statute must incorporate it.<sup>344</sup>

Military law contains a clear standard for when repeated, less-than-severe misconduct might justify a dishonorable characterization. The Manual for Courts-Martial in place at the time Congress enacted the statute instructed a dishonorable characterization for repeated offenses that did not involve moral turpitude only if there had been five prior convictions for minor offenses.<sup>345</sup> Current regulations allow for a dishonorable characterization for repeated offenses if there have been three convictions within the past year.<sup>346</sup> Non-judicial military punishment is only available for minor offenses, as determined by the military commander.<sup>347</sup> Because misconduct that results in a non-judicial punishment is not serious misconduct, it cannot be the basis for a dishonorable characterization. The original regulations adopted by the VA respected this principle by only considering misconduct that resulted in a conviction.<sup>348</sup>

Our proposed regulation would adopt the current military law standard but omit the requirement for court-martial convictions. The proposed language would find “dishonorable conditions” if within one year prior to discharge there had been three documented cases of misconduct that was eligible for at least one year of confinement, regardless of whether that conduct was actually punished by court-martial. This would avoid cases where service members are excluded because of misconduct that occurred long before discharge, or for misconduct that was too minor by military standards to contribute to a finding of dishonorable character.

Our proposed language removes this paragraph’s mitigating circumstances exception. We do this for two reasons. First, the mitigating circumstances exception in the current regulation is far narrower than what is required by statute, what the VA has officially committed to, and what the public expects.<sup>349</sup> It is only available in limited circumstances; the only

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<sup>344</sup> See Section II.D above.

<sup>345</sup> MCM 1943 ¶ 104c(B).

<sup>346</sup> RCM 1003(d)(1).

<sup>347</sup> MCM 2012 pt. V.1.e.

<sup>348</sup> 11 Fed. Reg. 8729, 8731 (Aug. 13, 1946).

<sup>349</sup> See Section IV.B.2 above.

mitigating factor is quality of service, without considering mental health, operational stress, duration of service, or extenuating circumstances; and the standard for quality of service is far too high, not even considering combat service as inherently “meritorious.” Second, because military law requires that mitigating factors be considered prior to all dishonorable characterizations,<sup>350</sup> we have proposed below to include a comprehensive mitigating analysis element that applies to all categories of disqualifying conduct. This makes a limited mitigation exception in this paragraph superfluous.

### **Sexual misconduct**

The current paragraph states:

Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

We propose to eliminate this section.

A conduct prohibition that singles out homosexual conduct is unconstitutional.<sup>351</sup> Preserving the regulation without its discriminatory content is unnecessary. The aggravating circumstances listed in this regulation are likely encompassed within the “moral turpitude” prohibition, or are subject to general courts-martial, and are therefore superfluous; if not, then the conduct not “dishonorable” and should not be a basis for denying veteran service.

Furthermore, the purpose of this regulation was to discriminate against homosexual conduct, and without its discriminatory purpose there is no reason to retain it in any form. The regulation originally targeted “homosexual acts or tendencies,”<sup>352</sup> was then limited to “homosexual acts,”<sup>353</sup> and was then limited to “aggravated” homosexual acts.<sup>354</sup> Now that the

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<sup>350</sup> See Section II.C.3 above.

<sup>351</sup> See Section IV.I above.

<sup>352</sup> 11 Fed. Reg. at 8,731.

<sup>353</sup> 28 Fed. Reg. 123 (Jan. 4, 1963).

underlying conduct is permitted, there is no reason to retain the limiting factors as a stand-alone prohibition. A simplified regulation would omit this paragraph entirely.

*3. The regulations should require adjudicators to consider mitigating circumstances*

There is no provision in regulation requiring consideration of mitigating factors.

We propose to add the following paragraph:

(2) The severe punishment of a dishonorable characterization is not justified where extenuating circumstances explain or mitigate the misconduct. The Secretary must consider any information that would justify a reduction in the severity of punishment. The following circumstances may show that service was not dishonorable

(i) The individual contributed substantial favorable service to the nation. A determination of favorable service to the nation will consider:

(A) The duration and quality of service prior to the misconduct that resulted in discharge, and

(B) Whether the service included hardship conditions, such as overseas deployment.

(ii) The person's state of mind at the time of misconduct was adversely affected by mental or physical disabilities or operational stress.

(iii) The person's actions were explained by extenuating circumstances, taking into consideration the person's age, maturity, and intellectual capacity.

We propose this language to harmonize the regulation with military law, other VA regulations, the VA's commitments, and public expectations. The current regulatory definition of "dishonorable conditions" does not include a general provision for considering mitigating circumstances.<sup>355</sup> This is inconsistent with military law, where a dishonorable characterization is only justified after consideration of a full range of mitigating circumstances.<sup>356</sup> Nor is the

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<sup>354</sup> 45 Fed. Reg. 2318 (Jan. 11, 1980).

<sup>355</sup> See Section III.B.4 above.

<sup>356</sup> See Section II.C.3 above.

current regulation consistent with the VA's own regulations. The VA has adopted a list of mitigating circumstances that may excuse an absence of over 180 days, as required by a statutory bar, but it has not applied these mitigating circumstances to absences that are less than 180 days and therefore subject to review under its regulatory bars.<sup>357</sup> This produces the perverse outcome where the VA is more lenient on more severe misconduct.

We propose a list of mitigating circumstances that incorporates terms from military law and from other VA regulations. The Military Judges' Benchbook provides model sentencing instructions that list the following mitigating factors: age, family/domestic difficulties, good military character, financial difficulties, mental/behavioral condition, personality disorder, physical impairment, addiction, education, and performance evaluations.<sup>358</sup> The VA's regulations defining "compelling circumstances" for the purposes of mitigating an unauthorized absence of more than 180 days lists the following factors: duration and character of service prior to absence, service of such quality that it is of benefit to the nation, family emergencies or obligations, obligations or duties owed to third parties, age, cultural background, educational level, judgmental maturity, hardship or suffering incurred during overseas service, combat wounds, and other service-incurred or aggravated disabilities.<sup>359</sup>

The proposed regulation adopts these factors from military law and VA regulations and groups them under three headers: factors that show favorable service to the nation; factors relating to the veteran's state of mind, as determined by their mental and physical health; and extenuating circumstances. The only term in the proposed regulation that is not adopted directly from existing military and VA sources is the factor considering "operational stress." "Operational stress" is similar to the consideration of "hardship ... incurred during overseas service" that is listed among the "compelling circumstances" factors. We propose to add this term because the military services have recently recognized "operational stress" as a distinct phenomenon, particularly in the current era of repeated deployments, that can justifiably result in behavior changes among otherwise honorable service members.<sup>360</sup> It is important that the VA's

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<sup>357</sup> See Section IV.B.2 above.

<sup>358</sup> See, e.g., Military Judges' Benchbook, DA Pam 27-9 ¶ 2-5-13.

<sup>359</sup> 38 C.F.R. § 3.12(c)(6)(i, ii, iii).

<sup>360</sup> U.S. Dep't of the Army, Field Manual 4-02.51 (FM 8-51): Combat and Operational Stress Control (2006).

("Soldiers, however good and heroic, under extreme combat stress may also engage in misconduct."). U.S. Dep't

regulations reflect current understanding and terminology for how the demands of military service may explain behavior changes.

We do not propose to retain the language that currently exists in the “willful and persistent misconduct” bar, whereby some misconduct is mitigated where service is “otherwise honest, faithful and meritorious.” While these are certainly positive qualities, these terms are not mitigating factors under military law. Moreover, those terms have been interpreted by Veteran Law Judges as imposing a much higher standard for mitigation than exists under military law or under other VA regulations. For example, adjudicators have found that even combat service is not “meritorious” enough to benefit from this exception, if the service member did not also earn awards for valor.<sup>361</sup> By only rewarding exceptional performance, it fails to acknowledge that military service is inherently beneficial to the nation. A proper mitigation analysis must give some credit to the fact of service, and to the duration of proficient service. This “meritorious” standard departs so significantly from military law and congressional intent that it must be replaced.

**B. Which service members require individual review – 38 C.F.R. § 3.12(a)**

We propose to amend this paragraph so that individual review is not required for people who are very unlikely to be excluded based on revised standards. The current paragraph states:

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

We propose the following text that replaces the final sentence:

If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C.

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of the Navy & U.S. Marine Corps, Combat and Operational Stress Control: NTTP 1-15M, MCRP: 6-11C (Dec. 2010) (identifying behavior that characteristically results from operational stress, including “losses of control,” “intense and uncharacteristic anger,” and “sudden outbursts of rage”).

<sup>361</sup> See Section III.B.1 above.

§ 101(2)). An administrative discharge shall be a discharge under conditions other than dishonorable unless it is issued in lieu of court-martial. Administrative discharges issued in lieu of court-martial, Dishonorable discharges, and Bad Conduct Discharges must be reviewed under the criteria in paragraph (d) in order to determine whether the separation was under dishonorable conditions.

This change will ensure that people who are not at risk of being found “dishonorable” are able to access care and services without requiring an individual review by the VA.

The VA is currently excluding more veterans than at any point in the nation’s history, more than three times as many people as were being excluded when the current “liberalizing” law was enacted.<sup>362</sup> This is not because service members are behaving worse, or because VA adjudicators are evaluating them more severely. It is solely because the VA’s regulations set aside an increasing share of service members that require adjudication—many more than behaved “dishonorably,” and many more than the VA can actually adjudicate.<sup>363</sup> It is both impractical and contrary to statute for the VA to require eligibility adjudications for categories of service members that Congress specifically intended to receive eligibility.

It is also unjust. All of these men and women served the nation, and it is shameful for them to be left without health care for disabilities, without housing if they are homeless, without income support if they are unable to work. The injustice is most acute for service members denied eligibility despite having served under hardship conditions. Over 33,000 service members discharged since 2001 served on a contingency deployment and yet received a discharge characterization that the VA treats as presumptively ineligible.<sup>364</sup> Because the VA has granted eligibility to only 4,600 veterans of this era,<sup>365</sup> there are probably over 30,000 service members who deployed to contingency operations since 2001 but who are currently ineligible for VA services.

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<sup>362</sup> See Table 10 above.

<sup>363</sup> See Section IV.A above.

<sup>364</sup> DOD FOIA Response 14-0557.

<sup>365</sup> See Table 10 above.

**Table 24: Selected discharge characterizations of service members who deployed to contingency operations, 2001-2014<sup>366</sup>**

<b>Characterization</b>	
<i>Presumptively VA-ineligible</i>	<b>33,977</b>
Other Than Honorable	29,364
Bad Conduct	4,265
Dishonorable	348

The dramatically increasing rate of exclusion from VA services results from the military's increasing use of administrative separations to deal with discipline issues that previously led to retention, retaining, and Honorable or General characterizations.<sup>367</sup> The use of the discharge characterization has increased from less than 1% of all discharges to 5.5%.<sup>368</sup> Because Congress instructed the VA to exclude these service members only on an exceptional basis, and because this represents such a large portion of all service members, it is no longer appropriate for the VA to presume ineligibility for all of them. In order to approach the rate of exclusion intended by Congress, and the standards it intended, the VA must recognize eligibility for a large number of these people separated for non-punitive administrative discharges.

As for people with General and Honorable discharges—some of whom may prove to be ineligible, but all of whom can receive services prior to eligibility determinations—the VA should identify additional categories of discharges that are very likely to be found eligible and who will not require eligibility review.

We propose to limit pre-eligibility reviews to people with punitive discharges (Bad Conduct or Dishonorable) and Other Than Honorable discharges issued in lieu of court-martial. This is an easily-administered standard that would ensure prompt eligibility for large numbers of people who are not at risk of exclusion.

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<sup>366</sup> DOD FOIA Response 14-0557.

<sup>367</sup> See Section II.D above.

<sup>368</sup> See Figure 2.

DOD instructions allow administrative discharges for misconduct under two scenarios: where the discharge is “In lieu of court-martial”<sup>369</sup> and where there is generic “Misconduct”<sup>370</sup> that the commander did not see fit to refer to court-martial. The first category includes cases where court-martial charges have been alleged, a preliminary investigation has occurred, and the service member, under advice from defense counsel, has admitted guilt and requested separation.<sup>371</sup> When this occurs, the separation documentation clearly states “Discharge in Lieu of Court Martial.” This is a category that may involve serious misconduct, including conduct that is morally turpitudinous or that might have been referred to a general court-martial. It is therefore proper for the VA to require an individual evaluation for these service members to determine whether their conduct was in fact dishonorable.

In contrast, the second category of misconduct that might lead to an Other Than Honorable discharge does not likely involve conduct at risk of exclusion under “dishonorable” standards. DOD Instructions list several types of conduct that might justify separation under the generic “Misconduct” paragraph, including “Minor disciplinary infractions,”<sup>372</sup> and “Pattern of misconduct ... consisting of discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline.”<sup>373</sup> This includes the types of misconduct that justify separation but that do not show “dishonorable” service, and which Congress instructed the VA to grant eligibility. They are all, moreover, situations where the commander, considering all mitigating and extenuating factors, decided not to convene a court-martial. In order to conform with statutory instructions, and in order to grant eligibility in a fair and efficient manner, the VA should not withhold eligibility for these service members pending individual review.

For ease of administration, we do not propose listing and categorizing all possible bases for administrative discharges. There are several designations that might appear on a DD214 when generic “Misconduct” was the basis for discharge. Military branches might use different terms for similar situations. Instead, we propose to set aside administrative discharges issued in lieu of court-martial, and to waive individual review for all others.

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<sup>369</sup> DODI 1332.14, Enclosure 3 ¶ 11.

<sup>370</sup> *Id.*, Enclosure 3 ¶ 10.

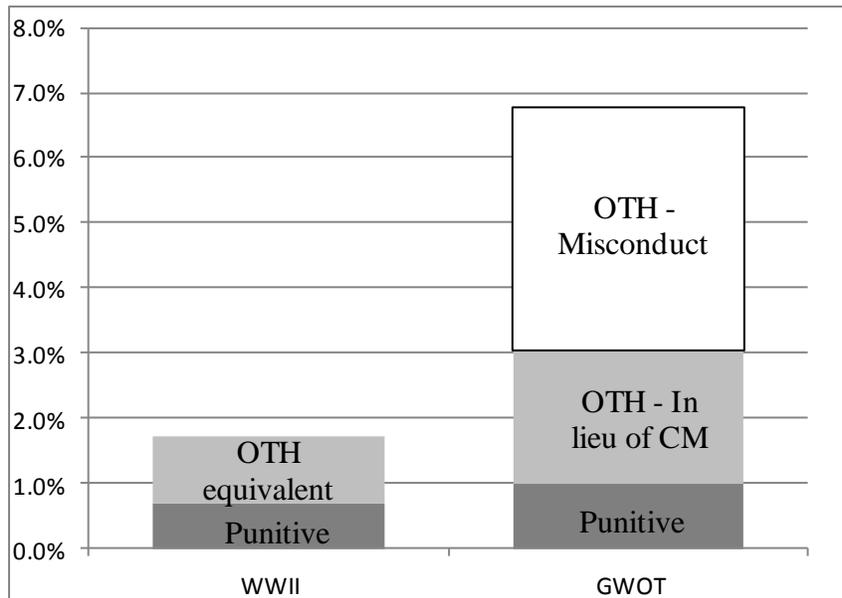
<sup>371</sup> *Id.*, Enclosure 3 ¶ 11.c.

<sup>372</sup> *Id.*, Enclosure 3 ¶ 10.a.1.

<sup>373</sup> *Id.*, Enclosure 3 ¶ 10.a.2.

This category of service members—with administrative, non-punitive discharges for general misconduct that did not involve court-martial charges—represent 3.8% of all service members, and over half of post-2001 the service members currently excluded from VA services. Allowing presumptive eligibility for these service members would reduce overall exclusion rates from 6.8% to 3%, much closer to the 1944 rate of 1.9% that Congress thought was too high when it enacted the current statute. The remaining 3% of service members include those with punitive discharges and those given administrative discharges in lieu of court-martial. This category of veteran would not be eligible for VA services unless a COD review finds that their service was other than dishonorable under the standards in 38 C.F.R. 3.12(d).

**Figure 3: Types of discharges leading to presumptive VA exclusion<sup>374</sup>**



**C. Tentative eligibility for health care - 38 C.F.R. § 17.34.**

We propose to expand tentative eligibility to include all service members who will probably be found eligible for health care and to include instructions for Enrollment and

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<sup>374</sup> DOD FOIA request, 14-10057. Staff of H. Comm. on Veterans’ Affairs, Eligibility for Veterans’ Benefits Pursuant to Discharge Upgradings, Hearing Before the Committee on Veterans’ Affairs on S. 1307 and Related Bills, Rep. No. 97-887, at 600-01 (Comm. Print 1977).

Eligibility Staff on initiating the Character of Discharge Review process. The current regulations read, in whole:

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

- (a) In emergencies. The applicant needs hospital care or other medical services in emergency circumstances, or
- (b) Based on discharge. The application is filed within 6 months after date of discharge under conditions other than dishonorably, and for a veteran who seeks eligibility based on a period of service that began after September 7, 1980, the veteran must meet the applicable minimum service requirements under 38 U.S.C. § 5303A.

We propose to replace this with the following:

Subject to the provisions of §§ 17.36 through 17.38, when any person has filed, or expressed an intent to file, an application for hospital care or other medical services, except outpatient dental care, or has expressed an interest in hospital care or medical services or concerns that indicate the need for care or treatment and that person's application requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized if it is determined that eligibility for care probably will be established.

(a) Tentative eligibility determinations under this section, however, will only be made under the following circumstances:

- (1) In emergencies. When the applicant needs hospital care or other medical services in emergency circumstances, those services may be provided based on tentative eligibility;
- (2) Based on discharge. When adjudication as to character of discharge is required, tentative eligibility will be provided to any applicant who has an Other Than Honorable characterization, who served more than four years, or who served more than one enlistment. For an applicant who seeks eligibility based on a period of service that began after September 7, 1980, the applicant

must meet the applicable minimum service requirements under 38 U.S.C. § 5303A; or

(3) Based on length of service. When any applicant does not meet applicable minimum service requirements under 38 U.S.C. § 5303A, tentative eligibility will be provided if the applicant was released for medical or health reasons, including medical discharge or retirement, condition not a disability, or other physical or mental health conditions.

Broadly, the expressed purpose of the current regulation is to allow the VA to provide medical care to all who are eligible or likely eligible without delay. It seeks to accomplish that goal by granting eligibility immediately if possible, and by granting “tentative eligibility” where eligibility “probably” will be established. The current proxies for probable eligibility are (a) emergencies and (b) discharge within the last six months where the discharge is “under conditions other than dishonorable” and any minimum service requirement is met.

Change is needed for three primary reasons. First, the current regulation is opaque and provides scant guidance to front-line staff. Whether a service member was discharged other-than-dishonorably and whether a service member meets any minimum service requirement is presently a complex adjudicatory process. Greater clarity and specificity would be helpful to describe whether a service member is probably eligible. Second, the proxies chosen do not adequately predict probable eligibility. As one example, they do not evaluate whether a service member completed a first or prior term of service on which eligibility can be based. Third, adoption of the proposals detailed above will increase access to the VA for service members with Other Than Honorable discharges, and their eligibility for VHA services is therefore probable. That has the added benefit of ensuring that other-than-honorably discharged service members with combat-related or Military Sexual Trauma-related health conditions are not wrongfully denied medical benefits for those service-connected injuries, to which they are entitled by law.

<sup>375</sup> Congress has recognized the “strong moral obligation of the Federal Government to provide treatment for service-connected disabilities.”<sup>376</sup>

Accordingly, the proposed regulation implements two new proxies for probable eligibility. The first grants tentative eligibility to those service members with Other Than Honorable discharges, for the reasons explained above, and to service members where facts indicate that they completed at least one term of service. The second, which applies where the service member does not appear to meet minimum service requirements, grants tentative eligibility to those who appear to have service-connected injuries based on available facts.

It is possible that some who are granted tentative eligibility will later be found ineligible after a more careful review. However, the VA should take the policy of being over-inclusive, rather than underinclusive—a policy that Congress clearly supports.<sup>377</sup> The denial of prompt treatment to a service member in need has long-term consequences. It is better to give service members the benefit of the doubt and provide support for a period of time while adjudication is ongoing. If ultimately the service member is not eligible, then the VA can cease providing services.

Finally, we propose that any hospital or medical care provided during the tentative eligibility period is not charged to the applicant. The VA may, of course, bill other insurers. However, so as not to deter service members from seeking necessary care based on the specter of potential charges, the best policy is to waive costs during tentative eligibility.

We also propose to add the following subsections to the regulation, in order to describe necessary procedures for satisfying this regulation’s goal.

(b) When a person files an application for hospital care or other medical services, or has expressed an interest in hospital care or medical services, and an adjudication as to service connection or a determination as to any

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<sup>375</sup> Pub. L. 113-146 (as amended by Pub. L. 113- 175, Pub. L. 113-235); see VHA Directive 2010-033, Military Sexual Trauma (MST) Programming (July 14, 2010); IB 10-448 Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits (Nov. 2014).

<sup>376</sup> S. Comm. on Veterans’ Affairs, Eligibility for Veterans Benefits Pursuant to Vietnam Era Discharge Upgrading, report to accompany S. 1307, 95th Cong., 1st sess., at 18 (June 28, 1977).

<sup>377</sup> See, e.g., House Hearings on 1944 Act, *supra* note 28 at 415 (“[W]e are trying to give the veteran the benefit of the doubt, because we think he deserves it.”).

other eligibility prerequisite is required, a request for an administrative decision regarding eligibility shall promptly be made to the appropriate VA Regional Office, or to the VA Health Eligibility Center.

(c) Applicants provided tentative eligibility shall promptly be notified in writing if they are found ineligible and furnished notice of rights of appeal.

The current regulation, written in the passive voice, fails to provide clear instructions to VHA staff and does not fully implement VA's broad mandate to provide rehabilitation and treatment services to those who have served. It passively refers to applications that have been filed, without here specifying how an applicant can obtain that application and submit it. Similarly, this regulation does not provide instructions to VHA staff about initiating a Character of Discharge Review for service members who seek health care for whom eligibility cannot immediately be established. Moreover, the regulation does not reflect the reality that when veterans go to VA health facilities they ask for treatment, not applications. That is, they say that they need counseling, medications, or housing, not an enrollment form.

To effectively implement this regulation, the proposed introductory paragraph triggers the tentative eligibility determination process not only when an application is filed, but also when a person expresses an intent to file an application, expresses interest in hospital or medical care, or expresses concern that indicates a need for care or treatment. This pragmatic, expansive language parallels the federal regulations for the Supplemental Nutrition Assistance Program (SNAP, commonly known as "food stamps"), which instruct staff to "encourage" to apply any person who "expresses interest in obtaining food stamp assistance or expresses concerns which indicate food insecurity."<sup>378</sup> The VA has a similar—indeed greater—obligation to ensure that all veterans get the care and treatment that they need and should adopt a similar stance of encouraging to apply all those who are interested.

Proposed subsection (b) then instructs VHA staff to request an administrative decision to the VA Regional Office or the VA Health Eligibility Center, and subsection (c) requires notice of any determinations and rights of appeal to service members. As discussed above, 90% of service members who require eligibility determinations never even obtain a review. Clearer instructions

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<sup>378</sup> 7 C.F.R. § 273.2(c)(2).

may help remedy the widespread phenomena of less-than-honorably discharged veterans being denied by default and of being turned away without adjudication. Practical guidance on required procedures will help VA staff efficiently and correctly process applications.

**D. Changes to health care enrollment procedures – 38 C.F.R. § 17.36(d).**

We propose revising the regulations to offer clearer guidance to VA staff and to embrace a more veteran-friendly enrollment process. We propose inserting short additions to the existing regulations, as underlined below:

(d) Enrollment and disenrollment process—

(1) Application for enrollment. Any person may apply to be enrolled in the VA healthcare system at any time. Enrollment staff shall encourage any person who expresses an interest in obtaining hospital care, medical services, or other benefits or who expresses concerns that indicate an interest in benefits to file an application. Upon request made in person or in writing by any person applying for or expressing an intent to apply for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form and instructions will be furnished. For enrollment in VA healthcare, the appropriate application form is the VA Form 10–10EZ. Any person who wishes to be enrolled must apply by submitting a VA Form 10–10EZ to a VA medical facility or via an Online submission at <https://www.1010ez.med.va.gov/sec/vha/1010ez/>.

(2) Action on application. Upon receipt of a completed VA Form 10–10EZ, a VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will accept a veteran as an enrollee upon determining that the veteran is in a priority category eligible to be enrolled as set forth in § 17.36(c)(2). Upon determining that a veteran is not in a priority category eligible to be enrolled, the VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will inform the applicant that the applicant is ineligible to be enrolled. If eligibility is in question based on character of service, a request for an administrative decision regarding eligibility shall be made to the appropriate VA Regional Office, or the VA Health Eligibility Center, using a VA Form 7131.

The proposed regulations seek to implement a number of VA's goals, including clear guidance to applicants and staff and ease of access for service members. To those ends, the proposal includes more detailed instruction for VA staff. For example, it instructs staff to provide the appropriate application form, a 10-10EZ, to any person who expresses an interest in health care and detail where to request a Character of Discharge Review if needed. The requirements for process and adjudication currently exist in disparate provisions of law, regulations, and guidance, but a concise and direct provision here would be most useful. Moreover, in accordance with VA's mission of caring for all veterans, the proposal urges VA staff to encourage individuals to apply for health care if any interest in or need for treatment is expressed. The additional language will work to ensure that all those who are eligible receive the support and treatment that they deserve.

## **VI. CONCLUSION**

We propose changes to the regulations implementing the VA's statutory requirement to exclude service members separated under "dishonorable conditions." We believe that the current regulations do not reflect public expectations, are inconsistent with the VA's official and external commitments, and violate the statute they implement. These problems are not the product of bad faith or systemic error on the part of VA adjudicators, but rather regulations that are outdated and inconsistent with Congressional intent. These improper standards have produced the highest rate of veteran exclusion for any era, denying access to 125,000 service members discharged since 2001, including about 30,000 who had deployed to contingency operations. The VA's regulations prevent it from successfully serving the veteran population, in particular those most at risk of suicide, homelessness and incarceration. We hope that the VA will recognize the opportunity it has to expand services to deserving veterans while correcting the legal infirmities of the present regulations.

## VII. PROPOSED AMENDMENTS

### **38 C.F.R. § 3.12(d)**

- d. The VA may find that a separation was under dishonorable conditions only if the conduct leading to discharge would have justified a Dishonorable discharge characterization. This includes service members with Dishonorable discharges, and service members with other discharge characterizations whose conduct would have justified that characterization. An administrative discharge generally indicates that a Dishonorable characterization was not justified.
  1. A discharge or release for any of the following types of misconduct was under dishonorable conditions unless circumstances exist that mitigate the misconduct:
    - i. Acceptance of a discharge to avoid trial by general court-martial. Avoidance of a trial by general court-martial is shown by documentation that charges had been referred to a general court-martial by a general court-martial convening authority.
    - ii. Mutiny or spying
    - iii. An offense involving moral turpitude. Moral turpitude is conduct that involves fraud, depravity, or a violation of moral standards with an intent to harm another person. Offenses of moral turpitude are: Treason, Rape, Sabotage, Espionage, Murder, Arson, Burglary, Kidnapping, Assault with a Dangerous Weapon, and the attempt of any of these offenses.
    - iv. Three or more separate incidents of serious misconduct that occurred within one year of each other. Misconduct is serious when it is punishable by at least one year of incarceration under the Uniform Code of Military Justice.
  2. The severe punishment of a Dishonorable characterization is not justified where extenuating circumstances explain or mitigate the misconduct. The Secretary must consider any information that would justify a less severe punishment. The following circumstances may show that service was not dishonorable:
    - i. The individual contributed substantial favorable service to the nation. A determination of favorable service to the nation will consider:
      1. The duration and quality of service prior to the misconduct that resulted in discharge, and
      2. Whether the person's service included hardship conditions, such as overseas deployment.
    - ii. The person's state of mind at the time of misconduct was adversely affected by mental or physical disabilities or operational stress.
    - iii. The person's actions were explained by extenuating circumstances, taking into consideration the person's age, maturity, and intellectual capacity.

### **38 C.F.R. § 3.12(a)**

- a. If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. § 101(2)). An administrative discharge shall be a discharge under conditions other than dishonorable unless it is issued in lieu of court-martial. Discharges issued by court-martial or issued in lieu of court-martial must be reviewed under the criteria in paragraph (d) in order to determine whether the separation was under dishonorable conditions.

### **38 C.F.R. § 17.34**

Subject to the provisions of §§ 17.36 through 17.38, when any person has filed, or expressed an intent to file, an application for hospital care or other medical services, except outpatient dental care, or has

expressed an interest in hospital care or medical services or concerns that indicate the need for care or treatment and that person's application requires an adjudication as to service connection or a determination as to any other eligibility prerequisite which cannot immediately be established, the service (including transportation) may be authorized if it is determined that eligibility for care probably will be established.

- a. Tentative eligibility determinations under this section, however, will only be made under the following circumstances:
  1. In emergencies. When the applicant needs hospital care or other medical services in emergency circumstances, those services may be provided based on tentative eligibility;
  2. Based on discharge. When adjudication as to character of discharge is required, tentative eligibility will be provided to any applicant who has an Other Than Honorable characterization, who served more than four years, or who served more than one enlistment. For an applicant who seeks eligibility based on a period of service that began after September 7, 1980, the applicant must meet the applicable minimum service requirements under 38 U.S.C. § 5303A; or
  3. Based on length of service. When any applicant does not meet applicable minimum service requirements under 38 U.S.C. § 5303A, tentative eligibility will be provided if the applicant was released for medical or health reasons, including medical discharge or retirement, condition not a disability, or other physical or mental health conditions.
- b. When a person files an application for hospital care or other medical services and an adjudication as to service connection or a determination as to any other eligibility prerequisite is required, a request for an administrative decision regarding eligibility shall promptly be made to the appropriate VA Regional Office, or to the VA Health Eligibility Center.
- c. Applicants provided tentative eligibility shall promptly be notified in writing if they are found ineligible and furnished notice of rights of appeal.
- d. Any hospital care or other medical services provided during the period of tentative eligibility shall be free of charge to the applicant.

**38 C.F.R. § 17.36 Enrollment—provision of hospital and outpatient care to veterans**

- a. Enrollment and disenrollment process—
  1. Application for enrollment. Any person may apply to be enrolled in the VA healthcare system at any time. Enrollment staff shall encourage any person who expresses an interest in obtaining hospital care, medical services, or other benefits or who expresses concerns that indicate an interest in benefits to file an application. Upon request made in person or in writing by any person applying for or expressing an intent to apply for benefits under the laws administered by the VA of Veterans Affairs, the appropriate application form and instructions will be furnished. For enrollment in VA healthcare, the appropriate application form is the VA Form 10–10EZ. Any person who wishes to be enrolled must apply by submitting a VA Form 10–10EZ to a VA medical facility or via an Online submission at <https://www.1010ez.med.va.gov/sec/vha/1010ez/>.
  2. Action on application. Upon receipt of a completed VA Form 10–10EZ, a VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will accept a veteran as an enrollee upon determining that the veteran is in a priority category eligible to be enrolled as set forth in § 17.36(c)(2). Upon determining that a veteran is not in a priority category eligible to be enrolled, the VA network or facility director, or the Deputy Under Secretary for Health for Operations and Management or Chief, Health Administration Service or equivalent official at a VA medical facility, or Director, Health Eligibility Center, will

inform the applicant that the applicant is ineligible to be enrolled. If eligibility is in question based on character of service, a request for an administrative decision regarding eligibility shall be made to the appropriate VA Regional Office, or the VA Health Eligibility Center, using a VA Form 7131.

**VIII. APPENDIXES**

**A. Sample Regional Office Decision Letter**



DEPARTMENT OF VETERANS AFFAIRS

JUN 23 2015

In Reply Refer To: 343/212/TH

[REDACTED]  
1060 HOWARD ST  
SAN FRANCISCO, CA 94103

Dear Mr. [REDACTED]:

We made a decision regarding your discharge from military service. Every effort was made to see that your claim received complete consideration.

This letter tells you what we decided, how we reached our decision and what evidence we used to reach our decision. We have also included information on what you can do if you don't agree with our decision, and who to contact if you have questions or need assistance

**What We Decided**

We decided that your military service for the period December 15, 2003 through August 19, 2008 isn't honorable for VA purposes. You and your dependents aren't eligible for any VA benefits for this period of military service. Only veterans with honorable service are eligible for VA benefits.

You are not eligible for health care benefits under Chapter 17, Title 38 for any disabilities determined to be service connected.

**Evidence Used to Decide Your Claim**

In making our decision, we used the following evidence:

- Facts and circumstances and DD214 as provided by the military service department
- VA Due Process Letter of 03-25-2011
- Responses to our due process letter and Buddy Statements received on 05-30-2012 and 01-17-2014
- VA Form 21-526EZ received on 1-12-2015

**What You Should Do If You Disagree With Our Decision**

If you do not agree with our decision, please download and complete VA Form 21-0958, "Notice of Disagreement". You can download the form at <http://www.va.gov/vaforms> <<http://www.va.gov/vaforms>> or you can call us at 1-800-827-1000. You have one year from the date of this letter to appeal the decision. The enclosed VA Form 4107(C), "Your Rights to Appeal Our Decision," explains your right to appeal.



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[REDACTED]  
[REDACTED]

You can also ask the Service Department to change the character of discharge or you can apply for a correction of military records. To request a change, use the enclosed DD Form 293, Application for the Review of Discharge or Dismissal from the Armed Forces of the United States. To apply for correction, use the enclosed DD Form 149, Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552. Send the completed form to the proper address on the back of the form.

**If You Have Questions or Need Assistance**

If you have any questions, you may contact us by telephone, e-mail, or letter.

<b>If you</b>	<b>Here is what to do.</b>
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711.
Use the Internet	Send electronic inquiries through the Internet at <a href="https://iris.va.gov">https://iris.va.gov</a> .
Write	VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached <i>Where to Send Your Written Correspondence</i> .

In all cases, be sure to refer to your VA file number [REDACTED]

If you are looking for general information about benefits and eligibility, you should visit our website at <https://www.va.gov>, or search the Frequently Asked Questions (FAQs) at <https://iris.va.gov>.

We sent a copy of this letter to your representative, Swords to Plowshares, Veterans Rights Org, Inc., whom you can also contact if you have questions or need assistance.

Sincerely yours,

RO Director  
VA Regional Office

Enclosure(s): VA Form 4107  
DD Form 149  
DD Form 293  
Where to Send Your Written Correspondence

Cc: Swords to Plowshares

**B. Presentation to Senate Veterans Affairs Committee, May 2014**

**Impact of Military Discharges on Establishing Status as a Veteran for Title 38 Disability and/or Healthcare Benefits**



You are here

We are here to help you achieve your goals.

VETERANS BENEFITS ADMINISTRATION May 2014 U.S. Department of Veterans Affairs

**Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits**

- **Does VHA work with VBA regarding an individual's eligibility for VA benefits, or does VHA explain to an individual that they have to contact VBA to resolve eligibility status?**
  - VHA will complete VA Form 10-7131 with all available information before forwarding it to VBA for an eligibility status decision.
- **What about for a Veteran who has not applied for service-connected disability yet, and doesn't plan to, but who would potentially qualify in a different enrollment category at VHA?**
  - VBA currently makes all determinations regarding veteran status. Even if the Veteran is only applying for VA health care, the determination of Veteran status under 38 U.S.C. 101(2) is sent to VBA for adjudication before VHA can determine health care enrollment.

VETERANS BENEFITS ADMINISTRATION 4

**Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits**

- Veterans must be discharged under other than dishonorable conditions to be eligible for VA disability and health care benefits.
  - VA considers honorable and general (under honorable conditions) discharges to be issued "under conditions other than dishonorable," for purposes of establishing Veteran status under 38 U.S.C. §101(2)
  - An individual who does not receive an honorable or general discharge *may* still receive treatment at a VA medical facility, unless the individual is subject to one of the statutory bars to benefits listed in the statute in 38 U.S.C. 5303. In such cases, VA makes an administrative determination as to whether the Servicemember's service was "under conditions other than dishonorable." 38. C.F.R. §3.12
  - VA considers medical issues, such as PTSD and TBI, with military service records when making such determinations.

VETERANS BENEFITS ADMINISTRATION

**Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits**

- **If a Veteran is temporarily enrolled, is there a time limit for VHA to provide health care?**
  - The Veteran is given a tentative eligibility for health care until a final determination is made for those who apply within 6 months of discharge. Those who apply more than 6 months after discharge are provided emergency care only until the [veteran's eligibility status under 38 U.S.C. § 101(2)] is adjudicated.
- **Do we give the Veteran a 6 month treatment period while the discharge is reviewed, 9 months, how long? Do we know how long the discharge review takes at VBA?**
  - We will continue to provide health care until VBA adjudicates the Veteran's [eligibility status].

VETERANS BENEFITS ADMINISTRATION 5

**Impact of Military Discharges on Establishing Status as a Veteran for Title 38 VA Disability and/or Healthcare Benefits**

- **If an individual requests healthcare at a VHA facility, and the system shows a military discharge that is potentially disqualifying, what are the next steps? What does VHA do?**
  - When an individual presents or applies for VA health care benefits and has a potentially disqualifying military discharge, VHA takes the following steps:
    - VA eligibility staff may register the individual and place the health care benefits application in a Pending Verification Status.
  - Send a request for an administrative decision regarding the character of service for VA health care purposes to the local VA Regional Office (VARO) using VA Form 7131.

VETERANS BENEFITS ADMINISTRATION 3

**Statutory Bar to Benefits**

- A dishonorable discharge, or a discharge under the conditions listed below, is a statutory bar to VA benefits (38 U.S.C. § 5303):
  - As a conscientious objector who refused to perform military duty, wear the uniform, or comply with a lawful order
  - Discharge by reason of a general court-martial
  - Resignation by an officer for the good of the service
  - As a deserter
  - As an alien during a period of hostilities, where it is affirmatively shown that the former Servicemember requested his or her release
  - By reason of discharge under other-than-honorable (OTH) conditions; or issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days

VETERANS BENEFITS ADMINISTRATION

### Non Statutory Bars to Benefits

- For Veterans with non statutory bars to benefits, including other-than-honorable, bad conduct, and certain uncharacterized discharges, VA must determine whether the Veteran is eligible for VA benefits (38 C.F.R. §3.12)
  - VA considers the available evidence, including the overall nature of the quality of service, and considers any mitigating factors when determining eligibility status.

### Homeless Registry Review

- The review of the Homeless Registry from the names identified by VBA of Veterans who have applied for benefits and have negative discharges shows the following information. Please note, the total numbers are for all years VA has collected data.
- VA has an internal discharge review process where approximately 160,000 have been reviewed to determine if a Veteran will be regarded as having an honorable discharge for VA health care and benefits. Of that total about 14,200 are also listed on the homeless registry. Approximately, 1,700 of the homeless Veterans were granted Chapter 17 health care access in the VBA Character of Discharge process.

### Veterans Status Eligibility Determination Process

- VAROs verify the Veteran's character of discharge with the service department review the facts, circumstances, and all other evidence of record to determine if the discharge is under conditions other than dishonorable.
- VA does not make character of discharge determinations and cannot change an existing DoD character of discharge determination.
- When determining Veteran status, VA provides due process as follows:
  - Provide a written notice of its intent to decide the status eligibility
  - Allow 60 days for the individual to respond to the notice and provide evidence or statements pertaining the decision.
  - Provide a hearing if requested
  - Allow the individual the right to representation
  - VA will assist individuals in obtaining third-party evidence to support their claim.

### Physical Disability Board Review

- The *Wounded Warrior Act* was signed into law on January 28, 2008. It established a process called Physical Disability Board of Review (PDBR), which provides Veterans who were medically separated between September 11, 2001 and December 31, 2009, the opportunity to request a review of their Department of Defense (DoD) adjudicated disability rating(s) to ensure accuracy and fairness.
- VA has an extensive local effort that is ongoing with Department of Defense to let homeless Veterans who are eligible for Physical Disability Board of Reviews (PDBR) know about their eligibility and assist with completing the DoD applications.

### Administrative Decision and Notification to Veteran

- VA documents its findings in an administrative decision that is sent to the Veteran.
  - The administrative decision outlines the evidence used to make the determination, and notifies Veterans of their right to an appeal if the decision is unfavorable.
- VA will provide benefits if there is a distinctly separate period of service which qualifies the Veteran for benefits. In such cases, benefits can only be provided based on the period of service that was determined to have been under [conditions other than dishonorable.]

### Physical Disability Board Review (Cont.)

- DoD recently provided the Department of Veterans Affairs (VA) with a list of approximately 73,000 Veterans who are eligible for PDBR consideration and who may or may not have previously accessed VA services. The Veterans Health Administration (VHA) has cross-referenced with the National Homeless Veteran Registry to determine if there are Veterans on the list who have accessed VA health care. The results indicate that VHA has assisted approximately 6,500 (almost 9 percent) of the PDBR Veterans through the local VA homeless programs. VHA was able to determine that over 85 percent of these homeless and at-risk Veterans are assigned to a Patient Aligned Care Team.

## Veterans Integrated Service Network

- On March 18, 2014, VHA issued guidance to all of the Veterans Integrated Service Network and VA medical center staff across the country to notify homeless and at-risk Veterans of their eligibility for PDBR and provide them with the appropriate letter and forms. In approximately 25 percent of the cases reviewed by the PDBR (as of December 2011), the applicant's Military Service Department has found the applicant eligible for a disability retirement and has awarded this to the applicant. This means many of our homeless Veterans could have additional benefits and a financial source available to assist with securing stable housing and supporting their families, thus ultimately helping VA achieve the goal of ending homelessness among Veterans.

**C. Letter from VBA Undersecretary to Congresswoman Pelosi, July 31, 2015**



**THE UNDER SECRETARY OF VETERANS AFFAIRS FOR BENEFITS**

**WASHINGTON, D.C. 20420**

**July 31, 2015**

The Honorable Nancy Pelosi  
U.S. House of Representatives  
Washington, DC 20515

Dear Congresswoman Pelosi:

Thank you for your July 6, 2015, letter regarding criteria the Department of Veterans Affairs (VA) uses to determine whether a former Servicemember is entitled to VA benefits or healthcare based upon character of discharge. I am responding on behalf of the Department.

Generally, to be eligible for VA disability, health care, and burial benefits, a Veteran must be discharged under "conditions other than dishonorable."<sup>1</sup> Please refer to 38 U.S.C. § 101(2). VA considers honorable and general discharges (both of which would be considered discharges under honorable conditions) as being issued under conditions other than dishonorable for VA benefit purposes. For all other discharges (such as "other than honorable" discharges), VA makes a factual determination as to whether the discharge is considered to be under conditions other than dishonorable for VA purposes.

Section 3.12 of title 38, C.F.R., outlines VA's character of discharge determination process. When a factual determination is needed, VA first reviews whether the reason for discharge is a statutory bar to benefits under 38 U.S.C. § 5303. Examples of statutory bars to benefits include:

- Resignation of an officer for the good of the service,
- Discharge due to conviction by a general court martial,
- Absence without official leave for 180 days or more, and
- A conscientious objector who refused to wear the uniform.

If a Servicemember's reason for discharge is one of the statutory bars to benefits, section 5303 requires VA to find the Servicemember's discharge disqualifying for VA purposes, unless he or she was considered insane at the time of the circumstances leading to the discharge. If a Servicemember's reason for separation is not a statutory bar to benefits, VA weighs the reason for separation against the overall nature of the quality of service and any mitigating factors, including those related to absence without leave for periods exceeding 180 days.

Typically, VA makes a character of discharge determination only after it receives a claim for benefits, which may be a request for medical treatment received at a VA medical facility, or a compensation or pension application received at a VA regional office. VA

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<sup>1</sup> Educational benefits generally require an honorable discharge.

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The Honorable Nancy Pelosi

regional office personnel are charged with the responsibility of making character of discharge determinations in claims for both health care and benefit programs. However, prior to this determination, a former Servicemember may be provided health care at a VA medical facility based on a tentative eligibility determination in emergency circumstances. With regard to compensation or pension applications, VA cannot make a final decision regarding entitlement to benefits until the character of discharge issue is resolved.

Before making any final determination on a former Servicemember's character of discharge, VA requests verification of the facts and circumstances surrounding the incident(s) resulting in an "other-than-honorable" discharge from the appropriate service department. VA then reviews all available evidence of record, including the reason for separation, precipitating circumstances, the quality and length of service, and other mitigating factors to determine whether the discharge is under conditions other than dishonorable for VA purposes. VA may consider behavioral health issues, specifically post-traumatic stress disorder (PTSD), when making a character-of-discharge determination. VA documents its determination in an administrative decision and sends it to the former Servicemember. Following this decision, even if VA determines that a Servicemember's character of discharge does not qualify him or her for other types of VA benefits, the Servicemember may still be entitled to treatment at a VA medical facility for any disabilities determined to be service connected, unless the Servicemember is subject to one of the statutory bars to benefits specified in section 5303. Please also refer to 38 C.F.R. § 3.360.

Administrative character-of-discharge decisions are subject to random quality assurance review at the local regional office level by experienced VA claim processors and nationally by quality assurance personnel. For the 12-month period ending May 31, 2015, VA's national claim-based accuracy rate for benefit entitlement decisions (which includes character of discharge decisions) was 91.6 percent. The accuracy of decisions completed by California's three regional offices was 91.2 percent for the same period.

Beyond VA's character of discharge determination process, former Servicemembers may also seek to have a Department of Defense (DoD) Discharge Review Board upgrade their less-than-honorable discharge or to have a DoD Board for Correction of Military or Naval Records revise their service records to change the service department's characterization of service. Changes to a former Servicemember's characterization of service, made by these Boards, are typically binding on VA. Such Boards are subject to 2014 guidance from former Secretary of Defense Charles Hagel, directing a "very liberal" standard for considering character of discharge upgrades when PTSD is a factor. During transition assistance briefings, DoD explains character of discharges to Servicemembers who are completing their military service. Information

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about DoD's discharge-upgrade process is available on VA's website located at: [www.benefits.va.gov/benefits/character\\_of\\_discharge.asp](http://www.benefits.va.gov/benefits/character_of_discharge.asp), as well as through VA's national call centers and regional office public contact activities.

VA is deeply committed to ensuring every eligible Veteran receives the maximum amount of benefits and care to which he or she is entitled. Should a Veteran requiring assistance come to your attention, particularly when entitlement is uncertain based upon character of service, we will readily assist in any way possible. Should you have further questions, please have your staff contact Ms. Mandy Hartman, Congressional Relations Officer, at (202) 461-6416, or by email at [Mandy.Hartman@va.gov](mailto:Mandy.Hartman@va.gov).

Thank you for your continued support of our mission.

Sincerely,



Allison A. Hickey