The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

September 8, 2020

Director, Office of Regulation Policy and Management (00REG)
U.S. Department of Veterans Affairs
810 Vermont Avenue NW, Room 1064
Washington, DC 20420

Re: Comment of National Veterans Council for Legal Redress and Connecticut Veterans Legal Center on Proposed Rule to Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, RIN 2900-AQ95

Dear Director:

On behalf of the National Veterans Council for Legal Redress and the Connecticut Veterans Legal Center, we write to strongly object to the Department of Veterans Affairs' proposed changes to the character of discharge regulations at 38 C.F.R. § 3.12. The Proposed Rule continues VA's unlawful policy of presumptively excluding veterans from basic benefits and services to which they are entitled by law and which Congress expressly granted to them. Not only does the Proposed Rule contravene the governing statute, contradict legislative intent, and violate basic principles of administrative law, it worsens an already unworkable administrative system that imposes excessive burdens on veterans and VA adjudicators alike.

Veterans who are in fact eligible for full VA benefits often wait years—and in some cases decades—in order to access those benefits, denying them and their families the support they deserve. For this part of the veterans population, who already have significantly higher rates of suicide and homelessness, denying or delaying access to care puts their very lives at risk. And if a veteran with a less-than-honorable discharge does die, VA's exclusionary rules prevent the veteran from being laid to rest with the honor of a military burial.

To bring its regulation into compliance with the law, and to prevent implementation of an utterly inscrutable regulatory scheme, VA must fundamentally overhaul the rule, starting with a clean slate. The new rule should presume eligibility for all veterans with administrative discharges—including those with Other Than Honorable discharge characterizations—and exclude only those former servicemembers who should have received or actually did receive a Dishonorable discharge.

WHO WE ARE

The National Veterans Council for Legal Redress (NVCLR) is a Connecticut-based veterans service organization that has been impacting veterans' lives since 1982. NVCLR engages in legislative advocacy, public education, and impact litigation to promote the respect and acceptance of all who served our country in uniform, including veterans with less-than-honorable discharges and veterans involved with the criminal justice system, and to secure much-needed benefits for those veterans and their families. NVCLR operates a referral network to direct veterans to legal assistance and social services which can help them secure housing, employment, food assistance,

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medical care, and education and disability benefits. NVCLR is particularly focused on the issue of discharge upgrades and state and federal veterans benefits access for veterans with less-than-honorable discharges. In 2014, NVCLR filed a class action lawsuit, along with Vietnam Veterans of America, seeking to provide an avenue for veterans who may have been discharged as a result of Post-Traumatic Stress Disorder (PTSD) to have their discharges reconsidered, which led to the issuance of the Hagel Memorandum.[1] NVCLR also provides training, resources, and technical assistance to other veterans service organizations.

The Connecticut Veterans Legal Center (CVLC) was founded in 2009 as the United States' first medical-legal partnership with the Veterans Health Administration. CVLC works with clinicians to help veterans recovering from homelessness and mental illness overcome legal barriers to housing, healthcare, and income. Much of CVLC's practice focuses on veterans who unjustly received less-than-honorable discharges, providing them representation both before the military review boards as well as VA. CVLC is nationally recognized for its work on discharge upgrades and character of discharge determinations (CODs), including co-authoring a legal treatise on discharge upgrade practice and regularly presenting at national trainings on discharge upgrades and CODs.

COMMENT ON THE PROPOSED RULE

In 1943, President Roosevelt called on Congress to create a plan for the end of World War II: "We must, this time, have plans ready" so that veterans are not "demobilized into an environment of inflation and unemployment, to a place on a bread line, or on a corner selling apples."[2] Congress, along with many Veterans Service Organizations, took up that task to create a generous set of benefits that would allow nearly all returning servicemembers to get the care and support they needed to reintegrate into civilian life. In furtherance of that goal, the initial drafters of what became the Servicemen's Readjustment Act of 1944—commonly known as the G.I. Bill of Rights—and the lawmakers who supported and enacted it wanted to ensure that the vast majority of veterans would be able to access these benefits. They therefore chose an eligibility standard that required only a discharge under "other than dishonorable" conditions. The "other than dishonorable" standard was deliberately less restrictive than the standards of prior laws, and Congress expressly designed it to include veterans who received less-than-honorable discharges. As Harry Colmery, the initial drafter of the law, stated:

> I was going to comment on the language "under conditions other than dishonorable." Frankly, we use it because we are seeking to protect the veteran against injustice . . . . We do not like the words "under honorable conditions"

[1] Secretary of Defense Chuck Hagel, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests of Veterans Claiming Post Traumatic Stress Disorder (Sep. 3, 2014), available at https://archive.defense.gov/news/osd009883-14.pdf.

[2] Franklin D. Roosevelt, U.S. President, Fireside Chat on the Progress of the War and Plans for Peace (July 28, 1943).

> because we are trying to give the veteran the benefit of the doubt, because we think he is entitled to it.[3]

Through the 1944 G.I. Bill of Rights, Congress imposed boundaries on whether and how VA can exclude former servicemembers from receiving veteran benefits. Congress granted VA the adjudicative authority to decide whether an individual veteran was separated under "dishonorable conditions," and thus disqualified. However, Congress intended that VA's authority extend only to correcting the rare circumstance where a servicemember should have, but did not, receive a Dishonorable discharge. The text of the 1944 G.I. Bill of Rights, its legislative history, and the caselaw interpreting it all make clear that Congress strictly limited VA's substantive and procedural standards to the narrow question of whether the conduct that led to a servicemember's discharge would merit a Dishonorable discharge.

The Proposed Rule perpetuates VA's longstanding misinterpretation of the governing statute by barring many more veterans from benefits than Congress intended where the veterans' service was not dishonorable. This Comment will focus on three key issues with the Proposed Rule:

First, the Proposed Rule's regulatory bars, like those in the current regulation, have their origin in legal language that pre-dates the 1944 G.I. Bill—language which Congress expressly rejected when enacting that statute. Any rule based on the pre-G.I. Bill law that Congress repudiated violates the governing statute and fundamental principles of administrative law.

Second, the Proposed Rule further extends and expands the burdensome Character of Discharge (COD) administrative adjudication process, requiring adjudicators to conduct a wide-ranging and highly discretionary review of servicemembers' records, and to come to their own independent conclusions about servicemembers' misconduct, mitigating factors, and their overall "benefit" to the nation. This additional scrutiny will serve only to complicate an already onerous, time-consuming, and costly process. The discretionary nature of the standards of the Proposed Rule, combined with the potential unavailability of some necessary records, will lead to inconsistent and unfair results for veterans with less-than-honorable discharges.

Third, the Proposed Rule continues VA's unlawful practice of presumptively excluding veterans who received Other Than Honorable discharges, rather than giving them the benefit of the doubt as Congress intended.

VA can—and should—avoid all these issues by adopting a Rule that would presume eligibility for all former servicemembers who received administrative discharges, including Other Than Honorable discharges, and remove the existing regulatory bars because of their failure to accurately and faithfully identify misconduct that did lead or should have led to a Dishonorable discharge.

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[3] World War Veterans' Legislation: Hearings on H.R. 3917 and S. 1767 Before the H. Comm. on World War Veterans' Legislation, 78th Cong. 418 (1944).

I. VA cannot impose regulatory bars that pre-existed the 1944 G.I. Bill and that Congress therefore rejected in establishing the "other than dishonorable" eligibility standard

The regulatory bars in the current rule and Proposed Rule have their origin in a law that pre-existed the 1944 G.I. Bill of Rights, and Congress both rejected and overwrote that pre-existing law in enacting the 1944 G.I. Bill and its "other than dishonorable" eligibility standard. VA's reinstatement of those standards in regulation exceeds its authority and violates fundamental principles of administrative law.

A. The current and proposed regulatory bars originate from a pre-1944 law that Congress expressly rejected in enacting the G.I. Bill of Rights

In the century before the passage of the 1944 G.I. Bill, Congress had experimented with a variety of standards for veterans benefits eligibility. These standards included requiring a fully Honorable discharge; barring veterans who received Bad Conduct or Dishonorable discharges; and delegating authority to VA to choose whichever standard it deemed fit, with which authority VA chose to exclude all veterans who did not receive an Honorable discharge.[4] Most relevant here, some pre-1944 statutes expressly excluded veterans who had been discharged for "mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he was found guilty by court-martial, or that he was an alien, conscientious objector who refused to perform military duty or to wear the uniform, or a deserter."[5]

Congress was aware of these varying standards when considering the text of the 1944 G.I. Bill. And Congress chose to depart from its prior practices and to establish a more generous eligibility standard—except insofar as it expressly chose to codify some portions of the enumerated bars in 38 U.S.C. § 5303: the statutory bars for discharge as a "conscientious objector" or "alien" (with additional narrowing criteria) or as a "deserter." Congress did not, however, codify the earlier bars for moral turpitude, willful and persistent misconduct, mutiny, treason, or spying of which the veteran had been convicted by court-martial.

Yet, after the passage of the 1944 G.I. Bill, VA reinstated those pre-existing exclusionary bars in even broader form, no longer requiring a conviction by court-martial. These are the bars that continue to exist in current regulation and the Proposed Rule.

B. The regulatory bars in the current regulation and Proposed Rule violate the governing statute and contravene principles of administrative law

In interpreting and implementing a law passed by Congress, VA must be faithful to the text, structure, and intent of the statute.[6] While VA has general rulemaking authority under 38 U.S.C.

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[4] See 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, 82-83 (2017).

[5] See, e.g., Act of June 25, 1918, ch. 104, 40 Stat. 609, amended by World War Veterans' Act, ch. 320, 43 Stat. 607 (1924).

[6] See Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134, 56 S. Ct. 397, 400 (1936) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed

§ 501(a), that provision "does not authorize the DVA to promulgate regulations that are contrary to congressional enactments."[7] To create a valid regulation, VA must not, for example, view the text of a single statute in isolation but rather must consider the text in the context of previously (and later) enacted statutes.[8] An agency also cannot adopt an interpretation of a statute that renders any element of that statute superfluous or that provides for a different outcome for an issue that Congress specifically addressed elsewhere in statute.[9]

By reinstating bars to benefits that Congress expressly rejected, VA violated these fundamental principles of administrative law and statutory interpretation, and thus exceeded its authority. Congress has the inherent constitutional authority to change the law, and separation of powers demands that executive agencies and courts alike comply with those changes.[10] In addition, one of the most basic tenets of administrative law is that Congress delegates authority to an agency to regulate, which means an agency may not create a regulation outside the bounds of that delegation.[11] Thus, when Congress changes a law, it is illegal for the agency to fail to change its regulations in the face of the changed or repealed law.[12] The 1944 Congress clearly decided that some of the bars from prior legislation—relating to conscientious objectors, aliens, and deserters—should remain bars, albeit in narrower form; and that the remaining bars—including for moral turpitude and willful and persistent conduct—should be discarded. VA, in response, decided not just to reinstate those bars that Congress repudiated but in fact expanded them by removing the requirement of a court-martial conviction. Thus, with the current § 3.12 and now with its Proposed Rule, VA contravenes the statute and congressional intent.

Because the regulatory bars for willful and persistent misconduct and for moral turpitude exceed VA's authority and violate the law, VA must remove them from its Final Rule. If VA chooses to impose regulatory bars—which it should not, for reasons discussed in Section II—it must not do so using a framework or text that Congress rejected, but instead must start from scratch and formulate entirely new standards that comport with the statute.

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by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.").

[7] Lofton v. West, 198 F.3d 846, 850 (Fed. Cir. 1999).

[8] See Branch v. Smith, 538 U.S. 254, 281 (2003) ("[C]ourts do not interpret statutes in isolation, but in the context of the corpus juris of which they are a part . . . .").

[9] Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation omitted); Reno v. Koray, 515 U.S. 50, 57 (1995) ("It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms, since Congress is presumed to have legislated with reference to those terms.") (internal citation and quotation marks omitted); Fourco Glass Co. v. Transmirra Prods. Corp., 3535 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (citation omitted).

[10] Robertson v. Seattle Audubon Soc., 503 U.S. 429, 439, 112 S. Ct. 1407, 1414, 118 L. Ed. 2d 73 (1992) ("A statutory directive binds both the executive officials who administer the statute and the judges who apply it in particular cases[.]").

[11] E.g., Civil Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 322 (1961) ("[T]he fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.").

[12] E.g., Aerolineas Argentinas v. United States, 77 F.3d 1564 (Fed. Cir. 1996).

II. Through its vague but technical language, the Proposed Rule will further complicate an already onerous and inconsistent adjudication process and will be unlikely to result in improved decision-making

The proposed modifications to the regulatory bars in § 3.12(d) would create a complicated and highly technical standard that will increase the administrative burden on VA. The regulatory standards are highly discretionary and likely to lead to disparate outcomes for veterans across different Regional Offices and Board of Veterans' Appeals Board Members. VA could avoid these unwanted outcomes by adopting a Rule that conforms to the intent of Congress and excludes only those servicemembers prohibited by the statutory bars.

A. Adjudication of the "willful and persistent misconduct" standard under §3.12(d)(ii) of the Proposed Rule will require expertise in military law that most VA adjudicators do not possess and a level of detailed service information that many veterans' service records simply do not provide

The Proposed Rule will require a level of expertise in military law that most Veterans Service Representatives, Board Members, and other VA staff do not possess, which will lead to erroneous and incorrect decisions. For example, in order to determine whether a servicemember was discharged under conditions involving willful and persistent misconduct under § 3.12(d)(ii) of the Proposed Rule, the VA adjudicator must be able to determine the "maximum sentence imposable pursuant to the Manual for Courts-Martial United States" for every instance of misconduct in that servicemember's record. In order to make such a determination, the adjudicator would need to be able to identify not only the specific Article of the UCMJ which was allegedly violated, but also the exact sub-specification within that Article. Appendix 12 of the Manual for Courts-Martial ("MCM") enumerates the maximum possible punishments for violations of the punitive Articles of the UCMJ. But the tables do not list maximum punishments for violation of the top-line Article. Rather, in order to determine the actual maximum punishment for any alleged misconduct, the adjudicator must know not only what Article of the UCMJ was violated, but exactly which of the nearly 250 different possible specifications of those Articles were violated.[13] In addition, for veterans whose misconduct occurred long ago, VA staff will have to become experts in historical versions of the UCMJ and the MCM.

The Proposed Rule defines "minor misconduct" as "misconduct for which the maximum sentence imposable . . . would not include a dishonorable discharge or confinement for longer than one year." In order to determine whether an instance of misconduct noted in a servicemember's record was "minor" or "major," the adjudicator must be able to distinguish the exact specification of the MCM that would be applicable and cross-reference it with the Appendix 12 Maximum Punishment Table. The differences between specifications that would be dispositive as to whether misconduct was "major" or "minor" under the definition offered by the Proposed Rule can often be extremely subtle. It would be insufficient, for example, for an adjudicator to know that a servicemember was charged with Article 87b "Offenses against correctional custody and restriction." Instead, they must know precisely whether the servicemember *escaped* correctional custody (which would constitute "major" misconduct) or *breached* correctional custody (which would constitute "minor"

[13] Manual for Courts-Martial, Appendix 12 (ed. 2019).

misconduct)—a legal distinction not explained by the punishment tables. A servicemember may have received an Article 15 for violation of Article 87 "Missing movement," but if the charging documents do not reflect whether it was by "design" or by "neglect," the adjudicator will be unable to draw a distinction between whether the offense was "major" or "minor."

Determining which of the hundreds of possible charging specifications in a particular version of the MCM are applicable to an instance of misconduct in a servicemember's personnel record requires a highly granular and precise level of information about the factual circumstances of the offense and, in many cases, the culpable mental state of the offender. The adjudicator will be forced to rely upon whatever description of the misconduct is available in the servicemember's personnel records.

Drafting factually accurate and legally sufficient courts-martial charges has been described by a former Judge Advocate and Coast Guard Chief Trial Judge as "one of the most . . . maddening jobs in military justice."[14] Even when court-martial charges are drafted by expert military JAG attorneys in preparation for trial, it is not uncommon for the "complicated legal doctrines" surrounding the proper construction, wording, and combination of UCMJ charging specifications to ultimately prove "fatal" to the case on appeal when it is determined that the charges were incorrectly drafted.[15]

Even in the most ideal circumstances under the Proposed Rule—where misconduct in a servicemember's record is documented by a court-martial charging document meticulously prepared and reviewed by trained Judge Advocates in preparation for a general court-martial—they may still be prone to drafting errors that will make it difficult for a VA adjudicator to correctly determine the applicable maximum punishments. Additionally, adjudicators may be forced to rely on documentation of misconduct that ultimately resulted in plea agreements, administrative discharges in lieu of courts-martial, or acceptance of non-judicial punishment in lieu of courts-martial, where detailed specifications that correctly conform to the Manual for Courts-Martial were never drafted, or where the charges that were drafted were never subjected to detailed legal review or any challenge to their factual accuracy.

Moreover, the most likely source from which VA adjudicators will discover instances of misconduct in a servicemember's records are the counseling statements, investigatory materials, and notification documents relating to the imposition of nonjudicial punishment by unit commanders pursuant to Article 15. The Manual for Courts-Martial requires only that the notification of charges under Article 15 include the "article of the code" that the servicemember allegedly violated. There is "no requirement" that the charging documents prepared for an Article 15 "follow the form specifications used in courts-martial . . . or even that the same degree of specificity be used."[16] Therefore, it is highly likely that adjudicators will encounter instances of misconduct in a servicemember's record that were documented as part of an Article 15, for which the adjudicator will be unable to determine the "maximum sentence imposable" had the offense been "tried by general court-martial," because the alleged offense was never described in a manner

[14] Captain Gary E. Felicetti, Surviving the Multiplicity/LIO Family Vortex, Army Law., February 2011, at 46.
[15] Id.
[16] United States v. Atchison, 13 M.J. 798, 799 (A.C.M.R. 1982)

that conforms to the form specifications used in a general courts-martial and cannot be matched with a potential maximum punishment.

Further complicating analysis under the Proposed Rule is that the service records of veterans are often woefully incomplete. VA adjudicators routinely encounter incomplete and unreliable military service records.[17] The military often fails to preserve—and in some cases even destroys—records before they are properly archived.[18] Service records for countless veterans were destroyed in the St. Louis fire.[19] VA adjudicators will be unable to effectively conduct the wide-ranging and detailed review of all the potential factors under the Proposed Rule in the face of these challenges.

If VA adjudicators do not have accurate and correctly drafted descriptions of misconduct which conform to the specifications provided by the Manuals for Courts-Martial, they will have no way to properly adjudicate the distinction between major and minor misconduct within the Proposed Rule. Adjudication under the Proposed Rule will place an onerous and time-consuming burden on VA adjudicators by forcing them to rely on potentially incomplete information to match misconduct to MCM Punishment Tables that require specific information and technical legal knowledge the adjudicator may not possess. This is likely to result in even longer delays in COD adjudications. Further, incorrect applications of the Proposed Rule will likely lead to lengthy appeals and the wrongful denial of benefits to veterans who desperately need them.

B. VA could avoid this onerous and burdensome process by adopting a Rule that utilizes the bars to benefits authorized by statute and omits any additional regulatory bars

By not just continuing but expanding its use of broad, vague language, VA imposes significant additional burdens on its adjudicators who must figure out how to apply the regulation. In so doing, VA risks erroneously depriving veterans of the benefits to which they are entitled. VA has expressed an intent to create a regulation that could be easily, consistently, and efficiently applied by Regional Office employees and Board Members, and a solution to that dilemma is easily available: VA should remove all regulatory bars and rely on the statutory bars expressly set forth by Congress.

The statutory bars are drafted with specificity and they define conduct that is both Dishonorable and, in Congress's estimation, disqualifying for benefits purposes. The likelihood of a Regional Office adjudicator or Board Member misapplying or disparately applying the statutory bars is quite low, especially when compared with the current and proposed regulatory bars.

Congress did not mandate that VA create any regulatory bars on top of its statutory bars; indeed, a faithful reading of the legislative text and history reveals that Congress limited VA's authority

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[17] See Adjudication Procedures Manual Part III, Subpart iii, Chapter 2, Section E.
[18] Lost to History: Missing War Records Complicate Benefit Claims by Iraq, Afghanistan Veterans, ProPublica (Nov. 9, 2012), available at https://www.propublica.org/article/lost-to-history-missing-war-records-complicate-benefit-claims-by-veterans.
[19] Dep't of Veterans Affairs, Adjudication Procedures Manual, at Part III, Subpart iii, Chapter 2, Section E(1)(a).

to impose any further exclusionary criteria. Thus, removing the regulatory bars would be consistent with statute.

As an example of how burdensome, complex, and illogical VA's current process is, CVLC represented a Post-9/11 Marine Corps veteran who was exposed to enemy fire, Improvised Explosive Devices (IEDs), and Rocket-Propelled Grenades (RPGs) while deployed to Afghanistan. These experiences led to Post-Traumatic Stress Disorder, which contributed directly to the misconduct for which he was then discharged other-than-honorably. Upon returning home, the veteran immediately sought mental health treatment at VA and received care for two years—until VA abruptly terminated him without notice. The veteran ended up with his PTSD untreated and then became incarcerated. After his release, CVLC advocated for him to gain Chapter 17 health care eligibility to obtain PTSD treatment, but VA refused to grant full access. After a COD appeal hearing, VA lost the hearing transcript. More than a year later, VA held another hearing, at which CVLC submitted extensive evidence, yet VA again denied full eligibility to this war-wounded veteran. Without support and care from VA, the veteran has lost jobs and struggles with chronic homelessness.

Removing, or at least limiting, the regulatory bars will also promote good policy by allowing for more holistic and centralized medical care. Because of the breadth and vagueness of the current regulatory bars, many veterans with Other Than Honorable discharges are deemed ineligible based on regulatory, not statutory bars. These veterans should be eligible for Chapter 17 health care (that is, VA medical benefits to treat any service-connected conditions). While any access to VA treatment is better than no access, sound medical evidence counsels against treating health conditions in a silo. Veterans, like all people, are likely best served when a single health care system can address both their mental and physical health conditions, in coordination, and with full supportive services, such as case management, housing assistance, and ideally access to comprehensive dental care. Limiting the number of veterans approved for Chapter 17 health care only, rather than full health care access, will thus have a positive impact on veterans' overall wellbeing.

As an example, Connecticut Veterans Legal Center represented a Post-9/11 Marine Corps combat veteran, Morgan Gray. Before deploying to Iraq, Ms. Gray was badly injured in a flatbed trailer accident. Doctors prescribed her Percocet, and she deployed on schedule. While deployed, she experienced combat trauma and began to experience symptoms of PTSD. When her prescription ran out, she began to self-medicate and eventually developed an opioid dependence. Despite asking her chain of command for help with her addiction and successfully completing recovery treatment while on active duty, she was discharged with an Other Than Honorable discharge. Post-service, Ms. Gray has experienced periods of homelessness and other challenges. Instead of helping, VA blocked her from services, deeming her "not honorable" despite meritorious combat service and no statutory bars. After seven years denying Ms. Gray treatment and assistance, and only after CVLC became involved in her case, VA finally decided that her service was "honorable for VA purposes." She is in treatment for her PTSD and other service-connected injuries and receives disability pay. However, she will not get back the seven years she was denied care despite being a combat veteran discharged for a minor infraction. Ms. Gray is exactly the profile of a veteran Congress had in mind when it created the expansive "other than dishonorable" eligibility standard, yet VA barred her for years from receiving full benefits. The regulations must be changed to accord with Congress's intent that veterans like Ms. Gray get the support and care they deserve.

III. Contrary to statute, the Proposed Rule continues to impermissibly require that veterans with Other Than Honorable discharges go through the burdensome and unfair COD determination process

To conform with statutory requirements in existence since World War II, VA must cease its automatic presumption under § 3.12(a) that veterans with Other Than Honorable discharges are ineligible for benefits. VA should instead create a presumption of *eligibility* for all administratively discharged veterans, including those with Other Than Honorable discharges.

A. The current presumption of ineligibility under 38 C.F.R. § 3.12(a) for veterans with Other Than Honorable discharges is inconsistent with the statutory text, structure, and history

The Proposed Rule violates the purpose and text of the 1944 G.I. Bill. In excluding veterans with OTH discharges from presumptive eligibility for benefits, § 3.12(a) deems veterans with OTH discharges as having committed the same kind of dishonorable conduct that merits a Dishonorable discharge—a judgment that Congress considered and rejected in 1944.[20]

38 U.S.C. § 101(2) defines a "veteran" as a former servicemember who was discharged "under conditions other than dishonorable." VA has interpreted § 101(2) to mean that individuals with "discharge[s] under honorable conditions"—i.e., with Honorable or General characterizations—are presumptively not discharged under "dishonorable" conditions and therefore eligible. Meanwhile, VA decided that veterans with Other Than Honorable discharges are presumptively "dishonorable" and therefore ineligible pending a COD determination. This distinction is contrary to Congress's intent as evidenced by the express text of § 101(2), the legislative history of that provision, and the structure of the VA statutory framework.[21]

First, the text of 38 U.S.C. § 101(2) precludes 38 C.F.R. § 3.12(a)'s exclusion of OTH discharges from its presumption of eligibility. The term "dishonorable" was a term of art in use long before its incorporation into 38 U.S.C. § 101(2).[22] That Congress chose the words "other than dishonorable" indicates an intent to incorporate the meaning of the word as it was generally understood.[23]

The standard meaning of "dishonorable conditions" was described in the 1943 Manual for Courts-Martial as being reserved for the most severe misconduct. It was used only for certain civilian

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[20] See S. Rep. No 78-755 at 15, 16 (1944); see also 90 Cong. Rec. at 3077 (statement of Sen. Clark) ("Many boys who do not receive [H]onorable discharges have capabilities of being very excellent citizens. They receive [O]ther than [H]onorable discharges. I differentiate them from [D]ishonorable discharges for many reasons.").

[21] The Court of Appeals for Veterans Claims' decision in Camarena v. Brown, 6 Vet. App. 565 (1994) aff'd, 60 F.3d 843 (Fed. Cir. 1995), is not to the contrary. There, the Court upheld the validity of VA creating regulatory bars at all, finding that the legislative history supported VA having some amount of discretion to exclude former servicemembers who were dishonorably discharged based on misconduct enumerated in regulation. Camarena, 6 Vet. App. At 566-67. The *Camarena* Court focused on the creation of regulatory bars in 38 C.F.R. § 3.12(d); the Court did not specifically rule on the legality of § 3.12(a).

[22] See 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, 99-101 (2017).

[23] See Morissette v. United States, 342 U.S. 246, 263 (1952).

felonies and serious military crimes such as desertion, mutiny, and spying.[24] But not all misconduct of this severity ultimately leads to a Dishonorable discharge. There are some narrow instances where dishonorable conduct would result in something less severe than a Dishonorable discharge, and certain procedural requirements may also bar a Dishonorable discharge even where it is substantively appropriate. One example is the requirement that a defendant be present at arraignment for court-martial, which is impossible in cases of continuing desertion or in which a servicemember commits a civilian felony and is incarcerated.[25]

Section 101(2) is meant to ensure that veterans whose misconduct was severe enough to merit a Dishonorable discharge, but who—for technical or procedural reasons—received a less harsh service characterization, do not become eligible for benefits.[26] While these cases may exist, they are exceptional: the majority of veterans receive less-than-honorable discharges for conduct that does not rise to the level of dishonorable conduct, and in many cases, there are mitigating and extenuating circumstances that explain the misconduct, such as a mental health condition related to combat service or Military Sexual Trauma.

By the plain words of the statute, Congress did not intend the vast majority of veterans with OTH discharges to presumptively lose access to benefits. Misconduct in the narrow "dishonorable" category is easily and expressly targeted by bars such as those found in 38 U.S.C. § 5303 and 38 C.F.R. § 3.12(c). The blanket presumption of ineligibility that VA applies to former servicemembers with OTH discharges deprives countless veterans of rightfully earned benefits in contravention of Congress's intent. OTH veterans should be granted benefits without a COD evaluation, as is done for Honorable and General discharges, with appropriately targeted statutory or regulatory bars terminating benefits only for those whose conduct was truly dishonorable.

Second, the legislative history of 38 U.S.C. § 101(2) confirms its plain language meaning that the statute precludes a presumption of ineligibility for OTH discharges. The G.I. Bill of Rights, which introduced the "other than dishonorable" conditions standard, marked a decisive, liberal shift away from previous, harsher eligibility standards.[27] The immediate predecessor statute delegated eligibility determinations to VA.[28] With its power under the predecessor statute, in 1933, VA limited eligibility to only those with Honorable discharges.[29]

Hearing testimony on the G.I. Bill shows that, in rejecting the Honorable requirement, Congress meant to correct for the limitations of these previous regimes by cutting off eligibility only for truly dishonorable conduct. As Harry Colmery, the bill's primary drafter and a former National Commander of the American Legion, explained, the new regime was intended to grant veterans

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[24] See Dep't of the Army, A Manual for Courts-Martial ¶¶ 103(a), 104(c) tbl. of maximum punishments (rev. ed. 1943) (1928), https://www.loc.gov/rr/frd/Military_ Law/pdf/manual-1943.pdf; see Adams & Montalto, supra, at 99-101.

[25] See, e.g., United States v. Price, 48 M.J. 181, 183 (C.A.A.F. 1998).

[26] See Camarena v. Brown, 6 Vet. App. 565, 567 (1994), aff'd 60 F.3d 843 (1995) (remarking that § 101(2) was meant to capture conduct that qualified for Dishonorable discharge).

[27] See Servicemen's Readjustment Act of 1944, Pub. L. 78-346, § 400, 58 Stat. 284, 287-90.

[28] See Act of Mar. 20, 1933, ch. 3, §§ 4, 19, 48 Stat. 8, 9, 12.

[29] See Exec. Order No. 6089 (Mar. 31, 1933); Exec. Order No. 6094 (Mar. 31, 1933). These decisions mirrored some earlier congressional enactments doing the same. See, e.g., Act of June 5, 1920, ch. 245, 41 Stat. 982 (limiting pension eligibility for several conflicts to veterans with Honorable discharges).

the "benefit of the doubt."[30] The "other than dishonorable" language was a "mantle of protection" safeguarding the livelihoods of veterans with less-than-honorable discharges so they might lead productive post-service lives.[31] One legislator stated that the expansive eligibility standard was meant to "do something for the boys who probably have 'jumped the track' in some minor instances, and yet have not done anything which would require a dishonorable discharge."[32] A 1946 House report summed up Congress's motives thus:

> In passing the [act], the Congress avoided saying that veteran's benefits are only for those who have been honorably discharged from service . . . . Congress was generously providing benefits on as broad a base as possible and intended that all persons not actually given a dishonorable discharge should profit by this generosity.[33]

With the 1944 G.I. Bill, Members of Congress rejected both VA's existing restrictive eligibility standards and the military's recommendation that an Honorable discharge be required.[34] Senator Champ Clark, a former Army Colonel and original sponsor of the G.I. Bill, explained the decision saying:

> In my opinion, [the objections raised by the military] are some of the most stupid, short-sighted objections which could possibly be raised. They were objections that were considered very carefully both in the subcommittee on veterans affairs . . . and in the full committee itself . . . .[35]

Senator Clark continued on to state: "Many boys who do not receive honorable discharges have capabilities of being very excellent citizens. They receive other than honorable discharges. I differentiate them from dishonorable discharges for many reasons."[36] Similarly, the American Legion's Chief of Claims remarked, "If [the service member] did not do something that warranted a court-martial and dishonorable discharge, I would certainly not see him deprived of his benefits."[37]

Third, the statutory framework of 38 U.S.C. §§ 101(2) and 5303 further shows that "other than dishonorable" includes all veterans with administrative discharges (including those with Other Than Honorable discharges) who are not excluded by a specific bar, and that any regulatory bars must be well defined and address a severe level of misconduct.

38 U.S.C. § 5303 sets forth a number of statutory bars to benefits that establish a high bar for ineligibility. The Senate Report on the 1944 G.I. Bill states that less-than-honorable discharges

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[30] World War Veteran's Legislation: Hearings on H.R. 3917 and S. 1767 Before the H. Comm. on World War Veteran's Legislation, 78th Cong. 418, 418 (1944) [hereinafter House Hearings].
[31] 90 Cong. Rec. 4453 (1944) (statement of Rep. Kearney).
[32] Id. at 3077 (statement of Sen. Connally).
[33] H.R. REP. NO. 1510, at 8 (1946).
[34] See, e.g., World War Veteran's Legislation: Hearings on H.R. 3917 and S. 1767 Before the H. Comm. on World War Veteran's Legislation, 78th Cong. 418, 420 (1944) [hereinafter House Hearings].
[35] 90 Cong. Rec. 3076.
[36] House Hearings at 419 (statement of Senator Champ Clark).
[37] House Hearings at 419 (statement of Carl Brown, Chief of Claims, Am. Legion).

"should not bar entitlement to benefits" unless the offense was "as for example those mentioned in section 300 of the bill [the statutory bars], as to constitute dishonorable conditions."[38] Thus, any regulatory bars must exclude only for severe misconduct that merited a Dishonorable discharge; they cannot be used to radically expand the number of veterans deemed ineligible. Under the presumption of consistent usage,[39] the phrase "other than dishonorable conditions" must be used consistently between the regulatory and statutory bars. If conduct reached by the regulatory bars is more inclusive (*i.e.*, reaches less severe misconduct) than the statutory bars, then the statutory bars would be "inoperative or superfluous, void or insignificant," which is impermissible.[40] The conduct classified as dishonorable by VA must be similar to that identified by statute.

Bruce v. Shinseki, a case that concerns the current "escape trial by general court martial" regulatory bar found in 38 C.F.R. § 3.12(d), provides an example of the intended congruence between statutory and regulatory bars.[41] There, Judge Moorman distinguished congressional concern for general courts-martial, which have the ability to "impose a bad conduct or a dishonorable discharge," from special courts-martial, which may only impose bad conduct discharges.[42] That 38 C.F.R. § 3.12(d) explicitly excludes only avoidance of trial by general court-martial—but not special court-martial—shows how VA has, in one section, attempted to accord with congressional intent and the statutory bars. However, other regulatory bars, such as for willful and persistent misconduct and moral turpitude, violate these principles.

To correctly and faithfully implement the text of the 1944 G.I. Bill, VA should change § 3.12(a) to presume eligibility for all veterans who were administratively separated from service, including those with Other Than Honorable discharges.

B. The current presumption of ineligibility under 38 C.F.R. § 3.12(a) for veterans with Other Than Honorable discharges is inconsistent with congressional intent that all former servicemembers—including those with Other Than Honorable discharges—should get the "benefit of the doubt" in applying for VA benefits

The purpose and intent of the 1944 G.I. Bill underscores the proper reading of the statute: that veterans with Other Than Honorable discharges should be presumed eligible for veteran benefits. Yet, the current regulation and Proposed Rule now exclude—by presumption or through COD determination—the very veterans to whom Congress sought to provide benefits.

In their deliberations, members of Congress identified the types of misconduct they believed the GI Bill should exclude: desertion, larceny, murder, chronic drunkenness not associated with a wartime disability, and shirking, for example.[43] Notably, this list largely approximates the Manual

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[38] S. Rep. No. 78-755, at 15 (1944). The offenses mentioned in § 300 are "discharge or dismissal by reason of the sentence of a general court martial … or the discharge of any such person on the ground that he was a conscientious objector … or as a deserter, or of an officer by the acceptance of his resignation for the good of the service." Servicemen's Readjustment Act of 1944, Pub. L. No. 346, § 300, 58 Stat. 284, 286 (1944).
[39] See, e.g., IBP, Inc. v. Alvarez, 546 U.S. 21, 33-34 (2005).
[40] Hibbs v. Winn, 542 U.S. 88, 101 (2005).
[41] No. 09-1659, 2010 WL 4879165 (Vet. App. Nov. 24, 2010).
[42] Id. at *2.
[43] See H.R. Rep. No. 1624, at 26 (1944); 90 Cong. Rec. 3077 (statement of Sen. Clark).

for Courts-Martial's itemization of conduct that was necessarily dishonorable.[44] At the same time, members listed misconduct that did not show dishonor: substance abuse associated with wartime disability, unauthorized absence not amounting to desertion, civilian offenses not resulting in incarceration, and convictions by special court-martial.[45]

Congress's description of the veterans to whom it sought to provide benefits describes the circumstance of many of NVCLR's members and CVLC's clients who received Other Than Honorable discharges. For example, Conley Monk—the Director of NVCLR—is a Marine Corps combat veteran who deployed to Vietnam. Only after redeploying, because of undiagnosed Post-Traumatic Stress Disorder, Mr. Monk began to have disciplinary issues that led to non-judicial punishment, a special court-martial, and ultimately an Undesirable discharge in lieu of special court-martial. When Mr. Monk sought veterans benefits shortly after discharge, he was erroneously denied based on his discharge in lieu of court-martial—even though the regulatory bar is only for discharge in lieu of *general* court-martial. For forty years afterward, VA excluded Mr. Monk from accessing any benefits, despite his service in combat, his lack of a Dishonorable discharge, and the inapplicability of the in lieu of general court-martial bar. Finally, in 2012, Mr. Monk applied again for VA benefits and for a discharge upgrade. Three years later, and only after the military granted his upgrade petition, VA finally conceded Mr. Monk's eligibility and granted him disability compensation with a permanent 100% rating for PTSD and physical health conditions related to his military service. But this favorable outcome does not remedy the decades that Mr. Monk was unable to receive health care, education, employment, and disability benefits from VA—nor that his children were unable to access dependents' education benefits.

The presumption of ineligibility for all veterans with less-than-honorable discharges contributes to the widespread misperception that less-than-honorably discharged veterans are categorically ineligible for VA benefits. This leads directly to veterans who are unquestionably eligible being denied the care they deserve. For example, Thomas Hammons is a Post-9/11 Army infantryman who served more than four years and participated in the initial invasion of Iraq. He completed both the elite Ranger school and the Pathfinder school. But his combat experiences led to diagnoses of PTSD and TBI, and when he returned from Iraq, he began to self-medicate. He was discharged from his second enlistment period in 2006 after two short unauthorized absences and a positive test for drug use. When Mr. Hammons returned home and tried to access VA health care, VA staff gave him conflicting information about his eligibility—despite the fact that he should have been qualified based on his first honorable term of service—and then tried to bill him for some medical treatment it had provided him. Fortunately, Mr. Hammons got connected to the CVLC, whose advocates were able to remove the debt, establish his eligibility, and get him service-connected compensation for PTSD and TBI. But that process took several years during which he was denied health care, lost his housing, and suffered the shame of being deemed "dishonorable" by VA despite his years of commendable military service and war-related wounds.

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[44] See Manual for Courts-Martial, supra, ¶¶ 103(a), 104(c) tbl. of maximum punishments.
[45] See House Hearings at 190, 415, 417; 90 Cong. Rec. 3077 (statement of Sen. Clark).

That veterans like Mr. Monk and Mr. Hammons, who did not commit severe unmitigated misconduct, are denied access to VA benefits for years—or decades—powerfully evidences that 38 C.F.R. § 3.12(a) violates legislative intent.

Until a COD determination is complete, VA treats veterans who commit lesser or mitigated misconduct exactly the same as those who commit severe, unmitigated misconduct. As a result, hundreds of thousands of veterans whose service may have been imperfect—perhaps because of an undiagnosed mental health condition or other extenuating situation—but far from dishonorable are wrongfully cut off from benefits while VA makes a COD determination. That is contrary to the clearly expressed intent of the lawmakers who drafted and passed the 1944 G.I. Bill.

C. Veterans who in the past would have been separated with Honorable discharges are instead being kicked out with Other Than Honorable discharges

The harm from VA's overbroad Proposed Rule is exacerbated by the fact that the Department of Defense issues far more Other Than Honorable discharges than when Congress introduced the "other than dishonorable" eligibility standard. When Congress enacted the 1944 G.I. Bill with a purpose of expanding access to *more* veterans with less-than-fully-Honorable discharges, only 1.7% of servicemembers were discharged with anything other than a fully Honorable discharge.[46] Yet, today, VA excludes far greater percentages of veterans from its services: 2.8% of Vietnam era veterans and 6.5% of Post-9/11 era veterans.[47] This vastly exceeds the percentage of eligible veterans that Congress had in mind when enacting the 1944 G.I. Bill.

No one would suggest that today's veterans are somehow less honorable than those who served in prior eras. Indeed, the rate of veterans who receive punitive discharges (Bad Conduct and Dishonorable)—a sign of severe misconduct—has remained steady at around 1% from World War II to the present.[48] What seems to have changed are the military's standards for what misconduct should lead to discharge. Servicemembers are now being kicked out less-than-honorably for conduct that before would perhaps have led to reprimand or non-judicial punishment, but not discharge.[49]

VA's character of discharge review process is supposed to serve as an equalizing force: it should ensure that veterans who had similar positive and negative marks in service are treated similarly. A veteran of World War II who abused alcohol to deal with PTSD should not be granted benefits when a veteran of Iraq or Afghanistan who did the same would be denied those same benefits. But by placing so much weight on the discharge status assigned by the military and not taking into account how the military has greatly increased its use of Other Than Honorable discharges, that is exactly what § 3.12(a) does, and what the Proposed Rule would still do. Veterans who served in Iraq or Afghanistan who received Other Than Honorable discharges but who, in earlier times,

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[46] Legal Services Center of Harvard Law School, Underserved: How the VA Wrongfully Excludes Veterans With Bad Paper 26 (March 2016), available at https://www.swords-to-plowshares.org/research-publications/underserved.
[47] Id.
[48] Id.
[49] It is also important to recognize that the standard enlistment contract today is longer than in the past—four or six years, compared to two years—and that many servicemembers are being called on to deploy multiple times in a single enlistment.

would have been honorably discharged are being excluded from benefits that Congress granted to them. This cannot be correct under the law.

VA must take these changed facts of what misconduct leads to an Other Than Honorable discharge into account when deciding which veterans must go through the lengthy and burdensome COD review process. To do so, VA should presumptively grant eligibility to all administratively discharged veterans.

D. VA already has decided to presumptively grant eligibility to veterans who are barred by statute

There is direct precedent for VA deciding that administratively discharged veterans who may have engaged in "dishonorable" conduct can access benefits: under § 3.12(a) as it now exists, VA presumptively grants eligibility to veterans barred by statute or regulation so long as they received an Honorable or General discharge characterization. VA determined, as a matter of policy, that such a discharge characterization would be "binding" on the adjudicator as to the issue of COD and that no further review of the veteran's record would be needed.

There is no evidence that, as a general category, veterans with administrative discharges (including those with OTHs) are likely to have the severity of behavior contemplated by Congress in enacting the "other than dishonorable" eligibility standard. Just as with veterans with Honorable or General discharge characterizations, the exceptional situations in which dishonorable conduct could result in an OTH discharge could easily be targeted with narrow and specific regulatory bars, such as the "mutiny and spying" bar already found in § 3.12. If a regulatory bar is found to capture a servicemember's conduct, benefits could be terminated in exactly the same process as is currently used for statutory bars. This would save the VA the expense of processing countless, costly denials of benefits appeals, while providing veterans benefits they have rightfully earned in service to this country, as Congress intended.

Importantly, while VA may make its own independent eligibility determination, it must do so with the recognition that all veterans who were administratively separated (including those with Other Than Honorable discharges) were not, in fact, given Dishonorable discharges. The military already considered whether the servicemember's conduct warranted going through a court-martial and being deemed Dishonorable—and the military determined it did not. Thus, it is reasonable for VA to start from the assumption that a veteran with an OTH does not meet the standard of dishonorable conduct.

As VA has done for veterans with Honorable or General discharges, VA should hold that those with Other Than Honorable discharges are presumptively eligible for benefits. A system that hails itself as being "veteran-friendly" should work for all who served our country, not just some.

CONCLUSION

We urge VA to adopt a rule that honors Congress's intent in enacting the 1944 G.I. Bill and gives the "benefit of the doubt" to all who served our country in uniform. Such a rule would remove all regulatory bars and exclude veterans on the basis of the statutory bars alone, and would presume eligibility for all administratively discharged veterans, including those with Other Than Honorable discharges. Doing so would serve the aims of both VA, by creating a lawful eligibility scheme that could be easily and consistently applied on a national scale, and of veterans who deserve timely access to health care and benefits.

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*This Comment does not purport to state the views of Yale Law School, if any.