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**LEAVING “OTHER THAN HONORABLE” SOLDIERS
BEHIND: HOW THE DEPARTMENTS OF DEFENSE AND
VETERANS AFFAIRS INADVERTENTLY CREATED
A HEALTH AND SOCIAL CRISIS**

DANIEL SCAPARDINE*

Every soldier knows that many men, even in his own company, had poor records, but no one ever heard of a soldier protesting that only the more worthy should receive general veterans’ benefits. “This man evaded duty . . . [but] [h]e wore the uniform. He is one of us.” . . . Soldiers would rather some man got more than he deserves than that any soldier should run a chance of getting less than he deserves.¹

Former Marine Private Thomas Weaver (“Weaver”) was a varsity track runner and captain of his high school soccer team before attending basic training at Marine Corps Air Station Beaufort (“Parris Island”), where he graduated near the top of his class.² He outperformed his peers, was promoted ahead of others, and fully intended to make a career out of the military,³ that is, until he began to witness the rampant mental and physical abuse of his fellow recruits at the hands of drill instructors.⁴ This abuse included a Muslim recruit tumbled in a clothes dryer and another Muslim recruit chased by a drill instructor, eventually falling three stories to his

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1. H.R. REP. NO. 1510, at 9 (1946).

2. Dave Philipps, *Ex-Marine Describes Violent Hazing and the Lies That Covered It Up*, N.Y. TIMES (Sept. 29, 2016), <http://www.nytimes.com/2016/09/30/us/ex-marines-describes-violent-hazing-and-the-lies-that-covered-it-up.html>.

3. *Id.*

4. *Id.*

death.⁵ The horrific events Weaver witnessed during his time at “boot camp” began to take a toll on his psyche.⁶ He reported trouble sleeping and was too depressed to conduct training with his unit.⁷ In September 2015, he was hospitalized and placed on suicide watch.⁸ Later that year, Weaver was discharged from the Marine Corps for “pattern[s] of misconduct” under “other-than-honorable” conditions (“OTH”).⁹ Major Clark Carpenter, a Marine spokesman, stated that had Weaver’s entire medical record been provided to the discharge’s final approving authority, Weaver would not have received the OTH discharge.¹⁰ Since his release from active duty, Weaver has been unemployed.¹¹ Like Weaver, over 31,000 service members were discharged from the military under less than honorable conditions between 2001 and 2010 for having “personality disorders,” without proper diagnosis or inquiry into underlying causes.¹²

In 2009, former Army Lieutenant Emily Vorland deployed to Iraq, where a higher-ranking male officer sexually harassed her.¹³ Upon reporting the issue to her superiors, Vorland’s commanding officer instructed her to file a formal complaint.¹⁴ This complaint resulted in an order directing her abuser to cease contact with Vorland.¹⁵ A subsequent investigation found that Vorland “‘acted inappropriately,’ engaged in consensual sex and was lying about it.”¹⁶ The Army used Vorland’s inability to affirmatively counter the alleged conduct as grounds for a letter of reprimand, and even-

5. Dan Lamothe, *‘They Put Us Through Hell’: A Marine Abused at Boot Camp Explains Why He Spoke Out*, WASH. POST (Sept. 29, 2016), <https://www.washingtonpost.com/news/check-point/wp/2016/09/29/they-put-us-through-hell-a-marine-abused-at-boot-camp-explains-why-he-spoke-out/>.

6. Philipps, *supra* note 2.

7. *Id.*

8. *Id.*

9. *Id.* Weaver was discharged under the OTH category despite the fact that his military psychologist recommended he receive a general discharge for medical reasons. *Id.*

10. *Id.*

11. *Id.* Unfortunately, Weaver feels that his future has been taken from him, as his discharge characterization is “a badge of shame and makes it hard to find work.” *Id.*

12. VIETNAM VETERANS OF AM., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY’S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM 3 (2012), https://www.law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf; *see* DEP’T OF DEF., ENLISTED ADMINISTRATIVE SEPARATIONS, INSTRUCTION NO. 1332.14, at 12 (2014) [hereinafter ENLISTED ADMINISTRATIVE SEPARATIONS], <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf> (describing the proper separation procedures on “personality disorder” grounds).

13. Mark Thompson, *Military Sexual Assault Victims Discharged After Filing Complaints*, TIME (May 18, 2016), <http://time.com/4340321/sexual-assault-military-discharge-women/>.

14. *Id.*

15. *Id.*

16. *Id.*

tually, as the basis for her removal from the military.¹⁷ In 2010, she was discharged from military service for “unacceptable conduct,” under OTH conditions.¹⁸ This discharge characterization barred her from service in the National Guard, prevented her from receiving transition assistance, “and denied her six months of free post-military health care.”¹⁹

Upon discharge, Vorland was not completely without remedy. She believed she would “[j]ust go to the discharge review board and . . . be fine.”²⁰ The review board, however, was not as understanding as she hoped it would be: “They just continued the retaliation, going into who I was as a person and asking me if I’d lied.”²¹ Vorland’s pro-bono attorney called it a “witch hunt” and was “flabbergasted” by how the hearing proceeded.²² Less than two weeks after the hearing, the discharge review board rejected Vorland’s request to upgrade her OTH discharge.²³

The stories of Weaver and Vorland are not as uncommon as most might believe. Thousands of individuals have been similarly discharged from military service under OTH conditions, undeservedly so, effectively barring them from benefits and services they are entitled to for serving their nation. In addition to potentially barring a veteran from benefits, an OTH discharge carries a negative stigma.²⁴ For instance, around eighty-four per-

17. *Id.* Vorland had an iron-clad defense—she is a lesbian—but this was prior to the repeal of “Don’t Ask, Don’t Tell” and the use of this defense would have ended her career. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* A Discharge Review Board (“DRB”) is a panel consisting of five military officers chosen by the secretary of each military department. Discharge Review Procedures, 32 C.F.R. § 70.8(b) (2016). DRBs review a petitioner’s request for a discharge upgrade and consider the facts and circumstances surrounding the discharge. DRBs will only upgrade discharges on grounds of equity or propriety. *Id.* § 70.9(a).

21. Thompson, *supra* note 13.

22. *Id.*

23. *Id.*

24. Compare Marisa Peñaloza & Quil Lawrence, *Other-Than-Honorable Discharge Burdens Like a Scarlet Letter*, NPR (Dec. 9, 2013), <http://www.npr.org/2013/12/09/249342610/other-than-honorable-discharge-burdens-like-a-scarlet-letter> (stating that those who served in the military entered into a “social contract” for benefits upon completion of their service, but when an OTH discharge denies them those benefits a “higher the cost to society” results by leaving them without help, while simultaneously creating a stigmatizing collateral consequence), with John W. Brooker et al., *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 12 (2012). Brooker states:

While some have characterized the brand of bad paper [other than honorable, or lesser, discharge] as a “life sentence,” for people who are often “nineteen or twenty years old,” others characterize it as “a ticket to America’s underclass” The idea is that, in harsh environments where lives may be on the line, serious breaches of conduct that interfere with the military mission should rightfully brand an offender for life and should likewise remove eligibility for the special military benefits and entitlements reserved for honorable and meritorious service. After all, the military’s generous benefits for

cent of all discharges issued are honorable.²⁵ An honorable discharge is typically viewed as “acceptable,” as opposed to “exemplary” service.²⁶ Consequently, anything less than this established “baseline” is viewed as “derogatory, and inevitably stigmatizes the recipient.”²⁷ The resulting intangible harm created by an OTH discharge is an “unmistakable social stigma [that] greatly limits the opportunities for both public and private civilian employment.”²⁸ Between 2002 and 2013, over 103,000 enlisted service members acquired this stigma by receiving a discharge from the military under OTH conditions.²⁹

Erroneously discharging service members under OTH conditions, and subsequently failing to properly upgrade such discharges, has also inadvertently created a growing challenge to our nation’s criminal justice system. In failing to recognize the mental health issues underlying an OTH discharge—before separation—the Department of Defense has put the onus of care on civilian society, which at large, does not fully understand issues facing the veteran community. One scholar approximates that, in the United States, there could be almost 700,000 veterans from the Iraq and Afghanistan wars with PTSD or depression, including those with delayed onset PTSD symptoms.³⁰ This same scholar posits that Veterans suffering from combat-induced PTSD often turn to illegal drugs to self-medicate.³¹ A group of physicians note that Marines who deployed to combat areas and were later diagnosed with PTSD stemming from their experiences overseas, were “11 times more likely to engage in the most serious forms of misconduct” than Marines who deployed to combat zones, but did not receive a

college education are often the singular factor motivating the initial decision to enlist for many recruits in an all-volunteer military.

Id. at 12 (footnotes omitted) (first quoting PAUL STARR ET AL., *THE DISCARDED ARMY, VETERANS AFTER VIETNAM: THE NADER REPORT ON VIETNAM VETERANS AND THE VETERANS ADMINISTRATION* 175 (1973); and then quoting Peter Slavin, *The Cruellest Discrimination: Vets with Bad Paper Discharges*, 14 *BUS. & SOC. REV.* 25, 25 (1975)).

25. VETERANS LEGAL CLINIC, LEGAL SERV. CTR. OF HARVARD LAW SCH., *UNDESERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER* 12 (2016), <https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf>.

26. *Bland v. Connally*, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961).

27. *Id.*

28. *Id.* at 858.

29. VETERANS LEGAL CLINIC, *supra* note 25, at 43. The number above constitutes 5.8% of all discharges from that period. *Id.* During the same time period, 1,518,392 individuals received discharges under honorable conditions; 150,434 received discharges under general conditions; 16,720 received discharges for bad conduct; and 1,189 received discharges under dishonorable conditions. *Id.*

30. BARRY R. SCHALLER, *VETERANS ON TRIAL: THE COMING COURT BATTLES OVER PTSD* 17–18 (2012).

31. *Id.* at 211–12.

psychiatric diagnosis.³² OTH veterans are also more likely to be homeless than are veterans with an honorable or general discharge.³³ The shortcomings of the military discharge process and subsequent avenues of redress, have placed the burden on civilian governments to “fill in the gaps.”³⁴

Furthermore, many veterans lack proper representation when petitioning both the Department of Defense for discharge upgrades and the Department of Veterans Affairs for access to benefits because a large portion of the veteran population is unable to afford an attorney, making recourse nearly impossible.³⁵ Even when represented, however, many of their attorneys lack experience in military issues and the expertise required to navigate the labyrinth-like appeals processes utilized by the Departments of Defense and Veterans Affairs.³⁶ OTH veterans require competent and effective representation if they hope to obtain relief.

This Comment discusses how OTH veterans are negatively affected by their discharge characterizations. It also explores how upgrade appeals’ processes and benefit-acquisition systems typically operate against veterans’ interests, despite their “pro-claimant” labelling, and disparately affect those with mental health issues or those who have experienced military

32. Robyn M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishments for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC PSYCHIATRY 1, 6 (2010).

33. John Rowan, Opinion, *A Less Than Honorable Policy*, N.Y. TIMES (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/opinion/a-less-than-honorable-policy.html?_r=1. Currently, there are over 39,000 homeless veterans nationwide, and nearly 1.4 million veterans are considered at risk of homelessness. *FAQ About Homeless Veterans*, NAT’L COAL. FOR HOMELESS VETERANS, http://nchv.org/index.php/news/media/background_and_statistics/#sources (last visited May 17, 2017); see also *2016 PIT Estimate of Homeless Veterans by State*, HOUS. AND URBAN DEV., <https://www.hudexchange.info/resources/documents/2016-PIT-Estimate-of-Homeless-Veterans-by-State.pdf> (last visited May 17, 2017).

34. SCHALLER, *supra* note 30, at 208.

35. See, e.g., *Veteran’s Choice of Representation Act of 2006: Hearing on S. 2694 Before the S. Comm. On Veterans Affairs*, 109th Cong. 48 (2006) (statement of Barton F. Stichman, Joint Executive Director of the National Veterans Legal Services Program) (citing Leonard Post, *Turf War Over Vets – Lawyers Gripe at Being Kept Away from V.A. Work*, 26 NAT’L L.J. 29 (2003)). In 2003, fourteen veterans service officers employed at the Department of Veterans Affairs (“VA”) regional office in St. Petersburg, Florida carried a caseload of 18,000 veterans with pending VA claims, while nine veterans service officers employed at the VA regional office in Los Angeles had a caseload of 9,000 veterans with pending VA claims. *Id.*

36. See *Fact Sheet: Community Homelessness Assessment, Local Education and Networking Groups (CHALENG)*, U.S. DEP’T OF VETERANS AFF. (2016), <https://www.va.gov/HOMELESS/docs/CHALENG-2015-factsheet-FINAL-0616.pdf>. A recent study by the Department of Veterans Affairs found that homeless veterans identify legal representation as one of the highest needs for this population. *Id.*; see also Jayme M. Cassidy, *Suddenly Discharged the Combat Continues: Eliminating the Legal Services Gap to Ensure Veterans’ Success After Leaving Military Service*, 45 U. MEM. L. REV. 837, 856–61, 869–81 (2015) (noting that legal assistance to a veteran is hindered by the fact that she may have medical needs “foreign to the layperson lawyer”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-676, VETERANS AFFAIRS: BETTER UNDERSTANDING NEEDED TO ENHANCE SERVICE TO VETERANS ADJUSTING TO CIVILIAN LIFE 1 (2014), <http://www.gao.gov/assets/670/665725.pdf>.

sexual trauma. Part I of this Comment discusses the rationale and methodology of discharging a service member from the military. Part I also discusses the types of discharge characterizations and how each characterization affects a veteran's access to benefits. Part I further discusses the statutory and regulatory bars that preclude OTH veterans from benefits and the methods in which OTH veterans may attempt to seek relief. Part II discusses the systemic issues among statutory and regulatory interpretations, the inefficiencies of each appeals process, and the unintended consequences that result from these institutional inadequacies. Part II also analyzes recommendations to ameliorate the growing issue OTH veterans face in failing to obtain the benefits they deserve.

I. BACKGROUND

It is important to understand military discharge policies and practices before discussing inherent inequities in the appeals processes established by those policies when OTH veterans petition to re-characterize their discharge status—a goal this Part seeks to accomplish. Part II.A of this Comment explains the pragmatic rationale behind discharging a service member from the military. Part I.B defines the various discharge characterizations a service member can receive upon separation from the military: honorable, general, other than honorable, or some variation of dishonorable. Part I.C describes the federal bars—statutory and regulatory—that preclude OTH service members from accessing benefits from the Department of Veterans Affairs (“VA”). Finally, Part I.D describes the appeals processes that OTH service members may pursue to upgrade their discharge characterizations and restore VA benefits.

A. *Separation from Military Service*

All service members are discharged from the military, in one form or another, at various points in their careers. A discharge may occur when a service member elects to leave the military upon the expiration of her enlistment or upon completion of her contractual obligation.³⁷ A discharge may also occur when a service member retires from the military, in accordance with statutory durational requirements or due to a medical disability.³⁸ A service member may also be involuntarily discharged from the military for administrative purposes or as a punitive consequence.³⁹ This Comment

37. *See, e.g.*, 10 U.S.C. § 1169 (2012) (stating that no service member may be discharged before his term of service expires, barring one of the three exceptions listed therein).

38. *See, e.g., id.* § 1201 (stating that a service member injured in the line of duty may be retired if his disability prevents him from performing his duty).

39. *Id.* § 1141.

focuses on the latter conditions—separation from the military due to administrative purposes or as a punitive consequence.

Involuntary separation of a service member from the military, for good cause, is essential in maintaining a combat-ready force that is prepared to deploy across the globe when called upon.⁴⁰ Joining the military “involves an individual’s commitment to the United States, Military Service, fellow citizens, and fellow Service members.”⁴¹ Prior to involuntarily separating a soldier from service, however, military leaders are required to attempt to rehabilitate a troublesome service member and retain her, so long as the force’s capabilities are not severely degraded in the process.⁴² Given the need to maintain a fully capable military force, the respective branches developed their own procedures for separating individuals from military duty.⁴³

Generally, involuntary separation in the military is a de-centralized process, affording a commander—the separation authority—broad discretion on how he chooses to separate an individual. According to the Army Regulation governing the separation of enlisted soldiers (“Regulation”), “[t]he separation authority . . . has complete discretion to direct any type of discharge and characterization of service authorized by applicable provi-

40. ENLISTED ADMINISTRATIVE SEPARATIONS, *supra* note 12, at 1–2. That instruction provides:

It is DoD policy that: (a) The readiness of the Military Services be preserved by maintaining high standards of performance, conduct, and discipline. Separation promotes the readiness of the Military Services by providing an orderly means to: (1) Evaluate the suitability of persons to serve in the enlisted ranks of the Military Services based on their ability to meet required performance, conduct, and disciplinary standards. (2) Maintain standards of performance, conduct, and discipline through characterization of service in a system that emphasizes the importance of honorable service. (3) Achieve authorized force levels and grade distributions. (4) Provide an orderly means of discharge for enlisted personnel.

Id.

41. *Id.* at 2.

42. *Id.* The DOD Instruction elaborates: “Reasonable efforts should be made by the chain of command to identify enlisted Service members who exhibit the likelihood for early separation and improve their chances for retention through counseling, retraining, and rehabilitation.” *Id.*

43. *See, e.g.*, U.S. Dep’t of the Army, Reg. 635-200, Personnel Separations: Active Duty Enlisted Administrative Separations (June 6, 2005); Memorandum from Daniel R. Sitterly, Principal Deputy Ass’t Sec’y, U.S. Air Force, Air Force Guidance Memorandum to AFI 36-3208, Administrative Separation of Airmen (June 24, 2016), http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3208/afi36-3208.pdf; *Guidelines on Characterization of Service*, MILPERSMAN [Military Personnel Manual] § 1910-300 (June 2, 2008), <http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1910-300.pdf>. This Comment predominately refers to the Army and its practices, in lieu of discussing each of the five branches separately. While the other services have slight variations in separation processes, the focus of this Comment will best be maintained by discussing the practices of one specific branch. The other four branches of the U.S. Military are the Air Force, Coast Guard, Marine Corps, and Navy.

sions.”⁴⁴ Chapter 2 of the Regulation further states that “in making recommendations on the type of discharge and characterization of service, [a commander] may recommend any type of discharge and characterization of service authorized for the notified basis of separation but will normally be limited to considering facts contained within the proposed action.”⁴⁵

B. Characterization of Discharge

Chapter Three of the Regulation delineates the various characterizations of service an individual will receive upon separation: honorable, general, other than honorable, dishonorable, or bad conduct.⁴⁶ An honorable discharge is a separation from service with honor.⁴⁷ A general discharge is a separation from service under honorable conditions, applied to a soldier whose military record is satisfactory, but not “sufficiently meritorious” to warrant an honorable discharge.⁴⁸ An OTH discharge “may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial.”⁴⁹ A dishonorable discharge is a separation from service “pursuant only to an approved sentence of a general court-martial.”⁵⁰ A bad conduct discharge is a separation from service “pursuant only to an approved sentence by a general or special court-martial.”⁵¹

These five discharge characterizations vastly differ in their effect on a service member’s eligibility for benefits. Service members with honorable discharges are automatically eligible for all benefits offered by the Department of Veterans Affairs.⁵² Pending a Characterization of Service (“COS”) determination, service members with OTH discharges are by regulation presumptively ineligible for: disability compensation, health care, dependency and indemnity compensation, education assistance, survivor pension, burial benefits, special housing, vocational rehabilitation, and reenlistment rights, but may become eligible pursuant to an affirmative Characterization of Service determination by the VA.⁵³ Veterans with general discharges are eligi-

44. Dep’t of the Army, *supra* note 43, at 21.

45. *Id.* at 23.

46. *Id.* at 45–46, 48.

47. *Id.* at 45.

48. *Id.* at 46.

49. *Id.*

50. *Id.* at 48.

51. *Id.* See generally JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES (2012) (further describing military discharge characterizations).

52. UMAR MOULTA-ALI & SIDATH VIRANGA PANANGALA, CONG. RES. SERV., R43928, VETERANS’ BENEFITS: THE IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY 7 (2015).

53. *Id.* OTH veterans may apply for benefits through a Characterization of Service, also known as a Characterization of Discharge, evaluation, a process initiated by the veteran with the Department of Veterans Affairs. *Id.* OTH veterans, however, are unable to apply for education assistance through this process. *Id.* But see VETERANS LEGAL CLINIC, *supra* note 25, at 8 (noting

ble for all benefits, except for education assistance.⁵⁴ Veterans with dishonorable or bad conduct discharges are not eligible for any benefits.⁵⁵ When a service member receives notice that she might receive a potentially negative discharge (general, OTH, dishonorable, or bad conduct), she may confer with counsel (a military or civilian attorney), attend a hearing before an administrative separation board regarding the discharge or, in the alternative, waive all of her rights in writing after conferring with counsel.⁵⁶

C. Statutory and Regulatory Bars to VA Benefits for OTH Veterans

Even if a prior service member is presumptively ineligible for benefits, she still has a right to apply.⁵⁷ First, it must be determined that an individual applying for benefits is a “veteran” in accordance with the statutory definition of the term. A “veteran” is “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”⁵⁸ Even if “veteran” status is satisfied, as previously noted, service members discharged under OTH, dishonorable, or bad-conduct conditions may be statutorily barred from accessing veterans’ benefits.⁵⁹ Federal law provides that a discharge from military service for any of the following reasons constitutes a statutory bar to benefits: (1) “sentence of a general court-martial,” (2) being a “conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority,” (3) desertion, (4) “absence without authority from active duty for a continuous period of at least one hundred and eighty days” (AWOL), (5) resignation by an officer “for the good of the service,” or (6) requesting release from service as an alien “during a period of hostilities.”⁶⁰ The only affirmative defense a veteran may proffer for the above conduct is insanity.⁶¹

that only ten percent of negatively discharged service members ever receive a COS determination).

54. MOULTA-ALI & PANANGALA, *supra* note 52, at 7.

55. *Id.*

56. Dep’t of the Army, *supra* note 43, at 21–22.

57. *See, e.g.,* Cushman v. Shinseki, 576 F.3d 1290, 1297–98 (Fed. Cir. 2009) (holding that even if ultimately ineligible, a person possesses a constitutionally protected property interest in “service-connected disability benefits” protected by the Due Process Clause of the Fifth Amendment of the U.S. Constitution).

58. 38 U.S.C. § 101(2) (2012). Full-time active military service is required to satisfy the statutory definition of a veteran (e.g., Army, Navy, Air Force, Marine Corps, Coast Guard). *Id.* § 101(21)(c). Commissioned officers of the Public Health Service (PHS), and National Oceanic and Atmospheric Administration (NOAA) or its predecessor, the Environmental Science Services Administration also have veteran status. *Id.*

59. *Id.* § 5303(a).

60. *Id.*

61. *Id.* § 5303(b). Insanity is defined at 32 C.F.R. § 3.354 (2016).

When statutory bars do not preclude a veteran's access to benefits, the veteran may still be barred by administrative regulations promulgated by the VA, which may be applied during a COS determination. The VA bars those who were separated from military service due to: (1) an "[a]cceptance of an undesirable discharge to escape trial by general court-martial," (2) "[m]utiny or spying," (3) "[a]n offense involving moral turpitude [including] generally, conviction of a felony," and (4) "[w]illful and persistent misconduct."⁶² When a veteran with a less than honorable discharge applies for any benefit from the VA, an adjudicator at a regional office will evaluate the circumstances surrounding an individual's discharge.⁶³ If no statutory or regulatory bar precludes that individual from receiving the benefit applied for, the VA adjudicator will find the person was discharged under conditions other than dishonorable and award the desired benefit.⁶⁴

D. OTH Veterans May Pursue the Restoration of VA Benefits Through Appeals Processes

A veteran can pursue multiple routes to upgrade her discharge characterization and obtain previously denied benefits. Part I.D.1 describes how a service member may request an upgraded discharge through her respective military component's discharge review board. Part I.D.2 describes how a service member may request an upgraded discharge through her respective-military component's board for correction of military records. Finally, Part I.D.3 describes how a service member may directly petition the Department of Veterans Affairs for specific benefits through a characterization of service ("COS") determination.

1. Discharge Review Boards

An OTH veteran may appeal to the Discharge Review Board ("DRB") of the military branch in which she served to upgrade the characterization of her discharge and thus become eligible for benefits.⁶⁵ The Secretaries of the respective military branches (Army, Air Force, Navy, Marine Corps., and Coast Guard⁶⁶) have each established boards of review, consisting of five

62. *Id.* § 3.12(d). The fifth regulatory bar to benefits is "[h]omosexual acts involving aggravating circumstances or other factors affecting the performance of duty." *Id.*; see also *Beck v. West*, 13 Vet. App. 535, 539 (2000) (holding that a discharge under OTH conditions for willful and persistent misconduct will render a claimant ineligible for veterans' benefits).

63. VETERANS BENEFITS MANUAL 32 (Barton F. Stichman et al. eds., 2016).

64. *Id.*

65. 10 U.S.C. § 1553 (2012).

66. See 32 C.F.R. § 581.2 (2016); *id.* §§ 865.100 to .126; *id.* §§ 724.101 to .903; 33 C.F.R. §§ 51.1–51.2; U.S. Dep't of the Army, Reg. 15-180, Army Discharge Review Board (Mar. 20, 1998); DEP'T OF THE NAVY, SECNAV INSTRUCTION NO. 5420.174D, NAVAL DISCHARGE REVIEW BOARD (NDRB) PROCEDURES AND STANDARDS (2004).

members, not legally trained, to review the discharge or dismissal of service members.⁶⁷ A veteran or her representative must submit a motion or request for review within fifteen years after the date of her discharge from military service.⁶⁸ Upon submitting the request, the board will review the veteran’s service records and any other evidence presented.⁶⁹ Additionally, the individual who requests a DRB hearing may appear before the board in person, through counsel, or by the appointed representative of an organization recognized by the Secretary of Veterans Affairs.⁷⁰ Furthermore, if the veteran requesting an upgrade review has been diagnosed with post-traumatic stress disorder (“PTSD”), traumatic brain injury (“TBI”), or mental illness, a clinical psychologist, psychiatrist, or physician with training in mental health services on the board reviewing the veteran’s discharge characterization and is allotted voting rights.⁷¹ If a DRB converts an OTH discharge to an honorable or general discharge, the conversion will remove the regulatory bars pursuant to 38 C.F.R. § 3.12(d), but will not remove the statutory bars delineated in 38 U.S.C. § 5303.⁷²

Generally, DRBs will only upgrade discharges on grounds of equity or propriety.⁷³ The burden is on the service member to prove that the discharge was illegal or unfair.⁷⁴ DRBs operate under the presumption, however, that the characterization of the discharge was properly determined and administered by the particular military department.⁷⁵ A DRB may upgrade a discharge on grounds of propriety if (1) an error of fact, law, procedure, or discretion occurred, and the error was prejudicial to the veteran during the discharge process; or (2) a change in policy has been enacted and the change is expressly made retroactive to the type of case currently confronted by the DRB.⁷⁶ A DRB may upgrade a discharge on the grounds of equity if (1) the current discharge policies and procedures are materially different than those that led to the service member’s discharge⁷⁷; (2) the

67. 10 U.S.C. § 1553(a) (2012). *See generally* DEP’T OF DEF., DIRECTIVE NO. 1332.41, BOARDS FOR CORRECTION OF MILITARY RECORDS (BCMRS) AND DISCHARGE REVIEW BOARDS (DRBs) 1 (2004), <http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf> (establishing uniform policies for the review of discharges or dismissals).

68. 10 U.S.C. § 1553(a) (2012).

69. *Id.* § 1553(c).

70. *Id.*

71. *Id.* § 1553(d)(1)–(2).

72. 38 C.F.R. § 3.12(g) (1992); *see supra* note 59 and accompanying text for statutory bars.

73. *See, e.g.*, DEP’T. OF DEF., INSTRUCTION NO. 1332.28, DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS 31 (2004), <http://www.secnv.navy.mil/mra/CORB/Documents/DoDI%201332.28.pdf> (stating that the “objective of a review board is to examine the propriety and equity of the applicant’s discharge”).

74. VETERANS BENEFITS MANUAL, *supra* note 63, at 1692.

75. 32 C.F.R. § 70.8(12)(vi) (2016).

76. *Id.* § 70.9(b).

77. *Id.* § 70.9(c)(1)(i).

discharge was inconsistent with disciplinary standards at the time of the discharge⁷⁸; or (3) it is determined that relief is warranted based upon consideration of the applicant's service record.⁷⁹ If dissatisfied with the DRB's decision, a veteran may request an entirely new DRB review.⁸⁰ A veteran may also appeal a DRB's decision in federal court pursuant to the Administrative Procedures Act ("APA").⁸¹

2. Boards for Correction of Military Records

If the OTH veteran is beyond the fifteen-year statute of limitations for DRB review, she may apply for an upgrade by petitioning a Board for Correction of Military Records ("BCMR").⁸² A BCMR will not consider an application until the service member has exhausted all other administrative remedies, such as pursuing a DRB if within the fifteen-year time limit.⁸³ A BCMR may correct military records and upgrade a discharge only if an application is filed within three years of the service member discovering an error or injustice.⁸⁴ The Court of Appeals for the District of Columbia Circuit held that this period begins when a veteran has actual knowledge of the error or injustice⁸⁵; most other jurisdictions have followed the District's lead.⁸⁶ BCMRs are able to waive the three-year statute of limitations "in the interest of justice"⁸⁷ after a cursory review of the merits of the case.⁸⁸

BCMRs have more authority to alter military discharges than DRBs.⁸⁹ For example, they can upgrade any discharge characterization, change any

78. *Id.* § 70.9(c)(2).

79. *Id.* § 70.9(c)(3). Areas of consideration include, but are not limited to: service history, awards and decorations, letters of commendation or reprimand, combat service, wounds received in action, records of promotions or demotions, level of responsibility at which the applicant served, other acts of merit, length of service, convictions by court-martial, and records of non-judicial punishment. *Id.*

80. *Id.* § 70.8(b)(8).

81. VETERANS BENEFITS MANUAL, *supra* note 63, at 1697–98.

82. 10 U.S.C. § 1552(a)(1) (2012).

83. VETERANS BENEFITS MANUAL, *supra* note 63, at 1647–48; *see also, e.g.*, Ballenger v. Marsh, 708 F.2d 349, 350–51 (1983) (holding that "administrative remedies must be exhausted before a denial of corrective action can be reviewed in federal court").

84. 10 U.S.C. § 1552(b) (2012).

85. *Ridgely v. Marsh*, 866 F.2d 1526, 1529 (D.C. Cir. 1989); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995) (concluding that an agency must do more than parrot "the language of a statute without providing an account of how it reached its results" when finding an absence of error or injustice).

86. *See, e.g., Halle v. United States*, 124 F.3d 216 (10th Cir. 1997); *Guerrero v. Stone*, 970 F.2d 626, 635 (9th Cir. 1992); *Houseal v. McHugh*, 962 F. Supp. 2d 286, 294–96 (D.D.C. 2013).

87. 10 U.S.C. § 1552(b) (2015).

88. *Dickson*, 68 F.3d at 1405.

89. VETERANS BENEFITS MANUAL, *supra* note 63, at 1647–48.

reason for discharge, and void discharges altogether.⁹⁰ A BCMR may change the military records of any former service member to correct any “error or injustice.”⁹¹ The BCMRs’ “error” standard is akin to the DRBs’ “impropriety” standard and the BCMRs’ “injustice” standard is akin to the DRBs’ “inequity” standard.⁹² Like DRBs, BCMRs consider any mitigating circumstances surrounding the offense that led to the discharge.⁹³ The presumptions and burdens of proof are the same as they are in the DRB context: BCMRs presume the records and discharges are accurate and the service member must prove why her records should be corrected.⁹⁴ BCMR decisions may be appealed in federal court and are to be reviewed under the standards of the APA.⁹⁵

BCMR determinations have denied upgrades for an alarming number of Vietnam veterans. The veterans allege that undiagnosed PTSD served as the underlying cause for the conduct that resulted in their discharge; therefore, their discharge for “patterns of misconduct” cannot withstand muster.⁹⁶ In response to this growing concern, then-Secretary of Defense,

90. *Id.* at 1646–47. A BCMR also has the authority to change the basis for discharge: to reinstate a veteran to military service, to expunge disciplinary actions and change or remove enlisted performance evaluations and officer efficiency reports, to order a promotion; to change the disability rating assigned by a Physical Evaluation Board, and to remove statutory bars to veterans’ benefits. *Id.*

91. 10 U.S.C. § 1552(a)(1) (2015); 32 C.F.R. § 581.3(b)(4)(i) (2005); *id.* § 723.1; *id.* § 865.0; 33 C.F.R. § 52.12(a) (2015); *see also* Mudd v. White, 309 F.3d 819, 824 (D.C. Cir. 2002) (holding that BCMR applicants must be current service members or former service members, which may include heirs or legal representatives, to have standing pursuant to 10 U.S.C. § 1552(g)).

92. Kathleen Gilberd, *Upgrading Less-Than-Fully Honorable Discharges*, in THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE: HOW TO CUT THROUGH THE BUREAUCRACY AND GET WHAT YOU NEED—AND ARE ENTITLED TO 323, 327–28 (Veterans for America ed., 2008).

93. *Id.*

94. *See, e.g.*, 32 C.F.R. § 581.3(e)(2) (2005) (“The ABCMR [Army Board for Correction of Military Records] begins its consideration of each case with the presumption of administrative regularity.”); *see also id.* § 723.3(e)(2); *id.* § 865.109(h); *id.* § 52.24(b) (stating that BCMRs should rely on a presumption of regularity “to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties”).

95. VETERANS BENEFITS MANUAL, *supra* note 63, at 1655–56. BCMR decisions may be heard by (1) a federal district court if the claim is purely equitable (a non-monetary claim for a record change), (2) a federal district court or the U.S. Court of Federal Claims if there is a monetary claim up to \$10,000 and the U.S. Court of Federal Claims for any monetary claim that is not *de minimis*. *Id.*; *see also* 28 U.S.C. § 1346(a)(2) (2011); *id.* § 1491(a)(1) (stating that the district courts and Court of Federal Claims shall have original jurisdiction of any “civil action or claim against the United States . . . founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department”).

96. *See* Complaint, Monk v. Mabus, No 3:14-CV-00260 (D. Conn. Mar. 3, 2014), ECF No. 1. This lawsuit was filed by a group of Vietnam veterans with OTH discharges. *Id.* The veterans sued the Secretaries of the Air Force, Army, and Navy, alleging violations of the APA during the

Charles “Chuck” Hagel called for meaningful reform of the BCMRs’ standards of review and procedures.⁹⁷ In a memorandum, Secretary Hagel demanded that leniency be granted in BCMR records-review determinations, particularly in the context of claims alleging PTSD or exhibiting any of PTSD’s symptoms.⁹⁸ The shift in policy was “intended to ease the application process for veterans . . . seeking redress and [to] assist the Boards in reaching fair and consistent results.”⁹⁹ Secretary Hagel, furthermore, directed his message specifically to the Department of Veterans Affairs, calling for a cooperative effort between the two agencies in addressing the growth of cases involving PTSD.¹⁰⁰

3. *Department of Veterans Affairs*

In addition to BCMRs and DRBs, OTH veterans may directly apply to a Veterans Health Administration (“VHA”) Regional Office (“RO”) for benefits through a process known as a characterization of service (“COS”) determination.¹⁰¹ An individual with an OTH discharge that is administratively barred from receiving benefits under 38 C.F.R. § 3.12 still retains presumptive eligibility for VA healthcare benefits for “service-incurred or service-aggravated disabilities” through the COS process.¹⁰² If an OTH veteran submits an application for VA disability healthcare benefits, “eligibility staff must register the individual and place [her] in a Pending Verification Status.”¹⁰³ A request for an administrative decision regarding the

review of their upgrade petitions to BCMRs. *Id.* Petitioners sought upgrades in their discharges, which would establish their eligibility for veterans’ benefits. *Id.*

97. Memorandum from Charles Hagel, Sec’y of Def., to Secretaries of the Military Departments, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder 1 (Sep. 3, 2014) [hereinafter 2014 PTSD Upgrade Memo], <http://archive.defense.gov/news/osd009883-14.pdf>.

98. *Id.*

99. *Id.* Secretary Hagel ordered that “[l]iberal consideration will be given in petitions for changes in characterization of service to Service treatment record entries which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions.” *Id.* at 3.

100. *Id.* at 1. The memorandum also states that BCMRs are to apply this “liberal consideration” in cases where civilian providers indicate the existence of PTSD-related symptoms and that “any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct” should be considered. *Id.* at 3.

101. VETERANS BENEFITS MANUAL, *supra* note 63, at 32; *see* 38 C.F.R. § 3.155 (2016) (providing policies and procedures governing a COS determination).

102. VETERANS HEALTH ADMIN., U.S. DEP’T OF VETERANS AFFAIRS, OTHER THAN HONORABLE DISCHARGES: IMPACT ON ELIGIBILITY FOR VA HEALTH CARE BENEFITS 1 (Nov. 2014), https://www.va.gov/healthbenefits/resources/publications/IB10-448_other_than_honorable_discharges11_14.pdf.

103. *Id.*

COS, for healthcare purposes, is made at the local RO.¹⁰⁴ During this process, the VA requests information regarding the veteran’s character of discharge, service records, and facts and circumstances surrounding the incident or incidents that resulted in the discharge.¹⁰⁵ The VA also allows the OTH veteran to present evidence or make a statement regarding the discharge.¹⁰⁶ Once the requested records are obtained, the VA makes a COS determination.¹⁰⁷

Compared to other federal agencies, the Department of Veterans Affairs is unique because “the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant.”¹⁰⁸ The VA’s pro-claimant environment is evidenced by the fact that it does not utilize an adversarial process, does not maintain a statute of limitations for filing claims, and applies a more favorable standard of proof to the veteran during its proceedings.¹⁰⁹ The Supreme Court has “long applied ‘the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.’”¹¹⁰ The Court has also recognized the VA’s unusual position

104. MOULTA-ALI & PANANGALA, *supra* note 52, at 2. It is important to note that the VA characterization of service process is different from the military’s characterization of a discharge. *Id.* at 8. “The VA possesses *no* authority to change or upgrade a military discharge.” *Id.* The VA only reviews the relevant evidence to determine whether the former servicemember’s record meets VA criteria to be granted access to certain benefits. *Id.*

105. BENEFITS ASSISTANCE SERV., U.S. DEP’T OF VETERANS AFFAIRS, CLAIMS FOR VA BENEFITS AND CHARACTER OF DISCHARGE: GENERAL INFORMATION (Mar. 2014), http://www.benefits.va.gov/BENEFITS/docs/COD_factsheet.pdf.

106. *Id.* at 4–5.

107. *Id.* at 5. When making its determination, the VA considers:

[M]itigating or extenuating circumstances presented by the claimant[,] . . . supporting evidence provided by third parties who were familiar with the circumstances surrounding the incident(s) in question[,] length of service[,] performance and accomplishments during service[,] nature of the infraction(s), and character of service preceding the incident(s) resulting in the discharge.

Id. Additionally, where no statutory bar to benefits exists, the impact of disabilities may be considered during the analysis of any mitigating or extenuating circumstances. *Id.*

108. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see also Hayre v. West*, 188 F.3d 1327, 1333–34 (Fed. Cir. 1999) (stating that Congress maintained a “strongly and uniquely pro-claimant system of awarding benefits to veterans” in passing legislation governing VA operations).

109. *See, e.g., Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990) (stating that “[u]nlike other claimants and litigants . . . a veteran is entitled to the ‘benefit of the doubt’ when there is an ‘approximate balance of positive and negative evidence’”).

110. *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King v. St. Vincent’s Hospital*, 502 U.S. 215, 220–21 (1991)); *see also Brown v. Gardner*, 513 U.S. 115, 117–18 (1994) (ordering lower courts to resolve an ambiguous statute in favor of the veteran); *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010) (reaffirming *Brown*, stating that statutory “interpretive doubt is to be resolved in the veteran’s favor” (quoting *Brown*, 513 U.S. at 118)); *Carpenter v. Principi*, 15 Vet. App. 64, 76 (2001) (holding that “[i]f there is any room for interpretive doubt as to what constitutes the ‘same work’ for the purposes of EAJA, such doubt must be resolved in the veterans’ [sic] favor” (citing *Brown*, 513 U.S. at 118)).

within the administrative state by holding that a less deferential standard of the APA should be applied when evaluating VA adjudication decisions.¹¹¹

In developing a case, the VA is required to “make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate [her] claim for a benefit under a law administered by the” VA.¹¹² Veterans can also receive free assistance with developing their claims from a certified veterans service organization (“VSO”).¹¹³ When making a COS determination, the VA is required to give the veteran the “benefit of the doubt” if there is “an approximate balance of positive and negative evidence regarding” any claim.¹¹⁴ The VA must also consider potential legal theories not proffered in the original claim if they would help substantiate the claim for benefits.¹¹⁵

If denied, a veteran may file a Notice of Disagreement with the Board of Veterans’ Appeals (“BVA”).¹¹⁶ Once a claim is with the BVA, the BVA may grant, deny, or remand the veteran’s appeal.¹¹⁷ If the veteran disagrees with the BVA’s decision, she may appeal the decision to the Court of Appeals for Veterans’ Claims (“CAVC”).¹¹⁸ If the veteran is dissatisfied with the determination made by the CAVC, she may appeal to the Court of Appeals for the Federal Circuit (“Federal Circuit”).¹¹⁹ The Federal Circuit’s standard of review is limited—it can only set aside VA regulations that are arbitrary or capricious, unconstitutional, in excess of statutory limitations, or procedurally flawed.¹²⁰ The Federal Circuit is not permitted to review any challenge to a factual determination or a “challenge to a law or regulation as applied to the facts of a particular case.”¹²¹ Finally, if the veteran is

111. Transcript of Oral Argument at 15, *Shinseki v. Sanders*, 556 U.S. 396 (2009) (No. 07-1209), http://www.supremecourtus.gov/oral_arguments/argument_transcript/07-1209.pdf (Ginsburg, J., stating, “We have never held that every agency—agencies come in many sizes and shapes, but in all cases, the APA places the burden [] on the petitioner. But this Court has never held that across the board . . .”).

112. 38 U.S.C. § 5103A(a)(1) (2012); *see also* 38 C.F.R. § 3.159(c)(1) (2016).

113. MOULTA-ALI & PANANGALA, *supra* note 52, at 3.

114. 38 U.S.C. § 5107(b); *see also* *Gilbert*, 1 Vet. App. at 49, 53.

115. 38 C.F.R. § 3.103(a).

116. BD. OF VETERANS’ APPEALS, HOW DO I APPEAL? 5 (2015), <http://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet—508Compliance.pdf>.

117. MOULTA-ALI & PANANGALA, *supra* note 52, at 16.

118. *How to Appeal a Board of Veterans’ Appeals Decision*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, <https://www.uscourts.cavc.gov/appeal.php> (last visited May 17, 2017). The CAVC is an Article I court and has exclusive jurisdiction over appeals from the BVA. 38 U.S.C. § 7252(a).

119. 38 U.S.C. § 7292(a).

120. *Id.* § 7292(d)(1); *see also* *Shinseki v. Sanders*, 556 U.S. 396, 400–01 (2009).

121. 38 U.S.C. § 7292(d)(2).

dissatisfied with the Federal Circuit’s decision, she may petition the Supreme Court for certiorari and any decision therein made is final.¹²²

II. ANALYSIS

Current adjudication processes, both to obtain a higher discharge characterization and to become eligible for benefits, are severely flawed and, more times than not, erroneously uphold a veteran’s OTH discharge. The inequitable practices utilized by these adjudicatory bodies have left thousands of OTH veterans ineligible for benefits, a result not contemplated by Congress. Not only are OTH veterans barred from receiving health care, they are also ineligible from accessing education, housing, employment, and burial benefits provided by the military.¹²³ An OTH discharge can also make it difficult for veterans to secure private employment and subjects them to lingering stigma and shame.¹²⁴ Furthermore, the inadequacies of appeals’ processes disparately affect veterans with PTSD, particularly when undiagnosed (or misdiagnosed), and disadvantage victims of military sexual trauma (“MST”). This Comment contends that executive and legislative action is required to remedy the situation before this growing issue becomes an even greater public health crisis.

This Part of the Comment analyzes the inadequacies of discharge upgrade processes and VA COS determinations, followed by an analysis of potential remedies. Part II.A of this Comment addresses issues OTH veterans face when petitioning a BCMR. Part II.B addresses issues inherent to VA characterization of service (“COS”) determinations. Part II.C discusses how sexual trauma victims—both women and men—are wrongly denied essential treatment. Finally, Part II.D analyzes steps currently being taken by Congress and veteran advocates to rectify this growing societal ill.

A. *Boards for the Correction of Military Records*

1. *Issues*

Before the 2014 PTSD Upgrade Memo,¹²⁵ the branches of the armed forces discharged roughly 260,000 Vietnam veterans under OTH or lesser conditions for patterns of misconduct.¹²⁶ After 1980, however, when PTSD

122. *Id.* § 7292(c).

123. *See infra* Part I.B.

124. Brooker et al., *supra* note 24, at 12.

125. 2014 PTSD Upgrade Memo, *supra* note 97.

126. SUNDIATA SIDIBE & FRANCISCO UNGER, UNFINISHED BUSINESS: CORRECTING “BAD PAPER” FOR VETERANS WITH PTSD: THE DEFENSE DEPARTMENT’S ADJUDICATION OF DISCHARGE UPGRADE APPLICATIONS ONE YEAR SINCE ITS SEPTEMBER 2014 PTSD DIRECTIVE 3 (2015), <https://www.law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf>.

began to gain medical recognition, OTH veterans—and their advocates—realized that their undiagnosed-PTSD symptoms might have significantly contributed to the misconduct resulting in their negative discharges.¹²⁷ Since the early 1990s, however, the BCMRs have had a “near-categorical rejection of applications by Vietnam veterans with undiagnosed PTSD.”¹²⁸ An examination of Army Board for Correction of Military Records (“ABCMR”) decisions demonstrates that a veteran must show “(1) a credible diagnosis of PTSD by a competent medical expert; (2) that [she] was subjected to the ‘ordeals of war,’ or to trauma during service that could have plausibly caused PTSD; and (3) some indication that [her] misconduct is reasonably traceable to PTSD,” (a “causal nexus”), to succeed on her claim.¹²⁹

Since the 2014 PTSD Upgrade Memo, the overall grant rate for veterans applying for PTSD-based discharge upgrades at ABCMRs has risen more than twelve-fold: from 3.7% in 2013 to 45% between 2014 and 2015.¹³⁰ The ABCMR upgraded discharges in most cases where a veteran had a PTSD diagnosis, but dismissed all petitions where an applicant claimed to suffer from PTSD at the time of his misconduct, but proffered no medical records to support such an assertion.¹³¹ Military-wide, the total number of PTSD upgrade decisions across the BCMRs “increased from approximately 39 per year to approximately five times that number.”¹³² With that said, however, experts predict that thousands of potentially eligible veterans have not petitioned a BCMR for a discharge upgrade.¹³³

Additionally, despite Secretary Hagel’s call for a public outreach initiative in the 2014 PTSD Upgrade Memo, it appears that the Department of Defense (“DOD”) has conducted little or no meaningful informative programming publicizing the lenient policy shift in BCMR determinations where PTSD is alleged.¹³⁴ In 2015, the Army disclosed internal emails related to its outreach strategy, but these emails offered no indication of any

127. *See How Common is PTSD?*, U.S. DEP’T OF VETERANS AFF., <http://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp> (last visited May 17, 2017) (estimating that about thirty percent of all Vietnam veterans suffered from PTSD in their lifetimes).

128. SIDIBE & UNGER, *supra* note 126, at 4.

129. *Id.* at 5.

130. *Id.* at 2.

131. *Id.* The ABCMR granted relief to sixty-seven percent of those seeking a discharge upgrade when a PTSD diagnosis existed. *Id.*

132. *Id.*

133. *Id.* While the number of PTSD-based applications to BCMRs has increased greatly, it is difficult to calculate an exact number because the BCMR did not disclose records of PTSD-based upgrades prior to the 2014 PTSD Upgrade Memo. *Id.* at 7.

134. *Id.* at 8–9.

large-scale public education effort.¹³⁵ In 2015, the DOD reported to Congress that it endeavored on a small number of outreach initiatives including an announcement in a military periodical and sending a member of the Naval DRB to serve as a panelist at a state bar association conference in Baltimore, Maryland.¹³⁶ Outreach efforts by the other military departments have been equally lacking, if not worse.¹³⁷ More recently, however, the DOD issued a press release, dated December 30, 2016, in an attempt to renew its efforts in educating veterans on opportunities to have their negative discharges reviewed.¹³⁸ But the press release failed to address how the agency intends to conduct a larger-scale outreach program, aside from providing links to already-existing instructional websites.¹³⁹

Despite the improved discharge upgrade rates for Vietnam War veterans since 2014, having received discharge upgrades in fifty-nine percent of all applications filed, veterans from the more recent wars in Afghanistan and Iraq have not enjoyed the benefits of the PTSD Upgrade Memo's leniency, receiving discharge upgrades only twenty-three percent of the time.¹⁴⁰ Some scholars posit that this discrepancy exists because BCMRs may have a greater willingness to accept retrospective PTSD diagnoses from Vietnam veterans than from veterans of more recent wars.¹⁴¹ Scholars note that PTSD was not a known condition during the Vietnam War; thus, it may follow that BCMRs believe Vietnam veterans could not have been properly diagnosed with PTSD.¹⁴² As a result, it is more likely that the BCMR erroneously dismissed them for misconduct, which makes them more deserving of review.¹⁴³ In contrast, PTSD is now a widely recognized mental illness. Thus, BCMR staff likely believe that Afghanistan and Iraqi veterans claim-

135. See Complaint for Declaratory and Injunctive Relief at Ex. B, Vietnam Veterans of Am. v. Dep't of Def., No. 3:15-cv-00658-VAB (D. Conn. May 4, 2015), ECF Nos. 1–2. Other outreach efforts included a single letter to Veterans Service Organizations (“VSOs”) and Military Service Organizations (“MSOs”) in January 2015 as well as the publication of a few articles publicizing the 2014 PTSD Upgrade Memo in Army periodicals. *Id.*

136. SIDIBE & UNGER, *supra* note 126, at 8.

137. *Id.*

138. Press Release, Dep't of Def., DoD Announces New Outreach Efforts to Veterans Regarding Discharges and Military Records, Release No: NR-459-16 (Dec. 30, 2016), <https://www.defense.gov/DesktopModules/ArticleCS/Print.aspx?PortalId=1&ModuleId=764&Article=1039945> (“Whether the discharge or other correction is the result of PTSD, sexual orientation, sexual assault, or some other consideration, the department [DOD] is committed to rectifying errors or injustices and treating all veterans with dignity and respect.”).

139. *Id.*

140. SIDIBE & UNGER, *supra* note 126, at 6; see also *How Common is PTSD?*, *supra* note 127 (estimating that anywhere from eleven to twenty percent of Operation Iraqi Freedom and Operation Enduring Freedom veterans have PTSD).

141. SIDIBE & UNGER, *supra* note 126, at 6.

142. *Id.*

143. *Id.*

ing their discharges should have taken PTSD symptoms into consideration do not deserve review, because they could have and should have been diagnosed by the military in the first instance.¹⁴⁴ This reasoning is potentially problematic, however, because medical professionals have only recently come to understand the full extent of PTSD's effects on behavior; for example, it is now known that PTSD symptoms may not manifest until years after service has ended.¹⁴⁵

Another issue that further undermines the credibility of BCMRs is the fact that they do not spend a significant amount of time deliberating each case before them.¹⁴⁶ On average, BCMRs from the Army and Navy spend less than six minutes deliberating each upgrade application they receive.¹⁴⁷ Estimates show that the Air Force deliberates for a slightly longer period of time and typically receives a read-ahead in anticipation of BCMR sessions.¹⁴⁸ The abovementioned amount of time dedicated to evaluating individual cases is shocking to the conscious, particularly when considered records may span the entire duration of a veteran's career, amounting to over twenty years in many instances. Additionally, very few veterans appeal or challenge BCMR decisions in federal court.¹⁴⁹ For example, out of tens of thousands of decisions recently made by the ABCMR, only fifty-six were remanded by federal courts back to the ABCMR, resulting in only about

144. *Id.*

145. *Id.*; see, e.g., Dep't of the Navy, Naval Discharge Review Board (NDRB), *Discharge Review Decisional Document, Docket No. ND13-00450* at 2 (Oct. 21, 2013) (granting relief to a petitioner who was erroneously discharged from the Navy on the grounds of a personality disorder when in fact, petitioner was suffering from a major depressive disorder).

146. HUMAN RIGHTS WATCH, *BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS* 11 n.22 (May 2016), https://www.hrw.org/sites/default/files/report_pdf/us0516_militaryweb_1.pdf ("Board sessions are conducted two times a week with an average of 80 cases decided by each Board" and "Boards usually sit twice a week on Tuesday and Thursday from 8:00 am until they are finished with the cases on the docket, typically about 1:00 pm." (quoting a FOIA response from Dept. of the Navy BCMR)).

147. *Id.* at 11; see also Alyssa Figueroa, *A Losing Battle: How the Army Denies Veterans Justice Without Anyone Knowing*, FUSION, <http://interactive.fusion.net/a-losing-battle/index.html> (last visited May 17, 2017) (stating that BCMR members "meet twice a week and begin deliberations at 8am and finish around 1pm, deciding about 80 cases" and that BCMR "members aren't required to read applications cover to cover. They're presented with a summary of the case and a decision recommended by an analyst who works for the BCMR"); U.S. Comm'n on Civil Rights, *Briefing: Sexual Assault in the Military* 16 (Jan. 11, 2013), http://www.usccr.gov/calendar/transcript/Transcript_01-11-13.pdf (testimony of Rachel Natelson, Legal Dir., Service Women's Action Network) (testifying that because such a small amount of time is dedicated to reviewing each upgrade application, BCMRs "hardly constitute the guarantor of due process").

148. HUMAN RIGHTS WATCH, *supra* note 146, at 11.

149. *Id.* at 12.

twenty percent of the veterans party to those fifty-six cases receiving some degree of relief.¹⁵⁰

2. Recommendations

Veteran advocates, such as the Veterans Legal Services Clinic at Yale Law School, have offered potential recommendations that may improve the current policies resulting in poor BCMR adjudication processes.¹⁵¹ The most effective methods for improving upgrade grants and ameliorating the crises faced by OTH veterans in part lie with Congress. Advocates argue that legislation must be enacted that (1) creates an automatic upgrade presumption for applicants maintaining a valid PTSD diagnosis, and (2) codifies the liberal considerations called for in Secretary Hagel’s 2014 PTSD Upgrade Memo.¹⁵²

But these basic statutory changes must go farther. For example, liberal consideration should be applied to cases where an applicant asserts that the misconduct leading to his OTH discharge was spurred by PTSD, TBI, or other mental health issue that went either misdiagnosed or undiagnosed altogether. PTSD and similar conditions typically result from an individual’s exposure to a traumatic event, particularly events that inevitably occur during war.¹⁵³ An upgrade presumption is, therefore, required given the nascent state of PTSD understanding and research.¹⁵⁴ In this vein, BCMRs should statutorily be required to empanel a mental health professional when considering petitions that offer a scintilla of evidence towards a potential diagnosis of PTSD, as DRBs are required to do, and provide a mental health screening for the veteran in cases where PTSD is suspected.¹⁵⁵

While statistics indicate that the ABCMR improved its methods for reviewing upgrade petitions from OTH and bad conduct discharge veterans, this is not the case with the other military departments.¹⁵⁶ The individual

150. *Id.* Human Rights Watch stated, “judicial oversight of BCMR cases is so negligible and deferential as to be nearly non-existent, providing little incentive for Boards to create credible decisions that can withstand scrutiny.” *Id.*

151. SIDIBE & UNGER, *supra* note 126, at 9–12.

152. *Id.* at 9; *see also* Rebecca Izzo, *In Need of Correction: How the Army Board for Correction Military Records is Failing Veterans with PTSD*, 123 YALE L.J. 1587, 1601–04 (2014) (arguing that BCMRs should operate more like COS determinations by the VA in providing the veteran-applicant the benefit of the doubt, in absence of clear and convincing evidence to the contrary).

153. Highfill-McRoy et al., *supra* note 32.

154. *Id.*

155. SIDIBE & UNGER, *supra* note 126, at 10. This is particularly important because since these veterans are VA-ineligible and frequently possess no health care, they lack the means to receive proper testing.

156. *Id.*; *see, e.g.*, Memorandum from the Office of Gen. Counsel, Dep’t of Def. to the Vietnam Veterans of America, FY16 2Q Statistics Pursuant to Settlement Agreement in *VVA v. DoD*, 15-cv-0658 (D. Conn.) (July 27, 2016) (stating that out of 161 petitions to the Naval Dis-

military departments must also promulgate regulations that incorporate the liberalized standards set forth in the 2014 PTSD Upgrade Memo. BCMRs should assume a more pro-claimant position, akin to the VA's, by better assisting petitioners in developing their cases.¹⁵⁷ BCMRs should grant the veteran the "benefit of the doubt" when there is an "approximate balance of positive and negative evidence."¹⁵⁸ And BCMRs should place more weight on veteran statements, especially when those statements discuss harsh conditions faced by the petitioner during her service and achievements accomplished during post-military, civilian life.

Finally, in conjunction with the VA, the DOD needs to vastly improve its outreach efforts to inform the tens of thousands of OTH veterans likely eligible for records' corrections what paths of recourse are available to them. The outreach program needs to reach VSOs, state bar associations, and pro bono practitioners and provide them with the tools and knowledge of the procedures and processes to best represent veterans seeking relief.¹⁵⁹ It is likely that if some of these recommendations were implemented, a greater number of veterans would petition for relief, accordingly receive upgrades, and gain access to benefits.

B. Department of Veterans Affairs

1. Issues

The Department of Veterans Affairs has created much broader exclusion criteria by its regulatory implementation of 38 C.F.R. § 3.12. It did so by inserting the catchall bar: "willful and persistent misconduct," as opposed to what Congress provided in 38 U.S.C. § 5303, which would only bar those who committed much more egregious conduct.¹⁶⁰ When it enacted the current VA eligibility standards, Congress intended to deny basic services only to individuals that received, "or should have received, a Dishonorable discharge by sentence of a court-martial."¹⁶¹ Specifically, in its passage of the Servicemen's Readjustment Act of 1944, Congress intended

charge Review Board and Board for Corrections of Naval Records, only twenty-five petitioners received relief).

157. See *supra* notes 112–115 and accompanying text.

158. See, e.g., *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).

159. SIDIBE & UNGER, *supra* note 126, at 11. Only 201 veterans applied to BCMRs for upgrades since the 2014 PTSD Upgrade Memo. *Id.* at 8; see also S. REP. NO. 114-49, at 128 (2015) (requiring the DOD to submit a report to the Committees on Armed Services of the Senate and House of Representatives on annual basis with information including the number of applications submitted to BCMRs and the "number of cases in which relief was granted" pursuant to the 2014 PTSD Upgrade Memo's directive).

160. See *supra* notes 59–62 and accompanying text.

161. VETERANS LEGAL CLINIC, *supra* note 25, at 6.

that basic benefits would not only be granted to those discharged honorably, but to those who received lesser discharges, only excluding those with dishonorable discharges by conviction of a court-martial.¹⁶²

Ineligible veterans retain the right to petition for benefits through a VA characterization of service (“COS”) determination.¹⁶³ Most excluded veterans, however, never receive this eligibility evaluation from the VA.¹⁶⁴ A COS determination only occurs when a veteran applies for benefits from the Veterans Benefit Administration (“VBA”).¹⁶⁵ Estimates indicate that only ten percent of veterans with negative discharges received a COS determination from the VA.¹⁶⁶ The remaining ninety percent of post-2001 OTH veterans have not received a COS evaluation.¹⁶⁷ Over 125,000 post-2001 veterans have not received an eligibility review and, therefore, remain ineligible for VA benefits by default.¹⁶⁸ Often times, veterans that do apply for a COS evaluation are summarily denied by the local VHA facility.¹⁶⁹ If a veteran does receive a COS evaluation, there is no predicting how the VHA will decide because there is an immense disparity in outcomes at the varying Regional Offices (“RO”) across the nation.¹⁷⁰ Furthermore, eligibility decisions fail to consider whether the petitioning individual ever “served in combat” or endured any other “hardship conditions.”¹⁷¹

Many OTH veterans that would probably receive benefits upon review are negatively and harshly impacted, in ways beyond preclusion from health care. Veterans excluded under current regulations are twice as likely to commit suicide, twice as likely to be homeless, and three times as likely to

162. *See generally* S. REP. NO. 78-755, at 15 (1944) (stating that individuals discharged under other than dishonorable conditions should not be barred from benefits; only a sentence by a court-martial should bar individuals from accessing VA benefits). In passing the [Servicemen’s Readjustment Act of 1944], Congress avoided language indicating that veterans’ benefits are only for those who have been Honorably discharged from service. The House Report on the bill provided: “Congress was generously providing the benefits on as broad a base as possible and intended that all persons not actually given a Dishonorable discharge should profit by this generosity.” H.R. REP. NO. 79-1510, at 8 (1946).

163. *See supra* Part I.D.3.

164. VETERANS LEGAL CLINIC, *supra* note 25, at 9.

165. *Id.* at 10.

166. *Id.*

167. *Id.* This is due in part to the fact that the VA does not conduct a COS evaluation automatically upon discharge. *Id.* The average COS determination also takes 1,200 days to complete. *Id.*

168. *Id.* at 2.

169. *Id.* at 10.

170. *Id.* at 16. In 2013, 69.2% of OTH veterans applying to a VHA in Boston were deemed “dishonorable” pursuant to the VA’s regulatory bars to benefits, while 100% of OTH veterans were deemed “dishonorable” at a VHA in Indianapolis. *Id.* at 16.

171. *Id.* at 14.

be involved in the criminal justice system.¹⁷² Not only are these results due to the discretionary policies of the VA, but also because of the overall systemic inadequacies of the VA.¹⁷³

The increased exclusion rate is not due to worse conduct by service members.¹⁷⁴ Many scholars note that other psychological issues, which are nearly inevitable consequences to military service, may be the underlying cause or causes of willful and persistent misconduct, issues that do not currently constitute an affirmative defense.¹⁷⁵

In fiscal year 2013, VA ROs, through COS determinations, found service to be “dishonorable” in ninety percent of all cases it reviewed.¹⁷⁶ The “dishonorable” veterans that decided to appeal to the BVA obtained similar results.¹⁷⁷ In fiscal year 2011, less than one percent of discharged service

172. Michael Blecker et al., Petition to Amend Regulations Restricting Eligibility for VA Benefits Based on Conduct in Service (Dec. 19, 2015), [https://www.swords-to-plowshares.org/sites/default/files/VA%20Rulemaking%20Petition%20to%20amend%20regulations%20interpreting%2038%20USC%20101\(2\)2.pdf](https://www.swords-to-plowshares.org/sites/default/files/VA%20Rulemaking%20Petition%20to%20amend%20regulations%20interpreting%2038%20USC%20101(2)2.pdf); see also Ray Sanchez, *What We Know About the Fort Lauderdale Airport Shooting Suspect*, CNN (Jan. 7, 2017, 9:02 PM), <http://www.cnn.com/2017/01/06/us/fort-lauderdale-airport-shooting-suspect/> (stating that the suspect was discharged from the Army National Guard upon returning from Iraq for unsatisfactory performance and did not receive the help he needed after reportedly talking about “the destruction and the killing of children”).

173. See generally Dave Boyer, *VA Still Plagued by Problems Two Years After Scandal*, WASH. TIMES (Apr. 3, 2016), <http://www.washingtontimes.com/news/2016/apr/3/va-still-plagued-by-problems-two-years-after-scandal/> (stating that the VA “is still beset with problems ranging from fresh accusation of falsified waiting lists to a system-wide failure to discipline [employee] wrongdoing”); Curt Devine & Drew Griffin, *Billions Spent to Fix VA Didn’t Solve Problems, Made Some Issues Worse*, CNN (July 6, 2016, 11:41 AM), <http://www.cnn.com/2016/07/05/politics/veterans-administration-va/> (discussing a congressional report that found despite the billions appropriated to the VA since its wait-list scandal in 2014, the VA has “failed to relieve many of the problems in delivering health care to veterans” and that “[i]n some cases, the report points out where so-called improvements to the VA system may have actually made things worse”).

174. VETERANS LEGAL CLINIC, *supra* note 25, at 9 (“Since World War II, the percentage of service members who received punitive discharges—that is, discharges for misconduct that justified a court-martial conviction—has stayed roughly the same: about 1%.”).

175. See, e.g., Amanda Carpenter, *Military Misconduct May Be Sign of PTSD*, WASH. TIMES (Jan. 12, 2010), <http://www.washingtontimes.com/news/2010/jan/12/misconduct-may-be-symptom-of-stress-disorder/> (citing a cautionary warning, in 2007, by a high-ranking Navy doctor within the DOD to their providers that “[t]he service may be discharging soldiers for misconduct when in fact they are merely displaying symptoms of post-traumatic stress disorder”); Maxine Waters & Jonathan Shay, *Opinion, Heal the “Bad Paper” Veterans*, N.Y. TIMES (July 30, 1994), <http://www.nytimes.com/1994/07/30/opinion/heal-the-bad-paper-veterans.html> (“Whatever the circumstances surrounding combat veterans’ bad-paper discharges, it is self-defeating to deny them benefits. We don’t save money by shutting them out; it costs taxpayers much more in unemployment compensation and support for prisons, homeless shelters, substance abuse treatment and emergency health care programs.”).

176. VETERANS LEGAL CLINIC, *supra* note 25, at 11.

177. *Id.* The average rate of success in COS appeals at the BVA is thirteen percent. *Id.* Three out of four veterans with OTH or worse discharges are denied eligibility for benefits by the BVA. *Id.* at 14.

members were excluded from federal benefits because of statutory bars, yet 5.5% were excluded because of the VA’s regulatory bars.¹⁷⁸ While Congress provided the VA with authority to effectuate additional regulations in excluding veterans from benefits, it nonetheless excludes many more veterans than Congress intended.¹⁷⁹

Serious consequences result from denying veterans access to VA benefits. One study found that Marines deployed to Iraq and subsequently diagnosed with PTSD after separation from service were eleven times more likely to be separated for misconduct than those that were not diagnosed.¹⁸⁰ After separation from military service, mental health issues likely continue and even worsen.¹⁸¹ One study determined that veterans outside of VA care have a thirty percent higher rate of suicide than those that receive VA care.¹⁸² Similarly, veterans with negative discharges are far more likely to be imprisoned than those discharged under honorable or general conditions.¹⁸³ Federal and local governments have stepped in to decrease this overwhelming overrepresentation in prisons.¹⁸⁴ For example, the VA-created Veteran Justice Outreach (“VJO”) program provides incarceration-avoidance services to veterans.¹⁸⁵ The VJO, however, can only provide support to VA-eligible veterans, leaving negatively discharged veterans without legal assistance.¹⁸⁶ Local governments across the nation have created Veteran Treatment Courts to help fill this void by offering diversionary programs to rehabilitate veterans, before prison or other punitive punish-

178. *Id.* at 11.

179. *Id.*

180. Highfill-McRoy et al., *supra* note 32. The same study found that Marines with a PTSD diagnosis were also eight times more likely to be discharged for substance abuse. *Id.*

181. See generally Mark A. Reger et al., *Risk of Suicide Among U.S. Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the U.S. Military*, 72 J. AM. MED. ASS’N PSYCHIATRY 561, 566–67 (2015) (stating that veterans discharged under other than honorable conditions are twice as likely to commit suicide as those discharged under honorable conditions).

182. JANET E. KEMP, VETERANS HEALTH ADMIN., SUICIDE RATE IN VA PATIENTS THROUGH 2011 WITH COMPARISONS WITH OTHER AMERICANS AND OTHER VETERANS THROUGH 2010, at 16–17 (2014), http://www.mentalhealth.va.gov/docs/suicide_data_report_update_january_2014.pdf.

183. See DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON AND JAIL, 2011–12 (2015), <https://www.bjs.gov/content/pub/pdf/vpj1112.pdf> (stating that 23.2% of veterans in prison and 33.2% of veterans in jail were negatively discharged from military service).

184. VETERANS LEGAL CLINIC, *supra* note 25, at 21–22.

185. *Id.*

186. *Id.* See generally *Veterans Justice Outreach Program*, U.S. DEP’T OF VETERANS AFF., <https://www.va.gov/homeless/vjo.asp> (last visited May 17, 2017) (describing the limited services the VJO can provide to veterans involved in the criminal justice system).

ments are imposed.¹⁸⁷ These courts, too, greatly utilize VA services to support their programs, limiting their overall effectiveness and minimizing their full outreach.¹⁸⁸ VA ineligibility also results in overwhelming rates of homelessness.¹⁸⁹ The Housing and Urban Development-Veterans Affairs Supportive Housing program, which provides Section 8 housing to veterans in conjunction with social work and health-care services, supports only those without negative discharges, in most cases.¹⁹⁰

2. Recommendations

Congress should remove the regulatory bars imposed by the VA in 38 C.F.R. § 3.12.¹⁹¹ These discretionary bars to veteran benefits are much more expansive than what Congress prescribed in 38 U.S.C. § 5303.¹⁹² Removing these bars would exclude only those veterans who received, or should have received, a conviction by a military court-martial, which is what Congress intended when it enacted 38 U.S.C. § 5303.¹⁹³ While many OTH veterans are discharged for patterns of misconduct, their misconduct would not satisfy the level of egregiousness contemplated by Congress. The “willful and persistent misconduct” regulatory bar to benefits is too ambiguous in its current form. The regulation fails to provide a comprehensive definition. Pursuant to 38 C.F.R. § 3.12(d)(4), the VA will consider a discharge “to have been issued under dishonorable conditions” if an individual’s discharge paperwork reflects that he was discharged for willful and persistent misconduct.¹⁹⁴ The language implies that a single occurrence of a minor offense will not rise to this level, but does not speak to the repetitiveness requirement of said minor offense.¹⁹⁵ This catch-all condition directly contravenes Congress’ intentions and, therefore, should be removed.

187. VETERANS LEGAL CLINIC, *supra* note 25, at 21–22; *see also* Press Release, Maryland Judiciary, Baltimore City District Court Begins First Veterans Treatment Docket (Oct. 9, 2015), <http://www.courts.state.md.us/media/news/2015/pr20151009.html>.

188. VETERANS LEGAL CLINIC, *supra* note 25, at 21–22.

189. *Id.* at 22.

190. *Id.* In 2014, a regional survey determined that two out of three unsheltered veterans in Houston had negative discharges. *Id.*

191. *See supra* note 62 and accompanying text.

192. *See supra* notes 59–61 and accompanying text.

193. *See supra* notes 159–160 and accompanying text.

194. 38 C.F.R. § 3.12(d)(4) (2016). The regulation continues, “[t]his includes a discharge *under other than honorable* conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.” *Id.* (emphasis added).

195. *Id.*

Additionally, the VA should automatically initiate COS evaluations for OTH veterans upon discharge from the military, instead of only initiating them if VHA benefits are requested.¹⁹⁶ By automatically initiating a COS determination on behalf of an OTH veteran, the VA may be able to preclude the possibility of a veteran not applying for one on his own due mere ignorance of the possibility. This measure, however, may prove to be too burdensome on an already overextended agency.¹⁹⁷ The VA could also improve its outreach efforts by informing all veterans, regardless of their discharge type, that a COS evaluation is available to them.¹⁹⁸ The VA should also allow its attorneys to assist in claims made by benefit-ineligible veterans, prior to receiving a final determination from a COS evaluation. OTH veterans are among those who need legal representation the most. While this may result in requiring the agency to expand its legal department, it will nonetheless lessen the burden on pro-bono attorneys, already managing hundreds of cases.¹⁹⁹ Improving the COS process might also take form by expanding the VA’s “duty to assist” petitioners in processing their claims.²⁰⁰ Or perhaps, it might occur by expanding the jurisdiction of the Federal Circuit, allowing it to reach the substance of individual cases.²⁰¹ Again, this remedy might cast too wide a net and not actually effect institu-

196. VETERANS LEGAL CLINIC, *supra* note 25, at 9.

197. *See generally* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-30, VETERANS HEALTH ADMINISTRATION: MANAGEMENT ATTENTION IS NEEDED TO ADDRESS SYSTEMIC LONG-STANDING HUMAN CAPITAL CHALLENGES (2016), <http://www.gao.gov/assets/690/681805.pdf>.

198. 2014 PTSD Upgrade Memo, *supra* note 97 (ordering the DOD to increase its outreach efforts to inform veterans with alleged-PTSD diagnoses that BCMRs are available mechanisms for remedy). Perhaps some sort of informational letter could be distributed to service members being discharged under OTH conditions, prior to their release from the armed forces.

199. *See, e.g., Veterans’ Benefits and Discharge Upgrades*, HOMELESS PERSONS REPRESENTATION PROJECT, INC., http://www.hprplaw.org/get_legal_help/veterans_benefits_and_discharge_upgrades (last visited May 17, 2017).

200. *See generally* DANIEL T. SHEDD, CONG. RES. SERV., R43740, VETERANS’ BENEFITS: THE DEPARTMENT OF VETERANS AFFAIRS AND THE DUTY TO ASSIST CLAIMANTS 1 (2014), <https://fas.org/sgp/crs/misc/R43740.pdf> (discussing the VA’s duty to assist veteran-claimants in developing their claims throughout the adjudication process, dubbing it a “unique obligation”); Rory R. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans’ Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS L. REV. 77, 80 (2010) (advocating that “although improvements to the current VA disability claims processing system are certainly warranted, any such improvements that are undertaken must be implemented in such a way as to preserve VA’s unique nonadversarial and pro-claimant structure”). *But see* Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner’s Presumption That Interpretive Doubt Be Resolved in Veterans’ Favor with Chevron*, 61 AM. L. REV. 59, 121–22 (2011) (concluding that the CVAC should restore a degree of deference to the VA, applying *Chevron* deference, when evaluating the agency’s decisions). Perhaps introducing a degree of adversity, without compromising the overall pro-claimant structure, into VA adjudicatory processes might result in greater positive COS determinations for OTH veterans.

201. *See supra* notes 158–162 and accompanying text.

tion-wide reform. Alternatively, as the plight of OTH veterans continues to multiply, perhaps the Federal Circuit will use its limited authority to deem 38 C.F.R. § 3.12(d) as “arbitrary and capricious.”²⁰²

C. *Military Sexual Trauma (“MST”)*

On July 14, 2010, the Department of Veterans Affairs released a memorandum stating that based on 38 U.S.C. § 1720(D),²⁰³ it would provide counseling, care, and other services to prior-service members who may not have veteran status, but who experienced sexual trauma while serving on active duty or active duty for training.²⁰⁴ This action by the VA made treatment to sexual assault victims much more accessible by (1) not requiring an individual to file a disability claim, (2) not requiring the injury to be service-connected, and (3) not requiring the individual to provide evidence of sexual trauma in order to receive care.²⁰⁵ Unfortunately, this VHA Directive abruptly expired on July 31, 2015, leaving hundreds of sexual assault victims without adequate health care, some of whom were already receiving benefits while the VHA Directive’s was in effect.²⁰⁶ Almost a year later, Acting Deputy Under Secretary for Health for Operations and Management, within the VA, published a memorandum justifying the withdrawal of these benefits.²⁰⁷ The memorandum cites the “recent amendments to

202. *Kreis v. Sec’y of the Air Force*, 866 F.2d 1508, 1511, 1514–15 (D.C. Cir. 1989); 38 U.S.C. § 7292(d)(1) (2002).

203. 38 U.S.C. § 1720(D). Section (a)(1) states the Secretary, in consultation with the Secretary of Defense:

[S]hall operate a program . . . [to provide] counseling and appropriate care and services to veterans who the Secretary determines require such counseling and care and services to overcome psychological trauma, which in the judgment of a mental health professional employed by the Department, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty or active duty for training.

Id. § 1720(D)(a)(1).

204. DEP’T OF VETERANS AFFAIRS, VHA DIRECTIVE 2010-033, MILITARY SEXUAL TRAUMA (MST) PROGRAMMING (2010).

205. *Id.* at 1. “Veterans and eligible individuals who received an ‘other than honorable’ discharge may be able to receive free MST-related care with the Veterans Benefits Administration (VBA) Regional Office approval.” *Id.*

206. *Id.* at 6; see generally Alex Zielinski, *Thousands of Sexual Assault Victims in the Military Have Been Denied Veteran Health Care*, THINK PROGRESS (May 30, 2016), <https://thinkprogress.org/thousands-of-sexual-assault-victims-in-the-military-have-been-denied-veteran-health-care-cc0f702764ef#.yione93xf>.

207. Memorandum from Steve Young, Acting Deputy Under Sec’y for Health for Operations and Mgmt. to Network Directors, Eligibility for Military Sexual Trauma-Related Counseling and Care and Services at the Department of Veterans Affairs (VA) (July 26, 2016) (on file with author).

38 U.S.C. 1720D” as the basis for the non-renewal of this vital program.²⁰⁸ The amendment, however, does not speak—either positively or negatively—about providing MST treatment to OTH veterans. It merely expands these services to individuals that experienced MST during periods of inactive training, such as National Guard and Reserve training.²⁰⁹ Therefore, the VA erroneously interprets Congress’ directive as a rescission of MST treatment to OTH veterans, further leaving individuals like Vorland and countless others without much needed care.²¹⁰ The VA places an immense burden on these victims by referring them to the tedious COS evaluations that notoriously deny OTH veterans the benefit of the doubt and often take years to resolve.²¹¹ In 2014, an estimated 10,600 active duty males and 9,600 females were sexually assaulted in the military.²¹² Regardless of the grounds and conditions for discharge, individuals who experienced MST during their service should not be precluded from VA health care benefits.²¹³

D. A Look at Potential Remedies

On March 3, 2016, U.S. Representative Mike Coffman (R-CO) introduced the Fairness for Veterans Act.²¹⁴ The bill seeks to ensure “that combat veterans, whose condition [PTSD or TBI-related] should have been considered prior to their discharge, receive due consideration in their post-discharge appeals.”²¹⁵ Rep. Coffman and the bill’s co-sponsors recognize

208. *Id.* The memorandum cites “title IV of the Veterans Access, Choice, and Accountability Act of 2014, Public Law 113-146 . . . (Choice Act)” as the law that amended Section 1720D. *Id.*

209. Veterans Access Choice and Accountability Act of 2014, Pub. L. No. 113-146, § 401, 128 Stat. 1754, 1755.

210. Memorandum from Steve Young, *supra* note 207, at 1. “Individuals who lack Veteran status are not eligible to receive MST-related counseling and care and services at VA medical centers and community-based outpatient clinics under 38 U.S.C. § 1720D(a)(1), even if they experienced sexual trauma while serving on inactive duty training.” *Id.*

211. *See supra* Part I.C.

212. ANDREW R. MORRAL ET AL., NAT’L DEF. RES. INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: VOL. 2. TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY xvii (2014). *See generally* HUMAN RIGHTS WATCH, *supra* note 146 (discussing how the military improperly discharged thousands of individuals due to “personality disorders” stemming from MST without investigating the probable correlation between the MST and subsequent personality disorder).

213. *See also* Parts II.A.2 and B.2 for other recommendations that would assist in remedying the removal of VA health care for MST victims with OTH or bad conduct discharges.

214. H.R. 4683, 114th Cong., (2016). This resolution would amend 10 U.S.C. § 1553(d).

215. Press Release, U.S. Representative Mike Coffman, Coffman Introduces Fairness for Veterans Act (Mar. 3, 2016), <https://coffman.house.gov/media-center/press-releases/coffman-introduces-fairness-for-veterans-act>. As of March 3, 2016, the proposed bill has been pending before the House Armed Services Committee. H.R. 4683, 114th Cong. (2016); *see also All Actions Except Amendments H.R. 4683*, CONGRESS.GOV, <https://www.congress.gov/bill/114th>

that “the Army has separated at least 22,000 combat veterans with less-than-honorable discharges since 2009” and that these discharges are often issued for minor misconduct, including being late to formation, but can also be linked to PTSD.²¹⁶ The bill would require DRBs to provide a rebuttable presumption in favor of the veteran if she served overseas and received a PTSD or TBI diagnosis from a mental healthcare professional.²¹⁷ This measure would make it easier for DRB petitioners to receive discharge upgrades, and would subsequently provide them with access to VA benefits.²¹⁸ While commendable, and a step towards providing negatively discharged veterans with recourse, the spirit of this bill would be equally effective, if not more so, in the setting of BCMRs, VA COS determinations, and BVA appeals’ processes. In those settings, as previously noted, the presumption generally tends to operate against the veteran petitioning for a discharge upgrade or VA benefits.²¹⁹ Furthermore, the Fairness for Veterans Act would require a veteran to obtain a PTSD, TBI, or other mental health diagnosis before receiving the presumption, but a diagnosis is not always accessible to a veteran ineligible for health care benefits. Congress should offer veterans with the favorable presumption in cases where PTSD is alleged or when a service record indicates any symptom of PTSD or a TBI. Finally, the proposed legislation should provide mental health screening for those with no formal diagnosis.

Some veteran advocates, on the other hand, call for a more sweeping response to this growing crisis.²²⁰ In this call-for-action memorandum (“Yale Memorandum”), its authors concluded that “[t]he President has the legal authority to pardon²²¹ veterans with an OTH [discharge] whose misconduct stemmed from undiagnosed post-traumatic stress disorder (PTSD) and other mental health issues, including pre-existing conditions.”²²² This

congress/house-bill/4683/all-actions-without-amendments (last visited May 17, 2017) (noting that on March 3, 2016, the bill was referred to the House Armed Services Committee).

216. *Id.* The co-sponsors of the bill include: Tim Walz (D-MN), Lee Zeldin (R-NY), Kathleen Rice (D-NY), Ryan Zinke (R-MT), Steve Russell (R-OK), Walter Jones (R-NC), Seth Moulton (D-MA), Tammy Duckworth (D-IL), Patrick Murphy (D-FL), and Ruben Gallego (D-AZ). *Id.*

217. *Id.*

218. *Id.*

219. *See supra* Parts II.A.1 and II.B.1.

220. Memorandum from Elizabeth Dervan et al., Yale Law School, to President Barack Obama, RE: Presidential Authority to Pardon Veterans with Bad Paper (Nov. 14, 2016), <https://vva.org/wp-content/uploads/2016/11/Memo-on-Presidential-Authority-to-Pardon-Veterans-with-Bad-Paper.pdf>.

221. U.S. CONST. art. II, § 2, cl. 1. Article Two, Section Two of the Constitution provides, “[t]he President shall . . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” *Id.*

222. Memorandum from Elizabeth Dervan et al., *supra* note 220, at 1. The memorandum further states, “[t]hrough the military has since adopted PTSD screening policies, at least 10,000 vet-

pardon, the authors contend, would remove the bars to VA benefits for thousands of veterans in need.²²³ Acknowledging that it would take years of advocacy, outreach, and Congressional effort to ensure “that all veterans who deserve discharge upgrades receive one, a presidential pardon of all veterans with OTHs and mental health diagnoses would be an immediate and comprehensive remedy.”²²⁴ While pardons typically restore rights to an individual she held prior to her conviction, however, they do not necessarily provide an individual with rights or benefits she did not hold prior to the conviction.²²⁵

The Yale Memorandum cites President Gerald Ford’s exercise of his clemency power to support their request.²²⁶ On September 16, 1974, President Ford pardoned individuals who evaded the Vietnam War draft between August 1964 and March 1973.²²⁷ This proclamation, however, granted clemency discharges and not honorable discharges.²²⁸ In response to the limited effect of his pardon, President Ford issued a memorandum on January 19, 1977, that bestowed honorable discharges to those “who were wounded in combat or who received decorations for valor in combat in Vietnam and subsequently received [OTH] discharges,” absent a “compelling reason to the contrary in any case.”²²⁹

It is unclear whether the presidential pardon recommended by the Yale Memorandum would effectively remove the statutory or regulatory bars preventing OTH veterans from accessing essential benefits. A pardon of that nature would probably have to be accompanied by legislative reform and more fervent policy measures from the executive branch and its departments, namely the Departments of Defense and Veterans Affairs. At a minimum, the VA needs to better utilize and streamline its COS process, synchronize its self-imposed regulatory bars with Congress’ statutory bars

erans of Operations Iraqi Freedom (OIF) and Enduring Freedom (OEF) likely have bad paper and PTSD.” *Id.* at 2.

223. *Id.*

224. *Id.* at 3.

225. *Frequently Asked Questions Concerning Executive Clemency*, U.S. DEP’T JUSTICE, <https://www.justice.gov/pardon/frequently-asked-questions-concerning-executive-clemency> (last updated Feb. 22, 2017); *see also* *Robertson v. Gibson*, 759 F.3d 1351 (Fed. Cir. 2014) (denying a veteran’s claim that a Presidential pardon conferred eligibility for VA benefits by contending that the veteran did not lose access to previously-held rights because of his discharge status).

226. Memorandum From Elizabeth Dervan et al., *supra* note 220, at 4.

227. Proclamation No. 4313, 39 Fed. Reg. 33,293–95 (Sept. 16, 1974).

228. *Id.* The clemency discharges “shall not bestow entitlement to benefits administered by the Veterans Administration.” *Id.*; *see also* *Robertson v. Gibson*, 759 F.3d 1351, 1359 (Fed. Cir. 2014) (holding that the VA could consider the presidential pardon when conducting a COS determination).

229. Memoranda on Vietnam-Era Selective Service Discharges, 3 PUB. PAPERS 1076 (Jan. 19, 1977), <http://www.presidency.ucsb.edu/ws/?pid=5576>.

to benefits, and provide veterans with a greater presumption in their favor.²³⁰

III. CONCLUSION

The current policies and adjudication processes of the Department of Defense and the Department of Veterans Affairs have left thousands of veterans, discharged under other-than-honorable conditions, presumptively ineligible for benefits to which they are otherwise entitled.²³¹ While discharging individuals from military service serves a national purpose, it is, nonetheless, not without its flaws.²³² Many service members separated from the armed forces are discharged for reasons that may be attributable to latent manifestations of PTSD or other mental health-related conditions, deriving from combat or other rigors of military service.²³³ These veterans are owed the treatment envisioned and promised by Congress and the American people. Standards of review by the Boards for the correction of military records and discharge review boards must continue to liberalize and provide leniency in cases where PTSD, TBIs, or sexual trauma are alleged.²³⁴ Veterans petitioning these adjudicatory bodies deserve a presumption in their favor.

The executive and legislative branches of the federal government must lead these movements. The current status, in which these two branches of government are waiting for the other to remedy these ever-growing issues, must be ameliorated before the lack of access to benefits for tens of thousands of veterans becomes a national health crisis.²³⁵ In the absence of meaningful reform, OTH veterans will continue go without health care, will continue to become homeless, will continue to fill jails and prisons across the nation, and will continue to take their own lives.²³⁶ While members of the current administration state that they plan to provide mental health care treatment to OTH veterans, it is unclear whether this policy statement would still require individuals with PTSD-like symptoms to endure the rigors of the COS process, nor does it indicate how the administration plans to better institutionalize this care.²³⁷ Lastly, the recent action taken by

230. *See supra* Parts II.A & II.B.

231. *See supra* Part II.

232. *See supra* Part I.A.

233. SIDIBE & UNGER, *supra* note 126, at 6.

234. *See supra* Part II.A.2.

235. *See supra* Part II.C.

236. *See supra* notes 178–181 and accompanying text.

237. Leo Shane III, *VA to Start Offering Mental Health Care to “Bad Paper” Veterans*, MILITARY TIMES (Mar. 7, 2017), <http://www.militarytimes.com/articles/bad-paper-va-extending-mental-health-services> (quoting the Secretary of the Department of Veterans Affairs, David Shulkin, as saying that the VA will start offering mental health services for veterans with OTH

members of Congress and veterans’ advocates are well intentioned, but not nuanced or meaningful enough to effect institutional change.²³⁸ A more comprehensive remedy, one that addresses the shortcomings of veterans’ appeal processes and benefit-acquisition mechanisms, needs to be developed. This remedy must compliment and support all avenues OTH veterans possess to attempt to make themselves whole again, or as close to whole as possible.

discharges “as soon as possible, saying the issue is too important to wait for congressional intervention”).

238. *See supra* Part II.D.