Volume 214 **Winter 2012**

MILITARY LAW REVIEW

ARTICLE

BEYOND "T.B.D.": UNDERSTANDING VA'S EVALUATION OF A FORMER SERVICEMEMBER'S BENEFIT ELIGIBILITY FOLLOWING INVOLUNTARY OR PUNITIVE DISCHARGE FROM THE ARMED FORCES

Major John W. Brooker, Major Evan R. Seamone & Ms. Leslie C. Rogall

MILITARY LAW REVIEW

Volume 214 **Winter 2012**

CONTENTS

ARTICLE

Headquarters, Department of the Army, Washington, D.C.

Pamphlet No. 27-100-214, Winter 2012

MILITARY LAW REVIEW—VOLUME 214

Since 1958, the *Military Law Review* has been published at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import to military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

The *Military Law Review* (ISSN 0026-4040) is published quarterly by The Judge Advocate General's Legal Center and School, 600 Massie Road, Charlottesville, Virginia, 22903-1781, for use by military attorneys in connection with their official duties.

SUBSCRIPTIONS: Interested parties may purchase private subscriptions from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, at (202) 512-1800. See Individual Paid Subscriptions form and instructions to the *Military Law Review* on pages vi and vii. Annual subscriptions are $20 each (domestic) and $28 (foreign) per year. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Technical Editor of the *Military Law Review*. Address inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies to the Technical Editor of the *Military Law Review*. Judge Advocates of other military services should request distribution

through their publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

CITATION: This issue of the *Military Law Review* may be cited as 214 MIL. L. REV. (page number) (Winter 2012). Each issue is a complete, separately-numbered volume.

INDEXING: *Military Law Review* articles are indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; four computerized databases—the JAGCNET, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*—and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois, 60611. The *Military Law Review* is available at http://www.jagcnet.army.mil/MLR.

SUBMISSION OF WRITINGS: Anyone may submit for publication consideration, articles, comments, recent development notes, and book reviews in Microsoft Word format to the Senior Editor, *Military Law Review*, at TJAGLCS-MLR-Editor@conus.army.mil. If electronic mail is not available, please forward the submission in duplicate, double-spaced, to the Senior Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, 22903-1781. Written submissions must be accompanied by an electronic copy on a 3 1/2 inch computer diskette or CD, preferably in Microsoft Word format.

Footnotes should be typed double-spaced and numbered consecutively from the beginning to the end of the writing, not chapter by chapter. Citations should conform to *The Bluebook: A Uniform System of Citation* (19th ed. 2010), copyrighted by the *Columbia*, *Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to the *Military Citation Guide* (TJAGLCS 16th ed. 2011).

Masculine pronouns appearing in the text refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of branch of service, duty title, present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If submitting a lecture, or a paper prepared in partial fulfillment of degree requirements, the author should include the date and place of delivery of the lecture or the date and source of the degree.

EDITORIAL REVIEW: The *Military Law Review* does not purport to promulgate Department of the Army policy. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of the Department of Defense, The Judge Advocate General, the Judge Advocate General's Corps, or any other governmental or non-governmental agency.

The Editorial Board of the *Military Law Review* includes the Chair, Administrative and Civil Law Department, Lieutenant Colonel Luis O. Rodriguez; and the Director, Professional Communications Program, Major Keirsten H. Kennedy. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. We accept submissions from military and civilian authors, irrespective of bar passage or law school completion. In determining whether to publish an article, note, or book review, the Editorial Board considers the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. No minimum or maximum length requirement exists.

When the Editorial Board accepts an author's writing for publication, the Editor of the *Military Law Review* will provide a copy of the edited text to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies usually are available in limited quantities. Authors may request additional copies from the Technical Editor of the *Military Law Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Technical Editor of the *Military Law Review* at TJAGLCS-Tech-Editor@conus.army.mil.

Bound copies are not available and subscribers should make their own arrangements for binding, if desired.

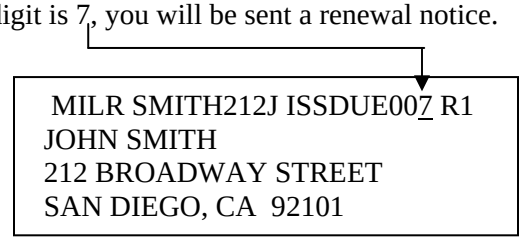
REPRINT PERMISSION: Contact the Technical Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

INDIVIDUAL PAID SUBSCRIPTIONS TO THE *MILITARY LAW REVIEW*

The Government Printing Office offers a paid subscription service to the *Military Law Review*. To receive an annual individual paid subscription (4 issues), complete and return the order form on the next page.

RENEWALS OF PAID SUBSCRIPTIONS: You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSDUE" on the top line of the mailing label as shown in this example:

When this digit is 7, you will be sent a renewal notice.



The numbers following ISSDUE indicate how many issues remain in the subscription. For example, ISSDUE001 indicates a subscriber will receive one more issue. When the number reads ISSDUE000, you have received your last issue and you must renew.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

INQUIRIES AND CHANGE OF ADDRESS INFORMATION: The Superintendent of Documents is solely responsible for the individual paid subscription service, not the Editors of the *Military Law Review* in Charlottesville, Virginia.

For inquires and change of address for individual paid subscriptions, fax your mailing label and new address to (202) 512-2250, or send your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, DC 20402

United States Government
INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review
SUBSCRIPTION ORDER FORM

Order Processing
Code: 5937

Easy Secure Internet:
bookstore.gpo.gov

Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104

Mail: Superintendent of Documents
PO Box 371954
Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the ***Army Lawyer*** (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the ***Military Law Review*** (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐ – ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

MILITARY LAW REVIEW

Volume 214 **Winter 2012**

BEYOND "T.B.D.": UNDERSTANDING VA'S EVALUATION OF A FORMER SERVICEMEMBER'S BENEFIT ELIGIBILITY FOLLOWING INVOLUNTARY OR PUNITIVE DISCHARGE FROM THE ARMED FORCES

MAJOR JOHN W. BROOKER*
MAJOR EVAN R. SEAMONE†
MS. LESLIE C. ROGALL‡

Table of Contents

I. Introduction

A. The Lost Legion—Wounded Warriors with Bad Paper Discharges

The number of servicemembers with undiagnosed and untreated psychological wounds of wars increases with each passing day.[1]

---

* Judge Advocate, U.S. Army. LL.M. 2010, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2003, University of North Carolina at Chapel Hill; B.A., 1998, Wake Forest University, Winston-Salem, North Carolina. Major Brooker currently teaches a variety of wounded warrior and veterans law courses at The Judge Advocate General's School, U.S. Army. Prior to joining the faculty at The Judge Advocate General's School, U.S. Army, Major Brooker held numerous military justice positions, to include trial counsel, senior defense counsel, and chief, military justice.

† Judge Advocate, U.S. Army. LL.M., 2011, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2002, University of Iowa College of Law, Iowa City, Iowa; M.P.P., 1999, School of Public Policy and Social Research, University of California, Los Angeles; B.A., 1997, University of California, Los Angeles. Major Seamone writes from the perspective of ten years' experience in primarily military justice positions, with his most recent duty ending in 2013 as the Chief of Military Justice for Fort Benning, Georgia and the U.S. Army Maneuver Center of Excellence.

‡ Deputy Assistant General Counsel, Office of General Counsel (OGC), Department of Veterans Affairs (VA), Washington, DC. Also currently serving as Coordinator, VA OGC Disability Counsel Assistance Program (DCAP). J.D., 1999, Rutgers University School of Law – Newark; B.A., 1996, Rutgers College. Previously served with VA OGC as Senior Appellate Attorney, 2006-2008, and Appellate Attorney, 2005-2006, and as Appellate Counsel, Judicial Appeals Office, Disabled American Veterans, Washington, DC, 2004-2005. Retired as a captain in the U.S. Army Judge Advocate General's Corps, and served in various billets with the XVIII Airborne Corps and Womack Army Medical Center, Fort Bragg, NC, 1999-2004. Ms. Rogall has co-authored this piece in her personal capacity. The views presented are solely those of the author and do not represent the views of the Department of Veterans Affairs or the United States Government.

This article is dedicated to F. Don Nidiffer, Ph.D., and his family. Dr. Nidiffer has dedicated his life to the exceptional treatment of servicemembers, veterans, and their families. In addition to forging unprecedented efforts to educate military attorneys about the treatment needs of wounded warriors, Dr. Nidiffer has been a true friend to the authors and many at The Judge Advocate General's Legal Center & School, U.S. Army.

We would like to recognize all of the dedicated professionals who made this article possible, including many who are not listed below. While the content and recommendations in this article may result in differing opinions, we sincerely thank them for their guidance, their willingness to be interviewed, and their continued support. We are grateful to The Honorable Paul J. Hutter, General Counsel, TRICARE Management Activity and former General Counsel, Department of Veterans Affairs (VA), and Mr. David Addlestone, Esq., for their assistance and guidance. From VA, Laura Eskenazi, Esq., Tara L. Reynolds, Esq., R. Randall Campbell, Esq., and Leah Mazar, provided

Associated with this general dilemma is the unconfirmed but highly suspected and logical connection between untreated mental illness and criminal offenses committed by combat veterans with specialized training in the art of war.[2] Following each combat campaign, some

---

much appreciated input and assistance. Garry J. Augustine, Joseph A. Violante, Esq., and Shane L. Liermann from the Disabled American Veterans, and Jeremy Bedford from the Vietnam Veterans of America, further contributed their valuable insights from the Veterans Service Organization (VSO) perspective. We also thank Captain Joseph D. Wilkinson, II and Mr. Charles J. Strong for their editorial assistance. Major Brooker thanks his wife, Melissa Brooker, and their children, Anna Brooker, Leah Brooker, and Matthew Brooker for their love, patience, and support. Ms. Rogall expresses love and gratitude to her husband and the most important veteran in her life, Chad Moos, for his unconditional support.

[1] A RAND study estimates that the rate of "probable" post-traumatic stress disorder (PTSD) or depression for servicemembers who had served in Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF) was nearly 20 percent, and that more than 30 percent of OIF and OEF servicemembers had probable PTSD, depression, or Traumatic Brain Injury (TBI), or some combination thereof. *See* TERRI TANIELIAN ET AL., RAND CORPORATION, INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES, *available at* http://www.rand.org/pubs/monographs/MG720z1. With the reality of delayed onset of symptoms for many with invisible wounds of war, reported cases represent only the tip of the proverbial iceberg. *See, e.g.*, BARRY R. SCHALLER, VETERANS ON TRIAL: THE COMING BATTLES OVER PTSD 17–18 (2012) (using studies to show that delayed onset of symptoms could account for nearly 700,000 cases of PTSD or major depression stemming from combat in Iraq and Afghanistan rather than the conservative projection of 400,000 cases).

[2] It is not possible to identify a generalized scientifically-tested link, due to differences in populations surveyed and testing methodologies. *See, e.g.*, SCHALLER, *supra* note 1, at 4 (discussing difficulties interpreting existing studies because "the populations studied, the subject of the studies, and the time periods vary among them"); JOANNA BOURKE, AN INTIMATE HISTORY OF KILLING: FACE-TO-FACE KILLING IN TWENTIETH-CENTURY WARFARE 145 (1999) (same). However, it is beyond question that combat trauma has contributed to later offending in a great many cases. This fact is recognized in official military publications. Consider this explanation of "Combat Misconduct Stress" in the Army's *Leader's Manual for Combat Stress Control*:

> Positive combat stress behaviors and misconduct stress behaviors are to some extent a double-edged sword or two sides of the same coin. The same physiological and psychological processes that result in heroic bravery in one situation can produce criminal acts such as atrocities against enemy prisoners and civilians in another. Stress may drag the sword down in the direction of the misconduct edge, while sound, moral leadership and military training and discipline must direct it upward toward positive behaviors.

U.S. DEP'T OF ARMY, FIELD MANUAL 22-51, LEADER'S MANUAL FOR COMBAT STRESS CONTROL ¶ 3-12 & fig.3-1 (Sept. 29, 1994). *See also* U.S. DEP'T OF DEF., DEFENSE

former servicemembers who have been discharged from the service for misconduct also suffer from psychological conditions brought about by combat trauma.[3] Despite pleas for immediate intervention to address this subset of the larger population, rather than study of the issue,[4] the military and the VA continue to encounter difficulty responding to the

---

HEALTH BOARD, TASK FORCE ON MENTAL HEALTH, AN ACHIEVABLE VISION: REPORT OF THE DEPARTMENT OF DEFENSE TASK FORCE ON MENTAL HEALTH 22 (June 2007) (citing post-deployment "complex disinhibitory behaviors," including, "[d]ifficulty controlling one's emotions, including irritability and anger . . ., [s]elf-medication with . . . illicit drugs in an attempt to return to normalcy [and] reckless/high risk behaviors" as consequences of "battlefield injury or trauma"). The connection has also become clear for civilian law enforcement agencies that encounter veterans on a daily and increasing basis. *See*, *e.g.*, Major Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 26 (2011) (discussing the development of arrest and jail diversion programs in major cities that emerged because of the link between untreated mental health conditions and their criminal behavior). As the Army's Vice Chief of Staff explained in the introduction to the recent "*Goldbook*" publication,

> One of the most important lessons learned in recent years is that we cannot simply deal with health or discipline in isolation; these issues are interrelated and will require interdisciplinary solutions. For example, a Soldier committing domestic violence may be suffering from undiagnosed post-traumatic stress. He may also be abusing alcohol in an attempt to self-medicate and relieve his symptoms. The reality is there are a significant number of Soldiers with a foot in both camps—health and discipline—who will require appropriate health referrals and disciplinary accountability.

General Peter W. Chiarelli, *VCSA Sends*, *in* U.S. DEP'T OF ARMY, ARMY 2020: GENERATING HEALTH & DISCIPLINE IN THE FORCE AHEAD OF THE STRATEGIC RESET (second introductory page) (2012).

[3] *See, e.g.*, Seamone, *supra* note 2, at 23–24 (recognizing historical connections in past wars).

[4] *See, e.g.*, *Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs, House of Representatives*, 103rd Cong., 2d Sess. 116 (May 4, 1994) (written testimony of Jonathan Shay, M.D., Ph.D.) [hereinafter Shay Written Testimony]: "This problem does not call for study or for an expansion of the existing case-by-case discharge upgrade program. Today I ask Congress for a blanket upgrade of all veterans discharged under less than honorable conditions who have any combat decoration . . . or obviously an award for heroism, such as a Bronze Star."); John Hoellwarth, *Medical Officer Links Misconduct and PTSD*, MARINE CORPS TIMES, WWW.MARINECOPRSTIMES.COM, Jun. 23, 2007 (10:37:48 EDT) (discussing military mental health professionals' calls for more "aggressive screening" of offenders for PTSD and treatment-based alternatives rather than simply punishment or involuntary separation with stigmatizing discharges) (citing Navy Captain William Nash).

treatment needs of this population in a comprehensive manner.[5] The major difficulty lies in the fact that servicemembers who are discharged for misconduct often receive service characterizations that make them ineligible for VA benefits despite pressing treatment needs and, often, prior valorous service in combat theaters.[6]

The military, through its discharge process, is creating huge handicaps to readjustment and reintegration into society by limiting the possibility of care and failing to at the least stabilize these warriors before their rough ejection.[7] VA compounds these handicaps in three ways: First, although detailed transition counseling could assist all discharged personnel, standard outreach services usually target those leaving the service under honorable conditions.[8] Second, VA is not tracking how many discarded warriors are applying for benefits, denied or approved, or appeal.[9] Instead, for the most part, the Department apparently considers that the issue is minor based on the comparatively small number of applicants who walk through its doors;[10] if adjudicators

---

[5] Throughout this article, the authors will refer to the Department of Veterans Affairs, along with its predecessor, the Veterans' Administration, as "VA." The Veterans' Administration was redesignated by Congress as a Cabinet-level Department with the enactment of Public Law 100-527 (Oct. 25, 1988).

[6] *Infra* Parts VIII and IX (discussing numerous provisions that render former servicemembers ineligible for most benefits if their service was dishonorable under VA definitions).

[7] *Infra* note 669 and accompanying discussion (describing a phenomenon known as the "Military Misconduct Catch-22").

[8] *See, e.g.*, Hal Bernton, *Troubled Veterans Left Without Health-Care* Benefits, SEATTLE TIMES, Aug. 12, 2012, www.seattletimes.com (reporting on the common experience of veterans who hold stigmatizing discharges that no one ever informed them of the ability to seek treatment, resulting in the case where they are turned away at VA hospitals because of those stigmatizing discharges); This assertion is also based on MAJ John W. Brooker's and MAJ Evan R. Seamone's professional experience as judge advocates from 2003 to present.

[9] *Infra* note 671 and accompanying discussion (describing various accounts from the VA regarding its lack of programs or efforts to track these cases).

[10] The time it takes for veterans to apply for eligibility determinations is perhaps the greatest deterrent to their follow-through on these cases. *See, e.g.*, PAUL STARR ET AL., THE DISCARDED ARMY, VETERANS AFTER VIETNAM: THE NADER REPORT ON VIETNAM VETERANS AND THE VETERANS ADMINISTRATION 175 (1973) ("Men are discouraged from appealing because the process usually takes years and requires legal assistance beyond their means."); *Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents: A Community Perspective, Hearing Before the Subcomm. On Oversight and Investigations of the Comm. on Veterans' Affairs, House of Representatives*, 103d Cong., 1st Sess. 106 (May 5, 1993) (written testimony of Warren Quinlan, New England Shelter for Homeless Veterans) [hereinafter Quinlan Written Testimony] (observing how "[t]ime in effect discriminates" against ex-servicemembers

and Veterans Law Judges rarely see these cases, then the lack of benefits for this population is not much of a problem, many may reason. Most importantly, Character of Service (COS) evaluations at VA regional offices across the country involve a high degree of subjectivity in their application to individual cases because key concepts lack definition.[11]

At the most general level, these negative outcomes have persisted for generations because of the reasoning that former servicemembers who committed misconduct serious enough to result in discharge deserved the negative consequences of their status. While some have characterized the brand of bad paper as "a life sentence," for people who are often "nineteen or twenty years old,"[12] others characterize it as "a ticket to America's underclass [and] a bar to leaving it."[13] 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.[14] After all, the military's generous benefits for college education are often the singular factor motivating the initial decision to enlist for many recruits in an all-volunteer military.[15]

Hence, it seems reasonable in the normal course of events, that leaving the military in dishonor should result in unique hardships greater

---

who would need to file for a discharge review by the VA based on the difficulties of their mental health and financial situations during the review).

[11] *Infra* Part IX.A.2 (explaining widespread and longstanding subjectivity and inconsistency in the application of COS standards and many reasons for these outcomes).

[12] STARR ET AL., *supra* note 10, at 175 (citing the criticisms of Congressman Clyde Doyle).

[13] Peter Slavin, *The Cruelest Discrimination: Vets with Bad Paper Discharges*, 14 BUS. & SOC. REV. 25, 25 (1975) (further explaining how veterans with bad paper "find it harder, if not impossible to obtain rental housing, credit, licenses, mortgages, home improvement loans, life and medical insurance" and generally transforms them into "bad risks" by any public or financial organization's calculus).

[14] For example, during the Vietnam War, the Army showed recruits a 30-minute color film titled, *The Smart Way Out*, which contrasted "Good Joe" with "AWOL Johnny." While Good Joe earned an honorable discharge, followed by "years of happiness," AWOL Johnny received an Undesirable Discharge for going AWOL to visit his girlfriend and was therefore doomed to a life of "bitterness, loneliness, and poverty." At the end of the film, AWOL Johnny "ended up as an unemployed drunk, arrested by the police for vagrancy." LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 121 (1978).

[15] *See, e.g.*, Kelli Kirwan, *Educational Chances Wait for Soldiers*, EL PASO TIMES (Tex.), May 12, 2004, at 1B ("Many people join the military for the educational benefits such as the . . . G.I. Bill.").

than those encountered in leaving a civilian occupation. The culpable offender who deprived the military of his or her faithful service, transformed other servicemembers or dependents into victims, or detracted from the military mission in some palpable way should sacrifice the perks of social mobility. We can consider this the "just deserts" thesis of military misconduct. It targets the individual and reasons that he or she deserves to have hard transition back to civilian life in a nation that values the sacrifices of men and women in uniform. The thesis is often communicated as honoring those who loyally served by preserving the distinction from those who did not.[16]

There is, however, an exceptional circumstance that turns the "just deserts" thesis on its head and that shifts concern away from the offender and back to society. It is the "public health" thesis of military misconduct, which recognizes that not all offenders are similarly situated. It considers one main discriminating characteristic; the offender's mental state at the time of the misconduct. This theory focuses on the very factors that make the military so valued an institution; (1) that so many servicemembers are exposed to combat trauma and its resulting stress conditions and (2) that the military is an occupation in which one is expected to encounter such stress on a regular basis. The complication for troops who have experienced combat is that many have sustained psychological wounds of war that manifest in undesirable behavior when the condition remains untreated.[17]

Although statistics on the connection between post-traumatic stress disorder (PTSD) and crime leave much to be desired, enough data now exist to conclude that the military has essentially criminalized mental

---

[16] *See, e.g.*, Letter from Edward J. Derwinski, Secretary of Veterans Affairs to Hon. G.V. (Sonny) Montgomery, Chairman of Comm. on Veterans' Affairs (Apr. 27, 1990), *in Incarcerated Veterans Rehabilitation and Readjustment Act of 1989, Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives of the 102nd Cong., 2nd Sess. on H.R. 3453, Incarcerated Veterans Rehabilitation and Readjustment Act of 1989*, at 91 (Apr. 24, 1990) (serial no. 99) (prioritizing the delivery of VA services to honorably discharged veterans over those with histories of misconduct); *infra* Part IX.A.1 (discussing Congress's rationale for barring benefits to those discharged under dishonorable conditions).

[17] *See, e.g.*, Amanda Carpenter, *Military Misconduct May be Sign of PTSD*, WASH. TIMES, www.washingtontimes.com, Jan. 12, 2010 (citing a sober warning, in 2007, by mental health professionals within the Department of Defense for its providers that "[t]he service may be discharging soldiers for misconduct when in fact they are merely displaying symptoms of post-traumatic stress disorder.").

illness in many instances—and a very predictable type of mental illness at that. Increasingly, military and VA mental health professionals and legislators have called for serious intervention to prevent this dilemma by providing treatment in lieu of merely punishment and swift discharge.[18] Their concerns acutely focus on the issue of eligibility for veterans' health care benefits. Namely, an Undesirable Discharge (UD), Under Other Than Honorable Conditions Discharge (OTH), Bad-Conduct Discharge (BCD), and Dishonorable Discharge (DD) can result in a total denial of VA entitlements.

Access to VA health care, as opposed to medical care provided by such entities as county general hospitals or emergency rooms, is vital to the successful reintegration of combat-traumatized veterans because it provides "the only reservoir of combat PTSD expertise."[19] Given concerns over the nation's jails existing as de facto psychiatric wards for members of the public with mental illness,[20] the following "Military Misconduct Catch-22" emerges:

> What's the point of [the Department of Defense] recognizing that PTSD/TBI causes misconduct when it

---

[18] *See, e.g.*, Hon. Maxine Waters & Jonathan Shay, *Heal the "Bad Paper" Veterans*, N.Y. TIMES, July 30, 1994, *reprinted in* BALT. SUN (Md.), Aug. 2, 1994, at 7B ("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 much more in unemployment compensation and support for prisons, homeless shelters, substance abuse treatment and emergency health care programs."); Shay Written Testimony, *supra* note 4, at 117:

> > [I] find the situation of veterans with 'bad paper' [being denied mental health treatment] to be as unjust and irrational as if they had been drummed out for failure to stand at attention after their feet had been blown off. Most of these men committed offenses because of [their] combat PTSD;

Hoellwarth, *supra* note 4 (describing calls for action by a Navy psychiatrist Captain William Nash: "Those who need treatment need to get treatment period. If because of justice they lose their benefits, that may not be justice totally."); Gregg Zoroya, *Discharged, Troubled Troops in No-Win Plight: Marines Kicked out for Conduct Linked to Stress Disorder are Often Denied Treatment by the VA*, USA TODAY, Nov. 6, 2006 (describing positions of Marine Corps defense attorneys who have witnessed the downward spiral faced by their discharged clients with untreated mental health conditions).

[19] Quinlan Written Testimony, *supra* note 10, at 105.

[20] *See, e.g.*, MARY BETH PFEIFFER, CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL (2007).

> doesn't do anything to stop the "pattern of misconduct" discharges for soldiers with PTSD/TBI? How can it say that this is evidence of a service-related disability only to use this evidence to deny service members access to benefits for that disability?[21]

Rather than involving the interest of retribution against the individual offender as the "just deserts" theory does, the Military Misconduct Catch-22 raises independent concerns of public health. Accordingly, retired Connecticut Supreme Court Justice Barry Schaller observes,

> The psychiatric profession must promote consideration of PTSD as a public health issue rather than simply as an individual mental health problem. The broad reach of combat PTSD within American society, in terms of the numbers of veterans who develop the disorder and the number of people whose lives are directly affected thereby, qualifies it as a public health issue, meaning one that involves the health of communities or populations.[22]

Untreated PTSD in offenders already prone to violent outbursts and loss of impulse control raises concerns fundamental to our self-interest as a nation.[23] For these forgotten warriors and lost legions of "bad paper

---

[21] Carissa Picard, *The Military's Misconduct Catch-22*, www.military.com, Jan 14, 2009. Marine Lieutenant Colonel Colby Vokey states the dilemma similarly, "When classic symptoms of [PTSD] arise—including alcoholism and drug abuse—the veterans are punished for the behavior . . . . Their less-than-honorable discharges can lead to a denial of VA benefits. Vokey calls it a Catch-22, referring to the no-win situation . . . ." Zoroya, *supra* note 18.

[22] SCHALLER, *supra* note 1, at 202–03. *See also* Seamone, *supra* note 2, at 29 (describing how the lethality of the veteran's training makes untreated PTSD a matter of public safety).

[23] From his years treating Vietnam veterans for combat stress conditions, Doctor Jonathan Shay identified a number of criminal behaviors stemming "directly from combat PTSD," including "AWOL or desertion after return to [the] U.S., [u]se of illicit drugs to self-medicate symptoms of PTSD, and [i]mpulsive assaults during explosive rages on officers or NCOs after return to the U.S." Shay Written Testimony, *supra* note 4, at 115. More recently, in 2010, Robyn Highfill-McRoy and her colleagues reviewed tens of thousands of TRICARE records and concluded that "combat deployed Marines with a PTSD diagnosis were 11 times more likely to engage in the most serious forms of misconduct than were combat deployed Marines without a psychiatric diagnosis." 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), http://www.biomedcentral.com/1471-244x/10/88. In 2012, research by forensic psychologist Eric Elbogen, Ph.D., and his colleagues concluded that "combat trauma in

veterans," the notion of invisibility is an illusion. They aren't invisible; when we are willing to look they re-emerge from obscurity in the homeless shelters,[24] prisons and jails,[25] and morgues[26] of every city and state in the nation. We can watch the public health dominoes fall in succession as untreated PTSD affects family members and innocent bystanders alike.[27]

As Justice Schaller prophetically notes, civilian "courts come into the picture only after all other efforts to prevent, minimize, or resolve PTSD problems have failed."[28] When they do, the "unspoken assumption" is that the military has abdicated its responsibilities to act when there was still time to prevent inevitable, and sometimes irreparable, societal harm.[29] One life saved is enough reason to

---

the form of PTSD, combined with the high irritability that PTSD can cause, does 'significantly raise the risk of criminal arrest.'" David Wood, *Combat Veterans with PTSD, Anger Issues More Likely to Commit Crimes: New Report*, WWW.HUFFINGTONPOST.COM (Oct. 9, 2012) (12:45 PM EDT) (citing interview with Professor Elbogen). *See also* Eric B. Elbogen et al., *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, J. CONSULTING & CLINICAL PSYCHOL. 1, 3 (Oct. 1, 2012) (advance online publication doi: 10.1037/s0029967) (finding that "[t]he link between combat exposure and arrest was mediated by PTSD with high irritability").

[24] *See, e.g.*, Quinlan Written Testimony, *supra* note 10, at 104 ("[O]n any given day, an average of about 50% of the men coming through the [shelter] doors . . . have 'bad paper.' Half or 25% of these are combat veterans.").

[25] MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISON 1, 6 (May 2007) (reporting "an estimated 140,000 veterans . . . held in the Nation's prisons, with 38 percent of them having "failed to receive an honorable discharge").

[26] While veterans are a population at heightened risk of suicide, incarcerated veterans suffer the added risk by occupying inmate status, which places them at even higher additive risk of suicide. Hal S. Wortzel et al. *Suicide Among Incarcerated Veterans*, 37 J. AM. ACAD. PSYCHIATRY & LAW 82, 87 fig 1 (2009) (recognizing the cumulative risk).

[27] *See, e.g.*, SCHALLER, *supra* note 1, at 136–53 (describing various studies of veteran criminality in the aftermath of Iraq and Afghanistan, including rates of victimization of strangers and specific types of crimes that occur in greater frequency among those with combat trauma); Seamone, *supra* note 2, at 24–25 n.64 (describing media reports and books that have focused on violent criminal behavior of recently re-deployed servicemembers in communities near their installations); Evan R. Seamone, *Improved Assessment of Child Custody Cases Involving Combat Veterans with Posttraumatic Stress Disorder*, 50 FAM. CT. REV. 310, 314, 326–27 (2012) (describing the harmful and lasting effects of some military parents' PTSD, including "secondary traumatic stress," on family members, particularly children).

[28] SCHALLER, *supra* note 1, at 196.

[29] *Id*. at 211; *see also id*. at 208 ("The failure of current [military] support systems has left it to states and cities to fill in the gaps . . . .").

intervene, claim some mental health professionals.[30] The result of this failure to intervene is not one, but tens of thousands hanging in the balance: Not only were 255,800 Vietnam-era veterans given stigmatizing UD and BCD characterizations,[31] but between October 2000 and September 2005, at least another 55,111 recipients of OTH discharges and 13,549 recipients of BCDs joined their swelling ranks.[32] Given its substantial size, one author of this article labels the population of discarded ex-servicemembers with a combination of bad paper and untreated PTSD as "America's largest sleeper cell."[33] The troublesome term highlights the manner in which a widespread lack of understanding and prioritization by the military and VA amplifies the effect of the enemy's traumatic act that caused the condition, potentially transporting its harm into America's neighborhoods, living rooms, and schools. No one can say how many of those discharges would have been handled differently had commanders, judge advocates, and VA adjudicators understood the system.

---

[30] *See, e.g.*, Mark C. Russell, *Preventing Military Misconduct Stress Behaviors*, HUFFPOST HEALTHY LIVING, www.huffingtonpost.com (Jan. 27, 2012 8:45AM) (sharing from his experience as a former military psychologist who has treated hundreds of combat veterans, "If we prevented one [homicide] incident, saved one life, it would be worth the time and investment.").

[31] BASKIR & STRAUSS, *supra* note 14, at 155 fig.6 (accounting for 31,800 BCDs and 224,000 UDs between August 4, 1964 and March 28, 1973). Although many cite to over 500,000 stigmatizing discharges during the Vietnam War, their definition of "less-than-Honorable" includes 305,000 General Discharges issued in the same period, which are less harmful than BCD or UD characterizations, though still somewhat stigmatizing. *See, e.g.*, Peter Slavin, *The Stigma's of Discharge*, WASH. POST, Apr. 18, 1976, at B1, B2 ("Between fiscal year 1967 and 1975, some 548,000 bad discharges were issued . . . .").

[32] VETERANS' DISABILITY BENEFITS COMM., HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 93, at tbl.5.1 (Oct. 2007) [hereinafter VETERANS DISABILITY BENEFITS COMM.] (citing a responsive e-mail). U.S. Ct. of Appeals for the Armed Forces, Annual Reports, http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm (last visited Mar. 10, 2013) (tabulating statistics for FY2000 to FY2005 in the appendices of the *Annual Reports of the Committee on Military Justice*). Reporter Hal Bernton of the *Seattle Times* collected another 20,000 OTH discharge recipients from responding agencies reporting on the period 2005 through 2012, and the corresponding *Annual Reports* for FY2006 to FY2011 tabulate an additional 9,766 BCDs. Bernton, *supra* note 8: U.S. Ct. of Appeals for the Armed Forces, *supra*.

[33] Evan R. Seamone, *Using Therapeutic Jurisprudence to Dismantle America's Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, NOVA SOUTHEASTERN L. REV. (forthcoming 2013).

B. Organizational Approach of This Article

The following sections of this article address the manner in which military commanders and attorneys can master the voluminous rules that govern VA benefit eligibility in the time *prior* to discharge, while there is maximum opportunity to enhance long-term recovery.[34] The sections also offer special insight for VA adjudicators, attorneys, and Veterans Law Judges to equip them with better knowledge about the interpretation of military rules.

Part II provides an overview of the VA claims process, underscoring the large degree to which VA relies upon military records and information that commanders provide. A reading of both sections reveals how, for OTH and BCD characterizations, small changes in the practice of annotating records can make a significant difference in preserving commanders' intentions, especially since VA uses definitions that do not reflect the military's terminology.

Another key point emphasized in this Part is that there are no precise military standards dictating when these characterizations will result or for what types of offenses. Historically and modernly, the military's reliance on and deference to command discretion has produced inconsistent punishments. Troops may be punished harshly with an OTH or BCD in one battalion for the same misconduct that garners a counseling statement or corrective training 50 yards away in a different battalion on the same installation.[35] Furthermore, the possibility of bias or discrimination in the exercise of discretion can never be eliminated.[36]

Part III of this article provides an overview of the benefits that are at stake in a VA COS review, specifically for the recipients of an OTH or a BCD. Because an Honorable Discharge will normally not preclude a former servicemember from receiving the full range of benefits, including GI Bill eligibility, this too often leads recipients of lesser

---

[34] SCHALLER, *supra* note 1, at 200 ("The goal must be to prevent problems of readjustment rather than expecting civilian society to deal with them after they occur.").

[35] *See, e.g.*, BASKIR & STRAUSS, *supra* note 14, at 159 (describing how stigmatizing discharges from commanders were often attributable to "bias, or even whim").

[36] *See, e.g.*, Charles P. Sandel, Comment, *Other-Than-Honorable Military Administrative Discharges: Time for Confrontation*, 21 SAN DIEGO L. REV. 839, 855 (1984) (noting how "[i]t is difficult to detect or protect against [command influence or abuse of discretion] within the existing discharge process" and noting various incentives for commanders to be extraordinarily harsh).

discharges to believe that their entitlements are far fewer.[37] In fact, based on simplified charts, the summaries in separation documents, or inaccurate legal advice, UD, OTH, and BCD recipients may believe that such discharges totally preclude them from all VA benefits.[38] For the most part, many of these involuntarily separated servicemembers may be eligible for substantial benefits, which, depending on offenses, surrounding circumstances, and disability ratings, might even include postsecondary education by virtue of VA's Vocational Rehabilitation program.[39] For this reason, we define key benefits and attempt to fix the errors, omissions, and misstatements that frequently appear in the authoritative documents now relied upon by military and civilian agencies.

With an idea of key benefits at stake in any COS determination, Part IV describes additional hurdles to eligibility that often arise independent of misconduct but which nevertheless must be considered in any misconduct-related case. Here, aside from difficulties that may be encountered with the minimum active duty service requirement, we also discuss practical hurdles that can contribute to the denial of benefits, such as the backlog of VA claims, a complex appellate system, inadequate evidentiary development, or misapplication of the proper standards.[40] Continuing with independent rules that have a bearing on COS determinations, Part V discusses what may be considered one of three exceptions to most of the bars to benefits. Here, we describe the effect of a servicemember's prior completed term of honorable service on his or her benefits eligibility despite a subsequent period of less than honorable service. The rule essentially mandates that VA permit any benefits rightfully earned during the prior honorable term, including those stemming from service-connected injuries. Of course, because these benefits are only granted for honorably completed periods of service, this Part necessarily describes how VA calculates obligated service and its termination, with further insights on avoiding common errors in such mathematics.

---

[37] STARR ET AL., *supra* note 10.
[38] *Id*.
[39] *Infra* Part III (discussing VA benefits for individuals with OTH or BCD characterizations).
[40] Press Release, U.S. Dep't of Veterans Affairs, VA Completes Over 1 Million Compensation Claims in 2012 (Sept. 20, 2012) (noting that 2012 was the third fiscal year in a row that VA's claims processors had exceeded the one million mark, but also acknowledging that "[t]oo many Veterans still wait too long," and that the overall accuracy of claims adjudication since Sept. 2011 was 86 percent).

Both VA and the military have begun to recognize the high risk that military women will fall victim to sexual trauma during their service (MST).[41] In fact, while the number of men who report sexual trauma is less, when considered on a proportional basis, "given the greater number of men in the military, the total number of male and female [sexual assault] victims is approximately equal."[42] Aside from DoD's initiation of prevention efforts during service, VA has recognized the priority of assisting MST victims following their separation from the military, with further acknowledgement that any servicemember who is dealing with the health consequences of sexual trauma should have access to VA care, regardless of discharge characterization.[43] Part VI, therefore, explains how recipients of less than honorable discharges may still retain healthcare eligibility for MST-related treatment, regardless of statutory or regulatory bars to VA benefit eligibility.

Part VII next considers insanity, the third and final independent basis for providing benefits to recipients of a stigmatizing OTH, UD, BCD, or DD. Consideration of VA's definition for the term reveals strict standards unique to the Department, like other non-military terms. Although some cases demonstrate the possibility of meeting the statutory requirements for insanity, we underscore the difficulty of qualifying for the exception, even if a former servicemember suffered from an aggravated case of PTSD or other wartime injury.

A former servicemember discharged under a less than honorable characterization will meet the definition of a "veteran" who is eligible for benefits only after VA's COS process has determined such status.[44] Part

---

[41] *Infra* Part VI.

[42] Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION & VIOLENT BEHAV. 267, 268 (2010).

[43] *Infra* Part VI.

[44] Commentators have widely labeled the General Discharge (GD) as stigmatizing along with UDs, OTHs, and punitive discharges. *See, e.g.*, Christopher H. Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33, 35 (1973) (noting that "[c]ourts have found the General Discharge to constitute 'a stigma of tremendous impact which [has] a lifelong effect'" and military regulations which explain that its recipient "may expect to encounter substantial prejudice in civilian life") (citing Unglesby v. Zimny, 250 F. Supp. 714, 717 (N.D. Cal. 1965) and an edition of Army Regulation 635-212 from the 1960s). While it is certainly true that a GD bears some negative consequences because it is still not fully honorable, the VA considers it as under honorable circumstances for the purpose of health care benefits. STARR ET AL., *supra* note 10, at 176 ("Anyone who received an Honorable or General Discharge is unambiguously entitled to benefits."). We, therefore limit our use of "stigmatizing

VIII of the article examines the statutory bars to VA benefits that will preclude veteran status, each of which appear in the *United States Code* with fairly simple terminology as Congress's direct proscription for VA benefit entitlement.[45] When discussing substantive provisions of the statutory bars, this Part offers a number of visual aids to assist readers in understanding the interrelationship of these varied rules.

As distinguished from statutory bars, Part IX explores the regulatory bars to VA benefits, which appear in the *Code of Federal Regulations* as the result of VA's administrative rulemaking process. Despite the fact that the regulatory bars to benefits originated at the same time as the statutory provisions, for the most part, the regulatory provisions exist in a framework described by some judges as extremely "murky" because of its confusing and antiquated provisions.[46] The problem mainly rests in the lack of definitions for key concepts as well as the lack of a methodology to practically apply these definitions. Too often, the result is a subjective determination by an individual adjudicator that is sure to conflict with other adjudicators' conclusions in the 56 VA regional offices, and even ones in his or her own regional office.[47] Here, we pay special attention to the regulatory bars of "willful and persistent misconduct" and "offenses involving moral turpitude," which are widely criticized for their lack of meaningful interpretive guidance.[48] To better understand the meaning of these terms, we examine interpretations by the VA regional offices and the way other federal agencies have defined and applied similar terms, and suggest improvements.

---

discharges" to the most crippling ones evaluated under the COS process: UD, OTH, and BCD.

[45] For the purposes of this article, the authors' use of the term "veteran status" refers not only to eligibility for VA benefits based on the characterization and length of active service, but also the absence of any statutory provision that would bar the receipt of VA benefits.

[46] Trilles v. West, 13 Vet. App. 314, 330 (2000) (Kramer, J., & Steinberg, J, concurring).

[47] VA provides non-medical benefits and services to veterans and other claimants at its regional benefits offices throughout the United States and the Philippines. *See* U.S. Dep't of Veterans Affairs, http://www2.va.gov/directory/guide/division_flsh.asp?drum=3 (last visited March 10, 2013). At the time of publication, VA operated 56 regional offices throughout the country. *See* Erik K. Shinseki, Sec'y, U.S. Dep't of Veterans Affairs, Remarks at National Association of State Departments of Veterans Affairs (NASDCA) Mid-Winter Conference (Feb. 13, 2013) (discussing an automated claims adjudication tool that is being fielded to all 56 regional offices in 2013), http://www.va.gov/opa/speeches/2013/02_13_2013.asp (last visited March 9, 2013).

[48] *Infra* Part III.

With the benefit of a framework for understanding both statutory and regulatory bars to benefits, Part X traces the history and development of the infamous "Benefits at Separation" chart that currently informs many commanders', servicemembers', judge advocates', and panel members' forecasts of future VA benefit eligibility. Although some rendition of the chart has existed since at least 1952,[49] and represents its creator's best intentions, it is our position that the chart's summaries, especially for the decisions purported to be "To Be Determined" by the administering agency, at best, offer little useful guidance and, at worst, provide an illusion of objectivity and misleading guidance for key decision-making. We thus offer new and improved guidance to eliminate confusion and better inform decisions prior to a servicemember's discharge and prior to the servicemember's adoption a legal course of action that could unintentionally harm future coverage for necessary life needs.

Part XI offers practical tools to enhance the quality of information dispensed to military judges, panels, servicemembers, commanders, and judge advocates regarding VA benefits and involuntary or punitive separation from the service. This Part begins with an explanation of the flaws within the current panel instructions related to VA benefits. It then proposes new instructions that more accurately reflect how punitive discharges and the level of court-martial impact an accused's eligibility for VA benefits.

This part then outlines the tools offered to bolster the scant notice routinely provided to servicemembers undergoing elimination to help them make knowing and intelligent waivers of their rights by explaining the nature of lost benefits as well as consequences of specific types of misconduct under VA's framework for statutory and regulatory bars. For example, rather than understanding simply that a servicemember may lose "substantially all" or "virtually all" benefits administered by VA, a soldier considering an Army Chapter 10, Discharge in Lieu of Court-Martial, must further understand how substantially all VA benefits might still be preserved if that same soldier is accepting a discharge in lieu of a Special, rather than a General Court-Martial.[50] The Part then offers an information paper to help commanders and military justice

---

[49] Captain W.C. Blake, *Punishment Aspects of a Bad Conduct Discharge*, JAG J., Dec. 1952, at 5, 6 (providing summarized standards specifically to "point out the punishment effect of a bad conduct discharge with regard to future benefits"). For a history and discussion of different iterations of the infamous chart, see *infra* Part X.

[50] *Infra* Part III.C (discussing the pivotal distinction in the regulatory bar for discharge in lieu of a *General* Court-martial).

practitioners identify the manner in which untreated mental health conditions can manifest in criminal conduct. Because research has identified certain behaviors related to PTSD and Traumatic Brain Injury (TBI) symptoms, decision-makers now have the benefit of a quick resource to consult.[51] Although the information paper does not suggest that mental conditions should excuse the servicemember from punishment, it provides a basis to ask for more detailed mental health evaluations and to make accurate appraisals of the potential need for future mental health treatment.[52] Because VA adjudicators often must determine Character of Service based on files with very limited, or even scant, documentation that is devoid of any context, various appendices provide improved templates for separation documents and recommendations from court-martial sentencing authorities to preserve the intentions of these authorities specifically for a later VA COS determination.[53]

Part XII concludes the article with additional practical and policy recommendations. It touches on the value of improved coordination between the military, VA, and Veterans Service Organizations (VSOs)—with transition services targeted toward servicemembers facing involuntary separation and less than honorable discharges. Here, we hope that such organizations will have the most impact while it is still possible to obtain key evidence and while mental health resources are still available to the servicemember, rather than waiting until years or decades after separation when such access is impossible. DOD's, VA's, and the VSO's ability to deliver focused outreach to this subpopulation of separating personnel can substantially improve the quality of information upon which adjudicators must rely. As important are efforts to revise the existing regulatory provisions to clarify ambiguous terms that invite subjectivity. Here, we rely upon the *Administrative Procedure Act* and its notice and comment provisions for agency rulemaking rather than congressional action. Despite multiple pleas to revise and liberalize the COS standards, Congress has left them virtually unchanged since the inception of the *1944 Servicemens' Readjustment Act*. Neither the enactment of the *Uniform Code of Military Justice* nor the development of entirely different discharge characterizations and standards has influenced the provisions of the *United States Code*. We thus identify the *Code of Federal Regulations* as the best place to supplement the most

[51] *Infra* app. I.
[52] *Id*.
[53] *Infra* app. L.

confusing regulatory bars with objective definitions and proposed practical methodologies.

Through this combination of efforts, our military and civil system can finally accept the entirety of the responsibility for bringing home all of our warriors, including those with invisible wounds, from the long wars that continue to confront them each and every day they are denied effective treatment resulting from misunderstandings and uninformed decisions. In so doing, the military, VA, local government, and VSOs can jointly protect the public's freedoms, health, and well-being, as well as help the individuals who deserve it.

II. The VA Claims Process: The Sometimes Difficult Road to Obtaining VA Benefits Following an Adverse Separation

VA administers numerous veterans benefits programs affecting our nation's nearly 22 million veterans and roughly an equal number of dependents and survivors of veterans.[54] These estimated 44 million people make up roughly 14 percent of this country's population.[55] With more than 294,000 employees and a budget in excess of $138 billion, VA is this country's second largest Cabinet-level department.[56] During Fiscal Year 2011, VA received more than 1.3 million claims for disability compensation benefits, and processed more than a million claims for benefits.[57] At the conclusion of that fiscal year, more than 3.7 million veterans and survivors were in receipt of service-connected disability or death compensation benefits.[58] More than 300,000, or nearly 10 percent, of the veterans in receipt of compensation at the end of that year obtained benefits payable at the 100 percent level of disability.[59] Owing in large part to the fact that VA serves such a vast population of eligible beneficiaries, it should not be a surprise that VA is

---

[54] U.S. DEP'T OF VETERANS AFFAIRS, 2012 PERFORMANCE AND ACCOUNTABILITY REPORT I-32 (2012) [hereinafter P&A REPORT].

[55] *Id.*

[56] P&A REPORT, *supra* note 54, at I-2; *see also* U.S. DEP'T OF VETERANS AFFAIRS, 2011-2015 STRATEGIC PLAN REFRESH 11 (2011).

[57] P&A REPORT, *supra* note 54, at I-3.

[58] U.S. DEP'T OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION ANNUAL BENEFITS REPORT, FISCAL YEAR 5 (2011) [hereinafter VBA REPORT].

[59] *Id.* at 8. A Veteran with no dependents who is 100 percent disabled current receives $2,816 per month. 38 U.S.C.A. § 1114(j) (2011). The most current Veterans Compensation Benefits Rate Tables can be found at http://benefits.va.gov/COMPENSATION/resources_comp01.asp.

a large bureaucracy that is steeped in laws, regulations, and formal procedures. It is important for military attorneys to be familiar with the VA claims process, both for client counseling purposes and to fully understand the likely long-term impact of the character of discharge that is a awarded pursuant to adverse separation proceedings. This section will provide an overview of the VA claims process.

A claimant will generally seek entitlement to any of VA's available benefits programs by filing a claim. In order to illustrate the VA administrative claims process and the procedures for appellate review thereof, we explain the process using the example of a claim for disability compensation benefits that has been submitted by a former servicemember who was discharged with an OTH characterization. Such a claim for service connected disability compensation includes a number of sub-elements (veteran status; the existence of a disability; a connection between military service and the disability; the degree of disability (i.e., the disability rating); and the effective date to be assigned), and the threshold element that must be established in order for a claim to be granted is veteran status.[60] Thus, regardless of whether a claimant actually *has* a disability that is connected to his or her military service, he or she cannot not prevail in a claim for VA disability compensation benefits unless he or she has qualifying status as a veteran.[61]

Found in the opening section of Title 38 of the *United States Code*, Congress has defined that 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."[62] Congress has further elaborated on the length and circumstances of such service that is required to qualify for veteran status.[63] In addition to defining certain circumstances of dishonorable service in its own right, Congress has delegated to the Secretary of Veterans Affairs the authority to

---

[60] *See* Dingess v. Nicholson, 19 Vet. App. 473, 484 (2006).
[61] *See* Robertson v. Shinseki, __ Vet. App. ___, No. 11-3521 (Mar. 15, 2013), slip op. at 7 (referencing VA's Adjudication Procedures Manual Rewrite and stating that "[i]f a service member receives an undesirable discharge, a discharge under other than honorable conditions, or a bad conduct discharge, VA is instructed to make a formal character of discharge determination before addressing a claim for benefits on the merits.").
[62] 38 U.S.C. § 101(2) (2006).
[63] *See, e.g.*, *id.* §§ 101, 106, 5303, and 5303A.

promulgate regulations.[64] Under that authority, VA has further addressed the circumstances associated with the term "dishonorable," which will be discussed at length in the proceeding section of this article.[65]

Ordinarily, and for the great majority of former servicemembers, establishing veteran status is as simple as submitting a DD Form 214 (Certificate of Release or Discharge from Active Duty) with one's claim to a VA regional office. That document, which is issued by a claimant's military service department, indicates, in pertinent part, the length of service and provides a characterization of that service, such as Honorable, General, or OTH.[66] If the characterization of discharge is honorable or general under honorable conditions, and no statutory bars to benefits apply, that characterization is binding on VA.[67]

Additionally, the DD Form 214 will often list a narrative reason for the discharge, and will generally identify the nature of the active duty service, such as Active Duty for Training.[68] If the characterization is OTH or BCD, then the DD Form 214 alone will likely not be sufficient to establish veteran status, and the question will have to be adjudicated by VA, a process that can take years if appeals are included. Assuming that a claimant has established veteran status, the veteran and possibly his or her dependents or survivors are eligible beneficiaries of VA benefits. If the veteran has a current disability and that same disability is adjudicated to be related to a disease or injury incurred or aggravated in service, then the disability will be "service connected" by VA.[69] A grant of service connection is a formal determination that "such disability was incurred or aggravated. . . . in [the] line of duty in the active military,

---

[64] *Id.* § 501(a).

[65] 38 C.F.R. § 3.12 (2012). The term "dishonorable" in 38 U.S.C. § 101(2) is not synonymous with the term "dishonorable discharge" as used in the military justice context. The statutory and regulatory bars that render service "dishonorable" within the meaning of the statute are discussed in Parts VIII and IX of this article.

[66] *See* U.S. DEP'T OF DEF., INSTR. 1336.01, CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY (DD FORM 214/5 SERIES), enclosure 3 (20 Aug. 2009).

[67] *See* 38 C.F.R. § 3.12(a) (2012) (characterization of honorable, general, or under honorable conditions is binding on VA). A favorable characterization does not necessarily entitle a claimant to any specific benefit or to benefits at all; inadequate time in service (Part IV.A *infra*) or a statutory bar (Part VIII *infra*) or a failure to meet a specific prerequisite for the benefit in question (app. H *infra*) may still prevent a claimant or veteran from receiving a particular benefit.

[68] *See* U.S. Dep't of Def., Form 214, Certificate of Release or Discharge From Active Duty (Aug. 2009) [hereinafter DD Form 214].

[69] *See* Hickson v. Shinseki, 23 Vet. App. 394 (2010); Dingess v. Nicholson, 19 Vet. App. 473, 484 (2006).

naval, or air service."[70] If a disability is adjudicated to be service connected, then payment will be afforded at the rates prescribed annually by Congress after a level of disability is assigned.[71] However, if a former servicemember has not established veteran status, then he or she will not be entitled to any compensation for disabilities incurred as a result of service.

It is important for military lawyers and commanders to understand that the foundation for all VA benefits is veteran status, and that it can take a number of years to fully appeal an adverse VA determination regarding whether a former servicemember's circumstances of discharge are a bar to benefits. As we explain below, there are a number of opportunities for commanders and their prosecuting attorneys, despite the fact that they are seeking the adverse separation of a servicemember, to help preserve the servicemember's entitlement to some, or even many, post-service benefits. For example, if an OTH is not based on a circumstance that is a legal bar to VA benefits under 38 C.F.R. § 3.12, then it would facilitate the adjudication of a future VA benefits claim for the command to explicitly include such evidence in the former servicemember's personnel records. This evidence could include documentation explicitly stating that the discharge was not given in lieu of a general court-martial, or a statement from a commander that a servicemember's discharge following misconduct was *not* based on "willful and persistent misconduct."[72] Additionally, in the case of a former servicemember who was discharged as a result of a prolonged period of absence without leave (AWOL), evidence showing the existence of "compelling circumstances" for the AWOL could include documentation showing a particular hardship at that time.[73] In such an instance, a former servicemember may quickly establish eligibility for VA benefits such as health care, vocational rehabilitation, and disability compensation. Otherwise, if the record lacks such evidence, then the administrative claim and appellate process can be lengthy, and the former servicemember may ultimately be unable to produce the evidence necessary to substantiate that the circumstances of his or her discharge should not be considered a bar to VA benefits. The following paragraphs briefly lay out the VA claims process, from the filing of a claim at a regional office to the highest level judicial appeal.

---

[70] 38 U.S.C. § 101(16) (2006).
[71] *See id.* § 1110 (2006); 38 U.S.C.A. § 1114 (2011); 38 U.S.C. § 1115 (2009).
[72] *Infra* Part IX.E.2 (describing the regulatory bars).
[73] *See infra* Part VIII.B.

The first step to file an administrative claim seeking VA disability compensation benefits is the submission of a VA Form 21-526.[74] However, a claimant need not file a VA Form 21-526 to initiate a claim; any "communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs… must be considered an informal claim."[75] A claimant is not required to file such a claim on his or her own, as VA recognizes a number of organizations that are accredited to assist in the preparation, presentation, and prosecution of claims.[76] If the claim submitted is substantially complete, then VA will send the claimant a notice explaining such information as the evidence that he or she should provide and that VA will obtain on his or her behalf, and it will also ask the claimant to identify relevant records and provide consent for VA to obtain private medical records identified by the claimant.[77] Such notice is provided in compliance with VA's statutory duty to notify a claimant of the information and evidence necessary to substantiate a claim, and in response to this notice, claimants are encouraged to provide VA with relevant records in their possession or to notify VA of the existence of records that would help to substantiate a claim.[78] VA has an additional statutory duty to assist claimants in the development of their claims through obtaining records and medical evidence, as necessary, to assist claimants in substantiating their claims.[79] In this regard, the VA system is supposed to be a "strongly and uniquely pro-claimant system of awarding benefits to veterans."[80] Furthermore, the Supreme Court has recognized that, as part of this pro-claimant system, "VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, VA must give the veteran the benefit of any doubt."[81]

---

[74] There is also streamlined "fully developed claim" application that can be filed. *See* U.S. Dep't of Veterans Affairs, Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits (Jan. 2013).
[75] 38 C.F.R. § 3.155 (2012). *See also infra* app. M.
[76] 38 U.S.C. § 5902(a) (2006).
[77] 38 U.S.C. § 5103(a) (2006); *see also* U.S. DEP'T OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL REWRITE, M21-1MR pt. I, ch. 1, § B, subsecs. (a), (b), and (f) (May 3, 2012), *available at* http://www.benefits.va.gov/WARMS/M21_1mr1.asp [hereinafter M21-1MR].
[78] 38 U.S.C.A. § 5103(a) (2009).
[79] 38 U.S.C. § 5103A (2006).
[80] Hayre v. West, 188 F.3d 1327, 1333–34 (Fed. Cir. 1999).
[81] Henderson v. Shinseki, 131 S. Ct. 1197, 1207 (2011).

With respect to the element of veteran status, the duty to assist a claimant in substantiating his or her claim applies. Although the general duty to assist has been in effect since the enactment of the *Veterans Claims Assistance Act* in 2000, it does not explicitly provide that such assistance is required to help a claimant substantiate veteran status.[82] As recently as 2009, VA had asserted that this duty did not apply to a claimant who had not yet established veteran status.[83] However, the United States Court of Appeals for Veterans Claims (CAVC) held that the duty to assist applied to the "critical element" of veteran status of a claim.[84] In that precedential decision in which a claimant was seeking veteran status, the CAVC remanded for the Board of Veterans' Appeals (BVA) to determine whether, pursuant to the duty to assist and VA's regulation defining insanity with respect to character of discharge determinations, a medical opinion was necessary to determine whether the appellant was insane at the time of the commission of an offense leading to his dishonorable discharge from service such that the discharge from service would not be a bar to VA benefits.[85]

VA is required by statute to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary."[86] With respect to cases involving character of discharge, it is necessary for VA "to request the facts and circumstances surrounding the claimant's discharge prior to making a formal decision."[87] This development may include a formal request for the facts and circumstances of the discharge from the former servicemember's service department, but VA does not control what information the service department will provide, and VA will therefore not necessary obtain a complete copy of the former servicemember's personnel file, service treatment records, or the record of court-martial proceedings,[88] let alone evidence outside of those

---

[82] Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (codified as amended at 38 U.S.C. § 5103A (2006)).
[83] Gardner v. Shinseki, 22 Vet. App. 415, 418 (2009). The *Gardner* decision effectively invalidated a portion of VA's implementing regulation, 38 C.F.R. § 3.159(d)(1), which excludes assistance in cases in which "veteran status" had not been shown.
[84] *Gardner*, 22 Vet. App. at 422.
[85] *Id.*
[86] 38 U.S.C. § 5103A(a)(1) (2006).
[87] M21-1MR, *supra* note 77, at pt. III, subpart V, ch. 1, § B, para. (5)(h) (Feb. 27, 2012).
[88] *Id*. In cases in which insanity is at issue, VA conducts additional development, as will be further addressed in the section of this article addressing the insanity exception to bars to benefits. *See* M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. (5)(i) (Feb. 27, 2012).

records that may help to demonstrate the presence of such exceptions as insanity or compelling reasons for a period of AWOL, or shed light on the facts surrounding the claimant's misconduct. Therefore, it is important that military attorneys advise their clients to maintain their own copies of documents that may support a claim for VA benefits. As evidence supporting such critical issues as insanity, compelling reasons for a period of AWOL, the level of the court-martial referral, and the facts surrounding instances of misconduct or civilian criminal offenses may not be fully developed in the information that VA receives, military attorneys should thus advise their clients to retain copies of such documentation so that they can provide this evidence in support of a future claim for VA benefits.

After a VA regional office develops a claim, it will issue a written rating decision.[89] The decision, for the example used in this section, would specifically determine whether the claimant had demonstrated veteran status, and if so, whether the claim for entitlement to service connection was granted or denied. If the regional office had determined that the claimant lacked veteran status as a result of the circumstances of his or her OTH discharge, then the claimant may seek to appeal this denial of his or her claim. When the rating decision is issued, the claimant will be provided with an explanation of the decision, notified of the right to a hearing and representation, and informed of how to initiate an appeal of the decision.[90]

If the former servicemember wishes to appeal the denial of his or her claim based on a lack of veteran status, he or she can initiate appellate review by filing a timely notice of disagreement.[91] Generally, a notice of disagreement shall be filed within one year of the mailing date of the rating decision.[92] A notice of disagreement must be in writing, and it can be submitted by the claimant, a legal guardian, or the claimant's

---

[89] 38 C.F.R. § 3.103 (2012). As of March 2, 2013, VA had more than 895,000 compensation and pension claims pending before its regional offices, and nearly 70 percent of those claims had been pending for more than 125 days. *See* U.S. Dep't of Veterans Affairs, Monday Morning Workload Report (Mar. 4, 2013), *available at* http://www.vba.va.gov/REPORTS/mmwr/index.asp.

[90] 38 C.F.R. § 3.103(b) (2012). This information is provided on a VA Form 4107 (Your Rights to Appeal Our Decision), which is included with VA's rating decision.

[91] 38 U.S.C. § 7105(a) (2006).

[92] *Id.* § 7105(a), (b)(1). The time limit is measured from the mailing of the rating decision.

representative.[93] If a notice of disagreement is not filed within one year of the issuance of the rating decision, then the decision becomes final.[94] Following the filing of a notice of disagreement, the VA regional office will conduct any development or review action that it deems appropriate.[95] For example, the regional office may obtain additional records identified by the claimant, or it could obtain a medical opinion addressing whether the claimant was insane at the time of the commission of the offense that led to the adverse separation.[96] Additionally, a claimant may opt to have a hearing before a decision review officer at the VA regional office that is the agency of original jurisdiction for the claim.[97] If, following any review and development, the disagreement has not been withdrawn and the regional office has not granted the relief sought, a "statement of the case" will be issued.[98] A statement of the case includes: (1) a summary of the evidence in the case pertinent to the issue or issues with which the disagreement has been expressed; (2) a citation to pertinent laws and regulations and a discussion of how such laws and regulations affected VA's decision; and (3) a decision on the issue or issues and a summary of the reasons for the decision.[99]

If, after the issuance of a statement of the case, a former servicemember has still not proven veteran status, then he or she can file an appeal within sixty days of the date of mailing of the statement of the case, and that period can be extended for good cause.[100] This formal appeal is known as a substantive appeal, and it is commonly filed through the submission of a VA Form 9 (Appeal to Board of Veterans' Appeals). However, a substantive appeal is not required to be filed on a

---

[93] *Id.* § 7105(b)(2); *see also* 38 U.S.C.A. § 5904(c)(1) (2007) (allowing accredited attorneys to receive compensation for representation of claimants at the time of or following the filing of a notice of disagreement); *see also* Cameron v. Shinseki, 26 Vet. App. 109, 113 (2012) (discussing the December 2006 statutory amendments to § 5904(c)(1) and their impact on the ability of attorneys to charge a fee for their services following the filing of a notice of disagreement).

[94] 38 U.S.C. § 7105(c) (2006).

[95] *Id*. § 7105(d)(1).

[96] VA's definition of insanity is found at 38 C.F.R. § 3.354(a) and differs from many other definitions, such as those found in state law and the *Uniform Code of Military Justice*. *See* 38 C.F.R. § 3.354(a) (2012). *See infra* Part VII.

[97] *Id.* § 20.1507(a). This hearing will occur at whichever regional office has original jurisdiction over the claim. *Id.*

[98] *Id.*

[99] *Id*.

[100] 38 U.S.C. § 7105(d)(3) (2006); *see also* 38 C.F.R. § 20.202 (2012).

VA Form 9; rather, it can be any writing that sets out specific allegations of error or fact or law related to specific items in the statement of the case, and the benefits sought on appeal should be clearly identified.[101] A VA Form 9 also gives the claimant the opportunity to indicate whether he or she desires a hearing before the judge who will ultimately decide his or her claim on appeal.[102]

Appeals of regional office decisions are reviewed on appeal by the BVA, which sits in Washington, D.C. The Chairman of the BVA is appointed by the President, and individual judges on the BVA are appointed by the Secretary of Veterans Affairs with the approval of the President.[103] The BVA is staffed by approximately 64 judges, 300 staff counsel, and numerous other administrative and clerical staff.[104] It is noteworthy that, at the point an appeal is initiated at the BVA, this is the first opportunity for a claimant to have his or her case decided by a judge.[105] In Fiscal Year 2011, the BVA received 47,763 appeals and issued 48,588 decisions, all of which are non-precedential.[106] Claims for disability compensation comprise the overwhelming majority of claims before the BVA, and more than 95 percent of the BVA's dispositions involved these types of claims.[107] More than 80 percent of claimants to the BVA are represented by accredited representatives from VSOs and state-level service organizations, and less than ten percent of claimants are represented by accredited attorneys.[108] Appellants have the right to a hearing before the BVA, regardless of whether they participated in a hearing at the regional office.[109] It is important for commanders, attorneys, and VA personnel to appreciate that the average processing time from the filing of a notice disagreement with a VA rating decision until the BVA's final disposition on an appeal is 1,123 days, plus the

---

[101] *Id*. Any writing that specifies the errors that are the basis for the appeal and the benefits sought can serve this purpose. A statement of the case may contain numerous issues, but the claimant may opt to narrow the issues being appealed in the substantive appeal. *Id*.

[102] U.S. Dep't of Veterans Affairs, Form 9, Appeal to Board of Veterans' Appeals (Nov. 2009).

[103] 38 U.S.C. § 7101(b)(1) (2006).

[104] *Id*. STEVEN L. KELLER, U.S. DEP'T. OF VETERANS AFFAIRS, BOARD OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN 3 (2011) [hereinafter BOARD CHAIRMAN'S REPORT].

[105] Veterans Law Judges are required to be members of good standing of the bar of a state. 38 U.S.C. §§ 7101A(a)(1), (2) (2006).

[106] BOARD CHAIRMAN'S REPORT, *supra* note 104, at 3.

[107] *Id*. at 21.

[108] *Id*. at 22.

[109] 38 U.S.C. § 7107(b) (2006); *see also* 38 C.F.R. § 20.1507(b) (2012).

amount of time that it took the regional office to adjudicate the initial claim.[110]

The BVA is the highest level of administrative review within VA, and its decision is the final decision of the Department on appeal.[111] By law, a decision of the BVA "shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."[112] Furthermore, the BVA is statutorily obligated to include "a written statement of the BVA's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record."[113] While decisions of the BVA are not precedential and have no binding effect on how future cases will be decided,[114] they can nonetheless be instructive to veterans law practitioners who represent veterans in the VA claims process.

A former servicemember whose claim is denied by the BVA can appeal to the CAVC.[115] However, the Secretary of Veterans Affairs is prohibited from seeking judicial review of a BVA decision.[116] As a court established pursuant to Article I of the Constitution, the CAVC provides veterans and claimants with the opportunity to pursue their benefits claims outside of VA's administrative scheme. The CAVC has exclusive jurisdiction to review decisions of the BVA, and it has the power to affirm, modify, or reverse a decision or to remand a matter.[117] Pursuant to statute, appeals of BVA decisions should be filed within 120 days of the issuance of the BVA decision, but such a requirement is not jurisdictional, but rather, is "an important procedural rule."[118] The

---

[110] BOARD CHAIRMAN'S REPORT, *supra* note 104, at 18.
[111] 38 U.S.C. 7104(a) (2006).
[112] *Id.*
[113] *Id.* § 7104(d).
[114] 38 C.F.R. § 20.1303 (2012) (explaining the nonprecedential nature of BVA decisions); Hillyard v. Derwinski, 1 Vet. App. 349 (1991) (holding that CAVC could not use BVA decisions in a precedential manner).
[115] This court was created by the Veterans Judicial Review Act of 1988, Pub. L. No. 100-687 (1988). The creation of the CAVC is codified at 38 U.S.C. § 7251 (2006). The CAVC was formerly known as the Court of Veterans Appeals (COVA). Pub. L. No. 105-368 (1999).
[116] 38 U.S.C. § 7252(a) (2006).
[117] *Id.*
[118] *Id.* § 7266(a). In explaining that the 120-day appeal period is an important procedural rule, the CAVC, in *Bove v. Shinseki*, 25 Vet. App. 136, 143 (2011) (per curiam), held that the doctrine of equitable tolling applies to late-filed appeals of BVA decisions.

CAVC is currently composed of nine judges.[119] In Fiscal Year 2011, the Court received 3,948 new appeals, and single-judge decisions were issued in 2,661 cases and 149 multi-judge panel decisions were issued (more than 100 of which were rulings on requests for panel decisions following a single judge decision or reconsideration decision).[120] Thus, the overwhelming majority of CAVC decisions are issued as single-judge memorandum decisions, as is permitted by law.[121] It is noteworthy that pursuant to Rule 30 of the CAVC's *Rules of Practice and Procedure*, citation of nonprecedential authority is generally prohibited.[122] As single-judge decisions are not published in the *Veterans Appeals Reporter*, the vast majority of decisions from the CAVC cannot be cited as binding precedents in other cases. Although these single-judge decisions have no precedential effect, they are frequently looked to by attorneys and representatives who practice in the CAVC and in proceedings before VA, as they may indicate how a particular issue is viewed by the individual CAVC judges.

Although claims processing is considered to be "paternalistic" before VA regional offices and the BVA,[123] there is no such requirement in cases before the CAVC. In CAVC litigation, VA's Office of General Counsel represents the Secretary of Veterans Affairs. Unlike the majority of cases at the BVA, the majority of appellants are represented by private attorneys. In fact, approximately three quarters of appellants before the CAVC are represented by privately retained counsel at the time of disposition of their cases.[124] The median processing time from the filing of a new appeal to the CAVC until disposition by a single judge of the Court averages 594 days, whereas, in instances in which a panel of judges is convened by the Court, the median processing time is 763 days.[125] Thus, the average processing time, from the filing of a notice of disagreement until the issuance of a single-judge decision by

---

[119] *See* CAVC Bar Ass'n, *A New Judge Joins the CAVC*, VETERANS L.J. 1 (Winter 2012-2013).
[120] U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT, OCT. 1, 2010 TO SEPT. 30, 2011 (FISCAL YEAR 2011) 1–2 (2012) [hereinafter CAVC ANNUAL REPORT], *available at* http://www.uscourts.cavc.gov/documents/FY_2011_Annual_Report_Final_Feb_29_2012_1PM_.pdf.
[121] 38 U.S.C. § 7254(b) (2006); *see also* Frankel v. Derwinski, 1 Vet. App. 23, 25–26 (1990).
[122] U.S. COURT OF APPEALS FOR VETERANS CLAIMS, RULES OF PRACTICE AND PROCEDURE r. 30, at 18 (Sept. 15, 2011) (incl. clerical revisions as of Feb. 3, 2012).
[123] *See, e.g.*, Jaquay v. Principi, 304 F.3d 1276, 1280 (Fed. Cir. 2002).
[124] CAVC ANNUAL REPORT, *supra* note 120, at 1.
[125] *Id*. at 3.

the CAVC, is 1,717 days, exclusive of the processing time for the issuance of the initial VA rating decision and the time elapsed between the issuance of the BVA decision and the filing of the appeal to the CAVC.[126] Furthermore, the issuance of a CAVC decision will not necessarily terminate the appeal for benefits after approximately 1,717 days in appellate status; rather, a favorable decision by the Court would most likely involve a remand to the Board for the issuance of a new decision or for additional development, thus necessitating additional time to complete the adjudication of the claim.

If a former servicemember's claim is denied by the CAVC, then he or she may seek review by the United States Court of Appeals for the Federal Circuit (Federal Circuit), which is a court established pursuant to Article III of the Constitution.[127] Likewise, the Secretary of Veterans Affairs may appeal a decision of the CAVC to the Federal Circuit.[128] Appeals to the Federal Circuit are limited, in that the Federal Circuit may not review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case.[129] The Federal Circuit has exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof, and to interpret constitutional and statutory provisions.[130] Fewer than 200 appeals of decisions from the CAVC were filed in the Federal Circuit during Fiscal Year 2012.[131] Like the CAVC, there is a relatively small amount of jurisprudence involving character of discharge from the Federal Circuit; in fact, a paucity of reported cases addressing this topic have been the subject of decisions by the Federal Circuit.[132] This lack of jurisprudence is one reason why there is so much subjectivity in VA COS determinations.

Finally, parties may petition for a writ of certiorari to the Supreme Court. The Supreme Court, although it has issued decisions on a small

---

[126] *See also* BOARD CHAIRMAN'S REPORT, *supra* note 104, at 18.
[127] 38 U.S.C. § 7292(a) (2006).
[128] *Id.*
[129] *Id.* § 7292(d)(2).
[130] *Id.* § 7292(c).
[131] U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, STATISTICS, CASELOAD, BY MAJOR ORIGIN, *at* http://www.cafc.uscourts.gov/the-court/statistics.html (last visited Mar. 7, 2013).
[132] *See, e.g.*, Lane v. Principi, 339 F.3d 1331, 1340-41 (Fed. Cir. 2003) (holding that the BVA could "look to the totality of the circumstances" in deciding whether a period of AWOL was disqualifying and that the burden was on the claimant to demonstrate the contrary, but not giving the VA any guidance on how to make that judgment).

number of appeals originating from the CAVC, has yet to issue a decision involving character of discharge issues under Title 38 of the *United States Code* or *the Code of Federal Regulations*.[133]

The VA claims and appeals process can be lengthy, and the likelihood of success is only as good as the evidence upon which a claim is based. As alluded to in the opening section of this article, while many servicemembers separate with adverse discharges that they undoubtedly "deserve," there are others, many of whom are college-aged individuals who have served in combat, who have engaged in misconduct after returning home from war. While some of these cases are "black and white" and lack complexity, the disposition of other and more difficult cases may squarely depend on the sound judgment of the adjudicator who will ultimately determine whether a young man or woman is entitled to a lifetime of benefits. Military officials, whenever possible, should strive to create a complete record which will lead to a fully developed and fair adjudication of a former servicemember's claim for VA benefits. Likewise, VA personnel who adjudicate these claims should carefully review the evidence of record, and strive to base their decisions on a complete and fair review of a fully developed record and based upon the correct application of the relevant laws. A deficient record or an adjudicatory error can contribute to many years of appeals with preclusion from benefits as the byproduct during such time.

Applied Example: Understanding the Impact of Character of Discharge and VA's Decision

There are potentially enormous VA benefits at stake upon a servicemember's discharge, both in terms of their aggregate monetary value over a lifetime and in terms of their immeasurable worth to a veteran in bettering his or her life. For example, a Veteran with just a 10 percent disability rating could be paid more than $75,000 in disability compensation over the span of 50 years, and that figure is estimated in today's dollars and does not take into account the cost of living increases that are granted most years.[134] To illustrate the critical importance of the

[133] The four cases originating from the CAVC that have been decided by the Supreme Court are *Brown v. Gardner*, 513 U.S. 115 (1994); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009); *Henderson v. Shinseki,* 131 S. Ct. 1197 (2011) .

[134] The most current Veterans Compensation Benefits Rate Tables can be found at http://benefits.va.gov/COMPENSATION/resources_comp01.asp. As of December 1,

potential impact of an OTH, and VA's determination of eligibility for benefits resulting therefrom, we tell the story of a fictional former soldier, Specialist (SPC) Mallone, who was discharged under Other Than Honorable conditions. Based on the circumstances of his discharge, and the VA rating decision determining his eligibility for VA benefits, the course of his life could take two very different paths.

Specialist Mallone enlisted for a term of three years. Shortly after he reported to his unit, his brigade deployed to Iraq for nine months. While he was not physically wounded during his combat service, SPC Mallone rode in two different convoys in which a lead vehicle was the target of an Improvised Explosive Device (IED). In one incident, three of the occupants sustained severe, but not life threatening, injuries. In a second incident, two of the vehicle's occupants died, and another occupant sustained severe burn injuries. As a medic, SPC Mallone treated these injured comrades, and provided comfort to one of the soldiers in the minutes prior to his passing.

When SPC Mallone returned from Iraq, he began to reflect on the events that occurred during his deployment. As a medic, he was intimately familiar with the post-deployment screening process and deliberately denied any mental health problems when he was screened during his post-deployment surveys and medical examinations.[135] Within weeks of his return from Iraq, he was arrested twice by civilian law enforcement authorities for driving under the influence (DUI) and for a simple assault that occurred during a bar fight. Shortly after pleading guilty to the assault charge and returning from two weeks of block leave, SPC Mallone tested positive for Marijuana during a properly-performed unit urinalysis.[136] When he learned that he was facing civilian prosecution for his drug use, SPC Mallone admittedly just "wanted out" of the military service. SPC Mallone's unit initiated

---

2012, a veteran with a 10 percent disability rating and no dependents would receive $129 per month in VA disability compensation.

[135] The Army uses Deployment Health Assessments (DHAs) to "address physical and behavioral health needs prior to, during and after deployment." *See* U.S. Dep't of Army, *Today's Focus: Army Deployment Health Assessments*, STAND-TO!, Mar. 20, 2012, *available at* http://www.army.mil/standto/archive/issue.php?issue=2012-03-20. The Post-Deployment Health Assessment (PDHA) and Post-Deployment Health Reassessment (PDHRA) are performed after redeployment. *Id*.

[136] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 313 (2012) ("An order to produce body fluids, such as urine, is permissible in accordance with this rule.").

administrative separation for a pattern of misconduct.[137] He decided to not fight an administrative separation, despite the fact that he would likely receive an OTH discharge characterization. SPC Mallone unconditionally waived his right to an administrative separation board,[138] as his primary concern and motivation was to get out of the Army.

The records pertaining to SPC Mallone's DUI and simple assault arrests were associated with the record of his administrative separation proceedings. SPC Mallone's defense counsel wanted SPC Mallone to self-refer for behavioral health treatment and evaluation, but SPC Mallone resisted. During the medical and mental health examinations pursuant to the administrative separation,[139] the providers did not document any psychiatric abnormalities, as SPC Mallone steadfastly denied that he had any mental health symptomatology.

After much effort, SPC Mallone's defense counsel was able to convince him to submit a statement for the separation authority to consider. In this statement, SPC Mallone indicated that he had "a lot going on in his head" and that he was "drinking quite a bit to deal with his issues." In particular, but without providing any specific details, Mallone explained that he had cared for wounded and deceased soldiers as a medic. At the time of his separation examination from service, Mallone continued to deny that he had any mental health issues. Five years after he separated from service, Mallone sought outpatient medical care at a VA Community Based Outpatient Clinic (CBOC).

A. Path 1: The Effect of a Favorable Discretionary Determination

The Eligibility Office informed him that, due to the fact that he had been discharged under OTH conditions, an administrative decision was necessary in order to determine whether he was eligible for VA benefits. Several months later, the VA regional office issued an administrative decision, which was based on a review of information provided to VA by the Army. In addition, Mallone had submitted copies of documents pertaining to his discharge that he had maintained since his departure

---

[137] *See* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 14-12c (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200].
[138] *See id.* paras. 1-19c(2)(a), 2-5. Normally, when the command seeks OTH separation, a soldier has the right to a separation board.
[139] *See id*. para. 1-32.

from service, to include the statement he had written at the request of his attorney. The adjudicator determined that, despite the Army's characterization of his service as OTH and the determination that he had engaged in a pattern of misconduct, Mallone's service was nonetheless "other than dishonorable" for VA benefits purposes.

In support of this determination, the decision explained that, although the Army had characterized his actions as a pattern of misconduct, the two arrests (without evidence of a conviction for the DUI in the record) and single positive drug were not "willful and persistent misconduct" such that would be a regulatory bar to VA benefits.[140] The decision put considerable emphasis on Mallone's statement that he submitted at the time of his administrative separation. The decision interpreted this statement to be an explanation that Mallone had been drinking heavily as a way to deal with his combat experiences, and that his heavy drinking led to at least two of the three instances of misconduct.

Mallone had earned his certification as an Emergency Medical Technician while in the Army, and he was able to obtain employment with a private medical transport company following his discharge. He became increasingly stressed and frequently had flashbacks about the convoy incidents in Iraq while he was on the job. He tried working in a less stressful and lower paying job as a medical technician at a doctor's office, but he eventually quit this job, as well. Shortly after he became unemployed, he was seen by the VA CBOC for a respiratory infection. At that time, a routine PTSD screening was performed. When the health care provider reported that his PTSD screen was positive, Mallone continued to insist that he was "fine." After significant persuasion by the treatment provider, Mallone reluctantly accepted a referral to visit a psychologist. This psychologist diagnosed PTSD, established a good rapport with Mallone, and persuaded him to attend counseling on a recurring basis, which helped him improve his outlook on life and motivated him to try to return to work. Mallone soon thereafter filed a claim for service connection for PTSD, which was granted and for which he received a 30 percent rating. Although he was not eligible for the post-9/11 GI Bill due to his lack of honorable service, his 30 percent rating entitled him to Vocational Rehabilitation Benefits, which would give him the training necessary to work in a field other than emergency

[140] *See infra* Part IX.B.2 (describing nuances of this regulatory bar and its related considerations).

medicine. Mallone attended college through that program, and he chose to study computer programming, which was a career field that interested him and would allow him to work independently and in an environment that was less stressful than his former position as an Emergency Medical Technician. With the income and stability of a good job, he was able to purchase a home several years later with the assistance of his VA Home Loan Guaranty benefit.

B. Path 2: The Effect of an Unfavorable Discretionary Determination

Five years after he separated from service, Mallone sought outpatient medical care at a VA CBOC. The Eligibility Office informed him that, due to the fact that he had been discharged under OTH conditions, an administrative decision was necessary in order to determine whether he was eligible for VA benefits. Several months later, the VA regional office issued an administrative decision, which was largely based on a review of Mallone's service personnel records.

The adjudicator reviewed the circumstances surrounding Mallone's discharge under Other Than Honorable conditions and determined that he was discharged as a result of "willful and persistent misconduct," which is a regulatory bar to most VA benefits.[141] The decision explained that Mallone had engaged in multiple instances of misconduct during service, and that the Army's determination that he had engaged in a pattern of misconduct weighed heavily in its decision. The decision explained that VA considered whether Mallone's combat service in Iraq was a factor in his misconduct during service, but it specifically referenced the multiple examinations that denied any PTSD symptoms and provided normal psychiatric assessments, including at the time of discharge from service. Mallone's statement that he submitted at the time of his administrative separation was also considered, but it was given less probative weight because it was determined to have been submitted in an attempt avert a potential court-martial. Based on the administrative decision, Mallone was informed that he was not entitled to any VA health care benefits since he did not have any service-connected disabilities. Furthermore, he was informed that he would be ineligible for most VA benefits. Mallone chose not to appeal the decision.

---

[141] *Infra* Part IX.B.2.

Because Mallone had been certified as an Emergency Medical Technician while in the Army, he was able to obtain employment with a private medical transport company following his discharge. He became increasingly stressed on the job and frequently had flashbacks about the convoy incidents in Iraq while he was on the job. He tried working at a lower paying job as a medical technician at a doctor's office, but he eventually quit this job, as well. Without a job and only trained to work in a career field that unduly stressed him, Mallone returned home to live with his parents, where he would work occasional work "odd jobs."

Since Mallone was not service connected for any disabilities, he was not eligible for any VA health care treatment and rarely saw a doctor because he did not have any health insurance. Therefore, he never had a PTSD screening that could have led to a diagnosis of and treatment for his PTSD; in fact, he continued to live in denial that he may have PTSD. With dishonorable service for VA purposes, Mallone was ineligible for any disability compensation. As a non-service connected former servicemember with a dishonorable discharge for VA purposes, Mallone was not entitled to Vocational Rehabilitation benefits that would allow him to retrain or provide the funding for him to go back to college. Despite his struggles and lack of steady employment, Mallone was fortunate to have a supportive family that provided a place for him to stay.

C. The Intersection of the Two Paths

Mallone's service terminated with a discharge under Other Than Honorable conditions based on a pattern of misconduct, and he ultimately bears responsibility for his actions that led to his administrative separation from service. However, the adjudicative process requires VA to consider whether the circumstances of his discharge were nonetheless under other than dishonorable conditions. In the examples provided above, the outcomes and VA benefits that would accompany each determination were very different, but it is important to note that neither VA decision is incorrect; each was a plausible decision based on the available evidence. This fictional case study demonstrates the nature and importance of the benefits that are at stake when VA adjudicates when a discharge under Other Than Honorable conditions is considered other than dishonorable for VA purposes. It further exemplifies why a former servicemember's actions during service, and VA's adjudication thereafter, can have lifelong and powerful

consequences. This case shows how the same evidence, even when carefully considered, can lead to two very different and equally justifiable outcomes. Further development of the record, advocacy by a representative, and a willingness to appeal VA's decision are undoubtedly factors that can lead to a more favorable outcome for a former servicemember.

III. Brief Overview of Common VA Benefits Programs

The benefits that VA administers are broadly encompassed by three separate administrations: the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the National Cemetery Administration (NCA). Their mission is to "provide benefits and services to Veterans and their families in a responsive, timely, and compassionate manner in recognition of their service to the Nation."[142] This section will provide an overview of the benefits provided by these three administrations. It is of the utmost importance that commanders, military attorneys, representatives, VA employees, and most importantly, servicemembers understand the VA benefits that can be forfeited due to an adverse characterization of discharge. The reader is strongly advised to conduct his or her own review of the specific laws and regulations governing these benefits when dealing with individual cases. This section discusses the benefits and their eligibility requirements in broad terms, but there are numerous exceptions to the general rules presented, and this paper cannot substitute for up-to-date, detailed research when a servicemember's benefits, and thus his or her future, are potentially at stake.

A. VBA Benefits

1. Disability Compensation

Service connected disability compensation is a monthly payment to compensate a disabled veteran for the "average impairment in earning capacity resulting from such diseases and injuries and their residuals conditions in civil occupations."[143] As with nearly all VA benefits, it

---

[142] VBA REPORT, *supra* note 58, at 1. *See also infra* app. H.
[143] 38 C.F.R. § 4.1 (2012).

requires that the disability must be connected to an "other than dishonorable" period of service.[144]

The rate of compensation is assigned according to a combined degree of disability ranging from 10 to 100 percent in ten-degree increments, with payments ranging from $129 per month (for ten percent disability) to $2,816 (for 100 percent disability).[145] Additionally, certain veterans are entitled to "special monthly compensation" payments that provide additional compensation for particular qualifying disabilities, such as the loss of a limb.[146] Veterans with serious disabilities, such as paralysis, the loss of multiple extremities, or conditions that require aid and attendance, may be entitled special monthly compensation that far exceeds the 100 percent rate.[147] Disability rating criteria are listed in the Schedule for Rating Disabilities in Part 4 of Title 38 of the *Code of Federal Regulations*.[148] Finally, there is no continuous active service requirement to be entitled to disability compensation,[149] although active duty status at the time of incurrence of a disability or disease may be at issue, especially for non-regular service.[150]

2. Dependency and Indemnity Compensation

Survivors of veterans who die as a result of service-connected disabilities, or while on active duty, are entitled to monthly dependency and indemnity compensation (DIC).[151] Qualifying survivors of veterans who were in receipt of a "total disability" rating at the time of death and

---

[144] *See* 38 U.S.C. § 101(2) (2006) (defining "veteran" as a person whose service ended with a discharge that was "other than dishonorable"); *see also* Part II *supra*. Furthermore, the disability itself cannot have been "the result of the veteran's own willful misconduct or abuse of alcohol or drugs." 38 U.S.C. 1110 (2006).

[145] 38 U.S.C.A. § 1114 (2011); 38 C.F.R. § 4.25(b) (2012). Veterans who are rated 30 percent or more disabled are entitled to additional compensation based on the number of dependents they have. 38 U.S.C.A. § 1115 (2012). The most current Veterans Compensation Benefits Rate Tables can be found at http://benefits.va.gov/COMPENSATION/resources_comp01.asp. Pub. L. No. 112-198 (2012).

[146] 38 U.S.C.A. § 1114(k) (2011).

[147] *Id*. §§ 1114-(l)–(t).

[148] *See also* 38 U.S.C. § 1155 (2006) (granting VA the authority to adopt and apply a schedule of ratings).

[149] *See id*. § 5303A(b)(3)(D) (24-month active service requirement does not apply "to the provision of a benefit for or in connection with a service-connected disability, condition, or death).

[150] *Id*. § 101.

[151] *Id*. § 1312.

were in receipt of a "total disability" rating for the ten years prior to death or for the first five years following discharge from active duty are also eligible for DIC.[152]

3. Additional Benefits for Service-Connected Disabled Veterans

Aside from monthly compensation benefits, service-connected disabled veterans may be eligible for numerous other VA benefits. A key consideration with respect to these other benefits for service-connected disabled veterans is that the qualifying disability or disabilities must be ideologically related to a period of service that has been characterized as other than dishonorable.[153] Although this article will not provide a complete explanation of every benefit afforded to disabled veterans, this section addresses the benefits most frequently sought.

a. Insurance

For a two-year period following the receipt of a decision granting service connection for a disability, and if a veteran is otherwise in good health, a veteran who has been discharged under other than dishonorable conditions has the option to purchase a Service-Disabled Veterans Insurance (S-DVI) policy for up to an additional $10,000 in life insurance coverage.[154] Veterans who are totally disabled are entitled to a waiver of S-DVI premiums and are eligible for a supplemental S-DVI policy for an additional $30,000 in coverage.[155] Similarly, certain severely disabled veterans will qualify for a Specially Adapted Housing grant,[156] and those veterans who are under age 70 are entitled to purchase Veterans' Mortgage Life Insurance that is payable to the mortgage holder (i.e., the bank) that can allow payoff of a mortgage loan in the event of the death of the veteran.[157] Disabled veterans may also have Veterans Group Life Insurance policies, which will be addressed in more detail below.

---

[152] *Id*. § 1318.
[153] *Id*. §§ 101(2), 1110. *See infra* Part II and note 65 for a discussion of the term "dishonorable" within the VA context.
[154] *Id*. § 1922.
[155] 38 U.S.C.A § 1922A (2011). This statute also provides that an application for Supplemental Service Disabled Veterans' Insurance (S-DVI) must be made before a veteran's 65th birthday. *Id*. § 1922A(c).
[156] 38 U.S.C.A. § 2101 (2012).
[157] 38 U.S.C.A. § 2106 (2011).

b. Clothing Allowance

Service-connected disabled veterans are entitled to an annual clothing allowance if, because of service-connected disability, they have a prosthetic or orthopedic appliance (to include a wheelchair) that is determined to wear out or tear their clothing, or they are prescribed medication for a service-connected disability that causes irreparable damage to their outergarments.[158] The allowance is currently set at $753 per year.[159]

c. Automobile Allowance

Certain service-connected disabled veterans, such as those who have lost or lost the use of an extremity, are entitled to a one-time grant for the purchase of an automobile or other conveyance, and are otherwise entitled assistance with the purchase of adaptive equipment necessary for the operation of an automobile or other conveyance.[160] The current rate for the one-time automobile purchase grant is $19,505.[161]

d. Vocational Rehabilitation

Service-connected disabled veterans who have a disability rating of 10 percent with a serious employment handicap,[162] or are rated at least 20 percent disabled and have an employment handicap,[163] are eligible for

---

[158] 38 U.S.C. § 1162 (2006); *see* 38 C.F.R. § 3.810(a)(2)(ii) (2012) (allowing the award of more than one clothing allowance to some veterans).

[159] 38 U.S.C. § 1162 (2006); Pub. L. No. 112-198 (2012). *See* http://www.va.gov/compensation/special_benefits_allowances_2012.asp (providing current rates for many special benefit allowances).

[160] 38 U.S.C.A. § 3902 (2011); 38 C.F.R. § 17.156 (2012).

[161] 38 U.S.C.A. § 3902(a) (2011); but if the cost of the vehicle is less, then the grant will not exceed the actual cost (including taxes). The maximum payment amount is adjusted annually based on the application of Consumer Price Index. *Id.* § 3902(e). *See* http://www.va.gov/compensation/special_benefits_allowances_2012.asp (providing current rates for many special benefit allowances).

[162] A serious employment handicap means a significant impairment, resulting in substantial part from a service-connected disability rated at 10 percent or more, of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes, and interests. 38 U.S.C. § 3101(7) (2006).

[163] An employment handicap means an impairment, resulting in substantial part from a service-connected disability, of a veteran's ability to prepare for, or retain employment consistent with such veteran's abilities, aptitudes, and interests. *Id.* § 3101(1).

Vocational Rehabilitation assistance.[164] Vocational Rehabilitation participants are evaluated and, as appropriate, are entitled to such tools as post-secondary training, on-the-job training, employment services, and supportive rehabilitation.[165] During Fiscal Year 2011, VA provided vocational rehabilitation benefits for more than 116,000 disabled veterans.[166] Of the nearly 60,000 veterans who received subsistence payments as part of that program in Fiscal Year 2011, more than 50,000 were attending undergraduate or graduate school.[167] Although veterans who have not received an honorable discharge are not entitled to VA's generous "GI Bill" education benefits, disabled veterans may nonetheless be entitled to post-secondary education through participation in this program – provided, as always, the disability that causes the employment handicap must be deemed to have been incurred from an "other than dishonorable" period of service.[168]

e. Pension

More than half a million veterans and their survivors receive VA non-service-connected pension benefits.[169] Pension benefits are available to veterans, regardless of whether they have a service-connected disability, who have a permanent and total non- service-connected disability, or are at least age 65, and who meet income and net worth limits.[170] A veteran must meet specified wartime length-of-service requirements in order to qualify for pension benefits.[171] Additionally, a veteran of the current wartime era must have been discharged under conditions other than dishonorable, and, with a number of exceptions, served 24 months of continuous active duty or the full period for which he or she was called or ordered to active duty.[172] Certain survivors of deceased disabled wartime veterans who met the requirements for pension benefits or were entitled to receive compensation or retirement pay for a service-connected disability are eligible for pension benefits.[173]

---

[164] *See also* 38 U.S.C.A. § 3102 (2012).
[165] 38 U.S.C. § 3104 (2006).
[166] VBA REPORT, *supra* note 58, at 76.
[167] *Id*. at 77.
[168] 38 U.S.C.A. § 3103(b)(2)(A) (2012).
[169] VBA REPORT, *supra* note 58, at 3.
[170] 38 U.S.C. §§ 1521, 1522 (2006); 38 C.F.R. §§ 3.3, 3.275 (2012).
[171] 38 U.S.C.A. § 1521 (2012).
[172] 38 U.S.C. §§ 101(2), 5303A(b)(1)(A) (2006).
[173] 38 U.S.C.A. § 1541 (2010).

It is noteworthy that non-service-connected death pension benefits may nonetheless be payable even if a death is considered not in the line of duty if the service member had two years of honorable military, naval, or air service, as certified by the Secretary concerned.[174]

4. Home Loan Guaranty

The VA Home Loan Guaranty is a benefit available to all veterans, regardless of the existence of a service-connected disability.[175] During Fiscal Year 2011, VA guaranteed a total of 357,594 loans totaling nearly $75 billion.[176] In this loan program, VA will back a mortgage loan up to a specified amount set by statute so that a veteran can purchase a or refinance a home.[177] A veteran is eligible for VA home loan guaranty benefits, so long as his or her service is characterized as other than dishonorable,[178] and the veteran completed 24 months of continuous active duty or the full period for which he or she was order or called to active duty (at least 90 days).[179] As with other benefits programs, certain exceptions to the minimum active service requirements apply.[180] Additionally, this benefit can be used by service members who have served more than 90 days on active duty during the Persian Gulf War era, which is currently in effect, and are continuing to serve on active duty.[181] The veteran must pay VA a "loan funding fee" equal to a small percentage of the amount being funded, but veterans who have a compensable service–connected disability are exempt.[182]

---

[174] *Id*. § 1541(h); 38 C.F.R. § 3.1(d)(2) (2012).
[175] 38 U.S.C.A. § 3702 (2008); 38 C.F.R. § 3.805 (2012). Although all veterans with qualifying active service are eligible, the funding fee for this loan product is waived for disabled veterans who are entitled to service-connected disability compensation. *See* 38 U.S.C.A. § 3729(c) (2012).
[176] VBA REPORT, *supra* note 58, at 67.
[177] *See generally* 38 U.S.C. § 3703 (2006).
[178] *Id*. § 101(2).
[179] 38 U.S.C.A. § 3702(a)(2)(D) (2008).
[180] *Id.* § 3702. Reserve and National Guard members with six years in the Selected Reserve or National Guard may be eligible for this benefit, even if the member was never called to active duty. For a helpful table denoting the minimum active duty service requirement for the VA home loan guaranty, see U.S. Dep't of Veterans Affairs, Eligibility Requirements for VA Home Loans, http://benefits.va.gov/HOMELOANS/purchaseco_eligibility.asp (last visited Mar. 12, 2013), *See also* Part IV.A (generally describing the minimum active duty service requirement).
[181] 38 U.S.C.A. § 3702(a)(2)(C), (E).
[182] 38 U.S.C.A. § 3729 (2012).

5. Insurance

Recently discharged servicemembers are eligible to convert a Servicemembers Group Life Insurance (SGLI) term policy to a Veterans Group Life Insurance (VGLI) term policy.[183] If the SGLI policy is converted within 240 days of separation from service, no evidence of insurability is required.[184] After that time, policies can be converted for up to one year and 120 days after discharge from service; however, evidence of insurability will be required.[185] As long as a servicemember was insured and paying premiums for SGLI on active duty, then he or she is eligible to convert his or her SGLI policy to a VGLI policy, *regardless of the characterization of his or her discharge*.[186] The maximum amount of life insurance coverage offered under the VGLI program is currently $400,000.[187]

6. Education

a. GI Bill Benefits

At the end of Fiscal Year 2011, there were more than 550,000 Post-9/11 GI Bill beneficiaries.[188] Veterans with 36 months of fully *honorable* active military service (not a general discharge) after September 11, 2001, are eligible for the full amount of Post-9/11 GI Bill benefits.[189] There are a number of exceptions to the minimum length of service requirement that is necessary to qualify for the full amount of benefits, such as for veterans who served at least 30 continuous days on active duty and were discharged for a service-connected disability.[190] This benefit provides "the actual net cost for in-State tuition and fees" for post-secondary education.[191] Additionally, veterans may be eligible for a monthly housing stipend that is payable at the rate of a service member

---

[183] 38 U.S.C.A. § 1977 (2010).
[184] 38 C.F.R. § 9.2(b) (2012).
[185] *Id.* § 9.2(c).
[186] 38 U.S.C.A. § 1973 indicates that VGLI is forfeited when a former service member is found guilty of mutiny, treason, spying or desertion, or who, because of conscientious objections, refuses to perform service or refuses to wear the uniform. 38 U.S.C.A. § 1973 (2008).
[187] 38 U.S.C.A. § 1967(a)(3)(a)(i) (2010).
[188] VBA REPORT, *supra* note 58, at 40.
[189] 38 U.S.C.A. §§3311(b)(1); (c) (2011).
[190] *Id.* § 3311(b)(2).
[191] *Id.* § 3313(c) (2011).

at the E-5 pay grade for the zip code in which the institution of higher learning is located.[192] Veterans with less than 36 months of honorable service after September 11, 2001, may still be eligible to use Post-9/11 GI Bill benefits, albeit at a reduced rate.[193]

A fully *honorable* discharge (not a General Discharge) is also required for eligibility for the Montgomery GI Bill program, which is the predecessor of the Post-9/11 GI Bill program.[194] The tuition payment rate and housing stipend normally make the Post-9/11 GI Bill program more appealing. However, if a veteran does not have the requisite length of honorable post-9/11 service to qualify for eligibility under the Post 9/11 GI Bill program, then he or she may opt to use Montgomery GI Bill benefits associated with a period of previous honorable service.

b. Survivors' and Dependents' Educational Assistance

Among other circumstances, the spouse and children of a veteran who is permanently and totally disabled as a result of service-connected disability, or who died from any cause while permanently and totally disabled due to service connected disability, are eligible for VA survivors' and dependents' educational assistance (DEA) benefits.[195] Additionally, the spouse and children of an active duty servicemember who is hospitalized for a service connected permanent and total disability and is likely to be discharged due to that disability are eligible for DEA benefits.[196] Eligible beneficiaries are entitled to training such as, but not limited to, degree programs, certificate programs, and apprenticeship or on-the-job training programs.[197]

B. VA Health Care

VA maintains this country's largest integrated health care system[198] As is the case with most VA benefits, in order to be eligible for VA health care benefits, a beneficiary must be a veteran who was discharged

---

[192] *Id.* § 3313(c)(B).
[193] *Id.* §§ 3313(c)(2), (3), (4), (5), (6), and (7) (2006).
[194] 38 U.S.C.A. § 3011(a)(3)(B) (2008).
[195] 38 U.S.C. § 3501(a)(1) (2006).
[196] *Id.*
[197] *Id.* §§ 3531, 3532, 3534, 3536, and 3537 (2006).
[198] P&A REPORT, *supra* note 54, at 1-2.

under other than dishonorable conditions.[199] However, there are a number of exceptions to this rule, such as for veterans who were discharged from service due to a service-connected disability or who have a compensable service connected disability.[200] However, VA health care has unique provisions for determining whether character of service will bar treatment. VA, by regulation, has specifically addressed the circumstances in which a former service member with a discharge under other than honorable conditions is eligible for VA health care benefits.[201] As explained earlier, and as VA does for a number of its benefit programs, VA will determine whether a former service member's service was under other than dishonorable conditions. A veteran who meets minimum service requirements and is deemed to have served under other than dishonorable conditions will be entitled to all VA health care benefits commensurate with the "priority group" to which he or she is assigned.[202] Additionally, if a veteran received an OTH that is determined to be a bar under the *regulatory bars* to benefits listed in 38 C.F.R. § 3.12(d), he or she will be entitled to VA health care benefits that is limited to the treatment of *any disability incurred or aggravated during active service*.[203] However, a veteran with an OTH that is based on one of the *statutory bars* referenced in 38 C.F.R. § 3.12(c) is *barred* from eligibility for any VA health care benefits.[204] Additionally, statute and regulation preclude veterans with a BCD, regardless of the level of court-martial, from eligibility for VA health care benefits based on that same period of service.[205] It is important to note that veterans with multiple periods of service may be eligible for VA health care benefits based on previous service that was under other than dishonorable conditions.[206]

---

[199] 38 U.S.C. §§ 101(2), 5303A(b)(1) (2006).
[200] *Id.* § 5303A(b)(3)(B).
[201] 38 C.F.R. § 3.360 (2012).
[202] *Id.* § 3.360(c); *see also* 38 U.S.C. §§ 101(2), 5303A(b)(1) (2006). Health care access and whether co-payments are necessary for services are governed by a veteran's "priority group." VA's priority group enrollment system is detailed in 38 C.F.R. § 17.36 (2012).
[203] 38 C.F.R. § 3.360(a) (2012).
[204] *Id.*; *infra* Part VIII.
[205] H.R. REP. 95-580, P.L. 95-126, 1977 U.S.C.C.A.N. 2844, 2861; 38 C.F.R. § 3.360(b) (2012).
[206] *See infra* Part V (describing this independent basis for granting benefits). Additionally, former servicemembers who are pending an eligibility determination are entitled to emergency treatment; however, they must agree to reimburse VA at the "Humanitarian Rate" for any emergency care or services that they are later deemed to have been ineligible to receive. *See* VHA INFORMATION BULLETIN 10-448 (December 2011).

C. Burial-Related Benefits

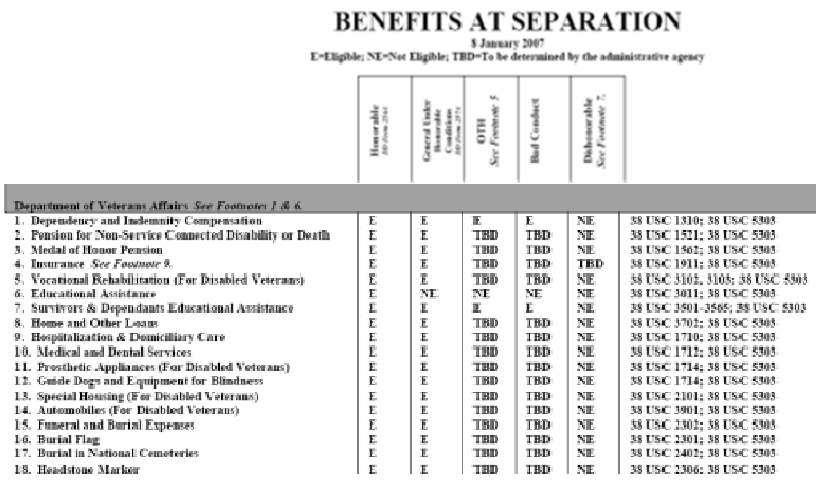
VA operates 131 national cemeteries and veterans, and, in turn, their survivors, are entitled to a number of burial-related benefits.[207] Like other benefits discussed herein, eligibility for burial-related benefits is based on a discharge under other than dishonorable conditions and fulfillment of the statutory minimum service requirements (or an exception to those requirements).[208] In addition to burial in a national cemetery,[209] other burial benefits include, but are not necessarily limited to, a burial flag,[210] reimbursement of certain burial and funeral expenses,[211] and headstones, markers, and burial receptacles.[212]

IV. Non-Characterization of Service Hurdles to VA Benefits Eligibility

Most of the "Benefits at Separation" type-charts indiscriminately use the term "Eligible" in a manner that could lead to an inaccurate calculation of VA benefit eligibility. A quick look at Figure 1 illustrates this point.

---

[207] U.S. Dep't. of Veterans Affairs, Burial Benefits, http://www.cem.va.gov/bbene/ (last visited Nov. 19, 2012).
[208] 38 U.S.C. §§ 101(2), 5103A(b)(1) (2006). Regardless of the character of discharge, Veterans who have been convicted of capital crimes and whose convictions are final are not entitled to burial in a National Cemetery or Arlington National Cemetery. *Id.* § 2411 (2006).
[209] 38 U.S.C.A. § 2402 (2010).
[210] *Id.* § 2301.
[211] 38 U.S.C. § 2302 (2006).
[212] 38 U.S.C.A. § 2306 (2010).



BENEFITS AT SEPARATION

5 January 2007

E=Eligible; NE=Not Eligible; TBD=To be determined by the administrative agency

	Honorable *See Footnote 2&3*	General Under Honorable Conditions *See Footnote 2&3*	OTH *See Footnote 5*	Bad Conduct	Dishonorable *See Footnote 7.*	
Department of Veterans Affairs *See Footnotes 1 & 6*						
1. Dependency and Indemnity Compensation	E	E	E	E	NE	38 USC 1310; 38 USC 5303
2. Pension for Non-Service Connected Disability or Death	E	E	TBD	TBD	NE	38 USC 1521; 38 USC 5303
3. Medal of Honor Pension	E	E	TBD	TBD	NE	38 USC 1562; 38 USC 5303
4. Insurance *See Footnote 8.*	E	E	TBD	TBD	TBD	38 USC 1911; 38 USC 5303
5. Vocational Rehabilitation (For Disabled Veterans)	E	E	TBD	TBD	NE	38 USC 3102, 3103; 38 USC 5303
6. Educational Assistance	E	NE	NE	NE	NE	38 USC 3011; 38 USC 5303
7. Survivors & Dependants Educational Assistance	E	E	E	E	NE	38 USC 3501-3565; 38 USC 5303
8. Home and Other Loans	E	E	TBD	TBD	NE	38 USC 3702; 38 USC 5303
9. Hospitalization & Domiciliary Care	E	E	TBD	TBD	NE	38 USC 1710; 38 USC 5303
10. Medical and Dental Services	E	E	TBD	TBD	NE	38 USC 1712; 38 USC 5303
11. Prosthetic Appliances (For Disabled Veterans)	E	E	TBD	TBD	NE	38 USC 1714; 38 USC 5303
12. Guide Dogs and Equipment for Blindness	E	E	TBD	TBD	NE	38 USC 1714; 38 USC 5303
13. Special Housing (For Disabled Veterans)	E	E	TBD	TBD	NE	38 USC 2101; 38 USC 5303
14. Automobiles (For Disabled Veterans)	E	E	TBD	TBD	NE	38 USC 3901; 38 USC 5303
15. Funeral and Burial Expenses	E	E	TBD	TBD	NE	38 USC 2302; 38 USC 5303
16. Burial Flag	E	E	TBD	TBD	NE	38 USC 2301; 38 USC 5303
17. Burial in National Cemeteries	E	E	TBD	TBD	NE	38 USC 2402; 38 USC 5303
18. Headstone Marker	E	E	TBD	TBD	NE	38 USC 2306; 38 USC 5303

Fig. 1

This Army-centric chart states that former servicemembers with honorable discharges are "Eligible" for all VA benefits, and former servicemembers with general discharges are "Eligible" for most VA benefits. While such a simple analysis is appealing, it could easily lead to inaccurate legal advice, as most VA benefits have numerous qualification prerequisites in addition to generic VA benefit eligibility.[213]

At best, this and other similar charts merely assist practitioners in estimating only one factor in determining whether the former servicemember qualifies for VA veteran status.[214] Because VA veteran status is only one variable in any equation to calculate or estimate

[213] *See infra* Part X (discussing how the charts often create an illusion of objectivity when none actually exists). Just below the listing of the potential benefits, the chart depicted in Figure IV-1 appears to attempt a disclaimer by stating, "General Eligibility. The eligibility of benefits set forth are not the sole determining factors, but only list the various types of discharge." Because this is disclaimer is both grammatically and factually confusing, it does not provide the proper level of assistance to practitioners. To further illustrate this point, it is important to note that even though a veteran may have received a fully honorable discharge, he or she may nonetheless not be entitled to the benefits associated with having a service-connected disability if VA determines that a disability was not incurred in the line of duty. *See* 38 U.S.C. § 105(a) (2006).

[214] For an in-depth discussion of VA veteran status, see *infra* notes 60–68 and accompanying text

eligibility for a particular benefit,[215] these charts would be more accurate if the term "Eligible" was replaced by the term "Not Precluded."[216]

In addition to analyzing the legal and practical impact that the type and characterization of discharge will have in a particular case, judge advocates and commanders must also scrutinize other variables that may preclude or enable the receipt of VA benefits. The chart depicted in Figure 1, as well as many similar charts, fails to address many of these dispositive variables.[217] Accordingly, the following sections discuss some of the most common additional variables that practitioners should consider.

A. Minimum Active Duty Service Requirement

The minimum active duty service requirement is a common statutorily-based eligibility prerequisite to many VA benefits.[218] The implementing regulation states,

> Except as provided in paragraph (d) of this section, a person listed in paragraph (c) of this section who does not complete a minimum period of active duty is not eligible for any benefit under title 38, United States Code or under any law administered by the Department of Veterans Affairs based on that period of active service.[219]

The minimum period of active duty is defined as "[t]wenty-four months of continuous active duty" or "[t]he full period for which a person was called or ordered to active duty."[220]

There are, expectedly, exclusions to the minimum active duty service requirement. Servicemembers with "early out" or "hardship" discharges

---

[215] *See, e.g., infra* Parts IV.A and IV.B.
[216] The "E" used to represent "Eligible" could be changed to "NP."
[217] *See infra* Part X; *infra* app. O.
[218] 38 U.S.C. § 5303A (2006); 38 C.F.R. 3.12a (2012). The requirement applies to enlisted members who enlisted after September 7, 1980, and anyone else who entered active duty after October 16, 1981. 38 U.S.C. § 5303A(b)(2) (2006).
[219] 38 C.F.R. § 3.12a(b) (2012).
[220] *Id*. § 3.12a(1)(i).

are excluded,[221] as are most servicemembers with a dischargeable or compensable service-connected disability.[222] Benefits that are "provided for or in connection with a service-connected disability, condition, or death" are also excluded.[223] Absent an exclusion or exception, however, failure to satisfy the minimum active duty service requirement precludes the receipt of VA benefits.

Because almost every enlisted servicemember who enlisted after September 7, 1980, and anyone who entered active duty after October 16, 1981, is covered by this provision,[224] it is an important factor in most cases involving servicemembers with less than twenty-four months of service. Appendix E is a chart designed to assist practitioners to determine when the minimum active duty service requirement will preclude a former servicemember from receiving VA benefits.[225] In addition, an applied example will show how the minimum active duty service requirement, which is not found on the chart depicted in Figure 1, makes that chart deceiving.

Applied Example

Specialist (SPC) Kel Johnson, a twenty-three year-old Army soldier with eighteen months of continuous active service, is facing administrative separation for serious misconduct because of Cocaine use.[226] SPC Johnson never deployed, and has no medical or mental health conditions or concerns. Because this is SPC Johnson's first offense, the chain of command has chosen to use notification procedure versus administrative board procedure, thereby eliminating OTH as a potential characterization of service.[227] SPC Johnson, who is considering purchasing a home after separation from the Army, asks his Trial Defense Counsel how an administrative separation will impact his

---

[221] *Id*. § 3.12a(d)(1) (referring to discharges pursuant to 10 U.S.C. § 1171 and 10 U.S.C. § 1173).
[222] *Id*. § 3.12a(d)(2), (3). This exception applies if the disabilities are "dischargeable" (i.e., are serious enough to warrant discharge) or "compensable" (i.e., enough to render the Veteran at least 10 percent disabled, and so entitled to compensation).
[223] *Id*. § 3.12a(d)(4).
[224] *See* 38 U.S.C. § 5303A(b)(2) (2006); 38 C.F.R. § 3.12(c) (2012).
[225] *See infra* app. E.
[226] This example is fictitious. Because this hypothetical example involves an active duty enlisted soldier, this separation would be pursuant to AR 635-200, ch. 14-12c. AR 635-200, *supra* note 137, ch. 14-12c.
[227] *See* AR 635-200, *supra* note 137, ch. 2.

eligibility for the VA home loan guaranty benefit after he separates from the service.[228]

A defense counsel who uses nothing other than the chart depicted in Figure 1 will probably give SPC Johnson incorrect advice. Figure 1 specifically states that SPC Johnson is eligible for "Home and other Loans" so long as he receives an Honorable or General characterization of discharge. This is not true. To qualify for the VA home loan guaranty, a servicemember must complete the minimum active duty service requirement.[229] In this case, SPC Johnson has only completed only eighteen continuous months of active service. Accordingly, he does not qualify for the benefit.[230]

Even if SPC Johnson's defense counsel researched the "Authority and References" sections listed for "Home and other Loans" on Figure 1, there is a high probability that he or she would misadvise SPC Johnson. The first listed citation, 38 U.S.C. § 1802, now discusses Spina Bifida-related benefits. While this statute previously discussed VA home loan guaranty eligibility, it was renumbered as 38 U.S.C. § 3702 in 1991.[231] The second listed statute, 38 U.S.C. § 1818, was repealed in 1988.[232]

Assuming SPC Johnson's attorney was able to find 38 U.S.C. § 3702, many defense counsel would falsely conclude that SPC Johnson would qualify for the benefit. The subsection listing eligible beneficiaries includes "Each veteran…, who has served after July 25, 1947, for a period of more than 180 days and was discharged or released therefrom under conditions other than dishonorable."[233] To an ambitious yet untrained practitioner, it might appear that SPC Johnson is covered, as he has more than 180 days of service following July 2, 1947. In fact, the statutory definition of "veteran" appears to fit SPC Johnson, as a "veteran" is defined as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under

---

[228] *See supra* Part III.A.4.
[229] *See supra* notes 218–224 and accompanying text.
[230] *See* Title Redacted by Agency, 93-03 583, Bd. Vet. App. 9423321 (1994).
[231] Pub. L. No. 102-83, § 5(a), (c)(1), 105 Stat. 406 (1991).
[232] Pub. L. No. 100-322, § 415, 102 Stat 487 (1988).
[233] 38 U.S.C.A. § 3702(a)(2)(C)(i) (2008).

conditions other than dishonorable."[234] Unfortunately, this seemingly thorough statutory research would lead to the incorrect legal advice.

Because SPC Johnson entered active duty after September 7, 1980, the minimum active duty service requirement discussed above trumps the statutory provisions set forth in 38 U.S.C. § 3702, as the eligibility requirements defined in § 3702 are premised on the loan guarantee recipient being a "veteran."[235] The first subsection of the minimum active duty service statute states, "Notwithstanding any other provision of law, any requirements for eligibility for or entitlement to any benefit under this title or any other law administered by the Secretary that are based on the length of active duty served by a person who initially enters such service after September 7, 1980, shall be exclusively as prescribed in this title."[236] Because SPC Johnson does not have "24 months of continuous active duty"[237] or a "full period for which [SPC Johnson] was called or ordered to active duty,"[238] SPC Johnson "is not eligible by reason of such period of active duty for any benefit under this title or any other law administered by the Secretary."[239] As a result, after separation from service, SPC Johnson would be ineligible for the VA home loan guaranty despite the contrary guidance found in the chart depicted at Figure 1.[240]

Practitioners, however, should not be discouraged. When equipped with the proper tools and guidance, judge advocates and paralegals can perform efficient and effective research that will lead to accurate advice. The following Parts of this article designed to assist judge advocates in conducting the research required in almost every case, such as the other prerequisites to VA benefits found in benefit-specific statutes, regulations, and implementing guidance.

---

[234] 38 U.S.C. § 101(2) (2006). Because SPC Johnson will receive an honorable or general characterization of service, his service will be honorable for VA purposes. *See supra* notes 60–68 and accompanying text.
[235] *See* 38 U.S.C.A. § 3702(a)(2)(C) (2008).
[236] 38 U.S.C. § 5303A (2006).
[237] *Id*. § 5303A(b)(1)(A).
[238] *Id*. § 5303A(b)(1)(B).
[239] *Id*. § 5303A(b)(1).
[240] Practitioners should not forget, however, that the requisite amount of active duty service is different for servicemembers who apply for this benefit while still serving on active duty. *See supra* note 181 and accompanying text.

B. Benefit-Specific Eligibility Prerequisites

In addition to the common variables of type and characterization of service and the minimum active duty service requirement, many VA benefits have additional statutory and regulatory prerequisites to benefit eligibility. To be able to provide accurate advice to a client, judge advocates and paralegals must invest the requisite time to research these prerequisites.

The majority of the references listed in the Benefits at Discharge chart depicted in Figure 1 are inaccurate or outdated. Most have been renumbered, repealed, or amended numerous times since the chart depicted in Figure 1 was last updated. Those conducting the requisite benefit-specific research should not rely on these outdated charts and references. Instead, judge advocates and paralegals should rely on a newer, more helpful starting point.

For practitioners looking to research the law behind a certain benefit, Appendix H includes materials designed to supplant the chart depicted in Figure 1.[241] While Appendix H-1 lists whether a particular characterization of discharge precludes the receipt of a specific VA benefit, Appendix H-2 provides updated statutory and regulatory authorities and references.[242] Practitioners must remember, however, that this area of the law is fluid. Appendix H is not designed to be an authoritative reference. Its sole purpose is to provide practitioners with a better starting point and roadmap for independent research. An applied example will demonstrate how practitioners should use Appendix H.

Applied Example

Sergeant (SGT) Timothy Wheatley has completed twenty months of a four-year active duty enlistment.[243] SGT Wheatley's Military Occupation Specialty (MOS) is 68E, Dental Specialist.[244] While SGT Wheatley is medically fit for duty, he has a permanent level-2 profile for

---

[241] *See infra* app. H.
[242] *See infra* apps. H-1, H-2.
[243] This example is fictitious.
[244] For a description of an Army Dental Specialist's duties, see http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/medical-and-emergency/dental-specialist.html.

a service-incurred knee injury.[245] SGT Wheatley has come to see a legal assistance attorney for help in applying for a hardship discharge, as his wife, who was the primary caretaker of his three children, was recently sentenced to fifteen years of incarceration in state court for serious drug distribution offenses.[246] Because SGT Wheatley has never committed misconduct, if his request for a hardship discharge is approved, he will receive a fully honorable discharge.[247]

One of SGT Wheatley's main concerns is civilian employability in the local community. He doesn't want to leave the local community, as he wants to minimize the disruption on his children. The community surrounding his installation is very small. SGT Wheatley has contacted all of the local dentists, but none of them have an opening for a dental assistant. SGT Wheatley asks his legal assistance attorney for advice on what he should do to find a job if his application for a hardship discharge is approved. Armed with Appendix H and basic research skills, a legal assistance attorney or paralegal would be able to assist SGT Wheatley.

An initial step is to determine if any statute or regulation automatically precludes SGT Wheatley from receiving any benefits. Because fully honorable discharges are binding on VA and would not preclude him from receiving any VA benefits, the type of discharge is not disqualifying.[248] Additionally, a hardship discharge also prevents the minimum active duty service requirement from applying, as those discharged because of hardship are exempt from the application of that rule.[249]

SGT Wheatley's legal advisors should then research each of the potential benefits that might help SGT Wheatley. Using Appendix H and Part III of this article, a legal assistance attorney or paralegal would see that SGT Wheatley may qualify for a number of job training-related

---

[245] For a detailed explanation of the military's PULHES system and fitness for duty, see U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS ch. 7 (14 Dec. 2007) (RAR Aug. 23, 2010) [hereinafter AR 40-501].

[246] This discharge would be pursuant to AR 635-200, chapter 6. Army legal assistance attorneys provide assistance in hardship discharge cases pursuant to AR 27-3, paragraph 3-6g(4)(o). U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6g(4)(o) (21 Feb. 1996) (RAR 13 Sept. 2011).

[247] AR 635-200, *supra* note 137, paras. 3-7a, 6-11.

[248] *See infra* Part II. For a description of the statutory bars, see *infra* Part VIII.

[249] 38 U.S.C. § 5303A(3)(A) (2006). For a more detailed discussion of the minimum active duty service requirement, see *supra* Part IV.A.

benefits, such as the Post-9/11 GI Bill, educational and vocational counseling, and vocational rehabilitation.

Benefit-specific qualification requirements can be complex, and precisely forecasting SGT Wheatley's eligibility will often not be possible. Accurate and complete legal advice to SGT Wheatley, however, is not contingent on precise calculations of SGT Wheatley's eligibility for each specific VA benefit. As long as SGT Wheatley understands the nature of and eligibility criteria for these benefits, he can make an informed decision regarding the wisdom of applying for a hardship discharge. In addition, a better understanding of the benefits for which he may be eligible, along with the proof required during the application process, could help expedite the receipt of benefits for which SGT Wheatley qualifies.

Appendix H-2 contains a list of benefit-specific statutes, regulations, and implementing guidance.[250] While Appendix H can serve as a useful starting point for judge advocates, paralegals, and commanders to conduct their own research, it is not a dispositive source of law. Unfortunately, even when a judge advocate conducts the proper amount of research and provides legally accurate advice, the mechanics and shortcomings of the VA claims system itself may lead to an unanticipated result.

C. Challenges in the VA Disability Claims Process

Understanding the manner in which VA may handle a particular case is arguably more important than the underlying legal analysis of eligibility for benefits. Because eligibility for disability benefits is particularly significant,[251] a spotlight on the VA disability claims process is necessary.

Unfortunately, this proverbial spotlight uncovers some painful facts. In its initial opinion in the 2011 case *Veterans for Common Sense v. Shinseki*, the U.S. Court of Appeals for the Ninth Circuit explains,

---

[250] *See infra* app. H-2.

[251] Appendix I is an information paper on the relationship between PTSD, TBI, and criminal behavior. It explains how "conditions that can be prevented and minimized with a proper course of mental health treatment if intervention occurs early enough during the life-course of the mental disorder." *See infra* app. I.

> Veterans who return home from war suffering from psychological maladies are entitled by law to disability benefits to sustain themselves and their families as they regain their health. Yet it takes an average of more than four years for a veteran to fully adjudicate a claim for benefits. During that time many claims are mooted by deaths. The delays have worsened in recent years, as the influx of injured troops returning from deployment in Iraq and Afghanistan has placed an unprecedented strain on the VA, and has overwhelmed the system that it employs to provide medical care to veterans and to process their disability benefits claims. For veterans and their families, such delays cause unnecessary grief and privation. And for some veterans, most notably those suffering from combat-derived mental illnesses such as PTSD, these delays may make the difference between life and death.[252]

---

[252] Veterans for Common Sense v. Shinseki, 644 F.3d 845, 850 (9th cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840, 81 U.S.L.W. 3130568 (U.S. Jan. 7, 2012) (No. 12-296). Pursuant to the *en banc* rehearing, the 9th Circuit Court of Appeals held,

> As much as we as citizens are concerned with the plight of veterans seeking the prompt provision of the health care and benefits to which they are entitled by law, as judges we may not exceed our jurisdiction. We conclude that the district court lacked jurisdiction to resolve VCS's [Veterans for Common Sense's] claims for system-wide implementation of the VA's mental health care plans, as well as VCS's request for procedures intended to address delays in the provision of mental health care. We similarly determine that the district court lacked jurisdiction to consider VCS's statutory due process challenges to delays in the system of claims adjudication. We do conclude, however, that the district court had jurisdiction to consider the VCS's claims related to the adjudication procedures in VA Regional Offices and the district court properly denied those claims on the merits.

Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc), *cert. denied*, 133 S.Ct. 840, 81 U.S.L.W. 3130568, (U.S. Jan. 7, 2012) (No. 12-296). All citations to the first Ninth Circuit opinion are provided solely to convey the information provided within the quotation or to another issue not central to the holding of the en banc rehearing. This article does not intend to comment in any way on the validity of any legal argument made by the court or either party to this litigation.

Accordingly, legal eligibility for the receipt of benefits is only part of the calculus for commanders and judge advocates who are deciding how to handle a particular case.

To provide accurate and timely legal advice regarding a servicemember's receipt for VA benefits, judge advocates must not simply analyze and apply the law. Because VA makes the final decisions regarding a servicemember's eligibility for VA benefits, judge advocates must also understand and consider the practical realities of the numerous challenges that the largely decentralized VA claims process currently faces. Despite the fact that almost all VA benefits claims examiners work hard and have the best of intentions, some commentators state that a crushing backlog of cases, insufficient adjudicator training, and a lengthy and complicated appeals process often leads to situations in which former servicemembers must wait for lengthy periods to receive benefits to which they are legally entitled.[253] As a result, commanders and judge advocates should not unknowingly add legal complexity to a VA benefits claim, as doing so could significantly increase the risk of an adverse result for the impacted servicemember. To prevent an unintended frustration of a client's intent, judge advocates must factor in the practical realities of the VA benefits claims system into their advice and recommendations.

1. Incorrect Determinations

A recent inspection indicates that an alarming number of VA claims have been processed incorrectly.[254] Pursuant to a VA Inspector General (VAIG) inspection of VA disability claims processing at 16 VA regional offices (VARO), inspectors estimate that "VARO staff did not correctly process 23 percent of approximately 45,000 claims."[255] Among other

[253] *See, e.g.*, James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES, Sept. 27, 2012, at A1. Marilynn Marchione, *U.S. Vets' Disability Filings Reach Historic Rate,* USA TODAY, May 28, 2012 (noting that 45 percent of the 1.6 million veterans from the wars in Iraq and Afghanistan have filed service connection claims and claimed an average of 8 to 9 disabilities, as compared to an average 4 disabilities per Vietnam veteran and two per Korean and World War II veteran).

[254] *See* U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDITS AND EVALUATIONS, SYSTEMIC ISSUES REPORTED DURING INSPECTIONS AT VA REGIONAL OFFICES (May 18, 2011) [hereinafter VA IG INSPECTION].

[255] *Id*. at i. This inspection "focused on disability claims processing related to temporary 100 percent disability evaluations, post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), herbicide exposure, and Haas cases. Haas claims involve veterans who

issues, this inspection specifically focused on PTSD and TBI disability claims processing.[256] Because the evidence linking PTSD, TBI, misconduct, and involuntary discharge is strong and widely accepted,[257] the data on error rates in PTSD and TBI disability claims processing is vital for judge advocates and commanders seeking to understand the nature of the VA claims processing system.

The inspection found that "[o]f the 16 VAROs inspected, 8 (50 percent) did not follow VBA policy when processing PTSD claims."[258] These errors "generally occurred because VARO staff lacked sufficient experience and training to process these claims accurately. Additionally, some VAROs were not conducting monthly quality assurance reviews."[259] While the evidentiary standard for service connection in PTSD cases was liberalized on July 13, 2010,[260] the inspection also found that VA staff members did not consider all available entitlements to PTSD applicants, "such as Dependents' Educational Assistance."[261]

The error rate in TBI cases raises even more concern. In this VAIG inspection, "Of the 16 VAROs inspected, 12 (75 percent) did not follow VBA policy when processing claims for residuals of TBI."[262] Mirroring the reasons for errors in PTSD cases, inspectors cite a lack of "sufficient

---

served in waters off Vietnam, never having set foot in Vietnam, and whether those veterans are entitled to the presumption of exposure to herbicide agents, including Agent Orange." *Id*.

[256] *Id*.

[257] *Supra* Part I; *infra* app. I.

[258] VA IG INSPECTION, *supra* note 254, at 5.

[259] *Id.*

[260] On July 13, 2010, the standard for evaluating PTSD claims was liberalized. Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,842 (July 13, 2010); *see also* U.S. DEP'T OF VETERANS AFFAIRS, FACT SHEET, NEW REGULATIONS ON PTSD CLAIMS (July 12, 2012). The VA IG inspection found a "noticeable improvement" in PTSD claims processing. Because of that improvement, the VA IG did not make recommendations for corrective action, giving VAROs "sufficient time to implement the fully amended rule." VA IG INSPECTION, *supra* note 254, at 6.

[261] *Id*. at 5.

[262] *Id*. As troubling, a VA Inspector General investigation released on May 10, 2012 found that "The Oakland VARO lacked controls and accuracy in processing temporary 100 percent disability evaluations and TBI-related claims." Of the 30 TBI Claims, 17 were processed incorrectly, with all potentially affecting the veterans' receipt of benefits. U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDITS AND EVALUATIONS, INSPECTION OF THE VA REGIONAL OFFICE, OAKLAND, CALIFORNIA 2 (May 10, 2012).

experience and training to process TBI claims accurately" as the main reason why "veterans did not always receive accurate benefits."[263]

This same inspection, however, indicates that VARO staff members almost always do the best they can to properly adjudicate claims. Despite the alarming number of errors, the inspection found that about 14,650 of 16,000 PTSD claims and 3,400 of 4,100 TBI claims were adjudicated properly.[264] Given the complex nature of the law and medicine in these claims, the successfully adjudicated cases are ones for which the hard-working, well-meaning VARO staff members deserve acknowledgement for their efforts. In fact, VA claims examiners processed more than a million claims in both 2011 and 2012.[265] Unfortunately, however, some cases may simply be too complex for their level of expertise.

The complexity of TBI cases has proven to be a major challenge. "During interviews, several VARO managers specifically attributed these errors to the complex policies regarding the TBI evaluation process, which [Ratings Veterans Service Representatives] found difficult to follow. VBA training materials acknowledge that symptoms of co-existing mental disorders and TBI residuals commonly overlap; it can be hard or impossible for a VA medical examiner to attribute the overlapping symptoms to one specific disability."[266]

2. Likely Difficulties with Complex COS Determinations

Because COS determinations can be equally complex, judge advocates and commanders must consider that issuing a type or characterization of discharge that requires a COS determination may lead to an increased risk for an incorrect VA benefits determination. In fact, two experienced CAVC judges have described the "statutory and

---

[263] VA IG INSPECTION, *supra* note 254, at 6. The inspectors also cited a lack of proper adequate qualify reviews of completed TBI claims as an addition problem. *Id*.
[264] *Id*. at 5–6.
[265] P&A REPORT, *supra* note 54, at I-3 ("In 2011, VA received over 1.3 million claims for disability benefits and processed more than 1,032,000 of these claims. As of September 2012, VA received 1,080,342 claims for disability benefits and processed 1,044,207 claims.").
[266] VA IG INSPECTION, *supra* note 254, at 8.

regulatory framework" to determine veteran status as "murky."[267] Because VAROs have demonstrated difficulty with relatively routine PTSD and TBI cases, such difficulty is also foreseeable in COS determination cases.

Benefits claims examiners at VA's 56 regional offices are typically not physicians or attorneys, and many have no prior military experience.[268] While a medical or legal degree is not necessary to properly adjudicate most cases, the statutes, regulations, and guidance surrounding COS determinations are complex, confusing, and often scattered.[269] Hence, understanding what guidance claims examiners are given in these cases can also assist judge advocates and commanders in understanding the importance of properly reflecting a commander's intent.

COS determinations are one of the less common adjudication issues that VA claims examiners confront in their day-to-day work.[270] When processing a COS determination case, claims examiners apply the guidance set forth in the *Adjudication Procedures Manual Rewrite*, also known as the *M21-1MR*.[271] While this Manual is a helpful source of basic information, its simplicity can lead to some of the same problems as the use of benefits at discharge charts such as the one depicted at Figure IV-1. Because the *M21-1MR* provides no additional training or guidance to practitioners primarily trained to handle other types of cases, incorrect determinations are inherently possible.[272]

---

[267] Trilles v. West, 13 Vet. App. 314, 330 (2000) (Kramer, J., and Steinberg, J., concurring).

[268] *See* U.S. OFFICE OF PERSONNEL MGMT., VETERAN CLAIMS EXAMINING SERIES, GS-0996, POSITION CLASSIFICATION STANDARD FOR VETERAN CLAIMS EXAMINING SERIES, GS-0996 (Issued: TS-40 June 1962) (rev.: May 2009).

[269] *See, e.g.*, *Trilles*, 13 Vet. App. at 330 (Kramer, J., and Steinberg, J., concurring).

[270] Interview with Leah Mazar, Procedures Analyst, Veterans Benefits Admin. in Wash. D.C. (May 24, 2012) [hereinafter Mazar Interview].

[271] M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B (Feb. 27, 2012). A portion of the *M21-1MR* is included at Appendix K.

[272] For example, M21-1MR, *supra* note 77, at pt. III, Subpart v, Chapter 1, Section B, para. 7b discusses the regulatory bar for Undesirable Discharge to Escape Trial by General Court Martial. It reads:

> Cases in which the facts indicate the service member agreed to accept an undesirable discharge (often seen on the DD Form 214 as OTH) in order to escape trial by GCM, are a bar to benefits. *Note*: The evidence must show that the service member accepted the undesirable discharge to escape a **general** court-martial, not a

3. Case Backlog

VA has more disability claims than it can process.[273] As of December 24, 2012, the number of pending disability claims eclipsed 900,000. Over two-thirds of those claims have been pending for over 125 days,[274] VA's self-imposed strategic goal for disability case processing timeliness.[275] Despite an ongoing, significant effort to eliminate this backlog,[276] both the number and percent of backlogged cases has increased since January 3, 2012.[277] During fiscal year 2012,

---

> summary court-martial or a special court-martial. (emphasis in original)

Id. There is no advice in the section regarding how to handle discharges in lieu of court-martial approved prior to any court-martial referral. There is also no advice on how to determine the level of court-martial referral, if any. In fact, the manual itself is not completely accurate, as a discharge in lieu of summary court-martial is not legally permissible. *See, e.g.*, AR 635-200, *supra* note 137, para. 10-1a. Additionally, the sections related to the regulatory bars for moral turpitude and willful and persistent misconduct are very brief. The only reference provided to assist claims examiners on how to apply the regulatory bar for moral turpitude is "General Council [sic] Precedent Opinion 6-87". M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 7c (Feb. 27, 2012). The only reference provided to assist claims examiners on how to apply the regulatory bar for willful and persistent misconduct is 38 C.F.R. §3.12(d)(4), the implementing regulation for 38 U.S.C. § 5303(a). M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 7d (Feb. 27, 2012).

[273] *See* Chris Adams, *Despite Promises to Improve, Delays on Veterans' Claims Skyrocket*, MCCLATCHY WASH., Nov. 29, 2012.

[274] U.S. Dep't of Veterans Affairs, Monday Morning Workload Report (Dec. 24, 2012), *available at* http://www.vba.va.gov/REPORTS/mmwr/index.asp.

[275] Press Release, U.S. Dep't of Veterans Affairs, VA Pilots Expedite Payments to Disabled Veterans (Nov. 16, 2012), *available at* http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=2006 ("Secretary Shinseki established as one of VA's highest priority goals the elimination of the disability claims backlog by 2015, so that all Veterans receive a quality decision on their claim in no more than 125 days.").

[276] *See, e.g.*, Press Release, U.S. Dep't of Veterans Affairs, VA Budget Request Tops $140 Billion for Veterans Programs (Feb. 13, 2012), *available at* http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2263; Susan D. Hall, *VA drowning in benefits backlog despite expensive paperless system*, FIERCE HEALTH IT, June 20, 2012, *available at* http://www.fiercehealthit.com/story/va-benefits-backlog-grows-despite-expensive-paperless-system/2012-06-20.

[277] The number of cases pending over 125 days has increased from 563,120 on January 3, 2012, to 608,365 on December 24, 2012. That represents a 3.6% increase. U.S. Dep't of Veterans Affairs, Monday Morning Workload Report (Jan. 3, 2012), *available at* http://www.vba.va.gov/REPORTS/mmwr/index.asp. *See* Bob Brewin, *VA's Disability Claims Backlog Tops 900,000*, Dec. 28, 2012, *available at* http://www.nextgov.com/health/2012/12/vas-disability-claims-backlog-tops-900000/60380/?oref=ng-HPriver. The 2012 VA Performance and Accountability Report, published on November 15, 2012,

the average disability or pension claim took 262 days to complete, up from 188 days in fiscal year 2011.[278]

This backlog has generated substantial criticism in many forms. In addition to the numerous media accounts on the impact that this backlog has on veterans and their families,[279]at least one federal circuit court has commented on the situation, even though the case was largely dismissed on jurisdictional grounds.[280]

Because this backlog is almost completely attributable to cases in which veteran status is not in dispute,[281] commanders, panel members, and legal advisors should consider the resulting delay that issuing less than an honorable or general discharge characterization may have on a particular case. "[E]rrors made by ratings specialists at the Regional Office level play a significant role in the lengthy delays that veterans experience in the adjudication of their claims."[282] Both common sense and data dictate that delays are more likely in cases that involve more complex legal issues.[283] Commanders and judge advocates, however, can potentially alleviate this problem by ensuring that the command

---

outlines how the timeliness of VA Education Claims has also worsened. P&A REPORT, *supra* note 54, at II-16, II-17, II-72.

[278] *See* Adams, *supra* note 273.

[279] *See, e.g.*, Dao, *supra* note 253, at A1 (describing how an 89 year-old widow with dementia waited almost two years for the processing of her survivor's pension claim).

[280] *See* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840, 81 U.S.L.W. 3130568, (U.S. Jan. 7, 2012) (No. 12-296).

[281] Of the 391,904 servicemembers aged 17-65 who were discharged from active duty during Fiscal Year 2006, 86.5 percent had an honorable or general characterization of service. Only 3.2 percent received characterizations of other than honorable (OTH) or bad conduct discharge (BCD). 10.3 percent received uncharacterized discharges. U.S. Dep't of Veterans Affairs, Office of Inspector General, Information Report, Quantitative Assessment of Care Transition: The Population-Based LC Database, at 15. While this data is several years removed from the current backlog, there is no evidence to indicate that the statistics of characterizations of discharge have shifted significantly during the intervening time period. *See, e.g.*, Bernton, *supra* note 8 (tallying 20,000 OTH discharges between 2005 and 2012).

[282] *See Veterans for Common Sense*, 644 F.3d 845, 859-60 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc), *cert. denied*, 133 S.Ct. 840, 81 U.S.L.W. 3130568, (U.S. Jan. 7, 2012) (No. 12-296); *supra* note 252.

[283] *See* Rick Maze, *VA Disability Claims Grow More Complex, Costly*, ARMY TIMES, Feb. 15, 2012, *available at* http://www.armytimes.com/news/2012/02/military-va-disability-claims-grow-more-complex-costly-021512w/ ("More complex cases not only cost more money but also add to the workload for claims processors.").

intent is properly reflected in the documentation surrounding the servicemember's separation.

Nonetheless, since many servicemembers facing involuntary separation have the same complex medical and mental health issues as many other VA benefits applicants, the legal analysis required for an accurate COS determination adds yet another hurdle in what can be an already long and complicated road to receiving VA Benefits.[284] When a commander's intent is to preserve a particular benefit, such as continued health care, this reality requires commanders to consider all tools available to effectuate their intent.[285]

4. Appellate System Delays

When educated about the many challenges that former servicemembers encounter when negotiating the VA disability claims process, commanders and judge advocates often respond with a question along the lines of, "Sure, there are problems, but isn't there a way for someone to appeal if something goes wrong?"[286] An appellate system does exist,[287] but the system can create many challenges. In the initial *Veterans for Common Sense* opinion, the court commented on the appellate system by stating, "The multi-phase appeals process is, however, extremely difficult to navigate, especially for those suffering from mental disabilities such as PTSD, and embarking upon an appeal may delay a veteran's receipt of benefits for many years."[288] Accordingly, commanders and judge advocates with the intent to preserve VA benefits should not rely on the VA claims adjudication appeal system as a timely antidote for the potential issues outlined above.

One central reason is the VA claims appeals process is not efficient. At the time of the *Veterans for Common Sense* litigation, it was taking

---

[284] *Supra* Part I (describing the "Military Misconduct Catch-22").

[285] Appendix G is a chart designed to assist practitioners on determining a servicemember's eligibility for VA health care benefits. *See infra* app. G.

[286] This assertion is based on Major (MAJ) John W. Brooker's professional experiences as an Associate Professor at The Judge Advocate General's School, U.S. Army, from May 21, 2010 through present.

[287] *See supra* Part II (explaining the appellate system for VA disability claims).

[288] *See* Veterans for Common Sense v. Shinseki, 644 F.3d 845, 857 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840, 81 U.S.L.W. 3130568, (U.S. Jan. 7, 2012) (No. 12-296); *supra* note 252.

> approximately 4.4 years from the date of the veteran's initial filing of a service-connected death and disability compensation claim to the final decision by the Board [of Veterans' Appeals] (not including any time that may have elapsed between the Regional Office's initial rating decision and the veteran's filing of his Notice of Disagreement, which may be up to one year.).[289]

Because the BVA affirms the VARO's decisions in approximately 40 percent of cases, and approximately 75 percent of cases remanded to the VAROs are re-appealed to the BVA, a slow, frustrating, yo-yo-like appellate system has resulted, particularly in cases involving PTSD.[290] While such a deliberate system may be evidence of a desire to arrive at the legally correct answer, the practical result can be devastating. "In just the six months between October 2007 and April 2008, at least 1,467 veterans died during the pendency of their appeals."[291]

Despite these problems, the appellate system can work in complicated COS determination cases. After serving 17 years in the U.S. Navy, Stephen Norko was separated with an OTH characterization for a failed drug test. A VARO initially denied Mr. Norko's claim for VA health benefits, but Mr. Norko appealed. With "significant legal and political support," the VBA granted Mr. Norko's appeal, granting him VA health care benefits.[292]

Unfortunately, not everyone is Stephen Norko. Many former servicemembers don't find the same level of help. Many are initially denied for numerous reasons, which results in a denial of care until eligibility is established.[293] Because many servicemembers with PTSD, TBI, and other debilitating mental health conditions must pursue their appeals for years in order to establish benefit eligibility, the initial

---

[289] *Veterans for Common Sense*, 644 F.3d 845, 857 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840, 81 U.S.L.W. 3130568, (U.S. Jan. 7, 2012) (No. 12-296); *supra* note 252.
[290] *See id*; Coburn v. Nicholson, 19 Vet. App. 427, 434 (2006) (Lance, J., dissenting) (acknowledging the "hamster-wheel reputation" of veterans law).
[291] *Veterans for Common Sense*, 644 F.3d 845, 860 (9th Cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc), *cert. denied*, 133 S.Ct. 840, 81 U.S.L.W. 3130568 (U.S. Jan. 7, 2012) (No. 12-296); *supra* note 252.
[292] Peggy McCarthy, *Connecticut Veteran Wins Rare VA Appeal*, THE HARTFORD COURANT, July 15, 2012, *available at* http://articles.courant.com/2012-07-15/health/hc-vet-wins-appeal-20120713_1_va-medical-care-va-benefits-va-hospital.
[293] *Id.*

Veterans for Common Sense v. Shinseki opinion's assessment that appeals are particularly difficult for servicemembers with PTSD is logical.[294]

5. The VA Claims System and Future Cases

Commanders and judge advocates must remember that providing a servicemember with a characterization of service lower than an honorable or general discharge will add legal complexity to the case—legal complexity that the current VA claims system might not initially handle accurately and efficiently. Hopefully, however, this will soon not be the case. VA recently set a goal "to process all disability claims within 125 days, at a 98 percent accuracy level, and eliminate the claims backlog in 2015."[295] How additional COS determination cases will impact this system is unknown.[296]

Commanders and judge advocates should be aware that VA is implementing numerous significant initiatives. In June 2012, VA announced a national recruitment effort to hire 1,600 additional mental health clinicians, as well as 300 support staff, to meet the higher demand for mental health care and services.[297] An improved, streamlined training program for new claims workers has also started.[298] Other initiatives include "a formalized triage process to associate claims documents and other mail with veterans files," a new electronic claims processing

---

[294] *See Veterans for Common Sense*, 644 F.3d 845, 857 (9th cir. 2011), *vacated by* Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc), *cert. denied*, 133 S.Ct. 840, 81 U.S.L.W. 3130568, (U.S. Jan. 7, 2012) (No. 12-296); *supra* note 252.

[295] Press Release, U.S. Dep't of Veterans Affairs, VA Completes Over 1 Million Compensation Claims in 2012 (Sept. 20, 2012), *available at* http://www.va.gov/opa pressrel/pressrelease.cfm?id=2388.

[296] Some Veterans Service Organizations (VSOs) are helping servicemembers with OTH characterizations of service apply for benefits. *See* McCarthy, *supra* note 292.

[297] Press Release, U.S. Dep't of Veterans Affairs, VA Announces Aggressive National Recruitment Effort to Hire Mental Health Professionals (June 11, 2012), *available at* http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2325. *See* Interview with Sonja Batten, Deputy Chief Consultant for Specialty Mental Health, PBS NEWSHOUR, Apr. 19, 2012, *available at* http://www.pbs.org/newshour/bb/health/jan-june12/vamental_04-19.html.

[298] Rick Maze, *VA Touts New Training for Claims Workers*, ARMY TIMES, July 10, 2012, *available at* http://www.armytimes.com/news/2012/07/military-veterans-affairs-touts-new-training-claims-workers-071012w/.

system,[299] a revised case-management approach, and "Segmented Processing Lanes" designed to give more complex cases to "more experienced and skilled employees."[300] Despite recent setbacks,[301] many of these initiatives appear promising. When combined with the superior professionalism, work ethic, and desire to help found within VA, the point may soon arrive where commanders, judge advocates, and former servicemembers will not have a reason to consider the efficiency and accuracy of the VA claims system.

Precise guidance on how the VA claims system impacts each case, however, will never be possible. Although there is little question that the system will improve in coming years, no system is perfect. Accordingly, one way for a commander to best ensure continued VA health care is to issue an honorable or general discharge for a non-statutorily barred reason. For cases in which a commander believes an OTH is necessary, but the commander wishes to preserve the servicemember's eligibility for VA benefits, the commander should include the requisite facts and legal analysis in the discharge approval paperwork to better ensure that his or her intent is met. Judge advocates must be able to draft the documents to reflect this intent. Part XI and Appendix L of this article helps judge advocates do just that.[302]

V. Independent Basis for VA Benefits Eligibility: Prior Periods of Honorable Service

In all cases involving a less than fully honorable characterization of service, commanders and judge advocates must first calculate the servicemember's period(s) of service for VA purposes. This date-based calculation is an indispensable precondition to properly understanding a servicemember's eligibility for VA benefits, as prior periods of honorable service may entitle a former servicemember to certain VA

---

[299] *See* James Dao, *Pinning Hopes on a Digital Fix for Veterans' Claims*, N.Y. TIMES, Sept. 27, 2012, *available at http://www.nytimes.com/2012/09/28/us/land-technology-passed-by-hopes-digital-fix-aids-veterans.html?_r=0*.

[300] Dave Autry, *VA Expands Use of New Claims System*, DISABLED AM. VETERANS, *available at* http://www.dav.org/news/NewsArticle.aspx?ID=628 (explaining how the DAV and VA are cooperating to improve the VA claims system).

[301] *See* Adams, *supra* note 273.

[302] *Infra* Part XI; *infra* app. L (containing numerous templates and resources for military justice practitioners).

benefits, even if the most recent period of service is characterized as dishonorable for VA purposes.[303]

If a servicemember is separated during his or her first period of service, benefit eligibility preclusions based on the servicemember's type and characterization of discharge are dispositive.[304] For servicemembers with more than one period of honorable service, however, "a discharge under dishonorable conditions from one period of service does not constitute a bar to VA benefits if there was another period of qualifying service upon which a claim could be predicated."[305] Since 1945, VA has formally held that a valid claim predicated upon a prior period of honorable service entitles a servicemember to that benefit.[306]

While the majority of this article focuses on the rules involving servicemembers with discharges that are dishonorable for VA purposes, calculations of prior periods of honorable service are necessary even when a general characterization of service is the worst possible result. Although a general characterization of service is honorable for VA purposes, all GI Bill benefits, such as the Post-9/11 GI Bill, the Montgomery GI Bill, and GI Bill Transferability require a fully honorable characterization of service.[307] If a servicemember has a prior period of honorable service upon which a claim for GI Bill benefits could be predicated, he or she may be eligible for GI Bill benefits, regardless of the characterization of the most recent period of service.

---

[303] Appendix C provides practitioners with quick-reference charts to assist in calculating prior periods of honorable service. *See infra* app. C. Appendix C-1 assists practitioners in determining if a servicemember has earned a prior period of honorable service, while Appendix C-2 assists practitioners in calculating the dates of the prior periods of honorable service. *See infra* apps. C-1, C-2.

[304] Some potential exceptions, however, include military sexual trauma, insanity, and compelling circumstances. *See infra* pts. VI, VII, and VIII.E.2. A subsequent discharge upgrading or military records correction by a service Board for Corrections of Military Records could also result in VA benefit eligibility. *See* U.S. Dep't of Def., Boards for Correction of Military Records, DoD Knowledge Base, https://kb.defense.gov/app/answers/detail/a_id/386/~/boards-for-correction-of-military-records (last visited Mar. 8, 2013).

[305] The Effect of a Discharge Under Dishonorable Conditions on Eligibility for Gratuitous Veterans' Benefits Based on a Prior Period of Honorable Service, Veterans Affairs Off. Gen. Counsel, Precedent Opinion 61-91 ¶¶ 4-5 (1991), *available at* 1991 WL 11692177 (citing 38 C.F.R. § 3.12(a), 38 U.S.C. § 101(18)) [hereinafter G.C. 61-91].

[306] *Id*.

[307] *See infra* Part III.A.6.a.

The rules for prior periods of service differ between servicemembers with long terms of continuous service and those with non-continuous periods of active duty. Many servicemembers have both. To better describe how this underdeveloped area of the law currently stands, this section will set forth the applicable law, implementing regulations, and practical guidance for both.

A. The Elements of Veteran Status as Applied to Prior Periods of Service

To qualify for VA benefits from a prior period of service, servicemembers must earn VA veteran status for that period and not otherwise be barred from receipt of VA benefits.[308] As noted previously, veteran status attaches to "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."[309] This statutory definition, in effect, creates an equation with three variables that a servicemember must satisfy to obtain veteran status: 1) active service; 2) discharge or release therefrom; and 3) under conditions other than dishonorable.

To provide accurate advice to a servicemember, commanders and judge advocates must understand the VA regulations and guidance that implements this statute. The following subsections will break down the equation by exploring each of the three variables that a servicemember must satisfy to obtain veteran status.

1. Active Military, Naval, or Air Service

Because veteran status requires active duty service, practitioners must first understand VA's definition of "active military, naval, or air service."[310] "Active military, naval, or air service" includes

---

[308] *See supra* notes 60–68 and accompanying text (providing an in-depth discussion of VA veteran status). *See infra* Part VI (discussing how former servicemembers who suffer from disabilities related to military sexual trauma (MST) may qualify for certain VA benefits despite a lack of veteran status).

[309] 38 U.S.C. § 101(2) (2006); 38 C.F.R. § 3.1(d) (2012) ("*Veteran* means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable." (emphasis in original)).

[310] 38 U.S.C. § 101(24) (2006).

> (A) active duty;
> (B) active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in the line of duty, and
> (C) any period of inactive duty for training during which the individual concerned was disabled or died –
>
> (i) from an injury incurred or aggravated in line of duty; or
>
> (ii) from an acute myocardial infarction, or cardiac arrest, or a cerebrovascular accident occurring during such training."[311]

"Active duty" is defined as "full-time duty in the Armed Forces, other than active duty for training."[312] "Active duty for training" is defined as "full-time duty in the Armed Forces performed by Reserves for training purposes."[313] Inactive duty for training includes many other forms of duty.[314] Authorized travel "to or from such duty or service" may also be included.[315]

For continuously serving active duty servicemembers, this element is easily satisfied. Nonetheless, practitioners should look to the servicemember's enlistment contract and accessions documentation to calculate the length of active duty service, as the minimum active duty service requirement may still preclude benefits.[316] For those with breaks in service, the issue of whether service is "active military, naval, or air service" may be more complex.

Many servicemembers, particularly those in the Reserves and National Guard, have multiple periods of differing types of service. Most mobilizations and deployments fit within the statutory definition of

---

[311] *Id*.
[312] *Id*. § 101(21)(A). Full-time duty in the Public Health Service, National Oceanic and Atmospheric Administration, or at a service academy may also qualify as active duty. *See id*. § 101(21).
[313] *Id*. § 101(22)(A). Full-time duty for training purposes in the Reserve Corps of the Public Health Service, as well as numerous other full-time duties in the Army National Guard, Air National Guard, or Senior Reserve Officers' Training Corps may qualify as active duty for training. *See id*. § 101(22).
[314] *Id*. § 101(23).
[315] *See id*. §§ 101(22)(E), 101(23)(E).
[316] *Supra* Part IV.A (discussing the minimum active duty service requirement).

active duty.[317] Many servicemembers will either enlist or otherwise rejoin full-time active duty status after a break in service. If there is an actual break in service of at least one day, it is usually easy for practitioners to determine the duration of the active military, naval, or air service, as the start and end dates will typically be stated on the servicemember's DD Form 214.[318] When there is an actual break in service, it is also relatively simple to calculate the periods of active service.

VA guidance states, "A complete and separate period of service is defined as a break in service greater than one day."[319] While this guidance is not logical on its face, as a break in service cannot be a period of service, the obvious meaning is that a break in active military, naval, or air service of more than one day will complete the prior period of service.[320]

If there is such a break, there is likely a DD Form 214 to cover that period of service,[321] and practitioners should consult it for the actual dates of that period of honorable service. The DD Form 214, if it exists, is also the best place to start when analyzing the last two elements of veteran status. Without a DD Form 214, the analysis can be very complicated, as will be shown below.

2. Discharged or Released Therefrom

Once a practitioner has determined that a servicemember has qualifying active military, naval, or air service, the next step is to determine whether the servicemember was "discharged or released therefrom." This step often causes the most confusion in calculating prior periods of honorable service.

---

[317] "Active duty" includes "full-time duty in the Armed Forces, other than active duty for training." 38 U.S.C. § 101(21) (2006).
[318] U.S. Dep't of Def., Form 214, Certificate of Release or Discharge from Active Duty (Aug. 2009).
[319] M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 9d (Feb. 27, 2012).
[320] *See id*. VA provides an example to demonstrate this premise. It states that if an individual was discharged on September 3, 1975, and then starts active service again on September 5, 1975, the period of active service completed on September 3, 1975 will be separate from the period of active service commencing on September 5, 1975. *Id.* M21-1MR, *supra* note 77, at Part III, subpart v, ch. 1, § B, para. 9d (Feb. 27, 2012).
[321] *See* U.S. DEP'T OF ARMY, REG. 635-5, SEPARATION DOCUMENTS para. 2-1a (15 Sept. 2000) [hereinafter AR 635-5].

Prior to 1977, it was impossible for a continuously serving active duty servicemember to have a prior period of honorable service.[322] This created "an inequity" because "veterans were being denied benefits based upon an entire period of service which terminated in a discharge under dishonorable conditions, even though the individuals had successfully completed the period of service to which they had originally agreed."[323]

In 1977, Congress responded to this apparent injustice by passing Public Law 95-126. The term "discharge or release" was modified to include

> the satisfactory completion of the period of active military naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.[324]

Thus, "the final discharge under dishonorable conditions no longer constitut[es] a bar to the receipt of veterans benefits based on the prior period."[325] Legislative history confirms that Congress desired to restore servicemembers who completed their entire obligation "to the position they would have been in if they had not agreed to extend their active duty service."[326] The revised definition has remained unchanged ever since.[327]

For the practitioner attempting to calculate periods of service for VA purposes, this statutory definition for "discharge or release" can be as confusing as it is helpful, as the breadth and manner of its application are

---

[322] H.R. REP. NO. 95-580, Pub. L. No. 95-126, 1977 U.S.C.C.A.N. 2844, 2861.
[323] G.C. 61-91, *supra* note 305.
[324] Pub. L. No. 95-126, 91 Stat. 1106, 1108 (codified at 38 U.S.C. § 101(18) (2006)). The definition of "active military, naval, or air service" is found at 38 U.S.C. § 101(24). The definitions of "active duty," "active duty for training," and "inactive duty for training" are found at 38 U.S.C. §§ 101(21), (22), and (23) respectively.
[325] G.C. 61-91, *supra* note 305 (citing Pub. L. No. 95-126, 91 Stat. 1106, 1108 (codified at 38 U.S.C. § 101(18) (2006)).
[326] H.R. REP. NO. 95-580, Pub. L. No. 95-126, 1977 U.S.C.C.A.N. 2844, 2861.
[327] 38 U.S.C. § 101(18) (2006).

clear only in simpler cases involving first- or second-term enlisted servicemembers. Interpretive case law is not helpful. In its sole opinion mentioning this definition, the CAVC states, "…the language is not a model of clarity."[328] This confusion and lack of binding precedent necessitates a review of the applicable terminology and VA guidance.

Practitioners must first understand the terms "conditional discharge," "constructive unconditional discharge," and "VA Release from Active Duty," as well as the arguably counterintuitive way that VA uses them. These terms are applicable only for calculations of prior periods of service for servicemembers with continuous active military, naval, or air service.

Because enlisted members with no breaks in service due to reenlistment do not have an actual break in active duty service, current VA guidance uses the term "conditional discharge" to represent the legal fiction that an enlisted member has completed a period of honorable service for VA purposes. The term can be confusing, as the enlisted member was not actually discharged, and nothing about the process is conditional. Additionally, the applicable VA regulation and relevant case law use the term differently than guidance that VA provides to benefits adjudicators.[329]

---

[328] Holmes v. Brown, 10 Vet. App. 38, 41 (1997). The court goes on to interpret the language as including "members who reenlist before completing their initial period of service, but who *would have been eligible* for discharges other than under dishonorable conditions at the time of the completion of the *initial* service obligation." (emphasis in original). Thus, a servicemember who enlisted for three years, reenlisted after twenty-one months for a further six years, but was in the middle of an extended AWOL on the three-year anniversary of his initial enlistment, was not eligible for benefits (and neither was his spouse) because he could not have been awarded an honorable discharge then. *Id.*

[329] The M21-1MR states,

> 38 U.S.C. 101(18) provides that an individual who enlisted or reenlisted before completion of a period of active service can establish eligibility to VA benefits if he/she satisfactorily completed the period of active service for which he/she was obligated at the time of entry. The satisfactory completion of one contracted period of service under a new enlistment is considered a conditional discharge.

M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 9(a) (Feb. 27, 2012).

The controlling regulation, however, uses the term "conditional discharge" to mean the completely opposite thing. 38 C.F.R. § 3.13 states that a period of service containing a "conditional discharge" constitutes just "one period of service and entitlement, and VA

Using current VA guidance, if an enlisted member has satisfactorily completed "one contracted period of enlistment while serving on a subsequent contracted period of service under a new enlistment," VA will declare that the enlisted member was "conditionally discharged" for the purposes of creating a period of service for VA benefits purposes.[330] However, 38 C.F.R. § 3.13(c)[331] and case law[332] use the term

---

benefits "will be determined by the character of the final termination of such period of active service. . . ." 38 C.F.R. § 3.13(b) (2012). In fact, when interpreting 38 U.S.C. § 101(18)(B), 38 C.F.R. 3.13(c) states, "Despite the fact that no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military, naval, or air service" when the conditions set forth in 38 U.S.C. 101(18)(B) are met. *Id.* § 3.13(c) (implementing 38 U.S.C. § 101(18) (2006)). While this linguistic conflict can create confusion, the term that a practitioner uses in his or her analysis does not matter so long as the practitioner properly calculates the prior periods of service.

A review of BVA decisions shows that some BVA decisions have determined that 38 C.F.R. § 3.13 "only pertains to those who served in World War I, World War II, the Korean conflict, the Vietnam era, or peacetime." Title Redacted by Agency, 09-19 564, Bd. Vet. App. 1135786 (Sept. 23, 2011); *see also* Title Redacted by Agency, 10-00 092A, Bd. Vet. App. 1128922 (Aug. 5, 2011). These BVA decisions find that cases arising solely during the Persian Gulf War, which started on August 2, 1990, and has continued through the publication date of this article, are not covered by 38 C.F.R. § 3.13, as the limitations in 38 C.F.R. § 3.13(a) are applicable throughout the entire provision. A survey of other BVA decisions indicates inconsistency within the BVA and that such an interpretation is not universal throughout the BVA. *See, e.g.*, Title Redacted by Agency, 10-34 472, Bd. Vet. App. 1241512 (Dec. 5, 2012) (applying 38 C.F.R. § 3.13(c) to a case involving an initial enlistment date of Sept. 6, 1995); Title Redacted by Agency, 09-18 888, Bd. Vet. App. 1239559 (Nov. 19, 2012) (applying 38 C.F.R. § 3.13(c) to a case involving multiple enlistment dates after August 2, 1990). Even if 38 C.F.R. § 3.13 is found to be inapplicable to cases after August 2, 1990, the practical analysis does not change, as 38 C.F.R. § 3.13(c) simply interprets 38 U.S.C. § 101(18). *See infra* note 389 (discussing the use of the term "intervening" in the regulation versus the statute).

[330] M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 9(a) (Feb. 27, 2012). Case law may also state that the servicemember will receive a "constructive unconditional discharge," or words to that effect, labeling the discharge given as the result of a re-enlistment as the "conditional discharge." *See, e.g.*, DeSousa v. Brown, 4 Vet. App. 561 (1993). Practitioners must constantly be aware of this confusing use of the term "conditional discharge" to define two related, yet completely different, things.

[331] 38 C.F.R. § 3.13 states that a period of service *containing* a "conditional discharge" constitutes just "one period of service and entitlement," and VA benefits "will be determined by the character of the final termination of such period of active service…" 38 C.F.R. § 3.13(b) (2012). In fact, when interpreting 38 U.S.C. § 101(18)(B), 38 C.F.R. 3.13(c) states, "Despite the fact that no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military, naval, or air service" when the conditions set forth in 38 U.S.C. 101(18)(B) are met. 38 C.F.R. § 3.13(c) (2012) (implementing 38 U.S.C. § 101(18)

"constructive unconditional discharge" to mean the fictional discharge at the end of the originally-contracted term of enlistment, reserving the term "conditional discharge" for an actual discharge given solely for purposes of reenlistment.[333]

Thus, if a servicemember enlists for a three-year term, and twenty-one months into that term he reenlists for six years, then according to the VA regulation and case law, he was "conditionally discharged" twenty-one months after his initial enlistment and "constructively unconditionally discharged" three years after his initial enlistment, whereas according to VA guidance he was "conditionally discharged" three years after his initial enlistment.

Using the term "conditional discharge" as it is used in current VA guidance, the date of the "conditional discharge" is also known as the VA Release from Active Duty date, or VA RAD.[334] This term can also be misleading, as the enlisted member was not in fact released from active duty on the VA RAD. Again, this date is a legal fiction created for delineating periods of service for VA benefits purposes. The VA RAD represents the last day of the period of service for VA benefits purposes.[335]

To determine periods of service for VA purposes when the servicemember continues serving past his or her original term of service, the regulatory guidance sets forth three separate requirements that an enlisted member must meet in these circumstances to earn a prior period of service.[336] First, an enlisted member must complete a period of

---

(2006)). While this linguistic conflict can create confusion, the term that a practitioner uses in his or her analysis does not matter so long as the practitioner properly calculates the prior periods of service.

[332] Appellate decisions (including non-precedential BVA and single-judge CAVC decisions) label the discharge given as the result of a re-enlistment as the "conditional discharge," and refers to the fictional discharge at the end of the original enlistment period a "constructive unconditional discharge," or words to that effect, *See, e.g.*, *DeSousa*, 4 Vet. App. 561; Title Redacted by Agency, 09-19 564, Bd. Vet. App. 1135786 (Sept. 23, 2011). Practitioners must constantly be aware of this confusing use of the term "conditional discharge" to define two related, yet completely different, things.

[333] M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 9(a) (Feb. 27, 2012).

[334] Using the statutory and case law definition of "conditional discharge," the VA RAD would not be the date of the conditional discharge. The conditional discharge would be the date of the reenlistment, and the VA RAD would be the date of the constructive "unconditional discharge." *See supra* note 329.

[335] M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 9 (Feb. 27, 2012).

[336] *See* 38 C.F.R. § 3.13 (2012).

obligated service.[337] Second, an intervening enlistment or reenlistment must be the reason that the enlisted member was not discharged or released from active service,[338] if, that is, he was not so released; if he was, then the term of service is unambiguous, the DD 214 will show it, and conditional discharges are not at issue.[339] Third, the enlisted member must have been eligible for a discharge or release under conditions other than dishonorable at the completion of the period of obligated service.[340] Breaking down these requirements will assist practitioners to properly apply them.

a. Completed Period of Active Service

First, the servicemember must have satisfactorily completed "the period of active military, naval, or air service for which [he or she] was obligated at the time of entry into such service."[341] Many military practitioners mistakenly believe that "periods of service" for VA purposes always match dates of enlistment and reenlistment, which is often not true.[342] This mistake is understandable, as accusers in court-martial cases must enter the most recent date of enlistment, along with the term of enlistment, into block 7 of the court-martial charge sheet, DD Form 458.[343] Prior periods of service for VA purposes, however, are not the same as prior periods of service for military administrative or other purposes.

When calculating periods of service for VA purposes, the term of the enlistment commitment determines the term of the obligation that the

---

[337] *Id*. § 3.13(c)(1).
[338] *Id*. § 3.13(c)(2).
[339] H.R. REP. No. 95-580, at 18, *reprinted in* 1977 U.S.C.C.A.N. 2844, 2861 (explaining that 38 U.S.C. § 101(18), which gives the definition of "discharge or release" under discussion here, was designed to *expand* the meaning of that term to *include* cases with "conditional discharges (2006))).
[340] 38 C.F.R. § 3.13(c)(3) (2012).
[341] 38 U.S.C. § 101(18)(B) (2006); *see* 38 C.F.R. § 3.13 (2012).
[342] This assertion is based on MAJ John W. Brooker's professional experiences as a judge advocate.
[343] U.S. Dep't of Def., DD Form 458, Charge Sheet (May 2000) [hereinafter DD Form 458]; *See* MCM, *supra* note 136, R.C.M. 307 and app. 4.

servicemember must complete. Reenlistment during that term does not complete it.[344]

b. Intervening Enlistment or Reenlistment

Second, the servicemember must have continued active duty service beyond the prior completed period of active service "due to an intervening enlistment or reenlistment."[345] How broadly the terms "enlistment or reenlistment" can be defined, however, is not clear. There is neither legislative history nor case law guidance to indicate how an "enlistment" differs from a "reenlistment," and no indication why both terms were used.[346]

Because no binding guidance exists that would expand the definition of these terms, it is not clear whether any basis for continuing to serve other than an enlistment or reenlistment will qualify the servicemember for a prior period of honorable service.[347] Unfortunately, there can be confusion even with enlisted member cases, as the VA implementing regulation does not mirror the statute that it implements.[348]

By requiring a reenlistment to be "intervening," 38 C.F.R. § 3.13(c)(2) appears to add an additional element to the statute that it implements. 38 U.S.C. § 101(18) does not require an "enlistment or reenlistment" to be intervening. Unfortunately, as will be described below, this additional element could have significant consequences in a number of cases.

---

[344] H.R. REP. NO. 95-580, Pub. L. No. 95-126, 1977 U.S.C.C.A.N. 2844, 2861 (describing the legislative intent behind Pub. L. No. 95-126, 91 Stat. 1106, 1108 (codified at 38 U.S.C. § 101(18) (2006))).

[345] 38 C.F.R. § 3.13(c)(2) (2012).

[346] The "Bill purpose" paragraph of the Congressional Budget Office Cost Estimate indicates that only a reenlistment situation was contemplated. *See* H.R. REP. NO. 95-580, Pub. L. No. 95-126, 1977 U.S.C.C.A.N. 2844, 2861 ("Eligibility for veterans benefits would be extended to persons who satisfactorily completed the period of military service for which they were obligated at the time of entry into service but who reenlisted and ultimately received less than honorable discharge as a result of conduct occurring after the initial enlistment period.").

[347] Department of Defense Form 4 documents both enlistments and reenlistments. U.S. Dep't of Def., Form 4, Enlistment/Reenlistment Document – Armed Forces of the United States (Oct 2007).

[348] 38 U.S.C. § 101(18) does not contain the term "intervening"; 38 C.F.R. § 3.13(c)(2) does.

c. Eligible for Discharge or Release Under Conditions Other Than Dishonorable

Third, the servicemember must have been eligible for a discharge or release under conditions other than dishonorable at the completion of the period of obligated service.[349] How hard this is to determine depends on the facts of each individual case.

Since servicemembers who continue to serve do not receive a discharge characterization upon reaching a VA RAD,[350] VA will determine the characterization of any prior period of service. Pursuant to 38 C.F.R. § 3.12(a), "a discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge."[351] For cases in which a servicemember does not have a break in service, however, there will be no actual discharge for a prior period of service, and therefore no command-determined characterization of discharge.[352] In these cases, VA will determine a constructive discharge characterization for that period of service based on the facts of each case.[353] While VA, and not the command, will make the ultimate decision on the constructive discharge characterization for a prior period of service, it appears that the basis for the servicemember's discharge can legally bind VA's decision.

Misconduct that does not, at least in part, form the basis of a servicemember's separation should not legally form the basis for VA to characterize a prior period of service as dishonorable. In other words, the statutory and regulatory bars that make service "dishonorable" for VA purposes only apply when the servicemember's actual discharge or release was based on one of the listed reasons. For a discharge to be characterized as dishonorable for VA purposes, a statutory or regulatory bar to benefits must apply.[354] A statutory bar applies only "where the

---

[349] 38 C.F.R. § 3.13(c)(3) (2012).
[350] *See supra* notes 334–35. *See, e.g.*, AR 635-5, *supra* note 321.
[351] 38 C.F.R. § 3.12(a) (2012) (implementing the definition of "veteran" from 38 U.S.C. § 101(2) (2006)).
[352] *See, e.g.*, AR 635-5, *supra* note 321.
[353] M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 9a (Feb. 27, 2012) ("VA has the authority to determine the character of discharge for any type of discharge that is not binding on it; therefore, VA has the authority to determine the character of discharge for all periods of service identified in a conditional discharge.").
[354] *See infra* Parts VIII & IX.

former service member was discharged or released" under one of the listed conditions.[355]

Similarly, a regulatory bar applies only when a "discharge or release" is because of one of the barred reasons.[356] Consequently, if a particular act of misconduct did not form the basis of the "discharge or release," there is neither a statutory nor regulatory basis for VA to determine that the misconduct was dishonorable, regardless of the severity or timing of the offense.

Conversely, if the misconduct upon which a separation is based occurred during a prior period of service, VA must determine if a statutory or regulatory bar to benefits applies to the prior period of service.[357] If a bar does apply, VA has the authority to determine that the prior period of service was not honorable for VA purposes. If VA determines that the prior period of service is not honorable for VA purposes, the former servicemember will not be characterized as a veteran for that period of service, and will generally not be entitled to VA benefits based solely upon that period of service.[358]

3. Under Conditions Other Than Dishonorable

Most of the remainder of this article is devoted to helping practitioners determine whether or not a discharge will be "other than dishonorable" for VA purposes. It is also important to remember, however, who gets to make the decision.

Upon the conclusion of a servicemember's active military, naval, or air service, the military will characterize the military service, and will typically reflect both the characterization of service and reason for discharge on the DD Form 214.[359] An honorable or general characterization of discharge is typically binding upon VA.[360] When

---

[355] 38 C.F.R. § 3.12(c) (2012) (implementing 38 U.S.C. § 5303(a) (2006)). *See infra* Part VIII (providing an in-depth discussion of the statutory bars to benefits).
[356] 38 C.F.R. § 3.12(d) (2012). *See infra* Part IX (providing an in-depth discussion of the regulatory bars to benefits).
[357] *See infra* Parts VIII & IX (discussing statutory and regulatory bars).
[358] *See infra* Parts V, VI, and VII (listing some independent bases for VA benefits eligibility).
[359] *Supra* note 68 and accompanying text.
[360] *See* 38 C.F.R. § 3.12(a) (2012).

VA has determined that a prior period of service exists because a conditional discharge or a constructive unconditional discharge exists, VA will characterize the prior period of honorable service.[361] While this characterization is arguably a part of the "Active Military, Naval, or Air Service" variable,[362] the result is the same. If VA determines that the discharge was dishonorable for VA benefits, the servicemember will be barred from receiving VA benefits.

As is discussed in depth in Parts VIII and IX, VA benefits adjudicators will apply the statutory bars to benefits found at 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c), as well as the regulatory bars to benefits found at 38 C.F.R. § 3.12(d), to each case.[363] If the facts and circumstances do not fit within one of the statutory or regulatory bars, the period of service will be considered honorable for VA purposes. If one of the bars to benefits applies, the service will be considered dishonorable for VA purposes. Even if the service is characterized as dishonorable for VA purposes, so long as a statutory bar does not apply and the servicemember was not separated because of an approved punitive discharge adjudged at a court-martial, the former servicemember will not be precluded by reason of the discharge characterization from receiving VA health care for service-connected disabilities.[364]

B. Cases Without Definitive Guidance on Prior Periods of Honorable Service

1. Indefinite Service Commitments

Neither VA nor the appellate courts have definitively said whether servicemembers who have served for a continuous period of service with an indefinite commitment can have prior periods of honorable service. Because both commissioned officers and enlisted members can serve for

---

[361] *Supra* note 350–58 and accompanying text.
[362] *See infra* pts. VIII, IX.
[363] The charts, tables, and other visual aids found in Appendix F provides a helpful tool when analyzing the applicability of the various bars to VA benefits. *Infra* app. F.
[364] *See* 38 U.S.C. § 5303(a) (2006); 38 C.F.R. § 3.12(c) (2012); *Id.* § 3.12(d) (2012); Pub. L. No. 95-126 (1977).

indefinite periods,[365] this lack of definitive guidance can make benefits eligibility estimates difficult in a large number of cases.

a. Commissioned Officers

Regular Army commissioned officers often serve their entire careers on indefinite commitments without a single break in service.[366] The complete lack of guidance on a commissioned officer's eligibility for a conditional discharge leaves practitioners with no choice but to advise commanders and clients that an officer's type and characterization of discharge may control the entire period of the service for which the servicemember served under an indefinite commitment.

The void of guidance for officer cases is particularly confusing given the congressional intent behind Public Law 95-126,[367] which was to put individuals who agreed to extend their service in "the position they would have been in if they had not agreed to extend their active duty service."[368] Officers must complete statutory and regulatory active duty service obligations [ADSOs], conceptually similar to terms of enlistment.[369] If Congress truly wanted to "treat the honorable completion of the obligated service as though it has resulted in a full discharge or release,"[370] the lack of attention to officer cases, as well as the general nature of the language in the controlling statute, is striking.

Much of the language included in the statutory definition of "discharge or release" is broad enough that one could argue that Congress meant for officers to be covered.[371] The term "completion of the period of active military, naval, or air service for which a person was

---

[365] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR, 13 Sept. 2011) (describing officer separations); U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM para. 3-16 (31 Jan. 2006) [hereinafter AR 601-280].

[366] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 601-100, APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY para. 2-3 (21 Nov. 2006).

[367] Pub. L. No. 95-126, 91 Stat. 1106, 1108 (codified at 38 U.S.C. § 101(18) (2006)).

[368] H.R. REP. NO. 95-580, Pub. L. No. 95-126, 1977 U.S.C.C.A.N. 2844, 2861.

[369] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 350-100, OFFICER ACTIVE DUTY SERVICE OBLIGATIONS (8 Aug. 2007) (RAR 10 Aug. 2009).

[370] G.C. 61-91, *supra* note 305 (citing Pub. L. No. 95-126, 91 Stat. 1106, 1108 (codified at 38 U.S.C. § 101(18) (2006)).

[371] 38 U.S.C. § 101(18) (2006).

obligated at the time of entry into such service"[372] could cover both an officer's active duty service obligation as well as an enlistment. The term "person" appears to refer to any servicemember, not just an enlisted member. At the end of an ADSO, an officer is arguably "eligible for the award of a discharge or release under conditions other than dishonorable."[373]

However, a servicemember who stays on active duty can be considered "discharged or released" for VA purposes only if his continued service is "due to enlistment or reenlistment."[374] Since officers do not enlist or re-enlist, it appears that an officer serving continuously on an indefinite commitment will only have one period of service, even if it lasts several decades.[375]

Accordingly, unless that officer has an actual break in service, the nature, type, and characterization of an officer's discharge could be dispositive for that officer's entire period of service.[376] This reality can

---

[372] *Id*.

[373] *Id*. Unlike enlisted members serving a defined enlistment period, commissioned officers must request to resign from the military or be released from active duty. *See, e.g.*, AR 600-8-24, *supra* note 365 (describing officer separations). While such a request could be denied, they typically are granted unless an officer has not fulfilled an active duty service obligation, has committed misconduct, or other circumstances requiring denial of the request exist. If a commissioned officer's proper request for an unqualified resignation or release from active duty is denied, the same arguments as found in the stop-loss situation would apply. *See infra* Part V.B.3.

[374] *See* 38 U.S.C. 101(18) (2006).

[375] The regulation largely mirrors the statute. The controlling regulatory provision states,

> Despite the fact that no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military, naval or air service when the following conditions are met:
>
> (1) The person served in the active military, naval or air service for the period of time the person was obligated to serve at the time of entry into service;
>
> (2) The person was not discharged or released from such service at the time of completing that period of obligation due to an intervening enlistment or reenlistment; and
>
> (3) The person would have been eligible for a discharge or release under conditions other than dishonorable at that time except for the intervening enlistment or reenlistment.

38 C.F.R. § 3.13 (2012).

[376] Some potential exceptions, however, include military sexual trauma, insanity, and compelling circumstances. *See infra* Parts VI, VII, and VII.E.2. A subsequent discharge

lead to draconian and counterintuitive consequences, particularly for officers separated for offenses that trigger a statutory bar to benefits.[377]

b. Indefinite Enlistment Contracts

Officers are not the only servicemembers who serve without a defined period of contracted service. Many Army noncommissioned officers serve on indefinite reenlistment contracts.[378] In 1996, Congress authorized the service secretaries to accept indefinite enlistments for servicemembers with at least 10 years of service.[379] Only the Army has implemented this program, and has since required "[a]ll [Regular Army] enlisted soldiers with over 10 years active federal service… to reenlist for an indefinite term unless otherwise exempted…."[380]

The nature of indefinite reenlistments creates the distinct possibility that the entire term of indefinite reenlistment will be one period of service for VA purposes. While there is no question that a servicemember on an indefinite reenlistment contract will satisfy the active military service variable, indefinite reenlistments do not carry an active duty service obligation. As such, there is no defined term of active military, naval, or air service to which the servicemember is obligated. An indefinite enlistment contract will likely be the last enlistment contract a servicemember ever signs.[381] Accordingly, the servicemember's active service will not be continued because of enlistment or reenlistment.

---

upgrading or military records correction by a service Board for Corrections of Military Records could also result in VA benefit eligibility. *See* U.S. Dep't of Def., Boards for Correction of Military Records, DoD Knowledge Base, https://kb.defense.gov/app/answers/detail/a_id/386/~/boards-for-correction-of-military-records (last visited Mar. 8, 2013).

[377] For a description of the statutory bars to VA benefits, see *infra* Part VIII.

[378] AR 601-280, *supra* note 365, para. 3-16. For a study on the effectiveness of the indefinite reenlistment program, see LAURA MILLER ET AL, RAND CORPORATION INDEFINITE REENLISTMENT AND NONCOMMISSIONED OFFICERS (2007).

[379] 10 U.S.C.A. § 505(d)(3)(B) (2008).

[380] AR 601-280, *supra* note 365, para. 3-16a ("[Regular Army] soldiers in the rank of SSG-CSM who are eligible for reenlistment IAW Chapter 3, this regulation, to include those with approved waivers, and have at least 10 or more years [Active Federal Service] on the date of discharge will be required to reenlist for an unspecified period of time.").

[381] *See, e.g.*, Capt. Addie Snay, *The Last Swearing In: 13-Year Veteran Re-enlists Indefinitely*, FT. HOOD SENTINEL, Mar. 22, 2012, *available at* http://www.forthoodsentinel.com/story.php?id=8756.C.

The likely result is that any period of service from the date after the last VA RAD following the indefinite reenlistment until the date of separation or retirement will be considered one period of service for VA purposes. Considering that soldiers can enter into an indefinite reenlistment contract at the 10-year mark of active federal service, a career noncommissioned officer's (NCO's) last term of service for VA purposes could last 20 or more years. Defense counsel representing senior NCOs must remember this fact, particularly for senior NCOs who have incurred disabilities in the latter stages of their military careers.

2. Enlistment Extensions

There is no definitive guidance for how to treat enlistment extensions.[382] In one case, the BVA referred to an "extension" as having a different characterization of service than the initial enlistment,[383] suggesting that a period of extension may be found to be a separate and distinct period of service. In other words, the BVA may treat an extension as an "intervening enlistment or reenlistment." While this BVA decision is logical and understandable, it is neither binding nor dispositive.[384] Unfortunately, there are many more situations for which a lack of guidance can create uncertainty and doubt.

3. Stop-Loss

During recent conflicts, thousands of servicemembers have been involuntarily extended beyond an enlistment obligation by a policy commonly known as "stop-loss."[385] Because servicemembers who commit misconduct during a stop-loss extension remain subject to UCMJ

---

[382] Enlistment extensions are different than reenlistments. Whereas the term of an reenlistment typically begins on the date of reenlistment, "the actual effective date of [an] extension[] is the date following the soldier's current ETS." AR. 601-280, *supra* note 365, para. 4-7.

[383] Title Redacted by Agency, 09-03 534A, Bd. Vet. App. 1216451 (May 8, 2012).

[384] *See supra* note 114 and accompanying discussion (explaining limitation on the precedential value of appellate cases within VA).

[385] *See* 10 U.S.C. § 12305(a) (2006) (describing Presidential authority to suspend separation laws). *See also* Thom Shanker, *'Stop-Loss' Will All But End By 2011, Gates Says*, N.Y. TIMES, Mar. 18, 2009, *available at* http://www.nytimes.com/2009/03/19/washington/19gates.html ("Some 120,000 soldiers have been affected by stop-loss in its various forms since 2001, . . . a practice that [Secretary of Defense Robert M.] Gates said had amounted to 'breaking faith' with those in uniform.").

jurisdiction,[386] it is possible for such servicemembers to receive a characterization or type of discharge that is dishonorable for VA purposes. Considering such servicemembers have already likely satisfied the minimum active duty service requirement,[387] and have already completed an entire contracted term of service,[388] one can make a strong argument that a period of service should be complete upon reaching the ETS date.

Because a stop-loss'd servicemember's service beyond the completed period of active service is not explicitly predicated upon an "intervening enlistment or reenlistment," however, it is not clear whether serving past the Expiration Term of Service (ETS) date, in and of itself, will result in a prior period of honorable service ending at the ETS date.[389] Whether the stop-loss clause in the original enlistment contract will be considered an "intervening enlistment or reenlistment" is not settled. The lack of guidance indicates that a stop-loss'd servicemember may need to complete the period of extended service in addition to the satisfactorily completed period of active service.

Because paragraph 10 of the standard enlistment contract explicitly contemplates the stop-loss situation, a logical argument can be made that stop-loss'd soldiers have not completed the contracted period of service. An equally compelling argument is that the stop-loss is the requisite "enlistment" that prevented actual discharge, and so satisfies the requirements of 38 U.S.C. § 101(18)(B). Absent definitive guidance, VA could go either way in any given case.

---

[386] *See* UCMJ art. 2 (2012).

[387] *See supra* Part IV.A.

[388] Public Law 95-126 was passed with the specific intent of preserving VA benefits for those who completed their initial term of service. *See* notes 324–25 and accompanying text.

[389] By requiring an enlistment to be "intervening," 38 C.F.R. § 3.13(c)(2) appears to add an additional element to the statute that it implements. 38 U.S.C. § 101(18) does not require an "enlistment or reenlistment" to be intervening. Because paragraph 10 of the standard enlistment contract explicitly contemplates the stop-loss situation, a logical argument can be made that Soldiers serving past their enlistment contract because of stop-loss have not completed the contracted period of service. An equally compelling argument is that the stop-loss clause in the initial enlistment contract satisfies the requirements of 38 U.S.C. § 101(18)(B), as the stop-loss clause would be the requisite "enlistment" that prevented the awarding of the discharge or release from active military, naval or air service. *See* 38 U.S.C. § 101(18) (2006); 38 C.F.R. § 3.13(c)(2) (2012); *supra* Part V.2.B.

4. Extension Past ETS for Medical Reasons

Servicemembers may also be voluntarily extended beyond their ETS dates[390] or terms of active service[391] for medical care or hospitalization. Many are extended to complete processing in the Disability Evaluation System.[392] As is the case with those extended for stop-loss, such servicemembers have already likely satisfied the minimum active duty service requirement,[393] and have already completed an entire contracted term of service.[394] Nonetheless, the question of whether an extension is an "intervening enlistment or reenlistment" remains open. Unlike many servicemembers extended by stop-loss, however, servicemembers extended because of a service-connected medical condition likely will have a compensable service-connected disability. If that disability is PTSD, TBI, or another mental health condition, misconduct related to that condition is a distinct possibility.[395] Additionally, misconduct during the active duty extension is foreseeable, as the combination of treatment and medical evaluation can take months, if not years.[396] Because the extension is for medical reasons, and extensions are only possible if the disability is not due to the servicemember's own misconduct, most disability-based extensions will be for what will likely be service-connected disabilities that are compensable upon the servicemember's discharge. Accordingly, the determination of whether or not a prior period of honorable service was completed at the original ETS date can be critically important.

---

[390] 10 U.S.C. § 507(a) (2006) ("An enlisted member of an armed force on active duty whose term of enlistment expires while he is suffering from disease or injury incident to service and not due to his misconduct, and who needs medical care or hospitalization, may be retained on active duty, with his consent, until he recovers to the extent that he is able to meet the physical requirements for reenlistment, or it is determined that recovery to that extent is impossible."); *see, e.g.*, AR 635-200, *supra* note 137, para. 1-24.

[391] U.S. DEP'T OF DEF., INSTR. 1241.2, RESERVE COMPONENT INCAPACITATION SYSTEM MANAGEMENT (30 May 2001) [hereinafter DoDI 1241.2] (explains authority to "[p]rovide medical and dental care to Reserve component members for an injury, illness, or disease incurred or aggravated in the line of duty….").

[392] *See, e.g.*, AR 635-200, *supra* note 137, para. 1-24(a)(2); DoDI 1241.2, *supra* note 391.

[393] *See supra* Part IV.A.

[394] Public Law 95-126 was passed with the specific intent of preserving VA benefits for those who completed their initial term of service. *See* footnote 324 and accompanying text.

[395] *See infra* app. I.

[396] Patricia Kime, *New Disability System Fails to Speed Claims, Average Case Now Drags on For More Than a Year*, ARMY TIMES, Oct. 1, 2012, *available at* http://www.armytimes.com/prime/2012/10/PRIME-military-new-disability-system-fails-to-speed-claims-100112w/. *See infra* app. I.

Unfortunately, because a disability-based extension of service is not predicated upon an "intervening enlistment or reenlistment," it is not clear whether a medical extension past the ETS date, in and of itself, will result in a prior period of honorable service ending at the ETS date. The lack of contrary guidance indicates that a servicemember who is extended pursuant to a disability may have to complete the period of extended service in addition to the satisfactorily completed period of active service.

C. The Exception: Treason and Subversive Activities

The only exception to the general rule that entitles former servicemembers to VA benefits based on a prior period of honorable service is if the case involves "a "subversive activity."[397] Those who are convicted of what 38 U.S.C. § 6105 defines as a "subversive activity" "shall, from and after the date of the commission of such offense, have no right to gratuitous benefits (including the right to burial in a national cemetery) under laws administered by the Secretary based on periods of military, naval, or air service, commencing before the date of the commission…."[398] More simply, a servicemember convicted and punitively discharged for of one of the offenses listed in Figure 2 appears to be precluded from receiving all gratuitous VA benefits, even if a prior period of honorable service exists.[399]

Practitioners with cases involving one of the offenses below should research all applicable laws and regulations pertaining to the impact that the charge will have on VA benefits.

---

[397] 38 U.S.C. § 6105 (2006). For cases involving similar offenses that occurred on or before September 1, 1959, see *id.* §§ 6103–6104.

[398] *Id.* § 6105. Family members of individuals convicted of offenses listed in 38 U.S.C. § 6105(b) are not entitled to VA benefits based upon the convicted servicemember's military service. *See id.* § 6105(b). For a good discussion of the legislative history of this provision and the case law up until 1991, see G.C. 61-91, *supra* note 305.

[399] *See* 38 U.S.C. §§ 6105(c) (2006). It is not explicitly clear whether a servicemember who is convicted of an offense listed in 38 U.S.C. § 6105(c), but is not discharged as a result of such an offense, will be precluded from such VA benefits. This article does not address such a highly unlikely occurrence. Practitioners who confront such a case must conduct additional independent research.

Statute	UCMJ Article	Name of Offense
10 U.S.C. § 894	UCMJ, art. 94	Mutiny or Sedition
10 U.S.C. § 904	UCMJ, art. 104	Aiding the Enemy
10 U.S.C. § 904	UCMJ, art. 106	Spies

Statute	Nature of Offense	Statute	Nature of Offense
18 U.S.C. § 175	Prohibitions with Respect to Biological Weapons	18 U.S.C. § 2384	Seditious Conspiracy
18 U.S.C. § 229	Chemical Weapons Prohibitions	18 U.S.C. § 2385	Advocating Overthrow of Government
18 U.S.C. § 792	Harboring and Concealing Persons	18 U.S.C. § 2387	Activities Affecting Armed Forces Generally
18 U.S.C. § 793	Gathering, Transmitting or Losing Information	18 U.S.C. § 2388	Activities Affecting Armed Forces During War
18 U.S.C. § 794	Gathering or Delivering Information to Aid Foreign Government	18 U.S.C. § 2389	Recruiting for Service Against United States
18 U.S.C. § 798	Disclosure of Classified	18 U.S.C. § 2390	Enlistment to Serve Against

	Information		United States
18 U.S.C. § 831	Prohibited Transactions Involving Nuclear Materials	18 U.S.C. ch. 105	Sabotage
18 U.S.C. § 1091	Genocide	42 U.S.C. § 2272	Atomic Weapons
18 U.S.C. § 2232a	Mass Destruction	42 U.S.C. § 2273	Construction of Supply of Components
18 U.S.C. § 2232b	International Terrorism	42 U.S.C. § 2274	Communication of Restricted Data
18 U.S.C. § 2381	Treason	42 U.S.C. § 2275	Receipt of Restricted Data
18 U.S.C. § 2382	Misprision of Treason	42 U.S.C. § 2276	Tampering With Restricted Data
18 U.S.C. § 2383	Rebellion or Insurrection		

Fig. 2. List of Subversive Activities

D. How VA Calculates Prior Periods of Honorable Service for Consecutive Enlistments

In some cases, calculating prior periods of honorable service is relatively simple and uncontroversial. In others, commanders, judge advocates, and clients will be forced to make decisions without a confident assessment of whether VA will find a prior period of honorable service. Practitioners must understand both the VA's current formal guidance on the subject and other reasonable interpretations of the law that may be implemented at the BVA level.

If a servicemember is on a second consecutive term of enlistment, calculating the prior period of honorable service is not difficult. If a servicemember is in his or her third or subsequent consecutive term of enlistment, however, there are two possible interpretations of the controlling statutory and regulatory guidance.[400]

1. Servicemembers on a Second Consecutive Enlistment Contract

The controlling statute and regulation directly address this situation. Stated simply, the first period of honorable service for VA purposes will be the actual term of active military, naval, or air service to which the servicemember committed upon the initial enlistment (that is, his first enlistment ever or his first enlistment after a break in service of at least one day). An intervening reenlistment does not end the first period of service for VA purposes.[401] As described above, the first period of honorable service ends on the VA RAD, not on the date of reenlistment.

2. Servicemembers on a Third or Subsequent Consecutive Enlistment Contract

The controlling statutes, however, do not appear to contemplate servicemembers serving on a third or subsequent enlistment. A colorable argument could be made that only the initial enlistment contract can form a prior period of honorable service for VA purposes. Both 38 U.S.C. § 101(18)(B) and 38 C.F.R. § 3.13(c), use the term "at the time of entry" into active military, naval, or air service to describe the term of service that could possibly be considered an independent period of service for VA purposes.[402] Because a servicemember on a third or subsequent enlistment had entered military service upon the initial enlistment, determining that more than one prior period of honorable service can exist is contingent upon interpreting the term "entry" as encompassing both initial and subsequent enlistments. Current VA guidance, as well as

---

[400] Appendix C provides practitioners with quick-reference charts to assist in calculating prior periods of honorable service. *See infra* app. C. Appendix C-1 assists practitioners in determining if a servicemember has earned a prior period of honorable service, while Appendix C-2 assists practitioners in calculating the dates of the prior periods of honorable service. *See infra* apps. C-1, C-2.

[401] 38 U.S.C. § 101(18) (2006) (defining "discharge or release" as it relates to 38 U.S.C. § 101(2)); 38 C.F.R. § 3.13(c) (2012).

[402] 38 U.S.C. § 101(18)(B) (2006); 38 C.F.R. § 3.13(c) (2012).

one non-precedential CAVC decision, is based upon such an interpretation.[403] Because the controlling statute and regulation do not directly address the situation of a third enlistment period, VA has promulgated guidance that may seem counterintuitive to some military justice practitioners.

a. Current VA Guidance

Current VA guidance, found largely in the *M21-1MR*, instructs VA claims examiners to run each term of obligation consecutively, with no period running concurrently.[404] In other words, when determining periods of service for VA purposes, each term of enlistment commitment is added one after the other, thereby making the actual dates of reenlistment meaningless in any calculation of periods of service for VA purposes. The only information from any reenlistment contract that matters is the specific term for which the servicemember obligated himself or herself.

This method of calculating prior periods of honorable service does not harmonize with the apparent intent behind 38 U.S.C. § 101(18). Congress intended to restore servicemembers who had properly completed their entire obligation "to the position they would have been in if they had not agreed to extend their active duty service."[405] The term of obligation for most reenlistment contracts, as opposed to enlistment extensions, begins on the day of reenlistment.[406] As such, a servicemember is eligible for unconditional release from active duty after serving the term of commitment, starting from the date of reenlistment. Accordingly, by strictly running enlistment commitments consecutively, with no regard to reenlistment dates, VA is effectively requiring a servicemember with continuing service to serve *beyond* the "time of such completion" of the second or subsequent enlistment contract to complete the second or subsequent period of service for VA purposes.[407]

---

[403] M21-1MR, *supra* note 77, pt. III, subpart v, ch. 1, § B (Feb. 27, 2012); Maxwell v. West, 17 Vet. App. 340 (table) (Feb. 28, 2000) (unpublished decision) (finding more than one prior period of honorable service).

[404] M21-1MR, *supra* note 77, pt. III, subpart v, ch. 1, § B, para. 9 (Feb. 27, 2012).

[405] H.R. REP. NO. 95-580, Pub. L. No. 95-126, 1977 U.S.C.C.A.N. 2844, 2861.

[406] *See, e.g.*, AR 601-280, *supra* note 365, para. 3-16.

[407] Both 38 U.S.C. § 101(18) and 38 C.F.R. § 3.13(c)(2) appear to contemplate a constructive unconditional discharge upon the completion of the obligated period of service. *See* 38 U.S.C. § 101(18) (2006); 38 C.F.R. § 3.13(c)(2) (2012).

Because this guidance appears inconsistent with congressional intent, commanders and judge advocates should follow any developments in this area of the law. Until then, however, advice to a client must include all reasonable and plausible interpretations of how prior periods of honorable service may be calculated.

b. A Broader Interpretation

While there is no specific guidance on point, there exists a second interpretation of how to calculate a second or subsequent period of service for VA purposes. Congressional intent would be satisfied if a subsequent period of honorable service for VA purposes were to begin upon the date of reenlistment, rather than upon the day after the previous VA RAD. In other words, this method allows for concurrent running of periods of service for VA purposes. Under this interpretation, a reenlistment will start the clock on a subsequent period of service for VA purposes, even if the prior period of service has not yet been completed because a servicemember has not served the complete term to which he or she committed in the prior enlistment or reenlistment.

This method is consistent with both statutory and regulatory guidance. Starting terms of VA service at the same time as terms of military service allows for a consistent, understandable application of statutory and regulatory guidance. Unlike the current VA guidance, this method does not require servicemembers to serve beyond the term of their obligation to complete a subsequent period of service for VA purposes. An applied example will demonstrate the difference between the two interpretations.

3. Prior Periods of Honorable Service—Applied Example[408]

Staff Sergeant (SSG) Timothy Jones, U.S. Army, initially enlisted for four years of active duty. He first entered active military service on December 29, 2000. On April 4, 2004, approximately three years and three months after his initial enlistment, SSG Jones reenlisted for a term

[408] The dates used in this applied example were derived, in part, from the example provided in the M21-1MR. *See* M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 9 (Feb. 27, 2012).

of six years. On October 31, 2008, SSG Jones reenlisted for another term of six years.

SSG Jones's first period of service for VA benefits ended on December 28, 2004. It did not end on April 4, 2004, the date of his reenlistment. Accordingly, if SSG Jones were to have committed misconduct at any time on or prior to December 28, 2004 that resulted in a type or characterization of discharge that precludes him from receipt of VA benefits, he would be ineligible for those VA benefits, as he would still have been on his first period of service for VA purposes at the time of the misconduct. If, however, the misconduct upon which the separation precluding VA benefits was based occurred on or after December 29, 2004, SSG Jones would be eligible for any benefits earned resulting from his first period of honorable service from December 29, 2000, through December 28, 2004.[409]

Assume, however, that SSG Jones went AWOL on May 1, 2010 for a continuous period of 180 days. He returned to his unit on October 28, 2010. Using the current VA guidance, SSG Jones's sole period of honorable service would be from December 29, 2000, to December 28, 2004: the date of his initial enlistment plus the four-year initial commitment. Despite the fact that SSG Jones successfully completed his second enlistment commitment prior to going AWOL, and would have been eligible for an unconditional discharge on April 3, 2010, current VA guidance states that his second period of service for VA purposes doesn't end until December 27, 2010, six years following the expiration of his first period of service for VA purposes. Using current VA guidance, SSG Jones would have to serve honorably for over eight months past his obligated term of service to qualify for a second period of service for VA purposes.

Using the broader interpretation, SSG Jones's second period of service would have started on April 4, 2004, the date of his reenlistment. From April 4, 2004, through December 28, 2004, SSG Jones's service on his first and second periods of service for VA purposes would have been running concurrently. If he would have been separated under conditions dishonorable for VA purposes prior to December 28, 2004, he still would not have completed a prior period of honorable service, as his first period of service would have been incomplete. Commencing the second period

---

[409] *See supra* Part V.D.1; *infra* Fig.3 (providing a graphic illustration of SSG Jones's periods of service).

of service for VA purposes at the same time as the Army commitment would only allow for the proper application of the elements found in both 38 U.S.C. § 101(18) and 38 C.F.R. § 3.13(c).

Assuming that SSG Jones went AWOL on May 1, 2012, instead of on May 1, 2010, SSG Jones would have two prior periods of honorable service. Using the current VA guidance, the second period of honorable service would have ended on December 27, 2010. Using the broader method, the second period of honorable service would have ended on April 3, 2010. Current VA guidance would start the third period of service on December 28, 2010, while the broader method would have started the third period on October 31, 2008, the date of the third reenlistment. Accordingly, using current VA guidance, the third period of service would end on December 26, 2016, whereas using the broader method, the third period of service would end on October 30, 2014.

Commanders, judge advocates, and VA benefits adjudicators must therefore closely analyze the medical evidence surrounding any disabilities. Eligibility for disability-related VA benefits is typically dependent upon the disability being incurred or aggravated during a period of honorable service.[410] If a disability is entirely attributable to a period of service that is dishonorable for VA purposes, the former servicemember may be ineligible for disability-related VA benefits. One last hypothetical with SSG Jones will illustrate this point.

Assume SSG Jones has no prior misconduct upon deployment to Afghanistan on January 10, 2011. SSG Jones redeploys on January 8, 2012. SSG Jones's deployment was like many; during his deployment, he experienced many traumatic, combat-related events, such as IEDs, rocket attacks, and human casualties. Shortly after redeployment, SSG Jones was diagnosed with PTSD, with the stressors identified as his deployment experiences. On February 14, 2012, SSG Jones went AWOL for a period of 243 continuous days, returning to his unit on October 14, 2012. In this example, regardless of which method of calculating prior periods of service for VA purposes is used, SSG Jones risks losing eligibility for VA health care for his service-connected PTSD, as his disability was incurred during what may be a dishonorable period of service for VA purposes.[411]

---

[410] *Supra* Parts II, III.

[411] *See infra* Parts VII and IX (discussing the statutory and regulatory bars to VA benefits).

Figure 3 visually depicts the potential periods of service for VA purposes using both the current VA guidance and the broader method.

Enlistment/ Reenlistment Date	**Enlistment Contract**	**VA RAD: Current VA Guidance**	**VA RAD: Broader Method**
December 29, 2000	4 years	December 28, 2004	December 28, 2004
April 4, 2004	6 years	December 27, 2010	April 3, 2010
October 31, 2008	6 years	December 26, 2016	October 30, 2014

Fig. 3. Chart Depicting Differing Methods to Calculate VA RAD

VI. Independent Basis for VA Benefits Eligibility: Military Sexual Trauma

A. Background

According to former Secretary of Defense Leon Panetta and Chairman of the Joint Chiefs of Staff Martin E. Dempsey, sexual assault within the military is "a serious problem that needs to be addressed."[412] In justifying a "zero tolerance" policy against sexual assault, military leadership states that sexual assault "is an affront to the basic American values we defend, and may degrade military readiness, subvert strategic goodwill, and forever change the lives of victims and their families."[413] Unfortunately, the manner in which sexual assault impacts its victims leads to difficulty in understanding the scope of the crime.

Multiple studies confirm that sexual assault is "a crime that is significantly underreported, both within and outside of the Military Services."[414] It is estimated that in Fiscal Year 2010, 19,000 servicemembers were victims of sexual assault.[415] DoD estimates that only approximately 14 percent of servicemember victims of sexual assault reported the crime.[416] VA studies and screenings also indicate the depth and breadth of sexual assault within the military. A recent VA study indicates "[a]bout half of women sent to Iraq or Afghanistan report being sexually harassed, and nearly one in four says she was sexually assaulted. . . ."[417] In addition, VA screenings demonstrate that one out of five female veterans enrolled in the Veterans Health Administration responded "yes" when screened for Military Sexual Trauma, or MST.[418]

---

[412] Lisa Daniel, *Panetta, Dempsey Announce Initiatives to Stop Sexual Assault*, AMERICAN FORCES PRESS SERVICE, Apr. 16, 2012, *available at* http://www.defense.gov/news/newsarticle.aspx?id=67954.

[413] U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2011, at 1 (Apr. 2012).

[414] *Id*.

[415] *Id*. at 28.

[416] *Id*.

[417] Gregg Zoroya, *Study: Sex Assault More Common Than DoD Says*, USA TODAY (Dec. 27, 2012), *available at* http://www.marinecorpstimes.com/news/2012/12/gannett-va-study-says-sex-assault-more-common-than-pentagon-reports-122712/.

[418] U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, HEALTHCARE INSPECTION, INPATIENT AND RESIDENTIAL PROGRAMS FOR FEMALE VETERANS WITH MENTAL HEALTH CONDITIONS RELATED TO MILITARY SEXUAL TRAUMA, at i (Dec. 5, 2012). For a definition of MST, see *infra* notes 425–26 and accompanying text.

Servicemember victims of sexual assault have cited numerous reasons for not reporting sexual assault to the chain of command. These reasons include, "(1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident."[419] In addition, many sexual assault victims "commented that they would not report a sexual assault because of concern about being disciplined for collateral misconduct."[420]

Congress and VA have studied the issue of military sexual trauma (MST) for over two decades.[421] In 1992, Congress authorized VA to provide counseling and treatment to female veteran victims of MST.[422] In 1994, male veteran victims of MST were included.[423] In 2010, VHA Directive 2010-033 expanded the program to provide "counseling, care, and services to Veterans and certain other Servicemembers who may not have Veterans status, but who experienced sexual trauma while serving on active duty or active duty for training."[424] In other words, all victims of MST are now potentially eligible for VA counseling, care, and services.

B. Current VA Policy

VA's provision of counseling and treatment for sexual trauma victims is pursuant to a unique statute that is interpreted broadly. Title 38 U.S.C. § 1720D(a)(1) serves the dual purpose of outlining the scope of the program and defining MST. It reads

> The Secretary shall operate a program under which the Secretary provides counseling an appropriate care and services to veterans who the Secretary determines

---

[419] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1013T, MILITARY PERSONNEL: PRELIMINARY OBSERVATIONS ON DOD'S AND THE COAST GUARD'S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS 14 (2008).

[420] *Id*.

[421] For a more in-depth history of how VA has provided treatment for sexual assault victims, see Brianne Ogilvie & Emily Tamlyn, *Coming Full Circle: How VBA Can Complement Recent Changes in DoD and VHA Policy Regarding Military Sexual Trauma*, 4 VET. L. REV. 1, 15-7 (2012).

[422] Pub. L. No. 102-585, § 102, 106 Stat. 4943, 4945-6 (codified at 38 U.S.C. § 1720D).

[423] Pub. L. No. 103-452, § 101, 108 Stat. 4783, 4783-84 (codified at 38 U.S.C. § 1712 and 38 U.S.C. § 1720D).

[424] U.S. DEP'T OF VET. AFFAIRS, VHA DIR. 2010-033, MILITARY SEXUAL TRAUMA (MST) PROGRAMMING para. 2a (July 14, 2010) [hereinafter VHA DIR. 2010-033].

> 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.[425]

Sexual harassment is defined as "repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character."[426]

Importantly, VA interprets this statute very broadly. As stated in VHA Directive 2010-033, "It is VHA policy to provide Veterans and eligible individuals who report having experienced MST with free care for all physical and mental health conditions determined by their VA provider to be related to the experiences of MST."[427] Understanding the terms within this policy is necessary to understand its wide scope.

The term "eligible individuals" makes this directive unique, as it creates one of the few situations for which VA benefit eligibility may not hinge on veteran status.[428] Despite the statutory authorization containing the term "veteran," VA has implemented the statute more broadly.

> For purposes of this Directive, "eligible individual" means someone without Veteran status who experienced sexual trauma as described in subparagraph 2a while on active duty or active duty for training. Because eligibility accrues as a result of events incurred in service and is not dependent on length of service some individuals may be eligible for MST-related care even if they do not have Veteran status.[429]

The policy also states,

> Veterans and eligible individuals who report experiences of MST, but who are deemed ineligible for other VA

---

[425] 38 U.S.C.A. § 1720D(a) (2010).
[426] *Id*. § 1720D(f).
[427] VHA DIR. 2010-033, *supra* note 424, para. 3.
[428] *See infra* Part II (discussing the impact of veteran status).
[429] VHA DIR. 2010-033, *supra* note 424, para. 2b.

> health care benefits or enrollment, may be provided MST-related care only. This benefit extends to Reservists and members of the National Guard who were activated to full-time duty states in the Armed Forces. 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.[430]

The policy does not explain its use of the words "may be able" and "may be eligible." The overarching policy statement does not qualify eligibility for "eligible individuals."[431] Until clarifying case law or policy guidance is available, practitioners should advise potentially eligible victims of MST to apply for benefits. Ironically, despite the seemingly permissive language that could prevent those without veteran status from receiving benefits, the actual claim for benefits appears, upon first glance, appears to be simpler than many other VA claims.

Those "who report having experienced MST" are eligible and the usual prerequisites do not apply. The injuries do not have to be adjudicated as service-connected,[432] and the minimum-service requirement is completely inapplicable.[433] There is also no requirement to file a disability claim.[434] More importantly, those applying for MST-related counseling, care, and services do not need to "provide evidence of the sexual trauma."[435] So long as a VA mental health professional determines that physical or mental trauma resulted from MST, the former servicemember could be eligible for MST-related care.[436]

The broad nature in which VA has recently interpreted the controlling statute appears to recognize the reality that hinging eligibility

---

[430] *Id*.
[431] *See* note 427 and accompanying text.
[432] VHA DIR. 2010-033, *supra* note 424, para. 2a ("VA has determined that because VA provides sexual trauma counseling and care pursuant to 38 U.S.C. Section 1720D only for sexual trauma-related disabilities that are incurred in service, there are no requirements for the condition to be adjudicated as service connected.").
[433] *Id*. ("Length of service or income eligibility requirements do not apply in order to receive this benefit.").
[434] *Id*.
[435] *Id*.
[436] While the statutory definition of MST ties counseling and care to "psychological trauma," VHA Directive 2010-033 implements the statute to include care for both "physical and mental health conditions." *See id*.

for MST-related care on veteran status could contribute to the problems related to the underreporting of sexual assault cases. There are numerous reasons why victims of military sexual assault do not report the crime,[437] Specifically, some victims worry that reporting the incident will also subject them to discipline, as an investigation into the sexual assault may also uncover misconduct by the victim.[438] "Fear over being punished for wrongdoing can keep victims from reporting sexual assault or make them hesitant to fully disclose details of the event to investigators."[439] By not making veteran status a prerequisite to receiving MST-related treatment, VA appears to have recognized the reality that MST victims deserve treatment regardless of any collateral misconduct. Unfortunately, it has often proven difficult to implement even the best of intentions.

Despite the broad way in which VA appears to interpret the statute, some assert that MST victims have faced significant difficulty in obtaining MST-related benefits because of a purported "far greater burden of proof than other VA claimants diagnosed with the same mental illnesses."[440] One such former servicemember is Ruth Moore. During congressional testimony in 2012, Ms. Moore explained how her personality disorder-based separation for borderline personality disorder precluded her from receiving benefits.[441] After 23 years of pursuing benefits, she was subsequently granted service connection and rated as 100 percent disabled.[442] Ms. Moore states that part of the difficulty she faced in obtaining benefits "was the difficulty in proving her mental health issues were the result of sexual assault that occurred while she was in the military."[443] Critics assert, "Survivors of military sexual assault and sexual harassment are betrayed twice: first by the military who all

---

[437] For an in-depth discussion of the barriers to reporting sexual assault, see U.S. DEP'T OF DEF., DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES (Dec. 2009).
[438] *Id*.
[439] *Id*.
[440] Service Women's Action Network, Landmark Legislation Introduced on VA Disability Claims for Military Sexual Assault Victims (Feb. 13, 2013), *available at* http://servicewomen.org/wp-content/uploads/2013/02/RuthMooreActpressrelease.pdf.
[441] Rick Maze, *Bill: Help Sex Assault Victims Get VA Benefits*, ARMY TIMES, Feb. 11, 2013, *available at* http://www.armytimes.com/news/2013/02/military-sexual-assault-victims-benefits-service-connection-021113w/. Separation because a personality disorder will often preclude a former servicemember from receiving VA benefits, as personality disorders, along with mental retardation, "are not diseases or injuries for compensation purposes, and, except as provided in [38 C.F.R. § 3.310(a)], disability resulting from them may not be service-connected. 38 C.F.R. § 4.127 (2012).
[442] Maze, *supra* note 441.
[443] *Id*.

too often fails to support the victim; and by the VA which has for years systematically rejected MST disability claims based on this unequal and unfair regulation."[444]

Consequently, Senator Jon Testor of Montana, a member of the Senate Committee on Veterans Affairs, and Congresswoman Chellie Pingree, a member of the House Committee on Armed Services, proposed the Ruth Moore Act of 2013, a bill designed to improve the evaluation procedures used in adjudicating MST-related claims.[445] Under this proposal, official records will not be required to prove an MST-related claim. "Veterans who say they were victims of military-related sexual trauma would have their claim accepted if a mental health professional says their condition is consistent with sexual trauma and their claims are not rebutted by evidence."[446] All reasonable doubts would be resolved in favor of the claimant.[447] At the time of publication, this proposed legislation has not been enacted, but its introduction and support reflect a growing awareness of the need for prompt MST treatment.

C. Practical Advice

Commanders, judge advocates, and all who work with MST victims must educate them, from the first steps in the process, of their potential eligibility for MST-related benefits through VA. While some claim that obtaining such benefits has been difficult, the prospect of pending and future legislation may make the road to benefits easier to navigate. Additionally, MST victims can obtain assistance from most VSOs to navigate what can be a confusing or frustrating process.[448] This assistance is available to victims from the beginning, as VSOs will assist a victim with filing a claim. Because MST-related care does not hinge on veteran status, MST victims with even the most unfavorable types and

---

[444] Karen McVeigh, *Military Sexual Assault Victims Hope Bill Fixes 'Unfair and Broken' VA System*, THE GUARDIAN, Feb. 13, 2013, *available at* http://www.guardian.co.uk/world/2013/feb/13/us-military-rape-victims-bill.

[445] Ruth Moore Act of 2013, S. 294, 113th Cong. (2013).

[446] Maze, *supra* note 441.

[447] *Id*.

[448] Disabled American Veterans (DAV), a congressionally chartered VSO, assisted Ms. Moore with her case. Rick Maze, *Bill: Help Sex Assault Victims Get VA Benefits*, ARMY TIMES, Feb. 11, 2013, *available at* http://www.armytimes.com/news/2013/02/military-sexual-assault-victims-benefits-service-connection-021113w/. For assistance in locating VSO help, see *infra* app. M.

characterizations of discharge should understand their eligibility for MST-related care, as well as their ability to obtain VSO assistance in their cases.

Even with proper education, many who have applied for MST-related care have experienced a long road to benefits. In future cases, part of that road may be shortened by advocates ensuring that MST victims preserve all medical records and documentation made contemporaneously with the MST incident. This is particularly true if the sole basis for VA health care eligibility is status as a MST victim, as the status of efforts to liberalize the rules surrounding MST-related claims for benefits, such as the *Ruth Moore Act of 2013*,[449] may modify the adjudicatory process for such claims.

VII. Independent Basis for VA Benefits Eligibility: Insanity

Insanity is another exception to the bars to VA benefits. If the claimant was insane when he or she committed the offense that resulted in an adverse separation, then he or she will not be barred from receiving any benefits for that period of service.[450] For purposes of eligibility for veteran status, VA employs the following definition of insanity:

> An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basis condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to

[449] Ruth Moore Act of 2013, S. 294, 113th Cong. (2013).

[450] 38 C.F.R. § 3.12(b) (2012); *see also* 38 U.S.C. § 5303(b) (2012). This may even apply to disabilities caused by injuries that would not otherwise have been incurred in the line of duty. *See* Line-of-Duty Determination—Unauthorized Absence, Veterans Affairs Off. Gen. Counsel, Precedent Opinion 18-90, ¶ 9 (1993), *available at* 1990 WL 10553765 (former servicemember who incurred injuries while AWOL may be found to have incurred them in the line of duty due to insanity, and not "due to his own misconduct").

> make further adjustments to the social customs of the community in which he resides.[451]

VA's definition of insanity is noteworthy in that it does not require a court adjudication or medical determination of insanity during service, nor is it substantially similar to a number of other medical and legal definitions of insanity that are utilized in the military, federal, and state-level justice systems.[452] To that end, the military justice system uses a more restrictive definition of insanity, which is equated with a defense of lack of mental responsibility. This military definition provides a much different threshold for insanity:

> It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.[453]

In fact, the CAVC has acknowledged that elements of the *Model Penal Code* and *UCMJ* are absent from the VA regulatory definition of insanity provided above, and that VA must make determinations of insanity by applying only the definition of insanity provided in 38 C.F.R. § 3.354(a).[454] A former servicemember does not need not have raised or proven insanity at trial or the time of adverse separation proceedings to

---

[451] 38 C.F.R. § 3.354(a) (2012). In *Zang v. Brown,* 8 Vet. App. 246 (1995), the CAVC clarified that the phrase "due to disease" applies to all three circumstances listed in 38 C.F.R. § 3.354(a).

[452] *See* United States v. Frederick, 3 M.J. 20 (1977) (in which the then- Court of Military Appeals adopted the American Law Institute's standard for insanity, which provides that "a person is not responsible for criminal conduct if at the time of such conduct as the result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."); 18 U.S.C. § 17(a) (2006) (providing that insanity is an affirmative defense in federal criminal cases when the defendant, "as a result of severe mental illness or defect, was unable to appreciate the nature and quality or the wrongfulness of his act.").

[453] UCMJ art. 50a (2012); *cf.* 18 U.S.C. § 17(a) (2006) (providing that insanity is an affirmative defense in federal criminal cases when the defendant, "as a result of severe mental illness or defect, was unable to appreciate the nature and quality or the wrongfulness of his act.").

[454] Gardner v. Shinseki, 22 Vet. App. 415, 420 (2009).

qualify for this exception.[455] To the contrary, for VA benefits purposes, a former servicemember can have been found sane during military justice proceedings but can nonetheless be adjudicated by VA to be insane at the time of the commission an offense.[456]

A claimant or his or her representative can raise insanity for the first time during the VA claim process, or a VA adjudicator can — indeed, must — raise and develop it *sua sponte* if he or she discovers evidence of potential insanity when reviewing the former servicemember's file.[457] In cases in which insanity is potentially at issue, VA requires additional development so that the issue of insanity is developed completely. Specifically, VA's *M21-1MR* requires that VA obtain all service treatment records and post-service treatment records that are "in any way, relevant."[458] Additionally, VA will obtain complete transcripts of any court-martial or board proceedings that may be relevant to the question of insanity.[459]

In addition to the *M21-1MR*, the CAVC has addressed the additional development that is necessary in cases implicating the issue of insanity. Specifically, the CAVC has extended VA's statutory duty to assist to these cases, even though veteran status has not yet been established.[460] The court held that, in fulfilling that statutory duty, VA may be required to obtain a medical opinion to determine if the claimant was insane at the

---

[455] In fact, as explained in *Gardner*, VA's statutory duty to assist applies to claims for veteran status, and VA may be required to obtain an examination or opinion that addresses whether a claimant was insane at the time of the commission of the offense or offenses that resulted in discharge for service. *Id*. at 421–22. Thus, not only the legal standard, but also the evidentiary record, may vastly differ between the military's and VA's reviews of whether a former servicemember was insane at the time of an offense leading to discharge, and the subsequent review by VA is not necessarily reliant on the sanity board's in-service evaluations, particularly if they do not provide the evidence necessary to make a determination under VA's unique definition of insanity. *But see* Vanessa Baehr-Jones, *A "Catch-22" for Mentally Ill Military Defendants: Plea-Bargaining away Mental Health Benefits*, 204 MIL. L. REV. 51 (Summer 2010) (positing that "because VA standards still differ from the UCMJ's insanity criteria, the sanity board's evaluations serve to limit the evidence to prove the insanity exception during later reviews.").

[456] *Gardner*, 22 Vet. App. at 420.

[457] M21-1MR, *supra* note 77, pt. III, subpart v, ch. 1, § E(20)(b) (Feb. 27, 2012).

[458] *Id*.

[459] *Id*.

[460] *See supra* notes 79–81 and accompanying text (describing VA's duty to assist claimants).

time of the commission of an offense (or offenses) leading to an adverse separation from service.[461]

While a servicemember is still on active duty, military counsel can help him or her develop a claim for VA benefits in such a way as to assist VA adjudicators in making a favorable determination regarding the applicability of the insanity exception, or alternatively, at least show that a potential issue of insanity is raised and must be developed by VA. First and foremost, it is critical that a military attorney with a client who may have been insane at the time of an offense advise the client that he or she should file a claim for any VA benefits he or she believes that he or she is entitled to, even if the client believes that he or she will not be entitled to any benefits based on the character of his or her discharge. Although most claimants know that a dishonorable discharge bars all VA benefits,[462] few likely know that insanity, by the VA definition, at the time offense could exempt them from this bar to benefits. Therefore, military attorneys should take the time to counsel clients regarding the insanity exception. The more time that passes between discharge and the filing of a claim increases the chance that records may no longer be available, or that people who can provide statements attesting to in-service actions will be unavailable or cannot accurately recall the events in question. Former servicemembers who have been separated under adverse conditions may have a mistaken belief that they are not entitled to any VA benefits, when, in fact, they are entitled to benefits, and as a result, decide not to file a claim for many years, or even decades.[463] By educating clients that VA benefits may still be available, the filing of a VA claim contemporaneous to separation from service could help maximize the chance for a successful outcome.

As it can sometimes be difficult to obtain records or "buddy statements" many years after service, servicemembers should be advised that, in addition to filing a claim immediately upon separation from service, they should also maintain their own copies of records that may help to substantiate a claim for VA benefits, and that copies of these records should be filed in conjunction with a claim. For example, mental health assessments may have been obtained at the time of court-martial

---

[461] Gardner v. Shinseki, 22 Vet. App. 415, 421-22 (2009); *see also* 38 U.S.C.A. § 5103A(d) (2012).
[462] *See* 38 C.F.R. § 3.12(b) (2012).
[463] *See supra* note 37 and accompanying text.

proceedings.[464] While in-service mental health assessments might not have demonstrated insanity for purposes of a Sanity Board, they nonetheless may demonstrate insanity for VA purposes if these assessments show that the former servicemember met VA's requirements for a determination of insanity at the time of the commission of the offense.[465] Additionally, as explained earlier, while VA may not routinely obtain all court-martial records, by providing VA with copies of records potentially implicating insanity, or at least notifying VA that such records exist, VA will be on notice that it is necessary to obtain other relevant records.

As VA recognizes that competent and credible lay evidence can be valuable in substantiating a claim for benefits, non-medical records may also be helpful to establish insanity.[466] For instance, a servicemember may have kept a diary during service or sent letters or email messages to friends and family members that provide insight into his or her then-mental state. Additionally, family members and friends may have observed a servicemember's mental state at that time; these people should be encouraged to document their observations.

Finally, counsel should also advise clients that the need to consider insanity at the time of the offense or offenses may not be readily apparent to a VA adjudicator. Separation documents may not in any way implicate the issue of insanity. Therefore, informing VA of the potential applicability of the insanity exception can be invaluable in proving a claim. For example, if a servicemember had a Sanity Board pursuant to court-martial proceedings and was found to not be insane, he or she should nonetheless inform VA that he or she had such an in-service board, as it raises the possibility that he or she could have been insane for VA purposes. Thus, if a former servicemember specifically indicates his or her belief that he or she was insane for VA purposes at the time of the offense or offenses leading to discharge, then VA will be obligated to consider that argument and develop evidence, as necessary.

---

[464] MCM, *supra* note 136, R.C.M. 706.
[465] *See id.*; 38 C.F.R. § 3.354(a) (2012).
[466] This is not to say the lay evidence, without additional medical evidence, could independently establish insanity pursuant to 38 C.F.R. § 3.354(a). However, lay evidence can be competent to detail symptomatology, which could include the behavior and actions of the former servicemember at the time of the offense or offenses leading to discharge. *See*, *e.g.*, Caluza v. Brown, 7 Vet. App. 498, 506 (1995) (holding that when determinative issue does not require medical expertise, lay evidence alone can suffice).

VIII. Statutory Bars to Benefits Under the VA Character of Service Evaluation

Judge advocates, commanders, and servicemembers often focus exclusively on the potential characterization of discharge when attempting to predict what VA benefits will be available to a former servicemember for a particular period of service.[467] The frequently-used *VA Benefits at Discharge Chart* leads to this overly-simplified analysis, as other critical variables are, at best, relegated to footnotes, or at worst, are not discussed at all.[468] While a former servicemember's characterization of discharge is often dispositive in VA benefits adjudications, servicemembers and their counselors must also analyze how the type of discharge, as well as the reasons for it, may impact the servicemember's eligibility for VA benefits.

As stated above, to be eligible for VA benefits, a former servicemember must usually have been "discharged or released [from active service] under conditions other than dishonorable."[469] Unfortunately, the word "dishonorable" is a confusing homonym, as it has radically different meanings and applications depending on the context in which it is used, and may not be dispositive on eligibility for VA benefits.

For some cases, a bright-line statute bars a servicemember from eligibility for VA benefits for a particular period of service, to include continued VA health care benefits for service-connected injuries.[470] In some of these cases, the characterization of discharge is completely irrelevant in terms of VA benefits eligibility, as the reason for the discharge, not the characterization of service, will preclude the former servicemember from receiving VA benefits.[471] Accordingly, to be able

---

[467] Part X provides a detailed analysis of the history and use of the various Benefits at Discharge charts similar to the one depicted in Figure 1. *See infra* Part X; *supra* fig.1.

[468] *See infra* app. O; *supra* fig.1.

[469] 38 U.S.C. § 101(2) (2006); *see supra* Part II (describing the VA claims process).

[470] 38 U.S.C. § 5303(a) (2006). The statutory bars discussed in this section preclude receipt of "gratuitous" benefits, which includes continued health care benefits for service-connected injuries. *See id.*

[471] *See* H.R. REP. NO. 95-580, Pub. L. No. 95-126, 1977 U.S.C.C.A.N. 2844, 2852 ("In addition to the section 101(2) characterization of service, a veteran may be denied benefits, regardless of the type or characterization of his or her discharge, if such veteran's reason for separation from the service comes within one of the bars to benefits listed in section 3103(a)."). 38 U.S.C. § 3103 was renumbered 38 U.S.C. § 5303 in 1991. *See* Pub. L. No. 102-40, § 402(b)(1) (1991). Because the reason for the discharge, rather

to properly advise a client, judge advocates must understand exactly when these statutory bars apply.[472]

A. Conscientious Objection With Refusal to Perform Duty

One example of a statutory bar to VA benefits for which the characterization of discharge is irrelevant involves certain servicemembers discharged for conscientious objection. Servicemembers who were discharged "as a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise refused to comply with lawful orders of a competent military authority" will be ineligible for almost all VA benefits for the relevant period of service.[473] This is so even if the former servicemember received a fully honorable discharge.[474]

The VA Office of General Counsel has ruled that the refusal to perform duty is an essential element of this bar. In other words, a servicemember discharged for conscientious objection who, before his discharge, performs military duty, obeys orders, and wears the uniform is entitled to benefits, the same as any other servicemember honorably discharged.[475] This applies to servicemembers seeking discharge as "1-0" conscientious objectors. Servicemembers seeking reassignment to

---

than the characterization of service, bars the receipt of VA benefits, the upgrading of the discharge characterization by one of the service Discharge Review Boards may not result in eligibility for VA benefits. *See id*. ("Such bars operate regardless of whether a discharge was upgraded pursuant to section 1553 of title 10. Persons whose discharges fall into the statutory bars of section 3103 should not be considered eligible for veterans entitlements.").

[472] While there are six statutory bars to VA benefits, only five will be discussed in this paper. This paper will not discuss the statutory bar for "the discharge of any individual during a period of hostilities as an alien," more commonly known as "Alien During a Period of Hostilities." 38 C.F.R. § 5303(a) (2006); 38 C.F.R. § 3.12(c)(5) (2012). This type of discharge is rarely, if ever, used, and is not considered in most military administrative publications.

[473] 38 U.S.C. § 5303(a) (2006). Like the other statutory bars, this one does not apply to certain very limited types of government insurance. *Id*. § 5303(d) (2006).

[474] *See* U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION para. 3-4 (21 Aug. 2006) [hereinafter AR 600-43].

[475] Discharge as a Conscientious Objector; Meaning of Active Continuous Service, Veterans Affairs Off. Gen. Counsel, Precedent Opinion 11-93 ¶¶ 3-5 (1993), *available at* 1993 WL 13651321 [hereinafter GC Precedent 11-93]. Precedent opinions of the Office of General Counsel "shall be conclusive as to all Department officials and employees with respect to the matter at issue." 38 C.F.R. § 14.507(a) (2013).

noncombatant duties as "1-A-0" conscientious objectors are not subject to discharge for conscientious objection and therefore this bar does not apply to them.

Conscientious objection is "[a] firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief."[476] Servicemembers must apply for conscientious objector status.[477] There are two classifications of conscientious objector. Cases for which a servicemember requests discharge are classified as "1-0."[478] Cases for which a servicemember requests noncombatant status are classified as "1-A-0."[479]

Servicemembers who are granted 1-A-0 status continue to serve in noncombatant roles for the duration of their enlistment.[480] If a servicemember completes his or her term of service as a 1-A-0 conscientious objector, or if the military service chooses to separate the conscientious objector who is otherwise performing duties, wearing the uniform, and complying with orders,[481] there will be no bar to VA benefits based on the type of discharge, as the servicemember will not have been separated because of the conscientious objector status.[482] Additionally, if there is no evidence that the servicemember "refused to perform military duty or refused to wear the uniform or otherwise comply with lawful orders of competent military authorities," the servicemember "is not thereby barred from eligibility from veterans' benefits."[483]

---

[476] AR 600-43, *supra* note 474, glossary.
[477] *See, e.g.*, *id.* ch. 2.
[478] *Id*.
[479] *Id*.
[480] *Id*. glossary (setting forth the definition of noncombatant duties).
[481] *See, e.g.*, *id*. para. 3-2; GC Precedent 11-93, *supra* note 475.
[482] Servicemembers granted 1-A-0 status may, however, not be eligible to reenlist or extend their term of service. *See* AR 600-43, *supra* note 474; fig.4.
[483] GC Precedent 11-93, *supra* note 475. Not all conscientious objector applicants will refuse to perform military duty, wear the uniform, or comply with orders while their application is pending. In fact, "persons who have submitted applications will be retained in their unit and assigned duties providing minimum practicable conflict with their asserted beliefs, pending a final decision on their applications. *See* AR 600-43, *supra* note 474, para. 2-10a (21 Aug. 2006). VA will make a factual determination to see if the statutory bar applies. *See, e.g.*, Title Redacted by Agency, 10-32 746, Bd. Vet. App. 1241864 (Dec. 7, 2012).

Servicemembers who request 1-0 conscientious objector status are seeking discharge based on conscientious objection status. Servicemembers who apply for this status must be counseled that, depending on their actions, they may or may not be eligible for VA benefits for the period of service from which they were separated because of the conscientious objection.[484] Army Regulation 600-43, *Conscientious Objection*, Figure 2-3, depicted below at Figure 4, illustrates the currently-used "Statement of Understanding" to inform an Army soldier of this consequence.[485] While the statement accurately quotes the statutory language, it does not stress the fact that servicemembers seeking a conscientious objection discharge can prevent the application of this statutory bar by simply by performing their duties and obeying orders up until their discharges.

(date)

SUBJECT: Section 3103, Title 38,
United States Code

(To whom it may concern)

I have been advised of the provisions of 38 USC 3103 concerning my possible nonentitlement to benefits administered by the Veterans Administration (VA) if I am discharged from the military service as a conscientious objector under certain conditions. I understand that a discharge as a conscientious objector, who refused to perform military duty, wear the uniform, or otherwise to comply with lawful orders of competent military authority will bar all my rights under any laws administered by the VA. I understand nonentitlement is based upon the period of service from which I was discharged. My legal entitlement (if any) to any war risk, Government (converted), or National Service Life Insurance, I understand, is an exception to this policy.

(signature
applicant's name, grade, SSN
and organization)

Figure 2–3. Statement of Understanding, 38 USC 3103

Fig. 4

Despite its facially clear language, this counseling form is incomplete, as it does not explain the specific benefits that the applicant is forfeiting. In addition, it does not emphasize that if the servicemember continues to perform his or her duties, wear his or her uniform, and follow lawful orders while the application is being processed, separation for conscientious objection should not trigger the statutory bar.[486] For a judge advocate to be able to provide accurate legal advice on a

[484] *See supra* note 474. For a detailed explanation of how to calculate a servicemember's period of service, see *supra* Part V.
[485] AR 600-43, *supra* note 474, fig.2-3.
[486] 38 U.S.C. § 5303(a) (2006); GC Precedent 11-93, *supra* note 475.

conscientious objector case, whether the client is a commander or an individual servicemember, the judge advocate must first determine if the statutory bar is likely to apply, as well as analyze what benefits package the applicant is likely to forfeit if the bar applies. A hypothetical example illustrates the need for more detailed counseling to this end.

1. Applied Example

Four months after graduating high school, and two months after marrying his high school sweetheart, then-Private Marshall Jones enlisted for a four-year term of active service.[487] An eighteen year-old, Private Jones completed Basic Combat Training and Advanced Individual Training at Fort Benning, Georgia, as his Military Occupation Specialty (MOS) is Infantryman.

Two years after enlisting, then-Private Jones deployed with his unit to eastern Afghanistan. During the one-year deployment, Specialist (SPC) Jones fought in numerous engagements. He earned the Combat Infantryman Badge, the Army Commendation Medal with Valor Device, and the Purple Heart Medal. He also became a father to a beautiful daughter eight months after deploying. Despite his superior performance, SPC Jones saw horrific things while deployed, but was always able to maintain composure. SPC Jones is a good soldier, and has never been the subject of any adverse administrative or judicial proceedings.

Upon return from deployment, SPC Jones began displaying symptoms of PTSD. He was hypervigilant, became more withdrawn, experienced nightmares and difficulty sleeping, and started to drink alcohol for the first time. His marriage became strained, but remained intact. SPC Jones's superiors noticed the changes, and convinced SPC Jones to seek treatment. After several visits to the mental health clinic, a psychiatrist diagnosed SPC Jones with moderate to severe PTSD, and had concern about possible repeated mild traumatic brain injuries.[488]

---

[487] The cases presented in these subsections are entirely fictional, and are designed solely to explain the need for more detailed counseling. Any similarity to actual persons or events is entirely unintentional.

[488] For this hypothetical, assume that Specialist Jones has not yet been issued a permanent profile. While the initiation of a Medical Evaluation Board (MEB) is a distinct possibility, the treatment providers have decided to see if continued outpatient treatment will reduce Specialist Jones's symptoms.

SPC Jones is now on a temporary profile that prevents him from deploying, but he is not assigned to a Warrior Transition Unit (WTU). While the treatment has helped some, SPC Jones still suffers many PTSD symptoms.

After his first deployment, SPC Jones also became highly introspective. He and his family started attending services at a church that holds strong pacifist sentiments and does not support military service. Over the past several months, SPC Jones has felt that the church has helped him with his struggles. He now desires to become a full member of the church. Accordingly, he has decided to request a discharge based on conscientious objection, despite the fact that he has only about nine months left on his initial enlistment contract and may qualify for medical separation or retirement. Despite the decision to apply for conscientious objector status, he continues to perform duties, wear the uniform, and obey orders.

Specialist Jones's unit, however, has now been informed that they will be deploying to Afghanistan in approximately four to five months. Despite SPC Jones's current non-deployable medical status and no indication that his enlistment will be extended, SPC Jones is very nervous about this development, and is curious about the proper course of action. He indicates to his legal assistance attorney that he would refuse to participate in pre-deployment training, such as weapon qualification, if so ordered.

Using the current forms and standard advice,[489] neither SPC Jones, nor SPC Jones's commander, nor most judge advocates, would have a solid understanding of the plethora of valuable and life-changing benefits that SPC Jones could be forfeiting with a successful 1-0 conscientious objection application populated with evidence of refusal to perform military duties. Simply informing SPC Jones that he may be ineligible for all VA benefits is akin to an involuntary waiver of rights, as it is not fully informed. More significantly, with a proactive approach and preservation of evidence, a commander and judge advocate can likely prevent the statutory bar from applying at all in SPC Jones's case if his application is approved.

[489] *See, e.g.*, AR 600-43, *supra* note 474, fig. 2-3, fig.4.

2. Counseling Potential Conscientious Objectors

Those charged with counseling SPC Jones should first counsel SPC Jones on the dangers of refusing to either perform military duties, wear the uniform, or obey lawful orders. Not only would such refusals be punishable under the UCMJ,[490] but they could also lead to lifetime ineligibility for VA benefits.[491] SPC Jones may not be aware of the lifelong impact that such refusals during the pendency of his application may have.

SPC Jones's advisors should also remember that while SPC Jones's application for conscientious objection status is pending, SPC Jones's assigned duties should create the "minimum practicable conflict" with SPC Jones's beliefs while it is pending.[492] Command adherence to this regulation may prevent a situation in which SPC Jones feels a conflict to disobey an order. In SPC Jones's case, his commander could delay predeployment training until after a decision on his conscientious objector application is complete. While the "minimum practicable conflict" standard is highly subjective, if SPC Jones's legal assistance attorney believes that the command is not adhering to this regulation, the legal assistance attorney should preserve evidence of that fact for SPC Jones to present to VA at a later time.

To properly advise SPC Jones of the nature and quality of his actions, SPC Jones's advisors must also inform him of the specific benefits that he could forfeit if the bar applies. If SPC Jones refused to participate in pre-deployment training, such information is even more critical. Part III of this article spells out the potential veterans benefits for which SPC Jones may qualify.[493]

Given his temporary profile and the fact that his enlistment contract is about to expire, it is reasonable to think that SPC Jones might change his mind about the conscientious objector application if he is aware of the value and nature of the benefits that he would forfeit if the bar applies, as well as the difficulty he may have in establishing his right to VA benefits. If he is not barred from receipt of VA benefits, SPC Jones would likely qualify for hundreds of thousands of dollars of VA benefits.

---

[490] *See, e.g.*., UCMJ arts. 89, 90 (2012).
[491] *See supra* note 474 and accompanying text.
[492] AR 600-43, *supra* note 474, para. 2-10a.
[493] *See supra* Part III (discussing many VA benefits important to servicemembers).

In addition to significant education benefits, SPC Jones would qualify for a lifetime of health care treatment for his service-connected injuries and conditions, such as his PTSD and TBI. He may also qualify for vocational rehabilitation, home loans, and a variety of other valuable benefits.[494]

While the statutory bar should not apply if SPC Jones complies with all orders and wears the uniform while his application is pending, there are many cases for which lengthy appeals were necessary to establish benefits.[495] Advising SPC Jones of the potential confusion his case could cause within the VA claims system is accurate advice. If SPC Jones were to complete his enlistment contract, it is less likely that a claim for VA benefits would be misadjudicated. Nonetheless, servicemembers like SPC Jones have a right to apply for conscientious objector status if they believe that it is the right thing for them to do.

If SPC Jones does not refuse to perform military duties, wear the uniform, or obey lawful orders, then SPC Jones and his advisors should create a written record contemporaneous with the conscientious objector application that indicates that he performed his duties, wore his uniform, and complied with all orders while his conscientious objector application was pending. Even a simple written statement from an NCO can help. Copies of these documents should be placed in the conscientious objector application, and the soldier should keep copies as well.

B. Desertion

A former servicemember whom VA classifies "as a deserter" is statutorily barred from receiving VA benefits for that period of service, regardless of the characterization of discharge.[496] However, neither Title 38, U.S.C., nor VA regulations clearly define who a "deserter" is.

---

[494] *See infra* Part III (discussing may VA benefits important to servicemembers).

[495] *See, e.g.*, Title Redacted by Agency, 10-32, Bd. Vet. App. 1241864, 10-32 746 (Dec. 7, 2012); Title Redacted by Agency, 09-23 136, Bd. Vet. App. 1214463 (Apr. 20, 2012); Title Redacted by Agency, 99-03 789A, Bd. Vet. App. 0016782 (June 26, 2000).

[496] 38 U.S.C. § 5303(a) (2006) ("The discharge or dismissal … as a deserter … shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed. . . ."); 38 C.F.R. § 3.12(c)(4) (2012) (stating benefits are not payable where the former service member was discharged or released "[a]s a deserter.").

"Deserter" is yet another homonym with multiple different definitions. To ensure the proper application of this powerful statutory bar to benefits, convening authorities, judge advocates, and others involved in desertion cases must first understand what facts and circumstances will and will not trigger its application. They must then consider this knowledge when making findings and drafting documents that may result in the separation of the servicemember from the military as a deserter.

1. Differing Definitions

Practitioners must first understand the different uses and definitions of the word "deserter" from within the Department of Defense. The term "deserter," along with its various derivations, has both a statutorily-based definition under the UCMJ,[497] as well as a regulatory definition under each service's prudential regulations.[498] Understanding the differences in the definitions, along with which definition applies in a particular case, will lead to well-informed recommendations and decisions in cases involving unauthorized absences.

Many intelligent military members and civilians mistakenly believe that an unauthorized absence for thirty or more days automatically makes a servicemember a "deserter."[499] This strict liability-like common understanding for the term "deserter" is likely based on a passing knowledge of how the military services administratively account for

---

[497] UCMJ art. 85 (2012).

[498] *See, e.g.*, U.S. DEP'T. OF ARMY, REG. 630-10, ABSENCE WITHOUT LEAVE, DESERTION, AND ADMINISTRATION OF PERSONNEL INVOLVED IN CIVILIAN COURT PROCEEDINGS Terms (13 Jan. 2006) [hereinafter AR 630-10]; U.S. DEPT. OF NAVY, NAVAL MILITARY PERSONNEL MANUAL ch. 20 (14 Aug. 2007).

[499] This assertion is based on MAJ John W. Brooker's and MAJ Evan R. Seamone's professional experience as judge advocates from 2003 to present. *See also* http://usmilitary.about.com/od/justicelawlegislation/a/awol2.htm, last visited November 12, 2012 (failing to fully explain the differences between the administrative and statutory definitions of "deserter," as well as misstating the government's burden of proof at court-martial) (last visited March 9, 2012); Captain Joseph D. Wilkinson II, *Custom Instructions for Desertion with Intent to Shirk*, ARMY LAW., Jan. 2012, at 56, 58–59 (noting the prevalence of this myth and recommending an instruction to prevent court-martial panels from being confused by it).

those who have absented themselves from their units without proper justification.[500]

When a servicemember absents himself from his unit and meets the regulatory definition of "deserter",[501] the unit commander will drop the soldier from the unit rolls using the procedures set forth in the prudential service regulation.[502] Unit commanders typically prefer to drop a servicemember from the rolls in order to receive a replacement servicemember, as dropping a soldier from the unit rolls "drops an absentee from the strength accountability" of the unit.[503] In order to drop a servicemember from the unit rolls, the unit commander must fill out a DD Form 553, *Deserter/Absentee Wanted by the Armed Forces*, and prefer court-martial charges on a DD Form 458, *Charge Sheet*.[504] In the Army, the commander will submit these documents to the U.S. Army Deserter Information Point (USADIP), who will ensure that the information is entered into the National Crime Information Center (NCIC) database, which is available to civilian and military law enforcement agencies nationwide.[505] However, these administrative actions may be taken without knowledge of the missing servicemember's actual intent, so that a "deserter" for administrative purposes may not be guilty of the crime of desertion, or even AWOL, at all.

In Army cases, the court-martial charges preferred as a part of a dropped from rolls packet are not typically referred to court-martial.[506] They are almost always preferred solely to satisfy the administrative prerequisite to drop the servicemember from the rolls.[507] While these

---

[500] *See, e.g.*, AR 630-10, *supra* note 498; U.S. DEPT. OF NAVY, NAVAL MILITARY PERSONNEL MANUAL § 1600-010-1.a.(2) (14 Aug. 2007) [hereinafter MILPERSMAN]. Both definitions also include servicemembers who have been AWOL for less than 30 days, but who are absent under circumstances suggesting a violation of Article 85, *UCMJ*.

[501] AR 630-10, *supra* note 498, at Terms; *infra* note 512.

[502] *See, e.g.*, AR 630-10, *supra* note 500, para. 3-1.

[503] *Id.* at Terms.

[504] *Id*. para. 3-1; U.S. Dep't of Def., DD Form 553, Deserter/Absentee Wanted by the Armed Forces (May 2004); DD Form 458, *supra* note 343.

[505] *See* AR 630-10, *supra* note 498, paras. 1-4, 3-1; Federal Bureau of Investigation, National Crime Information Center, http://www.fbi.gov/about-us/cjis/ncic (last visited Mar. 9, 2013).

[506] This assertion is based on MAJ John W. Brooker's professional experiences as a judge advocate at Fort Sill, Oklahoma, from Jan. 2004 through Jun. 2007. A personnel control facility (PCF), a unit designed to process AWOL servicemembers out of the U.S. Army, was located at Ft. Sill.

[507] *Id*.

initial charges may later be used as the basis for a request for discharge in lieu of court-martial, charges ultimately referred to court-martial are typically re-preferred to more accurately reflect the purported offenses.[508] Conversely, many servicemembers who were charged with an AWOL offense as part of a dropped from rolls packet are ultimately not guilty of the charged offense.[509] Accordingly, both judge advocates and VA benefits adjudicators should be wary of using these perfunctorily preferred charges as evidence of anything. Charges preferred as part of a dropped from rolls packet are not evidence of desertion.

The misunderstanding of the term "deserter" could also be based, in part, on a misapplication of a maximum punishment aggravator found under Article 86, *UCMJ*, Absence Without Leave.[510] While the confusion is somewhat understandable, properly educating decision-makers on the differences between the various definitions of "deserter" is not pedantic.

The aforementioned administrative definition for "deserter" is found in many military administrative regulations and materials.[511] These administrative definitions are broader than Article 85, *UCMJ*, as they do not require any evidence of the absent servicemember's specific intent. For example, the Terms section in Army Regulation (AR) 630-10, *Absence Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings*, lists nine different reasons why a soldier may be administratively classified as a deserter, to include the commonly-mentioned "Absent without authority for 30 consecutive days."[512] While several of these nine reasons are similar to or appear

---

[508] *Id*.

[509] *Id*.

[510] The maximum punishment for a violation of Article 86, UCMJ, depends on the length of the unauthorized absence. An absence of greater than 30 days carries a significantly larger maximum punishment, to include a punitive discharge. *See* UCMJ art. 86e (2012). *See also id*. art. 86c(8) ("Unauthorized absence under Article 86(3) is an instantaneous offense. It is complete at the instant the accused absents himself or herself without authority. Duration of the absence is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense.").

[511] *See, e.g.*, AR 630-10, *supra* note 498, Terms; MILPERSMAN, *supra* note 500, ch. 20.

[512] *See, e.g.*, AR 630-10, *supra* note 498, Terms. The nine factors include:

> (1) Absent without authority for 30 consecutive days;
> (2) The unit commander believes the Soldier voluntarily sought political asylum or is living in a foreign country apart from official duties or authorized leave;

related to the elements for a violation of Article 85, *UCMJ*, many would be merely circumstantial evidence to prove the actual elements needed to secure a guilty finding for desertion under the *UCMJ*.[513]

Article 85, UCMJ, defines desertion more restrictively as a specific-intent offense. The UCMJ definition requires the Government to allege and prove one or more theories of desertion, all of which require proof of the absent servicemember's specific intent.[514] These theories include when a servicemember absents himself from his unit with intent to remain away permanently, or quits with the intent to avoid hazardous duty or shirk important service.[515] This does not depend on the length of

---

> (3) The Soldier has joined the armed forces of a foreign country;
> (4) There is reasonable belief that the Soldier has left his or her duty station with the intent to avoid hazardous duty or important service, or intends to remain permanently absent. An expressed intention not to return to a particular unit is not enough evidence to drop the Soldier from the rolls of the Army;
> (5) The Soldier fails to return to a unit from which he or she is AWOL after RMC at another location or departs prior to the completion of administrative, judicial, or nonjudicial action for a previous absence;
> (6) He or she escapes from confinement;
> (7) Identified as a special category absentee;
> (8) A commissioned office tenders his or her resignation and before notice of its acceptance, departs their post or proper duties without leave and with the intent to remain away therefrom permanently; and
> (9) A member of the Armed Forces of the United States goes from or remains absent from his or her unit, organization, or place of duty with intent to remain away therefrom permanently. (A violation of UCMJ, Art. 85).

Id.

[513] For example, Article 85, UCMJ, allows for a fact finder to infer that the accused "intended to remain absent permanently" from circumstantial evidence, of which a period of lengthy absence is a permissible factor. MCM, *supra* note 136, pt. IV, ¶9c(1)(c)(iii). The 30-day mark used in AR 630-10, however, is not a threshold under the UCMJ. *See id.* In addition, factors such as "special category absentees" are found nowhere in the UCMJ.

[514] The standard and burden of proof will depend on the action using the UCMJ as the basis for separation. For courts-martial, the burden of proof is on the government, and the standard of proof is beyond a reasonable doubt. *See* MCM, *supra* note 136, R.C.M. 918(c), 920(e)(5)(D) (2012). For administrative separation actions, the burden of proof remains on the Government, but the standard of proof is preponderance of the evidence. *See, e.g.*, AR 635-200, *supra* note 137, para. 2-12a(1).

[515] UCMJ art. 85 (2012).

the servicemember's absence, and in fact no length of absence will, by itself, establish desertion within the meaning of Article 85.[516]

A hypothetical example illustrates the differences between the administrative and *UCMJ* definitions of "deserter." Assume a servicemember departed his unit on November 21, 2011 with no valid legal defense. On December 21, 2011, the servicemember's unit properly drops him from the unit rolls for desertion pursuant to the applicable service regulation's definition of desertion.[517] The servicemember then voluntarily returned to military control on January 12, 2013. Despite the proper administrative determination that the servicemember was a deserter, the over year-long length of unauthorized absence, without more, is not a proper basis for a separation for desertion under the *UCMJ*, as the length of absence is not alone is not enough proof of the servicemember's specific intent to desert.[518] While separation at court-martial explicitly requires the application of the *UCMJ* definition for desertion, how desertion should be defined in administrative separations is not as clear.

---

[516] The text of the statute states:

> (a) Any member of the armed forces who –
>
> (1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently;
>
> (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or
>
> (3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion.
>
> (b) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away permanently is guilty of desertion.

Id. The elements, explanations, maximum punishments, and other information is included after the statute's text. *Id*.

[517] *See, e.g.*, AR 630-10, *supra* note 498, Terms; MILPERSMAN, *supra* note 500, ch. 20.

[518] MCM, *supra* note 136, pt. IV, ¶9c(1)(c)(v) ("Proof of, or a plea of guilty to, and unauthorized absence, even of extended duration, does not, without more, prove guilt of desertion.").

2. Administrative Separations for Unauthorized Absence: Which Definition Applies?

Unfortunately, military regulations do not specify which definition of deserter or desertion can or should be used in administrative separations for desertion. In fact, it appears that the drafters of these regulations were completely unaware that the careless and imprecise way in which these terms are used in the controlling separation regulations can have a significant, unintended negative impact on a servicemember's eligibility for VA benefits. Accordingly, commanders and judge advocates must clearly explain the basis for the separation so that VA benefits adjudicators do not mistakenly grant or deny benefits. Two examples will illustrate these points. The first example is a modification of the hypothetical situation from the last subsection.

Assume a first-term enlisted Army soldier with no prior misconduct departed his unit without authorization on November 21, 2012. There is no legal defense for the departure, and the soldier is sane. On December 22, 2012, the soldier's unit drops him from the unit rolls for desertion, properly using the general intent administrative definition of desertion.[519] The servicemember then voluntarily returned to military control on January 12, 2013. There is no evidence that the soldier absented himself from his unit with intent to remain away permanently, nor is there evidence that he quit with the intent to avoid hazardous duty or shirk important service. In this hypothetical example, the soldier is properly classified as a deserter for administrative purposes, but is not a deserter pursuant to Article 85, *UCMJ*.[520] If the unit wishes to separate this soldier for the period of unauthorized absence, is this soldier a deserter for the purposes of VA benefits? Which definition of deserter may be used to classify a servicemember as a deserter for an administrative separation—the statutory, specific intent definition, or the administrative, general intent definition?

A close examination of the relevant administrative separation regulations doesn't provide a clear result. In this example, if the command wishes to separate the soldier administratively, it may do so under AR 635-200, paragraph 14-12c for commission of a serious offense.[521] Accordingly, regardless of whether the command

[519] *See, e.g.*, AR 630-10, *supra* note 498, para. 3-1.
[520] *See supra* note 516.
[521] AR 635-200, *supra* note 137, para. 14-12c.

characterizes the misconduct as AWOL or desertion, the nature of the misconduct authorizes administrative separation. The application of the statutory bar hinges on whether such an unauthorized absence can or should be characterized as desertion.

Under this chapter, an offense is defined as serious "if the specific circumstances . . . warrant separation and a punitive discharge is, or would be, authorized for the same or closely related offense under the [Manual for Courts-Martial (MCM)]."[522] This reliance on the offenses and maximum punishments listed in the MCM appears to support the argument that the command must use to the *UCMJ*'s statutory, specific intent definition for desertion if it desires to separate a soldier for desertion.

The next subparagraph of the regulation, however, specifies, "An absentee returned to military control from a status of absent without leave or desertion may be separated for commission of a serious offense."[523] This reference to the administrative, general intent definition of desertion within the regulation could indicate that the administrative definition is usable in this administrative proceeding.[524] Because relevant regulatory guidance about this important distinction does not exist, CAVC decisions can be a helpful source to better understand the issue.

While the term "deserter" is not specifically defined in any VA regulation or precedential authority, non-precedential decisions appear to indicate that for the statutory bar to apply, a servicemember should have been separated for misconduct pursuant to the *UCMJ*'s statutory, specific intent definition of desertion. The 2009 CAVC single-judge, memorandum decision in *Bullock v. Shinseki* illustrates this point.[525]

---

[522] *Id*.
[523] *Id*. para. 14-12c(1).
[524] Other portions of AR 635-200 do not provide guidance regarding this dilemma. For example, when providing guidance for how to characterize a soldier's term of service, the regulation states, "The quality of service will be determined according to standards of acceptable personal conduct and performance of duty for military personnel… These standards are found in the UCMJ, directives and regulations issued by the Army and time-honored customs and traditions of military service." *Id*. para. 3-5a(1), (2).
[525] *See* Bullock v. Shinseki, No. 07-2588, 2009 WL 2372086 (Vet. App. Aug. 4, 2009) (unpublished disposition). *See also* Title Redacted by Agency, 08-08 360, Bd. Vet. App. 1229487 (August 27, 2012) ("As the appellant was discharged for an offense under Article 86 and not 85, the Board concludes that a statutory bar for desertion is not for

Mr. Bullock was a highly-decorated participant in the Vietnam War. He was awarded numerous "individual valor and merit awards," to include two Bronze Star Medals, the Cross of Gallantry Medal with Palm, and the Air Medal with "V" device.[526] Despite having served in the Army from October 1966 until January 1975, to include 30 months deployed to Vietnam in support of the Vietnam War, the question of his veteran status remained open over 30 years after he initially applied for benefits.

In October 1969, Mr. Bullock did not return to his unit following a 30-day period of authorized leave. On November 9, 1969, his unit administratively dropped him from the Army rolls as a deserter. In January 1975, Mr. Bullock voluntarily returned to Army control. Because of his "excellent record," Mr. Bullock received a general discharge, effective January 31, 1975. In 1978, Mr. Bullock applied for VA educational assistance. After years of delay based in large part because of conflicting documentation regarding the reason for separation, VA denied Mr. Bullock's claim for benefits in July 1981, citing the statutory bar for desertion. In February 2003, Mr. Bullock appealed this decision, arguing that he was not discharged because of desertion. After over six years of appeals, the CAVC issued an unpublished opinion on August 4, 2009 which provides guidance to practitioners who have administrative separation cases based on unauthorized absence.[527]

Because Mr. Bullock received a general discharge, determining whether Mr. Bullock was separated for desertion or AWOL is dispositive on his eligibility for most VA benefits.[528] Unfortunately, the documentation involved in Mr. Bullock's case indicates numerous reasons for the separation, to include both AWOL and desertion.[529] In other words, while the nature of Mr. Bullock's misconduct is not disputed, whether or not it could be classified as desertion was not clear.[530]

---

application."). Neither of these opinions have precedential value. *Supra* notes 106, 121–122.

[526] *Bullock*, No. 07-2588, 2009 WL 2372086 (unpublished disposition).

[527] *Id*.

[528] The statutory bar for a continuous period of AWOL of 180 days or greater is inapplicable if the servicemember receives an honorable or general characterization of service. *See infra* Part VIII.E.

[529] *Bullock*, No. 07-2588, 2009 WL 2372086 (unpublished disposition).

[530] *Id*.

In its analysis, the court relies upon the distinctions in the statutory definitions when vacating the BVA's decision that Mr. Bullock's separation was based on desertion. The court explains, "the Court notes that there are distinct differences in meaning between **desertion** and AWOL, which neither the BVA in June 1981 nor the BVA in July 2007 appeared to consider. In particular, under the Uniform Code of Military Justice, a member of the armed forces is guilty of **desertion** when he [listing the *UCMJ* definition of desertion] [emphasis in original]."[531] This reliance on the statutory definitions and distinctions between AWOL and desertion indicate that military justice practitioners should not rely on the broad, general intent administrative definition of desertion for the purposes of administrative separation actions for desertion.

3. Recommended Course of Action

A command can eliminate all ambiguity and doubt regarding the application of the statutory bar for desertion by taking two simple steps. First, commanders and judge advocates should consistently apply the *UCMJ*'s statutory, specific intent definition of desertion when processing administrative separation cases based on a period of unauthorized absence. Second, when an approved administrative separation is based on an unauthorized absence, the command should clearly indicate whether the separation is based on desertion or merely AWOL.

Applying the *UCMJ*'s definition of desertion should first occur when the accused is notified that he or she is subject to administrative separation.[532] Instead of simply describing the nature of the unauthorized absence that forms the basis for the administrative separation, the command should inform the servicemember whether or not the alleged unauthorized absence rises to the definition of desertion under Article 85, *UCMJ*. By doing so, the government will place the respondent and his or her counsel on notice that the statutory bar to benefits may apply. Doing so will also help VA benefits adjudicators determine whether the statutory bar for desertion should apply. If the command does not believe that the respondent's misconduct meets the definition of

---

[531] *Id*. at *10. Of course, if the administrative definition of "deserter" had applied, Mr. Bullock's five years of unauthorized absence would have met it, and no remand would have been necessary, as his discharge was definitely because of this absence.

[532] *See, e.g.*, AR 635-200, *supra* note 137, para. 2-4a(1) ("The commander will cite the specific allegations on which the proposed action is based.").

desertion under Article 85, *UCMJ*, it should explain that the separation is for a violation of Article 86, *UCMJ*, and not Article 85, *UCMJ*. Sample language for doing so is found in Appendix L.[533]

Proper notification will also lead to more clarity in other recommendations and decisions, as well as the resulting documentation. If a command gives proper notice that the administrative separation for desertion allegation is based on Article 85, *UCMJ*, an administrative separation board, if applicable,[534] must decide whether the desertion allegation "in the notice of proposed separation is supported by a preponderance of the evidence."[535] In all cases, a judge advocate will prepare documentation for the separation authority.[536] By properly defining desertion from the initiation of an administrative separation, the entire process will not be mired by a confusion of definitions.

The second step a command should take to clarify eligibility for veterans benefits is to explicitly state whether or not desertion formed a basis for the administrative separation. If desertion does not form a basis for the administrative separation, the command should explicitly opine that the statutory bar for desertion does not apply, as the period of unauthorized absence that forms a basis for the administrative separation is classified as an AWOL and not a desertion.[537] Doing so will prevent cases like Mr. Bullock's, where over three decades passed without a final resolution as to VA benefits eligibility.[538]

---

[533] *See infra* app. L.

[534] Whether or not a servicemember is entitled to an administrative separation board depends on a variety of factors set forth in the prudential service regulations.

[535] AR 635-200, *supra* note 137, para. 2-12a(1).

[536] For example, in Army enlisted administrative separation cases, judge advocates often prepare a commanding officer's report for inclusion in the administrative separation packet. *See id*. fig. 2-5. Additionally, judge advocates may prepare a formal written recommendation, as well as the documentation that records the separation authority's final action.

[537] *See infra* app. L.

[538] Bullock v. Shinseki, No. 07-2588, 2009 WL 2372086 (Vet. App. Aug. 4, 2009) (unpublished disposition).

C. Officer Resignation for Good of the Service

A third example of a statutory bar to VA benefits for which the characterization of discharge is irrelevant is when a commissioned or warrant officer resigns for the good of the service (RFGOS).[539] The RFGOS is a form of administrative discharge in lieu of a GCM.[540] Officers typically submit RFGOS requests when facing court-martial charges for which the chain of command has a "view toward trial by GCM."[541] An officer facing court-martial charges has the right to request a resignation in lieu of GCM to avoid the potential punishments of a GCM. If an accused's RFGOS is accepted, the accused receives no further formal punishment, but "normally receives characterization of service of Under Other Than Honorable Conditions."[542] Any administrative characterization of discharge, however, is authorized.[543]

As a result, military justice practitioners must be careful to not make the mistake of assuming that an honorable or under honorable conditions (general) characterization of service will preserve an officer's VA benefits for that period of service, as the RFGOS itself will result in the denial of veteran status for that period of service.[544] In other words, even if an officer receives a fully honorable characterization of service in conjunction with an RFGOS, the officer will be barred from receipt of VA benefits for that period of service, as the reason for the separation itself serves as a bar to benefits, making the discharge characterization irrelevant.[545]

---

[539] 38 U.S.C. § 5303(a) (2006); 38 C.F.R. § 3.12(c)(2) (2012); *see, e.g.*, AR 600-8-24, *supra* note 365, para. 3-13a(1).

[540] While the acceptance of an undesirable discharge in lieu of a GCM is also a regulatory bar to benefits, see *supra* Part IX.C, an RFGOS is a distinct procedure that subjects the applicant to a statutory, rather than regulatory, bar to benefits. 38 U.S.C. 5303(a) (2006); 38 C.F.R. § 3.12(c)(2) (2010). A special court-martial cannot punitively discharge an officer, MCM, *supra* note 137, R.C.M. 201(f)(2)(B)(i), and a summary court-martial cannot try officers, *id.*, R.C.M. 1301(c).

[541] AR 600-8-24, *supra* note 365, para. 3-13a(1). An officer with a suspended sentence of dismissal may also submit a resignation for the good of the service. *See id*. para. 3-13a(2).

[542] *Id*. para. 3-13i.

[543] *Id*. para. 1-22.

[544] *See* 38 U.S.C. § 5303(a) (2006); *id.* § 101(2); 38 C.F.R. § 3.12(c)(3) (2010). In cases for which a statutory bar does not apply, an honorable or under other than honorable characterization of service is binding on VA, thereby entitling the servicemember to VA benefits for which he or she otherwise qualifies. 38 C.F.R. § 3.12(a) (2012).

[545] *See* 38 U.S.C. § 5303(a) (2006); *id.* § 101(2); 38 C.F.R. § 3.12(c)(3) (2010).

To make a properly informed decision, both an accused who submits an RFGOS request and the commanders recommending its approval or disapproval must understand the nature of the VA benefits to be forfeited if the RFGOS request is approved.[546]

D. By Reason of the Sentence of a General Court-Martial (GCM)

Servicemembers punitively discharged by sentence of a General Court-Martial (GCM) are statutorily barred from receipt of VA benefits.[547] While this arguably is a fourth statutory bar that is not dependent on the characterization of discharge, this distinction is largely academic, as the only authorized characterizations of discharge at a general court-martial are dismissal, dishonorable, and bad-conduct.[548] This facially-basic rule is understandable and largely uncontroversial. The application of this rule in current military court-martial practice, however, is not as simple as it may seem.

All members of a court-martial, as well as an accused, should fully understand how a GCM-imposed punitive discharge could impact the loss of VA benefits prior to making any decision. To achieve this goal, they must understand two basic concepts. First, all should understand how to calculate a prior period of honorable service.[549] Second, all should better understand the specific benefits that an accused will lose as the result of a GCM-imposed punitive discharge.[550] To better understand the current limitations and our recommendations on achieving these two objectives, Part XI provides a detailed analysis.[551]

---

[546] *See supra* Part III.
[547] 38 U.S.C. § 5303(a) (2006); 38 C.F.R. § 3.12(c)(3) (2012).
[548] MCM, *supra* note 136, R.C.M. 1003(b)(3)(8). Dismissal is the least favorable characterization of discharge available for commissioned officers. It is the functional equivalent of the dishonorable discharge, which is the least favorable characterization of discharge available for warrant officers and enlisted servicemembers. *See id.*; U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Jan. 2010) [hereinafter BENCHBOOK]. A bad-conduct discharge resulting from the sentence of a special court-martial is not a statutory bar to benefits. *See supra* Part VIII.
[549] *See supra* Part V; *infra* app. E.
[550] *See supra* Part III.
[551] *Infra* Part XI.A.

E. Absent Without Leave (AWOL) for at Least 180 Continuous Days with an Other Than Honorable (OTH) Discharge Characterization

Servicemembers who are discharged "on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days . . . under conditions other than honorable" are statutorily barred from receiving VA benefits.[552] In other words, absent an exception, if a servicemember's unauthorized absence of at least 180 continuous days forms all or part of the basis for an OTH discharge characterization, that servicemember is barred from the receipt of all VA benefits for that period of service, to include health care for service-connected disabilities.[553]

This statutory bar is potentially fraught with peril for the uninformed commander and judge advocate, as the number of servicemembers separated for AWOL offenses is significant.[554] Additionally, unauthorized absence is a common offense that servicemembers with PTSD or TBI commit, as many attempt to avoid the military environment and its associated stressors.[555] Commanders and judge advocates unaware of this statutory bar could unwittingly bar hundreds, if not thousands, of accused servicemembers from receiving VA benefits, to include continued health care benefits for service-connected wounds, illnesses, and injuries.[556]

Fortunately, those who understand the specifics of this bar to benefits will recognize that the prerequisite factors for the bar to apply give the government and defense counsel ample room to devise a solution that satisfies the needs of each side. All practitioners must first understand the legal variables that trigger application of this statutory bar, as well as

---

[552] 38 U.S.C. § 5303(a) (2006); 38 C.F.R. § 3.12(c)(6) (2010).

[553] *See* 38 U.S.C. § 5303(a) (2006); 38 C.F.R. § 3.12(c)(6) (2010). There are two exceptions; insanity and compelling circumstances. *See supra* Part VII (discussing of insanity). *See infra* Part VIII.E.2 (discussing of the compelling circumstances exception).

[554] While concrete statistics on the number of unauthorized absence-based separations from the military would be very difficult to obtain, the mere fact that the U.S. Army has created two separate units, called Personnel Control Facilities (PCFs), to "[s]upervise and coordinate administrative processings and accomplish the expeditious proper disposition, either administrative or judicial," of certain soldiers who were dropped from their unit rolls indicates the commonality of this issue. *See* U.S. DEP'T OF ARMY, REG. 600-62, UNITED STATES ARMY PERSONNEL CONTROL FACILITIES AND PROCEDURES FOR ADMINISTERING ASSIGNED AND ATTACHED PERSONNEL (17 Nov. 2004).

[555] *See infra* app. I.

[556] *See* 38 U.S.C. § 5303(a) (2006); *supra* Parts II & III.

the exceptions that can prevent its implementation. Additionally, because the application of this statutory bar is more discretionary than the ones listed above, military justice practitioners should understand what information is important to VA claims adjudicators, as well as how to ensure that such information is properly presented to those claims adjudicators.

1. Variables of the Statutory Bar for AWOL ≥ 180 Continuous Days

To properly understand how and when the statutory bar for AWOL applies, one must first understand how VA interprets each term found within this specific statutory bar. Understanding when the bar applies will give the command the power to prevent its application entirely.

This statutory bar reads,

> The discharge…on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable unless such person demonstrates to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged absence… shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed….[557]

Unfortunately, as is often the case when analyzing the statutes and regulations controlling VA benefits, terms are often homonyms with similar meanings, yet critical differences.

a. Basis for Discharge

The first requirement for this statutory bar is that the unauthorized absence that forms the basis of the discharge must last for at least 180 continuous days.[558] Because the separation authority controls the reasons

[557] 38 U.S.C. § 5303(a) (2006).
[558] *Id.* ("The discharge . . . on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days….").

for which a servicemember is discharged, a plain reading of the controlling statute, regulation, and current VA guidance indicates that the separation authority can prevent the application of this statutory bar by simply not basing the separation on a continuous period of unauthorized absence of 180 or more days.[559]

Commanders initiating separation who wish to attempt to prevent application of this statutory bar can effectuate this intent by explicitly notifying the servicemember facing separation that a period of unauthorized absence of 179 days (or less) is the basis of the separation, regardless of the actual length of the unauthorized absence. The separation notification should also state that the separation is based on absence without leave, and not desertion, and any other evidence of a longer unauthorized absence does not form any basis for the administrative separation.[560]

Even if the commander initiating separation notifies the accused that a period of unauthorized absence of 180 continuous days or longer forms a basis for the separation, if the separation authority does not wish for the statutory bar to apply, all approval documentation should explicitly state that the discharge is based on a period of continuous unauthorized absence of 179 days or less, and that evidence of a longer period of absence was not considered.[561]

In cases involving discharges in lieu of court-martial, both the accuser and separation authority appear to have the ability to prevent the application of this statutory bar. First, it appears that accusers who limit an Article 86, *UCMJ* specification to a period of 179 days or less will prevent application of this statutory bar.[562] Because the charge sheet

---

[559] *Id*., 38 C.F.R. § 3.12(c)(6); M21-1MR, *supra* note 77, at pt. III, subpart v, ch. 1, § B, para. 6d (Feb. 27, 2012) ("If the service department confirms a continuous period of 180 or more days of [Unauthorized Absence] or AWOL (exclusive of periods of imprisonment or confinement) which led to the OTH discharge, and the claimant didn't provide compelling reasons for the absence, then deny benefits").

[560] *See infra* app. L. In the alternative, the separation authority can omit the AWOL entirely and base the separation on some other misconduct that does not trigger a bar to benefits, if such exists; or grant an honorable or general discharge, which eliminates both this statutory bar and all regulatory bars.

[561] *See infra* app. L (providing sample language to include in administrative separation documentation).

[562] *See* MCM, *supra* note 136, R.C.M. 306 ("Each commander has discretion to dispose of offenses by members of that command."). Article 86, UCMJ is a lesser included offense of Article 85, UCMJ. *Id*. pt. IV, ¶ 9.d. In cases involving a specification of a

forms the basis for the separation for discharges in lieu of court-martial, limiting the length of the charged AWOL appears to eliminate all questions regarding the basis of the discharge.[563] Second, in cases in which an accused is charged with a violation of Article 86, *UCMJ*, for a continuous period of at least 180 days, a convening authority may approve the request for discharge in lieu of court-martial with a finding that the separation is based on a period of unauthorized absence of more than 30 days, but less than 180 days.[564] Sample language for inclusion in approvals of requests for discharge in lieu of court-martial is found at Appendix L-2.[565]

b. Other Than Honorable

The second requirement for this statutory bar is that the discharge be "under conditions other than honorable."[566] This is the only statutory bar for which a specific characterization of discharge is required for the statutory bar to apply. An OTH discharge characterization based, at least

---

violation of Article 85, UCMJ, accusers and convening authorities seeking to prevent application of a statutory bar must first make clear that the discharge in lieu of court-martial is for a violation of Article 86, UCMJ, for a period of less than 180 continuous days, and not for a violation of Article 85, UCMJ. Any separation based on a violation of Article 85, UCMJ, will trigger a statutory bar to benefits. *See supra* Part VIII.B. If an accused has an otherwise documented period of AWOL of at least 180 days, commanders and judge advocates should consider specifically disclaiming any additional period of AWOL as a factor in any decision.

[563] Practitioners must remember, however, that other statutory and regulatory bars may apply in the case. A comprehensive analysis of all potential bars to benefits is necessary in each case. For example, desertion and resignations for good of the service (RFGOS) form independent bases for statutory bars. *See supra* Parts VIII.B and VIII.C.

[564] For a servicemember to request a discharge in lieu of court-martial, the servicemember must admit to committing an offense for which the maximum potential punishment under the UCMJ includes a punitive discharge. *E.g.* AR 635-200, supra note 137, para. 10-1(a). The separation authority is "encouraged" to approve a request for discharge in lieu of court-martial when the offense is "sufficiently serious" and the servicemember "has no rehabilitation potential." *E.g. id*. para. 10-4. Because the maximum punishment for a violation of Article 86, UCMJ, for a period of more than 30 days carries the possibility of a punitive discharge, MCM, *supra* note 136, pt. IV, ¶ 9.d, an accused may submit a request for discharge in lieu of court-martial so long as he or she can admit to a period of unauthorized absence of at least 31 days. *See* AR 635-200, *supra* note 137, para. 10-1(a); MCM, *supra* note 136, pt. IV, ¶ 9.d. Correspondingly, the convening authority may approve a request for discharge in lieu of court-martial based on a period shorter than 180 continuous days. *See* AR 635-200, supra note 137, para. 10-1(a); MCM, *supra* note 136, pt. IV, ¶ 9.d.

[565] *See infra* app. L-2.

[566] 38 U.S.C. § 5303(a) (2006).

in part, on a continuous period of AWOL of at 180 days will satisfy this element.

For example, if a servicemember is given an OTH discharge pursuant to a discharge in lieu of court-martial, and one of the specifications on the charge sheet is for at least 180 days of AWOL, this requirement is satisfied.[567]

This bar may also apply to a servicemember with a bad-conduct discharge adjudged at a special court-martial. While there is no explicit binding guidance to indicate whether or not the term "other than honorable" as stated in 38 U.S.C. § 5303(a) includes approved BCDs that were originally adjudged at a special court-martial, one CAVC decision indicates it may. When analyzing 38 U.S.C. § 5303(e)(2)(A), a provision "enacted in 1977 in response to President Carter's clemency and discharge review and upgrade programs for Vietnam-era draft evaders and deserters," the court states that the provisions

> were specifically designed to prevent … the award of benefits to Vietnam era benefits to Vietnam era veterans who had *deserted* (as indicated by an AWOL status of 180 days or more) and therefore, had received OTH discharges or worse, but who subsequently had their original discharges upgraded under the amnesty programs.[568]

---

[567] The level of court-martial is irrelevant in this case. This statutory bar should not be confused with the regulatory bar for discharge in lieu of a general court-martial with an OTH discharge. *See infra* Part IX.C. It is possible for both a statutory bar and a regulatory bar to apply at the same time. If both apply, they could preclude the claimant from receiving substantially all VA benefits for the period of service in which the misconduct occurred. The statutory bar could also preclude VA health care for service-connected disabilities. *See infra* note 596 and accompanying text.

[568] Winter v. Principi, 4 Vet. App. 29, 31 (1993). Interestingly, *Winter* expresses the view that servicemembers who were absent for over 180 days were, by that fact, *deserters*, 4 Vet. App. at 31, yet we were unable to locate another authority with this definition of "desertion." The confusion may stem from an apparent anomaly in H. Rep. 95-580, 1977 U.S.C.C.A.N, at 2860, which claims that the House bill "amends the term 'deserter' to include any individual who as a member of the Armed Forces was absent without authority for a continuous period of 180 days." The actual act passed (Public Law 95-126) did not define "deserter" in this way, or at all; but simply placed the new bar right next to the existing one for servicemembers discharged for desertion, where it remains to this day.

Because 38 U.S.C. § 5303(e)(2)(A) uses the term "other than honorable," and the court states it is applicable to those who "received OTH discharges or worse," one could argue that the term "other than honorable" as used in 38 U.S.C. § 5303(a) has the same broader interpretation.

In addition, in an October 2012 non-precedential decision that applied 38 U.S.C. § 5303(a) to a case in which a servicemember received a BCD at a special court-martial, the BVA held that a BCD adjudged at a special court-martial "is included under the purview of 'discharge under other than honorable conditions.'"[569] On the other hand, Congress specifically used the term "other than honorable."[570] It is not clear whether "other than honorable" is yet another confusing homonym that, in the application of 38 U.S.C. § 5303(a), encompasses both OTH and BCD discharges adjudged at special court-martial. The distinction, however, could be largely academic, as a combination of a regulatory bar and a statutory bar may serve as a complete bar to VA benefits for the period or periods of service that contain the misconduct.

Even if the term "other than honorable" is determined to not include bad-conduct discharges, the regulatory bar for willful and persistent misconduct[571] and the statutory bar barring the receipt of health care benefits for servicemembers who receive punitive discharges[572] could combine to preclude VA benefits in the same manner as a statutory bar under 38 U.S.C. § 5303(a). The regulatory bar would serve to preclude the receipt of all VA benefits except for health care for service-connected disabilities,[573] while Public Law 95-126 would preclude the receipt of VA health care.[574] This combination of the regulatory bar and statutory bar to benefits could be more detrimental to the servicemember than

---

[569] Title Redacted by Agency, 09-46 028, Bd. Vet. App. 1235867 (Oct. 16, 2012). This decision simply asserts that, in the context of the bar, "a bad conduct discharge . . . is included under the purview of 'discharge under other than honorable conditions.'" It does not explain why. *Id*.

[570] 38 U.S.C. §5303(a) (2006).

[571] *See infra* Part IX.B.2.

[572] Pub. L. No. 95-126 (1977) (barring the receipt of VA health care benefits for the period or periods of service in which the misconduct occurred if the servicemember is separated with a punitive discharge).

[573] An AWOL for a period of more than thirty days will trigger the regulatory bar for willful and persistent misconduct. *See* Winter v. Principi, 4 Vet. App. 29 (1993); *infra* notes 831–836 and accompanying text.

[574] Pub. L. No. 95-126 (1977).

application of the statutory bar found in 38 U.S.C. § 5303(a), as the latter includes an exception that the former does not.

2. Exception: Compelling Circumstances

If the servicemember can demonstrate "to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged absence," this statutory bar to benefits will not apply. While VA has a duty to assist a former servicemember with developing a case,[575] the statute places the burden on the claimant to demonstrate compelling circumstances.[576] Even though the statutory burden of proof of "to the satisfaction of the Secretary" is vague, regulatory guidance provides numerous factors for VA benefits adjudicators to consider when applying this exception. Additionally, the regulatory guidance provides a framework of considerations regarding what may be considered "compelling."

a. Service Exclusive of the Period of Prolonged AWOL

When determining if compelling circumstances exist, benefits adjudicators must first consider the "[l]ength and character of service exclusive of the period of prolonged AWOL."[577] For the exception to apply, "[s]ervice exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation."[578] Multiple additional periods of AWOL, for example, can be used to find that the "service exclusive of the period of prolonged AWOL" is not honest, faithful and meritorious.[579] This factor, however, is not

---

[575] *See supra* notes 79–81 and accompanying text.
[576] 38 U.S.C. § 5303(a) (2006) (stating that the claimant must "demonstrate" compelling circumstances).
[577] 38 C.F.R. § 3.12(c)(6)(i) (2012).
[578] *Id*. For an in-depth discussion on the concept of "honest, faithful, and meritorious service," see *infra* Part IX.B.2.a.6.
[579] *See* Brownlow v. Nicholson, 23 Vet. App. 316 (Table), 2007 WL 980791 (Vet. App.) (2007) (unpublished disposition) (determining that additional periods of AWOL can serve as a basis for finding that the "[s]ervice exclusive of the prolonged AWOL" is not "honest, faithful[,] and meritorious"); Title Redacted by Agency, 09-29 461, Bd. Vet. App. 1236855 (Oct. 24, 2012) (determining that multiple periods of AWOL, along with a lack of "decorations, medals, badges, commendation, or campaign ribbons," demonstrate that service exclusive of the period of prolonged AWOL was not honest, faithful and

dispositive. The "service exclusive of the prolonged AWOL" can be found to be "honest, faithful, meritorious, and of benefit to the nation," but if the remaining factors do not support the application of the exception, it will not apply.[580]

b. Reasons for Going AWOL

Second, benefits adjudicators must also consider the servicemember's "[r]easons for going AWOL" when determining if compelling circumstances existed.[581] This broad analysis is both comprehensive and performed explicitly from the point of view of the claimant.

> Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds or other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.[582]

Because the reasons for unauthorized absence are diverse and case-specific, and because there is little binding precedent on the topic, it is

---

meritorious and of benefit to the nation); Title Redacted by Agency, 09-40 391, Bd. Vet. App. 1113386 (Apr. 5, 2011) (determining that additional short periods of AWOL and Article 15s precluded the appellant's service exclusive of the prolonged AWOL from being honest, faithful and meritorious and of benefit to the nation); *But see* Title Redacted by Agency, 10-27 193, Bd. Vet. App. 1232892 (Sept. 24, 2012) (determining that despite multiple periods of AWOL, service excusive of the prolonged AWOL could still be honest, faithful and meritorious, and of benefit to the Nation).

[580] *See* Lane v. Principi, 16 Vet. App. 78, 81 (2002).

[581] 38 C.F.R. § 3.12(c)(6)(ii) (2012).

[582] *Id*.

not feasible to craft additional guidance for what reasons are most likely to succeed when arguing compelling circumstances. A review of the BVA's decisions indicates that documentary evidence of the reasons for the AWOL can be persuasive.[583]

Documentary evidence produced contemporaneously with or prior to the AWOL offense can be critical because the burden of demonstrating "to the satisfaction of the Secretary that there are compelling circumstances" rests on the claimant.[584] The power to judge and weigh the evidence, however, remains with the VA claims adjudicator. "[N]either the statute nor the implementing regulation directs the adjudicator simply to accept any and all reasoning from a claimant. If so construed the claimant would impermissibly because the final adjudicator of his own claim."[585] Accordingly, documentary evidence to support a hard-luck story or understandable reason for an absence can eliminate any doubts of veracity.

c. Valid Legal Defense

Third, benefits adjudicators must determine whether "[a] valid legal defense exists for the absence which would have precluded a conviction for AWOL."[586] Any such defense "must go directly to the substantive issue of absence rather than to procedures, technicalities, or formalities."[587] Compelling circumstances can occur "as a matter of law if the absence could not be validly charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice."[588] An applied

---

[583] *See* Title Redacted by Agency, 10-27 193, Bd. Vet. App. 1232892 (Sept. 24, 2012) (citing letters from claimant and his friends, pastor, and mother, all dating from the period he was AWOL, as persuasive evidence of compelling circumstances); Title Redacted by Agency, 96-21 342, Bd. Vet. App. 9922648 (Aug. 11, 1999) (citing doctor's statement made before the AWOL period, which the claimant had tried to use to obtain compassionate reassignment, to establish reasons for AWOL; also citing letters from claimant's National Guard service to show the character of his non-AWOL service); Title Redacted by Agency, 09-03 631A, Bd. Vet. App. 1118153 (May 11, 2011) (denying claim because the record lacked evidence to corroborate claimant's assertions about his absence).

[584] 38 U.S.C. § 5303(a) (2006).

[585] *Lane*, 16 Vet. App. at 85 (2002) (holding that VA's mandate to "evaluate" and "consider" claims allows VA the right to look to factors other than the claimant's own statements, and to require him to produce evidence). *Id.* at 84.

[586] 38 C.F.R. § 3.12(c)(6)(iii) (2012).

[587] *Id*.

[588] *Id*.

example will help illustrate the application of the valid legal defense consideration.

Assume a first-term Army soldier is facing a court-martial charge for violating Article 86, *UCMJ*, for a continuous period of AWOL of 185 days. The accused has no defense for the first 175 continuous days of the charged AWOL. The accused, who is stationed at Ft. Sill, Oklahoma, surrendered to military authorities at Ft. Bragg, North Carolina, 175 days after departing his unit. Because of administrative confusion between the units at Ft. Bragg and Ft. Sill, the accused stayed at Ft. Bragg for 10 days until he was flown back to his unit at Ft. Sill, Oklahoma. Mistakenly, the charge sheet lists the period of AWOL from the departure date until the date the accused returned to his unit at Ft. Sill, rather than the date that the accused surrendered to military authorities at Ft. Bragg.[589]

No factually compelling circumstances exist. The accused simply didn't want to be at his unit. The unit was not scheduled to deploy or go to the field. A year prior, however, the accused suffered a back injury during a training accident. While the accused meets medical retention standards,[590] and is therefore fit for duty, he has a permanent profile, and will likely need continuous treatment for spasms and other related back conditions.

To avoid possible confinement and the federal convictions that result from a general or special court-martial conviction, the accused chooses to submit a request for discharge in lieu of court-martial.[591] The case is not yet referred to court-martial.[592] While the accused will have to admit that he "is guilty of the charge(s) or of a lesser included offense(s) therein contained which also authorizes the imposition of a punitive discharge,"[593] there is no requirement to make the admission more factually specific. In this case, if the accused uses this blanket admission

---

[589] A period of AWOL terminates when a servicemember "notifies [a military] authority of his or her unauthorized absence status, and submits or demonstrates a willingness to submit to military control." MCM, *supra* note 136, ¶ 10c(10)(a).
[590] AR 40-501, *supra* note 245.
[591] *See, e.g.*, AR 635-200, *supra* note 137, ch. 10. Because the accused can admit to AWOL for greater than thirty days, a crime for which a dishonorable discharge is possible, a discharge in lieu of court-martial is permissible. MCM, *supra* note 136, ¶ 10e(2)(c); AR 635-200, *supra* note 137, para. 10a(1).
[592] MCM, *supra* note 136, R.C.M. 601.
[593] *See, e.g.*, AR 635-200, *supra* note 137, para. 10-2(e).

and is given an OTH discharge, and does not maintain any documentary evidence to show that his period of AWOL was only 175 days, the accused may be mistakenly statutorily barred from receiving benefits, as there may not be documentary evidence to the contrary.

An astute defense counsel can prevent this statutory bar from applying by demonstrating to the Government that the length of the AWOL is not properly charged. A government counsel should then amend the charge sheet, as it will form the factual basis for the discharge upon which the statutory and regulatory bars will depend. If a government counsel, accuser, or convening authority refuses to amend the charge sheet, the accused should not admit to the full period of the AWOL in the request for discharge in lieu of court-martial. In fact, the accused should specifically disclaim guilt for the length of time for which he was not AWOL.[594] The accused should also save all documentation showing the shorter length of the AWOL. Having such documentation will assist VA benefits adjudicators in properly applying the valid legal defense exception to the statutory bar for a continuous AWOL of at least 180 days with an OTH discharge.

d. Confusing Interaction Between Statutory and Regulatory Bars

If VA determines that the statutory bar for a continuous period of AWOL of at least 180 days does not apply in a particular case, whether or not the regulatory bars to benefits under 38 C.F.R. § 3.12(d) remain applicable may depend on the reason that the statutory bar does not apply.[595] This inconsistency appears to be largely the result of confusion surrounding how and when the compelling circumstances exception should apply.

If the statutory bar does not apply because the length of the AWOL was less than 180 days, the CAVC has consistently indicated that other regulatory bars to VA benefits still apply.[596] Two regulatory bars

[594] Appendix L-4 provides an example of the sample language to include in such a request for discharge in lieu of court-martial.

[595] For a list of the regulatory bars, see 38 C.F.R. § 3.12(d). Part IX discusses major regulatory bars in great depth.

[596] *See, e.g.*, Winter v. Principi, 4 Vet. App. 29 (1993) (holding that when the statutory bar for AWOL in inapplicable, the regulatory bars must be analyzed); Emory v. West, 16 Vet. App. 398 (Table), 1999 WL 159549 (Vet. App.) (Mar. 11, 1999) (unpublished

commonly applicable to AWOL cases include (1) acceptance of an undesirable discharge to escape trial by general court-martial,[597] and (2) willful and persistent misconduct.[598] In *Winter v. Principi*, the CAVC held that when the statutory bar for AWOL was inapplicable because the 32-day AWOL did not meet the 180-day threshold, the regulatory bars under 38 C.F.R. § 3.12(d) were applicable.[599] In *Emory v. West*, a non-precedential decision, the CAVC barred the former servicemember from VA benefits based on the regulatory bar for willful and persistent misconduct after stating that the provisions surrounding the statutory bar do not apply because "like the appellant in *Winter*, [] Mr. Emory's other than honorable discharge was not the result of being AWOL for 180 continuous days. . . ."[600]

If the statutory bar does not apply because VA finds that there were compelling circumstances, however, the applicability of the regulatory bars is not clear. In a September 2012 decision, the BVA found that compelling circumstances existed in a case for which a servicemember was administratively separated for a 539-day period of AWOL.[601] Despite the fact that a bar for willful and persistent misconduct was potentially permissible,[602] the BVA states, "As the Board has found compelling circumstances for the appellant's prolonged AWOL, it cannot be found that such prolonged AWOL is considered willful and persistent misconduct."[603] This assertion that a finding of compelling

---

disposition) (holding that the statutory bar does not apply because the length of AWOL was less than 180 days, but the bar for willful and persistent misconduct does apply); Charles v. Shinseki, Slip Copy, 2010 WL 3314622 (Table) (Vet. App.) (Aug. 24, 2010) (unpublished disposition) (barring benefits based on willful and persistent misconduct when the statutory bar for AWOL was inapplicable because the AWOL was not for 180 continuous days).

[597] 38 C.F.R. § 3.12(d)(1) (2012); *see infra* Part IX.C.

[598] 38 C.F.R. § 3.12(d)(4); *see infra* Part IX.B.2.

[599] Winter v. Principi, 4 Vet. App. 29, 31-2 (1993).

[600] Emory v. West, 16 Vet. App. 398 (Table), 1999 WL 159549 (Vet. App.) (Mar. 11, 1999) (unpublished disposition). Because this disposition is unpublished, it carries no precedential value. *See supra* notes 121–22.

[601] Title Redacted by Agency, 10-27 193, Bd. Vet. App. 1232892 (Sept. 24, 2012).

[602] 38 C.F.R. § 3.12(d)(4) (2012); *see infra* Part IX.B.2.

[603] "[T]he regulation pertaining to willful and persistent misconduct, when applied to periods of AWOL for less than 180 days, cannot reasonably be interpreted in such a way as to provide a harsher penalty for a veteran with less than 180 days of AWOL, then would result from AWOL of 180 days or more. Thus, in order to maintain consistency and harmony, the criteria for compelling circumstances set forth in 38 C.F.R. § 3.12(c) are relevant to our analysis of whether the veteran's AWOL constituted willful and persistent misconduct." Title Redacted by Agency, No. 98-11 881, Bd. Vet. App.

circumstances precludes a finding of willful and persistent misconduct is not supported by any binding law, regulation, or legal precedent. When combined with the sometimes inconsistent application of the compelling circumstances exception, confusion results.

At times, the BVA has applied or performed a compelling circumstances analysis even when it does not appear to be applicable.[604] The CAVC has indicated multiple times that "the compelling circumstances exception applies only to absences without leave for a continuous period of at least 180 days."[605] The BVA has also stated, "[E]ven if the Board were to accept the Veteran's statements surrounding the circumstances of his unauthorized absence as credible, the 'compelling circumstances' exception applies to 38 C.F.R. 3.12(c), which is not applicable here."[606] Nonetheless, the BVA has recently used the compelling circumstances exception as a method to grant benefits in cases in which the statutory bar was inapplicable because the servicemember was not absent for 180 days. In one case involving just a 30-day AWOL, the BVA performed an extensive compelling circumstances analysis to grant benefits in the case.[607]

0108534 (Mar. 22, 2001). *See also* Title Redacted by Agency, 10-27 193, Bd. Vet. App. 1232892 (Sept. 24, 2012).

[604] *See, e.g.*, Title Redacted by Agency, 11-31 347, Bd. Vet. App. 1244050 (Dec. 28, 2012) (applying a compelling circumstances analysis to a 16-day AWOL, but still denying benefits for willful and persistent misconduct because of repeated absences); Title Redacted by Agency, 05-14 057A, Bd. Vet. App. 1221358 (June 19, 2012) (applying a compelling circumstances analysis despite only three brief periods of AWOL, and total active naval service of approximately 15 months).

[605] *See* Winter v. Principi, 4 Vet. App. 29 (1993) (holding that the statutory bar does not apply to a case involving an AWOL of only 32 days); Diaab v. West, 16 Vet. App. 391 (Table), 1999 WL 149885 (Feb. 26, 1999) (unpublished disposition) (citing Winter v. Principi, 4 Vet. App. at 448); Emory v. West, 16 Vet. App. 398 (Table), 1999 WL 159549 (Vet. App.) (Mar. 11, 1999) (unpublished disposition) (citing Winter v. Principi, 4 Vet. App. at 448); Bruce v. Shinseki, Slip Copy, 2010 WL 4879165 (Table) (Nov. 24, 2010) (unpublished disposition) (stating that an AWOL for less than 180 days does not trigger the considerations found in 38 C.F.R. § 3.12(c)(6)).

[606] Title Redacted by Agency, 09-03 631A, Bd. Vet. App. 1118153 (May 11, 2011). *See also* Title Redacted by Agency, 08-23 074A, Bd. Vet. App. 1240136 (Nov. 23, 2012) ("The appellant's discharge was for persistent and willful misconduct, which falls under 38 C.F.R. § 3.12(d)(4). Therefore, any compelling circumstances for the appellant's numerous AWOLs are irrelevant to the issue before the Board.").

[607] Title Redacted by Agency, 96-21 342, Bd. Vet. App. 9922648 (Aug. 11, 1999). *See also* Title Redacted by Agency, 05-14 057A, Bd. Vet. App. 1221358 (June 19, 2012) (performing a detailed compelling circumstances analysis despite short periods of AWOL). *But see* Title Redacted by Agency, 11-31 347, Bd. Vet. App. 1244050 (Dec.

e. Recommendations for Change

Eliminating this inconsistent application of the compelling circumstances exception should be a priority for VA. This can be done by implementing one of two simple changes.

First, for AWOL-based discharges, VA should consider applying the compelling circumstances exception to all regulatory bars to benefits found in 38 C.F.R. § 3.12(d). In other words, VA claims adjudicators should perform a compelling circumstances analysis for any AWOL offense that forms the basis for a discharge. The regulatory change would be simple. VA could move the compelling circumstances language found in 38 C.F.R. § 3.12(c)(6) to a new subsection that covers both statutory and regulatory bars. The new subsection would then state that if the circumstances surrounding the AWOL are compelling, the AWOL offense should not be used as a basis to deny benefits. By doing this, VA would eliminate any confusion regarding how to apply the regulatory bars found in 38 C.F.R. § 3.12(d) after finding that the circumstances surrounding the AWOL were compelling. This change would also prevent the potentially counter-intuitive and unfair situation that arises when a former servicemember with a continuous period of AWOL of at least 180 days is able to argue compelling circumstances, and if successful, prevent the application of regulatory bars, yet a servicemember with a continuous period of AWOL of 179 days or less has no such vehicle.[608]

Second, if the compelling circumstances exception is not expanded, VA could eliminate this confusion by providing guidance on the legal impact of compelling circumstances on the regulatory bars found in 38 C.F.R. § 3.12(d). Determining that the regulatory bars to benefits may still apply would be logically consistent, easy to apply, and still provide the former servicemember a significant benefit even if a regulatory bar applies when the statutory bar does not. Because regulatory bars to benefits under 38 C.F.R. § 3.12(d) do not bar receipt of VA health care for service-connected disabilities,[609] a servicemember would be

---

28, 2012) (finding that the circumstances surrounding a 16-day AWOL were compelling, but finding other repeated absences constituted willful and persistent misconduct).

[608] *See* Title Redacted by Agency, Bd. Vet. App. 1232892 (Sept. 24, 2012) (refusing to apply the regulatory bar for willful and persistent misconduct once the circumstances surrounding the AWOL were found to be compelling).

[609] *See* Pub. L. No. 95-126, § 2, 91 Stat. 1107 (1977), *as amended by* Pub. L. No. 102-40, tit. IV, § 4029d)(2), 105 Stat. 239 (1991).

motivated to eliminate the statutory bar to benefits even if a regulatory bar still applies. An applied example will illustrate this concept.

Assume a first-term Army soldier returned to his unit after a continuous 180-day AWOL. Upon his return, the unit preferred court-martial charges.[610] After an Article 32 hearing,[611] the case was referred to a general court-martial.[612] A sanity board pursuant to RCM 706 determined that the accused possessed the requisite mental responsibility for the offense and to stand trial.[613] After the case is referred, the accused requested a discharge in lieu of court-martial.[614] The discharge in lieu of court-martial was granted, and the accused received an OTH characterization of service.

After separation from the Army, the accused applies for VA benefits, as he wants VA health care treatment for knee and back injuries sustained during military training accidents. As part of his application, he explains the circumstances surrounding his AWOL, which the VA find compelling. Accordingly, VA determines that the statutory bar for AWOL of a continuous period of 180 days does not apply.

Even though the statutory bar does not apply, as VA finds the circumstances compelling, the applicability of the regulatory bars to benefits for acceptance of an undesirable discharge to escape trial by general court-martial[615] and willful and persistent misconduct[616] remains unsettled. Because the case was already referred to general court-martial, the regulatory bar for acceptance of an undesirable (OTH) discharge to escape trial by court-martial appears to be squarely applicable. Additionally, despite the circumstances surrounding the AWOL being compelling, both the CAVC, in a precedential decision, and the BVA, in non-precedential decisions, have repeatedly found that AWOL of 30 days or more is willful and persistent misconduct.[617] Additionally, the sanity board, which found the accused sane, would

---

[610] *See* DD Form 458, *supra* note 343; MCM, *supra* note 136, R.C.M. 307.
[611] *See* UCMJ art. 32 (2012).
[612] *See* MCM, *supra* note 136, R.C.M. 601.
[613] *See id*. R.C.M. 706.
[614] *See* AR 635-200, *supra* note 137, ch. 10.
[615] 38 C.F.R. § 3.12(d)(1) (2012); *see* Part IX.C.
[616] 38 C.F.R. § 3.12(d)(4) (2012); *see* Part IX.B.2.
[617] *See, e.g.*, Winter v. Principi, 4 Vet. App. 29, 32 (1993). *But see* Title Redacted by Agency, Bd. Vet. App. 1232892 (Sept. 24, 2012) (refusing to apply the regulatory bar for willful and persistent misconduct once the circumstances surrounding the AWOL were found to be compelling).

possibly influence a VA determination regarding whether the accused was insane.[618]

If VA issues guidance that the regulatory bars are still applicable, this former servicemember would still be motivated to eliminate the application of the statutory bar to benefits, even if one of the regulatory bars applies. Because regulatorily-barred servicemembers are not barred from receiving VA health care benefits for service-connected injuries,[619] eliminating the applicability of the statutory bar would eliminate the bar to VA health care for the servicemember's service-connected knee and back injuries. If VA holds that the regulatory bars are inapplicable, however, and VA does not make the compelling circumstances exception apply to all statutory bars, a strange phenomenon that possibly rewards longer duration AWOLs would arise.

3. Practical Advice

When analyzing AWOL cases, commanders, judge advocates, and servicemembers facing adverse separation should not forget certain critical considerations. Properly understanding these overarching variables will assist each in making fully-informed decisions.

First, for the servicemember, it is almost always advantageous to eliminate all potential bars to VA benefits. While the compelling circumstances exception appears to give a potential avenue to benefits for servicemembers with continuous AWOLs of at least 180 days that is not available to those with shorter AWOLs, there is no guarantee that VA will find the servicemember's circumstances to be compelling. Servicemembers are also ineligible for VA benefits, to include care for service-connected disabilities, while eligibility issues are working their way through VA's administrative claims and appeals processes.[620] There is also no guarantee that VA will not apply seemingly applicable regulatory bars to benefits, even if the statutory bar does not apply. A defense counsel should not advise a potential client to extend his or her AWOL to 180 days to take advantage of the compelling circumstances exception. Not only is doing so likely ethically impermissible, as it

---

[618] *See* 38 U.S.C. § 5303(b); 38 C.F.R. 3.12(b); *id.* § 3.354; Baehr-Jones, *supra* note 455.
[619] *See* Pub. L. No. 95-126, § 2, 91 Stat. 1107 (1977), *as amended by* Pub. L. No. 102-40, tit. IV, § 4029d)(2), 105 Stat. 239 (1991).
[620] *See supra* Part IV.C.

potentially advises a servicemember to increase their criminal culpability,[621] but it also relies upon a tenuous, unsettled, and illogical application of current VA-related statutory and regulatory guidance.

Second, commanders and judge advocates should always advise servicemembers facing separation for AWOL how to most effectively apply for benefits. The exception for insanity provides a legal right to VA benefits,[622] and the exception for compelling circumstances may practically result in the receipt of full or partial VA benefits.[623] While no hard statistics exist, servicemembers who are able to present documentation made contemporaneously with the reasons for a determination of insanity or compelling circumstances are almost always more successful than those who rely only on their own testimony.[624]

IX. Regulatory Bars to Benefits Under the VA Character of Service Evaluation

A. A History of Innovation and Stagnation

Chapter 38 of the *Code of Federal Regulations* contains five regulatory bars to VA benefits under the COS review process:

> (1) Acceptance of an undesirable discharge to escape trial by general court-martial;
> (2) Mutiny or spying.
> (3) An offense involving moral turpitude. This includes, generally, conviction of a felony.
> (4) 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.

---

[621] *See generally* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).
[622] *See supra* Part VII.
[623] *See supra* Part VIII.E.2.
[624] *See supra* notes 583–85 and accompanying text.

> (5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duties. Examples . . . include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.[625]

These bars collectively enable adjudicators to determine the threshold question of whether the ex-servicemember is an eligible "veteran," in the sense that he or she performed service "under conditions other than dishonorable."[626] These bars, unlike some of the statutory bars listed above, rely upon character of discharge. If the servicemember's discharge was honorable or general, then that determination is binding on VA, and these bars do not apply.[627]

The second bar needs no discussion. A conviction for mutiny or spying, as noted in Part V.C, will not only bar benefits for the current period of service, but "reach back" and bar benefits for earlier periods of honorable service. An administrative separation for mutiny or spying with no conviction would not have this "reach back" effect. The fifth bar will not be discussed in this article based on the paucity of appellate decisions on this issue.[628]

---

[625] M21-1MR, *supra* note 77, pt. III, subpart v., ch. 1, § B, para. 5k (Feb. 27, 2012) (citing 38 C.F.R. § 3.12(d)(1)–(5) (2012)).

[626] 38 U.S.C. § 101(2) (2006) (defining a benefits-eligible veteran as "a person who served in the active . . . service and who was discharged or released therefrom under conditions other than dishonorable").

[627] 38 C.F.R. § 3.12(a) (2012) ("A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge"); M21-1MR, pt. III, subpart V, ch. 1, § B, p. 1-B-3 (noting that character of discharge is binding "irrespective of the separation reason. For example, if the separation reason is 'drug use,' but the characterization of service is under honorable conditions, the character [of] service is still binding on the VA and no [character of discharge] determination should be made." Since the regulatory bars serve *only* to characterize a discharge as "dishonorable," 38 C.F.R. § 3.12(d), they are irrelevant when the military has issued a discharge with binding character.

[628] Due to the comparative rarity at which the CAVC has considered claims related to the regulatory bars involving 3.12 and homosexuality involving aggravated circumstances and mutiny and spying, this Article limits discussion to the most prevalent issues in the COS process. On the one hand, a search of the LEXIS Website for cases within the CAVC revealed no cases discussing bars for mutiny or spying and one case discussing

This terminology reflects a range of circumstances besides the receipt of a DD. Congress could have limited the analysis solely to one type of punitive discharge characterization from a general court-martial, yet, here, it purposely broadened the scope of circumstances under review.[629] Although the statute prohibits VA benefits for troops adjudged a DD, the "conditions other than dishonorable" standard created a fixed rule requiring VA to review all discharges that are not honorable, regardless of how many types would come to exist in the years following the enactment of the *Servicemens' Readjustment Act of 1944* (*1944 SRA*).[630]

1. The Era of Ingenuity 1944–1948

To fully understand the scope of the COS review, it is necessary to consider the historical backdrop surrounding the *1944 SRA*, as well as the objectives of the legislators who enacted the statute. In 1943 and 1944, when the Congress laid the *Act*'s groundwork, the military justice system depended upon the *Articles of War* and commanders, for the most part, applied discipline in an inconsistent and often harsh manner.[631] Although

---

the bar on homosexuality involving aggravated circumstances. On the other hand, willful and persistent misconduct and 3.12 scored 63 hits, moral turpitude and 3.12 scored 8, and "escape," "general court-martial," and 3.12 scored 13. Analysis conducted at http://www.lexis.com on Oct. 27, 2012 (using the search category "U.S. Court of Appeals for Veterans Claims").

[629] Testimony of Philip V. Warman, Associate General Counsel of the Veterans' Administration, *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92d Cong. 1st Sess., at 6004 (June 2, 3, 7, 8 and July 7, 1971) [hereinafter Warman Testimony] ("The statute could just as easily have said, if the Congress had meant a dishonorable discharge, 'other than dishonorable discharge' which would have precluded any administrative determination.").

[630] U.S. Veterans' Administration, Office of General Counsel, Discussion Paper—Veterans' Administration Responsibility to Determine Whether a Discharge is Under Dishonorable Conditions, *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92d Cong. 1st Sess., at 6005, 6008 (June 2, 3, 7, 8 and July 7, 1971) [hereinafter Discussion Paper] (observing that "it would be illegal for the [VA] to grant benefits merely upon the predicate of a discharge being other than dishonorable").

[631] *See, e.g.*, WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 14 (1973) (describing excessive reliance on the

the Second World War witnessed two million courts-martial, commanders and panel members retained many of the offenders for the war effort. In some cases, theater commanders encouraged their subordinates to avoid courts-martial punishments that would deprive the services of a fighting man on the front lines.[632]

During the War, many servicemembers evaded punishment altogether, and legislators became concerned over two groups that might eventually apply for VA benefits notwithstanding their misconduct: 1) those servicemembers who *should have* been court-martialed and dishonorably discharged but were not for the sake of command expediency;[633] and 2) servicemembers who feigned illness in order to evade tough duty.[634] Regarding the first group, the drafters of the *1944 SRA* considered five groups of offenders unworthy for VA benefits, including hospitalization, due to their misconduct:

> 1. Servicemembers who went "over the hill";
> 2. those who engaged in Absence Without Leave or Desertion;
> 3. "chronic" drunkards;
> 4. those who committed larceny or murder only to be arrested and convicted and/or imprisoned by civilian authorities; and
> 5. those discharged under Blue conditions "merely because the Army wanted to get rid of them and did not want to take the trouble to court-martial them and give them what they deserved—a dishonorable discharge."[635]

For the second group, psychiatrists of the time were generally concerned that malingerers would not only avoid hazardous duty, but would attempt to use the feigned illness as a basis to collect pension and other benefits reserved for veterans who were wounded under the most meritorious of circumstances.[636] Using the interchangeable terms of "goldbricking,

---

court-martial system to the point that they averaged "nearly sixty convictions by the highest form of military court, somewhere every day of the war").

[632] *See, e.g.*, Seamone, *supra* note 2, at 65 (discussing WWII directives to minimize reliance on courts-martial and liberalize suspended discharges for the war effort).

[633] *See generally* Discussion Paper, *supra* note 630.

[634] *Id*.

[635] *Id*. at 6007 (internal citations omitted).

[636] Carrie H. Kennedy & Jeffrey A. McNeil, *A History of Military Psychology*, *in* MILITARY PSYCHOLOGY: CLINICAL AND OPERATIONAL APPLICATIONS 1, 6 (Carrie H.

faking, or malingery," legislators followed the military psychiatrists' lead and sought to develop a benefits framework that would enable VA adjudicators to detect this most "elusive" group and terminate financial rewards for their deception.[637] In line with these concerns, congressional floor debates and other statements of intent provide insight into the underlying purposes of the *1944 SRA*'s COS process and the regulatory standards that simultaneously emerged with its passage.

The congressional documents identified a major concern that prior benefits rules were unclear regarding DDs. While the former statute precluded nearly all benefits to anyone who had not been discharged under honorable conditions, a loophole permitted recipients of DDs to obtain hospital care.[638] In clarifying the standard to eliminate all benefits for DD holders, the congressmen expounded on their primary goal in the COS process exemplifying the just deserts theory of misconduct. Noting that the law "permits most unworthy cases to be hospitalized often to the detriment of persons honorably discharged or discharged under conditions other than dishonorable," the drafters of the Act automatically barred DD holders to ensure "hospital facilities . . . [would] be maintained for veterans whose service was honest and faithful or otherwise meritorious."[639] Continuing along similar retributive lines, Congress also targeted malingerers who had not been subject to court-martial. Speaking for the members of the committee that drafted the COS provision, Senator Bennett Champ Clark took to the Senate floor and explained,

> The people who drew this act, and particularly the people who worked on this provision, are almost without exception fellows who have actually had the experience of going up against the guns themselves. We are more interested than anyone else could possibly be in keeping the gold-brickers, the coffee-coolers, the skulkers, and

---

Kennedy & Erica A. Zillmer eds., 2006) (noting widespread concern over "malingering in order to avoid military service or discipline").

[637] *Id*. at 7 (relating psychiatrists' wartime concerns that malingerers were the "leading pension and compensation seekers"). For more detailed analysis of this concern, see, e.g., M.M. Campbell, *Malingery in Relation to Psychopathy in Military Psychiatry*, 42 NORTHWEST MED. 349, 352 (1943).

[638] Discussion Paper, *supra* note 630, at 6006.

[639] S. REP. NO. 755 at 15 (Mar. 18, 1944) (discussing S. 1767).

> the criminals, the bad soldiers and bad sailors and bad marines, off the benefit rolls.[640]

The COS process that Congress developed represented foresight and ingenuity considering the state of military justice and discipline in the existing discharge system. In 1944, discharges resembled a palette of three colors and corresponding characterizations: The Honorable Discharge was white; both discharges Without Honor and Uncharacterized Discharges were blue; and the DD was yellow.[641] The Blue Discharge originated in 1916 to replace the administrative discharge known as "Uncharacterized."[642] By collapsing both Without Honor and Uncharacterized categories into one Blue Discharge, this administrative characterization represented a wide variety of circumstances—egregious misconduct on the one hand, and poor performance on the other. During its lifespan between 1916 and 1947, the Blue Discharge garnered criticisms from even VA for its failure to distinguish the nature and severity of one's service-related behavior.[643]

In the face of this dilemma, Congress created the COS process in 1944 with two goals in mind. Chiefly, the determination acted as a check on command discretion to weed-out unworthy servicemembers whose Blue Discharges fell on the more egregious end of the spectrum of misconduct. Along with the primarily retributive objective, the legislators also acknowledged a compassionate secondary objective to identify individuals at the opposite end of the misconduct spectrum whose Blue Discharges represented a harsh response to mere unsuitability for service or negligent performance of duties. Senator Clark confirmed, "I don't think anyone wants to penalize boys who lied about their age in order to enlist, or who did something else of that sort, or, certainly, men who were discharged because of a lack of aptitude for military service."[644] Considering how the creation of a *Uniform Code of Military Justice* did not come until 1950, six full years after the

---

[640] 90 CONG. REC. 3077 (Mar. 24, 1944).

[641] Captain Leo Fitzgibbons, *Disability Benefits for Discharged Soldiers—Law, Regulations and Procedures*, 31 IOWA L. REV. 1, 16 (1945).

[642] Major Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 2 (1973) (explaining further how the "unclassified" characterization had emerged in 1913 to replace the longstanding "without honor" administrative characterization).

[643] *Id*. (noting "Veteran's Administration pressure for an increase in the definitive classifications of discharges to insure more categories of benefits among discharged servicemember").

[644] 90 CONG. REC. 3076 (Mar. 24, 1944).

enactment of the *1944 SRA*,[645] Congress's oversight mechanism—its own detached VA court of appeals for recipients of Blue Discharges—was unprecedented. At a 1971 congressional hearing, VA's Director of Compensation, Pension, and Education Services shared his understanding of the Congress's intent in developing the COS process: "that there be someone set apart from the environment of the military which is under the pressure to make a decision and get the man out to arrive at a decision in a calmer atmosphere based on all of the military records available."[646] The process was sophisticated enough to allow for the attainment of divergent retributive and compassionate goals during the same review.

2. The Era of Neglect: 1947–Present

No doubt, in the initial years following the enactment of the *1944 SRA*, the COS process functioned as intended. Most of the adjudicators were familiar with standards of military discipline and discharge, themselves living at a time of conscription and overseas service, enabling adjudicators to reach fairly consistent determinations that reflected "general rules" of practical application.[647] But this state of reliability existed when the military justice system remained frozen in its 1944 color-coded infantile state. Over time, as the *UCMJ* came into being, and discharge practices evolved after undergoing strict scrutiny from investigatory committees,[648] each new category of discharge presented unforeseen dilemmas that quickly outgrew the limited punitive pallet.

The first significant change occurred with the abolition of the Blue Discharge and its bifurcation into the General and Undesirable Discharges in 1947.[649] This change was the military's first official acknowledgement since 1916 that some gradations of administrative separation were far less noble and meritorious than others. The UDs

---

[645] Pub. L. No. 506, H.R. 4080 (May 5, 1950).
[646] Testimony of James T. Taaffe, Director of Compensation, Pension, and Education Services for the Veterans' Administration, *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92nd Cong. 1st Sess., at 6010 (June 2, 3, 7, 8 and July 7, 1971) [hereinafter 1971 Taaffe Testimony].
[647] Blake, *supra* note 49, at 5, 22.
[648] *See, e.g.*, REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SECRETARY OF WAR (1946) (reporting the results of the Vanderbilt Committee).
[649] Jones, *supra* note 642, at 2.

were reserved for misconduct or unfitness while the General Discharges were reserved for unsuitability—non-deliberate failures to conform one's conduct during military service.[650] Because the General Discharge was still under honorable conditions, as compared with the UD, the new categories presented additional unanswered questions within the COS process.

The next major development was the Army's adoption of the BCD in 1948.[651] Although the BCD existed in the Navy since 1885,[652] its widespread adoption by the Army occurred for specific reasons. The War Department believed that panels too often adjudged the DD for relatively minor misconduct and that they should have an intermediate option reserved for less serious offenses. In Brigadier General Hubert D. Hoover's explanation to a congressional committee, he observed that the BCD was a lesser degree of punishment than a DD and "appl[ied] particularly to the military type of cases, as distinguished from the felony-type cases."[653] Other than this, the two characterizations had few differences.[654] This monumental change in military justice infused more unanswerable questions in the existing COS framework.

The effects of entirely new discharge characterizations that Congress never contemplated during the enactment of the *1944 SRA* resulted in a dilution of the general standards that adjudicators adopted to address the tri-color discharge system. In his testimony before a congressional committee, VA Associate General Counsel Philip V. Warman explained the effects of these sea changes in military justice:

> [N]obody really fixed what kind of discharge the service is going to give. I think it started back in World War II. Fundamentally we were starting with an honorable discharge and dishonorable discharge. Then they came up with the blue discharge. . . . It was when they got into

---

[650] *Id*. at 3 (noting that "unsuitability is a word of art concerning matters and problems which are beyond the serviceman's control whereas unfitness and misconduct are words of art for acts which are voluntarily performed").
[651] Captain Richard J. Bednar, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 MIL. L. REV. 1, 6 (1962).
[652] *Id*.
[653] Testimony of Brigadier General Hubert D. Hoover, *in Hearings on Court-Martial Legislation, Senate Comm. on Armed Servs*., 80th Cong., 2d Sess. 2025 (May 22, 1953).
[654] *Id*. (noting that, aside from the above distinction "there isn't a tremendous difference" between a BCD and a DD for all practical purposes).

> these twilight zones resulting in all of the various grades of discharges, which even now vary between the services, it would be different [and problematic].[655]

By 1948, once these major changes had taken effect, and in the coming years through the present, each adjudication within VA's COS framework represents a visit to the Twilight Zone, where resulting determinations are often as unpredictable and implausible as episodes of Rod Serling's critically-acclaimed television series by the same name.[656]

Although criticisms of the COS process never reached the rumored fifth dimension of sight, sound, and mind,[657] they frequently touched upon the adjudicators' ambiguous and undefined guidelines and inconsistent results. In 1952 Navy Captain W.C. Blake surveyed VA regional offices and concluded that "it is not possible to lay down any hard and fast rules" for the manner in which VA would evaluate discharges during the COS process.[658] In 1961, Navy Lieutenant Donald Brown similarly observed, "unfortunate though it may be[,] no clear guidelines can be formulated concerning the effects" of discharges reviewed under the COS process.[659] This was largely the case because each major regulatory bar to benefits is stated in so "sufficiently indefinite [a manner] that its application may vary among the different Veterans' Administration field activities and adjudication units."[660] In 1971, VA Associate General Counsel Warman acknowledged that VA adjudicators were still reaching inconsistent results in COS determinations regarding similarly-situated applicants.[661]

Congressional hearings raised serious concerns regarding the lack of consistency in the application and outcomes of VA adjudicators' evaluations. Representative Richard White questioned whether an adjudicator could "take case A of an individual and male a different decision than [he or she] would in case B of the individual who has done

---

[655] Warman Testimony, *supra* note 629, at 6008.
[656] THE TWILIGHT ZONE (CBS Television 1959–64).
[657] *Id*. (opening monologue).
[658] Blake, *supra* note 49, at 5, 22.
[659] Lieutenant Donald J. Brown, *The Results of the Punitive Discharge*, JAG J., Jan.–Feb. 1961, at 13, 14.
[660] *Id*.
[661] Warman Testimony, *supra* note 629, at 6009 (recognizing a "great room for variance" in adjudicators application of the same general standards).

approximately the same thing."[662] As he heard more unsettling responses about the lack of objective standards, he explained his fear that an adjudicator might consider "persistent jaywalking" as sufficient to trigger the regulatory bar for willful and persistent misconduct, thus straying from Congress's intent by substituting subjective personally-determined adjudicatory criteria.[663] In response to the concerns raised, Committee Chair Charles E. Bennett voiced the desire for servicemembers to know the results of their VA benefits determination at the same time as separation, rather than leaving the decision to some uncertain future "behind-the-scenes gray area."[664] Although a senior VA official explained that minor offenses were exceptions to the regulatory bar for willful and persistent misconduct, the witness regretfully admitted there was no codified summary of qualifying offenses that meet the exception.[665] In the process of criticizing the VA's COS process, Chairman Bennett not only pondered why the public had not complained more frequently about this dilemma, but left the VA Director of Compensation, Pension, and Education Services and the Associate General Counsel with these sobering words at the conclusion of the hearing:

> [C]onsidering the leeway that you have, I think you are to be congratulated on the small amount of flak generated, because you never hear any flak from it. Perhaps it is because a lot of people don't know about it . . . . It is a very fuzzy statutory situation and the fact that

---

[662] Comments of Hon. Richard C. White, *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92nd Cong. 1st Sess., at 5861 (June 2, 3, 7, 8 and July 7, 1971) [hereinafter White Comments].

[663] *Id*. at 5862.

[664] Comments of Hon. Charles E. Bennett, Chair, Subcomm. 3, House Comm. on Armed Servs., *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92d Cong. 1st Sess., at 6004 (June 2, 3, 7, 8 and July 7, 1971) [hereinafter Bennett Comments]. *See also id.* at 5896 ("I think that . . . the time to make the decision [is] when the man is given the penalty and not let him litigate this thing separately almost behind closed doors."); *id*. ("Why allow another agency years later to litigate the nuances of his crime when there are no witnesses present and a case can be made only one way or the other? That really is not well founded. I think it ought to be at the time the klieg light is on what actually transpired.").

[665] Taaffe Testimony, *supra* note 646, at 6010.

> you have had so little criticism of it I think we must say is a compliment to the VA.[666]

While others have suggested similar concerns about public confusion, which could explain the lack of support for any reforms,[667] the absence of concern or outrage likely stems more from the theory of just deserts which cares little for the rocky road of a social outcast who presumably earned his or her station in life.[668]

Today, standards unchanged since 1944 continue to result in widely inconsistent results. Although the 1971 congressional hearings raised many questions and signaled the need for elimination of the Military Misconduct Catch-22, the situation has only grown worse over time. Today, some veterans advocates who frequently work with the COS process criticize VA adjudicators for routinely failing to understand or apply their own regulatory guidelines when making these vital determinations.[669] It appears that VA's adjudicators are not necessarily as versed in the law as a senior VA official proclaimed them to be.[670] During the 1971 hearings—and now—no one knows precisely how many COS applications have been filed or denied at VA regional offices, or appealed at the BVA.[671]

In a reported 1954 court-martial case, one prosecutor argued to the military panel members, "it is up to the discretion of the Veterans Administration as to whether the man is deprived of benefits under the GI Bill when he receives a bad conduct discharge from a special. And, in most cases, they decide in favor of the man so that he receives a large

---

[666] Bennett Comments, *supra* note 664, at 6010.

[667] *See, e.g.*, Jones, *supra* note 642, at 11 ("Confusion exists in the public mind as to which discharges bar the ex-serviceman from which benefits.").

[668] *Supra* discussion accompanying note 16.

[669] *See, e.g.*, Jeremy Schwartz, *"Bad Paper" Discharges Can Stymie Veterans' Health Care: Diagnosed with Post-Traumatic Stress Disorder Before he was Kicked Out of Marines for Failing a Drug Test, Austinite Carries on Without Counseling*, STATESMAN.COM, Oct. 3, 2010 (citing Swords to Plowshares Attorney Teresa Panepinto's experience that her veteran clients are often "turned away unjustly" based on adjudicators' lack of awareness of rules).

[670] Taaffe Testimony, *supra* note 646, at 6010 (responding "[m]ost of our people are law trained and have a pretty good idea" when asked "wouldn't it be helpful in your administrative processes to spell out what minor offenses are?").

[671] Mazar Interview, *supra* note 270 (explaining how these cases are relatively rare and the absence of a system to collect or analyze these statistics). *See also* Bernton, *supra* note 8 (relaying VA's position that "the department has no way to track how many of [COS] reviews are conducted, how long they take or their outcomes").

portion of the benefits."[672] However, it is impossible to determine whether his observation of "most cases" was the byproduct of advocacy or research. In the early '70s, a general denial rate of 93 percent for applicants with stigmatizing discharges led researchers to believe there was "an unwritten presumption that the services impose bad discharges only for acts of moral turpitude or persistent and willful misconduct, because VA hardly ever comes to any other conclusion."[673] By 1976, shortly after the 1972 high of 40,000 servicemembers discharged with Undesirable characterizations,[674] researchers reported that "the VA . . . denied benefits to nearly all those with Undesirables."[675] In the '90s, attorney David Addlestone shared only a slightly higher estimate than the 93 percent denial statistic with an estimate in the comprehensive *Military Discharge Upgrading Manual* that VA adjudicators approved only ten percent of COS applications on a national average.[676] A 2006 *USA Today* article notes an average denial rate of "eight out of 10 veterans who received bad-conduct discharges" between 1990 and September 2006.[677]

While one noted VA psychiatrists assumes an eligibility number closer to zero based on his experience treating veterans for PTSD,[678] a former senior adjudicator who worked in VA's Los Angeles Regional Office from 2002 to 2008 estimates that she and her peers denied more applications than they granted, but only by a slight margin.[679] It is unknown whether her experience is generalizable beyond that office because VA simply does not keep statistics on initial applications or appeals, and therefore grant and denial rates for these types of claims are not available. Most comprehensively, in 2007, the Veterans' Disability

---

[672] United States v. Kelley, 17 C.M.R. 259, 261 (C.M.A. 1954).

[673] STARR ET AL., *supra* note 10, at 177. For this reason, the researchers—and some VA officials—concluded that "Undesirable and Bad Conduct Discharges are effectively the same as a Dishonorable Discharge in terms of eligibility for veterans' benefits." *Id*. at 179.

[674] *Id*. at 170 (describing annual rates of stigmatizing discharges totaling "148, 194 Undesirable Discharges (or six out of every seven who received a discharge less than honorable)" between 1965 and 1972).

[675] Slavin, *supra* note 31, at B1.

[676] DAVID ADDLESTONE, MILITARY DISCHARGE UPGRADING, AN INTRODUCTION TO VETERANS ADMINISTRATION LAW: A PRACTICE MANUAL ¶ 26.3.4.1 (1990) ("The VA favorably adjudicates only about ten percent of these cases.").

[677] Zoroya, *supra* note 18.

[678] Shay Written Testimony, *supra* note 4, at 116 ("As a VA physician, I have never treated a veteran with a Bad Conduct, Undesirable or Dishonorable discharge, because they cannot get through the front door—they are ineligible for any VA services.").

[679] Mazar Interview, *supra* note 270.

Benefits Commission attempted to obtain a figure by examining various data from VA's massive records repository, the Beneficiary Identification and Records Locator Subsystem. From the records, the Commission concluded that 28,459 applicants undergoing administrative adjudication were deemed to be discharged under honorable conditions. Contrastingly, 100,781 applicants were "determined by VA as having dishonorable discharges for VA [benefits entitlement] purposes."[680]

Whatever the actual approval rate is for COS applications, the general consensus safely concludes that a majority of ex-servicemembers with stigmatizing discharges are being denied health care benefits based on statutory and regulatory provisions that were never updated to reflect monumental changes in the military justice system. The absence of clear definitions in VA regulations lends to VA adjudicators' subjective interpretations. As Representative Bennett noted in 1971, society should rightfully expect more when a man's future—and perhaps over "$100,000 worth of benefits"—hangs in the balance.[681] Accordingly, it is worth considering VA's response when confronted with the concern that its adjudicators might be denying necessary benefits to similarly situated veterans on a whim, especially when many sustained combat-related health conditions.

3. VA's Response to Congressional Concerns Over the COS Process

VA legal representatives offered a two-fold response during the 1971 hearings to justify recurring subjective and inconsistent determinations in the denial of benefits during the COS process: 1) no one lobbied for change or raised any concerns about perceived injustice; and 2) despite multiple opportunities for Congress to revamp the COS standards, it declined to do so on each occasion.[682] In a detailed discussion paper and

---

[680] VETERANS DISABILITY BENEFITS COMM., *supra* note 32, at 94.

[681] Bennett Comments, *supra* note 664, at 5860 (criticizing the lack of a "clear definition" for evaluative standards and commenting further how "strange" it is that "we have allowed that to occur").

[682] Discussion Paper, *supra* note 630, at 6005, 6008:

> It seems relevant to observe that the [COS] discharge provision . . . and its implementing administrative regulations have been in effect for in excess of one-quarter of a century, with no indication on the part of Congress of au difference of opinion as to the validity of the Veterans Administrations' interpretation. The "under conditions other than dishonorable" language was re-enacted, without

at the hearings, representatives of the VA General Counsel's Office reasoned that the absence of congressional interest or action must mean that the issue of arbitrary COS determinations was unimportant or unnecessary to address.[683] Ironically, had the speakers at the hearings merely looked down the halls of the neighboring congressional office buildings or the Pentagon on any given day, they would have observed intensive efforts to reform the military's discharge review process.[684] The major reason provided for increasing the due process protections for servicemembers undergoing involuntary separation was the fact that they could lose VA benefits eligibility as a result of OTH discharges issued by separation boards.[685]

Apparently, no one has seriously examined VA's COS process; like the Judge Advocates General (TJAGs), senior military policymakers, and legislators at the 1971 hearings, many modern public officials assume that VA adjudicators consistently use sound and objective standards, accord VA benefits applicant proper due process, and recognize the magnitude of the task at hand. The then-Air Force Judge Advocate General, Major General James S. Cheney, testified that he presumed all of VA's COS determinations were based on objective standards outlined in statutes.[686] For example, after confirming that he "couldn't describe for [the congressman] what the internal procedures of the VA are,"

> modification, in 1957, incorporated into section 101(2) of Public Law 85-56; and again in 1958 . . . .

[683] *Id*.

[684] As noted later in President Jimmy Carter's 1978 *Presidential Review Memorandum*, the discharge system established in 1948 and carried through the *Uniform Code of Military Justice* "has been repeatedly reviewed and adjusted to keep pace with developing social changes, due process considerations, and administratively determined policy." PRESIDENT JIMMY CARTER, PRESIDENTIAL REVIEW MEMORANDUM ON VIETNAM ERA VETERANS (RELEASED OCT. 10, 1978), at 30 (May 12, 1979).

[685] *See, e.g.*, Bennett Comments, *supra* note 664, at 5826 (describing, as the basis for proposals to strengthen due process protections during boards empowered to issue UD discharges, "the loss of veterans benefits that usually accompanies undesirable discharges"); ADDLESTONE, *supra* note 676, app. 17C (providing a summary of the changes to administrative discharge standards in each of the services over time in the "Chronological Development of Current Standards for Unfitness/Misconduct Discharges").

[686] Testimony of Major General James S. Cheney, The Judge Advocate General, U.S. Air Force, *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92nd Cong. 1st Sess., at 5896 (June 2, 3, 7, 8 and July 7, 1971).

Major General Leo Benade, Deputy Assistant Secretary of Defense for Military Personnel Policy, reasoned, "[h]opefully the Veterans' Administration would utilize the same standards in evaluating [different COS] cases and reach the same decision if the pattern of conduct is the same."[687] Yet, sadly, like most commanders who read through the widely distributed charts indicating the "T.B.D." nature of COS determinations,[688] these senior officials guessed wrong. General Benade's frank explanation for his lack of knowledge regarding VA's COS process was simply, "The Department of Defense is not consulted in these cases."[689] Consequently, one of our key recommendations for maintaining accountability and responsibility over the COS process is frequent information communication across organizational divides, especially at the unit commander-regional office level through the use of commanders' statements of intent in transmittal and initiation documents.

With the historical backdrop of the COS process in mind, the following section moves from the problem of a time machine stuck on 1944 when it comes to frameworks for administrative discharge to a related outgrowth; two of the most ambiguous regulatory bars to benefits.

B. The Two Most Problematic Regulatory Bars: Moral Turpitude and Willful and Persistent Misconduct

The two regulatory bars for moral turpitude and willful and persistent misconduct emerged at the same time as the *1944 SRA*,[690] and

---

[687] Testimony of Major General Leo E. Benade, Deputy Assistant Secretary of Defense for Military Personnel Policy, Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs, *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92nd Cong. 1st Sess., at 5861 (June 2, 3, 7, 8 and July 7, 1971) [hereinafter Major General Benade Testimony].

[688] *See infra* Part X (describing the great potential for benefits charts to mislead their readers).

[689] Major General Benade Testimony, *supra* note 687, at 5861.

[690] Warman Testimony, *supra* note 629, at 6005 (describing the contemporaneous development of the regulatory bars along with the passage of the *1944 SRA*). Standards for the regulatory bars were only minimally different from today's in 1945:

reflected a number of concerns raised by the legislators during their COS hearings.[691] Along these lines, adjudicators adopted certain interpretive rules that observers referenced as "general" guidelines concerning the application of each standard in practice.[692] Understanding the distinct interpretive nuances of each of these phrases reveals how both of these regulatory bars invite indeterminate decisional outcomes. When the General Counsel, the BVA, and the CAVC have attempted to define these terms with respect to misconduct occurring while the servicemember was in the military, they have consistently bypassed military law, opting instead for generic civilian definitions in sources like *Black's Law Dictionary*, which is often the sole source consulted.[693] For example, in tackling the meaning of the term "moral turpitude" in the most recent 1987 precedent opinion, the VA General Counsel turned to its uses in legal practice areas ranging from professional responsibility to immigration.[694] Among the sources it consulted, not one touched on the multiple military standards that have implemented this term.[695]

In contemplating the language differences between VA and the Department of Defense, there is a definite gulf. Critics of the regulatory

---

> It will be observed further, that . . . benefits . . . are barred where the person was discharged under dishonorable conditions. The requirement of the words 'dishonorable conditions' will be deemed to have been met when it is shown that the discharge or separation from active duty or naval service was (1) for mutiny, (2) spying, or (3) for an offense involving moral turpitude or willful and persistent misconduct, of which convicted by a civil or military court: Provided, however, where service was otherwise honest, faithful, and meritorious a discharge or separation other than dishonorable because of the commission of a minor offense will not be deemed to constitute discharge or separation under dishonorable conditions.

Fitzgibbons, *supra* note 641, at 17–18 (citing various VA provisions, including Veterans' Administration Instruction No. 1, Sections 300 and 1503, P.L. 346-78th Congress). Of interest, the distinction between the present interpretation seems to be the expansion of moral turpitude beyond court convictions and the additional language indicating the presumption that felonies are turpitudinous.

[691] *See supra Part* IX.A.1 (citing to congressmembers' intentions in developing the COS process).

[692] Blake, *supra* note 49, at 5, 22.

[693] *See, e.g.*, Manuel v. Shinseki, 2012 WL 86713 at *2 (Vet. App. Jan 12, 2012) (unpublished disposition).

[694] *See generally* U.S. Dep't of Veterans Affairs, Op. G.C. 6-87, Subject: Character of Discharge: Juvenile Offenses as Moral Turpitude, Veterans Affairs Off. Gen. Counsel, Precedent Opinion 6-87 (Feb. 5, 1988) [hereinafter Op. G.C. 6-87].

[695] *Compare id*. *with infra* Part IV.B (discussing military standards for moral turpitude).

bars say they "don't appear to have been written by anyone familiar with basic concepts of criminal law."[696] This may be a result of the distinct cultural differences between these two organizations which often operate in spite of one another rather than collaboratively. As former VA General Counsel Paul J. Hutter explains, optimal results come only when the agencies are able to use a common language that bridges the expanse of the Potomac River.[697] Although VA evaluators have relied primarily on nonmilitary standards, they will be aided by knowledge of the military's own definitions. Because the COS process depends entirely on the failure of a servicemember behave within the context of the unique military setting, it seems obvious that military legal standards, refined over the years, should achieve parity and priority in the COS process over terms arising from less regimented and demanding civilian environments. For this reason, after discussing the current approaches and their pitfalls, the sections below will highlight civilian *and military* legal approaches that will surely improve interpretive rubrics.

1. Offenses of Moral Turpitude Under 38 C.F.R. § 3.12(d)(3)

The notion of moral turpitude dates back to its first use in the 1809 case *Brooker v. Coffin*.[698] It was a New York civil action for slander in which the plaintiff sued the defendant for making statements that she was a prostitute.[699] The term's first legal use related to behavior that was not even criminal but, instead, which violated standards of decency from one citizen to another.[700] A century later, the 1909 Idaho case In re *Henry* established the most common conception of the general concept of moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general contrary to the accepted and customary role of right and duty between man and men."[701] In line with this definition, moral turpitude

---

[696] THEODORE C. JARVI, MILITARY MISCONDUCT IN VA ADJUDICATIONS 5 (2006).
[697] Interview with Paul J. Hutter, General Counsel, TRICARE Management Agency, in Falls Church, Va. (Aug. 8, 2012).
[698] 5 Johns 188 (N.Y. 1809). For further discussion of the context surrounding *Brooker* and mention of it as the "earliest" mention of moral turpitude in a case, see Carroll E. Day, Comment, *Violation of Liquor Laws as Involving Moral Turpitude*, 4 DAKOTA L. REV. 29, 30 (1932).
[699] Day, *supra* note 698, at 30.
[700] *Id. See also* Note, *Violation of Volstead Act as a "Crime Involving Moral Turpitude*," 4 N.Y. L. REV. 46, 48 (1926) (observing that "moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law.").
[701] 99 P. 1054, 1055 (Idaho 1909).

has largely been judged according to the statutory elements of the offense, rather than the offender,[702] representing the notion that some behaviors are inherently deplorable to warrant liability for a breach of a duty and resulting punishment.[703]

In the 1930s, the U.S. Attorney General adopted a definition of moral turpitude that incorporated some of *Henry*'s language, indicating that it is "anything done contrary to justice, honesty, principle, or good morals" and "an act of baseness, vileness, or depravity."[704] Despite such attempts, it has been impossible to define a single concept applicable to all cases:

> What can be learned from the variety of definitions is that moral turpitude means slightly different things to different judges. The term is non-descriptive. It seems appropriate to liken the test for ascertaining whether a crime involves moral turpitude to Justice Stewart's famous test for obscenity—"I know it when I see it." . . . Perhaps judges inherently know when a crime involves moral turpitude.[705]

Since *Brooker* and *In re* Henry, different organizations, legislatures, and courts adopted the term in areas besides tort law. A 1936 law review article identified more than five other legal frameworks for the moral turpitude standard, including removability of aliens, disbarment of attorneys, professional discipline cases involving doctors and dentists, in rules for impeaching witnesses' credibility based on prior convictions, and in sentencing enhancements for prior convicts.[706] Just as the meaning of the term differed between each legal domain in earlier

---

[702] This rule, considered the "categorical approach" to interpretation is common in immigration cases and holds that, "the immigration officers and the courts may only look at the criminal statute and the record of conviction [and] may not look at the particular circumstances underlying the conviction." Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to* Congress, 15 GEO. IMMIGR. L.J. 259, 266 (2001).

[703] Cate McGuire, Note, *An Unrealistic Burden: Crimes Involving Moral Turpitude*, 30 REV. LITIG. 607, 609 (2011) (observing how courts find moral turpitude in cases where "[evil] intent is implicit in the nature of the crime" (internal citation omitted)).

[704] Immigration Laws—Offenses Involving Moral Turpitude, Op. Att'y Gen, 293, 294 (1933).

[705] Jay Wilson, *The Definitional Problems with "Moral Turpitude,"* 16 J. LEGAL PROF. 261, 262 (1991).

[706] Day, *supra* note 698, at 29–30.

studies,[707] it remained elusive after 1936,[708] and remains so through the present day.[709]

VA's standard for moral turpitude reflected divergent rules in civilian courts when it adopted the 1944 regulatory bar.[710] Even though misconduct by servicemembers in the context of VA benefits is unique from the other legal practice areas, and would necessarily differ based on the military's implementation of the term in its military justice provisions,[711] VA's implementation of the term incorporated some of the universal problems that the term faces in any legal domain. Foremost among these problems, the moral turpitude standard is susceptible to subjectivity, bias, and ambiguity because it necessarily raises questions of morality, a conception that has personal meaning for adjudicators separate from the societal context.[712] Whether in the context of VA benefits or any other legal domain, individuals applying the standard must develop certain objective measures to prevent inevitable interpretive pitfalls.[713] The next Part's analysis of VA's standards reveals only a small amount of guidance, coupled with the absence of needed protective measures.

---

[707] Note, *supra* note 700, at 48 (finding "no hard and fast rule as to what constitutes moral turpitude").
[708] *See generally* Wilson, *supra* note 705.
[709] *See, e.g.*, Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 687 (2012) (noting that "[c]ourts and scholars alike have commented that the term as used in other areas of law is uncertain, leading to inconsistent results," and maintaining this is true today).
[710] *See generally* Op. G.C. 6-87, *supra* note 694.
[711] Infra Part IX.B.1.c (describing military law's implementation of the "moral turpitude" standard).
[712] *See, e.g.*, STARR ET AL., *supra* note 10, at 177 (questioning "whether it is . . . constitutionally correct to deny benefits on grounds of extra-legal moral attitudes," which infect the VA's COS process on a widespread basis, and expressing the concern that the standard for "moral turpitude" is really "whatever the person ruling on the request for benefits decided").
[713] Consider the Department of Justice's historical reluctance to examine facts about the perpetrator of an offense. United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914) (establishing a longstanding rule to avoid relitigation of criminal cases by a reviewing administrative body). More recently, the Department of Justice developed a three-part framework to increase the likelihood of eliminating bias in determinations of moral turpitude. *Infra* Part IX.B.1.a.ii.

a. VA's Current Regulatory Standards for Offenses Involving Moral Turpitude

The regulatory "character of discharge" bar for moral turpitude appearing in 38 C.F.R. § 3.12(d)(3) states: "It is a bar to benefits that the servicemember engaged in offenses of moral turpitude; including generally conviction of a felony."[714] Because the regulation does not describe specific offenses that fall within VA's definition of the term, in line with historical accounts, many VA adjudicators at both the "national and regional offices" were completely unable to "offer any definition" for the term at the most general level, lending to the concern that the definition is "[W]hatever the person ruling on the request for benefits decided."[715] Despite specific definitions, the short provision in the *Code of Federal Regulations* contains at least four significant elements offering some degree of guidance.

i. Offense

First, the term "offense" is distinguishable from a "crime," which the Congress has used other enactments, such as the *Immigration and Nationality Act*, to define only those offenses that had resulted in an adjudicated conviction.[716] This is important to military justice practitioners because it means that the bar equally applies to discharges resulting from administrative separations that did not result in a conviction or require the high level of due process applied to a court-martial. While the regulation does not specifically define an "offense," at the very least, it suggests a wider range of behaviors than "crimes." Some jurisdictions, for example, note that public offenses are those which can result in fines from political subdivisions of states, even if they cannot ultimately result in a term of imprisonment.[717] Common law notions of moral turpitude also support the interpretation that qualifying offenses can include punishments less severe than incarceration.

---

[714] As a unified whole, the regulation states "An offense involving moral turpitude. This includes, generally, conviction of a felony." 38 U.S.C. § 3.12(d)(3) (2012).
[715] STARR ET AL., *supra* note 10, at 177.
[716] Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of a Criminal Conviction: A Guide for Defense Attorneys*, 1988 IMMIGR. & NAT'LITY L. REV. 493, 498 n.51 (1988).
[717] *See*, *e.g.*, ARIZ. REV. STAT. § 13-105 (2012).

ii. Moral Turpitude

Morality has a meaning rooted outside of the law. In 1987, the VA General Counsel issued a binding legal opinion in which he offered a concise definition of the term, defining moral turpitude, in part, as a willful and wrongful act "which gravely violates accepted moral standards"[718] The use of this terminology, even for VA, signifies a societal standard which will necessarily change over time because American values are never fixed: "The morals of a nation are constantly shifting, and it is concededly difficult for the administrative agencies to determine morality at a given time."[719] Some examples of shifting standards of morality involve "consensual anal sex between heterosexual adults, consensual homosexual sodomy, and abortion," which had all been defined as crimes of moral turpitude, but which are no longer criminal.[720] Without some sort of objective measure to address this inevitable pitfall, many characterize the moral turpitude standard as inherently subjective and impossible to apply evenhandedly because of this inexactitude.[721]

The term "turpitude" connotes an offense that "usually must involve a *mens rea* of intent or knowledge, or at the very least recklessness causing serious bodily injury."[722] In this light, the Supreme Court has affirmed the position that "crimes involving fraud have universally been held to involve moral turpitude,"[723] because "evil intent is implicit in the nature of the crime."[724] The VA General Counsel adopted this view in the 1987 precedent opinion, noting that an act of moral turpitude is "an act that is inherently wrong," although acknowledging that "there is not universal agreement" as to which acts qualify.[725] Accordingly, care must be given to statutory interpretations of specific offenses in jurisdictions were offenses occurred, especially within military settings, which have their own presumptions.

---

[718] Op. G.C. 6-87, *supra* note 694, at 3.
[719] Joseph C. Tatum, *Comment*, 4 ST. MARY'S L.J. 126, 132 (1972).
[720] Craig R. Shagin, *Deporting Private Ryan: The Less Than Honorable Condition of the Noncitizen in the United States Armed Forces*, 17 WIDENER L.J. 245, 268 (2007).
[721] Derrick Moore, Note, *"Crimes Involving Moral Turpitude": Why the Void-for-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 1814 (2008) (noting additional descriptions of "'vague,' 'nebulous,' 'most unfortunate,' and even 'bewildering'").
[722] McGuire, *supra* note 703, at 609.
[723] Jordan v. De George, 341 U.S. 223, 228 (1951).
[724] McGuire, *supra* note 703, at 609.
[725] Op. G.C. 6-87, *supra* note 694, at 3.

The combination of "moral" with "turpitude" conveys that the act is so inherently violative of societal standards that its very commission so characterizes the offense, regardless of the offender's attributes. As the Board of Immigration Appeals explained in a case applying the moral turpitude standard to an offense committed by a noncitizen, it is the depravity of the offense that is of concern, not the depravity of the offender.[726] The VA General Counsel also submitted to this same view, remarking, "we believe it is the nature of the offense and not its statutory classification or the degree of punishment that determines whether moral turpitude was involved" in its 1987 precedent opinion.[727] This distinction about turpitude is important because, the context of the crime as defined by the elements of a specific offense matter.[728] Moreover, aside from offenses involving fraud, not all states consistently define specific offenses as turpitudinous,[729] requiring review of an individual statute and local precedents on moral turpitude prior to the conclusion that a state or local offense so qualifies as turpitudinous. This distinction is equally important in the military context because some military offenses have no civilian criminal law counterparts. Reviewers need to be especially conscious of the military offenses considered as turpitudinous.

iii. Includes

The additional language, "This includes, generally, conviction of a felony," was added to VA's regulatory framework for Moral Turpitude offenses in 1963, expanding the term's reach and creating "a rebuttable presumption . . . that a felonious act was one involving moral turpitude."[730] While, undoubtedly, "the regulatory provision does not . . . restrict the meaning of moral turpitude to offenses resulting in conviction of a felony," and permits consideration of misdemeanors,[731] the conditional term "generally" cuts both ways. One nonprecedential CAVC decision explains, "there may be occasions when a felony

[726] Tatum, *supra* note 719, at 128.
[727] Op. G.C. 6-87, *supra* note 694, at 2.
[728] Wilson, *supra* note 694, at 264 ("[W]hether illegal conduct constitutes moral turpitude depends on the unique circumstances surrounding the crime.").
[729] *Id*. at 265.
[730] Op. G.C. 6-87, *supra* note 694, at 2.
[731] *Id*.

conviction is not considered a crime of moral turpitude."[732] The term "includes" also conveys the fact that the following term "felonies" is a non-exhaustive list, which necessarily embraces additional unstated categories, such as misdemeanors.

iv. Conviction of a Felony

In the military context, a conviction is certainly different from acceptance of non-judicial punishment for alleged misconduct, an accusation of alleged misconduct, or involuntary separation based on alleged violation of civilian or military law.[733] In the state civilian context, a conviction is often different from a deferred adjudication, a probationary term, or a plea of *nolo contendere*, as evident in recent jurisprudence on the effects of the *Lautenberg Amendment*, which prohibits ownership or access to weapons based on the conviction of a crime of domestic violence.[734] As opposed to administrative proceedings that reference criminal violations, a conviction signifies the involvement of either a military or civilian judge, rules of evidence, the right to confrontation, and other procedural due process protections, even in the case of guilty pleas. A conviction is generally defined as a final adjudication for which "no further proceedings were available on the issue of guilt or innocence of the original charge and no further appeals were available."[735]

---

[732] Manuel v. Shinseki, No. 08-1276, Slip Copy, 2009 WL 3401421, at *1 (Vet. App. Oct. 23, 2009) (unpublished disposition).

[733] Major Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F. L. REV. 115, 131 (2007) (describing the inapplicability of the Lautenberg Amendment's statutory bar on weapons possession to nonjudicial punishment for domestic violence offenses).

[734] *See* 18 U.S.C. § 922(g)(8) (2006) (noting in pertinent part "it shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess . . . any firearm or ammunition"). Thus, under Rhode Island law, R.I. GEN LAWS § 12-18-3 (1956), if a person pleads *nolo contendere* and is placed on probation, and completes that probation, then "the plea and probation shall not constitute a conviction for any purpose." However, while the probation is still in effect, the nolo contendere plea *does* constitute a conviction. Carew v. Centracchio, 17 F. Supp.2d 56, 60 (D. R.I. 1998) (contrasting a state law rule exempting pleas of nolo contendere and completed probationary terms from consideration as convictions with opposing federal rules). In normal circumstances, a *nolo contendere* plea *is* a conviction, just as a guilty plea is. United States v. Pierce, 60 F.3d 886, 892 (1st Cir. 1995).

[735] One definition of "conviction," which the VA regulations do not provide, exists for immigration matters. Nathalie A. Bleuze, Note, Matter of Roldan*: Expungement of Conviction and the Role of States in Immigration Matters*, 72 U. COLO. L. REV. 829–30

For all practical purposes, the most frequent time the COS process will involve a potential felony conviction is in the context of a Bad-Conduct Discharge issued by a Special Court-Martial.[736] Like the Department of Justice, VA presumption accords a certain amount of deference to the conviction because it is the result of a judicial process made reliable by its exacting procedural requirements. The goal in such cases is not to require re-litigation of key facts in an administrative forum that lacks any such protections.[737] However, this also suggests that the opposite is true in cases involving the findings of administrative separation boards. Namely, the felony presumption does not and should not apply to any finding from an administrative proceeding (whether Article 15, Captain's Mast, or administrative separation) because it was not achieved through a judicial process and is inherently less reliable.[738] Although we could not locate any case law or VA General Counsel Precedent Opinions on this issue, attorneys and advisors should be mindful of the distinction between court-martial convictions and

---

(2001) (describing the federal standard). For immigration purposes, to account for deferred adjudications and other alternatives to traditional case processing, a conviction is more liberally defined as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. § 1101(a)(48) (2006). *See also* United States v. Pierce, 60 F.3d 886, 892 (1st Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) (holding that a plea of *nolo contendere* qualifies as a conviction under application of the *Federal Sentencing Guidelines*).

[736] Because convictions from general courts-martial or dishonorable discharges bar one from VA benefits by statute, there are few other scenarios that would lead to a discretionary consideration by the VA. *See supra* Part VIII (discussing statutory bars where felony offenses are far more likely).

[737] As established in the 1914 *Uhl* immigration opinion, the objective is not to re-litigate the case because "immigration officers act in an administrative capacity. They do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude." United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914). This standard is vital because, oftentimes, VA adjudicators have no more than the military records to go on with little information provided by the claimant. Decisions sometimes hinge on three pages of documents and vague descriptions of an offense. Mazar Interview, *supra* note 270.

[738] *See, e.g.*, STARR ET AL., *supra* note 10, at 171 ("A commanding officer who wanted to get rid of a man would often send him to an administrative discharge board instead of a court-martial, where his legal rights might protect him from being discharged."); Slavin, *supra* note 13, at 27 (noting the concerns of Representative John Seiberling that less than honorable discharges issued by administrative separation boards "invite society to punish hundreds of thousands of former servicemen who have not been convicted or even charged with any crime").

administrative processes that reference potentially felonious offenses when the issue of moral turpitude arises.

Regarding the definition of the term "felony," it has a fixed meaning in federal law: "an offense punishable by death or imprisonment for more than one year."[739] State criminal statutes often follow a similar course.[740] Where states differ in their respective definitions of felonious behavior, the individual state statute will describe which offenses qualify. In the military context, the term has a different connotation. While the *Manual for Courts-Martial* has, on occasion, defined a felony, the distinction between felonies and misdemeanors is less prominent.

Early on in the Armed Forces, "felony" offenses often related to serious common law civilian crimes, as opposed to "military offenses," which were uniquely military crimes, more minor in nature.[741] Modernly, military law determined the turpitudinous nature of crimes not by the felony/misdemeanor distinction, but, instead, by maximum punishments and allowable discharges. The 1969 Revision to the *Manual for Courts-Martial*, in fact, separated federal and state from military crimes in its own definitions for of turpitudinous conduct: "A conviction by court-martial of an offense for which a punishment of dishonorable discharge or confinement at hard labor for more than one year is authorized, whether or not such punishment was actually adjudged."[742] Qualifying state or federal offenses, contrarily, involved "confinement for more than a year."[743] Most recently, "serious offense" was substituted for "felony" in the Article 134, *UCMJ*, offense of Misprision of a Serious Offense, specifically to clarify "that concealment of serious military offenses, as well as serious civilian offenses, is an offense."[744] The substitution recognizes that reference only to felonies

---

[739] 18 U.S.C. § 1 (1970); *see also* 18 U.S.C. § 3156(a)(3) (2006) ("[A]n offense punishable by a maximum term of imprisonment of more than one year.").

[740] Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. POL. & SOC. SCI. 281, 283 (2006) ("In the contemporary United States, felonies are considered crimes punishable by incarceration of more than **one year** in prison, whereas misdemeanors are crimes punishable by jail sentences, fines, or both.").

[741] See text accompanying note 653. For further distinction between military and other more serious crimes, see also Lieutenant Colonel Donald W. Hansen, *Discharge for the Good of the Service: An Historical, Administrative, and Judicial Potpourri*, 74 MIL. L. REV. 99, 170 (1976).

[742] MANUAL FOR COURTS-MARTIAL ¶ 153b(1) (1969 rev. ed.).

[743] *Id*. ¶ 153b(2) & (3).

[744] MCM, *supra* note 136, ¶ 95, at A23-25 (Analysis of Punitive Article 134).

without accounting for uniquely military offenses has threatened to unfairly limit the application of the crime.

b. Interpretative Guidelines for "Moral Turpitude" Offenses from Regional Offices' Early Standards

Studies of the VA regional offices in the aftermath of the *1944 SRA* gleaned "general rules which guide the Veterans Administration"[745] in their application of character of service determinations to moral turpitude offenses. In the 1950s, presumably when adjudicators had more recent knowledge of the legislature's intent regarding the COS process, they generally considered civilian felony level offenses to involve moral turpitude, much like the current presumption.[746] For military offenses, adjudicators used the *Table of Maximum Punishments* to determine moral turpitude by inquiring whether "the maximum punishment is a dishonorable discharge."[747] The bar applied even if the offense was referred to a Special Court-Martial and only resulted in a BCD.[748]

Adopting the theory that certain offenses qualified as turpitudinous based on their nature, VA adjudicators in the 1950s found moral turpitude in offenses that involved obtaining money under false pretenses, even if the offense was addressed at an administrative discharge board and based on a civil conviction.[749] Adjudicators likewise regularly decided that a BCD resulting from larceny or receiving stolen goods equally qualified as a moral turpitude offense.[750] On the other hand, desertion was questionable, and led one concerned judge advocate to conclude that it could "probably" result in a finding of moral turpitude.[751] As reported in 1952, VA adjudicators at regional offices not only applied the bar to conduct addressed by separation boards, civilian courts, and courts-martial, they also applied it to conduct

---

[745] Blake, *supra* note 49, at 5, 22.
[746] *Id*. at 8 ("Generally speaking the commission of an offense of sufficient gravity to constitute a felony constitutes moral turpitude.").
[747] *Id*.
[748] *Id*. ("Where the gravity of an offense, military in nature, is such that the maximum punishment is a dishonorable discharge, it is probable that the Veterans Administration would deny benefits to a former serviceman separated from the service with a bad conduct discharge adjusted by a special court-martial.").
[749] *Id*.
[750] *Id*.
[751] *Id*. ("A bad conduct discharge as the result of a conviction of desertion probably would deny entitlement.").

that led to the vacation of a suspended BCD, even where the conduct underlying the BCD would not qualify for the bar.[752]

Despite the above standards, which added some level of consistency to COS determinations, investigators unanimously recognized the great potential that different regional offices continued to reach disparate outcomes upon evaluating cases involving indistinguishable offenses or underlying facts: "The phrase 'moral turpitude . . . ' is sufficiently indefinite that its application may vary among the different Veterans' Administration field activities and adjudication units."[753] This has remained true in recent years. While "[a]n older VA employee in Montgomery, Alabama, may consider smoking marijuana an offense involving moral turpitude, while his younger counterpart in San Francisco would merely be amused."[754] For much the same reason, it remains the case that VA's COS "criteria may be applied differently within the same office."[755] Sometimes, however, such inconsistency allows for flexible applications of a standard that could still potentially result in a favorable determination for the applicant.[756]

c. Interpretive Guidelines for Moral Turpitude Offenses in Military Settings

A singularly applicable definition of moral turpitude in all jurisdictions is not possible. The term can, at best, be stated in a "conclusory but non-descriptive way" without application.[757] In the non-precedential CAVC decision of *Manuel v. Shinseki*, the judge resorted to the Eighth Edition of *Black's Law Dictionary* for the following definition of moral turpitude: "Conduct that is contrary to justice, honesty, and morality."[758] Even with the benefit of its definition in specific state statutes, the term does not extend to military offenses in the same manner. Moral turpitude must also be considered in both a military and civilian context, because 38 C.F.R. § 3.12(d)(3) applies it to civilian and

---

[752] *Id*. In this case, "[t]he Veterans Administration determination was apparently based on the ground that a violation of probation was evidence of moral turpitude." *Id*.
[753] Brown, *supra* note 659, at 13, 14.
[754] STARR ET AL., *supra* note 10, at 177.
[755] *Id*.
[756] Brown, *supra* note 659, at 14.
[757] Wilson, *supra* note 705, at 263.
[758] Manuel v. Shinseki, 2012 WL 86713, at *2 (Vet. App. Jan 12, 2012) (unpublished disposition) (citing BLACK'S LAW DICTIONARY (8th ed. 1994)).

military offenses. While *Black's Law Dictionary* provides a general definition for military offenses, "any conduct for which the approved punishment is a dishonorable discharge or confinement not less than a year,"[759] which also reflects some trends in adjudications in the '50s,[760] the definition fails to capture the diverse and extensive body of military law on moral turpitude. The concept does characterize many military regulations in modern times. However, military regulations are only one potential source for definitions of moral turpitude. Like the variety of sources in any given civilian jurisdiction, the military too has different uses for the term, which occur not only in regulations, but also military appellate opinions, evidentiary rules, definitions of specific offenses, and classifications of minor offenses for the purpose of imposing administrative punishment.

i. Definitions of "Moral Turpitude" in Military Regulations

Military regulations are the weakest source of definitions for moral turpitude because they change regularly and quite dramatically, and they have never been entirely uniform across the services.[761] In the 1960s, for example, while recognizing that "the term 'moral turpitude' has been defined in other sources to apply to many other offenses and possibly could be applied to the offense of Driving While Intoxicated,"[762] both the Army and the Air Force placed only two offenses under the ambit of this definition—"narcotics violations" and "sexual perversions."[763] Contrarily, "[t]he Coast Guard, Marine Corps, and Navy [did] not spell out what offenses involve moral turpitude," greatly expanding the possibilities.[764] During 1971 congressional hearings, a senior officer responsible for the promulgation of administrative discharge standards considered the VA regulatory bar and confirmed, "AWOL doesn't involve moral turpitude."[765] Yet, he was hard-pressed to identify

[759] *Id*. at *2 (citing *Black's*).
[760] *Supra* Part IX.B.1.b.
[761] *See*, *e.g.*, Bennett Comments, *supra* note 664, at 5858: "It does seem anomalous in 1971 that we have different standards for [elimination] in all the branches of service. We have had a degree of ununification for 20 years now and it seems to me we should be coming closer."
[762] Clifford A. Dougherty & Norman B. Lynch, *The Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498, 503–04 (1965) (citing applicable Air Force Regulation 39-22).
[763] *Id*. (additionally citing Army Regulation 600-206).
[764] Jones, *supra* note 5, at 3.
[765] Major General Benade Testimony, *supra* note 687, at 5861.

consistent standards for discharges based on offenses involving moral turpitude or how VA could interpret them following discharge. Compounding confusion over regulatory provisions, it was not until March 1978 that the Department of Defense articulated a singular directive that would address uniform discharge review standards for each of the services.[766] The sections below, therefore, consider far more optimal sources than military regulations to help VA personnel consider turpitudinous conduct within the military setting.

ii. The Maximum Punishment Chart as a Starting Point

The *Maximum Punishment Chart* is nothing more than a quick reference appendix that has appeared in successive editions of the *Manual for Courts-Martial*. Upon reviewing the listed offense, readers will see the maximum penalties associated with it. Adjudicating Officers' use of the *Chart* in conducting character of service determinations in the 1950s suggests that it has long been a tool for evaluating the moral turpitude bar. While it should not be the only source consulted, reliance on it can assist VA personnel today in identifying when the felony presumption applies to military crimes. The *Chart* can also be especially useful in identifying offenses which cannot result in any sort of discharge, let alone one less severe than a DD. A copy of the 2012 iteration, "Maximum Punishment Chart," is included in Appendix F-7. Prior ones are available online.

iii. Elements of Offenses

The *Manual for Courts-Martial* has implemented moral turpitude in elements of Conduct Unbecoming an Officer under Article 133, *UCMJ*,[767] and Conduct that is Prejudicial to Good order and Discipline or of a nature to bring discredit upon the Armed Forces under Article 134, *UCMJ*.[768] of the *Uniform Code of Military Justice*. In *United States v. Light*, the Army Board of Review explained that the following acts were deemed prejudicial and service discrediting "by their very nature" under Article 134, *UCMJ*, specifically because they involved an element of moral turpitude:

---

[766] CARTER, *supra* note 684, at 31.
[767] 10 U.S.C. § 833 (2006).
[768] *Id.*

- "Where a sergeant accepts money from a member of his platoon as compensation for a pass";
- "wrongfully receiving money as compensation for transporting a Korean female in a Government vehicle";
- "cheating on an examination"; and,
- "receiving money for calling false numbers at a bingo game."[769]

However, the Army Board of Review also distinguished that "there is no moral turpitude involved in borrowing money." Even if the offense involves a subordinate and a superior and violates customs of the service, "[b]orrowing money does not cease to be an honest act and turn despicable because the lender is a military subordinate."[770] There are some reasons for caution when reviewing such military appellate decisions. Among these decisions, "[t]he court-martial decisions that have used the language of moral turpitude offer no discernible pattern to help predict which conduct will be defined as immoral."[771] Often "they resort to listing examples of immoral conduct rather than endeavoring to describe what actually makes conduct morally wrong."[772] This practice becomes problematic when the military courts of appeal reach divergent opinions on whether the same offense involves moral turpitude. One example occurs in the instance of false swearing in violation of Article 134, *UCMJ*.[773] These cases can help VA adjudicators, attorneys, and judges, sift through various military-specific crimes when no such conflict exists.

---

[769] 36 C.M.R. 597, 584 (A.B.R. 1965).
[770] *Id*.
[771] Katharine Annuschat, Note, *An Affair to Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1179 n.120 (2010).
[772] *Id*. at 1180.
[773] *Contra* United States v. Greene, 34 M.J. 713, 714 (A.C.M.R. 1992) (finding false swearing to be turpitudinous), *with* United States v. Johnson, 39 M.J. 1033, 1038 (A.C.M.R. 1994) (acknowledging that lying is dishonest, but refusing to find it turpitudinous).

iv. Military Evidentiary Rules

In the law of evidence, conviction for an offense involving moral turpitude has long been a basis to impeach the credibility of a testifying witness on the basis that the nature of the offense speaks to the witness's character, moral fiber, and honesty.[774] The *Manual for Courts-Martial* adopted this same impeachment rule, but neglected to provide specific examples.[775] Military courts interpreting the provision held, for example, that a prior conviction for "wrongfully using a military pass with intent to deceive" constituted a crime of moral turpitude, but explained that military offenses like "extended absence without leave from a combat area" or "an act of outright desertion" might be considered turpitudinous only in times of war.[776]

To cure the problem of unspecified offenses, the revision to the 1969 *Manual for Courts-Martial* included a list of "convictions of offenses involving moral turpitude or otherwise affecting credibility" based on the military courts' application of the evidentiary rule:

> (1) A conviction by court-martial of an offense for which a punishment of dishonorable discharge or confinement at hard labor for more than one year is authorized, whether or not such punishment was actually adjudged.
> (2) A conviction by a Federal civilian court of a felony, that is, of an offense punishable under the United States Code by confinement for more than one year, whether or not that punishment was actually adjudged.
> (3) A conviction by any other court of an offense similar to an offense made punishable by the United States Code as a felony or of an offense characterized by the

---

[774] 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 609:6, at 731–32 (6th ed. 2006).
[775] *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 124b (1928) ("Evidence of a conviction of any crime is admissible for impeachment where such crime involves moral turpitude or is such as to affect the credibility of the witnesses.").
[776] United States v. Moore, 18 C.M.R. 311, 319–20 (C.M.A. 1955) ("Regardless of the situation in more tranquil times, we are sure that, during national peril, one who shirks a compelling obligation to the Armed Forces—the importance of the service being attested by the penalty assessable for its denial—is as steeped in turpitude as the run-of-the-mil felon.").

> jurisdiction in question as a felony or as an offense of comparable gravity.
> (4) A conviction of any offense involving *fraud*, *deceit*, *larceny*, *wrongful appropriation*, or the *making of a false statement*.[777]

Despite the fact that some judge advocates believed the list to offer a singular solution to the dilemma of character of service determinations,[778] later revisions in the *Manual for Courts-Martial* eliminated the term moral turpitude from the evidentiary provision, noting that the 1969 list was "illustrative only and non-exhaustive" and thus a basis for confusion.[779] The current standard still requires consideration of minimum possible sentences, but, in place of the moral turpitude language, merely indicates that the following criminal convictions can be used to impeach:

> [E]vidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of a year, the maximum punishment prescribed by the President . . . at the time of the conviction applies without regard to whether the case was tried by a general, special, or summary court-martial.[780]

---

[777] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 153b (1969 rev. ed.) [hereinafter 1969 MCM] (emphasis added).
[778] Testimony of Colonel Jacob Hagopian, Judge Advocate General's Corps, USA, Retired, Director, Urban Studies Center, Roger Williams College, *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92nd Cong. 1st Sess., at 5912 (June 2, 3, 7, 8 and July 7, 1971) ("The Manual for Courts-Martial of 1969, the President's regulations which implement the Uniform Code of Military Justice as amended in 1968, defines and enunciates in detail at page 27-68 of the Manual certain convictions of crimes and offenses which, in fact, involve moral turpitude.").
[779] MCM, *supra* note 136, Analysis of Military Rule Evidence 609, at A22-48.
[780] *Id.* MIL R. EVID. 609(a)(2).

v. Definitions of Minor Misconduct for the Purposes of Imposing Administrative Punishment

The Part below addressing VA's regulatory bar for willful and persistent misconduct addresses the distinction between serious and minor misconduct, since "minor misconduct" can serve as an exception to application of the regulatory bar for willful and persistent misconduct.[781] However, one facet of this analysis relates directly to moral turpitude. A paragraph in the 1949 *Manual for Courts-Martial* defined a minor offense, in part, as "misconduct not involving moral turpitude,"[782] and further included these examples "*larceny*, *fraudulently making and uttering bad checks*, and the like."[783] This language was later incorporated and expanded in the 1951 *Manual's* definition of minor misconduct, for which the respective paragraph actually provided examples of turpitudinous misconduct: "Offenses such as *larceny*, *forgery*, *maiming*, and the like involve moral turpitude and are not to be treated as minor."[784]

Ultimately, then, a survey of military legal authority provides specific examples of offenses of moral turpitude, besides the general notion of a fixed potential maximum sentence. Figure 5, below, offers the summarized list:

---

[781] 38 C.F.R. § 3.12(d)(4) (2012).
[782] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 118 (1949) [hereinafter 1949 MCM].
[783] *Id*. (emphasis added).
[784] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 128b (1951) [hereinafter 1951 MCM] (emphasis added).

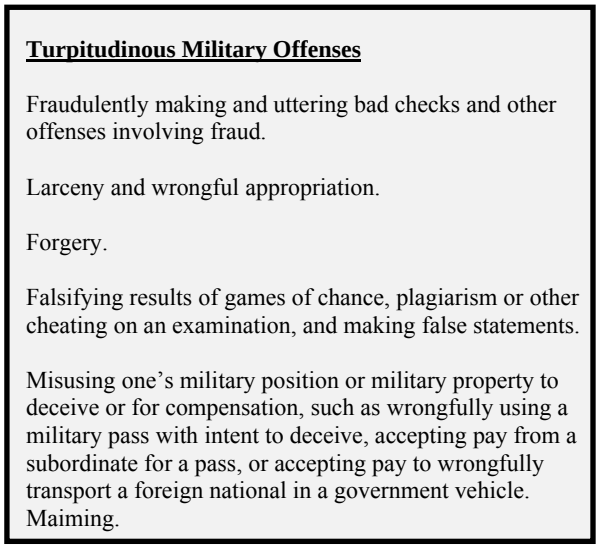


Fig. 5. Summary of Specific Military Offenses Involving Moral Turpitude

d. Interpretive Guidelines for Moral Turpitude Offenses in Other Governmental Agencies' Statutory and Regulatory Frameworks

i. The Social Security Administration

After the Second World War, Social Security Administration (SSA) had its own COS determination for benefit eligibility that was similar, and, in some cases, identical to VA's evaluation.[785] On December 31, 1956, SSA abolished the distinction finding all former servicemembers eligible for benefits "without regard to the character of the discharge the serviceman received for service after that date."[786] In cases falling within the window of the post-War period and 1957, SSA did not use "moral turpitude" but rather elected to spell-out a limited list of offenses that

[785] Letter from Robert M. Ball, Commissioner of Social Security, to Hon. Charles E. Bennett, *in Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes before Subcomm. No. 3 of the Comm. on Armed Services, House of Representatives*, 92nd Cong. 1st Sess., at 6010–11 (June 2, 3, 7, 8 and July 7, 1971) [hereinafter Ball Letter].
[786] *Id*. at 6010.

ostensibly fell within this category: "a discharge was given by reason of a civilian court for[:] treason, sabotage, espionage, murder, rape, arson, burglary, kidnapping, assault with intent to kill, assault with a dangerous weapon[,] or an attempt to commit any of these crimes."[787]

For SSA, an undesirable discharge for different offenses would still render a serviceman eligible for federal benefits. Under the rules, while a bad-conduct discharge from a General Court-Martial precluded Social Security credit, "If a bad conduct discharge was issued as a result of a special court-martial social security credit would be denied for the service only if the same rule that applies to civil courts applies."[788] An undesirable discharge also fell under the same offense-based provision.[789] Apart from this, the SSA also denied benefits for a discharge that stemmed from desertion, an officer's resignation for the good of the service, or certain behaviors of a conscientious objector.[790] Why VA regulations did not adopt the same clear guidance for the same sort of determination is unknown. However, the above list provides a good idea of the nature of specific offenses considered turpitudinous for the purpose COS determinations.

ii. Department of Justice and the Board of Immigration Appeals

Since 1891, U.S. immigration laws have contained provisions making aliens deportable based on a conviction of a crime involving "moral turpitude."[791] The 1917 *Immigration Act*, which forms the basis of the current statute, with minor exception, explains:

> An alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution for a year or more.[792]

---

[787] *Id*. at 6011.
[788] *Id*.
[789] *Id*.
[790] *Id*.
[791] Moore, *supra* note 721, at 814.
[792] Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889 (1917).

The statutes, however, never defined what constituted a crime of moral turpitude, raising serious concerns that judges would apply inconsistent and subjective standards.[793] In 1914, the Second Circuit Court of Appeals developed a standard known as the "categorical approach" to moral turpitude to prevent immigration judges from re-litigating a conviction by examining its underlying facts.[794] Under this rule, "the inherent nature of the crime as defined by statute and interpreted by the courts as limited and described by the record of conviction . . . determines whether the offense is one involving moral turpitude."[795]

On occasion, the Supreme Court has addressed cases which involve this approach, any time where Congress has vaguely defined a criminal offense that could have entirely different meanings within the states. This has occurred where a statute defined the crime of "burglary" for the purpose of considering a prior offense as a sentencing enhancement.[796] The Supreme Court's opinions apply in construing moral turpitude provisions of the *Immigration and Nationality Act*. Importantly, *Jordan v. De George*, addressed the Board of Immigration Appeals's (BIA's) application of the "moral turpitude" standard to a fraud offense, upholding the categorical approach.[797] While *De George* definitively resolves the issue of whether fraud offenses categorically involve moral turpitude, the Court has not addressed the full range of other categorical offenses. For offenses that are not so easily categorized immigration judges and the federal courts apply the "minimum conduct" test to see whether moral turpitude exists under "the least culpable conduct

---

[793] *See, e.g.*, De Leon-Reynoso v. Ashcroft, 293F.3d 633, 635 (3d Cir. 2002) ("The term 'moral turpitude' defies a precise definition."); Moore, *supra* note 721, at 815 (citing the 1st and 9th Circuits' divergent interpretations of whether accessories after the fact commit crimes of moral turpitude as an example of circuit splits among circuit courts of appeal). In *Jordan v. De Gorge*, Justice Jackson raised these concerns over the standard:

> How should we ascertain the moral sentiments of masses of persons on any better basis than a guess? . . . . How many aliens have been deported who would not have been had some other judge heard their case, and vice versa, we may only guess. That is not government by law.

341 U.S. 223, 237–40 (1951) (Jackson, J., dissenting).
[794] United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d. Cir. 1914).
[795] Matter of Short, 20 I. & N. Dec. 136, 137 (B.I.A. 1989).
[796] Taylor v. United States, 459 U.S. 575, 588 (1990).
[797] 341 U.S. 223 (1951).

necessary to sustain a conviction."[798] "Generally, a statute that encompasses both acts that do and do not involve moral turpitude cannot be the basis of a removability determination under the categorical approach."[799]

Nearly a century of immigration cases applying the categorical analysis for moral turpitude have defined the general contours of qualifying crimes as ones "which involve evil or malicious intent or inherent depravity; intentional or reckless behavior which risks or causes great bodily harm; theft with intent to permanently deprive the owner; and crimes involving the intent to defraud."[800] Drawing on these cases, scholars have identified different categories of turpitudinous conduct with examples of contextual situations that differentiate related offenses. Their findings are displayed in Figure 6, below:

Categories of Moral Turpitude Crimes in the Immigration Context

General Nature	Qualifying Crimes	Recognized Exceptions
Crimes Against the Person	When Malicious Intent is an Element: Murder, Voluntary Manslaughter, Kidnapping, Assault w/Intent to Kill, Rob, or Rape	Not : Involuntary Manslaughter, Simple Assault, or Attempted Suicide
Sexual Offenses	Aggravated in Nature: Rape, Sexual Misconduct with Children, Prostitution	Not: Vagrancy Charged in Lieu of Prostitution, Maintaining a Nuisance, or Fornication
Crimes Against Property	Intent to Deprive, Defraud, or Destroy; Blackmail, Forgery, Robbery, Burglary, Larceny, Extortion, Embezzlement, Malicious Destruction of Property	Not: Unlawful Entry or Damaging Private Property
Crimes Against Government	Counterfeiting, Perjury, Willful Tax Evasion, Bribery, and Impersonating a Government Official	Not: Escape From Prison, Failure to Report for Induction, or Desertion; No Regulatory Violations Like Gambling
Crimes Involving Fraud	All such crimes. *Jordan v. De George.*	NONE
Weapons Violations	When committed with a malicious intent: Assault with a deadly weapon, even if only reckless	Not when the crime is committed passively, such as carrying a concealed weapon

Fig. 6[801]

[798] McGuire, *supra* note 29, at 610.
[799] Padilla v. Gonzales, 397 F.3d 1016, 1019 (7th Cir. 2005).
[800] Hon. Dana Leigh Marks & Hon. Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, 38 FORDHAM URB. L.J. 91, 101–02 (2011).
[801] Fullerton & Kinigstein, *supra* note 716, at 501–03 (summarizing categories and respective categories).

Interestingly, desertion in the military context has been excluded out as a crime of moral turpitude in the immigration courts on the basis that it is not "commonly regarded as a manifestation of personal depravity or baseness."[802] Over the years, the BIA and federal appellate courts have analyzed court-martial convictions and underlying purely military crimes,[803] most recently concluding that a court-martial conviction of Article 120 for Carnal Knowledge constitutes a crime of moral turpitude.[804]

iii. The Department of Justice's Sea Change in the Analysis of Moral Turpitude

Over time, the immigration courts developed different approaches to the categorical analysis and the minimum conduct test, spelling-out rules for when the adjudicator is permitted, if at all, to look beyond the charging instrument or the record of conviction.[805] In 2008, Attorney General Michael Mukasey certified a case, *Matter of Silva-Trevino*, to his level and created a three-part test to standardize the analysis of the BIA's moral turpitude analyses.[806] The problem appeared to be the fact that courts would hypothesize unrealistic law-school type fact patterns in an effort to show when a crime appearing to be turpitudinous still would not be under the minimum conduct standard.[807] In rejection of courts that would use "imagination" to identify behavior that would not involve

---

[802] Matter of S.B., 4 I. & N. Dec. 682, 683 (1952) (addressing a General Court-Martial conviction for desertion "with the intent not to return" that resulted in a DD and five years confinement). *Compare with* United States v. Moore, 18 C.M.R. 311, 319–20 (C.M.A. 1955) (finding that, in the military context, desertion would be turpitudinous if committed during a time of national peril). The two findings seem consistent on the basis that the immigration court explicitly found that the alien's case did not involve desertion from combat. Matter of S.B., 4 I. & N. Dec. at 682–83.

[803] The earliest immigration case dates back to the 1935 case of *The Matter of W.A.S.* In the Matter of W, 1 I. & N. Dec. 485 (B.I.A. 1943). For a description of trends over time, see generally Ira L. Frank, *Deportation of Alien Military Personnel*, 13 U. HAW. L. REV. 111, 124–35 (1991); U.S. DEP'T OF JUSTICE G.C. OP. NO. 98-16, 1998 WL 1806687 (Nov. 24, 1998).

[804] Matter of Rivera-Valencia, 24 I. & N. Dec. 484 (B.I.A. 2008).

[805] McGuire, *supra* note 703, at 610.

[806] 24 I. & N. Dec. 687 (A.G. 2008).

[807] In the *Silva-Trevino* case, the BIA hypothesized the following fact-pattern to determine that the crime of non-intrusive sexual touching under the *Texas Penal Code* could be committed in a nonturpitudinous manner: "[A] twenty-year-old woman dancing suggestively with a male younger than seventeen, who represented himself as older, could be liable under the statute." McGuire, *supra* note 703, at 615.

moral turpitude even though it met the statutory elements,[808] the new test demands a "realistic probability" rather than a "theoretical possibility" of nonturpitudinous conduct under the statute forming the basis of the conviction.[809] For practical purposes, this revised test requires the alien to "point to his own case or other cases in which a person was convicted without proof of the statutory element that evidences moral turpitude."[810] If ambiguity still results, the judge may then consult "evidence beyond the formal record of conviction."[811]

Despite widespread recognition of serious gaps in VA's existing framework for adjudicating COS determinations based on offenses that potentially involve moral turpitude, military law provisions and decisional frameworks adopted within other federal agencies offer important bases for improving the quality of evidence presented by the claimant and the quality of analysis by the regional office adjudicator and Veterans Law Judges. The Department of Justice's new standards are particularly valuable because of a recent CAVC decision that adopted a similar basic approach.

Although the BVA and CAVC have not directly applied BIA and the Attorney General's moral turpitude cases as such, the VA General Counsel cited immigration cases and *De George* in its precedent opinion on moral turpitude[812] and cases suggest that the categorical approach withstands scrutiny under VA's COS evaluation. In the nonprecedential *Manuel v. Shinseki* decision, the BVA initially denied benefits on the basis of moral turpitude for a former servicemember who had been convicted in Tennessee for Burglary. The Board concluded "The appellant was discharged from the service [administratively under other than honorable conditions] because of his felony convictions and, as such, his discharge is considered to have been under dishonorable conditions."[813] The CAVC remanded because "[m]erely stating that the conviction was a felony is insufficient to support the conclusion that it was also a crime of moral turpitude."[814] A satisfactory analysis, instead,

---

[808] *Silva-Trevino*, 24 I. & N. Dec. at 708.
[809] *Id*. at 690.
[810] McGuire, *supra* note 703, at 625.
[811] *Silva-Trevino*, 24 I. & N. Dec. at 690.
[812] Op. G.C. 6-87, *supra* note 694, at 2–4.
[813] Manuel v. Shinseki, 2009 WL 3401421, at *1 (Vet. App. Oct. 23, 2009) (unpublished disposition) (citing Record).
[814] *Id*.

would require consideration of "the circumstantial and factual nature of the burglary."[815]

To resolve the issue, the Board conducted the following analysis:

> Moral turpitude is not defined in 38 C.F.R. § 3.12(d), nor has it been defined in common law applying and interpreting the regulation. *Black's Law Dictionary* offers two definitions for moral turpitude. The first defines the term as "conduct that is contrary to justice, honesty, or morality." . . . . The second, which *Black's* states is applicable to military law, simply defines moral turpitude as "any conduct for which the applicable punishment is a dishonorable discharge or confinement not less than one year." . . . . Even without knowing the surrounding circumstances, the Board is comfortable labeling any second degree burglary conviction as a crime of moral turpitude. Breaking into a home with the intent to commit a felony therein certainly meets the first *Black's* definition of conduct that is contrary to justice, honesty, or morality.[816]

The CAVC upheld this categorical approach to the burglary convictions observing that, even though the Board "did not determine that the crime he was convicted of involved moral turpitude based on the specific facts of his crimes," the Board sufficiently permitted judicial review by explaining "why burglary [as charged by the State of Tennessee] was a crime of moral turpitude."[817] This approach makes decades of BIA opinions useful touchstones in the task of evaluating specific crimes, especially when they relate to purely military offenses with no civilian counterparts. Recognizing that every BCD since 1950 represents a trial that has involved either a military judge or panel, rules of evidence, and representation by a licensed attorney, the categorical approach is a method of analysis that can eliminate some of the major conundrums involving disparate application of the same rules. It can not only account for developments in crimes over time, but it eliminates

---

[815] *Id*.
[816] *Manuel* v. Shinseki, 2012 WL 86713, at *2 (Vet. App. Jan. 12, 2012) (unpublished disposition).
[817] *Id*. at *2.

other serious concerns that would limit the application of the standard to individual cases.

As explored in the next Part, contrary to established civilian precedents that may offer additional help to adjudicators addressing offenses of moral turpitude, few sources of similar assistance exist for those considering the regulatory bar for willful and persistent misconduct.

2. Willful and Persistent Misconduct Under 38 C.F.R. § 3.12(d)(4)

a. VA's Current Regulatory Standards for Offenses Involving Willful and Persistent Misconduct

The regulatory "character of discharge" bar for willful and persistent misconduct appearing in 38 C.F.R. § 3.12(d)(4) states that a discharge is issued under dishonorable conditions if it involves "willful and persistent misconduct," including OTH discharges "issued because of willful and persistent misconduct."[818] The exception to this rule is also codified: "A discharge because of a minor offense, will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious."[819] Much like offenses involving moral turpitude, the concept of willful and persistent misconduct "lends itself to . . . a wide variety of subjective interpretations."[820] As mentioned previously, CAVC judges have described the standard as a "murky statutory and regulatory framework."[821] Unlike offenses involving moral turpitude, there are few if any analogous civilian provisions. The *M21-1MR* quotes the regulatory language, and adds only that "[a] one time offense or a technical violation of police regulations or ordinances does not necessarily constitute willful and persistent misconduct."[822] Attorneys who represent veterans have observed this as the most common basis for denial of benefits under the COS process and further

---

[818] 38 C.F.R. § 3.12(d)(4) (2012).
[819] *Id.*
[820] JARVI, *supra* note 696, at 6.
[821] Trilles v. West, 13 Vet. App. 314, 330 (2000) (Kramer, J. & Steinberg, J., concurring).
[822] M21-MR, *supra* note 77, pt. III, subpart V, ch. 1, § B, p. 1-B-16 (2012); *see also* 38 C.F.R. § 3.1(n)(2).

note that the provision has garnered the greatest amount of review by the appellate bodies.[823]

Addressing a perceived deferential view of the CAVC toward adjudicators' denials in these cases,[824] one critic speculates that the moral turpitude bar is a default position for adjudicators when offenders have been eliminated from the service in a manner that could potentially avail them of the willful and persistent misconduct bar's "single minor offense" exception.[825] The facial similarity between patterns of misconduct as a basis for involuntary separation from the military and willful and persistent misconduct has caused others to believe that one discharge characterization naturally plays into the other.[826] Adjudicators, however, deny that they are searching for any bar to benefits upon which to deny a claim in COS reviews, explaining, instead, that they consider offenses under any applicable bars raised by the facts of individual cases.[827] Overall, the lack of any uniform guidance regarding what constitutes willful and persistent misconduct raises as many, if not more, questions than the bar for moral turpitude.[828]

Despite a lack of specific definitions, the above *Code of Federal Regulations* provisions, including the exception, contain at least six significant elements and some degree of guidance.

---

[823] JARVI, *supra* note 696, at 6 ("It is the exception [to benefits] which has been used by the VA and challenged by VA claimants most frequently.").
[824] *Id*. ("In most of the challenges that reached the CAVC, the Court has trotted out a canned approval of the VA factual conclusion.").
[825] *Id*. at 5.
[826] *See, e.g.*, AR 635-200, *supra* note 137, ¶ 14-12*b*, at 102, permits involuntary separation from the Army based on:

> A pattern of misconduct consisting of . . . (1) Discreditable involvement with civil or military authorities [or] (2) [d]iscreditable conduct and conduct prejudicial to good order and discipline including conduct violating the accepted standards of personal conduct found in the UCMJ, Army regulations, the civil law, and time-honored customs and traditions of the Army;

Picard, *supra* note 21 (criticizing the VA for barring PTSD-afflicted servicemembers from obtaining health care benefits on the basis of OTH characterizations from "patterns of misconduct discharges").
[827] Mazar Interview, *supra* note 270.
[828] STARR ET AL., *supra* note 10, at 177 (discussing why the definition for willful and persistent misconduct is ultimately subjective and individually determined by the adjudicator in each case).

i. Willful

Under 38 C.F.R. § 3.1(n), the term "willful" indicates "deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences."[829] The provision goes further to note that "[m]ere technical violations of police regulations or ordinances will not per se constitute willful misconduct."[830] Willful, however, does not necessarily require a specific intent to commit an offense under this framework. While general intent offenses would certainly fall within its definition, negligent ones seemingly would not.

ii. "And"

The use of the connector "and" in this provision indicates that even the most sinister and intentional act will not satisfy the entire clause unless it also meets the independent requirement for persistence.

iii. Persistent

Persistent misconduct is misconduct that either continues as an ongoing offense over a period of time or conduct that recurs on more than one occasion after concluding. While an isolated, singular event would not meet the requirement for persistence, a period of absence that continues for successive days, on the other hand, would qualify. On this view, in the CAVC *Winter v. Principi* opinion, AWOL for a period of 32 days meets the definition of persistent misconduct, even when it is accompanied by an absence of any other misconduct over 176 days of total service.[831] Multiple BVA decisions have chosen to evaluate the aggregate days with the *Winter* case in mind, or by calculating the servicemember's AWOL term as a percentage of the days he or she served prior to separation.[832] While at least one Veterans Law Judge

---

[829] 38 C.F.R. § 3.1(n)(1), (2) (2012). As noted above, the *M21-1MR* uses the latter language in describing "willful and persistent misconduct" under the regulatory bar, M21-MR, *supra* note 77, pt. III, subpt. V, ch. 1, § B, p. 1-B-16 (2012). This suggests these definitions should apply in that context as well.

[830] 38 C.F.R. § 3.1(n)(1), (2) (2012).

[831] Winter v. Principi, 4 Vet. App. 29, 32 (1993) (commenting that the AWOL represented more than 18% of the claimant's total service).

[832] *See, e.g.*, *id.* (finding 32 days of AWOL, which constituted 18% of the claimant's total service, to be "willful and persistent"); Struck v. Brown, 9 Vet. App. 145, 153 (1996),

viewed each single day of AWOL as a persistent offense,[833] and others have cited a general rule that "AWOL cannot constitute a minor offense for purposes of willful and persistent misconduct,"[834] more opinions have recognized the fact that only an AWOL of 30 days or more qualifies as a serious offense, suggesting that shorter AWOL periods constitute minor offenses susceptible to the minor offense exception.[835] On this basis, a BVA decision vacated the denial of benefits based on misconduct that included a four-day AWOL period during a two year term of service.[836] Ultimately, AWOL offenses involving more than 30 days are considered persistent and serious for the purpose of the regulatory bar for willful and persistent misconduct.

iv. Misconduct

The term misconduct is measurably different from 38 C.F.R 3.12(d)(3)'s "offense" terminology. Misconduct includes unacceptable behaviors that do not rise to the level of criminal offenses, such as

---

abrogated on other grounds as recognized in Gardner v. Shinseki, 22 Vet. App. 415, 421 n.5 (2009) (finding two and a half months of AWOL out of nine months of service, or about 27%, to be willful and persistent, in part because it was terminated by apprehension); Title Redacted by Agency, Bd. Vet. App. 0108534 (Mar. 22, 2001) (finding 117 days of AWOL, which constituted 5.8% of the claimant's service, not to be willful and persistent); Title Redacted by Agency, 08-07 337, Bd. Vet. App. 1019474 (May 26, 2010) (citing *Winter* and using percentage equivalents from reported cases as touchstones, including "over 27 percent AWOL" and "over 18 percent AWOL").

[833] Title Redacted by Agency, 00-23 239, Bd. Vet. App. 0118087 (Sept. 11, 2001) ("[B]ecause he spent 45 days of his service time in an AWOL status, the offense essentially occurred 45 times, i.e. once for each day he was gone, it is persistent.").

[834] Title Redacted by Agency, 08-00 139, Bd. Vet. App. 1200122 (Jan. 4, 2012).

[835] *See, e.g.*, *Winter*, 4 Vet. App. at 32:

> The BVA correctly determined that the UCMJ views AWOL in excess of 30 days as a severe offense, punishable by confinement for up to one year and the issuance of either a bad conduct or dishonorable discharge . . . . Consequently, the BVA's determination that this veteran's misconduct was severe, and by analogy, persistent because he spent one fifth of his time in AWOL status is fully supported by the record.

[836] Title Redacted by Agency, 04-07 245A, Bd. Vet. App. 0713630 (May 9, 2007) (finding the offense of four days AWOL minor, in addition to an incident of underage drinking and nonjudicial punishment for failure to obey a lawful order, where the offenses were "widely separated" by time and, within the veteran's nearly four years of service, he had "several decorations and medals"). These circumstances rendered his other time in service "otherwise meritorious" and sufficient to obtain benefits. *Id*.

plagiarism, deceptive conduct, or the use of profanity in public places.[837] At the most general level, while offenses are most certainly felonies or misdemeanors, misconduct can involve behavior that is criminal or otherwise improper.[838] In many instances, for example, "serious incidents of misconduct [often] do not resemble the offenses that have been defined by civil and criminal law."[839]

v. Minor

Normally, in the military setting, in order to form the basis for involuntary discharge, a single act of misconduct must be serious, as opposed to minor, in nature.[840] By their nature, minor offenses are less severe. No offense involving moral turpitude can be a minor offense.[841] In the 1990s, a number of VA opinions involving AWOL periods clarified the general rule that an offense which interferes with or precludes the performance of military duties cannot be a minor offense under this exception.[842] While a two-day AWOL can be distinguished from a two-month period of absence, and any absence 30 days or more can be viewed as serious by virtue of the *Manual for Courts-Martial* provisions, there is a legitimate question over the point at which an absence rises to the level of interference with or preclusion of duty.[843]

---

[837] *See, e.g.*, Jennifer Kulunych, *Intent to Deceive: Mental State and Scienter in the New Uniform Federal Definition of Scientific Misconduct*, 1998 STAN. TECH. L. REV. 2, ¶ 23 (1998).
[838] *See, e.g.*, THE LAW DICTIONARY, FEATURING BLACK'S LAW DICTIONARY FREE ONLINE LEGAL DICTIONARY (2d ed.), http://thelawdictionary.org (last visited Oct. 28, 2012).
[839] Kulunych, *supra* note 837, ¶ 23, at 2.
[840] AR 635-200, *supra* note 137, ¶ 14-12*c* (considering a single offense serious enough to warrant involuntary separation when "a punitive discharge is, or would be, authorized for the same or a closely related offense under the MCM," whether the offense is civilian or military in nature).
[841] *Supra* Part IX.B.1 (discussing the nuances of moral turpitude offenses).
[842] *See, e.g.*, Winter v. Principi, 4 Vet. App. 29, 32 (1993); Cropper v. Brown, 6 Vet. App. 450, 452, 453 (1994); Struck v. Brown, 9 Vet. App. 145, 153 (1996); Stringham v. Brown, 8 Vet. App. 445, 448 (1996).
[843] *Supra* notes 835–36 (discussing nuances of AWOL periods below 30 days).

vi. Honest, Faithful, and Meritorious Service

The notion of honest, faithful, and meritorious service has not been defined explicitly by VA regulatory provisions.[844] The phrase appears to have a combined meaning, rather than separate interpretations for each of the three terms, hinging mainly on the concept of "meritorious" duty rather than honest or faithful service.[845] The most basic question is whether the servicemember performed above the duty expected in a manner worthy of praise, reward, or esteem.[846] As noted in one BVA opinion, which acknowledged an applicant's 24 months of service, including service in Vietnam, but refused to find meritorious service: the "duty did not rise above the level of one who did his job as required, which the Board does not equate to meritorious, that is, service deserving praise or reward."[847] As an alternative to *Black's Law Dictionary*, an allied provision in 38 C.F.R. § 3.12(c) provides additional context for evaluating the nature of this exception because it too mentions service that is "of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation."[848]

In determining whether there are "compelling circumstances" for a qualifying AWOL under the statutory bar, the subsection calls for the adjudicator to analyze the servicemember's performance of duty, independent of the dates of the offensive behavior that led to the discharge.[849] The provision suggests that honest, faithful, and meritorious service provides some benefit to the Nation and the military mission.[850] Such service can be demonstrated through awards, positive counseling statements, efficiency reports indicating improvement or contributions, etc.[851] However, when reviewed in accordance with the regulatory bar, honest, faithful and meritorious service can easily be

---

[844] *See, e.g.*, Title Redacted by Agency, 08-00 139, Bd. Vet. App. 1200122 (Jan. 4, 2012) (observing that, for purposes of the exception to the regulatory bar for willful and persistent misconduct, "the term 'meritorious' is not defined by regulation").
[845] *See, e.g.*, Title Redacted by Agency, 03-09 368, Bd. Vet. App. (June 19, 2009) (refusing to address the other elements of the exception after negating the element of meritorious duty).
[846] *Id*. (relying upon the 9th Edition of *Black's Law Dictionary* to define the term "meritorious").
[847] *Id*.
[848] 38 C.F.R. § 3.12(c)(6)(i) (2012) (pertaining to "compelling circumstances" for AWOLS over 180 days that resulted in an OTH characterization).
[849] *Id*.
[850] *Id*.
[851] *See supra* Part VIII.E.2 (discussing proof of compelling circumstances).

negated. For instance, in one BVA decision, a letter from the commander indicating that discharge would "improve morale and discipline within the unit," was enough to foreclose this exception, since continued service would have been a detriment to the military.[852] In another case, a single incident of passing a bad check at the Post Exchange resulted in the determination that an applicant's service was not sufficiently honest to warrant the exception.[853]

b. Interpretative Guidelines for "Willful and Persistent Misconduct" from Regional Offices' Early Standards

Continued examination of trends and "general rules"[854] within VA regional offices following the passage of the *1944 SRA*, reveals some guidance regarding the interpretation of willful and persistent misconduct. Notably, adjudicators had a strict requirement that misconduct be both willful and persistent to the point where they would refuse to apply the bar where the military tried a servicemember on several offenses at trial but none involved an element of willfulness.[855] Adjudicators in the '50s further refused to apply the bar when a servicemember's discharge was based upon one minor offense, regardless of whether the offense was willful or not.[856] At a time when some servicemembers had numerous courts-martial convictions on their records, and some had earned honorable restoration to duty, adjudicators looked for a series of convictions prior to the one that formed the basis of a discharge. If an offender had prior convictions followed by a BCD for new misconduct, adjudicators viewed the behavior as persistent and "inferred" willfulness even if none of the offenses had an intent element.[857] None of these historical standards seems to conflict with the CAVC's precedential opinions, and they may assist in modern interpretations.

---

[852] Title Redacted by Agency, 08-19 203, Bd. Vet. App. 1015167 (Apr. 26, 2010).
[853] Title Redacted by Agency, 93-08 285, Bd. Vet. App. 9502246 (1995). The Board also considered a statement by the claimant's former commanding officer that his overall conduct was "less than model," and gave this statement considerable weight as it was uncontradicted. Like so many cases reviewed in this article, this shows the importance of helping a servicemember create a record to his benefit *before* he is discharged.
[854] Blake, *supra* note 49, at 5, 22.
[855] *Id*. at 8.
[856] *Id*.
[857] *Id*. at 8, 22.

c. Interpretive Guidelines for Willful and Persistent Misconduct in Military Settings

i. Military Law Interpretations of Willfulness

At the most general level, the military has defined the element of willfulness as "intentionally or on purpose," as evident in its panel instructions.[858] However, the analysis is not as simple. Willfulness can have different contextual applications depending on the nature of a military crime. Sometimes, as in the case of *UCMJ* Article 109's offense of wasting or spoiling nonmilitary real property, willfulness is on a similar plane as recklessness, which is defined there as "a degree of carelessness greater than simple negligence [and] a negligent (act) (failure to act) with a gross, deliberate, or wanton disregard for the foreseeable results to the property of others."[859] For *UCMJ* Article 111's reckless and wanton operation of a vehicle, aircraft, or vessel, "recklessness and wantonness," are further defined as:

> [A] negligent (act) (failure to act) combined with a gross or deliberate disregard for the foreseeable results to others. "Recklessness" means that the accused's manner of operation or control of the (vehicle) (aircraft) (vessel) was, under all of the circumstances, of such a heedless nature that made it actually or imminently dangerous to the occupants or to the rights or safety of (others) (another).[860]

As explained in the context of *UCMJ* Article 134's offense of reckless endangerment, willfulness is of a more aggravating quality than wantonness: "'Wanton' includes recklessness, but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense."[861]

In cases involving willful disobedience of an order, the disobedience is willful when there is "an intentional defiance of authority."[862] Yet, for

---

[858] *See, e.g.*, U.S. DEP'T OF ARMY, PAM. 27-29 MILITARY JUDGES BENCHBOOK, instr. 3-32-2*d*.n.7 (10 Jan. 2010) (addressing the element of willfulness for the crime of damage, destruction, or loss of military property under Article 108).
[859] *Id*. instr. 3-33-1*d*.n.2.
[860] *Id*. instr. 3-35-1*d*.n.10.
[861] *Id*. instr. 3-100A-1*d*.n.1.
[862] *Id*. instr. 3-14-2*d*.

dereliction in the performance of duties under Article 92, *UCMJ*, willfulness means that "[t]he accused actually knew of the assigned (duty) (duties)."[863] Importantly, simple negligence cannot meet the element of willfulness. "'Simple negligence' is the absence of due care. The law requires everyone at all times to demonstrate care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what 'due care' means."[864] Thus, one cannot fail to act willfully if she reasonably should have known of the duty to act in the context of dereliction of duty.[865] These distinctions are useful when evaluating purely military offenses to determine whether the bar for willful and persistent misconduct applies.

ii. Military Law's Interpretations of Minor Misconduct

Historically, within the military, certain provisions have required courts to consider whether a military offense is minor or serious.[866] This occurs, for example, where a servicemember receives an Article 15 or Captain's Mast (nonjudicial punishment) and is later prosecuted at court-martial for the same offense(s) that formed the basis of the nonjudicial punishment. In *Mittendorf v. Henry*, the Supreme Court had occasion to define minor misconduct for the purpose of military punishment as well, in a due process challenge to the absence of legal representation at summary courts-martial and nonjudicial punishment proceedings.[867] The Court concluded that attorney representation was not required at these administrative proceedings because they were designed for only the most minor offenses.[868] Minor misconduct is generally defined by military courts and the Supreme Court as "misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by a summary court-martial."[869]

In 1951, the *Manual for Courts-Martial* directed commanders and courts to evaluate the "nature [of the offense], the time and place of its

---

[863] *Id*. 3-16-4*c*.n.2.
[864] *Id*. instr. 3-14-1*d*.n.4.
[865] *Id*. instr. 3-16-4*c*.n.3.
[866] *See generally* William R. Salisbury, *Nonjudicial Punishment Under Article 15 of the Uniform Code of Military Justice: Congressional Precept and Military Practice*, 19 SAN DIEGO L. REV. 839 (1982).
[867] 425 U.S. 25 (1976).
[868] *Id*. at 31–32.
[869] 1949 MCM, *supra* note 782, ¶ 118.

commission, and the person committing it" to determine how serious the misconduct was to determine whether it was minor or serious.[870] As examples, "*Escape from confinement*, *willful disobedience of a noncommissioned officer or petty officer*, and *protracted absence without leave* are offenses which are more serious than the average offense tried by summary courts-martial and should not ordinarily be treated as minor."[871] In interpreting the evidentiary rule on impeachment, the military's highest court was also "willing to equate" civilian felonies to serious military convictions "by court-martial for an offense for which confinement in excess of one year, or a dishonorable discharge, [was] imposable." The court further defined *prolonged periods of AWOL* and *outright desertion* as examples of such serious offenses.[872]

iii. Military Law's Conceptions of Honest, Faithful, and Meritorious Service

Notably, the military considers service "honorable" even when a service member has departed from required standards on occasion; there is leniency for a few incidents or infractions, often even those punished nonjudicially.[873] Precisely where the cutoff falls for an entire period of service is questionable. Within the combat arms, for example, commanders have desired those troops who stand their ground and who are not easily bullied. Marine Lieutenant General Chesty Puller often asked to visit the brig when touring bases because there, he would find the "real Marines."[874] Often, the best fighters who won the toughest battles on the front lines often encountered disciplinary problems in garrison environments:

> From the Second World War to the Vietnam War, elite forces which depended upon recruiting the most aggressive men often targeted "cowboys," ex-borstal

[870] 1951 MCM, *supra* note 784, ¶ 128b.
[871] *Id*. (emphasis added).
[872] *Moore*, 18 C.M.R. at 317 & 319 (emphasis added).
[873] STARR ET AL., *supra* note 10, at 169 ("If a soldier has performed 'proficiently,' he is likely to receive an Honorable Discharge even if he has one or two minor violations of discipline on his record.").
[874] Don Catherall, *Systemic Therapy with Families of U.S. Marines*, *in* FAMILIES UNDER FIRE 99, 103 (R. Blaine Everson & Charles R. Figley eds., 2011) (citing General Puller and describing how some misconduct "must be tolerated [in the combat arms] because it is an unfortunate side effect of maintaining a proper level of aggression" in military organizations).

> boys, and men who had prison records, and oral accounts acknowledged that "the guy who gives you the most trouble in peacetime" was the best in battle.[875]

Because of the nature of combat operations, and their connection to aggressive, violent behavior in non-combat environments,[876] a certain degree of lenity should rightfully weigh in the servicemember's favor during the COS process, much like mitigation at sentencing in a court-martial. History and military tradition embody as much.[877]

3. Some Concluding Insights on Contentious Regulatory Bars

The above analyses of the regulatory bars for moral turpitude and willful and persistent misconduct reveal a complex interaction between civilian and military provisions. While some may question whether any good can come from two Departments with entirely different regulations and definitions related to misconduct, there is much to be gained from a comprehensive understanding of the historical development of the military justice system and the laws that resulted from it. The sharing of information and ideas can improve the adjudication and review of COS determinations, as would additional specific guidelines for VA personnel. Until such time, the following evaluative steps are recommended to address crimes of moral turpitude:

If the offense relates to a court-conviction, determine whether any of the elements of the offense involve fraud. If so, it is a crime of moral turpitude. If not, check on the maximum penalties for the offense to see whether it is a felony. If the case is military, check the Maximum Punishment Chart for the relevant timeframe. This will not be dispositive, but, in accordance with VA General Counsel Opinion 6-87, it would create a presumption of moral turpitude. Next, look to the date of the offense and the specific statute within that jurisdiction at the time. Conduct a categorical analysis of the offense based on the record of conviction and the elements of the offense to determine whether the crime is one for which an offender could be convicted without having

---

[875] BOURKE, *supra* note 2, at 113–14 (internal citations omitted).

[876] *See, e.g.*, *id*. at 352 (observing how combat "skills *dis*equipped men for life outside war zones"); *supra* Part I & *infra* app. I (discussing the contribution of combat PTSD to later violent behavior).

[877] *See generally* Seamone, *supra* note 2 (discussing historical precedents for providing a second chance for combat-traumatized offenders to obtain treatment).

acted in a turpitudinous manner. Consider the three-part categorical analysis adopted by *Silva-Trevino* to examine the case further.

In the military context, determine whether charges relate to Conduct Unbecoming an Officer under Article 133, *UCMJ*, or Conduct Prejudicial to Good Order and Discipline in the Armed Forces under Article 134, *UCMJ*. If so, consult military law to determine whether the nature of the offense is one that has been deemed to be per se prejudicial. Also consider whether the offense involved discrediting of the officer's ability to lead, such as abuse of official position, or some public element of the offense that would cause the public to know of the misconduct in question.

For evaluations of military offenses that may involve willful and persistent misconduct, identify whether any of the variations on willful behavior are present. Also consult the military's standards on minor versus serious offenses to note distinctions in military offenses that might otherwise evade detection.

C. Discharge In Lieu of General Court-Martial (GCM) with an OTH Discharge

Enlisted servicemembers who receive an OTH discharge characterization pursuant to a discharge in lieu of a GCM are ineligible for most VA benefits based upon the period or periods of service in which the misconduct that forms the basis of the discharge in lieu of court-martial occurred.[878] Both the explicit text of this bar and unpublished decisions of the CAVC state that the discharge must be in lieu of GCM.[879] While most commanders and judge advocates will think this regulatory bar to benefits is easy to interpret and apply, there are two main reasons that such is not the case.

---

[878] 38 C.F.R. § 3.12(d)(1) (2012) ("A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions. (1) Acceptance of an undesirable discharge to escape trial by general court-martial."). OTH discharges were formerly known as "undesirable" discharges. *See* Part IX.A. Regulatorily-barred servicemembers remain eligible for VA health care for service-connected disabilities. *See* Pub. L. No. 95-126, § 2, 91 Stat. 1107 (1977), as amended by Pub. L. No. 102-40, tit. IV, § 402(d)(2), 105 Stat. 239 (1991).

[879] 38 C.F.R. § 3.12(d)(1); McDowell v. Shinseki, Slip Copy, 2011 WL 759667 (Table) (Vet. App.) (unpublished disposition); Bruce v. Shinseki, Slip Copy, 2010 WL 4879165 (Table) (Vet. App.) (unpublished disposition).

First, a number of VA benefits adjudicators are not familiar with the military justice system or its language.[880] While most commanders and judge advocates understand that a general court-martial does not exist until the referral of court-martial charges to a general court-martial,[881] VA benefits adjudicators may not know the legal significance of the various steps of the military justice system. Because discharges in lieu of court-martial may be granted prior to referral of court-martial charges,[882] many discharges in lieu of court-martial are granted prior to a court-martial being convened.[883] In other words, in many cases, a discharge in lieu of court-martial is granted prior to any level of court-martial being determined. A VA benefits adjudicator unfamiliar with the military justice system may look to irrelevant ancillary documents, such as subordinate commanders' recommendations or documents surrounding an investigation pursuant to Article 32, *UCMJ*,[884] in an attempt to determine the level of court-martial for which the discharge in lieu was granted.

Second, regardless of the VA adjudicator's experience, the documentation obtained in connection with a claim may be incomplete. Because a DD Form 214 typically does not indicate the level of court-martial for which a discharge in lieu of court-martial was granted, benefits adjudicators may have difficulty determining for which level of court-martial the discharge in lieu of court-martial was granted.

The non-precedential CAVC case of *Bruce v. Shinseki* illustrates this problem.[885] In October 2005, Mr. Bruce submitted a claim for VA benefits. He was denied benefits because of an "other than honorable discharge due to acceptance of an undesirable discharge to escape trial

---

[880] Mazar Interview, *supra* note 270.

[881] Court-martials are not convened, and therefore do not exist, until referral of charges. *See* MCM, *supra* note 136, R.C.M. 601. The preferral of a charge under the UCMJ is simply an allegation of an offense. Even if a general court-martial is permissible based on the maximum punishment available for a particular charge, competent commanders have "independent discretion to determine how charges will be disposed of. . . ." *See* MCM, *supra* note 136, R.C.M. 401. The level of a court-martial referral will always be reflected in block 14 of DD Form 458. DD Form 458, *supra* note 343.

[882] *See, e.g.*, AR 635-200, *supra* note 137.

[883] This assertion is based on MAJ John W. Brooker's and MAJ Evan R. Seamone's professional experience as judge advocates from 2003 to present.

[884] *See, e.g.*, U.S. Dep't. of Def., DD Form 457, Investigating Officer's Report (Aug. 1984).

[885] Bruce v. Shinseki, Slip Copy, 2010 WL 4879165 (Table) (Vet. App.) (unpublished disposition).

by court-martial under 38 C.F.R. [§] 3.12(d)(1)." Mr. Bruce appealed this denial all the way through the CAVC, arguing that a "'discharge in lieu of court-martial' is not the same thing as being discharged 'to escape trial by general court-martial' under § 3.12(d)(1)."[886] In this single judge, unpublished disposition, the CAVC judge, William A. Moorman, former TJAG of the United States Air Force, was unable to find the charge sheet in the record of proceedings before the court in order to find the level of court-martial. The record before the court included Mr. Bruce's DD Form 214, but did not include the DD Form 458, Charge Sheet, or any other documentation indicating the level of court-martial for which the discharge in lieu of court-martial was granted. This incomplete file led to a vacation of the benefits denial and a remand of case to the BVA, as the BVA "failed to give *any* statement of reasons or bases for its conclusion that the appellant's discharge was to avoid trial by *general* court-martial."[887]

While the VA claims appellate system appears to be handling the issue, practitioners should note that the most recent CAVC decision in this case, which did not settle the issue, occurred over six calendar years following Mr. Bruce's filing of his original claim for benefits.[888] If the commander and judge advocate who originally handled the case had indicated the applicability of this regulatory bar in all discharge documentation, both Mr. Bruce and VA could have saved considerable time, effort, and expense.

Accordingly, commanders and judge advocates should explicitly indicate when this regulatory bar to benefits should and should not apply.[889] They are in the best position to do so, as the application of the bar is completely dependent upon both command discretion and the timing of the decision to grant a discharge in lieu of court-martial. Additionally, defense attorneys should counsel their clients to maintain all documentation that would preclude the application of certain bars to VA benefits.

---

[886] *Id*.
[887] *Id*. at *2.
[888] Bruce v. Shinseki, 2012 WL 1825213 (Vet. App.) (unpublished decision) (remanding the case yet again, and requiring VA "to conduct an expedited record request within 6 months of the date of this filing, to include adding appropriate documentation of the search effort to the appellants file").
[889] Appendices L-2 and L-3 contains sample language that commanders and judge advocates can include in discharge in lieu of court-martial documentation to indicate to VA claims examiners whether or not this regulatory bar to benefits applies.

Additionally, VA claims examiners and benefits adjudicators who process cases that potentially involve the provisions of 38 C.F.R. § 3.12(d)(1) should immediately locate the DD Form 458, Charge Sheet, upon which the discharge in lieu of court-martial is based.[890] Block 14 will almost always indicate the level of court-martial to which the case was referred.[891] If Block 14 of DD Form 458 is not completed, and there is no other indication that a general court-martial convening authority (GCMCA) has referred a case to a general court-martial, 38 C.F.R. § 3.12(d)(1) should not apply, as the discharge is not in lieu of a GCM. If the case was not referred to GCM prior to the granting of the request for discharge in lieu of court-martial, the severity of the offense, the permissible level of court-martial, the maximum potential sentence, and other recommendations are all completely inapplicable, as the GCMCA has complete discretion to determine how to handle the case,[892] and chose to not refer the case to GCM prior to granting the discharge in lieu of court-martial.

To better ensure timely and accurate adjudication of VA claims, practitioners should use the applicable guidance found in the various appendices. Appendix L-2 is a sample approval form for a request for discharge in lieu of court-martial for use in certain cases.[893] It contains sample language that may better convey command intent to VA claims examiners and adjudicators. Appendix N is a sample DD Form 458, Charge Sheet, that instructs VA claims examiners, benefits adjudicators, and veterans' representatives where to find evidence of the level of court-martial referral.[894]

Practitioners should not forget that other statutory bars will trump 38 C.F.R. § 3.12(d)(1). For example, this regulatory bar is not applicable for commissioned officers, as officers who resign for good of the service are statutorily barred from receiving VA benefits.[895] Additionally, if a servicemember is given an OTH discharge for an AWOL of at least 180

---

[890] DD Form 458, *supra* note 343.
[891] *Id*.
[892] Even if a general court-martial is permissible based on the maximum punishment available for a particular charge, competent commanders have "independent discretion to determine how charges will be disposed of. . . ." *See* MCM, *supra* note 136, R.C.M. 401.
[893] *See infra* app. L-2.
[894] *See infra* app. N.
[895] 38 U.S.C. § 5303(a) (2006); *see also supra* pt. VIII.C.

continuous days, that servicemember may be statutorily barred from receiving VA benefits.[896]

Even if 38 C.F.R. § 3.12(d)(1) does not apply, practitioners must continue with the analysis to determine if another regulatory bar applies. For example, assume that a servicemember's request for discharge in lieu of court-martial for an AWOL of 40 days is granted prior to the case being referred to a GCM. While 38 C.F.R. § 3.12(d)(1) does not apply, as the discharge was not in lieu of a general court-martial, such misconduct could trigger 38 C.F.R. § 3.12(d)(4), the regulatory bar for willful and persistent misconduct.[897]

X. "Benefits at Discharge" Charts: Illusions of Objectivity

Shortly after the passage of the *1944 SRA*, a military attorney summarized a list of its new benefits and corresponding eligibility requirements.[898] Many would follow in his footsteps, eventually discussing the effects of discharge characterizations as they diversified over time and comparing VA benefits to military ones.[899] The updated charts now reflect additional entitlements from a host of agencies, including the Department of Agriculture, Labor, Commerce, Homeland Security (Immigration), the Social Security Administration, and the Office of Personnel Management.[900] Among all benefits, however, those from VA provide the most significant coverage of all from home loans, to health services, to college tuition.[901]

---

[896] 38 U.S.C. § 5303(a) (2006); *see also supra* pt. VIII.E.
[897] Winter v. Principi, 4 Vet. App. 29 (1993); *supra* notes 831–36 and accompanying text
[898] Fitzgibbons, *supra* note 641.
[899] *See, e.g.*, Blake, *supra* note 49, at 5, 7–8, 22 (summarizing trends in the '50s); Bednar, *supra* note 651, at 34–42 app. (depicting and discussing trends in the '60s); Brown, *supra* note 659, at 13, 13–15 (same); Ball Letter, *supra* note 785, at 6010–11, encl. (depicting trends current in the early '70s); Captain Charles E. Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 MIL. L. REV. 1, 66–71, app. D ("Veterans' Benefits'") (depicting and describing trends in the late '70s, and correcting errors in official Department of the Army benefits charts); U.S. DEP'T OF ARMY, FIELD MANUAL 7-21.13, THE SOLDIER'S GUIDE, at tbl. 7-5 (Feb. 2004) [hereinafter FM 7-21.13] (Veteran's Benefits and Discharge") (depicting standards in the 2000s).
[900] *See, e.g.*, FM 7-21.13, *supra* note 899, tbl.7-6, at 7-33 (summarizing "Other Federal Benefits and Discharge").
[901] *Id*. tbl.7-5 (focusing on VA benefits specifically).

As soon as the columns began to factor the new categories of discharge, problems emerged summarizing their nuances. The first attempt to document the COS process on VA benefits came from the Office of The Judge Advocate General of the Army's Military Affairs Division, in the form of the October 1, 1960 publication AGO 4870B, *Incidents at Discharge*.[902] This initial attempt referenced the COS requirement for case-by-case analysis of attendant circumstances by indicating "Eligible," accompanied by a footnote next to each determination involving the COS process, which clarified, "Subject to a review of the facts surrounding the discharge by the agency administering the benefit except in the case of death gratuities by the Administrator of Veterans Affairs."[903] Despite potential for confusion by suggesting a default determination of eligibility in these discretionary areas, the chart clearly differentiated among benefits for those who were "discharged for the good of the service," and those who were discharged with a BCD from a special court-martial as opposed to a general court-martial, which provided additional insights into the statutory and regulatory bars.[904]

Within eight years, by 1969, in an apparent attempt to improve the quality of information regarding VA benefits, the Army modified the chart with the publication of GTA 21-2-1, which switched to the acronym "T.B.D.," revealing that the eligibility decision was "to be determined" by the reviewing agency rather than a presumption of eligibility.[905] The GTA 21-2-1 also attempted to describe statutory and regulatory bars in its sixth footnote:

> Benefits from the Veterans Administration are not payable to (1) a person discharged as a conscientious objector, (2) by reason of a sentence of a general court-martial, (3) resignation by an officer for the good of the service, (4) as a deserter, and (5) as aliens during a period of hostilities. 38 U.S.C. 3103. A discharge (1) by acceptance of an undesirable discharge to avoid court-martial, (2) for mutiny or spying, (3) for a felony offense

---

[902] Bednar, *supra* note 651, at 34. This form can be distinguished from earlier depictions related only to eligibility for military or other federal benefits at discharge. *See, e.g.*, Blake, *supra* note 49, at 5, 6 n.4 (discussing the Navy publication "Rights and Benefits," NAVPERS-15619A (Dec. 1948 rev.), B-8621).
[903] Bednar, *supra* note 651, app. 42 n.3.
[904] *Id*. app. 37–42, tbl. III.
[905] U.S. DEP'T OF ARMY GTA 21-2-1 (June 1969 rev.).

> involving moral turpitude, (4) for willful and persistent misconduct, or (5) for homosexual acts will be considered to have been issued under dishonorable conditions and thereby bar veterans benefits. 38 C.F.R. 3.12. A discharge under dishonorable conditions from one period of service does not bar payment if there is another period of eligible service on which the claim may be predicated (Administrator's Decision, Veterans Admin. No. 655, 20 June 1945).[906]

Although the short synopsis lacked definitions and missed some major elements, such as the minor offense exception to the regulatory bar for willful and persistent misconduct and the applicability of the moral turpitude bar to more than just felonies, it offered some insights beyond its predecessors.

Successors to the GTA 21-2-1 still appeared neat and tidy with T.B.D.-adjacent references to several obscure entitlements that attorneys and commanders probably never heard of, but these revised and modified charts created nothing more than the illusion of objectivity based on their deceptive oversimplifications. This is reflected in the fact that some charts corrected mistakes in the official ones in used by the Army,[907] or provided other updates for the purpose of clarification.[908] The moniker of T.B.D., which began as early as the '60s, has remained constant through 2013, as reflected in Appendix O below. Except, the more recent versions, as indicated, now lack reference to the more common regulatory bars of willful and persistent misconduct and moral turpitude, perhaps on the expectation that T.B.D. accounts for these too.[909] The

---

[906] *Id*. n.6.

[907] Lance, *supra* note 899, at 66–70 (using * to note at least 26 "change[s] from Dept of the Army Chart" regarding discharge characterization to correct erroneous entries).

[908] U.S. DEP'T OF ARMY, FIELD MANUAL 7-21.13, C1, THE SOLDIER'S GUIDE 3-35 & tbl.7-6 (20 Sept. 2011) (Change No. 1) (revising various provisions in the 2004 version of the Manual related to discharge characterization). For example, the Manual now clarifies:

> An honorable discharge is the best discharge a soldier can receive from the service. A general discharge affects some of the benefits a veteran is eligible for. An OTH Discharge will deprive you of most of the benefits you would receive with an honorable discharge and may cause you substantial prejudice in civilian life.

Id. ¶ 3-144, 3-35.

[909] *Infra* app. O.

notoriety of such charts propelled their use as Department of the Army forms into different Services' posters, guides, and handbooks,[910] with additional endorsements from other federal agencies outside of the Department of Defense.[911]

The many T.B.D. entries have assuredly led to misleading impressions because UD, OTH, and BCD titles, alone, obscure the major statutory and regulatory distinctions; for example, that the recipient of an OTH may be eligible for service-connected health care treatment, even despite a negative COS determination, as long as he or she not qualify for a statutory bar to benefits,[912] or that recipients of BCDs are automatically ineligible for service-connected health care.[913] Ultimately, the biggest problem for any chart-reader is the apparent assumption that VA adjudicators will give *all* discharges in the collapsed categories equal consideration under a standard evaluative framework that always preserves the possibility of obtaining treatment. Not only does the T.B.D. moniker create the false hope that benefits may be preserved in all situations, such as the appellate judges in *Hopkins* who believed all recipients of OTHs and BCDs were "tentatively" approved for benefits,[914] but worse, it suggests that there is some standardized, viable, unbiased process to guide the evaluator during the determination. While chart-readers anticipate objective answers as their final destinations, T.B.D. leads them astray, into that fifth dimension of imagination better known as the Twilight Zone.[915]

Even the simple "E" for "eligible" is misleading. The charts describe servicemembers with honorable discharges are "Eligible" for all VA benefits, and former servicemembers with general discharges are "Eligible" for most VA benefits. Most benefits also require a minimum amount of active duty service, and many have other specific requirements of their own.[916] Thus, a medically fit servicemember

---

[910] *See, e.g.*, U.S. MARINE CORPS, ORDER P1900.16F, CH. 2, MARINE CORPS SEPARATION AND RETIREMENT MANUAL (MARCORSEPMAN), at app. K (6 June 2007) ("Benefits at Separation").

[911] The Commissioner of the Social Security Administration, for example, included the Army's 1969 chart as an attachment to his official responses for a congressional committee on behalf of his agency in 1971. Ball Letter, *supra* note 785, at 6010–11, encl.

[912] *Supra* Part VIII.

[913] *Supra* Part III.

[914] United States v. Hopkins, 25 M.J. 671, 673 (A.F.C.M.R. 1987).

[915] *Supra* discussion accompanying notes 655–56.

[916] *See supra* Parts IVa, b.

discharged for drug use with a general discharge after eighteen months of active duty is listed as "eligible" for most benefits, but in reality is eligible for almost none of them. Also, some of the statutory bars apply regardless of character of discharge.[917]

In criminal justice, perhaps more than legal assistance, judge advocates are required to fill these gaps with a working knowledge of the effects of discharge characterizations on VA benefits.[918] However, in this singular area, military attorneys often guess at answers[919]—wrongly[920]—preferring their intuition over the requirement to learn an entirely new area of complex law characterized as a "riddle."[921] As one commentator recognized early on, the complexity of VA benefits leads to a situation where, although scholars, courts, and witnesses testifying before Congress all observe a VA stigma against bad paper discharges, "the exact nature and extent of the stigma . . . are rarely discussed [with] hearsay substitut[ing] for legal knowledge, and personal experience suffic[ing] in view of the lack of empirical data."[922] Complicating matters, even when the attorney does not guess, many benefits determinations still depend on the analysis of a VA adjudicator whose prognosis might be at odds with the attorney's.[923]

A reliable framework purporting to indicate the VA benefits that accrue with different discharge characterizations must capture the differences between statutory and regulatory bars and the various rules

---

[917] *See supra* Part VIII.

[918] Captain Gerald A. Williams, *A Primer on Veteran's Benefits for Legal Assistance Attorneys*, 47 A.F. L. REV. 163, 187 (1999) ("All judge advocates must have a sound working knowledge of [VA] benefits and programs and how they interact with each other.").

[919] *See, e.g.*, Jones, *supra* note 642, at 16 ("Much of the commentary regarding the effects of the administrative discharge is based on sheer speculation."); *id*. at 1 ("The consequences of the general and undesirable discharges are . . . little understood by JAG officers asked to 'counsel' the recipients."); Major Jeff Walker, *The Practical Consequences of a Court-Martial Conviction*, ARMY LAW., Dec. 2001, at 1, 1 (observing how "experienced trial attorneys . . . may have never actually looked up the laws or regulations" regarding VA benefits").

[920] STARR ET AL., *supra* note 10 (describing the erroneous beliefs of many judge advocates that recipients of BCDs and UDs were ineligible for VA benefits).

[921] Jones, *supra* note 642, at 11.

[922] *Id*. at 10.

[923] *See supra* Part IX (describing the loose standards adopted by VA adjudicators and explaining the resulting inconsistency among adjudicators within offices and offices themselves), IV.C (describing frequency of errors as reported by the VA Inspector General).

scattered throughout the *Code of Federal Regulations* that apply them to different behaviors or situations. In addition to Figures the Appendices introduced in this Article to depict the various processes, we supplement the standard "Benefits at Separation" chart with an interrelated visual. The COS process depends upon the discharge characterization issued to a former servicemember and the factual circumstances surrounding it. In some cases, it also hinges upon the commanders' specific intentions, such as whether to refer a court-martial to a Special or General Court-Martial, or whether a prolonged period of AWOL was the purpose for a separation versus a factor that had been considered along with other misconduct. For too long, the aesthetically appealing boxes on handouts indicating T.B.D. (for "To Be Determined," E (for "Eligible"), or N.E. (for "Not Eligible"), have eluded a more concrete description of actual practices and interpretive guidelines. Figure 7, below, marks our attempt to depict the assessment of cases evaluated for moral turpitude and/or willful and persistent misconduct within the framework of the most common statutory and regulatory bars to benefits. The Figure aims to provide more context and help readers accurately assess how different circumstances surrounding misconduct may either preclude or still permit the receipt of certain VA benefits.

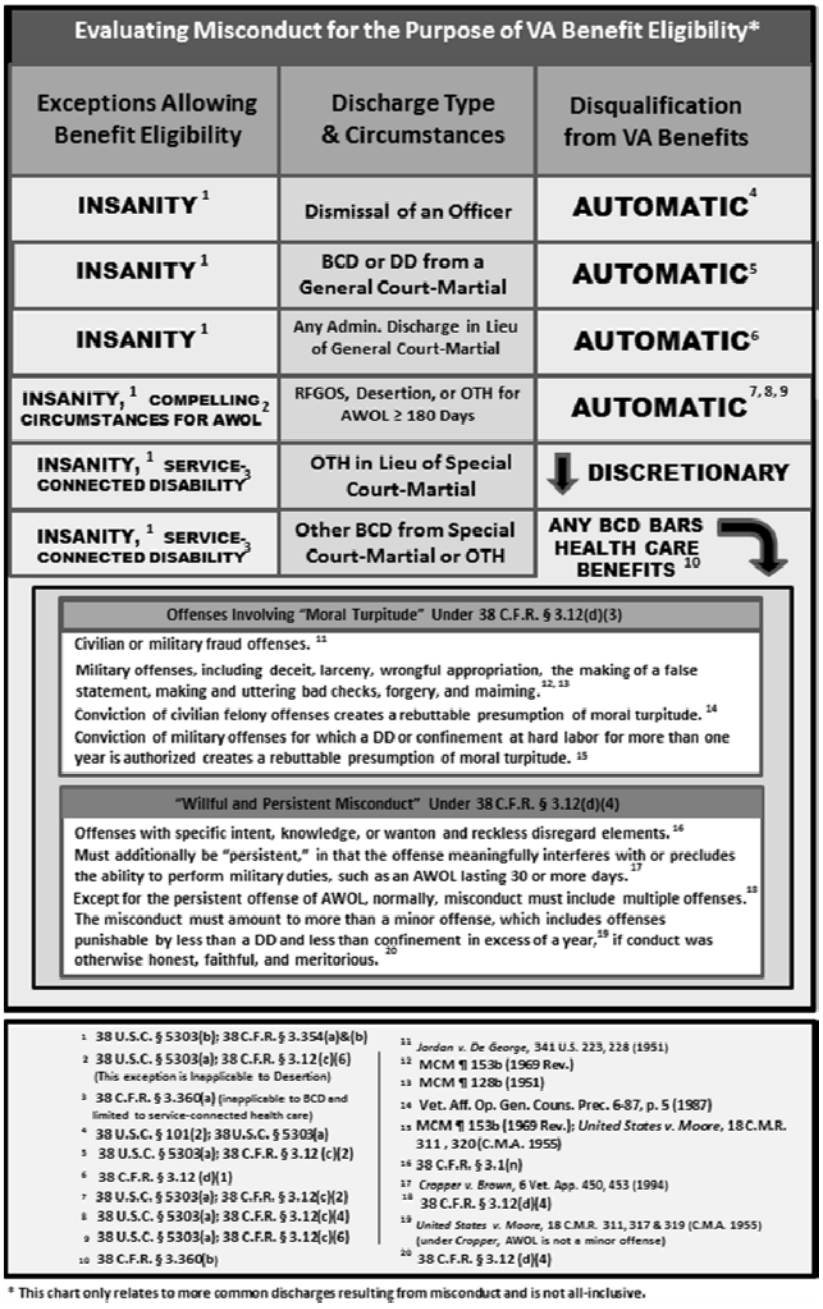


Fig. 7. Evaluating Misconduct for the Purpose of VA Benefit Eligibility

While our collective visuals do not state every possible circumstance influencing VA adjudicators in their final determinations, or eliminate the inherent possibility of bias in their decision-making, our visual aids go further than existing solutions to identify additional factors like the type of offense committed or the commanders intentions, upon which benefit eligibility equally hinges.

XI. Improvements for Administrative Separations and Courts-Martial

A. Sentencing Authority Instructions Relating to the COS Process

The potential loss of VA benefits as the result of a punitive discharge at court-martial is a thorny issue for commanders, attorneys, military judges, and military panels. Some commanders have foregone courts-martial and initiated administrative separation with a recommendation for a General Discharge or suspended punitive discharges specifically to preserve the veteran's ability to obtain PTSD treatment from the VA health care system.[924] Yet, other commanders have sent cases to courts-martial with the hopes that the panel's sentence would preclude VA benefits. Consider the prosecutor's argument in *United States v. Connolly*, "How many soldiers deployed to Iraq, went to war, came back, and they didn't drink and drive? They didn't run over two security guards. These are the soldiers that deserve VA benefits, not the accused."[925] This is not unlike the commanders who frequently charge their prosecutors to "make it hurt as much as possible" for an accused servicemember facing court-martial.[926] Although commanders may have access to an iteration of the pervasive "Benefits at Discharge" Chart, all versions offer unclear and confusing guidance regarding OTH and BCD discharges through the "T.B.D." mantra.[927] A survey of military

---

[924] *See generally* Seamone, *supra* note 2 (describing consistent trends in courts-martial practice by commanders, military judges, and panels since WWII revealing an ingrained rehabilitative ethic, especially for offenders with combat-related mental health treatment needs).

[925] Supplement to Petition for Grant of Review, United States v. Connolly, No. 07-0184, 2007 WL 299320, at *9 (C.A.A.F., Jan 26, 2007).

[926] Experience of MAJ Evan R. Seamone at various installations over a ten-year period of service.

[927] *Supra* Part X (describing the chart's illusory guidance). In addressing panel instructions, even the Air Force Court of Criminal Review was led astray by the chart, which gave a panel of its judges the faulty impression that "Servicemembers who have received bad conduct discharges from special courts-martial are *tentatively eligible* for

attorneys at the height of the military's issuance of UDs, in fact, revealed many who wrongly believed that receipt of a BCD or UD would "absolutely" bar any VA benefits.[928]

Attorney confusion with the COS process is more concerning because it translates directly to the client's immediate decision to accept or contest proposed dispositions of the case and results in long-term, irreversible effects.[929] In the case of *United States v. Gonyea*, for example, the trial defense attorney asked the convening authority to "substitute an administrative discharge under other than honorable conditions for the bad-conduct discharge" specifically to ensure that his client would be entitled to VA benefits for alcoholism treatment.[930] Sadly, the attorney had no clue that both the BCD and OTH characterizations necessarily require the same COS evaluation and bar benefits until VA adjudicators complete their review.[931] Despite some level of confusion over specific consequences in cases involving an accused with mental or physical injuries, defense counsel often raise the potential loss of VA benefits as a sentencing "strategy" to prevent a punitive discharge.[932]

Military judges face a dilemma in crafting instructions for panel members. While the panel must be informed of the general negative effect that a punitive discharge could have on the receipt of VA

---

nearly all benefits administered by the Veterans' Administration." United States v. Hopkins, 25 M.J. 671, 673 (A.F.C.M.R. 1987) (relying, to their detriment, on the chart in the second attachment to the Air Force's 1976 *Civil Law Manual*).

[928] STARR ET AL., *supra* note 10, at 169, at 179–80 ("[S]o widespread is the opinion that the VA has no discretion . . . that several military lawyers contacted answered 'absolutely not' when asked whether veterans with Undesirable and Bad Conduct Discharges might be entitled to VA benefits.").

[929] *See*, *e.g.*, United States v. Emerick, 2008 WL 4525840, at *1 (A.F. Ct. Crim. App., Sept. 9, 2008) (citing a convict's affidavit that noted, in part, "[m]y defense attorney never explained anything to me about veterans' benefits").

[930] United States v. Gonyea, 44 M.J. 811, 812 (A.F. Ct. Crim. App. 1996) (accused asked convening authority to convert BCD to OTH separation so he could get alcoholism treatment.

[931] The court specifically noted the counsel's failure to understand that an OTH discharge "may well have deprived the appellant of any opportunity to use veterans' medical benefits" since eligibility was "not a matter of right, but is a discretionary decision of the Veterans Administration." *Id*. at 813.

[932] United States v. Hairston, 1994 WL 481435, at *2 (A.F.C.M.R., July 29, 1994) (noting the "defense position . . . that a punitive discharge was not warranted, and appellant should be allowed to be separated administratively so he could obtain Veterans' Administration treatment for his cocaine dependency").

benefits,[933] military judges must be careful not to infuse the sentencing process with tangential or speculative inquiries that divert them from the task of considering the offense and the offender.[934] To this end, the Navy-Marine Court of Criminal Review aptly stated why information on VA benefits must be limited to a manageable quantum of relevant and accurate information:

> If energetic trial participants did delve into the administrative implications of punitive discharges, they would soon detect variables of discretion which repose in Veterans' Administration (VA) officials. Administrative research would also lead inevitably to the possibilities of trends in the Naval Clemency and Parole Board relief as to individuals within particular classes of offenders. "Veterans' Benefits" occupy three volumes of the United States Code Annotated. Courts-martial progress would come to a halt if all possible questions based on prior facts, possible sentences, and foreseeable agency actions were to be instructed, understood, and argued.[935]

While too little information might deprive the panel of the ability to understand the full negative impact of their punishment options, too much information makes the VA benefits issue collateral to the sentencing determination.[936] These preferences and rules of thumb do not preclude more detailed instructions on VA benefits, or even the use of a benefits chart. However, all information provided to the panel must

---

[933] Instructional errors on this have resulted in the appellate courts setting aside the sentence. *See, e.g.*, United States v. Simpson, 16 M.J. 506, 507 (A.F.C.M.R. 1983) (considering the military judge's refusal to instruct members that punitive discharge deprives accused of "substantially all" VA benefits was reversible error); United States v. Ballinger, 13 C.M.R. 465, 467 (A.B.R. 1953) (addressing the law officer's erroneous instruction that VA could waive statutory bar for punitive discharge was reversible error).

[934] *See, e.g.*, United States v. McElroy, 40 M.J. 368, 371 (C.M.A. 1994) ("The general rule at courts-martial is that instructions on collateral administrative consequences of a sentence should be avoided.").

[935] United States v. Givens, 11 M.J. 694, 696 (N.M.C.M.R. 1981).

[936] The notable case of *United States v. Quesinberry*, which dealt with requests for updated and successive versions of the Benefits at Discharge Chart, articulated the military judge's duty to avoid "an unending catalogue of administration information to court members." 31 C.M.R. 195, 198 (C.M.A. 1962). Ultimately, "[o]ptimism born of mere expectancies of future agency relief would . . . run contrary to the rule that members must sentence without reliance on possible relief by a higher authority." *Givens*, 11 M.J. at 696.

be "clear, accurate, and complete."[937] When the courts' guidance meets these threshold requirements, then it is considered appropriate because the negative effect is "a direct and proximate consequence of the punitive discharge and not merely a potential collateral consequence."[938] Judges often commit instructional error by making assumptions regarding the COS process, such as the guidance in *Ballinger* that an accused who received a dismissal from a general court-martial could obtain relief from an independent review by VA,[939] the instruction in *Winchester* that a BCD from a special court martial would automatically preclude all VA benefits,[940] or the military judge's recommendation to VA in *McLendon*, despite the adjudged dismissal at a GCM, that "Captain McLendon and his family be entitled to any and all medical benefits that he would be entitled to but for this court-martial."[941] In an important way, the standard panel instructions on VA benefits are to blame for the confusion because they grossly oversimplify and confuse VA's COS process.

Currently, the *Military Judges' Benchbook* instructs panel members in an identical manner on the effect of the BCD and the DD on veterans' benefits: In the sentencing instructions subtitled "(Dishonorable Discharge Allowed):" and "(Only Bad Conduct Discharge Allowed):" both instruct "This court may adjudge [the respective designation]. Such a discharge deprives one of substantially all benefits administered by the

---

[937] United States v. Winchester, No. S28735, 1994 WL 481709, at *3 (A.F.C.M.R., Aug. 12, 1994) (requiring these three standards when a Military Judge chooses to answer panel member questions about administrative consequences, "despite the extemporaneity of the occasion and the fact that military judges may not be well versed concerning the collateral consequences of sentences").

[938] United States v. Perry, 48 M.J. 197, 199 (C.A.A.F. 1998) (citing cases where failure to instruct panel members on loss of retirement benefits was error). Without such clarity, multiple judicial opinions advise judges to "simply 'reaffirm the idea that collateral consequences are not germane." *Winchester*, 1994 WL 481709, at *3 (citing United States v. McLauren, 34 M.J. 926, 934 n.9 (A.F.C.M.R. 1992)).

[939] *Ballinger*, 13 C.M.R. at 467:

> [I]t is always possible where a dismissal is given, that the Veterans' Administration may waive, in any particular case where they deem it appropriate, a dismissal and grant certain benefits which that person may be entitled to, but that is a question for the V.A. to settle and we have no way of knowing when they will waive any particular case.

[940] *Winchester*, 1994 WL 481709, at *2 (instructing that a BCD would "eliminate essentially all benefits" and result in "no veterans benefits from the federal government").

[941] Supplement to Petition for Grant of Review, United States v. McLendon, No. 09-0171, 2008 WL 5654262 (2008).

Department of Veterans Affairs and the Army establishment."[942] The instructions completely fail to define what "substantially all" means. More problematically, by mirroring the definition of consequences for the GCM with the definition of consequences for the special court-martial, and the DD with the BCD, one of these definitions obviously misses the mark. As the courts have explained, the BCD at the special court-martial permits the possibility of retention of benefits after VA review, while any discharge from a general court-martial precludes the same benefits.[943] That vital distinction is currently lost in the existing sentencing instructions.

If a panel has no understanding of the COS process, like the panel in *Ballinger*, members may mistakenly believe a BCD at a GCM or even a DD could still permit some sort of positive determination by VA.[944] Even worse, panel members at a special court-martial might believe that the BCD automatically precludes benefits. At the strategic level, defense counsel have asked for the "substantially all" instruction over other more accurate statements regarding VA review of BCDs in the hopes of making the BCD seem more fatal to the servicemember on trial.[945] Diplomatically, the Air Force Board of Military Review challenged the *Military Judges' Benchbook*'s instruction in 1987 on the basis that the noted formulation and distinction between special and general courts-martial is "not as accurate as it could be" in the that it completely failed

---

[942] *Compare* BENCHBOOK, *supra* note 548, ¶ 2-5-22, at 70; *with id*. ¶ 2-6-10, at 99. Other services' judicial branches have used the Army's same *Benchbook* provisions for "several years." United States v. Hopkins, 25 M.J. 671, 672 (A.F.C.M.R. 1987) (describing this preference).

[943] *See, e.g.*, *Hopkins*, 25 M.J. at 673; United States v. Ryno, 31 C.M.R. 637, 641–42 (A.F.B.R. 1961). A BCD issued by a general court-martial is a statutory bar to benefits, including health care; a BCD issued by a SPCM is not. Part VIII.D, *supra*; *see also Hopkins*, 25 M.J. at 673 (upholding military judge at SPCM who instructed that the VA would review a BCD "on its facts in most cases . . . before determining eligibility," and who refused to instruct that it would deprive the convicted Airman of "substantially all" VA benefits, because the judge's instruction was more accurate than the requested instruction); United States v. Harris, 26 M.J. 729, 734 (A.C.M.R. 1988) (finding error when Military Judge at GCM instructed the panel that a BCD would deprive the Soldier of "many" instead of "substantially all" VA benefits, because this instruction did not take into account the statutory bar for a BCD issued by a GCM).

[944] *See also Harris*, 26 M.J. at 734 (providing erroneous instructions that "many benefits" would be precluded by a BCD at a general court-martial).

[945] *See, e.g.*, *Hopkins*, 25 M.J. at 673 (upholding the trial court's refusal to instruct in this less accurate manner at a special court-martial).

to capture the "distinct difference" in effects.[946] Today, more than two decades later, the instruction remains unchanged.

B. Recommended Revisions to Panel Instructions Concerning COS

Former Chief Judge of the military justice system's highest court, Andrew S. Effron, acknowledged that accurate instructions on loss of VA benefits represent "truth in sentencing," the concept that panel members should have tools to reach an intelligent and reasoned sentence.[947] Counsel must propose, and military judges must use, better instructions on VA benefits to meet the objectives of truth in sentencing. At the very least, instructions must inform panel members at special courts that a BCD adjudged by a special court-martial is subject to VA's discretionary review and that both a BCD and a DD adjudged at a GCM will preclude benefits. Judicial opinions provide valid suggestions for terminology. For example, recognizing the limitations of the standard instructions, the military judge in the Air Force *Hopkins* special court-martial deviated from the standard instructions to this, more specific, one: "You are further advised that with regard to veterans' benefits a bad conduct discharge adjudged by a special court-martial is reviewed on its facts in most cases by the agency administering the particular benefit in question before determining eligibility."[948] We prefer this version of the instruction based on its more detailed explanation of VA COS process and recommend that military judges use it at all special courts-martial.

As importantly, instructions must relay the fact that, even if a servicemember has been awarded a favorable character of service after review, statutory provisions related to health care benefits still preclude such services for *all* recipients of BCDs. Despite serious confusion, a 1977 public law,[949] incorporated into the *Code of Federal Regulations*, explains that VA health care services are automatically barred for "any disability incurred or aggravated during a period of service from which such person was discharged with a Bad Conduct Discharge."[950] While a positive character of service determination would still permit recipients of BCDs to enjoy vocational rehabilitation, disability pension, and some

---

[946] *Id*. at 673.
[947] United States v. Perry, 48 M.J. 197, 200 (C.A.A.F. 1998) (Effron, J., concurring in part and in the result).
[948] *Hopkins*, 25 M.J. at 672–73.
[949] Pub. L. No. 95-126 (1977).
[950] 38 C.F.R. § 3.360(b) (2012).

other VA benefits,[951] VA's *Adjudication Procedures Manual Rewrite* explains, "Even if a BCD is determined to be honorable for VA purposes . . . the service member is **not** eligible for health care. This is the **only** circumstance in which a service member may be found to have service connected disabilities but not be eligible for health care."[952] To appropriately distinguish between bars to health care and eligibility for other benefits, our model panel instruction explains,

> A favorable character of service determination will permit a veteran with a Bad-Conduct Discharge to obtain various benefits, such as a disability pension or vocational rehabilitation, but not health care benefits. Under federal law and regulation, the receipt of a Bad-Conduct Discharge will bar a servicemember's eligibility for VA health care benefits for disabilities not incurred or aggravated during an honorably completed prior term of service, even if (her) (his) injury or medical condition was incurred as a result of the servicemember's performance of military duties.[953]

These distinctions will permit the members to consider potential benefits, even if an accused will be barred from receiving health care treatment.

Of course, the above provisions do not touch upon the general court-martial or the DD. In the case of a general court-martial, we recommend the following substitution:

> Under federal law and regulations applicable to the Department of Veterans Affairs, also known as "VA," a punitive discharge from a General Court-Martial, including both a Bad-Conduct Discharge and a Dishonorable Discharge, will result in an automatic bar to eligibility for benefits administered by VA, except for conversion of life insurance coverage. Only retention in the Service will preserve eligibility for VA benefits if

---

[951] *See infra* apps. F, G.
[952] M21-1MR, *supra* note 77, pt. III, subpart v, ch. 1, § B.17, para. 8a.n. (Feb. 27, 2012).
[953] *Infra.* app. L-1.

> the accused is later discharged under honorable conditions.[954]

While our proposed instruction is more specific than prior attempts, it captures the basic explanation set forth in *Ryno*: "[A] person dishonorably discharged is denied all veterans benefits administered by the [Department of Veterans Affairs] . . . ."[955]

To avoid misleading the panel,[956] military judges should continue to use an instruction that informs the members that an honorable discharge from a prior term of service will still entitle the accused to receive benefits, even if a subsequent period of service results in a bar to benefit eligibility.[957] Yet, we suggest eliminating the current references to "vesting of benefits," because the VA General Counsel confirmed that benefits do not "vest," and at least one court has noted the absence of a definition of "vesting" in the *Benchbook*, which only serves to invite more ambiguity.[958] While our recommended revision considers certain charges that bar the receipt of benefits earned during a prior period of honorable service, it follows the general principles set forth in the *Lenard* court's concise explanation that "[t]he standard instruction on depravation of veteran's benefits would also not apply to any personnel

---

[954] *Id*. In *United States v. Ryno*, the court used the following similar explanation: "A bad conduct discharge if adjudicated by a general court-martial has, as to the great majority of veterans benefits, an effect identical with that of a dishonorable discharge." 31 C.M.R. 637, 642 (A.F.B.R. 1961). Chief Judge Everett went further in *Murray*:

> A punitive discharge imposed by a general court-martial—whether dishonorable discharge or a bad-conduct discharge—has more severe legal effects than does a bad-conduct discharge imposed by a special court-martial. . . . The former terminates automatically any possible entitlement to later benefits, while a punitive discharge adjudged by a special court-martial leaves open for adjudication by the Veterans Administration the eligibility of the accused to receive various benefits.

United States v. Murray, 25 M.J. 445, 450 (C.M.A. 1988) (Everett, CJ, concurring in part and dissenting in part) (citing 38 U.S.C. § 3103(a)).

[955] *Ryno*, 31 C.M.R. at 641. *Infra* app. L-1.

[956] United States v. Lenard, 27 M.J. 739, 740 & n.1 (A.C.M.R. 1988).

[957] The current version states, "vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service." BENCHBOOK, *supra* note 548, at ¶¶ 2-5-22 & 2-6-10. *See generally* G.C. 61-91, *supra* note 305.

[958] United States v. McElroy, 40 M.J. 368, 371 (C.M.A. 1994).

who had earned an honorable discharge for earlier honorable service in the Army."[959]

Appendix L-1 captures these collective recommendations in a series of concise model instructions relating to VA benefits.[960] References to statutes and VA General Counsel opinions will help counsel, military judges, and ultimately panel members. Evident in Appendix L, we agree with those judges and law officers who have allowed panel members to consider summary charts during sentencing deliberations.[961] Our only variation is the further recommendation for courts to use other materials to avoid misinforming the members.

C. Additional Tools

In addition to the flow charts and information papers designed to assist practitioners in understanding the impact that certain types and characterizations of discharge have on VA benefit eligibility,[962] this article offers numerous templates and information papers designed to assist commanders and judge advocates properly understand the impact of a discharge on eligibility for VA benefits. While every effort has been made to verify the accuracy of these tools, practitioners must continually verify their accuracy and independently analyze their applicability to a particular case.

Appendix I is an information paper designed to assist commanders and judge advocates better understand the manner in which untreated mental health conditions can manifest in criminal conduct.[963] This quick-reference resource should not only assist commanders and judge advocates in making more informed recommendations and decisions, but also identify situations for which more involved mental health evaluation and treatment is necessary.

---

[959] United States v. Lenard, 27 M.J. 739, 740 n.1 (A.C.M.R. 1988).
[960] *Infra* app. L-1.
[961] *See, e.g.*, *Ryno* 31 C.M.R. at 642 (providing the members "a document entitled Effect of Type of Discharge Upon Eligibility for Federal Veteran's Benefits" to address the question of benefits at sentencing); United States v. King, 1 M.J. 657, 660 (N.C.M.R. 1975) (permitting the panel to consider "a chart for reduced VA benefits associated with a bad conduct discharge in considering the sentencing of an offender with continued needs for mental health treatment).
[962] *Infra* apps. B, C, D, E, F, G, H.
[963] *Infra* app. I.

Other tools are designed for distribution to servicemembers. Appendix L-5 is a sample client counseling form to inform servicemembers about the potential impact of character of discharge on eligibility for VA benefits.[964] This sample client counseling summarizes the potential characterizations of discharge, the bars to benefits, and independent bases for VA benefits eligibility. Appendix J is a handout that summarizes the resources available to help a servicemember or former servicemember apply for VA benefits.[965] Appendix M is a listing of the Veterans Service Organizations (VSOs) that will assist servicemembers in their efforts to obtain VA benefits.[966] Defense counsel should consider providing these resources to every client who faces administrative or punitive separation.

The remaining tools are designed for use when a particular case so requires. Appendix L-2 is a sample Army-centered discharge in lieu of court-martial approval memorandum designed to assist convening authorities better reflect their intent to VA claims adjudicators.[967] Appendix L-4 is a sample Army-centered request for discharge in lieu of court-martial, including the more accurate advice regarding eligibility for VA benefits.[968] Convening authorities and judge advocates from the Navy, Marine Corps, Air Force, and Coast Guard can modify their discharge in lieu of court-martial templates with the guidance set forth in Appendix L-2. Appendix L-3 is sample language that convening authorities, separation authorities, and judge advocates can include in separation documentation when such language is appropriate.[969]

Convening authorities and judge advocates who invest the time to use these tools properly will not only arrive at a more accurate recommendation or decision, but will also save significant effort and expenditure during a future VA claim adjudication. These simple steps can improve the results without significant change to any system. There are, however, efforts to make the systems involved in VA claims adjudications better.

---

[964] *Infra* app. L-5.
[965] *Infra* app. J.
[966] *Infra* app. M.
[967] *Infra* app. L-2.
[968] *Infra* app. L-4.
[969] *Infra* app. L-3.

XII. Practical Recommendations and Concluding Remarks

A. The Benefits of the Administrative Rulemaking Process

Experienced VA employees have sought to clarify and thus improve VA's regulations by revising their wording and organization.[970] The expansive effort recognized the antiquity of many discretionary rules similar to the ones that guide the COS, but apparently have yet to reach the COS process.[971] The basis for clarifying the rules is VA's notice and comment rulemaking process, which applies to any revisions of provisions in the *Code of Federal Regulations*.[972] This process still unequivocally remains the best option to address the COS standards.[973] In sum, we recommend clarification of the moral turpitude and willful and persistent misconduct standards with objectively identifiable definitions. Regarding moral turpitude offenses, we recommend bifurcating the definition into standards applicable to civilian offenses and military offenses.

1. Clarifying Civilian Moral Turpitude Offenses

For civilian offenses, we recommend adopting a similar approach to SSA's COS process, which was virtually indistinguishable from VA's at the very same timeframe in which the regulatory bars emerged.[974] Incorporating the Supreme Court's precedent on moral turpitude,[975] for civilian offenses we recommend articulation of the following specific offenses: "treason, sabotage, espionage, murder, rape, arson, burglary, kidnapping, assault with intent to kill, assault with a dangerous weapon[,] or an attempt to commit any of these crimes."[976] Recognizing the VA General Counsel's position, we also recommend that the presumption of moral turpitude apply to all civilian offenses defined as crimes of moral turpitude by the respective jurisdiction, as well as those defined generally as crimes punishable by death or imprisonment over

---

[970] *See, e.g.*, William A. Moorman & William F. Russo, *Serving Our Veterans Through Clearer Rules*, 56 ADMIN. L. REV. 207 (2004) (describing avenues for promptly improving VA regulations through administrative rulemaking process).
[971] *Id.*
[972] *Id.*
[973] *Id.*
[974] *Supra* Part III.B.1.d.
[975] Jordan v. DeGeorge, 341 U.S. 224, 228 (1951).
[976] Ball Letter, *supra* note 785, at 6011.

one year.[977] However, to make sense of the rule that such presumptions are rebuttable, we further recommend an additional clear standard to guide adjudicators and Veterans Law Judges in applying the exception; the presumption of turpitude is overcome when the felony level offense does not have an intent element. This would coincide with the notion that turpitude applies only where evil intent is categorically present in the commission of any such offense.[978]

2. Clarifying Willful and Persistent Misconduct

Like the "Moral Turpitude" standard, the "Willful and Persistent Misconduct" standard would benefit from additional clarification. We first recommend that willful and persistent misconduct be identified as multiple incidents of misconduct for which the perpetrator had knowledge of, intended, or disregarded a reasonably foreseeable prohibited outcome or a single incident of misconduct that substantially interfered with or precluded the actor's ability to perform significant military duties. The notion that military duties have to be significant incorporates the jurisprudence that an AWOL of 30 days or more would constitute persistent misconduct even though it involves a single chargeable offense. Inclusion of "substantial" considers that a minor period of AWOL, such as a day or few days may permit a servicemember to perform military duties and make right the unperformed duty. Otherwise, any offense that involved a minor period of absence, without being charged as AWOL would qualify as persistent misconduct, overextending far beyond the intended definition.

We further recommend clarification of minor misconduct as any civilian misconduct not constituting a felony or any military misconduct punishable by a BCD only, no punitive discharge, or punishable by one year's confinement or less. Under this view, an AWOL of 30 days or more would not be considered as minor misconduct, but a period of less than 30 days would. We also recommend clarification of the standard for "honest, faithful, and meritorious," service as periods of service without misconduct, characterized by some conduct involving service beyond the call of duty, as evidenced by awards for meritorious service, heroism, valor, or other exceptional acts in combination with the absence

[977] Op. G.C. 6-87, *supra* note 694.
[978] *Supra* Part IX.B.1.

of serious offenses and false, misleading, or fraudulent conduct in the performance of duties.

B. Conclusion: The Way Forward

In this article, we explored a complex area of law that has been generating many of the same criticisms and concerns about subjective interpretation for the last six decades. In many instances, while T.B.D. can be misleading and while the moniker may only scratch the surface of the behemoth character of service determination process, too often, T.B.D. stands for *To Be Denied*. However, it doesn't have to be this way. There is tremendous potential for the frustration of commanders' intentions in certain cases simply because there is no way to preserve that intent in the documents that work their way to VA adjudicators. Among various VA employees from the regional office adjudicators up through the leadership at Board of Veterans' Appeals, all agree that the difficulty lies in not knowing commanders' desires and commanders' appraisals of the servicemember's conduct at the time of the adverse elimination. Judge advocates and commanders need to know that there is no guarantee that medical files or allied papers will reach VA at the time of the benefits adjudication, whether it occurs a month from separation or a decade from separation. With pressure to evaluate as many cases as possible and files that sometimes constitute a just a few sheets of paper with no supporting evidence from the ex-servicemember or command, it is quite easy to see why evaluations are denied or determined on more subjective and inconsistent standards across regional offices.

Our recommended solution for most of the existing challenges in VA's COS process is to clarify the commanders' intent in writing as often as possible in the key documents that are required to accompany military files for VA evaluation. We are not suggesting limitations on punishment of servicemembers or measures that would in any way dilute good order and discipline within units. Rather, by understanding how the bars operate, the command can preserve its intent to help preserve benefits, despite punishment and discharge, by articulating the factors they considered and by explaining why certain bars would not apply. While we cannot guarantee that each regional office adjudicator will consider himself or herself bound to the recommended course of action, VA adjudicators and Veterans Law Judges desire such information and that it would be immensely helpful to them.

A summary of our major recommendations includes the following. Where appropriate and warranted, the best way to assist servicemembers in preserving their benefits is with an Honorable or General Under Honorable conditions discharge. This will normally lead to the preservation of health care and pension benefits for qualifying disabilities unless the basis for separation is desertion, resignation of an officer for the good of the service, or conscientious objection with refusal to perform duties, wear the uniform, or obey orders. Because the circumstances of the underlying conduct in those three cases all result in statutory bars to benefits, there is a possibility that adjudicators may still find the ex-servicemember barred even though the character of service is under honorable conditions.

Where appropriate and warranted, referring a court-martial to a Special Court-Martial empowered to adjudge a BCD, rather than a General Court-Martial, can avoid two statutory bars and one regulatory bar from applying—sentence of a GCM, a Dishonorable Discharge, and discharge in lieu of a GCM if one results. Furthermore, to avoid the unnecessary imposition of bars for moral turpitude or willful and persistent misconduct, commanders can indicate that the offenses do not constitute either category and explain common reasons why, such as the fact that a given military offense is not analogous to a civilian felony, for example, or why misconduct was minor and service was otherwise honest, faithful, and meritorious in the commander's estimation.

While we do not expect commanders to reach these conclusions alone, we hope that their judge advocates will assist in evaluating individual cases and that the tools we have developed will make that process far more efficient. We recognize that efficient analysis is important for the often overburdened staff judge advocate, chief of military justice, or trial counsel. The Benefits at Discharge charts offered the illusion of an accurate, simple, and efficient analysis. Unfortunately, the charts often lead to inaccurate and uninformed advice and decisions. We recognize that adding another variable into an already complex military justice equation cause give commanders and judge advocates to hesitate. Such hesitation, however, should not cause commanders and judge advocates to disregard the variable entirely, as the consequences are too great.

Commanders and their legal advisors are morally bound to analyze the impact that contemplated courses of action have on VA benefits, and to then reflect any desire to preserve VA benefits in the applicable

documentation. After nearly a dozen years of war an conflict, servicemembers have returned with wounds, injuries, and illnesses that often lead to misconduct that warrants separation from the military. In other words, military service has broken many servicemembers in a way that leads directly to the misconduct for which the servicemember is being separated. Many other servicemembers who commit misconduct do not have service-connected disabilities that led to their misconduct, but all servicemembers who are being separated from the military took an extraordinary step to volunteer to serve. These servicemembers, and the civilian society that they are about to enter, should not have to bear the burden of a commander's or judge advocate's ignorance.

Defense counsel must take one additional step. Defense counsel must not only educate their clients on the impact that the particular types and characterizations of discharge have on eligibility for VA benefits, but must also educate the client on how to seek benefits. Because of the independent bases for VA benefits eligibility, servicemembers seemingly precluded from VA benefits because of the type or characterization of their discharge may still be eligible for benefits. As is demonstrated by the depth and breadth of this article, this complicated process can be an obstacle too challenging for a client to negotiate alone. Accordingly, defense counsel should build solid relationships with VSOs in their area, and ensure that clients are properly informed on how to get the requisite help.

VA adjudicators must also seek additional help to properly adjudicate COS determination cases. For example, regional offices could contact local staff judge advocate offices to conduct cross-training on the VA claims system and the military justice system. VA adjudicators must also be willing to seek guidance, when required, to determine when various statutory and regulatory bars apply. VA adjudicators should also ensure that they are adjudicating a claim based on a fully developed record. While the VA claims appellate system may correct inaccurate determinations, getting it right the first time is in everyone's best interest.

With the tools and references in this article, military and VA employees can approach the COS process with a more objective and informed methodology, ultimately ensuring that "T.B.D." does not

simply be "To Be Denied" in cases for which the former servicemember's claim is valid.

Appendix A
Proper Use of this Article and the Appendices

This article and its appendices are provided to aid the reader's understanding of this area of the law. They are also provided as a starting point for the reader to conduct his or her own independent research. Despite every effort to ensure that all information and guidance was accurate as of publication, the applicable laws and regulations, as well as the binding interpretations of each, are subject to change without notice. While readers should not hesitate to use this publication as a guide, it should not be relied upon as final authority on any specific law, regulation, or decision. Where appropriate, attorneys should consult more regularly updated references before giving legal advice.

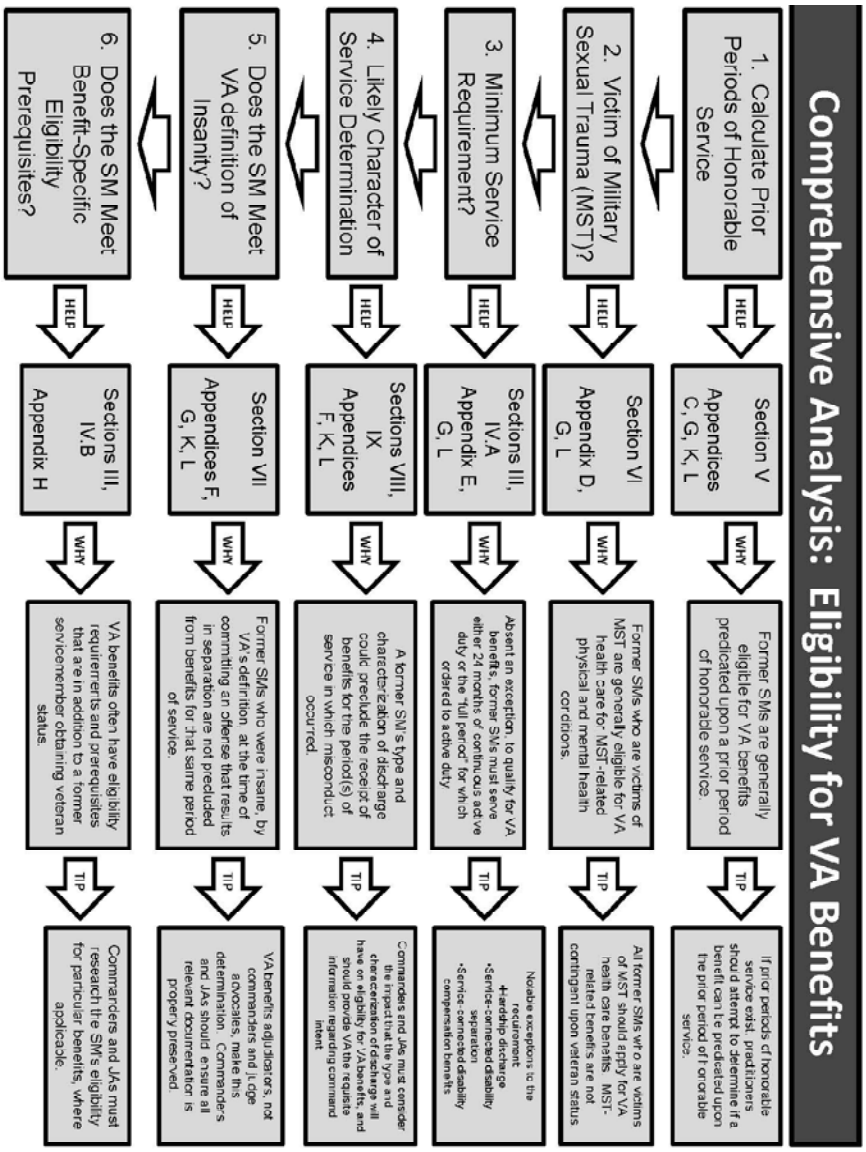
The following appendices are designed to be used in conjunction with, rather than as a substitute for, the text and references contained in the article. While many of the appendices contain sample forms, proposed language, and summaries of resources, readers must conduct independent legal and factual research to verify the accuracy and applicability of each resource before relying upon it. Not every resource should be used in every case.

Use of these appendices without the proper understanding of the underlying statutory, regulatory, and case law could lead to inaccurate advice, improper determinations, or legal error. These appendices were neither created nor designed to update the previously popular benefits at discharge charts.[979] By reading and studying the article in conjunction with the appendices, readers will be able to properly use the appendices as a resource to improve the advice to their clients and the decisions they make in particular cases.

Full color versions of these appendices are available at https://www.jagcnet2.army.mil/sites/administrativelaw.nsf/homeLibrary.xsp. Good luck!

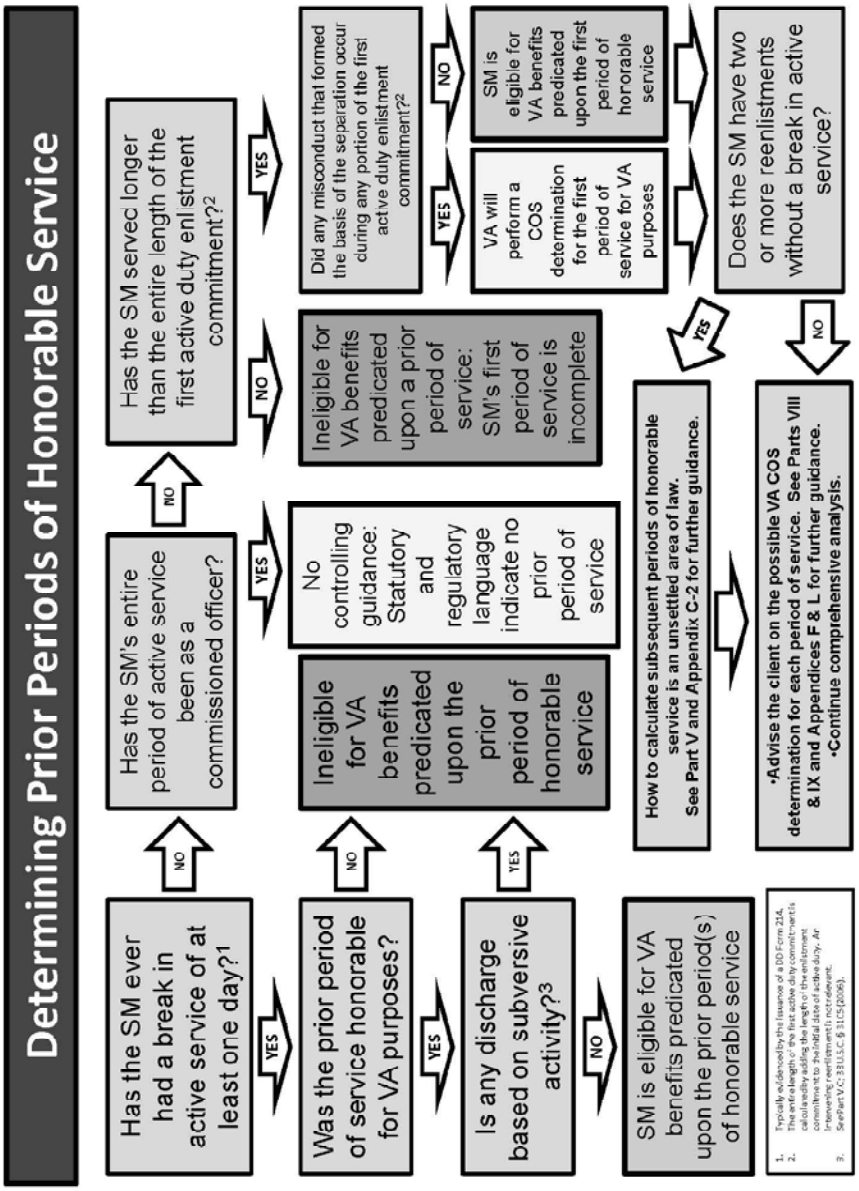
[979] *See, e.g.*, *supra* Part X, app. O.

Appendix B
Comprehensive Analysis Framework



Appendix C
Prior Periods of Honorable Service Resources

Appendix C-1
Determining Prior Periods of Honorable Service



Appendix C-2
Calculating Prior Periods of Honorable Service

Calculating Prior Periods of Honorable Service

Enlistment/ Reenlistment Date	Enlistment Contract	VA RAD: Current VA Guidance	VA RAD: A Broader Interpretation
December 29, 2000	4 years	December 28, 2004	December 28, 2004
This is the SM's first day of active service.	This is the term of the SM's first enlistment contract.	This is the date that the first period of service for VA purposes ends.	This is the day that the first period of service for VA purposes ends.
April 4, 2004	6 years	December 27, 2010	April 3, 2010
This is the date of the SM's first reenlistment.	This is the term of the SM's first reenlistment.	This is the date that the second period of service for VA purposes ends.	This is the date that the second period of service for VA purposes ends.
October 31, 2008	6 years	December 26, 2016	October 30, 2014
This is the date of the SM's second reenlistment.	This is the term of the SM's second reenlistment.	This is the date that the third period of service for VA purposes ends.	This is the date that the third period of service for VA purposes ends.

References: 38 U.S.C. § 101(18) (2006); 38 C.F.R. § 3.13 (2012).

Appendix D
Military Sexual Trauma (MST) Resources

Appendix D-1
Military Sexual Trauma Fact Sheet, August 2012
Available at **http://www.mental health.va.gov/docs/mst_general_factsheet.pdf**

Military Sexual Trauma

What is military sexual trauma (MST)?

Military sexual trauma, or MST, is the term used by VA to refer to experiences of sexual assault or repeated, threatening sexual harassment that a Veteran experienced during his or her military service. The definition used by the VA comes from Federal law (Title 38 U.S. Code 1720D) and is "psychological trauma, which in the judgment of a VA mental health professional, 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." Sexual harassment is further defined as "repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character."

More concretely, MST includes any sexual activity where someone is involved against his or her will -- he or she may have been pressured into sexual activities (for example, with threats of negative consequences for refusing to be sexually cooperative or with implied better treatment in exchange for sex), may have been unable to consent to sexual activities (for example, when intoxicated), or may have been physically forced into sexual activities. Other experiences that fall into the category of MST include unwanted sexual touching or grabbing; threatening, offensive remarks about a person's body or sexual activities; and threatening and unwelcome sexual advances. The identity or characteristics of the perpetrator, whether the Servicemember was on or off duty at the time, and whether he or she was on or off base at the time do not matter. If these experiences occurred while an individual was on active duty or active duty for training, they are considered by VA to be MST.

How common is MST?

VA's information about how common MST is comes from its national screening program, in which every Veteran seen for healthcare is asked whether he or she experienced MST. National data from this program reveal that about 1 in 5 women and 1 in 100 men respond "yes," that they experienced MST, when screened by their VA healthcare provider. Although rates of MST are higher among women, because there are so many more men than women in the military, there are actually significant numbers of women and men seen in VA who have experienced MST. These rates are almost certainly an underestimate of the actual rate of MST, given that in general sexual trauma is frequently underreported. Also, it's important to keep in mind that these data speak only to the rate of MST among Veterans who have chosen to seek VA healthcare; they do not address the actual rate for all those who serve in the U.S. Military. Finally, although Veterans who respond "yes" when screened are asked if they are interested in learning about MST-related services available, not every Veteran who responds "yes" necessarily needs or is interested in treatment. MST is an experience, not a diagnosis, and Veterans' current treatment needs will vary.

How can MST affect Veterans?

MST is an experience, not a diagnosis or a mental health condition, and as with other forms of trauma, there are a variety of reactions that Veterans can have in response to MST. The type, severity, and duration of a Veteran's difficulties will all vary based on factors like whether he/she has a prior history of trauma, the types of responses from others he/she received at the time of the MST, and whether the MST happened once or was repeated over time. Although trauma can be a life-changing event, people are often remarkably resilient after experiencing trauma. Many individuals recover without professional help; others may function well in general, but continue to experience some level of difficulties or have strong reactions in certain situations. For some Veterans, experiences of MST may continue to affect their mental and physical health in significant ways, even many years later.

Some of the experiences both female and male survivors of MST may have include:

Strong emotions: feeling depressed; having intense, sudden emotional reactions to things; feeling angry or irritable all the time

Feelings of numbness: feeling emotionally 'flat'; difficulty experiencing emotions like love or happiness

Trouble sleeping: trouble falling or staying asleep; disturbing nightmares

Difficulties with attention, concentration, and memory: trouble staying focused; frequently finding their mind wandering; having a hard time remembering things

Problems with alcohol or other drugs: drinking to excess or using drugs daily; getting intoxicated or "high" to cope with memories or emotional reactions; drinking to fall asleep

Difficulty with things that remind them of their experiences of sexual trauma: feeling on edge or 'jumpy' all the time; difficulty feeling safe; going out of their way to avoid reminders of their experiences

Difficulties in relationships: feeling isolated or disconnected from others; abusive relationships; trouble with employers or authority figures; difficulty trusting others

Physical health problems: sexual difficulties; chronic pain; weight or eating problems; gastrointestinal problems

Although posttraumatic stress disorder (PTSD) is commonly associated with MST, it is not the only diagnosis that can result from MST. For example, VA medical record data indicate that in addition to PTSD, the diagnoses most frequently associated with MST among users of VA healthcare are depression and other mood disorders, and substance use disorders.

Fortunately, people can recover from experiences of trauma, and VA has effective services to help Veterans do this.

August 2012

How has VA responded to the problem of MST?

VA is strongly committed to ensuring that Veterans have access to the help they need in order to recover from MST.

- Recognizing that many survivors of sexual trauma do not disclose their experiences unless asked directly, VA healthcare providers ask every Veteran whether he or she experienced MST. This is an important way of making sure Veterans know about the services available to them.
- All treatment for physical and mental health conditions related to experiences of MST is provided free of charge. VA has services available to meet Veterans where they are in their recovery, whether that is focusing on strategies for coping with challenging emotions and memories or, for Veterans who are ready, actually talking about their MST experiences in depth.

- To receive free treatment for mental and physical health conditions related to MST, Veterans do not need to be service connected (or have a VA disability rating). Veterans may be able to receive this benefit even if they are not eligible for other VA care. Veterans do not need to have reported the incident(s) when they happened or have other documentation that they occurred.
- Every VA healthcare facility has a designated MST Coordinator who serves as a contact person for MST-related issues. This person can help Veterans find and access VA services and programs. He or she may also be aware of state and federal benefits and community resources that may be helpful.
- Every VA healthcare facility has providers knowledgeable about treatment for the aftereffects of MST. Many have specialized outpatient mental health services focusing on sexual trauma. Vet Centers also have specially trained sexual trauma counselors.
- Nationwide, there are programs that offer specialized sexual trauma treatment in residential or inpatient settings. These are programs for Veterans who need more intense treatment and support.
- To accommodate Veterans who do not feel comfortable in mixed-gender treatment settings, some facilities have separate programs for men and women. All residential and inpatient MST programs have separate sleeping areas for men and women.

In addition to its treatment programming, VA also provides training to staff on issues related to MST, including a mandatory training on MST for all mental health and primary care providers. VA also engages in a range of outreach activities to Veterans and conducts monitoring of MST-related screening and treatment, in order to ensure that adequate services are available.

How can Veterans get help?

For more information, Veterans can speak with their existing VA healthcare provider, contact the MST Coordinator at their nearest VA Medical Center, or contact their local Vet Center. A list of VA and Vet Center facilities can be found at www.va.gov and www.vetcenter.va.gov. Veterans should feel free to ask to meet with a clinician of a particular gender if it would make them feel more comfortable.

Veterans can also learn more about VA's MST-related services online at www.mentalhealth.va.gov/msthome.asp and see video clips with the recovery stories of Veterans who have experienced MST at http://maketheconnection.net/stories-of-connection/military-sexual-trauma.

Appendix D-2
Military Sexual Trauma (MST) Brochure
Available at **http://www.mentalhealth.va.gov/docs/MST-BrochureforVeterans.pdf**

For more information, male and female veterans can speak with their existing VA healthcare provider, contact the MST Coordinator at their nearest VA Medical Center, or contact their local Vet Center.

A list of VA and Vet Center facilities can be found online at
www.va.gov and
www.vetcenter.va.gov.

Both women and men can experience military sexual trauma (MST) during their service. All veterans seen at Veterans Health Administration facilities are asked about experiences of sexual trauma because we know that any type of trauma can affect a person's physical and mental health, even many years later. We also know that people can recover from trauma. VA has services to help veterans do this.

You can also call VA's general information hotline at 1-800-827-1000 or visit www.mentalhealth.va.gov/msthome.asp

Veterans should feel free to ask to meet with a clinician of the same or opposite sex if it would make them feel more comfortable.

Military Sexual Trauma

VETERANS:

Did you experience any unwanted sexual attention, uninvited sexual advances, or forced sex while in the military?

Does this experience continue to affect your life today?

mst support team

Department of Veterans Affairs

Employee Education System

June, 2012

WHAT IS MILITARY SEXUAL TRAUMA?

Military sexual trauma (MST) is the term that the Department of Veterans Affairs uses to refer to sexual assault or sexual harassment that occurred while the veteran was in the military. It includes any sexual activity where someone is involved against his or her will - he or she may have been pressured into sexual activities (for example, with threats of negative consequences for refusing to be sexually cooperative or with implied faster promotions or better treatment in exchange for sex), may have been unable to consent to sexual activities (for example, when intoxicated), or may have been physically forced into sexual activities. Other experiences that fall into the category of MST include unwanted sexual touching or grabbing; threatening, offensive remarks about a person's body or sexual activities; and/or threatening and unwelcome sexual advances.

MST can affect a person's mental and physical health, even many years later. Some of the difficulties both female and male survivors of MST may have include:

- **Strong emotions**: feeling depressed; having intense, sudden emotional reactions to things; feeling angry or irritable all the time
- **Feelings of numbness:** feeling emotionally 'flat'; difficulty experiencing emotions like love or happiness
- **Trouble sleeping:** trouble falling or staying asleep; disturbing nightmares
- **Difficulties with attention, concentration, and memory:** trouble staying focused; frequently finding their mind wandering; having a hard time remembering things
- **Problems with alcohol or other drugs**
- **Difficulty with things that remind them of their experiences of sexual trauma:** feeling on edge or 'jumpy' all the time; difficulty feeling safe; going out of their way to avoid reminders of their experiences; difficulty trusting others
- **Difficulties in relationships:** feeling isolated or disconnected from others; abusive relationships; trouble with employers or authority figures
- **Physical health problems:** sexual difficulties; chronic pain; weight or eating problems; gastrointestinal problems

WHAT SERVICES ARE AVAILABLE?

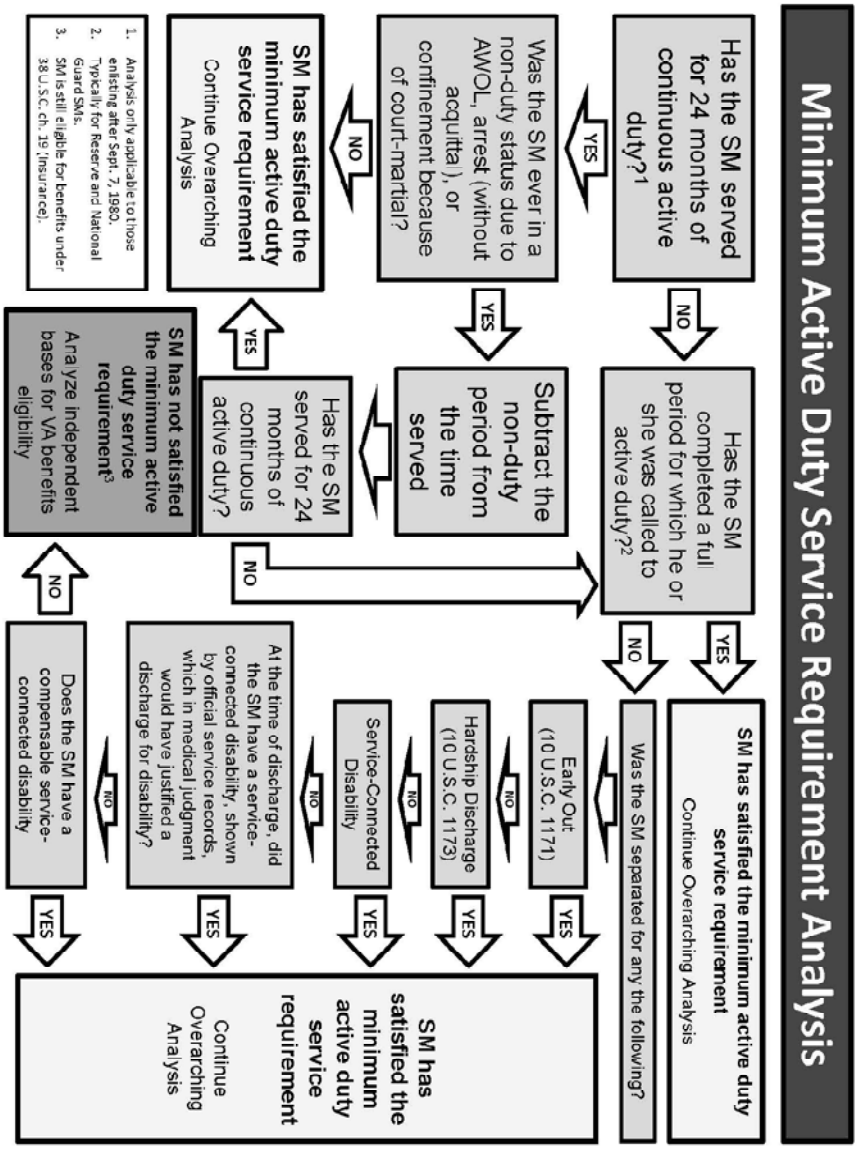
The VA provides free, confidential counseling and treatment to male and female veterans for mental and physical health conditions related to experiences of MST. You do not need to be service connected and may be able to receive this benefit even if you are not eligible for other VA care. You do not need to have reported the incident when it happened or have other documentation that it occurred.

CAN I APPLY FOR DISABILITY COMPENSATION FOR CONDITIONS RELATED TO MY EXPERIENCES OF MST?

Veterans can receive compensation for disabilities that began or got worse in the line of duty, including disabilities or injuries resulting from MST. When a veteran applies for disability compensation, VA must first determine whether there are current disabilities related to his or her military service. If there are,compensation is based on the current level of impairment.

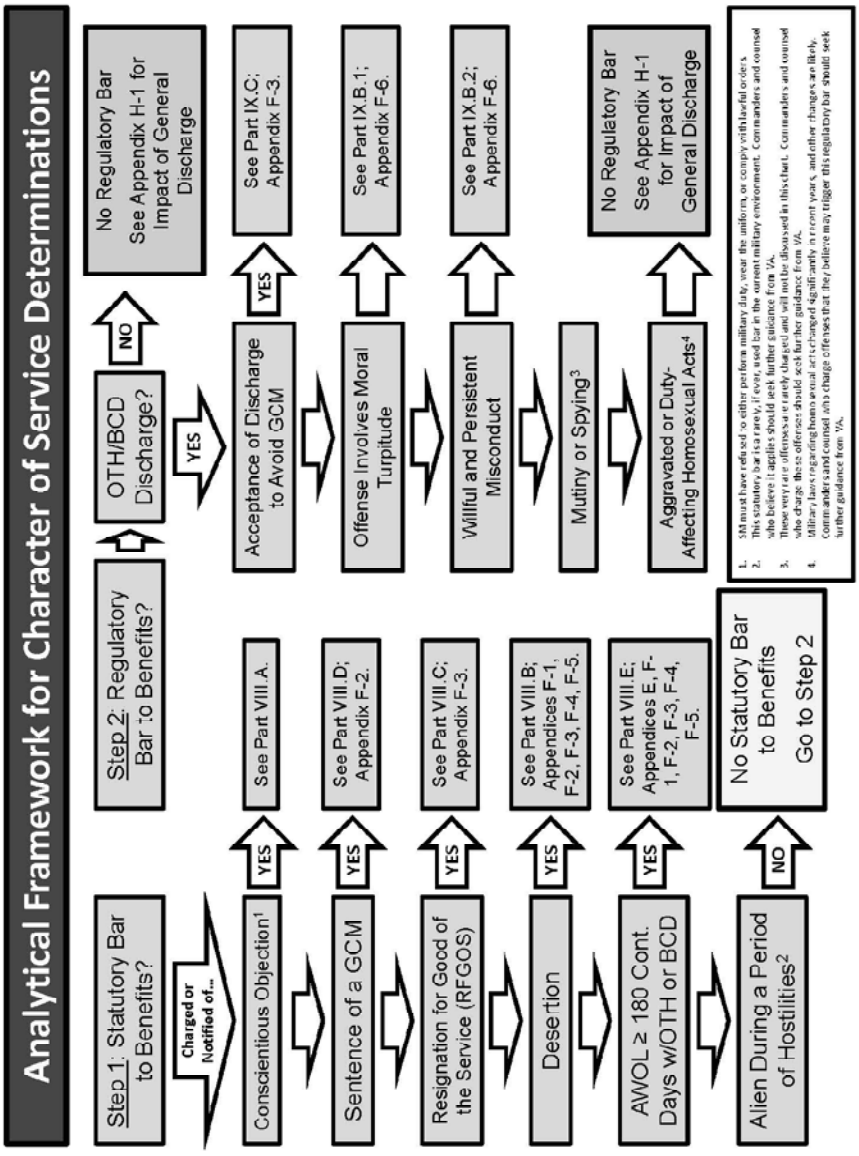
A Veterans Service Representative at the Veterans Benefits Administration (VBA) can explain the compensation program in greater detail and assist you in filing a claim. For more information, call the VA's general information hotline at **1-800-827-1000.**

Appendix E
Minimum Active Duty Service Requirement Analysis

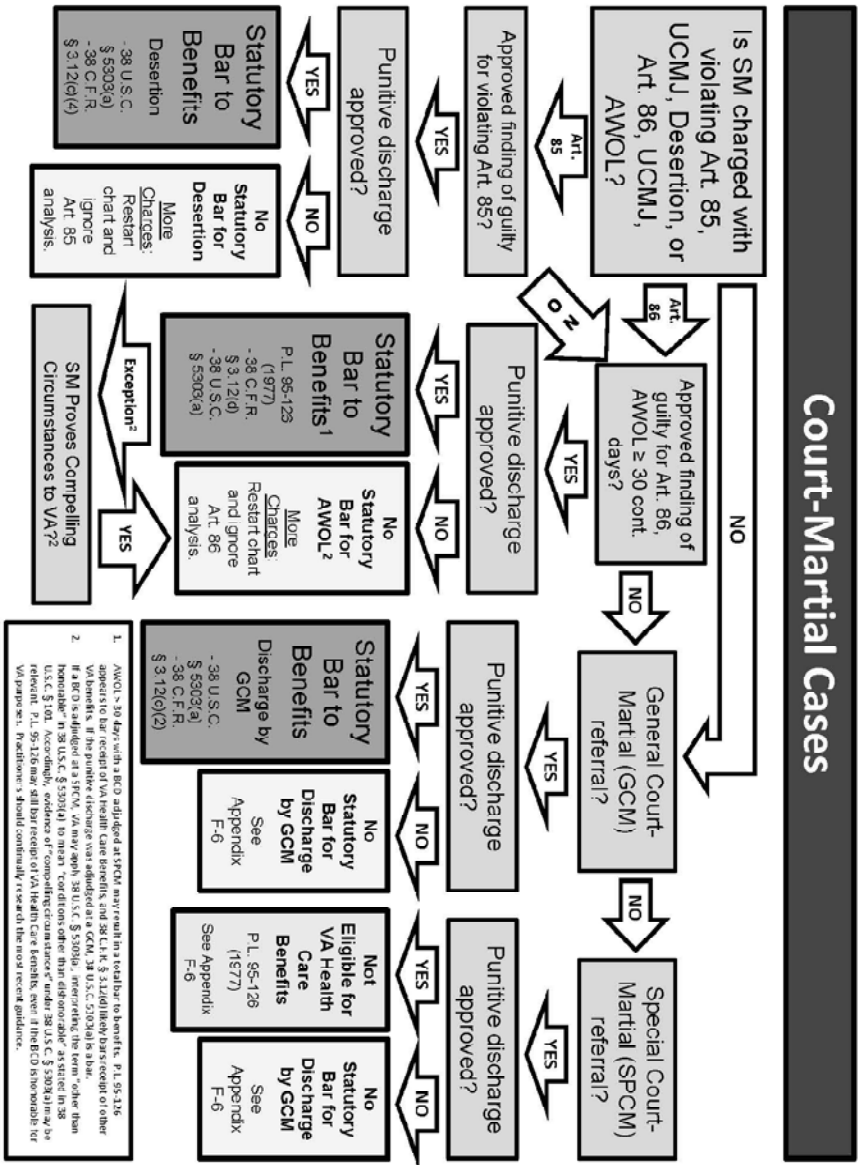


Appendix F
Character of Service Resources

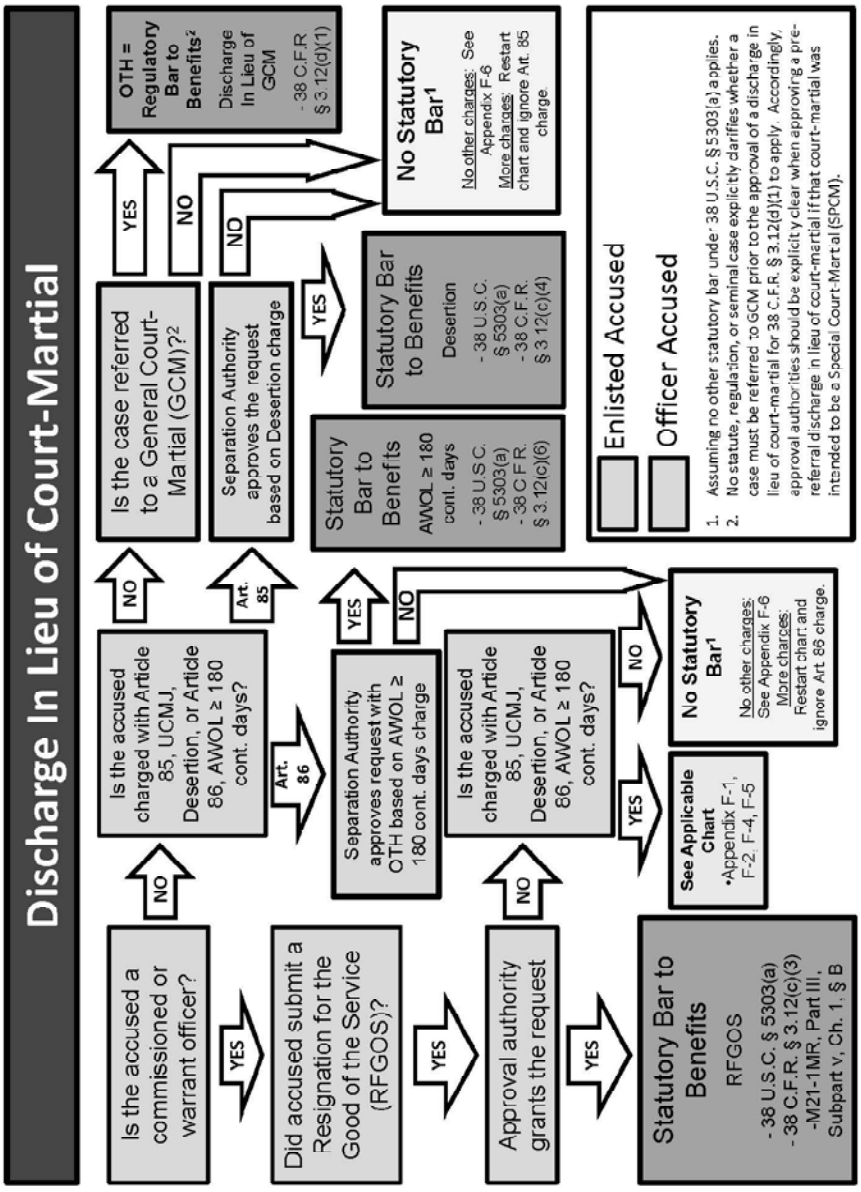
Appendix F-1
Analytical Framework for Character of Service Determinations



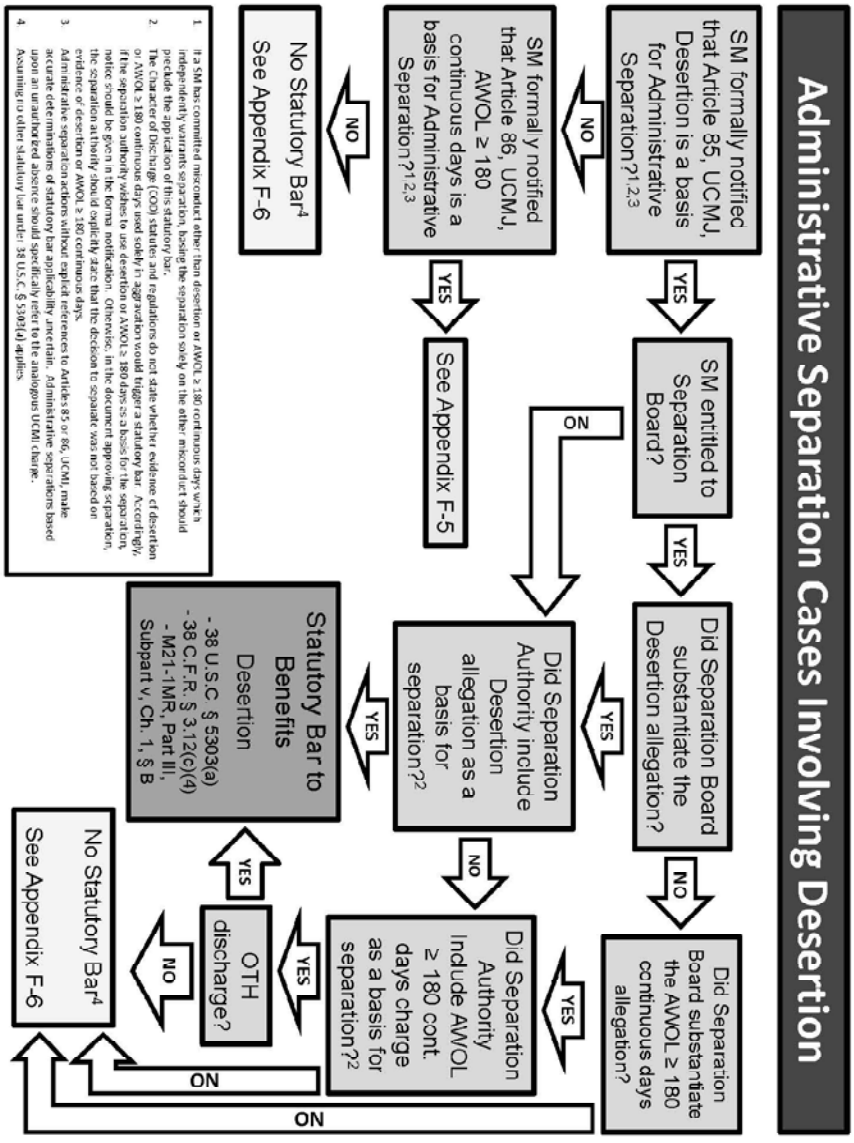
Appendix F-2
Court-Martial Cases



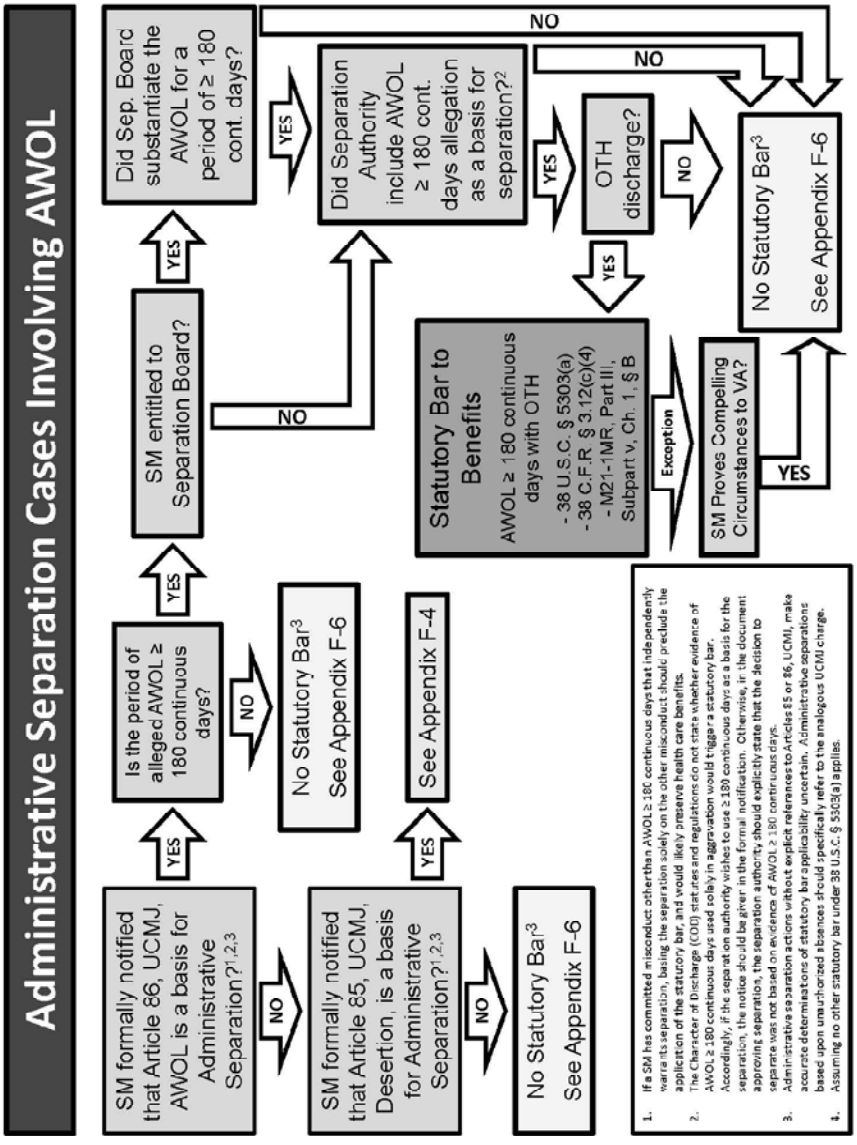
Appendix F-3
Discharge in Lieu of Court-Martial



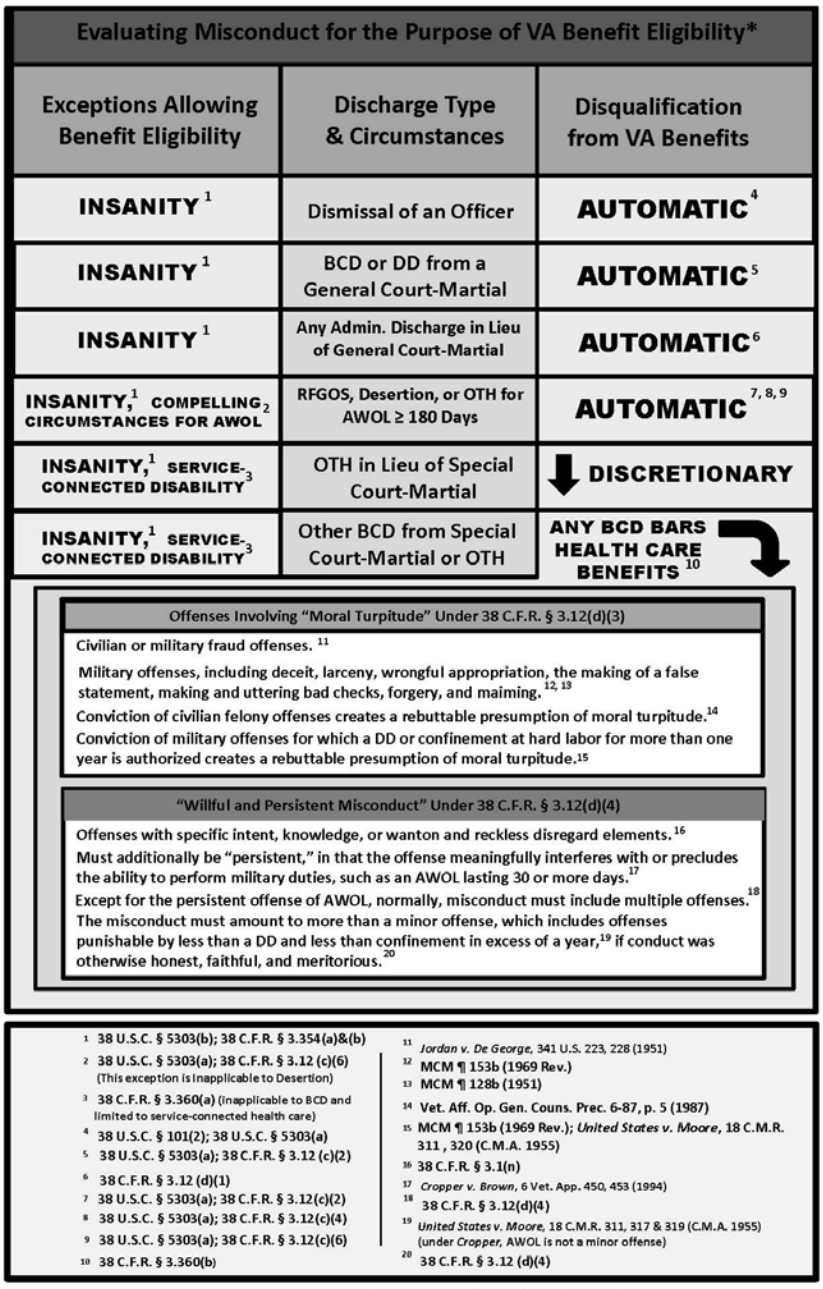
Appendix F-4
Administrative Separation Cases Involving Desertion



Appendix F-5
Administrative Separation Cases Involving AWOL



Appendix F-6
Evaluating Misconduct for the Purpose of VA Benefit Eligibility



Appendix F-7
Maximum Punishment Chart
MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 Edition)
***Available at* http://armypubs.army.mil/epubs/pdf/mcm.pdf**
This chart is located at Appendix 12 in the MANUAL FOR COURTS-MARTIAL.

MAXIMUM PUNISHMENT CHART

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
77	Principals (*see* Part IV, Para. 1 and pertinent offenses)			
78	Accessory after the fact (*see* Part IV, Para. 3.e.)			
79	Lesser included offenses (*see* Part IV, Para. 2 and pertinent offenses)			
80	Attempts (*see* Part IV, Para. 4.e.)			
81	Conspiracy (*see* Part IV, Para. 5.e.)			
82	Solicitation			
	If solicited offense committed, or attempted, *see* Part IV, Para. 6.e.			
	If solicited offense not committed:			
	Solicitation to desert[1]	DD, BCD	3 yrs.[1]	Total
	Solicitation to mutiny[1]	DD, BCD	10 yrs.[1]	Total
	Solicitation to commit act of misbehavior before enemy[1]	DD, BCD	10 yrs.[1]	Total
	Solicitation to commit act of sedition [1]	DD, BCD	10 yrs.[1]	Total
83	Fraudulent enlistment, appointment	DD, BCD	2 yrs.	Total
	Fraudulent separation	DD, BCD	5 yrs.	Total
84	Effecting unlawful enlistment, appointment, separation	DD, BCD	5 yrs.	Total
85	Desertion			
	In time of war	Death, DD, BCD	Life[4]	Total
	Intent to avoid hazardous duty, shirk important service [1]	DD, BCD	5 yrs.[1]	Total
	Other cases			
	Terminated by apprehension	DD, BCD	3 yrs.[1]	Total
	Terminated otherwise	DD, BCD	2 yrs.[1]	Total
86	Absence without leave, etc.			
	Failure to go, going from place of duty	None	1 mo.	2/3 1 mo.
	Absence from unit, organization, etc.			
	Not more than 3 days	None	1 mo.	2/3 1 mo.
	More than 3, not more than 30 days	None	6 mos.	2/3 6 mos.
	More than 30 days	DD, BCD	1 yr.	Total
	More than 30 days and terminated by apprehension	DD, BCD	18 mos.	Total
	Absence from guard or watch	None	3 mos.	2/3 3 mos.
	Absence from guard or watch with intent to abandon	BCD	6 mos.	Total
	Absence with intent to avoid maneuvers, field exercises	BCD	6 mos.	Total
87	Missing movement			
	Through design	DD, BCD	2 yrs.	Total
	Through neglect	BCD	1 yr.	Total
88	Contempt toward officials	Dismissal	1 yr.	Total
89	Disrespect toward superior commissioned officer	BCD	1 yr.	Total
90	Assaulting, willfully disobeying superior commissioned officer			
	In time of war	Death, DD, BCD	Life[4]	Total
	Striking, drawing or lifting up any weapon or offering any violence toward superior commissioned officer in the execution of duty[1]	DD, BCD	10 yrs.[1]	Total
	Willfully disobeying lawful order of superior commissioned officer[1]	DD, BCD	5 yrs.[1]	Total
91	Insubordinate conduct toward warrant, noncommissioned, petty officer			
	Striking or assaulting:			
	Warrant officer	DD, BCD	5 yrs.	Total
	Superior noncommissioned or petty officer	DD, BCD	3 yrs.	Total
	Other noncommissioned or petty officer	DD, BCD	1 yr.	Total
	Willfully disobeying:			
	Warrant officer	DD, BCD	2 yrs.	Total
	Noncommissioned or petty officer	BCD	1 yr.	Total
	Contempt or disrespect toward:			
	Warrant Officer	BCD	9 mos.	Total
	Superior noncommissioned or petty officer	BCD	6 mos.	Total
	Other noncommissioned or petty officer	None	3 mos.	2/3 3 mos.

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
92	Failure to obey order, regulation			
	Violation of or failure to obey general order or regulation [2]	DD, BCD	2 yrs.	Total
	Violation of or failure to obey other order [2]	BCD	6 mos.	Total
	Dereliction in performance of duties			
	Through neglect or culpable inefficiency	None	3 mos.	2/3 3 mos.
	Willful	BCD	6 mos.	Total
93	Cruelty & maltreatment of subordinates	DD, BCD	1 yr.	Total
94	Mutiny & sedition	Death, DD, BCD	Life[4]	Total
95	Resisting apprehension, flight, breach of arrest, escape			
	Resisting apprehension	BCD	1 yr.	Total
	Flight from apprehension	BCD	1 yr.	Total
	Breaking arrest	BCD	6 mos.	Total
	Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations imposed pursuant to Article 15	DD, BCD	1 yr.	Total
	Escape from post-trial confinement	DD, BCD	5 yrs.	Total
96	Releasing a prisoner without proper authority	DD, BCD	2 yrs.	Total
	Suffering a prisoner to escape through neglect	BCD	1 yr.	Total
	Suffering a prisoner to escape through design	DD, BCD	2 yrs.	Total
97	Unlawful detention	DD, BCD	3 yrs.	Total
98	Noncompliance with procedural rules, etc.			
	Unnecessary delay in disposing of case	BCD	6 mos.	Total
	Knowingly, intentionally failing to enforce or comply with provisions of the code	DD, BCD	5 yrs.	Total
99	Misbehavior before enemy	Death, DD, BCD	Life[4]	Total
100	Subordinate compelling surrender	Death, DD, BCD	Life[4]	Total
101	Improper use of countersign	Death, DD, BCD	Life[4]	Total
102	Forcing safeguard	Death, DD, BCD	Life[4]	Total
103	Captured, abandoned property; failure to secure, etc.			
	Of value of $500.00 or less	BCD	6 mos.	Total
	Of value of more than $500.00	DD, BCD	5 yrs.	Total
	Any firearm or explosive	DD, BCD	5 yrs.	Total
	Looting or pillaging	DD, BCD	Life[4]	Total
104	Aiding the enemy	Death, DD, BCD	Life[4]	Total
105	Misconduct as prisoner	DD, BCD	Life[4]	Total
106	Spying	Mandatory Death, DD, BCD	Not applicable	Total
106a	Espionage			
	Cases listed in Art. 106a(a)(l)(A)–(D)	Death, DD, BCD	Life[4]	Total
	Other cases	DD, BCD	Life[4]	Total
107	False official statements	DD, BCD	5 yrs.	Total
108	Military property; loss, damage, destruction, disposition			
	Selling or otherwise disposing			
	Of a value of $500.00 or less	BCD	1 yr.	Total
	Of a value of more than $500.00	DD, BCD	10 yrs.	Total
	Any firearm or explosive	DD, BCD	10 yrs.	Total
	Damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed:			
	Through neglect, of a value or damage of:			
	$500.00 or less	None	6 mos.	2/3 6 mos.
	More than $500.00	BCD	1 yr.	Total
	Willfully, of a value or damage of			
	$500.00 or less	BCD	1 yr.	Total
	More than $500.00	DD, BCD	10 yrs.	Total
	Any firearm or explosive	DD, BCD	10 yrs.	Total

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
109	Property other than military property of U.S.: waste, spoilage, or destruction.			
	Wasting, spoiling, destroying, or damaging property of a value of:			
	$500.00 or less	BCD	1 yr.	Total
	More than $500.00	DD, BCD	5 yrs.	Total
110	Improper hazarding of vessel			
	Willfully and wrongfully	Death, DD, BCD	Life[4]	Total
	Negligently	DD, BCD	2 yrs.	Total
111	Drunk or reckless operation of vehicle, aircraft, or vessel			
	Resulting in personal injury	DD, BCD	18 mos.	Total
	No personal injury involved	BCD	6 mos.	Total
112	Drunk on duty	BCD	9 mos.	Total
112a	Wrongful use, possession, manufacture or introduction of controlled substances [3]			
	Wrongful use, possession, manufacture, or introduction of:			
	Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	DD, BCD	5 yrs.	Total
	Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances	DD, BCD	2 yrs.	Total
	Wrongful distribution of, or, with intent to distribute, wrongful possession, manufacture, introduction, or wrongful importation of or exportation of:			
	Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	DD, BCD	15 yrs.	Total
	Phenobarbital and Schedule IV and V controlled substances	DD, BCD	10 yrs.	Total
113	Misbehavior of sentinel or lookout			
	In time of war	Death, DD, BCD	Life[4]	Total
	In other time:			
	While receiving special pay under 37 U.S.C. 310	DD, BCD	10 yrs.	Total
	In all other places	DD, BCD	1 yr.	Total
114	Dueling	DD, BCD	1 yr.	Total
115	Malingering			
	Feigning illness, physical disablement, mental lapse, or derangement			
	In time of war, or in a hostile fire pay zone	DD, BCD	3 yrs.	Total
	Other	DD, BCD	1 yr.	Total
	Intentional self-inflicted injury			
	In time of war, or in a hostile fire pay zone	DD, BCD	10 yrs.	Total
	Other	DD, BCD	5 yrs.	Total
116	Riot	DD, BCD	10 yrs.	Total
	Breach of peace	None	6 mos.	2/3 6 mos.
117	Provoking speech, gestures	None	6 mos.	2/3 6 mos.
118	Murder			
	Article 118(1) or (4)	Death, mandatory minimum life with parole, DD, BCD	Life[4]	Total
	Article 118(2) or (3)	DD, BCD	Life[4]	Total
119	Manslaughter			
	Voluntary	DD, BCD	15 yrs.	Total
	Involuntary	DD, BCD	10 yrs.	Total
	Voluntary manslaughter of a child under the age of 16 years	DD, BCD	20 yrs.	Total
	Involuntary manslaughter of a child under the age of 16 years	DD, BCD	15 yrs.	Total
119a	Death or injury of an Unborn Child (*see* Part IV, Para. 44a.(a)(1))			

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
	Injuring or killing an unborn child	Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the bodily injury or death occurred to the unborn child's mother.		
	Attempting to kill an unborn child	Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the attempt been made to kill the unborn child's mother.		
	Intentionally killing an unborn child	Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the death occurred to the unborn child's mother.		
120	Rape and Rape of a Child	Death, DD, BCD	Life[4]	Total
	Aggravated Sexual Assault	DD, BCD	30 yrs	Total
	Aggravated Sexual Assault of a Child	DD, BCD	20 yrs	Total
	Aggravated Sexual Abuse of a Child	DD, BCD	20 yrs	Total
	Aggravated Sexual Contact	DD, BCD	20 yrs	Total
	Aggravated Sexual Contact with a Child	DD, BCD	20 yrs	Total
	Abusive Sexual Contact with a Child	DD, BCD	15 yrs	Total
	Indecent Liberty with a Child	DD, BCD	15 yrs	Total
	Abusive Sexual Contact	DD, BCD	7 yrs	Total
	Indecent Act	DD, BCD	5 yrs	Total
	Forcible Pandering	DD, BCD	5 yrs	Total
	Wrongful Sexual Contact	DD, BCD	1 yr	Total
	Indecent Exposure	DD, BCD	1 yr	Total
	[Note: The Article 120 maximum punishments apply to offenses committed during the period 1 October 2007 through 27 June 2012. See Appendices 23, 27, and 28]			
120a	Stalking	DD, BCD	3 yrs	Total
121	Larceny			
	Of military property of a value of $500.00 or less	BCD	1 yr.	Total
	Of property other than military property of a value of $500.00 or less	BCD	6 mos.	Total
	Of military property of a value of more than $500.00 or of any military motor vehicle, aircraft, vessel, firearm, or explosive	DD, BCD	10 yrs.	Total
	Of property other than military property of a value of more than $500.00 or any motor vehicle, aircraft, vessel, firearm, or explosive	DD, BCD	5 yrs.	Total
	Wrongful appropriation			
	Of a value of $500.00 or less	None	3 mos.	2/3 3 mos.
	Of a value of more than $500.00	BCD	6 mos.	Total
	Of any motor vehicle, aircraft, vessel, firearm, or explosive	DD, BCD	2 yrs.	Total
122	Robbery			
	Committed with a firearm	DD, BCD	15 yrs.	Total

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
	Other cases	DD, BCD	10 yrs.	Total
123	Forgery	DD, BCD	5 yrs.	Total
123a	Checks, etc., insufficient funds, intent to			
	To procure anything of value with intent to defraud			
	$500.00 or less	BCD	6 mos.	Total
	More than $500.00	DD, BCD	5 yrs.	Total
	For payment of past due obligation, and other cases, intent to deceive	BCD	6 mos.	Total
124	Maiming	DD, BCD	20 yrs	Total
125	Sodomy			
	By force and without consent	DD, BCD	Life[4]	Total
	With child under age of 16 years and at least 12	DD, BCD	20 yrs.	Total
	With child under the age of 12	DD, BCD	Life[4]	Total
	Other cases	DD, BCD	5 yrs.	Total
126	Arson			
	Aggravated	DD, BCD	20 yrs.	Total
	Other cases, where property value is:			
	$500.00 or less	DD, BCD	1 yr.	Total
	More than $500.00	DD, BCD	5 yrs.	Total
127	Extortion	DD, BCD	3 yrs.	Total
128	Assaults			
	Simple Assault:			
	Generally	None	3 mos.	2/3 3 mos.
	With an unloaded firearm	DD, BCD	3 yrs.	Total
	Assault consummated by battery	BCD	6 mos.	Total
	Assault upon commissioned officer of U.S. or friendly power not in execution of office	DD, BCD	3 yrs.	Total
	Assault upon warrant officer, not in execution of office	DD, BCD	18 mos.	Total
	Assault upon noncommissioned or petty officer not in execution of office	BCD	6 mos.	Total
	Assault upon, in execution of office, person serving as sentinel, lookout, security policeman, military policeman, shore patrol, master at arms, or civil law enforcement	DD, BCD	3 yrs.	Total
	Assault consummated by battery upon child under 16 years	DD, BCD	2 yrs.	Total
	Assault with a dangerous weapon or other means or force likely to produce			
	death or grievous bodily harm:			
	Committed with loaded firearm	DD, BCD	8 yrs.	Total
	Other cases	DD, BCD	3 yrs.	Total
	Assault in which grievous bodily harm is intentionally inflicted:			
	With a loaded firearm	DD, BCD	10 yrs.	Total
	Other cases	DD, BCD	5 yrs.	Total
	Aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm when committed upon a child under the age of 16 years	DD, BCD	5 yrs	Total
	Aggravated assault in which grievous bodily harm is intentionally inflicted when committed upon a child under the age of 16 years	DD, BCD	8 yrs	Total
129	Burglary	DD, BCD	10 yrs.	Total
130	Housebreaking	DD, BCD	5 yrs.	Total
131	Perjury	DD, BCD	5 yrs.	Total
132	Frauds against the United States			
	Offenses under article 132(1) or (2)	DD, BCD	5 yrs.	Total
	Offenses under article 132(3) or (4)			
	$500.00 or less	BCD	6 mos.	Total
	More than $500.00	DD, BCD	5 yrs.	Total
133	Conduct unbecoming officer (*see* Part IV, para. 59e)	Dismissal	1 yr. or as prescribed	Total
134	Abusing public animal	None	3 mos.	2/3 3 mos.

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
	Adultery	DD, BCD	1 yr.	Total
	Assault			
134	With intent to commit murder or rape	DD, BCD	20 yrs.	Total
	With intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary	DD, BCD	10 yrs.	Total
	With intent to commit housebreaking	DD, BCD	5 yrs.	Total
	Bigamy	DD, BCD	2 yrs.	Total
	Bribery	DD, BCD	5 yrs.	Total
	Graft	DD, BCD	3 yrs.	Total
	Burning with intent to defraud	DD, BCD	10 yrs.	Total
	Check, worthless, making and uttering—by dishonorably failing to maintain funds	BCD	6 mos.	Total
	Child Endangerment:			
	Endangerment by design resulting in grievous bodily harm	DD, BCD	8 yrs	Total
	Endangerment by design resulting in harm	DD, BCD	5 yrs	Total
	Other cases by design	DD, BCD	4 yrs	Total
	Endangerment by culpable negligence resulting in grievous bodily harm	DD, BCD	3 yrs	Total
	Endangerment by culpable negligence resulting in harm	BCD	2 yrs	Total
	Other cases by culpable negligence	BCD	1 yr	Total
	Child Pornography			
	Possessing, receiving, or viewing	DD, BCD	10 yrs.	Total
	Possessing child pornography with intent to distribute	DD, BCD	15 yrs.	Total
	Distributing child pornography	DB, BCD	20 yrs.	Total
	Producing child pornography	DD, BCD	30 yrs.	Total
	Cohabitation, wrongful	None	4 mos.	2/3 4 mos.
	Correctional custody, escape from	DD, BCD	1 yr.	Total
	Correctional custody, breach of	BCD	6 mos.	Total
	Debt, dishonorably failing to pay	BCD	6 mos.	Total
	Disloyal statements	DD, BCD	3 yrs.	Total
	Disorderly conduct			
	Under such circumstances as to bring discredit	None	4 mos.	2/3 4 mos.
	Other cases	None	1 mo.	2/3 1 mo.
	Drunkenness			
	Aboard ship or under such circumstances as to bring discredit	None	3 mos.	2/3 3 mos.
	Other cases	None	1 mo.	2/3 1 mo.
	Drunk and disorderly			
	Aboard ship	BCD	6 mos.	Total
	Under such circumstances as to bring discredit	None	6 mos.	2/3 6 mos.
	Other cases	None	3 mos.	2/3 3 mos.
	Drinking liquor with prisoner	None	3 mos.	2/3 3 mos.
	Drunk prisoner	None	3 mos.	2/3 3 mos.
	Drunkenness—incapacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs	None	3 mos.	2/3 3 mos.
	False or unauthorized pass offenses			
	Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling	DD, BCD	3 yrs.	Total
	All other cases	BCD	6 mos.	Total
	False pretenses, obtaining services under			
	Of a value of $500.00 or less	BCD	6 mos.	Total
	Of a value of more than $500.00	DD, BCD	5 yrs.	Total
	False swearing	DD, BCD	3 yrs.	Total
	Firearm, discharging—through negligence	None	3 mos.	2/3 3 mos.
	Firearm, discharging—willfully, under such circumstances as to endanger human life	DD, BCD	1 yr.	Total
	Fleeing scene of accident	BCD	6 mos.	Total
	Fraternization	Dismissal	2 yrs.	Total
	Gambling with subordinate	None	3 mos.	2/3 3 mos.
	Homicide, negligent	DD, BCD	3 yrs.	Total
	Impersonation			
	With intent to defraud	DD, BCD	3 yrs.	Total

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
	Other cases	BCD	6 mos.	Total
	Indecent language			
134	Communicated to child under the age of 16 yrs	DD, BCD	2 yrs.	Total
	Other cases	BCD	6 mos.	Total
	Jumping from vessel into the water	BCD	6 mos.	Total
	Kidnapping	DD, BCD	Life[4]	Total
	Mail: taking, opening, secreting, destroying, or stealing	DD, BCD	5 yrs.	Total
	Mails: depositing or causing to be deposited obscene matters in	DD, BCD	5 yrs.	Total
	Misprision of serious offense	DD, BCD	3 yrs.	Total
	Obstructing justice	DD, BCD	5 yrs.	Total
	Wrongful interference with an adverse administrative proceeding	DD, BCD	5 yrs.	Total
	Pandering	DD, BCD	5 yrs.	Total
	Prostitution and patronizing a prostitute	DD, BCD	1 yr.	Total
	Parole, violation of	BCD	6 mos.	2/3 6 mos.
	Perjury, subornation of	DD, BCD	5 yrs.	Total
	Public record: altering, concealing, removing, mutilating, obliterating, or destroying	DD, BCD	3 yrs.	Total
	Quarantine: breaking	None	6 mos.	2/3 6 mos.
	Reckless endangerment	BCD	1 yr.	Total
	Restriction, breaking	None	1 mo.	2/3 1 mo.
	Seizure: destruction, removal, or disposal of property to prevent	DD, BCD	1 yr.	Total
	Self-injury without intent to avoid service			
	In time of war, or in a hostile fire pay zone	DD	5 yrs.	Total
	Other	DD	2 yrs.	Total
	Sentinel, lookout			
	Disrespect to	None	3 mos.	2/3 3 mos.
	Loitering or wrongfully sitting on post by			
	In time of war or while receiving special pay under 37 USC 310	DD, BCD	2 yrs.	Total
	Other cases	BCD	6 mos.	Total
	Soliciting another to commit an offense (*see* Part IV, para. 105e)			
	Of a value of $500.00 or less	BCD	6 mos.	Total
	Of a value of more than $500.00	DD, BCD	3 yrs.	Total
	Straggling	None	3 mos.	2/3 3 mos.
	Testify, wrongfully refusing to	DD, BCD	5 yrs.	Total
	Threat, bomb, or hoax	DD, BCD	10 yrs.	Total
	Threat, communicating	DD, BCD	3 yrs.	Total
	Unlawful entry	BCD	6 mos.	Total
	Weapon: concealed, carrying	BCD	1 yr.	Total
	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	BCD	6 mos.	Total

Notes:

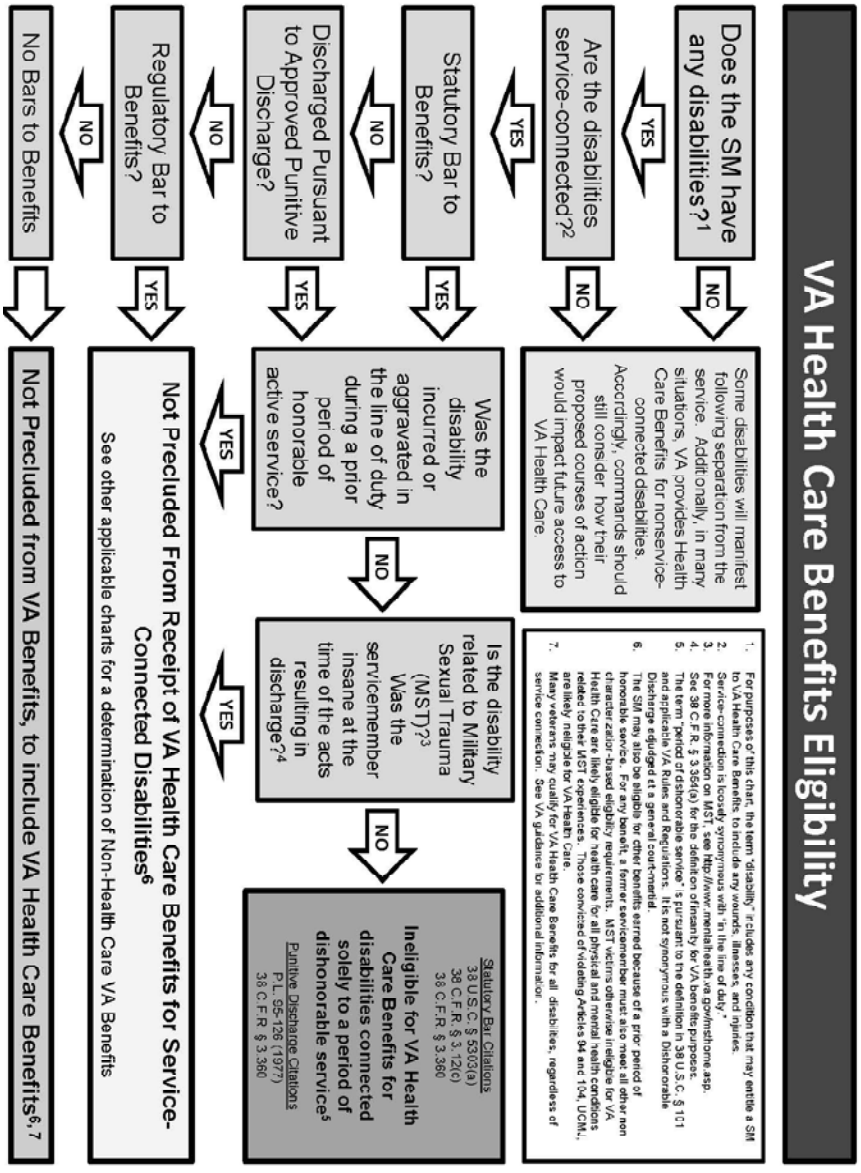
1. Suspended in time of war.

2. *See* paragraph 16e(1) & (2) Note, Part IV

3. When any offense under paragraph 37, Part IV, is committed: while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. sec. 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such offense shall be increased by 5 years.

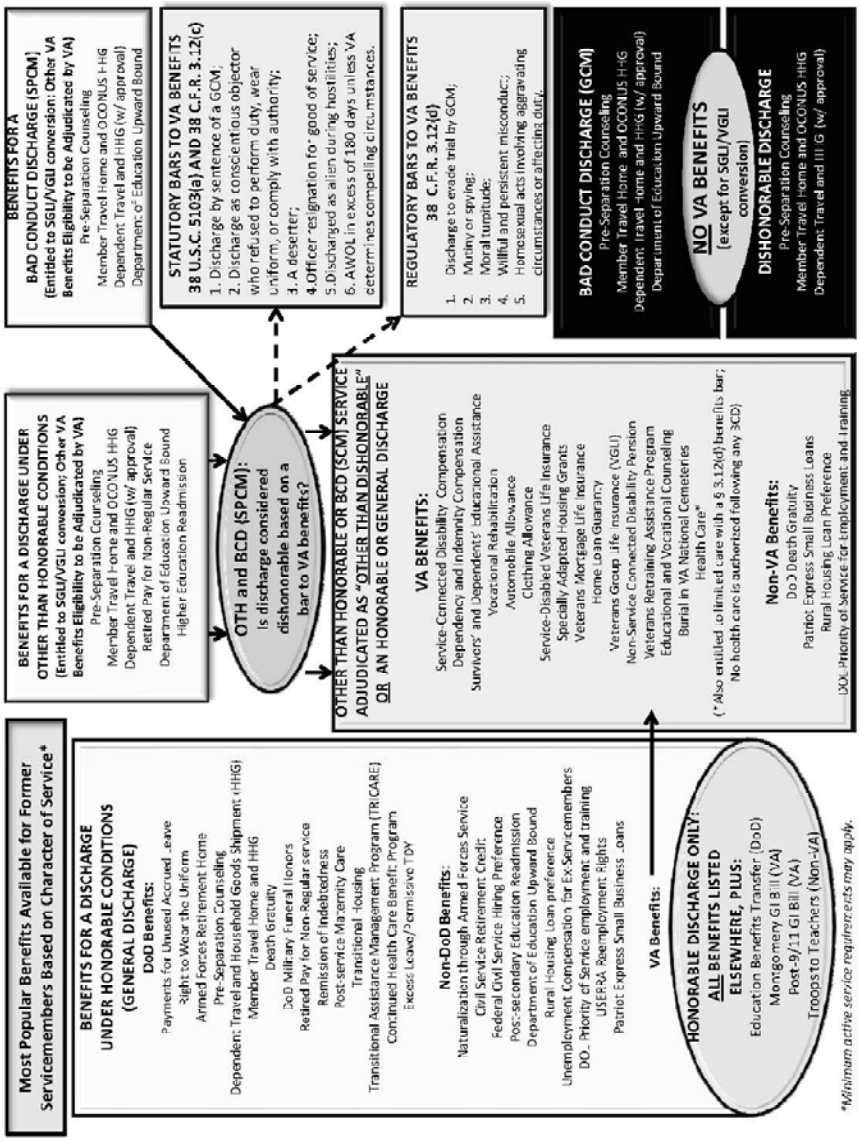
4. With or without eligibility for parole.

Appendix G
VA Health Care Benefits Eligibility

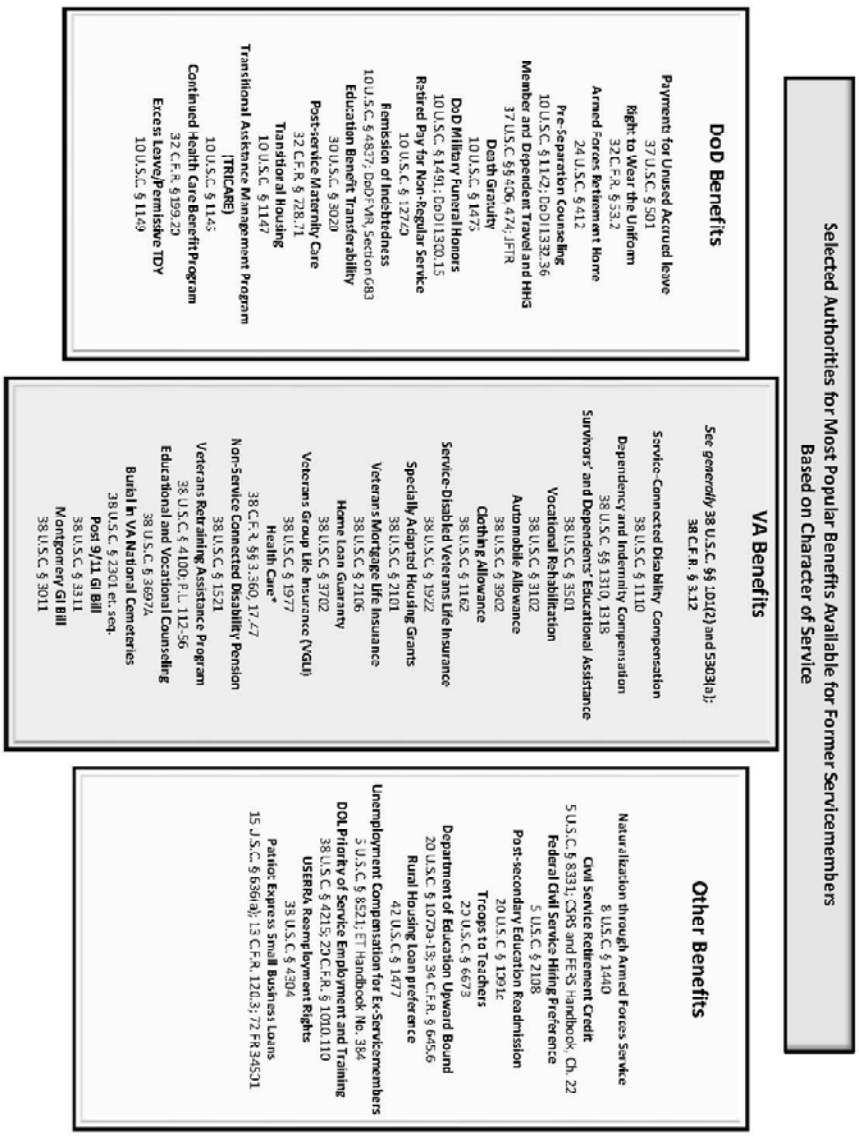


Appendix H
Specific VA Benefits Resources

Appendix H-1
Most Popular Benefits Based on Character of Service



Appendix H-2
Selected Authorities for Most Popular Benefits



Appendix I
Information Paper on the Relationship Between PTSD, TBI, and Criminal Behavior

This information paper highlights the current state of knowledge about the relationship between criminal behavior and mental illnesses that are common among servicemembers who have experienced combat and situations in which their lives were threatened or in which they were forced to harm others in the course of their duties, particularly noncombatants. Although each person can—and many do—react very differently to the events which cause Posttraumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and there are incentives for persons facing charges to fake a disorder or exaggerate its symptoms in attempts to reduce potential punishment, countless real experiences have led to a consensus among experts that *some portion* of combat veterans engage in criminal conduct as a result of untreated mental health conditions related to combat. Excluding cases in which individuals have malingered a disorder or its symptoms, the following paragraphs discuss lessons from actual cases.[*]

Criminal Conduct Related to Mental Health Conditions

Traumatic Brain Injury is a signature injury of the wars in Iraq and Afghanistan, and one estimate projects that 300,000, or nearly 20%, of veterans of these wars may suffer from PTSD.[1] Posttraumatic Stress Disorder and TBI often underlie criminal behavior because both conditions, together or independently, influence one's judgment and ability to respond to stressful triggering events. This information paper does not seek to suggest that there is an excuse for the criminal misconduct stemming from PTSD or TBI. Rather, the below examples, drawn from research and observations from Vietnam to the present, are intended to highlight conditions that can be prevented or minimized with a proper course of treatment if intervention occurs early enough during the life-course of the disorder.

For practical purposes, PTSD is a disorder that arises from a significant threatening event that leads to specific types of responses based on unwanted reminders of the real trauma or attempts to avoid

[*] For ease of reading, references are kept to a minimum and appear in endnotes following the text.

similar trauma from happening again. One shorthand description of combat PTSD is "the persistence into civilian life or life in garrison of the valid physiological, psychological, and social adaptations that promote survival when other human beings are trying to kill you."[2] Traumatic Brain Injury is injury to the brain which results from physical impact. Based on the nature of the trauma inflicted and the parts of the brain damaged by the physical impact, physiological responses can influence the brain's processing of information and the ability to regulate emotion. In some cases, TBI impairs judgment to the point where a person perceives nonexistent threats or lacks the ability to express rage, shock or grief in a socially acceptable manner.[3] Those individuals who suffer from both PTSD and TBI, often stemming from injuries inflicted during the same combat events, may experience symptoms of greater or extended severity than they would if they only suffered from one.

While the true incidence of trauma-related criminal behavior remains unknown due to non-reporting, lack of mental health diagnoses, and lack of evaluation of circumstances or history by military or civilian authorities, criminal behavior more commonly associated with, and often "stemming directly from," untreated PTSD includes:

- "AWOL or desertion after return to U.S.";
- "Use of illicit drugs to self-medicate symptoms of PTSD"; and
- "Impulsive assaults during explosive rages . . . after return to the U.S."[4]

Army Field Manual 22-51, the *Leader's Manual for Combat Stress Control*, includes these and other criminal behaviors as "misconduct stress behaviors" originating from experiences in combat and emerging over time following such exposure.[5] While the former sources date to 1994 and lessons from Vietnam era combat veterans, a 2007 Department of Defense mental health task force report similarly linked PTSD to "[d]ifficulty controlling one's emotions, including irritability and anger . . . , [s]elf-medication with . . . illicit drugs in an attempt to return to normalcy [and] reckless/high risk behaviors."[6] Overall, many violations of the *Uniform Code of Military Justice* may be further explained by the specific symptom clusters, stress triggers, or environmental stimuli addressed below:

Self-Medication. The persistent reminders of original trauma that repeat over time in an unwanted way and hypervigilence, a state in which an individual is constantly on alert expecting a threat to guard against, are PTSD symptoms that can lead one to become exhausted and constantly on edge. A very common response to these conditions is misuse and abuse of alcohol, prescription medication, or illicit narcotics to relieve such symptoms. Although servicemembers have choices and their mental conditions do not force them to engage in this activity, this "self-medication" is often for the purpose of relaxing or sleeping. Depending on the facts of an individual case, one who might have recreationally used alcohol prior to the trauma may begin abusing it for its benefits without knowing he or she has a mental health disorder and failing to notice abuse of alcohol until an event or a witness makes this clear.

A **dissociative episode** is an experience in which a person detaches from reality and believes himself or herself to be in an environment similar to the one in which actual trauma occurred, mistakenly anticipating or believing that a similar threat will be or is present. Sometimes described as a "flashback," the dissociative episode can be triggered by sights, smells, situations of high emotion, or other reminders of actual trauma. Witnesses often describe individuals as "going on autopilot" when they are in dissociative states in part because the trauma-survivor, overcome by events, will resort back to survival behavior that they had learned through repetition during training or that they actually relied upon to survive in extremely dangerous situations.

Behaviors based on a **shattered assumption of moral order**. When an event is traumatizing enough to result in PTSD, which is currently diagnosed in part based on the duration of a person's symptoms lasting more than one month,[7] the causal event challenges a number of core assumptions necessary for social survival. One key assumption that is often "shattered" by the trauma is the notion that "a moral order exists in the universe that discriminates right from wrong."[8] After the traumatic event, the survivor may find certain behaviors to be acceptable that he or she considered as morally wrong or criminal prior to the event, essentially reasoning that life operates according to fewer rules in a far more haphazard manner.

Thrill or sensation-seeking behavior, which arises from sustained periods living in dangerous environments where the veteran expected threats at any moment, can occur when the trauma-survivor returns to

civilian roles that he or she perceives to be boring and uneventful. In some cases, combat veterans perceive such uneventful roles as an exception to the norm and extremely distressful. In an effort to return to a similar sense of routine, some veterans try to recreate the common adrenaline rush by engaging in dangerous behavior behind the wheel of a car or handlebar of a motorcycle, starting fights at bars, or undertaking more deliberate acts involving the possibility of capture by the authorities or persons capable of retaliating with force.[9]

Self-punishment. In a different response to traumatic experiences, particularly ones in which the combat veteran felt responsible for injury or death to fellow servicemembers or civilians, the veteran may resort to criminal activity hoping to be caught and punished with the belief "I deserve to suffer,"[10] viewing incarceration and its resulting discomfort as methods of evening the score or making right the situation. In an extreme variation, "Depression-Suicide Syndrome," the veteran may hope for law enforcement to respond to his or her criminal behavior with lethal force as a means of suicide.[11] As opposed to this "unconscious" or "survivor's" guilt,[12] a combat veteran may also use extreme forms of self-punishment in an effort to protect society from his or her own threat of unpredictable violence.[13] In either case, because the object of the behavior is in law enforcement's response to it, the crimes often appear to be illogical, "bizarre," and "poorly planned."[14]

"Moral injury" results from a traumatic event in which a veteran felt authorized or required by the circumstances in combat to act in conflict with his or her conscience and sense of values.[15] A common example used by the psychiatrist who coined the term is the Marine who acted on orders to shoot a sniper who was using an infant serving as a human shield.[16] Although the situation and the rules of engagement may have permitted such conduct, the nature of the behavior can create a major conflict within the servicemember on a deeper moral level. Moral injury can result in criminal offenses, especially those involving domestic violence, through the veteran's effort to "strike first," one of three common maladaptive responses to the lack of ability to trust others.[17]

Revenge. It is sometimes the case that individuals suffering from symptoms of combat-related mental conditions will engage in criminal behavior as a form of retaliation. After being plagued by recurring readjustment difficulties, criminal behavior may be an attempt to "prove their abilities, for they perceive society as viewing them to be

incapable.[18] Alternatively, these veterans may direct such rage toward "any figures or symbols of authority" as a result of feeling used and exploited during combat service.[19]

Decrease in duty performance due to lack of ability to concentrate or cognitively organize information. Failures to show up to work call or physical fitness on time, outbursts, and inability to meet deadlines are often explained by PTSD and TBI symptoms. These symptoms, when left undiagnosed, may give leaders the misleading impression of a lazy or unmotivated servicemember who has chosen to disregard significant responsibilities within his or her military unit.

Violent behavior occurring during a sleep-state in response to vivid nightmares. Within family advocacy committees it is not uncommon to encounter a spouse assaulted by the military member during sleep or as he or she awoke from a nightmare. In some cases, veterans have killed their spouses in such states.[20]

Adverse reactions to psychotropic medications during the course of treatment for mental conditions. The treatment of PTSD and other mental health conditions resulting from combat trauma often involves prescription narcotics to regulate behavior and emotion. When physicians replace drug types, add new ones, or experiment with different dosages of the same drug over time to overcome the body and brain's resistance, these changes or combinations can result in adverse reactions that impair judgment or induce stress responses.[21]

Recognition of the Criminal Connection

Although the mental health community is learning more about PTSD and TBI with each passing day and has much more to learn, its members have recognized a significant relationship between combat trauma and later criminal conduct by a significant proportion of the total population of combat veterans:

- The Department of Justice's study of incarcerated veterans in 2004 revealed that "over 200,000 veterans are in U.S. jails and prisons, and more than half have been incarcerated for violent offenses."[22] Such statistics do not reflect more recent trends in the wake of intensified combat operations since that time.

- The majority of the incarcerated veteran population (54% in state and 64% in federal prison) "served during a wartime period."[23]

- The National Vietnam Readjustment Study, "the largest study of Vietnam veterans," revealed that "nearly half of [the] male Vietnam combat veterans afflicted with PTSD had been arrested or incarcerated in jail one or more times."[24]

- A study of veterans of Operation Iraqi Freedom who had seen "violent combat" revealed common experiences of "aggressive behaviors following deployment, including angry outbursts, destroying property, and threatening others with violence."[25] Combat veterans have an increased likelihood of using handguns or other weapons in the perpetration of such threats.[26]

- In 2005, Marines who had deployed, including service in Operations Enduring and Iraqi Freedom, were up to twice as likely to use illegal narcotics as their peers who had never deployed.[27]

- In 2010, a key study of 77,998 Marines who deployed in Operation Enduring Freedom or Operation Iraqi Freedom revealed that those who were diagnosed with PTSD were "11.1 times more likely to have a misconduct discharge compared with their peers who did not have a psychiatric diagnosis."[28]

- More recently, in 2012, research with a sample of 1,388 Iraq and Afghanistan veterans revealed that a diagnosis of PTSD or TBI increases the risk of criminal conduct and subsequent arrest for those who experience anger and irritability linked to their symptoms.[29]

Systemic Responses

Outside the DoD, many state legislatures have created diversionary programs specifically for veterans to allow them to obtain mental health treatment in lieu of arrest, conviction, or incarceration. Nearly 100 special court dockets devoted to veterans, called "veterans treatment courts," are functioning throughout the nation with hundreds more in the planning stages.[30] While these courts differ, state by state, and

sometimes jurisdiction by jurisdiction, they all exist in recognition that a common manifestation of untreated mental health disorders is criminal conduct. They further understand that traditional punitive responses involving conviction and incarceration largely fail to address the underlying cause of the misconduct, sometimes counterproductively leading symptoms to worsen.[31]

The DoD has begun to realize the value of mental health treatment in a number of ways. In the introduction to the 2012 *Goldbook*, the Army's Vice Chief of Staff underscored the fact that military leaders "cannot simply deal with health or discipline in isolation," and that "these issues are interrelated and will require interdisciplinary solutions."[32] Aside from the efforts of individual commanders to create options for offenders in need of treatment, institutional responses exist for individuals who qualify for Disability Evaluation System processing for a mental health condition. If they are simultaneously facing separation for misconduct, the commander acting as the separation authority must evaluate the circumstances surrounding the misconduct and address whether the mental health condition was the "direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation."[33] While it is unknown how many punitive actions have been terminated to allow for medical separation of those qualifying for mental health treatment, the requirement to address such circumstances suggests special sensitivity toward and recognition of the connection between mental health conditions and criminal conduct.

A second sign of institutional response within DoD occurred in October 2009 when Department of Defense mental health providers met with Department of Veterans Affairs (VA) professionals and identified the objective to provide targeted mental health services for active duty servicemembers facing disciplinary action.[34] Modeled off of VA's Veterans Justice Outreach program now operating in jails and prisons throughout the Nation as well as most Veterans Treatment Courts,[35] a pilot program is now underway at Army, Navy, and Air Force installations to determine the effectiveness of an intervention program with the input of Veterans Justice Outreach personnel in the same communities.[36] Although the success of the program has not been evaluated and the program's focus is on obtaining treatment during the servicemember's interaction with the military justice system and planning for the servicemember's transition to the civilian community, its genesis lies in the fact that many servicemembers who are involved in

the military justice system have mental health conditions and related needs not currently met by the military disciplinary system.

---

[1] RAND CORPORATION, CENTER FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 434–35 (Terri Tanielian & Lisa H. Jaycox eds., 2008).

[2] Jonathan Shay, *Afterword: A Challenge to Historians*, *in* DISABLED VETERANS IN HISTORY 375, 376 (David A. Gerber ed., enlarged & rev. ed. 2012).

[3] Brett A. Moore et al., *After the Battle: Violence and the Warrior*, *in* LIVING AND SURVIVING IN HARM'S WAY: A PSYCHOLOGICAL TREATMENT HANDBOOK FOR PRE- AND POST-DEPLOYMENT OF MILITARY PERSONNEL 307, 317–18 (Sharon M. Freeman et al. eds., 2009) (discussing violence that results from damage to the brain).

[4] *Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs, House of Representatives*, 103rd Cong., 2d Sess. 115 (May 4, 1994) (written testimony of Jonathan Shay, M.D., Ph.D.).

[5] U.S. DEP'T OF ARMY, FIELD MANUAL 22-51, LEADER'S MANUAL FOR COMBAT STRESS CONTROL, at ch. 4 (Sept. 29, 1994).

[6] U.S. DEP'T OF DEFENSE, DEFENSE HEALTH BOARD, TASK FORCE ON MENTAL HEALTH, AN ACHIEVABLE VISION: REPORT OF THE DEPARTMENT OF DEFENSE TASK FORCE ON MENTAL HEALTH 22 (June 2007) .

[7] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467–68 (4th ed. Text Revision 2000).

[8] William P. Nash, *Combat/Operational Stress Adaptations and Injuries*, *in* COMBAT STRESS INJURY: THEORY, RESEARCH, AND MANAGEMENT 33, 53 (Charles R. Figley & William P. Nash eds., 2007).

[9] John P. Wilson & Sheldon D. Zigelbaum, *The Vietnam War Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 Behav. Sci. & L. 69, 74 (1983) (describing "Sensation Seeking Syndrome"). *See also* Bruce Pentland & James Dwyer, *Incarcerated Viet Nam Veterans*, *in* The Trauma of War: Stress and Recovery in Viet Nam Veterans 403, 408–09 (Stephen M. Sonnenberg et al. eds., 1985) (describing "Action Junkie" behavior); Daniel Burgess et al., *Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility in a Post Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 66–67 (2010) (providing brief descriptions of actual cases involving such criminal symptoms).

[10] Harvey J. Schwartz, *Unconscious Guilt: Its Origin, Manifestations, and Treatment*, *in* PSYCHOTHERAPY OF THE COMBAT VETERAN 47, 52 (Harvey J. Schwartz ed. 1984).

[11] Wilson & Zigelbaum, *supra* note 9, at 74–75 (describing "Depression-Suicide Syndrome"). *See also* Burgess et al., *supra* note 9, at 68 (providing actual examples of these symptoms from reported cases).

[12] Schwartz, *supra* note 10, at 47, 52.

[13] Pentland & Dwyer, *supra* note 9, at 403, 409.

[14] *Id*. at 409.

[15] Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCHOL. REV. 695 (2009).

[16] Jonathan Shay, *No Sugar Coating: Combat Trauma and Criminal Conduct*, *in* ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT 1, 9 (forthcoming DC Press 2013) (chapter manuscript on file with the *Military Law Review*).

[17] *Id*. at 11.

[18] Pentland & Dwyer, *supra* note 9, at 403, 409.

[19] ROBERT JAY LIFTON, HOME FROM THE WAR: LEARNING FROM VIETNAM VETERANS 142 (1992 rev. ed).
[20] Shay, *supra* note 16, at 1, 5.
[21] *See generally* Sharon Morgillo Freeman et al., *Myths and Realities of Pharmacotherapy in the Military*, *in* LIVING AND SURVIVING IN HARM'S WAY: A PSYCHOLOGICAL TREATMENT HANDBOOK FOR PRE- AND POST-DEPLOYMENT OF MILITARY PERSONNEL 329 (Sharon M. Freeman et al. eds., 2009).
[22] Eric B. Elbogen et al., *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, J. CONSULTING & CLINICAL PSYCHOL. 1, 2 (Oct. 1, 2012) (advance online publication doi: 10.1037/s0029967) (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VETERANS IN STATE AND FEDERAL PRISON, 2004 (May 2007)).
[23] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VETERANS IN STATE AND FEDERAL PRISON, 2004, at 1 (May 2007).
[24] DRUG POLICY ALLIANCE, HEALING A BROKEN SYSTEM: VETERANS BATTLING ADDICTION AND INCARCERATION 3 (Nov. 4, 2009) (citing RICHARD A. KULKA ET AL., TRAUMA AND THE VIETNAM WAR GENERATION: REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY (1990)).
[25] Robyn M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC PSYCHIATRY 1, 2 (2010) (summarizing William D.S. Killgore et al., *Post-Combat Invincibility: Violent Combat Experiences are Associated with Increased Risk-Taking Propensity Following Deployment*, 42 J. PSYCHIATRIC RES. 1112 (2008)).
[26] Eric Elbogen et al., *Improving Risk Assessment of Violence Among Military Veterans: An Evidence-Based Approach for Clinical Decision-Making*, 30 CLINICAL PSYCHOL. REV. 595, 599 (2010).
[27] Robyn M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC PSYCHIATRY 1, 2 (2010) (characterizing the findings of ROBERT M. BRAY ET AL., 2005 DEPARTMENT OF DEFENSE SURVEY OF HEALTH RELATED BEHAVIORS AMONG ACTIVE DUTY PERSONNEL (Dec. 2006)).
[28] Robyn M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC PSYCHIATRY 1, 6 (2010).
[29] Eric B. Elbogen et al., *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, J. CONSULTING & CLINICAL PSYCHOL. 1 (Oct. 1, 2012) (advance online publication doi: 10.1037/s0029967).
[30] Nat'l Assn. Drug Ct. Profs., Just. for Vets, *The History*, WWW.JUSTICEFORVETS.ORG/VTC-HISTORY (last visited Sept. 15, 2012).
[31] Jennifer K. Wilson et al., *Prosecutor Pretrial Attitudes and Plea-Bargaining Behavior Toward Veterans with Posttraumatic Stress Disorder*, 8 PSYCHOLOGICAL SERVS. 319, 328 (2011) (recognizing that "there is a nationwide interest in applying a treatment approach [to veterans] rather than a punitive one").
[32] General Peter W. Chiarelli, *VCSA Sends*, *in* U.S. DEP'T OF ARMY, ARMY 2020: GENERATING HEALTH & DISCIPLINE IN THE FORCE AHEAD OF THE STRATEGIC RESET (second introductory pg.) (2012).
[33] MESSAGE, 131824Z JUN 12, U.S. DEP'T OF ARMY, SUBJECT: ENLISTED ADMINISTRATIVE SEPARATION PROCESSING—FINAL MEDICAL DISPOSITION, ALARACT [All Army Activities] 159/2012 ¶ 4B(2) (June 12, 2012).
[34] U.S. Dep't of Defense & U.S. Dep't of Veterans Affairs, *Integrated Mental Health*

Strategy, IMHS #22, Evaluation of the Veterans Affairs Justice Outreach Program as a Model for Service Members Facing Disciplinary and Legal Problems 1 (n.d.) (on file with the *Military Law Review*).

[35] *See, e.g.*, Jim McGuire, *Closing a Front Door to Homelessness Among Veterans*, 28 J. PRIMARY PREVENTION 389 (2007) (describing the genesis of the Veterans Justice Outreach program).

[36] U.S. Dep't of Defense & U.S. Dep't of Veterans Affairs, *Integrated Mental Health Strategy, IMHS #22, Pilot Project Proposal: Service Member Justice Outreach* (n.d.) (on file with the *Military Law Review*). U.S. Dep't of Defense & U.S. Dep't of Veterans Affairs, *Integrated Mental Health Strategy, IMHS #22, Evaluation of the Veterans Affairs Justice Outreach Program as a Model for Service Members Facing Disciplinary and Legal Problems* (n.d.) (on file with the *Military Law Review*).

Appendix J
VA Benefits and Claims Resources for Separating Personnel

VA Benefits and Claims Resources for Separating Personnel

Department of Veterans Affairs: VA has 56 Regional Offices throughout the country and has benefits counselors who are often able to answer questions regarding VA benefits on a walk-in basis. A list of VA's Regional Offices can be found on VA's website at *http://www.benefits.va.gov/benefits/offices.asp*. Servicemembers can also contact VA toll-free by calling (800) 827-1000.

Federal Benefits for Veterans, Dependents, and Survivors: Each year, VA publishes a book that provides information about each of its benefits programs. An online edition of this publication can be found on VA's website at *http://www.va.gov/opa/publications/benefits_book.asp.*

Veterans Service Organizations: There are currently 36 Congressionally chartered and other Veterans Service Organizations that are recognized by the Secretary of Veterans Affairs to provide "responsible, qualified representation in the preparation, presentation, and prosecution of claims" for Department of Veterans Affairs benefits. A complete listing of these organizations, along with contact information for each organization, is available in the Veterans Service Organization Directory that is published annually on VA's website at *www.va.gov*. Many of these Veterans Service Organizations have offices that are co-located at VA's Regional Offices throughout the country, and the VA-accredited representatives who staff these organizations are often able to provide assistance to claimants on a walk-in basis. These organizations do not charge VA benefits claimants any fees for the services that they provide. Many of

these organizations will assist former servicemembers with OTH or BCD characterizations, as such a characterization may not preclude the former servicemember from eligibility for certain VA benefits.

Accredited Representatives: VA recognizes numerous individuals who are not employed by Veterans Service Organizations. These individuals, who are primarily attorneys, but may also be claims agents, are accredited by VA and are authorized to advise claimants as to eligibility requirements and to assist individuals in the filing of claims for VA benefits. These representatives are authorized, in certain circumstances, to charge fees for their services. However, due to federal law regarding fees they may collect, an attorney may not be able to represent you until you file a notice of disagreement with a VA rating decision. VA's Office of General Counsel maintains a list of accredited representatives, which can be found at http*://www.va.gov/ogc/accreditation/index/html*. Some attorneys, regardless of whether they are accredited to practice before VA, may be able to assist you if you are seeking a discharge upgrade.

Law School Clinics: A number of law schools throughout the country have clinics that provide free legal services to veterans and former servicemembers. Depending on the focus of each school's clinic, law students, under faculty mentorship, may be able to assist you with your claim for VA benefits. Some law school clinics also help former servicemembers who are seeking a discharge upgrade. A list of veterans law clinics can be found at *http://www.vetsprobono.net/wp-content/uploads/2011/05/Law-Clinics1.pdf*. This list may not be comprehensive, and other law school clinics may be able to provide free services.

Appendix K
VA Adjudication Procedures Manual Rewrite (M21-1MR)
Part III, Subpart v, Chapter 1, Section B (February 27, 2012)
Statutory Bar to Benefits and Character of Discharge Overview

Available at **http://www.benefits.va.gov/WARMS/M21_1MR3.asp**

Statutory Bar to Benefits and Character of Discharge (COD) Overview

In this Section This section contains the following topics:

M21-1MR, Part III, Subpart v, Chapter 1, Section B

5. Character of Discharge (COD) Determinations

Introduction

This topic contains general information on character of discharge determinations, including

- character of discharge (COD) requirement for benefit eligibility
- when COD is binding on VA
- formal findings required for other than honorable discharges
- when it is not necessary to make a COD determination
- responsibility for development of evidence
- responsibility for COD determinations
- overview of COD determination process
- requesting facts and circumstances
- sufficient facts and circumstances for a COD determination
- insufficient facts and circumstances for a COD determination, and
- COD determination template

Change Date

February 27, 2012

a. COD Requirement for Benefit Eligibility

A Veteran's character of discharge (COD) must be under other than dishonorable conditions to establish eligibility for Department of Veterans Affairs (VA) benefits based on that individual's military service.

A dishonorable discharge or a statutory bar deprives a claimant of all VA benefits.

Exception:

- A dishonorable discharge or statutory bar is *not* binding on VA if it is determined that the individual was insane when committing the acts which resulted in the discharge.

Note: A COD under other than honorable (OTH) conditions is **not** the same as dishonorable and does **not** deprive the claimant of all benefits.

References: For more information on

- conditions of discharge and eligibility for VA benefits, see
  - 38 CFR 3.12, and
  - 38 CFR 3.13, and
- insanity, see
  - M21-1MR, Part III, Subpart v, 1.E, or
  - 38 CFR 3.354 (b)
- statutory bar, see M21-1MR, Part III, Subpart v, 1.B.6
- the definition of the term *Veteran*, see
  - 38 CFR 3.1(d), or
  - 38 U.S.C. 101(2).

Continued on next page

5. Character of Discharge (COD) Determinations, Continued

b. When COD is Binding on VA

An individual is entitled to full rights and benefits of programs administered by VA, unless there is a bar to benefits under 38 U.S.C. 5303(a). Normally, the military's characterization of service is binding on VA if the discharge is

- honorable
- under honorable conditions (UHC), or
- general.

Note: The characters of service listed above are binding on VA, irrespective of the separation reason. For example, if the separation reason is "drug use," but the characterization of service is under honorable conditions, the character is service is still binding on the VA and no COD determination should be made.

c. Formal Findings Required for OTH Discharges

A formal COD determination is required when the Veteran's discharge is one of the following:

- an undesirable discharge
- an OTH discharge, or
- a bad conduct discharge.

Important: Review the issue of "Veteran status" prior to making a COD determination. Determinations of status as a Veteran must be supported by a preponderance of the evidence. See 38 CFR 3.1(b) for the definition of Veteran.
The reasonable doubt rule of 38 CFR 3.102 does *not* apply in determinations of status. In *Laruan v West, No. 96-179*, the Court of Appeals for Veterans Claims (CAVC) discussed a claimant's need to establish Veteran status before he or she can enjoy the more favorable evidentiary criteria under the reasonable doubt rule.

Continued on next page

5. Character of Discharge (COD) Determinations, Continued

d. When it is Not Necessary to Make a COD Determination

It is *not* necessary to make a COD determination for VA claim purposes

- before the claimant applies to VBA and places the matter at issue, or
- if there is a separate period of honorable service, which qualifies the person for the benefits claimed

Exception: A COD determination may be made prior to a claimant's an application for VBA benefits, as noted in M21-1MR, Part III, Subpart v, 1.B.5.f

Note: If there is any question regarding which period of service would qualify the person for the benefits claimed, a COD determination **must** be made before a rating decision can be completed.

e. Responsibility for Development of Evidence

The development activity has the responsibility for development of all necessary evidence and preparation of administrative decisions for issues discussed in this chapter.

Reference: For more information on the responsibility of the Pre-Determination Team, see M21-1MR, Part III, Subpart i, 1.3.a.

f. Responsibility for COD Determinations

The development activity is responsible for determining if an OTH discharge was granted under honorable conditions for VA purposes (HVA) for eligibility to *all* VA benefits.

Note: Upon request, the development activity makes these determinations for other entities, such as the

- Department of Veterans Affairs Health Administration (VHA),
- U.S. Department of Labor
- U.S. Railroad Retirement Board, and
- State agencies.

References:

- For information on requests to, or from, other Federal and State agencies, see M21-1-MR, Part III, Subpart iii, 4.
- For information on the Pre-Determination Team functions, see M21-1MR, Part III, Subpart i, 1.3.a.

Continued on next page

5. Character of Discharge (COD) Determinations, Continued

g. Overview of COD Determination Process

Follow the steps in the table below when a COD determination is needed.

Important: Strictly observe the due process provisions listed in 38 CFR 3.103 and M21-1MR, Part I, Chapter 2.

Step	Action
1	If the discharge at issue is not specifically honorable, under honorable conditions, or general, send a request to the service department for the complete summary of the facts and circumstances and proceedings pertaining to the discharge. ***References***: For more information on requesting facts and circumstances see M21-1MR, Part III, Subpart v, 1.B.h
2	Make a formal determination. ***Important***: • In any COD determination, there *must* be, minimally, a finding that the issue of the Veteran's sanity is *not* involved. • If the Veteran had more than one period of consecutive service, include information covering the periods of satisfactory as well as unsatisfactory service in the determination. ***Note***: Vietnam Era Special Upgraded Discharges require special consideration before a formal determination. ***References***: For more information on • Vietnam Era Special Upgraded Discharges, see M21-1MR, Part III, Subpart v, 1.B.11. • insanity, see – M21-1MR, Part III, Subpart v, 1.E, or – 38 CFR 3.354 (b).
3	Prepare the formal determination for the approval of the Veterans Service Center Manager (VSCM) or designee *not* lower than a coach. ***Reference***: For more information on preparation of a formal administrative decision for the approval, see M21-1MR, Part III, Subpart v, 1.A.2.

Continued on next page

M21-1MR, Part III, Subpart v, Chapter 1, Section B

5. Character of Discharge (COD) Determinations, Continued

h. Requesting Facts and Circumstances

It is always necessary to request the facts and circumstances surrounding the claimant's discharge prior to making a formal decision.

Request facts and circumstances using Personnel Information Exchange System (PIES) or Defense Personnel Records Information Retrieval System (DPRIS), as appropriate.

i. Sufficient Facts and Circumstances for a COD Determination

The service department generally provides sufficient facts and circumstances to make an administrative decision when discharge or dismissal is due to any of the following reasons:

- the person was a conscientious objector who refused to perform military duties, wear the uniform, or otherwise comply with lawful orders of competent military authorities
- sentence issued by a General Court Martial (GCM)
- resignation of an officer for the good of the service
- the reason for discharge was desertion
- the discharge was for alienage, or
- an unauthorized absence (UA) or absence without leave (AWOL) for a continuous period of 180 days or more.

Exception: If insanity becomes an issue, full and complete development of information pertaining to the discharge, including but not limited to Service Treatment Records (STRs) and the complete military personnel file, is needed.

References: For more information on

- insanity, see
  - M21-1MR, Part III, Subpart v, 1.E, and
  - 38 CFR 3.354 (b)
- cases in which discharge was for alienage, see M21-1MR, Part III, Subpart v, 1.B.6.c, and
- cases of UA or AWOL, see M21-1MR, Part III, Subpart v, 1.B.6.d, and
- developing for facts and circumstances, see M21-MR, Part III, Subpart v, 1.B.5.h

Continued on next page

5. Character of Discharge (COD) Determinations, Continued

j. Insufficient Facts and Circumstances for a COD Determination

Occasionally the service department will provide only limited facts and circumstances. Make a determination using all the evidence in VA's possession.

k. COD Determination Template

Below is an example of a COD determination. This sample determination shows *all* possible paragraphs and language that *may* be included in the determination depending on the facts of the particular case.

Generally, in a well-written decision, with valid reasons and bases, the conclusion should be obvious to the reader.

[DEPARTMENT OF VETERAN AFFAIRS]
[Designation of VA Office] [File Number]
[Location of VA Office] [Veteran's Name]

ADMINISTRATIVE DECISION

ISSUE: [State the issue. For example, "Statutory Bar Determination," if the reason for discharge is under 38 CFR 3.12(c), or "Character of Discharge Determination," if the reason for the discharge is under 38 CFR 3.12(d)]

EVIDENCE: [Use bullets to list all documents and information reviewed in making the decision. Give specific data about each to distinguish it from other evidence] For example:

- VA Form 21-526 received September 6, 2004.
- Response to due process letter received November 9th, 2004.
- Facts and circumstances of discharge and DD 214 received from the National Personnel Records Center on November 25th, 2004.

DECISION: [Clearly and briefly state the decision. Only the decision need be provided here, no explanation.] For example:

[Joe/Jane Q. Veteran's] [Name of branch of service] service from [EOD date to RAD date] is under [other than honorable/ honorable] conditions and [is/is not] a bar to VA benefits under the provisions of [38 CFR 3.12(x)(x)].

[Mr./Ms. Veteran] [is/is not] entitled to health care benefits under Chapter 17, Title 38 U.S.C. and 38 CFR 3.360(a) for any disability determined to be service connected for active service from [EOD date to RAD date].

REASONS AND BASES: [The reasons and bases section must be included on **all** administrative decisions, including favorable ones. Include the regulations used in the determination. Begin by

Continued on next page

M21-1MR, Part III, Subpart v, Chapter 1, Section B

5. Character of Discharge (COD) Determinations, Continued

k. COD Determination Template (continued)

quoting verbatim from the relevant law or regulation(s) that pertain(s) to the issue at hand. See sample text below:]

Part of all decisions: According to 38 CFR 3.12 (a) If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)).

As stated in 38 CFR 3.360(a) The health-care and related benefits authorized by chapter 17 of title 38, United States Code shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty. (b) With certain exceptions such benefits shall be furnished for any disability incurred or aggravated during a period of service terminated by a discharge under other than honorable conditions. Specifically, they may not be furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in §3.12(c) applies.

Only part of decisions when the discharge is evaluated under 38 CFR 3.12(c):
According to 38 CFR 3.12(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.
(2) By reason of the sentence of a general court-martial.
(3) Resignation by an officer for the good of the service.
(4) As a deserter.
(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See §3.7(b).

Continued on next page

5. Character of Discharge (COD) Determinations, Continued

k. COD Determination Template (continued)

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term "established basic eligibility to receive Department of Veterans Affairs benefits" means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

- (i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.
- (ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.
- (iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

Continued on next page

M21-1MR, Part III, Subpart v, Chapter 1, Section B

5. Character of Discharge (COD) Determinations, Continued

k. COD Determination Template (continued)

Only include in decisions when the discharge is evaluated under 38 CFR 3.12 (d):
A discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)). (38 CFR 3.12)

A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.
(1) Acceptance of an undesirable discharge to escape trial by general court-martial.
(2) Mutiny or spying.
(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.
(4) 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.
(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status. (38 CFR 3.12)

With certain exceptions such benefits shall be furnished for any disability incurred or aggravated during a period of service terminated by a discharge under other than honorable conditions. Specifically, they may not be furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in 38 CFR §3.12(c) applies. (38 CFR 3.360)

Only include in decisions when the discharge is a conditional discharge: According to 3.13(c)Despite the fact that no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military, naval or air service when the following conditions are met:
(1) The person served in the active military, naval or air service for the period of time the person was obligated to serve at the time of entry into service;
(2) The person was not discharged or released from such service at the time of completing that period of obligation due to an intervening enlistment or reenlistment; and
(3) The person would have been eligible for a discharge or release under conditions other than dishonorable at the time except for the intervening enlistment or reenlistment.

Continued on next page

5. Character of Discharge (COD) Determinations, Continued

k. COD Determination Template (continued)

[Follow this with a statement of the reasons and bases for the decision in clear, simple, easy-to-understand terms. Fully describe the reasoning that led to the decision. Evaluate all the evidence, including sworn oral testimony and certified statements submitted by the claimant, and clearly explain why that evidence is found to be persuasive or not persuasive. In so doing, explicitly address items of evidence and each of the claimant's statements or allegations. Cite all evidence, both favorable and unfavorable, impartially. Generally, identify and digest pertinent information from the available evidence instead of quoting from it at length. Conclusions must be supported by analysis and explanation of the credibility and value of the evidence on which they are based. Assertion of unsupported conclusions does not comply with statutory requirements. Acknowledge statements or allegations that argue against the decision, and explain why they did not prevail.]

Always include: **Sanity [IS/IS NOT] an issue.**

Always sum up your decision.
For example: The claimant was sent a due process letter on [date of due process letter], to which [he/she failed to respond to/responded to on [date of response]]. (If claimant responded, explain why he/she failed to show or did show sufficient reason to overrule 3.12.) The claimant [failed to show/showed] sufficient reason why the 38 CFR 3.12 should be overruled in [his/her] favor. In the absence of any additional evidence, it is therefore determined that the claimant's discharge from the period of service from [dates of service that the decision addresses], was under [Other than Honorable/Honorable Conditions] for the purpose of eligibility for VA benefits and is therefore [considered/not considered] a bar to benefits under 3.12[part of 3.12 you are using to support your decision.]

The claimant [is/is not] eligible for health care benefits under the provisions of Chapter 17, Title 38 U.S.C for this period of service.

Submitted by (signature) :_____ [Date]
Printed Name and Title:_____

Concurred by (signature):_____ [Date]
Printed Name and Title:_____

Approved by (signature):_____ [Date]
Printed Name and Title:_____

M21-1MR, Part III, Subpart v, Chapter 1, Section B

6. Statutory Bar to Benefits

Introduction

This topic contains information on the statutory bar to benefits, including

- bars established by 38 CFR 3.12(c)
- additional information on discharge
  - by the sentence of a General Court-Martial (GCM),
  - for alienage, and
  - for unauthorized absence (UA) or absence without official leave (AWOL).

Change Date

February 27, 2012

a. Bars Established by 38 CFR 3.12(c)

A statutory bar to benefits is established any time a COD determination finds that the reason the discharge or release was under any of the conditions listed in 38 CFR 3.12 (c) Some examples of discharges under 38 CFR 3.12 (c) include

- as a conscientious objector
- sentence of a General Court-Martial (GCM)
- resignation by an officer for the good of the service,
- an alien during a period of hostilities,
- absence without official leave (AWOL) for continuous period of at least 180 days, and
- as a deserter.

b. Additional information on Discharge by the Sentence of a General Court-Martial

Cases in which the facts indicate the service member was sentenced by a GCM are considered to be a statutory bar to benefits.

Note: The evidence, including facts and circumstances, **must** show that the service member was sentenced by a **general** court-martial, not a summary court-martial or a special court-martial.

c. Additional information on Discharge for Alienage

If there was a discharge during a period of hostilities that was not changed to honorable prior to January 7, 1957, determine if the records show that the Veteran requested the discharge. If the record

- *shows* that the Veteran requested the discharge, it is a bar,
- does *not* show that the Veteran requested the discharge, make a specific request to the service department for this information.

Continued on next page

6. Statutory Bar to Benefits, Continued

c. Additional information on Discharge for Alienage (continued)

Note: The absence of affirmative evidence in the service department's reply or in the claims folder showing that the Veteran requested the release is a sufficient basis for a favorable decision.

Reference: For more information on discharge for alienage, see 38 CFR 3.7(b)

d. Additional information on Discharge for UA or AWOL

Follow the steps in the table below to determine the action to take if a discharge was issued under OTH conditions, and there was a **continuous** period of 180 or more days of either an unauthorized absence (UA) or AWOL.

Step	Action
1	As with all COD determinations, send the claimant a due process letter and request facts and circumstances via PIES or DPRIS, as appropriate. ***Reference***: For more information on due process letters, see M21-1MR Part I, chapter 2.
2	Review the information collected via facts and circumstances to confirm that it includes the exact dates and nature of the lost time. ***Reference***: For more information on UA or AWOL, see 38 CFR 3.12(c)(6).
3	If the service department confirms a continuous period of 180 or more days of UA or AWOL (exclusive of periods of imprisonment or confinement) which led to the OTH discharge, and the claimant didn't provide compelling reasons for the absence, then deny benefits. ***Note***: "Time Lost" as listed on the DD Form 214, *Certificate of Release or Discharge from Active Duty*, is **not** sufficient to determine the number of days of UA or AWOL, because it does not reflect periods of imprisonment or confinement and does not typically indicate if the days absent were continuous.

Continued on next page

6. Statutory Bar to Benefits, Continued

d. Additional information on Discharge for UA or AWOL (continued)

Step	Action
4	If the claimant provided compelling reasons for the absence but our decision is ultimately unfavorable, make the issue in the formal decision "Statutory Bar Under 38 U.S.C. 5303(a)" rather than "Character of Discharge," and use the following as the Conclusion: "The discharge for the period **[date]** to **[date]** is a bar to VA benefits under the provisions of 38 CFR 3.12(c)(6) and 38 U.S.C. 5303(a)." ***Important***: Do *not* make a separate decision concerning character of discharge since 38 CFR 3.12(a) is not an issue.

Note: Records added to BIRLS from the Veterans Assistance Discharge System (VADS) after October 16, 1975, include the reason for separation. Further development of circumstances of discharge is required, even if there is indication that character of discharge was honorable or general, if the reason code shown in the corporate record is

- T38 (possible Title **38** bar to VA benefits)
- 953 (clemency discharge)
- BEO (**b**y executive **o**rder), or
- DRO (**d**ischarge **r**eview under **o**ther than honorable conditions).

Reference: For more information on identifying upgraded discharges, see M21-1MR, Part III, Subpart v, 1.B.10.c.

7. Discharges Considered to be OTH

Introduction

This topic contains information on the discharges considered to be OTH, including

- bars established by 38 CFR 3.12(d)
- additional information on
  - undesirable discharge to escape trial by General Court Martial
  - discharge for moral turpitude, and
  - discharge for willful and persistent misconduct.

Change Date

February 27, 2012

a. Bars Established by 38 CFR 3.12(d)

A bar to benefits is established any time a COD determination finds that the reason the discharge or release was under any of the conditions listed in 38 CFR 3.12 (d). Some examples of discharges under 38 CFR 3.12 (d) include

- mutiny or spying
- undesirable discharge to escape trial by General Court Martial (GMC), and
- homosexual acts involving aggravating circumstances.

b. Additional Information on Undesirable Discharge to Escape Trial by General Court Martial

Cases in which the facts indicate the service member agreed to accept an undesirable discharge (often seen on the DD Form 214 as OTH) in order to escape trial by GCM, are a bar to benefits.

Note: The evidence must show that the service member accepted the undesirable discharge to escape a **general** court-martial, not a summary court-martial or a special court-martial.

c. Additional Information on Discharge for Moral Turpitude

Cases in which the facts indicated the discharge was for moral turpitude, generally including conviction of a felony, are a bar to benefits.

General Council Precedent Opinion 6-87 defined moral turpitude by saying, in part, that it is a willful act committed without justification or legal excuse. This act violates accepted moral standards and would likely cause harm or loss of a person or property.

Continued on next page

M21-1MR, Part III, Subpart v, Chapter 1, Section B

7. Discharges Considered to be OTH, Continued

c. Additional Information on Discharge for Moral Turpitude (continued)	Moral turpitude does **not** have to be a felony conviction; it can be a single incident or a series of events. Reference: For more information on willful and persistent misconduct, see General Council Precedent Opinion 6-87.
d. Additional Information on Discharge for Willful and Persistent Misconduct	Cases in which the facts indicated the service member's behavior constituted willful and persistent misconduct are a bar to benefits. *Note:* The evidence must show both willful and persistent misconduct. A one time offense or a technical violation of police regulations or ordinances does not necessarily constitute willful and persistent misconduct. *Reference:* For more information on willful and persistent misconduct, see 38 CFR 3.12 (d) (4).

8. COD Determinations and Healthcare

Introduction

This topic contains information on the healthcare benefits available with different types of discharges, including

- health care benefits for former military personnel with certain OTH discharges, and
- statutory bar or bad conduct discharges (BCDs).

Change Date

February 27, 2012

a. Health Care Benefits for Former Military Personnel With Certain OTH Discharges

Effective October 8, 1977, under *Public Law (PL) 95-126*, eligibility to health care benefits for any disability incurred or aggravated in the line of duty during active service is extended to any former military personnel with an OTH discharge, regardless of the date of that discharge. Even service members who are determined to have been discharged under the bars described in 38 CFR 3.12(d), are eligible for health care.

Eligibility for health care is **not** extended to persons discharged

- by reason of a bad conduct discharge (BCD), or
- under one of the statutory bars described in 38 CFR 3.12(c).

Consider any claim which requires review of a statutory bar or preparation of a COD determination as a claim for health care benefits.

Note: Even if a BCD is determined to be honorable for VA purposes (HVA), the service member is **not** eligible for health care. This is the **only** circumstance in which a service member may be found to have service connected disabilities but not be eligible for health care.

References: For more information on

- eligibility for the health care benefits based on an OTH discharge, see 38 CFR 3.360, and
- treatment for service-connected disabilities, see Chapter 17, 38 U.S.C. 1710.

Continued on next page

M21-1MR, Part III, Subpart v, Chapter 1, Section B

8. COD Determinations and Healthcare, Continued

b. Statutory Bar or BCD

Use the table below to determine action to take for health care benefits when a COD is the result of a statutory bar or is a BCD.

If the claimant has an other than honorable discharge and there is…	Then …
a determination that the discharge was • due to a statutory bar under 38 CFR 3.12 (c), or • a BCD	• in the conclusion of the administrative decision include the following eligibility statement: "The individual **is not** entitled to health care under Chapter 17 of Title 38, U.S.C. for any disabilities incurred in service." • notify the claimant that entitlement to health care is not established ***References***: For more information on the notification procedures in character of discharge cases, see M21-1MR, Part III, Subpart v, 1.A.3

Continued on next page

8. COD Determinations and Healthcare, Continued

b. Statutory Bar or BCD(continued)

If the claimant has an OTH discharge and there is…	Then …
A determination that discharge was due to a condition listed in 38 CFR 3.12 (d), but not due to a • statutory bar, or • BCD	• in the conclusion of the administrative decision include the following eligibility statement: "The individual **is** entitled to health care under Chapter 17 of Title 38, U.S.C. for any disabilities incurred in service." • notify the claimant entitlement to health care is established, and • explain that, although conditions surrounding his/her discharge generally preclude payment of VA benefits, there may be eligibility to VA medical care for any disabilities incurred or aggravated during active service, and that he or she should apply for VA medical care at the nearest VA Medical Center. ***References***: For more information on notification procedures in character of discharge cases, see M21-1MR, Part III, Subpart v, 1.A.3.

Note: If a routine review of a living Veteran's claim folder reveals a COD determination without either of these statements, determine eligibility to health care benefits and make a written annotation on the existing paper copy of the determination with the appropriate eligibility statement. It is not necessary to send a due process letter in these cases.

M21-1MR, Part III, Subpart v, Chapter 1, Section B

9. Conditional Discharges and Uncharacterized Discharges

Introduction

This topic contains information on conditional discharges and uncharacterized separations, including

- provisions of 38 U.S.C. 101(18), for reenlistment prior to discharge
- when to develop for a possible conditional discharge
- how to develop for possible conditional discharge
- identifying the need for a conditional discharge COD determination
- determining the dates of service for a conditional discharge
- example of the dates of service for a conditional discharge
- sample language for a conditional discharge COD determination
- assigning effective dates for claims based on a conditional discharge
- uncharacterized separations, and
- action to take for uncharacterized separations.

Change Date

February 27, 2012

a. Provisions of 38 U.S.C. 101(18), for Reenlistment Prior to Discharge

38 U.S.C. 101(18) provides that an individual who enlisted or reenlisted before completion of a period of active service can establish eligibility to VA benefits if he/she satisfactorily completed the period of active service for which he/she was obligated at the time of entry. The satisfactory completion of one contracted period of enlistment while serving on a subsequent contracted period of service under a new enlistment is considered a conditional discharge.

The provisions of 38 U.S.C. 101(18) apply even if

- the subsequent discharge was under dishonorable or other than honorable conditions, or
- a statutory bar exists for entitlement to benefits for the later period of service.

Note: VA has the authority to determine the character of discharge for any type of discharge that is not binding on it; therefore, VA has the authority to determine the character of discharge for all periods of service identified in a conditional discharge.

Continued on next page

9. Conditional Discharges and Uncharacterized Discharges, Continued

b. When to develop for a Possible Conditional Discharge

A DD Form 214 may show that an individual served one continuous period of service. However, enlistment contracts generally range from three to six years. Therefore development for a conditional discharge must be undertaken, if

- the service was over three years, especially if the discharge dates do not line up to an exact number of years or months, or
- if there is any question about how many periods of service the Veteran enlisted for, or
- the DD Form 214 shows that prior active service exists

Example: Claimant served from February 5, 1969 to May 26, 1972. Though this service was only for 3 years and appx. 4 months, the actual periods of enlistment were as follows:

- First enlisted on February 5, 1969 for 3 years,
- Discharged November 14, 1970 for immediate reenlistment for 3 years, and
- Discharged on July 26, 1971 for immediate reenlistment for 3 years

c. How to Develop for a Possible Conditional Discharge

To develop for a possible conditional discharge

- request facts and circumstances as with all COD determinations, and
- request complete eligibility for separation information from the applicable service department using PIES or DPRIS, as appropriate. This request will provide information regarding
  - whether the Veteran was eligible for complete separation prior to the date of dishonorable or OTH discharge, and
  - the date(s) on which this claimant completed the period(s) of active service for which he or she was obligated at the time(s) of induction or reenlistment.

Continued on next page

9. Conditional Discharges and Uncharacterized Discharges, Continued

d. Identifying the need for a Conditional Discharge COD Determination

Once development is complete and evidence is received, use the table below to identify the need for a conditional discharge COD determination.

If…..	Then…
development discloses a prior and separate period of honorable service which would qualify the claimant for the benefit requested ***Note***: A complete and separate period of service is defined as a break in service greater than one day. *Example:* The individual was discharged on September 3, 1975. His next period of service began on September 5, 1975.	• adjudicate the claim on that basis, if the claimed conditions fall under the good period of service, or • complete a COD determination if the claimed conditions fall under the questionable period of service. ***Note:*** If it is unclear which period of service the claimed conditions fall under, complete a COD determination.
development does not disclose a prior and separate period of honorable service which would qualify the claimant for the benefit requested	• proceed with a COD determination, • consider whether the former service member had faithful and meritorious service through the period of active duty for which he/she was obligated at the time of induction or enlistment, and • discuss the issue of conditional discharge in the decision.

Continued on next page

9. Conditional Discharges and Uncharacterized Discharges, Continued

e. Determining the Dates of Service for a Conditional Discharge

When determining the dates of service for a conditional discharge it is necessary to know the length of each enlistment contract the claimant signed. Dates of faithful and meritorious service are calculated by

- adding the full length of the first enlistment contract to the claimant's entry into service date, thus calculating the date the individual **would** have completed his first period of obligation and would have been discharged, then
- adding the full length of the next enlistment contract to the date determined above, thus calculating the next date that the individual would have completed his period of obligation and would have been discharged, then
- continuing to add the full length of the each enlistment contract to the date determined above, until no more enlistment contract periods remain.

f. Example 1: Dates of Service for a Conditional Discharge

A claimant has one DD Form 214 showing dates of service as December 29, 1980, to December 23, 1991, nearly 11 years of service. Because enlistment contracts generally range from three to six years, conditional discharge may be at issue and we must request information regarding his eligibility for complete separation.

The evidence, such as enlistment contracts, shows that the claimant actually had three periods of service. He entered active duty on December 29, 1980, for four years, reenlisted for six years on April 4, 1984, and reenlisted for another six years on October 31, 1988. He began a period of 243 days AWOL on February 14, 1991.

Continued on next page

9. Conditional Discharges and Uncharacterized Discharges, Continued

f. Example 1: Dates of Service for a Conditional Discharge (continued)

The chart below shows how the dates of service would be determined for this conditional discharge:

Dates	Facts	Remarks
Entered Duty on12/29/80	Initial enlistment for 4 years	Based on enlistment date, the obligated period of service is considered complete on 12/28/84
Obligated period of service would have ended on 12/28/84	Reenlisted for 6 years on 04/04/84	Based on reenlistment contract, the obligated period of service is considered complete on 12/27/90 ***Note:*** The 6 year enlistment is added to the completion date determined above (12/28/84).
Obligated period of service would have ended on12/27/90	Reenlisted for 6 years on 10/31/88	Based on reenlistment contract, the obligated period of service is considered complete on 12/26/96 ***Note:*** The 6-year enlistment is added to the completion date determined above (12/27/90).
2/14/91	Begins period of AWOL for 243 consecutive days	
12/23/91	Received a separation type of Other than Honorable (OTH)	Discharged on 12/23/91

Continued on next page

9. Conditional Discharges and Uncharacterized Discharges, Continued

f. Example 1: Dates of Service for a Conditional Discharge (continued)

Below is another way to replicate the chart above using just entry, obligation, and RAD dates:

Entry	Period of Obligation	VA RAD
12/29/80	4 years	12/28/84
12/28/84	6 years	12/27/90
12/27/90	6 years	12/26/96
12/23/91	Discharged OTH	

2/14/91 AWOL period of 243 days begins.

Veteran only completed obligation through 12/27/90.

Since the claimant did not begin his period of AWOL until February 14, 1991, he completed his initial enlistment and one reenlistment period, ending December 27, 1990, faithfully and meritoriously. The time from December 28, 1990, to December 23, 1991—the date of discharge—cannot be considered good service due to the AWOL period of over 180 consecutive days.

g. Sample Language for a Conditional Discharge Determination

The "Decision" section of a conditional discharge determination should state how many periods of obligation were honorably completed, the COD for the periods and health care benefit eligibility.

Example from above case: The claimant's service from December 29, 1980, to December 27, 1990, his first two periods of obligation, was under honorable conditions, and he is entitled to receive VA benefits and health care benefits under Chapter 17, Title 38 U.S.C based upon this period of service.

The claimant's service from December 28, 1990, to December 23, 1991, was under other than honorable conditions, and he is not entitled to receive VA benefits or health care benefits under Chapter 17, Title 38 U.S.C. based upon this period of service.

Note: The "Reasons and Basis" section of a conditional discharge determination should explain how the dates of service are determined.

Continued on next page

9. Conditional Discharges and Uncharacterized Discharges, Continued

g. Sample Language for a Conditional Discharge Determination (continued)

Example: A review of facts and circumstances shows the claimant originally enlisted on December 29, 1980, for four years with an obligated period of service until December 28, 1984. On April 4, 1984, he extended his enlistment for another six years with a new obligated period of service until December 27, 1990. On October 31, 1988, he extended his enlistment again for another six years, with a new obligated period of service until December 26, 1996. He was discharged on December 23, 1991, with an OTH character of discharge.

h. Assigning Effective Dates for Claims Based on a Conditional Discharge

Use the table below to determine the effective dates for claims based on a conditional discharge.

Determining the date for	Procedure
a Presumptive Period	• Treat the conditional discharge date as – certified by the service department, and – authorized by the character of discharge determination as if the Veteran were actually given a complete and honorable separation, and • measure all presumptive periods and any other issue that relates to date of discharge or release from the conditional discharge date.
Payment	If a conditional discharge is established, apply the provisions of 38 CFR 3.114(a) to determine the effective date. *Note*: The effective date may not be earlier than October 8, 1977.

i. Uncharacterized Separations

In cases in which enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of following three categories of administrative separation:

- entry level separation
- void enlistment or induction, and
- dropped from the rolls.

Continued on next page

9. Conditional Discharges and Uncharacterized Discharges, Continued

i. Uncharacterized Separations (continued)

Note: Entry level separation can include separation reasons such as:

- failure to meet procurement medical fitness standards
- failure to meet retention standards due to a preexisting medical condition
- completion of a period of Active Duty for Training (ADT)
- hardship discharge
- dependency discharge

Important: The service department does not need to provide a characterization of service for the aforementioned three categories of separation.

Reference: For more information on uncharacterized separations, see 38 CFR 3.12(k).

Continued on next page

M21-1MR, Part III, Subpart v, Chapter 1, Section B

9. Conditional Discharges and Uncharacterized Discharges, Continued

j. Action to Take for Uncharacterized Separations

Use the table below for the action to take for the three categories of uncharacterized administrative separations.

Type of Separation	Action
Entry Level Separation	• Consider uncharacterized separations of this type to be under conditions other than dishonorable. • No administrative decision is required. ***Reference***: For information on the effect of an entry-level separation based upon fraudulent enlistment on the status as a Veteran, see VAOPGCPREC 16-99.
Void Enlistment or Induction	• Review uncharacterized separations of this type based on facts and circumstances surrounding separation, with reference to the provisions of 38 CFR 3.14 to determine whether separation was under conditions other than dishonorable. • Prepare an administrative decision.
Dropped from the Rolls	• Review uncharacterized administrative separations of this type based on facts and circumstances surrounding separation to determine whether separation was under conditions other than dishonorable. • Prepare an administrative decision.

10. Clemency, Upgraded, and Discharge Review Board (DRB) Discharges

Introduction

This topic contains information on Clemency, Upgraded, and DRB second reviews, including

- identifying a clemency discharge
- making a clemency discharge determination
- elements that assist in identifying upgraded discharges,
- decisions made through a board for correction of records or a DRB
- recognizing an honorable or general discharge issued by a DRB intended to set aside a bar
- effect of a change in character of discharge
- the guidelines of *PL 95-126*
- cases exempt from *PL 95-126*

Change Date

February 27, 2012

a. Identifying a Clemency Discharge

All copies of a *DD Form 214, Certificate of Release or Discharge From Active Duty,* granting clemency issued to military absentees under *Presidential Proclamation no. 4313* contain the following statement in the Remarks section: "*Subject member has agreed to serve _____ months alternate service pursuant to Presidential Proclamation No. 4313.*"

In addition, the VA copy of the *DD Form 214*, which goes to the Austin Data Processing Center (DPC) (but not to the discharged individual), gives the reason for separation as "*Separation for the good of the service by reason of a willful and persistent unauthorized absence, pursuant to Presidential Proclamation No. 4313.*"

The service department also issued a special type of discharge, *Clemency Discharge, DD Form 1953*, which was a substitute for the previously awarded undesirable discharge.

Continued on next page

10. Clemency, Upgraded, and Discharge Review Board (DRB) Discharges, Continued

a. Identifying a Clemency Discharge (continued)

Note: These clemency discharges were offered to certain individuals who incurred other than honorable discharges for unauthorized absence, or failed to report for ordered military service between August 4, 1964, and March 28, 1973.

b. Making a Clemency Discharge Determination

A clemency discharge does not necessarily entitle or reinstate entitlement to benefits administered by VA, and VA must make a decision on the COD.

Prior to making a determination on service that resulted in a clemency discharge furnish notification in accordance with M21-1MR, Part III, Subpart v, 1.A.3.

c. Elements That Assist in Identifying Upgraded Discharges

Use the table below for descriptions of elements that assist in identifying upgraded discharges.

Type of Upgrade	Element	Description
All	9A on *DD Form 214*	Contains "Discharge."
	9F on *DD Form 214*	Contains "Certificate Issued."
	13 on *DD Form 214*	(Reserve Obligation) contains "NA."
	21 and 27 of *DD Form 214*	Shows 30 days or more time lost.
	29 on *DD Form 214*	Contains no signature of person separated.

Continued on next page

10. Clemency, Upgraded, and Discharge Review Board (DRB) Discharges, Continued

c. Elements That Assist in Identifying Upgraded Discharges (continued)

Type of Upgrade	Element	Description
Issued as a result of the Presidential Proclamation of January 19, 1977	Item 27 on copy 3 (VA copy) of corrected *DD Form 214*	Contains a statement to the effect that the discharge was upgraded to "under honorable conditions" by the January 19, 1977, extension of Presidential Proclamation 4313 by virtue of being wounded in combat or decorated for valor in Vietnam.
	The BIRLS record	Was established, or updated to show • the type of discharge as HONORABLE, and • the separation reason as BEO (**B**y **E**xecutive **O**rder).

Continued on next page

10. Clemency, Upgraded, and Discharge Review Board (DRB) Discharges, Continued

c. Elements That Assist in Identifying Upgraded Discharges (continued)

Type of Upgrade	Element	Description
Issued as a result of the DoD Special Discharge Review Program	The VA copy (copy 3) of the corrected *DD Form 214*	Contains the narrative reason for separation as "*Upgraded under the DoD Discharge Review Program (Special)*" and also indicates • the date the individual first applied for discharge upgrade • the date the discharge was upgraded, and the character of service (discharge) prior to upgrade.
	The BIRLS record	Established or updated to show • the type of discharge as HONORABLE, and • the separation reason as – DRO (Discharge Review—prior discharge "Under Conditions Other Than Honorable)", or DRG (Discharge Review—prior discharge "Under Honorable Conditions," commonly called general).

d. Decision Made Through a Board for Correction of Records or a DRB

A decision by a service department acting through a Board for Correction of Records is final and binding on VA.

This applies:

- even if VA previously made a formal determination concerning a statutory bar under 38 CFR 3.12, and/or

Continued on next page

10. Clemency, Upgraded, and Discharge Review Board (DRB) Discharges, Continued

d. Decision Made Through a Board for Correction of Records or a DRB (continued)

- a service department, acting through a Discharge Review Board (DRB), changed the character of discharge **prior** to enactment of *PL 95-126* on October 8, 1977.

Exception: A change in character of discharge from a service department through a DRB is **not** final and binding on VA when there is a bar because the discharge was due to the sentence of a GCM per 38 CFR 3.12(c)(6) and 38 CFR 3.12(f).

e. Recognizing an Honorable or General Discharge Issued by a DRB Intended to Set Aside a Bar

VA does *not* recognize an honorable or general discharge issued by a DRB intended to set aside a bar under 38 CFR 3.12(c), **on or after** enactment of *PL 95-126*, October 8, 1977 (38 CFR 3.12(g)). If such an upgraded discharge is received, examine the claim for the existence of a statutory bar.

Exception: Only favorable action by a Board for Correction of Military Records will overcome a bar under 38 CFR 3.12(c).

Note: This provision also applies to those discharges issued prior to October 8, 1977, under the special review program (38 CFR 3.12(h)), even if a later review by a DRB confirms that the upgrading was warranted under the uniform published review criteria.

f. Effect of a Change in Character of Discharge

Do *not* make a formal determination to void the earlier determination. Write an annotation on the prior determination to show that it has been superseded by a later "corrected" discharge.

Make a formal determination if the corrected character of discharge is OTH, therefore requiring reconsideration and redetermination.

Continued on next page

M21-1MR, Part III, Subpart v, Chapter 1, Section B

10. Clemency, Upgraded, and Discharge Review Board (DRB) Discharges, Continued

f. Effect of a Change in Character of Discharge (continued)

Determine the effective date of the determination per 38 CFR 3.400(g).

g. Guidelines of PL 95-126

In addition to a requirement that the Department of Defense (DoD) establish a set of uniform procedures and standards for use by DRBs, *PL 95-126* also prohibits payment of VA benefits based solely on a discharge upgraded under

- the Presidential Proclamation of January 19, 1977, or
- the DoD Special Discharge Review Program.

The DRB had to review an upgraded discharge to determine if it could be upheld under the new uniform criteria established by *PL 95-126*. After the DRB completed their second review and made a decision, the responsibility for determining eligibility to VA benefits exists solely with VA.

Reference: A detailed discussion of *PL 95-126* and administrative review procedures was presented in *DVB Circular 20-78-18*. The criteria for the second discharge review is explained in *DoD Directive 1332.28*.

h. Cases Exempt From *PL 95-126*

Veterans are exempt from the procedures applicable to special upgraded discharges if they had

- general or under honorable conditions discharges upgraded by the special review program, or
- filed a claim for VA benefits based on an other than honorable discharge and had received a favorable character of discharge determination **prior** to enactment of *PL 95-126*, effective October 8, 1977.

11. Processing DRB Second Review Decisions

Introduction

This topic contains information on adjudication procedures, including handling

- eligibility for DRB second review
- responsibility for determining eligibility to benefits after a DRB second review
- narrative of decision on *DD Form 215*
- favorable DRB determinations
- favorable DRB determinations when 38 CFR 3.12(c) is a possible factor
- unfavorable DRB decisions, and
- effective dates for compensation and pension benefits based on DRB second review.

Change Date

February 27, 2012

a. Eligibility for DRB Second Review

A Veteran may request that the DRB perform a second review of a character of discharge determination.

Note: The second review was done automatically for all Veterans whose discharges were upgraded under one of the special programs.

To be eligible for the DRB second review, the Veteran must have

- served between August 4, 1964, and March 28, 1973
- been released with an "other than honorable" (formerly known as "undesirable") discharge, and
- been issued an upgraded discharge on or after January 19, 1977, under the provisions of the
  - Presidential Proclamation of January 19, 1977, or
  - the DoD Special Discharge Review Program.

b. Responsibility for Determining Eligibility to Benefits After a DRB Second Review

VA has final responsibility for determining eligibility to VA benefits.

If the DRB review was favorable, and the Veteran's upgraded discharge was, VA can still deny eligibility to VA benefits if a statutory bar under 38 CFR 3.12(c) exists.

Continued on next page

11. Processing DRB Second Review Decisions, Continued

b. Responsibility for Determining Eligibility to Benefits After a DRB Second Review (continued)

If the DRB review was unfavorable and the Veteran's upgraded discharge was not upheld, VA will decide eligibility to VA benefits using the original discharge and facts and circumstances to complete a COD determination.

c. Narrative of Decision on *DD Form 215*

The narrative summary of the decision of the DRB's second review should be released on *DD Form 215*. VA must have a copy of this paperwork in order to make a decision. The following table shows the commonly used language for favorable and unfavorable decisions.

Criteria	Narrative Decision on *DD Form 215*
USN/USMC favorable second review	*Discharge review under PL 95-126 and a determination has been made that characterization of service is warranted by DOD Directive 1332.28.*
USN/USMC unfavorable second review	*Discharge review under PL 95-126 and a determination has been made that characterization of service is warranted by DOD SDRP 4 Apr 77.*
USA/USAF favorable second review	*Discharge review under PL 95-126 and a determination has been made that a change in characterization of service is warranted by DOD Directive 1332.28.*
USA/USAF unfavorable second review	*Discharge review under PL 95-126 and a determination has been made that characterization of service was warranted by DOD SDRP 4 Apr 77.*

d. Favorable DRB Determinations

Carefully review the full service records and determine if the former service member was discharged or released under one of the following conditions listed in 38 CFR 3.12(c).

- If so, follow the instructions in M21-1MR, Part III, Subpart v, 1.B.11.e
- If not, the favorable DRB determination is used as the basis for eligibility to VA benefits.

Reference: For more information on aliens, see 38 CFR 3.7(b).

Continued on next page

11. Processing DRB Second Review Decisions, Continued

e. Favorable DRB Determinations When 38 CFR 3.12(c) Is a Factor

If 38 CFR 3.12(c) is a factor, VA can still deny eligibility to benefits, even though the DRB review was favorable.

If a previous administrative decision held that the character of discharge was other than honorable, and 38 CFR 3.12(c) is a factor, annotate that decision to show the date of the

- application for discharge review
- initial DRB upgrade, and
- VA affirmed previous decision.

Continued on next page

11. Processing DRB Second Review Decisions, Continued

f. Unfavorable DRB Determinations

If the DRB decision is unfavorable, eligibility to VA benefits rests on the merits of the original "other than honorable" discharge and corresponding facts and circumstances.

Follow the steps in the table below to process an unfavorable DRB decision, even if the claims folder contains an unfavorable administrative decision made prior to the issuance of the adverse DRB decision.

Step	Action
1	Provide the claimant with a due process notice prior to making an administrative decision.
2	Following receipt of any evidence from the claimant or the expiration of 60 days, whichever is earlier • review the case and prepare an administrative decision • cite 38 CFR 3.12(h) in the administrative decision as the authority for reexamining a DRB decision.
3	If the individual's discharge was issued under conditions that prevent payment of VA benefits, discuss and resolve the issues of • a possible conditional discharge, and • entitlement to 38 U.S.C. Chapter 17 medical benefits in the same administrative decision. ***References***: For more information on • eligibility requests for health care benefits under 38 U.S.C. Chapter 17, see – M21-1MR, Part III, Subpart v, 1.B.8, and • conditional discharge, see M21-1MR, Part III, Subpart v, 1.B.9.

Notes:

- Unless a valid conditional discharge for a separate period of service is established, eligibility to health care benefits under 38 U.S.C. Chapter 17 must be denied if a statutory bar exists.

- A Special Upgraded Discharge that is affirmed by a DRB under *PL 95-126* is an honorable discharge for purposes of entitlement to unemployment compensation under 5 U.S.C. 85. This is true even if a statutory bar exists under 38 CFR 3.12(c)(6).

Continued on next page

11. Processing DRB Second Review Decisions, Continued

g. Effective Dates for Compensation and Pension Benefits Based on DRB Second Review

Authorize payments from the date

- an application for review of discharge was filed with the service department, or
- the claim was filed with VA, whichever is later.

Reference: For information on the provisions that should be applied when authorizing payments, see

- 38 CFR 3.400(b), and
- 38 CFR 3.400 (g).

Important:

- January 19, 1977, is considered the date of application for all discharges upgraded under the Presidential Memorandum of January 19, 1977.
- Use the date the original application was filed with the service department for DoD Special Review Board cases.
- If a previously disallowed claim is reopened based on a change in the character of discharge, authorize payments from the latest of the following dates:
  - one year prior to receipt of the reopened claim
  - the date on which the application for review of discharge was filed with the service department, or
  - the date of receipt of the previously disallowed claim.

Appendix L
Templates and Resources for Practitioners

Appendix L-1
Courts-Martial: Model Instruction Regarding Eligibility for Benefits Administered by the Department of Veterans Affairs

2-5-22-1A ELIGIBILITY FOR BENEFITS ADMINISTERED BY THE DEPARTMENT OF VETERANS AFFAIRS (VA)

(FOR GENERAL COURT-MARTIAL): Under federal law and regulations applicable to the Department of Veterans Affairs, also known as "VA," a punitive discharge from a General Court-Martial, including both a Bad-Conduct Discharge and a Dishonorable Discharge, will result in an automatic bar to eligibility for benefits administered by VA, except for conversion of life insurance coverage. Only retention in the Service will preserve eligibility for VA benefits if the accused is later discharged under honorable conditions.

(FOR CASES NOT INVOLVING A CONVICTION OF ARTICLE 94, 104, or 106): Despite any bars to VA benefits based on the level of this court-martial, a punitive discharge, or the nature of the offense(s), the accused will still retain certain VA benefits if (she) (he) honorably completed a prior term of active duty service. Such benefits are limited to benefits already earned as a result of any honorably completed prior term(s) of active duty service.

(FOR CASES INVOLVING A CONVICTION OF ARTICLE 94, 104, or 106): Because the accused was convicted of violating Article (94) (104) (106), UCMJ, the accused is ineligible for VA benefits related to a prior or current term of service.

(FOR SPECIAL COURT-MARTIAL): While any punitive discharge adjudged by a General Court-Martial will result in an automatic bar to benefits administered by Department of Veterans Affairs, also known as "VA," this is not true regarding Special Courts-Martial that result in a Bad-Conduct Discharge.

Some automatic bars to benefits include a Bad-Conduct Discharge accompanying a conviction for Article 85, UCMJ, or Article 86, UCMJ (with a continuous period of absence without authority of 180 days or

greater). Otherwise, an accused who has been discharged with a Bad-Conduct Discharge at a Special Court-Martial may still be considered by VA for a Character of Service determination if (she) (he) applies. In this process, adjudicators will review the accused's entire period of service, the individual facts surrounding the accused's conduct, and the nature of (her) (his) offenses to determine whether the service was other than dishonorable in character. This evaluation relies on VA's definition of other than dishonorable service, not the military's definition. A favorable character of service determination will permit a veteran with a Bad-Conduct Discharge to obtain various benefits, such as a disability pension or vocational rehabilitation, but not health care benefits. Under federal law and regulation, the receipt of a Bad-Conduct Discharge will bar a servicemember's eligibility for VA health care benefits for disabilities not incurred or aggravated during an honorably completed prior term of active duty service, even if (her) (his) injury or medical condition was incurred or aggravated as a result of the servicemember's performance of military duties.

Provided another bar to benefits does not apply, the imposition of a punitive discharge is the only circumstance in which a service member may be found to have service-connected disabilities but not be eligible for VA health care benefits.

Until a favorable decision is made by either VA or on an appeal of an adverse VA decision, under VA rules, the accused remains ineligible for VA benefits. It is a process that could take months or years to complete before a final decision is rendered. VA uses a number of standards to evaluate one's character of military service and the panel should not speculate on whether the accused will obtain a favorable or unfavorable VA determination. However, because certain circumstances will result in a bar to benefits, such as a conviction for desertion at a special court-martial that adjudges a Bad-Conduct Discharge, I am providing you with a chart titled, "Evaluating Misconduct for the Purpose of VA Benefit Eligibility." The chart provides a summary of major guidelines for VA's Character of Service evaluation. Because these determinations are left to the discretion of VA adjudicators, only retention in the Service guarantees continued eligibility for VA benefits if the accused is later discharged under honorable conditions.

(FOR CASES NOT INVOLVING A CONVICTION OF ARTICLE 94, 104, or 106): Despite any bars to VA benefits based on the level of this court-martial, a punitive discharge, or the nature of the

offense(s), the accused will still retain certain VA benefits if (she) (he) honorably completed a prior term of active duty service. Such benefits are limited to benefits already earned as a result of any honorably completed prior term(s) of active duty service.

(FOR CASES INVOLVING A CONVICTION OF ARTICLE 94, 104, or 106): Because the accused was convicted of violating Article (94) (104) (106), the accused is ineligible for VA benefits related to a prior or current term of service.

Appendix L-2
Sample Approval Memorandum
Request for Discharge in Lieu of Trial by Court-Martial

DEPARTMENT OF THE ARMY
HEADQUARTERS, 8th INFANTRY DIVISION AND FORT SNUFFY
FORT SNUFFY, VIRGINIA 12345-6789

REPLY TO ATTENTION OF:

ATXX-CG

MEMORANDUM THRU

Commander, 3d Brigade Combat Team, 8th Infantry Division, Fort Snuffy, Virginia 12345
Commander, 103d Brigade Support Battalion, 3rd Brigade Combat Team, 8th Infantry Division, Fort Snuffy, Virginia 12345
Commander, A Company, 103d Brigade Support Battalion, 3rd Brigade Combat Team, 8th Infantry Division, Fort Snuffy, Virginia 12345

FOR Specialist John Q. Soldier, 987-65-4321, A Company, 103d Brigade Support Battalion, 3rd Brigade Combat Team, 8th Infantry Division, Fort Snuffy, Virginia 12345

SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist John Q. Soldier, 987-65-4321

1. The request for discharge in lieu of trial by court-martial pertaining to SPC John Q. Soldier, 9087-65-4321, A Company, 103d Brigade Support Battalion, Fort Snuffy, Virginia, is approved.

2. Specialist Soldier will be discharged from the U.S. Army under the provisions of AR 635-200, Chapter 10, with an under other than honorable conditions characterization of service.

3. The court-martial charges pending against SPC Soldier will be withdrawn and dismissed effective upon date of separation.

4. In accordance with AR 635-200, paragraph 1-32a and AR 40-501, Table 8-2, SPC Soldier will be discharged without separation physical or mental examination unless he/she submits a written request for such. No written waiver is necessary. In the event that he/she requests either a physical or mental examination, separation will not be delayed for completion of the examination, and the examination(s) may be completed at Department of Veterans Affairs (VA) facilities after discharge.

5. Specialist Soldier will be reduced to the lowest enlisted grade IAW AR 600-8-19, paragraph 10-1(d).

6. Specialist Soldier will not be transferred to the Individual Ready Reserves (IRR).

7. Information Regarding VA Benefits.

ATXX-GC
SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist John Q. Soldier, 987-65-4321

All Discharges In Lieu of Court-Martial Granted Without Prior GCM Referral
Add this paragraph in all cases for which a request for discharge in lieu of court-martial is granted without a prior referral to general court-martial. While other statutory or regulatory bars to VA benefits may apply, adding this paragraph will help to prevent VA benefits adjudicators from mistakenly applying the VA regulatory bar to benefits for Soldiers discharged to avoid trial by general court-martial.

a. This is not a discharge to escape trial by general court-martial, as the charges and specifications have not been referred to general court-martial. Accordingly, the regulatory bar to VA benefits set forth in 38 C.F.R. § 3.12(d)(1) for acceptance of an undesirable discharge to avoid trial by general court-martial should not apply.

Excluding AWOL ≥ 180 Continuous Days as a Basis for Discharge
If an accused is charged with violating Article 85, UCMJ, Desertion, or Article 86, UCMJ, AWOL for a period of continuous absence of at least 180 days, add this paragraph if the convening authority decides that the statutory bar to VA benefits for AWOL ≥ 180 Continuous Days should not apply. Statutory bars to benefits generally preclude receipt of VA health care benefits, while regulatory bars generally do not. The convening authority must ensure that a proper reason to grant the request remains. For example, approving the request based on a period of AWOL of greater than 30 days, but less than 180 days, would be a proper basis for approving the request while preventing application of the statutory bar. Additional explanation is permissible, but not required.

b. This discharge under other than honorable conditions is not issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. The statutory bar to benefits set forth in 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(6) for absence without leave for a period of at least 180 continuous days should not apply. [Optional: Insert additional explanation.]

Excluding Other Charge(s) and Specification(s) as a Basis for Discharge
Add this paragraph if the convening authority does not wish to include a specific charged offense as the basis for approving the request. The application of several statutory and regulatory bars to VA benefits depends on the type and nature of the charged misconduct. Specifically excluding certain charged offenses from the basis of the separation can prevent the application of a statutory or regulatory bar that would deny a Soldier benefits.

c. This discharge in lieu of court-martial is not based on the following charged offense(s): [Insert Charge(s) and Specification(s) that do not form any basis for approving the discharge in lieu of court-martial]. When making a decision on VA benefits eligibility, benefits adjudicators should not consider the charged offense(s) listed in this paragraph, as I did not consider these charged offense(s) when granting this request for discharge in lieu of court-martial. [Optional: Insert additional explanation.]

Recommendation Against Moral Turpitude Bar to VA Benefits
Add this paragraph if the convening authority does not believe that an/the offense(s) on which the discharge is based involve(s) moral turpitude. Granting a request for discharge in lieu of court-martial with an OTH characterization of service generally serves as a regulatory bar to VA benefits if an offense involving moral turpitude is all or part of the basis for separation. Findings and recommendations set forth in this paragraph are not binding on VA benefits adjudicators, but may be persuasive.

ATXX-GC
SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist John Q. Soldier, 987-65-4321

d. After a thorough review of the charges and factual circumstances, I find that the offense(s) on which this discharge is based do(es) not involve moral turpitude for the purposes of a VA benefits determination. I recommend that 38 C.F.R. § 3.12(d)(3) not serve as a bar to VA benefits. The offense(s) on which this discharge is based do(es) not involve moral turpitude because [, for the offenses on which this discharge is based, a Dishonorable Discharge/Dismissal is not among the permissible sentences at a court-martial,] [,] [none of the offense(s) are analogous to a felony level offense under the circumstances] [,] [all absence offenses on which this discharge is based did not occur during times of War or national peril] [,] [and] [military courts and the Manual for Courts-Martial have not recognized the offense(s) on which this discharge is based as constituting crimes involving moral turpitude]. [Optional: Insert additional or alternate explanation.]

Recommendation Against Willful and Persistent Misconduct Bar to VA Benefits

Add this paragraph if the convening authority does not believe that an/the offense(s) on which the discharge is based constitute(s) willful and persistent misconduct. Granting a request for discharge in lieu of court-martial with an OTH characterization of service generally serves as a regulatory bar to VA benefits if misconduct determined to be willful and persistent is all or part of the basis for separation. Findings and recommendations set forth in this paragraph are not binding on VA benefits adjudicators, but may be persuasive.

e. After a thorough review of the charges and factual circumstances, I find that the offense(s) on which this discharge is based (was)(were) not willful and persistent misconduct for the purposes of a VA benefits determination. I recommend that 38 C.F.R. § 3.12(d)(4) not serve as a bar to VA benefits. The offense(s) on which this discharge is based do(es) not involve willful and persistent misconduct because [it involves] [they all share a nexus in] a single incident and should rightfully be considered a single one-time event] [,] [the offense(s) on which this discharge is based did not materially interfere with or prevent the accused's ability to meaningfully perform military duties], [the offense(s) was/were minor in nature and the accused's conduct was otherwise Honest, Faithful, and Meritorious]. [Optional: Insert additional explanation.]

Compelling Circumstances Recommendation for Continuous AWOL ≥ 180 Days

If an accused is charged with violating Article 86, UCMJ, AWOL for a continuous period of at least 180 days, and the convening authority does not make an affirmative finding that the discharge in lieu of court-martial with an OTH characterization of service is not based on a continuous period of AWOL for at least 180 days, the accused will likely be statutorily barred from VA benefits. The convening authority can likely prevent this statutory bar from applying by specifically finding that the request for discharge in lieu of court-martial is not based on a continuous period of AWOL for at least 180 days. If the accused is statutorily barred, the convening authority may also make a finding and recommendation to the VA benefits adjudicators that there were compelling circumstances that warranted the prolonged unauthorized absence for the purpose of VA benefits. This finding, however, is simply a recommendation to VA benefits adjudicators in the event that the accused later applies for VA benefits. While this recommendation may persuade VA benefits adjudicators to apply the compelling circumstances exception to this statutory bar, it does not prevent the application of the statutory bar.

ATXX-GC
SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist John Q. Soldier, 987-65-4321

f. Because this discharge is based on a violation of Article 86, UCMJ, Absence Without Leave, for a period of at least 180 continuous days, 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(6) may serve as a statutory bar to VA benefits. I find, however, that for the purposes of VA benefits eligibility, there are compelling circumstances that warranted the prolonged unauthorized absence. While these compelling circumstances do not present a valid legal defense, they are sufficiently extenuating and mitigating for me to recommend that this statutory bar to benefits not apply. In making this determination, I have considered the [length and character of service exclusive of the period of prolonged AWOL] [and] [the reasons that the accused has given for the period of prolonged AWOL. I have evaluated these reasons in terms of the accused's age, cultural background, educational level and judgmental maturity [, to include the [hardship][and][suffering] [incurred as a result of overseas service] [,][and] [as a result of combat wounds] [,][and] [other service incurred or aggravated disability]. [Optional: Insert additional explanation.]

Proper Use of These Findings and Recommendations
This paragraph is recommended in all cases for which the convening authority includes information regarding VA benefits. This paragraph clarifies the limited purposes of the convening authority's findings and recommendations regarding VA benefits determinations.

g. These findings and recommendations are solely for the purpose of assisting VA benefits adjudicators in making their decisions on eligibility for veterans benefits. I have made the findings and recommendations in this paragraph after being advised by my Staff Judge Advocate on the applicable legal standards, definitions, and regulations. These recommendations are not made for any purpose other than assisting with determining the appropriate VA benefits determination.

Statement of Gratuitous Nature of VA Benefits Findings and Recommendations
This paragraph is recommended in all cases for which the convening authority includes information regarding VA benefits. Convening Authorities, Judge Advocates, and other legal counsel are advised against negotiating for the inclusion of language. Because VA and other judicial officials retain complete authority to make VA benefits eligibility determinations, convening authorities have neither the statutory nor regulatory authority to make final determinations on whether or not an accused is eligible for VA benefits. Convening authorities also have no authority to make binding precedential determinations regarding the interpretation of VA-related statutes and regulations. In addition, Army Regulation (AR) 635-200 does not provide any authority for an accused to include conditional language as a part of a request for discharge in lieu of court-martial. The accused and defense counsel should request the inclusion of VA benefit-related language in the request for discharge in lieu of court-martial under the authority of AR 635-200, para. 10-9.

h. No member of the command has made any promises, assurances, or other representations to the accused or defense counsel regarding the accused's eligibility for VA benefits. There was no negotiation with the accused or defense counsel for the inclusion of any VA benefits-related language in this approval document. The determinations, findings, and recommendations in this paragraph were not made in exchange for the submission of this request for discharge in lieu of court-martial. I believe that granting this discharge in lieu of court-martial is the correct action in this case regardless of any final decision on the accused's eligibility for VA benefits. I have granted this request for discharge in lieu of court-martial and

ATXX-GC
SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist John Q. Soldier, 987-65-4321

made these specific findings and recommendations regarding VA benefits eligibility with full knowledge that VA and other judicial officials are the proper arbiters of VA benefits eligibility determinations. If the determinations, findings, and recommendations included in this paragraph are found to be legally invalid, inapplicable, or unpersuasive, or they do not result in the preservation of any VA benefits for the accused, this discharge in lieu of court-martial shall remain valid, and the characterization of discharge shall remain unchanged unless upgraded or otherwise modified by another proper administrative, judicial, or legal process.

ALBERT T. VANDALEIGH
Major General, USA
Commanding

CF:
ATXX-AG (Transition)
TDS

Appendix L-3
Sample Language Regarding VA Benefits Eligibility Administrative Separation Actions

Sample Language Regarding VA Benefits Eligibility

Instructions: In all administrative separation actions for which a servicemember may lose eligibility for Department of Veterans Affairs (VA) benefits, convening authorities and their legal advisors should consider including additional information that is designed to assist VA benefits adjudicators in making more accurate and informed determinations on VA benefits eligibility. The paragraphs below are templates that commanders and their legal advisors may use in recommendation and decision documents to address specific statutory and regulatory bars that may prevent a former servicemember from receiving VA benefits. Additional explanation of each statutory and regulatory bar to benefits can be found in the main article. Additional legal research may be necessary for a particular case.

The templates in Section I are designed for use, where appropriate, in all administrative separation action recommendation and decision documents, to include Discharges in Lieu of Court-Martial. The template in Section II is designed solely for use, where appropriate, in Discharge in Lieu of Court-Martial decision documents.

I. All Administrative Separation Actions

1. Excluding Charge(s) and Specification(s) or Notified Offenses as a Basis for Discharge

Add paragraph 1 if the convening authority does not wish to include a specific charged or notified offense as the basis for approving the administrative separation action. The application of several statutory and regulatory bars to VA benefits depends on the type and nature of the charged misconduct. Specifically excluding certain charged offenses from the basis of the separation can prevent the application of a statutory or regulatory bar that would deny a servicemember benefits.

This discharge is not based on the following charged offense(s): [Insert Charge(s) and Specification(s) that do not form any basis for the separation]. When making a decision on VA benefits eligibility, benefits adjudicators should not consider the offense(s) listed in this paragraph, as I did not consider these charged offense(s). [Optional: Insert additional explanation.]

2. Excluding AWOL ≥ 180 Continuous Days as a Basis for Discharge

If a servicemember is charged with or notified of a violation of Article 85, UCMJ, Desertion, or Article 86, UCMJ, AWOL for a period of continuous absence of at least 180 days, add paragraph 2 if the convening authority decides that the statutory bar to VA benefits for AWOL ≥ 180 Continuous Days should not apply, but wants to include AWOL for a continuous period of 179 days or less as a basis for the discharge. If a violation of Article 85, UCMJ, Desertion, is charged or notified, and the period of continuous absence is 180 days or greater, the convening authority should consider including both paragraph 1 and paragraph 2 if the basis of the discharge will include AWOL for a continuous period of 179 days or less. Statutory bars to benefits generally preclude receipt of VA health care benefits, while regulatory bars generally do not. The convening authority must ensure that a proper reason to grant the request remains. Additional explanation is permissible, but not required.

This discharge under other than honorable conditions is not issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. The statutory bar to benefits set forth in 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(6) for

absence without leave for a period of at least 180 continuous days should not apply. [Optional: Insert additional explanation.]

3. Compelling Circumstances Recommendation for Continuous AWOL ≥ 180 Days

If an accused is charged with or notified of a violation of Article 86, UCMJ, AWOL for a continuous period of at least 180 days, and the convening authority does not use paragraphs 1 or 2 to make an affirmative finding that the administrative separation with an OTH characterization of service is not based on a continuous period of AWOL for at least 180 days, the accused will likely be statutorily barred from VA benefits. If the accused is statutorily barred, paragraph 3 assists the convening authority in making a recommendation to VA benefits adjudicators that there were compelling circumstances that warranted the prolonged unauthorized absence for the purpose of VA benefits. This is simply a recommendation to VA benefits adjudicators in the event that the accused later applies for VA benefits. While this recommendation may persuade VA benefits adjudicators to apply the compelling circumstances exception to this statutory bar, it neither prevents the initial application of the statutory bar, nor guarantees future eligibility for VA benefits.

Because this discharge is based on a violation of Article 86, UCMJ, Absence Without Leave, for a period of at least 180 continuous days, 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(6) may serve as a statutory bar to VA benefits. I find, however, that for the purposes of VA benefits eligibility, there are compelling circumstances that warranted the prolonged unauthorized absence. While these compelling circumstances do not present a valid legal defense, they are sufficiently extenuating and mitigating for me to recommend that this statutory bar to benefits not apply. In making this determination, I have considered the [length and character of service exclusive of the period of prolonged AWOL] [and] [the reasons that the accused has given for the period of prolonged AWOL. I have evaluated these reasons in terms of the accused's age, cultural background, educational level and judgmental maturity [, to include the [hardship][and][suffering] [incurred as a result of overseas service] [,][and] [as a result of combat wounds] [,][and] [other service incurred or aggravated disability]. [Optional: Insert additional explanation.]

4. Recommendation Against Moral Turpitude Bar to VA Benefits

Add paragraph 4 if the convening authority does not believe that an/the offense(s) on which the discharge is based involve(s) moral turpitude. Granting an administrative separation with an OTH characterization of service generally serves as a regulatory bar to VA benefits if an offense involving moral turpitude forms part or all of the basis for separation. Findings and recommendations set forth in this paragraph are not binding on VA benefits adjudicators, but may be persuasive.

After a thorough review of the charges and factual circumstances, I find that the offense(s) on which this discharge is based do(es) not involve moral turpitude for the purposes of a VA benefits determination. I recommend that 38 C.F.R. § 3.12(d)(3) not serve as a bar to VA benefits. The offense(s) on which this discharge is based do(es) not involve moral turpitude because [, for the offenses on which this discharge is based, a Dishonorable Discharge/Dismissal is not among the permissible sentences at a court-martial,] [,] [none of the offense(s) are analogous to a felony level offense under the circumstances] [,] [all absence offenses on which this discharge is based did not occur during times of War or national peril] [,] [and] [military courts and the Manual for Courts-Martial have not recognized the offense(s) on which this discharge is based as constituting crimes involving moral turpitude]. [Optional: Insert additional or alternate explanation.]

5. Recommendation Against Willful and Persistent Misconduct Bar to VA Benefits

Add paragraph 5 if the convening authority does not believe that an/the offense(s) on which the discharge is based constitute(s) willful and persistent misconduct. Granting an administrative separation with an OTH characterization of service generally serves as a regulatory bar to VA benefits if misconduct determined to be willful and persistent forms at least part of the basis for separation. Findings and recommendations set forth in this paragraph are not binding on VA benefits adjudicators, but may be persuasive.

After a thorough review of the charges and factual circumstances, I find that the offense(s) on which this discharge is based (was)(were) not willful and persistent misconduct for the purposes of a VA benefits determination. I recommend that 38 C.F.R. § 3.12(d)(4) not serve as a bar to VA benefits. The offense(s) on which this discharge is based do(es) not involve willful and persistent misconduct because [it involves] [they all share a nexus in] a single incident and should rightfully be considered a single one-time event] [,] [the offense(s) on which this discharge is based did not materially interfere with or prevent the accused's ability to meaningfully perform military duties], [the offense(s) was/were minor in nature and the accused's conduct was otherwise Honest, Faithful, and Meritorious]. [Optional: Insert additional explanation.]

6. Proper Use of These Findings and Recommendations

Paragraph 6 is recommended in all cases for which the convening authority includes information regarding VA benefits. This paragraph clarifies the limited purposes of the convening authorities findings and recommendations regarding VA benefits determinations.

These findings and recommendations are solely for the purpose of assisting VA benefits adjudicators in making their decisions on eligibility for VA benefits. I have made the findings and recommendations in this paragraph after being advised by my Staff Judge Advocate on the applicable legal standards, definitions, and regulations. These recommendations are not made for any purpose other than assisting with determining the appropriate VA benefits determination.

7. Statement of Gratuitous Nature of VA Benefits Findings and Recommendations

Paragraph 7 is recommended in all cases for which the convening authority includes information regarding VA benefits. Convening Authorities, Judge Advocates, and other legal counsel are advised against negotiating for the inclusion of VA benefits-related language. Because VA and other judicial officials retain complete authority to make VA benefits eligibility determinations, convening authorities have neither the statutory nor regulatory authority to make final determinations on VA benefits eligibility. Convening authorities also have no authority to make binding precedential determinations regarding the interpretation of VA-related statutes and regulations. In addition, many controlling regulations do not provide any authority for an accused to include conditional language as a part of a request for discharge in lieu of court-martial. The accused and defense counsel should request the inclusion of VA benefit-related language as matters that accompany the request for discharge in lieu of court-martial. Defense Counsel should consider whether or not the request is protected under Military Rule of Evidence 410.

No member of the command has made any promises, assurances, or other representations to the accused or defense counsel regarding the accused's eligibility for veterans benefits. There was no negotiation with the accused or defense counsel for the inclusion of any veterans benefits-related language in this approval document. The

determinations, findings, and recommendations in this paragraph were not made in exchange for anything. I believe that granting this is the correct action in this case regardless of any final decision on the accused's eligibility for VA benefits. I have taken this action and made these specific findings and recommendations regarding VA benefits eligibility with full knowledge that VA and other judicial officials are the proper arbiters of VA benefits eligibility determinations. If the determinations, findings, and recommendations included in this paragraph are found to be legally invalid, inapplicable, or unpersuasive, or they do not result in the preservation of any VA benefits for the accused, this separation action shall remain valid, and the characterization of discharge shall remain unchanged unless upgraded or otherwise modified by another proper administrative, judicial, or legal process.

II. Discharges In Lieu of Court-Martial

8. All Discharges In Lieu of Court-Martial Granted Without Prior GCM Referral
Add paragraph 8 in all cases for which a request for discharge in lieu of court-martial is granted without a prior referral to general court-martial. While other statutory or regulatory bars to VA benefits may apply, adding this paragraph will help to prevent VA benefits adjudicators from mistakenly applying VA regulatory bar to benefits for servicemembers discharged to avoid trial by general court-martial.

This is not a discharge to escape trial by general court-martial, as the charges and specifications have not been referred to general court-martial. Accordingly, the regulatory bar to VA benefits set forth in 38 C.F.R. § 3.12(d)(1) for acceptance of an undesirable discharge to avoid trial by general court-martial should not apply.

Appendix L-4
Sample Request for Discharge in Lieu of Court-Martial

DEPARTMENT OF THE ARMY
TRIAL DEFENSE SERVICE, REGION SOUTHEAST
976 WILLIAM H WILSON AVE, BUILDING 621
FORT STEWART, GEORGIA 31314

AFZP-TDS-JA 8 April 2013

MEMORANDUM THRU

Commander, Headquarters and Headquarters Company, 3-69th Armor Regiment, 1st Heavy Brigade Combat Team, 3d Infantry Division, Fort Stewart, Georgia 31314
Commander, 1st Heavy Brigade Combat Team, 3d Infantry Division, Fort Stewart, Georgia 31314

FOR Commander, 3d Infantry Division, Fort Stewart, Gerogia 31314

SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist (SPC) Joe Snuffy, Headquarters and Headquarters Company, 3-69th Armor Regiment, 1st Heavy Brigade Combat Team, 3d Infantry Division, Fort Stewart, Georgia 31314

1. I, SPC Joe Snuffy, hereby voluntarily request a Discharge In Lieu of Trial by Courts-Martial under Army Regulation (AR) 635-200, Chapter 10. I understand that I may request a Discharge In Lieu of Trial by Courts-Martial because the attached charge and specifications which have been preferred against me under the Uniform Code of Military Justice (UCMJ) authorize the imposition of a punitive discharge.

2. I request discharge in lieu of trial by court martial because I believe that it is in my best interest and in the best interest of my family and the United States Army.

3. I am making this request of my own free will and have not been subjected to any coercion whatsoever by any person. I have been advised of the implications that are attached to my request. By submitting this request for discharge, I acknowledge that I understand the elements of the offenses charged and I am guilty of at least one of the charges or of a lesser included offense, which also authorizes the imposition of a punitive discharge. I do not, however, acknowledge that I am guilty of violating (Article __, UCMJ, _____) (for a period of of 180 or more continuous days).[1] Moreover, I hereby state that, under no circumstances, do I desire further rehabilitation for I have no desire to perform further military service.

[1] Even if a servicemember is successful in avoiding an adverse COS determination on the basis of discharge in lieu of a general court-martial, admission to charged offenses in the discharge request could form the basis of another statutory or regulatory bar for OTH recipients. As a special note to counsel, in some cases, it may be wise to disclaim guilt for any offense known to be morally turpitudinous, willful and persistent, or which would trigger a statutory bar. Thus, depending on the facts and circumstances of the case, defense counsel should consider advising a client to either disclaim guilt or not admit to guilt for theft and fraud offenses. While such disclaimers may increase the chances of a positive outcome on a future COS determination, there is no guarantee as to the effect of such disclaimers on an individual adjudication. Such disclaimers are not binding on VA. Furthermore, a command may be less likely to support a request for discharge if it appears as though the accused desires to avoid responsibility for the commission of serious offenses. It may also be wise, based on the facts and circumstances of each individual case, to make a non-specific admission of guilt that does not include the highlighted language. Each case is different and requires detailed analysis of numerous factors. For example, if there is only a single charge and specification, a non-specific admission would, in effect, still be an admission to the charged offense, or to a sufficiently serious lesser-included offense. At the very least, counsel should inform the client of all risks of an admission of guilt pursuant to this request, as such an admission, based on the charged offenses, could lead to automatic bars to VA benefits. Defense counsel should abide by the client's wishes after considering attendant risks.

AFZP-TDS-JA
SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist (SPC) Joe Snuffy, Headquarters and Headquarters Company, 3-69th Armor Regiment, 1st Heavy Brigade Combat Team, 3d Infantry Division, Fort Stewart, Georgia 31314

4. Prior to completing this form, I have been afforded the opportunity to consult with appointed counsel. I have consulted with CPT (TDS Counsel) who advised me of the nature of my rights under the UCMJ; the elements of the offenses with which I am charged; any relevant lesser included offense thereto; the facts which must be established by competent evidence beyond a reasonable doubt to sustain a finding of guilty; the possible defenses which appear to be available at this time; and the maximum permissible punishment if found guilty. He has also explained, per AR 635-200, paragraph 1-13 and AR 600-8-19, Chapter 17, that the separation authority will direct an immediate reduction to the lowest enlisted grade if the discharge is characterized as Under Other Than Honorable (OTH). I fully understand this advice. Although he has furnished me with legal advice, this decision is my own.

5. I understand that if my request for discharge is accepted, I may be discharged under conditions which are other than honorable (OTH) and furnished with an Under OTH Discharge Certificate. I have been advised and understand the possible effects of the Under OTH Discharge and that, as a result of the issuance of such a discharge, I will be deprived of many or all Department of Defense and service department benefits, and that I may be deprived of my rights and benefits as a veteran under both Federal and State Law. I also understand that I may expect to encounter substantial prejudice in civilian life because of an Under OTH Discharge. I further understand that there is no automatic upgrading or review by any Government agency of a less than honorable discharge and that I must apply to the Army Discharge Review Board or the Army Board for Correction of Military Records if I wish review of my discharge. I realize that an act of consideration by either board does not imply that my discharge will be upgraded.

6. I understand that a discharge that is less than fully honorable may deprive me of benefits administered by the Department of Veterans Affairs (VA) for my current period of service. Furthermore, if I do not have a service connected disability and have less than two years of continuous active military service, or if I have not served the entire period for which I was ordered or called to active service, I may be ineligible for many VA benefits, regardless of how my discharge is characterized. If my discharge is less than fully honorable, I will not be eligible for GI Bill benefits unless such benefits are predicated upon a prior period of honorable service. If I receive an Under OTH discharge, then VA will administratively review the circumstances of my discharge and determine whether I am eligible for receiving benefits based on the circumstances of my discharge. I acknowledge that I will be barred from receiving all VA benefits if VA determines that I was a deserter or that I was AWOL for a period in excess of 180 continuous days and I was not insane, according to VA's definition of insanity, at the time of the AWOL, and there were not "compelling circumstances" for the AWOL. Furthermore, if VA determines that my OTH discharge was given in lieu of a General Court-Martial, or as a result of mutiny or spying; moral turpitude; willful and persistent misconduct; or homosexual acts involving aggravating circumstances, then I will likely be barred from receiving nearly all VA benefits, with the exception of health care for service-connected disabilities incurred during this period of service. I have been advised that more information about VA's bars to benefits can be found at 38 C.F.R. §§ 3.12(c) and (d). I understand that, regardless of the characterization of my discharge, I may still be entitled to VA benefits based on a previous period of active duty service.

AFZP-TDS-JA
SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial – Specialist (SPC) Joe Snuffy, Headquarters and Headquarters Company, 3-69th Armor Regiment, 1st Heavy Brigade Combat Team, 3d Infantry Division, Fort Stewart, Georgia 31314

7. I understand that once my request for discharge is submitted, it may be withdrawn only with consent of the commander exercising General Court-Martial Convening Authority, or without that commander's consent, in the event my trial results in an acquittal or the sentence does not include a punitive discharge even though one could have been adjudged by the court. Further, I understand that if I absent myself without leave, this request may be processed and I may be discharged even though I am absent.

8. I have been advised that I may submit any statements I desire in my own behalf. 9. I hereby acknowledge receipt of a copy of this request for discharge.

JOE SNUFFY
SPC, U.S. Army
Respondent

Having been advised by me of the basis for his contemplated trial by court-martial and the maximum permissible punishment authorized under the UCMJ, of the possible effects of an Under OTH Discharge if this request is approved, and of the procedures and rights available to him, SPC Joe Snuffy personally made the choice indicated in the foregoing request for a Discharge in Lieu of Trial by Courts- Martial.

(TDS COUNSEL)
CPT, JA
Trial Defense Counsel

THE PRIVACY ACT OF 1974 (5 U.S.C. 552A)

AUTHORITY: Title 5 U.S.C. Section 301, and Title 10 U.S.C. Section 3012.

PURPOSE: To be used by the commander exercising general court-martial jurisdiction over you to determine approval or disapproval of your request.

ROUTINE USES: Request with appropriate documentation, including the decision of the discharge authority, will be filed in the MPRJ as permanent material and disposed of in accordance with AR 640-10, and may be used by other appropriate federal agencies and state and local governmental activities where use of the information is compatible with the purpose for which the information was collected.

DISCLOSURE: Submission of a request for discharge is voluntary. Failure to provide all or a portion of the requested information may result in your request being disapproved.

Appendix L-5
Sample Client Counseling Form
Character of Discharge and VA Benefits

Information for Servicemembers Regarding the Potential Impact of Character of Discharge on Department of Veterans Affairs (VA) Benefits

_____ HONORABLE DISCHARGE

An Honorable Discharge is a separation from the military service with honor. If you receive an Honorable Discharge, your discharge characterization will not preclude you from receiving VA benefits. With some exceptions, including having a service-connected disability, a minimum of 24 months of continuous active service is required to be eligible for most VA benefits. Other benefit-specific eligibility requirements may apply.

_____ GENERAL DISCHARGE (UNDER HONORABLE CONDITIONS)

A separation from service Under Honorable Conditions is for conduct that it not sufficiently meritorious to warrant an Honorable Discharge. If you receive a General Discharge, your discharge characterization will not preclude you from receiving VA benefits, except for education-related benefits (*i.e.*, the GI Bill). However, if you have a prior period of service upon which the education-related benefits may be predicated, you still may qualify for those benefits. With some exceptions, including having a service-connected disability, a minimum of 24 months of continuous active service is required to be eligible for most VA benefits. Other benefit-specific eligibility requirements may apply.

_____ UNDER OTHER THAN HONORABLE (OTH) CONDITIONS DISCHARGE

A separation under OTH conditions is one that is characterized by misconduct. If you are being discharged Under Other Than Honorable Conditions, you may or may not be entitled to VA benefits for that period of service. VA will conduct an administrative review and determine whether the misconduct upon which your discharge is based constitutes a bar to benefits for that period of service. Even if VA determines that you are not barred from receiving VA benefits, a minimum of 24 months of continuous active service is required to be eligible for most VA benefits. There are a number of exceptions to the minimum continuous active service requirement, such as if you are adjudicated by VA to have a service-connected disability. Other benefit-specific eligibility requirements may apply. See the Administrative Review section on the next page for more information about the potential impact of a discharge under Other Than Honorable Conditions on your VA benefits.

_____ BAD CONDUCT DISCHARGE (BCD)

A separation for bad conduct (BCD) may only be imposed by a General Court-Martial or a Special Court-Martial. VA will conduct an administrative review and independently determine whether the misconduct upon which your discharge is based constitutes a bar to VA benefits. Even if VA determines that you are not barred from receiving VA benefits, a minimum of 24 months of continuous active service is required to be eligible for most VA benefits. There are a number of exceptions to the minimum continuous active service requirement, such as if you are adjudicated by VA to have a service-connected disability. See the Administrative Review section on the next page for more information

regarding the potential impact of a Bad Conduct Discharge on your VA benefits. If your Bad Conduct Discharge is imposed by a General Court-Martial, then your discharge is a bar to all VA benefits (excluding SGLI life insurance conversion) for that period of service, except if VA determines that you were insane at the time of the commission of the offense(s) leading to your discharge.

_____ DISHONORABLE DISCHARGE or DISMISSAL FROM SERVICE (OFFICER)

A separation under dishonorable conditions or a dismissal from service may only be imposed by sentence of a General Court-Martial. A Dishonorable Discharge or Dismissal is a bar to all VA benefits (excluding SGLI life insurance conversion), except if VA determines that you were insane at the time of the commission of the offense(s) leading to your Dishonorable Discharge or Dismissal.

ADMINISTRATIVE REVIEW BY VA OF OTHER THAN HONORABLE AND BAD CONDUCT DISCHARGES

For Other then Honorable Conditions and Bad Conduct Discharges, VA will issue an administrative decision that determines whether you are eligible for VA benefits. If VA determines that you were insane at the time you committed the offense(s) leading to your discharge, then the character of your discharge in and of itself will not preclude your eligibility for any VA benefits. VA will determine whether a "statutory bar" or "regulatory bar" to your eligibility for VA benefits exists. You are ineligible for VA benefits if you were discharged under one of the following conditions that are considered statutory bars to benefits: 1.) A sentence imposed by a General Court-Martial; 2.) Due to being a conscientious objector who refused to perform duty, wear the uniform, or comply with authority; 3.) Desertion; 4.) Resignation (of an officer) for the good of the service; 5.) An alien during hostilities; 6.) Absence without leave (AWOL) for 180 or more continuous days unless VA determines that there were compelling circumstances for the AWOL. You will be ineligible for most VA benefits if your discharge is based on one of the following regulatory bars to benefits: 1.) Acceptance of an undesirable discharge to escape trial by GCM; 2.) Mutiny or spying; 3.) Moral turpitude; 4.) Willful or persistent misconduct; 5.) Homosexual acts involving aggravating circumstances or affecting duty. Even if you are subject to a statutory or regulatory bar to benefits, you will be allowed to convert your SGLI policy to a VA VGLI life insurance policy.

VA HEALTH CARE ELIGIBILITY

If your discharge is under Other Than Honorable Conditions and VA determines that a regulatory bar, but not a statutory bar, to benefits exists, you will still be entitled to health care benefits for disabilities that have been adjudicated to be service-connected. If your service terminated with a Bad Conduct Discharge, then you will likely not be eligible for any VA health care benefits based on that same period of service. However, health care benefits eligibility may be established through a previous period of service.

PRIOR PERIODS OF HONORABLE SERVICE

If you have completed the entire term of an active duty enlistment contract, or if you have a break in active duty service evidenced by a DD Form 214 that indicates an honorable or general discharge, you may be entitled to VA benefits based upon a prior period of honorable service. If you have a prior period of honorable service, you may be entitled to VA benefits regardless of the characterization of your current term of service. Because calculating prior periods of honorable service can be difficult, please consult with the Department of Veterans Affairs, a Veterans Service Organization, or an attorney regarding your potential eligibility for VA benefits based upon a prior period of honorable service.

CONSCIENTIOUS OBJECTOR DISCHARGES

Being discharged due to conscientious objector status will not, in and of itself, result in the denial of VA benefits. However, and *regardless of your character of discharge*, you will be barred from receiving any VA benefits based on your current period of service if as a conscientious objector, you refused to perform military duties, wear the uniform, or obey lawful orders.

DESERTION

A discharge based on desertion, *regardless of your character of discharge,* is a bar to all VA benefits.

RESIGNATION FOR THE GOOD OF THE SERVICE (OFFICERS)

A discharge based on a resignation for the good of the service, *regardless of the character of discharge*, is a bar to all VA benefits.

TREASON AND SUBVERSIVE ACTIVITIES

If you were convicted of a crime that VA defines as a "subversive activity," you will not be entitled to any VA benefits based on *any* period of service. A complete list of crimes is found at 38 U.S.C. § 6105.

VA BENEFITS AND INSANITY AT THE TIME OF MISCONDUCT

If VA determines that you were insane at the time you committed the offense leading to your court-martial, discharge, or resignation (officers), you will not be precluded from receiving any VA benefits based on that period of service. VA's definition of insanity is unique to VA and is not based on the same definition that may have been used if were found to be sane by a Sanity Board. If you believe that you may have been insane, per the VA standard, at the time of your misconduct, you are urged to make this known to VA if and when you file a claim for benefits. In addition, if you had a Sanity Board, received mental health treatment during service, or believe that you suffered from a mental illness during service, you should share this information with VA if and when you file a claim for VA benefits.

CARE FOR MILITARY SEXUAL TRAUMA (MST) VICTIMS

It is VA's policy to provide veterans and other eligible individuals who report having experienced MST free care for all physical and mental health conditions determined by their VA provider to be related to their MST. This benefit may be available to you regardless of the character of your discharge or length of service. If you apply for MST-related counseling, care, and services, you do not need to provide evidence of the sexual trauma. So long as a VA mental health professional determines that you have physical or mental trauma that resulted from MST, you may be eligible for MST-related care. If you think you may be eligible for MST-related services, you are encouraged to see the MST Coordinator at your local VA Medical Center or contact VA at (800) 827-1000.

I have been advised regarding the potential impact of my expected character of my discharge on my eligibility for VA benefits. I also understand that it costs nothing to file a claim for benefits, nor does it cost anything to obtain assistance in filing a claim. If I have further questions regarding my potential eligibility for VA benefits, I have been advised to consult with the Department of Veterans Affairs, a Veterans Service Organization, or an attorney who is accredited to practice before the Department of Veterans Affairs.

_____	_____	_____
Name	Signature	Date

Appendix M
Veterans Service Organization (VSO) Information

LIST OF RECOGNIZED ORGANIZATIONS

The following organizations have been granted recognition by the Secretary of Veterans Affairs for the purpose of preparation, presentation, and prosecution of claims under the laws administered by the Department of Veterans Affairs:

African American PTSD Association* ..... Lakewood, WA
American Ex-Prisoners of War, Inc. ..... Arlington, TX
American GI Forum of the United States ..... Denver, CO
The American Legion ..... Indianapolis, IN
American Red Cross ..... Washington, DC
AMVETS ..... Lanham, MD
Army and Navy Union, U.S.A., Inc. ..... Niles, OH
Blinded Veterans Association ..... Washington, DC
Catholic War Veterans of the U.S.A., Inc. ..... Alexandria, VA
Disabled American Veterans ..... Cold Springs, KY
Fleet Reserve Association ..... Alexandria, VA
Gold Star Wives of America, Inc. ..... Birmingham, AL
Italian American War Veterans of the United States, Inc. ..... Youngstown, OH
Jewish War Veterans of the U.S.A. ..... Washington, DC
Legion of Valor of the United States of America, Inc. ..... Santa Barbara, CA
Marine Corps League ..... Fairfax, VA
Military Officers Association of America (MOAA) ..... Alexandria, VA
Military Order of the Purple Heart of the U.S.A., Inc. ..... Springfield, VA
National Amputation Foundation, Inc. ..... Malverne, NY
National Association for Black Veterans, Inc. ..... Milwaukee, WI
National Association of County Veterans Service Officers, Inc. ..... Arlington, VA
National Veterans Legal Services Program ..... Washington, DC
National Veterans Organization of America (NVOA)* ..... Victoria, TX
Navy Mutual Aid Association ..... Arlington, VA
Non Commissioned Officers Association of the U.S.A. ..... San Antonio, TX
Paralyzed Veterans of America ..... Washington, DC
Polish Legion of American Veterans, U.S.A. ..... Washington, DC
Swords to Plowshares, Veterans Rights Organization ..... San Francisco, CA
The Retired Enlisted Association ..... Aurora, CO
United Spinal Association, Inc.* ..... Jackson Heights, NY
Veterans Assistance Foundation, Inc.* ..... Newburg, WI
Veterans of Foreign Wars of the United States ..... Kansas City, MO
Veterans of the Vietnam War, Inc. & The Veterans Coalition* ..... Pittston, PA
Veterans of World War I of the U.S.A., Inc. ..... Alexandria, VA
Vietnam Veterans of America ..... Silver Spring, MD
Wounded Warrior Project ..... Jacksonville, FL

*** Denotes an organization that is not congressionally chartered.**

Source: 2012/2013 Directory of Veterans and Military Service Organizations, available at http://www1.va.gov/vso/VSO-Directory_2012-2013.pdf.

Appendix N
Sample Court-Martial Charge Sheet (DD Form 458)
MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 Edition)
***Available at* http://armypubs.army.mil/epubs/pdf/mcm.pdf**
This sample is located at Appendix 4 in the MANUAL FOR COURTS-MARTIAL.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
Winnows, Brandon M.	001-01-0001	SGT	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Company C, 1st Battalion, 1st Brigade, 24th Marne Division, Fort Bless, Louisiana	28 April 2010	4 Years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,487.60	$0.00	$2,487.60	Pretrial Confinement	24 November 2011

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: **VIOLATION OF THE UCMJ, ARTICLE** 91.

SPECIFICATION: In that Sergeant Brandon M. Winnows, U.S. Army, at or near Fort Bless, Louisiana, on or about 24 November 2011, was disrespectful in language toward 1SG Charles E. Norris, a noncommissioned officer, then known by the said Sergeant Brandon M. Winnows to be a superior noncommissioned officer, who was then in the execution of his office, by saying to him, "I'm gonna smack you down," or words to that effect.

CHARGE II: Violation of the UCMJ, Article 112a.

SPECIFICATION 1: In that Sergeant Brandon M. Winnows, U.S. Army, did, at or near Fort Bless, Louisiana, on or about 22 September 2011, wrongfully use cocaine.

SPECIFICATION 2: In that Sergeant Brandon M. Winnows, U.S. Army, did, at or near Fort Bless, Louisiana, on or about 1 November 2011, wrongfully possess marijuana.

CHARGE III: Violation of the UCMJ, Article 128.

SPECIFICATION: In that Sergeant Brandon M. Winnows, U.S. Army, did, at or near Fort Bless, Louisiana, on or about 24 November 2011, commit an assault upon 1SG Charles E. Norris by cutting him with a knife on the forearm.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
Delgado, Christopher F.	O-3	C Co, 1st Bn, 1st Bde, 24th Marne Division

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
Christopher F. Delgado	20111129

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 29th day of November, 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Vincent D. Morrison	HQ, 1st Bde, 24th Marne Div
Typed Name of Officer	*Organization of Officer*
O-3	Trial Counsel
Grade	*Official Capacity to Administer Oath (See R.C.M. 307(b)_ must be commissioned officer)*

Vin Morrison
Signature

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE. APD PE v1.00

12.
On 29 November , 2011 , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

Christopher F. Delgado
Typed Name of Immediate Commander

C Co, 1st Bn, 1st Bde, 24th Marne Division
Organization of Immediate Commander

O-3
Grade

Christopher F. Delgado
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at 1404 hours, 1 December , 2011 at HQ, 1st Bde, 24th Marne
Designation of Command or
Division, Fort Bless, Louisiana .
Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE [1] Commander

Reed P. Wright
Typed Name of Officer

Adjutant
Official Capacity of Officer Signing

O-3
Grade

Reed P. Wright
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE *(YYYYMMDD)*
Headquarters, 24th Marne Division	Fort Bless, Louisiana	20120116

Referred for trial to the General court-martial convened by CMCO number 3, dated

11 November , 2011 , subject to the following instructions: [2]

None.

By COMMAND of MAJOR GENERAL CARL A. NARROW
Command or Order

John F. Doe
Typed Name of Officer

Chief, Military Justice
Official Capacity of Officer Signing

O-4
Grade

John Doe
Signature

15.
On 17 January , 2012 , I (caused to be) served a copy hereof on (each of) the above named accused.

Vincent D. Morrison
Typed Name of Trial Counsel

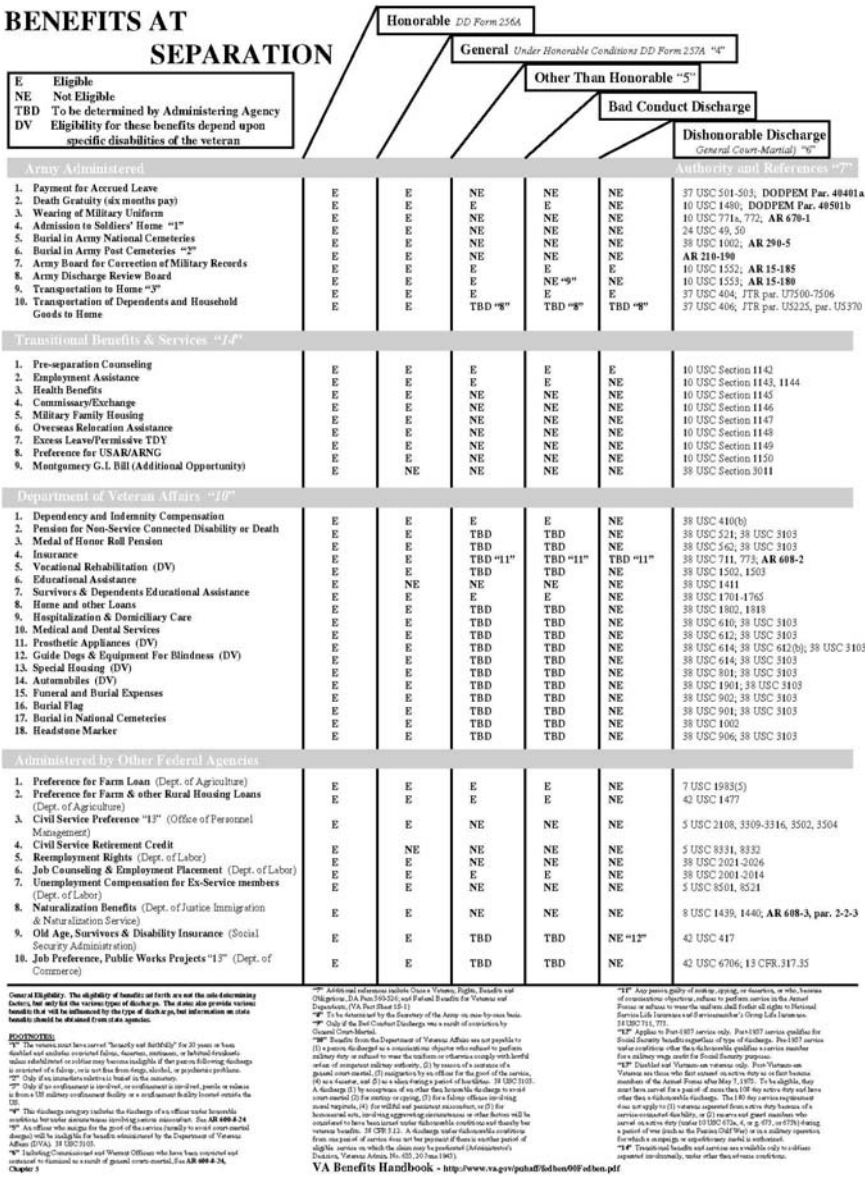
O-3
Grade or Rank of Trial Counsel

Vin Morrison
Signature

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken.
2 - See R.C.M. 601(e) concerning instructions. If none, so state.

DD FORM 458 (BACK), MAY 2000 APD PE v1.00

Appendix O
Historical Benefits at Separation Charts



BENEFITS AT SEPARATION

E Eligible
NE Not Eligible
TBD To be determined by Administering Agency
DV Eligibility for these benefits depend upon specific disabilities of the veteran

	Honorable *DD Form 256A*	General *Under Honorable Conditions DD Form 257A "4"*	Other Than Honorable "5"	Bad Conduct Discharge	Dishonorable Discharge *General Court-Martial) "6"*	Authority and References "7"
Army Administered						
1. Payment for Accrued Leave	E	E	NE	NE	NE	37 USC 501-503; **DODPEM Par. 40401a**
2. Death Gratuity (six months pay)	E	E	E	E	NE	10 USC 1480; **DODPEM Par. 40501b**
3. Wearing of Military Uniform	E	E	NE	NE	NE	10 USC 771a, 772; **AR 670-1**
4. Admission to Soldiers' Home "1"	E	E	NE	NE	NE	24 USC 49, 50
5. Burial in Army National Cemeteries	E	E	NE	NE	NE	38 USC 1002; **AR 290-5**
6. Burial in Army Post Cemeteries "2"	E	E	NE	NE	NE	**AR 210-190**
7. Army Board for Correction of Military Records	E	E	E	E	E	10 USC 1552; **AR 15-185**
8. Army Discharge Review Board	E	E	E	NE "9"	NE	10 USC 1553; **AR 15-180**
9. Transportation to Home "3"	E	E	E	E	E	37 USC 404; JTR par. U7500-7506
10. Transportation of Dependents and Household Goods to Home	E	E	TBD "8"	TBD "8"	TBD "8"	37 USC 406; JTR par. U5225, par. U5370
Transitional Benefits & Services "14"						
1. Pre-separation Counseling	E	E	E	E	E	10 USC Section 1142
2. Employment Assistance	E	E	E	E	NE	10 USC Section 1143, 1144
3. Health Benefits	E	E	NE	NE	NE	10 USC Section 1145
4. Commissary/Exchange	E	E	NE	NE	NE	10 USC Section 1146
5. Military Family Housing	E	E	NE	NE	NE	10 USC Section 1147
6. Overseas Relocation Assistance	E	E	NE	NE	NE	10 USC Section 1148
7. Excess Leave/Permissive TDY	E	E	NE	NE	NE	10 USC Section 1149
8. Preference for USAR/ARNG	E	E	NE	NE	NE	10 USC Section 1150
9. Montgomery G.I. Bill (Additional Opportunity)	E	NE	NE	NE	NE	38 USC Section 3011
Department of Veteran Affairs "10"						
1. Dependency and Indemnity Compensation	E	E	E	E	NE	38 USC 410(b)
2. Pension for Non-Service Connected Disability or Death	E	E	TBD	TBD	NE	38 USC 521; 38 USC 3103
3. Medal of Honor Roll Pension	E	E	TBD	TBD	NE	38 USC 562; 38 USC 3103
4. Insurance	E	E	TBD "11"	TBD "11"	TBD "11"	38 USC 711, 773; **AR 608-2**
5. Vocational Rehabilitation (DV)	E	E	TBD	TBD	NE	38 USC 1502, 1503
6. Educational Assistance	E	NE	NE	NE	NE	38 USC 1411
7. Survivors & Dependents Educational Assistance	E	E	E	E	NE	38 USC 1701-1765
8. Home and other Loans	E	E	TBD	TBD	NE	38 USC 1802, 1818
9. Hospitalization & Domiciliary Care	E	E	TBD	TBD	NE	38 USC 610; 38 USC 3103
10. Medical and Dental Services	E	E	TBD	TBD	NE	38 USC 612; 38 USC 3103
11. Prosthetic Appliances (DV)	E	E	TBD	TBD	NE	38 USC 614; 38 USC 612(b); 38 USC 3103
12. Guide Dogs & Equipment For Blindness (DV)	E	E	TBD	TBD	NE	38 USC 614; 38 USC 3103
13. Special Housing (DV)	E	E	TBD	TBD	NE	38 USC 801; 38 USC 3103
14. Automobiles (DV)	E	E	TBD	TBD	NE	38 USC 1901; 38 USC 3103
15. Funeral and Burial Expenses	E	E	TBD	TBD	NE	38 USC 902; 38 USC 3103
16. Burial Flag	E	E	TBD	TBD	NE	38 USC 901; 38 USC 3103
17. Burial in National Cemeteries	E	E	TBD	TBD	NE	38 USC 1002
18. Headstone Marker	E	E	TBD	TBD	NE	38 USC 906; 38 USC 3103
Administered by Other Federal Agencies						
1. Preference for Farm Loan (Dept. of Agriculture)	E	E	E	E	NE	7 USC 1983(5)
2. Preference for Farm & other Rural Housing Loans (Dept. of Agriculture)	E	E	E	E	NE	42 USC 1477
3. Civil Service Preference "13" (Office of Personnel Management)	E	E	NE	NE	NE	5 USC 2108, 3309-3316, 3502, 3504
4. Civil Service Retirement Credit	E	NE	NE	NE	NE	5 USC 8331, 8332
5. Reemployment Rights (Dept. of Labor)	E	E	NE	NE	NE	38 USC 2021-2026
6. Job Counseling & Employment Placement (Dept. of Labor)	E	E	E	E	NE	38 USC 2001-2014
7. Unemployment Compensation for Ex-Service members (Dept. of Labor)	E	E	NE	NE	NE	5 USC 8501, 8521
8. Naturalization Benefits (Dept. of Justice Immigration & Naturalization Service)	E	E	NE	NE	NE	8 USC 1439, 1440; **AR 608-3, par. 2-2-3**
9. Old Age, Survivors & Disability Insurance (Social Security Administration)	E	E	TBD	TBD	NE "12"	42 USC 417
10. Job Preference, Public Works Projects "13" (Dept. of Commerce)	E	E	TBD	TBD	NE	42 USC 6706; 13 CFR 317.35

General Eligibility. The eligibility of benefits set forth are not the sole determining factors, but only list the various type of discharges. The dates also provide various benefits that will be influenced by the type of discharge, but information on state benefits should be obtained from state agencies.

FOOTNOTES:

"1" The veteran must have served "honestly and faithfully" for 20 years or been disabled and otherwise convicted felons, deserters, mutineers, or habitual drunkards unless rehabilitated or soldier may become ineligible if the person following discharge is convicted of a felony, or is not free from drugs, alcohol, or psychiatric problems.

"2" Only if no unsuitable relative is buried in the cemetery.

"3" Only if no confinement is involved, or confinement is involved, parole or release is from a US military confinement facility or a confinement facility located outside the US.

"4" This discharge category includes the discharges of an officer under honorable conditions but under circumstances involving serious misconduct. See **AR 600-8-24**.

"5" An officer who resigns for the good of the service (usually to avoid court-martial charges) will be ineligible for benefits administered by the Department of Veterans Affairs (DVA). 38 USC 3103.

"6" Including Commissioned and Warrant Officers who have been convicted and sentenced to dismissal as a result of general court-martial. See **AR 600-8-24, Chapter 5**

"7" Additional references include Once a Veteran, Rights, Benefits and Obligations, DA Pam 360-520, and Federal Benefits for Veterans and Dependents, (VA Fact Sheet 1S-1)

"8" To be determined by the Secretary of the Army on case-by-case basis.

"9" Only if the Bad Conduct Discharge was a result of conviction by General Court-Martial.

"10" Benefits from the Department of Veterans Affairs are not payable to (1) a person discharged as a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise comply with lawful orders of competent military authority, (2) by reason of a sentence of a general court-martial, (3) resignation by an officer for the good of the service, (4) as a deserter, and (5) as a alien during a period of hostilities. 38 USC 3103. A discharge (1) by reason of an other than honorable discharge to avoid court-martial (2) for mutiny or spying, (3) for a felony offense involving moral turpitude, (4) for willful and persistent misconduct, or (5) for homosexual acts, involving aggravating circumstances or other factors will be considered to have been issued under dishonorable conditions and thereby bar veterans benefits. 38 CFR 3.12. A discharge under dishonorable conditions from one period of service does not bar payment if there is another period of eligible service on which the claim may be predicated (Administrator's Decision, Veterans Admin, No. 655, 20 Jan 1947).

"11" Any person guilty of mutiny, spying, or desertion, or who, because of conscientious objections, refuses to perform service in the Armed Forces or refuses to wear the uniform shall forfeit all rights to National Service Life Insurance and Servicemember's Group Life Insurance. 38 USC 711, 773.

"12" Applies to Post-1957 service only. Post-1957 service qualifies for Social Security benefits regardless of type of discharge. Pre-1957 service under conditions other than dishonorable qualifies a service member for a military wage credit for Social Security purposes.

"13" Disabled and Vietnam-era veterans only. Post-Vietnam-era Veterans are those who first entered on active duty or in fact became members of the Armed Forces after May 7, 1975. To be eligible, they must have served for a period of more than 180 days active duty and have other than a dishonorable discharge. The 180 day service requirement does not apply to (1) veterans separated from active duty because of a service-connected disability, or (2) reserve and guard members who served on active duty (under 10 USC 672a, d, or g, 673, or 673b) during a period of war (such as the Persian Gulf War) or on a military operation for which a campaign or expeditionary medal is authorized.

"14" Transitional benefits and services are available only to officers separated involuntarily, under other than adverse conditions.

VA Benefits Handbook - http://www.va.gov/pubaff/fedben00/fedben.pdf

BENEFITS AT SEPARATION

8 January 2007

E=Eligible; NE=Not Eligible; TBD=To be determined by the administrative agency

	Honorable *DD Form 214*	General Under Honorable Conditions *DD Form 214*	OTH *See Footnote 5.*	Bad Conduct	Dishonorable *See Footnote 7.*	
Army Administered						**Authority and References *See Footnote 1.***
1. Payment for Accrued Leave	E	E	NE	NE	NE	37 USC 501-503; DODPEM Par. 40401a
2. Death Gratuity (six months pay)	E	E	E	E	NE	10 USC 1480; DODPEM Par. 40501b
3. Wearing of Military Uniform	E	E	NE	NE	NE	10 USC 771a; 772; AR 670-1, par. 30-4.a
4. Burial in Army National Cemeteries *See Footnote 10.*	E	E	TBD	TBD	NE	38 USC 2402; AR 290-5
5. Burial in Post Cemeteries	E	E	NE	NE	NE	AR 210-190; *See Footnote 2.*
6. Army Board for Correction of Military Records	E	E	E	E	E	10 USC 1552; DODI 1332.28; AR 15-185; *See Footnote 3.*
7. Army Discharge Review Board	E	E	E	NE	NE	10 USC 1553; AR 15-180; *See Footnote 4.*
8. Transportation to Home	E	E	E	E	E	37 USC 404; JFTR par. U5125; par. U7500-7506
9. Transportation of Dependents and their Household Goods to Home *See Footnote 8 for OTH, BCD and DD.*	E	E	TBD	TBD	TBD	37 USC 406; JFTR par. U5225, par. U5370
Transitional Benefits & Services *See Footnote 5.*						
1. Pre-Separation Counseling	E	E	E	E	E	10 USC 1142
2. Employment Assistance	E	E	E	E	E	10 USC 1143; 1144
3. Health Benefits *See Footnote 12.*	E	E	E	NE	NE	10 USC 1145
4. Commissary/ Exchange *See Footnote 11.*	E	E	NE	NE	NE	DODR 1330.17-R
5. Military Family Housing	E	E	NE	NE	NE	DODR 4165.63-M
6. Overseas Relocation Assistance	E	E	NE	NE	NE	10 USC 1148
7. Excess Leave/ Permissive TDY	E	E	NE	NE	NE	10 USC 1149
8. Preference for USAR/ARNG	E	E	NE	NE	NE	10 USC 1150
9. Montgomery GI Bill (Additional Benefits)	E	NE	NE	NE	NE	38 USC 3011
Department of Veterans Affairs *See Footnotes 1 & 6.*						
1. Dependency and Indemnity Compensation	E	E	E	E	NE	38 USC 1310; 38 USC 5303
2. Pension for Non-Service Connected Disability or Death	E	E	TBD	TBD	NE	38 USC 1521; 38 USC 5303
3. Medal of Honor Pension	E	E	TBD	TBD	NE	38 USC 1562; 38 USC 5303
4. Insurance *See Footnote 9.*	E	E	TBD	TBD	TBD	38 USC 1911; 38 USC 5303
5. Vocational Rehabilitation (For Disabled Veterans)	E	E	TBD	TBD	NE	38 USC 3102, 3103; 38 USC 5303
6. Educational Assistance	E	NE	NE	NE	NE	38 USC 3011; 38 USC 5303
7. Survivors & Dependants Educational Assistance	E	E	E	E	NE	38 USC 3501-3565; 38 USC 5303
8. Home and Other Loans	E	E	TBD	TBD	NE	38 USC 3702; 38 USC 5303
9. Hospitalization & Domiciliary Care	E	E	TBD	TBD	NE	38 USC 1710; 38 USC 5303
10. Medical and Dental Services	E	E	TBD	TBD	NE	38 USC 1712; 38 USC 5303
11. Prosthetic Appliances (For Disabled Veterans)	E	E	TBD	TBD	NE	38 USC 1714; 38 USC 5303
12. Guide Dogs and Equipment for Blindness	E	E	TBD	TBD	NE	38 USC 1714; 38 USC 5303
13. Special Housing (For Disabled Veterans)	E	E	TBD	TBD	NE	38 USC 2101; 38 USC 5303
14. Automobiles (For Disabled Veterans)	E	E	TBD	TBD	NE	38 USC 3901; 38 USC 5303
15. Funeral and Burial Expenses	E	E	TBD	TBD	NE	38 USC 2302; 38 USC 5303
16. Burial Flag	E	E	TBD	TBD	NE	38 USC 2301; 38 USC 5303
17. Burial in National Cemeteries	E	E	TBD	TBD	NE	38 USC 2402; 38 USC 5303
18. Headstone Marker	E	E	TBD	TBD	NE	38 USC 2306; 38 USC 5303
Other Federal Agencies						
1. Preference for Farm Loans (Dept. of Agriculture)	E	E	E	E	NE	7 USC 1983(5)
2. Preference for Farm & Other Rural Housing Loans (Dept. of Agriculture)	E	E	E	E	NE	42 USC 1477
3. Civil Service Preference (Office of Personnel Management)	E	E	NE	NE	NE	5 USC 2108; 3309-3316, 3502, 3504
4. Civil Service Retirement Credit	E	NE	NE	NE	NE	5 USC 8331, 8332
5. Job Counseling & Employment Placement (Dep't of Labor)	E	E	E	E	NE	38 USC 4211-4215
6. Unemployment Compensation for Ex-Servicemembers (Dep't of Labor)	E	E	NE	NE	NE	5 USC 8501, 8521
7. Naturalization Benefits (Dep't of Justice Immigration & Customs Enforcement)	E	E	NE	NE	NE	8 USC 1439; 1440;
8. Old Age Survivors & Disability Insurance (Social Security Administration)	E	E	E	E	E	42 USC 417

General eligibility: The eligibility set forth are not the sole determining factors, but only list the various types of discharge. The states also provide various benefits that will be influenced by the type of discharge. Obtain state information from your state agency.

Footnotes.

1. VA Home Page: www.va.gov; benefits line 1-800-827-1000.
2. Only if an immediate family member has been interred at an earlier date.
3. AR 185-15, par. 2-4 Applicants [to the ABCMR] must file an application within 3 years after an alleged error or injustice is discovered or reasonably should have been discovered. The time limit may be waived upon a showing of good cause.
4. DODI 1332.28. Procedures. A request for review must be made within 15 years after the date of discharge or dismissal.
5. Transitional benefits and services are available only to soldiers separated involuntarily, under other than adverse conditions.
6. 38 USC 5303. VA benefits are not payable to (1) Anyone receiving a discharge or dismissal by sentence of a general court-martial; (2) Anyone discharged on the ground that such person was 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) a deserter; (4) An officer who resigns for the good of the service, or (5) the discharge of any individual during a period of hostilities as an alien, notwithstanding any action subsequent to the date of such discharge by the ADRB A discharge under dishonorable conditions from one period of service does not constitute a bar to VA benefits if there was another period of qualifying service upon which a claim could be predicated. See Administrator's Decision No. 655 (6-20-45); Op.Sol. 218-51 (6-4-51).
7. Includes any commissioned or warrant officer who receives a dismissal as a result of a court-martial conviction.
8. To be determined by the Secretary of the Army on a case by case basis.
9. Any person found guilty of mutiny, spying, or desertion, or, who because of conscientious objections, refused to perform service in the Armed Forces or refuses to wear the uniform shall forfeit all rights to National Servicemember's Group Life Insurance.
10. Veterans whose discharges are other than dishonorable may be buried in a national cemetery.
11. Must have been discharged under honorable conditions and have a 100% disability.
12. Transitional health care for a member who is involuntarily separated shall be available for 180 days beginning on the date on which the member is separated from active duty.

MARINE CORPS SEPARATION AND RETIREMENT MANUAL

APPENDIX K

BENEFITS AT SEPARATION

E = Eligible
NE = Not Eligible
TBD = To Be Determined by Administering Agency
DV = Eligibility for these benefits depend upon specific disabilities of the veteran

Legend

A = Honorable (DD Form 256 MC)
B = General Under Honorable Conditions (DD Form 257A)
C = Other Than Honorable
D = Bad Conduct Discharge
E = Dishonorable Discharge (General Court-Martial, (1))

Service Administered	A	B	C	D	E	Authority and References(7)
1. Payment for Accrued Leave	E	E	NE	NE	NE	37 USC 501-503; DODPEM par. 40401a
2. Death Gratuity (six months pay	E	E	E	E	NE	10 USC 1480; DODPEM par. 40501b
3. Wearing of Military Uniform	E	E	NE	NE	NE	10 USC 771a, 772
4. Admission to Naval Home(2)	E	E	NE	NE	NE	24 USC 49, 50
5. Burial in National Cemeteries	E	E	NE	NE	NE	38 USC 1002
6. Burial in Army Post Cemeteries (3)	E	NE	NE	NE	NE	AR 210-190
7. Navy Board for Correction of Military Records	E	E	E	E	E	10 USC 1552
8. Navy Discharge Review Board	E	E	E	NE(8)	NE	10 USC 1553
9. Transportation to Home(4)	E	E	E	E	E	37 USC 404, JFTR par. U7500-7506
10. Transportation of Dependents and Household Goods to Home	E	E	TBD (7)	TBD (7)	TBD (7)	37 USC 406; JFTR par. U5225, par. U5370
Transitional Benefits and Services(13)						
1. Pre-Separation Counseling	E	E	E	E	E	10 USC Section 1142
2. Employment Assistance	E	E	E	E	NE	10 USC Section 1143, 1144

MARINE CORPS SEPARATION AND RETIREMENT MANUAL

BENEFITS AT SEPARATION

E = Eligible
NE = Not Eligible
TBD = To Be Determined by Administering Agency
DV = Eligibility for these benefits depend upon specific disabilities of the veteran

Legend

A = Honorable (DD Form 256 MC)
B = General Under Honorable Conditions (DD Form 257A)
C = Other Than Honorable
D = Bad Conduct Discharge
E = Dishonorable Discharge (General Court-Martial (1))

Service Administered	A	B	C	D	E	Authority and References(7)
3. Health Benefits	E	E	NE	NE	NE	10 USC Section 1145
4. Commissary/Exchange	E	E	NE	NE	NE	10 USC Section 1146
5. Military Family Housing	E	E	NE	NE	NE	10 USC Section 1147
6. Overseas Relocation Assistance	E	E	NE	NE	NE	10 USC Section 1148
7. Excess Leave/Permissive TAD	E	E	NE	NE	NE	10 USC Section 1149, Def Auth Act 1999, Sec. 561
8. Preference for USMCR	E	E	NE	NE	NE	10 USC Section 1150
9. Montgomery G.I. Bill (Additional Opportunity)	E	NE	NE	NE	NE	38 USC Section 3011
Department of Veterans Affairs(5,6,9)						
1. Dependency and Indemnity Compensation	E	E	E	E	NE	38 USC 410(b)
2. Pension for Non-Service Connected Disability or Death	E	E	TBD	TBD	NE	38 USC 521; 38 USC 3103
3. Medal of Honor Roll Pension	E	E	TBD (10)	TBD (10)	NE	38 USC 562, 38 USC 3103
4. Insurance	E	E	TBD (10)	TBD (10)	TBD (10)	38 USC 711, 773
5. Vocational Rehabilitation (DV)	E	E	TBD	TBD	NE	38 USC 1502, 1503
6. Educational Assistance	E	NE	NE	NE	NE	38 USC 1411
7. Survivors & Dependents Educational Assistance	E	E	E	E	NE	38 USC 1701-1765

MARINE CORPS SEPARATION AND RETIREMENT MANUAL

BENEFITS AT SEPARATION

E = Eligible NE = Not Eligible TBD = To Be Determined by Administering Agency DV = Eligibility for these benefits depend upon specific disabilities of the veteran	Legend A = Honorable (DD Form 256 MC) B = General Under Honorable Conditions (DD Form 257A) C = Other Than Honorable D = Bad Conduct Discharge E = Dishonorable Discharge (General Court-Martial (1))

8. Home and other Loans	E	E	TBD	TBD	NE	38 USC 1802, 1818
9. Hospitalization & Domiciliary Care	E	E	TBD	TBD	NE	38 USC 610; 38 USC 3103
10. Medical and Dental Services	E	E	TBD	TBD	NE	38 USC 612; 38 USC 3103
11. Prosthetic Appliances (DV)	E	E	TBD	TBD	NE	38 USC 614; 38 USC 612(d); 38 USC 3103
12. Guide Dogs & Equipment For Blindness (DV)	E	E	TBD	TBD	NE	38 USC 614; 38 USC 3103
13. Special Housing (DV)	E	E	TBD	TBD	NE	38 USC 801; 38 USC 3103
14. Automobiles (DV)	E	E	TBD	TBD	NE	38 USC 1901; 38 USC 3103
15. Funeral and Burial Expenses	E	E	TBD	TBD	NE	38 USC
16. Burial Flag	E	E	TBD	TBD	NE	38 USC 901; 38 USC 3103
17. Burial in National Cemeteries	E	E	TBD	TBD	NE	38 USC 1002
18. Headstone Marker	E	E	TBD	TBD	NE	38 USC 906; 38 USC 1003
Administered by Other Federal Agencies						
1. Preference for Farm Loan (Dept. of Agriculture)	E	E	TBD	TBD	NE	7 USC 1983(5)
2. Preference for Farm & other Rural Housing Loans (Dept. of Agriculture)	E	E	E	E	NE	42 USC 1477
3. Civil Service Preference (12) (Office of Personnel Mgmt.)	E	E	NE	NE	NE	5 USC 2108, 3309-3316, 3502, 3504

K-3

MARINE CORPS SEPARATION AND RETIREMENT MANUAL

BENEFITS AT SEPARATION

E = Eligible
NE = Not Eligible
TBD = To Be Determined by Administering Agency
DV = Eligibility for these benefits depend upon specific disabilities of the veteran

Legend

A = Honorable (DD Form 256 MC)
B = General Under Honorable Conditions (DD Form 257A)
C = Other Than Honorable
D = Bad Conduct Discharge
E = Dishonorable Discharge (General Court-Martial (1))

4. Civil Service Retirement Credit	E	NE	NE	NE	NE	5 USC 8331, 8332
5. Reemployment Rights (Dept. of Labor)	E	E	NE	NE	NE	38 USC 2021-2026
6. Job Counseling & Employment Placement (Dept. of Labor)	E	E	E	E	NE	38 USC 2001-2014
7. Unemployment Compensation for Ex-Service Members (Dept. of Labor)	E	E	NE	NE	NE	5 USC 8501, 8521
8. Naturalization Benefits (Dept. of Justice, Immigration & Naturalization Service)	E	E	NE	NE	NE	8 USC 1439, 1440
9. Old Age, Survivors & Disability Insurance (Social Security Administration)	E	E	TBD	TBD	NE (11)	42 USC 417
10. Job Preference, Public Works Projects (12) (Dept. of Commerce) Code of Federal Regulations (CFR)	E	E	TBD	TBD	NE	42 USC 6706; 13 CFR.317.35

General Eligibility. The eligibility for benefits set forth are not the sole determining factors, but only list the effect of the various types of discharge. The states also provide various benefits that will be influenced by the type of discharge, but information on state benefits should be obtained from state agencies.

MARINE CORPS SEPARATION AND RETIREMENT MANUAL

FOOTNOTES:

(1) Including commissioned and warrant officers who have been convicted and sentenced to dismissal as a result of general courts martial.

(2) The veteran must have served "honestly and faithfully" for 20 years or been disabled and excludes convicted felons, deserters, mutineers, or habitual drunkards, unless rehabilitated or the Marine may become ineligible if that person, following discharge, is convicted of a felony, or is not free from drugs, alcohol, or psychiatric problems.

(3) Only if an immediate relative is buried in the cemetery.

(4) Only if no confinement is involved, or if confinement is involved, parole, or release is from U.S. military confinement facility or a confinement facility located outside the U.S.

(5) An officer who resigns for the good of the service (usually to avoid court martial charges) will be ineligible for benefits administered by the Department of Veterans Affairs (DVA). 38 USC 3103.

(6) Additional references include Once a Veteran; Rights, Benefits and Obligations, DA Pam 360-526; and Federal Benefits for Veterans and Dependents, (VA Fact Sheet 1S-1)

(7) To be determined by the Secretary of the Navy on a case-by-case basis.

(8) Only if the Bad Conduct Discharge was the result of conviction by general court martial.

(9) Benefits from the DVA are not payable to (1) a person discharged as a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise comply with lawful orders of competent military authority, (2) by reason of a sentence of a general court-martial, (3) resignation by an officer for the good of the service, (4) as a deserter, and
(5) as an alien during a period of hostilities. 38 USC 3103. A discharge (1) by acceptance of an other than honorable discharge to avoid court martial (2) for mutiny or spying, (3) for a felony offense involving moral turpitude, (4) for willful and persistent misconduct, or (5) for homosexual acts, involving aggravating circumstances or other factors will be considered to have been issued under dishonorable conditions and thereby bar veterans benefits. A discharge under dishonorable conditions from one period of service does not bar payment if there is another period of eligible service on which the claim may be predicated (Administrator's Decision, Veterans Admin. No. 655, 20 June 1945).

(10) Any person guilty of mutiny, spying, or desertion, or who, because of conscientious objections, refuses to perform service in the Armed Forces or refuses to wear the uniform shall forfeit all rights to National Service Life Insurance and Servicemember's Group Life Insurance. 38 USC 711, 773.

K-5

MARINE CORPS SEPARATION AND RETIREMENT MANUAL

(11) Applies to Post-1957 service only. Post-1957 service qualifies for Social Security benefits regardless of type of discharge. Pre-1957 service under conditions other than dishonorable qualifies a service member for a military wage credit for Social Security purposes.

(12) Disabled and Vietnam-era veterans only. Post-Vietnam-era veterans are those who first entered on active duty as or first became members of the Armed Forces after 7 May 1975. To be eligible, they must have served for a period of more than 180 days active duty and have other than a dishonorable discharge. The 180 day service requirement does not apply to (1) veterans separated from active duty because of a service-connected disability, or (2) reserve and guard members who served on active duty (under 10 USC 672a, d or g. 673, or 673(b) during a period of war (such as the Persian Gulf War) or in a military operation for which a campaign or expeditionary medal is authorized.

(13) Some transitional benefits and services are available only to those separated involuntarily, under other than adverse conditions.

See Department of Veterans Affairs: http://www.va.gov

United States Postal Service

Statement of Ownership, Management, and Circulation

1. Publication Title	2. Publication Number	3. Filing Date
Military Law Review	0026-4040	October 1, 2012
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Quarterly	Four	Domestic: $20.00 Foreign: $28.00

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4)*

The Judge Advocate General's School, U.S. Army

600 Massie Road, Charlottesville, VA 22903-1781

Contact Person: Charles J. Strong

Telephone: (434) 971-3396

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*

Office of The Judge Advocate General, U.S. Army

2200 Army Pentagon, Washington, DC 20310-2200

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*

Colonel David N. Diner

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

Editor *(Name and complete mailing address)*

Captain Joseph D. Wilkinson II

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

Managing Editor *(Name and complete mailing address)*

Captain Joseph D. Wilkinson II

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	Complete Mailing Address
Office of The Judge Advocate General, U.S. Army	2200 Army Pentagon, Washington, DC 20310-2200

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☐ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*

The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:

☐ Has Not Changed During Preceding 12 Months

☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title	14. Issue Date for Circulation Data Below
Military Law Review	December 2012

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			5,120	4,907
b. Paid and/or Requested Circulation	(1)	Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. *(Include advertiser's proof and exchange copies)*	2,645	2,710
	(2)	Paid In-County Subscriptions Stated on Form 3541 *(Include advertiser's proof and exchange copies)*	0	0
	(3)	Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	2,475	2,197
	(4)	Other Classes Mailed Through the USPS	0	0
c. Total Paid and/or Requested Circulation *[Sum of 15b. (1), (2),(3),and (4)]* ▶			5,120	4,907
d. Free Distribution by Mail *(Samples, compliment ary, and other free)*	(1)	Outside-County as Stated on Form 3541	0	0
	(2)	In-County as Stated on Form 3541	0	0
	(3)	Other Classes Mailed Through the USPS	0	0
e. Free Distribution Outside the Mail *(Carriers or other means)*			0	0
f. Total Free Distribution *(Sum of 15d. and 15e.)* ▶			0	0
g. Total Distribution *(Sum of 15c. and 15f)* ▶			5,120	4,907
h. Copies not Distributed			0	0
i. Total *(Sum of 15g. and h.)* ▶			5,120	4,907
j. Percent Paid and/or Requested Circulation *(15c. divided by 15g. times 100)*			100	100

16. Publication of Statement of Ownership

☐ Publication required. Will be printed in Volume 210 (Winter 2011) ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner — Date 1 Oct 12

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

Instructions to Publishers

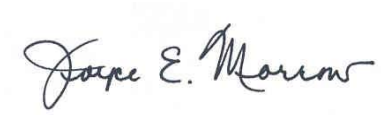
1. Complete and file one copy of this form with your postmaster annually on or before October 1. Keep a copy of the completed form for your records.
2. In cases where the stockholder or security holder is a trustee, include in items 10 and 11 the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who are stockholders who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check the box. Use blank sheets if more space is required.
3. Be sure to furnish all circulation information called for in item 15. Free circulation must be shown in items 15d, e, and f.
4. Item 15h., Copies not Distributed, must include (1) newsstand copies originally stated on Form 3541, and returned to the publisher, (2) estimated returns from news agents, and (3), copies for office use, leftovers, spoiled, and all other copies not distributed.
5. If the publication had Periodicals authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or, if the publication is not published during October, the first issue printed after October.
6. In item 16, indicate the date of the issue in which this Statement of Ownership will be published.
7. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of Periodicals authorization.

By Order of the Secretary of the Army:

RAYMOND T. ODIERNO
General, United States Army
Chief of Staff

Official:



JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
1310101

U.S. GOVERNMENT PRINTING OFFICE: 1994-300-757:00001