



VETS HELPING VETS SINCE 1974

**TOWARDS AN END TO VETERAN HOMELESSNESS AND SUICIDE:**  
*Recommended Changes to the VA's Character of Discharge Determination Process*

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**Testimony Summary**

The VA's exclusion of veterans with less than honorable discharges has significant consequences on those veterans and on society. "Bad paper" veterans are more likely to have Post-Traumatic Stress Disorder, to have experienced Military Sexual Trauma, and be at risk of suicide than those with honorable discharges. Without the resources and services available from the VA, they experience higher rates of incarceration and homelessness. The VA has the authority to provide care and assistance to these veterans today, but their current scheme excludes veterans for minor misconduct and without consideration of the traumas and hardships these veterans have endured. With greater outreach to veterans, guidance to VA decision makers, and more expansive eligibility criteria, the VA could vastly improve the lives of these veterans and take a meaningful step in ending veteran homelessness and suicide.

**Background on Swords to Plowshares**

Founded in 1974 by veterans, Swords to Plowshares ("Swords") is a community-based not-for-profit 501(c)(3) organization that provides needs assessment and case management, employment and training, housing, and legal assistance to approximately 3,000 veterans in the San Francisco Bay Area each year. War causes wounds and suffering that last beyond the battlefield. Swords' mission is to heal the wounds of war, to restore dignity, hope, and self-sufficiency to all veterans in need, and to prevent and end homelessness and poverty among veterans.

The Legal Services Unit at Swords to Plowshares provides pro bono advice and representation to low-income and homeless veterans in the San Francisco Bay Area on their Department of Veterans Affairs (VA) benefits claims and Department of Defense (DOD) discharge upgrades. We focus our resources on helping the most vulnerable of the veteran population – homeless veterans, those experiencing mental illness, and veterans who are precluded from VA benefits, employment, and other resources due to a less than honorable discharge. We make representation decisions based primarily on whether our advocacy will likely make a difference in the outcome of the veteran's case. We regularly represent clients in Character of Discharge (COD) determination cases because the high rate of denials in this process

means clients are unlikely to prevail without assistance. We also prioritize these cases because the outcomes can be life altering. As explained in detail below, a positive COD determination is necessary for veterans with a less than honorable discharge to access VA benefits. These benefits, which often include free VA healthcare and monetary compensation for service-connected disabilities, can mean the difference between a veteran sleeping on the street or with a roof over their head. Last year, Swords assisted over 600 veterans and approximately 44% of those cases included COD determinations.

I began working at Swords' Legal Unit in 2014 and served as our Pro Bono Program Manager for many years before moving into the role of Legal Director in June 2019. As the Legal Director, I lead a team of veterans' law experts in our work representing clients before the VA and DOD. I personally represent veterans before the VA on their COD determinations, and have supervised numerous volunteer attorneys and Swords' staff attorneys in such matters. Additionally, I have trained hundreds of attorneys in effective advocacy for veterans with "bad paper" discharges through Swords' Pro Bono Program and courses with the Practicing Law Institute, a continuing legal education provider to attorneys.

### **Who are "Bad Paper" Veterans?**

Veterans who receive a less than honorable discharge from the military are commonly referred to as veterans with "bad paper." Roughly 1 out of every 4 veterans receives a bad paper discharge, but which veterans are affected often hinges on factors outside of the quality of their service or the severity of any misconduct. Rather, it is heavily influenced by circumstances such as the era of their service, their branch of service, and whether they developed PTSD or some other mental health condition due to their in-service experiences.

Bad paper discharges overall have increased from 1.7% during the WWII era to 6.8% for post-2001 veterans, meaning that recent-era veterans are far more likely to have received a discharge that precludes their access to benefits than veterans of prior eras. Additionally, due to differences in leadership and management style, certain branches hand down more bad paper discharges than others. As a result, an Airman is 13 times more likely to receive an Under Honorable Conditions discharge than a Marine with the same misconduct, service length, and performance history – a massive disparity.<sup>1</sup>

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**Veterans with "bad paper" discharges are twice as likely to commit suicide as those separated under honorable conditions.**

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In addition, many veterans with bad paper deployed to a war zone, experienced hardships or trauma during service, and acquired physical and mental injuries that persist to this day. Often, performance issues or misconduct leading to a bad paper discharge are symptomatic of such injuries. Tellingly, Marines with combat deployments who were diagnosed with PTSD were 11 times more likely to be discharged for misconduct than those without a PTSD diagnosis.<sup>2</sup>

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<sup>1</sup> Gov. Accountability Office, Rep. No. FCP-80-13, *Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Is Needed* 29-33 (1980).

<sup>2</sup> R.M. Highfill-McRoy, et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, BMC Psychiatry (2010).

There are also significant racial disparities. Black Airmen are 71% more likely to face a court martial or non-judicial punishment than white Airmen, and Black Soldiers are 61% more likely to face a general or special court martial than white Soldiers.<sup>3</sup> The unacceptable outcome is veterans of color are more likely to have a discharge that precludes them from VA monetary and health benefits than white veterans. Lastly, service members who report sexual harassment and sexual assault are subjected to higher rates of administrative action which impacts their discharge status, indicating the pattern of retaliation against MST survivors in the military.<sup>4</sup>

Considering all of this, it is easy to understand why veterans with bad paper are often in great need of VA healthcare and assistance. When compared to veterans who were honorably discharged, they are more likely to have mental health conditions, experience homelessness, and to be involved with the criminal justice system.<sup>5</sup> Perhaps most sobering, they are also twice as likely to commit suicide. Yet, due to an unnecessarily burdensome and inequitable system for determining eligibility, they are refused services by the VA.

### **Overview of the VA Character of Discharge Determination Process for “Bad Paper” Veterans**

Not everyone who served in the military is considered a veteran per the VA’s definition. Since 2001, over 125,000 people have been discharged from active duty with bad paper and do not have “veteran status” at the VA.<sup>6</sup> This number includes 30,000 service members who deployed to a contingency operation during their service.<sup>7</sup> Only those who meet the VA’s definition of veteran are eligible for VA benefits. To meet their criteria, the former service member must have “separated under conditions other than dishonorable.”<sup>8</sup> The VA determines this through a process called the Character of Discharge (COD) Determination.

#### ***Types of Military Discharges***

Whether a veteran meets the VA’s definition depends in large part on the discharge status given to them by the DOD when they leave the military. The service member will be given one of six discharge statuses:

1. Honorable
2. General Under Honorable Conditions
3. Uncharacterized
4. Other than Honorable (formerly referred to as Undesirable)
5. Bad Conduct

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<sup>3</sup> Protect Our Defenders, *Racial Disparity in Military Justice* (2017), available at: [https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report\\_20.pdf](https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf); See also, Gov. Accountability Office, *DOD And the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities* (2019), available at: <https://www.gao.gov/assets/700/699380.pdf> (finding that Blacks, Hispanics, and males were more likely than Whites to be tried in general and special courts-martial in all military services.)

<sup>4</sup> 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>.

<sup>5</sup> Veterans Legal Clinic, Legal Services at Harvard Law School, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper* (2016), available at <https://bit.ly/underserved-vlc>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 38 U.S.C. § 101(2)

6. Dishonorable

The first four discharges – Honorable, General, Uncharacterized and Other than Honorable (OTH) – are administrative discharges given by the service member’s command.

The last two – Bad Conduct and Dishonorable – are punitive discharges given as part of a court martial conviction. There are two types of court martials that have the authority to separate a service member – a special court martial and a general court martial. In civilian terms, a special court martial would compare to a misdemeanor level court, and a general court martial would compare to a felony level court.

**Who is Eligible for VA Benefits?**

To be eligible for GI Bill Education Benefits, the VA requires at least one fully honorable term of active duty service. For other VA benefits, such as VA Health Care, VA Service-Connected Disability Compensation, and VA Wartime Pension, the VA has some discretion over a veteran’s eligibility.

As the chart below lays out, if a veteran has an Honorable or General Under Honorable Conditions discharge, the VA concedes that the applicant meets the definition of a veteran and grants them benefits eligibility without review.<sup>11</sup> Veterans with Uncharacterized discharges due to entry level separation are also eligible for benefits without review.<sup>12</sup>

If a veteran has an OTH administrative discharge or a Bad Conduct punitive discharge from a *special* court martial conviction, the VA conducts a COD determination to decide whether to grant that veteran

Discharge Status	Explanation	VA Benefits Eligibility
Honorable	No misconduct or minor misconduct	Eligible <sup>9</sup>
General Under Honorable Conditions	Minor misconduct	
Uncharacterized	Due to Entry Level Separation	
Uncharacterized	Due to Void Enlistment or Dropped from the Rolls	VA Character of Discharge Determination needed
Other than Honorable (OTH)	Service record shows some misconduct, but <i>not</i> separated due to court martial conviction	
Bad Conduct	From conviction of a special court martial (misdemeanor-level)	
Bad Conduct	From conviction of a general court martial	Barred from VA benefits <sup>10</sup>
Dishonorable	From conviction of a general court martial	

<sup>9</sup> Unless a statutory bar applies. See 38 U.S.C. § 5303.

<sup>10</sup> Unless the claimant was found insane at the time of the misconduct, per VA definition of insanity at 38 CFR § 3.354.

<sup>11</sup> 38 CFR 3.12(a) (“A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.”)

<sup>12</sup> The only exception to this is when a statutory bar applies, but it is incredibly rare that a statutory bar would apply and that the service member received one of these discharge statuses. Thus, practically speaking, if a veteran has one of these statuses,

eligibility. This is also true for those separated with an Uncharacterized discharge due to a voided enlistment or being dropped from the rolls.

Lastly, veterans with a Bad Conduct or Dishonorable discharge from a *general* court martial are statutorily barred from VA benefits. An exception to this bar is if the veteran is found to be insane at the time of the misconduct, per the VA's definition of insanity.<sup>13</sup> Additionally, if the veteran with a Bad Conduct or Dishonorable discharge has a separate, earlier, honorable period of active duty, they would be eligible for benefits from that period of service.

### ***How Does the VA Determine Eligibility for Those with OTH and Bad Conduct Discharges?***

Unlike most VA adjudications, there is no designated application for a veteran to request a COD determination. The determination happens automatically whenever a veteran with an OTH or Bad Conduct discharge applies for VA benefits. For example, if a veteran with an OTH applies for VHA benefits at an enrollment office of a VA healthcare facility or applies to the VBA for service-connected disability compensation, those applications should trigger the VA to conduct a COD determination.

When the VA receives an application from a "bad paper" veteran, the VA will review any evidence and argument the claimant and their advocate submits, along with their military records. There are statutory and regulatory bars to "veteran status" that guide the VA in their determination of whether, based on that evidence, a veteran should be found benefits eligible.

A **statutory bar** to benefits exists when VA determines a former service member's discharge was under any of the conditions discussed in 38 U.S.C. 5303 and listed in 38 C.F.R. 3.12(c). Those conditions are:

- As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities
- Due to a sentence of a general court martial
- Resignation by an officer for the good of the service
- As a deserter
- As an alien during a period of hostilities, and
- Due to an absence without official leave (AWOL) for continuous period of 180 days or more, absent compelling circumstances.

A **regulatory bar** to benefits exists when the VA determines a former service member's discharge was due to any of the offenses listed at 38 C.F.R. 3.12(d). The statutory definition of veteran requires that the former service member be separated "under conditions other than dishonorable," and these regulations are the VA's elaboration on what conditions they consider to be dishonorable. Those conditions are:

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their discharge status will not preclude them from VA benefits. (See discussion below regarding the statutory bars found at 38 U.S.C. § 5303 and 38 C.F.R. § 3.12(c)).

<sup>13</sup> 38 C.F.R. § 3.354.

- Acceptance of an undesirable (or other than honorable) discharge to escape trial by general court martial
- Mutiny or spying
- An offense involving moral turpitude. This includes, generally, conviction of a felony.
- Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.
- Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty.

## **Common Issues Facing Veterans and their Advocates in the COD Process and Recommended Solutions**

Swords has advocated for hundreds of veterans navigating the COD determination process. Through this experience we have identified aspects of the current system that lead to unjust and sometimes non-sensical outcomes. The four main issues we and our veteran clients face with the VA's current COD determination process are 1) a lack of clear guidance on what misconduct falls within the regulatory bars leading to inconsistent outcomes; 2) a lack of outreach to veterans about the COD determination process; 3) a lack of consideration for mitigating evidence based on mental health and other trauma-based injuries; and 4) inconsistent outcomes due to the DOD's inconsistent use of less than honorable discharges across branches, eras, races, and MST experiences. As a result of these issues, veterans who served honorably and have minor misconduct in their record, including combat veterans and MST survivors, are denied the benefits they desperately need to heal after their military service.

### **1. Lack of Clear Guidance: The Overbroad and Vague Regulatory Language Fails to Provide Claimants and VA Adjudicators with Proper Guidance, Leading to Unjust and Inconsistent Outcomes**

The current VA regulations provide little guidance to veterans and their advocates, as well as VA adjudicators, on what misconduct warrants being barred from eligibility. This results in a host of unjust and inconsistent outcomes.

#### ***a. Unclear Guidance Leads to Perverse Results***

The VA Adjudication Manual provides little guidance to adjudicators regarding what misconduct would and would not be considered "willful and persistent," per VA regulation. As shown in the excerpt below, the guidelines are minimal and provide only one example. ("A one-time offense or a technical violation of police regulations or ordinances does not necessarily constitute willful and persistent misconduct."). No definition of willful or persistent is included, and the decision makers' only other guidance is the bare bones text provided in the regulation itself. In a review of cases, the BVA denied eligibility because an absence of one week was "not minor" despite the veteran's combat deployment to the Gulf,

while in another case the BVA found the absence of one month was minor.<sup>14</sup> Additional meaningful guidance would minimize the risk of these inconsistent outcomes and give adequate notice to advocates and adjudicators on what the VA is looking for in COD applications.

Similarly, the regulatory bar based on misconduct involving “moral turpitude” is vague and has led to outrageous outcomes. Again, the VA’s own adjudication manual provides unclear guidance. It states, “[T]he development activity must apply a liberal standard” without any additional information on exactly what “liberal” means, and what “standard” is being referenced.

Guidance to VA Adjudicators on “Willful and Persistent” in the M21-1MR	
III.v.1.B.3.d. Additional Information on Discharges for Willful and Persistent Misconduct	<p>A discharge, including those issued under OTH conditions, for behavior constituting willful and persistent misconduct is considered to have been issued under dishonorable conditions and is a bar to benefits.</p> <p><b>Exceptions:</b></p> <ul style="list-style-type: none"> <li>• A minor offense is not considered willful and persistent misconduct if service was otherwise honest, faithful, and meritorious.</li> <li>• Insanity is a defense to willful misconduct.</li> </ul> <p><b>Notes:</b></p> <ul style="list-style-type: none"> <li>• A one-time offense or a technical violation of police regulations or ordinances does not necessarily constitute willful and persistent misconduct.</li> <li>• Multiple offenses are not automatically deemed “persistent.”</li> </ul> <p><b>References:</b> For more information on</p> <ul style="list-style-type: none"> <li>• willful and persistent misconduct, see <a href="#">38 CFR 3.12(d)(4)</a>, and</li> <li>• the effect of a finding of insanity, see <ul style="list-style-type: none"> <li>• <a href="#">38 CFR 3.12(b)</a></li> <li>• <a href="#">38 CFR 3.354 (b)</a></li> <li>• <a href="#">M21-1, Part III, Subpart v. 1.E</a> and</li> <li>• <a href="#">Struck v. Brown</a>, 9 Vet.App. 145 (1996).</li> </ul> </li> </ul>

The ambiguity of this regulatory bar also leads to perverse outcomes. The VA Office of General Counsel (OGC) issued the only meaningful guidance available on this regulation in a 1987 precedential opinion. Analyzing whether a veteran’s conviction of burglary, larceny, housebreaking, and narcotics involved moral turpitude, the OGC stated that an offense constitutes moral turpitude if it “gravely violates accepted moral standards, is committed without justification or legal excuse, and, by reasonable calculation, would be expected to cause harm or loss to person or property.”

Guidance to VA Adjudicators on “Moral Turpitude” in the M21-1MR	
III.v.1.B.3.c. Additional Information on Discharges for Moral Turpitude	<p>A bar to benefits exists when the facts indicate the discharge was for moral turpitude, generally including conviction of a felony.</p> <p>Office of General Counsel Opinion 6-87 defined <i>moral turpitude</i> as a willful act committed without justification or legal excuse that gravely violates accepted moral standards and would likely cause harm or loss of a person or property.</p> <p>Moral turpitude does <b>not</b> have to be a felony conviction; it can be a single incident, or a series of events.</p> <p><b>Note:</b> When determining whether an offense is related to moral turpitude, the development activity must</p> <ul style="list-style-type: none"> <li>• apply a liberal standard, and</li> <li>• consider the context and any mitigating circumstances, including whether an SC mental or physical condition caused, aggravated, or resulted in the offense.</li> </ul>

Just last month Swords received a decision after a Higher Level Review where the VA held that a one-time positive drug test was an offense of moral turpitude. In our client’s case, the VA cited this OGC opinion and held that the one-time positive drug test fit this definition since that offense “gravely violates accepted moral standards”. Unfortunately, Swords has exhausted our local Regional Office appeals and the veteran will now need to wait for the BVA to correct this error.

<sup>14</sup> [Title Redacted by Agency](#), No. 97-28543 (Bd. Vet. App. Aug. 18, 1997); [Title Redacted by Agency](#), No. 06-19120 (Bd. Vet. App. July 7, 2006).

The legislative history is clear that Congress intended to exclude only those veterans whose misconduct in service would have warranted a dishonorable discharge.<sup>15</sup> Yet, the ambiguity of VA regulations allows for veterans, like Swords' client, to be turned away for very minor misconduct.

*b. Vast Discrepancies Exists Amongst VA Regional Offices*

The lack of clear guidance to adjudicators has resulted in significantly different approval rates in COD determinations based on which VA Regional Office hears the case and when. For example, in FY2018 the Regional Office in Milwaukee, WI granted 5.9% of COD cases, whereas veterans living across the state line in Illinois had a COD approval rate of 25%. The Regional Office in Los Angeles approved only 15% of COD cases that year whereas 130 miles south in San Diego, the approval rate was nearly 40%. In Philadelphia, the COD approval rate in FY2009 was 84%, in FY2015 was 8%, and in FY2018 was 31%.<sup>16</sup>

Which side of the state line a veteran happens to live on, or what year the veteran happens to apply for benefits, should not vastly alter their eligibility for federal veterans' benefits.

*c. COD Outcomes Defy Congressional Intent*

Moreover, the failure of the VA to issue clear guidance on the COD determination process has led to outcomes incongruent with congressional intent. For example, the Court of Appeals for Veterans Claims has held that an AWOL of 30 days constitutes "willful and persistent" misconduct, and the BVA has held that as little as a one-week AWOL also qualifies. Yet, the statute establishing the COD process states that an AWOL of 180 days or more would be considered a bar to benefits, indicating that Congress did not intend for a one-week absence to bar veterans from benefits. The outcome otherwise suggests the VA has gone well beyond the bounds of its statutory authority.

Importantly, the VA has authority from Congress to allow access to benefits and services to many more veterans than they currently do. Most applicants are denied eligibility based on the VA's discretionary criteria set out in their regulations rather than because of a statutory requirement.<sup>17</sup> Approximately 4 out of 5 veterans are denied eligibility based on regulatory, not statutory, grounds. A review of BVA decisions found 7 out of every 10 veterans denied VA eligibility have been excluded based on a regulatory bar, and 84% of those denials were based on 38 CFR 3.12(d)(4) alone – "willful and persistent misconduct".<sup>18</sup> This is significant because the VA could, with relative ease and speed, issue guidance to its adjudicators and alleviate the identified problems.

**2. Lack of Outreach: The VA Processes Few COD Cases Relative to the Number of Veterans with "Bad Paper" due to a Lack of Information and Outreach to the Veteran Community about Their Possible Eligibility.**

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<sup>15</sup> *Underserved*, supra note 5.

<sup>16</sup> On file with author.

<sup>17</sup> M.A. Reger et al., *Risk of Suicide Among US Military Service Members Following OEF/OIF Deployments and Separation from US Military*, J. Am. Med. Ass'n Psychiatry (2015).

<sup>18</sup> *Underserved*, supra note 5.



In my years of assisting veterans, I have never had a client ask me directly for assistance in the VA's COD determination process. At Swords, we help hundreds of veterans annually who have "bad paper" discharges, but they come to our offices seeking assistance on the DOD's Discharge Upgrade process because they understand that process to be the only one available to help them obtain VA benefits. The VA also does not initiate this process upon discharge, and it is only triggered when a veteran applies for VA benefits. Since many veterans with less than honorable discharges simply assume they are not eligible for VA benefits, they never apply and thus are not evaluated. Only ten-percent of veterans with bad paper discharges receive an eligibility evaluation from the VA.<sup>19</sup> In addition, the VA often fails to initiate COD reviews when veterans request healthcare at a VA hospital or clinic.<sup>20</sup> Until the veteran applies to the VBA and the VBA completes a COD adjudication, almost no services are available to the veteran. Between 2009-2018, nearly half of the 58 VA Regional Offices received fewer than 10 COD claims in any year, including the Denver and Boston Regional Offices.<sup>21</sup>

Although a DOD discharge upgrade is also a path to benefits eligibility, the wait times to obtain a decision on a discharge upgrade are even longer than those at the VA and the chances of success are quite low.<sup>22</sup>

Those veterans excluded from VA services are some of the most in need. A 2005 study found that USMC veterans with PTSD were eleven times more likely to have misconduct discharges than those Marines without PTSD. Between 2009-2015, the Army discharged 20,000 service members with a misconduct discharge *after* diagnosing them with PTSD.<sup>23</sup> The VA has decided to exclude these service members suffering from PTSD from healthcare and assistance unless they can prove themselves worthy through the unjust COD process. And thousands of veterans who are at greater risk of suicide and homelessness may never access this process because they do not know it exists.

### **3. Lack of Consideration of Mitigating Evidence: The Regulations Fail to Account for Mental and Other Health Issues, Such as PTSD, TBI, and Military Sexual Trauma.**

Nearly six years ago, the DOD issued the first of four memoranda providing guidance to the military records corrections boards on how PTSD, Traumatic Brain Injury (TBI), Military Sexual Trauma (MST), and other mental health conditions should factor into their decision making regarding military discharge upgrades. The general guidance is that a veteran's application should be given "liberal consideration" when it is established that a mental health condition mitigates the misconduct that led to a less than honorable discharge. As a result of this guidance, veterans with PTSD and other mitigating mental health conditions have a higher rate of success before the Boards, albeit they still experience significant delays in obtaining decisions.<sup>24</sup> The Boards instituted this guidance given our greater understanding today of mental health conditions, in particular PTSD, and the prevalence and impact of TBIs and MST.

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<sup>19</sup> *Underserved*, supra note 5.

<sup>20</sup> 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>.

<sup>21</sup> On file with author.

<sup>22</sup> Veterans Legal Services Clinic, Yale Law School, *Unfinished Business: Correcting "Bad Paper" For Veterans with PTSD* (2015), available at: <https://www.law.yale.edu/sites/default/files/documents/pdf/unfinishedbusiness.pdf>.

<sup>23</sup> Swords to Plowshares et al., *Petition for Rulemaking to Amend Regulations Interpreting 38 U.S.C. § 101(2)*, available at <https://bit.ly/rulemaking-petition>

<sup>24</sup> *Unfinished Business*, supra at note 19.

The VA has yet to issue comparable regulations in assessing a veteran's eligibility for VA benefits where mental health is a factor. The current law is silent regarding the impact mental health and trauma has on former service members' eligibility. As a result, adjudicators are not required to consider if a veteran has combat-related PTSD or survived a sexual assault in service when assessing if they should be found benefits eligible despite a less than honorable discharge. The perverse outcome then is that veterans in greatest need of VA benefits – those struggling with PTSD, TBI, and other debilitating mental illnesses – are the ones denied treatment and benefits. Although there is now limited guidance in the VA Adjudicator's Manual on considering service-connected mental health conditions only in moral turpitude cases, in practice, there is little impact on the presence of mitigating mental health evidence in the outcome of a veteran's COD case.

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*U.S. Marine Corps Veterans with PTSD are 11 times more likely to have a less than honorable discharge than those without PTSD.*

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In a review of BVA cases where mental health was a factor, the Board found a veteran's service was "dishonorable" 84% of the time.<sup>25</sup> Only one out of every four veterans whose misconduct may be attributed to a TBI are successful in their COD determination. And 81% of cases where a veteran reported PTSD were denied eligibility.<sup>26</sup>

Many of these veterans are men and women who served honorably in war, came home after experiencing extraordinary traumas and hardship, struggled to acclimate due to the severity of their PTSD and/or TBI symptoms, and misconduct led to their discharge. They have no access to healthcare, therapists, social workers, or disability assistance – all services essential to ending veteran suicide and homelessness. The suicide rate among "bad paper" veterans is twice that of other veterans and their rates of homelessness and incarceration are 50% higher than those who separated with an honorable discharge.<sup>27</sup> The VA has a regular practice of turning these veterans away.

#### **4. Inconsistent Outcomes: Veterans from Different Eras and Different Branches have Vastly Different Rates of "Bad Paper," thus Impacting Their VA Benefits Eligibility**

Veterans today are much more likely to be excluded from VA benefits than in previous eras. During WWII and the Korean War, less than 2% of veterans did not have "veteran status" at the VA. Today, nearly 6.5% of veterans who served in the Global War on Terror (2002-2013) are excluded from VA benefits.

The rate of misconduct discharges also varies greatly by branch. The Marine Corps issues an Other than Honorable Discharge to one out of every 10 Marines, whereas the Air Force issues an OTH to one out of every 20 Airmen. The Army issues them to only 3% of service members. A Government Accountability Office report compared Marines and Airmen with the same misconduct history and found the Air Force was 13 times more likely to give a discharge under honorable conditions.<sup>28</sup>

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<sup>25</sup> This is only slightly lower than the BVA's overall denial rate of 87% of COD cases.

<sup>26</sup> *Petition for Rulemaking*, supra at note 23.

<sup>27</sup> *Underserved*, supra at note 5.

<sup>28</sup> *GAO Report*, supra at note 1.

Perhaps most alarming are the vast differences between white service members and those of color in their experience of the military justice system. In a given year, Black Airmen are 71% more likely to face a court martial or non-judicial punishment than white Airmen, and Black Soldiers are 61% more likely to face a general or special court martial than white Soldiers.<sup>29</sup> Lastly, those who experience MST in the service are at greater risk of receiving a less than honorable discharge than those who do not.<sup>30</sup>

Although the VA has no control over how the DOD dispenses military justice and discharges, they have authority over who is found eligible for veterans' benefits after they separate. They could authorize PTSD treatment and benefits assistance to veterans with service-connected PTSD despite a less than honorable discharge. They could provide support and services to those with minor misconduct who otherwise served our country meritoriously. They could provide clear, accurate guidance, that aligns with Congressional intent, regarding the statutory and regulatory bars so there is consistent, correct application of the law.

The VA is positioned to provide exceptional care to veterans with less than honorable discharges. Under their current Character of Discharge scheme, this is not happening. We implore the VA to review their current practices and to revise them to include our most vulnerable veterans.

Sincerely,



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<sup>29</sup> *Racial Disparity in Military Justice*, supra at note 4.

<sup>30</sup> *Booted*, supra at note 3.