



ENSURING THAT ALL VETERANS AT RISK OF SUICIDE AND HOMELESSNESS  
CAN ACCESS BASIC HEALTH CARE AND SUPPORTIVE SERVICES  
AT THE DEPARTMENT OF VETERANS AFFAIRS

Written Testimony of Dana Montalto  
Veterans Legal Clinic, Legal Services Center of Harvard Law School  
before the  
Subcommittee on Disability Assistance & Memorial Affairs, House Veterans Affairs Committee  
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**Executive Summary:**

Congress, the Department of Veterans Affairs, and the American public are committed to ending homelessness and suicide in the veterans community. But many of the veterans most at risk of homelessness and suicide are excluded from accessing basic VA care and services because of a less-than-honorable discharge status—which may have been caused by an in-service mental health condition, such as Post-Traumatic Stress Disorder, or Military Sexual Trauma. While the World War II Era Congress created an expansive eligibility standard for VA, under which many veterans with less-than-honorable discharge statuses may be entitled to benefits, VA’s regulations, policies, and practices have excluded thousands of veterans whom Congress sought to help. Reforming how VA treats veterans with less-than-honorable discharges is long overdue.

**Background on the Veterans Legal Clinic:**

The Veterans Legal Clinic at the Legal Services Center of Harvard Law School provides free legal representation to veterans and their family members in civil matters, including federal veterans benefits appeals, state veterans benefits appeals, discharge upgrades, and records corrections. Since its founding in 2012, the Clinic has focused on serving veterans who are most at risk or unable to advocate for themselves—including those who have service-related mental health conditions such as Post-Traumatic Stress Disorder, have experienced Military Sexual Trauma, are homeless or formerly incarcerated, or come from marginalized or underrepresented communities. Many of our veteran clients have received less-than-honorable “bad paper” discharges, and we have significant experience with the Department of Veterans Affairs and Department of Defense laws, regulations, policies, and adjudicatory systems that affect such veterans—including

character of discharge determinations before the Veterans Benefits Administration and health care applications to the Veterans Health Administration.

In addition to providing individual *pro bono* representation to veterans with bad paper discharges, the Veterans Legal Clinic also collaborates with other veterans organizations on initiatives to update and improve government policies that prevent veterans from accessing needed care and supportive services and to train more *pro bono* advocates about how to represent veterans with bad paper. Among these initiatives are the *Underserved* report<sup>i</sup> and associated Petition for Rulemaking<sup>ii</sup> on behalf of Swords to Plowshares and the National Veterans Legal Services Program, which asked VA to amend its character of discharge regulations that govern eligibility for basic VA services for veterans with bad paper; the *Turned Away* report,<sup>iii</sup> which documented the nationwide practice of VHA unlawfully denying veterans with bad paper the right to apply for health care; and the *Discharge Upgrade Practice Manual*, a forthcoming treatise co-authored with Connecticut Veterans Legal Center on how to effectively advocate for veterans seeking to correct an unlawful or unjust discharge status.

My work at the Clinic focuses on advocating for veterans with bad paper discharges to help them access health care and other benefits. I provide *pro bono* representation to individual veterans before the Department of Defense military review boards, Department of Veterans Affairs, and other state and federal agencies, and in state and federal court. I also conduct community legal trainings for veterans and veteran service providers, as well as recruit, train, and mentor private attorneys to offer *pro bono* representation to veterans who unjustly received bad paper discharges. In addition to leading or contributing to the systemic reform initiatives mentioned above, I co-authored a law review article on the history of VA’s character of discharge eligibility rules.

discharge characterizations				
Administrative Separation			Punitive (Court-Martial)	
Honorable	General or Under Honorable Conditions	Other Than Honorable or Undesirable	Bad Conduct	Dishonorable
VA Decided Presumptively Eligible			VA Decided Presumptively Ineligible	

*The armed forces assign one of five discharge characterizations to every servicemember upon that member’s separation—which, by congressional design, do not directly correlate to VA’s “other than dishonorable” eligible standard. Current VA regulations put all former members who received an Other Than Honorable or worse discharge status into a “limbo” category where they cannot access services unless and until they first prove their eligibility.*

## Wartime Congresses Have Chosen To Expand Access to Basic VA Services, But VA’s Regulations Bar Many Veterans From Getting the Help They Need

The Department of Veterans Affairs is tasked with carrying out our national obligation to care for those who have served our country in uniform, especially if they have service-related mental or physical wounds. Having learned from the hungry and jobless World War I veterans who marched on Washington when the government failed to support them in their transition home, the World War II Era Congress expanded the eligibility standards for accessing basic VA services—like health care, disability compensation, vocational rehabilitation, and home loans—so that an Honorable discharge was not required.<sup>iv</sup> Rather, Congress chose to provide support to all former service members who were discharged or released under “other than dishonorable” conditions, which can include many service members who received less-than-honorable “bad paper” discharges.<sup>v</sup> Congress recognized then that many service members faithfully carried out their duties, but were nevertheless kicked out less-than-honorably because of “combat stress” or other extenuating circumstances.<sup>vi</sup> While Congress understood that those service members perhaps should no longer be serving in the military, it believed that they should have help transitioning back to civilian life and treating any service-related disabilities.<sup>vii</sup>

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

*Rep. Colmery, Sponsor of 1944 G.I. Bill*

However, the regulations that VA created to implement the statutory standard are overbroad, vague, and drastically depart from Congress’s intent.<sup>viii</sup> They exclude many former service members based on minor misconduct, without considering any mental health conditions or other mitigating circumstances that may have led to the discharge.<sup>ix</sup>

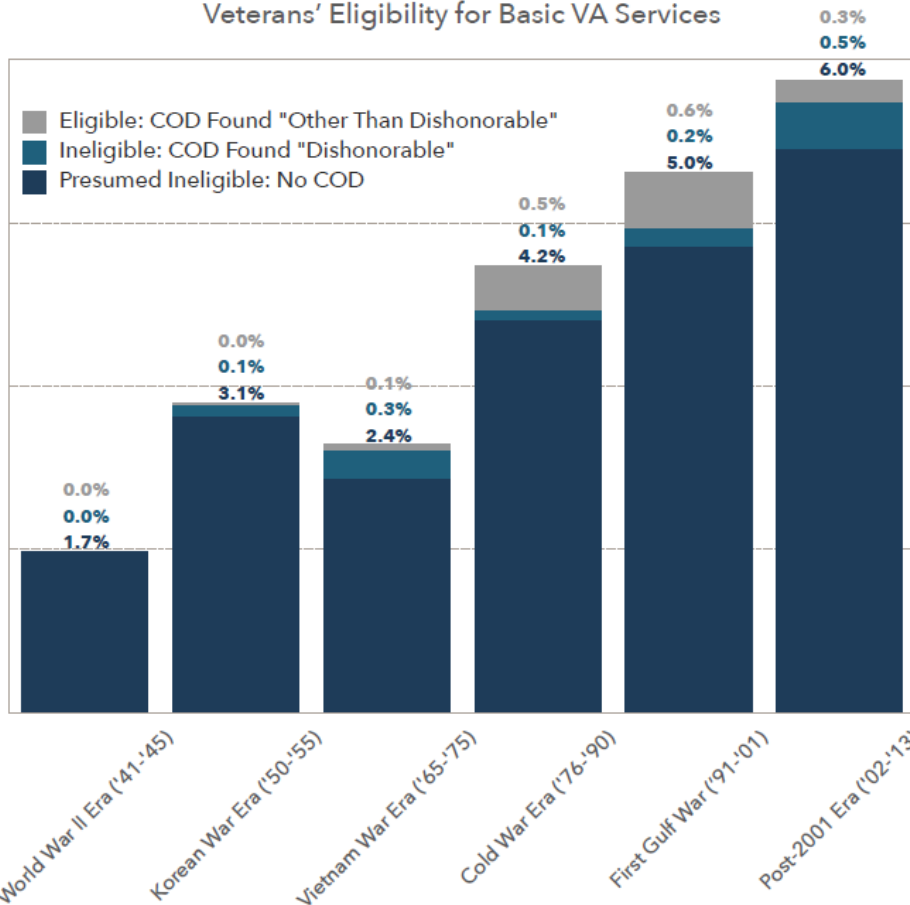
Moreover, VA’s regulations presumptively exclude all former service members discharged with an administrative Other Than Honorable discharge characterization.<sup>x</sup> That is, former service members are not able to access supportive services unless and until they go through a lengthy and burdensome administrative process<sup>xi</sup>—a process that takes VA on average more than 500 days to complete.<sup>xii</sup> However, as discussed more below, many veterans are not even able to get into that line to wait because of regulatory barriers and oversight failures that turn away veterans from simply applying.

**125,000**

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

Over time, as the service branches have discharged increasing percentages of service members with less-than-honorable administrative discharges, more and more veterans have been presumptively excluded from accessing VA services.<sup>xiii</sup> Whereas less than 2% of World War II veterans were unable to access VA, now, almost 7% of post-9/11 veterans are presumptively barred.<sup>xiv</sup> Yet, no one would say that the veterans of our most recent wars—all of whom volunteered to serve—are less honorable than those who served before them.

Veterans' Eligibility for Basic VA Services



*As the armed forces have discharged higher and higher percentages of servicemembers with bad paper discharges, VA's regulations and policies on Character of Discharge (COD) determinations have operated to exclude more and more veterans.*

### **VA Presumptively Excludes Veterans Who Served In Combat, Experienced Military Sexual Trauma, or Are At Heightened Risk of Homelessness and Suicide**

There is a strong connection between having an in-service mental health conditions, such as Post-Traumatic Stress Disorder (PTSD), and receiving a less-than-honorable discharge. One study found that Operation Iraqi Freedom (OIF) Marine Corps combat veterans diagnosed with PTSD are 11 times more likely to be discharged for misconduct and 8 times more likely to be discharged for substance abuse.<sup>xv</sup> A recent Government Accountability Office report found that of service members discharged for misconduct from FY2011 to 2015, nearly two-thirds had been diagnosed with a mental health condition or a Traumatic Brain Injury (TBI) in the past two years.<sup>xvi</sup> Indeed, Department of Defense guidance acknowledges that veterans' mental health symptoms are often deemed misconduct, which directly leads to less-than-honorable discharge characterizations.<sup>xvii</sup>

Similarly, many veterans who experienced Military Sexual Trauma were kicked out either because of MST-related mental health conditions, misdiagnoses of Personality Disorder, or in retaliation for reporting a sexual assault.<sup>xviii</sup>

Veterans with bad paper not only have higher rates of mental health conditions, they also have higher rates of unemployment, incarceration, homelessness, and suicide.<sup>xix</sup> One recent study found that they are at three times the risk of experiencing suicidal ideations.<sup>xx</sup>

Robert, a Military Sexual Trauma survivor who received an Other Than Honorable discharge, sought mental health treatment at VA in 2019. The VA enrollment representative said that Robert would be eligible because of special eligibility rules for veterans who experienced MST and sent Robert to make an appointment at triage. However, the VA triage employee refused to schedule Robert for an appointment because of his OTH discharge. Only later, with the assistance of a *pro bono* attorney, did VA eventually agree to grant Robert access to VA mental health treatment and schedule an appointment.

But, that same study found that veterans with bad paper who had recently accessed VA mental health care had no greater risk of suicidal ideation.<sup>xxi</sup> Access to VA health care is truly life-saving.

In addition to the strong connection between in-service mental health and bad paper discharges, many veterans were separated with bad paper because of discrimination on the basis of race or sexual orientation.<sup>xxii</sup>

### **By Statute, Many Veterans with Bad Paper Should Be Able to Access VA—But VA’s Regulations, Policies, and Practices Bar Them**

Every veteran—even a veteran with a less-than-honorable discharge—has the right to submit an application for a VA benefit, to have that application considered on the merits, and to receive a written decision and notice of appeal rights.

Many veterans with bad paper may, in fact, be eligible for full or limited VA benefits, including health care and disability compensation. For example, they may be able to prove through VA’s Character of Discharge (COD) Determination review that their service was “other than dishonorable.” Or they may have served multiple enlistments and were honorably discharged from their first enlistments but less-than-honorably discharged from their last enlistment, and those earlier Honorable discharges establish their eligibility. Or they may fit into one of the exceptions for certain programs—such as homelessness prevention services or mental health counseling for certain veterans—where discharge status is not a factor.

Yet, across the country and going back decades, VA has unlawfully denied veterans with less-than-honorable discharges their right to simply apply for benefits. Most often, this occurs when a veteran seeks health care at a VA health facility—and frontline VA staff turn the veteran away based on the discharge status listed on a DD 214. When turned away by VA, the veteran is not allowed to fill out an application form, is not provided an individualized eligibility review, is not given a written decision, and is not advised of the right to appeal the denial. Our recent report documented numerous instances of VA unlawfully turning away veterans.<sup>xxiii</sup> Currently, more than 400,000 veterans are at risk of being turned away by VA or have been dissuaded from even attempting to apply.<sup>xxiv</sup>

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

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

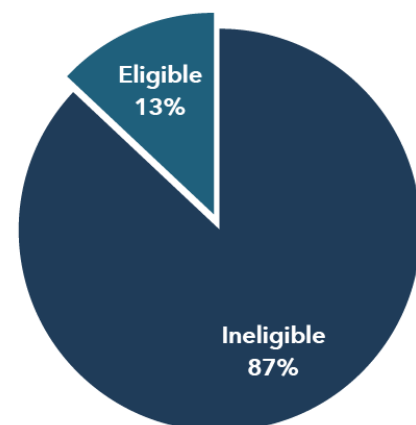
\* There are limits and additional eligibility requirements for each possibility listed. Not all veterans with bad paper can receive benefits.

Even those veterans with bad paper who do succeed in getting VA to take their applications continue to face barriers. VBA sometimes fails to act on an application, especially those referred from VHA, or fails to communicate the outcome of its COD review to VHA or the veteran.<sup>xxv</sup>

And, as mentioned above, the standards that VBA uses in its COD review process are overly broad and vague, leading to excessive exclusion and inconsistent outcomes. Our past report found that the Board of Veterans' Appeals denied eligibility to 3 out of every 4 veterans who had served in combat and had PTSD.<sup>xxvi</sup> Overall, from 1992 to 2015, BVA Veterans Law Judges denied eligibility for 87% of veterans with less-than-honorable discharges<sup>xxvii</sup>—but there was significant variability across the VLJs, with one VLJ who denied just 55% of veterans but seven VLJs who denied 100% of veterans.<sup>xxviii</sup>

Misconceptions about the potential eligibility for veterans with less-than-honorable discharges pervades VA, from its most junior staff to its most senior appointees. Combined with the many issues in the application and adjudication process, this leaves many veterans with bad paper wrongly believing that they are categorically ineligible for VA care. The misinformation propagated by VA leads to misunderstandings throughout the veterans community and among veteran service organizations, all of which leads to many veterans with bad paper being dissuaded from ever even reaching out to VA—even in times of great need.

Board of Veterans' Appeals Character of Discharge Determinations, 1992-2015





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

Many veterans with bad paper, when being turned away from VA services, are told to go apply for a discharge upgrade and return when their DD 214 says “honorable”. Not only does this violate VA’s congressionally imposed duty to decide eligibility, it ignores the realities of the discharge upgrade process. In recent decades, the military review boards have granted upgrades in a small minority of cases. Even with favorable changes in the law concerning upgrades based on in-service mental health conditions, the success rates are below 50%.<sup>xxix</sup> And, the boards usually take more than a year—and often two to four years—to render a decision. For a veteran experiencing suicidal ideation or homelessness, that is too long to wait. Moreover, Congress established the military review boards at the same time that it created the “other than dishonorable” eligibility standard for accessing VA benefits: Congress intentionally created two separate paths for veterans to both correct unjust discharges and access supportive services. VA and DOD must both uphold their statutory duties to veterans.

### **What VA Can and Must Do To Ensure That No Veteran Is Denied Needed Care**

VA can, within its existing powers, fix many of the barriers that prevent veterans with less-than-honorable discharges from accessing care and supportive services. There are four main tasks:

First, VA must improve training, guidance, and supervision for all VA staff about the character of discharge eligibility rules. VA should adopt a no wrong door approach to accessing VA care and should encourage all former service members to apply.

Second, VA must update its character of discharge regulations to account for positive or mitigating circumstances, exclude only those who committed serious misconduct, simplify the adjudication process, and extend tentative health care eligibility while it conducts its review. Almost four years ago, VA agreed that its current regulations needed revision and began the rulemaking process. However, VA has yet to issue a proposed rule. In the meantime, VA has denied more than 4,000 veterans with bad paper under the current rules that it admits are inadequate.

VA Associate General Counsel  
Warman:

One of the problems that we have frankly is that these [Character of Discharge regulation] terms are very broad and very imprecise.

1971 Hearing Before the House  
Armed Services Committee

Third, VA must improve communication, both between VHA and VBA and between VA and veterans. There should be a separate form that a veteran can use to initiate a Character of Discharge

review that gathers information relevant to the VA’s standards. VHA and VBA must revise their form letters and ensure that their computer systems are up to date so that a veteran’s eligibility— if already established—can be quickly confirmed.

Fourth, and finally, VA must embark on a sustained public outreach campaign to inform the veterans community about the true eligibility standards and encourage veterans with less-than-honorable discharges to come forward and apply.

Congress has a critical role to play as well. The first is already happening—by holding this hearing, this Committee is conducting important oversight of how VA treats this population of veterans. Congress can also consider ways of changing the laws to simplify the eligibility standards and streamline the eligibility determination process.

VA has an important mission, different from the mission of the service branches. Whereas the service branches must maintain good order and discipline, sometimes through the use of military justice measures and separation from the service, VA must care, support, and rehabilitate former service members so that they can be productive and successful members of the civilian community. Many veterans with bad paper have much to contribute, if they are given access to mental health care, job retraining, and any other needed transitional services. At the very least, VA should be there for veterans when they are struggling with service-connected physical or mental health disabilities, when they are experiencing homelessness, and when they are at risk of suicide. Discharge status should not pose a barrier to accessing basic VA services. The World War II Era Congress saw this—and this Congress can, too.

Larry served as a combat engineer in Vietnam. After being hit with a grenade that failed to explode, he developed both physical and mental wounds. He was separated with an Other Than Honorable discharge for going AWOL after returning to the U.S. He was told that his OTH discharge made him completely ineligible for any VA benefits, and so for years he struggled on his own with undiagnosed and untreated PTSD. Nearly 50 years after returning from Vietnam, with the assistance of *pro bono* counsel, Larry finally applied for a discharge upgrade and was then able to access VA health care.

Thank you for your time and attention to this important matter.

**Please address questions and comments** to Dana Montalto, (617) 390-2737, [dmontalto@law.harvard.edu](mailto:dmontalto@law.harvard.edu).

**For more information** about access to VA for veterans with bad paper discharges, consult two reports co-authored by the Veterans Legal Clinic, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper* (available at <http://legalservicescenter.org/underserved>) and *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges* (available at <http://legalservicescenter.org/turnedawaybyva>).

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<sup>i</sup> Veterans Legal Clinic, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper* (2016), available at <http://legalservicescenter.org/Underserved>.

<sup>ii</sup> Swords to Plowshares et al., Petition for Rulemaking to Amend Regulations Interpreting 38 U.S.C. § 101(2), available at <https://www.swords-to-plowshares.org/wp-content/uploads/VA-Rulemaking-Petition-to-amend-regulations-interpreting-38-USC-10122.pdf>.



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- iii Veterans Legal Clinic et al., *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges* (2020), available at <http://legalservicescenter.org/TurnedAwaybyVA>.
- iv Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical & Legal Basis for Excluding Veterans from “Veteran” Services*, 122 Penn. St. L. Rev. 69 (2017).
- v *Id.*
- vi *Id.*
- vii *Id.*
- viii *Id.* See 38 C.F.R. § 3.12(d). See also Veterans Legal Clinic, *Underserved*, *supra* note 1.
- ix Adams & Montalto, *With Malice Toward None*, *supra* note 4; Veterans Legal Clinic, *Underserved*, *supra* note 1. See 38 C.F.R. § 3.12(d).
- x See 38 C.F.R. § 3.12(a).
- xi Veterans Legal Clinic, *Underserved*, *supra* note 1.
- xii Data on file with author. See Veterans Legal Clinic, *Underserved*, *supra* note 1.
- xiii Veterans Legal Clinic, *Underserved*, *supra* note 1.
- xiv Veterans Legal Clinic, *Underserved*, *supra* note 1.
- xv Robyn Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC Psychiatry 88 (2010).
- xvi U.S. Gov’t Accountability Off., GA-17-260, *Actions Needed to Ensure Post-Traumatic Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations* 12 (2017).
- xvii See Chuck Hagel, Secretary of Defense, Memorandum, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (Sep. 3, 2014) (“Hagel Memorandum”); Brad Carson, Principal Deputy Under Secretary of Defense, Memorandum, Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) (Feb. 24, 2016) (“Carson Memorandum”); A.M. Kurta, Under Secretary of Defense, Memorandum, Clarifying Guidance to the Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (Aug. 25, 2017) (“Kurta Memorandum”).
- xviii Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors* (2016), available at <https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors>.
- xix Adi V. Fundlapalli et al., *Military Misconduct and Homelessness Among US Veterans Separated from Active Duty, 2001-2012*, *Journal of the American Medical Association* 314 (2015); Claire Hoffmire et al., *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans*, *Am. J. Prev. Med* 1,3 (2019); Sara Kintzle et al., *Exploring the Economic and Employment Challenges Facing U.S. Veterans: A Quantitative Study of Volunteers of America Service Providers and Veteran Clients* (May 2015).
- xx Claire Hoffmire et al., *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans*, *Am. J. Prev. Med* 1,3 (2019).
- xxi *Id.*
- xxii Veterans Legal Clinic et al., *Do Ask, Do Tell, Do Justice: Pursuing Justice for LGBTQ Military Veterans*, at 5-7 (June 2018); Don Christensen et al., *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities within the United States Military Justice System*, at ii (May 2017).
- xxiii Veterans Legal Clinic, *Turned Away*, *supra* note 3.
- xxiv *Id.*
- xxv *Id.*
- xxvi Veterans Legal Clinic, *Underserved*, *supra* note 1.
- xxvii *Id.*
- xxviii *Id.*
- xxix Veterans Legal Clinic, *Turned Away*, *supra* note 3.