

# **“BAND-AIDS DON’T FIX BULLET HOLES:”<sup>\*</sup> THE VETERANS WHO ARE NOT “VETERANS,” THE UNIQUE CRISES THEY FACE, AND WHY PROACTIVE INTERAGENCY COLLABORATION IS KEY**

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<sup>\*</sup> “Band-aids don’t fix bullet holes” is a common expression used to signal that a quick solution to a serious problem is inadequate. While there is a perception that the relationship between the Department of Defense and Department of Veterans Affairs is fraught with tension and “bad blood,” this Article provides recommendations for meaningful collaboration and feasible solutions to benefit veterans.

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## ABSTRACT

Not all veterans are “veterans.” Over 540,000 living veterans have served this country, yet their military administrative discharge status prevents them from accessing U.S. Department of Veterans Affairs (VA) care and benefits. A shocking number of these veterans suffer from undiagnosed or untreated mental health conditions, and when exacerbated by the secondary effects from lack of access to VA support, put them at one of the highest risks for other psychosocial crises such as suicide and homelessness. The VA excludes these veterans from accessing its services due to the “less-than-honorable” nature of their discharge, which is excluded in the federal statutory and regulatory definitions of a “veteran.”

For a veteran with a less-than-honorable discharge to become a “veteran,” they must embark on a lengthy, arduous, inefficient, and often unsuccessful administrative appeal process within the VA or within Military Department Review Boards—in the Department of War (DoW). Uniquely, this Article proposes that despite the differing missions of the DoW and VA, greater alignment of their policies, concerning administrative discharge status and unequal treatment of veterans with less-than-honorable discharges, could proactively reduce the number of veterans at highest-risk for the secondary psychosocial crises of suicide and homelessness by creating a better avenue towards veteran-centric healthcare and services provided through the VA. Where reactive policy “band-aids” have been of little avail, new proactive policy collaboration between the DoW and VA can reaffirm this nation’s commitment to care for all veterans who have served under the banner of the United States.

## INTRODUCTION

*“Never was so much owed by so many to so few.”-*  
*Winston Churchill*

There are approximately 18 million living veterans of the U.S. armed forces who have given their service to this country.<sup>1</sup> The vast majority of these veterans served their country faithfully, received an Honorable discharge from their branch of the armed forces, and thus meet the character of discharge criteria to become eligible for U.S.

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1. See Nat’l Ctr. for Veteran Analysis and Stat., U.S. DEP’T OF VETERANS AFFS., [https://www.va.gov/vetdata/veteran\\_population.asp](https://www.va.gov/vetdata/veteran_population.asp) (on file with Syracuse Law Review) (last visited Nov. 15, 2025).

Department of Veterans Affairs (VA) healthcare and benefits.<sup>2</sup> Yet, there are approximately 540,566 living veterans whose discharge status from the military prevents them from accessing that same level of care for the remainder of their lives.<sup>3</sup> A shocking number of veterans in this subset of the population often suffer from undiagnosed and untreated mental health conditions. These mental health conditions—exacerbated by the secondary effects from lack of access to VA support—put these veterans at high risk for other psychosocial crises such as suicide and homelessness.<sup>4</sup> The best possible veteran-centric medical treatment and services are available in the VA health care system because they provide medical benefits packages tailored for those who have served.

Unfortunately, the VA excludes these veterans from accessing their services due to the “less-than-honorable”<sup>5</sup> nature of their discharge, which is built into the federal statutory definition of a “veteran”<sup>6</sup> that determines VA eligibility.<sup>7</sup> For a veteran with a less-than-honorable discharge to become a “veteran,” under federal law, they must embark on a lengthy, arduous, and often unsuccessful appeals

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2. See VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARV. L. SCH., *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper Discharges*, SWORDS TO PLOWSHARES 1, 43 (Mar. 2016), <https://www.swords-to-plowshares.org/research-publications/underserved> (on file with Syracuse Law Review) (last visited Nov. 15, 2025) [hereinafter UNDERSERVED]; see also *infra* Part III.

3. See U.S. DEP’T OF VETERANS AFFS., *Regulatory Impact Analysis for RIN 2900-AQ95(F), Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge*, 1, 6 (Apr. 23, 2024), <https://www.regulations.gov/document/VA-2020-VBA-0018-0124> (on file with the Syracuse Law Review) (last visited Nov. 15, 2025).

4. See generally *infra* Part II.

5. For the purposes of this Article, “less-than-honorable” discharge status for VA purposes includes *Other Than Honorable*, *Bad Conduct*, and *Dishonorable Discharges* from the armed forces. *Honorable and General (Under Honorable Conditions)* discharges from the armed forces qualify a former service member for “veteran” status based on the character of their discharge. See *infra* Part I(A); see also Eleanor T. Morales, *Distinction without a Difference: Other Than Honorable vs. Bad Conduct Discharge*, 1 ARMY LAWY. 38, 38, 41 (2024).

6. For the purposes of this Article, the term “veteran” is used to describe a former service member who is now discharged and eligible for VA healthcare and benefits. The term “veteran” shall be inclusive of all former service members regardless of their discharge status.

7. It is noted that some veterans who do not meet “veteran” status may still qualify for some VA healthcare for treatment purposes only for a service-connected disability. Despite this, these veterans are not eligible for critical VA disability compensation, nor is their consistent access to healthcare ensured due to a complicated statutory scheme. The full scope of Chapter 17 healthcare, for treatment purposes only, is not within the scope of this Article. See *infra* Part I(A)(3); see *infra* Part III(A); see Morales, *supra* note 5, at 42.

process within the VA or within Military Department review boards, amongst the various service branches, in the Department of War.<sup>8</sup> To complicate this process, the VA and the DoW often assume that the other’s discharge appeal process is “easier” or more accessible to veterans, yet successfully navigating either route is the exception, not the rule, necessitating the involvement of a trained advocate to be effective.<sup>9</sup> Uniquely, this Article proposes that despite the differing missions of the DoW and VA,<sup>10</sup> greater alignment of their policies concerning discharge status and treatment of veterans with less-than-honorable discharges could proactively reduce the number of veterans who suffer from untreated—and sometimes undiagnosed—service-connected mental health disorders that place them at high-risk for secondary psychosocial crises.<sup>11</sup> Proactive interagency collaboration between the DoW and the VA is the most accurate—and the most efficient—step for these veterans towards “ensur[ing] that [they] are given the care and support they so richly deserve” and reaffirming “our unwavering commitment to those who served under the flag of the United States.”<sup>12</sup>

While there may be a multitude of reasons why a veteran received a less-than-honorable discharge status,<sup>13</sup> this Article specifically explores enlisted veterans<sup>14</sup> who have received an “Other Than Honorable” (OTH) discharge for “misconduct” related to a service-connected traumatic brain injury (TBI) or mental health condition (such as post-traumatic stress disorder (PTSD))<sup>15</sup> because the status of their

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8. See *infra* Part III. Note: The Author’s use of the *Department of War (DoW)* is reflective of the administrative name change effective September 5, 2025. The use of the term *Department of Defense (DoD)* is in a historical context to reflect prior policies, decisions, and titles in effect before this date. The use of DoW and DoD by the Authors is intended to be interchangeable for these purposes. Exec. Order No. 14,347, 90 Fed. Reg. 43893.

9. See *infra* Part IV.

10. See *infra* notes 409–10.

11. See *infra* Part IV.

12. *President Donald J. Trump Takes Care of Veterans from the Battlefield to the Home Front*, THE WHITE HOUSE (Jan. 9, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-takes-care-veterans-battlefront-home-front/> (on file with Syracuse Law Review) (discussing Executive Order 13822 *Supporting Our Veterans During Their Transition From Uniformed Service to Civilian Life*) (last visited Nov. 15, 2025).

13. See *infra* Part I.

14. Commissioned officers cannot receive an OTH discharge. See 10 U.S.C. §1611 (limitations of dismissal for commissioned officers). This Article focuses on non-commissioned officers and other enlisted personnel.

15. Importantly, the focus of this Article explores veterans with a service-connected TBI or mental health condition not *specifically* related to military sexual

discharge lies just beyond the threshold of “veteran” status—denying them full access to VA care and benefits needed to manage their condition long-term.<sup>16</sup> Further, this Article explores the secondary high-risk psychosocial crises that can result from having an OTH, simultaneously suffering from one or more mental health conditions, and the reactive “band-aids” that have been applied in an attempt to reverse the crises. This Article uses a realistic hypothetical throughout to illustrate the devastating circumstances that many non-“veterans” find themselves in, the prolonged length of time it takes before they can acquire necessary treatments or beneficial services, and the secondary effects brought on by countless administrative delays.

*John Smith is a nine-year veteran of the Army and the Army National Guard.<sup>17</sup> He enlisted in the Army directly out of high school, serving a total of four years before honorably discharging from active service and enlisting in the National Guard. There, he served five years of active and inactive duty, eventually rising to the rank of E-6, Staff Sergeant. John has deployed overseas twice but never to a combat zone. John Smith was an exemplary Soldier with no disciplinary marks in his service record. Despite having no formal education outside of his high school diploma and military training, John is proud to call himself a Soldier. He is grateful for the military because it gave him a chance to escape his rough upbringing in the foster care system. In one last act of service to his country before retirement, John is honorably discharged from the National Guard and reenlists in the active Army again after September 11, 2001. John is quickly deployed to Afghanistan with the remainder of his division.*

*Like many of his fellow Soldiers, John was a veteran of a relatively stable period of peacetime. The first month in Afghanistan, John was traveling in a convoy when an improvised explosive device (IED) struck the lead Humvee. A senior commander and a close friend were*

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trauma (MST). While many similarities and general concepts from this Article may be applied to a veteran’s claim that stems from an MST incident, special provisions do exist for these veterans affected by MST. See 38 U.S.C. § 1720D; see also Alina Suris et al., *Predictors of Suicidal Ideation in Veterans with PTSD Related to Military Sexual Trauma*, 24 J. TRAUMATIC STRESS 605 (2011).

16. See *infra* Part I(A).

17. The account of “John Smith” is a depersonalized, hypothetical compendium of the histories of actual clients at the Betty and Michael D. Wohl Veterans Legal Clinic at Syracuse University (Syracuse University VLC). No identifying client information can be traced specifically to this hypothetical veteran. The story of *John Smith*—interspersed throughout—is used exclusively to illustrate the real-life impacts of receiving an OTH discharge based on the actual lived experiences of veterans.

*killed in the blast, though John went unscathed. Soon after, the forward operating base (FOB) where John was located began to take nightly mortar fire. John stopped sleeping at night and became paranoid that if he were to sleep too long, he might not be able to wake his men to find cover if a mortar round struck their barracks. His paranoia worsened because he felt that when he and his men traveled throughout the area of operations, he did not know from whom the next attack would come. John sought the assistance of a company medic, who gave him some antidepressants to help with his symptoms and told him to return to duty.*

Despite decades of research on service members who demonstrated signs of PTSD, it was not until the mid-2000s (post-9/11 era) that the DoD began to understand the long-term effects of certain military-related mental health conditions.<sup>18</sup> It took another decade for the DoD to officially recognize that certain mental health conditions might *cause* a service member to demonstrate maladaptive coping behaviors that could be characterized as misconduct.<sup>19</sup> Even with a shift in policy to allow for the mitigation of an OTH discharge precipitated by misconduct caused by an underlying mental health condition, veterans in this scenario still must battle an administrative system that does not proactively consider these mitigating circumstances nor, generally, works in their favor.<sup>20</sup> All too frequently, in the military command’s interest in maintaining a deployable, ready unit, separations for misconduct trump any concerted effort to diagnose and treat a mental health condition.

*John’s gunner in his Humvee was struck by sniper fire one day while on patrol. John drug the Soldier to cover and tried to resuscitate him. His friend died in his arms. After this combat stressor, John felt that his entire existence was in a “fog.” John was still not sleeping and would pace the barracks at night to check on his Soldiers. One month before redeploying home, a younger Soldier reported to superiors that John had inappropriately touched him in what he felt was a sexual manner while John was pacing the barracks.<sup>21</sup> Upon*

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18. See *infra* Part II.

19. See *infra* Part II.

20. See *infra* Part III.

21. Military sexual trauma (MST) is extremely serious, can happen to veterans of all genders and backgrounds, and should be reported immediately. Making *John Smith* the MST offender in this hypothetical is in no way intended to devalue the experiences lived by the victims of MST. The choice in making *John* the offender was intentional to demonstrate the marked change in behavior that can be caused by an underlying severe mental health condition.

*investigation by the Army Criminal Investigative Division (CID), another Soldier reported the same. John was immediately punished in Afghanistan under Article 15<sup>22</sup> that resulted in a reduction in rank, forfeiture of pay, and a brief confinement to his barracks.*

*Upon returning to the U.S. months later, John was surprised to learn that his commanders had initiated administrative discharge proceedings against him. He felt remorseful for his actions, did not understand what happened because it was all in his “fog,” but thought that he served that punishment while in Afghanistan. Compounding his confusion, John still did not “feel right” after his experiences in Afghanistan, and his family noticed that he was a “changed man.” Even after returning home, John still was still paranoid, anxious, averse to loud noises, and not sleeping. Three months after initiating separation proceedings, John Smith went before an Administrative Separation Board, represented by a Trial Defense Attorney, and was issued an “Other Than Honorable” discharge for the misconduct occurring in Afghanistan. He has never heard of PTSD. Despite the shock of his discharge, he prides himself on being a veteran.*

Part I of this Article explores who is eligible to become a “veteran,” and the distinguishing factors that mark the border of this area based on a veteran’s discharge status. Part II then discusses the gradual increase in both the DoD and the VA’s awareness of the serious effects of service-related mental health disorders, as well as related secondary high-risk psychosocial crises in the veteran population. Part III describes the options available for veterans with an OTH discharge and demonstrates the inadequacy and inefficiency of these remedies. Importantly, Part III also discusses new VA regulations designed to address veterans with OTH discharge characterizations; however, the regulatory implementation is notably untested in the long-term success rate for resolving veteran crises. Finally, Part IV offers remedies that both the VA and the DoW could swiftly implement to address the immediate needs of these veterans and stem the flow of excessively punitive administrative discharges that result in a later denial of essential VA medical care and support. These remedies are distinguishable in that they are administrative solutions that do not contradict the function or purpose of either federal agency but foster a new collaboration among them for the betterment of veterans and the United States.

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22. An Article 15 punishment is considered an administrative, nonjudicial punishment under the Uniform Code of Military Justice (UCMJ). *See* 10 U.S.C. § 815; *see also Article 15 Fact Sheet*, U.S. ARMY TRIAL DEF. SERV., [https://www.7atc.army.mil/Portals/17/Documents/SJA/TDS\\_AR15.pdf](https://www.7atc.army.mil/Portals/17/Documents/SJA/TDS_AR15.pdf) (on file with the Syracuse Law Review) (last visited Nov. 15, 2025).



## I. WHAT IS A “VETERAN”?

Anyone can apply for VA benefits, but only those who meet the federal statutory and regulatory requirements are entitled to receive them.<sup>23</sup> In order to qualify for most VA benefits, the applicant must be a “veteran,”<sup>24</sup> a dependent of a “veteran,”<sup>25</sup> or the surviving spouse of a “veteran.”<sup>26</sup> Consequently, despite being a veteran of one of the U.S. armed forces, a claimant applying for VA benefits might not be a qualifying “veteran” for VA purposes. Additionally, for a non-“veteran” to become a “veteran,” they must surpass the statutory bars to benefits set by Congress and the regulatory bars set by the VA<sup>27</sup> because any one of these individual barriers renders a veteran ineligible for most VA services.<sup>28</sup> If this simple paragraph immediately confuses the legal reader, imagine the confusion it causes a lay veteran. As this Article continues to explain and examine these complexities, it is understandable why many veterans sadly believe they are unworthy of being called a “veteran.”

## A. The VA’s Definition of a “Veteran”

The definition of a “veteran” used by the VA is “a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable.”<sup>29</sup> Found in this definition of a “veteran” are three initial requirements that a veteran must meet: 1) their service must have occurred in the “military, naval, air, or space service,” 2) their period of service must have been “active service,” and 3) they must have been discharged under conditions that were not dishonorable.<sup>30</sup>

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23. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (concluding that veterans’ disability benefits are nondiscretionary, statutorily mandated benefits, and those who meet the statutory and regulatory eligibility requirements have a protected property interest under the Due Process Clause of the Fifth Amendment to the United States Constitution).

24. See 38 U.S.C. § 101(2); 38 C.F.R. § 3.1(d) (2024).

25. See 38 C.F.R. §§ 3.57, 3.59 (2024).

26. See 38 C.F.R. § 3.50 (2024).

27. See 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(d) (2024).

28. See *UNDERSERVED*, *supra* note 2, at 4–7.

29. 38 U.S.C. § 101(2); 38 C.F.R. § 3.1(d) (2024).

30. See *supra* note 29; see also John W. Brooker, Evan R. Seamone, & Leslie C. Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Service-member’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MILITARY L. REV. 1, 72 (2012) (discussing a comprehensive evaluation of the elements of veteran status in Part V(A)).

The first requirement of “military, naval, air, or space service” includes categories of persons much broader than its initial reading. For example, service in any one of the following categories meets this requirement:

conventional military service in one of the six branches of the United States Armed Forces (Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard); service as a member of the Reserve of one of these branches; . . . service as a member of the Air or Army National Guard; . . . cadets at the U.S. Military, Air Force, and Coast Guard Academies; . . . Midshipmen at the U.S. Naval Academy; . . . attendance at one of the preparatory schools for the Military, Air Force, and Naval Academies; . . . commissioned officers in the Public Health Service on full-time duty; commissioned officers of the National Oceanic and Atmospheric Administration or Environmental Science Services Administration (or their predecessor agency, the Coast and Geodetic Survey) on full-time duty; World War II service in the organized military forces of the Government of the Commonwealth of the Philippines; service in the Women’s Army Auxiliary Corps; World War II service in the American Merchant Marine.<sup>31</sup>

In sum, Congress has recognized at least twenty-six distinct ways that one’s service to the United States may potentially qualify a person to receive benefits from the VA as a “*veteran*.”

Once a person has served in one of the aforementioned categories, their period of service must be considered “active service” before they may be considered a “*veteran*.”<sup>32</sup> Generally, active full-time duty meets this requirement for all categories, as well as National Guard personnel who are activated for “[f]ederal [military] service.”<sup>33</sup> If National Guard personnel are activated by a governor for the service of a

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31. BARTON F. STRICHMAN, ET AL., VETERANS BENEFITS MANUAL, pt. 1, ch. 2, § 2.2.1 (2023–24 ed.) [hereinafter VBM]; *see also* 38 U.S.C. §§ 101(10), (21), (24); 38 C.F.R. §§ 3.1, 3.6 (2024).

32. *See* 38 U.S.C. § 101(2); *see also* 38 C.F.R. § 3.1(d) (2024).

33. 38 U.S.C. § 101(21), (22), (24); *Allen v. Nicholson*, 21 Vet. App. 54, 58 (2007) (finding that “basic eligibility for veterans benefits based on a period of duty as a member of a state Army National Guard, a National Guardsman must have been ordered into Federal service by the President of the United States *see* 10 U.S.C. § 12401, or must have performed “full-time duty” under the provisions of 32 U.S.C. §§ 316, 502, 503, 504, or 505.”).

state, that service is not “active” for VA purposes.<sup>34</sup> Unrelated to the merits of this Article, the VA also considers periods of “active duty for training,”<sup>35</sup> “inactive duty training,”<sup>36</sup> and “active” service in organizations other than the traditional Armed Forces<sup>37</sup> sufficient to fulfill this “active” service requirement of being a “veteran.”

### *B. The Character of the Discharge Matters*

To be a “veteran,” the character of discharge from the armed forces must be “other than dishonorable”<sup>38</sup> to qualify for VA benefits.<sup>39</sup> The VA’s commonly used phrase, “other than dishonorable,” and its nuances, cause immediate confusion as the VA adopted a phrase found nowhere in any regulation or instruction within a Military Department.<sup>40</sup> Determining this status requires first understanding the types of discharges that the DOW issues and the implications of each.<sup>41</sup> Second, the discharge must not be due to one of the enumerated statutory bars or VA regulatory bars to benefits before eligibility can be met for service-connected conditions.<sup>42</sup> Specifically, this Article explores the impact on, and distinguishing factors between, veterans who receive “General (Under Honorable Conditions)” discharges versus those who receive “Other Than Honorable” discharges.<sup>43</sup> Only after surpassing these hurdles can a veteran be a “veteran” for VA purposes.

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34. See 10 U.S.C. § 12401; see also *Perpich v. Dep’t of Def.*, 496 U.S. 334, 345 (1990) (finding that members of the National Guard retain their status as a “separate state Guard unit” unless they are “ordered to active duty in the Army.”); see also *Clark v. U.S.*, 322 F.3d 1358, 1366 (Fed. Cir. 2003) (holding that members of the National Guard only perform Federal military service when formally called into the service of the United States and remain a part of the State militia at all other times).

35. See 38 U.S.C. § 101(22), (24)(B); 38 C.F.R. § 3.6(c), (e) (2024).

36. See 38 U.S.C. § 101(23), (24)(C), 106(d)(1); 38 C.F.R. § 3.6(d), (e) (2024).

37. See 38 C.F.R. § 3.7 (2024).

38. Morales, *supra* note 5, at 41 (discussing the VA’s broad definition of “dishonorable” applies to veterans with Other Than Honorable, Bad Conduct, and Dishonorable Discharges, whereas the DoD definition of “dishonorable” applies to a specific punitive discharge issued pursuant to a general court-martial).

39. 38 U.S.C. § 101(2); 38 C.F.R. § 3.1(d) (2024).

40. See, e.g., U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (2024) (discussing DoD policy for Enlisted Administrative Separations without using the phrase “other than dishonorable”); see *infra* note 383 (discussing the administrative separation policies of each Military Department, none notably using the phrase “other than dishonorable”).

41. See *infra* Part I(B)(1-2).

42. See 38 U.S.C. § 5303(a) (2025); 38 C.F.R. § 3.12(d) (2024).

43. See *supra* Part I(A).

*1. Types of Discharges<sup>44</sup> from the Armed Forces*

An “Honorable” discharge is the most common form of discharge from the armed forces, accounting for 80-90% of separated service members depending on the branch of service.<sup>45</sup> Veterans receiving an “Honorable” discharge have met acceptable standards<sup>46</sup> for performance and service, and their period of service was “otherwise so meritorious that any other characterization would be clearly inappropriate.”<sup>47</sup> An “Honorable” discharge entitles a veteran to the full range of benefits and services offered by the VA.<sup>48</sup>

Additionally, a “General (Under Honorable Conditions) Discharge” is classified as “other than dishonorable” for the VA’s purposes.<sup>49</sup> As distinguished from an “Honorable” discharge, a “General” discharge “is warranted when the positive aspects of the enlisted Service member’s conduct or performance of duty outweigh negative aspects of the enlisted Service member’s conduct or performance of duty as documented in their service record.”<sup>50</sup> Veterans receiving this type of discharge are eligible for all VA benefits except those educational benefits offered under the Post-9/11 GI Bill and the Montgomery GI Bill.<sup>51</sup> Both “Honorable” and “General (Under Honorable Conditions)” characterizations of discharge are “other than dishonorable” for the VA, are binding on the VA, and not subject to a regulatory bar

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44. See *infra* notes 202–03 and accompanying text (depicting a graphical representation of the types of discharges from the armed forces and the corresponding VA services a veteran may be eligible for depending on the type of discharge).

45. See generally UNDERSERVED, *supra* note 2, at 12; *How do you Correct a Bad Discharge?*, SENIOR VETERANS SERV. ALL., [https://www.veteransaidbenefit.org/correcting\\_military\\_discharge.htm](https://www.veteransaidbenefit.org/correcting_military_discharge.htm) (on file with Syracuse Law Review) (both citing historical data provided by the DoD regarding the character of discharge breakdown of separated members) (last visited Nov. 15, 2025).

46. The definition of “Honorable” includes the term “acceptable” and does not imply “impeccable” or “flawless.”

47. U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.3(b)(2)(a) (2024).

48. See CATHERINE PORTER, U.S. DEP’T OF VETERANS AFFS., OTHER THAN HONORABLE (OTH) DISCHARGE POLICY UPDATE MEETING, 1, 11 (2024), <https://www.tn.gov/content/dam/tn/veteranservices/learning/vso-tools/job-aids/discharge-upgrades/OTH%20Policy%20Update%20Presentation%2006.21.2024.pdf> (on file with the Syracuse Law Review).

49. See 38 C.F.R. § 3.12(a) (2024).

50. U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.3(b)(2)(b) (2024).

51. See PORTER, *supra* note 48.

or a later Character of Discharge (COD) finding by the VA that would disqualify a veteran from receiving benefits.<sup>52</sup>

Discharges that are classified by the VA as “under dishonorable conditions” include “Dishonorable Discharges,” “Bad Conduct Discharges,” and OTH discharges.<sup>53</sup> “Dishonorable” discharges are reserved for those who were convicted under a general court martial of an offense usually recognized as a felony in civilian courts or of a military nature requiring severe punishment; this will always be considered a statutory bar to receiving VA benefits.<sup>54</sup> However, a “Bad Conduct” discharge is a less severe discharge designed to punish conduct or repeated minor offenses that may still be eligible for some VA benefits if adjudged by a special court-martial rather than a general court-martial (those receiving a “Bad Conduct” discharge by a special court-martial face the same challenges as veterans receiving an OTH, however, their ability to secure benefits is often less successful due to the increased severity of the discharge characterization).<sup>55</sup>

In contrast to the aforementioned punitive discharges, an OTH discharge is an administrative discharge given when a service member displays a “pattern of behavior that constitutes a significant departure from the conduct expected of enlisted Service members” or “one or more acts or omissions” that result in the same.<sup>56</sup> Similar to the more serious punitive discharges, due process requires a service member to receive adequate notice of the charges against them, a hearing, and have an opportunity for their responses to these charges to be heard before an OTH is issued (unless the separation is in lieu of trial by court-martial).<sup>57</sup> However, as is often the case, many service members

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52. See 38 C.F.R. § 3.12(a) (2024) (“A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.”).

53. See U.S. DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL U.S., II-90 (2023); U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.3(b)(2)(c) (2024).

54. See U.S. DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL U.S., II-90 (2023); 38 U.S.C. § 5303(a).

55. See U.S. DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL U.S., II-90 (2023); 38 U.S.C. § 5303(a).

56. U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.3(b)(2)(c)(1)(a)–(b) (2024). “Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death; abuse of a special position of trust; disregard by a superior of customary superior-subordinate relationships; acts or omissions that endanger U.S. security or the health and welfare of other Service members; and deliberate acts or omissions that seriously endanger the health and safety of other persons.” *Id.*

57. See U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.3(b)(2)(c)(2) (2024).

simply waive their right to a hearing during the stress of an administrative discharge as another perceived bureaucratic obstacle in the separation process.<sup>58</sup>

## 2. Distinguishing a “General” Discharge From an “OTH” Discharge

At the heart of the issue is the bright line drawn by Congress and the VA between a General discharge and an OTH discharge. Generally, fall on one side of this line, and you are a “veteran” entitled to a full range of services and benefits<sup>59</sup> offered by the VA.<sup>60</sup> Fall on the other side of the line, and you are a veteran with almost no access to the benefits afforded to former members of the armed forces and very limited access to healthcare treatment—if they can even get it service-connected.<sup>61</sup>

Individual military commands have wide latitude to determine what type of actions or conduct are deserving of an administrative discharge.<sup>62</sup> Moreover, the culture and command structure variances between different branches of the armed forces reflect disparities in the number of persons discharged with an OTH.<sup>63</sup> The Government Accountability Office (GAO) confirmed this in 1980, finding that for the same level of misconduct, a service member might receive an “Honorable” discharge, a “General” discharge, or an “OTH” depending on

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58. See Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards’ Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 CALIF. L. REV. 1357, 1401 n.295 (2020) (discussing the questionable validity of a hearing waiver when a service member is involuntarily separated under OTH conditions).

59. Veterans with a General (Under Honorable Conditions) discharge are not entitled to GI Bill benefits. See PORTER, *supra* note 48.

60. It is noted that regardless of the type of discharge, a veteran is still subject to the conditions found in statutory bars and may be subject to regulatory bars to VA benefits and services. See *infra* Part I(B)(3).

61. See *supra* Part I(B)(1); see, e.g., VBM, *supra* note 31, at pt. 1, ch. 3, § 3.1.5 (explaining the essential concepts related to service-connected disability compensation).

62. See U.S. GOV’T ACCOUNTABILITY OFF., FPCD-80-13, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED 1, 23 (1980); see also VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARV. L. SCH. ET AL., *Turned Away: How the VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges* 1, 6 (2020), <https://legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf> (last accessed Feb. 1, 2025) (on file with the Syracuse Law Review) [hereinafter TURNED AWAY]; see *infra* note 383 (discussing the administrative separation policies of the Military Departments).

63. See TURNED AWAY, *supra* note 62, at 6.

the branch of service and their mission or philosophy.<sup>64</sup> Given the high risk of the adverse effects of an OTH on a veteran’s post-service life, standardization of what constitutes honorable service was recommended so that misconduct in one branch was equally viewed as such by all.<sup>65</sup>

Current DoW separation guidance provides that a member of the armed forces may be separated for misconduct under the following circumstances:

- 1) a pattern of misconduct consisting solely of minor disciplinary infractions;
- 2) a pattern of misconduct that is prejudicial to good order and discipline;
- 3) a pattern of misconduct consisting of discreditable involvement with civil or military authorities;
- 4) commission of a serious civilian or military offense;
- 5) or, conviction by civilian authorities (or action taken equivalent to a finding of “guilty”) where a punitive discharge would be authorized for a similar offense or sentencing by the civilian authority that results in confinement of six months or more.<sup>66</sup>

Such a wide definition leads to inherent variability in application. How many instances of “misconduct” constitute a pattern? Who decides which “disciplinary infractions” are minor, and would that discipline be stricter or lighter depending on the area of operations? What level of interaction with authorities becomes “discreditable involvement?” It is undisputed that some veterans have objectively engaged in severe misconduct while enlisted without any mitigating circumstances, however, lying hidden within the DoW’s definition of “misconduct” is a subjective standard that can be applied arbitrarily by individual military commanders.<sup>67</sup>

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64. See U.S. GOV’T ACCOUNTABILITY OFF., FPCD-80-13, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED, 22–24 (1980) (demonstrating the disparities in administrative discharge practice between Military Departments are still an issue forty-five years later).

65. See *id.* at 70–72.

66. U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 3.10(a)(1)–(4) (2024).

67. See TURNED AWAY, *supra* note 62, at 4; see also U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 3 (2024) (discussing bases for separation from the Armed Services). It is noted that due to the strict nature of the military command structure, “misconduct” could be construed to encompass

Further compounding the DoW's subjectivity in the definition of "misconduct," is the subjectivity found in the DoW's characterization of what constitutes a "General (Under Honorable Conditions)" discharge or an "OTH" discharge. A "General" discharge is warranted when "the positive aspects of the enlisted Service member's conduct or performance of duty outweigh [the] negative aspects of [their] conduct or performance" that is documented in the service record.<sup>68</sup> While the results of receiving a "General" versus an "OTH" discharge are in stark contrast when it comes to receiving VA benefits, such a vivid contrast cannot be found in the characterization of a "General" versus an "OTH" discharge. An "OTH" discharge is characterized as one that is based on a "pattern of behavior" or "one or more acts or omissions that constitute a significant departure from the conduct expected of enlisted Service members."<sup>69</sup> When combining the DoW's definition of misconduct with its characterization of these two types of discharges, only one common theme is clear: A service member receiving an OTH discharge must have committed an instance of misconduct that was so severe, or the pattern of minor misconduct must have become so severe over time, that the negative aspects of the misconduct outweigh any positive aspects of their conduct or performance that is

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habitually showing up late for work or speaking negatively to one's superior. Similarly, "unsatisfactory performance" could be construed to encompass the failure to meet work deadlines or project specifications. These hypothetical examples were chosen to highlight the subjective authority held by military commanders and for their contrast to the reality of a civilian workplace where a single dismissal from a place of employment does not carry the life-long implications of an adverse discharge status.

68. U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 4.3(b)(2)(b) (2024). The language in U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 4.3(b)(2)(b) (a "General" discharge is warranted when "the positive aspects of the enlisted Service member's conduct or performance of duty outweigh [the] negative aspects of [their] conduct or performance") is remarkably similar to the revised language found in 38 C.F.R. § 3.12(e) (2024). *See infra* Part III(C)(2) 38 C.F.R. § 3.12(e) (2024) now provides that VA regulatory bars *will not* be applied for certain misconduct so long as compelling circumstances are present and "[s]ervice exclusive of the period of prolonged AWOL or misconduct should generally be of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation." 38 C.F.R. § 3.12(e)(1) (2024).

69. U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 4.3(b)(2)(c)(1)(a)–(b) (2024). "Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death; abuse of a special position of trust; disregard by a superior of customary superior-subordinate relationships; acts or omissions that endanger U.S. security or the health and welfare of other Service members; and deliberate acts or omissions that seriously endanger the health and safety of other persons." *Id.*



documented in the service record without mitigating circumstances.<sup>70</sup> Yet, veterans have received an OTH as a result of “undiagnosed physical or mental health disabilities that contributed to behavior that was interpreted as unmitigated misconduct” as the result of discriminatory policies,<sup>71</sup> and as the result of subjective and arbitrary determinations of commanders whose focus is on mission-ready capabilities versus the later effects on a veteran.<sup>72</sup> From 1980 to 2020, 465,750 veterans were discharged with an OTH, and each will have to independently apply in a complicated process that can take years to reach a decision if they want their OTH changed so that they can receive VA benefits and care.<sup>73</sup> These veterans are not “veterans” in the eyes of the VA.

### 3. Statutory and VA Regulatory Bars to Benefits

Given the notable stigma surrounding an OTH discharge and the initial determination that an OTH excludes a veteran from VA healthcare and benefits, it seems counterintuitive that a veteran would ever apply for VA benefits.<sup>74</sup> However, it is possible that a veteran with an OTH might be found eligible for VA benefits after a lengthy administrative process.<sup>75</sup> Focusing exclusively on veterans receiving an OTH discharge (and to a lesser extent those receiving a “Bad Conduct” discharge from a special court martial<sup>76</sup>), the VA must conduct a COD determination if any of these veterans later apply for VA benefits.<sup>77</sup> In this process, the VA must initially determine if there are any

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70. See U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 3.10(a)(1)–(4), 4.3(b)(2)(b), (2)(c)(1)(a)–(b) (2024).

71. One example of discriminatory policy was the Don’t Ask, Don’t Tell (DADT) policy that discriminated against service members for their actual or perceived LGBTQ status. The DADT policy was repealed and became effective in 2011. See Don’t Ask, Don’t Tell Repeal Act of 2010, 111 Pub. L. 321, 124 Stat. 3515 (2010); see also Brandon Alford & Shawna J. Lee, *Toward Complete Inclusion: Lesbian, Gay, Bisexual, and Transgender Military Service Members After Repeal of Don’t Ask, Don’t Tell*, 61 SOC. WORK 257, 259 (2016).

72. See TURNED AWAY, *supra* note 62, at 4–6.

73. See *id.*, at 7–8 (calculating 81% of veterans receiving an OTH out of the 575,000 veterans from 1980–2020 with “bad paper” discharges).

74. See *infra* notes 136, 200, 204 (discussing the “stigma” associated with receiving an OTH discharge).

75. See discussion *infra* Sections III(B), III(C).

76. Veterans receiving a “Bad Conduct” discharge from a special court-martial are not the primary focus of this Article, but their special qualification is noted here.

77. See VBM, *supra* note 31, at pt. 1, ch. 2, § 2.2.3.2; see also U.S. DEP’T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. X, subpt. iv, ch. 1, § A.1.b, [https://www.knowva.ebenefits.va.gov/system/templates/self-service/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177986/M21-1-Part-X-Subpart-](https://www.knowva.ebenefits.va.gov/system/templates/self-service/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177986/M21-1-Part-X-Subpart-)

statutory or additional regulatory bars to receiving benefits that do not fall within any exception (later discussed).<sup>78</sup> If it is determined that no bar applies, then the VA may find that the OTH discharge is “Honorable for VA Purposes.”<sup>79</sup> However, the following are statutory bars established by Congress that preclude an award of VA benefits and services *per se*:<sup>80</sup>

- 1) discharge “as a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise refused to comply with lawful orders of a competent military authority;”
- 2) discharge or dismissal by reason of a sentence of a general court-martial;
- 3) an officer resigning for the good of the service;
- 4) desertion;
- 5) discharge as an alien during a time of hostility; and

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iv-Chapter-1-Section-A-Character-of-Discharge-COD-and-Bars-to-Benefits%3FarticleViewContext=article\_view\_related\_article (last updated June 1, 2023) (on file with Syracuse Law Review).

78. See 38 C.F.R. § 3.12(d)(1), (2) (2024) (describing regulatory bars to VA benefits); *cf.* 38 U.S.C. § 5303(b); *and* 38 C.F.R. §§3.12(b), (e) (2024) (both of the latter describing exceptions to statutory and regulatory bars).

79. U.S. DEP’T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. XIII, subpt. i, ch. 3, § B.1.d, [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-us/portal/55440000001018/content/554400000173782/M21-1-Part-XIII-Subpart-i-Chapter-3-Section-B-Healthcare-Eligibility-Determinations-for-Former-Service-Members-Discharged-Under-Other-Than-Honorable-OTH-Conditions](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-us/portal/55440000001018/content/554400000173782/M21-1-Part-XIII-Subpart-i-Chapter-3-Section-B-Healthcare-Eligibility-Determinations-for-Former-Service-Members-Discharged-Under-Other-Than-Honorable-OTH-Conditions) (last updated Aug. 10, 2022) (on file with Syracuse Law Review). Prior to July 2024, the VA used “Honorable for VA purposes” and “Dishonorable for VA purposes” to delineate “veteran” status and reflect eligibility for VA care and benefits. As part of the liberalizing regulations discussed in Part III.C.2, the VA is shifting to the terms “eligible for VA benefits” or “ineligible for VA benefits” to reflect the same “veteran” status. This was in part to “avoid the using the stigma of ‘Dishonorable for VA purposes.’” While the Authors agree that this semantic shift is appropriate due to the different contexts in which “dishonorable” is used by the VA and DoW, this Article will continue to use the “Honorable” and “Dishonorable” language historically proffered by the VA because it still appears in most VA notifications, and it is the language familiar to practitioners and scholars in veterans law. In fact, it is the use of the “Dishonorable” term that is at the heart of the debate regarding the Congressional intent underlying which categories of veterans qualify for VA “veterans” benefits. The full scope of that debate is not the subject of this Article. See PORTER, *supra* note 48, at 21. For a discussion on the historical intent to offer greater access to VA benefits by statute and the subsequent restriction of VA access by regulation, see e.g. Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from “Veteran” Services*, 122 PENN. STATE L. REV. 69, pt. II, V (2017); UNDERSERVED, *supra* note 2.

80. See 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c) (2024).

- 6) discharge under other than honorable conditions issued as a result of absence without official leave (AWOL) for at least 180 continuous days (“unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged unauthorized absence”).<sup>81</sup>

Subject to a narrow exception discussed later in this Article, Congress has deemed a veteran who was dismissed from the armed forces under any of these “dishonorable” conditions unworthy of VA benefits;<sup>82</sup> the merits of this decision are not debated in this Article.<sup>83</sup>

Additionally, the VA may also apply one or more of its own regulatory bars when a veteran with an OTH discharge applies for a COD determination. These regulatory bars are:

- 1) accepting an undesirable discharge or discharge under other than honorable conditions to escape trial by general court-martial;
- 2) mutiny or spying;
- 3) an offense involving moral turpitude (generally a felony);
- 4) willful and persistent misconduct.<sup>84</sup>

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81. 38 U.S.C. § 5303(a), (c); 38 C.F.R. § 3.12(c) (2024); VBM, *supra* note 31, at pt. 1, ch. 2, § 2.2.3.1.

82. *See* 38 U.S.C. § 5303(b); *see also infra* Section III(C)(1). A 1991 amendment to this provision provides that “[n]otwithstanding any other provision of law, the Secretary of Veterans’ Affairs [then Administrator of Veterans Affairs] shall provide the type of health care and related benefits authorized to be provided under chapter 17 of title 38, United States Code [38 USCS §§ 1701 et seq.], for any disability incurred or aggravated during active military, naval, or air service in line of duty by a person other than a person barred from receiving benefits by section 5303(a) (formerly 3103(a)) of such title, but shall not provide such health care and related benefits pursuant to this section for any disability incurred or aggravated during a period of service from which such person was discharged by reason of a bad conduct discharge.” Pub. L. No. 102-40, § 402(d)(2), 105 Stat. 239, 1024 (1991) (codified as 38 U.S.C. § 5303); *see also infra* Part III(A).

83. This Article recognizes the wisdom of Congress to place reasonable limitations on persons receiving benefits from the VA but notes that the legislative history of 38 U.S.C. § 5303(a) reveals the exclusionary criteria were last amended in significant form in 1977.

84. 38 C.F.R. § 3.12(d)(1), (2) (2024). Prior to 2024, 38 C.F.R. § 3.12(d)(5) (2023) previously contained the language “homosexual acts involving aggravating circumstances or other factors affecting the performance of duty” as an additional regulatory bar. *See* Mem. from Clifford L. Stanley, Under Sec’y of Def., to Sec’y of the Military Dep’ts., on Corr. of Military Rec. Following Repeal of Sec. 654 of Title 10, United States Code (Sep. 20, 2011) (issuing guidance on the abolishment of the DoD’s “Don’t Ask Don’t Tell” policy).

Statistics have indicated that up to 84% of all Board of Veterans' Appeals decisions rejecting a veteran's request for a favorable character of discharge (COD) are a result of "willful and persistent misconduct."<sup>85</sup> Within this definition, the VA may find that conduct relating to a discharge "involve[ed] conscious wrongdoing or known prohibited action."<sup>86</sup> In turn, if the VA can determine that the act of misconduct was performed either knowingly or recklessly and was the proximate cause of perceived injury, it may use this regulation to deny benefit eligibility to a veteran.<sup>87</sup> Importantly, minor offenses—"misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge"—occurring over two years apart should not be considered persistent.<sup>88</sup>

Even more problematic for veterans is the regulatory bar of "an offense involving moral turpitude."<sup>89</sup> While the VA did attempt to clarify this definition through a proposed rule in 2021, the VA did not issue a final rule on the matter.<sup>90</sup> Sadly, the only guidance for veterans and VA adjudicators is that an offense involving moral turpitude is "generally, a felony"—leaving no further interpretive directions.<sup>91</sup>

It is important to note that a regulatory bar to VA benefits only exists for the period of service in which the veteran received a discharge that was less-than-honorable.<sup>92</sup> If the veteran has another qualifying period of service where they were discharged honorably, they can receive VA healthcare and benefits for any disability that was caused or aggravated by *that period of service*.<sup>93</sup> Non-"veterans," by means of their discharge status, can only receive limited care for

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85. See UNDERSERVED, *supra* note 2, at 24–25. It is noted that a Freedom of Information Act (FOIA) request was placed to update the data referenced in the UNDERSERVED source. The "partial grant" of the FOIA request detailed that the data provided could not be broken down further to "include the underlying acts as provided in the example in your request" as that information was no longer tracked. FOIA request 24-18990-F and the associated response are on file with the Authors.

86. 38 C.F.R. § 3.1(n) (2024).

87. See *id.*; see also 38 C.F.R. § 3.1(n)(2) (2024) (directing the VA to not consider "mere technical violations" as a *per se* indication of "willful misconduct").

88. 38 C.F.R. § 3.12(d)(2)(ii) (2024).

89. 38 C.F.R. § 3.12(d)(2)(i) (2024).

90. See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 86 Fed. Reg. 50513 (proposed Sep. 9, 2021) (to be codified at 38 C.F.R. § 3.12).

91. 38 C.F.R. § 3.12(d)(2)(i) (2024).

92. See 38 C.F.R. § 3.360(b) (2024).

93. See VBM, *supra* note 31, at pt. 1, ch. 2, § 2.2.3.2.

service-connected conditions under the complicated provisions authorized by Congress in Chapter 17 of Title 38 U.S.C.<sup>94</sup>

*Five years after John Smith was given his OTH discharge, he sought mental health treatment for his declining condition. He continued to experience paranoia, anxiety, aversion to loud noises, and did not sleep well. This resulted in him losing several jobs and becoming socially isolated. In addition, John often self-medicated with alcohol and his spouse’s sleeping pills. Upon intake at a local VA medical center, John is told he is not eligible for VA care because he has an OTH discharge for the period of service during which his mental health claim was related. John leaves in disgust as the VA has just told him that he is not a “veteran” for their purposes. It will be another year before John tries unsuccessfully to commit suicide by intentionally driving his car off a steep embankment because he can no longer stand living with such high levels of anxiety and paranoia.*

## II. CARING FOR VETERANS WITH MENTAL HEALTH CONDITIONS: MODERN UNDERSTANDING OR REACTIVE POLICY TOWARDS VETERANS IN CRISIS?

From 1941 to 1945 (World War II era), only 1% of veterans had a discharge status of OTH.<sup>95</sup> This number rose to 2.5% of discharged veterans during the years 1965 to 1975 (Vietnam War Era).<sup>96</sup> In the post-9/11 era—to include: Operation Enduring Freedom (OEF), Operation Iraqi Freedom (OIF), and Operation New Dawn (OND)—this number of veterans with OTH discharges rose again to 5.8%.<sup>97</sup> However, misconduct that resulted in a “Dishonorable Discharge” dropped from 0.3% in the post-World War II era to 0.1% in the post-9/11 era.<sup>98</sup> While these percentages may seem small, as of July 2022, the total number of living, non-“veteran” veterans was 540,566—all ineligible for most VA care and all benefits.<sup>99</sup>

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94. See 38 C.F.R. § 3.360(b) (2024); *see also infra* Part III(A).

95. See UNDERSERVED, *supra* note 2, at 48: Appendix C.

96. See *id.*

97. See *id.* (acknowledging the data on the percent of veterans discharged with an OTH or “Bad Conduct” discharge provided runs from 2002–2013); *see also Dates and Names of Conflicts*, U.S. DEP’T OF VETERANS AFFS., [https://www.va.gov/vetsinworkplace/docs/em\\_datesnames.asp](https://www.va.gov/vetsinworkplace/docs/em_datesnames.asp) (on file with the Syracuse Law Review) (acknowledging the official start date of OEF began in 2001 with an official end date in 2014) (last visited Nov. 15, 2025).

98. See UNDERSERVED, *supra* note 2, at 48.

99. See U.S. DEP’T OF VETERANS AFFS., REGULATORY IMPACT ANALYSIS FOR RIN 2900-AQ95(F), UPDATE AND CLARIFY REGULATORY BARS TO BENEFITS BASED ON CHARACTER OF DISCHARGE 6 (2024).

This data demonstrates that “commanders have increasingly preferred managing personnel misconduct through an OTH issuance to avoid lengthy court-martial proceedings.”<sup>100</sup> Regardless of the reason for this statistical shift,<sup>101</sup> the fact remains that there is a positive correlation between a discharge for misconduct and the prevalence of mental health conditions—some conditions even diagnosed while in service despite a veteran’s maladaptive coping behaviors being construed as misconduct.<sup>102</sup> For example, a GAO study from 2011–2015 showed that for veterans discharged for misconduct, 62% had been diagnosed within two years prior to that separation with “PTSD, TBI, or certain other conditions that could be associated with misconduct.”<sup>103</sup> Of these, 23% of veterans were issued an “Other Than Honorable” characterization of service.<sup>104</sup> Within this population of veterans, 87% had not submitted a claim to the VA for benefits or for a COD determination.<sup>105</sup> They were without any VA treatment for their “PTSD, TBI, or certain other conditions that could be associated with

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100. Angela K. Clague et al., *The Veterans Left Behind: Eligibility for Department of Veterans Affairs Benefits and Other Than Honorable Discharges*, RAND 4 (2024) [hereinafter RAND.org]; see also Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485, 519–20 (2014) (citing ELIZABETH L. HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* 20 (2005); citing JOINT SERV. COMM. ON MIL. JUST., *ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2012 TO SEPTEMBER 30, 2013* 98 (2013)); see also James B. Roan & Cynthia Buxton, *The Am. Mil. Just. Sys. in the New Millennium*, 52 A.F. L. REV. 185, 192 (2002) (describing the lengthy process required to convene a court-martial versus an administrative separation).

101. See TURNED AWAY, *supra* note 62, at 4; see also RAND.org, *supra* note 100, at 4 (noting that administrative separation proceedings are quicker (thus cheaper) than the lengthy court-martial process).

102. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-260, *DOD HEALTH: ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS*, 12–15 (2017) (detailing that 62% of servicemembers discharged between 2011 and 2015 for misconduct had been diagnosed within the two years prior to separation with PTSD, TBI, or another condition associated with misconduct); see also RAND.org, *supra* note 100, at 13 (citing Robyn M. Highfill-McRoy et. al, *Psychiatric diagnoses and punishment for misconduct: the effects of PTSD in combat-deployed Marines*, 10 BMC PSYCHIATRY 88, 6 (2010)).

103. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 102, at 12.

104. See RAND.org, *supra* note 100, at 13.

105. See *id.*

misconduct” that was diagnosed as caused or aggravated by military service while the veteran was still in the armed forces.<sup>106</sup> Unaccounted for in these statistics are the unknown numbers of veterans who were separated for “misconduct” and were *much later diagnosed* with service-connected PTSD, TBI, or another condition associated with “misconduct”.<sup>107</sup>

While it is true that the vast majority of veterans are indeed “*veterans*,” there is still a significant population of persons discharged from the armed forces who will never be viewed as a “*veteran*.”<sup>108</sup> Perhaps, a more modern understanding of the effects PTSD, TBI, and other mental health conditions<sup>109</sup> have had on a service member’s ability to conform their behavior to military standards of conduct has led the VA to liberalize their regulations regarding the COD determination process.<sup>110</sup> On the other hand, perhaps it is not solely an evolution of understanding but a secondary reaction in the face of a mental health and high-risk psychosocial crises faced by a veteran population with OTH discharges and minimal to no access to VA care.<sup>111</sup> In 2009, the VA found that the suicide rate amongst male veterans was almost twice the rate amongst males in the general U.S. population and approximately two-and-a-half times greater for female veterans respectively.<sup>112</sup> Further, a 2015 study found that there was a direct correlation between veteran homelessness and separation from the armed forces for misconduct—suggesting that misconduct may serve as a proxy for a variety of issues, including mental health.<sup>113</sup> Whether these observations are a product of a growing understanding of the issues or

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106. *Id.* at 13, 15.

107. *Compare to Id.* at 13, 14 (discussing 2017 GAO findings that in a 2011–2015 sample, 62% of service members discharged with an OTH or similar punitive discharge were diagnosed with PTSD, TBI, or substance abuse within *only two years* of their discharge date).

108. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 102, at 12–15; *see also* UNDERSERVED, *supra* note 2, at 48: Appendix C; RAND.org, *supra* note 100, at 3.

109. *See infra* Part II(A).

110. *See infra* Part III(C)(2); *cf. infra* Part II(A)(1) (discussing the “liberal consideration” standard).

111. *See infra* Part II(B), Part II(C).

112. *See PTSD: National Center for PTSD*, U.S. DEP’T OF VETERANS AFFAIRS, [https://www.ptsd.va.gov/professional/treat/cooccurring/suicide\\_ptsd.asp](https://www.ptsd.va.gov/professional/treat/cooccurring/suicide_ptsd.asp) (on file with the Syracuse Law Review) (last visited Nov. 22, 2025).

113. *See* Adi V. Gundlapalli et al., *Military Misconduct and Homelessness Among US Veterans Separated from Active Duty, 2001-2012*, 314(8) J.A.M.A. 832, 833 (2015).

merely reactions to developing mental health and psychosocial crises are discussed below.

*A. Recognizing the Effects of Military Service on Long-Term Mental Health Disorders*

As early as World War I, military doctors were diagnosing service members with a neurological condition they termed “shell shock,” “battle fatigue,” or “war neurosis,” first believed to be caused by the concussive force of explosions and later a “psychological reaction to the stresses of warfare.”<sup>114</sup> Symptoms included fatigue, tremors, confusion, nightmares, amnesia, hallucinations, and anxiety attacks.<sup>115</sup> By World War II, the armed forces began deploying psychotherapists to the front line to assist service members who could no longer tolerate combat because they “reached their psychological ‘breaking point.’”<sup>116</sup> Despite efforts to implement acute management of war neurosis through “combat stress control teams,” it was not until after seeing the “soaring numbers of veterans”<sup>117</sup> returning from the Vietnam War with PTSD symptoms that psychiatrists realized that prolonged combat exposure can have “adverse long-term consequences.”<sup>118</sup> One study conducted fifteen years after the U.S. withdrew from Vietnam found that 15% of veterans continued to suffer from service-related PTSD, while between 25–33% of veterans had symptoms at one point or another.<sup>119</sup> PTSD was officially added to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-III) in 1980 and directly correlated with combat exposure after the Gulf War.<sup>120</sup>

Non-exclusive of PTSD, “TBI, depression, operational stress, and other mental health conditions can [also] lead to behavioral

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114. Tiffany M. Chapman, *Leave no Soldier Behind: Ensuring Access to Health Care for PTSD-afflicted Veterans*, 204 MIL. L. REV. 1, 6 (2010) [hereinafter Chapman]. See Dr. Edgar Jones, *Shell Shocked*, 43(6) AM. PSYCH. ASS’N. 18 (2012); see also Hans Pols & Stephanie Oak, *War and Military Mental Health: The U.S. Psychiatric Response in the 20th Century*, 97 AM. J. PUB. HEALTH 2132, 2133 (2007) [hereinafter Pols and Oak].

115. See Chapman, *supra* note 114, at 6, note 19.

116. Chapman, *supra* note 114, at 7 (quoting Pols and Oak, *supra* note 114, at 2135).

117. *Id.*; Various studies have estimated that between 3.5% and 50% of Vietnam veterans displayed symptoms of PTSD at one time. See Pols and Oak, *supra* note 114, at 2138.

118. Chapman, *supra* note 114, at 7.

119. See Pols and Oak, *supra* note 114, at 2138.

120. See Chapman, *supra* note 114, at 7; see also Matthew J. Friedman, *Acknowledging the Psychiatric Cost of War*, 351(1) NEW ENG. J. MED. 75, 75 (2004).



changes” that might *cause* a service member to commit an act of “misconduct” that they would not have otherwise.<sup>121</sup> Many times, this is because the presence of a mental health condition brought on by severe combat stress can lower a service member’s ability to process other stressors and cause them to engage in maladaptive coping behaviors.<sup>122</sup> Symptoms of these combat-related mental health conditions may present as substance abuse, increased violence or aggression, anger, mood disorders, antisocial behaviors, somatic disorders (multiple unexplained physical symptoms), and increased autonomic arousal—symptoms not normally diagnosed with the underlying mental health condition itself.<sup>123</sup> Commanders are likely to first observe these maladaptive coping mechanisms for the underlying mental health condition as it affects a service member’s performance of their duties, rather than recognizing the presence of the condition itself.<sup>124</sup> It is then easy to see where these maladaptive behaviors brought on by combat stressors could lead to misconduct that a commander deems a “one or more acts or omissions” or a “pattern of behavior that constitutes a significant departure from the conduct expected of enlisted Service members”—warranting an administrative separation under OTH conditions.<sup>125</sup> Yet, “misconduct” that is the result of a mental health condition, generally, is uncharacteristic of a service member’s record and lacks premeditation because it is more the product of impulsivity or self-medication.<sup>126</sup>

As service members began to return home in the early stages of OEF and OIF, a 2004 study—from the Department of Psychiatry and Behavioral Sciences at Walter Reed Army Institute of Research—found that service members in combat infantry units returning from Iraq had a 15.6–17.1% chance of meeting the criteria for depression, anxiety, or PTSD.<sup>127</sup> Similarly, service members returning from

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121. UNDERSERVED, *supra* note 2, at 13.

122. See U.S. DEP’T OF VETERANS AFFS. ET AL., *IRAQ WAR CLINICIAN GUIDE* 24 (2d ed. 2004).

123. See *id.* at 11–12; see also Chapman, *supra* note 114, at 13.

124. See Chapman, *supra* note 114, at 14.

125. DEP’T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.3(b)(2)(c)(1)(a), (b) (2024); see *supra* Part (I)(A).

126. See Chapman, *supra* note 114, at 16; see also Robyn M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: the effects of PTSD in combat-deployed Marines*, 10 BMC PSYCHIATRY 88, 6 (2010).

127. See Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 N. ENGL. J. MED. 13, 13 (2004) (noting three Army combat infantry units and one Marine Corps units were given an anonymous screening survey before deploying to Iraq and three to four months after re-deploying home from Iraq or Afghanistan).

Afghanistan had an 11.2% of screening positive for the same conditions.<sup>128</sup> Contrast these numbers with an earlier study by the same author that found from 1998–99, where only 6% of all the military population sought ambulatory treatment for mental health disorders.<sup>129</sup> Additionally, of the service members who screened positive for depression, anxiety, or PTSD, only 23–40% ever sought out mental health care.<sup>130</sup> This dataset did not continue to track the 60–77% of service members with a combat-related mental health disorder who never sought treatment to determine the long-term effects of their condition, the potential effects on their “conduct expected of enlisted Service members,”<sup>131</sup> or their potential discharge status.<sup>132</sup> However, this data does show that “mental disorders are common, disabling, and costly,” not only for the military but for veterans themselves.<sup>133</sup> Further, the data demonstrated that those who screened positive for a combat-related mental disorder were twice as likely to *avoid* mental health treatment because of concerns with stigmatization, labeling, and negative treatment by their leadership.<sup>134</sup> As the understanding of the inter-relationship between service-related mental health disorders, misconduct, and discharge status continued to evolve, so did the policies concerning “potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.”<sup>135</sup> The aforementioned factors have combined to create a mental healthcare and psychosocial crisis for a very specific population of veterans—those who have a service-related mental health disorder, committed some level of misconduct potentially attributed to the

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128. *See id.*

129. *See* Charles W. Hoge et al., *Mental Disorders Among U.S. Military Personnel in the 1990s: Association with High Levels of Health Care Utilization and Early Military Attrition*, 159 AM. J. PSYCHIATRY 1576, 1576 (2002).

130. *See* Hoge, *supra* note 129, at 13.

131. U.S. DEP’T OF DEF. 1332.14, at ¶ 4.3(b)(2) (c)(1)(a), (b) (referencing the administrative standard that may be used to issue an OTH discharge).

132. Hoge, *supra* note 129, at 14–16 (discussing methodology).

133. *See* Hoge, *supra* note 129, at 1576.

134. *See* Hoge, *supra* note 129, at 13, Table 5; *see also* Dinesh Mittal et al., *Stigma Associated with PTSD: Perceptions of Treatment Seeking Combat Veterans*, 36:2 PSYCHIATRIC REHAB. J., 86 (2013) (discussing avoidance of early treatment to circumvent the “label of mental illness”).

135. Memorandum from Chuck Hagel, Sec’y of Def., on Discharge Upgrades from PTSD Veterans to Secretaries of the Mil. Dep’ts, attach. at 1. (Sep. 3, 2014) (on file with the Syracuse Law Review) [hereinafter Hagel Memo].

disorder, were discharged under conditions that were OTH, and received little to no follow-up care after their discharge.<sup>136</sup>

*1. “Liberal Consideration” required by the Hagel and Kurta Memos*

As increasing numbers of veterans began to seek VA healthcare only to learn they were ineligible due to their OTH discharge, they then sought relief from the various Military Boards that had difficulty with a new category of appeals that pointed to undiagnosed and untreated PTSD as the source of “misconduct.”<sup>137</sup> Partly as a reaction to a federal lawsuit that sought redress for Vietnam veterans discharged under OTH conditions seeking discharge upgrades<sup>138</sup> related to PTSD,<sup>139</sup> Secretary of Defense Chuck Hagel issued a memorandum (the Hagel Memo) in 2014 directing the Military Boards for Correction of Military/Naval Records<sup>140</sup> to give “liberal consideration” to evidence that PTSD or PTSD-related conditions could “be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.”<sup>141</sup> The Hagel Memo also directly reinforced that misconduct as the result of PTSD is most likely not premeditated due to the “causal relationship of symptoms to the misconduct.”<sup>142</sup> Later, the DoD clarified that this standard should be applied to all veterans—not just Vietnam

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136. This combines statistics from those excluded from being a “veteran” in Part I with the growing awareness of the impacts of service-related mental health disorders in Part II.

137. *See infra* Part III(B).

138. The discharge upgrade process, and its importance, are more fully discussed later in this Article. *See infra* Part III(B). The Authors also credit the advocacy of many scholars who have previously written on the topic of the adverse impacts of an OTH discharge, many of whom are cited in the Article.

139. “[C]laims of previously unrecognized Post Traumatic Stress Disorder (PTSD) . . . [were] not recognized as a diagnosis at the time of service and, in many cases, diagnoses were not made until decades after service was completed.” Hagel Memo, *supra* note 135, at 1.

140. The role and function of these Boards are discussed in *infra* Part III(B).

141. Hagel Memo, *supra* note 135, at attach. 1. *See* Andrew Tilghman, *DoD willing to reconsider discharges of Vietnam vets with PTSD*, MIL. TIMES (Sep. 3, 2014), <https://www.militarytimes.com/news/pentagon-congress/2014/09/03/dod-willing-to-reconsider-discharges-of-vietnam-vets-with-ptsd/> (on file with Syracuse Law Review); *see generally* Complaint, *Monk v. Mabus*, No. 3:14-cv-00260-WWE (D. Conn. 2014) (where a complaint requesting remedy for veterans who were discharged because of the effects PTSD from service has had on their ability to continue serving).

142. Hagel Memo, *supra* note 135, at attach. 2. *See generally* Highfill-McRoy, *supra* note 126 (regarding the lack of premeditation in impulsive conduct caused by PTSD and other mental disorders).

veterans—and that any previous discharge upgrade petition that was denied be given *de novo* review in light of the new liberal consideration standard.<sup>143</sup> For the Discharge Review Boards the “liberal consideration” standard was codified at 10 U.S.C. §1553(d)(3)(ii).<sup>144</sup>

In 2017, a critical piece of DoD guidance was issued by acting Under Secretary of Defense Anthony Kurta (the Kurta Memo), recognizing that “invisible wounds” are by their nature some of the most difficult to prove and easing the evidentiary burden was more than warranted for veterans seeking a discharge upgrade “when the application for relief is based in whole or in part on matters relating to mental health conditions.”<sup>145</sup> The substantive guidance of the Kurta Memo called for “greater uniformity amongst the review boards” and for giving veterans “a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later.”<sup>146</sup> Further, the Discharge Review Boards and Boards for Correction of Military Records/Naval Records (collectively, Boards) were instructed to consider all “mental health conditions,” not just PTSD and TBI—in addition to sexual assault/harassment—as mitigating factors under the “liberal consideration” standard.<sup>147</sup> To implement these standards, the Kurta Memo provided a four-question framework for the Boards to apply liberal consideration:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/ experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?

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143. See Memorandum from Brad Carson, Acting Principal Deputy Under Sec’y of Def., on Discharge Upgrades for PTSD & TBI Veterans to Secretaries of the Mil. Dep’ts (Feb. 24, 2016), <https://afrba-portal.cce.af.mil/app/assets/2016-Carson-Memo-24-Feb-2016.pdf> (on file with Syracuse Law Review).

144. See 10 U.S.C. §1553(d)(3)(ii).

145. Memorandum from A.M. Kurta, Performing the Duties of the Under Sec’y of Def., on Discharge Upgrades due to Mental Health Conditions, Sexual Assault, or Sexual Harassment for Veterans to the Secretaries of the Military Departments, 1, attach. 1 (2017) [hereinafter Kurta Memo].

146. *Id.* at 1.

147. *Id.* at 1, attach. 1–2. See generally *infra* notes 232–36 (discussing the compendium of entities that comprise the military Discharge Review Boards and Boards for the Correction of Military/Naval records).

d. Does that condition or experience outweigh the discharge?<sup>148</sup>

Recognizing that “invisible wounds” caused by mental health conditions often go undiagnosed,<sup>149</sup> the Kurta Memo made “it clear that no clinical diagnosis is necessary to establish a mental health-related condition led to the discharge if other sufficient evidence is present.”<sup>150</sup> Importantly, each of the four “Kurta Questions” gives specific examples of the types of evidence the Boards should consider at each stage of the analytic framework to make sure that they are correctly implementing the “liberal consideration” standard.<sup>151</sup> Despite the lofty goals set forth in the Kurta Memo, the Boards do not uniformly demonstrate an increase in grant rate for mental health conditions since the “liberal consideration” standard’s implementation.<sup>152</sup> With some notable exceptions, veterans with mental health conditions who were discharged less-than-honorably for misconduct causally related to that condition remain critically without care and support—their chances of becoming a “veteran” remain scant.

#### *B. High-Risk Crisis: Veteran Suicide*

When discussing veterans’ mental health issues and lack of access to VA care, it is impossible to omit from the conversation the growing rate of veteran suicide in the post-9/11 era. According to recent data in the VA’s 2023 National Suicide Prevention Annual Report, in CY 2001, the unadjusted suicide rate<sup>153</sup> for veterans was 23.3 per 100,000 persons, and that number rose in FY 2021 to 33.9 per

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148. Kurta Memo, *supra* note 145, at 1, attach. 1.

149. *Cf. supra* notes 130–35 (discussing the high percentage of veterans who do not initially seek treatment for service-related mental health disorders).

150. MARGARET KUZMA ET AL., MILITARY DISCHARGE UPGRADE LEGAL PRACTICE MANUAL, 364 (2021) [hereinafter MDU]; Kurta Memo, *supra* note 145, at 1, attach. 1.

151. *See* Kurta Memo, *supra* note 145, at attach. 1–4. While too lengthy to fully list here, it is noted that for the four “Kurta Questions,” thirty-seven additional points of guidance were offered to the Boards regarding the implementation of the “liberal consideration” standard. *See id.*

152. *See infra* Part III(B), tbl 2.

153. *See* U.S. DEP’T OF VETERANS AFFS., 2023 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, 1, 16 (2023). The VA Office of Mental Health and Suicide Prevention provides “unadjusted” raw numbers and “adjusted” data that is statistically normed to reflect similar age and sex distributions in the civilian and veteran populations. *See id.*

100,000,<sup>154</sup> rising again to 34.7 in CY 2022.<sup>155</sup> In comparison, the suicide rate in the civilian population was 12.6 per 100,000 for CY 2001 and 16.7 per 100,000 in CY 2021,<sup>156</sup> with a slight increase to 17.1 in CY 2022.<sup>157</sup> However, the age- and sex-adjusted rate revealed that in 2022, female veterans saw a 24.1% reduction in suicide rate while male veterans saw a 1.6% increase.<sup>158</sup> Yet, the 2022 unadjusted data reveals that 17.6 per 100,000 more veterans die by suicide than civilian adults—a 102.9% increased likelihood of death by suicide based on veteran status.<sup>159</sup> While the full scope of issues relating to the veteran suicide crisis is beyond the scope of this Article, it is important to note that of the 6,392 veterans who died by suicide in CY 2021,<sup>160</sup> 61.9% of them had not accessed VA services within the last year of their life.<sup>161</sup>

The development of suicidal behaviors and their correlation to mental disorders caused or aggravated by military service is still being studied because the full series of risk factors is not clear.<sup>162</sup> Evidence suggests that receiving multiple combat wounds or being hospitalized for a combat wound is directly correlated to an increased risk for suicidal behavior.<sup>163</sup> Further, PTSD has been shown to make a veteran four times more likely to report suicidal ideation even when controlling for age, depression, and substance abuse.<sup>164</sup> When PTSD was

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154. *See id.*

155. *See* U.S. DEP'T OF VETERANS AFFS. 2024 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, 1, 4 (2024).

156. *See* 2023 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, *supra* note 153, at 16.

157. *See* 2024 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, *supra* note 155.

158. *See id.* at 2.

159. *See id.* at 4.

160. *See Timeline: The U.S. War in Afghanistan*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/timeline/us-war-afghanistan> (on file with Syracuse Law Review) (last visited Nov. 15, 2025). August 30, 2021, marked the date that the last U.S. service member left the ground in Afghanistan. *See id.*

161. *See* 2023 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, *supra* note 153, at 15.

162. *See* William Hudenko, Beeta Homaifar & Hal Wortzel, *The Relationship Between PTSD and Suicide*, U.S. DEP'T OF VETERANS AFF.'S, [https://www.ptsd.va.gov/professional/treat/cooccurring/suicide\\_ptsd.asp](https://www.ptsd.va.gov/professional/treat/cooccurring/suicide_ptsd.asp) (on file with Syracuse Law Review) (last visited Nov. 15, 2025).

163. *See* Tim A. Bullman & Han K Kang, *The Risk of Suicide among Wounded Vietnam Veterans*, 86(5) AM. J. PUB. HEALTH 662, 666 (1996).

164. *See* Matthew Jakupcak et al., *PTSD as a Risk Factor for Suicidal Ideation in Iraq and Afghanistan War Veterans*, 22(4) J. TRAUMATIC STRESS 303, 305 (2009) (studying a clinical sample of OEF/OIF veteran enrolled in VA healthcare).

combined with one additional mental disorder, no change in this rate was observed, but when combined with two or more disorders, the rate rose to 5.7 times more likely to consider suicide.<sup>165</sup> Even veterans with subthreshold PTSD<sup>166</sup> have been shown to be three times more likely to report a feeling of hopelessness or suicidal ideation.<sup>167</sup>

Two things are certain: 1) thousands of veterans are excluded from VA care by the characterization of their discharge, many of whom suffer from service-related mental health conditions<sup>168</sup>, and 2) veteran suicide “is a public health and national security crisis.”<sup>169</sup> Starting in 2012, the VA and the DoD reacted to this crisis by implementing early interventions, crisis hotlines, interagency task forces, national suicide prevention campaigns, and a variety of other interdisciplinary approaches, yet the overall rate of veteran suicide continues to remain higher than non-veteran U.S. adults.<sup>170</sup> However, “[r]educing suicide cannot be accomplished singularly through *reactive* policy change” but requires the “implement[ation] [of] *systemic changes* in how we support service members, veterans, and their families”

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165. See *id.* (noting “increase[d]” likelihood of “suicidal ideation associated with comorbid[ity]” is notable because, of those OIF/OEF veterans diagnosed with a mental disorder, 27% have three or more different mental health diagnoses) (citing K.H. Seal et al., *Bringing the war back home: Mental health disorders among 103,788 US veterans returning from Iraq and Afghanistan seen at Department of Veterans Affairs facilities*, 167(5) ARCH. INTERN. MED. 476 (2007)).

166. See generally Katie A. McLaughlin et al., *Sub-threshold Post Traumatic Stress Disorder in the WHO World Mental Health Surveys*, 77(4) BIOL PSYCHIATRY 375 (2015) (concluding that “[s]ub-threshold DSM-5 PTSD is most usefully defined as meeting two or three of the DSM-5 Criteria B-E.”).

167. See Matthew Jakupcak et al., *Hopelessness and Suicidal Ideation in Iraq and Afghanistan War Veterans Reporting Subthreshold and Threshold Posttraumatic Stress Disorder*, 199(4) J. NERV. MENT. DIS. 272, 272 (2011).

168. See *supra* Part II, Part II(A).

169. Exec. Off. of the President, *Reducing Military and Veteran Suicide: Advancing a Comprehensive, Cross-Sector, Evidence-Informed Public Health Strategy* 1, 4 (2021), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/11/Military-and-Veteran-Suicide-Prevention-Strategy.pdf> (on file with the Syracuse Law Review).

170. See 2024 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, *supra* note 155, at 4. While the full scope of all the suicide prevention programs implemented across the U.S. government is not the focus of this Article, many are listed in REDUCING MILITARY AND VETERAN SUICIDE: ADVANCING A COMPREHENSIVE, CROSS-SECTOR, EVIDENCE-INFORMED PUBLIC HEALTH STRATEGY. EXEC. OFF. OF THE PRESIDENT, *supra* note 169, at 4–8. Any veteran experiencing suicidal thoughts or any reader of this Article who knows a veteran who may be considering suicide should call the Veterans Crisis Line by dialing 9-8-8 and then pressing 1. *Signs of Crisis*, VETERANS CRISIS LINE, <https://www.veteranscrisisline.net/signs-of-crisis/> (on file with Syracuse Law Review) (last visited Nov. 15, 2025).

(emphasis added).<sup>171</sup> It is reasonable to consider that a “systemic change” to the system of how “veteran” status is determined might also have an impact on this crisis.<sup>172</sup>

### *C. High-Risk Crisis: Veteran Homelessness*

Another important issue related to veteran mental health, military misconduct, and OTH discharge status is the veteran homelessness crisis. A landmark study sponsored by the VA in 2015 found that “[m]ilitary misconduct may be a proxy indicator for a variety of risk factors associated with homelessness among veterans.”<sup>173</sup> These risk factors included “premilitary history of criminality, adverse deployment experiences, mental health issues, alcohol and substance abuse, post-deployment financial instability, and unemployment.”<sup>174</sup> Importantly, the authors noted that the increase in veteran homelessness was on the rise at a time when “the incidence of misconduct-related separations [was] increasing” and “ending homelessness among veterans [was] a federal government priority.”<sup>175</sup>

In FY 2023, 35,574, or twenty-two out of every 10,000 veterans, were experiencing homelessness.<sup>176</sup> While this number represented a 7% increase since FY 2022, it is also 51.5% lower than when first studied under the Annual Homelessness Assessment Report to Congress (AHAR) in 2009.<sup>177</sup> In part as a reaction to these 2009 AHAR numbers, the VA established the National Center on Homelessness Among Veterans (NCHAV), which developed a multitude of programs geared toward establishing VA care and social support for

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171. EXEC. OFF. OF THE PRESIDENT, REDUCING MILITARY AND VETERAN SUICIDE, *supra* note 169, at 4.

172. *See infra* Part IV(B)–(C).

173. Gundlapalli et al., *supra* note 113, at 832 (noting “[v]eterans who dishonorably separated from the military were not included in this study because those individuals are not eligible for VHA services and are not in VHA databases”). This study was limited to veterans separated between October 1, 2001 and December 31, 2011 for “misconduct, disability, early release, disqualified, normal, and other.” *Id.* All veterans in the study were deployed in OEF/OIF and were potentially eligible for VHA services. *See id.*

174. *Id.*

175. *Id.*

176. TANYA DE SOUSA ET AL., U.S. DEP’T OF HOUS. AND URB. DEV., 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS, 3, 66 (2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf> (on file with the Syracuse Law Review) (last visited Sep. 20, 2025). This rate is slightly higher than the rate for the U.S. civilian population at twenty persons out of every 10,000. *See id.*

177. *See id.* In 2009, 73,367 veterans were experiencing homelessness. *See id.* at 65.



homeless veterans, supported using a “housing first” model to provide stability for veterans who do not qualify for traditional housing programs, and utilized special healthcare teams designed to address the needs of homeless veterans.<sup>178</sup>

Still, research conducted by the VA has shown that the most consistent risk factors for veteran homelessness are substance abuse, mental health problems and psychotic disorders (including PTSD), and low income/unemployment—common characteristics seen in veterans discharged under less-than-honorable conditions for misconduct.<sup>179</sup> Specifically, in a VA study that surveyed discharged veterans from 2001–2012, those with a discharge for misconduct represented 25.6% of homeless veterans at their first encounter with the VA, 28.1% of homeless veterans within one year of this encounter, and 20.6% of veterans within five years of their first VA encounter.<sup>180</sup> The positive correlation between a military discharge relating to some level of misconduct and resulting homelessness is especially impactful when it is known that an overwhelming majority of these veterans likely suffer from mental health conditions and are not eligible for VA treatment.<sup>181</sup>

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178. See *Homelessness*, U.S. DEP’T OF VETERANS AFFS., OFF. OF RES. AND DEV., <https://www.research.va.gov/topics/homelessness.cfm> (on file with Syracuse Law Review) (last visited Sep. 21, 2025); *Nat’l Center for Homelessness Among Veterans*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/homeless/nchav/index.html> (on file with Syracuse Law Review) (last visited Sep. 21, 2025). Note: The full scope of VA programs that have been implemented to reduce the number of homeless veterans is not the subject of this Article. A full list of VA programs for homeless veterans may be found at: [https://www.va.gov/homeless/for\\_at\\_risk\\_veterans.asp](https://www.va.gov/homeless/for_at_risk_veterans.asp). Any veteran experiencing homelessness or housing instability, or any reader of this Article who knows a veteran who is homeless or at risk of homelessness, should call the National Call Center for Homeless Veterans (1-877-4AID-VET) or the Veterans Crisis Line by dialing 9-8-8. In addition, it is noted that many of the VA resources dedicated to the homelessness crisis apply the same “veteran” eligibility standard discussed in this Article. Thus, veterans with a less-than-honorable discharge status often do not qualify for homelessness assistance programs despite their overrepresentation in the population. See *UNDERSERVED*, *supra* note 2, at 22.

179. See Jack Tsai & Robert A. Rosenheck, *Risk Factors for Homelessness Among U.S. Veterans*, 37 EPIDEMIOLOGIC REVS. 177, 191 (2015); cf. *supra* notes 121–26 (discussing misconduct and maladaptive behaviors associated with combat-related mental health conditions).

180. See Gundlapalli et al., *supra* note 113, at 832.

181. See, e.g., *UNDERSERVED*, *supra* note 2, at 13; U.S. DEP’T OF VETERANS AFFS. ET AL., *supra* note 122; Chapman, *supra* note 114, at 13–14, 16; DEP’T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.3(b)(2)(c)(1)(a), (b) (2024); *supra* Part I(B)(1)-(2); Highfill-McRoy et. al, *supra* note 126.

While the VA did not meet its initial five-year goal to end the veteran homelessness crisis,<sup>182</sup> it has taken substantial steps toward this goal and reports a 51.5% reduction in homeless veterans from FY 2009 to FY 2023.<sup>183</sup> Particularly relevant to the audience of this Article, in 2017, the VA found that “[v]eterans’ mental health and housing improved when they accessed free legal services in a VA facility.”<sup>184</sup> Through medical-legal partnerships,<sup>185</sup> lawyers are integrated into healthcare settings and help veterans resolve legal issues related to VA benefits, housing issues, family issues, and consumer problems that affect other social determinants of health.<sup>186</sup> While the VA has no statutory authority to directly provide legal assistance, veterans who engaged with free legal services demonstrated significant improvements in housing and “mental health within the first three months and continued to show these improvements at twelve months.”<sup>187</sup> Unfortunately, despite the positive impact on veterans, legal providers have only established thirty-one medical-legal partnerships at VA medical centers across the U.S. as of May 2024.<sup>188</sup>

Building on this concept, the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Public Law 116–315, established that the Secretary “shall award grants to eligible entities that provide legal services to homeless veterans and veterans at risk for homelessness.”<sup>189</sup> As a result of this provision, the Legal Services for Veterans-Homeless (LSV-H) grant program was established to fund the provision of a wide range of legal

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182. See Tsai & Rosenheck, *supra* note 179, at 177–78 (announcing VA Secretary Shinseki’s five-year plan to end homelessness).

183. See DE SOUSA ET AL., *supra* note 176, at 66.

184. *Homelessness*, U.S. DEP’T OF VETERANS AFFS., OFF. OF RES. AND DEV., <https://www.research.va.gov/topics/homelessness.cfm> (on file with Syracuse Law Review) (last visited Nov. 15, 2025). See also Jack Tsai, et al., *Medical-Legal Partnerships at Veterans Affairs Medical Centers Improved Housing and Psychosocial Outcomes for Vets*, 36(12) HEALTH AFF. 2195 (2017).

185. See *Medical-Legal Partnerships and VA-Affiliated Legal Clinics*, U.S. DEP’T OF VETERANS AFFS., [https://www.va.gov/HOMELESS/lsv/MLP\\_LC\\_List.pdf](https://www.va.gov/HOMELESS/lsv/MLP_LC_List.pdf) (on file with Syracuse Law Review) (last visited Nov. 15, 2025).

186. Tsai et al., *supra* note 184, at 2201–02.

187. *Id.* at 2196, 2201–02.

188. See Nat’l Ctr. for Healthcare Advancement and P’ships, *Medical Legal Partnerships*, U.S. DEP’T OF VETERANS AFFS. (Apr. 6, 2020), <https://www.va.gov/healthpartnerships/updates/mlp/mlpadditionaresources.asp> (on file with Syracuse Law Review).

189. 38 U.S.C. § 2022A (2021).

services<sup>190</sup> for these veterans to better secure their access to housing, employment, and healthcare.<sup>191</sup> Importantly, this grant program does not limit its intended beneficiaries to “veterans”<sup>192</sup> like most other VA programs.<sup>193</sup> Through research, the VA has broadly understood that to address the critical number of veterans who are homeless or at risk of becoming homeless, it must target veterans regardless of their discharge status.<sup>194</sup>

### III. WHAT HAPPENS TO A VETERAN WHO RECEIVES AN OTHER THAN HONORABLE DISCHARGE?

Veterans with OTH discharges, “many of whom carry mental health injuries[,] . . . suffer a lifetime of stigma, employment barriers,

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190. Services provided include: “(a) legal services related to housing, including eviction defense, representation in landlord-tenant cases, and representation in foreclosure cases; (b) legal services relating to family law, including assistance in court proceedings for child support and custody, divorce, estate planning, and family reconciliation; (c) legal services relating to income support, including assistance in obtaining public benefits; (d) legal services related to criminal defense, including defense and resolution of, and assistance with, matters symptomatic of homelessness, such as outstanding warrants, fines, driver’s license revocation, and citations ([t]o reduce recidivism and facilitate the overcoming of reentry obstacles in employment or housing, covered legal services relating to criminal defense also include legal assistance with requests to expunge or seal a criminal record); (e) legal services relating to requests to upgrade the characterization of a discharge or dismissal of a former member of the Armed Forces under 10 U.S.C. § 1553; and (f) other covered legal services as determined appropriate by the Secretary, including: (1) legal assistance with protective orders and other matters related to domestic or intimate partner violence; (2) access to health care; (3) consumer law matters, such as debt collection, garnishments, usury, fraud, deceit, and financial exploitation; (4) employment law matters, and; (5) the unmet legal needs of male and female veterans in VA’s annual Community Homelessness Assessment, Local Education and Networking Groups (CHALENG) survey for the grant award year.” 38 C.F.R. § 79.20(a)–(f)(5) (2025). See 38 C.F.R. § 79.0 (2025); *VA awards \$11.5 million in first-of-their-kind grants for legal services for homeless Veterans*, VA NEWS (June 29, 2023), <https://news.va.gov/press-room/first-of-their-kind-grants-for-legal-services-for-homeless-veterans/> (on file with Syracuse Law Review). The Syracuse University VLC has been an LSV-H grant recipient in all years awarded.

191. Similarly, the VA has a proposed rule to establish an additional Legal Services for Veterans—Legal Assistance for Access to VA Programs (LSV-A) grant that would provide funding to improve “the character of discharge for those individuals whose current discharge status renders them ineligible for VA benefits.” Legal Services for Veterans—Legal Assistance for Access to VA Programs Grant Program, 89 Fed. Reg. 80172-01 (proposed Oct. 2, 2024) (to be codified at 38 CFR pt. 81).

192. See 38 U.S.C. § 101(2); see also *supra* Part I(A).

193. See 38 C.F.R. § 79.15(a) (2025).

194. See *supra* notes 178–82.

and benefits ineligibility.”<sup>195</sup> As one author has put it, these veterans are truly “kicked out and left behind” by the military and excluded from the often necessary support by the VA.<sup>196</sup> The “civilian reality” for these veterans is much greater than giving them notice that they “may expect to encounter substantial prejudice in civilian life”<sup>197</sup> because the OTH discharge status on their DD 214<sup>198</sup> can affect job future prospects, social status amongst other veterans needed for peer support, and signals to the world that the remainder of their service was not worthy of honor or respect, excluding the incident(s) that led to their discharge.<sup>199</sup> Misinformation about what services are available to veterans with an OTH discharge further drives the stigma by discouraging them from seeking “veteran” status from the VA, opting instead for the rarely successful discharge upgrade process.<sup>200</sup>

When the VA tells a veteran that they are not a “veteran,” it greatly reduces the valuable services that might otherwise be available to them, their dependents, or their surviving spouse.<sup>201</sup> The VA diagram below illustrates the number of services for which automatic eligibility is reduced:<sup>202</sup>

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195. Michael J. Wishnie, “A Boy Gets Into Trouble”: *Service Members, Civil Rights, and Veterans’ Law Exceptionalism*, 97 BOS. UNIV. L. REV. 1709, 1712 (2017).

196. Wherry, *supra* note 58, at 1362.

197. *Active Duty Enlisted Administrative Separations*, AR 635-200, fig. 2-2, 41 (2021) (demonstrating the notice language provided by the Army to service members receiving an OTH discharge); *see also* Hugh McClean, *Discharged and Discarded: The Collateral Consequences of a Less-Than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2219 (2021) (discussing the collateral consequences of administrative military discharges and their comparison to a civilian criminal conviction).

198. *See DD Form 214 / DD214 / DD 214 Discharge Papers and Separation Documents*, THE U.S. NAT’L ARCHIVES AND RECS. ADMIN., <https://www.archives.gov/personnel-records-center/dd-214> (on file Syracuse Law Review) (last visited Nov. 17, 2025). A DD 214 is the Certificate of Release or Discharge from Active Duty that summarizes a service member’s military service.

199. *See TURNED AWAY*, *supra* note 62, at 3–8; *see also* Wherry, *supra* note 58, at 1362, 1377.

200. *See TURNED AWAY*, *supra* note 62, at 21–22; *see also infra* Part III(A)–(C) (discussing Chapter 17 care, the discharge upgrade process, and the COD determination process, respectively).

201. *See supra* Part I.

202. *See PORTER*, *supra* note 48, at 11.

**Table 1**<sup>203</sup>

Table 1	9/11 GI Bill	Mont. GI Bill	Veteran Readiness & Employment	Home Loans	VA Life & VMLI	SGI/VGL/FSGLI/TSGLI	Compensation and Pension	VBA & NCA Burial Benefits	Enrollment in VA Health Care	VA Mental Health Care	Vet Centers	Homeless (HUD-VASH/SSVF/GPD)	Emergent Suicide Care	Health Care MST
<b>Honorable</b>	○	○	○	○	○	○	○	○	○	○	○	○	○	○
<b>General</b> (Under Honorable Conditions)	●	●	○	○	○	○	○	○	○	○	○	○	○	○
<b>Other Than Honorable</b>	●	●	●	●	●	○	●	●	●	○	●	○	○	○
<b>Bad Conduct</b> (Special Court-Martial)	●	●	●	●	●	○	●	●	●	●	●	○	●	●
<b>Bad Conduct</b> (General Court-Martial)	●	●	●	●	●	○	●	●	●	●	●	●	●	●
<b>Dishonorable</b>	●	●	●	●	●	○	●	●	●	●	●	●	●	●
● Ineligible (except for very limited circumstances)      ○ Eligible      ● Case by Case														

While the diagram correctly indicates that veterans with an “OTH” or “Bad Conduct” discharge from a special court-martial are eligible on a case-by-case basis, the reality is that many veterans are erroneously turned away by the VA after initial inspection of their DD 214,<sup>204</sup> or the veteran is stuck appealing the character of their discharge to become eligible for services.<sup>205</sup>

Three avenues are available for veterans who are not considered “veterans.” First, a veteran may be eligible for healthcare for “treatment purposes only” under Chapter 17 of 38 U.S.C. if their disability is determined to be service-connected, but this process is rife with its own difficulties.<sup>206</sup> Second, a veteran may apply to their Military Department’s Discharge or Correction Boards, which have the direct

203. See *id.* The division line (upper) between the “General” and “OTH” categories was added by the authors to emphasize the loss of automatic eligibility for services. The division line (lower) between “Bad Conduct- SCM” and “Bad Conduct- GCM” was added by the authors to illustrate the statutory bars set by Congress. Veterans with a discharge status below the lower division line are not eligible for VA services under most all conditions. The Authors do note that healthcare reflected in the OTH discharge line as “Eligible” is Chapter 17 care for treatment purposes only, referenced in Part III.A. It is not “eligibility” for full VA care and benefits without a COD decision.

204. See *DD Form 214 / DD214 / DD 214 Discharge Papers and Separation Documents*, THE U.S. NAT’L ARCHIVES AND RECS. ADMIN., <https://www.archives.gov/personnel-records-center/dd-214> (on file Syracuse Law Review) (last visited Nov. 17, 2025).

205. See TURNED AWAY, *supra* note 62, at 10–12.

206. See *infra* Part III(A).

authority to change the character of discharge found on a DD 214.<sup>207</sup> Finally, a veteran may apply to the VA seeking a “character of discharge” (COD) determination, where if shown by credible evidence to meet a statutory or regulatory exception, the VA then considers that veteran “Honorable for VA purposes.”<sup>208</sup> However, this does not change the actual character of their discharge listed on the DD 214 from the armed forces.<sup>209</sup> While each of these remedies seems straightforward, they are often inadequate, inefficient, and each is mired in administrative hurdles that often necessitate the intervention of an experienced veterans law attorney to have a successful outcome.<sup>210</sup>

*A. Chapter 17 Care for “Treatment Purposes Only” is an  
Administrative Nightmare*

The best place to receive veteran-centric medical treatment and services is through the VA health care system, and while the VA has attempted to carve out an avenue for non-“veterans” to receive certain health care, it only causes confusion and frustration. “Veterans” are entitled to VA healthcare and benefits for conditions that are service-connected.<sup>211</sup> However, “health-care and related benefits authorized by [C]hapter 17 of [T]itle 38 U.S.C. shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated” by their military service.<sup>212</sup> Chapter 17 of Title 38 authorizes the Secretary of the VA to furnish *hospital care and medical services to any* veteran of the armed forces for a service-connected disability so long as that veteran does not have a “Bad Conduct” (at general a court-martial) discharge, a “Dishonorable” discharge, or one of the statutory bars to VA

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207. See *infra* Part III(B).

208. See *infra* Part III(C).

209. See *id.*

210. See STACEY-RAE SIMCOX & DAVID E. BOELZNER, VETERANS BENEFITS: LAW, THEORY, AND PRACTICE, 580 (2023) (n. c. “The VA’s official recognition of the National Law School Veterans Clinic Consortium (NLSVCCC) was an explicit acknowledgment of the value of the assistance that [law school] clinics provide to veteran claimants”).

211. See *supra* Part I. While the exact mechanics of and challenges with service connection are not the subject of this Article, service connection generally requires 1) evidence of a current disability, 2) medical evidence of an in-service incurrence or aggravation, and 3) a nexus between the in-service incurrence or aggravation and the current disability. See *Caluza v. Brown*, 7 Vet App. 498, 506 (1995), *aff’d*, 78 F.3d 604, 604 (Fed. Cir. 1996). The VA Regional Offices then adjudicate the claim to determine whether a service connection exists. See VBM, *supra* note 31, at pt. 1, ch. 3, § 3.1.7.

212. See 38 C.F.R. § 3.360(a) (2024).

benefits applies.<sup>213</sup> Additionally, the VA *must* furnish an initial mental health assessment and any further mental or behavioral healthcare that is required to treat ongoing needs, “including risk of suicide or harming others” for these veterans.<sup>214</sup> Importantly, Chapter 17 healthcare does not include access to valuable—and sometimes essential—VA disability payments; it is only for treatment purposes.<sup>215</sup> Further, to qualify to receive treatment under Chapter 17, a veteran with an OTH discharge characterization must first get their claimed disability service-connected.<sup>216</sup>

These two challenges for veterans in accessing healthcare treatment under Chapter 17 manifest in different ways. First, veterans with other than honorable discharge characterizations face higher rates of mental health conditions, suicide, becoming homeless or at risk for homelessness, and have a higher risk of being involved in the criminal justice system.<sup>217</sup> While the VA has created programs to address these high-risk conditions individually,<sup>218</sup> it has yet to fully implement a strategy where it attempts to provide comprehensive care for these veterans upon their military discharge in an effort to mitigate the problem.<sup>219</sup>

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213. See 38 U.S.C. § 1710(a) (2024); 38 C.F.R. § 3.360(a), (b) (2024); see *supra* Part I(A).

214. See, e.g., 38 U.S.C. § 1720I(a)(2); 38 U.S.C. § 1720I(a), (b) (adding the additional requirement that the veteran cannot have a dishonorable discharge or discharge by court-martial and 1) serve “in the Armed Forces for a period of more than 100 cumulative days”; and 2) deploy “in a theater of combat operations, in support of a contingency operation, or in an area at a time during which hostilities are occurring in that area during such service, including by controlling an unmanned aerial vehicle from a location other than such theater or area; *or* while serving in the Armed Forces, was the victim of a physical assault of a sexual nature, a battery of a sexual nature, or sexual harassment” (emphasis added)). Note: 38 U.S.C. § 1720I(a)(2) does not specifically state that the “mental or behavioral health care needs of the former service members” *must* be service-connected. It speaks only to the current “needs” of the veteran. Yet, the VA Secretary’s regulation at 38 C.F.R. § 3.360(a) (2024) provides that “health-care and related benefits authorized by chapter 17 of title 38 U.S.C. shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any *disability incurred or aggravated during active military, naval, or air service in line of duty.*” (emphasis added).

215. See 38 C.F.R. § 3.360(a) (2024).

216. See 38 U.S.C. § 1710(a)(1)(A).

217. See UNDERSERVED, *supra* note 2, at 21–22; see also *supra* Part II.

218. See UNDERSERVED, *supra* note 2, at 21–22.

219. See *id.* at 17–18; see generally James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 217–19 (2011) (concluding that throughout history there have been and will continue to face challenges when changing the structure of the veterans’ benefits systems because of the political and budgetary interests involved).

More specifically, veterans are often turned away by VA frontline staff when applying for healthcare eligibility because of their discharge status.<sup>220</sup> Simply put, VA frontline staff access the veteran's records, see that they have received an OTH discharge characterization, and tell the veteran that they are ineligible for healthcare. Interestingly, despite the high amount of scholarly attention focused on this issue by veterans' advocates, the VA only maintains records of those who are enrolled in VA services, not those who have been turned away.<sup>221</sup> A 2020 report prepared by the Legal Services Center of Harvard Law School found that veterans in nineteen states described being unlawfully turned away by the VA with no indication that they could apply for a COD determination—also triggering an ancillary decision by the Regional Office (RO) regarding Chapter 17 eligibility.<sup>222</sup> This is despite the VA's own directive for eligibility determinations—last amended March 6, 2024—directing staff that veterans with an OTH discharge are eligible for an initial mental health assessment and ongoing behavioral healthcare under 38 U.S.C. § 1720I.<sup>223</sup> For ease of application by VA adjudicators, the directive provides a step-by-step decision tree on how to establish mental and behavioral healthcare eligibility in Appendix E of the document.<sup>224</sup>

If a veteran with an OTH discharge applies for a COD decision from the VA, they should receive a decision letter from the RO indicating the outcome of an administrative decision and explaining any statutory and regulatory bars to VA benefits.<sup>225</sup> If the discharge status

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220. See TURNED AWAY, *supra* note 62, at 13.

221. See *id.* at 15.

222. See *id.*; MDU, *supra* note 150, at 696; see U.S. DEP'T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. X, subpt. iv, ch. 1, § B.1.a–e (Feb. 2, 2023), [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000178524/M21-1-Part-X-Subpart-iv-Chapter-1-Section-B-Special-Topics-Involving-Character-of-Discharge](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000178524/M21-1-Part-X-Subpart-iv-Chapter-1-Section-B-Special-Topics-Involving-Character-of-Discharge) (on file with Syracuse Law Review).

223. See VETERANS HEALTH ADMIN., U.S. DEP'T OF VETERANS AFFS., VHA DIRECTIVE 1601A.02(6) (6)(a)–(c) (last amended Mar. 6, 2024). The Authors note that part (6)(c) of VHA Directive 1601A.02(6) directs enrollment staff that a veteran with an “OTH” requires a COD determination by the VA and provides an internal link to the proper form for the veteran to fill out requesting one. See *id.*

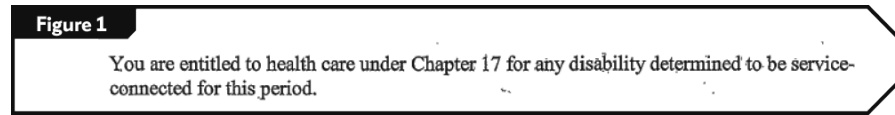
224. See *id.* at Appendix E; see also 38 U.S.C. § 1720I(a)–(b).

225. U.S. DEP'T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. X, subpt. v, ch. 1, § C.1.a (Aug. 26, 2024), [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177999/M21-1-Part-X-Subpart-v-Chapter-1-Section-C-Administrative-](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177999/M21-1-Part-X-Subpart-v-Chapter-1-Section-C-Administrative-)



is then determined to remain “dishonorable for VA purposes,” the decision letter often includes the following notice:

**Figure 1**<sup>226</sup>



Combining the problem of being initially turned away by front-line staff with the need to have their mental health condition service-connected, what happens to a veteran who cannot become service-connected for their mental health disability because each time it is requested, they are turned away because of their discharge status?<sup>227</sup> The following is a representative example from a real veteran client of the Syracuse VLC:

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Decisions%3FarticleViewContext=article\_view\_related\_article (on file with Syracuse Law Review); *see also supra* Part I (discussing statutory and regulatory bars).

226. This is an actual COD decision letter received by a client of the Syracuse University VLC.

227. *See supra* notes 195–200.

**Figure 2- March 2023**

**Figure 2—March 2023**

**Periods Of Service**

Service #:

Branch: Army

EOD: 11/1/2011

RAD: 11/1/2011

Character of Discharge: Dishonorable for VA Purposes

Verified: Yes

VADS: N/A

All photos are de-identified screenshots of the Veterans Benefits Management System (VBMS) taken from the client dashboard under the “military service tab.”<sup>228</sup> The same client—with an OTH—who received the decision letter in **Figure 1** presented to the Syracuse VLC attempting to service-connect his PTSD. He had VA treatment in the past, but treatments were stopped because he was told at one point his PTSD was not “service-connected.” He was never told what “Chapter 17” eligibility meant.

228. The Veterans Benefits Management System (VBMS) is software “intended to streamline [v]eterans’ disability claims process by providing claims processors” and accredited veteran advocates with an electronic platform in which to submit, maintain, review, and make decisions for veterans’ claims. U.S. DEP’T. OF VETERANS AFFS., VETERANS BENEFITS MANAGEMENT SYSTEM (VBMS) CLOUD ASSESSING (2024), <https://department.va.gov/privacy/wp-content/uploads/sites/5/2025/01/FY25VeteransBenefitsManagementSystemVBMSCloud-AssessingPIA.pdf> (on file with Syracuse Law Review). It is essential that attorneys representing veteran clients before the VA are not only accredited by the VA but also acquire VBMS access from the VA to actively be able to monitor their client’s files. All attorneys with the Syracuse University VLC are accredited by the VA and have VBMS access through affiliation with the local Regional Office. *See* OFF. OF GEN. COUNS., *Accreditation, Discipline, & Fees Program*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/ogc/accreditation.asp> (on file with Syracuse Law Review) (last visited Nov. 17, 2025).

**Figure 3- May 2023**

**Figure 3—May 2023**

**Periods Of Service**

Service #:

Branch: Army

EOD: 11/ [REDACTED]

RAD: 11/ [REDACTED]

Character of Discharge: Honorable

Verified: Yes

VADS: N/A

The Syracuse VLC helped the veteran file a supplemental claim<sup>229</sup> to service connect his PTSD. Upon receiving the supplemental claim, the veteran’s VBMS status displayed as “Honorable” despite having an OTH discharge and the COD determination claim being held until the veteran’s PTSD was “service-connected.”

**Figure 4- July 2023**

**Figure 4—July 2023**

**Periods Of Service**

Service #:

Branch: Army

EOD: 11/ [REDACTED]

RAD: 11/ [REDACTED]

Character of Discharge: Dishonorable for VA Purposes

Verified: Yes

VADS: N/A

The RO decided on the veteran’s supplemental claim, which simply asked to generate a disability exam request so the veteran could service connect his PTSD for Chapter 17 care. The VA RO refused to grant the exam request—simply for service connection—because of the veteran’s OTH discharge status despite being eligible for mental healthcare under Chapter 17.

229. A supplemental claim (VA Form 20-0995) is used when the veteran can present new and relevant evidence of service-connection, and the VA had previously issued an administrative decision on the claim in the past. *See Supplemental Claims*, U.S. DEP’T. OF VETERANS AFFS., <https://www.va.gov/decision-reviews/supplemental-claim/> (on file with the Syracuse Law Review) (last visited Nov. 17, 2025).

**Figure 5- September 2024**

**Figure 5—September 2024**

**Periods Of Service**

Service #:  
 Branch: Army  
 EOD: 11/ [redacted]  
 RAD: 11/ [redacted]  
 Character of Dishonorable - Ch 17  
 Discharge: Eligible  
 Verified: Yes  
 VADS: N/A

The Syracuse VLC requested a higher-level review<sup>230</sup> of this decision which was conducted in the winter of 2023. The reviewer noted that the RO had made a mistake and failed to consider evidence of the record that warranted ordering an exam to service connect the veteran's PTSD. After the exam was conducted, the VA granted service-connection in September 2024.

Eligibility for Chapter 17 healthcare is hampered by the ability to access it through frontline VA personnel and behind the scenes at the RO level.<sup>231</sup> It is not an effective solution for access to healthcare for those deemed non-“veterans” because many, if not most, do not or cannot access it.<sup>232</sup> While the VA may not provide services to veterans outside of their statutory mandate, they 1) have a duty to adequately train their staff on the applicable laws and regulations and 2) not create unnecessarily complex administrative processes that disfavor veterans.

*After John Smith intentionally wrecks his car trying to die by suicide, he is admitted to a VA Emergency Room, treated for his injuries, and placed on a psychiatric hold for suicidal ideations. Once recovered, John is discharged, and a case manager sets up outpatient mental health treatments for PTSD and suicidal ideation. John attends appointments for several months before stopping because he must return to work now that his physical injuries have healed. John's employer before the wreck could not afford to hold his position open, and John finds work overnight stocking shelves at a big box store.*

230. If a veteran disagrees with an initial decision, they may request a higher-level review of the decision by a senior decision officer who determines whether an error or difference of opinion would change the decision. *See Higher-Level Reviews*, U.S. DEP'T. OF VETERANS AFFS., <https://www.va.gov/decision-reviews/higher-level-review/> (on file with the Syracuse Law Review) (last visited Nov. 15, 2025).

231. *See supra* notes 195–200.

232. *See UNDERSERVED, supra* note 2, at 18.

*Because he sleeps during the day, he cannot attend his mental health treatment but enjoys the night work because he does not have to interact with many other people. John resumes self-medicating with alcohol within six months. In another six months, he is fired from the big box store because he shows up to work one evening drunk. John’s wife tells him that “she can’t stand him anymore because he is not the man she married,” that “he needs to get his s\*\*t together,” and then files for divorce, kicking him out of their house. He is forced to stay on his brother’s couch, but that abruptly ends after he becomes violent after being awakened in the middle of the night. John is now homeless and hates how the way he feels inside hurts people in his life. John tries to reinstate his mental health treatment but is denied by VA staff because of the OTH status of his discharge. He blames the military for his OTH discharge and does not understand why the VA won’t help him. For the first time in over eight years since being discharged, John seeks help from a Veterans Service Organization (VSO) to get a COD decision. He is denied by the VA but told he is “Chapter 17 eligible.” John then seeks free legal assistance from a law school clinic to service-connect his PTSD and upgrade his discharge. After an extensive battle over administrative technicalities, John Smith’s PTSD is service-connected. Ten years after his discharge, he has now secured access to consistent mental health treatment through VA service connection. He wonders why this could not have happened sooner.*

*B. A Discharge Upgrade is Likely Not the Answer*

Under the authority of 10 U.S.C. § 1552(a), the Secretary of any Military Department may correct any military record within their department if it is considered “necessary to correct an error or remove an injustice.”<sup>233</sup> This power is effectuated by the Army Discharge Review Board (ADRB), the Naval Discharge Review Board (NDRB)<sup>234</sup>, the Air Force Discharge Review Board (AFDRB), and the Coast Guard Discharge Review Board (CGDRB),<sup>235</sup> which are administrative boards with the authority to review and direct changes to the character of discharge or dismissal of a veteran.<sup>236</sup> Further, four parallel

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233. 10 U.S.C. § 1552(a)(1).

234. The NDRB hears cases from both the Navy and the Marine Corps. See MDU, *supra* note 150, at 63.

235. The Coast Guard reports to the Department of Homeland Security except when activated by the U.S. Navy. See U.S. COAST GUARD, BD. FOR CORR. OF MIL. RECS. OF THE COAST GUARD, <https://www.uscg.mil/resources/legal/bcmr/> (on file with the Syracuse Law Review) (last visited Nov. 15, 2025).

236. See *id.*; see also 10 U.S.C. § 1553(a)–(b).

Boards for the Correction of Military or Naval Records (BCMRs/BCNR)<sup>237</sup> exist to correct any error or injustice in a veteran's service record.<sup>238</sup> If a veteran with an OTH discharge successfully applies to one of the aforementioned Boards and can secure a discharge upgrade to at least "General (Under Honorable Conditions)," that upgraded discharge status is binding on the VA, and they will now be considered a "veteran."<sup>239</sup>

When a veteran applies for VA services and is denied because they have an OTH discharge characterization, the VA decision letter will include the following notice:

**Figure 6**<sup>240</sup>

**Figure 6**

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.

While this notice is fair and technically accurate, it is deceiving in that it does not indicate the probability of success that veterans will have with pursuing a discharge upgrade before the military Boards. The "myth of the easy discharge upgrade" in the military community may even lead some veterans to accept an OTH discharge during an administrative separation in lieu of otherwise adjudicating their rights before a court martial.<sup>241</sup> The civilian reality for "non-veterans" is that the military Boards rarely issue decisions in the veteran's favor and suffer from extreme backlogs.<sup>242</sup> Unsurprisingly, the majority of petitions filed with the military Boards are filed *pro se*, which

237. The Army, the Navy, the Air Force, and the Coast Guard all have BCMRs/NRs. Like the NDRB, the BCNR hears cases from both the Navy and the Marine Corps. *See* MDU, *supra* note 150, at 71.

238. *See id.*; *see also* 10 U.S.C. § 1552(a)(1).

239. 38 C.F.R. § 3.12(f) (2024).

240. This is an actual COD decision letter received by a client of the Syracuse University VLC.

241. *See* TURNED AWAY, *supra* note 62, at 8.

242. *See id.*; *see also* Wherry, *supra* note 58, at 1369–70. A recent Syracuse VLC client notification from the Army BCMR stated that the veteran should *expect an eighteen-month wait before their petition would even be considered* by the Board.

highlights the need for legal assistance to have a greater chance for a successful discharge upgrade.<sup>243</sup>

In calendar year (CY) 2018, the ADRB and ABCMR granted successful upgrades to 24.9% of veteran applicants, the NDRB and BCNR<sup>244</sup> to 32.1%, and at the AFDRB and AFBCMR just 5.1% of petitions were successful.<sup>245</sup> By CY 2023, the ADRB and ABCMR granted successful upgrades to 33.5% of veteran applicants, the

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243. See Wherry, *supra* note 58, at 1370; see also TURNED AWAY, *supra* note 62, at 8; see, e.g., *TVC Discharge Upgrade Program*, THE VETERANS CONSORTIUM, <https://www.vetsprobono.org/legal-help/discharge-upgrade> (on file with Syracuse Law Review) (last visited Sep. 21, 2025) (describing their Discharge Upgrade Program). “Based on [CY 2022] data, 84.7% of [combined DRB] applications were *pro se* and 15.3% were represented.” BDS. OF REV. READING ROOM, *Boards Statistics*, CY2022, [https://boards.law.af.mil/stats\\_CY2022.htm](https://boards.law.af.mil/stats_CY2022.htm) (on file with the Syracuse Law Review) (last visited Oct. 5, 2025); “The *pro se* veteran-applicants often ‘do not ‘fully develop their cases and submit viable issues for review.’” Jessica Lynn Wherry, *Denied by Dysfunctional Design*, 74 AM. U. L. REV. 1057, 1062 (2025) (emphasis added) (quoting CONN. VETERANS LEGAL CTR., VETERANS DISCHARGE UPGRADE MANUAL 21 (2011), <https://ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-20111.pdf> (on file with the Syracuse Law Review) (last visited Oct. 5, 2025) (quoting AM. LEGION, GUIDE TO FILING MILITARY DISCHARGE REVIEW BOARD AND BOARD FOR CORRECTION OF MILITARY RECORDS APPLICATIONS 1 (2001), <https://blackpony.org/dodguide.pdf> (on file with the Syracuse Law Review) (last visited last visited Oct. 5, 2025))).

244. This number includes data for both Navy and Marine Corps veterans. See MDU, *supra* note 150, at 94.

245. The DoD Electronic Reading Room for the Military Departments’ Boards for Corrections of Military/Naval Records (BCM/NR) and the Discharge Review Boards (DRB) publishes statistics for each of the DRBs and BCMR/NRs (collectively the “Boards”) for public research. The data is available at the end of each quarter of the year (31 March, 30 June, 30 September, and 31 December), which adds decisions finalized in the preceding quarter. Datasets are available for each of the Boards and are broken down by whether a mental health claim was adjudicated, by whether a sexual assault (military sexual trauma (MST)) was adjudicated, and all “other” claims not related to mental health or MST. Data is available to show when the Boards grant relief that includes a discharge upgrade. The DoD does note that “upgrades are not always requested and not always an option. Most discharges are honorable or uncharacterized, and many veterans, therefore, seek other forms of relief (e.g., a change in the discharge basis).” BDS. OF REV. READING ROOM, *Boards Statistics*, CY2023, [https://boards.law.af.mil/stats\\_CY2022.htm](https://boards.law.af.mil/stats_CY2022.htm) (on file with the Syracuse Law Review) (last visited Oct. 5, 2025) The data compiled for the above-quoted statistics is a compendium of the quarterly reports available from 2018 to 2023. 2024 data was not included because, at the time this Article was written, a complete set of quarterly reports were not available. This data set was compiled on a spreadsheet that is on file with the Authors, a copy of which is formatted and attached as Appendix A. See *Electronic Reading Room for the Military Departments’ Boards for Corrections of Military/Naval Records (BCM/NR) and the Discharge Review Boards (DRB)*, U.S. DEP’T OF DEF., <https://boards.law.af.mil/index.htm> (on file with Syracuse Law Review) (last visited Feb. 1, 2025) [hereinafter DRB & BCMR/NR STATISTICS].

NDRB and BCNR dropped their rate of successful upgrade to 25.2%, and the rate for the AFDRB and AFBCMR rose to 8.4%.<sup>246</sup> Using the data published by the DoD, the ADRB and ABCMR have a six-year average<sup>247</sup> of granting an upgrade in 30.7% of cases, the NDRB and BCNR have an average of upgrading in 20.9% of cases, and the average for the AFDRB and AFBCMR is 10.8%.<sup>248</sup>

In addition to the low success rate of securing a discharge upgrade before one of the military Boards, the process itself is “slow, complicated, and opaque.”<sup>249</sup> In 2018, the *Military Times* reported that the three service DRBs alone had a backlog of 26,000 petitions that had been backlogged for ten months or more.<sup>250</sup> In that same year, the three service DRBs decided 3,414 cases.<sup>251</sup> For reference, the DRBs in CY 2023 were able to decide 4,796 cases, which demonstrates the inability to timely or effectively resolve a backlog and increase the time to reach a decision for veterans.<sup>252</sup> At the ABCMR, 2019 reporting found that they can reach a decision on a petition in ten months for 90% of cases and in eighteen months for 100% of cases by utilizing a process where analysts present an executive summary of the case to Board members who spend an average of *three minutes and forty-five seconds*<sup>253</sup> on finalizing a decision for most petitions.<sup>254</sup> At the time of these findings, some veterans were waiting 450 or more days just to see movement on their petition.<sup>255</sup>

Further, compounding the chance of successfully upgrading their discharge consideration are the Board’s seeming failure to follow the

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246. See DRB & BCMR/NR STATISTICS, *supra* note 245.

247. Referencing the complete CY 2018 through CY 2023, *supra* note 245.

248. See *id.*

249. UNDERSERVED, *supra* note 2, at 19.

250. See Leo Shane III, Can DoD Fix the Painfully Long Wait for Reviews of Bad-Paper Discharges?, *Mil. Times* (Sep. 28, 2018), <https://www.militarytimes.com/news/pentagon-congress/2018/09/28/lawmakers-eye-an-overhaul-of-military-review-boards-system/> (on file with Syracuse Law Review).

251. See DRB & BCMR/NR STATISTICS, *supra* note 245.

252. See *id.*

253. A successful discharge upgrade petition prepared by the Syracuse University VLC can take days to months to fully draft (in the most complex cases), months to years to acquire necessary records, and can be hundreds of pages long, including evidentiary exhibits. Hundreds of hours of student attorney time, with Staff Attorney supervision, go into preparing just one complex application.

254. See Alissa Figueroa, *A Losing Battle: How the Army Denies Veterans Justice Without Anyone Knowing*, FUSION (Nov. 6, 2014), <http://interactive.fusion.net/a-losing-battle/> [<https://perma.cc/UQ67-UN5H>].

255. Shane III, *supra* note 250; see *supra* note 240 (notifying a veteran in 2024 that they should expect approximately 550 days to see movement on their petition).



“liberal consideration” standard outlined in the *Kurta Memo* and codified by Congress in 10 U.S.C. § 1553(d)(3)(ii).<sup>256</sup> Since 2018, only the NDRB and BCNR have shown a consistent trend of steadily increasing the number of discharges upgraded on account of a mental health condition.<sup>257</sup> While in CY 2022 and CY 2023, the ADRB and ABCMR have increased their numbers of discharges upgraded on account of a mental health condition by 10% and 77%, respectively, all other years reported post-*Kurta* show a downward trend from their 2018 numbers.<sup>258</sup> In fact, despite one outlying year in CY 2019, the AFDRB and AFBCMR have consistently upgraded fewer discharges based on mental health in the same time span.<sup>259</sup>

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256. See *supra* Part II(A)(1); 10 U.S.C. § 1553(d)(3)(ii) (as applied to the DRBs); see also Wherry, *supra* note 58, at 1386–88.

257. See DRB & BCMR/NR STATISTICS, *supra* note 245.

258. See *id.*

259. See *id.*

**Table 2**<sup>260</sup>

<b>Table 2</b>			
<b>Successful Discharge Upgrades Based on a Mental Health Condition by the DRBs and BCMR/NR</b>			
	<b>Air Force</b>	<b>Army</b>	<b>Navy/ Marine Corps</b>
<b>CY 2018</b>			
Q1	2	97	56
Q2	10	88	47
Q3	11	235	127
Q4	20	69	35
<b>Total</b>	<b>43</b>	<b>489</b>	<b>265</b>
% increase above 2018 numbers	—	—	—
<b>CY 2019</b>			
Q1	529	76	71
Q2	14	110	57
Q3	23	109	60
Q4	7	83	50
<b>Total</b>	<b>573</b>	<b>378</b>	<b>238</b>
% increase above 2018 numbers	1333%	-22%	-10%
<b>CY 2020</b>			
Q1	8	57	41
Q2	16	77	70
Q3	9	46	127
Q4	6	160	84
<b>Total</b>	<b>39</b>	<b>340</b>	<b>322</b>
% increase above 2018 numbers	-9%	-30%	22%
<b>CY 2021</b>			
Q1	4	69	104
Q2	3	94	119
Q3	4	88	88
Q4	7	111	61
<b>Total</b>	<b>18</b>	<b>362</b>	<b>372</b>
% increase above 2018 numbers	-58%	-26%	40%
<b>CY 2022</b>			
Q1	8	120	162
Q2	6	145	152
Q3	3	121	133
Q4	5	153	129
<b>Total</b>	<b>22</b>	<b>539</b>	<b>576</b>
% increase above 2018 number	-49%	10%	217%
<b>CY 2023</b>			
Q1	6	168	168
Q2	3	222	255
Q3	3	256	174
Q4	12	221	78
<b>Total</b>	<b>24</b>	<b>867</b>	<b>675</b>
% increase above 2018 numbers	-44%	77%	255%

260. *See id.*

Naturally, the liberal consideration standard does not guarantee that a veteran should receive or is entitled to an upgrade, but it does allow for potential mitigating circumstances.<sup>261</sup> Nor does the liberal consideration standard change the individual facts and circumstances of the cases presented by veterans before the military Boards.<sup>262</sup> But, to the extent that the liberal consideration standard was established in response to prior low grant rates for veterans with PTSD, TBI, MST, and other mental health conditions, it is reasonable to expect an overall trend toward higher grant rates.<sup>263</sup> The liberal consideration policy was intended to change how the Boards consider the facts and circumstances—as potential *mitigating* circumstances—of a veteran’s petition in relation to the legal standard they must meet to be considered for an upgrade, but it may be that the presumption of “regularity in the conduct of governmental affairs” will continue to win out in the minds of the Boards.<sup>264</sup>

Given these facts, and returning to the notice provision in the VA COD decision referenced above,<sup>265</sup> the addition of the following hypothetical text would make the notice less deceiving for veterans yet soberingly representative of the arduous path ahead:

If you apply to a Service department to change the character of your discharge or to correct a military record, be advised that: 1) your chance of success is very low without the assistance of legal counsel, 2) even with the assistance of legal counsel the overall success

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261. See Wherry, *supra* note 58, at 1387–88.

262. See *id.*

263. *Id.*; see Kurta Memo, *supra* note 145, at attach. 1 at 1, 3; see, e.g., DRB & BCMR/NR STATISTICS, *supra* note 245. The expectation of higher grant rates is reasonable because the data in the DRB & BCMR/NR STATISTICS does not show an overall decrease in the number of discharge upgrade petitions based on a mitigating mental health condition. If there were fewer veterans seeking discharge upgrades based on a mitigating mental health condition, it is stipulated that grant rates would likely decrease proportionally.

264. “There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.” 32 C.F.R. § 724.211 (2024). This presumption of regularity—that the original decision was “correct, lawful, and in good faith”—is often used as a basis for upholding an original discharge characterization decision. See Wherry, *supra* note 58, at 1389. To the extent that the liberal consideration policy presumes that the military was “wrongfully” failing to consider the impacts of mental health on the misconduct that led to the discharge, it sits in direct conflict with this presumption. See *id.*; cf. Kurta Memo, *supra* note 145; see also *supra* Part II(A)(1).

265. See *supra* Part III, Figure 6.

rate in the last six years is approximately 23%<sup>266</sup> across all Military Departments, 3) you should not expect to have your petition even considered by the Service Department for up to eighteen months, and 4) there is a strong presumption that the original discharge characterization was correct, lawful, and accurate.<sup>267</sup>

*After securing free legal assistance from a law school clinic to service-connect his PTSD and upgrade his discharge, John Smith is surprised to learn that the process is not as simple as filling out a form and telling his story like he had heard from other veterans. He is advised that, due to the nature of the incident that led to his OTH discharge—and the low overall success rate with an upgrade—his best chance of success is in building a strong evidentiary record, including new private forensic medical opinions relating his service-connected PTSD to the incident itself. An upgrade petition, which contains over 150 pages of evidence—including strong medical opinions about the nature of his maladaptive coping responses to PTSD—is diligently prepared over the next several months, in addition to the brief. When it is submitted, John will have to wait over a year and a half to even have his petition considered. In the meantime, he continues to struggle to maintain steady employment. He was able to secure a part-time position as a janitor at a motel that allows him the flexibility to attend weekly mental health treatment. The compensation would not be enough to cover apartment rent, but the motel rents him a room at a steep discount on top of his compensation. Lack of financial stability means John must make monthly decisions on whether he will pay for food or his psychiatric medications. John remains angry that his OTH discharge and his PTSD control every aspect of his life.*

### *C. A VA Character of Discharge Determination and COD Exceptions*

When a veteran first applies for healthcare from the VA, the RO must make a Character of Discharge (COD) determination to determine their eligibility for VA healthcare and benefits.<sup>268</sup> For a non-“veteran,” this assumes that the veteran is not initially turned away by VA frontline personnel when they see the OTH status of a discharge

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266. DRB & BCMR/NR STATISTICS, *supra* note 245 (calculated from the total upgrades granted by all Boards (12,743) divided by the total number of petitions before all Boards (55,853) during the reportable timeframe).

267. The Authors offer this provision as an example of the reality that veterans face, *not* as a proposal for formal VA implementation.

268. See VBM, *supra* note 31, at pt. I, ch. 2, § 2.2.3.5; 38 U.S.C. § 5303B(a).

on a DD 214.<sup>269</sup> When the RO issues its decision, it must evaluate any statutory<sup>270</sup> or regulatory bars<sup>271</sup> to receiving VA healthcare or benefits for a period of service,<sup>272</sup> and it must provide a non-“*veteran*” with the information necessary regarding their ability to correct this deficiency in their eligibility.<sup>273</sup>

If it is determined that a statutory or regulatory bar exists, the VA may waive that bar “if it is established to the satisfaction of the Secretary that, at the time of the commission of an offense leading to a person’s court-martial, discharge, or resignation, that person was *insane*.”<sup>274</sup> However, as discussed below, that exception is rarely met without additional assistance and claim development.<sup>275</sup> New, in July 2024, the VA created an additional “compelling circumstances” exception that applies to the regulatory bars of “willful and persistent misconduct,” “an offense of moral turpitude,” and the statutory bar of “discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days.”<sup>276</sup> It is too early to know if VA adjudicators and the Board of Veterans’ Appeals (BVA) will broadly construe circumstances as “compelling” enough to create significantly more “*veterans*” under this exception in the long term. If the statutory or regulatory bar is waived, the veteran is now considered a “*veteran*,” and their discharge is “Honorable for VA Purposes.”<sup>277</sup>

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269. See *supra* Part III(A); TURNED AWAY, *supra* note 62, at 2.

270. *Supra* Part I(B)(3).

271. *Supra* Part I(B)(3).

272. Veterans may have more than one period of service and may have an Honorable discharge status for an earlier period of service while receiving an OTH discharge for a later period of service. For these veterans, medical conditions caused or aggravated by an Honorable period of service are eligible for VA care, while their medical conditions related to a less-than-honorable period of service are not. Thus, it is possible to be seen by the VA as a veteran and a “*veteran*” at the same time. See VBM, *supra* note 31, at pt. I, ch. 2, § 2.2.3.2.

273. See 38 U.S.C. § 5303B(b).

274. *Id.* (emphasis added); see 38 C.F.R. § 3.12(b) (2024).

275. See *infra* Part III(C)(1); see, e.g., VBM, *supra* note 31, at pt. I, ch. 2, § 2.2.3.3.1 (describing that the determination of insanity necessarily requires a medical opinion that the insanity occurred during the time of the offense that led to the less-than-honorable discharge).

276. 38 C.F.R. § 3.12(c)(6)(i), (d)(2)(i)–(ii) (2024).

277. However, veterans must still wait an average of 695 days if they appeal an initial COD decision to the BVA on an “evidence submission” docket and 927 days if they appeal on a “hearing” docket. BD. OF VETERANS’ APPEALS, DEP’T OF VETERANS AFFS., ANNUAL REPORT FISCAL YEAR (FY) 2023, 5, 44 (2023), [https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2023\\_bva2023ar.pdf](https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2023_bva2023ar.pdf) (on file with the Syracuse Law Review)

### 1. The “Insanity” Exception Is *INSANE*

A determination that a veteran was *insane* at the time of the action or misconduct that led to their OTH discharge will not preclude them from receiving VA benefits based upon that period of service.<sup>278</sup> The problem with this definition is that “modern psychology and psychiatry . . . no longer deem people ‘insane.’”<sup>279</sup> The most widely accepted—and first—legal definition of insanity is that a criminal defendant must have a “mental illness or disease that makes it impossible for a defendant to know they were committing a crime or to understand that their actions are wrong.”<sup>280</sup> The Uniform Code of Military Justice (UCMJ)—under Article 50(a)—defines insanity as “at the time of the commission of the acts constituting the offense, the accused, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of the acts.”<sup>281</sup> Did the VA promulgate a regulation under the mandate of 38 U.S.C. §

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(last visited Nov. 15, 2025). Over 200,000 appeals of all RO decisions remained pending before the BVA at the end of FY 2023 despite the BVA issuing decisions in 100,000 cases. *Id.* The full scope of the VA claim filing and appeals process is beyond the scope of this Article. These numbers are included to illustrate the waiting period that veterans still face after an initial unfavorable COD decision. *Id.* In addition, a determination that a veteran’s discharge is “Honorable for VA Purposes” does not change the underlying character of the discharge itself—only a service branch DRB or BCMR may upgrade the character of a veteran’s discharge. *See supra* Part III(B); *see also* U.S. DEP’T OF VETERANS AFFS., *supra* note 79 (regarding a discussion of the use of the terms “Honorable” and “Dishonorable” as they relate to the VA’s purpose versus that of the DoD).

278. *See* 38 U.S.C. § 5303(b).

279. *UNDERSERVED*, *supra* note 2, at 13; *see generally* AMER. PSYCH. ASS’N, *DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5)* (5th ed. 2013). The DSM-5 is the American Psychiatric Association’s classification of mental disorders. A search of the index at page 931 reveals no entry for the term “insane.”

280. *Criminal Insanity*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/criminal\\_insanity](https://www.law.cornell.edu/wex/criminal_insanity) (on file with Syracuse Law Review) (last visited Nov. 15, 2025) (This definition is the common law *M’Naghten Rule*, originally the first test for criminal insanity. The Authors acknowledge that depending on the state, modern penal codes may reflect a different variation of this rule.).

281. 10 U.S.C. § 850a(a). This definition of insanity is remarkably similar to the second leading definition of the term under the MODEL PENAL CODE § 4.01 (2025) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”). *Model Penal Code insanity defense*, CORNELL L. SCH. LEGAL INFO. INST. (July 2023), [https://www.law.cornell.edu/wex/model\\_penal\\_code\\_insanity\\_defense](https://www.law.cornell.edu/wex/model_penal_code_insanity_defense) (on file with the Syracuse Law Review).

5303(b)<sup>282</sup> that used either a medical definition of insanity<sup>283</sup> or a known legal definition used by civilian courts or the military? No.<sup>284</sup> The VA defines *insanity* as:

An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, [1)] a more or less prolonged deviation from his normal method of behavior; [2)] or who interferes with the peace of society; [3)] 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.<sup>285</sup>

The Court of Appeals for Veterans Claims has opined that this definition is “less than clear given its obvious drafting defects, [and] must be interpreted so as to avoid . . . absurd result[s].”<sup>286</sup> What is known is that the *insanity* needed to exist at the time the veteran committed the offense that led to their discharge and that the *insanity* can be shown by medical evidence.<sup>287</sup> In addition, the *insanity* need not be

282. See 38 U.S.C. § 501(a) (noting “[t]he Secretary has the authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department”).

283. Acknowledging that while modern psychologists and psychiatrists no longer use the term “insanity,” it does have historical prominence in its use. A search of the American Psychiatric Association’s DSM-I—in publication from 1952–1968 (at the time of the promulgation of this rule)—reveals no medical diagnosis or definition for the term “insanity.” See generally AMER. PSYCH. ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-I) (1st ed. 1952) The DSM-I was the first edition of the American Psychiatric Association’s manual categorizing mental disorders. The manual contains no definition for the term “insanity.” See *id.*

284. See 38 C.F.R. § 3.354 (2025) (defining insanity for the purposes of interpreting 38 U.S.C. § 5303(b); see also 38 C.F.R. § 3.12(b) (2025)). It was added to the Federal Register at 26 FR 1589 on February 24, 1961, and remains un-amended to this date. Cf. DSM-I, *supra* note 283 (having no established medical diagnosis or definition of the term insanity in the year 1961).

285. 38 C.F.R. § 3.354(a) (2025).

286. Zang v. Brown, 8 Vet. App. 246, 252 (1995); see also Caleb R. Stone, Making the Best from a Mess: Mental Health, Misconduct, and the “Insanity Defense” in the VA Disability Compensation System, 90.3 UMKC L. REV. 661 (2022); cf. Letter from VA Office of General Counsel on Definition of Insanity in 38 C.F.R. § 3.354(a) to Acting Chairman for Board of Veterans Appeals (May 22, 1997), <https://www.va.gov/ogc/opinions/1997precedentopinions.asp> (where the VA Office of General Counsel issued necessary interpretive guidance on seven separate and distinct phrases in this definition) (on file with Syracuse Law Review).

287. Gardner v. Shinseki, 22 Vet. App. 415, 421 (2009); see Bowling v. McDonough, 33 Vet. App. 385, 398 (2021), *aff’d*, 38 F.4th 1051 (Fed. Cir. 2022).

the cause of the misconduct leading to the discharge.<sup>288</sup> Existence of the condition itself is determinative; rather than the criminal law requirement that the *insanity* affect the veteran's ability to determine right from wrong.<sup>289</sup> Furthermore, the phrase "due to a disease" must be read to apply to "all three circumstances mentioned in the regulation."<sup>290</sup>

Despite the VA's definition of *insanity* having a seemingly broader scope than other legal definitions,<sup>291</sup> Veterans Law Judges continue to interpret this provision in a restrictive manner that excludes veterans who clearly demonstrated mental health conditions at the time of the misconduct that led to their discharge.<sup>292</sup> In part, this may be because demonstrating the requirements found in the *insanity* definition requires veterans to obtain expert medical evidence from a psychologist, psychiatrist, or other qualified medical professional that establishes *insanity* existed at the time the misconduct took place.<sup>293</sup> In practice, this often requires the veteran to seek outside legal assistance with the development of this claim because "VA adjudicators rarely send veterans to Compensation & Pension examinations for a medical opinion as to whether they met the [*insanity*] standard."<sup>294</sup> Additionally, it is critical that the qualified medical examiner be given the VA's definition of *insanity*, asked to opine precisely when this condition began, and phrase their findings in a manner that clearly demonstrates the standard is or is not met, or a VA adjudicator may misconstrue any medical jargon and find the veteran has not met the *insanity* exception.<sup>295</sup> It may be that the most accurate statement regarding the definition of *insanity* in 38 C.F.R. §3.354 is that it is "insanely" hard for a veteran to comply with its provisions so that they may become "veteran" for VA purposes.

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288. See *Struck v. Brown*, 9 Vet. App. 145, 154 (1996).

289. See *Gardner*, 22 Vet. App. at 420; see also *Zang*, 8 Vet. App. at 252.

290. *Bowling*, 33 Vet. App. at 398.

291. See *supra* notes 277–82.

292. See *UNDERSERVED*, *supra* note 2, at 15.

293. See *id.* at 14; see also *Gardner*, 22 Vet. App. at 421; *Bowling*, 33 Vet. App. at 398.

294. *UNDERSERVED*, *supra* note 2, at 14.

295. This serves as a practice reminder from the Syracuse University VLC which regularly uses expert psychological examiners to further develop veterans' claims. All examiners are educated on the precise language of any VA standard they are asked to assess, asked to clearly delineate when symptoms were evident, and asked to phrase their expert findings in a manner that clearly addresses each component of the standard required for the VA. Anecdotally, the Syracuse University VLC reports a higher veteran initial claim grant rate when medical examiners are educated on the precise wording required for VA opinions.



2. *The New §3.12(d) and the “Compelling Circumstances” Exception*

Perhaps in response to the growing advocacy surrounding veterans with OTH discharge characterizations, the VA published a proposed rule in July 2020 that would amend its COD determination process.<sup>296</sup> Almost four years later—and after a well-developed comment period—the final rule was published on June 25, 2024, amending the VA’s COD process found in 38 C.F.R. §3.12.<sup>297</sup> This liberalizing rule is thought to “expand VA benefits eligibility, bring more consistency to adjudications of benefits eligibility, and ensure [COD] determinations consider all pertinent factors.”<sup>298</sup> The VA stated that its justification for these changes “will allow the military to retain a deterrent to misconduct that promotes good order and discipline, while also allowing VA to provide a case-by-case, more holistic analysis” for any veteran during the COD process.<sup>299</sup> Specifically, the new version of §3.12 removed one regulatory bar to being considered a “veteran,”<sup>300</sup> objectified the extent to which the bar of “willful and persistent misconduct” may be applied, and created a “compelling circumstances” exception for certain regulatory bars to ensure that a veteran’s “length and character of service exclusive of a period of misconduct and potential mitigating reasons for the misconduct” are considered by VA adjudicators.<sup>301</sup> Due to the infancy of this regulatory shift, its cumulative long-term impact on the number of veterans receiving COD decisions that find them “Honorable for VA Purposes” is untested.<sup>302</sup>

i. *One Less Regulatory Bar*

Prior to this June, 2024 rule amendment, 38 C.F.R. §3.12(d) contained the regulatory bar of “homosexual acts involving aggravating circumstances or affecting the performance of duty” that would allow the VA to find a veteran’s discharge “issued under dishonorable

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296. See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41471 (proposed July 10, 2020) (to be codified at 38 C.F.R. pt. 3).

297. See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 89 Fed. Reg. 32361 (June 25, 2024) (to be codified at 38 C.F.R. pt. 3) [hereinafter FINAL UPDATE].

298. *Id.* at 32362.

299. *Id.* at 32362–63.

300. See generally Alford & Lee, *supra* note 71 (referencing the “homosexual acts” regulatory bar).

301. FINAL UPDATE, *supra* note 297, at 32362.

302. This references the implementation date of June 25—the third quarter of FY 2024.

conditions.”<sup>303</sup> In 2011, the DoD “Don’t Ask Don’t Tell” policy was abolished, and discharges were no longer issued based on a veteran’s sexual identity.<sup>304</sup> In this rulemaking, the VA found that the “homosexual acts bar is outdated and unnecessary,” removing it completely.<sup>305</sup>

*ii. “Willful and Persistent:” More Accurately Defined*

From 1992–2015, 84.2% of all COD denials by the VA were for conduct that VA adjudicators deemed “willful and persistent.”<sup>306</sup> To be “willful,” the act must involve “conscious wrongdoing or known prohibited action” that was intentionally performed or performed with “wanton and reckless disregard of its probable consequences.”<sup>307</sup> The regulation clarifies that “[m]ere technical violation[s] of police regulations or ordinances will not *per se* constitute willful misconduct.”<sup>308</sup> Yet, despite this clarity surrounding the “willful” component, VA adjudicators had little guidance to determine what “persistent” misconduct is—short of the fact that by definition, it must happen more than once.<sup>309</sup>

Under the new 2024 regulation, the VA provided a point of reference for deciding what misconduct should be viewed as persistent.<sup>310</sup> By implementing a decisional framework for VA adjudicators

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303. Alford & Lee, *supra* note 71 (referencing the “homosexual acts” regulatory bar); *cf.* 38 C.F.R. § 3.12(d) (2022); *see also* 38 C.F.R. § 3.12(d) (2024).

304. *See* Memorandum from Clifford L. Stanley, Under Secretary of Defense, on Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code to Secretaries of the Military Departments. (Sep. 20, 2011) (on file with the Syracuse Law Review) (allowing old discharges based on this policy to be reviewed and potentially upgraded).

305. FINAL UPDATE, *supra* note 297 at 32363.

306. UNDERSERVED, *supra* note 2, at 24; *see, e.g.*, 38 C.F.R. § 3.12(d) (2023).

307. 38 C.F.R. § 3.1(n), (n)(1) (2024).

308. *Id.* at § 3.1(n)(2) (emphasis added).

309. *See* UNDERSERVED, *supra* note 2, at 23–24; *see also* FINAL UPDATE, *supra* note 297, at 32367. This lack of guidance may be partly due to the fact that the BVA’s determination that conduct was “willful and persistent” is considered a finding of fact by the Court of Appeals for Veterans Claims. Findings of fact are reviewed under the “clearly erroneous” standard of review. 38 U.S.C. § 7261(a)(4). Under this standard, “if there is a ‘plausible’ basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them.” *Struck*, 9 Vet. App. at 152 (quoting *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990)).

310. FINAL UPDATE, *supra* note 297, at 32367.

that uses the statute of limitations for administrative separations<sup>311</sup> and for general court-martials<sup>312</sup> under the Uniform Code of Military Justice, a VA COD decision can no longer consider misconduct that could not be punished by the military as “persistent.”<sup>313</sup> Now, the “willful and persistent” regulatory bar should only be applied if there are 1) “instances of minor misconduct<sup>314</sup> occurring within two years of each other,” 2) “an instance of minor misconduct occurring within two years of more serious misconduct,” and 3) “instances of more serious misconduct occurring within five years of each other.”<sup>315</sup> Further, this liberalized standard is bolstered by the “compelling circumstances” exception discussed below.<sup>316</sup> This ensures that veterans whose misconduct can properly be labeled as “willful and persistent” in a COD determination “receive an individualized review that considers whether the misconduct should be considered mitigated or outweighed by otherwise meritorious service or other factors.”<sup>317</sup>

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311. See 10 U.S.C. § 843(b)(3) (describing a two-year statute of limitations for Article 15 infractions).

312. See *id.* at § 843(a), (b)(1) (describing a five-year statute of limitations for any offense that is not: 1) AWOL in time of war, 2) murder, 3) rape or sexual assault, 4) rape or sexual assault of a child, 5) maiming of a child, 6) kidnapping of a child, or 7) any other offense punishable by death).

313. See FINAL UPDATE, *supra* note 297, at 32367; *cf.* UNDERSERVED, *supra* note 2, at 23–25 (describing the ambiguity in the previous regulation (38 C.F.R. § 3.12(d) (2023)) as so “imprecise” that the VA could deem almost any misconduct “disqualifying from all basic veteran services”). This is an example of the VA harmonizing its regulations with standards used by the DoD, as referenced in Part IV of this Article. See *infra* Part IV (discussing remedies that focus on collaboration between the VA and DoW as being the most effective route in addressing the critical needs of veterans with an OTH). In addition, the Authors note that this point of reference still includes ambiguity regarding what conduct may be viewed as “persistent.” Simply excluding conduct that could not be punished by the military as “persistent” only provides one limitation in its application.

314. Grading “misconduct” as “minor” or “more serious” is in reference to the DoD Manual for Courts-Martial, United States. See *generally* U.S. DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL U.S. (2023) (describing the general use of “minor misconduct” as misconduct that the maximum imposable sentence would not result in a dishonorable discharge or confinement of longer than one year).

315. 38 C.F.R. § 3.12(d)(2)(ii) (2024); see 10 U.S.C. § 843(b)(3); see also 10 U.S.C. § 843(b)(1).

316. See 38 C.F.R. § 3.12(d)(2) (2024).

317. FINAL UPDATE, *supra* note 297, at 32367.

*iii. Understanding “Compelling Circumstances”*

For the first time in history, VA adjudicators have been provided a non-exhaustive list<sup>318</sup> of compelling circumstances that may be found to mitigate the effects of a less-than-honorable discharge, allowing “veterans” to receive the care and benefits that they deserve.<sup>319</sup> Mitigation occurs when the veteran’s “[s]ervice exclusive of the period of prolonged AWOL or misconduct [is generally] of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation.”<sup>320</sup> It is important to note that this language nearly parallels the definition of a General (Under Honorable Conditions) discharge found in DoDI 1332.14 ¶ 4.3 (b)(2)(b).<sup>321</sup> Specifically, if one or more compelling circumstances can be shown, the bars to benefits of 180 days or more of prolonged AWOL, an offense of moral turpitude, and willful and persistent misconduct *will not be applied* to prevent a “veteran” from receiving benefits—so long as the remainder of their service can be characterized as honest, faithful, and of benefit.<sup>322</sup> Perhaps in response to the combination of growing awareness of the impact of mental health conditions,<sup>323</sup> the high rate of veteran suicide,<sup>324</sup> the high rate of veteran homelessness,<sup>325</sup> and veterans advocates continuously pressing this issue, the following are now formally recognized<sup>326</sup> as compelling circumstances that may mitigate the underlying cause of a less-than-honorable discharge characterization<sup>327</sup>:

- (i) Mental or cognitive impairment at the time of the prolonged AWOL or misconduct, to include but not limited to a clinical diagnosis of (or evidence that could later be medically determined to demonstrate existence of)
- of) posttraumatic stress disorder (PTSD), depression,

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318. Some commenters on the proposed rule expressed concerns that the list of conditions in 38 C.F.R. § 3.12(e)(2) (2024) would be viewed as exhaustive and limiting against veterans. The VA confirmed in the final rule that this was a non-exhaustive list that was “intended only as a guide.” FINAL UPDATE, *supra* note 297, at 32365.

319. *See* 38 C.F.R. § 3.12(e)(2) (2024).

320. 38 C.F.R. § 3.12(e)(1) (2024).

321. *See supra* Part I(B)(2).

322. 38 C.F.R. § 3.12(e) (2024).

323. *See supra* Part II(A).

324. *See supra* Part II(B).

325. *See supra* Part II(C).

326. To reiterate a point previously made in this Article, the VA considers this list non-exhaustive. FINAL UPDATE, *supra* note 297, at 32365.

327. *See* 38 C.F.R. § 3.12(e)(2)(ii) (2024).

bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, or cognitive disabilities.

(ii) Physical health, to include physical trauma and any side effects of medication.

(iii) Combat-related or overseas-related hardship.

(iv) Sexual abuse/assault.

(v) Duress, coercion, or desperation.

(vi) Family obligations or comparable obligations to third parties.

(vii) Age, education, cultural background, and judgmental maturity.<sup>328</sup>

The breadth of this list and what additional factors may be considered compelling enough for VA adjudicators to forego applying a regulatory bar to benefits may be the most sweeping change in the history of the veterans’ benefits system for veterans with OTH discharges.<sup>329</sup> This is underscored by the fact that veterans who received a “prior unfavorable COD determination . . . may request a new COD determination under [the] new § 3.12,”<sup>330</sup> and these requests for a new COD determination will be processed “*without* the need for new and relevant evidence.”<sup>331</sup> In its rule impact analysis, the VA anticipates a five-fold increase in the number of veterans requesting a COD determination in FY 2025 over FY 2024 and an over 7000% increase in its budgetary requirements to meet this need.<sup>332</sup> Despite these staggering numbers, and the policies behind the liberalizing law, the VA

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328. *Id.*

329. As it applies only to the 180 days of continuous AWOL bar in 38 C.F.R. § 3.12(c)(6) (2024), an additional compelling circumstance is whether a valid legal defense (for a substantive issue of absence or misconduct) would have precluded a conviction for AWOL or misconduct under the UCMJ. *See* 38 C.F.R. § 3.12(e)(3) (2024).

330. PORTER, *supra* note 48, at 19.

331. *Id.*; The “new and relevant evidence” standard is the standard required for the submission of a supplemental claim. A supplemental claim would be used when a veteran has filed a claim in the past, received an unfavorable decision, and the issue is no longer ripe. If the supplemental claim is based on a change in the law (here), new and relevant evidence is not required. *See Supplemental Claims*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/decision-reviews/supplemental-claim/> (on file with Syracuse Law Review) (last visited Nov. 17, 2025).

332. *See* U.S. DEP’T OF VETERANS AFFS., Regulatory Impact Analysis for RIN 2900-AQ95(F), Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 1, 3–4 (Apr. 23, 2024), <https://www.regulations.gov/document/VA-2020-VBA-0018-0124> (on file with Syracuse Law Review).

anticipates that it will only create new “veterans” at a rate of 10% of total applications.<sup>333</sup>

*iv. The Untested Nature of These Changes*

Some veteran advocates have criticized the changes to § 3.12 as not going far enough to address the conditions faced by those veterans who have OTH discharges—even going as far to suggest that the VA should remove all regulatory bars unless the discharge is “Dishonorable.”<sup>334</sup> However, the VA was concerned that additional liberalization would interfere with military discipline and good order by sending a message that military misconduct has no repercussions in civilian life.<sup>335</sup> What is certain is that military service has created a population of 540,566 living veterans who were discharged with a COD that renders them ineligible for most VA benefits<sup>336</sup>, and those veterans face higher rates of mental health issues,<sup>337</sup> suicide,<sup>338</sup> and homelessness.<sup>339</sup>

With the new COD regulations in place—and the ability for veterans to reapply for a COD decision under these regulations without showing new and relevant evidence<sup>340</sup>—the VA demonstrated a 66% grant rate for COD petitions at the RO level in CY 2024 versus CY

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333. *Id.* at 5–7.

334. See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 89 Fed. Reg. 32361, 32361–70 (Apr. 26, 2024) (addressing public comments and justifying the VA’s current position); see, e.g., Adams & Montalto, *supra* note 79, at Pt. II, V; UNDERSERVED, *supra* note 2, at 4–7 (both discussing the historical intent to offer greater access to VA benefits by statute and the subsequent restriction of VA access by regulation); c.f. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024) (overturning *Chevron* deference to an Executive Agency’s interpretation of an ambiguous statute).

335. See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 89 Fed. Reg. at 32368 (discussing the tension between the positions of veteran advocates that “doubt that any commander in the U.S. Military relies on VA’s eligibility rules to maintain good order and discipline within [their] command” and those who believe liberalization of the eligibility standards denigrates honorable service by “changing the rules to provide care to people who could not, or would not, serve in the same manner”).

336. See *supra* Part II(C).

337. See *supra* Part II(A).

338. See *supra* Part II(B).

339. See *supra* Part II(C); see also U.S. DEP’T OF VETERANS AFFS., Regulatory Impact Analysis for RIN 2900-AQ95(F), Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 1, 6 (Apr. 23, 2024), <https://www.regulations.gov/document/VA-2020-VBA-0018-0124> (on file with the Syracuse Law Review) (last visited Nov. 15, 2025).

340. See PORTER, *supra* note 48, at 19.

2023.<sup>341</sup> While the VA reiterates that COD adjudicators will only apply a regulatory bar when it is “clearly supported by the military record,” and that the “benefit of the doubt”<sup>342</sup> will be resolved in the veteran’s favor, these rules have not prevented narrow interpretations of the law once decisions get appealed from the RO and the incorrect application of the law in the past.<sup>343</sup> Practitioners should be reminded that VA adjudicators have no required military, medical, psychological, or legal training until a veteran’s claim is appealed to a Veterans Law Judge and their advising attorneys at the BVA—they simply follow the guidance in the M21-1 when deciding a claim.<sup>344</sup> Veteran advocates should always submit COD claims after working with the veteran to develop the best evidence to support their claim, highlighting exactly where in the record relevant information can be found, and detailing the relevant law and M21-1 provision that directs adjudicators to render a certain decision.<sup>345</sup> Veterans deserve no delay in becoming “veterans” for the first time.

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341. FOIA request 25-18838-F and the associated response are on file with the Authors (noting 5,488 COD petitions were approved in CY 2024 versus 8,338 petitions approved in CY 2023).

342. See 38 U.S.C.S. § 5107(b) (2025) (stating the benefit of the doubt rule). The extent and scope of the “benefit of the doubt” rule is currently before the Supreme Court in *Bufkin v. McDonough*, No. 23-713, (United States Supreme Court, oral arguments Oct. 16, 2024).

343. See *supra* Part III(A), (C); see also FINAL UPDATE, *supra* note 297, at 32362; U.S. DEP’T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. X, subpt. iv, ch. 1, § A.1.h (June 1, 2023), [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177986/M21-1-Part-X-Subpart-iv-Chapter-1-Section-A-Character-of-Discharge-COD-and-Bars-to-Benefits%3FarticleViewContext=article\\_view\\_related\\_article](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177986/M21-1-Part-X-Subpart-iv-Chapter-1-Section-A-Character-of-Discharge-COD-and-Bars-to-Benefits%3FarticleViewContext=article_view_related_article) (on file with Syracuse Law Review).

344. See *About the Board*, BOARD OF VETERANS’ APPEALS, <https://www.bva.va.gov/about/index.asp> (on file with the Syracuse Law Review) (last visited Nov. 15, 2025); see also U.S. DEP’T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. XIII, subpt. i, ch. 3, § B.1.d (Aug. 10, 2022), [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-us/portal/55440000001018/content/554400000173782/M21-1-Part-XIII-Subpart-i-Chapter-3-Section-B-Healthcare-Eligibility-Determinations-for-Former-Service-Members-Discharged-Under-Other-Than-Honorable-OTH-Conditions](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-us/portal/55440000001018/content/554400000173782/M21-1-Part-XIII-Subpart-i-Chapter-3-Section-B-Healthcare-Eligibility-Determinations-for-Former-Service-Members-Discharged-Under-Other-Than-Honorable-OTH-Conditions) (on file with Syracuse Law Review).

345. The Syracuse University VLC follows the “best evidence first” practice when it submits all veteran claims to the VA. Veteran claims are approved faster and at a higher rate when time is taken to provide VA adjudicators with specific, well-developed evidence and the controlling M21-1 provisions that govern their actions. Further, for veterans that may be eligible for healthcare under Chapter 17, service connecting their condition before applying for a COD determination helps close the

*When John secured free legal assistance from a law school clinic to service-connect his PTSD and upgrade his discharge, they informed him that he might have a better chance of success securing access to VA benefits in a timely manner by requesting a VA COD determination. Shortly after submitting his discharge upgrade petition, the VA returned its COD decision finding that John had committed “willful and persistent” misconduct because he was accused of inappropriately touching two Soldiers while serving in country, and he was not insane based on a narrow reading of the definition. It would be another six months before John had another avenue of redress.*

*In the summer of 2024, the “compelling circumstances” exception to the regulatory bar of “willful and persistent misconduct” became law. The law school clinic immediately filed for a second COD determination on John’s behalf, believing that John’s now service-connected PTSD and years of associated treatment were certain to justify mitigating his discharge status. John remains severely affected by his combat-related PTSD. He does not go out in public longer than he must due to panic attacks but has a new janitorial job because it allows him to clean office buildings at night—when no one is there. John can feel himself going through long periods that he describes as “on autopilot,” where he doesn’t really remember how he got there or the actions he took. He continues to struggle with poverty and being able to provide basic needs for himself.*

*John faithfully served in the armed forces for nine years before developing PTSD on his last deployment, and his maladaptive coping response subsequently led to an OTH discharge. He was once a man treated with respect and honor. Now, he is confused, angry, and scared. It has been almost eleven years since John was discharged from the Army, and he will continue to wait to see if he can finally be seen as a “veteran.”<sup>346</sup>*

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gap to better ensure the character of the veteran’s discharge is found “Honorable for VA purposes.”

346. The compendium of deidentified veterans whose histories formed the basis for the hypothetical “John Smith” all similarly have Discharge Upgrade requests and COD decisions pending. They continue to wait to see if they will be deemed “veterans.” No resolution, whether actual or hypothetical, can be provided until these decisions are returned.



#### IV. THE HEART OF THE MATTER: BETTER CARE FOR VETERANS WITH AN OTH AND MENTAL HEALTH DISORDERS

Veterans’ benefits issues raise concerns that are simultaneously medical, political, fiscal, and legal in their nature.<sup>347</sup> Unfortunately for veterans with an OTH discharge, these forces have merged to deprive them of most VA services “at a higher rate than any point in our history.”<sup>348</sup> As evidence of the VA’s awareness of its role in this problem, it has changed its COD exception policy to potentially be inclusive of more “veterans”<sup>349</sup> and funded grant programs for legal services providers to help these veterans stuck in the aforementioned crisis situations.<sup>350</sup> Yet, the nature of these remedies—like many before them—is reactive in nature to a population of veterans already suffering.<sup>351</sup> Moreover, the DoW has yet to implement effective proactive guidance to its administrative separation policies for “misconduct”<sup>352</sup> that recognizes the effects of mental health disorders and the consequences of maladaptive coping behaviors.<sup>353</sup> There have been few effective measures taken to either stop the high rate of veterans receiving an OTH—suffering from a service-related mental health condition—or to proactively ensure their access to comprehensive VA care. In order to stem the flow of non-“veterans” being placed in this situation, the VA and the DoW must collaborate to effectively harmonize their regulations governing the matter because the available data suggests that reactive measures are not effective at eliminating the crisis situations faced by these veterans with OTH discharges.<sup>354</sup>

This level of collaboration between the VA and DoW is not only practical but, in some cases, mandated. For example, in crafting the final rule that would become the current version of 38 C.F.R. § 3.12 (2024),<sup>355</sup> the VA reduced the number of proposed changes that would increase benefits eligibility to “respect[] concerns of the Military Departments regarding the impact to their ability to maintain good order

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347. See Ridgway, *supra* note 219, at 219.

348. See *UNDERSERVED*, *supra* note 2, at 2.

349. *Supra* Part III(C)(2).

350. See LSV-H grant program, *supra* notes 190–91.

351. See, e.g., *supra* Part II(A)–(C) (discussing the development of programs for veterans in crisis and the liberalization of standards to allow for mitigation of discharge status).

352. See *supra* Part I(A)(2), III(B).

353. See *supra* Part II(A).

354. See *supra* Parts I–III.

355. See *supra* Part III(C).

and discipline among their troops.”<sup>356</sup> Specifically, they noted that “the removal of [all] the regulatory bars would undermine [the military’s] ability to use the consequence of loss of VA benefits as a deterrent to misconduct.”<sup>357</sup> Moreover, 10 U.S.C. § 1553(a)—regarding the establishment of DRBs<sup>358</sup>—mandates that the Secretary of the respective Military Department consult with the Secretary of the VA when setting up the goals, purposes, and procedures of these Boards.<sup>359</sup> Finally, under Executive Order 13822, the Secretary of Defense, the Secretary of Veterans Affairs, and the Secretary of Homeland Security were directed to “collaborate to address the complex challenges faced by our transitioning uniformed service members and veterans” related to “seamless access to mental health treatment and suicide prevention resources for transitioning uniformed service members in the year following discharge, separation, or retirement.”<sup>360</sup> These examples demonstrate the interdependency between the character of a military discharge from the DoW and the VA’s ability “to care for those who have served in our nation’s military and for their families, caregivers, and survivors.”<sup>361</sup> Consequently, the VA and the DoW should align their regulations to ensure that a veteran’s discharge status accurately considers all pertinent factors instead of maintaining independent, varying standards.<sup>362</sup> The existence of separate standards affecting a common issue is not only inefficient, but it also leads to the development of reactive “band-aids” by one party trying to mitigate the consequences of the other’s decision.

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356. FINAL UPDATE, *supra* note 297, at 32362.

357. *Id.*

358. *See supra* Part III(B).

359. *See* 10 U.S.C. § 1553(a) (2021).

360. Exec. Order No. 13822, 83 Fed. Reg. 1513 (2018).

361. *See* U.S. DEPARTMENT OF VETERANS AFF., *New VA Mission Statement recognizes sacred commitment to all Veterans, their families, caregivers, and survivors*, VA NEWS (Mar. 16, 2023, 12:00 PM), <https://news.va.gov/press-room/new-va-mission-statement-recognizes-sacred-commitment-to-all-veterans-their-families-caregivers-and-survivors/> (on file with Syracuse Law Review).

362. *Cf. supra* Part III(B); *see also supra* Part III(C) (discussing the standards for a discharge upgrade used at the DRB and BCMR/NRs and the standards used by the VA for a COD determination—both avenues could potentially result in accomplishing the goals of a veteran, eligibility for VA care and benefits). Practitioners often anecdotally note that the Military Departments often assume the VA COD process is easier than a discharge upgrade, while the VA assumes that the discharge upgrade process is an easier alternative to a COD determination. Both are simply false notions, as demonstrated by the data in Part III. Alignment of the VA’s and the DoD’s understanding of the lasting effects of an OTH discharge is critical to dispel this notion. *See* TURNED AWAY, *supra* note 62, at 8.

While it is undisputed that Congress provided the VA with some discretion in determining “veteran” status outside of their own statutory bars, it is also undisputed that their underlying intent was to grant veterans benefits on as large of a basis as possible.<sup>363</sup> This Article proposes remedies that are administrative in nature to bring VA and DoW policy and treatment of veterans more in line with the underlying Congressional intent that established the modern veterans’ benefits system.<sup>364</sup> First, the VA must stop unlawfully denying care to veterans who are Chapter 17 eligible for treatment purposes only because these veterans are already entitled to receive certain healthcare under the law. Second, the DoW must align the administrative separation policies of the Military Departments with the VA’s current COD exceptions in 38 C.F.R. § 3.12 (2024) in order to ensure that the final military separation authority, involved in the issuance of an OTH discharge, is aware that a service member will be largely ineligible for VA benefits unless they attempt the arduous COD or discharge upgrade process. Finally, the VA and the DoW must collaborate to ensure that when a less-than-honorable discharge is issued from a Military Department, that veteran is automatically enrolled in VA healthcare, which would trigger an initial COD decision and a determination about potential Chapter 17 eligibility.

*A. Streamlining Chapter 17 Access to Healthcare for Treatment Purposes*

Renewing the call for the VA to provide better training and guidance to its frontline staff and adjudicators is simply not enough to ensure that future veterans are not unlawfully turned away based on their discharge status or denied lawful access to care under Chapter 17.<sup>365</sup> While the VA should create standardized Chapter 17 eligibility and COD training that requires annual, mandatory recertification for these staff, the VA has previously issued extensive training materials on these topics.<sup>366</sup> In addition, the M21-1 adjudication procedure manual correctly directs VA decision makers on the COD process and

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363. See *Garvey v. Wilkie*, 972 F.3d 1333, 1337, 1339 (Fed. Cir. 2020) (discussing VA discretion to set standards for benefit eligibility). See also 38 U.S.C. § 5303(a) (statutory bars to VA benefits); *UNDERSERVED*, *supra* note 2, at 4–7 (discussing Congressional intent behind offering veteran benefits); see generally *Adams & Montalto*, *supra* note 79, at 94 (discussing the historical development of eligibility rule and military discharge practices since WWII).

364. See *UNDERSERVED*, *supra* note 2, at 4–7.

365. See *TURNED AWAY*, *supra* note 62, at 26–28.

366. See *supra* note 223, at 9–10, 21, 26–27, App. E (even linking readers to an internal training video on the topic).

instructs them to also render an opinion regarding any potential entitlement under Chapter 17.<sup>367</sup> Because veterans continue to be denied lawful access to the VA for these issues, it demonstrates either that the training is inadequate, the regulations governing access are too intricate to reliably comprehend and render consistent decisions, there remain hidden flaws within the VA's system that must be solved, or any combination of the preceding factors are simultaneously true.

Here, this Article proposes that the VA proactively implement a series of simple solutions first on the forms that all veterans must file when seeking any type of claim for VA benefits, and then in its procedure once a veteran tries to service-connect a condition that is Chapter 17 eligible for care. This preserves veterans' lawful rights, any potential for conditional healthcare eligibility, and forces any VA claims agent to trigger a COD decision and determine Chapter 17 eligibility. First, the VA should amend its 21-526EZ<sup>368</sup> in "Section VI: Service Information" to include a new item 20E phrased as follows:

**20E: CHARACTER OF DISCHARGE**

**Did the period of service related to your current disabilities listed in SECTION V: CLAIM INFORMATION result in an Honorable or General (Under Honorable Conditions) Discharge?**

- ☐ **YES**— If YES, move to the next question.
- ☐ **NO**— Please submit VA Form 21-4128: Statement in Support of Claim requesting a Character of Discharge determination and determination of eligibility for benefits under Title 38 Chapter 17.

One additional question and one additional form explaining the need for a COD determination generates a paper trail within the veteran's file that forces the VA claims agents to render a COD decision based on the available record, evaluate the potential for Chapter 17

367. See U.S. DEP'T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. II, subpt. i, ch. 2, § A.2.f, [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000174858/M21-1-Part-II-Subpart-i-Chapter-2-Section-A-Process-Overview-for-Screening-Mail](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000174858/M21-1-Part-II-Subpart-i-Chapter-2-Section-A-Process-Overview-for-Screening-Mail) (updated Mar. 31, 2023) (on file with the Syracuse Law Review); see also *id.*, at pt. X, subpt. iv, ch. 1, § A.1.k (updated June 1, 2023).

368. The 21-526EZ is the VA form used by all veterans to apply for disability compensation and other compensation related benefits. See U.S. DEP'T OF VETERANS AFFS., *Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits*, VA Form 21-526EZ, <https://www.vba.va.gov/pubs/forms/VBA-21-526EZ-ARE.pdf> (2022) (on file with the Syracuse Law Review).

eligibility, and communicate to the veteran the next steps to take if they disagree with that decision at a time where the temporal component of service-connection is easier to establish.<sup>369</sup> To the extent that this additional step could complicate decisions by the VA further, the failure to render a proper decision based on the veteran’s record creates an additional avenue of appeal, again, when timely redress is best achieved. When effectively combined with the following procedural modification by the VA, this would eliminate repeated applications for benefits by the veteran and confusion on the part of VA claims agents as to how to properly classify the veteran in the future.

Notification of Chapter 17 eligibility must trigger an automatic determination of what conditions are currently service-connected, and those conditions must be communicated to the veteran so that they can immediately begin accessing care. For many veterans with an OTH discharged for misconduct, a proactive review of their service records by VA claims agents would reveal that they were diagnosed in-service with a TBI, PTSD, or other mental health condition.<sup>370</sup> In-service diagnosis of a mental health condition brought on by military service should be granted *presumptive service connection* by the VA.<sup>371</sup> Further, for those veterans who were not diagnosed with the claimed condition in-service, the VA must extend their “duty to assist”<sup>372</sup> to veterans with an OTH and are seeking Chapter 17 care to help them develop service connection. The duty to assist must extend to include

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369. See *supra* note 59 (discussing the components of “service-connection”); U.S. DEP’T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. X, subpt. iv, ch. 1, § A.1.k, [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177986/M21-1-Part-X-Subpart-iv-Chapter-1-Section-A-Character-of-Discharge-COD-and-Bars-to-Benefits%3FarticleViewContext=article\\_view\\_related\\_article](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177986/M21-1-Part-X-Subpart-iv-Chapter-1-Section-A-Character-of-Discharge-COD-and-Bars-to-Benefits%3FarticleViewContext=article_view_related_article) (updated Jun. 1, 2023) (on file with the Syracuse Law Review); see, eg., *supra* Part III(A), Figure 1 (demonstrating the notice clause for potential Chapter 17 eligibility).

370. See U.S. Gov’t Accountability Off., GAO-17-260, 12–14, DOD Health: Actions Needed to Ensure Post-Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations (May 2017) (detailing that 62% of servicemembers discharged between 2011 and 2015 for misconduct had been diagnosed within the two years prior to separation with PTSD, TBI, or other condition associated with misconduct).

371. Cf. 38 C.F.R. § 3.307(a) (2025) (discussing conditions and diseases that “will be considered to have been incurred in or aggravated by service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service,” otherwise known as *presumptive service connection*).

372. The “duty to assist” means that the VA is required to make all reasonable efforts to help a veteran gather evidence to support their claim. See *VA’s Duty to Assist*, U.S. DEP’T OF VETERANS AFFS, <https://www.va.gov/resources/vas-duty-to-assist/> (on file with the Syracuse Law Review) (last visited Nov. 15, 2025).

the request for a VA medical opinion for these veterans because they likely will not be able to show service connection without one.<sup>373</sup> To enshrine and clarify this procedure, this Article proposes a two-sentence amendment to 38 C.F.R. § 3.360(a) (2025):

*Proposed 38 C.F.R. § 3.360(a)(i) - Service Connection.*  
The duty to assist shall extend to developing service connection for healthcare and related benefits authorized by chapter 17 of title 38 U.S.C. at the moment the former service persons are deemed potentially eligible by the VA. In-service diagnosis of any disability incurred or aggravated during active military, naval, or air service in the line of duty shall be presumptively granted service connection.

The combination of these two simple modifications to a VA form and procedure would secure access for veterans with an OTH to treatment that they are entitled to under the law. Comparing this proposed course to the current VA practice, which VLC's veteran client in Part III(A) underwent—it could result in acquiring treatment for a veteran *18 months* faster by reducing VA confusion, repeated applications by the veteran, and the need to involve legal services just so that a simple service connection can be granted when the evidence is already present in the veteran's records.<sup>374</sup> Notably, when the Chapter 17 care is for a mental health condition, the absence of medical care can result in a destabilization of the veteran's health and increased risk of suicide or becoming homeless.<sup>375</sup> While the VA does offer some limited counseling services<sup>376</sup> through community-based Vet Centers regardless of discharge status,<sup>377</sup> the level of care and continuity they provide is simply not the same as comprehensive VA healthcare—if the

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373. See Kurta Memo, *supra* note 145, at 1 (recognizing that “invisible wounds” are by their nature some of the most difficult to prove and veterans must have a lower evidentiary burden when trying to prove these claims).

374. It is noted that the VLC's client began fighting for service connection for Chapter 17 care in 2023. The VA's extensive guidance on how to handle veterans eligible for this type of care was issued in July 2020. See *supra* note 223, at 9–10, 21, App. E (last amended Mar. 6, 2024).

375. See *supra* Part II.

376. See *Vet Centers (Readjustment Counseling): Services*, U.S. DEP'T OF VETERANS AFFS., [https://www.vetcenter.va.gov/Vet\\_Center\\_Services.asp](https://www.vetcenter.va.gov/Vet_Center_Services.asp) (on file with the Syracuse Law Review) (discussing services offered at Vet Centers) (last visited Nov. 17, 2025).

377. See *Vet Centers (Readjustment Counseling): Vet Center Eligibility*, U.S. DEP'T OF VETERANS AFFS., <https://www.vetcenter.va.gov/Eligibility.asp> (on file with the Syracuse Law Review) (discussing the differing Vet Center eligibility criteria) (last accessed Nov. 17, 2025).

comprehensive nature of the care were truly the same, the necessity of a separate entity would not exist.<sup>378</sup> Further, this population of veterans is at such a high risk for the development of secondary psychosocial crises that only the highest level of care is acceptable.<sup>379</sup>

As a matter of law, the VA cannot continue to turn these veterans away simply because the law or regulations are difficult to follow. As a matter of public policy, the VA must stop denying or delaying Chapter 17 care because these veterans are most at risk of being in high-risk crisis situations.<sup>380</sup> The VA cannot fulfill its “promise to care for those who have served in our nation’s military . . .” if it cannot provide consistent care that veterans are entitled to by law.<sup>381</sup>

*B. “Compelling Circumstances” Must be Considered and Applied Before Issuing an OTH*

Each Military Department of the DoW has regulations governing the issuance of an administrative discharge, and they regularly utilize them to “maintain good order and discipline . . .”<sup>382</sup> by promoting high standards of performance and conduct.<sup>383</sup> By preserving these standards, the armed forces maintain military readiness and protect their investment in the training and development of enlisted service

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378. It is not this Article’s position that Vet Centers do not provide valuable services to veterans, rather that 1) the services offered are not equivalent to the comprehensive care available through the VA and 2) the risk for developing secondary crisis in this population of veterans is so high that even a penultimate level of care falls short of the veterans’ needs.

379. *See supra* Part II.

380. *See id.*

381. *New VA Mission Statement recognizes sacred commitment to all Veterans, their families, caregivers, and survivors*, VA NEWS (Mar. 16, 2023, 12:00 PM), <https://news.va.gov/press-room/new-va-mission-statement-recognizes-sacred-commitment-to-all-veterans-their-families-caregivers-and-survivors/> (on file with the Syracuse Law Review).

382. FINAL UPDATE, *supra* note 297, at 32362.

383. *See* Dep’t of Def., Instr. No. 1332.14, Enlisted Administrative Separations, ¶ 1.2 (2024); *see also* Dep’t of the Army, AR 635-200, Active Duty Enlisted Administrative Separations (2021); Naval Military Personnel Manual, Article 1910-10 (series) Enlisted Administrative Separations (ADSEP) Policy and General Information (2019); Marine Corps Order 1900.16, Separation and Retirement Manual (2025); Dep’t of the Air Force, Instr. No. 36-3211, Military Separations, § 1.1, 3.15, (2022); Dep’t of the Air Force, Manual 51-507, Enlisted Discharge Boards and Boards of Officers, § 2.3 (2023). The Space Force follows Air Force policy regarding administrative separations. The Department of Homeland Security (DHS) administers the Coast Guard unless activated by the U.S. Navy. Thus, the DoW’s administrative separation policy is not applicable for the purposes of this Article but could be similarly followed by DHS.

members.<sup>384</sup> While each may have slight differences, generally, the commanding officer initiating the administrative separation has the authority to recommend the character of the service member's proposed discharge to the separation authority for final decision.<sup>385</sup> This discretion of the commanding officer also extends to whether any misconduct by a service member is referred for formal disciplinary proceedings.<sup>386</sup>

The focus of a commanding officer referring a service member for administrative separation should be, and is, the maintenance of discipline, morale, and military readiness of their unit.<sup>387</sup> However, it is the separation authority that has the final say in the characterization of the service member's discharge, and they should be reviewing each case on its individual merits with the full knowledge of the impact on the separating service member.<sup>388</sup> Here, the DoW must require that *any* service member being referred for OTH be proactively afforded a full diagnostic psychological examination—not a simple screen—and must give the separation authorities greater discretion to consider the same “compelling circumstances” as the VA that might otherwise mitigate an OTH discharge.<sup>389</sup> Additionally, the DoW must instruct the

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384. See DEP'T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 1.2 (2024).

385. *Cf. supra* note 381.

386. See RAND.org, *supra* note 100, at 15–16.

387. See *id.*

388. An example of the separation authority being directed to assess the merits of an administrative discharge on a “case-by-case” basis, using “sound judgment,” and to consider the impact the separation may have on service members' future can be found in DEP'T OF THE ARMY, AR 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS 1-37 (2021). Similarly, the Authors propose this case-by-case judgement be applied to the service member's future ability to access the VA for care and services. See *e.g., id.* (directing the separation authority to use “careful deliberation” when considering the discharge of a service member for a physical or mental condition because they may be rehabilitated to become a useful asset for later mobilization); DEP'T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 5.2(d) (2024).

389. The DoW will likely raise the issue of the cost of such exams and the necessity of their order when a veteran has not self-reported a mental health condition. However, the available data and this Article demonstrate that the underreporting and misidentification of mental health symptoms necessitate this step for servicemembers referred for administrative discharge. While there will be costs associated with changing DoW policy to require mandatory mental health examinations for administratively discharged servicemembers, these costs pale in comparison to the amount that the VA spends on suicide and homelessness prevention in addition to the overall DoW budget. See *VA's Homelessness Budget: Where Dollars Go*, VA NEWS (Nov. 6, 2024), <https://news.va.gov/136057/vas-homelessness-budget-where-the-dollars-go/> (on file with the Syracuse Law Review) (citing the VA's FY 2025 budget for homelessness programs is \$3.2 billion); *VA awards \$52.5 million to community*



various DRBs and BCMRs/NR to adopt this new guidance retroactively when considering any petition for a discharge upgrade.

First, a full psychological examination must be afforded to any service member being referred for an OTH to determine if the effects of a mental health condition “constitute matters in extenuation that relate to the basis for administrative separation.”<sup>390</sup> At present, 10 U.S.C. § 1177 compels the DoW to determine whether the effects of PTSD or a TBI may have contributed to the acts or omissions that caused the referral for administrative separation, but only if they have “been deployed overseas in support of a contingency operation” or have reported being “sexually assaulted,” both during the previous 24 months.<sup>391</sup> However, this congressional mandate is dependent upon two conditions—overseas combat deployment<sup>392</sup> and reporting a sexual assault<sup>393</sup>—which are inadequate to capture every service member referred for an OTH discharge.<sup>394</sup> If the DoW were to issue instructions to all Military Departments requiring a full psychological exam to be performed on every service member referred for an OTH discharge, it would provide an opportunity to have evidence of any existing mental health condition incurred or aggravated during active-duty service before the separation authority, who could then evaluate any mitigating factors regarding the characterization of service.<sup>395</sup>

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*organizations working to prevent Veteran suicide*, VA NEWS (Sep. 12, 2024), <https://news.va.gov/press-room/va-awards-52-5m-to-community-organizations-working-to-prevent-veteran-suicide/> (on file with the Syracuse Law Review); *Department of Defense Completes Seventh Consecutive Department-Wide Financial Statement Audit*, U.S. DEP’T OF DEF. (Nov. 15, 2024), <https://www.war.gov/News/Releases/Release/Article/3967009/departments-of-defense-completes-seventh-consecutive-department-wide-financial-s/> (on file with Syracuse Law Review) (discussing the failure of the seventh consecutive audit to account for the more than \$800 billion in spending).

390. See DEP’T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 5.9(a)(1) (2024).

391. 10 U.S.C.A. § 1177(a)(1) (West 2024).

392. This condition assumes that only overseas combat deployment may be the cause of PTSD or a TBI.

393. This condition assumes that all incidences of MST/sexual assault are immediately reported, *if ever reported*. The underreporting of MST is a noteworthy topic but not the focus of this Article.

394. While a large focus of this Article has been the effects of PTSD and TBI, there are other mental health conditions that may cause a service member to commit maladaptive coping behaviors—construed as misconduct—and thus be referred for an OTH discharge. See *supra* Part II; see also 10 U.S.C.A. § 1177(a)(1) (West 2024).

395. See, e.g., 10 U.S.C.A. § 1177(b) (West 2024) (discussing mitigating characterization due to the effects of PTSD or TBI); see also DEP’T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 5.9(a)(1) (2024) (implementing the statutory requirement), ¶ 5.9(b) (“An enlisted Service member receiving a

Second, the “compelling circumstances” exception, now found in 38 C.F.R. §3.12(e) (2024), must be mirrored in the DoW policy to allow the separation authority to consider the available evidence and determine if a wider range of mitigating factors was present such that they could issue a General (Under Honorable Conditions) discharge.<sup>396</sup> The DoW has, *at minimum*, some responsibility to prevent statistically probable adverse outcomes for discharged service members in the same way as the VA has a duty to care for discharged veterans—thus, it is the separating authority that must consider the *full impact* of the administrative discharge status on the separating service member.<sup>397</sup> (emphasis added) Specifically, the DoD Instruction 1332.14 should be amended to add the following language in the following places:

*Proposed DoDI 1332.14 ¶4.3(b)(1)(e) Characterization of Service: Special Consideration-* Due consideration shall be given by the separation authority to compelling circumstances that may be found to mitigate the effects of a less-than-honorable discharge consideration. Service exclusive of the period of the acts, omissions, or patterns of behavior that constitute a significant departure from the conduct expected of enlisted Service members should generally be of such quality and length that it can be characterized as honest, faithful, meritorious, and of benefit to the Nation. An Other Than Honorable discharge characterization will not be applied if compelling circumstances mitigate acts, omissions, or the patterns of behavior at issue. The following factors will be considered in a determination on this matter:

- (1) Mental or cognitive impairment at the time of the acts, omissions, or patterns of behavior, including but not limited to a medical diagnosis of PTSD, TBI, depression, bipolar disorder, schizophrenia,

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medical examination in accordance with Paragraphs 5.9.a.(1) and 5.9.a.(2) will not be separated until the examination results have been reviewed by appropriate authorities responsible for evaluating, reviewing, and approving the separation case, as determined by the Secretary of the Military Department concerned.”).

396. See DEP’T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.1(b)(4), 4.3(c) (2024) (discussing factors to be weighed when considering the issuance of a General discharge versus an OTH discharge).

397. This Article anecdotally contends that no military commanding officer wishes to contribute to the veteran suicide and homelessness crisis intentionally. DoW guidance for the separation authority regarding these adverse impacts is critical to stem the flow of veterans placed in these crisis situations.

substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, or cognitive disabilities.

- (2) Physical health, to include physical trauma and any side effects of medication.
- (3) Combat-related or overseas-related hardship.
- (4) Sexual abuse/assault.
- (5) Duress, coercion, or desperation.
- (6) Family obligations or comparable obligations to third parties.<sup>398</sup>

*Proposed DoDI 1332.14 ¶4.3(b)(2)(c)(1)(c) Under Other Than Honorable Conditions-* The compelling circumstances found in ¶4.3(b)(1)(e) shall be weighed against the acts, omissions, or patterns of behavior that constitutes a significant departure from the conduct expected of enlisted Service members. If the enlisted Service member’s service could otherwise be characterized as honest, faithful, meritorious, and of benefit to the Nation, exclusive of the period of negative conduct or performance, it is appropriate to issue a General (Under Honorable Conditions) discharge.

The combination of these two proposed regulations would ensure that 1) commanders retain the ability to refer a service member for administrative discharge to protect the discipline, morale, and military readiness of their unit,<sup>399</sup> and 2) that the same standard used by the VA to determine “veteran” status is at minimum given an initial review before a veteran is given an OTH.<sup>400</sup> Further, if a mandatory psychological exam of sufficient depth<sup>401</sup> were required by the DoW for all

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398. See 38 C.F.R. § 3.12(e) (West 2024) (rephrased and duplicative items removed to fit within the scheme of DEP’T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 4.3 (2024)).

399. See RAND.org, *supra* note 100, at 15.

400. See generally 38 C.F.R. § 3.12 (West 2024) (discussing bars to VA eligibility and COD exceptions).

401. A Separation Health Assessment is ordered for all separating service members and may be completed by the DoW or the VA, which shares the health information. This process relies on self-reporting of current symptoms that are then evaluated by a clinician comparing the results to the service treatment records. Form DD3146, which initiates this process, includes a simple screen for mental health and PTSD-related issues amongst fifteen other pages of health-related data fields. This screening examination would be insufficient for an examiner to opine on causal connections between mental health and misconduct. See *Veteran Benefits Administration: Separation Health Assessment for service members*, U.S. DEP’T OF VETERANS

service members potentially receiving an OTH, this medical evidence would be in front of the separation authority when making the final decision regarding the characterization of the discharge. The interplay between these requirements is critical to ensure that service members have an opportunity to show any compelling circumstances proactively—before they are given an OTH and deemed a non-“*veteran*.”<sup>402</sup>

Finally, if the DoW were to adopt the amendments proposed by this Article to DoDI 1332.14 ¶ 4.3(b)(1)(e) and ¶ 4.3(b)(2)(c)(1)(c), it is imperative that they also instruct the Boards to retroactively apply this guidance to all future discharge upgrade petitions where the initial discharge was performed under a stricter standard without the presumption of regularity that the previous decision should stand.<sup>403</sup> Retroactive application of these standards would ensure that the 540,566 living veterans with a less-than-honorable discharge characterization could potentially become “*veterans*” for the first time upon meeting these requirements. For qualifying “*veterans*,” this would ensure access to VA healthcare and benefits that could potentially have life-changing—and life-saving—effects.<sup>404</sup> This measure would also align DoW and VA policy under the umbrella of Congress’s broader intent to provide certain *per se* statutory bars to benefit and allow the VA to determine regulatory bars for dishonorable conduct.<sup>405</sup> Both the DoW and the VA have a role to play in reacting to the crises faced by this population of veterans, and while the VA has taken some proactive steps to modify its regulations restricting access to essential services, the DoW has yet to effectively follow suit for these veterans.<sup>406</sup>

Importantly, if the DoW were to align its OTH discharge policy with the COD exception policy implemented by the VA, a decision regarding the non-existence of compelling circumstances should have no precedential or persuasive effect on the VA’s ability to determine the opposite. This is because the military is not bound by 38 U.S.C. §

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AFFS, <https://benefits.va.gov/BENEFITS/separation-health-assessment.asp> (on file with the Syracuse Law Review) (last visited Nov. 15, 2025).

402. This also helps further the “purpose[] of military law. . .[by] promot[ing] justice” for the separating service member. *See* U.S. DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL U.S., I-1 (2024 ed.).

403. *See* 32 C.F.R. §724.211 (2024); *cf.* Hagel Memo, *supra* note 135, and Kurta Memo, *supra* note 145 (each instructing the Boards to apply new standards as to how they make discharge upgrade determinations).

404. *See supra* Part I, II.

405. *See* UNDERSERVED, *supra* note 2, at 4–7.

406. *Cf. supra* Part III(C), with *supra* Part III(B) (discussing the liberalization of 38 C.F.R. §3.12 (2024) versus the suboptimal effectiveness of the “liberal consideration” standard used by the DRBs and BCMRs/NR).

5107(b), which mandates the VA give the benefit of the doubt to the veteran where there is an “approximate balance of positive and negative evidence regarding any issue material to the determination of a matter.”<sup>407</sup> In contrast, so long as the Military Department within the DoW finds compelling circumstances exist to warrant the issuance of a General discharge, that character of discharge is binding on the VA.<sup>408</sup> Ultimately, if the DoW continues to generate such high rates of OTH discharges,<sup>409</sup> the VA will be forced to continually react and develop technical exceptions in order to provide some level of support for these veterans before they fall further into crisis—an inefficient “band-aid” to a critical problem.<sup>410</sup>

*C. Determining if Veterans are “Veterans” Immediately upon Discharge*

As this Article demonstrates, the DoW and the VA both have a role to play in addressing the challenges faced by veterans receiving an OTH. Acknowledging that the mission of the DoW and Military Departments is the maintenance of military readiness, lethality, and the deterrence of war,<sup>411</sup> while the mission of the VA is to care for the nation’s military, family, and survivors,<sup>412</sup> the application of these missions does not need to be exclusive of one another. In fact, this Article proposes that the more the DoW and VA align their policies for this population of veterans, the VA might support the deterrence of war and future readiness by caring for and rehabilitating a veteran who could potentially reenter a fighting force, and the DoW might help to better care for veterans after their discharge by considering a greater number of circumstances before issuing an excessively punitive OTH.

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407. 38 U.S.C. §5107(b); *see supra* note 339 (discussing the scope of the “benefit of the doubt” rule is currently before the U.S. Supreme Court).

408. *See* 38 C.F.R. § 3.12(a) (2024).

409. *See* Ghiotto, *supra* note 100, at 519–20.

410. *See supra* Part III(C) (discussing COD determinations and newly created exceptions); *supra* Part II (discussing veterans with an OTH having higher incidences of mental health issues and veterans with mental health issues having a higher suicide risk and risk of becoming homeless).

411. *See Department of Defense: Mission*, PERFORMANCE.GOV, <https://trumpadministration.archives.performance.gov/defense/#:~:text=Mission,our> (on file with the Syracuse Law Review) (last visited Nov. 15, 2025).

412. *See New VA Mission Statement recognizes sacred commitment to all Veterans, their families, caregivers, and survivors*, U.S. DEP’T OF VETERANS AFFS. (Mar. 16, 2023, at 12:00 PM), <https://news.va.gov/press-room/new-va-mission-statement-recognizes-sacred-commitment-to-all-veterans-their-families-caregivers-and-survivors/> (on file with the Syracuse Law Review).

“Transitioning out of the military can be challenging, even for [“veterans”] who separate honorably and have the full range of VA benefits available to them” (emphasis added to “veterans” from original).<sup>413</sup> Given the preponderance of unique challenges faced by veterans with an OTH discharge,<sup>414</sup> the DoW and the VA must collaborate to ensure that these veterans are automatically enrolled in VA care immediately upon separation so that the COD process is initiated and any entitlement to VA care can be determined.<sup>415</sup> As previously noted, this collaboration between the Secretaries of the DoW and VA is often seen where a policy implementation by one directly impacts the mission of the other,<sup>416</sup> in addition to, affording the most efficient solution and building on Congress’ intent to provide veterans’ benefits to as broad of a category of “veterans” as possible.<sup>417</sup>

At present, the DoW and VA already collaborate to provide all separating service members with a Separation Health Assessment,<sup>418</sup> and that information is shared between the entities to “determine any existing medical condition incurred during active-duty service, provide baseline information for future care, complete an enlisted Service member’s military medical record, and provide a final opportunity before separation to document any health concerns, exposures, or risk factors associated with active-duty service.”<sup>419</sup> What is *not required* is that any separating service member mandatorily enroll in VA benefits or healthcare.<sup>420</sup> Given that such a high percentage of veterans

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413. RAND.org, *supra* note 100, at 16 (citing WHITNEY S. LIVINGSTON ET. AL., “This Is a Solvable Problem” *Proceedings from a Roundtable on Providing Support to Veterans in the Transition from Military Service to Civilian Life*, RAND CORP., 6–8 (2025)).

414. *See supra* Part II, III.

415. *See supra* Part III(A) for Ch. 17 care; *see also supra* Part III(C) for the COD process.

416. *See supra* notes 350–59.

417. *See* UNDERSERVED, *supra* note 2, at 4–7.

418. *See Veteran Benefits Administration: Separation Health Assessment for service members*, U.S. DEP’T OF VETERANS AFFS, <https://benefits.va.gov/BENEFITS/separation-health-assessment.asp> (on file with the Syracuse Law Review) (last visited Nov. 17, 2025).

419. DEP’T OF DEF., INSTR. NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 5.9(a) (2024).

420. At present, the recent DoD’s Transition Assistance Program (DoDTAP), which mandates transition education for separating service members, does not require mandatory enrollment in VA care—only a training module about available benefits. Military commanders currently have the discretion to exempt a current service member receiving an OTH separation from the DoDTAP curriculum. *See* 10 U.S.C. § 1142, 1155; *see also* DoDTAP, <https://www.dodtap.mil/dodtap/app/home> (on file with Syracuse Law Review) (last

discharged with an OTH have mental health conditions caused or aggravated by military service,<sup>421</sup> that the presence of this mental health condition leads to an increased risk for suicide and homelessness,<sup>422</sup> and that some veterans would automatically qualify for VA treatment,<sup>423</sup> it is unconscionable that neither the DoW nor the VA would not take this minor step to proactively—and mandatorily<sup>424</sup>—enroll these veterans to help avoid placing them in a crisis situation by facilitating a path towards VA care and services.<sup>425</sup> If the DoW and VA were to implement the administrative proposals in this Article, this additional step would trigger automatic COD decisions by the VA, eligibility determinations for Chapter 17 care,<sup>426</sup> and the DoW’s transitional healthcare program (under DoDTAP, Title 10, Chapter 58 U.S.C.) could be extended by the Secretary of War to allow these veterans with an OTH to be treated at military medical facilities based on “hardship” until the VA can return its decision.<sup>427</sup> Even if no other proposal were implemented, automatic enrollment in the VA upon receiving an OTH would ensure that current practice is followed and these veterans are not later unlawfully turned away from the care they

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visited Nov. 17, 2025); DEP’T OF DEF., INSTR. 1332.35, TRAINING ASSISTANCE PROGRAM (TAP) FOR MILITARY PERSONNEL, ¶ 5.5(a)(6)(b) (2019).

421. See *supra* Part II(A).

422. See *supra* Part II(B), II(C).

423. See *supra* Part III(A).

424. This Article suggests that *mandatory* enrollment in VA care is necessary for this population of veterans because the current VA enrollment process—resulting in the conditions precedent for this Article—is *voluntary*.

425. Enrollment in the Veterans Benefits Administration requires form 21-526EZ (for claimed disability compensation), and enrollment in the Veterans Healthcare Administration requires form 10-10EZ (for healthcare treatment). Both forms may be completed and submitted online for *free* with minimal computer competency (with an estimated response time of 25 minutes and 30 minutes, respectively). If the forms were printed, there would be approximately twenty-one sheets of paper. Not including postage and toner/ink, twenty-one printed sheets of paper costs approximately \$0.19. *For the approximately 2,000 veterans discharged with an OTH every year, this would amount to \$388.08. The VA’s budget for FY 2023 was \$302 billion dollars. The DoD’s budget for FY 2023 was approximately \$820 billion dollars.* SIDATH V. PANANGALA & JARED S. SUSSMAN, CONG. RSCH. SERV., R47314, DEP’T. OF VETERANS AFFS. FY2023 APPROPRIATIONS (2022); *Summary of the Fiscal Year 2023 National Defense Authorization Act*, U.S. S. COMM. ON ARMED SERVS., [https://www.armed-services.senate.gov/imo/media/doc/fy23\\_ndaa\\_agreement\\_summary.pdf](https://www.armed-services.senate.gov/imo/media/doc/fy23_ndaa_agreement_summary.pdf) (on file with Syracuse Law Review) (last visited Nov. 15, 2025).

426. See *supra* Part IV(A).

427. 10 U.S.C. § 1145(c)(1), (2) (describing the 180-day transitional healthcare program offered by the DoD to persons on the individual basis of hardship who are otherwise ineligible to participate because of an adverse discharge status (see 10 U.S.C. § 1141 for the definition of an involuntarily separated person)).

desperately need in a time when they need it most—transition to civilian life.<sup>428</sup>

Currently, DoW regulations only require that “enlisted Service members being separated with anything other than an honorable discharge are *informed*, in writing, that they may petition the Veterans Benefits Administration of the Department of Veterans Affairs for certain benefits under the laws administered by the Secretary of Veterans Affairs, despite their service characterization (emphasis added).”<sup>429</sup> However, it would be more prudent to require the service member to enroll in VA care as a part of administrative separation because some studies have shown that the documentation and notification process at separation does not always provide accurate or comprehensive information about their rights to later access benefits. By amending DoDI 1332.14 with the following language, the DoW could provide a direct funnel for veterans with an OTH to the agency with the resources to care for them as they transition to civilian life—the VA:

*Proposed DoDI 1332.14, ¶ 5.13(c) ADDITIONAL REQUIREMENT FOR MEMBERS RECEIVING AN OTHER THAN HONORABLE CHARACTERIZATION OF SERVICE-* The Secretary of the Military Department concerned shall ensure that enlisted Service members being separated with anything other than an honorable discharge have filed initial claims with the Department of Veterans Affairs on the effective date of their discharge, or as soon thereafter as practical. The Secretary of the Military Department concerned is authorized to extend military transitional healthcare under 10 U.S.C. §1145 to service members on the basis of medical hardship for 180 days or until such decision

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428. See TURNED AWAY, *supra* note 62, at 10–12, 31. The VA and U.S. Army are currently partners in a program called Onward Ops. Onward Ops is a transition program focusing on the first twelve months after a service member’s discharge to help them “reintegrate[e] into civilian life as a new veteran.” The program provides new veterans with links to community resources, guidance, and transition sponsors to help them navigate the transition to civilian life. Certain steps of the *voluntary* enrollment procedure can trigger the VA to enroll a new veteran in healthcare services. The transition support and collaboration between Executive Departments (VA and DoD) within this program (associated with DoDTAP) could serve as a model for *mandatory* VA enrollment and transitional healthcare support for veterans being discharged under OTH conditions. See *About Us*, ONWARD OPS, <https://onwardops.org/about-us> (last visited Feb. 1, 2025) (on file with Syracuse Law Review).

429. U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 5.13(a) (2024).



regarding the basis of eligibility by the Department of Veterans Affairs.

In sum, regardless of whether the DoW adopts other liberalizing standards regarding the treatment of service members with an OTH, if newly made non-“*veterans*” are funneled directly to the VA upon discharge—and transitional support is provided—they stand a better chance at getting the treatment and services that they desperately need and deserve.

#### CONCLUSION

This Article has proposed what are termed proactive measures to help stem the flow of veterans with mental health conditions being discharged with excessively punitive OTHs “at a higher rate than any point in our history.”<sup>430</sup> Moreover, this Article uniquely suggests that the DoW and the VA must adopt these measures in cooperation with one another, lest one federal Executive Department will continue to create non-“*veterans*” at high risk for crisis, while the other is forced to deal with the ramifications of these decisions. Proactive measures are necessitated because if this trend continues, the population of veterans—lacking VA care and services—with mental health issues that put them at a higher risk for psychosocial crises such as suicide and homelessness will only grow. Reactive measures are important to address the 540,566 living veterans whose discharge status limits their ability to access VA care and benefits, but their impact is diminished when the standards that help to create the problem remain in place. This Article has demonstrated that the application of retroactive “band-aids” is an insufficient strategy to either resolve the backlog of necessary administrative decisions or to eliminate veterans placed in this situation as a *prima facie* matter.

Many non-“*veteran*” veterans—like the hypothetical *John Smith*—remain in limbo, waiting to see if the VA’s new liberalizing regulatory change will grant them “*veteran*” status for the first time. Many more may be prevented from fighting a years-long battle with untreated mental health conditions, suicidal ideation, and homelessness if the DoW and the VA implement the administrative remedies proposed in this Article. While it is true that Congress could craft legislation that implements a more overarching series of reforms, these administrative remedies close gaps under the current law that allow veterans to go untreated for years. Further, these remedies support the

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430. See UNDERSERVED, *supra* note 2, at 2.

Congressional intent to have some *per se* statutory bars but also allow the benefit of the doubt to be given to the veteran when it comes to the delivery of benefits. These remedies also support the DoW's concern that a less-than-honorable discharge serves as a deterrent to misconduct that promotes good order and discipline, while allowing for mitigating circumstances based on a modern understanding of the effects that military-related mental health conditions may have. The burden of caring for this population of veterans is not the VA's to bear alone—as outlined in this Article, the DoW has a role to play as well. Proactively recognizing the role that the DoW and the VA both play in these issues, as well as collaboration to align their missions regarding veterans with an OTH, is critical for future resolution. These federal agencies can and should work together towards the mission of properly supporting veterans after they have given their service to this country. This is the right step toward truly fulfilling President Lincoln's promise to "care for those who have served in our nation's military and for their families, caregivers, and survivors."<sup>431</sup>

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431. *New VA Mission Statement recognizes sacred commitment to all Veterans, their families, caregivers, and survivors*, U.S. OFF. OF VETERANS AFFS. (Mar. 16, 2023, 12:00 PM), <https://news.va.gov/press-room/new-v-a-mission-statement-recognizes-sacred-commitment-to-all-veterans-their-families-caregivers-and-survivors/> (on file with Syracuse Law Review).

## APPENDIX A

\*All values listed in Appendix A were compiled from Department of Defense Electronic Reading Room for the Military Departments’ Boards for Corrections of Military/Naval Records (BCM/NR) and the Discharge Review Boards (DRB), <https://boards.law.af.mil/>.

<b>Appendix A</b>					
<b>Branch: Air Force</b>					
	<b>DRB</b>	<b>BCMR</b>	<b>Successful Discharge Upgrades for Mental Health claims</b>	<b>Successful Discharge Upgrades for MST claims</b>	<b>Successful Discharge Upgrades for “other claims”</b>
<b>CY 2018</b>					
Q1	80	48	2	1	6
Q2	89	228	10	3	12
Q3	89	724	11	3	7
Q4	126	590	20	1	26
<b>CY 2019</b>					
Q1	141	5	529	2	8
Q2	141	497	14	3	14
Q3	234	44	23	6	9
Q4	117	318	7	2	7
<b>CY 2020</b>					
Q1	176	349	8	3	10
Q2	188	447	16	5	9
Q3	148	407	9	3	12
Q4	84	405	6	1	10
<b>CY 2021</b>					
Q1	99	138	4	2	4
Q2	78	306	3	1	19
Q3	55	54	4	0	3
Q4	143	254	7	0	9
<b>CY 2022</b>					
Q1	86	400	8	1	10
Q2	94	367	6	2	11
Q3	133	264	3	0	2
Q4	134	301	5	1	2
<b>CY 2023</b>					
Q1	119	110	6	4	11
Q2	116	327	3	2	21
Q3	101	320	3	3	13
Q4	136	313	12	6	47
<b>Totals</b>	<b>2523</b>	<b>7216</b>	<b>719</b>	<b>55</b>	<b>282</b>
<b>Total Discharge Upgrades Per Branch</b>	<b>9739</b>				
<b>Total Upgrades Per Branch</b>	<b>1056</b>				

Appendix A					
Branch: Army					
	DRB	BCMR	Successful Discharge Upgrades for Mental Health claims	Successful Discharge Upgrades for MST claims	Successful Discharge Upgrades for "other claims"
<b>CY 2018</b>					
Q1	309	317	97	9	39
Q2	418	231	88	7	39
Q3	811	657	235	33	150
Q4	251	348	69	14	55
<b>CY 2019</b>					
Q1	177	191	76	15	127
Q2	489	797	110	13	295
Q3	292	421	109	19	112
Q4	288	737	83	26	141
<b>CY 2020</b>					
Q1	282	545	57	21	151
Q2	334	245	77	14	97
Q3	158	625	46	13	162
Q4	224	674	160	31	162
<b>CY 2021</b>					
Q1	260	761	69	17	139
Q2	151	588	94	26	139
Q3	147	421	88	30	109
Q4	330	672	111	28	151
<b>CY 2022</b>					
Q1	358	541	120	31	94
Q2	530	343	145	28	126
Q3	344	467	121	21	50
Q4	388	413	153	43	74
<b>CY 2023</b>					
Q1	435	650	168	30	100
Q2	507	736	222	36	128
Q3	611	476	256	43	100
Q4	508	363	221	35	98
<b>Totals</b>	<b>8602</b>	<b>12219</b>	<b>2975</b>	<b>583</b>	<b>2838</b>
<b>Total Discharge Upgrades Per Branch</b>	<b>20821</b>				
<b>Total Upgrades Per Branch</b>	<b>6396</b>				

Appendix A					
Branch: Navy/Marine Corps					
	DRB	BCMR	Successful Discharge Upgrades for Mental Health claims	Successful Discharge Upgrades for MST claims	Successful Discharge Upgrades for “other claims”
<b>CY 2018</b>					
Q1	345	452	56	13	49
Q2	194	492	47	7	53
Q3	298	487	127	11	527
Q4	404	313	35	6	30
<b>CY 2019</b>					
Q1	460	651	71	11	58
Q2	405	774	57	9	55
Q3	399	750	60	4	72
Q4	367	736	50	4	68
<b>CY 2020</b>					
Q1	345	772	41	5	65
Q2	194	834	70	10	106
Q3	430	819	127	28	95
Q4	153	709	84	19	79
<b>CY 2021</b>					
Q1	248	856	104	44	59
Q2	307	752	119	31	54
Q3	404	595	88	20	41
Q4	191	546	61	22	63
<b>CY 2022</b>					
Q1	470	699	162	31	83
Q2	572	663	152	36	138
Q3	495	671	133	26	134
Q4	605	715	129	24	136
<b>CY 2023</b>					
Q1	501	678	168	23	83
Q2	719	576	255	34	101
Q3	597	573	174	43	102
Q4	446	631	78	17	116
<b>Totals</b>	<b>9549</b>	<b>15744</b>	<b>2448</b>	<b>478</b>	<b>2365</b>
<b>Total Discharge Upgrades Per Branch</b>	<b>25293</b>				
<b>Total Upgrades Per Branch</b>	<b>5291</b>				

Appendix A			
Totals for Air Force, Army, Navy/Marine Corps			
	Air Force	Army	Navy/Marine Corps
Total Discharge Upgrades Per Branch	9739	20821	25293
Total Upgrades Per Branch	1056	6396	5291
Total Petitions Brought Before All Boards	55853		
Total Upgrades Granted by All Boards	12743		