NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

Swords to Plowshares
VETS HELPING VETS SINCE 1974

February 10, 2021

Via Email and FedEx

The Honorable Denis R. McDonough
Secretary of Veterans Affairs
810 Vermont Ave, NW
Washington, DC 20420

Secretary McDonough,

Congratulations on your recent confirmation as Secretary of Veterans Affairs (VA). The undersigned attorneys, law professors, and advocates who serve homeless and low-income veterans are invested in your success as the VA's new leader and look forward to the progress you plan to make within the Department.

As you may know, in 2016 under the Obama-Biden Administration, the VA committed to revise its Character of Discharge (COD) regulations, which govern when veterans with less-than-honorable discharges are eligible for basic VA benefits like health care and disability support. VA agreed to do so based on a petition for rulemaking by Swords to Plowshares and the National Veterans Legal Services Program (NVLSP), represented by the Legal Services Center of Harvard Law School and Latham & Watkins, concerning these unjust, unlawful, and outdated regulations that disproportionately exclude veterans of color, veterans with mental health conditions, veterans at risk of suicide, and LGBTQ+ veterans.[1] Four years later, the VA finally issued proposed regulations that, if finalized, will continue to unlawfully bar veterans from the benefits that they have earned and deserve.[2]

We write to express our serious concern with the regulations proposed under the previous administration. Within your first 100 days as VA Secretary, we ask that revised final regulations be issued that better accord with VA's governing law and VA's purpose of serving our nation's veterans. Swords to Plowshares and NVSLP additionally request a meeting with your office to discuss how the VA can better serve veterans with less-than-honorable discharges. Many of the undersigned have already submitted detailed comments to the VA about the problematic nature of the proposed regulations and to suggest alternative language.[3] The proposed regulations are contrary

[1] Petition for Rulemaking to Amend 38 C.F.R. §§ 3.12(a), 3.12(d), 17.34, 17.36(d) Regulations Interpreting 38 U.S.C. § 101(2) Requirement for Service "Under Conditions Other Than Dishonorable", https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5efed0ac6dc9fc718786414b_Petition%20to%20amend%20regulations%20implementing%2038%20USC%20101(2).pdf.

[2] AQ95-Proposed Rule - Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41471 (proposed Jul. 10, 2020), https://www.federalregister.gov/documents/2020/07/10/2020-14559/update-and-clarify-regulatory-bars-to-benefits-based-on-character-of-discharge.

[3] Swords to Plowshares and NVSLP's omnibus public comment is enclosed for ease of reference.

to the plain statutory language and legislative intent, harm the most vulnerable veterans, and serve only to further an arbitrary and confusing regulatory system.

(1) VA Regulations are Contrary to Statutory and Legislative Intent

VA benefits, including health care, are only accessible to "Veterans," which federal statute defines as "a person who served in the active military, naval, or air service, *and who was discharged or released therefrom under conditions other than dishonorable*."[4] Under the current and proposed regulations, however, hundreds of thousands of veterans are, and will continue to be, left out of the VA's system of care due to minor misconduct that is often consequent to Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) symptoms they were experiencing when they separated from the military. This is because whenever a former service member with a discharge status of *Other than Honorable*, *Bad Conduct*, *Dishonorable*, or *Uncharacterized* applies for VA services, the VA does not automatically recognize them as a veteran. Instead, the VA will first conduct an individualized COD review to decide whether the claimant meets the definition of a veteran. In this process, the VA reviews the claimant's benefits application materials and their military records to determine if any statutory or regulatory bar exists.[5]

In contrast to the VA's regulatory system, the plain language of the relevant statutes and the legislative history establish that veterans should be excluded from VA only if they received (or should have received) a Dishonorable Discharge.[6] The legislative history of the Servicemen's Readjustment Act of 1944—the statute that created the "*other than dishonorable*" standard—demonstrates Congress's expansive and generous attitude toward veterans, including those with less-than-honorable discharges. Congress knowingly enacted that expanded eligibility standard, which was drafted by Harry Colmery, former National Commander of the American Legion. Mr. Colmery explained the purpose of that phrase as follows:

> I was going to comment on the language "under conditions other than dishonorable." Frankly, we use it because we are seeking to protect the veteran against injustice . . . We do not like the words "under honorable conditions" because we are trying to give the veteran the benefit of the doubt, because we think he is entitled to it.

Three current United States Senators, in their public comment in response to the VA's proposed rule, concurred with this interpretation:

> Congress only authorized exclusion of those servicemembers who received or should have received dishonorable discharges by military standards. Congress did not intend for VA to create a new standard that would be more exclusionary that the military standard and did not give VA any authority to do so.[7]

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[4] 38 USC § 101(2)(emphasis added)
[5] 38 CFR § 3.12(c), (d)
[6] 38 USC § 101(2); *see, e.g.*, S. Rep. No. 78-755, at 15 (1944) ("Many persons who have served faithfully and even with distinction are released from the service for relatively minor offenses. . . . It is the opinion of the committee that such discharge should not bar entitlement to benefits otherwise bestowed unless the offense was such, as for example those mentioned in section 300 of the bill, as to constitute dishonorable conditions.").
[7] Comments on RIN 2900-AQ95, Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge from Richard Blumenthal, Jon Tester & Sherrod Brown, U.S. Sen., U.S. Senate (Sep. 3, 2020) (on file with

However, should the current proposed rule be finalized, former service members will continue to be barred from VA benefits for minor infractions. For example, the VA is proposing to exclude former service members who have two incidents of minor misconduct within a 24-month period. That is, under the proposed regulations, the VA could deny eligibility to a claimant whose only misconduct was two days of absence without leave (AWOL) in the last two years of a 6-year enlistment. Such misconduct could never warrant a Dishonorable Discharge under the Uniform Code of Military Justice. In fact, Congress authorizes VA to deny eligibility to veterans who have gone AWOL, but requires the AWOL be "for a continuous period of at least 180 days" – considerably longer than the two days permitted under the VA's proposed regulations.[8]

(2) Proposed Rule Harms the Most Vulnerable Veterans

In many cases, former service members received less-than-honorable discharges because of trauma, hardship, or discrimination. Studies have found a strong correlation between having a mental health condition in service, whether because of combat or Military Sexual Trauma, and being less-than-honorably discharged. For example, Operation Iraqi Freedom Marine Corps combat veterans with PTSD are eleven times more likely to be discharged for misconduct and eight times more likely to be discharged for substance abuse than veterans without PTSD.[9] A GAO Report from 2017 found that the military routinely failed to provide mandatory mental health screenings, or conducted inadequate screenings, and that 62 percent of service members discharged for misconduct from 2011 to 2015 had been diagnosed with a mental health condition in service, yet separated anyway.[10] Systemic and institutionalized discrimination, such as against LGBTQ+ service members and service members of color, also has led to higher rates of less-than-honorable discharges in those communities. A recent study by Protect Our Defenders found that Black service members are between 1.29 times and 2.61 times more likely to have disciplinary action taken against them than white service members in an average year.[11] The accumulation of disciplinary infractions leads directly to less-than-honorable discharges.

Those in-service experiences often continue to affect a service member after discharge, especially when compounded by the shame, stigma, and exclusion imposed by a less-than-honorable discharge characterization. Thus, veterans with less-than-honorable discharges have higher rates of homelessness, mental health conditions, incarceration, and unemployment.[12] They are three times

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Regulations.gov (beta)) at 3.

[8] 38 USC § 5303(a)

[9] Robyn M. Highfill-McRoy, Gerald E. Larson, Stephanie Booth-Kewley & Cedric F. Garland, *Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines*, BMC Psychiatry, Oct. 25, 2010, at 5.

[10] DOD Health: Actions Needed to Ensure Post Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations, U.S. GAO GAO-17-260, 2-3 (May 16, 2017), https://www.gao.gov/assets/690/684608.pdf.

[11] Don Christenson & Yelena Tsilker, *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System, at* i-ii (2017), protectourdefenders.com/disparity.

[12] Adi V. Fundlapalli et al., *Military Misconduct and Homelessness Among US Veterans Separated from Active Duty, 2001-2012,* 314 J. Am. Med. Ass'n 832 (2015); Claire A. Hoffmire et al., *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans*, 56 Am. J. Prev. Med. 727 (2019); Sara Kintzle et al., *Exploring the Economic and Employment Challenges Facing U.S. Veterans: A Qualitative Study of Volunteers of America Service Providers and Veteran Clients* (May 2015).

more likely to experience suicidal ideation.[13] But because of the VA's exclusionary COD regulations, the former service members who need VA's services the most usually cannot access them.

(3) COD Process is Arbitrary and Overly Burdensome

The current and proposed COD process, which presumes service members with less-than-honorable discharges to be ineligible, is overly burdensome on both VA adjudicators and veterans. The process is opaque and the regulations are vague, leading to inconsistent results. For example, in Fiscal Year 2018, the Oakland Regional Office granted 39.7 percent of COD determinations, while the Milwaukee Regional Office granted just 5.9 percent.[14] NVLSP and Swords to Plowshares' comment details how the current proposed regulations continue to be vague and include language that we expect will results in varying outcomes from VA adjudicators.

Additionally, many VA employees and service members do not understand how to request an eligibility review. Only about 10 percent of less-than-honorably discharged veterans have undergone COD review. The remaining 90 percent are excluded by default, because VA has chosen to presumptively exclude all veterans who were not honorably discharged.[15] The VA's proposed regulation does nothing to help this issue; in fact, even though the new rules are supposed to correct errors of the past created by excluding veterans for minor misconduct and not taking into account mitigating factors, the VA is expecting to grant eligibility at the same rate as it does under the current regulations.[16]

Our clients regularly suffer the consequences of this failed system and of being denied life-sustaining care and benefits that the VA was created to provide. And, when the system does work, we see how life-altering it is for a veteran to go from homeless and being unable to work due to severe PTSD to having exceptional mental healthcare, monthly disability compensation, and housing assistance from the VA. Perhaps as important, they also achieve the dignity of having the VA recognize them as a Veteran.

We respectfully request that the VA abandon its current proposed language. The VA has a moral and legal obligation to help these veterans, and to that end, we ask that finalized regulations be issued that include the following standards:

- Presume eligibility of all administratively discharged veterans, except those discharged in lieu of court-martial;
- Remove regulatory bars in excess of VA's statutory authority that operate to exclude veterans based on misconduct that never could have or would have led to a Dishonorable Discharge; and
- Require holistic consideration of compelling circumstances, such as mental health and hardship, in all cases.

[13] Hoffmire, *supra* note 12 at 730.
[14] FOIA results on file with the authors.
[15] Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges, https://legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf.
[16] FOIA results on file with the authors.

Thank you for your careful review of this matter, as well as for your review of the omnibus public comment submitted by Swords to Plowshares and NVLSP, and the numerous other public comments in support of creating a more just and inclusive VA eligibility process. Should the VA undertake to re-write new proposed regulatory language, Swords and NVLSP are readily available to your office to provide our input, guidance, and support.

Sincerely,

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Enclosure: Comments on RIN 2900-AQ95, Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge from the National Veterans Legal Services Program and Swords to Plowshares