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### OTHER THAN HONORABLE DISCHARGES: UNFAIR AND UNJUST LIFE SENTENCES OF DECREASED EARNING CAPACITY

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*Every soldier knows that many men, even in his own company, had poor records, but no one ever heard of a soldier protesting that only the more worthy should receive general veterans' benefits. "This man evaded duty, he has been a 'gold bricker,' he was hard to live with, yet he was a soldier. He wore the uniform. He is one of us." So they feel. Soldiers would rather some man got more than he deserves than that any soldier should run a chance of getting less than he deserves.<sup>1</sup>*

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<sup>1</sup> H.R. REP. NO. 1510, at 9 (1946) (responding to assertions that "soldiers who have been in combat service and made a good record will resent similar benefits to theirs going to men with poor records.").

INTRODUCTION.....	689
I. THE PROCESS OF BARRING ELIGIBILITY FOR DISABILITY COMPENSATION .....	691
II. INCREASED FREQUENCY OF BARRING OF DISABILITY COMPENSATION ..	693
III. ISSUES WITH BARRING ELIGIBILITY FOR DISABILITY COMPENSATION ..	694
A. <i>VA Benefits</i> .....	695
1. The purpose of disability compensation .....	695
2. VA health care for service-connected disabilities .....	697
3. Other VA benefits distinguished .....	698
4. Effect of barring eligibility for certain VA benefits .....	699
5. Military recruiting and retention.....	700
6. The Federal Employee Compensation Act (FECA) .....	701
B. <i>Administrative Separation Boards</i> .....	701
1. Separation regulation purpose .....	702
a. Restricting disability compensation as a punishment.....	702
b. Deterrence .....	703
c. Period of service.....	705
d. Most likely deterrent effect of separation .....	707
2. Improper effect on separation board waivers .....	707
3. Improper effect on characterization of service .....	710
C. <i>Disparate Outcomes</i> .....	712
IV. SOLUTION .....	714
A. <i>Congress</i> .....	715
1. Congressionally required exception.....	715
2. Congress is slowly expanding benefits for OTH discharged former SMs.....	716
3. Eligibility defined outside of the definition of veteran.....	716
4. Change statutory definition of veteran.....	717
5. Potential negative consequences.....	718
B. <i>DoD</i> .....	718
1. Changing the separation regulation .....	719
2. Changing operational policy.....	720
C. <i>VA</i> .....	723
V. RESULTS OF SUCH A CHANGE.....	723
A. <i>Separation Boards</i> .....	724
B. <i>Additional Positive Consequences</i> .....	724
1. SMs with PTSD (including due to military sexual trauma (MST)) and TBI .....	724
2. Decrease workload at Discharge Review Boards .....	727
a. Army Discharge Review Board .....	727
b. The Army Board for Correction of Military Records .....	728
c. Discharge review statistics .....	729

C. <i>Potential Negative Consequences</i> .....	730
VI. PUBLIC SENTIMENT PERSPECTIVE.....	731
CONCLUSION.....	733
APPENDIX A: VERBATIM FINDINGS AND RECOMMENDATIONS (NOT DISHONORABLE).....	734
APPENDIX B: VERBATIM FINDINGS AND RECOMMENDATIONS (DISHONORABLE).....	734

## INTRODUCTION

Since the dawn of our Republic, the United States government compensated veterans for injuries they incurred while serving in the military.<sup>2</sup> With few exceptions,<sup>3</sup> up to and including World War II (WWII),<sup>4</sup> Congress barred only veterans with dishonorable discharges, bad conduct discharges, or those discharged for specific statutory reasons from receiving some variant of disability compensation.<sup>5</sup> While the system of compensating these veterans changed over the years, the basic principle remained the same—providing monetary compensation to injured veterans. However, since WWII, with the increased use of other than honorable (OTH) discharges by the Department

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<sup>2</sup> Indeed, one of the earliest Supreme Court cases, *Hayburn's Case*, involved interpreting the Invalid Pension Act of 1792, which Congress enacted to provide pensions to soldiers injured in the Revolutionary War. *In re Hayburn*, 2 U.S. (2 Dall.) 409 (1792). For a general discussion of the impact of *Hayburn's Case*, see Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 590–618 (1989).

<sup>3</sup> An 1890 change in law, ch. 634, 26 Stat. 182, required an honorable discharge for pension benefits. See Harry V. Lerner, *Effect of Character of Discharge and Length of Service on Eligibility to Veterans' Benefits*, 13 MIL. L. REV. 121, 125 (1961) (“[T]he act of June 27, 1890 granted service pensions to exservicemen or their widows of the Civil War under certain conditions, one of which was an honorable discharge.” (footnote omitted)). At that time, there was no other than honorable discharge.

<sup>4</sup> Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from “Veteran” Services*, 122 PENN ST. L. REV. 69, 81–83 (2017).

<sup>5</sup> See *id.* at 81–84 (providing a detailed account of eligibility for disability compensation prior to WWII). The United States also provided benefits to veterans of the Civil War; the Pension Act of July 14, 1862, ch. 166, 12 Stat. 566, provided pension eligibility to every person in military or naval service since March 4, 1861, regardless of character of service. President Lincoln invoked the inclusive eligibility standard for veterans’ benefits in his Second Inaugural Address when he stated, “[w]ith malice toward none, with charity for all . . . to care for him who shall have borne the battle and for his widow and his orphan.” Abraham Lincoln, Second Inaugural Address, in S. DOC. NO. 101-10, at 143 (1989). The VA uses this statement as its motto, which is ironic because the VA routinely denies benefits to veterans through Department-created regulations. 38 C.F.R. § 3.12(d) (2019).

of Defense (DoD),<sup>6</sup> the Department of Veterans Affairs (VA) has barred veterans from receiving benefits with increased frequency. The rate at which the VA bars veterans from receiving benefits continues to grow.<sup>7</sup> Disability compensation is included in the category of barred benefits.

Barring the receipt of disability compensation is an unfair and unjust life sentence of reduced earning capacity. Unlike other VA benefits, the government does not use disability compensation as a reward for satisfactory service; the government uses it to render a former Servicemember (SM)<sup>8</sup> whole for an in-service injury. Unfortunately, with the increased use of OTH discharges by the military, the VA bars an increasing number of former SMs from the receipt of disability compensation.

This results in disparate treatment for similarly situated former SMs as the military services assign OTH discharges on unequal bases. Moreover, the military improperly uses the barring of receipt of disability compensation as a potential punishment in administrative separation boards, and separation boards improperly use disability compensation as a factor in assigning characterizations of service.

The government must discontinue this practice and allow all former SMs with OTH discharges<sup>9</sup> to retain eligibility for VA disability compensation.<sup>10</sup> Allowing such retention would restore the benefit's original purpose and prevent the military from improperly using the loss of VA disability compensation as punishment in administrative separation boards and as a factor in assigning characterization of service. Moreover, it would ensure all OTH discharged former SMs with posttraumatic stress disorder (PTSD) (including that due to military sexual trauma (MST)) and traumatic

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<sup>6</sup> See generally VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD L. SCH., *UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER* (2016), <https://www.swords-to-plowshares.org/research-publications/underserved> [<https://perma.cc/YMM2-TN7Y>] (describing VA eligibility criteria and noting the large increase in OTH discharges since WWII).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> This paper utilizes the term “former SM” to describe SMs with an OTH discharge. This term is used in lieu of “veteran,” because, in most cases, the VA will not consider an SM with an OTH discharge to meet the statutory definition of veteran found in 38 U.S.C. § 101(2). Part II, *infra*, contains an in-depth discussion of the VA’s “veteran” analysis.

<sup>9</sup> Although bad conduct and dishonorable discharges also prohibit the receipt of disability compensation in most cases (38 U.S.C. § 101(2)), this paper focuses solely on OTH discharges. Since bad conduct and dishonorable discharges are assigned as forms of punishment, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8)(B)–(C) [hereinafter MCM], there is a nexus between the service characterization and loss of benefits because the loss of this benefit can be considered punishment.

<sup>10</sup> Numerous scholarly works, including many cited herein, argue that eligibility ought to be granted for all VA benefits for SMs with OTH discharges. This paper narrowly addresses only eligibility for VA disability compensation.

brain injuries (TBI) receive the disability compensation they need to manage persistent and life-long symptoms related to in-service injuries. It would also decrease the workload at the overworked discharge review boards. This change logically extends current policy and aligns with public sentiment toward veterans' benefits.

Part I of this paper describes the problem of barring OTH discharged former SMs from the receipt of disability compensation. Part II discusses the applicability of OTH discharges to VA disability compensation and the barring of benefits (including disability compensation) process. Part III presents current and historical statistics for the assignment of OTH discharges and bars to benefits. Part IV describes how these bars to benefits defeat the purpose of disability compensation and distinguishes disability compensation from other VA benefits. It also details how bars to benefits undermine the purpose of separation boards, have an improper effect on separation and character of service determinations, and lead to disparate outcomes for former SMs.

Part V provides a solution to the problem: namely, requiring the government to change relevant laws and regulations. Part VI describes how the solution solves the problems raised in Part IV. Additionally, Part VI addresses secondary benefits of the proposed change, including the provision of disability compensation to all OTH discharged former SMs with PTSD and/or TBI and a decrease in the workload of discharge review boards. Part VII discusses why public sentiment aligns with such a solution.

## I. THE PROCESS OF BARRING ELIGIBILITY FOR DISABILITY COMPENSATION

All SMs leave the military through either an administrative separation,<sup>11</sup> punitive discharge,<sup>12</sup> or death. The military services<sup>13</sup> may only assign an OTH<sup>14</sup> service characterization when separating an SM through the

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<sup>11</sup> U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED ADMINISTRATIVE SEPARATIONS para. 3-4 (19 Dec. 2016) [hereinafter AR 635-200]. Those separated from the military receive an honorable, general under honorable conditions, other than honorable, or uncharacterized (Entry-Level status) service characterization.

<sup>12</sup> See MCM, *supra* note 9, R.C.M. 1003(b)(8)(C) (providing that those punitively discharged receive a dishonorable or bad conduct discharge).

<sup>13</sup> This paper is written from an Army perspective. While the rates and reasons for the assignment of OTH discharges vary throughout the services (as discussed *infra*, Section IV.C.), the VA addresses entitlement to disability compensation for OTH discharged former SMs in the same fashion regardless of branch of service.

<sup>14</sup> See AR 635-200, *supra* note 11, para. 3-7.c (“[An OTH discharge] may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial in the following circumstances: (1) When the reason for separation is based upon a pattern of

administrative separation board process.<sup>15</sup> After separation, when an OTH discharged former SM applies to the VA for disability compensation, the VA must first make an eligibility determination for general VA benefits.

The first step in establishing eligibility for these benefits requires the VA to determine whether the former SM meets the statutory definition of “veteran,” which 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.”<sup>16</sup> If the VA determines the former SM meets this definition, the former SM establishes eligibility for a myriad of VA benefits,<sup>17</sup> including disability compensation.

Unfortunately, the military services do not use the language “conditions other than dishonorable” as found in the definition of “veteran” in their service characterizations.<sup>18</sup> This disconnect in terminology requires the VA to independently determine whether a former SM is a “veteran.” While honorable and general discharges clearly meet the definition of veteran as they are “other than dishonorable,”<sup>19</sup> OTH discharges are open to interpretation, thus requiring the VA to conduct a character of service determination<sup>20</sup>

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behavior that constitutes a significant departure from the conduct expected of Soldiers of the Army. (2) When the reason for separation is based upon one or more acts or omissions that constitutes a significant departure from the conduct expected of Soldiers of the Army. Examples of factors that may be considered include the following: (a) Use of force or violence to produce serious bodily injury or death. (b) Abuse of a position of trust. (c) Disregard by a superior of customary superior-subordinate relationships. (d) Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers of the Army. (e) Deliberate acts or omissions that seriously endanger the health and safety of other persons.”)

<sup>15</sup> See *id.* para. 3-7.e (“No Soldier will be discharged per this regulation under other than honorable conditions unless afforded the right to present his/her case before an administrative discharge board.”).

<sup>16</sup> 38 U.S.C. § 101(2).

<sup>17</sup> While meeting the definition of “veteran” grants eligibility for a myriad of VA benefits, this paper focuses on disability compensation. Any recommendation that results in the attainment of additional benefits is a secondary benefit.

<sup>18</sup> See U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS enclosure 4, para. 3.a (12 Apr. 2019) (describing how the military services use service characterizations of honorable, general (under honorable conditions), and under other than honorable conditions in administrative separations). The military services use service characterizations of bad conduct and dishonorable in punitive discharges. MCM, *supra* note 9, R.C.M. 1003(b)(8)(C).

<sup>19</sup> See 38 C.F.R. § 3.12(a) (2019) (providing that the VA is bound by the military character of service determinations of honorable or general).

<sup>20</sup> See U.S. DEP’T OF VETERANS AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL, pt. 3, subpt. v, ch. 1, sec. B, para. 1.c (19 Feb. 2019) [hereinafter ADJUDICATION MANUAL] (“A COD determination is required if a service member received an undesirable discharge[,] an OTH discharge, or a bad conduct discharge (BCD).”).

to determine whether a statutory<sup>21</sup> or regulatory<sup>22</sup> bar to benefits applies to that period of service.<sup>23</sup> If a bar to benefits applies,<sup>24</sup> the VA renders the service dishonorable and finds that the former SM does not meet the definition of “veteran.” Such a finding leaves the SM ineligible for almost all VA benefits, including disability compensation.

As of 2014, the VA barred benefits, including disability compensation, in 85% of all applications for VA benefits for OTH discharged former SMs, most often due to misconduct,<sup>25</sup> which falls under the VA’s regulatory bar to benefits.<sup>26</sup>

## II. INCREASED FREQUENCY OF BARRING OF DISABILITY COMPENSATION

As of March 2017, the VA estimates there are over half a million living former SMs with OTH discharges.<sup>27</sup> The rate at which SMs receive

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<sup>21</sup> 38 U.S.C. § 5303(a) (“The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person 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, or as a deserter, or 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 unauthorized absence, or of an officer by the acceptance of such officer’s resignation for the good of the service, or (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10.”). If the person was insane at the time of the offense leading to the separation from service, the person retains eligibility for VA benefits. *Id.* § 5303(b).

<sup>22</sup> 38 C.F.R. § 3.12(d) (2019). These offenses are “(1) [a]cceptance of undesirable discharge to escape trial by general court-martial; (2) [m]utiny or spying; (3) [a]n offense involving moral turpitude. This includes, generally, conviction of a felony. (4) [w]illful and persistent misconduct . . . [and] (5) [h]omosexual acts involving aggravating circumstances or other factors affecting the performance of duty.” *Id.*

<sup>23</sup> For a thorough explanation of character of service, separate periods of service, and VA benefits, see Jeremy R. Bedford, *Eligibility for VA Disability Compensation and Health Care Benefits for Army National Guardsmen Discharged with an Other Than Honorable Discharge*, ARMY LAW, July 2014, at 36, 36–37.

<sup>24</sup> See VETERANS LEGAL CLINIC, *supra* note 6, at 11 (explaining that in a majority of circumstances, the VA determines that a bar to benefits applies).

<sup>25</sup> *Id.* at 23.

<sup>26</sup> 38 C.F.R. § 3.12(d) (2019).

<sup>27</sup> Memorandum from Acting Under Sec. for Health, Dep’t of Veterans Aff., Poonam Alaigh, subject: Access to Mental Health Services for Other Than Honorable Discharged Servicemembers to VSN and VAMC Directors (20 Mar. 2017), [https://www.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=5350](https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=5350) [<https://perma.cc/WNB4-EPRJ>].

OTH discharges continually rises. As demonstrated below, this correspondingly leads to a growing population of former SMs deemed ineligible for disability compensation.

In the WWII era, 98% of SMs received honorable discharges; by 2011, that figure dropped to 84%.<sup>28</sup> While the number of honorable discharges decreased, the number of punitive discharges (bad conduct or dishonorable) remained constant at around 1% of all discharges.<sup>29</sup> However, the assignment of OTH discharges increased five-fold since that time.<sup>30</sup> Recent statistics show that around 13% of SMs separated from the military receive OTH discharges including, between 2002 and 2013, over 103,000 enlisted service members.<sup>31</sup> This indicates that since WWII, SMs engage in a similar amount of activity warranting punitive discharges (which essentially renders them ineligible for VA benefits, including disability compensation), yet the number of SMs receiving honorable discharges plunged.

Compounding the issue, the VA increasingly denies VA benefits (including disability compensation) to former SMs. In 1944, the VA excluded 1.7% of former SMs from VA benefits. During the Vietnam War, the exclusion rate was 2.8% and it is now 6.5%.<sup>32</sup> This increase in the denial of veterans' benefits is problematic considering the rate at which SMs receive punitive discharges<sup>33</sup> remains constant. Since only 1% of SMs receive punitive discharges, OTH discharged former SMs constitute the entire increase of individuals that the VA denied benefits. While problematic in and of itself, the increasing denial of eligibility for disability compensation is especially worrisome.

### III. ISSUES WITH BARRING ELIGIBILITY FOR DISABILITY COMPENSATION

The barring of the receipt of disability compensation defeats the very purpose of the benefit. It also undermines and confuses the purpose of administrative separation boards, which results in fundamentally unfair consequences for former SMs. Unequal assignment of OTH service characterizations by the military services also lead to unfair results for former SMs of specific branches as the VA treats OTH discharges the same regardless of the branch of service that assigned them.

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<sup>28</sup> VETERANS LEGAL CLINIC, *supra* note 6, at 8, 43.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 43.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 9. This paper is solely focused on the issues with denying OTH discharged former SMs disability compensation. The recommendations made in this paper are not intended to extend to punitive discharges.

## A. VA Benefits

While the above statistics cover the barring of all VA benefits for OTH discharged former SMs, the barring of VA disability compensation is particularly problematic as it undermines the purpose of the benefit. As described below, the VA uses disability compensation as a method to compensate former SMs for considerable loss of working time from exacerbations or illnesses,<sup>34</sup> while using other VA benefits as rewards for successful service. Because of this, a logical nexus between character of service and other non-disability compensation VA benefits exists, while none exists between character of service and disability compensation.

### 1. The purpose of disability compensation

According to the VA, the purpose of disability compensation is to provide “a tax free monetary benefit paid to Veterans<sup>35</sup> with disabilities that are the result of a disease or injury incurred or aggravated during active military service.”<sup>36</sup> Regarding the rate of payment, the VA states, “[g]enerally, the degrees of disability specified are also designed to compensate for considerable loss of working time from exacerbations or illnesses.”<sup>37</sup> The VA bases the rate of payment solely on the degree of impairment. The actual employment and/or income of the former SM bear no relation to the rate of payment. Since the government bases the monetary amount on presumed loss of earning capacity, eligibility for this benefit is very important. This is particularly vital for former SMs who cannot work full-time due to an in-service injury or disease.

The VA assigns disability rates in degrees of ten, ranging from 10% to 100%.<sup>38</sup> Effective December 1, 2020, the compensation rates begin at \$144.14 per month for a 10% disability rating rising to \$3,146.42 for a 100% disability rating with no dependents.<sup>39</sup> The government uses this substantial

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<sup>34</sup> See *VA Disability Compensation*, U.S. DEP’T OF VETERANS AFFS. (Apr. 15, 2020), <https://www.benefits.va.gov/compensation/> [https://perma.cc/F5M2-7997] (describing available disability compensation benefits).

<sup>35</sup> See 38 U.S.C. § 101(2) (defining veteran as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”).

<sup>36</sup> *VA Disability Compensation*, *supra* note 34.

<sup>37</sup> *Id.*

<sup>38</sup> 38 U.S.C. § 1155.

<sup>39</sup> *Compensation*, U.S. DEP’T OF VETERANS AFFS. (Nov. 30, 2020), <https://www.va.gov/disability/compensation-rates/veteran-rates/> [https://perma.cc/JZ2G-A2WV]. There are numerous additional benefits an SM may receive once service-connected including additional pay per dependent, special monthly compensation, adaptive housing, adaptive clothing, etc.

monetary benefit to compensate SMs for the presumed loss of earning capacity based on injuries or diseases incurred while serving our country.

To illustrate the importance of disability compensation, consider a hypothetical former SM who is now a carpenter and earns \$3,146.42<sup>40</sup> of net income per month. Because of an in-service knee injury,<sup>41</sup> the carpenter is 10% less effective at his job, which affects his monthly income because of time off due to injury, etc. If the carpenter received an honorable or general discharge,<sup>42</sup> the VA would compensate him \$144.14<sup>43</sup> per month to make up for his loss of work efficiency due to the in-service injury. However, if the carpenter received an OTH discharge and the VA bars him from benefits, he would not receive the \$144.14 per month even though his in-service injury renders him 10% less effective at his job. Assuming the knee injury does not improve,<sup>44</sup> the carpenter's OTH discharge amounts to a life sentence of reduced earning capacity. This life sentence is unfair for a multitude of reasons; but mainly because there is no logical nexus<sup>45</sup> between the purpose of the disability compensation and character of service. As stated before, the government uses disability compensation to compensate for the loss due to service.

To further illustrate, consider a hypothetical OTH discharged Vietnam veteran who received in-service exposure to Agent Orange. Due to this exposure, in his fifties he becomes afflicted with severe prostate cancer, a disease presumptively caused by Agent Orange exposure.<sup>46</sup> His prostate cancer, treatment, and residuals prevented him from working for many years. While out of work, he did not earn any income and his character of discharge rendered him ineligible to receive VA benefits. His livelihood and earning capacity were taken from him based on a disease he incurred solely due to military service. Alternately, if he received a general or honorable discharge from service, he would be eligible to receive the maximum amount of \$3,146.42 (not taking into account potential dependents or special monthly compensation) per month.

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<sup>40</sup> This number could be \$1,000 or could be \$10,000. This is the government's set rate for 100% disability regardless of the actual occupation or earning capacity of the former SM. This number is used for simplicity's sake.

<sup>41</sup> See 38 C.F.R. § 4.71(a) (2019) (providing that, under diagnostic code 5257, he receives a 10% rating for "[r]ecurrent subluxation or lateral instability" of the knee).

<sup>42</sup> See 38 C.F.R. § 3.12(a) (2019) ("A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.").

<sup>43</sup> While this clearly is not 10% of \$3,146.42, this is the 10% rate as determined by the VA.

<sup>44</sup> If anything, the knee condition would likely worsen with age.

<sup>45</sup> While the VA requires a nexus of a characterization of service under conditions of other than dishonorable (38 U.S.C. § 101(2)), this nexus is illogical, except for punitive discharges, which are used as a form of punishment. MCM, *supra* note 9, R.C.M. 1003(b)(8).

<sup>46</sup> See 38 C.F.R. § 3.309(e) (2019) (providing former SMs exposed to certain herbicide agents, including Agent Orange, with presumptive service connection for numerous conditions including prostate cancer).

Further, if the same OTH discharged Vietnam veteran eventually died from prostate cancer, his surviving spouse would be ineligible to receive Dependency and Indemnity Compensation (DIC)<sup>47</sup> due to his character of discharge.<sup>48</sup> The financial impact on this individual and his dependents cannot be understated. His lifetime sentence of decreased, or in his case ceased, earning capacity caused severe financial hardship for himself and his family. Again, this life (and death) sentence is unfair for various reasons, mainly because there is no logical nexus between the purpose of the disability compensation and character of service.

While the Agent Orange hypothetical looks at past results of current policy, it is important to examine how the policy affects former SMs from the War on Terror and potential issues moving forward. Similar to the early development of presumptive conditions for Agent Orange, there are no current presumptive conditions linked to burn pits. However, the VA is currently researching diseases potentially caused by burn pit exposure.<sup>49</sup> These diseases, of which the VA is not yet aware, may result in future life sentences of reduced earning capacity for OTH discharged former SMs.

In addition to the purpose of disability compensation making a former SM whole from an in-service injury, disability compensation is also distinguishable from other VA benefits because the government does not use it as a reward for successful service. Receipt of disability compensation does not place the former SM in a better position than if he or she never served in the military. Similar to VA health care for service-connected disabilities, the logical nexus to the benefit is the in-service injury, not the character of service.

## 2. VA health care for service-connected disabilities

The purpose of disability compensation is analogous to the purpose of VA health care for service-incurred disabilities. They are both basic services the government uses to compensate for actual losses or harms experienced while in the military. There is no logical nexus between character of service and VA health care for service-incurred disabilities. Accordingly, an OTH discharged former SM receives VA health care benefits for service-

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<sup>47</sup> See 38 C.F.R. § 3.5(a) (2019) (providing for dependency and indemnity compensation as a monthly payment made by the VA to surviving dependents because of a service-connected death).

<sup>48</sup> See 38 C.F.R. § 3.12a(e)(1) (2019) (“If a person is, by reason of this section, barred from receiving any benefits under title 38, United States Code (or under any other law administered by the Department of Veterans Affairs based on a period of active duty, the person’s dependents or survivors are also barred from receiving benefits based on the same period of active duty.”).

<sup>49</sup> *Public Health: Airborne Hazards and Burn Pit Exposures*, U.S. DEP’T OF VETERANS AFFS., <https://www.publichealth.va.gov/exposures/burnpits/index.asp> [<https://perma.cc/TVR2-TVSD>] (last visited Apr. 15, 2020).

connected disabilities regardless of characterization of discharge, unless a statutory bar to benefits applies. The benefit is received based on the logical nexus between the service-incurred disability and the health care benefit.

Highlighting the fact that no logical nexus exists between character of service and VA health care for service-incurred disabilities, Congress requires the VA to provide OTH discharged former SMs VA treatment for their service-incurred disabilities (as long as a statutory bar to benefits does not apply).<sup>50</sup> It is only fair to treat a former SM for an injury incurred while in military service regardless of an OTH discharge. Logically, the VA should also allow the receipt of disability compensation for injuries for which a former SM receives treatment.

### 3. Other VA benefits distinguished

The government uses VA benefits other than disability compensation and VA health care for service-incurred disabilities as rewards for successful service. The most important distinguishing factor between disability compensation and other VA benefits (such as the VA home loan guarantee<sup>51</sup> and the G.I. Bill<sup>52</sup>) is that the latter benefits place the former SM in a better position post-service than if they had never joined the military. Disability compensation is distinguishable because the receipt of disability compensation does not place a former SM in a better position post-service; they are merely in receipt of the government's attempt to compensate their considerable loss of working time from exacerbations of injuries or illnesses.<sup>53</sup>

Additionally, SMs establish entitlement to these benefits at different times. Barring certain exceptions, the triggering event establishing eligibility

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<sup>50</sup> See VETERANS HEALTH ADMIN., U.S. DEP'T OF VETERANS AFFS., OTHER THAN HONORABLE DISCHARGES: IMPACT ON ELIGIBILITY FOR VA HEALTH CARE BENEFITS 2 (2017), [https://www.va.gov/healthbenefits/resources/publications/IB10-448\\_other\\_than\\_honorable\\_discharges5\\_17.pdf](https://www.va.gov/healthbenefits/resources/publications/IB10-448_other_than_honorable_discharges5_17.pdf) [<https://perma.cc/349Q-JKMV>] (“An individual with an ‘Other than Honorable’ discharge that VA has determined to be disqualifying under application of title 38 C.F.R. § 3.12 still retains eligibility for VA health care benefits for service-incurred or service-aggravated disabilities unless he or she is subject to one of the statutory bars to benefits set forth in Title 38 United States Code §5303(a).”).

<sup>51</sup> See *VA Home Loans*, U.S. DEP'T OF VETERANS AFFS. (Apr. 23, 2020), <https://www.benefits.va.gov/homeloans/> [<https://perma.cc/8LLV-7KDT>] (“VA Home Loans are provided by private lenders, such as banks and mortgage companies. VA guarantees a portion of the loan, enabling the lender to provide you with more favorable terms.”).

<sup>52</sup> See *VA Education and Training Benefits*, U.S. DEP'T OF VETERANS AFFS. (Dec. 7, 2020), [https://www.benefits.va.gov/gibill/education\\_programs.asp](https://www.benefits.va.gov/gibill/education_programs.asp) [<https://perma.cc/84PT-XLYT>] (describing VA education benefits under the Post-9/11 G.I. Bill).

<sup>53</sup> See *VA Disability Compensation*, *supra* note 34 (explaining that disability compensation offers a monthly tax-free payment to veterans harmed or injured while serving in the military as well as to veterans whose service made an existing condition worse).

for the G.I. Bill<sup>54</sup> and the VA home loan<sup>55</sup> is the successful completion of a specified period of service. The triggering event for disability compensation is the in-service injury. If separated the day after the injury, service connection would be granted—not some arbitrary day when an enlistment ends. The National Guard provides the perfect illustration where an SM establishes eligibility for disability compensation immediately after a period of active duty for training<sup>56</sup> in which they were injured regardless of when their enlistment ends. This is why there is no minimum service requirement for disability compensation while there is for the other VA benefits.

Additionally, the flat rate payment<sup>57</sup> for disability compensation does not take into account actual earning potential,<sup>58</sup> conceivably placing these former SMs in worse positions than if he or she never served at all. Contrasted are the VA home loan and G.I. Bill, which place SMs in a better position than if they never served at all. To illustrate this principle, contrast the consequences that barring of eligibility for specific VA benefits has on a former SM.

#### 4. Effect of barring eligibility for certain VA benefits

While barring access to most VA benefits leaves the former SM no worse than if he or she never joined the military, barring access to disability compensation negatively affects the former SM in various ways. An OTH discharged former SM barred from receiving disability compensation receives a life sentence of reduced earning capacity. Barring an improvement in the disability or disease, the former SM experiences reduced earning capacity and a physical or mental disability until death. If the former SM dies

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<sup>54</sup> See 38 C.F.R. § 21.9520 (2019) (providing minimum service requirements to be eligible for benefits under the Post-9/11 G.I. Bill).

<sup>55</sup> See 38 U.S.C. § 3702 (describing the basic entitlement for Veterans with active duty service as modified by certain minimum active duty requirements set forth in 38 U.S.C. § 5303(a)).

<sup>56</sup> Character of Discharge of National Guard Member, Vet. Aff. Op. Gen. Couns. Prec. 06-04 (12 July 2004) (“[A] claimant’s eligibility for VA disability compensation is governed by the character of the claimant’s discharge or release from the [active duty for training] period during which a disabling injury or disease was incurred, [and the] VA is not required to reconsider an award based on a period of ADT if the claimant is subsequently discharged from the National Guard under other than honorable conditions . . .”).

<sup>57</sup> See *VA Disability Compensation*, *supra* note 34 (listing the flat rate payments veterans receive as their disability compensation).

<sup>58</sup> For example, a surgeon that injures their hand while serving in the military and who eventually receives a 10% compensable rating from the VA will only receive \$144.14 per month while potentially losing thousands of dollars a month based on the inability to conduct surgery. Contrast that with a security guard that injures their hand. They will receive the same rate of payment even if there is no discernable impact on their ability to do their job.

due to a disability or disease incurred from service, the family of the former SM suffers because they are ineligible to receive DIC.<sup>59</sup>

The G.I. Bill and VA home loan benefits are distinguishable from disability compensation. An OTH discharged former SM barred from receiving the G.I. Bill<sup>60</sup> is no worse off than if he or she never joined the military. The individual retains eligibility for all student aid to which he or she would have been entitled if they never joined the military.<sup>61</sup> Similarly, an OTH discharged former SM barred from receiving the VA home loan guaranty<sup>62</sup> is no worse off than if he or she never joined the military. The individual retains eligibility for Federal Housing Authority loans to which he or she would have been entitled if they had never joined the military.<sup>63</sup>

When earned, these benefits reward the former SM by providing advantages only achieved through successful military service. These benefits provide an advantage to the former SM over those that did not serve in the military. Because of this, a logical nexus to character of service exists. Consequently, a logical basis exists for restricting eligibility for these benefits from an OTH discharged former SM. The same cannot be said for restricting eligibility for disability compensation.

## 5. Military recruiting and retention

Additionally, the government publicly advertises these benefits differently. The Army recruitment website touts “[h]ealth care, subsidized food, housing and education,” adding up to “an unmatched benefits package,” as reasons to join.<sup>64</sup> Conspicuously missing from the website as a benefit is

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<sup>59</sup> See 38 C.F.R. § 3.12(a) (2019) (explaining a general bar on dependent or survivor benefits).

<sup>60</sup> See *Applying for Benefits and Your Character of Discharge*, U.S. DEP’T OF VETERANS AFFS. (Dec. 10, 2020), [https://www.benefits.va.gov/benefits/character\\_of\\_discharge.asp](https://www.benefits.va.gov/benefits/character_of_discharge.asp) [<https://perma.cc/MW6L-NE76>] (“To receive VA education benefits and services through the Montgomery GI Bill program or Post-9/11 GI Bill program, the Veteran’s character of discharge or service must be honorable.”); 38 U.S.C. § 3311(c) (imposing an honorable discharge requirement to receive educational assistance for service in the Armed Forces after September 11, 2001).

<sup>61</sup> See 34 C.F.R. § 668.32 (2019) (establishing student eligibility requirements for assistance under the Title IV HEA program).

<sup>62</sup> See *Applying for Benefits*, *supra* note 60 (“To receive VA home loan benefits and services, the Veteran’s character of discharge or service must be under other than dishonorable conditions . . .”).

<sup>63</sup> See U.S. DEP’T OF HOUSING AND URBAN DEV., MORTGAGE CREDIT ANALYSIS FOR MORTGAGE INSURANCE (4155.1), at 4-A-6 (2011) (describing eligibility requirements for FHA-insured financing).

<sup>64</sup> See *Benefits*, U.S. DEP’T OF ARMY, <https://www.goarmy.com/benefits.html> [<https://perma.cc/NND9-KSN5>] (last visited Oct. 22, 2019) (describing the range of benefits available to Army servicemembers).

disability compensation.<sup>65</sup> While Soldiers earn and retain most of these benefits during service, entitlement to the G.I. Bill requires successful completion of service. Since the Army uses the G.I. Bill to entice people to join the military, a logical nexus to character of service exists because it is a reward for successful service. Satisfactory completion of service equals receipt of the benefit for which civilians are ineligible to receive.<sup>66</sup> Consequently, a logical basis exists for restricting eligibility for this benefit when discharged with an OTH.

#### 6. The Federal Employee Compensation Act (FECA)

Similar to disability compensation in the military, the federal government does not use disability compensation as a recruiting/retention tool or as a reward for federal employment. The federal government provides disability compensation for federal employees through the Federal Employment Compensation Act<sup>67</sup> (FECA) for at-work injuries. Employees attain eligibility for the program when they receive an injury “in performance of duty while in service to the United States.”<sup>68</sup> The government does not treat FECA as a reward for successful service. It treats it as a benefit incident to employment to make a civilian employee whole for injuries sustained during service to the United States.

For example, USAJobs.gov lists health insurance, dental and vision insurance, life insurance, long term care insurance, and flexible spending accounts as working-in-government benefits.<sup>69</sup> Conspicuously missing from the website is entitlement to FECA if injured. Similar to disability compensation, the government uses FECA to make civilian employees whole for injuries incurred in performance of duty while in service to the United States, not to reward them for government service.

#### *B. Administrative Separation Boards*

In addition to defeating the purpose of the benefit, the VA’s potential barring of eligibility for disability compensation undermines the purpose of administrative separation boards. The Army uses separation policy to

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<sup>65</sup> Imagine the tagline, “Join the Army and we will compensate you when you are invariably injured.”

<sup>66</sup> See 38 U.S.C. § 3311(c) (requiring an honorable discharge in order to receive G.I. Bill benefits).

<sup>67</sup> See 20 C.F.R. § 10.0 (2019) (“The Federal Employees’ Compensation Act (FECA) as amended (5 U.S.C. 8101 *et seq.*) provides for the payment of workers’ compensation benefits to civilian officers and employees of all branches of the Government of the United States.”).

<sup>68</sup> *Id.* § 10.0(b).

<sup>69</sup> OFF. OF PERS. MGMT., *Benefits*, USAJOBS.GOV, <https://www.usajobs.gov/Help/working-in-government/benefits/> [<https://perma.cc/9VAY-UN2V>] (last visited December 19, 2019).

“[j]udge the suitability of persons to serve in the Army on the basis of their conduct and their ability to meet required standards of duty performance and discipline.”<sup>70</sup> The Army uses administrative separations to promote readiness by separating Soldiers for failure to meet required standards of performance or discipline.<sup>71</sup> Involuntary administrative separations are akin to being fired from a job in the civilian sector.<sup>72</sup>

### 1. Separation regulation purpose

The purpose of the separation regulation is to separate SMs for failure to meet required standards of performance or discipline.<sup>73</sup> Once a separation authority or a separation board decides to separate<sup>74</sup> or retain an SM, the regulation achieves its purpose. Potentially restricting eligibility for disability compensation for separated SMs through OTH service characterizations does nothing to further this purpose and is akin to a punishment<sup>75</sup> because the negative impact on former SMs continues long after separation.

#### a. Restricting disability compensation as a punishment

The Army uses a separate forum—the court-martial—to remove SMs and assign potentially lifelong punishments.<sup>76</sup> The purpose of administrative separations is to separate SMs (firing), while the purpose of courts-martial is to punish by assigning punitive discharges (among other punishments). Any punishments that extend past separation from the military should be considered outside the scope and purpose of the separation regulation because the SM is already removed from the military.

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<sup>70</sup> AR. 635-200, *supra* note 11, para. 1-1.b.(1).

<sup>71</sup> *Id.* para. 1-1.c(1).

<sup>72</sup> *Administrative Separations: The Basics*, FINDLAW (June 20, 2016), <https://military.findlaw.com/administrative-issues-benefits/administrative-separation-the-basics.html> [https://perma.cc/TD7B-JMYS].

<sup>73</sup> See AR. 635-200, *supra* note 11, para. 1-1.c(1) (“Early separation for failure to meet required standards of performance or discipline represents a failure to fulfill that commitment.”).

<sup>74</sup> See generally AR 635-200, *supra* note 11 (requiring the board to recommend the character of service in cases where the separation board recommends separation).

<sup>75</sup> Scholarly works mention this view as far back as 1973. See Major Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 10 (1973) (“[A]ny less than honorable discharge may substantially hinder the post-service life of its recipient. Clearly the military itself promotes this belief.”).

<sup>76</sup> See Captain Richard J. Bednar, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 MIL. L. REV. 1, 16 (1962) (“[L]oss of veteran’s benefits is only a part of the punishment which flows from a punitive discharge . . .”). See generally MCM, *supra* note 9 (providing a complete guide to the conduct of courts-martial in the U.S. military).

While the loss of benefits incident to removal of service may also be considered punishment,<sup>77</sup> administrative separation requires removal of such benefits to achieve its purpose. The receipt of base pay, health care, on-base housing, etc., require the SM to serve on active duty.<sup>78</sup> The removal of these benefits corresponds to the purpose of the separation regulation<sup>79</sup>—removing the SM from service. The potential removal of eligibility for disability compensation exceeds the scope of the separation regulation because the negative consequences continue long after the achievement of the purpose of the separation regulation.

While the VA ultimately decides whether to restrict eligibility for disability compensation for OTH discharged former SMs, the Army, through assigning service characterizations, influences whether a former SM loses eligibility for disability compensation through the VA. Regarding access to VA benefits with an OTH discharge, the Army separation regulation states: “Discharge under other than honorable conditions may or may not deprive the Soldier of veterans’ benefits administered.”<sup>80</sup> Encompassed in this statement is the potential loss of disability compensation.

As discussed above, restricting access to disability compensation does not further the purpose of separation policy because its impact is not felt until after the separation. With the VA barring 85%<sup>81</sup> of applicants with OTH discharges from VA benefits, including disability compensation, the assignment of an OTH by the Army is essentially assigning a punishment of reduced earning capacity until death. The proper forum for the assignment of punishment beyond separating from service is the punitive discharge system.<sup>82</sup>

### **b. Deterrence**

An argument can be made that the potential loss of disability compensation furthers the purpose of separation policy. The separation regulation even recommends using the threat of loss of benefits (punishment) as a tool to discourage bad conduct: “Many Soldiers can be discouraged from

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<sup>77</sup> They should be considered punishments because the government is taking the benefits for violating the rules.

<sup>78</sup> See AR 635-200, *supra* note 11, para. 1-1.c(1) (explaining that the acquisition of military status requires a period of service).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* para. 3-6.b.

<sup>81</sup> VETERANS LEGAL CLINIC, *supra* note 6, at 11, 23.

<sup>82</sup> *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989) (“Our society recognizes five principal reasons for the sentence of those who violate the law. They are: 1. Protection of society from the wrongdoer. 2. Punishment of the wrongdoer. 3. Rehabilitation of the wrongdoer. 4. Preservation of good order and discipline in the military. 5. The deterrence of the wrongdoer and those who know of his/her crime and his/her sentence from committing the same or similar offenses.”).

conduct that warrants an unfavorable discharge.”<sup>83</sup> However, the regulation’s language regarding VA benefits betrays this contention when it states that an SM “*may or may not*” be deprived of VA benefits.<sup>84</sup> Thus, SMs appearing before a separation board are faced with the uncertain result that they “*may or may not* be deprived of VA benefits,” including disability compensation.<sup>85</sup>

While no comprehensive study exists analyzing the deterrent effect of potential loss of disability compensation, numerous criminological studies show that certainty of punishment has a larger deterrent effect than the severity of punishment.<sup>86</sup> There is no certainty of punishment regarding the loss of eligibility for disability compensation. While statistics show that the VA deems ineligible from disability compensation 85%<sup>87</sup> of OTH discharged former SMs, there is no indication that SMs potentially engaging in behavior warranting separation are aware of that statistic. The uncertainty in the separation regulation likely renders the deterrent effect of potentially losing disability compensation negligible.

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<sup>83</sup> AR 635-200, *supra* note 11, para. 17-1.b.

<sup>84</sup> *Id.* para. 3-6.b (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> See *United States v. Martinez*, 184 F. Supp. 3d 1209, 1235–36 (D.N.M. 2016), *aff’d*, 660 F. App’x 659 (10th Cir. 2016) (“An avalanche of criminological studies have determined that this theoretical symmetry between severity of punishment and certainty of detection does not exist in the real world.”); Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521, 544–47 (1973) (finding that the certainty of punishment was a more important factor than severity in deterring murder, rape, and robbery); Harold G. Grasmick & George J. Bryjak, *The Deterrent Effect of Perceived Severity of Punishment*, 59 SOC. FORCES 471, 472 (1980) (reviewing twelve deterrence studies and explaining that “nearly all these researchers conclude that perceived certainty of legal sanctions is a deterrent, [while] only one (Kraut) concludes that perceptions of the severity of punishment are part of the social control process.”); Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 304 (1991) (studying California arrestees and concluding that “increased certainty of punishment provides a much more effective deterrent than increased severity” and that “[a] six percentage point increase in average conviction rates would deter as many arrests as a 3.6 month increase in average prison sentences.”); Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721, 741 (1989) (surveying graduate students about tax evasion scenarios and finding that certainty of punishment is an effective deterrent); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 13 (1998) (reviewing the literature and concluding that “cross-sectional and scenario-based studies have consistently found that perceptions of the risk of detection and punishment have negative, deterrent-like associations with self-reported offending or intentions to offend”); Daniel S. Nagin & Greg Pogarsky, *An Experimental Investigation of Deterrence: Cheating, Self-Serving Bias, and Impulsivity*, 41 CRIMINOLOGY 167, 183 (2003) (testing whether students would cheat on a trivia quiz to earn a cash bonus and finding that cheating decreased when the certainty of detection was higher but not when the perceived severity of punishment increased).

<sup>87</sup> VETERANS LEGAL CLINIC, *supra* note 6, at 11, 23.

Additionally, most SMs experience no certainty of the need of disability compensation in the future. There is no indication SMs potentially engaging in behavior warranting separation are aware certain in-service exposures (such as Camp Lejeune's drinking water contamination incident,<sup>88</sup> or burn pits)<sup>89</sup> may lead to severely disabling diseases for which they need disability compensation. Thus, using the potential loss of disability compensation as a deterrent does not further the purpose of the separation regulation. The linking of eligibility for disability compensation to distinct periods of service further weakens the deterrent argument, especially when an SM's military career consists of several consecutive or nonconsecutive periods of service.<sup>90</sup>

### c. Period of service

As described above, a former SM establishes eligibility for VA disability compensation if “the *period of service* on which the claim is based was terminated by discharge or release under conditions other than dishonorable.”<sup>91</sup> According to the VA, “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,”<sup>92</sup> unless they are found guilty of “mutiny, treason, sabotage, or

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<sup>88</sup> See *Camp Lejeune Water Contamination Health Issues*, U.S. DEP'T OF VETERANS AFFS. (Sept. 22, 2020), <https://www.va.gov/disability/eligibility/hazardous-materials-exposure/camp-lejeune-water-contamination/> [<https://perma.cc/9F7K-8EKE>] (“Two on-base water wells that were shut down in 1985 had these chemicals: Trichloroethylene (TCE);] Perchloroethylene (PCE);] Benzene; Vinyl chloride;] Other compounds.”).

<sup>89</sup> See *Public Health: Airborne Hazards and Burn Pit Exposures*, *supra* note 49 (“While on active duty, military service members may have been exposed to a variety of airborne hazards including: The smoke and fumes from open burn pits;] Sand, dust, and particulate matter;] General air pollution common in certain countries;] Fuel, aircraft exhaust, and other mechanical fumes;] Smoke from oil well fires.”).

<sup>90</sup> For the regulatory definition of periods of service, see 38 C.F.R. § 3.6 (2019) (wherein duty periods for VA benefits purposes include “active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident which occurred during such training.”).

<sup>91</sup> *Id.* § 3.12 (emphasis added).

<sup>92</sup> *The Effect of a Discharge Under Dishonorable Conditions on Eligibility for Gratuitous Veterans' Benefits Based on a Prior Period of Honorable Service*, Vet. Aff. Op. Gen. Couns. Prec. 61-91 (17 July 1991) (citing Adm'rs Decision No. 655 (20 June 1945); Op. Sol. 218-51 (4 June 1951)). “The General Counsel, or the Deputy General Counsel acting as or for the General Counsel, is authorized to designate, in accordance with established standards, those legal opinions of the General Counsel which will be considered precedent opinions involving

rendering assistance to an enemy of the United States or of its allies.”<sup>93</sup> Consecutive reenlistments may cause confusion regarding the period of service in which an injury warranting disability compensation occurred.<sup>94</sup>

It is difficult to see a deterrent effect in restricting eligibility for disability compensation when an SM’s military career may consist of several periods of service and it is unclear under which period of service a potentially compensable disability occurred. The logic behind restricting eligibility for disability compensation based upon these arbitrary dates is also questionable.

A hypothetical SM injured the first day of a four-year enlistment contract, that commits misconduct at the 3.5 year mark, and that is discharged with an OTH, likely won’t receive disability compensation for that injury even though it occurred 3.5 years prior to discharge. However, an SM injured on the last day of an enlistment contract, that commits misconduct on the first day of a consecutive reenlistment contract, and that is discharged with an OTH will be eligible for disability compensation based on the injury even though it occurred one day before the misconduct.

For National Guard/Reservists, the VA treats each time in uniform as a separate period of service,<sup>95</sup> thus further weakening the deterrent effect. Even though a standard National Guard enlistment contract is for six years, when rendering a disability compensation claim determination, the VA treats each drill weekend and each annual training as a separate period of service.<sup>96</sup>

A National Guard Soldier who injures himself/herself during a drill weekend can fail a urinalysis the following weekend, receive an OTH discharge from the National Guard, yet still retain eligibility for disability compensation.<sup>97</sup> All this while an active duty Soldier potentially loses eligibility for disability compensation for all injuries and/or diseases incurred

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veterans' benefits under laws administered by the Department of Veterans Affairs.” 38 C.F.R. § 2.6(e)(8) (2019). According to VA regulations, the VA General Counsel is authorized to designate precedential opinions. *Id.*

<sup>93</sup> Character of Discharge of National Guard Member, Vet. Aff. Op. Gen. Couns. Prec. 06-04 (12 July 2004) (“[A] claimant’s eligibility for VA disability compensation is governed by the character of the claimant’s discharge or release from the [active duty for training] period during which a disabling injury or disease was incurred, [and the] VA is not required to reconsider an award based on a period of ADT if the claimant is subsequently discharged from the National Guard under other than honorable conditions . . .”).

<sup>94</sup> Each enlistment is considered a separate period of service for VA benefits purposes even if the enlistments were consecutive and the SM never left the service. 38 U.S.C. § 101(18)(B).

<sup>95</sup> Character of Discharge of National Guard Member, *supra* note 93; *see also* 38 C.F.R. § 3.6 (2019) (explaining duty periods for VA benefits).

<sup>96</sup> *See* Character of Discharge of National Guard Member, *supra* note 93 (explaining how the character of discharge affecting a disability compensation claim is dependent on the portion of service that qualifies as active service for VA purposes, which is if the injury or disease occurred in the line of duty).

<sup>97</sup> *Id.*

during an entire four-year enlistment even if the misconduct happens completely separate from the injury. With each period in uniform considered a separate period of service by the VA, any deterrent effect of restricting eligibility for disability compensation would be negligible.

#### **d. Most likely deterrent effect of separation**

Again, due to the absence of an in-depth study regarding the deterrent effect of administrative separations, it appears unlikely that the potential loss of disability compensation serves any deterrent purpose. The loss of immediate benefits incident to service, including base pay, health care, on-base housing, etc., serves the deterrent effect as prescribed by the regulation.

#### **2. Improper effect on separation board waivers**

In addition to serving no purpose in administrative separations, potentially losing eligibility for disability compensation negatively affects separation board waiver determinations. When appearing before a separation board, SMs may make choices based on the uncertainty in eligibility for disability compensation with an OTH discharge. Such decisions further undermine the purpose of the separation regulation because these SMs may accept a general (under honorable)<sup>98</sup> discharge and waive their right to a separation board<sup>99</sup> because they are worried about potentially losing their eligibility for disability compensation<sup>100</sup> as described by the regulation.<sup>101</sup> While the waiver of a board is voluntary, it undermines the purpose of the separation procedures in two ways—it prevents the board from determining

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<sup>98</sup> See AR 635-200, *supra* note 11, para. 2-5.b (explaining that a soldier can waive their right to an administrative separation board hearing “contingent upon receiving a characterization of service or description of separation more favorable than the least favorable characterization authorized”).

<sup>99</sup> See *id.* para. 2-5.a (explaining how waiving a right to a hearing before the administrative board with approval from the separation authority allows for processing a case without convening a board).

<sup>100</sup> See Jeremy R. Bedford, *Outdated VA Regulations Lead to Confusion for Army National Guard Soldiers with OTH Service Characterizations*, FED. LAW., Oct./Nov. 2015, 58, 58–65, 77 (providing a detailed description of the even more confusing separation process and its effects on VA disability benefits in the National Guard).

<sup>101</sup> For clarity, any choices made by the SMs based on the uncertainty in eligibility for disability compensation with an OTH discharge are not “deterrents” as discussed above because these choices made by the SM at this stage occur after the SM has already committed the alleged misconduct.

whether to retain<sup>102</sup> and/or suspend<sup>103</sup> separation of the SM, and it prevents the SM from appearing before the board and presenting his/her case for retention.

Additionally, the Army uses separation policy as a tool to promote readiness.<sup>104</sup> The separation regulation instructs separation boards to consider the potential for rehabilitation and further military service when determining whether to recommend separation.<sup>105</sup> It also recommends considering suspending a separation in certain situations.<sup>106</sup> The board must take into account numerous factors when determining whether to recommend separation and/or suspending<sup>107</sup> a separation.<sup>108</sup>

Specifically, for misconduct separations, the regulation allows retention when it is in the best interest of the Army.<sup>109</sup> When the SM waives the right to a board, it is problematic because “separation prior to completion of an obligated period of service is wasteful because it results in loss of this investment and generates a requirement for increased accessions.”<sup>110</sup> The likelihood of losing eligibility for disability compensation places the Army in a worse position. While retention is the exception to the rule,<sup>111</sup> the regulation still contemplates this as a possible result.

By waiving the right to the board, the SM also misses the opportunity to present evidence before the board arguing for retention.<sup>112</sup> The SM may have

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<sup>102</sup> See AR 635-200, *supra* note 11, para. 2-12.b(1)(c) (stating that the board convening “to determine whether a Soldier should be separated for misconduct” can recommend they be retained in the service).

<sup>103</sup> See *id.* para. 2-12.b(6) (“When the board recommends separation, it may also recommend that the separation be suspended . . .”).

<sup>104</sup> *Id.* para. 1-1.b.

<sup>105</sup> *Id.* para. 1-15.a.

<sup>106</sup> *Id.* para. 1-15.a.

<sup>107</sup> See *id.* para. 1-18.a (“A highly deserving Soldier may be given a probation period to show successful rehabilitation before the Soldier’s enlistment or obligated service expires.”).

<sup>108</sup> See *id.* para. 1-15.c (outlining the factors the administrative board must consider when deciding between retention or separation in a case: “(1) The seriousness of the events or conditions that form the basis for initiation of separation proceedings. Also consider the effect of the Soldier’s continued retention on military discipline, good order, and morale. (2) The likelihood that the events or conditions that led to separation proceedings will continue or recur. (3) The likelihood that the Soldier will be a disruptive or undesirable influence in present or future duty assignments. (4) The Soldier’s ability to perform duties effectively now and in the future, including potential for advancement or leadership. (5) The Soldier’s rehabilitative potential. (6) The Soldier’s entire military record”).

<sup>109</sup> See *id.* para. 14-7 (“Retention should be considered only in exceptionally meritorious cases when clearly in the best interest of the Army.”).

<sup>110</sup> *Id.* para. 1-1.c(3).

<sup>111</sup> See *id.* para. 14-7 (stating that retention may be considered only in “exceptionally meritorious cases.”).

<sup>112</sup> See *id.* para. 2-10 (describing the board procedures for SM separation, which includes an opportunity for the SM to present evidence before the board).

compelling reasons warranting retention, but the board never hears them because the SM was worried about losing eligibility for disability compensation.

For example, SSG Harvey failed a urinalysis due to the presence of tetrahydrocannabinol (THC) in his sample. His chain of command subscribes to an unwritten zero tolerance policy for drug usage and recommends separation with an OTH service characterization.<sup>113</sup> SSG Harvey has fifteen years of service and a stellar service record including numerous deployments and awards. He wants to remain in the military for at least five more years so that he may retire. Because of this, he wants to appear before the separation board and present his case for retention. However, during his fifteen years of service, he experienced numerous injuries and degenerative age-related conditions. Based upon consulting with his doctor and reviewing the relevant VA diagnostic codes, he believes he would likely receive a 50% disability rating from the VA once he left service. He is worried about potentially losing eligibility for this benefit if he goes before the board because these disabilities will affect his post-service employment—especially as he ages.

He decides to waive his right to the board<sup>114</sup> and accept a general discharge,<sup>115</sup> thus ensuring eligibility for this benefit. Because of this decision, the board is robbed of the opportunity to potentially retain<sup>116</sup> this otherwise stellar SM who committed a one-time mistake. This result robs the SM of the opportunity to plead for retention and finish his military career. This result does not benefit the SM or the Army.<sup>117</sup> While retention is the exception to the rule in separation boards, the separation regulation allows the opportunity to retain stellar SMs such as SSG Harvey.<sup>118</sup>

The more likely and less sympathetic scenario is SPC Brooks. He fails numerous urinalyses and his chain of command recommends separation with

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<sup>113</sup> See generally Bedford, *supra* note 100 (providing an example of a similar scenario using a National Guard Soldier, in which illegal drug use constitutes serious misconduct which may warrant OTH discharge).

<sup>114</sup> See AR 635-200, *supra* note 11, para. 2-5.a (explaining how waiving a right to a hearing before the administrative board with approval from the separation authority allows for processing a case without convening a board).

<sup>115</sup> See *id.* para. 2-5.b (explaining that a soldier can waive their right to an administrative separation board hearing “contingent upon receiving a characterization of service or description of separation more favorable than the least favorable characterization authorized.”).

<sup>116</sup> See *id.* para. 2-12.b(1)(c) (stating that the administrative board convenes to decide whether a soldier should be separated and that the board can decide whether to retain them).

<sup>117</sup> See *id.* para. 1-1.c(3) (“[T]he Army makes a substantial investment in training, time, equipment, and related expenses when persons enter into military service. Separation prior to completion of an obligated period of service is wasteful because it results in loss of this investment and generates a requirement for increased accessions. Consequently, attrition is an issue of significant concern at all levels of responsibility within the Army.”).

<sup>118</sup> See *id.* para. 1-15.a (“[U]nless separation is mandatory, rehabilitation and further useful military service will be considered by the separation authority”).

an OTH service characterization, which he receives because it is in the best interest of the Army and the board found no evidence supporting retention. This is the proper and likely result in most separation boards. However, even if the laws/regulations changed (as suggested in Part V, *infra*) allowing someone to receive disability compensation with an OTH, this would likely not affect how the military addressed SPC Brooks's misconduct—he would likely still be separated with an OTH.

In reviewing the above scenarios, uncertainty in potentially losing disability compensation led to a result that was not in the best interest of the Army (SSG Harvey) and had no impact in a result that was in the best interest of the Army (SPC Brooks). However, the best interest of the Army can be served in both scenarios by removing the question of eligibility for disability compensation.

While on the front end an SM may make separation board waiver decisions based upon eligibility for disability compensation, on the back end the separation board may improperly use eligibility for disability compensation in making their character of service recommendations. Such determinations by the board exceed the scope of the separation regulation.

### 3. Improper effect on characterization of service

Often, separation boards want to know what effect characterizations of service have on eligibility for VA benefits, including disability compensation. Such inquiries are improper as character of service determinations should be conduct-based, not medical-based,<sup>119</sup> determinations. Boards exceed the scope of the separation regulation when they take into account potential eligibility for disability compensation in making a character of service determination. The guidelines for characterizations of service do not mention using potential for disability compensation as a factor in assigning one service characterization over another.<sup>120</sup> The Army issues an honorable discharge when the SM's service meets standards of acceptable conduct;<sup>121</sup> a general discharge when the SM's service is satisfactory;<sup>122</sup> and an OTH discharge when there is

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<sup>119</sup> See 10 U.S.C. § 1177 (stating that an SM should not be separated under less than honorable conditions for PTSD or traumatic brain injury).

<sup>120</sup> See AR 635-200, *supra* note 11, para. 3-7 (listing the criteria for administrative discharges and characterization of service).

<sup>121</sup> *Id.* para. 3-7.a (“An honorable discharge is a separation with honor. The honorable characterization is appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.”).

<sup>122</sup> *Id.* para. 3-7.b(1) (“A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.”).

evidence of “misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial.”<sup>123</sup>

According to the separation regulation, “[c]haracterization at separation will be based upon the quality of the Soldier’s service, including the reason for separation.”<sup>124</sup> The character of service “must accurately reflect the nature of service performed.”<sup>125</sup> “Characterization will be determined solely by the Soldier’s military record which includes the Soldier’s behavior and performance of duty.”<sup>126</sup> The regulation lists various conduct-based reasons for characterization determinations.<sup>127</sup> While the regulation directs providing due consideration to “physical and mental conditions”<sup>128</sup> in making the characterization determination, it does not encompass taking into account potential eligibility for disability compensation.<sup>129</sup>

The regulation contains no provision directing an honorable or general discharge in lieu of an OTH discharge upon the presentment of evidence the SM may need disability compensation after separation. However, boards may improperly consider this factor when making a characterization of service determination. This leads to disparate results as healthy SMs may receive an OTH discharge while an injured<sup>130</sup> SM may

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<sup>123</sup> *Id.* para. 3-7.c (“A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial [under certain circumstances] . . .”).

<sup>124</sup> *Id.* para. 3-5.a.

<sup>125</sup> *Id.* para. 3-5.e.

<sup>126</sup> *Id.* para. 3-8.

<sup>127</sup> *See id.* para. 3-5 (“(1) The quality of service will be determined according to standards of acceptable personal conduct and performance of duty for military personnel. (2) . . . b. The quality of service of a Soldier on AD is affected adversely by conduct that is of a nature to bring discredit on the Army or is prejudicial to good order and discipline. Characterization may be based on conduct in the civilian community. c. The reasons for separation, including the specific circumstances that form the basis for the separation, will be considered on the issue of characterization. As a general matter, characterization will be based upon a pattern of behavior other than an isolated incident. There are circumstances, however, in which the conduct or performance of duty reflected by a single incident provides the basis for characterization. d. Due consideration will be given to the Soldier’s age, length of service, grade, aptitude, physical and mental conditions, and the standards of acceptable conduct and performance of duty.”).

<sup>128</sup> *Id.* para. 3-5.d; *cf.* para. 3-8.f(11) (providing that the checklist prepared for the characterization determination will include “[a]ny medical or other data meriting consideration in the overall evaluation.”).

<sup>129</sup> *See* 10 U.S.C. § 1177 (indicating that boards are required to take into account whether symptoms of a service incurred mental condition caused the SM to engage in the behavior warranting separation). However, this factor is distinguished from improperly taking into account potential receipt of disability compensation after separation.

<sup>130</sup> For the purposes of this example, the injury is unrelated to combat.

receive a general discharge even though they engaged in identical behavior warranting separation and possessed similar military records.

In another hypothetical, SSG Harris and SSG Goff possess identical service records and both failed a urinalysis warranting separation with an OTH service characterization. At SSG Harris's separation board, his Trial Defense Services<sup>131</sup> (TDS) attorney presents evidence that he sought treatment for PTSD after failing the urinalysis. The evidence shows he received treatment, but did not receive a diagnosis. His TDS attorney argues for a general discharge so SSG Harris can receive disability compensation and health care benefits for his PTSD post-service. Based solely on the evidence of PTSD treatment, the board assigns a general discharge even though there is no PTSD diagnosis and no guarantee he will receive disability compensation for this undiagnosed condition. Meanwhile, SSG Goff presents no medical evidence at his separation board and receives an OTH discharge even though his service record and misconduct were identical to that of SSG Harris.

Separation boards should only consider service records in separation determinations, thus rendering the result of SSG Harris's separation improper. Taking the potential receipt of disability compensation into account undermines separation boards and leads to unfair results for SMs with similar service records and similar alleged misconduct. Unfortunately, disparate outcomes such as this occur beyond the potential of receipt of disability compensation. Often, disparities exist between military services and even command philosophies regarding the assignment of OTH service characterizations.

### *C. Disparate Outcomes*

Ever since the military services adopted the administrative discharge system in 1947, they have disparately assigned OTH service characterizations.<sup>132</sup> The disparity in the assignment of OTH service characterizations results in similarly situated SMs engaging in similar prohibited behavior yet receiving different service characterizations based

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<sup>131</sup> See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-2 (11 May 2016) ("The mission of USATDS is to provide specified defense counsel services for Army personnel, whenever required by law or regulation and authorized by TJAG or TJAG's designee. The USATDS will also develop programs and policies to promote the effective and efficient use of defense counsel resources and enhance the professional qualifications of all personnel providing defense services.").

<sup>132</sup> See generally COMPTROLLER GENERAL, U.S. GOV'T ACCOUNTABILITY OFF., FPCD-80-13, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED (1980) (studying military service characterizations and detailing some of the ways that it disadvantages former service members).

upon different philosophies of the military services or even different philosophies of different commanders.

While the unequal assignment of OTH discharges is problematic in and of itself, such disparities lead to some SMs receiving a life sentence of decreased earning capacity through the assignment of an OTH while similarly situated SMs retain eligibility for disability compensation through the assignment of a general discharge.<sup>133</sup>

Such concerns about the disparities in the administrative separation system between the military services led Congress, in the late 1970s, to request a GAO investigation.<sup>134</sup> In its 1980 report, the GAO sounded the alarm on the unequal assignment of OTH discharges between the services. “Different philosophies and practices among the services for imposing and upgrading discharges have led to wide disparities which erode the integrity of the system.”<sup>135</sup> The report discovered variances in discharges imposed by the separate services or even the same service over time.<sup>136</sup> The type of discharge a former SM received often had little to do with performance on active duty.<sup>137</sup> Different SMs received different service characterizations even though the circumstances surrounding the discharge were similar.<sup>138</sup> The report uses the disparities between similarly situated Air Force and Marine Corps members as an example. “The probability of people with similar absence-without-leave and conviction records getting honorable discharges in the Air Force is about 13 times greater than in the Marine Corps.”<sup>139</sup> This led to some with less than honorable discharges having better service records than those with honorable discharges and former SMs with similar service records receiving different types of discharges.<sup>140</sup>

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<sup>133</sup> *Id.* at 57.

<sup>134</sup> *Id.* at i.

<sup>135</sup> *Id.* at cover.

<sup>136</sup> *Id.* at 22.

<sup>137</sup> *Id.* at 22 (“[R]easonable consistency in the discharges imposed has never been achieved”).

<sup>138</sup> *Id.* at [34] (“Some commanders appear to discharge people with AWOL records by the most expeditious reason, believing that it is in the best interests of everyone. Other commanders are reluctant to separate people with AWOL records in the most expeditious manner because it results in an honorable or general discharge and many veterans' benefits for people serving more than 6 months. They believe that this diminishes the integrity of the honorable discharge and results in veterans' benefits being given to those whose service is not considered honorable. Thus they are more likely to separate people with AWOL records for the reason of misconduct, which has a high probability of resulting in a discharge under other than honorable conditions.”).

<sup>139</sup> This means Marines were thirteen times more likely to receive a life sentence of decreased earning capacity. *Id.* at ii. The Marine Corps issued OTH discharges twenty-three times as often as the Air Force. *Id.* at 24, 43.

<sup>140</sup> *Id.* at 43

As noted in the GAO report, there was no uniformity in discharges for SMs with similar service records.<sup>141</sup> The military services never achieved consistency in discharges since the adoption of the administrative discharge system in 1947.<sup>142</sup>

Unfortunately, this disparity still exists. From the beginning of the War on Terror up to 2015, the VA presumptively recognized 98% of former Airmen as “veterans”<sup>143</sup> while only presumptively recognizing 88% of former Marines<sup>144</sup> as “veterans” due to their characterizations of service.<sup>145</sup> The increased assignment of OTH service characterization and increased denial of VA benefits, including disability compensation, makes this problem even more worrisome. Consequently, some with better service records receive an unfair life sentence of reduced earning capacity while those with lesser records receive eligibility for disability compensation.

The assignment of OTH discharges varies throughout the services and may vary depending on the whim of the command.<sup>146</sup> This leads to SMs committing the same acts but suffering vastly different consequences—including the assignment of an OTH service characterization. In one case, a former SM receives a life sentence of reduced earning capacity while another SM receives VA disability compensation even though separation occurred for the exact same reason.

#### IV. SOLUTION

During the debate over eligibility for the G.I. Bill<sup>147</sup> in 1944, American Legion Chief of Claims Carl Brown stated: “If [the

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<sup>141</sup> *Id.* at 22.

<sup>142</sup> *Id.*

<sup>143</sup> A “veteran” is a former service member who received an honorable or general discharge. “A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.” 38 C.F.R. § 3.12(a) (2019).

<sup>144</sup> VETERANS LEGAL CLINIC, *supra* note 6, at 13.

<sup>145</sup> 38 C.F.R. § 3.12(a) (2019).

<sup>146</sup> *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); Major John W. Brooker, Major Evan R. Seamone & Leslie C. Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 18 (2012) (detailing how the military has long relied on deference to the discretion of commanders to dole out punishments leading to inconsistent results).

<sup>147</sup> While current use of the term G.I. Bill colloquially refers to educational benefits, the 1944 G.I. Bill provided education and training, loan guaranty for homes, farms or businesses, and unemployment pay to veterans. *Education and Training*, U.S. DEP’T OF VETERANS AFFS.

servicemember] did not do something that warranted court-martial and dishonorable discharge, I would certainly not see him deprived of his benefits.”<sup>148</sup> While he made this statement regarding a myriad of veterans’ benefits, the government should use this sentiment in determining eligibility for disability compensation. Former SMs with OTH discharges should retain eligibility for disability compensation. Congress, the DoD,<sup>149</sup> and/or the VA should change the laws and/or regulations currently barring eligibility.

#### A. Congress

There are many avenues Congress may take to allow OTH discharged former SMs to retain eligibility for disability compensation. While Congress has moved toward allowing more benefits for OTH discharged former SMs, it needs to take further steps.

##### 1. Congressionally required exception

The optimal solution allowing all OTH discharged former SMs to be eligible for disability compensation is legislative; Congress should provide a limited exception allowing OTH discharged former SMs to receive disability compensation. Such an exception would be similar to the exception that allows OTH discharged former SMs to receive VA health care for service-connected conditions (even though they do not receive disability compensation for these conditions).<sup>150</sup> Former SMs would receive disability compensation and treatment for in-service injuries and diseases. This exception logically extends the current policy allowing for treatment of these conditions and would not grant eligibility for any other VA benefits. Such an exception accelerates the piecemeal approach Congress is taking toward allowing more benefits for OTH discharged former SMs.

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(Nov. 21, 2013), <https://www.benefits.va.gov/gibill/history.asp> [<https://perma.cc/A7YY-VXP7>]. Eligibility for these programs, as well as eligibility for disability compensation, was established through meeting the definition of “veteran.” See Adams & Montalto, *supra* note 4, at 109–10 (analyzing the contemporaneous Congressional discussion regarding G.I. Bill eligibility for SMs at the time of its drafting).

<sup>148</sup> *World War Veterans' Legislation: Hearings on H.R. 3917 and S. 1767 Before the H. Comm. on World War Veterans' Legislation*, 78th Cong. 419 (1944); Adams & Montalto, *supra* note 4, at 109 n.186.

<sup>149</sup> While the DoD is not the final arbiter for determining whether OTH discharged former SMs receive eligibility for disability compensation, there are steps it can take to influence the decision making of the VA.

<sup>150</sup> See VETERANS HEALTH ADMIN., *supra* note 50, at 1 (noting that service members with an “Other than Honorable” discharge characterization may still retain benefits for service-incurred disabilities as long as they are not disqualified by other statutory bars under Title 38).

## 2. Congress is slowly expanding benefits for OTH discharged former SMs

Congress is already expanding eligibility for benefits to OTH discharged former SMs. In 2017, the VA allowed OTH discharged former service members to receive care for mental health emergencies for an initial period of up to ninety days.<sup>151</sup> In 2018, Congress also expanded eligibility for ongoing mental and behavioral health benefits to OTH discharged former SMs who were either on active duty for over 100 days in a combat role or who experienced sexual harassment or sexual assault while serving.<sup>152</sup>

The House of Representatives recently passed the Veteran HOUSE Act of 2020, which expands eligibility for Department of Housing and Urban Development–Veterans Affairs Supportive Housing to OTH discharged former SMs, providing housing assistance to all former SMs who were not dishonorably discharged.<sup>153</sup> While this expansion of benefits does not address disability compensation, it provides another example of Congress slowly granting benefits to OTH discharged former SMs.

While this piecemeal approach by Congress increased accessibility to some VA benefits for some OTH discharged former SMs, a quicker and more uniform approach to providing disability compensation for these individuals is defining eligibility for this benefit outside of the definition of “veteran.”

## 3. Eligibility defined outside of the definition of veteran

Prior to 1958, Congress defined eligibility for each VA benefits program separately (although most still required an other than dishonorable discharge).<sup>154</sup> In 1958, Congress added “other than dishonorable” to the definition of “veteran” and the VA has used that definition since.<sup>155</sup> Congress could return to the pre-1958 eligibility standard and define eligibility for disability compensation outside of the definition of “veteran.” Congress did so in defining eligibility requirements<sup>156</sup> for the Uniformed Services Employment and Reemployment Rights Act (USERRA) and can do the same for disability compensation.<sup>157</sup> Specifically, USERRA states that entitlement to the benefit terminates when there is “[a] separation of such person from

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<sup>151</sup> Hans Petersen, *Other-than-Honorable Discharge?: You’re Still Eligible for VA Mental Health Care*, U.S. DEP’T OF VETERANS AFFS. (May 15, 2019, 11:52 AM), <https://www.blogs.va.gov/VAntage/60349/other-than-honorable-discharge/> [<https://perma.cc/LZY3-S2WS>].

<sup>152</sup> 38 U.S.C. § 1720I(b).

<sup>153</sup> See generally H.R. 2398, 116th Cong. (2019).

<sup>154</sup> Adams & Montalto, *supra* note 4, at 94.

<sup>155</sup> *Id.*

<sup>156</sup> 38 U.S.C. § 4304.

<sup>157</sup> However, Congress should not replicate the eligibility requirements for USERRA because OTH discharged former SMs are restricted from receiving USERRA protections. Marcy L. Karin, *“Other Than Honorable” Discrimination*, 67 CASE W. RESV. L. REV. 135, 157 (2016).

such uniformed service with a dishonorable or bad conduct discharge.”<sup>158</sup> Similarly, Congress established a separate eligibility requirement for the G.I. Bill by requiring an honorable discharge.<sup>159</sup>

Congress recently (in 2018) legislated changes similar to the above proposal by ensuring that certain OTH discharged former SMs received eligibility for mental health treatment. Initial eligibility for the benefit requires discharge or release from service “under a condition that is not honorable but not—(A) a dishonorable discharge; or (B) a discharge by court-martial.”<sup>160</sup> While Congress provided further restrictions for eligibility in this legislation, Congress could use the above language to define eligibility for disability compensation outside of the definition of “veteran.”<sup>161</sup>

#### 4. Change statutory definition of veteran

Finally, the simplest yet most unlikely way to grant all OTH discharged former SMs eligibility for disability compensation is for Congress to change the statutory definition of “veteran” from requiring a discharge “under conditions other than dishonorable”<sup>162</sup> to “under conditions other than bad conduct or dishonorable.” Such a change would grant OTH discharged former SMs eligibility for most VA benefits unless a statutory bar<sup>163</sup> to benefits applied.

Additionally, Congress could remove the statutory bars<sup>164</sup> to benefits or require a bad conduct discharge or dishonorable discharge for them to apply. If Congress removed the statutory bars while also changing the definition of veteran as recommended above, OTH discharged former SMs would attain eligibility for most VA benefits. If Congress only removed the statutory bars to benefits, such a change would not affect the VA’s regulatory

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<sup>158</sup> 38 U.S.C. § 4304(1).

<sup>159</sup> For example, the Montgomery G.I. Bill requires an honorable discharge. *See* U.S. DEP’T OF VETERANS AFFS., THE MONTGOMERY G.I. BILL—ACTIVE DUTY 2 (2011), [https://www.benefits.va.gov/gibill/docs/pamphlets/ch30\\_pamphlet.pdf](https://www.benefits.va.gov/gibill/docs/pamphlets/ch30_pamphlet.pdf) [<https://perma.cc/7K5Q-VDWT>] (“To use [the Montgomery G.I. Bill] after you’re separated from active duty, your discharge must be fully honorable.”).

<sup>160</sup> 38 U.S.C. § 1720I(b)(2).

<sup>161</sup> *See id.* § 1720I (noting several other eligibility requirements outside of a former SM’s discharge status defined under § 1720I(b)(2), such as length of service and deployment status to combat theaters).

<sup>162</sup> *Id.* § 101(2).

<sup>163</sup> *See id.* § 5303(a) (delegating discretionary authority to the Secretary to make determinations on eligibility status for certain classes of former SMs including court-martialed SMs, conscientious objectors, and deserters).

<sup>164</sup> *See, e.g., id.* (delegating authority to remove statutory bars on a discretionary, case-by-case basis).

bars<sup>165</sup> to benefits, thus leaving most OTH discharged former SMs ineligible for disability compensation.<sup>166</sup>

### 5. Potential negative consequences

However, if Congress changed the definition of “veteran” and removed the statutory bars, OTH discharged former SMs would attain eligibility for essentially the same VA benefits as generally (under honorable) discharged former SMs. This could potentially dilute the importance of general discharges, which, in turn, dilutes the importance of honorable service as general discharges are considered “under honorable conditions.”<sup>167</sup> This arguably undermines the purpose of administrative separation policy as it is used to “[m]aintain standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service.”<sup>168</sup> However, the separation regulation specifically contemplates OTH discharged former SMs receiving VA benefits; thus, any impact on “emphasizing the importance of honorable service” would be minimal.<sup>169</sup> The stigma of the OTH discharge would also continue to exhibit the importance of honorable service.

Finally, the more targeted proposals, such as the suggested Congressional exception or defining eligibility outside of the definition of “veteran,” allay such concerns as they maintain the distinction between OTH and general under honorable service characterizations.

While Congress has taken small steps in granting some benefits to OTH discharged former SMs, it is still unlikely Congress will change the definition of “veteran,” create a new eligibility requirement, or grant an exception to eligibility requirements for disability compensation. Therefore, the DoD should take measures to rectify the problem.

### B. DoD

While the DoD does not control eligibility for disability compensation for OTH discharged former SMs, there are steps it can take to increase the

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<sup>165</sup> See 38 C.F.R. § 3.12(d) (2019) (outlining the VA’s own regulatory standards for benefits eligibility which are more numerous and restrictive than the standards required by statute).

<sup>166</sup> As of 2014, the VA has barred benefits—including disability compensation—for 85% of all OTH discharged former SMs applying for VA benefits, most often on the basis of misconduct. VETERANS LEGAL CLINIC, *supra* note 6, at 11, 23.

<sup>167</sup> AR 635-200, *supra* note 11, para. 3-7.b.

<sup>168</sup> *Id.* para. 1-1.b(2).

<sup>169</sup> See *id.* para. 3-6.b (“Discharge under other than honorable conditions may or may not deprive the Soldier of veterans’ benefits administered by the Department of Veterans Affairs; a determination by that agency is required in each case.”).

probability these former SMs receive this benefit. The suggestions below are Army-specific but may apply to sister services.

### 1. Changing the separation regulation

The broadest change the Army could make is changing the definition of OTH as found in the separation regulation<sup>170</sup> to include the language “not dishonorable.” The character of service would be neither honorable nor dishonorable. It would be uncharacterized. This change would place those with OTH discharges within the statutory definition of “veteran” as the characterization is expressly “under conditions other than dishonorable.”<sup>171</sup>

Such a change would grant affected former SMs eligibility for many VA benefits, including disability compensation, unless a statutory bar to benefits applies.<sup>172</sup> This change would not guarantee benefits because the VA could still bar benefits as it is only bound by service characterizations of under honorable conditions.<sup>173</sup> However, the “not dishonorable” language would make it more difficult for the VA to overcome the military service’s character of service determination. Conceivably, the VA would defer to the decision made by a separation board, due to its firsthand knowledge of the circumstances surrounding the separation and character of service determination. Such a change would also decrease the VA’s workload by negating the need for character of service determinations.<sup>174</sup>

However, this suggested resolution raises the same potential issue noted above as changing the definition of “veteran.” Other than honorably discharged former SMs would attain eligibility for essentially the same VA benefits as generally (under honorable) discharged former SMs. This potentially undermines the purpose of administrative separation policy as the policy issued to “[m]aintain standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service.”<sup>175</sup> However, as indicated above, the separation regulation contemplates OTH discharged former SMs receiving VA benefits,<sup>176</sup> thus allaying such concerns. Additionally, the stigma of receiving an OTH would

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<sup>170</sup> See *id.* para. 3-7.c (“A discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct, fraudulent entry, security reasons, or in lieu of trial by court martial . . .”).

<sup>171</sup> See 38 U.S.C. § 101(2) (“The term ‘veteran’ means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”).

<sup>172</sup> See *id.* § 5303(a) (detailing bars to VA benefits).

<sup>173</sup> 38 C.F.R. § 3.12(a) (2019).

<sup>174</sup> See ADJUDICATION MANUAL, *supra* note 20, pt. 3, subpt. v, ch. 1, sec. B, para. 1.e (providing an overview of the character of discharge (COD) determination process).

<sup>175</sup> AR 635-200, *supra* note 11, para. 1-1.b(2).

<sup>176</sup> *Id.* para. 3-7.c.

still apply thus still emphasizing the importance of honorable service, even while receiving VA benefits.

A more restrictive and yet more hands-on change would be the Army requiring separation boards to determine whether to characterize an OTH discharge as dishonorable.<sup>177</sup> This would remove uncertainty regarding eligibility for disability compensation and allow the board to make a more informed decision on characterization. This change would also provide the board a degree of subjectivity in making its determination and allow it to focus on the content of the SM's military record when making the character of service determination without straying from the regulation by considering potential eligibility for disability compensation. However, similar to above, this change would not guarantee benefits because the VA could still bar benefits, as it is only bound by service characterizations of under honorable conditions.<sup>178</sup>

Similar to above, if the board determines the service as not dishonorable, the SM receives eligibility for essentially all VA benefits that a generally (under honorable) discharged SM receives. However, the board would be aware of this consequence when making its recommendation.

Finally, the most restrictive option would be to allow the board to determine whether the former SM retains eligibility for disability compensation. This change would not be as effective because the VA does not sever disability compensation determinations from general VA benefits determinations and Congress does not sever disability compensation from other VA benefits that use the definition of "veteran"<sup>179</sup> for eligibility. While such a change produces the most desirable result, it requires collaboration between the DoD, Congress and the VA, rendering it the least likely change.

## 2. Changing operational policy

An indirect way to decrease the number of OTH discharged former SMs is to rely less on the administrative separation system. This would significantly decrease the number of SMs receiving life sentences of reduced earning capacity through the administrative separation system. The punitive discharge system is the proper forum to determine whether to restrict eligibility for disability compensation.

Recently, concerns regarding the overuse of the administrative separation system rose all the way to the top of the Department of Defense. In an August 2018 memorandum, Secretary of Defense James Mattis sounded the alarm on the overuse of the administrative separation system when he

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<sup>177</sup> See *infra* App. A; App. B.

<sup>178</sup> 38 C.F.R. § 3.12(a) (2019).

<sup>179</sup> See 38 U.S.C. § 101(2) ("The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.").

declared: “Administrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system.”<sup>180</sup> With statistics showing a decrease in the use of the punitive discharge system, Secretary Mattis’s concern was well placed.

According to a *Military Times* analysis, from 2007 through 2017 the total court-martial cases handled by the military services dropped from 6,377 to 1,980, an almost 70% decrease.<sup>181</sup> One of the primary reasons for the drop, according to many military experts,<sup>182</sup> originates from a commander’s preference to use administrative discipline instead of non-judicial punishments or courts-martial proceedings.<sup>183</sup> Other potential reasons for the drop may include better behaved troops and a prioritization of time-consuming sexual assault cases.<sup>184</sup> While concerns regarding an overreliance on administrative discharges are well founded, they are not new.

With the Uniform Code of Military Justice (UCMJ) taking effect in 1951, a trend developed where the military services used administrative discharge actions in lieu of trials by court-martial where a major objective was eliminating an SM from service.<sup>185</sup> At that time, an undesirable (now other than honorable) discharge as assigned by a military service subjected an SM to many of the same consequences as a punitive discharge.<sup>186</sup> These included the potential barring of eligibility for disability compensation.

Even as far back as 1960, concerns arose that the military services used administrative discharges to circumvent the UCMJ.<sup>187</sup> These concerns brought to light the possible abuses of the administrative discharge system—especially concerning misconduct discharges that could be made subject of trial by court-martial.<sup>188</sup>

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<sup>180</sup> Memorandum from Sec’y of Def. to Sec’ys of the Military Depts., subject: Discipline and Lethality (13 Aug. 2018) (on file with author).

<sup>181</sup> Geoff Ziezulewicz, *UCMJ Crackdown: Why Mattis Thinks Commanders Have Gone Soft on Misconduct*, MILITARY TIMES (Sept. 10, 2018), <https://www.militarytimes.com/news/your-military/2018/09/10/ucmj-crackdown-why-mattis-thinks-commanders-have-gone-soft-on-misconduct/> [https://perma.cc/GM62-DTKP].

<sup>182</sup> See *id.* (“Military Times could not independently verify whether administrative separations are eating into the number of traditional punishment proceedings. Those administrative measures are not tracked in the annual UCMJ reports to Congress . . .”).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See Robinson O. Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41, 42–43 (1966) (noting that Congress and the courts were concerned about the use of administrative discharge actions instead of trials by court-martial because UCMJ protections, such as assistance of counsel and opportunities to confront and cross-examine witnesses, are not applicable to such actions).

<sup>186</sup> *Id.* at 44.

<sup>187</sup> Jones, *supra* note 75, at 7.

<sup>188</sup> Everett, *supra* note 185, at 42.

Around that time, Chief Justice Robert E. Quinn of the Court of Military Appeals stated that he was aware of circumstances indicating that military services used the undesirable (now OTH) discharge as a substitute for a court-martial.<sup>189</sup> Before the House Committee on DoD Appropriations in 1961, Chief Judge Quinn remarked that “[a]n undesirable discharge is just as severe a punishment as a bad-conduct discharge . . . . I certainly think the services should not be permitted to give an undesirable discharge except as the result of a court-martial.”<sup>190</sup>

In 1962, Captain (and future Brigadier General) Richard J. Bednar wondered whether “it would appear that the commander who uses administrative procedures in lieu of established judicial machinery violates the spirit of the Code and flies in the face of the very reason for the distinction between administrative and judicial discharges.”<sup>191</sup> In coming to this conclusion, Captain Bednar referenced a 1959 opinion of the Judge Advocate General of the Army:

undesirable discharges are given for a variety of reasons of disparate gravity, that the conduct of the member in many cases does not warrant the stigma and loss of privileges and benefits attached to the undesirable discharge, and that there is a lack of uniformity in administering the procedures and requirements established for the undesirable discharge of a member.<sup>192</sup>

A 1980 GAO report noted that, since 1950, the number of people administratively separated with less than honorable discharges increased relative to those separated through the court-martial process.<sup>193</sup> The report noted that, in 1967, military services used OTH discharges three and a half times more frequently than punitive discharges.<sup>194</sup> Since 1967, and leading up to the report, OTH discharges were used as many as nine times more often than discharges rendered by military courts.<sup>195</sup> The report concluded that administrative discharges were used as a substitute for actions under the UCMJ.<sup>196</sup>

The military services can rectify this problem in two ways: they can recommend more general discharges in lieu of OTH discharges and/or they can send more cases to courts-martial instead of using the administrative separation procedures. While these solutions are much broader than those

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<sup>189</sup> *United States v. Phipps*, 30 C.M.R. 14, 16 (C.M.A. 1960).

<sup>190</sup> *Department of Defense Appropriations for 1961: Hearings Before the Subcomm. of the Comm. on Appropriations, H. of Representatives*, 86th Cong. 561–62 (1961) (statement of Chief Judge Quinn); Bednar, *supra* note 76, at 29.

<sup>191</sup> Bednar, *supra* note 76, at 14.

<sup>192</sup> *Id.* at 29 n.145 (quoting *Department of Defense Appropriations for 1961*, *supra* note 190, at 561–62).

<sup>193</sup> COMPTROLLER GENERAL, *supra* note 132, at 44–47.

<sup>194</sup> *Id.* at 65.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 71.

recommended above, they are ways to prevent OTH discharged former SMs from receiving life sentences of reduced earning capacity. If the conduct is bad enough to warrant a life sentence of reduced earning capacity, the military should use a court-martial. If the conduct does not warrant a life sentence of reduced earning capacity, the conduct warrants a general discharge.

### C. VA

Due to the ambiguous statutory definition of “veteran,”<sup>197</sup> the VA is the final arbiter in determining whether an OTH discharged former SM receives eligibility for VA benefits, including disability compensation. The narrowest approach the VA could take is adding an exclusion for disability compensation to its regulatory bars,<sup>198</sup> similar to how it allows VA treatment for the service-connected disabilities of OTH discharged former SMs.<sup>199</sup> The exclusion would allow the receipt of disability compensation even when a regulatory bar applies. The VA would still exclude all other benefits.

Additionally, while the VA is required to apply the statutory bars to benefits, it could remove or amend<sup>200</sup> its agency developed regulatory bars.<sup>201</sup> As indicated above, most bar to benefit determinations are the result of misconduct,<sup>202</sup> which is a VA developed regulatory bar. The removal of this bar would lead to many more OTH discharged former SMs receiving eligibility for VA benefits, including disability compensation.

## V. RESULTS OF SUCH A CHANGE

The benefits of allowing former SMs with OTH discharges to retain eligibility for disability compensation would be huge and immediate. Allowing SMs to retain this eligibility would remove the life sentence of reduced earning capacity and return the benefit to its original purpose—making former SMs whole by compensating them for in-service injuries.

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<sup>197</sup> See 38 U.S.C. § 101(2) (defining veteran as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”).

<sup>198</sup> See 5 U.S.C. § 553 (stating that § 553 applies “except to the extent that there is involved—(1) a military or foreign affairs function of the United States.”).

<sup>199</sup> See 38 C.F.R. § 3.360 (2019) (“The health-care and related benefits . . . 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 . . .”).

<sup>200</sup> See 5 U.S.C. § 553 (describing notice-and-comment rulemaking procedures).

<sup>201</sup> See 38 C.F.R. § 3.12(d) (2019) (listing offenses considered to have been issued under dishonorable conditions).

<sup>202</sup> VETERANS LEGAL CLINIC, *supra* note 6, at 11, 23.

### A. Separation Boards

Such a change would also allow separation boards to refocus on the purpose of separations—separating SMs for failure to meet required standards of performance or discipline. Such a change is in the best interest of the Army because it would remove the question regarding eligibility for disability compensation upon the recommendation of an OTH discharge.

This allows potentially stellar SMs, such as SSG Harvey in the urinalysis hypothetical above, the opportunity to make fully informed decisions when faced with a potential OTH service characterization. The change would also remove speculative medical determinations from the separation board and ensure that all SMs facing a character of service determination are treated the same regardless of potential to receive disability compensation post-service. In the example above, SSG Goff and SSG Harris, the similarly situated SMs who failed urinalyses, would receive the same character of service despite the fact one had a potentially compensable disability.

### B. Additional Positive Consequences

In addition to these positive outcomes, such a change would also result in many secondary benefits. It would ensure that all OTH discharged former SMs with PTSD and TBI receive disability compensation. It would also decrease the workload for the overworked discharge review boards and boards of correction of military records.

#### 1. SMs with PTSD (including due to military sexual trauma (MST)) and TBI

A particularly sympathetic subset of OTH discharged former SMs are those with PTSD (including PTSD due to MST) and TBI. The government is taking incremental steps to ensure these individuals receive proper VA benefits, including disability compensation.

The first DoD effort in recent memory to allow access to VA benefits, including disability compensation, for these individuals was the 2014 Hagel Memorandum<sup>203</sup> which directed discharge review boards<sup>204</sup> to provide “liberal consideration” in upgrade applications where service records contained evidence of PTSD.<sup>205</sup> The memorandum directed boards to use

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<sup>203</sup> Memorandum from Sec’y of Def. to Sec’ys of the Mil. Dep’ts, subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (3 Sept. 2014) [hereinafter Hagel Memo].

<sup>204</sup> See 10 U.S.C. § 1553 (describing the establishment and function of a board of review).

<sup>205</sup> Hagel Memo, *supra* note 203.

evidence of PTSD as a potential mitigating factor when analyzing misconduct and determining whether to upgrade a discharge.<sup>206</sup>

A subsequent memorandum, the Kurta Memorandum, directed the expanded use of liberal consideration to cases involving TBI and/or sexual assault.<sup>207</sup> Congress became involved in the effort to provide benefits to these former SMs with the passage of the National Defense Authorization Act of 2017, which adopted the “liberal consideration” standard set forth in the Hagel Memorandum.<sup>208</sup>

While valiant, these efforts still fall short in granting benefits to this specific subset of former SMs. While the Kurta Memorandum lists various sources that applicants can use to evidence in service PTSD, TBI, and/or MST,<sup>209</sup> there are still cases where no documentary evidence exists.<sup>210</sup> Evidence may be difficult to produce because the former SM may not have reported the assault in-service for fear of retaliation, shame, or losing unit cohesion, among other reasons.<sup>211</sup> Most military sexual violence goes unreported,<sup>212</sup> making it difficult to provide such evidence.

Additionally, as noted below, the process to apply for a discharge upgrade is long and tedious. Many former SMs may not be aware of the “liberal consideration” standard.<sup>213</sup> They may need benefits immediately and not have the time, knowhow, or resources to petition a discharge review

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<sup>206</sup> *Id.*

<sup>207</sup> Memorandum from Under Sec’y of Def. for Pers. and Readiness to Secy’s of the Mil. Dep’ts, subject: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (25 Aug. 2017) [hereinafter Kurta Memo].

<sup>208</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 4351 (2016).

<sup>209</sup> See Kurta Memo, *supra* note 207 (providing a list of sources from which evidence may come, including law enforcement authorities, rape crisis centers, mental health counseling centers, and tests for sexually transmitted diseases).

<sup>210</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-260, ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS 1 (2017) (“PTSD, TBI, and other mental and physical conditions can go unrecognized and unacknowledged by the military, family members, and society in general.”).

<sup>211</sup> Alexandra Besso, *Veterans as Victims of Military Sexual Assault: Unequal Access to PTSD Disability Benefits and Judicial Remedies*, 23 BUFF. J. GENDER, L. & SOC. POL’Y 73, 81 (2015).

<sup>212</sup> ALI R. TAYYEB & JENNIFER GREENBURG, WATSON INST. FOR INT’L & PUB. AFFS., “BAD PAPERS”: THE INVISIBLE AND INCREASING COSTS OF WAR FOR EXCLUDED VETERANS 12 (2017).

<sup>213</sup> SUNDIATA SIDIBE & FRANCISCO UNGER, VETERANS LEGAL SERVS. CLINIC, YALE L. SCH., UNFINISHED BUSINESS: CORRECTING “BAD PAPER” FOR VETERANS WITH PTSD: THE DEFENSE DEPARTMENT’S ADJUDICATION OF DISCHARGE UPGRADE APPLICATIONS ONE YEAR SINCE ITS SEPTEMBER 2014 PTSD DIRECTIVE 8 (2015), <https://law.yale.edu/sites/default/files/documents/pdf/unfinishedbusiness.pdf> [<https://perma.cc/CF6J-W2UR>].

board. Specifically, when a former SM makes a mental health mitigation argument, they must provide specific medical evidence in order to prevail.<sup>214</sup>

Presumably, the principal motivation for many of these discharge upgrade applicants is the receipt of disability compensation.<sup>215</sup> The only way to guarantee that all of these former SMs receive eligibility for disability compensation is to grant eligibility for all OTH discharged former SMs. This ensures that no former SMs with PTSD and/or TBI fall through the cracks and do not receive disability compensation. This also saves these former SMs from having to go through the time consuming and tedious process of requesting a discharge upgrade from a discharge review board or board of correction of military records.

Case studies provided by The Veterans Consortium Pro Bono Program (TVC) illustrate the need to allow OTH discharged former SMs to retain eligibility for disability compensation. In one case, a Marine Corps former SM received a Purple Heart for his service in Vietnam.<sup>216</sup> Upon return from Vietnam, while suffering from severe PTSD, he went AWOL five times, and received an OTH in lieu of court-martial.<sup>217</sup> In 2012, the SM applied for a discharge upgrade and received a denial.<sup>218</sup> Eventually, forty-nine years after leaving service, with the expert assistance of the TVC, the Board of Corrections of Naval Records (BCNR) upgraded his discharge from OTH to General, based upon his PTSD.<sup>219</sup> He is now eligible for disability compensation for his PTSD. While this is a success story, it must be noted that it took forty-nine years for the former SM (now veteran) to receive this eligibility and he only achieved it with the expert assistance of the TVC. He missed out on benefits to which he was entitled for forty-nine years. A change in policy would automatically render former SMs such as this eligible for disability compensation and remove the need to find representation, apply for the upgrade, and wait for a determination.

Another TVC case involved a Navy Sailor who was harassed and hazed by fellow shipmates while in service. A ship psychologist diagnosed him with adjustment disorder and noted he was depressed. The Sailor

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<sup>214</sup> In order to be successful, former SMs must prove they have a condition, that it existed during service, and that the condition was a mitigating factor in the misconduct. Interview with Danica Gonzalves, Program Director, Discharge Upgrade Program, The Veterans Consortium Pro Bono Program in Wash., D.C. (Dec. 15, 2020) [hereinafter Gonzalves Interview].

<sup>215</sup> VA health care should be considered inextricably intertwined with disability compensation. There are already programs allowing for the treatment of mental health condition for OTH discharged former SMs, including 38 C.F.R § 3.360, which allows for the treatment of service-connected disabilities as long as a statutory bar to benefits does not exist.

<sup>216</sup> Gonzalves Interview, *supra* note 214.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

subsequently attempted suicide by jumping off the hanger deck. The Navy charged him with a serious offense and discharged him with an OTH. After service, the Sailor experienced homelessness. Eventually, with the help of the TVC, the BCNR upgraded his discharge to honorable, which renders him eligible for disability compensation. While, again, this is a success story, allowing automatic eligibility for disability compensation would have removed the need to find representation, apply for the upgrade, and wait for a determination. He would have been eligible for benefits to which he was entitled immediately after discharge; thus, potentially preventing his descent into homelessness.

## 2. Decrease workload at Discharge Review Boards

There are two methods to upgrade a discharge in the Army: applying to the Army Discharge Review Board (ADRB) or to the Army Board for Corrections of Military Records (AMCMR). The application process for both can be tedious and time consuming. Each has its own jurisdictional requirements.

### a. Army Discharge Review Board

One method OTH discharged former SMs can use to obtain disability compensation benefits is to petition a discharge review board for a discharge upgrade. Specifically, for the Army, such a request must be made at the ADRB.<sup>220</sup> The ADRB reviews discharges that are less than fifteen years old and that are not the result of a discharge by general court-martial.<sup>221</sup> They review and make decisions based upon propriety and equity.<sup>222</sup> If the Board upgrades the former SM's discharge from an OTH to an honorable or

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<sup>220</sup> See ARMY REV. BDS. AGENCY, *Army Discharge Review Board: Frequently Asked Questions*, U.S. DEP'T OF ARMY [hereinafter ADRB FAQ], <https://arba.army.pentagon.mil/adrb-faq.html> [<https://perma.cc/AR8C-DULR>] (last visited Apr. 15, 2020) (“The Army Discharge Review Board is authorized to review the character, reason and authority of a discharge of any service member discharged from active military service within the past 15 years. The authority for ADRB review comes from Public Law 95-126 and Title 10 U.S.C. [§] 1553. The Department of Defense Directive 1332.28, Discharge Review Board Procedures and Standards, establishes uniform policies and procedures and standards for review of discharges and dismissals. Army Regulation 15-180, Army Discharge Review Board, governs the actions and composition of the ADRB.”).

<sup>221</sup> ARMY REV. BDS. AGENCY, *Army Discharge Review Board: Mission Statement and Overview*, U.S. DEP'T OF ARMY, <https://arba.army.pentagon.mil/adrb-overview.html> [<https://perma.cc/9SKE-SRNQ>] (last visited Apr. 15, 2020).

<sup>222</sup> *Id.*

general,<sup>223</sup> the former SM achieves eligibility for VA benefits, including disability compensation, unless a statutory bar<sup>224</sup> to benefits still applies. According to the ADRB website, it may take up to 12 months to receive a decision on an application.<sup>225</sup> If denied a discharge upgrade, a former SM may request a personal appearance review or apply to the ABCMR.<sup>226</sup>

### **b. The Army Board for Correction of Military Records**

The ABCMR is the highest level of review for record correction, including discharge upgrades, within the Army.<sup>227</sup> If a former SM was discharged over 15 years ago or by result of a general court martial, they must apply for an upgrade with the ABCMR.<sup>228</sup> The ABCMR reviews applications and determines whether there was error or injustice in a military record.<sup>229</sup> If the Board upgrades the former SM's discharge from an OTH to an honorable or general,<sup>230</sup>

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<sup>223</sup> See ADRB FAQ, *supra* note 220 (“The Army Discharge Review Board (ADRB) may decide to upgrade the discharge characterization or determine that the current characterization is proper and equitable.”).

<sup>224</sup> See 38 U.S.C. § 5303(a) (“The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person 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, or as a deserter, or 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 unauthorized absence, or of an officer by the acceptance of such officer’s resignation for the good of the service, or (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10.”). If the person was insane at the time of the offense leading to the separation from service, the person retains eligibility for VA benefits. 38 U.S.C. § 5303(b).

<sup>225</sup> ADRB FAQ, *supra* note 220.

<sup>226</sup> *Id.*

<sup>227</sup> ARMY REV. BDS. AGENCY, *The Army Board for Correction of Military Records*, U.S. DEP’T OF ARMY, <https://arba.army.pentagon.mil/abcmr-overview.html> [<https://perma.cc/B4WB-AQFR>] (last visited Apr. 15, 2020).

<sup>228</sup> ADRB FAQ, *supra* note 220.

<sup>229</sup> U.S. DEP’T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS para. 1-8.a (31 Mar. 2006).

<sup>230</sup> See ADRB FAQ, *supra* note 220 (“The Army Discharge Review Board (ADRB) may decide to upgrade the discharge characterization or determine that the current characterization is proper and equitable.”).

the former SM achieves eligibility for VA benefits, including disability compensation, unless a statutory bar<sup>231</sup> to benefits still applies.

### c. Discharge review statistics

Discharge review boards are slow and overworked. As of September 2018, over 26,000 cases were pending at discharge review boards for over ten months with some for over 450 days.<sup>232</sup> The Army predicted it would take at least six years to eliminate the backlog.<sup>233</sup> Numerous legal clinics,<sup>234</sup> private attorneys,<sup>235</sup> and pro bono organizations<sup>236</sup> run programs that exist for

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<sup>231</sup> See 38 U.S.C. § 5303(a) (“The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person 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, or as a deserter, or 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 unauthorized absence, or of an officer by the acceptance of such officer’s resignation for the good of the service, or (except as provided in subsection (c)) the discharge of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10.”). If the person was insane at the time of the offense leading to the separation from service, the person retains eligibility for VA benefits. 38 U.S.C. § 5303(b).

<sup>232</sup> Leo Shane III, *Can DoD Fix the Painfully Long Wait for Reviews of Bad-Paper Discharges?*, MILITARY TIMES (Sept. 28, 2018), <https://www.militarytimes.com/news/pentagon-congress/2018/09/28/lawmakers-eye-an-overhaul-of-military-review-boards-system/> [<https://perma.cc/4KJM-3MRF>]. Former Congressional Representative Michael Coffman noted: “In some cases, veterans have waited 450 days or more for action on their applications.” *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> For example, Harvard and Wake Forest, among many other law schools, have law clinics that provide discharge upgrade assistance. *Veterans Law and Disability Benefits Clinic*, HARV. L. SCH., <https://hls.harvard.edu/dept/clinical/clinics/veterans-law-and-disability-benefits-clinic-lsc/> [<https://perma.cc/32NG-AFKG>] (last visited Apr. 16, 2020); *Veterans Legal Clinic*, WAKE FOREST L., <http://veteransclinic.law.wfu.edu/practice-areas/> [<https://perma.cc/F98X-A63M>] (last visited Apr. 2, 2021).

<sup>235</sup> A quick internet search provides many hits for discharge upgrade attorneys (this paper does not wish to endorse any).

<sup>236</sup> For example, the Veterans Consortium Pro Bono Program and the National Veterans Legal Services Program provide assistance for SMs seeking discharge upgrades. *Get Help with a Discharge Upgrade*, THE VETERANS CONSORTIUM PRO BONO PROGRAM, <https://www.vetsprobono.org/dischargeupgrade/> [<https://perma.cc/K9RF-TPKX>] (last visited Apr. 15, 2020); *Request Assistance with Discharge Upgrades for Veterans from All Eras*, NAT’L VETERANS LEGAL SERV. PROGRAM, <https://www.nvlsp.org/what-we-do/lawyers->

the sole purpose of upgrading discharges in order to establish eligibility for disability compensation. Presumably, there would be fewer applicants for discharge upgrades if OTH discharged former SMs automatically received eligibility for disability compensation. This would decrease the workload and allow quicker dispositions for other applications, thus benefitting the Army and other current and former SMs who may bring petitions before these bodies.

### C. Potential Negative Consequences

As discussed extensively above, the Army separation regulation states, “Discharge under other than honorable conditions may or may not deprive the Soldier of veterans’ benefits.”<sup>237</sup> Therefore, the regulation contemplates OTH discharged former SMs receiving VA benefits. Since the regulation contemplates the receipt of such benefits, any change in OTH policy that automatically grants access to the benefits would minimally affect the military services.

Even with the regulation specifically contemplating OTH discharged former SMs receiving VA benefits, concerns may arise regarding the potential dilution of the importance of honorable service. The best way to allay this concern would be to adopt the narrower proposals that provide an exception for disability compensation, define eligibility for disability compensation outside of “veteran,”<sup>238</sup> or adopt some combination of those measures. Such proposals would allow the former SM to receive only disability compensation while remaining ineligible for additional VA benefits.

However, even the broader suggestions that would change the definition of “veteran”<sup>239</sup>—or allow the DoD to determine whether a former SM meets the definition of “veteran”—still maintain the importance of honorable service. While these suggestions would allow an OTH discharged former SM to establish eligibility for essentially the same VA benefits as a generally discharged former SM, the stigma of the OTH discharge would still attach. Most importantly, as addressed above,<sup>240</sup> any negative impact in the expanded eligibility for VA benefits is negated by the fact that the regulation specifically contemplates such a result.

Finally, the principal negative impact on the Army of such as change would be a possible unfavorable effect on good order and discipline;

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serving-warriors/assistance-with-discharge-upgrades-for-veterans-from-all-eras/ [https://perma.cc/B5LT-N4H5] (last visited Apr. 15, 2020).

<sup>237</sup>AR 635-200, *supra* note 11, para. 3-6.b.

<sup>238</sup> See 38 U.S.C. § 101(2) (“The term ‘veteran’ means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”).

<sup>239</sup> *Id.*

<sup>240</sup> See discussion *supra* Section IV.A.5.

however, this theory requires the potential loss of future disability compensation (as discussed above) to serve as an adequate enough deterrent to prevent misconduct. There is no evidence to support such a belief. Most likely, the deterrent effect of the OTH discharge is the loss of a job and the scarlet letter of an OTH discharge, not the loss of disability compensation. SMs may not know whether they will need it in the future and, regardless, the VA makes the ultimate benefits determination after the discharge.

## VI. PUBLIC SENTIMENT PERSPECTIVE

Returning to the theme of the opening quote, “[s]oldiers would rather some man got more than he deserves than that any soldier should run a chance of getting less than he deserves,”<sup>241</sup> public sentiment—as exhibited through recent congressional legislation—and public response dictates that former SMs receive eligibility for disability compensation.

In March 2017, then-Secretary of Veterans Affairs David J. Shulkin, expressed intent to remove the administrative barriers that prevent OTH discharged former SMs from receiving VA mental health care.<sup>242</sup> Although this may seem insignificant, it was the first time in VA history that the integration of OTH discharged former SMs into the VA system was proposed.<sup>243</sup> Subsequent to his statement, the VA began expanded mental health treatment for OTH discharged former SMs.<sup>244</sup>

Congress already requires the VA to allow OTH discharged former SMs to receive free VA treatment for service-connected disabilities.<sup>245</sup> Congress also allows VA mental health treatment to OTH discharged former SMs without service-connection in certain circumstances.<sup>246</sup> Pending Congressional legislation proposes providing benefits related to homelessness to OTH discharged former SMs.<sup>247</sup>

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<sup>241</sup> H.R. REP. NO. 79-1510, at 9 (1946).

<sup>242</sup> Cynthia M.A. Geppert, *Bad Paper, Good Decisions: Providing Mental Health Care to All Veterans Regardless of Discharge Status*, FED. PRAC., May 2017, at 4, 4–5, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6370434/> [<https://perma.cc/P86U-KSQN>].

<sup>243</sup> *Id.*

<sup>244</sup> OFF. OF PUB. & INTERGOVERNMENTAL AFFS., *VA Secretary Formalizes Expansion of Emergency Mental Health Care to Former Service Members With Other-Than-Honorable Discharges*, U.S. DEP’T OF VETERANS AFFS. (Jun. 27, 2017), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2923> [<https://perma.cc/4YZR-XWDF>].

<sup>245</sup> See 38 C.F.R. § 3.360(a) (2019) (authorizing healthcare benefits “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.”).

<sup>246</sup> See 38 U.S.C. § 1720I (establishing mental and behavioral health care for SMs who were not dishonorably discharged or discharged by court-martial).

<sup>247</sup> See generally Veteran HOUSE Act, H.R. 2398, 116th Cong. (2019).

No public or military uproar exists regarding these policies because they are the fair and right things to do. In creating the policy allowing treatment for service-connected disabilities, Congress recognized the inherent unfairness in injured former SMs not receiving treatment due to an OTH discharge. As described above, recent Congressional legislation trends toward extending eligibility for VA treatment to OTH discharged former SMs. The logical extension of these policies is allowing OTH discharged former SMs to retain eligibility for disability compensation.

Additional issues in the public consciousness include veteran homelessness and veteran suicide. Non-routinely discharged former SMs are more likely to be homeless.<sup>248</sup> Veterans with OTH discharges make up 3% of the veteran population—but they compose 15% of the homeless veteran population. About 51% of homeless veterans have disabilities.<sup>249</sup> A 2015 study concluded that discharges that were not honorable and early separation from military service were suicide risk factors.<sup>250</sup> Allowing eligibility for disability compensation, thus potentially creating a steady stream of income, may go a long way toward resolving these issues.<sup>251</sup>

The recommendation in this paper goes beyond eligibility for disability compensation for minor conditions such as a dislocated shoulder or torn knee muscle. Other than honorably discharged SMs may become afflicted with a disability or disease that will eventually kill them and their families will likely receive no compensation<sup>252</sup> due to the OTH discharge.

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<sup>248</sup> Geppert, *supra* note 242, at 5.

<sup>249</sup> U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF VETERANS AFFS., VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 9 (2010), <https://www.va.gov/HOMELESS/docs/2010AHARVeteransReport.pdf> [<https://perma.cc/VMZ8-EG2U>].

<sup>250</sup> Mark A. Reger, Derek J. Smolenski, Nancy A. Skopp, Melinda J. Metzger-Abamukang, Han K. Kang, Tim A. Bullman, Sondra Perdue & Gregory A. Gahm, *Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the US Military*, 72 J. AM. MED. ASS'N PSYCHIATRY 561, 566–67 (2015).

<sup>251</sup> See Eric B. Elbogen, Megan Lanier, Ann Elizabeth Montgomery, Susan Strickland, H. Ryan Wagner & Jack Tsai, *Financial Strain and Suicide Attempts in a Nationally Representative Sample of US Adults*, 189 AM. J. EPIDEMIOLOGY 1266, 1273 (2020) ("The present findings demonstrate a significant association between cumulative financial strain and increased suicide risk, indicating that socioeconomic factors shape a large part of mental health's connection with suicide.").

<sup>252</sup> *About VA DIC for Spouses, Dependents, and Parents*, U.S. DEP'T OF VETERANS AFFS. (Feb. 18, 2021), <https://www.va.gov/disability/dependency-indemnity-compensation/> [<https://perma.cc/2736-BBSG>] ("If you're the surviving spouse, child, or parent of a service member who died in the line of duty, or the survivor of a Veteran who died from a service-related injury or illness, you may be able to get a tax-free monetary benefit called VA Dependency and Indemnity Compensation (VA DIC).").

Agent Orange<sup>253</sup> and Camp Lejeune’s drinking water contamination<sup>254</sup> presumptively cause numerous conditions that lead to death, often many years after leaving service. Exposure to burn pits has been shown to cause health conditions<sup>255</sup> that lead to death. If an OTH discharged former SM becomes afflicted with any these conditions, it is likely they will not be eligible to receive disability compensation and their families will not receive death benefits even though exposure occurred solely due to military service. Since most of these conditions manifest many years after service, it is highly unlikely a separation board would be able to account for these conditions when making a characterization determination and, as explained above, there are independent reasons not to do so.

### CONCLUSION

All OTH discharged former SMs should retain eligibility for disability compensation. Allowing retention would remove the life sentence of reduced earning capacity and return the benefit to its original purpose—making former SMs whole by compensating them for in-service injuries. Such a change would return separation policy to its original purpose by removing this “punishment” and allowing administrative separation board members and SMs to make informed recommendations and choices while participating in separation boards. It would also ensure that those discharged for similar reasons but who receive different characterizations of service, as detailed in the GAO report,<sup>256</sup> retain the same eligibility for disability compensation.

Finally, allowing all OTH discharged former SMs to retain eligibility for disability compensation will ensure all those discharged that have PTSD (including due to MST) and TBI receive the benefits they deserve. Conceivably, it would also decrease the workload at the overworked discharge review and board of military corrections. Such a policy is in line with public opinion and furthers the measures already taken by Congress.

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<sup>253</sup> *Public Health: Veterans' Diseases Associated with Agent Orange*, U.S. DEP’T OF VETERANS AFFS., <https://www.publichealth.va.gov/exposures/agentorange/conditions/> [https://perma.cc/6VKQ-AJBK] (last visited Apr. 15, 2020).

<sup>254</sup> *Camp Lejeune Water Contamination Health Issues*, *supra* note 88.

<sup>255</sup> See *Public Health: Airborne Hazards and Burn Pit Exposures*, *supra* note 49 (advising that prolonged exposure to munitions burning sites could cause greater risk for long-term health conditions).

<sup>256</sup> COMPTROLLER GENERAL, *supra* note 132.

**APPENDIX A<sup>257</sup>: VERBATIM FINDINGS AND RECOMMENDATIONS (NOT DISHONORABLE).**

**VERBATIM FINDINGS AND RECOMMENDATIONS**

FINDINGS: In the board proceedings concerning Private (E2) John A. Doe, 000-00-0000, the board carefully considered the evidence before it and finds:

1. Private Doe is undesirable for further retention in the military service because of the following misconduct:
  - a. Frequent incidents of a discreditable nature with military authorities.
  - b. Habitual shirking.
2. His rehabilitation is not deemed possible.

**RECOMMENDATIONS:**

In view of the findings, the board recommends that Private Doe be discharged from the Service because of misconduct under other than honorable conditions. The character of service should be considered neither honorable nor dishonorable.

*(President)*

*(Member)*

*(Recorder)*

**APPENDIX B: VERBATIM FINDINGS AND RECOMMENDATIONS (DISHONORABLE)**

**VERBATIM FINDINGS AND RECOMMENDATIONS**

FINDINGS: In the board proceedings concerning Private (E2) John A. Doe, 000-00-0000, the board carefully considered the evidence before it and finds:

1. Private Doe is undesirable for further retention in the military service because of the following misconduct:
  - a. Frequent incidents of a discreditable nature with military authorities.

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<sup>257</sup> These appendices represent altered recommended findings instructions. For the original findings see AR 635-200, *supra* note 11, fig. B-1.

b. Habitual shirking.

2. His rehabilitation is not deemed possible.

RECOMMENDATIONS:

In view of the findings, the board recommends that Private Doe be discharged from the Service because of misconduct under other than honorable conditions. The character of service should be considered dishonorable.

*(President)*

*(Member)*

*(Recorder)*