



DISCRETIONARY INJUSTICE

How Racial Disparities in
the Military's Administrative
Separation System Harm
Black Veterans



CONNECTICUT
VETERANS
LEGAL
CENTER



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ABOUT CVLC AND THE VETERANS INCLUSION PROJECT

The Connecticut Veterans Legal Center (CVLC) is dedicated to removing legal barriers to housing, healthcare, and income for veterans recovering from homelessness and mental illness. CVLC's vision is for all military veterans to live with adequate means, affordable healthcare, safe and secure housing, and peace of mind. As the first medical-legal partnership co-located at a VA facility, CVLC provides free legal services to low-income veterans and those recovering from homelessness and mental illness. Through its national policy arm, the Veterans Inclusion Project, CVLC litigates on behalf of veterans, reports on key issues, and builds the capacity of veterans and their advocates to remedy the unjust exclusion of veterans with less-than-fully honorable discharge statuses from veterans benefits.

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EXECUTIVE SUMMARY

For over a century, military service has offered a path to middle-class life and economic security. Yet the publicly funded benefits of military service have enriched white veterans throughout history far more than veterans of color. The population-level analysis in this report demonstrates the existence of persistent racial disparities in the administrative separation system.* The data show that Black veterans are much more likely than white veterans to bear the stigma of a less than honorable discharge.

Accordingly, Black veterans make up a disproportionate share of those former servicemembers whom VA presumptively excludes from VA benefits. Lack of access to benefits leaves veterans at higher risk for poverty, homelessness, and suicide, and can foreclose the pathway to economic stability. The effects go beyond economic stability and healthcare to create a racial disparity in how much honor, respect, and dignity our society offers its veterans of color and their descendants.

*Our analysis only identified a disparity between Black and white servicemembers. We also analyzed trends concerning other races and ethnicities, but the methods used by the military to collect race and ethnicity data limit possibilities for conclusive analysis regarding other racial groups, as discussed below at pp. 26–27.

As veterans' advocates who routinely represent veterans of color shut out from federal benefits due to their military discharge status, CVLC examined years of data on military administrative separations. We discovered clear evidence of racial disparity in the process. CVLC issued Freedom of Information

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Act requests to the Army, Navy, Air Force and Marines. Each request required that the service branch turn over five years of data, from 2014 through 2020, on the racial and ethnic makeup of administratively-separated veterans by discharge status.

In this report, we review the history of Black military service in order to contextualize the racial disparities that persist despite the military's longstanding efforts at desegregation and equal opportunity. We explain how the military separates veterans with less than honorable discharge statuses and describe the highly discretionary nature of

the administrative separation system: a system in which even minor misconduct can result in deprivation of veterans benefits. We explain how less than honorable discharges severely impede access to VA

benefits and healthcare. We detail the data we received and findings from that data, and we provide recommendations for steps the military, VA, and the government should take to address the issue.

KEY FINDINGS

Black servicemembers make up nearly 18% of separations in the armed forces, but received only 16.5% of the Honorable discharges. However, they received over 25% of Other Than Honorable discharges, and over 30% of General discharges.

Black servicemembers overall—across all service branches—were approximately 1.5 times as likely as white servicemembers to receive an Other Than Honorable rather than Honorable discharge, and approximately twice as likely as white servicemembers to receive a General discharge.

The disparity in Other Than Honorable discharges was most pronounced in the Navy, where Black sailors were approximately 2.3 times as likely as white sailors to receive an Other Than Honorable discharge.

The disparity in General discharges was most pronounced in the Air Force, where Black airmen were approximately 2.5 times as likely as white airmen to receive a General discharge.

In the years 2014–2020, there was no discernable improvement over time in the racial disparities in discharge status.

KEY RECOMMENDATIONS

THE DEPARTMENT OF DEFENSE (DOD) SHOULD:

- Standardize and improve its race and ethnicity data collection across all branches.
- Conduct a study to identify racial disparities in discharge status from WWII to the present.
- Track disciplinary actions at the unit level to identify and remedy disparities prior to separation.
- Create guidance for the Discharge Review Boards and Boards for Correction of Military Records so veterans have a meaningful opportunity to upgrade their discharge status in cases of racial bias.

THE DEPARTMENT OF VETERANS AFFAIRS (VA) SHOULD:

- Rescind regulations that bar veterans from benefits based on less than honorable discharge status when not expressly required by law.
- Pending rescission, create guidance for VA character of discharge adjudicators to meaningfully consider potential racial bias as a factor leading to discharge status.
- With input from veterans of color, conduct outreach inviting less than honorably discharged veterans to seek benefits from VA.

CONGRESS SHOULD:

- Enact reparations legislation to restore and compensate veterans who were unfairly shut out of veterans benefits due to discrimination and racial bias.
- Commission the Government Accountability Office (GAO) to study VA approvals and denials of veteran status for veterans who raise allegations of discrimination.
- Commission the GAO to study the Discharge Review Boards and Boards for Correction of Military Records practices when veterans request discharge upgrades on the basis of discrimination.

A BRIEF HISTORY OF BLACK MILITARY SERVICE AND RACIAL BIAS IN THE ARMED FORCES

Asian, Hispanic, American Indian & Alaskan Native servicemembers, as well as those from other ethnic and racial groups, also have rich histories of military service. They have also experienced racial discrimination perpetrated by the U.S. government since the beginning of this country's history. For the purposes of this report, we chose to highlight the history of Black American military service, because the results of our data analysis showed a pronounced racial disparity in discharges of current Black servicemembers compared to white servicemembers, but no similar pronounced disparity with respect to other racial and ethnic categories. This likely stems from the wide-ranging inconsistencies in how the military has defined racial and ethnic groups across branches and throughout time. We lay out suggestions for improved data collection in the Discussion and Recommendations sections of this report.

BLACK MILITARY SERVICE THROUGH WORLD WAR II

Black, Indigenous, and other people of color have served in the United States military since the time of the American Revolution. A total of about 5,000-9,000 enslaved and free Black Americans, the majority from New England, volunteered or were drafted to serve in the Continental Army and Navy.¹ Even after their service, the military returned Black Revolutionary War veterans to those who enslaved them. In some cases, the U.S. Government denied war pensions to Black veterans who had fled from slavery to serve the cause of freedom.²

Black people, including those who were enslaved, also served during the War of 1812. As happened following the Revolutionary War, the government returned Black servicemembers to enslavement at the conclusion of their service.³

VA BENEFITS HISTORY CONTEXTUALIZED

Military History

Civil Rights History

VA Benefits History

- **1776** Continental congress creates pension for disabled veterans
- **1862** Congress authorizes Black service members to join Union Army
- **1863** Emancipation Proclamation
- **1866** Congress authorizes the creation of six permanent all-Black units in the Army
- **1914-1918** World War I: Veterans promised a future bonus payment
- **1932** WWI veterans march on Washington during the Great Depression for unpaid bonus
- **1944** Congress passes GI Bill of Rights — first iteration of current VA benefits system (education, home loan, and disability benefits)
- **1948** Executive Order — End of Segregation in the Military
- **1954** *Brown v. Board of Education*
- **1955** Vietnam War begins
- **1963** March on Washington
- **1966** Secretary of Defense McNamara's "New Standards Men" campaign sends disproportionate number of poor Black service members to combat in Vietnam
- **1968** Assassination of Dr. Martin Luther King Jr.
- **1968** Fair Housing Act
- **1968** In response to MLK assassination, white troops fly confederate flags and burn crosses on Vietnam bases
- **1972** Task force finds evidence of intentional and unintentional discrimination towards racial minorities in the military justice system
- **2013** Founding of Black Lives Matter Movement
- **2017** Protect Our Defenders Report reveals stark disparities in military justice system
- **2020** CVLC report shows stark disparities in Congressional nomination to military service academies
- **2022** Congress creates a naming commission to remove confederate names from Department of Defense property

During the Civil War, the Union Army did not officially accept Black soldiers until Congress authorized their service on July 17, 1862.⁴ Approximately 186,000 Black Americans served in the Union Army as part of 16 segregated combat regiments, and some 30,000 served in the Union Navy.⁵ Black soldiers fought for equal pay and rations, which Congress only agreed to in 1864.⁶

In 1866, Congress authorized the creation of six permanent all-Black units in the Army.⁷ These “Buffalo Soldiers” were the first Black soldiers to serve in the U.S. Armed Forces during peacetime, allowing Black Americans the opportunity to pursue military service as a career.⁸ Although the creation of these units guaranteed career opportunities, it also entrenched formal racial segregation as the norm in the armed services.⁹

The pressing need for additional manpower during World War I again drove the entry of Black individuals into the armed services, through racially separate “white” and “colored” draft calls, and Black soldiers made up 13% of all those conscripted.¹⁰ Black servicemembers representing the United States abroad faced such animosity from white servicemembers and the American public that the military required some segregated Black units to fight under the flags of other nations—such as the 369th Infantry Regiment, which the U.S. Army assigned to the French Army during World War I.¹¹

As the United States entered World War II, Black Americans created the “Double V” Campaign, calling for victory over fascism abroad and victory over racism at home.¹² The Selective Service Act of 1940 ostensibly allowed Black Americans to join the military

in numbers proportional to their representation in the country, provided for white and Black officers to train together, and established aviation training for Black officers.¹³ The Army, however, maintained a quota restricting the recruitment of Black soldiers to less than 10% of total recruits.¹⁴ Rather than integrated training, the War Department maintained segregated training and unit assignments.¹⁵ As a result, the

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Army and Navy concentrated Black servicemembers in less-prestigious roles.¹⁶ In 1945, at peak World War II manpower strength, Black servicemembers comprised 7.2% of the total military force, but represented only 0.6% of officers.¹⁷ The Army prohibited Black officers from commanding white officers in the same unit, yet placed white officers in command of all-Black units.¹⁸

INTEGRATION OF THE ARMED FORCES

In 1948, with Executive Order 9981, President Truman ordered all the military branches to end segregation, formally creating equal opportunity under the law for all servicemembers regardless of race.¹⁹ However, desegregation and expanded opportunity did not

occur overnight. Several all-Black active-duty units remained in place until 1954, and in some areas, the Reserves and National Guard remained segregated or closed to Black entrants into the 1960s.²⁰ The Marine Corps restricted Black marines to certain occupational roles until 1962.²¹

During this period, military leadership began to pay increasing attention to claims of racial discrimination within the military justice system. After the military thwarted the NAACP's efforts to investigate racial discrimination in courts martial during the two World Wars, General Douglas MacArthur granted Thurgood Marshall permission to travel to Japan and Korea to investigate racial

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disparities in the military justice system during the Korean War.²² In 1951, Marshall issued his report to the NAACP's executives, detailing gross human rights violations, including life sentences for trials lasting less than an hour and soldiers granted no more than 15 minutes to converse with their attorneys.²³ Although there were four times as many white soldiers as Black soldiers in the 25th Division of the U.S. Army, twice as many Black soldiers as white soldiers were subjected to courts martial.²⁴

VIETNAM THROUGH THE 1980s

The onset of conflict in Vietnam required more troops. In 1966, Secretary of Defense Robert S. McNamara created an initiative to reduce the standards for recruitment.²⁵ His "New Standards Men," were disproportionately Black and poor, and over half deployed to Vietnam.²⁶ Statistics from the early years of the war show that Black service-members were overrepresented in both combat roles and combat deaths.²⁷

The Vietnam War was the first major military conflict following the integration of the armed forces as well as the first following the passage of landmark civil rights laws such as the Civil Rights Act and Voting Rights Act. The military reflected the racial tensions of the era, which at times escalated into uprisings on bases or installations, including Travis Air Force Base in 1971,²⁸ onboard the *USS Kitty Hawk* in 1972,²⁹ and within the Long Binh military prison in Vietnam in 1968.³⁰ Following the assassination of Dr. Martin Luther King in 1968, white troops flew confederate flags and burned crosses on various Vietnam bases.³¹

On April 5, 1972, then Secretary of Defense Melvin R. Laird established a task force to investigate discrimination in the military justice system, which found evidence of both intentional and unintentional discrimination toward racial minorities.³² Although Black servicemembers comprised about 13% of the enlisted armed forces at the time, over 25% of non-judicial punishments and nearly 35% of court martials were against Black troops.³³ The task force also determined that white servicemembers received a higher

proportion of Honorable discharges, and Black servicemembers a disparate proportion of General and Undesirable (the precursor to Other Than Honorable) discharges.³⁴ However, Congress failed to follow the task force's recommendation to adopt legislation to ban discrimination in the military.

Although the military adopted new antidiscrimination policies, programs, and protections along with the advent of the All-Volunteer Force in 1973, racial injustice still existed, sometimes overtly. In 1976, at California's Camp Pendleton, white Marines openly wore KKK patches and held Klan meetings.³⁵ In 1979, the Klan held a military recruiting rally in Virginia Beach.³⁶ Military policy at the time considered participation in white supremacist movements permissible under servicemembers first amendment rights.³⁷ Only in 1986 did Defense Secretary Caspar Weinberger direct military personnel to "reject participation in white supremacy, neo-Nazi, and other such groups which espouse or attempt to create overt discrimination."³⁸

PRESENT DAY

Over the years, the military has made great strides in addressing racial discrimination in its ranks. Still, disparities remain in the military justice system, and the issue remains an understudied problem, particularly from the 1980s through the 2000s.

In 2002, Congress ordered the military to conduct a periodic survey to assess racial, ethnic, and gender discrimination in the armed forces.³⁹ The results of the most recent survey, from 2017, showed

that almost 30% of active-duty Black servicemembers experienced racial harassment and over 11% experienced racial discrimination in the past year.⁴⁰ Of those reporting harassment (including all races and ethnicities), 68% reported that the harassment happened on more than one occasion, and 53% reported that the harasser held a leadership position.⁴¹ Only 28% of those who experienced harassment reported it, and of those reports, only 16% resulted in official action against the harasser; yet, 35% of reporting servicemembers experienced some form of retaliation.⁴²

Also in 2017, the organization Protect Our Defenders detailed racial disparities in the modern military justice system, finding that from 2006 to 2015 Black airmen were 71% more likely to face court-martial or non-judicial punishment (NJP) than white airmen, Black marines were 32% more likely to have a guilty finding at court martial or NJP than white marines, and Black soldiers were 61% more likely to face special or general court martial than white soldiers, and from 2014 to 2015 Black sailors were 40% more likely than white sailors to be referred to special or general court martial.⁴³

In 2020, the Air Force published the results of its own investigation into race disparities in its ranks, finding that enlisted Black airmen were 72% more likely to face NJP and 57% more likely than white airmen to face court martial.⁴⁴ Additionally, Black airmen were nearly twice as likely as white airmen to be involuntarily discharged for misconduct.⁴⁵ Overall, Black servicemembers in the Air Force were underrepresented in officer positions and in the career tracks most likely to lead to promotion, and lacked

confidence in their leadership's ability to address racism and bias.⁴⁶

In 2020, CVLC released a report detailing stark racial disparities in Congressional nominations to the military service academies, a process that severely limits the military's ability to develop an equitable and representative officer corps.⁴⁷ The military service academies train the officers who command our nation's diverse military. The service academies require a nomination for admission, and the most common pathway involves a member of Congress providing the nomination. CVLC's report found that Black candidates comprised only 6% of

Congressional nominations, and white candidates an overwhelming 74%.⁴⁸ This explains, in part, the lack of diversity in military leadership.

This report adds to our knowledge of racial disparities in the service by demonstrating that those disparities extend to the current administrative separation system. Race disparities in discharge status reflect a present reality for the living Black veterans who carry a less than honorable discharge following their military service. This stigma carries lifelong and generational consequences, including depriving veterans of the essential VA benefits that they earned through service to their nation.

THE ADMINISTRATIVE SEPARATION SYSTEM

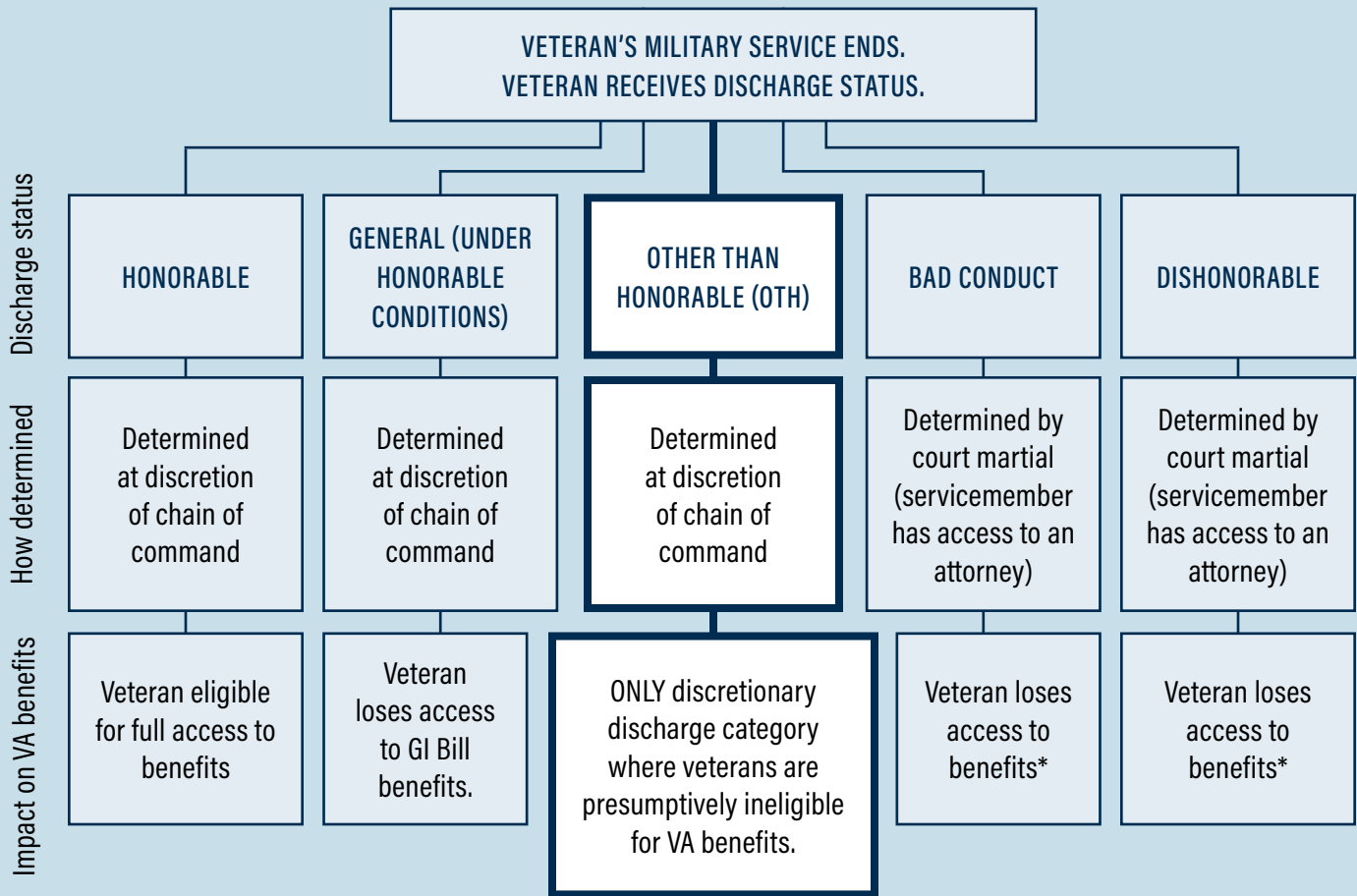
For veterans with more than six months of service, the military assigns one of five “character of service” designations at discharge: Honorable, General (Under Honorable Conditions), Other than Honorable (“OTH”), Bad Conduct, and Dishonorable. Because this discharge status impacts the veteran’s entitlement to benefits, it is important to understand the military’s system for assigning discharge statuses when separating service members.

Bad Conduct and Dishonorable discharges are punishments that can only be imposed after a trial by court martial, in which the service member is represented by a lawyer.⁴⁹ An “administrative separation,” on the other hand, is any type of separation that occurs before the end of a term of enlistment, at the discretion of the service member’s chain of command. When an administrative separation occurs because of something the military deems “misconduct,” the chain of command has significant discretion to assign an Honorable, a General, or an OTH character of service. To maintain good order and discipline, actions that may seem minor to a civilian could lead to a less than honorable discharge.

Additionally, although a less than honorable discharge is not legally considered a punishment and therefore the service member has fewer due process protections before it is imposed, the real-world consequences to veterans can be quite severe.

Once rare, less than honorable administrative separations are much more common than at mid-century. Since World War II, the percentage of veterans who receive a punitive discharge—that is, a Dishonorable or Bad Conduct discharge adjudicated at court martial—has stayed at a relatively constant 1%.⁵⁰ However, the percentage of veterans who receive an OTH discharge increased five-fold between 1941 and 2013.⁵¹ In the World War II era, only 1% of veterans received an OTH.⁵² By the end of the Vietnam War, the percentage had grown to 2.5%. Through the Cold War in the 80’s and Gulf War in the 90’s the rate continued to rise, until in the post 9/11 era, 5.8% of all veterans had been discharged with an OTH label.⁵³ As a result, more than 465,000 veterans who left the service since 1980 have an OTH discharge.⁵⁴ Likewise, the administration of General discharges rose from only 0.2% in the World War II era up to 8.4% by 2013.⁵⁵

IMPACT OF DISCHARGE STATUS ON VA BENEFITS



*unless VA makes a finding of insanity. If Bad Conduct discharge was not issued by General Court Martial, VA must conduct a character of discharge review.

It defies logic to conclude that today's servicemembers truly commit misconduct at rates so much higher than in the 1940s. Instead, other explanations—such as a need to draw down forces for budget purposes—must explain the change. Administrative separations offer the chain of command an expeditious way to fire servicemembers they view as undesirable or no longer needed, without the additional time, expense, and procedural protections of a court martial.

Other advocates have shown that administrative separations, particularly OTH discharges, are used disproportionately to eject servicemembers who experience mental health issues due to trauma and traumatic brain injury,⁵⁶ those who report sexual assault and harassment,⁵⁷ and those who are LGBTQ.⁵⁸ This report demonstrates that implicit bias or racial discrimination is also a potential factor in less than honorable administrative separations.

THE EFFECTS OF LESS THAN HONORABLE DISCHARGES ON VETERANS BENEFITS

A less than fully honorable discharge can bar a veteran—potentially for life—from important and valuable benefits. The United States boasts a large system of services and benefits intended to ensure that veterans and their families live with dignity after the conclusion of their service to their country. However, veterans with less than honorable discharges, particularly those with an OTH, face serious impediments to accessing their benefits.

Congress defines which former servicemembers are “veterans” entitled to veterans benefits. The definition of a “veteran” under U.S. law is “a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable.”⁵⁹ Congress also defined specific circumstances when a veteran’s misconduct should bar them from VA benefits: these circumstances comprise the “statutory bars.”⁶⁰ The only statutory bar that commonly prevents OTH veterans from accessing care concerns a prolonged AWOL (Absence With Out Leave) of at

least 180 continuous days. Even then, VA must consider the circumstances surrounding the AWOL before invoking that statutory bar to prevent a veteran from accessing benefits.

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The history of these statutes shows that Congress intended benefits to be expansive, even for veterans who were discharged with less than honorable characterizations of service due to misconduct.⁶¹ Despite this history, VA presumes that all veterans with an OTH discharge were released from service under dishonorable conditions and are therefore

not legally “veterans.” The VA therefore presumptively excludes all veterans with an OTH discharge status from VA health care or benefits unless the veteran convinces VA that their service was “other than dishonorable.”⁶²

MANY VETERANS WHO RECEIVED AN OTH BELIEVE THEY CANNOT ACCESS THE VA, AND SO NEVER EVEN GO THROUGH THE “CHARACTER OF DISCHARGE” PROCEEDING.

Veterans with General discharges are better situated than veterans with an OTH, because VA automatically considers them “veterans” under the law and therefore they are eligible for most benefits to the same extent as Honorably discharged veterans. However, the one notable exception is that veterans with General discharges are not eligible for education benefits under the GI Bill. The loss of educational opportunities can be personally devastating to veterans who rely on their military service to afford college to support their careers and families.

An unfortunate result of the VA’s longstanding practice of exclusion is that many veterans who received an OTH believe they cannot access the VA, and so never even go through the process for VA to determine if their service was “under conditions other than dishonorable.” This determination, known as a “character of discharge” proceeding, or COD, can take months or years, during which time the VA deprives the veteran of all benefits. Equally problematic, the VA’s regulations confuse

even their own employees, who often wrongly tell veterans that they cannot obtain benefits because of their OTH discharge.⁶³ Finally, the majority of veterans who do go through a COD with VA lose. Recent VA statistics show that VA found only 1 in 5 veterans eligible for full VA benefits during the COD determination. As this shows, for the majority of veterans with an OTH, VA merely rubber-stamps the military’s decision.

VETERANS BENEFITS ADMINISTRATION CHARACTER OF DISCHARGE DECISIONS 2017-2021⁶⁴

A veteran with an OTH, bad conduct, or dishonorable discharge cannot access VA Benefits without a Character of Discharge decision by VA.

Decision Type	2017	2018	2019	2020	2021
Eligible for VA Benefits*	19.7%	20.3%	20.1%	26.9%	21.3%
Barred from VA Benefits, with the exception of health care limited to treatment for a service-connected disability	49.7%	52.1%	56%	50.8%	53.3%
Barred from VA benefits, including treatment for service-connected disabilities	30.6%	27.6%	23.8%	22.3%	25.4%

*Education benefits under the GI Bill require an Honorable discharge

It was outside the scope of this report to examine whether racial disparities exist within VA’s COD process, yet other recent reports suggest that such a study would be worthwhile. In July 2020, in a nationwide survey of VA staff by the American Federation

of Government Employees, 80% said discrimination was a moderate or severe problem within the agency, and over 50% said they had directly witnessed racism against veterans.⁶⁵ Additionally, while the VA's internal guidance instructs adjudicators to consider factors such as military sexual trauma, traumatic brain injury, and other trauma-related mental health conditions which might explain a misconduct-based separation, no such guidance exists for claims of racial bias. This adds up to a system where, in order to access veterans benefits, Black servicemembers must navigate two highly-discretionary processes that are vulnerable to racial bias: the DOD's administrative separation process and the VA's character of discharge determination.

Veterans with less than honorable discharges have one other path to improve their access to benefits: apply to their branch of service for a discharge upgrade. A veteran may apply to her branch's Discharge Review Board or Board of Corrections for Military or Naval Records (hereinafter "Boards") to request an upgrade to Honorable. However, the Boards deny 90% of applications, especially if the veteran applies without a lawyer. In addition, the Boards often take years to adjudicate applications.⁶⁶ Although in recent years DOD leaders have instructed Boards to take PTSD, Traumatic Brain Injury ("TBI") and Military Sexual Trauma into account when reviewing applications, no similar consideration exists to address the impacts of racial bias.⁶⁷ An analysis of recent Board decisions showed that for all of the Boards except one, applications made on the basis of racial discrimination were granted at *lower* rates than the overall grant rate.⁶⁸

BENEFITS AT STAKE

VA BENEFITS

VA prevents veterans with an OTH from accessing the following benefits, unless the veteran prevails at a COD hearing.

Health care

The VA provides primary and specialty health care to veterans. Unlike the other benefits, a veteran with an OTH may access limited VA health care in certain circumstances. For instance, some veterans with an OTH discharge found "dishonorable for VA purposes" are eligible for limited VA health care for disabilities incurred or aggravated in service, but in many cases these veterans face difficulties accessing that care.⁶⁹ Likewise, VA routinely turns away veterans with OTH discharges who, despite their discharge status, should be given mental health care because they are MST survivors or served in combat or as drone operators.⁷⁰ VA will treat veterans with OTHs (and civilians) for an emergency, but may bill them afterwards.

Financial Benefits for Disabled and Elderly Veterans

The VA provides disability compensation and pension benefits, important sources of income for veterans whose disabilities render them unable to support themselves. Disability compensation

BENEFITS AT STAKE, continued

is available to veterans whose disability was incurred in, caused by, or aggravated by their time in service, and pension benefits are available to wartime veterans who face poverty and are elderly or have non-service-connected disabilities.

Education

VA offers tuition assistance for higher education. Education benefits under the GI Bill are the only benefits that, by law, require an Honorable discharge.⁷¹

Vocational Training

VA also provides vocation training (Veteran Readiness and Employment Services) to help veterans obtain jobs. This benefit is especially important when a veteran's disability requires them to learn a new skill set for employment.

Home Loans

The VA's home loan program has allowed generations of veterans to own homes. Historically, government red-lining policies and racist covenants in home deeds prevented Black veterans from accessing this program.

Burial Benefits

Veterans are eligible for burial in National Cemeteries and with military honors, an important source of dignity for them and their families. Additionally, VA defrays the cost of funeral expenses paid by the veteran's survivors.

NON-VA BENEFITS

In addition to VA benefits, veterans with an OTH discharge are prevented from accessing additional federal and state benefits.

Reemployment

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects servicemembers from losing their civilian jobs when they serve their country.⁷² However, USERRA fails to protect veterans with an OTH, regardless of whether they prevail in the VA's character of discharge process.

Naturalization

Not all military servicemembers are U.S. citizens. The law allows non-citizens who serve to become citizens, but only if they receive an Honorable or General discharge.⁷³

State Benefits

In addition to federal benefits offered, all states offer a range of additional benefits to veterans.⁷⁴ The types of benefits and eligibility criteria vary widely by state, and the state may or may not exclude veterans with OTH discharges.

The veterans benefits system conveys the gratitude of a nation and serves to reintegrate veterans into civilian life and care for their wounds of war. Yet veterans discharged with less than honorable discharges, especially those with an OTH, are often left to fend for themselves. The consequences can be devastating. Veterans with OTH discharges are more likely to die by suicide, and more likely to have problems

related to untreated mental illness.⁷⁵ They are more likely to have a substance abuse disorder, often in conjunction with mental health issues.⁷⁶ Veterans with OTH discharges are more likely to be homeless than other veterans.⁷⁷ These consequences are far too high for veterans, particularly when the data suggest that many of these discharges have been assigned unfairly.

DATA ANALYSIS

The data collected by CVLC show a clear and consistent trend: even in the most recent years of service, from Fiscal Year 2014 through 2020, every branch of the military discharged Black servicemembers with less than honorable discharges at higher rates than expected given their representation in the service. As a result, Black veterans as a class are less likely than white veterans to be eligible for veterans benefits.

A basic analysis of the data provided by DOD clearly shows a disparity for Black veterans. In addition, we ran a multinomial logistic regression on the data to confirm the findings and control for gender. The results of our analysis are presented below, and the multinomial logistic regression tables are included in Appendix B.

BASELINE TRENDS

The data provided by DOD indicates that the use of less than honorable administrative separation has declined slightly from previous averages. The data provided contained 1,244,678 total separations. Those with unknown race or ethnicity or unknown or “uncharacterized” character of service were excluded from the analysis. Once unknowns were excluded, 1,064,574 separations remained for analysis. Between 2014 and 2020, 7.8% of all separations issued were General, down slightly from 8.4% between 2002 and 2013. Encouragingly, 2.3% of separations in our data were OTH, down from 5.8% between 2002 and 2013.⁷⁸ While not yet back to World War II levels, this

trend shows a recent small improvement in the military’s use of benefits-disqualifying administrative discharges.

Character of Service	Number of Separations	Percent of Separations
Honorable	952,014	89.43%
General – Under honorable conditions	82,712	7.77%
Under other than honorable conditions	24,487	2.30%
Bad conduct	4,176	0.39%
Dishonorable – Dismissal	1,185	0.11%
<i>Grand Total</i>	<i>1,064,574</i>	<i>100.00%</i>

Although the overall percentage of less than honorable discharges is improving, as our analysis shows, Black servicemembers still receive a disproportionate share of those discharges. Additionally, the number of servicemembers separated less than honorably is substantial. During the time period of data collected, over 107,000 military veterans were administratively discharged without access to full VA benefits.

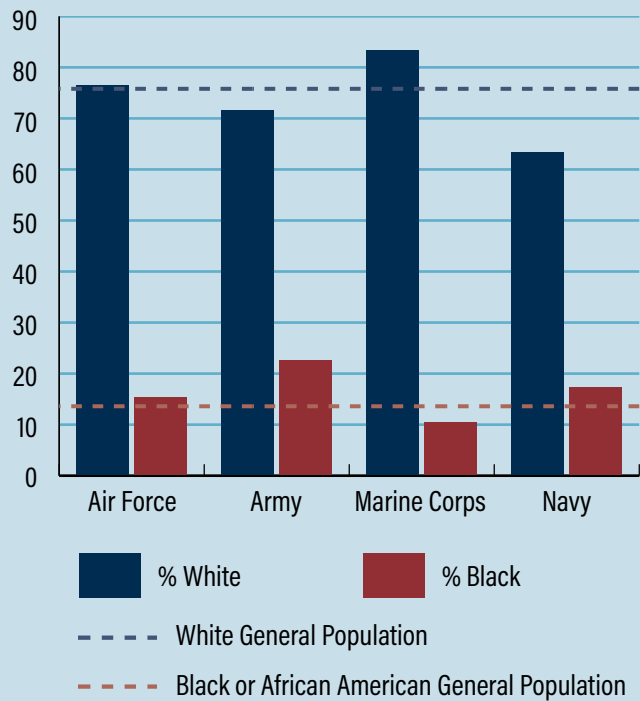
Our data also confirm that Black Americans serve at rates higher than their representation in the general population of the United States. Black servicemembers accounted for 17.9% of all separations in this time period, although they comprise 13.6% of the population.⁷⁹ However, this diversity is not equal across all the branches. Only 10.5% of Marines identified as Black, making the Marine Corps less diverse than the U.S. as a whole. Additionally, the low numbers of Black Marines created a small sample size for this study, as discussed below.

RESULTS BY MILITARY BRANCH

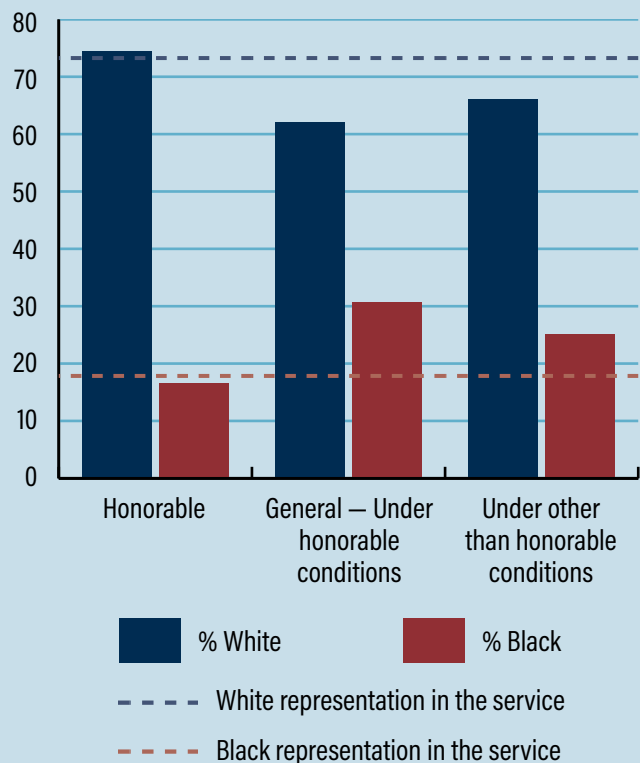
Across all military branches and for the military as a whole, Black servicemembers were more likely than white servicemembers to receive a less than honorable rather than an Honorable discharge.

In absolute values, although Black servicemembers comprise 17.9% of all the servicemembers who left military service between 2014 and 2020, they received only 16.5% of all Honorable discharges.

PERCENT OF BLACK AND WHITE SERVICEMEMBERS BY BRANCH COMPARED TO GENERAL POPULATION



BLACK AND WHITE SERVICEMEMBERS AS A PERCENT OF DISCHARGE STATUS



However, they received over 30% of General discharges, and over 25% of OTH discharges, an outsized share based on their representation in the service.

In contrast, white servicemembers comprise 73.3% of all separations during this period, yet they obtained 74.5% of all Honorable discharges, and only 62.1% of General and 66.1% of OTH discharges.

The multinomial logistic regression confirmed that these values represent a statistically significant disparity, where white servicemembers are advantaged and Black servicemembers disadvantaged in the administrative separation system.

In comparison to white servicemembers:

- **In the military as a whole**, Black servicemembers were approximately 1.5 times as likely to receive an OTH and approximately twice as likely to receive a General discharge rather than Honorable.
- **In the Army**, Black soldiers were approximately 1.8 times as likely to receive an OTH and approximately twice as likely to receive a General discharge rather than Honorable.
- **In the Navy**, Black sailors were approximately 2.3 times as likely to receive an OTH and approximately twice as likely to receive a General discharge rather than Honorable.
- **In the Air Force**, Black servicemembers were approximately twice as likely to receive an OTH and approximately 2.5 times as likely to receive a General discharge rather than Honorable.
- **In the Marines**, the data followed the consistent trend showing that Black servicemembers

disproportionately received less than honorable discharges. However, the results were not statistically significant, potentially due to the small sample size of Black Marines. Therefore, we do not present this finding as a numerical likelihood.

In addition to finding that Black servicemembers were more likely than white servicemembers to receive less than honorable administrative discharges (General and Other Than Honorable), our data demonstrate that they are also more likely to receive punitive discharges (Bad Conduct and Dishonorable).

RESULTS BY YEAR

We also broke down results for the entire service based on each year for which we received data. Again, the data show that for each year, a disparity existed between white and Black servicemembers.

In comparison to white servicemembers:

- **In 2014**, Black servicemembers were approximately 1.4 times as likely to receive an OTH and approximately 1.9 times as likely to receive a General discharge rather than Honorable.
- **In 2015**, Black servicemembers were approximately 1.6 times as likely to receive an OTH and approximately 2.2 times as likely to receive a General discharge rather than Honorable.
- **In 2016**, Black servicemembers were approximately 1.7 times as likely to receive an OTH and

approximately 2.3 times as likely to receive a General discharge rather than Honorable.

- **In 2017**, Black servicemembers were approximately 1.8 times as likely to receive an OTH and approximately 2.4 times as likely to receive a General discharge rather than Honorable.
- **In 2018**, Black servicemembers were approximately 1.5 times as likely to receive an OTH and approximately twice as likely to receive a General discharge rather than Honorable.
- **In 2019**, Black servicemembers were approximately 1.3 times as likely to receive an OTH and approximately 1.8 times as likely to receive a General discharge rather than Honorable.
- **In 2020**, Black servicemembers were approximately 1.7 times as likely to receive a General discharge rather than Honorable. However, in 2020 the results for OTH discharges were not statistically significant.

Additionally, for each year analyzed, Black servicemembers were also more likely than white servicemembers to receive a punitive discharge (Bad Conduct or Dishonorable).

LIMITATIONS OF THE DATA

The quality of the data we received from the DOD limited our ability to run a similar multinomial logistic regression comparing races and ethnicities other than white and Black. As discussed in more detail in the next section, the lack of nuance and clarity in the DOD's data collection prevents us from asserting with confidence that no disparity exists for non-Black servicemembers of color.

Additionally, because the “unknown” racial category obscures the race of the individual, these data were excluded from the analysis. Individuals of “unknown” race account for over 3.5% of all separations across all branches. The “unknown” category received a higher proportion of honorable discharges than any other group, meaning that further elucidation of the “unknown” racial category could have an impact on the results of the analysis.

While our study looked at discharge status and race alone, the military tracks additional data on servicemembers that may help it isolate factors leading to these disparities. For instance, disparities may concentrate in certain job types, among certain ranks, within certain bases, or after certain forms of misconduct. A deeper look into this data may reveal when and where disparities are most pronounced.

DISCUSSION

The data from recent years show that Black servicemembers fare significantly worse than white servicemembers in the administrative discharge system, which means Black veterans are disproportionately cut off from veterans benefits.

Our data only touch the most recent years, showing that disparities are an egregious problem confronting servicemembers in the present day even after recent attention on issues of racial injustice in the military and American society at large. The history of Black military service suggests that similar disparities extend back through previous eras, meaning

THE DATA SHOW THAT IN EVERY BRANCH, BLACK SERVICEMEMBERS FARED WORSE THAN WHITE SERVICEMEMBERS IN THE ADMINISTRATIVE SEPARATION PROCESS.

that many living veterans of color and their families have been prevented from obtaining veterans benefits. Neither the DOD's discharge upgrade process, nor the VA's character of discharge review process,

contain meaningful guidance geared toward rectifying racial injustice in the administrative separations system. This means untold numbers of Black veterans are left without recourse.

DATA SHOW THAT BLACK VETERANS RECEIVE BAD PAPER AT DISPROPORTIONATE RATES

Our data analysis confirmed what Black veterans have stated for many years: that they are more likely to receive less than honorable discharges than their white peers. The data show that in every branch, Black servicemembers fared worse than white servicemembers in the administrative separation

process. In our view, these disparities most likely stem from the likelihood of bias in the highly discretionary administrative separation process.

This study set out to determine how service-members of color fared in the administrative separation process.* Less than honorable administrative separations are viewed by the military as non-punitive, even as they deprive veterans of the important benefits they otherwise would earn by their service. Because these separations are non-punitive, DOD permits more discretion by command and offers fewer procedural protections for servicemembers. This discretion allows high levels of implicit—or explicit—bias against Black servicemembers to endure, while rendering such biases invisible or hard to prove in any individual case. Because of the minimal due process afforded to servicemembers facing administrative separation, there are few safeguards to protect servicemembers from receiving a less than honorable discharge due to bias or other unjust reasons.

Bias is a likely source of the disparity because the military’s recruitment policies provide a measure

*Our data finding that Black servicemembers received a disproportionate share of punitive discharges is compatible with other recent research showing racial disparities in the military justice system. Protect Our Defenders, analyzing a data set from overlapping years, found that servicemembers of color faced court martial at higher rates than white servicemembers. *Racial Disparities in Military Justice*, https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf. Our data demonstrate that in addition to prosecuting servicemembers of color at a higher rate, Black servicemembers receive a disparate share of punitive discharges following court martial.

of control for other factors that could explain the disparity. For instance, in its recruitment process, the military screens for specific levels of educational attainment, prior criminal justice involvement, prior drug use, and previous employment.⁸⁰ Therefore,

**THERE ARE FEW SAFEGUARDS TO PROTECT
SERVICEMEMBERS FROM RECEIVING A
LESS THAN HONORABLE DISCHARGE DUE
TO BIAS OR OTHER UNJUST REASONS**

these factors are unlikely sources of the significant disparities we found. Additionally, the potential for racial bias fits within the documented trend that less than honorable discharges are disparately imposed on other groups historically disfavored within the military, including servicemembers with PTSD, TBI, or other mental health issues,⁸¹ those who experienced sexual assault and harassment,⁸² and LGBTQ servicemembers.⁸³

Although our results showed that every branch has a racial disparity in its administrative separation system, only the Air Force has made any attempt to study this issue in recent years.⁸⁴ We note that our results showed a disparity in the Marine Corps that was not statistically significant. This is likely due to sample size. The Marine Corps is one of the smallest branches of the military. Additionally, it is the least diverse branch, with only 10.5% of Marines identifying as Black, a smaller percentage than the U.S. general population. Finally, we set a stringent benchmark for statistical significance for this study. As a result of

these factors, we state with confidence that a disparity exists in the Marine Corps' administrative separation process, although we do not provide a percentage likelihood as we do for the other branches.

The data show that this potential bias against Black servicemembers in military discharges is a current and ongoing problem. Our results are from the most recent years of service, casting doubt on the fairness of the current separation process. From 2014 through 2020, there was no trend toward improvement over time.

The existence of these racial disparities should be of serious concern to DOD and civilians who honor veterans for their service to their country. The data show that Black veterans are disproportionately barred from the post-service benefits accessible to their white colleagues. As a result, these veterans lack access to life-saving compensation and healthcare owed them for their service and miss out on the promises of middle-class opportunities for themselves and their families.

DOD'S DATA COLLECTION MAY OBSCURE DISPARITIES FOR OTHER SERVICEMEMBERS OF COLOR

Our analysis confirmed a disparity only between Black and white servicemembers. According to our preliminary analysis, servicemembers of other races were not disadvantaged. However, we are concerned

that the data provided by the DOD are not rich enough to ascertain disparities that may nonetheless exist, particularly for Asian, Pacific Islander, and Middle Eastern servicemembers.

The military data had racial categories for "Asian" and "Native Hawaiian or other Pacific Islander," and our preliminary analysis ran these categories separately. Other common data sets in social science categorize these groups under the term "Asian American and Pacific Islander" or AAPI, an umbrella term that contains over 50 different race and ethnicity categories.⁸⁵ Disaggregation of data about AAPI individuals reveals trends. For instance, while AAPI as a group have a higher household median income and higher educational attainment than the U.S. average, subgroups within AAPI have significantly lower income and educational attainment than the U.S. average.⁸⁶ When data analysis only explores AAPI as a whole, these differences are masked.⁸⁷

Similarly, our data analysis showed no disparity between Asians or Hawaiian Native or other Pacific Islanders and white servicemembers when it came to discharge status. The data set contained some information on ethnicity within the racial group, but this was provided inconsistently, and the data collection methods appeared to use a write-in textbox, leading to a vast spectrum of responses and compromising the comparability of the data. Therefore, we are unable to offer any conclusions on whether members of certain AAPI subgroups in the military face disparities.

For similar reasons, we are unable to determine whether there is a discharge disparity affecting servicemembers of Middle Eastern descent. The

military's data does not track Middle Eastern in any identifiable format. We presume that Middle Eastern servicemembers are identified as "white" race. If so, and if there is a disparity in discharge status for Middle Eastern servicemembers, it could also potentially mask a higher disparity between white and Black discharge status in our analysis.

Finally, the data identified a large number of servicemembers as race "Unknown." Without more precise data, we could not include these individuals in the analysis.

The concept of disaggregation of racial and ethnic data is nuanced, implicates privacy concerns for individuals within small groups, and is complex due to the numerous ways people may self-identify their race or ethnicity. For that reason, we do not suggest a specific solution to this issue, but point out that DOD's current data collection does not enable a complete understanding of whether there are existing disparities within the service branches for servicemembers of color who do not identify as Black.

RECOMMENDATIONS

RECOMMENDATIONS FOR THE DEPARTMENT OF DEFENSE

- 1.** The DOD should standardize and improve data collection across all branches to allow for accurate demographic comparisons and tracking of racial disparities and discharge rates. DOD should review whether and how to track ethnic categories such as subgroups of AAPI servicemembers and Middle Eastern servicemembers.
- 2.** The DOD should conduct a study with similar methodology to this report to determine the extent of racial disparities in discharge status back to at least World War II. Such a study would provide important knowledge to historians, as well as assist living veterans who may still desire to upgrade a disparaging discharge. Additionally, it would provide dignitary value to descendants of now-deceased veterans who may have experienced a bad discharge due to race.
- 3.** The DOD should command each branch to track and report, using centrally-determined metrics, each instance of command action pertaining to alleged misconduct, such as counseling warnings, non-judicial punishment, referrals for investigation, referrals for court martial, and other actions that precede a recommendation for administrative separation. Such disciplinary tracking should include the race, ethnicity, and gender of the service member. Such a report would not capture instances of supervisors who preferentially declined to administer a warning or punishment, nor would it distinguish between disciplinary actions that are merited verses unmerited. However, this data set would reveal when, in the aggregate, disciplinary actions rise to a disproportionate level based on the composition of servicemembers of a particular race, ethnicity or gender within particular commands or units and allow the branch or DOD to take ameliorative action.

4. Secretary of Defense Austin and Under Secretary of Defense for Personnel and Readiness Cisneros should issue a memo to the Discharge Review Boards and Boards for Correction of Military/Naval Records providing guidance for adjudicating applications when the applicant contends that they experienced racial discrimination, bias, or harassment. The DOD's existing anti-discrimination regulation at 32 C.F.R. § 70.9(c)(3)(ii)(D) does not provide meaningful guidance to applications or adjudicators, and in practice the Boards rarely apply the existing regulation in any given case. New guidance should require the Boards to grant liberal consideration to applications requesting an upgrade based on racial discrimination, racial bias, or harassment. The new guidance should also state that given the typical lack of documentation of racial bias in any individual veteran's military personnel file, a veteran's testimony or statement alone is sufficient to establish the likelihood that discrimination occurred, and that the Boards should grant upgrades in the interest of justice or equity.

RECOMMENDATIONS FOR THE DEPARTMENT OF VETERANS AFFAIRS

5. The VA should rescind 38 CFR § 3.12(d) so as to no longer presumptively deny all veterans with Other Than Honorable discharges access to benefits. The regulation as it currently exists unjustly bars from benefits veterans whose OTH discharge stemmed from factors outside the veteran's control, including racial bias. This regulation is not required by statute, and VA should heed the urging of numerous veterans and advocates who have called for VA to revoke this regulation. Instead, VA should limit denial of VA benefits to only those circumstances where the veteran is statutorily barred by Congress.
6. Immediately, pending revocation or revision of 38 C.F.R. § 3.12(d), Secretary of Veterans Affairs McDonough should issue binding guidance to VA Character of Discharge adjudicators instructing them to consider veteran's claims: (1) that racial discrimination, bias, or harassment negatively impacted the veteran's mental health, or (2) that experiences of racial discrimination, bias or harassment mitigate the misconduct that serves as the basis of the discharge. This guidance should specifically state that when the veteran has a prior

COD decision a supplemental claim may be reviewed with evidence of discrimination, to include the veteran's personal statement.

7. VA should implement a public awareness campaign, with contribution from veterans of color and organizations serving veterans of color, inviting veterans who have been previously turned away from VA or have never applied for VA benefits due to their discharge status, to submit an initial or supplemental claim.

RECOMMENDATIONS FOR CONGRESS

8. Congress should pass the GI Bill Restoration Act, which would extend access to the VA Home Loan Guaranty Program and GI Bill education benefits to the spouses and descendants of Black World War II veterans who were denied access to these programs at the conclusion of their service. Additionally, Congress should enact a statute providing that a veteran who shows that a form of discrimination proscribed by federal law was a contributing factor in the veteran's less than honorable discharge may receive VA benefits reserved for honorably-discharged veterans. The statute should also extend the time limit for claiming and using such benefits for a reasonable period of time following enactment of the statute.
9. Congress should commission a Government Accountability Office (GAO) report of VA approvals and denials of CODs for veterans according to race, particularly when veterans raise claims of mental health issues.
10. Congress should likewise commission a GAO report of the military Discharge Review Boards and Boards for Correction of Military/Naval Records on the approvals and denials of discharge upgrade petitions according to race, particularly when veterans raise contentions regarding mental health and/or racial bias.

APPENDICES

APPENDIX A: DATA METHODOLOGY FOR MULTINOMIAL LOGISTIC REGRESSION

This report increases transparency in the administrative separations process by collecting, contextualizing, and analyzing demographic data and administrative separation data from the military service branches from 2014-2020. This report adopts conservative measures of demographic and administrative separation trends, likely understating the racial disparities in discharge statuses given.

SOURCES OF DEMOGRAPHIC AND ADMINISTRATIVE SEPARATION DATA

The data for this report were obtained from the military service branches pursuant to requests submitted under the Freedom of Information Act (FOIA).⁸⁸ We made separate FOIA requests to the Army, Air Force, Navy, and Marines. The Army then transferred our request to the Office of the Secretary of Defense and Joint Staff FOIA Requester Service Center, which

provided data from the Defense Manpower Data Center. This production was responsive to the request for all branches for fiscal years 2014 through 2020. The production contained a data set showing the racial, ethnic, and gender demographics of all servicemembers, their discharge status, paygrade, and years of service. DOD also provided data on the Interservice Separation Code used in misconduct separations, but that data was not used in this analysis. A statistician, Emily G. Simpson, Ph.D., assisted the CVLC team with the statistical analysis of this data and in interpreting the final multinomial logistic regression models. SPSS was used to clean up and code the data received as well as run both preliminary and final models.

CODING OF RACE AND ETHNICITY DATA

The military branches require servicemembers to self-report their race and ethnicity. The racial

categories used by the Defense Manpower Data Center are: American Indian/Alaskan Native, Asian, Black or African American, Multi Racial, Native Hawaiian or other Pacific Islander, Unknown, and White. This report omitted from the data analysis any servicemembers that self-reported as Unknown, Multi-Racial, or when race data was missing. The preliminary analysis includes the five remaining racial categories with enough servicemembers to generate statistically reliable results: White, Black or African American, Asian, American Indian/Alaskan Native, and Native Hawaiian or other Pacific Islander. Hispanic was coded using the ethnicity data, with those servicemembers who identified as being of Hispanic ethnicity being coded as Hispanic and all others coded as non-Hispanic. Results of the preliminary analysis showed a significant disparity only for Black or African American compared to White. For that reason, full multinomial logistic regressions were performed only for those variables.

CODING OF SERVICE BRANCHES AND CHARACTERIZATIONS OF SERVICE

The four service branches reported on were coded as: Army, Air Force, Marine Corps, and Navy. Each of the four service branches uses the same naming conventions and ranking for characterizations of service, Honorable, General — Under honorable conditions, Under other than honorable conditions, Bad conduct, Dishonorable — Dismissal, Uncharacterized, and Unknown. This report omitted any servicemembers that had Uncharacterized or Unknown

characterizations of service, and used the 5 main characterizations of service in analysis: Honorable, General — Under honorable conditions, Other than Honorable, Bad conduct, Dishonorable.

PREDICTING CHARACTERIZATION OF SERVICE BY RACE FOR EACH SERVICE BRANCH FROM 2014-2020

Multinomial logistic regression was used to predict the characterization of service for servicemembers across the four service branches, between 2014-2020 based on race. A binary dummy variable was developed for race, and results controlled for gender. White servicemembers functioned as the reference category relative to other racial categories of servicemembers, the primary focus of analysis being on Black or African American servicemembers. Preliminary race analyses were run on white servicemembers relative to each of the following classifications: Hispanic, Asian, American Indian/Alaskan Native, Multi-Racial, and Native Hawaiian or Pacific Islander servicemembers, but the preliminary model did not significantly predict character. Preliminary models also tested an interaction between gender and race, but this variable did not significantly predict character and was removed from the final models. Characterizations of service were also coded as dummy variables for the purpose of this analysis. Honorable characterization of service functioned as a reference category relative to General, Other than Honorable, Bad conduct, or Dishonorable characterization of service.

The following logistic regressions were performed:

- White servicemembers’ characterizations of service compared to Black or African American servicemembers:
 - Across all service branches, from 2014-2020
 - For each service branch, from 2014-2020
 - Across all service branches, for each of 2014, 2015, 2016, 2017, 2018, 2019, and 2020

Because of the large number of analyses performed, $p < 0.001$ was selected as a more conservative cutoff for determining statistical significance. Outputs from analysis included the regression coefficients and odds ratio used for interpretation, standard errors, 95% confidence intervals, and p-values.

APPENDIX B: MULTINOMIAL LOGISTIC REGRESSION TABLES

Table 1: Multinomial Logistic Regression Predicting Discharge Character Across Branches, 2014-2020, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.755*	.025	.470	.448 - .494
Other than Honorable Race^a	-.415*	.028	.660	.625 - .787
Bad Conduct Race^a	-.456*	.043	.634	.577 - .765
Dishonorable Race^a	-.409*	.072	.665	.583 - .690

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 2: Multinomial Logistic Regression Predicting **Army** Discharge Character, 2014-2020, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.741*	.033	.477	.447 - .509
Other than Honorable Race^a	-.570*	.043	.565	.520 - .615
Bad Conduct Race^a	-.523*	.059	.594	.529 - .667
Dishonorable Race^a	-.536*	.094	.585	.487 - .703

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 3: Multinomial Logistic Regression Predicting **Navy** Discharge Character, 2014-2020, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.683*	.054	.505	.454 - .562
Other than Honorable Race^a	-.816*	.057	.442	.395 - .495
Bad Conduct Race^a	-.650*	.108	.522	.422 - .646
Dishonorable Race^b	-	-	-	-

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

^b Insufficient unique variability

* $p < .001$

Table 4: Multinomial Logistic Regression Predicting **Air Force** Discharge Character, 2014-2020, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.897*	.058	.408	.364 - .475
Other than Honorable Race^a	-.677*	.084	.508	.431 - .600
Bad Conduct Race^a	-.363*	.105	.696	.567 - .855
Dishonorable Race^a	-.353	.167	.702	.506 - .974

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 5: Multinomial Logistic Regression Predicting **Marines** Discharge Character, 2014-2020, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.192	.117	.825	.656 - 1.039
Other than Honorable Race^a	-.178	.113	.837	.671 - 1.045
Bad Conduct Race^a	-.346	.141	.707	.537 - .933
Dishonorable Race^a	-.293	.186	.746	.518 - 1.075

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 6: Multinomial Logistic Regression Predicting Discharge Character Across Branches in **2014**, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.617*	.062	.540	.447 - .610
Other than Honorable Race^a	-.345*	.070	.708	.617 - .812
Bad Conduct Race^a	-.412*	.097	.662	.548 - .801
Dishonorable Race^a	-.668*	.199	.513	.347 - .757

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 7: Multinomial Logistic Regression Predicting Discharge Character Across Branches in **2015**, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.783*	.055	.457	.411 - .509
Other than Honorable Race^a	-.454*	.064	.635	.560 - .720
Bad Conduct Race^a	-.466*	.108	.627	.508 - .775
Dishonorable Race^a	-.327	.208	.721	.479 - 1.085

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 8: Multinomial Logistic Regression Predicting Discharge Character Across Branches in **2016**, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.850*	.066	.428	.376 - .487
Other than Honorable Race^a	-.505*	.074	.603	.522 - .698
Bad Conduct Race^a	-.518*	.115	.596	.476 - .746
Dishonorable Race^a	-.498	.207	.608	.405 - .912

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 9: Multinomial Logistic Regression Predicting Discharge Character Across Branches in **2017**, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.862*	.064	.422	.373 - .479
Other than Honorable Race^a	-.561*	.073	.571	.495 - .658
Bad Conduct Race^a	-.553*	.115	.575	.459 - .721
Dishonorable Race^a	-.783*	.168	.457	.329 - .635

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 10: Multinomial Logistic Regression Predicting Discharge Character Across Branches in **2018**, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.759*	.068	.468	.410 - .534
Other than Honorable Race^a	-.407*	.075	.666	.574 - .771
Bad Conduct Race^a	-.481*	.112	.618	.496 - .770
Dishonorable Race^a	-.366	.166	.694	.501 - .960

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 11: Multinomial Logistic Regression Predicting Discharge Character Across Branches in **2019**, relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.599*	.077	.549	.472 - .639
Other than Honorable Race^a	-.268*	.084	.765	.648 - .902
Bad Conduct Race^a	-.359	.132	.698	.539 - .905
Dishonorable Race^a	-.197	.211	1.218	.805 - 1.843

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

Table 12: Multinomial Logistic Regression Predicting Discharge Character Across Branches in **2020** relative to Honorable Character

	β	SE	Odds Ratio	95% CI
General Race^a	-.534*	.079	.586	.502 - .684
Other than Honorable Race^a	-.090	.087	.914	.772 - 1.083
Bad Conduct Race^a	-.231	.138	.794	.605 - 1.041
Dishonorable Race^a	.027	.202	1.028	.692 - 1.526

Note. **Honorable** served as the reference character

^a Race/Ethnicity coded as 0 = White and 1 = Black or African American

* $p < .001$

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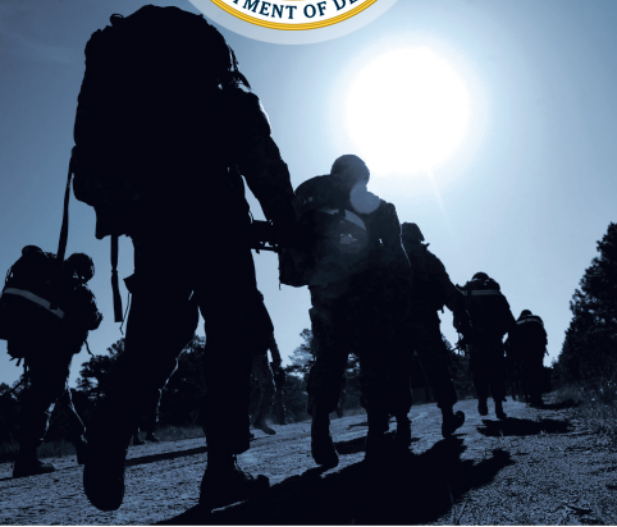
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INSPECTOR GENERAL

U.S. Department of Defense



PRESENTED BY: DOD WHISTLEBLOWER PROTECTION COORDINATOR

WHISTLEBLOWER PROTECTION MILITARY PERSONNEL



INSPECTOR GENERAL

U.S. Department of Defense

PRESENTED BY: KENNETH M. SHARPLESS

WHISTLEBLOWER PROTECTION
PROHIBITIONS, RIGHTS, RESPONSIBILITIES
10 U.S.C 1034

WHISTLEBLOWER PROTECTION COORDINATOR

“The DoD’s ability to protect our warfighters and safeguard the taxpayers’ money depends on each of us. We rely heavily on our military members, civilian employees, and contractors to freely report issues of fraud, waste, and abuse without fear of retaliation. We all are potential whistleblowers and we should be aware of the protections afforded to us under the applicable statutes.” It is a responsibility we can’t afford to dismiss!

Ken Sharpless, DoD WPC



BACKGROUND ON RIGHTS & PROTECTIONS

- Congress wanted military personnel to report wrongdoing without fear of retaliation and initially addressed whistleblower rights and protection for military personnel in 1988 with the enactment of the Military Whistleblower Protection Act (10 U.S.C. 1034).
- These protections were updated and strengthened throughout the years by broadening the definition of “protected communications” and expanding the scope to whom protected communications can be made.
- Executive Order 12674, as amended, requires Federal employees to, “disclose waste, fraud, abuse, and corruption to appropriate authorities.”
- The Whistleblower Protection Enhancement Act of 2012 broadened the scope of some of these rights and protections, and required each Inspector General of a federal agency to appoint a Whistleblower Protection Ombudsman to educate agency employees about prohibitions on retaliation for protected disclosures and rights and remedies against such retaliation.
- In June 2018, under the Whistleblower Protection Coordination Act, the Ombudsman position was renamed the Whistleblower Protection Coordinator.



BACKGROUND ON RIGHTS & PROTECTIONS

- The Whistleblower Protection Coordinator is required to educate agency employees about the prohibitions on retaliation for protected disclosures and rights and remedies against such reprisal.
- This role compliments the existing responsibility of the Secretary to ensure Department of Defense employees are informed of their whistleblower rights and remedies.
- Ken Sharpless was designated to serve as the Whistleblower Protection Coordinator for the Department of Defense.
- You can contact the DoD Whistleblower Protection Coordinator at:

Whistleblowerprotectioncoordinator@dodig.mil



DoD POLICY ON WHISTLEBLOWING

- Members of the Armed Forces shall be free to make a protected communication and be free from reprisal for making or preparing to make a protected communication.
- No person shall restrict a member of the Armed Forces from making lawful communications to a member of Congress or an Inspector General.
- No person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, in reprisal against any member of the Armed Forces for making, preparing, or being perceived as making or preparing a protected communication.



REPRISAL & RESTRICTION DEFINED

- Reprisal
 - Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making, preparing, or being perceived as making or preparing a protected communication.
- Restriction
 - Preventing or attempting to prevent members of the Armed Forces from making or preparing to make lawful communications to members of Congress or an IG.



ELEMENTS OF REPRISAL

To demonstrate reprisal you must show:

- You made a protected communication
- A responsible management official (RMO) knew or perceived that the complainant made or prepared to make a protected communication
- A personnel action was taken, withheld, or threatened
- The protected communication was a contributing factor in the decision to take, withhold, or threaten the personnel action



PROTECTED COMMUNICATION DEFINED

A communication in which the Armed Forces member has a reasonable belief that evidences:

- A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of the UCMJ, sexual harassment, or unlawful discrimination
- Gross mismanagement
- Gross waste of funds
- An abuse of authority
- A substantial and specific danger to public health or safety
- Any threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the Armed Forces or civilians or damage to military, federal, or civilian property



COMMUNICATION MADE TO THE FOLLOWING ENTITIES

- A member of Congress
- An Inspector General
- A member of a DoD audit, inspection, or law enforcement organization
- Any person in the chain of command
- A court-martial proceeding
- Any other person designated pursuant to regulations or other established administrative procedures to receive such communications



PERSONNEL ACTION

- **Any action taken on a member of the Armed Forces that affects, or has the potential to affect, that military member's current position or career (DoDD 7050.06)**
- Promotions
- Disciplinary or other corrective action
- Transfer or reassignment
- Performance evaluation
- Decision on pay, benefits, awards or training



PERSONNEL ACTION CONTINUED

- **Any action taken on a member of the Armed Forces that affects, or has the potential to affect, that military member's current position or career (DoDD 7050.06)**
- Referral for mental health evaluations
- Other significant changes in duties or responsibilities inconsistent with the military member's grade
- Retaliatory investigations for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication



SHOULD I SUBMIT A REPRISAL COMPLAINT?

IF YOU MADE A PROTECTED COMMUNICATION AND BELIEVE YOU HAVE BEEN REPRISED AGAINST BECAUSE OF THAT COMMUNICATION, YOU CAN SUBMIT A REPRISAL COMPLAINT THROUGH THE DOD HOTLINE.



WHERE TO SUBMIT A REPRISAL COMPLAINT?

- Notifying your local or command Inspector General (IG) office is the most efficient means to report and resolve your complaint within the IG system.
- All reprisal complaints receive DoD IG oversight regardless of submission location.
- Complaints may also be submitted to the DoD Hotline using the on-line complaint forms for the following:
 - www.dodig.mil/hotline (Internet)
 - www.dodig.smil.mil/hotline (SIPRNet)
 - www.dodig.ic.gov/hotline/index.html (JWICS) **Link does not work on unclassified systems
 - Phone: 1-800-424-9098
 - Please call prior to submitting complaints via SIPRNet or JWICS, or to ask general questions regarding submitting a complaint.



MILITARY REPRISAL TIME LIMITS

- No investigation is required when a service member submits a reprisal complaint more than one year after the date the member became aware of the personnel action that is the subject of the investigation.
- The Inspector General may still consider the complaint based on compelling reasons or circumstances
 - Service member was actively misled regarding his/her rights
 - Service member was prevented in some extraordinary way from exercising his/her rights
 - Service member filed the same allegation within the 1 year period with the wrong office or agency



BOARDS OF CORRECTION OF MILITARY RECORDS

- A military member may obtain a review of the service reprisal investigation by submitting a copy of the investigative report to the appropriate Board for Correction of Military Records (BCMR).
 - Air Force BCMR: <https://www.afpc.af.mil/Career-Management/Military-Personnel-Records/>
 - Navy/Marine BCNR: <http://www.donhq.navy.mil/bcncr/bcncr.htm>
 - Army BCMR: <http://arba.army.pentagon.mil/>
 - U.S. Coast Guard BCMR: <https://www.uscg.mil/Resources/Legal/BCMR/>
 - Deputy Under Secretary of Defense for Program Integration USD (PI) within 90 days of BCMR decision. Refer to DoDD 7050.6 for more information.



WHAT IF I DON'T KNOW WHAT TO DO

Contact the DoD Whistleblower Protection Coordinator

The Coordinator's role is to educate all agency employees about the prohibitions on reprisal and the means by which employees can employ avenues of resolution through either the DoD Office of Inspector General or other alternative solutions. He is prohibited from acting as a legal representative, agent, or advocate.



We Have Been Given a Responsibility

Report Fraud, Waste, Abuse

...Do What's Right



SELECT CLAIMS DATA FOR REVIEW BOARDS
(April 2022-June 2022)

Review Boards	Mental Health Claims Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade ¹	No Relief Granted	Percent
Air Force Discharge Review Board	47	6	13%	6	41	87%
Air Force Board for Correction of Military Records	40	5	13%	0	35	88%
Army Discharge Review Board	378	138	36.5%	121	240	63.5%
Army Board for Correction of Military Records	71	26	37.0%	24	45	63.0%
Naval Discharge Review Board	238	126	52.9%	117	112	47.1%
Board for Correction of Naval Records	268	54	20.1%	35	214	79.9%
Review Boards	Sexual Assault Claims Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade ¹	No Relief Granted	Percent
Air Force Discharge Review Board	11	2	18%	2	9	82%
Air Force Board for Correction of Military Records	13	4	31%	0	9	69%
Army Discharge Review Board	45	29	64.4%	27	16	35.6%
Army Board for Correction of Military Records	3	2	66.6%	1	1	33.3%
Naval Discharge Review Board	51	22	43.1%	20	29	56.9%
Board for Correction of Naval Records	61	23	37.7%	16	38	62.3%
Review Boards	Claims Other Than MH/SA Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade ¹	No Relief Granted	Percent
Air Force Discharge Review Board	36	9	25%	7	27	75%
Air Force Board for Correction of Military Records	314	92	29%	4	222	71%
Army Discharge Review Board	107	42	39.3%	38	65	60.7%
Army Board for Correction of Military Records	269	101	37.5%	88	168	62.5%
Naval Discharge Review Board	283	109	38.5%	93	174	61.5%
Board for Correction of Naval Records	333	73	21.9%	45	260	78.1%

¹ Upgrades are not always requested and not always an option. Most discharges are honorable or uncharacterized and many veterans, therefore, seek other forms of relief (e.g., a change in the discharge basis).

SELECT CLAIMS DATA FOR REVIEW BOARDS
(April 2022-June 2022)

Review Boards	Number of Claims Submitted									
	Operation Freedom's Sentinel (Afghanistan)	Operation Inherent Resolve (Iraq)	Operation Enduring Freedom (Afghanistan)	Operation New Dawn (Iraq)	Operation Iraqi Freedom (Iraq)	Persian Gulf War	Vietnam War	Korean War	World War II	World War I
Air Force Discharge Review Board	0	1	0	0	7	0	0	0	0	0
Air Force Board for Correction of Military Records	2	1	2	0	3	6	6	1	0	0
Army Discharge Review Board	2	0	2	0	7	0	0	0	0	0
Army Board for Correction of Military Records	12	69	8	7	116	49	190	19	12	2
Naval Discharge Review Board	1	0	6	0	12	0	0	0	0	0
Board for Correction of Naval Records	22	21	35	6	41	44	59	4	5	0

SELECT CLAIMS DATA FOR REVIEW BOARDS
(July 2022-September 2022)

Review Boards	Mental Health Claims Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade ¹	No Relief Granted	Percent
Air Force Discharge Review Board	59	5	8.0%	3	54	92.0%
Air Force Board for Correction of Military Records	25	6	24.0%	0	19	76.0%
Army Discharge Review Board	267	92	34.5%	81	175	65.5%
Army Board for Correction of Military Records	139	63	45.3%	40	76	54.7%
Naval Discharge Review Board	194	105	54.1%	96	89	45.9%
Board for Correction of Naval Records	336	62	18.5%	37	274	81.5%
Review Boards	Sexual Assault Claims Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade¹	No Relief Granted	Percent
Air Force Discharge Review Board	11	1	9.0%	0	10	91.0%
Air Force Board for Correction of Military Records	11	3	27.0%	0	8	73.0%
Army Discharge Review Board	25	12	48.0%	10	13	52.0%
Army Board for Correction of Military Records	15	11	73.3%	11	4	26.7%
Naval Discharge Review Board	18	10	55.6%	10	8	44.4%
Board for Correction of Naval Records	67	19	28.4%	16	48	71.6%
Review Boards	Claims Other Than MH/SA Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade¹	No Relief Granted	Percent
Air Force Discharge Review Board	63	11	17.0%	2	52	83.0%
Air Force Board for Correction of Military Records	228	79	35.0%	0	149	65.0%
Army Discharge Review Board	52	19	36.5%	16	33	63.5%
Army Board for Correction of Military Records	313	68	21.7%	34	245	78.3%
Naval Discharge Review Board	283	109	38.5%	93	174	61.5%
Board for Correction of Naval Records	268	67	25%	41	201	75%

¹ Upgrades are not always requested and not always an option. Most discharges are honorable or uncharacterized and many veterans, therefore, seek other forms of relief (e.g., a change in the discharge basis).

SELECT CLAIMS DATA FOR REVIEW BOARDS
(July 2022-September 2022)

Review Boards	Number of Claims Submitted									
	Operation Freedom's Sentinel (Afghanistan)	Operation Inherent Resolve (Iraq)	Operation Enduring Freedom (Afghanistan)	Operation New Dawn (Iraq)	Operation Iraqi Freedom (Iraq)	Persian Gulf War	Vietnam War	Korean War	World War II	World War I
Air Force Discharge Review Board	0	0	2	0	5	0	0	0	0	0
Air Force Board for Correction of Military Records	3	1	4	0	4	4	6	0	0	0
Army Discharge Review Board	2	1	7	0	16	0	0	0	0	0
Army Board for Correction of Military Records	8	8	51	0	70	27	101	11	1	0
Naval Discharge Review Board	0	2	25	0	26	0	0	0	0	0
Board for Correction of Naval Records	26	27	43	3	35	55	79	5	2	0

SELECT CLAIMS DATA FOR REVIEW BOARDS
(October 2022-December 2022)

Review Boards	Mental Health Claims Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade ¹	No Relief Granted	Percent
Air Force Discharge Review Board	57	5	9%	5	52	91%
Air Force Board for Correction of Military Records	32	4	13%	0	28	88%
Army Discharge Review Board	271	106	39%	100	165	61%
Army Board for Correction of Military Records	125	59	47.2%	53	66	52.8%
Naval Discharge Review Board	276	105	38.0%	94	171	62.0%
Board for Correction of Naval Records	336	55	16.4%	35	281	83.6%
Review Boards	Sexual Assault Claims Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade ¹	No Relief Granted	Percent
Air Force Discharge Review Board	14	2	14%	1	12	86%
Air Force Board for Correction of Military Records	13	5	38%	0	8	62%
Army Discharge Review Board	44	30	68%	30	14	32%
Army Board for Correction of Military Records	14	13	92.9%	13	1	7.1%
Naval Discharge Review Board	46	14	30.4%	14	32	69.6%
Board for Correction of Naval Records	64	13	20.3%	10	51	79.7%
Review Boards	Claims Other Than MH/SA Adjudicated	Relief Granted	Percent	Relief Includes an Upgrade ¹	No Relief Granted	Percent
Air Force Discharge Review Board	63	10	16%	2	53	84%
Air Force Board for Correction of Military Records	256	124	48%	0	132	52%
Army Discharge Review Board	73	24	33%	17	49	67%
Army Board for Correction of Military Records	274	69	25.2%	57	205	74.8%
Naval Discharge Review Board	283	109	38.5%	93	174	61.5%
Board for Correction of Naval Records	315	70	22.2%	43	245	77.8%

¹ Upgrades are not always requested and not always an option. Most discharges are honorable or uncharacterized and many veterans, therefore, seek other forms of relief (e.g., a change in the discharge basis).

SELECT CLAIMS DATA FOR REVIEW BOARDS
(October 2022-December 2022)

Review Boards	Number of Claims Submitted									
	Operation Freedom's Sentinel (Afghanistan)	Operation Inherent Resolve (Iraq)	Operation Enduring Freedom (Afghanistan)	Operation New Dawn (Iraq)	Operation Iraqi Freedom (Iraq)	Persian Gulf War	Vietnam War	Korean War	World War II	World War I
Air Force Discharge Review Board	0	0	0	0	0	0	0	0	0	0
Air Force Board for Correction of Military Records	3	4	10	0	7	2	3	0	0	0
Army Discharge Review Board	0	0	4	1	4	0	0	0	0	0
Army Board for Correction of Military Records	14	11	103	6	152	56	206	9	12	2
Naval Discharge Review Board	0	3	30	1	44	0	0	0	0	0
Board for Correction of Naval Records	23	23	41	5	41	31	62	1	9	0



PERSONNEL AND
READINESS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

AUG 25 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

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

In December 2016, the Department announced a renewed effort to ensure veterans were aware of the opportunity to have their discharges and military records reviewed. As part of that effort, we noted the Department was currently reviewing our policies for the Boards for Correction of Military/Naval Records (BCM/NRs) and Discharge Review Boards (DRBs) and considering whether further guidance was needed. We also invited feedback from the public on our policies and how we could improve the discharge review process.

As a result of that feedback and our internal review, we have determined that clarifications are needed regarding mental health conditions, sexual assault, and sexual harassment. To resolve lingering questions and potential ambiguities, clarifying guidance is attached to this memorandum. This guidance is not intended to interfere with or impede the Boards' statutory independence. Through this guidance, however, there should be greater uniformity amongst the review boards and veterans will be better informed about how to achieve relief in these types of cases.

To be sure, the BCM/NRs and DRBs are tasked with tremendous responsibility and they perform their tasks with remarkable professionalism. Invisible wounds, however, are some of the most difficult cases they review and there are frequently limited records for the boards to consider, often through no fault of the veteran, in resolving appeals for relief. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. This clarifying guidance ensures fair and consistent standards of review for veterans with mental health conditions, or who experienced sexual assault or sexual harassment regardless of when they served or in which Military Department they served.

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days. My point of contact is Lieutenant Colonel Reggie Yager, Office of Legal Policy, (703) 571-9301 or reggie.d.yager.mil@mail.mil.

A. M. Kurta
Performing the Duties of the Under Secretary of
Defense for Personnel and Readiness

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment

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; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment

Generally

1. This document provides clarifying guidance to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault; or sexual harassment.
2. Requests for discharge relief typically involve four questions:
 - a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
 - b. Did that condition exist/ experience occur during military service?
 - c. Does that condition or experience actually excuse or mitigate the discharge?
 - d. Does that condition or experience outweigh the discharge?
3. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.
4. Evidence may come from sources other than a veteran's service record and may include records from the DoD Sexual Assault Prevention and Response Program (DD Form 2910, *Victim Reporting Preference Statement*) and/or DD Form 2911, *DoD Sexual Assault Forensic Examination [SAFE] Report*), law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, physicians, pregnancy tests, tests for sexually transmitted diseases, and statements from family members, friends, roommates, co-workers, fellow servicemembers, or clergy.
5. Evidence may also include changes in behavior; requests for transfer to another military duty assignment; deterioration in work performance; inability of the individual to conform their behavior to the expectations of a military environment; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; unexplained economic or social behavior changes; relationship issues; or sexual dysfunction.
6. Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.

7. The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.
8. Cases falling under this guidance will receive timely consideration consistent with statutory requirements.

Was there a condition or experience?

9. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge.
10. Evidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge.
11. A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.
12. Review Boards are not required to find that a crime of sexual assault or an incident of sexual harassment occurred in order to grant liberal consideration to a veteran that the experience happened during military service, was aggravated by military service, or that it excuses or mitigates the discharge.

Did it exist/occur during military service?

13. A diagnosis made by a licensed psychiatrist or psychologist that the condition existed during military service will receive liberal consideration.
14. A determination made by the Department of Veterans Affairs (VA) that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the Department of Defense, is persuasive evidence that the condition existed or experience occurred during military service.
15. Liberal consideration is not required for cases involving pre-existing conditions which are determined not to have been aggravated by military service.

Does the condition/experience excuse or mitigate the discharge?

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.
17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally

construed as warranting a change in narrative reason to “Secretarial Authority,” “Condition not a disability,” or another appropriate basis.

Does the condition/experience outweigh the discharge?

18. In some cases, the severity of misconduct may outweigh any mitigation from mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

19. Premeditated misconduct is not generally excused by mental health conditions, including PTSD; TBI; or by a sexual assault or sexual harassment experience. However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.

Additional Clarifications

20. Unless otherwise indicated, the term “discharge” includes the characterization, narrative reason, separation code, and re-enlistment code.

21. This guidance applies to both the BCM/NRs and DRBs.

22. The supplemental guidance provided by then-Secretary Hagel on September 3, 2014, as clarified in this guidance, also applies to both BCM/NRs and DRBs.

23. The guidance memorandum provided by then-Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness Brad Carson on February 24, 2016, applies in full to BCM/NRs but also applies to DRBs with regards to de novo reconsideration of petitions previously decided without the benefit of all applicable supplemental guidance.

24. These guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations.

25. Unless otherwise indicated, liberal consideration applies to applications based in whole or in part on matters related to diagnosed conditions, undiagnosed conditions, and misdiagnosed TBI or mental health conditions, including PTSD, as well as reported and unreported sexual assault and sexual harassment experiences asserted as justification or supporting rationale for discharge relief.

26. Liberal consideration includes but is not limited to the following concepts:

a. Some circumstances require greater leniency and excusal from normal evidentiary burdens.

b. It is unreasonable to expect the same level of proof for injustices committed years ago when TBI; mental health conditions, such as PTSD; and victimology were far less understood than they are today.

- c. It is unreasonable to expect the same level of proof for injustices committed years ago when there is now restricted reporting, heightened protections for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment than ever before.
- d. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported.
- e. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected.
- f. Reviews involving diagnosed, undiagnosed, or misdiagnosed TBI or mental health conditions, such as PTSD, or reported or unreported sexual assault or sexual harassment experiences should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.
- g. Veterans with mental health conditions, including PTSD; TBI; or who experienced sexual assault or sexual harassment may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran's life.
- h. An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.
- i. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case. For example, marijuana use is still unlawful in the military but it is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.
- j. Service members diagnosed with mental health conditions, including PTSD; TBI; or who reported sexual assault or sexual harassment receive heightened screening today to ensure the causal relationship of possible symptoms and discharge basis is fully considered, and characterization of service is appropriate. Veterans discharged under prior procedures, or before verifiable diagnosis, may not have suffered an error because the separation authority was unaware of their condition or experience at the time of discharge. However, when compared to similarly situated individuals under today's standards, they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care.
- k. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

JUL 22 2011

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Certification of the Repeal of "Don't Ask, Don't Tell"

The purpose of this memorandum is to inform you that the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have certified to Congress that the Services are prepared for the implementation of the repeal of 10 U.S.C. § 654, the law commonly known as "Don't Ask, Don't Tell" (DADT).

As you are well aware, on December 22, 2010, the President signed legislation that will lead to the eventual repeal of DADT. The legislation provides that repeal will take effect 60 days after the President, Secretary, and Chairman certify to Congress that the Armed Forces are prepared to implement repeal in a manner that is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces. Accordingly, repeal of DADT will be effective 60 days from certification, on September 20, 2011.

It remains the policy of the Department of Defense that sexual orientation is a personal and private matter, to treat all members with dignity and respect, and to ensure maintenance of good order and discipline. Leadership, Professionalism, Discipline, and Respect remain essential components for the implementation of repeal. Additional policy guidance, to be effective upon September 20, 2011, can be found in the attached memo dated January 28, 2011, "Repeal of Don't Ask, Don't Tell and Future Impact on Policy."

A handwritten signature in black ink, appearing to read "Clifford L. Stanley".

Clifford L. Stanley

Attachments:
As stated

cc:
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary of Defense for Public Affairs
General Counsel of the Department of Defense



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

MM 28 2010

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Repeal of Don't Ask Don't Tell and Future Impact on Policy

On December 22nd, 2010, the President signed legislation that will lead to the eventual repeal of 10 U.S.C. § 654 and its implementing regulations (commonly known as "Don't Ask, Don't Tell"). The legislation provides that repeal will take effect 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify to Congress that the Armed Forces are prepared to implement repeal in a manner that is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces. Until such time, there are no changes to 10 U.S.C. § 654 nor any existing Department or Service policies.

The purpose of attachment one is twofold: 1) to provide the Department's Policy Guidance that will take effect on the date of repeal (the exact date is not yet known) and 2) to inform the Military Services about the steps each should take immediately in order to prepare for the effective date of repeal.

Additionally, the second attachment contains those changes to Department Instructions and Directives that will be effective on the date of repeal.

It remains the policy of the Department of Defense that sexual orientation is a personal and private matter, to treat all members with dignity and respect, and to ensure maintenance of good order and discipline. Leaders will be essential to implementing this change in policy fairly and consistently. A clear focus on leadership, professionalism, and respect will enable any change in policy to be executed with minimum disruption to the force.

Clifford L. Stanley

Attachments:
As stated

cc:
Chairman of the Joint Chiefs of Staff
Coast Guard, Commandant (CG1)
General Counsel of the Department of Defense



DADT Repeal Policy Guidance

On the effective date of repeal of Don't Ask, Don't Tell (DADT), which is yet to be determined, this policy guidance will apply to all military personnel serving in the Armed Forces of the United States, including those serving in the Reserve components of the Armed Forces.

In order to prepare to implement the below policy guidance on the effective date of repeal of DADT, each Service is immediately directed to identify its specific instructions and regulations related to all policy areas affected by the future repeal of DADT and prepare draft changes based on the below policy guidance. It is critical to reemphasize that these policy changes will not be effective until the date of repeal.

Separations

Upon repeal, Services may no longer separate Service members under the homosexual conduct policy set forth under 10 U.S.C. § 654 and its implementing regulations. Service members will no longer be subject to administrative separation based solely on legal homosexual acts, a statement by a Service member that he or she is a homosexual or bisexual (or words to that effect), or marriage or attempted marriage to a person known to be of the same biological sex. Members who have an approved separation date after the effective date of repeal based on proceedings commenced solely under 10 U.S.C. § 654 and its implementing regulations will have that separation cancelled and will return to duty.

Additionally, on the date of repeal, Services will cease all pending investigations, separations, discharges, or administrative proceedings commenced solely under 10 U.S.C. § 654, and its implementing regulations. Services may reprocess if facts afford another appropriate reason for separation other than 10 U.S.C. § 654 and its implementing regulations. In those cases already begun in which 10 U.S.C. § 654 and its implementing regulations represent one of multiple reasons for separation, Services will make a case-by-case determination as to whether to proceed with the separation or to start the proceedings over again.

DoD discharge codes JB, RA, RB, RC for discharges under 10 U.S.C. § 654 and its implementing regulations will be discontinued.

Accessions and Recruiting Policy

Upon repeal, statements about sexual orientation or lawful acts of homosexual conduct will not be considered as a bar to military service or admission to Service academies, ROTC or any other accession program. Sexual orientation will continue to be a personal and private matter. Applicants for enlistment or appointment may not be

asked, or be required to reveal, their sexual orientation. All applicants, regardless of any statements in regard to sexual orientation, will be treated with professionalism and respect.

The required briefings given to applicants for enlistment and appointment regarding standards of personal conduct in the armed forces and separations policy will be amended appropriately to reflect the new policy.

Re-Accessions

Upon repeal, former Service members who were discharged solely under 10 U.S.C. § 654 and its implementing regulations may apply to re-enter the Armed Forces. They will be evaluated according to the same criteria and Service requirements applicable to all prior-Service members seeking re-entry into the military at that time. There will be no preferential treatment for Service members separated solely under 10 U.S.C. § 654 and its implementing regulations. They will be processed as any other re-accession applicant under Service policies. Services shall continue to consider a Service member's previous performance and disciplinary record when determining suitability for re-entry.

Services will waive re-entry codes on DD Forms 214 that are based upon separations under 10 U.S.C. § 654 and its implementing regulations. Applicants will then be processed on a case-by-case basis in accordance with Service policies.

In considering applications for re-accessions, the Services will not consider to the detriment of an applicant any separation that was solely for under 10 U.S.C. § 654, and its implementing regulations. For example, former Service members who were separated with an honorable discharge (or an uncharacterized discharge for those occurring during initial training), and who have a separation code in their records reflecting a separation under 10 U.S.C. § 654 and its implementing regulations, shall be considered for re-entry according to the most favorable re-entry classification. The military requirements of the Services will continue to dictate re-accession criteria.

Standards of Conduct

Upon repeal, existing standards of conduct shall continue to apply to all Service members regardless of sexual orientation. Enforcement of service standards of conduct, including those related to public displays of affection, dress and appearance, and fraternization will be sexual orientation neutral. All members are responsible for upholding and maintaining the high standards of the U.S. military at all times and at all places. Services retain the authority provided by law, Department and Service regulations to counsel, discipline, and involuntarily separate those Service members who fail to obey established standards.

Leaders at all levels are entrusted to ensure the impartial administration of these standards and to hold Service members accountable. In cases where conduct is prohibited, leaders shall be expected to take such appropriate corrective or disciplinary action as they determine may be necessary to preserve morale, good order and discipline, unit cohesion, military readiness, and combat effectiveness.

In order to meet the intent of this policy guidance, each Service is directed to immediately review its standards of personal and professional conduct policies and procedures to ensure that they provide adequate guidance in relevant areas, apply uniformly to all personnel, and promote an environment free from personal, social or institutional barriers that prevent Service members from rising to their highest potential. Place special emphasis in such review on the following areas: public displays of affection (PDA), dress and appearance, nepotism, unprofessional relationships, conflicts of interest, and zero tolerance for harassment and hazing. Standards of conduct shall clearly address the responsibility of leaders, supervisors, and subordinate personnel at all levels to foster unit cohesion, good order and discipline, respect for authority, and mission accomplishment.

Additional Guidance

Moral and Religious Concerns/Freedom of Speech

Policies regarding Service members' individual expression and free exercise of religion already exist and are adequate. In today's military, people of different moral and religious values work, live and fight together. This is possible because they treat each one another with dignity and respect. This will not change. There will be no changes regarding Service member exercise of religious beliefs, nor are there any changes to policies concerning the Chaplain Corps of the Military Departments and their duties. The Chaplain Corps' First Amendment freedoms and their duty to care for all will not change. When Chaplains are engaged in the performance of religious services, they may not be required to engage in practices contrary to their religious beliefs. Service members will continue to respect and serve with others who may hold different views and beliefs.

Equal Opportunity

All Service members, regardless of sexual orientation, are entitled to an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible. Harassment or abuse based on sexual orientation is unacceptable and will be dealt with through command or inspector general channels.

Sexual orientation will not be considered along with race, color, religion, sex, and national origin as a class under the Military Equal Opportunity (MEO) program and therefore will not be dealt with through the MEO complaint process.

In order to meet the intent of this policy guidance, DoD, Military Departments, and Service MEO programs will immediately review their current MEO Programs as established in DODD 1350.2 *Department of Defense Military Equal Opportunity (MEO) Program* to ensure consistency with this policy.

Collection and Retention of Sexual Orientation Data

Sexual orientation is a personal and private matter. DoD components, including the Services are not authorized to request, collect, or maintain information about the sexual orientation of Service members except when it is an essential part of an otherwise appropriate investigation or other official action.

Personal Privacy

The creation of separate bathroom facilities or living quarters based on sexual orientation is prohibited, and Commanders may not establish practices that physically segregate Service members according to sexual orientation.

Personal privacy is a concern for many Service members. Members of the Armed Forces accept living and working conditions that are often austere, primitive, and characterized by forced intimacy with little or no privacy. Consistent with current policy, Commanders will continue to maintain the discretion to alter berthing or billeting assignments in accordance with Service policy in the interest of maintaining morale, good order and discipline, and consistent with performance of the mission.

Benefits

There will be no changes at this time to eligibility standards for military benefits, including applicable definitions. Service members and their opposite-sex spouses receive a range of entitlements and benefits depending on eligibility. The Defense of Marriage Act, 1 U.S.C. § 7, and the existing definition of “dependent” in some laws, prohibit extension of many military benefits—such as medical care, travel and housing allowances, and other benefits—to same-sex couples.

All Service members will continue to have various benefits for which they may designate beneficiaries in accordance with the rules governing each program. Some Service members may not have taken full advantage of these designations prior to repeal of DADT. The Services will reemphasize the opportunity to designate beneficiaries for these benefits to all its Service members. Such benefits include the following:

1. Service Member's Group Life Insurance (SGLI) Beneficiary
2. Post Vietnam-Era Veterans Assistance Program (VEAP) Beneficiary
3. G.I. Bill Death Beneficiary
4. Death Gratuity Beneficiary
5. Final Settlement of Accounts Beneficiary
6. Wounded Warrior Act Designated Caregiver
7. Thrift Savings Plan (TSP) Beneficiary
8. Survivor Benefit Plan Beneficiary

Although there will be no changes to benefits eligibility on the date of repeal, the Department will continue to study existing benefits to determine those, if any, that should be revised, based on policy, fiscal, legal, and feasibility considerations, to give the Service member the discretion to designate a person or persons of their choosing as a beneficiary.

Medical Policy

There will be no changes to existing medical policies. The Surgeons General of the Military Departments have determined that repeal of DADT does not affect the military readiness of the force and that changes to medical policies are not necessary.

Duty Assignment

There will be no changes to assignment policies. All Service members will continue to be eligible for world-wide assignment without consideration of sexual orientation. Service members assigned to duty, or otherwise serving in countries in which homosexual conduct is prohibited or restricted, will abide by the guidance provided to them by their local commanders.

Release from Service Commitments

There will be no new policy to allow for release from service commitments for Service members opposed to repeal of 10 U.S.C. § 654 or to serving with gay and lesbian Service members. Service members may request to be voluntarily discharged under the plenary authority of the Military Department Secretary concerned, or other appropriate authority based upon the specific facts of each case. Such discretionary discharge may only be granted when the Military Department Secretary concerned has determined the early separation would be in the best interest of the Service.

Claims for Compensation and Retroactive Full Separation Pay

The Department will not authorize compensation of any type, including retroactive full separation pay, for those previously separated under 10 U.S.C. §654 and its implementing regulations.

ATTACHMENT 2

REVISED AND NEW GUIDANCE BASED UPON REPEAL
OF 10 U.S.C. § 654 (DON'T ASK DON'T TELL)

- References:
- (a) DoDI 1332.14, "Enlisted Administrative Separations," August 28, 2008
 - (b) DoDI 1332.30, "Separation of Regular and Reserve Commissioned Officers," December 11, 2008
 - (c) DoDI 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction," September 20, 2005
 - (d) DoDI 1332.29, "Eligibility of Regular and Reserve Personnel for Separation Pay," June 21, 1991 (incorporating change 1, February 23, 1996)
 - (e) DODD 1332.23, "Service Academy Disenrollment," February 19, 1988
 - (f) DODD 1322.22, "Service Academies," August 24, 1994
 - (g) DoDI 6400.06, "Domestic Abuse Involving DoD Military and Certain Affiliated Personnel," August 21, 2007
 - (h) DOD 6400.1-M-1, "Manual For Child Maltreatment and Domestic Abuse Incident Reporting System," July 15, 2005

1. CHANGES TO REFERENCE (a)

- a. Delete "5. Guidelines for Fact-Finding Inquiries into Homosexual Conduct" from the list of Enclosures on page 3.
- b. Delete "8. Homosexual Conduct.....17" from the Table of Contents on page 4.
- c. Delete the entire "GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT.....38" section from the Table of Contents on page 4.
- d. Delete paragraph 8 (including all subparagraphs contained under paragraph 8) of Enclosure 3 on pages 17-22 .
- e. Delete Enclosure 5 on pages 38-41.
- f. Delete "homosexual conduct or" from paragraph 2.d.(7) of Enclosure 6 on page 45.

- g. Delete “has recommended separation on the basis of homosexual conduct or” from paragraph 3.e.(7)(c)4 of Enclosure 6.
- h. Delete the following terms and their definitions from the GLOSSARY.
 - (1) bisexual.
 - (2) homosexual.
 - (3) homosexual conduct.
 - (4) sexual orientation.

2. CHANGES TO REFERENCE (b)

- a. Delete “8. Guidelines for Fact-Finding Inquiries into Homosexual Conduct” from the list of Enclosures on page 4.
- b. Delete “3. Homosexual Conduct.....9” from the Table of Contents on page 5.
- c. Delete “Homosexual Conduct,” from “Discharge for Misconduct, Moral or Professional Dereliction, Homosexual Conduct, or in the Interest of National Security.....” From the Table of Contents on page 6.
- d. Delete the entire “GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT.....23” section from the Table of Contents on page 6.
- e. Delete paragraph 3 (including all subparagraphs of paragraph 3) of Enclosure 2.
- f. Delete paragraph 2.b.(5) of Enclosure 3 on page 12.
- g. Delete “In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with Enclosure 2,” from paragraph 3.d.(1) of Enclosure 3 on page 13.
- h. Delete “homosexual conduct,” from paragraph 4.b.(2) of Enclosure 3 on page 14.

- i. Delete "homosexual conduct," from paragraph 6.b. of Enclosure 3 on page 14.
- j. Delete "HOMOSEXUAL CONDUCT," from paragraph 2. of Enclosure 7 on page 21.
- k. Delete paragraph 2.b.(2), including all subparagraphs (a-g), of Enclosure 7 on pages 21-22.
- l. Delete Enclosure 8 on pages 23-26.
- m. Delete the following terms and their definitions from the GLOSSARY on pages 27-29.
 - (1) bisexual
 - (2) homosexual.
 - (3) homosexual act.
 - (4) homosexual conduct.
 - (5) homosexual marriage or attempted marriage.
 - (6) propensity to engage in homosexual acts.
 - (7) sexual orientation.
 - (8) statement that a member is a homosexual or bisexual, or words to that effect.

3. CHANGES TO REFERENCE (c)

- a. Delete paragraph E2.2.8 and all subparagraphs of paragraph E2.2.8. of Enclosure 2.

4. CHANGES TO REFERENCE (d)

- a. Delete paragraph 3.2.3.1.4.

5. CHANGES TO REFERENCE (e)

- a. Delete paragraph 6.1.2.3.

- b. Delete paragraph 6.3.

6. CHANGES TO REFERENCE (f)

- a. Delete paragraph 3.2. of Enclosure 3.
- b. Revise paragraph 3.3. of Enclosure 3: delete “or E3.2.1. through E3.2.3.”

7. CHANGES TO REFERENCE (g)

- a. Delete the phrase “of the opposite sex” in paragraph E2.13.
- b. Delete both occurrences of the phrase “of the opposite sex” in paragraph E2.14.

8. CHANGES TO REFERENCE (h)

- a. Delete the phrase “of the opposite sex” in paragraph C2.1.15.2.4.
- b. Delete the phrase “of the opposite sex” in paragraph C2.1.15.2.5
- c. Delete the phrase “of the opposite sex” in paragraph AP1.2 of Appendix 1.
- d. Delete the phrase “of the opposite sex” in paragraph AP1.10 of Appendix 1.
- e. Delete both occurrences of the phrase “of the opposite sex” in paragraph AP1.11 of Appendix 1.
- f. Delete the phrase “of the opposite sex” in paragraph AP1. 22 of Appendix 1.
- g. Delete the phrase “of the opposite sex” in paragraph AP1. 39 of Appendix 1.



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

JUL 25 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations

The Department has evaluated numerous aspects of the Service Discharge Review Boards (DRBs) and Boards for Correction of Military / Naval Records (BCM/NRs) over the last two years. We have redoubled our efforts to ensure veterans are aware of their opportunities to request review of their discharges and other military records. We have initiated several outreach efforts to spread the word and invite feedback from veterans and organizations that assist veterans and active duty members, and issued substantive clarifying guidance on Board consideration of mental health conditions and sexual assault or sexual harassment experiences. And, we have partnered with the Department of Veterans Affairs to develop a web-based tool that provides customized guidance for veterans who want to upgrade their discharges. But our work is not yet done.

Increasing attention is being paid to pardons for criminal convictions and the circumstances under which citizens should be considered for second chances and the restoration of rights forfeited as a result of such convictions. Many states have developed processes for restoring basic civil rights to felons, such as the right to vote, hold office, or sit on a jury, and many states have developed veterans' courts to consider special circumstances associated with military service. States do not have authority, however, to correct military records or discharges.

The Military Departments, operating through DRBs and BCM/NRs, have the authority to upgrade discharges or correct military records to ensure fundamental fairness. DRBs and BCM/NRs have tremendous responsibility and perform their tasks with remarkable professionalism, but further guidance to inform Board decisions on applications based on pardons for criminal convictions is required.

The attached guidance closes this gap and sets clear standards. While not everyone should be pardoned, forgiven, or upgraded, in some cases, fairness dictates that relief should be granted. We trust our Boards to apply this guidance and give appropriate consideration to every application for relief.

Military Department Secretaries will ensure that Board members are familiar with and appropriately trained on this guidance within 90 days. My point of contact is Monica Trucco, Director, Office of Legal Policy, who may be reached at (703) 697-3387 or monica.a.trucco.civ@mail.mil.

Robert L. Wilkie

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary to the Defense for Public Affairs

Attachment

Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations

Generally

1. This document provides standards for Discharge Review Boards (DRBs) and Boards for Correction of Military / Naval Records (BCM/NRs) in determining whether relief is warranted on the basis of equity, injustice, or clemency.
2. DRBs are authorized to grant relief on the basis of issues of equity or propriety. BCM/NRs are authorized to grant relief for errors or injustices. These standards, specifically equity for DRBs and relief for injustice for BCM/NRs, authorize both boards to grant relief in order to ensure fundamental fairness.
3. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority that DRBs and BCM/NRs have to ensure fundamental fairness. BCM/NRs may grant clemency regardless of the court-martial forum; however, DRBs are limited in their exercise of clemency in that they may not exercise clemency for discharges or dismissals issued at a general court-martial.
4. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.
5. This guidance does not mandate relief, but rather provides standards and principles to guide DRBs and BCM/NRs in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each board.
6. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DRBs and BCM/NRs shall consider the following:
 - a. It is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds.
 - b. Relief should not be reserved only for those with exceptional aptitude; rather character and rehabilitation should weigh more heavily than achievement alone. An applicant need not, for example, attain high academic or professional achievement in order to demonstrate sufficient rehabilitation to support relief.

c. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

d. Evidence in support of relief may come from sources other than a veteran's service record.

e. A veteran or Service member's sworn testimony alone, oral or written, may establish the existence of a fact supportive of relief.

f. Changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received, may be grounds for relief.

g. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct in the case of the mitigating evidence in a case. For example, marijuana use is still unlawful in the military, but it is now legal under state law in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.

h. Requests for relief based in whole or in part on a mental health condition, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety.

i. Evidence submitted by a government official with oversight or responsibility for the matter at issue and that acknowledges a relevant error or injustice was committed, provided that it is submitted in his or her official capacity, should be favorably considered as establishing a grounds for relief.

j. Similarly situated Service members sometimes receive disparate punishments. A Service member in one location could face court-martial for an offense that routinely is handled administratively across the Service. This can happen for a variety of lawful reasons, for example, when a unit or command finds it necessary to step up disciplinary efforts to address a string of alcohol- or drug-related incidents, or because attitudes about a particular offense vary between different career fields, units, installations, or organizations. While a court-martial or a command would be within its authority to choose a specific disposition forum or issue a certain punishment, DRBs and BCM/NRs should nevertheless consider uniformity and unfair disparities in punishments as a basis for relief.

k. Relief is generally more appropriate for nonviolent offenses than for violent offenses.

l. Changes to the narrative reason for a discharge and/or an upgraded character of discharge granted solely on equity, injustice, or clemency grounds normally should not result in

separation pay, retroactive promotions, the payment of past medical expenses, or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded character.

7. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DRBs and BCM/NRs should also consider the following, as applicable:

- a. An applicant's candor
- b. Whether the punishment, including any collateral consequences, was too harsh
- c. The aggravating and mitigating facts related to the record or punishment from which the veteran or Service member wants relief
- d. Positive or negative post-conviction conduct, including any arrests, criminal charges, or any convictions since the incident at issue
- e. Severity of misconduct
- f. Length of time since misconduct
- g. Acceptance of responsibility, remorse, or atonement for misconduct
- h. The degree to which the requested relief is necessary for the applicant
- i. Character and reputation of applicant
- j. Critical illness or old age
- k. Meritorious service in government or other endeavors
- l. Evidence of rehabilitation
- m. Availability of other remedies
- n. Job history
- o. Whether misconduct may have been youthful indiscretion
- p. Character references
- q. Letters of recommendation
- r. Victim support for, or opposition to relief, and any reasons provided



FACTS ON UNITED STATES MILITARY SEXUAL VIOLENCE

Statistics from the 2016 DoD SAPR Annual Report and its appendices/annexes, unless otherwise noted
www.rand.org/nsrd/projects/rmws/publications.html www.sapr.mil/index.php/annual-reports
Updated February 2018

Sexual Violence Remains Pervasive

- **14,900** members (8,600 women and 6,300 men) were sexually assaulted in 2016. Rates of penetrative assault were unchanged from 2014.
- Most victims were sexually assaulted more than once, resulting in over **41,000** assaults in 2016 alone.
- Over **1 in 4 women** and **1 in 3 men** were assaulted by someone in their chain of command.

Vast Majority of Cases Go Un-Reported

- **81%** of victims did **not** report the crime in 2016.

Retaliation Is the Norm

- **58% of women** and **60% of men** who reported a sexual assault face retaliation.
- **77%** of retaliation reports alleged that retaliators were in the reporter's chain of command.
- A **third** of victims are discharged after reporting, typically **within 7 months** of making a report.ⁱ
- Victims received **harsher discharges**, with 24% separated under less than fully honorable conditions, compared to 15% of all service members.ⁱⁱ

Low Trust and Satisfaction in System

- **1 in 10** victims dropped out of the justice process—a rate unchanged since 2013.
- Over **1 in 4** victims who did not report feared retaliation from their command or coworkers.
- Nearly **1 in 3** victims who did not report feared the process would be unfair or nothing would be done.
- **1 in 3 women** and **over half of men** were dissatisfied with their treatment by their chain of command.

Definitions: Sexual assault in the survey corresponds to crimes defined by Uniform Code of Justice (UCMJ) Article 120 (rape & sexual assault) and Article 80 (attempts). Sexual harassment is defined in federal law and military regulations, and includes a pervasive and severe sexually hostile work environment that interferes with the ability to do one's job and/or sexual quid pro quo. Gender discrimination, also defined in law and regulations, refers to gender-based mistreatment that results in harm to one's career.

Sexual Assault is More Common in a Military Context

- In 2014, rates were **50%** higher among active-duty women, and over **100%** higher among men, than in the Reserves.

Conviction and Prosecution Rates

- Prosecution and conviction rates fell dramatically from prior years.
- In 2016, of cases where the military could take action, only **13%** (389) were prosecuted and just **4%** (124) of offenders were convicted of a sex offense.

High Demand for VA Care

- **1,307,781** outpatient visits took place at the VA for Military Sexual Trauma (MST)-related care in 2015.ⁱⁱⁱ
- Approximately **38% of female** and **4% of male** military personnel and veterans have experienced MST.^{iv}
- **40%** of women homeless veterans have faced MST.^v Veterans with an MST history are **over twice as likely** to experience homelessness.

Sexual Harassment is Alarming High

- **129,000** service members (1 in 4 women, 1 in 15 men) faced severe and persistent sexual harassment or gender discrimination in 2016.^{vi}
- **The majority** of victims were harassed by someone in their chain of command.

Good Order and Discipline at Risk

- Service members who are sexually harassed are at **significantly greater risk** of sexual assault.
- **1 in 4** survivors of either sexual assault or sexual harassment/discrimination took steps to leave the military as a result.

ⁱ Department of Defense (DoD) Inspector General, *Evaluation of the Separation of Service Members Who Made a Report of Sexual Assault* (2016), <http://goo.gl/qUjZmm>

ⁱⁱ DoD IG report; Veterans Legal Clinic, Legal Services Center of Harvard Law School, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper* (2016), <https://goo.gl/UV8jmF>

ⁱⁱⁱ Department of Veterans Affairs, Patient Care Services, Mental Health Services, MST Support Team, *FY 2015 Summary of MST-Related Outpatient Care* (2016)

^{iv} L Wilson, "The Prevalence of Military Sexual Trauma: A Meta-Analysis," *Trauma, Violence, & Abuse* (2016)

^v J Pavao, JA Turchik, JK Hyun, et al., "Military Sexual Trauma Among Homeless Veterans," *Journal of General Internal Medicine* 28 Suppl 2 (2013)

^{vi} E Brignone, AV Gundalappalli, RK Blais, et al., "Differential Risk for Homelessness Among US Male and Female Veterans With a Positive Screen for Military Sexual Trauma," *JAMA Psychiatry*, 73, no. 6 (2016), <https://goo.gl/6fJt1G>