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With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from "Veteran" Services

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By Bradford Adams and Dana Montalto*

ABSTRACT

In enacting the G.I. Bill of Rights in 1944, Congress made available an unprecedented slate of benefits to nearly all returning servicemembers, establishing a broad eligibility standard that excluded only those whose conduct in service was "dishonorable." This move revoked from the Department of Veterans Affairs (VA) its authority to choose the standards for receiving benefits but preserved agency authority to evaluate the facts of each case. Yet today, former servicemembers whose conduct was not "dishonorable" are nevertheless excluded from receiving basic services at the VA because agency regulations have drifted from the statutory standard. At the same time, military discharge practices have changed in ways that exacerbate the gap between statutory intent and regulatory outcomes. These changes have led to a historically unprecedented rate of exclusion from basic veteran services and a failure to enact the statutory standard Congress prescribed. This article uncovers the history of the VA's "other than dishonorable conditions" eligibility standard and uses traditional tools of statutory interpretation to rediscover its true meaning and argue for revisions to the VA's present implementing regulations and policies. Restoring the clarity and purpose of this law would re-establish the proper balance between Congress and the VA, and better fulfill our nation's promise to care for those who have served our country in uniform.

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I. INTRODUCTION

Every year, the Department of Veterans Affairs (VA) spends tens of billions of dollars upholding our nation's promise to care for those who have served in our armed forces.[1] Across the country, the VA operates hospitals, clinics, and cemeteries; manages rehabilitation and education programs; and delivers disability benefits to millions of veterans. But not all who have worn the uniform can access these myriad programs. Congress has excluded certain former servicemembers from its definition of who is a "veteran"—and the VA's implementation of this definition has

1. In Fiscal Year 2015, the Veterans Benefits Administration's total program expenditures were $90.5 billion, and the Veterans Health Administration's budget for Fiscal Year 2016 was $70.6 billion. VETERANS BENEFITS ADMIN., ANNUAL BENEFITS REPORT FISCAL YEAR 2015 7 (2016); VETERANS HEALTH ADMIN., RESTORING TRUST IN VETERANS HEALTH CARE: FISCAL YEAR 2016 ANNUAL REPORT 5 (2016).

prevented increasing percentages of servicemembers from accessing its programs.

The modern definition of a "veteran" dates back to the World War II era, when Congress was creating the broad range of federal veteran benefits that we are familiar with today. In that moment, as 16 million servicemembers were about to demobilize to a country only recently recovered from the Great Depression, Congress devised a new definition of "veteran" that broadened access to the fledgling VA programs. Congress chose to extend benefits to all active duty servicemembers who were discharged under conditions "other than dishonorable," so long as their conduct did not violate certain enumerated disqualifying conditions. Then, as now, military law provided for a range of conduct that was less than "honorable" but better than "dishonorable." By excluding only those whose service was "dishonorable," Congress expressly intended that many servicemembers who did not receive Honorable discharges would be eligible for basic veteran services. In adopting this standard, Congress abandoned more exclusive standards previously legislated, and revoked the more exclusive standards the VA had adopted under discretionary authority.

The contours of the exclusionary rule have been a matter of regulatory interpretation for 70 years, with very little examination of underlying statutory instruction. The statutory and legislative background of the term "veteran" are largely unknown, even among practitioners of veterans law, and have received little attention from legal scholars or courts.[2] Many hold misconceptions about the standard, including the incorrect belief that a former servicemember must have been "honorably

2. An authoritative treatise on the contours of the regulatory standard, with some discussion of its legislative underpinnings, was provided in John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1 (2012). Recent articles have examined certain effects of the exclusionary rule without reexamining the contours of the rule itself, including HUMAN RIGHTS WATCH, BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS (2016) (documenting nexus between military sexual assault and involuntary discharges); Tiffany M. Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1 (2010) (discussing incidence of PTSD among less-than-honorably discharged veterans); Marcy L. Karin, *"Other Than Honorable" Discrimination*, 67 CASE W. RES. L. REV. 135 (2016) (discussing the effect of less-than-Honorable discharges on reemployment rights); Evan R. Seamone, *Dismantling America's Largest Sleeper Cell: The Imperative To Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479 (2013) (discussing military commanders' alternatives to discharge for servicemembers with behavioral health problems); Craig R. Shagin, *Deporting Private Ryan: The Less Than Honorable Condition of the Noncitizen in the United States Armed Forces*, 17 WIDENER L.J. 245 (2007) (discussing the effect of discharge on the risk of deportation among non-citizen veterans).

discharged" in order to receive veteran benefits. The absence of judicial review of this issue has left the VA's discretion effectively unreviewed; it is a relic of the "splendid isolation" era of veteran benefit administration that the Veterans' Judicial Review Act of 1988[3] was meant to bring under law.

While the statutory standard for access to veteran services has remained largely unchanged—and unexamined—military discipline and discharge practices have changed substantially since 1944. This raises two questions: (1) whether the evolution of military law and practice has changed the meaning of the term "dishonorable conditions," and (2) whether that statutory standard is still desirable. These two questions are often conflated in discussions of veteran eligibility law. Statements of policy preference about what the law should be stand in for legal interpretation about what the law is.

This article focuses on interpreting the law itself. Part II reviews the legal historical background of the definition of a "veteran." It starts by tracing the history of military discharge characterizations and how they relate—or not—to accessing veteran benefits. It then looks to Congress's 1944 enactment of the Servicemen's Readjustment Act—better known as the G.I. Bill of Rights—to understand the origins, framework, intent, and purpose of the modern definition of "veteran." Part II also surveys how that fundamental standard has remained largely the same from 1944 to the present day. Part III illuminates the meaning of a "veteran" under federal law.[4] Using traditional tools of statutory interpretation, Part III proposes an understanding of the term that is grounded in Congress's express intent, military law, and civilian legal principles. With that backdrop, Part IV discusses the VA's interpretation of the term "veteran" since 1944 and presents empirical research on the VA's implementation of the statute. Comparing the VA's regulations to its authorizing statute, Part IV reveals how VA regulations poorly implement the plain text, scheme, and intent

3. Act of Nov. 18, 1988, Pub. L. No. 100-687, 102 Stat. 4105.

4. This article discusses only the federal definition of a "veteran," and only as it relates to evaluating conduct in service. States and other entities may adopt different definitions for their purposes. *See, e.g.*, FLA. STAT. § 1.01(14) (2016). The Florida Statues define veteran for the purposes of Florida state benefits as:

> [A] person who served in the active military, naval, or air service and who was discharged or released under honorable conditions only or who later received an upgraded discharge under honorable conditions, notwithstanding any action by the United States Department of Veterans Affairs on individuals discharged or released with other than honorable discharges.

Id.; MASS. GEN. LAWS ch. 4, § 7, cl. 43 (2016). Various statutes and regulations describe other eligibility criteria unrelated to conduct, or address exceptional issues like the effect of multiple enlistments and discharge upgrades. For a discussion of these regulations see Brooker et al., *supra* note 2.

of the G.I. Bill of Rights. Finally, Part V proposes alterations to the VA's regulations to better accord with the G.I. Bill of Rights and also suggests policy alternatives that may further agency goals.

The question of which former servicemembers actually count as "veterans" is of immense importance to those who served, and is fundamental to the proper operation of a national system designed to serve "veterans." It therefore deserves legal scrutiny. Uncovering this history will hopefully benefit the veterans, agency staff, and practitioners who interact with the VA on a regular basis. More broadly, it is a fascinating study of the powers and challenges of administrative law: of regulations drifting from their authorizing statute, of agency empowerment and inertia, of facts shifting underneath static rules, and of congressional attention followed by decades of disregard. Hopefully, by rediscovering this history, clarity and purpose can be restored into the VA's eligibility standard so our country's promise to those who have served can be fulfilled.

Before beginning, a note on terminology: this article discusses the relationship between the characterization of discharge assigned by the military (Honorable, General (Under Honorable Conditions), Other Than Honorable, etc.) and official assessments of service quality. In some cases, these two usages employ the same terms. However, this article shows that the usages do not always align, and the correct application of the governing statute requires attention to the differences between these two usages. In order to distinguish the two usages, the article will capitalize the types of discharge because they serve as proper nouns ("an Honorable discharge was issued"), but it will not capitalize the descriptions of the quality of service ("the record shows that service was honorable").[5]

II. THE HISTORY OF THE G.I. BILL OF RIGHTS

The VA's modern discharge-eligibility standard originated in the Servicemen's Readjustment Act of 1944, more commonly known as the G.I. Bill of Rights or the G.I. Bill. This law—which made available a vast array of benefits and programs to millions of returning servicemembers—set the basic eligibility criteria of a discharge under "other than dishonorable conditions," and it remains the core eligibility standard today.[6]

5. Department of Defense practice is inconsistent. The current governing regulation, DODI 1332.14, capitalizes discharge characterizations in some sections but does not capitalize them in other sections. *Compare* Department of Defense Instruction No. 1332.14, § E5.9a(1)(a) (Jan. 27, 2014), *with id.* § E5.5c.

6. Servicemen's Readjustment Act of 1944, Pub. L. 78-346, § 400, 58 Stat. 284.

The G.I. Bill of Rights was built on the foundation of America's long history of providing benefits to veterans, a practice that reaches back to the colonial era. But the Bill also represented a drastic departure from previous veteran benefits programs, as it offered many more types of services to many more veterans. Understanding the terms, debates, and decisions underpinning the G.I. Bill of Rights, as well as our country's historical practices in caring for veterans, is essential to properly interpreting the discharge-eligibility standard legislated in 1944.

A. Historical Overview of Discharge Characterizations

Congress did not invent the term "dishonorable" in 1944 when devising the eligibility standard for G.I. Bill benefits. The term had long existed in the military, where it was used to punish, shame, and expel those who committed wrongdoings. It was—and remains—the worst characterization that the military can assign a servicemember when he or she leaves the service.[7] Congress adopted the "other than dishonorable" standard against the backdrop of this framework and history, and that backdrop must inform an interpretation of the standard of misconduct that Congress meant to disqualify a former servicemember from receiving basic veteran services.

The basic framework for the American military's separation of servicemembers and characterization of their service dates back to the founding era. During the Revolutionary War, the Continental Congress adopted the British Articles of War as its own military's code of conduct, along with the British practice of separating soldiers "honorably" or "dishonorably."[8] Then, as now, a Dishonorable discharge was available only after conviction of certain crimes by court-martial, as an element of a sentence that might also include incarceration and withholding of specific military benefits, such as travel pay.[9]

The specific offenses warranting a Dishonorable discharge have changed over time, but this classification has always been reserved for the most severe misconduct and remains relatively rare. According to Colonel William Winthrop, the leading authority on military law at the turn of the

7. This article describes military law as it relates to enlisted servicemembers, rather than commissioned officers, unless otherwise stated. Whereas enlisted servicemembers receive Dishonorable discharges, officers receive Dismissals. A Dishonorable discharge and a Dismissal are functionally equivalent, and this article will use the term Dishonorable discharge to encompass Dismissals.

8. Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792–1796*, 144 MIL. L. REV. 77, 79 (1994); Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 5–6 (1989).

9. Richard J. Bednar, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 MIL. L. REV. 1, 6 (1962).

century, Dishonorable discharges were generally used to separate servicemembers prior to imprisonment after conviction of an offense.[10] He advised that they be used where there is repeated misconduct; a Dishonorable discharge for a single act or first offense is usually "inappropriate" and "too severe."[11] At one point, Congress attempted to strip citizenship of certain individuals punished by Dishonorable discharges.[12] It is the most severe punishment short of death, considered graver than a sentence of a lifetime of hard labor.[13]

Even when authorized under military law, Dishonorable discharges were not always imposed and frequently were never executed. Rather, punishments were often mitigated or remitted.[14] Commanding officers had significant discretion to address misconduct through non-judicial channels that would not lead to a Dishonorable discharge, and had the ability to commute a Dishonorable discharge after it had been imposed.[15] Furthermore, servicemembers who received Dishonorable discharges

10. WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS 433 (2d ed. 1920).

11. *Id.* Winthrop indicated certain aggravating factors that might make a Dishonorable discharge appropriate for a single offense, such as a particularly grave offense or commission of an offense by more senior servicemember. *Id.* at 433 n.45.

12. An Act to Amend the Nationality Act of 1940, Pub. L. No. 221, 58 Stat. 4 (1944) (providing that desertion from military service in time of war results in loss of citizenship or nationality, if the desertion results in a Dishonorable discharge by court-martial). This law was ruled unconstitutional in *Trop v. Dulles*, 356 U.S. 86 (1958). However, it reflects the fact that a Dishonorable discharge conveys the highest degree of opprobrium.

13. DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 1912–1940 257 (1942) (voiding a reviewing authority's conversion of a sentence from lifetime at hard labor to 15 years at hard labor with a Dishonorable discharge, because a reviewing authority may only "mitigate" a sentence, and a Dishonorable discharge does not mitigate a lifetime at hard labor).

14. *Id.*; DEP'T OF THE ARMY, MANUAL FOR COURTS-MARTIAL ¶ 87(b) (rev. ed. 1943), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1943.pdf [hereinafter 1943 MCM]; *see also* Myron C. Cramer, *Address to the Judge Advocate General's Conference: Equalization of Court-Martial Sentences*, 2 JUDGE ADVOC. J. 7, 7 (1945) (recounting a Judge Advocate General's recommendation that an excessive sentence for a conscientious objector who refused an order be reduced to accord with widely known, "settled" policy about the appropriate sentence).

15. 1943 MCM, *supra* note 14, ¶¶ 105–09; *see, e.g.*, United States v. Finster, 51 M.J. 185, 186 (C.A.A.F. 1999). The *Finster* court stated:

> One of the distinguishing features of the military justice system is the broad authority of the commander who convened a court-martial to modify the findings and sentence adjudged at trial. Although frequently exercised as a clemency power, the commander has unfettered discretion to modify the findings and sentence for any reason—without having to state a reason—so long as there is no increase in severity.

Finster, 51 M.J. at 186. Commanding officers continue to retain a significant amount of discretion regarding punishment and separation. However, that discretion is now more limited in the area of addressing sex offenses. Any servicemember convicted of rape, sexual assault, forcible sodomy, or any attempt of those offenses, who was not punitively discharged, must be administratively separated. Department of Defense Instruction No. 1332.14, § E5.12 (Jan. 27, 2014).

could have their sentences suspended and, after satisfactory participation in a rehabilitation program, be allowed to return to duty and later be honorably discharged.[16]

Starting in the late nineteenth century, the military services began using additional types of discharge to permit a more nuanced assessment of conduct. Some of these types of discharges were made available only as punishments by a court-martial; along with the Dishonorable discharge, they are now referred to as the "punitive discharges."[17] Other new discharges were made available to commanders without resort to court-martial; along with the Honorable discharge, these are now referred to as "administrative discharges."[18] In 1893, the Army created the discharge Without Honor.[19] That status, which was neither Honorable nor Dishonorable, could be imposed administratively—that is, by the commander, not by a court-martial sentence—in cases of fraudulent enlistment, in-service misconduct that did not warrant a court-martial, or imprisonment due to civilian court conviction.[20]

In 1913, the Army added a third administrative characterization: the Unclassified discharge.[21] Around World War I, the Without Honor and Unclassified discharges became known colloquially as "blue" discharges because the Army printed those discharge certificates on blue paper.[22] In 1916, bases for a "blue" discharge included protracted absence without leave, fraudulent enlistment, "undesirable traits of character," and "poor performance."[23] The Army's purpose in creating this intermediate administrative discharge was to "distinguish and preserve the high degree

16. WINTHROP, *supra* note 10, at 433 n.41; Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method To Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 3, 48–49, 53–55, 95–98, 102 (2011); *see also* 1943 MCM, *supra* note 14, ¶ 94, app. 1 art. 52.

17. *See, e.g.*, 32 C.F.R. § 724.111 (2017).

18. Department of Defense Instruction No. 1332.14, § E4.3(a)(1); *see, e.g.*, 32 C.F.R. § 724.108 (2017).

19. Harry V. Lerner, *Effect of Character of Discharge & Length of Service on Eligibility to Veterans' Benefits*, 13 MIL. L. REV. 121, 127 (1961).

20. *Constitutional Rights of Military Personnel: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. 8 (1962) (statement of Carlisle P. Runge, Assistant Secretary of Defense for Manpower, Department of Defense) [hereinafter *Senate Hearing on Constitutional Rights*]; 121 CONG. REC. 3,720 (daily ed. Feb. 20, 1975) (analysis of Rep. Steiger).

21. Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 2 (1973).

22. Honorable discharges were printed on white paper, and Dishonorable discharges were printed on yellow paper. 90 CONG. REC. 4,359 (daily ed. May 11, 1944) (statement of Rep. Cunningham).

23. *Senate Hearing on Constitutional Rights*, *supra* note 20, at 8.

of merit represented by the Honorable discharge and yet not stigmatize the recipient's service as dishonorable."[24]

Likewise, in 1885, the Navy developed a new punitive separation: the Bad Conduct discharge.[25] By 1909, the Navy added its own intermediate administrative discharge as well. The less-than-Honorable (but better-than-Dishonorable) discharge was called the Ordinary discharge, known colloquially as a "small" discharge.[26] The Navy later added a third administrative discharge: the Under Honorable Conditions discharge.[27]

The use of intermediary discharges solved one problem—allowing commanders to provide more graduated evaluations of performance—while creating the second problem of establishing criteria for what those intermediary grades should represent. For the punitive discharges, some criteria were provided in substantive judicial regulations.[28] In the early twentieth century, the Articles of War allowed the imposition of a Dishonorable discharge by general court-martial sentence, while the substantive standard for when to impose such a sentence was promulgated by the President in the Manual for Courts-Martial (MCM).[29]

The MCM edition published in 1943 provided four doctrinal principles for deciding when a Dishonorable discharge was justified.[30] First, many offenses could not be punished by Dishonorable discharge because they did not rise to that level of sanction. The 1943 edition of the Army's MCM did not authorize a Dishonorable discharge for failing to

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24. *Id.* at 9.

25. Bednar, *supra* note 9, at 6.

26. Lerner, *supra* note 19, at 126. In conceptualizing its administrative discharge framework, the Navy distinguished between the "character" of a sailor's service and the "type" of discharge the sailor would receive. DEP'T OF THE NAVY, 1942 BUREAU OF NAVAL PERSONNEL MANUAL §§ D-9103, D-9115(9)(b) (1942) [hereinafter 1942 BUREAU OF NAVAL PERSONNEL MANUAL]. Moreover, the Navy authorized discharge for "misconduct" in only specific and relatively severe circumstances. DEP'T OF THE NAVY, 1948 BUREAU OF NAVAL PERSONNEL MANUAL § C-10313 (1948) [hereinafter 1948 BUREAU OF NAVAL PERSONNEL MANUAL].

27. *World War Veterans' Legislation: Hearings on H.R. 3917 and S. 1767 Before the H. Comm. on World War Veterans' Legislation*, 78th Cong. 418, 420 (1944) [hereinafter *House Hearings on G.I. Bill*]; *Mustering-Out Pay: Hearings on H.R. 3742 and H.R. 3799 Before the H. Comm. on Military Affairs*, 78th Cong. 41 (1943).

28. *See* 1943 MCM, *supra* note 14, at ix; Act of June 4, 1920, 41 Stat. 787; Exec. Order No. 4773 (1928), *superseded by* Exec. Order No. 10,020 (Dec. 7, 1948).

29. Act of June 4, 1920, 41 Stat. 787; Exec. Order No. 4773 (1928), *superseded by* Exec. Order No. 10,020 (Dec. 7, 1948); *see* 1943 MCM, *supra* note 14, at ix.

30. While the MCM applied to the Army, and not to the other service branches, Navy and Marine Corps practice generally followed similar principles. As in the Army's MCM, Naval courts and boards limited Dishonorable discharges to "crimes involving moral turpitude or the serious military or naval crimes," required consideration of mitigating and extenuating circumstances, and indicated which offenses were potentially eligible for a Dishonorable discharge after taking mitigating and extenuating factors into account. DEP'T OF NAVY, NAVAL COURTS AND BOARDS §§ 306, 390, 456 (1944).

obey a lawful order, absence without leave for fewer than 60 days, or for assault and battery.[31] Second, certain offenses by their nature warranted a Dishonorable discharge, irrespective of any mitigating factors. These offenses include the named offenses of desertion, spying, murder, and rape;[32] civilian felonies;[33] and offenses that constitute "moral turpitude."[34]

Third, offenses that potentially warranted a Dishonorable discharge should be imposed only after considering a wide range of mitigating and extenuating factors.[35] Opportunities to consider such factors, and therefore avoid Dishonorable discharge, arose at multiple junctures, including at the commander's initial decision to refer to court-martial, in the original sentencing decision, and during the mandatory review proceedings.[36]

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31. 1943 MCM, *supra* note 14, ¶ 104(c) tbl. of maximum punishments. One exception was that if the servicemember had five prior court-martial convictions, a Dishonorable discharge would be authorized for the sixth conviction. *Id.* at 101.

32. *Id.* ¶ 103(a).

33. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL II-133–34 (rev. ed. 2016), http://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957; *see also* United States v. Mahoney, 27 C.M.R. 898, 901 (N.B.R. 1959).

34. 1943 MCM, *supra* note 14, ¶ 87(b) (instructing commanders to suspend discharge sentences if there is any possibility for rehabilitation, unless it is an offense of moral turpitude).

35. 1943 MCM, *supra* note 14, ¶ 80(a). The 1943 MCM instructed:

> [T]o the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment . . . . In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment. The members should bear in mind that the punishment imposed must be justified by the necessities of justice and discipline. See in this connection . . . [paragraph] 111 (Evidence in extenuation).

Id. This is a long-standing principle of military justice. *See* S. V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 137 (6th ed. 1868); DEP'T OF ARMY, MANUAL FOR COURTS-MARTIAL ¶ 342 (rev. ed. 1917); WINTHROP, *supra* note 10, at 396–97; Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 157 (1991); Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87, 108 (1986). Prior to World War I, the practice was for an original sentence to review only the facts of the offense, and for mitigating factors to be considered during the mandatory sentencing review phase. WINTHROP, *supra* note 10, at 396.

36. 1943 MCM, *supra* note 14, ¶¶ 87(b), 105. The executive order that originally created maximum sentences stated, "This order prescribes the *maximum* limit of punishment for the offenses named, and this limit is intended for those cases in which the severest punishment should be awarded. In other cases punishment should be graded down according to the extenuating circumstances." Exec. Order No. 980 (Nov. 25, 1908); *see also* 1943 MCM, *supra* note 14, ¶ 104(c). *See generally* Cramer, *supra* note 14, at 7; Andrew S. Effron, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L. L. REV. 227 (1974). Cramer stated:

Fourth, where a Dishonorable discharge was not an authorized punishment for a particular offense, it could nevertheless be imposed if the servicemember had been convicted at court-martial on five occasions within the past year.[37]

This codified guidance did not eliminate wide variations in what types of conduct resulted in a Dishonorable discharge. This persistence was due to the less mature state of military law at the time and the determinative role of command discretion in military law, as well as the principle shared with civilian law that criminal sentences are by nature always fact-intensive and therefore highly variable.[38] Contemporary critiques generally attributed military sentencing variability to one reason over the others: the failure of commanders to adhere to known standards, rather than to a lack of standards.

The Army Judge Advocate General, in a 1946 address titled "Equalization of Court-Martial Sentences," discussed his limited ability to force "commanding generals [who] have definite ideas of their own as to discipline, sentences and related matters" to comply with "appropriate War Department policy as to the length of sentences and . . . whether the [D]ishonorable discharge should be executed or suspended."[39] He left no doubt that there were "settled punishment[s] for [a given] type of case . . . and [this] was known to the field."[40] Judge Alexander Holtzoff of the D.C. District Court, who served on a blue-ribbon committee chartered to review military justice immediately after World War II, arrived at a similar conclusion: that the inequalities that existed in the military justice system

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> The theory that a court-martial should impose the maximum punishment and leave it to the reviewing authority to reduce the sentence is all wrong and contrary to the plain provisions of paragraph 80, p. 67, of the Manual for Courts-Martial which provides that the sentences initially shall be legal, appropriate and adequate.

Cramer, *supra* note 14, at 7.

37. 1943 MCM, *supra* note 14, ¶¶ 80(a), 104(c). While a servicemember's history of non-judicial punishments could be considered when deciding sentences generally, only court-martial convictions could be considered for the purposes of granting a Dishonorable discharge after repeated minor misconduct. *Id.* ¶¶ 79a, 79e; 2 BULL. OF THE JUDGE ADVOC. GEN. OF THE ARMY No. 5, 183–84 (1943). Relatedly, the Army's standard for other non-judicial discharges confirms these four doctrinal principals. Contemporaneous Army separation regulations stated that a person who "is disqualified in character for service, by his own misconduct" should be classified as "undesirable" and receive a Regular, not Dishonorable, discharge. Dep't of Army Reg. No. 615-360, ¶ 52(b) (1942). This was not merely an expedient alternative to court-martial. Regulations specifically stated that commanders could use this separation procedure only for misconduct that did not rise to the level of a court-martial, meaning misconduct that would not justify a Dishonorable discharge. *Id.*

38. *See* ANDREW ASHWORTH, SENTENCING & CRIMINAL JUSTICE 331 (Robert Stevens et. al. eds., 2d ed. 1995).

39. Cramer, *supra* note 14, at 8.

40. *Id.* (emphasis omitted).

were primarily caused by the failure to implement existing court-martial rules and regulations.[41] This indicates that the codified standards for Dishonorable discharges were believed at the time to have specific, meaningful contours, and that disparities in sentencing were attributable to adjudicators' discretion rather than incoherence of standards.

The military branches also developed guidance for how their new administrative discharges should be issued.[42] By World War II, each of the branches employed a similar approach: regulations identified certain conduct that might warrant non-punitive separation; each disqualifying circumstance was associated with certain broad "conditions" or "characters" of service, such as "unsuitability," "undesirability," or "inaptness"; and each "condition" or "character" was recommended for a certain type of discharge.[43] This two-step analysis guided commanders toward appropriate discharge types. For example, the 1942 Navy regulations distinguished between conduct that showed "inaptitude" as opposed to "unfitness," the former reflecting "indifferent" character that should lead to an "Ordinary" discharge whereas the latter showed "undesirable" character that should lead to a "Without Honor" discharge.[44]

Importantly, all of the services adopted a "condition" or "character" that involved some degree of misconduct and reflected less-than-honorable conduct, but warranted an administrative, rather than punitive, discharge. The terminology varied between branches and over time, but they shared the same analytical framework: they recognized that circumstances or traits of character may warrant separation from the service for reasons that fell below the standards of honorable conduct but that did not indicate dishonorable character or justify punitive discharge.

This discharge framework was well established by the time Congress convened to debate the 1944 G.I. Bill. The structure of discharges was not complicated: the Army issued three discharges, and the Navy and Marine Corps issued five.[45] The terminology used to describe the conduct that warranted different discharge types had varied over time and between

41. Alexander Holtzoff, *Administration of Military Justice in the United States Army*, 22 N.Y.U. L.Q. REV. 1, 8–9, 17 (1947).

42. *See* Dep't of Army Reg. No. 615-260, § 7 (1935) (discharge of enlisted servicemembers); 1948 BUREAU OF NAVAL PERSONNEL MANUAL, *supra* note 26, § C-10301(1); DEP'T OF NAVY, MARINE CORPS MANUAL § 3-11(l)(1) (1940) [hereinafter MARINE CORPS MANUAL]; DEP'T OF NAVY, BUREAU OF NAVIGATION MANUAL § D-9101 (1934).

43. *See* Dep't of Army Reg. No. 615-360, 23–26 (1942); 1942 BUREAU OF NAVAL PERSONNEL MANUAL, *supra* note 26, at §§ D-9101–9103.

44. 1942 BUREAU OF NAVAL PERSONNEL MANUAL, *supra* note 26, at §§ D-9102, 9110–9112.

45. *Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings: Hearing on S. 1307 and Related Bills Before the S. Comm. on Veterans' Affairs*, 95th Cong. 600–01 (1977).

services, and was the source of considerable confusion; however, this variation affected intermediary grades of conduct, not the longstanding concept of "dishonorable" service. Members of Congress were keenly aware of these distinctions, because many members of Congress had served in the armed forces themselves, and because members of Congress were petitioned by constituents with less-than-Honorable discharges seeking to change that status by private bill.[46]

B. Veteran Benefits and the Effects of Discharge Status Before World War II

For as long as America has been fighting battles, it has been providing benefits to the men and women who fought in such battles. Since the early nineteenth century, access to certain benefits has depended on the reason or manner by which the veteran left the armed forces.

For example, in congressional actions in 1819 and 1855, Congress authorized land grants to certain veterans as long as they had not deserted or been dishonorably discharged from service.[47] However, for most of the nineteenth century, "invalid pensions," granted to veterans disabled by war-related injuries or to the widows and orphans of soldiers who died in war, had no discharge status requirement.[48] This was the standard of care that President Lincoln adopted in his Second Inaugural Address exhortation, which the VA has now adopted as its motto, "with malice toward none, with charity for all . . . to care for him who shall have borne the battle, and for his widow, and his orphan."[49] Only in 1890 did Congress

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46. *See House Hearings on G.I. Bill*, *supra* note 27, at 420 (statement of Rep. Rankin, Chair, H. Comm. on World War Veterans' Legislation). Representative Rankin explained:

> These discharges that have been referred to have in the past resulted in a barrage of private bills. We pass a law here and apply the same measuring stick to all of the veterans. If that were not the case, we would have 10,000 cases a year, probably, before the committee. I think the Committee on Pensions had 5,000 bills last year. That is my recollection. One thing that caused those bills to pile up was that after the War between the States these very questions that you are raising here arose, and the question of private pension bills got so rampant at one time that it became almost a national issue; in fact, it did become a national issue.

Id.; *see* KNOWLTON DURHAM, BILLIONS FOR VETERANS: AN ANALYSIS OF BONUS PROBLEMS—YESTERDAY, TODAY AND TOMORROW 29–30 (1932).

47. PRESIDENT'S COMM'N ON VETERAN PENSIONS, STAFF OF H. COMM. ON VETERANS' AFFAIRS, 84TH CONG., REP. ON DISCHARGE REQUIREMENTS FOR VETERANS' BENEFITS 2 (Comm. Print 1956) [hereinafter BRADLEY COMM'N STAFF REPORT]; Lerner, *supra* note 19, at 124, 125 n.24.

48. *See, e.g.*, Act of July 14, 1862, ch. 166, 12 Stat. 566.

49. DEP'T OF VETERANS AFFAIRS, THE ORIGIN OF THE VA MOTTO: LINCOLN'S SECOND INAUGURAL ADDRESS, http://www.va.gov/opa/publications/celebrate/vamotto.pdf (last visited June 6, 2017) (describing the impact of Lincoln's address to VA's mission); Abraham Lincoln, U.S. President, Second Inaugural Address, *in* S. DOC. NO. 101-10, at 143 (1989).

add a prerequisite to receiving an invalid pension that Civil War veterans must have received Honorable discharges.[50] Similarly, a 1917 statute providing compensation for veterans disabled in World War I barred eligibility for those who received Dishonorable or Bad Conduct discharges.[51]

Prior to World War II, there was no single set of eligibility criteria for all veteran benefits. For each wartime mobilization, Congress would make different services available and each authorizing act had its own eligibility criteria.[52] An Honorable discharge was required for disability pensions for veterans of the Spanish-American War, Philippine Insurrection, and Boxer Rebellion[53] and for medical care for service-connected disabilities of peacetime veterans;[54] a discharge not under other-than-honorable conditions was required for vocational rehabilitation[55] and the World War I Adjusted Compensation ("Bonus");[56] and those with Bad Conduct or Dishonorable discharges were barred from certain hospital and medical care benefits and burial benefits.[57] The War Risk Insurance Act of 1917 excluded from benefits veterans discharged for "mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he was found guilty by court-martial, or that he was an alien, conscientious objector who refused to perform military duty or to wear the uniform, or a deserter."[58] Although each statute was independent, the general trend during the period leading up to World War II was for increasingly restrictive eligibility criteria.

The eligibility statute enacted immediately prior to the 1944 G.I. Bill of Rights took a different approach by delegating the discretion to define an eligibility standard to the VA. A 1933 act instructed the administrator to adopt by regulation such "requirements as to entitlement as he shall

50. Lerner, *supra* note 19, at 124.

51. BRADLEY COMM'N STAFF REPORT, *supra* note 47, at 2. The statute also barred officers who received a Dismissal from service—the officer's equivalent of an enlisted servicemember's Dishonorable discharge. *Id.*

52. For a list of all benefits and their associated eligibility criteria, see *id.* at 9.

53. Act of June 5, 1920, ch. 245, 41 Stat. 982; *see also* Act of June 2, 1930, ch. 375, 46 Stat. 492.

54. Act of June 16, 1933, ch. 101, 48 Stat. 283.

55. Act of July 11, 1919, ch. 12, 41 Stat. 158.

56. Act of May 19, 1924, ch. 157, 43 Stat. 121.

57. Act of October 6, 1917, ch. 105, 40 Stat. 398; *see also* BRADLEY COMM'N STAFF REPORT, *supra* note 47, at 9; Lerner, *supra* note 19, at 128 n.34.

58. Act of June 25, 1918, ch. 104, 40 Stat. 609, *amended by* World War Veterans' Act, ch. 320, 43 Stat. 607 (1924); *see also* BRADLEY COMM'N STAFF REPORT, *supra* note 47, at 3. The Act also contained an exception to this bar: veterans would still be eligible for benefits if they were "insane" at the time of the otherwise disqualifying misconduct. World War Veterans' Act, § 23, 43 Stat. at 613–14.

deem equitable and just."[59] With this authority, the administrator limited veteran services to those who had been honorably discharged.[60]

By the time Congress considered how to provide for veterans returning from World War II, it had experimented with a variety of discharge-eligibility standards. It also had experimented with various types of benefits—disability pensions, general service pensions, mustering out pay, land grants, hospitalization benefits, medical care, vocational rehabilitation, civil service preferences, and bonuses—creating for each generation of veterans a unique assortment of programs. Importantly, Congress had also experimented with delegating these judgments to the VA, and saw that doing so resulted in the most restrictive conduct standard.

The stakes were known to be high. For World War I veterans, Congress had authorized a range of benefits for honorably discharged disabled veterans—including medical care, vocational rehabilitation, and disability compensation—but for veterans who were not disabled, Congress initially granted only mustering out pay.[61] Veterans of World War I found the benefits insufficient to compensate them for the sacrifices they had made in service and to support their readjustment to civilian life.[62] They organized to demand a bonus, which Congress eventually granted in 1924, but which could not be cashed in until 1945 or death, whichever came first.[63]

Dissatisfaction with that framework led the community to mobilize, culminating in the 1932 Bonus March, where veterans from Portland, Oregon walked across the country to demand immediate payment.[64] Joined by other veterans along the way, thousands of members of the so-called Bonus Expeditionary Force arrived in Washington, D.C. and set up camp.[65] The refusal of President Hoover to grant their demands—and his decision instead to send the Army to raze the camp and use tear gas to disburse the veteran protesters—came to symbolize the President's

59. Act of March 20, 1933, ch. 3, §§ 4, 19, 48 Stat. 8, 9, 12; Lerner, *supra* note 19, at 129.

60. Exec. Order No. 6089 (Mar. 31, 1933); Exec. Order No. 6094 (Mar. 31, 1933).

61. EDWARD HUMES, OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM 14–15 (2006); *see* DURHAM, *supra* note 46, at 41, 50–52.

62. GLENN C. ALTSCHULER & STUART M. BLUMEN, THE GI BILL: A NEW DEAL FOR VETERANS 27–29 (2009).

63. *Id.*; Stephen R. Ortiz, *Rethinking the Bonus March: Federal Bonus Policy, Veteran Organizations, and the Origins of a Protest Movement*, *in* VETERANS' POLICIES, VETERANS' POLITICS: NEW PERSPECTIVES ON VETERANS IN THE MODERN UNITED STATES 173, 173–75 (Stephen R. Ortiz ed., 2012).

64. Ortiz, *supra* note 63, at 177–79, 187.

65. *Id.* at 187–88.

disregard for the common man and contributed to Franklin Roosevelt's victory in the 1932 presidential election.[66]

These past experiences were present in the minds of lawmakers as they gathered during World War II to decide how to care for the newest generation of veterans. At 16 million members, the World War II generation was larger than any to come before it—and, to political leaders, their return to a country only just emerging from the depths of the Great Depression threatened to plunge the nation back into economic and political crisis unless drastic steps were taken.

C. Congress's Comprehensive Program for Veterans Returning from World War II

Less than two years after entering the war, the U.S. government began planning for its end. In July 1943, President Roosevelt spoke in one of his "fireside chats" about how members of the armed forces made a "greater economic sacrifice and every other kind of sacrifice than the rest of us," and are therefore entitled to care for their "special problems."[67] He called on Congress to work with him in developing a comprehensive plan for demobilization that would include mustering out pay, educational assistance, unemployment insurance, social security credit for military service, hospitalization and medical care, and disability compensation. "We must, this time, have plans ready," the President stated, so that veterans are not "demobilized into an environment of inflation and unemployment, to a place on a bread line, or on a corner selling apples."[68]

Congress took up the task, as did many of the major Veterans Service Organizations (VSOs) and other interest groups. Among these was the American Legion, one of the most powerful and well-connected VSOs, which had been founded on the fields of Europe in the days after World War I ended.[69] A former American Legion National Commander, Harry Colmery, famously drafted a bill at D.C.'s Mayflower Hotel on hotel stationery.[70] Colmery's draft framework remained largely unchanged as it worked its way through Congress to become the Servicemen's Readjustment Act of 1944—the G.I. Bill of Rights.[71] The bill was the most

66. *Id.* at 174; *see* ALTSCHULER & BLUMEN, *supra* note 62, at 28.

67. Franklin D. Roosevelt, U.S. President, Fireside Chat on the Progress of the War and Plans for Peace (July 28, 1943), *reprinted in* 1943 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 326, 334 (1950); *see* ALTSCHULER & BLUMEN, *supra* note 62, at 47.

68. Roosevelt, *supra* note 67, at 333.

69. ALTSCHULER & BLUMEN, *supra* note 62, at 52; KATHLEEN J. FRYDL, THE GI BILL 48 (2009).

70. HUMES, *supra* note 61, at 8.

71. ALTSCHULER & BLUMEN, *supra* note 62, at 57, 71.

generous and expansive program of benefits for veterans in the nation's history, offering educational assistance; home, farm, and business loans; unemployment insurance; hospital and medical care; and disability compensation.[72] The discharge-eligibility standard that Colmery and the American Legion selected was similarly expansive. A veteran did not need an Honorable discharge, or even a discharge "under honorable conditions;" instead, accessing benefits required only a discharge under "conditions other than dishonorable."[73]

The American Legion secured congressional champions for its bill, and Congress took up the task of debating the G.I. Bill of Rights in early 1944. The discharge-eligibility element of the statute did not travel a straight path to enactment. The phrase "conditions other than dishonorable" was included in the original bills and then debated in both the House and the Senate. At one point, the House version of the bill adopted an "honorable conditions" discharge-eligibility standard. As expressed by members of Congress in hearings and in floor debates, the reasons for granting, or not granting, veteran benefits were many and changing: gratitude for service and sacrifice; prioritization of resources for those who performed best; obligation to care for those wounded in war; philosophies of the role of the national government; beliefs about military service as an obligation of democratic citizenship; concern for the federal budget; and acknowledgement of the political power of veterans organizations.[74] In the end, the views of those preferring a more restrictive standard did not prevail, and the "other than dishonorable" standard was enacted into law.

To survey the congressional debate, members of Congress expressed many motivations for supporting this comprehensive bill. Primary among them was a concern that millions of returning servicemembers would lead to economic recession and political unrest.[75] They feared repeating the

72. *Id.* at 55–58; FRYDL, *supra* note 69, at 119–21; HUMES, *supra* note 61, at 29.

73. *See* FRYDL, *supra* note 69, at 119.

74. *See infra* note 101–05 and accompanying text. *See generally* ALTSCHULER & BLUMEN, *supra* note 62, at 13–33; FRYDL, *supra* note 69, at 37, 43–44, 47; STEPHEN R. ORTIZ, BEYOND THE BONUS MARCH & GI BILL 5, 8–9, 13–31, 198–99, 201–02 (2010).

75. Margot Canaday, *Building a Straight State: Sexuality and Social Citizenship under the 1944 G.I. Bill*, 90 J. AM. HIST. 935, 938 (2003); *see, e.g.*, 90 CONG. REC. A210–11 (1944) (continued remarks of Sen. Wiley); 90 CONG. REC. 415 (1944) (statement of Rep. Angell). Representative Angell stated:

> We do not want to see duplicated again the spectacle that took place following the last World War, when thousands of our heroic fighting men were compelled to stand on street corners seeking employment, or be subjected to the humiliation of accepting menial jobs merely to keep body and soul together during the time they were seeking to rehabilitate themselves and find permanent employment in our economic structure.

90 CONG. REC. 415 (1944) (statement of Rep. Angell).

mistakes of World War I, which led to the Bonus Army's march on Washington.[76] Equally important were feelings of deep gratitude for the sacrifice of the men and women serving in the armed forces.[77] Congress sought to aid veterans' readjustment to civilian life and restore them to the place they would have been had their lives not been interrupted by the call to serve.[78] Another motivation behind the bill was a desire to continue the tradition of providing special support to veterans with disabilities incurred in war.[79] By design, the bill proposed more uniform standards and procedures allowing veterans to more easily navigate benefits.[80]

In hearings and floor debates, Congress expressly discussed the eligibility criteria and deliberately selected the broad standard of "other

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76. Canaday, *supra* note 75, at 938; *see, e.g.*, 90 CONG. REC. A3008 (1944) (statement of Rep. Weiss). Representative Weiss stated:

> [M]y pledge to G.I. Joe is: History shall not repeat itself. I am fully cognizant of the failure of the Congress following World War No. 1 . . . to enact legislation to protect the war veterans of that historic conflict. . . . Lest we forget, our heroes and starving veterans of World War No. 1—Flanders Field, Chateau-Thierry, and Verdun—were run out of the National Capital at the point of bayonets and with tear gas when they came to fight for their rights—simple rights—to work and earn a livelihood in a democracy for which so many of their buddies paid the supreme sacrifice. With that record so clear in my mind, I pledged to my boys fighting everywhere, and to their parents, that history shall not repeat itself.

90 CONG. REC. A3008 (1944) (statement of Rep. Weiss); *see* 90 CONG. REC. 4443 (1944) (statement of Rep. Bennett). Representative Bennett explained:

> [W]hen our loved ones return victorious from this awful war, their first question is going to be a practical one, 'Where do we go from here?' Orations, parades, and resolutions of gratitude will not pay rent, buy groceries, or start a man in business. And they cannot eat medals. Veterans will return to their homes with an ambition to get off the Government pay roll. They will not want any G.I. job selling applies and raking leaves. They will want to carve out their own futures as freemen have always done in America. But, in many cases they will need help so that they can help themselves. Therein lies the responsibility of Congress. President Abraham Lincoln said, 'It is the duty of the country to care for him who shall have borne the battle and for his widow and orphans.'

90 CONG. REC. 4443 (1944) (statement of Rep. Bennett).

77. Canaday, *supra* note 75, at 938.

78. ALTSCHULER & BLUMEN, *supra* note 62, at 57–58.

79. S*ee House Hearings on G.I. Bill*, *supra* note 27, at 418–20; 90 CONG. REC. A3008 (1944) (statement of Rep. Weiss); FRYDL, *supra* note 69, at 42–43.

80. *See* Servicemen's Aid Act of 1944, S. 1767, 78th Cong. (as introduced Mar. 13, 1944). To those shared goals, there were also political considerations. Liberal members of Congress saw the opportunity for a second New Deal—a pilot program for an expanded social welfare state that could later be extended to civilians. ALTSCHULER & BLUMEN, *supra* note 62, at 6; Canaday, *supra* note 75, at 939. Conservative members, meanwhile, supported the bill precisely because it was not a broad social welfare program, but instead targeted to a special and particularly deserving class: veterans. ALTSCHULER & BLUMEN, *supra* note 62, at 6; FRYDL, *supra* note 69, at 90, 112. For all members of Congress, enacting legislation to help veterans seemed wise in the election year of 1944. Nancy Beck Young, *"Do Something for the Soldier Boys": Congress, the G.I. Bill of Rights, & the Contours of Liberalism*, *in* VETERANS' POLICIES, VETERANS' POLITICS: NEW PERSPECTIVES ON VETERANS IN THE MODERN UNITED STATES, *supra* note 63, at 199, 211.

than dishonorable" discharge. This standard served Congress's desire to prevent economic and political crises while honoring servicemembers' sacrifices by making available an array of readjustment benefits; it was also a single standard that applied uniformly across all of the benefit programs.[81]

Harry Colmery, drafter of the G.I. Bill, explained his choice of an "other than dishonorable" standard at a hearing of the House Committee on World War Veterans' Legislation:

> I was going to comment on the language "under conditions other than dishonorable." Frankly, we use it because we are seeking to protect the veteran against injustice . . . . We do not like the words "under honorable conditions" because we are trying to give the veteran the benefit of the doubt, because we think he is entitled to it.[82]

Colmery went on to point out that a servicemember may get an unfavorable discharge but "may have been just as dislocated as anyone else" and "just as needy of the help and the benefits that are provided under this act."[83]

Members of Congress echoed Colmery's sentiments. Chairman of the House Committee, Representative John Rankin, spoke out in favor of "the most liberal [terms]."[84] Representative Kearney later expressed support for the bill because it put a "mantle of protection" around veterans who had been given "blue discharges"; he was concerned about their employment prospects because "in many instances [they] were of excellent character, but the possession of such a discharge will brand them for life."[85] During the floor debate, Senator Thomas Connally exhorted: "We might save some of these men . . . . We may reclaim these men but if we blackball them and say that they cannot have [veteran benefits] we will confirm them in their evil purposes."[86]

According to many legislators, an "other than dishonorable" standard was appropriate because often there were mitigating or extenuating circumstances that led servicemembers to receive something other than an Honorable discharge. They may have served on the front lines but later have experienced combat stress or drank more heavily.[87] They may have

81. *See, e.g.*, 90 CONG. REC. 4453–54 (1944) (discussing individuals who are not "good soldiers" but may be "excellent citizens," and how such a servicemember is "not going to become a very useful citizen to society if he is walking around with a blue discharge").

82. *House Hearings on G.I. Bill*, *supra* note 27, at 415.

83. *Id.* at 416.

84. *Id.* at 420.

85. 90 CONG. REC. 4453 (1944).

86. 90 CONG. REC. 3077 (1944).

87. *House Hearings on G.I. Bill*, *supra* note 27, at 202–05, 417.

been young and immature.[88] To legislators, those were not reasons to exclude veterans from basic supportive services—indeed, they may be the veterans most in need of assistance.

For basic benefits supporting readjustment, Congress ultimately found that only severe misconduct—behaviors that did or should have led to a Dishonorable discharge—should be disqualifying.[89] As American Legion Chief of Claims Carl Brown explained of the draft bill, "If [the servicemember] did not do something that warranted court martial and dishonorable discharge, I would certainly not see him deprived of his benefits."[90] Both the House and Senate reports explained that a servicemember is ineligible for benefits only if he receives a Dishonorable discharge by sentence of a court-martial, or if he should have received a Dishonorable discharge but did not—because he deserted and could not be brought to court-martial, he resigned to avoid trial by court-martial, or did not receive a Dishonorable discharge for similar reasons.[91]

Congress listed in the G.I. Bill specific reasons a former servicemember would be disqualified: discharge by sentence of general court-martial; discharge of a conscientious objector who refused to wear the uniform and obey lawful orders; discharge for desertion; discharge of an officer for the good of the service; and discharge as an alien in a time of war.[92] Congress contemplated that there might be other unenumerated misconduct that would constitute "dishonorable" conditions, but its enumerated list of statutory bars set a high standard for disqualification.[93]

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88. 90 CONG. REC. 415 (1944) (statement of Rep. Hinshaw); 90 CONG. REC. 3076 (1944) (statement of Sen. Clark).

89. A 1946 House report described the previous Congress's motives:

> In passing the Veterans' Readjustment Act of 1944, the Congress avoided saying that veteran's benefits are only for those who have been honorably discharged from service . . . . Congress was generously providing the benefits on as broad a base as possible and intended that all persons not actually given a [D]ishonorable discharge should profit by this generosity.

H.R. REP. NO. 1510, at 8 (1946).

90. *House Hearings on G.I. Bill*, *supra* note 27, at 419.

91. S. REP. NO. 78-755, at 15 (1944). The report explained:

> A [D]ishonorable discharge is affected only as a sentence of a court-martial, but in some cases offenders are released or permitted to resign without trial—particularly in the case of desertion without immediate apprehension. In such cases benefits should not be afforded as the conditions are not less serious than those giving occasion to [D]ishonorable discharge by court-martial.

Id.; *see* H.R. REP. NO. 78-1418, at 17 (1944) ("If such offense [resulting in discharge] occasions a [D]ishonorable discharge, or the equivalent, it is not believed benefits should be payable.").

92. Servicemen's Readjustment Act of 1944, ch. 268, § 300, 58 Stat. 284, 286.

93. S. REP. NO. 78-755, at 16 ("It is the opinion of the Committee that such discharge [less than honorable] should not bar entitlement to benefits otherwise bestowed unless such offense was such, as for example those mentioned in section 300 of the bill [listing the statutory bars], as to constitute dishonorable conditions."); H.R. REP. NO. 78-1418, at 17.

Among the disqualifying conduct mentioned in hearings and floor debates were murder, larceny, civilian incarceration, "chronic drunkenness" not associated with a wartime disability, and shirking.[94] Conduct not disqualifying a servicemember from benefits was periods of absence that did not involve desertion, civilian convictions that did not lead to incarceration, conviction by special court-martial, violations of military regulations, and substance abuse associated with wartime disability.[95] "[B]oys who probably have 'jumped the track' in some minor instances, and yet have not done anything that would require a [D]ishonorable discharge," should be aided, not excluded, said one Senator.[96] "They need education more than anything else."[97]

Congress chose not to give controlling weight to the discharge type that the military assigned to each servicemember. Rather, Congress assigned to the VA the task of examining each individual case and determining whether the veteran's service was dishonorable or "other than dishonorable" under the law and guidelines set forth by Congress.[98] As Harry Colmery explained,

> [T]his is no reflection upon the services, but frankly we do not care to have the Army and the Navy be the arbiter and primarily pass directly in judgment on whether or not the men who serve the colors derive the benefits granted by the Congress. We prefer to have that done by the Veterans' Administration acting under the supervision of the Congress through a committee like this.[99]

That decision, and its more generous standard, may have stemmed from Congress's awareness of inequities in the discharge process. At the time, administrative discharge proceedings had few procedural protections for servicemembers.[100] Disparities existed among units and across service

94. S. REP. NO. 78-755, at 15; H.R. REP. NO. 78-1418, at 26; 90 CONG. REC. 3076–77 (1944).

95. *House Hearings on G.I. Bill*, *supra* note 27, at 190–91, 202–05, 415, 417.

96. 90 CONG. REC. 3077 (1944) (statement of Sen. Connally).

97. *Id.*

98. *Id.* (statement of Sen. Clark). Senator Clark explained:

> I say to the Senator from Massachusetts that what we did was amend that provision by using the words "under other than dishonorable conditions." That means that under this provision the Veterans' Bureau, if a man's service has been dishonorable . . . the Veterans' Administration will have some discretion with respect to regarding the discharge from the service as dishonorable, and that therefore the man involved will be entitled to the benefit of that discretion.

Id.; *see House Hearings on G.I. Bill*, *supra* note 27, at 416–20 (statement of Carl C. Brown, Chief of Claims, American Legion) ("Under this term, it becomes a matter of fact for determination by the Veterans' Administration as to whether or not he is entitled to it.").

99. *House Hearings on G.I. Bill*, *supra* note 27, at 416.

100. *See* 90 CONG. REC. 415 (1944) (statement of Rep. Hinshaw). Representative Hinshaw stated:

branches; different commanding officers could address similar misconduct in disparate ways.[101] Representatives were concerned that a servicemember might unfairly receive a less-than-Honorable discharge because it was an expedient way to downsize units, because the servicemember had "run afoul of... temperamental commanding officers,"[102] or because the servicemember had a mental or physical disability.[103] Based on her own discussions with former servicemembers, Representative Rogers expressed concern that the military may have assigned less-than-Honorable discharges "arbitrarily."[104]

Although the bill would shift eligibility determination from the military branches to the VA, it also implicitly revoked from the VA the authority to independently determine its own eligibility standard. The "honorable conditions" standard that legislators characterized as unfairly exclusive had been adopted by the VA under its rulemaking discretion granted by a prior statute.[105] By enacting an "other than dishonorable conditions" standard, Congress replaced the VA's previous standard with a substantially more inclusive one. The VA would be responsible for applying the law to the facts in each case, and therefore had a certain degree of fact-finding discretion; however, Congress no longer granted the VA discretion to define the underlying standard.

In debating the eligibility standard, the potential impact of the language of the eligibility standard was not lost on Congress. As Veterans' Administration Solicitor E.E. Odom explained at a congressional hearing, "[Y]ou say either honorably discharged, discharged under conditions not dishonorable, or discharged under honorable conditions. Those latter two things do not mean the same thing . . . ."[106]

Of course, not every member of Congress thought the eligibility standard should be so broad. Some legislators expressed concern that the

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> It seems to me that a soldier, sailor, or marine who is offered a blue discharge should have an opportunity to be heard on record before being discharged, and that none of them should be asked to accept a blue discharge as a condition to release from the service . . . .

Id.

101. *House Hearings on G.I. Bill*, *supra* note 27, at 417 (statement of Rep. Rogers, Ranking Member, H. Comm. on World War Legislation).

102. *Id.* at 295–96; *see* 90 CONG. REC. 4348 (1944) (statement of Rep. Rogers); 90 CONG. REC. 4454 (1944) (statement of Rep. Rogers).

103. *House Hearings on G.I. Bill*, *supra* note 27, at 202–05.

104. *Id.* at 417; *see generally id.* at 416–20.

105. *See supra* notes 59–60 and accompanying text.

106. *House Hearings on G.I. Bill*, *supra* note 27, at 419. Expressing a similar familiarity with different discharge characterizations, one Senator remarked: "Many boys who do not receive [H]onorable discharges have capabilities of being very excellent citizens. They receive [O]ther [T]han [H]onorable discharges. I differentiate them from [D]ishonorable discharges for many reasons." 90 CONG. REC. 3077 (1944) (statement of Sen. Clark).

"other than dishonorable" standard might induce bad behavior by servicemembers or reward individuals who shirked their military duties.[107] Legislators expressed concern about malingerers and limited hospital beds being occupied by punitively discharged veterans.[108]

In addition to congressional critics, representatives of the armed forces specifically objected to the "other than dishonorable" eligibility standard. They proposed instead that only honorably discharged servicemembers be able to access veteran benefits.[109] Rear Admiral Randall Jacobs wrote to Congress, arguing that a grant of benefits to veterans with less-than-Honorable discharges would interfere with military discipline, have a "detrimental effect on morale," and allow unfit individuals to enjoy benefits that should be reserved for honorably discharged veterans.[110]

The Senate rejected the military's proposal. Senator Champ Clark, former Army Colonel, original sponsor of the G.I. Bill, and future judge on the D.C. Circuit Court of Appeals, responded:

> Mr. President, let me say that I am very familiar with the objections raised by Admiral Jacobs. In my opinion, they are some of the most stupid, short-sighted objections which could possibly be raised. They were objections that were considered very carefully both in the subcommittee on veterans affairs of the Finance Committee and in the full committee itself. . . .
>
> . . . .
>
> In the present war, . . . in many cases the Army is giving blue discharges, namely, discharges without honor, to those who have had no fault other than that they have not shown sufficient aptitude toward military service. I say that when the Government drafts a man from civil life and puts him in the military service—most of the cases we are now discussing as to aptitude involve older men—and thereafter, because the man does not show sufficient aptitude, gives him a blue discharge, or a discharge without honor, that fact should not be permitted to prevent the man from receiving the benefits which soldiers generally are entitled to.[111]

On the other hand, the House Committee initially acquiesced to the military's request and changed the eligibility standard to require an

107. *See, e.g.*, *House Hearings on G.I. Bill*, *supra* note 27, at 418 (statement of Rep. Scrivner); 90 CONG. REC. 5889 (1944) (statement of Rep. Miller).
108. H.R. REP. NO. 1624, at 26 (1944).
109. *See, e.g.*, *House Hearings on G.I. Bill*, *supra* note 27, at 182–84, 294–96.
110. 90 CONG. REC. 3076 (1944).
111. *Id.*

Honorable discharge to receive benefits.[112] However, that change may have been motivated by racial discrimination. Representative John Rankin, Chairman of the House committee responsible for the bill, was an unabashed racist and fervent segregationist who sought to deny African-American veterans equal access to the G.I. Bill's benefits.[113] Representative Rankin knew that minority servicemembers were more likely to receive less-than-Honorable discharges, and therefore may have allowed amendment of the bill so that minority veterans would be disproportionately excluded.[114]

Ultimately, after each bill passed its respective house and the bill went to conference, the Senate's more expansive eligibility standard won the day. The conference bill then returned to the houses for a vote and Representative Miller stood up to object to the broader eligibility standard. Miller noted that the eligibility standard would allow veterans with "blue" discharges to use G.I. Bill benefits, contrary to the War Department's recommendation.[115] The standard should be an Honorable discharge, Miller argued; anyone who received a less-than-Honorable discharge could go to the new military records correction boards and have his characterization changed if there had been some error or injustice.[116] Representative Edith Nourse Rogers, the ranking Republican on the World War Veterans' Committee and a member of the Joint Conference Committee, rejected Representative Miller's arguments. Rogers explained that the Committee's consensus was to adopt the "other than dishonorable" eligibility standard, and concluded: "I would rather take the chance so that all deserving men get their benefits."[117]

The bill then passed both chambers and President Roosevelt signed the bill into law on June 22, 1944.[118]

Early interpretations of the law affirmed that veterans with less-than-Honorable discharges were eligible for benefits. The Army's Adjutant General admitted, "'The recently enacted "G.I." legislation,' . . . 'contains provisions under which it appears that [those with blue discharges] are eligible for . . . benefits.'"[119] A report of the 1956 Presidential Commission

112. Servicemen's Readjustment Act of 1944, S. 1767, 78th Cong. (as amended May 5, 1944); 90 CONG. REC. 4333–36 (1944).

113. HUMES, *supra* note 61, at 36. For in-depth discussions about Representative Rankin's attempts—both successful and unsuccessful—to deny African-American veterans equal access to G.I. Bill benefits, see FRYDL, *supra* note 69, at 222–62, and IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 113–41 (2006).

114. HUMES, *supra* note 61, at 36.

115. 90 CONG. REC. 5889 (1944).

116. *Id.* at 5889–90.

117. *Id.* at 5890.

118. Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284.

119. Canaday, *supra* note 75, at 941 (alteration in original).

on Veteran Benefits chaired by General Omar Bradley, who had served as the VA Administrator from 1945 to 1947, likewise explained that: "The congressional committees which studied the measure apparently believed that if the conduct upon which the discharge was based could be characterized as dishonorable the veteran should be barred from any benefit; if it could not be so characterized, the veteran should be eligible."[120]

The Bradley Commission Staff Report further expounded:

> The Congress did not want to use the words "honorably discharged" or "discharged under honorable conditions," because it was felt that such an eligibility requirement was too restrictive. Neither did Congress want to use the words "not dishonorably discharged" because such words would have been too broad and opened the door to persons who were administratively discharged for conduct that was in fact dishonorable. The controversy was finally resolved by adopting the words "conditions other than dishonorable."[121]

In enacting the G.I. Bill of Rights, Congress debated at length whether veterans with less-than-Honorable discharges should be able to access VA benefits. They considered many options, including the military's proposal to restrict eligibility just to honorably discharged veterans. Ultimately, Congress chose to enact the "other than dishonorable" standard used in the American Legion's original draft. This broad eligibility standard would protect veterans who had wrongfully or unjustly received less-than-Honorable discharges and ensure that they could access the support they needed to readjust to civilian life. This standard would exclude only those who received a Dishonorable discharge, or should have received one, because of severe misconduct. The G.I. Bill placed responsibility for making the eligibility determination with the Veterans' Administration, not the armed forces. While Congress has periodically revisited the question of restricting access to basic veterans benefits to honorably discharged veterans, it has rejected that suggestion every time.[122] The "other than dishonorable" eligibility standard has persisted to this day through every conflict since World War II.[123]

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120. PRESIDENT'S COMM'N ON VETERAN PENSIONS, STAFF OF H. COMM. ON VETERANS' AFFAIRS, 84TH CONG., REP. ON VETERANS' BENEFITS IN THE UNITED STATES 394 (Comm. Print 1956).

121. BRADLEY COMM'N STAFF REPORT, *supra* note 47, at 15.

122. *See, e.g.*, *World War Veterans' Legislation: Hearings Before the H. Comm. on World War Veterans' Legislation*, 79th Cong. 229 (1945); Donald J. Brown, *The Results of the Punitive Discharge*, 15 JAG J. 13, 14 (1961) (describing that Congress rejected a proposal to bar all veterans with Bad Conduct discharges, whether by special court-martial or general court-martial).

123. 38 U.S.C. § 101(2) (2012).

D. Eligibility Rules and Discharge Practices Since World War II

The discharge-eligibility standard for basic veteran services has remained fundamentally the same in the decades since World War II. However, Congress has made some stylistic changes and minor amendments, as well as creating a new class of reward and recruitment benefits contingent upon more stringent eligibility criteria.

In 1958, Congress codified all VA statutes at Title 38 of the U.S. Code, reorganizing certain sections in the process. Through codification, the "other than dishonorable" standard moved from a subsection of each individual benefits program to the definitions section, where it became part of the definition of a "veteran."[124] The statutory bars that excluded veterans who committed specifically enumerated acts were codified in a different section.[125] As a legal matter, these changes did not alter the eligibility standard. In practice, however, it has come to mean that a former servicemember deemed ineligible by the VA is essentially told that he or she is not a "veteran" in the eyes of the federal government—despite the fact of his or her service in the armed forces.

After the Vietnam War, Congress expanded healthcare eligibility for many servicemembers who had received Other Than Honorable discharges. Former servicemembers could now receive medical care at VA hospitals for service-connected disabilities, even if the VA considered them "non-veterans" because their service was "dishonorable," so long as a statutory bar did not apply.[126] At the same time, Congress added another statutory bar that would render a veteran ineligible for VA benefits. This new subsection excluded from benefits those veterans who were absent without leave for more than 180 days consecutively, unless there were "compelling circumstances" that justified the absence.[127]

These changes did not represent any major shift in Congress's thinking about which veterans should be eligible for benefits. The new statutory bar represented a similar level of severe misconduct as the existing bars and was added to provide specific guidance on how to respond to the large number of desertions and unauthorized absences that occurred during the Vietnam era. The provision of health care for service-

124. Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105. *Compare* 10 U.S.C. §§ 694(a), 696(a), 697(c) (1952), *with* 38 U.S.C. § 101(2) (1958). Prior to 1944, other veteran benefit bills had also incorporated conduct standards into their definitions of the term "veteran." The legislative history does not explain why in 1944 Congress did not incorporate its eligibility standard into the definition of "veteran," or why in 1958 Congress incorporated the "other than dishonorable conditions" element into the definition of "veteran" but not the statutory bars.

125. 38 U.S.C. § 3103(b) (1958).

126. *Id.* § 2.

127. Act of Oct. 8, 1977, Pub. L. No. 95-126, § 1, 91 Stat. 1106, 1106–07.

connected injuries did broaden the eligibility criteria, and by guaranteeing such care, Congress demonstrated its belief in a special obligation to care for veterans wounded in service. However, Congress left the basic "veteran" eligibility standard intact.

Congress also chose to create certain benefits to induce individuals to join the armed forces or to reward servicemembers for exceptional service. For example, later education benefits programs—the 1984 Montgomery G.I. Bill and the Post-9/11 G.I. Bill—expressly require a fully Honorable discharge.[128] Federal civil service hiring preferences and the Unemployment Compensation for Ex-Servicemembers program require a discharge "under honorable conditions," that is, an Honorable or a General (Under Honorable Conditions) characterization.[129] This effectively creates a two-tier benefits system: a tier of basic services available to all "veterans," and a tier of preferential benefits available only to those with honorable service.

While Congress has made only minor changes to eligibility for basic veteran services, the military made significant changes to its discharge system in the first decade after World War II. In 1947, after criticism by members of Congress and the general public, the military universally adopted another type of characterization: the General (Under Honorable Conditions) discharge.[130] This separated the Army's former Regular discharge into two: the General discharge, which was under honorable conditions, and the Undesirable discharge, which was under less-than-honorable conditions and was later renamed the Other Than Honorable discharge. A General discharge was considered to be under honorable conditions, and therefore veterans who received it would be eligible for basic VA benefits.[131]

In 1948, further consolidation and simplification of the discharge system occurred. All branches adopted similar separation frameworks, including the same five discharge characterizations for enlisted servicemembers: Honorable, General (Under Honorable Conditions), Undesirable (later changed to Other Than Honorable), Bad Conduct, and

128. Veterans Educational Assistance Act of 1984, Pub. L. 98-525, sec. 702, § 1411(a)(3), 98 Stat. 2492, 2555 (codified at 38 U.S.C. § 3011(a)(3) (2012)); Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. 110-252, sec. 5003, § 3311(c), 122 Stat. 2323, 2361–62 (codified at 38 U.S.C. § 3311(c) (2012)).

129. 5 U.S.C. §§ 2108(1), 8521(a)(1)(A) (2012).

130. *Senate Hearing on Constitutional Rights*, *supra* note 20, at 9 (statement of Carlisle P. Runge, Assistant Secretary of Defense for Manpower, Department of Defense); 121 CONG. REC. 3720–21 (1975).

131. *Senate Hearing on Constitutional Rights*, *supra* note 20, at 9 (statement of Carlisle P. Runge, Assistant Secretary of Defense for Manpower, Department of Defense); 121 CONG. REC. 3720–21 (1975); Canaday, *supra* note 75, at 951.

Dishonorable.[132] This framework abandoned the two-part assessment of service "condition" or "quality" followed by discharge "type."[133] Instead, Congress mandated the use of a single discharge certificate for all separations by all service branches on which the "conditions" and "type" of discharge were merged into a single "character" assessment.[134]

The most significant military-law revision came in 1950, with the enactment of the Uniform Code of Military Justice (UCMJ). The UCMJ standardized certain discipline and discharge practices across all of the service branches.[135] It introduced enhanced procedural protections in court-martial proceedings for servicemembers.[136] However, the creation of the UCMJ did not substantially change the contours of what was considered "dishonorable" conduct from the pre-UCMJ standards, such as those set forth in the 1943 MCM. The 2016 MCM, like the 1943 edition, associates a Dishonorable discharge with severe military offenses and civilian felonies; it states that a Dishonorable discharge may be imposed only after consideration of a full range of mitigating factors, and it allows for consideration of mitigating factors at multiple junctures.[137] The most significant change in the MCM's standards for "dishonorable" conduct is that current rules allow a sentencing decision to consider non-judicial disciplinary actions in the record, whereas the 1943 edition only permitted consideration of court-martial convictions.[138] Although the administration of military justice underwent major reforms, the written standards for issuance of Dishonorable discharges has not changed significantly in nearly a century.

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132. *Senate Hearing on Constitutional Rights*, *supra* note 20, at 9; *see* Department of Defense Directive No. 1332.14 (Jan. 14, 1959). In the 1980s, an administrative "Uncharacterized" discharge was added for servicemembers who served fewer than 180 days in service. *See* Department of Defense Instruction No. 1332.14 (Jan. 28, 1982).

133. *See supra* note 43–44 and accompanying text.

134. The harmonized "Report of Separation from Active Duty," now called a "Certificate of Release or Discharge from Active Duty" and often referred to by its form number, "DD-214," was created pursuant to Selective Service Act of 1948, ch. 625, title I, § 9, 62 Stat. 604, 614–18. This requirement did not prohibit the use of service-specific discharge forms, and some services used both after the introduction of the DD-214. *See, e.g.*, Dep't of Army Reg. No. 635-200, 1–4, ¶¶ 1-9–1-10 (1979). The "characterizations" now in use have blended the terminology from the prior two-step analysis. For example, the "General (Under Honorable Conditions)" discharge explicitly merges the prior quality of service terminology with the type of discharge terminology.

135. Act of May 5, 1950, ch. 169, § 1, arts. 18–19, 64 Stat. 107, 114 (codified at 10 U.S.C. §§ 801–940 (2012)); *see Senate Hearing on Constitutional Rights*, *supra* note 20, at 4.

136. Section 1, arts. 18–19, 64 Stat. at 114; *see* Robinson O. Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 Duke L.J. 41, 41 (1966).

137. JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 33, II-25–26, II-128, II-134, II-153; *see* Military Judges' Benchbook, DA Pam 27-9 ¶ 2-5-13.

138. *Compare* 1943 MCM, *supra* note 14, ¶¶ 79(b), 80(a), *with* JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 33, at II-127.

What has changed, both in terminology and practice, is the use of intermediate characterizations.[139] Over the decades since World War II, there has been a steady decrease in the grant of Honorable discharges and a corresponding increase in the grant of Other Than Honorable discharges.[140] The shift now means that post-9/11 era veterans are nearly four times more likely to receive a less-than-Honorable discharge than World War II era veterans.[141]

Importantly, however, those changes have all occurred at the boundary between Honorable and intermediary characterizations; they have not implicated the boundary between Dishonorable and the intermediary characterizations. Underscoring this point is the fact that the overall rate of punitive discharges has not changed, staying at or near one percent of all discharges.[142] This leaves open the possibility that there has

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139. For example, low-level misconduct that may previously have led to a Regular discharge—which would have been under "honorable conditions"—may now be described as "minor disciplinary infractions" and therefore lead to an Other Than Honorable discharge. This reflects, in part, a change in the military from a draft force to a volunteer force, adopting a zero-tolerance performance culture in place of a supportive and rehabilitative culture. *See* Seamone, *supra* note 16, at 102.

140. VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD LAW SCH., UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD-PAPER DISCHARGES 10 (2016), https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf [hereinafter VETERANS LEGAL CLINIC, UNDERSERVED].

141. *Id.* at 2, 8–10.

142. *Id.* at 9–10. The number of courts-martial has dramatically decreased; however, the rate of discharges by courts-martial has not changed. *Id.* This suggests that commanders are less likely to use courts-martial for low-level misconduct that does not warrant a discharge, but they are equally likely to refer to court-martial for severe misconduct that justifies a punitive discharge. This contradicts somewhat a common observation in military justice: that commanders responded to the procedural protections established with the UCMJ by using administrative misconduct discharges as an alternative to punitive separations by court-martial. *E.g.*, Everett, *supra* note 136, at 49. Everett stated:

> [T]he Court of Military Appeals commented in its annual report for 1960:
>
> > The unusual increase in the use of the administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code. The validity of that suspicion was confirmed by Maj. Gen. Reginald C. Harmon, then Judge Advocate General of the Air Force, at the annual meeting of the Judge Advocates Association held at Los Angeles, Calif., August 26, 1958. He there declared that the tremendous increase in undesirable discharges by administrative proceedings was the result of efforts of military commanders to avoid the requirements of the Uniform Code. Although he acknowledged that men thereby affected were deprived of the protections afforded by the code, no action to curtail the practice was initiated.

Id. If that were the case, then the rate of Honorable discharges should be constant, and the increase in administrative misconduct separations should be offset by a decrease in punitive separations. Data recently compiled by the authors shows that this did not occur. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 9–10. The increase in administrative misconduct discharges has not accompanied a decrease in punitive discharges; instead, it has been offset by a decrease in Honorable and General discharges. *Id.* The apparent

been a change in usage between the punitive discharges; that conduct previously resulting in Dishonorable discharges would later result in a Bad Conduct discharge. The relevance of the lack of change to the overall rate of punitive discharges to the interpretation of "dishonorable" will be discussed below.[143] Nevertheless, it is notable that the share of servicemembers sentenced to discharge at court-martial has not changed significantly in 70 years.

The adoption of the UCMJ and the standardization of discharge characterizations in the post-World War II era could have alleviated Congress's concerns that servicemembers were unjustly receiving less-than-Honorable discharges, and therefore, could justify revision of the "other than dishonorable" standard.[144] Alternatively, Congress could have adopted one of these standardized intermediary discharges as its eligibility criterion. But Congress never restricted eligibility nor changed the VA's criteria to exclude only those discharged under dishonorable conditions.

In sum, Congress carefully selected the "other than dishonorable conditions" eligibility standard for basic veteran services in 1944, and has upheld that standard for more than seven decades. Even when the military adopted changes to address Congress's expressed concerns, and even when presented with the opportunity to revise the standard, Congress has never enacted any major change to the VA's basic eligibility standard. Nor has Congress ever endorsed any interpretation of VA benefits eligibility that is different from the "other than dishonorable" standard. The broad standard—that aims to aid as many veterans as possible in readjusting to

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contradiction between a decreased rate of courts-martial and constant rate of punitive discharges can be explained by a decline in the practice of conducting courts-martial with sentences that did not include discharges, instead allowing those defendants to serve their punishments, reform their conduct, and possibly earn an Honorable discharge. *See* Seamone, *supra* note 16, at 49–103 (discussing the historical decline in remitted and suspended sentences at court-martial). Following this analysis, the increase in Other Than Honorable administrative discharges does not include servicemembers who would have previously received punitive discharges; rather, the increase in Other Than Honorable discharges represents servicemembers who would have previously obtained discharges under honorable conditions. Moreover, significant differences exist between military services' discharge practices. Marines are ten times more likely to receive Other Than Honorable discharges than Airmen, even when controlling for the severity of the underlying conduct.

143. *See infra* notes 169–72 and accompanying text.

144. *See, e.g.*, H.R. REP. NO. 85-863, at 4 (1957) (discussing whether harmonization of court-martial practices by adoption of the UCMJ warrants amendment to the G.I. Bill of Rights). Throughout the mid-twentieth century, many members of Congress were deeply worried that servicemembers were being less-than-honorably discharged—and thereby potentially deprived of veteran benefits and entitlements—without sufficient due process. *E.g.*, *id.* at 3–5; 95 CONG. REC. 5722 (1949) (statement of Rep. Vinson); *id.* at 5722–23 (statement of Rep. Brooks); 94 CONG. REC. 7510–25 (1948) (debate regarding military justice); *see* Effron, *supra* note 36, at 236–38 (evaluating adequacy of due process protections in administrative separation process).

civilian life; that seeks to avoid past errors when our government was stingy with returning veterans; and that gives veterans due credit for their sacrifices and grants them "the benefit of the doubt"—remains the law to the present day.

III. STATUTORY INTERPRETATION

The language that Congress chose, the framework it created, and the sentiments expressed in the G.I. Bill can and should guide our interpretation of the "other than dishonorable" eligibility standard. A statutory analysis accounting for those factors renders an interpretation allowing servicemembers to be excluded only based on severe misconduct and only after considering mitigating factors.

In short, the statutory requirement of a discharge "under conditions other than dishonorable" establishes a threshold level of conduct that servicemembers must satisfy in order to access veteran services. Servicemembers whose conduct falls below that threshold forfeit recognition as "veterans" under federal law, despite their enlistment or commission in the military and the nature or duration of their term of military service. Given the material and dignitary consequences of withholding recognition as a veteran and attendant VA services, care should be taken to define the contours of the statutory term "dishonorable conditions" correctly.

An analysis of the plain language of the G.I. Bill, the statutory framework, and its legislative history all lead to similar conclusions: each show that there is a relatively narrow range of reasonable interpretations of the "dishonorable conditions" term that the VA may apply. Moreover, while operating within this range, the VA must apply certain interpretive principles and guidance that favor veterans. Although alternative interpretations of the statute have been put forth, they fail to follow the fundamental principles of statutory interpretation. As a result, these interpretations risk supplanting Congress's policy decisions with those of the VA.

A. "Dishonorable Conditions" in Military Law

The first source for interpreting statutory meaning is the text itself.[145] Here, the terms "dishonorable" and "conditions" deserve careful attention for the guidance they provide in correctly interpreting the statute.

"Dishonorable" is a term of art in the context of military law and discipline. Congress's decision to adopt this term indicates that Congress

145. BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

specifically intended to incorporate the meaning of "dishonorable" in the military context.[146] If Congress meant to exclude servicemembers based on conduct other than what is indicated by the term "dishonorable," it could have adopted other terms used at the time to classify military service, such as "inapt," "indifferent," "undesirable," "unfavorable," or "unsatisfactory";[147] or it could have adopted a new term, such as "unmeritorious" or "unfaithful." However, Congress did not do so. Instead, Congress adopted a term already in use, and it should be assumed that Congress intended to incorporate its established meaning.[148]

The general contours of the meaning of "dishonorable" in military law can be discerned from the regulations, guidance, and practice sources that implemented it. Acknowledging the variability that characterized military justice of that period,[149] the inclination of contemporary authorities to attribute that variation to abuses of discretion rather than incompleteness of the law justifies a close reading of the law.[150] The fact that the substantive standards for "dishonorable" conduct have not substantially changed since then[151] confirms that the written standards in effect at that time were reliable statements of what conduct was considered "dishonorable."

At that time, the term "dishonorable" was used both as a type of discharge certificate—the Dishonorable discharge—and as a term to characterize the conduct leading to discharge—dishonorable discharge conditions.[152] Although the conditions of service and type of discharge were distinct analyses in service regulations, the term "dishonorable" had

146. The Court in *Morrissette v. United States* described how terms of art should be treated when used by Congress:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such [a] case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952).

147. *See* Dep't of Army Reg. No. 615-360, 23–26 (1942); 1942 BUREAU OF NAVAL PERSONNEL MANUAL, *supra* note 26, §§ D-9101–9103.

148. Other analysts have stated that the phrase "dishonorable conditions" did not exist in military law. *E.g.*, Lerner, *supra* note 19, at 130. The discussion below indicates otherwise.

149. Holtzoff, *supra* note 41, at 8–9; Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts Of Criminal Appeals*, 66 A.F. L. REV. 79, 83 (2010).

150. *See supra* note 36 and accompanying text.

151. *See supra* notes 135–38 and accompanying text.

152. Dep't of Army Reg. No. 615-260, § 3(c) (1934); 1948 BUREAU OF NAVAL PERSONNEL MANUAL, *supra* note 26, § C-10301(1); *see supra* notes 8–16 and accompanying text.

nearly equivalent meanings in both contexts and was used interchangeably.[153]

Thus, a primary source for identifying the meaning of "dishonorable conditions" is the codified standards for "Dishonorable discharges" that existed in 1944, which have remained largely unchanged since then. Aside from general statements associating a Dishonorable discharge with "serious" or "severe" misconduct, the 1943 MCM provided three specific elements limiting when a Dishonorable discharge could be issued: it was required only for civilian felonies and high military crimes such as desertion and mutiny; it was potentially available for certain lesser offenses, but only after consideration of a wide range of factors in mitigation and extenuation; and it was available for any offense if there had been multiple convictions within a prior year.[154] Conversely, military regulations anticipated that a wide range of behavior would be treated as misconduct and punished proportionately, but without rising to the level of dishonor. These codified standards of Dishonorable discharges provide a starting point for defining the contours of dishonorable conduct.[155]

There were at least three cases where dishonorable conduct was not coextensive with a Dishonorable discharge. First, military officers convicted at court-martial receive a Dismissal, rather than a Dishonorable discharge. They are, however, legally equivalent, and "dishonorable conditions" therefore encompassed both enlisted Dishonorable discharges

153. Army and Navy regulations stated that a "[D]ishonorable discharge certificate" was associated with "dishonorable conditions of service" and vice versa. Dep't of Army Reg. No. 615-360, § 68 (1938). The Marine Corps "character" assessment did not include a "dishonorable" option. Its regulations permitted "[e]xcellent," "[v]ery [g]ood," "[g]ood," or "[b]ad," and the "[b]ad" character was indicated for "Dishonorable" and "Bad Conduct" discharges, and for discharges for undesirability. U.S. Marine Corps Order 30 (May 10, 1909); MARINE CORPS MANUAL, *supra* note 42, § 3-17(3). Thus the term "dishonorable conditions" did not exist in Marine Corps regulations, and its regulations did not identify a "character" of service coextensive with a Dishonorable discharge certificate.

154. *See supra* notes 30–37 and accompanying text.

155. Case law provides little additional guidance on the contours of "dishonorable" conduct at the time of the G.I. Bill's enactment. Some court-martial decisions affirmed the principle that "dishonorable" conduct was worse than mere misconduct. 2 BULL. OF THE JUDGE ADVOC. GEN. OF THE ARMY No. 11, 430 (1943) (taking judicial notice that there is a range of misconduct that falls below "honorable" but is not "dishonorable," for the purpose of distinguishing an officer Dismissal from an officer resignation for the good of the service). Digests reviewing military sentences occasionally identified cases where a proposed Dishonorable discharge sentence was reduced on review, indicating the limit of "other than dishonorable" behavior. Examples of such cases include desertion from wartime guard duty for nine days, 1 BULL. OF THE JUDGE ADVOC. GEN. OF THE ARMY No. 1, 16–17 (1942), and desertion pending departure to wartime service where the servicemember's family was experiencing financial hardship, 1 BULL. OF THE JUDGE ADVOC. GEN. OF THE ARMY No. 2, 103–04 (1942). These outcomes confirm the principles stated in code, but add little substantial guidance.

and officer Dismissals.[156] Second, a commanding officer might make an error of judgment or discretion. For example, a commander may pursue a court-martial conviction when the underlying conduct did not warrant it, or obtain an administrative separation when a court-martial would have been appropriate.[157] Third, procedural requirements may bar a court-martial when the underlying conduct otherwise warrants it. For example, military law requires that a defendant be present at arraignment for a court-martial, and because a deserter who has not been apprehended would not be present, the military services cannot convene a court-martial to impose a Dishonorable discharge on a person in desertion.[158] The services must instead separate administratively, under which the most severe characterization available is Other Than Honorable.[159] This is a purely procedural obstacle to imposing a Dishonorable discharge where the conduct merits the designation.[160]

The instances where dishonorable conditions did not align with Dishonorable discharges all related to procedural constraints or adjudicator error. By adopting a "dishonorable conditions" standard for exclusion from veteran services, rather than a "Dishonorable discharge" standard, the statute applied the substantive standard of a Dishonorable discharge without requiring the discharge characterization itself. This allows for the proper exclusion of cases of dishonorable conduct that evade

156. 2 BULL. OF THE JUDGE ADVOC. GEN. OF THE ARMY No. 1, 10 (1943) ("A sentence of dismissal, while inappropriate in the case of an enlisted man, has, if used, the same effect as one of dishonorable discharge."); WINTHROP, *supra* note 10, at 434; Bednar, *supra* note 9, at 7.

157. Legislators specifically cited this occurrence as a justification for its generous eligibility standard. *See supra* notes 39–41 and accompanying text.

158. United States v. Price, 48 M.J. 181, 183 (C.A.A.F. 1998); 1943 MCM, *supra* note 14, ¶ 62; JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 33, at II-78.

159. *E.g.*, Dep't of Army Reg. No. 635-200, ¶ 15-5 (authorizing discharge without trial for absences of one year or more where the service member is absent or where court-martial has been unsuccessful due to "technical error" or statute of limitations); 1942 BUREAU OF NAVAL PERSONNEL MANUAL, *supra* note 26, § C-10313(1)(a) (authorizing administrative discharge for "[a]n individual who has deserted and who has not been brought to trial").

160. Other situations where procedural obstacles may bar a Dishonorable discharge include: servicemembers who commit civilian felonies that result in civilian incarceration may not receive a court-martial because they cannot be present at arraignment; for some time military courts-martial did not have jurisdiction over purely civilian offenses, so felonious conduct may never receive a Dishonorable discharge; and the military equivalent of a plea bargain, called a discharge "for the good of the service" or "in lieu of court-martial," includes an admission of guilt but not a conviction on record, and therefore cannot result in a Dishonorable discharge. Dep't of Army Reg. No. 635-200, ¶ 14-5 (2011) (authorizing administrative separation in absentia for servicemembers in civilian criminal custody); *see* Dep't of Army Reg. No. 635-200, ¶ 10-2 (2011) (authorizing administrative discharge under other than honorable conditions upon defendant's request and acknowledgement of guilt); Solorio v. United States, 483 U.S. 435, 436 (1987) (overturning the prior rule that military courts-martial have no jurisdiction over offenses that lack "service-connection").

court-martial, particularly the circumstances of procedural constraint outlined above. Under statute, servicemembers therefore should be denied recognition as a "veteran" if they received a Dishonorable discharge or should have received one, based on the nature of their conduct, but for the formal requirements of military justice.[161]

Legislators specifically endorsed this reading of the statute. The Senate Report on the G.I. Bill of Rights explained the "dishonorable conditions" phrase as follows:

> A [D]ishonorable discharge is effected only as a sentence of court-martial, but in some cases offenders are released or permitted to resign without trial—particularly in the case of desertion without immediate apprehension. In such cases benefits should not be afforded as the conditions are not less serious than those giving occasion to [D]ishonorable discharge by court martial.[162]

The House Report echoed that sentiment: "If such offense [resulting in discharge] occasions [a] [D]ishonorable discharge, or the equivalent, it is not believed benefits should be payable."[163]

The only case law that addresses this issue arrived at the same conclusion. In *Camarena v. Brown*,[164] a former servicemember with a Bad Conduct discharge argued that the statute permitted exclusion of only those veterans whose service was characterized as Dishonorable by the armed forces.[165] Reviewing the statutory text and legislative history, the Court of Appeals for Veterans Claims disagreed with the claimant and found that the phrase "dishonorable conditions" gave the VA the discretion to exclude people with discharge characterizations other than fully Dishonorable.[166] The court explained, however, that Congress meant to exclude only those veterans who committed misconduct equivalent to the dishonorable standard:

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161. Because a "dishonorable conditions" standard is effectively a "Dishonorable discharge" stripped of its procedural protections, its use raises the question of whether this standard adequately respects due process. This relates to the question of whether reliance on administrative discharges in general is appropriate, given the range of negative consequences. *See* H.R. REP. NO. 85-863, at 4 (1957); STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE S. COMM. ON THE JUDICIARY, 88TH CONG., SUMMARY—REP. OF HEARINGS BY THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL PURSUANT TO S. RES. 260 *passim* (Comm. Print 1963); Effron, *supra* note 36, at 268; Everett, *supra* note 136, at 81; Thomas R. Folk, *Use of Compelled Testimony in Military Administrative Proceedings*, 1983-AUG ARMY LAW. 1 (1983).

162. S. REP. NO. 78-755, at 15 (1944).

163. H. REP. NO. 78-1418, at 17 (1944) (emphasis added).

164. Camarena v. Brown, 6 Vet. App. 565 (1994), *aff'd*, 60 F.3d 843 (Fed. Cir. 1995) (per curiam).

165. *Id.* at 566.

166. *Id.* at 567–68.

> The legislative history of the enactment now before this Court shows clearly a congressional intent that if the discharge given was for conduct that was less than honorable, . . . the Secretary would nonetheless have the discretion to deny benefits in appropriate cases where he found *the overall conditions of service had, in fact, been dishonorable.*[167]

Thus, the "dishonorable conditions" term in military law references the substantive standard of a Dishonorable discharge, and a plain reading of the veteran eligibility statute must start by defining that term as applied in military practice. As discussed above, variability existed in military law practice, despite generally applicable and known legal standards. But this lack of consistent implementation does not mean that the term "dishonorable" is indiscernible or indescribable.

The transformational changes to military justice brought about by the UCMJ addressed this failure to achieve uniformity. The impact of these reforms cannot be overstated. However, it does not appear that those reforms affected the question here: it did not change the underlying legal standard of dishonorable service that Congress referenced in its 1944 legislation. The published standards for Dishonorable discharges have changed hardly at all, despite numerous revisions to the MCM, and the overall incidence of punitive discharges by court-martial has not changed.

One change to military justice that potentially shifted practice and interpretation was the adoption of the Bad Conduct discharge across all service branches.[168] Since this adoption in 1948, its use has slowly and steadily risen. The overall rate of punitive discharges has remained stable at around one percent of all separations, but Bad Conduct discharges make up a larger portion of that one percent.[169] This therefore raises the possibility that some servicemembers who would have received Dishonorable discharges in World War II or earlier might now receive a Bad Conduct discharge; that is, they no longer receive a discharge that is clearly under dishonorable conditions. The 2012 MCM states that a Bad Conduct discharge is not intended "as a punishment for serious offenses of either a civilian or military nature," thus excluding conduct that was associated with a Dishonorable discharge in 1943.[170] Service regulations reinforced that a Bad Conduct discharge was not appropriate for conduct warranting a Dishonorable discharge.[171] Some service regulations further specified that a Bad Conduct discharge, though issued by a sentence at

167. *Id.* at 567 (emphasis added).
168. Selective Service Act of 1948, ch. 625, § 210, 62 Stat. 630.
169. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 9–10.
170. JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 33, at II-128.
171. *See, e.g.*, DEP'T OF NAVY, MARINE CORPS MANUAL ¶ 2603(1)(d) (1980), http://www.marines.mil/Portals/59/Publications/MARINE%20CORPS%20MANUAL%20W%20CH%201-3.pdf.

court-martial, indicated a character of service that was equivalent to an administrative "Other Than Honorable" discharge and not indicative of "dishonorable" character.[172]

However, the 2012 MCM added that the Bad Conduct discharge is "appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary," a category that echoes the 1943 rule authorizing Dishonorable discharges in cases involving five minor convictions within the prior year. This comparison of codified standards suggests that present Bad Conduct discharges should compare with prior Dishonorable discharges only when issued for repeated misconduct. This change in practice does not prevent implementation of the standard as originally written or render it inapplicable to the modern age; rather it emphasizes the important fact-reviewing, adjudicative role that Congress assigned to the VA, which can look at the underlying conduct that led to discharge and determine whether that conduct qualifies as "dishonorable."

In sum, Congress imported the term "dishonorable conditions" from military law into veteran benefits law in the G.I. Bill of Rights, and that term brought with it history and meaning. Although actual practice varied, military law provided certain clear standards for when conduct shows "dishonor": the most severe military and civilian misconduct, only after consideration of mitigating factors, and for minor disciplinary offenses where there were multiple convictions within one year. The term "dishonorable conditions" specifically encompasses situations where those criteria are met, but where procedural or practical constraints prevent a court-martial judgment. With the passage of time, and despite transformational change in many areas of military justice, the substantive standard for dishonorable conduct has remained largely the same.

B. Statutory Framework

Another source for understanding the "other than dishonorable conditions" standard is the overall statutory framework. Congress placed the "other than dishonorable" requirement alongside other eligibility criteria that relate to conduct, and whose interaction with the "other than dishonorable" standard should inform its interpretation.[173]

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172. Dep't of Army Reg. No. 635-200, 1–4 tbl.1-1 (1977).

173. Branch v. Smith, 538 U.S. 254, 281 (2003) ("[C]ourts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes."); Reno v. Koray, 515 U.S. 50, 57 (1995) ("'It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms,' since Congress is presumed to have 'legislated with reference to' those terms.") (citation omitted); Smith v. Brown, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (quoting U.S. Nat'l Bank

The G.I. Bill of Rights contains two elements limiting access to veteran services based on conduct in service. First, Congress attached the "other than dishonorable conditions" requirement to each veteran benefit in the statute.[174] Second, Congress added a provision that "bar[s] all rights of such person under laws administered by the Secretary" if the servicemember was discharged under enumerated circumstances: by sentence of a general court-martial; for conscientious objection, when the servicemember refuses to perform military duty or wear the uniform or otherwise comply with lawful orders of a competent military authority; for desertion; by seeking discharge as an alien during a period of hostilities; and for resignation by an officer for the good of the service.[175] As one exception, those who were insane "at the time of the commission of the offense" would nevertheless be eligible.[176] Later, Congress added to the list of disqualifying conduct the unauthorized absence of 180 days or more, unless "compelling circumstances" justified the absence.[177] Because the statute specifies the standards for exclusion, these disqualifying conditions have become known as the statutory bars; exclusions based on the "other than dishonorable conditions" element have become known as the regulatory bars, referring to the VA regulations that elaborate the term.[178]

Several features of the statutory bars are notable. First, they address the same subject matter as the "other than dishonorable conditions" regulatory bar: both discuss how conduct in service may limit access to VA-administered services after discharge. Second, the statutory bars provide specific standards that set a very high bar for exclusion from basic veteran services. General courts-martial are the most serious and least common type of military trial, and a conviction by general court-martial is

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of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993)). The *Smith* court explained:

> The Supreme Court has cautioned "over and over" again that "in expounding a statute we must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law . . . ." Only by such full reference to the context of the whole can the court find the plain meaning of a part.

Smith, 35 F.3d at 1523 (quoting *U.S. Nat'l Bank of Or.*, 508 U.S. at 455).

174. Servicemen's Readjustment Act of 1944, ch. 268, § 400, 58 Stat. 284, 287–90 (education benefits); *id.* § 500(a), 58 Stat. at 291 (home loans); *id.* § 607, 58 Stat. at 295 (employment services); *id.* § 700(a), 58 Stat. at 295 (unemployment benefits); *id.* § 1503, 58 Stat. at 301 (all other services).

175. *Id.* § 300, 58 Stat. at 286 (codified at 38 U.S.C. § 5303(a) (2012)).

176. *Id.*

177. Act of Oct. 8, 1977, Pub. L. No. 95-126, § 1(a)(1), 91 Stat. 1106 (codified at 38 U.S.C. § 5303(a)).

178. *E.g.*, DEP'T OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL No. M21-1, pt. III.ii.7.2.c ("[O]n receipt of a claim, review all evidence to determine if there is a statutory or regulatory bar to entitlement.") [hereinafter ADJUDICATION PROCEDURES MANUAL].

comparable to a felony conviction. Similarly, the statute's bar against those who desert or who are absent for more than 180 days anticipates that people who are absent for up to six months should retain eligibility. Finally, the standards account for some extenuating circumstances, either mental health or, for absences over 180 days, other "compelling circumstances."[179]

Canons of statutory construction require that these features of the statutory bars inform the interpretation of the term "dishonorable conditions." First, agencies and courts should not adopt an interpretation that renders any element of the same statute superfluous.[180] That would be the case if the "dishonorable conditions" bar was more exclusive than the statutory bars; the statutory bars would be superfluous. For example, an interpretation of "dishonorable conditions" that excluded all or most people with punitive discharges—meaning those discharged by sentence of general court-martial or of special court-martial—would render redundant the statutory bar's exclusion of only those discharged by general court-martial.

Furthermore, a general statutory term cannot be interpreted so that it provides a different outcome for an issue that Congress specifically addressed elsewhere in statute.[181] That would happen here if the regulatory bars excluded a servicemember for shorter unauthorized absences. The statutory bars provide a precise numerical threshold for how long of an unauthorized absence may justify exclusion from veteran services: 180 days or more, unless there are compelling circumstances. The more general term discharge under "dishonorable conditions" should not be defined in a way that excludes servicemembers discharged for unauthorized absences of less than 180 days, as this would lead to outcomes that depart from a specific standard provided elsewhere in statute.

In order to give effect to both elements of the statutory scheme, the "dishonorable conditions" standard must prohibit conduct of similar severity to what is listed in the statutory bars. If the "dishonorable

179. 38 U.S.C. § 5303(a).

180. Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation omitted); *see* Branch v. Smith, 538 U.S. 254, 281 (2003) ("[C]ourts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes."); Reno v. Koray, 515 U.S. 50, 57 (1995) ("'It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms,' since Congress is presumed to have 'legislated with reference to' those terms.") (citation omitted).

181. *See* Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (citation omitted).

conditions" element excludes only conduct listed in the statutory bars, then that legislative act is made redundant. If the "dishonorable conditions" element excludes conduct much less severe than what is listed in the statutory bars, then the statutory bars have been made superfluous. Neither outcome is permissible. However, there remains a range of conduct that is not specifically anticipated in the statutory bars but describes conduct of similar severity. The term "dishonorable conditions" must exclude this conduct and no further.

Congress endorsed this method for interpreting the G.I. Bill. The Senate Report directly addressed the relationship between the "dishonorable conditions" element and the statutory bars. It stated that the statutory bars were intended to list the types of conduct that would result in a Dishonorable discharge, and that the "dishonorable conditions" bar was meant to replicate this standard:

> It is the opinion of the Committee that such [less-than-Honorable] discharge should not bar entitlement to benefits otherwise bestowed unless the offense was such, as for example those mentioned in section 300 of the bill [listing the statutory bars], as to constitute dishonorable conditions.[182]

Some general standards can be extrapolated from the several specific offenses listed in the statutory bars and therefore provide guidance on which offenses could reasonably be deemed disqualifying under the "other than dishonorable" standard. Conduct listed in the statutory bars fall into two categories. One includes conduct that shows an abandonment of military responsibility: desertion, absence for more than six months without compelling circumstances to justify the absence, conscientious objection with refusal to follow orders, and request for separation by an alien during wartime.[183] This degree of abandonment does not include moderate misconduct such as failures to follow rules, conflicts with superiors, or insubordination. The second category includes felony-level offenses that warrant the most severe penalty: a discharge by general court-martial or a resignation by an officer for the good of the service. Notably, the second category does not include those discharged by special court-martial or those discharged subsequent to summary court-martial; nor does it include those discharged after general court-martial that did not

182. S. REP. NO. 78-755, at 15 (1944) (emphasis added).

183. Servicemen's Readjustment Act of 1944, ch. 268, § 300, 58 Stat. 284, 286 (establishing bars for desertion and for conscientious objection with refusal to follow orders); Act of Sept. 2, 1958, Pub. L. 85-857, § 3103, 72 Stat. 1105, 1230 (establishing bad for aliens who requested separation during wartime); Act of Oct. 8, 1977, Pub. L. 95-126, 91 Stat. 1106, 1106 (establishing bar for unauthorized absences of at least 180 days, except where compelling circumstances exist).

impose a punitive discharge. These omissions indicate that Congress specifically intended for eligibility to be granted to people with moderate misconduct, such as misconduct that would lead to special court-martial conviction, misconduct that would lead to a discharge characterization less severe than Dishonorable, or unauthorized absences of 179 days or less.

C. Legislative History

The legislative history of the G.I. Bill of Rights provides additional bases for determining Congress's intended standard for "dishonorable conditions." This analysis produces similar guidance as the plain meaning and statutory framework discussions above.

Many legislators, including the G.I. Bill's sponsors and committee leaders, endorsed a plain reading of the statute whereby the VA should exclude only servicemembers whose conduct justified a Dishonorable discharge under prevailing military law standards. They expressed this view at committee hearings on the G.I. Bill and in floor debates.[184] The view was further stated in the official House and Senate reports explaining the G.I. Bill's provisions.[185] At committee hearings, representatives from the American Legion, who had drafted the G.I. Bill, stated that excluding only those servicemembers who behaved dishonorably was their intent.[186] In addition, legislators expressed the view that the dishonorable conditions bar should exclude only servicemembers whose conduct was of

184. *See, e.g.*, *House Hearings on G.I. Bill*, *supra* note 27, at 420 (statement of Rep. Rankin, Chairman, H. Comm. on World War Veterans' Legislation); 90 CONG. REC. 3077 (1944) (statement of Sen. Connally). Senator Connally stated:

> [W]e very carefully went over this whole matter [of choosing the "dishonorable conditions" standard] . . . . That is one place where we can do something for the boys who probably have "jumped the track" in some minor instances, and yet have not done anything which would require a [D]ishonorable discharge.

90 CONG. REC. 3077 (1944) (statement of Sen. Connally).

185. S. REP. NO. 78-755, at 15. One report explained:

> A [D]ishonorable discharge is affected only as a sentence of a court-martial, but in some cases offenders are released or permitted to resign without trial—particularly in the case of desertion without immediate apprehension. In such cases benefits should not be afforded as the conditions are not less serious than those giving occasion to [D]ishonorable discharge by court-martial.

Id.; *see* H. REP. NO. 78-1418, at 17 (1944) ("If such offense [resulting in discharge] occasions a [D]ishonorable discharge, or the equivalent, it is not believed benefits should be payable.").

186. *House Hearings on G.I. Bill*, *supra* note 27, at 419 (statement of Carl Brown, Chief of Claims, American Legion) ("If [the service member] did not do something that warranted court-martial and [D]ishonorable discharge, I would certainly not see him deprived of his benefits."); *see also id.* at 415 (statement of Harry S. Colmery, Former National Commander, American Legion).

comparable severity to what is listed in the statutory bars.[187] The Senate Report on the G.I. Bill endorsed this interpretation as well.[188]

Members of Congress also discussed particular examples of veterans who they believed should be qualified or disqualified under the "other than dishonorable" eligibility standard. These examples demonstrate that an eligibility assessment should be based on a servicemember's overall service, not focused solely on the conduct that led to discharge. For example, many legislators wanted to ensure eligibility for wounded combat veterans discharged for repeated regulation violations, periods of absence without leave, or substance abuse,[189] even if such conduct might lead to exclusion without the presence of those mitigating factors.[190]

Likewise, legislators provided examples of the types of conduct they intended the G.I. Bill to exclude. These examples show that Congress understood "dishonorable conditions" to refer to only very severe misconduct and explicitly stated that a wide range of mild to severe misconduct would not result in a loss of eligibility. Conduct that merited loss of eligibility, according to members of Congress, included: desertion, murder, larceny, civilian incarceration, substance abuse not associated with a wartime disability, and shirking.[191] This list approximates the itemized conduct that the MCM listed as necessarily dishonorable. Conduct that did not show "dishonor" included: substance abuse associated with a wartime disability, discharge for unauthorized absence that did not involve desertion, conviction of civilian offenses that did not result in incarceration, conviction by special court-martial, and violations of military regulations.[192] These actions constituted misconduct, and may merit separation with a less-than-Honorable characterization, but did not justify exclusion from basic services.

187. 90 CONG. REC. 3077 (1944) (statement of Sen. Connally) (expressing that "boys who probably have 'jumped the track' in some minor instances, and yet have not done anything that would require a dishonorable discharge," should have access to veteran services).

188. S. REP. NO. 78-755, at 15.

189. *House Hearings on G.I. Bill*, *supra* note 27, at 417.

190. 90 CONG. REC. 3076–77 (1944).

191. H.R. REP. NO. 1624, at 26 (1944) (stating that service members should be excluded from veteran services if they engaged in shirking); 90 CONG. REC. 3077 (1944) (stating that service members should be excluded from veteran services if they engaged in desertion, murder, or larceny, or if they experienced civilian incarceration or "chronic drunkenness" not associated with a wartime disability).

192. *House Hearings on G.I. Bill*, *supra* note 27, at 190, 415, 417 (stating that service members should not be excluded if they engaged in unauthorized absences that did not involve desertion, civilian convictions that did not involve incarceration, convictions by special courts-martial, and violations of military regulations); 90 CONG. REC. 3077 (1944) (stating that service members should not be excluded if they engaged in "chronic drunkenness" associated with a wartime disability).

The prior legislative record provides additional evidence that Congress purposefully and knowingly intended that a wide range of misconduct, including conduct that may lead to a less-than-Honorable discharge, should not bar access to basic veteran services. All of the services had used intermediary characterizations between Honorable and Dishonorable for decades, and Congress had used these different characterizations as the eligibility standard in prior benefit legislation.[193] Congress understood the range of discharge characterizations, including the fact that conduct can be less than honorable without being dishonorable.[194] Congress openly considered and rejected adopting one of these more exclusive standards when it was proposed by some legislators, as well as the military branches themselves.[195] The Chief of Naval Personnel, in particular, objected directly that the "other than dishonorable conditions" standard would result in veterans with Bad Conduct discharges obtaining basic services.[196] However, Congress adopted the standard anyway over the military's objections.

Finally, Congress's intent is shown by a comparison of the G.I. Bill's standards with standards enacted in prior legislation. Earlier eligibility standards were more restrictive, often requiring fully Honorable discharges; the standards also varied among different benefits and different eras of service.[197] In passing the G.I. Bill of Rights, Congress created a new framework designed to give servicemembers "the benefit of the doubt," as the Bill's main drafter explained.[198] According to various legislators, the broadened "other than dishonorable" eligibility standard was meant as a "mantle of protection" that could ensure that veterans with less-than-honorable discharges could still get decent jobs;[199] as a way to rehabilitate them so that they engaged in no further misconduct and could be productive members of society;[200] and as a way to recognize the sacrifice of those who had served their country.[201]

193. *See supra* notes 17–29 and 47–60 and accompanying text.

194. *E.g.*, *House Hearings on G.I. Bill*, *supra* note 27, at 419 ("You say either honorably discharged, discharged under conditions not dishonorable, or discharged under honorable conditions. Those latter two things do not mean the same thing."); 90 CONG. REC. 3076–77 (1944) ("Many boys who do not receive [H]onorable discharges have capabilities of being very excellent citizens. They receive [O]ther [T]han [H]onorable discharges. I differentiate them from [D]ishonorable discharges for many reasons.").

195. *E.g.*, *House Hearings on G.I. Bill*, *supra* note 27, at 418 (statement of Rep. Scrivner); 90 CONG. REC. 5889–90 (1944).

196. *See supra* Part II.

197. *See supra* Part II.A.

198. *House Hearings on G.I. Bill*, *supra* note 27, at 415.

199. 90 CONG. REC. 4453 (1944) (statement of Rep. Kearney).

200. *Id.* at 3077 (statement of Sen. Connally); *see id.* at 4453–54.

201. *Id.* at 3076 (statement of Sen. Clark).

Overall, the broad eligibility standard fit the more general purposes of the bill—to care for veterans wounded in war, to acknowledge veterans' sacrifices, and to reintegrate them into civilian society in way that forestalled economic and social upheaval[202]—by making available to nearly all servicemembers the benefits of the G.I. Bill programs and services. Thus, *ceteris paribus*, a reasonable interpretation of the statute should render more servicemembers eligible for benefits after the enactment of the G.I. Bill than prior to its passage. Regulations implementing the "other than dishonorable" standard should include some veterans who would have been excluded under pre-1944 regulations.

Overall, the legislative history provides some direction as to how to interpret the term "other than dishonorable." The G.I. Bill's drafters, congressional sponsors, committee heads, and other legislators all expressed support for the standard and stated how it should be applied in practice. The term, and alternatives, were considered and debated at length. The rejected alternatives included requiring an Honorable discharge or discharge under honorable conditions. The House and Senate Reports offered additional instruction on correctly interpreting the law's eligibility provisions.[203] The evidence strongly indicates that the "other than dishonorable conditions" standard was meant to exclude servicemembers who had engaged in serious conduct that warranted a Dishonorable discharge, so long as there were no countervailing positive or mitigating factors. The VA was entrusted with faithfully administering this standard, making individual determinations, and ensuring that all servicemembers were given the services they deserved and the benefit of the doubt.

D. Synthesis of Statutory Interpretation

The doctrinal meaning of the military term of art "dishonorable" at the time of the G.I. Bill of Rights' enactment, the statutory framework, and the legislative history all provide consistent guidance on how to interpret the phrase "other than dishonorable conditions." Certain principles can be can be derived from these sources.

First, most misconduct is not "dishonorable." Dishonorable is a highly prejudicial characterization that describes only the most severe misconduct. Only a few offenses are facially dishonorable: civilian felonies, desertion, mutiny, spying, and crimes of moral turpitude. Other conduct may show "dishonorable conditions" if it rises to similar gravity.

202. *See supra* notes 74–80 and accompanying text.
203. *See supra* notes 184–201 and accompanying text.

Importantly, Congress decided that unauthorized absences up to 180 days should not bar basic eligibility.[204]

Second, repeated misconduct may show dishonor only if each event is moderate or severe and if they occur proximately in time. In 1944, a Dishonorable discharge could not be justified with reference to disciplinary issues that were never referred to court-martial; for misconduct that did lead to court-martial, there must have been five convictions within the prior year. Current standards have shifted, requiring as few as three convictions within the prior year and permitting consideration of non-judicial punishment. However, there is still a relatively high bar for establishing dishonor.

Third, a dishonorable judgment must look at the whole person, including any mitigating or exculpatory factors, not only the nature of the underlying conduct. Whether a military offense authorizes a Dishonorable discharge is not determinative. Physical and mental health, personal constraints, immaturity, duration of service, and nature of service must all be considered.

E. Alternative Interpretations

Alternative interpretations of the statute have been proposed or could be raised. Each alternative, however, misunderstands some key component of the statute's text, structure, or history.

One alternative interpretation holds that Congress did not understand the significance of the intermediary discharge types that the military branches had been using, and with the term "dishonorable conditions" Congress created a new standard, delegating to the VA the authority to decide the contours of that standard on its own. This interpretation was first articulated by a VA Deputy General Counsel at congressional hearings in 1971:

> [N]obody has really fixed what kind of discharge the service is going to give. I think that it started back in World War II. Fundamentally we were starting with an [H]onorable discharge and [D]ishonorable discharge. Then they came up with a [regular] blue discharge. The old . . . criteria [for veteran services] really went to basically an [H]onorable discharge. It was when they got to these twilight zones resulting in all the various grades of discharges [sic]. If legislation could foresee exact gradations between discharges, which even now vary between the services, it would be different.[205]

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204. Act of Oct. 8, 1977, Pub. L. No. 95-126, § 1, 91 Stat. 1106, 1106–07.

205. *Hearings on H.R. 523 (H.R. 10422) to Amend Title 10, United States Code, to Limit Separation of Members of the Armed Forces Under Conditions Other Than Honorable, and for Other Purposes Before Subcomm. No. 3 of the H. Comm. on Armed*

This interpretation, suggesting that Congress was uninformed about discharge standards and had not foreseen specific degrees of conduct, might justify delegating to the VA a wide range of latitude in defining "dishonorable conditions." However, the interpretation is based on several incorrect factual premises: as discussed above, prior veteran benefits did not all require Honorable discharges;[206] the military branches had used intermediary discharges for over 50 years;[207] legislators demonstrated in their debates an understanding of the differences between the different characterizations of service;[208] and legislators showed through their examples that they had a certain conduct standard in mind.[209] This interpretation also misrepresents the important fact that the prior "honorable conditions" standard had been chosen by the VA, not Congress, and that by choosing the "other than dishonorable conditions" standard Congress was limiting, not expanding, the VA's discretion to determine eligibility standards.

A second alternative interpretation posits that Congress intended the "dishonorable conditions" standard to describe a moderate level of conduct as a compromise between competing interests.[210] Some legislators advocated for an inclusive eligibility standard in the interests of lenity,[211]

Services, 92d Cong. 6008 (1971) (statement of Philip V. Warman, Associate General Counsel of the Veterans' Administration).

206. *See supra* Part II.B.

207. *See supra* Part II.A.

208. *See supra* Part II.C.

209. *See supra* Part II.C.

210. *See* Evan Seamone, Presentation at the Board of Veteran's Appeals Grand Rounds: Practical and Historical Considerations Implementing Regulatory Bars for "Moral Turpitude" & "Willful and Persistent Misconduct" (Aug. 9, 2012) (monograph on file with authors).

211. *See House Hearings on G.I. Bill*, *supra* note 27, at 419–20 ("I believe that the most liberal provision that could go into this bill should be adopted, and the most liberal practice that could be reasonably followed should be pursued."); 90 CONG. REC. 3077 (1944) (statement of Sen. Connally) ("This is one place where we can do something for the boys who probably have 'jumped the track' in some minor instances, and yet have not done anything that would require a [D]ishonorable discharge.").

to mitigate injustice,[212] and as a social protection,[213] while others held that veteran services are earned and should be forfeited by less than satisfactory performance. According to this second alternative interpretation, Congress adopted the phrase "dishonorable conditions" as a middle ground between those two interests. This interpretation also attributes to the VA broad authority to decide the standard. It suggests that Congress did not have a specific standard in mind, or that they were inventing a new standard without existing reference. This interpretation is also based on incorrect factual premises. While it is true that some legislators advocated for more exclusive eligibility standards, these views were defeated when the most expansive eligibility standard was eventually adopted. Legislators specifically explained that they chose the term "dishonorable conditions" over "Dishonorable discharge" in order to address specific procedural issues—cases where a Dishonorable discharge would be appropriate but is not imposed due to formal requirements of military justice—not in order to create a more exclusive substantive standard.[214] This second interpretation improperly frames Congress's options and ultimate selection, and thus contradicts both the plain meaning of the statute and legislators' own explanation of their intent.

A third alternative posits that the "other than dishonorable conditions" standard is synonymous with "honorable conditions." Under this interpretation, military conduct falls into only two categories, and any conduct less than honorable is disqualifying because it is necessarily dishonorable. This view has no legal or historical basis. It has been more than a century since the armed forces or Congress have viewed service in this binary way; both institutions have long recognized a range of conduct that is unsatisfactory without being dishonorable, and Congress has decided that basic services should be extended to conduct falling in between. Yet, this interpretation has been unhelpfully perpetuated by the VA itself. The VA's internal systems describe eligible service as "Honorable for VA Purposes" and ineligible service as "Dishonorable for

212. For example, one legislator remarked:

> I was going to comment on the language "under conditions other than dishonorable." Frankly, we use it because we are seeking to protect the veteran against injustice. . . . We do not like the words "under honorable conditions" because we are trying to give the veteran the benefit of the doubt, because we think he is entitled to it. . . .
>
> . . . .
>
> . . . [W]e do not want the committee or the Congress to cut off a hand in order to cure a sore thumb.

House Hearings on G.I. Bill, *supra* note 27, at 415, 417.

213. 90 CONG. REC. 3077 (1944) ("We might save some of those men. . . . We may reclaim those men, but if we blackball them and say that they cannot have [veteran services] we will but confirm them in their evil purposes.").

214. *See supra* notes 81–104 and accompanying text.

VA Purposes."[215] This framework influences VA adjudicators' substantive decision-making. For example, a Veterans Law Judge denied eligibility to a former servicemember because his conduct was "not of an *honorable* nature."[216] However, as detailed above, Congress did not see characterizations as binary, nor did it set the VA eligibility standard at honorable.

A fourth interpretation is that changing military discipline practices make current discharges incomparable with 1944 discharges, such that an "other than dishonorable conditions" standard properly excludes a large number of servicemembers who today receive intermediary discharge characterizations. This position relies on two premises. One is legal: that the enactment of the UCMJ in 1950 represented such a break from prior military law that the concept of dishonorable in 1944 does not translate into current practice. However, while many aspects of military justice changed in 1950, the substantive standards relating to dishonorable conduct as codified in 1944 did not. The other premise is practical: that for reasons of efficiency, military commanders today are less willing to undertake courts-martial than previously, resulting in more favorable administrative discharges where a Dishonorable discharge would have occurred in prior generations.[217] Essentially, this alleges "characterization inflation" over time. Yet, aggregate data does not support this argument.

Since 1944, the percentage of servicemembers discharged by court-martial has held steady at about one percent.[218] The percentage of servicemembers receiving Honorable discharges has dropped from 98 percent in the World War II era to 84 percent in 2011.[219] Meanwhile, the stated goals of military discipline have changed from rehabilitation to "zero tolerance."[220] Rather than characterization inflation, the data suggests that characterization standards have become stricter over time. Veterans who would have been honorably discharged in prior eras are now receiving Other Than Honorable discharges. On those facts, implementing the standards Congress provided in 1944 should militate in favor of including more servicemembers than previously.

Finally, a fifth interpretation argues that Congress granted the VA no discretion whatsoever in administering the "other than dishonorable conditions" eligibility standard; the statutory bars were the only bases on

215. *See, e.g.*, ADJUDICATION PROCEDURES MANUAL, *supra* note 178, at pt. II.v.1.A.3.e (describing how to register the results of an eligibility determination).

216. Title Redacted by Agency, No. 06-39238, 2006 WL 4442371, at *3 (Bd. Vet. App. Dec. 18, 2006) (emphasis added); *see infra* Part IV.B.3.

217. *See* Everett, *supra* note 136, at 49.

218. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 10.

219. *Id.*

220. *See* Seamone, *supra* note 16, at 1.

which the VA could prevent a former servicemember from accessing benefits.[221] Under this theory, the VA's creation of additional "regulatory bars" was an unfounded assertion of power that violated Congress's express intent.[222] As described above, Congress expressly granted the VA some discretion to adjudicate whose service was dishonorable and whose service was "other than dishonorable."[223] In fact, members of Congress stated so on the record after thorough discussion of the relative merits of alternative frameworks.[224] The Court of Appeals for Veterans Claims found this legislative history persuasive, holding that the VA had authority to exclude more than just veterans with Dishonorable discharge characterizations or those who were statutorily barred.[225] That is not to say that the VA has unlimited discretion; the statutory construction discussed in this Part limits the VA's range of permissible implementations. However, this fifth interpretation goes too far by arguing that no discretion exists at all.

The VA likely would not have discretion to adopt alternative interpretations of the statute based on these theories. Congress issued specific instructions, expressed through the adoption of codified military law terms, the overall statutory framework, and the explanations provided in supporting reports.[226] Using the "traditional tools of statutory construction," the statute produces specific interpretive outcomes that do not leave wide scope for reasonable discretionary interpretation under the *Chevron* "step one" analysis.[227]

Within the boundaries of the VA's limited discretion to interpret the statute, the VA must choose an interpretation with an eye toward a unique interpretive tool: the *Gardner* presumption. In *Brown v. Gardner*,[228] the Supreme Court recognized a "rule that interpretive doubt is to be resolved in the veteran's favor."[229] The *Gardner* presumption derives from the

221. Canaday, *supra* note 75, at 942.
222. *Id.* at 942–43, 950.
223. *See supra* note 98 and accompanying text.
224. *See supra* note 99 and accompanying text.
225. Camarena v. Brown, 6 Vet. App. 565, 567–68 (1994).
226. *See supra* Part III.
227. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844, 865–66 (1984). One scholar has described the *Chevron* step-one analysis as follows:

> At step one [of *Chevron*'s two-step analysis], the court undertakes an independent examination of the question. If it concludes the meaning of the statute is clear, that ends the matter. But if the court concludes that the statute is ambiguous, then it moves on to step two, under which it must defer to any interpretation by a responsible administrative agency that the court finds to be reasonable.

Thomas W. Merrill, *Textualism & the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994).
228. Brown v. Gardner, 513 U.S. 115 (1994).
229. *Id.* at 118.

principle that Congress crafts legislation affecting veterans in a spirit of generosity, and that the laws should be interpreted with a pro-veteran framework in mind.[230] This canon thus further reduces the range of permissible interpretations of the term "other than dishonorable."[231] Specifically, in determining whether a veteran's service is dishonorable, the *Gardner* presumption weighs in favor of a narrow interpretation that finds more former servicemembers eligible for benefits.

IV. AGENCY IMPLEMENTATION

After the G.I. Bill of Rights was signed into law in June 1944, the Veterans Administration first implemented the new eligibility standards in its internal policy manual in 1945[232] and by regulation in 1946.[233] This implementation required describing in detail the meaning of "other than dishonorable conditions." With the exception of how the regulation treats

230. Henderson v. Shinseki, 562 U.S. 428, 441 (2011) (explaining "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor") (citations omitted); *see also* Kirkendall v. Dep't of the Army, 479 F.3d 830, 843 (Fed. Cir. 2007) (en banc) (applying the "canon that veterans' benefits statutes should be construed in the veteran's favor"). This interpretive principle was applied to the question of eligibility for veteran services in Wellman v. Whittier, 259 F.2d 163 (D.C. Cir. 1953). In that case, the VA had terminated benefit eligibility to a World War II veteran who was found to have "rendered assistance to an enemy of the United States" based on his participation in Communist Party activities in Michigan. *Id.* at 165. In doing so, the VA had applied a 1943 statute that barred services when a veteran was "shown by evidence satisfactory to the Administrator of Veterans' Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States." *Id.* The court held that "while [the statute] authorizes a determination by the Administrator upon 'evidence satisfactory to' him, his ruling . . . is not simply discretionary with him. If it depends upon an erroneous interpretation of the law, it may be subject to review by the courts." *Id.* at 167. The court found that the VA's interpretation of the statute was invalid because it imputed a more exclusive standard than Congress had expressly provided: "The strict interpretation necessary as to so drastic a forfeiture statute . . . requires that it be limited in its application to the specific grounds spelled out by Congress, with clear proof of the overt acts relied upon." *Id.* at 167–68. One court has declined to apply this canon to the question of veteran status, but the holding was later overturned. Laruan v. West, 11 Vet. App. 80, 84–85 (1996) (holding that the preferential standards granted to veterans must be earned, and that service members with potentially disqualifying conduct have forfeited the benefit of those standards), *overruled by* D'Amico v. West, 209 F.3d 1322 (Fed. Cir. 2000).

231. Note, however, that courts have not fully resolved how the pro-veteran *Gardner*'s statutory construction scheme interacts with the pro-agency *Chevron* deference scheme. *See generally* Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption That Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U.L. REV. 59 (2011); James D. Ridgway, *Toward a Less Adversarial Relationship Between Chevron and Gardner*, 9 U. MASS. L. REV. 388 (2014). However, that tension may be mitigated here where both *Chevron* analysis and *Gardner* analysis point to an expansive eligibility standard.

232. VETERANS' ADMINISTRATION REGULATIONS AND PROCEDURES ¶ 2694(B) (1945).

233. Determinations as to Basic Entitlement, 11 Fed. Reg. 8729, 8731 (Aug. 13, 1946) (to be codified at 38 C.F.R. § 2.1064).

servicemembers discharged for homosexual conduct, the agency has made only small changes to the regulatory standard since that time. However, these shifts in language and structure have significantly affected the types and number of servicemembers who can access basic veteran services. As a result, the VA has largely reverted the eligibility standard to its pre-1944 position—under which all, or nearly all, veterans with less-than-Honorable discharges were excluded—largely undoing the liberalizing change mandated by the G.I. Bill of Rights.

A. Summary of Regulations and Regulatory Changes

The VA's 1946 regulation listed the following conduct as showing dishonorable conditions: mutiny; spying; a crime of moral turpitude; "willful and persistent misconduct, of which convicted by a civil or military court";[234] a discharge "to escape trial by general court-martial";[235] and a discharge "because of homosexual acts or tendencies generally."[236] The first four bases could be mitigated by balancing the discharge against favorable service: "where service was otherwise honest, faithful and meritorious a discharge or separation other than dishonorable because of the commission of a minor offense will not be deemed to constitute discharge or separation under dishonorable conditions."[237] This initial regulation listed the statutory bars in a separate subparagraph, but tied that prong to its overall conduct analysis, stating that "[i]n addition to the question of the character of the discharge there should also be borne in mind the provisions of [the 1944 G.I. Bill of Rights statutory bars] under which benefits under any laws administered by the Veterans' Administration are barred . . . ."[238]

Agency revisions since 1946 have been subtle but consequential. The first change removed the requirement that only court-martial convictions qualified as misconduct under the willful and persistent misconduct prong.[239] Thus, lesser punishments for lower-level offenses became potentially disqualifying.

Then, after the 1958 codification of Title 38 veteran statutes, the VA reorganized its regulation to reflect those changes.[240] Because the statute now incorporated the "other than dishonorable conditions" standard into

234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. Determination as to Basic Entitlement, 11 Fed. Reg. 12,869, 12,878 (Oct. 31, 1946) (to be codified at 38 C.F.R. § 2.1064(a)).
240. *See supra* note 124 and accompanying text.

the definition of "veteran," VA regulations did the same.[241] At the same time, the VA combined the itemized statutory bars with the regulatory bars under a single subparagraph describing dishonorable conditions, thus eliminating any distinction between the two exclusion authorities.[242] In doing so, the regulation restricted which servicemembers could have their misconduct mitigated by prior good conduct. The new regulation associated the favorable conduct mitigation analysis exclusively with the willful and persistent misconduct bar; it removed any opportunity to mitigate moral turpitude or other bases for exclusion.[243] The reorganization also provided a detailed definition of the insanity exception that Congress had legislated in 1944, as well as in earlier statutes.[244] The VA adopted a lower standard than what existed at that time in criminal or military law.[245]

In 1963, the VA separated the itemized statutory bars from the definition of dishonorable conditions, treating them as independent bases for exclusion.[246] Technically, this change meant that a violation of one of the criteria for dishonorable conditions would make a person a non-veteran, and therefore unable to receive any of the benefits designed for veterans, whereas a person whose conduct violated the statutory bars would still be a veteran but barred from receiving benefits intended for veterans. Moreover, the new regulation stated that "a discharge under honorable conditions is binding on the Veterans Administration as to character of discharge."[247] This created a presumption of eligibility for

241. Pensions, Bonuses, and Veterans' Relief, 26 Fed. Reg. 1561, 1563 (Feb. 24, 1961) (to be codified at 38 C.F.R. § 3.1(d)) (implementing Pub. L. 85-857 (1958), codified at 38 U.S.C. § 101(2)).

242. *Id.* at 1566 (to be codified at 38 C.F.R. § 3.12(b)).

243. *Id.* (to be codified at 38 C.F.R. § 3.12(b)(8)).

244. *Id.* at 1589–90 (to be codified at 38 C.F.R. § 3.354(b)).

245. *Id.* (to be codified at 38 C.F.R. § 3.354(a)). The insanity definition provided:

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

Id.; *see* Clarence E. Brand, *The Issue of Insanity in the Administration of Military Justice*, 32 J. CRIM. L. & CRIMINOLOGY 331, 331 (1941) ("By 'sanity' is meant mental capacity on the part of accused to commit the crime charged, or mental capacity to understand the nature of the proceedings of the trial and intelligently to conduct or cooperate in his defense.").

246. Character of Discharge, 28 Fed. Reg. 101, 123 (Jan. 4, 1963) (to be codified at 38 C.F.R. § 3.12).

247. *Id.* (to be codified at 38 C.F.R. § 3.12(a)).

servicemembers with Honorable and General discharge characterizations, and a default of ineligibility for all other servicemembers.

After Congress created a new statutory bar for servicemembers who had been absent without leave for 180 days or more, except when warranted by "compelling circumstances," the VA amended the regulation to incorporate this bar.[248] The regulation provided a detailed definition of "compelling circumstances," taking into consideration physical and mental health, conditions of service, length of service, individual capacity to service, and other extenuating factors. The VA only associated this mitigation analysis with the new statutory bar; it did not extend such analysis to any of its regulatory bars.

In contrast to the subtle shifts in other regulations, the standard addressing homosexual conduct by servicemembers has changed significantly and repeatedly. The original 1946 regulation barred discharges for "homosexual acts or tendencies generally," with the proviso that "the facts in a particular case may warrant a different conclusion," subject to central office review.[249] In 1954, the VA removed the exception for "facts in a particular case."[250] In 1962, the standard changed again, to "homosexual acts generally," thus removing the authority for exclusion based on homosexual tendencies and focusing only on acts.[251] In 1980, the VA limited the exclusion to discharge for homosexual acts "involving aggravating circumstances," such as prostitution, coercion, or fraternization.[252] Despite the vast changes in laws and interpretations thereof affecting LGBT individuals, this subsection remains to the present day.

The VA has publicly proposed additional changes to the eligibility regulations through Notice and Comment Rulemaking, which have not been adopted yet.[253] The VA has proposed changing the insanity mental health mitigation standard to closely approximate the common law criminal insanity standard, "a defect of reason resulting from injury, disease, or mental deficiency that he or she did not know or understand the nature or consequence of the act, or that what he or she was doing was

248. Character of Discharge, 43 Fed. Reg. 15,152, 15,153 (Apr. 11, 1978) (to be codified at 38 C.F.R. § 3.12(c)(6)) (implementing Pub. L. 95-126, § 1(a) (1977)).

249. Determinations as to Basic Entitlement, 11 Fed. Reg. 8729, 8731 (Aug. 13, 1946) (to be codified at 38 C.F.R. § 2.1064(d)).

250. Miscellaneous Amendments, 19 Fed. Reg. 6914, 6918 (Oct. 28, 1954) (to be codified at 38 C.F.R. § 3.64(d)).

251. Miscellaneous Amendments, 27 Fed. Reg. 4023, 4024 (Apr. 27, 1962) (to be codified at 38 C.F.R. § 3.12(c)).

252. Pension, Compensation, and Dependency and Indemnity Compensation; Character of Discharge, 45 Fed. Reg. 2307, 2318 (Jan. 11, 1980) (to be codified at 38 C.F.R. § 3.12(d)(5)).

253. For an account of the reorganization process, see VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. 71,042, 71,042–322 (Nov. 27, 2013).

wrong."[254] It has proposed removing the reference to prohibited homosexual acts, such that any aggravated sexual act could be disqualifying.[255] It has also proposed further isolating the statutory bars from the "dishonorable conditions" element, instead categorizing them as an independent bar to benefits for otherwise eligible veterans.[256] It is not publicly known when the VA will finalize these proposed changes.

B. Comparison of Regulatory Standards with Statutory Standards

Three features of the regulatory standard are notable for how they relate to the statutory "dishonorable conditions" standard: how it evaluates the severity of misconduct; how it treats mitigating factors, including mental health; and whether it faithfully adopts Congress's liberalizing "dishonorable conditions" standard.

1. Severity of Misconduct

The criteria for "dishonorable conditions" adopted by the VA in its 1945 policy manual[257]—mutiny, treason, spying, moral turpitude, and willful and persistent misconduct shown by conviction at court-martial—closely match the codified standards for a Dishonorable discharge.[258] Like the Articles of War, and similar to the current UCMJ, the VA's initial regulation itemized the same limited acts of misconduct that military law deemed inherently dishonorable.[259] The initial regulation stated that crimes of moral turpitude are dishonorable, and deemed lesser conduct dishonorable if it led to multiple court-martial convictions. [260] Also, by adding a bar in cases of discharge in lieu of general court-martial, but not special court-martial,[261] the regulation respected congressional intent to exclude only on the basis of conduct that could lead to a Dishonorable discharge, because only a general court-martial can impose a Dishonorable discharge. Only the bar for "homosexual acts or tendencies"[262] had no basis in codified military law.

The VA departed from the military-connected standard with its first regulatory amendment in 1946 when it removed the requirement that willful and persistent misconduct be established by convictions at court-

254. *Id.* at 71,165 (to be codified at 38 C.F.R. § 5.1).
255. *Id.* at 71,172 (to be codified at 38 C.F.R. § 5.30(f)(4)).
256. *Id.*
257. VETERANS' ADMINISTRATION REGULATIONS AND PROCEDURES ¶ 2694(B) (1945).
258. *See supra* Part III.D.
259. Determinations as to Basic Entitlement, 11 Fed. Reg. 8729, 8731 (Aug. 13, 1946) (to be codified at 38 C.F.R. § 2.1064).
260. *Id.*
261. *Id.*
262. *Id.*

martial.[263] Instead, any documentation of discipline problems could potentially contribute to a finding of dishonorable conditions. This removed the key substantive protection that only misconduct severe enough to merit a court-martial could potentially qualify as dishonorable service, and it removed the substantial procedural protection of requiring successful proof of the offense at court-martial. Misconduct would only need to be willful and persistent, two terms that in practice present a very low legal standard.[264] Conduct that had led only to non-judicial punishment under Article 15 of the UCMJ—which by definition indicates that the military commander considered the misconduct to be minor[265]—could now be disqualifying.

An early survey of VA agency practice indicates that adjudicators still typically required misconduct to be shown by multiple court-martial convictions, even though this was not mandated by regulation.[266] Over time, this imputed severity standard eroded. Current training materials state that a veteran may be excluded where the record shows "multiple failures to be at appointed place."[267] This very low bar for exclusion from veteran services is reflected in VA adjudications: Board of Veterans' Appeals (BVA) decisions have upheld the denial of eligibility in part on absences as short as 2 hours, 18 minutes.[268] As a result, the willful and persistent misconduct bar is the basis for excluding the large majority of claimants: 73 percent of all less-than-honorable conditions claimants were

263. Determination as to Basic Entitlement, 11 Fed. Reg. 12,869, 12,878 (Oct. 31, 1946) (to be codified at 38 C.F.R. § 2.1064(a)).

264. *See* Brooker et al., *supra* note 2, at 186.

265. 10 U.S.C. § 815(b) (2012); JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 33, at V-1 ("The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment."); *see* Turner v. Dep't of Navy, 325 F.3d 310, 314–18 (D.C. Cir. 2003) (discussing the "highly deferential" standard of review of military commanders' discretionary determination that alleged misconduct is "minor" when the UCMJ authorizes severe punishments for the underlying conduct); Marshall Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F.L. Rev. 115, 148 (2007) (discussing military commanders' discretion to determine whether misconduct is "minor" for the purpose of avoiding court-martial protections through the use of non-judicial punishments).

266. William Blake, *Punishment Aspects of a Bad Conduct Discharge*, 1952 JAG J. 5, 8 (1952) (reviewing VA decisions on this point and finding that eligibility would probably be denied for a service member given a Bad Conduct discharge if the service member had previously been convicted twice for two other offenses).

267. DEP'T OF VETERANS AFFAIRS, CHARACTER OF DISCHARGE DETERMINATION TRAINEE HANDOUTS 7 (July 2012) (on file with authors).

268. Title Redacted by Agency, No. 15-19246, 2015 WL 4154699, at *4 (Bd. Vet. App. May 5, 2015).

excluded from VA services because of a finding that their services involved "willful and persistent misconduct."[269]

The regulatory separation of the statutory bars from the "dishonorable conditions" standard has also affected the severity of misconduct considered dishonorable. In official reports, Congress explicitly stated that it intended the term "dishonorable conditions" to reflect conduct of similar gravity as listed in the statutory bars section.[270] This parity is also required by principles of statutory interpretation.[271] The original regulatory implementation reflected this intent by associating the statutory bars with the dishonorable conditions criteria. The 1961 reorganization amplified this connection by embedding the statutory bars within the dishonorable conditions definition. But when the VA separated the two elements in its 1963 rulemaking,[272] the two elements' standards diverged. The VA has treated the two elements as entirely separate questions with no substantive relationship, enabling the erosion of the severity standard imputed to "dishonorable conditions."

The impact of this divergence is most apparent in how the VA evaluates unauthorized absence, because the duration of absence provides a quantifiable and comparable measure of severity. Congress decided, in amending the statutory bars, that an absence without leave justified exclusion from veteran services only if the absence was 180 days or longer, and that even such a long absence would not be disqualifying if it was explained by "compelling circumstances."[273] In contrast, decisions evaluating whether an absence violates the "willful and persistent misconduct" standard for dishonorable conditions have determined that absences as short as one week constitute dishonorable conditions.[274] No compelling circumstances analysis is applied to mitigate these shorter absences.[275] As a result, servicemembers explicitly included by Congress

269. This result was based on a review of all Administrative Law Judge decisions between 1992 and 2015. *See* VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 11, 14, 50–53.

270. *See supra* note 182 and accompanying text.

271. *See supra* Part III.B.

272. Character of Discharge, 28 Fed. Reg. 101, 123 (Jan. 4, 1963) (to be codified at 38 C.F.R. § 3.12). This change was technically necessary because the 1958 legislative reorganization had defined "veteran" with respect to the "dishonorable conditions" standard only, not the statutory bars. *See supra* note 128 and accompanying text. This drafting change did not revert the intent of the original statute, and does not moot the principles of statutory construction.

273. Act of Oct. 8, 1977, Pub. L. No. 95-126, § 1, 91 Stat. 1106, 1106.

274. Title Redacted by Agency, No. 97-28543, 1997 WL 33724513, at *2 (Bd. Vet. App. Aug. 18, 1997).

275. Winter v. Principi, 4 Vet. App. 29, 32 (1993). Some Board of Veteran Appeals decisions have applied the "compelling circumstances" analysis to the "willful and persistent" bar, in order to avoid the incongruities that otherwise result. *See, e.g.*, Title Redacted by Agency, No. 12-32892, 2012 WL 5972729, at *5–7 (Bd. Vet. App. Sept. 24,

are nevertheless excluded by VA regulations interpreting the same statute. The Court of Appeals for Veterans Claims has affirmed this incongruous result, based solely on an interpretation of the regulation's two separate elements without looking to the underlying statute to enforce the parity that Congress intended and that statutory interpretation requires.[276]

Although the disparity between the severity standard in the statutory bars versus the dishonorable conditions regulatory bars is most stark in cases involving unauthorized absence, a similar divergence arises for other conduct. For example, behavior that did not, and probably would not, merit a discharge by general court-martial—which is the severity standard set by the statutory bars—nevertheless regularly results in exclusion based on regulatory interpretation of the "dishonorable conditions" element.

2. Mitigating Factors

Military law requires that a Dishonorable discharge be imposed only after considering a full range of factors in mitigation and extenuation, and the G.I. Bill's congressional record includes multiple statements where legislators stated that they expected such factors to be taken into account. Yet, the VA's regulatory interpretation of "dishonorable conditions" contains almost no opportunity to consider positive or mitigating factors. That lacuna directly impacts decisions made regarding the applications of individual servicemembers, even those with mental health symptoms resulting from multiple deployments to combat zones.

The VA's original regulation provided limited opportunities to consider mitigating factors, but these were minimized or eliminated over time.[277] The deletion of the requirement that willful and persistent misconduct be shown by court-martial convictions removed the mitigation analysis that was inherently part of court-martial proceedings. Also, the original regulation allowed for moral turpitude, willful and persistent misconduct, mutiny, and spying to be weighed against "otherwise honest, faithful and meritorious service."[278] However, the agency later limited the scope of that mitigation element to solely the willful and persistent bar.[279] The impact of that provision has been further minimized through regulatory interpretation. Veterans Law Judges who work at the BVA have

2012). However, this is exceptional and violates Court of Appeals for Veterans Claims decisions on point. *See, e.g.*, Gardner v. McDonald, No. 14-3751, 2015 WL 9212462, at *5 (Vet. App. Dec. 17, 2015); Diaab v. West, No. 97-962, 1999 WL 149885, at *3 (Vet. App. Feb. 26, 1999); *Winter*, 4 Vet. App. at 31–32.

276. *Winter*, 4 Vet. App. at 31–32.

277. *See* DEP'T OF VETERANS AFFAIRS, REGULATION & PROCEDURE § 2694(B) (1945).

278. *Id.*

279. Certificates Authorizing Employment of Learners at Special Minimum Rates, 28 Fed. Reg. 101, 123 (Jan. 4, 1963); *see* 38 C.F.R. § 3.12(a) (2017).

repeatedly held that military service is not inherently meritorious.[280] In one instance, the BVA held that a combat infantryman did not perform meritorious service because combat is a basic duty of an infantryman.[281] To have meritorious service, the Board has held, requires a medal or award for valor or some other special distinction.[282]

The regulations include a limited opportunity to consider mental health as a mitigating factor. Congress created an exception to the statutory bars in cases where the servicemember was "insane" at the time of the misconduct,[283] and the VA chose to extend that exception to its regulatory bars.[284] Although the VA adopted a regulatory definition of "insanity" that could potentially reach a range of mental and behavioral health issues,[285] the VA Office of General Counsel issued a Precedential Opinion that interprets the term to require a very high degree of mental impairment.[286] In practice, Veterans Law Judges applying the Precedential Opinion's holding have characterized the insanity exception as "more or less synonymous with psychosis"[287] and "akin to the level of incompetency

280. *See, e.g.*, Title Redacted by Agency, No. 07-32365, 2011 WL 4145159, at *6 (Bd. Vet. App. July 20, 2011); Title Redacted by Agency, 09-15475, 2011 WL 1356497, at *3–4 (Bd. Vet. App. Feb. 28, 2011); Title Redacted by Agency, No. 09-23281, 2009 WL 2454147, at *9 (Bd. Vet. App. June 19, 2009); *see also* Title Redacted by Agency, No. 08-08360, 2012 WL 5222529, at *5, *9 (Bd. Vet. App. Aug. 27, 2012) (citing a prior Board decision finding that service of Vietnam combat veteran with Post-Traumatic Stress Disorder was not meritorious).

281. Title Redacted by Agency, No. 09-23281, 2009 WL 2454147, at *9 (Bd. Vet. App. June 19, 2009) ("[T]he quality of service does not raise above the level of one, who did his job as required, which the Board does not equate to meritorious service, that is, service deserving praise or reward.").

282. Title Redacted by Agency, No. 07-32365, 2011 WL 4145159, at *6 (Bd. Vet. App. July 20, 2011).

283. 38 U.S.C. § 5303(b) (2012).

284. 38 C.F.R. § 3.12(b) (2017).

285. *Id.* § 3.354(a). Section 3.354(a) defines insanity as follows:

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

Id. The Court of Appeals of Veterans Claims has held that this definition is lower than the criminal insanity standard used in the Model Penal Code. *See* Gardner v. Shinseki, 22 Vet. App. 415, 420–21 (2009).

286. Definition of Insanity in 38 C.F.R. § 3.354(a), No. 20-97, 1997 WL 34674474, at *3–4 (D.V.A. May 22, 1997).

287. *See, e.g.*, Title Redacted by Agency, No. 10-16336, 2010 WL 2807345, at *2 (Bd. Vet. App. May 3, 2010).

generally supporting appointment of a guardian."[288] The VA has proposed to formalize this narrow interpretation by changing its regulatory definition of insanity to conform with the standard for criminal insanity, requiring such "defect of reason" that the person did not "know or understand the nature or consequence of the act(s) or that what he or she was doing was wrong."[289]

In its application, the insanity exception often does not function as a general mitigation function for servicemembers experiencing mental health conditions such as Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury. An analysis of all BVA decisions between 1992 and 2015 shows that less-than-honorably discharged servicemembers with PTSD were denied eligibility in 91 percent of cases on appeal.[290] For at least 17 percent of such claimants with PTSD, the insanity exception was not even considered.[291] In cases where insanity was considered, BVA judges found that PTSD mitigated misconduct in only 12 percent of all PTSD-related claims.[292]

The insanity exception's limitations likely exist because VA adjudicators apply a stricter standard than the regulation requires and servicemembers, doctors, and adjudicators are reluctant to apply such a stigmatizing term to mental health conditions. One BVA decision illustrates this point:

> Initially, the Board points out there is no claim or evidence that the appellant was insane at the time of the offenses in question that resulted in his OTH discharge. The appellant has not produced any evidence from a qualified medical doctor who has expressed an opinion that he was insane prior to, during, or after his period of AWOL . . . . Additionally, when asked during the Board hearing, the appellant stated he was not insane. He did say that he had been harassed and that he might have been suffering from the symptoms and manifestations of PTSD, but he was not insane.[293]

Because of its limitations, the insanity exception is rarely used in practice. Due in part to the limited applicability of the insanity mitigation element, presence of PTSD has little statistical impact on eligibility

288. *See, e.g.*, Title Redacted by Agency, No. 15-19246, 2015 WL 4154699, at *3 (Bd. Vet. App. May 5, 2015).
289. General Provisions, 71 Fed. Reg. 16,464, 16,468 (Mar. 31, 2006).
290. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 14.
291. *Id.* at 51.
292. *Id.*
293. Title Redacted by Agency, No. 10-08205, 2010 WL 1939217, at *5 (Bd. Vet. App. Mar. 5, 2010).

decisions—the 81 percent denial rate for servicemembers who claimed PTSD is a small improvement over the overall denial rate of 87 percent.[294]

Most importantly, the regulations have never incorporated a general mitigation element that would allow for and require consideration of length of service, mental and physical injuries, awards and commendations, or similar factors. In military law, duration and quality of service, hardship service, physical injuries, and extenuating circumstances all factor into the analysis of culpability and dishonor. However, no such mitigation is present in VA regulations. The text of the regulations simply states that a discharge is considered to be "under dishonorable conditions" when any of the listed conduct is present, without any requirement or opportunity to consider other factors.[295] The "willful and persistent misconduct" bar includes a limited provision for considering overall service, as discussed above, but this does not apply to any other bar.[296] Because the regulations omit any such provision, these mitigating factors do not impact the VA's decisions in individual cases. The following BVA decision provides an example of how these considerations are formally excluded from the analysis under the VA's regulatory bars: "The governing law and regulations do not provide for any mitigating factors in determining whether actions that are not minor offenses are willful and persistent misconduct. Therefore, assuming that the appellant now suffers from PTSD, *his in-service marital problems and any PTSD are irrelevant* . . . ."[297]

Similarly, the VA denied eligibility to a servicemember based on one fight with a noncommissioned officer and a single one-week absence, despite significant external pressures such as a PTSD diagnosis in service, "exemplary" service during the first Persian Gulf War, and having three family members murdered within the prior two years.[298] These outcomes are correct applications of the regulations as currently written. Yet they fail to properly implement the standard provided in statute.

Mitigating factors like hardship service and combat service have little or no mitigating effect on VA eligibility decisions. An analysis of BVA decisions between 1992 and 2015 found that individuals who served in combat were only ten percentage points more likely to be deemed "veterans" and therefore eligible for VA services.[299] Most of that ten-point

294. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 52.
295. 38 C.F.R. § 3.12 (2017).
296. *Compare id.* § 3.12(d)(4), *with id.* § 3.12(d)(1)–(3), (5).
297. Title Redacted by Agency, No. 12-36342, 2012 WL 6557906, at *4 (Bd. Vet. App. Oct. 19, 2012) (emphasis added).
298. Title Redacted by Agency, No. 97-28543, 1997 WL 33724513, at *2–3 (Bd. Vet. App. Aug. 18, 1997).
299. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 15.

increase can be attributed to mental health rather than the hardships of combat itself.[300] Servicemembers who served in combat but did not claim PTSD saw only a two percentage-point increase in their chances of success.[301] Servicemembers who deployed to Vietnam but did not serve in combat were actually less likely to be found eligible than the average by more than ten percentage points.[302]

Some VA adjudicators, recognizing the injustice and inconsistency of the regulatory scheme, take mitigating factors into account even though regulations do not permit it. For example, one Veterans Law Judge felt compelled to evaluate mitigating circumstances "in an effort of fairness":

> The Board notes that the 'compelling circumstances' exception does not apply to 38 C.F.R. § 3.12(d)(4). Even so, as it appears that his February 1970 to October 1970 AWOL offense was a primary reason for his separation, the Board will, in an effort of fairness, review the record to determine whether the appellant's AWOL was based on 'compelling circumstances' as understood by VA.[303]

Although adjudicators should be commended on applying the spirit of the law, rather than the letter of the regulation, the spontaneous goodwill of adjudicators does not remedy the facial incompatibility of regulations with their authorizing statute. At best, it creates arbitrary and inconsistent outcomes.

3. Implicit "Honorable Conditions" Standard

Although Congress explicitly stated that it wanted servicemembers with conduct between honorable and dishonorable conditions to be eligible, under current practice only a small percentage of such servicemembers are actually able to access veteran services. This results from changes to regulatory structure and the evolution of regulatory interpretation that has created an "honorable conditions" eligibility standard.

The primary driver of this result is the regulatory architecture, not the substantive standard itself. Starting in 1963, the agency treated all servicemembers with discharges under honorable conditions as presumptively eligible.[304] Servicemembers with other discharges were

300. *See id.*
301. *Id.*
302. *Id.*
303. Title Redacted by Agency, No. 09-30611, 2009 WL 3323943, at *5 (Bd. Vet. App. Aug. 14, 2009).
304. Character of Discharge, 28 Fed. Reg. 101, 123 (Jan. 4, 1963) (to be codified at 38 C.F.R. § 3.12(a)). Although the regulation states that a discharge under honorable conditions (i.e., an Honorable or General discharge) "is binding on the agency," 38 C.F.R.

potentially eligible, subject to an individual review under the regulatory standards. Yet a large majority of servicemembers with other discharges never receive an individual evaluation due to sub-regulatory policies and procedures such as hospital eligibility clerk conduct.[305] As a result, these individuals are ineligible solely on the basis of the regulatory presumption of ineligibility. Of over 125,000 post-9/11 veterans with discharges under less-than-honorable conditions, a mere 10 percent have received an evaluation; the remaining 90 percent are ineligible by default.[306] By creating substantial obstacles to receiving an evaluation, the presumptive "honorable conditions" standard becomes the de facto standard for the large majority of affected service members.

For servicemembers that do receive an evaluation, few are found eligible under VA regulations, largely because the regulations have drifted so far from the statutory standard. The eroded-conduct severity standards described above now more closely approximate a substantive "honorable conditions" standard rather than an "other than dishonorable conditions" standard. Because there is no requirement for misconduct severe enough to trigger a court-martial, nearly no opportunity for mitigation, and consideration of favorable conduct only when it is exemplary—shown by valor in combat, for example—the net result is that eligibility is only found where conduct approaches honorable conditions.

Indeed, some decisions have strayed so far as to explicitly adopt "honorable conditions" as the eligibility standard.[307] For example, a Veterans Law Judge denied veteran status to a former servicemember because his conduct "was not consistent with the honest, faithful, and meritorious service for which veteran's benefits are granted[; m]oreover, the other incidents of misconduct reflect an ongoing pattern of disciplinary

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§ 3.12(a), this eligibility finding is in fact rebuttable, so it is accurate to refer to this as a presumption rather than a rule. The finding is rebuttable if the servicemember with a discharge under honorable conditions nevertheless violated a statutory bar. *See, e.g.*, Title Redacted by Agency, No. 12-41864, 2012 WL 7014448, at *3 (Bd. Vet. App. Dec. 7, 2012) (ordering a remand for a conscientious objector with an Honorable discharge characterization to determine whether the servicemember is barred from VA services by the statutory bars at 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(1)).

305. Although VA healthcare centers are many servicemembers' primary interface to the VA system, the authors' personal experience is that VA health center eligibility staff routinely turn less-than-honorable-conditions servicemembers away without initiating an eligibility review. The 2015 policy manual for these personnel removed any instruction on how to refer these servicemembers to an eligibility review. *Compare* VETERANS HEALTH ADMIN., VHA HANDBOOK 1601A.02 5–6, ¶ 6(c) (2009), *with* VETERANS HEALTH ADMIN., VHA HANDBOOK 1601A.02 4–5, ¶ 5(c) (2015). The most recent policy manual retained that lack of instruction. VETERANS HEALTH ADMIN., VHA HANDBOOK 1601A.02 6, ¶ 6(c) (2017).

306. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 18.

307. *See* Title Redacted by Agency, No. 06-39238, 2006 WL 4442371, at *3 (Bd. Vet. App. Dec. 18, 2006).

offenses which were not of an *honorable* nature."[308] While the federal government certainly has an interest in promoting and rewarding service of a high caliber, Congress chose to do so through other instruments that are available only to those with Honorable discharges, such as access to certain education benefits. For basic services, such as healthcare and disability compensation, Congress set the bar at "other than dishonorable" service. Converting the statutory "other than dishonorable conditions" standard into an "honorable conditions" standard violates that legislative choice.

The presumption of ineligibility, the low rate of eligibility reviews, and the narrow regulatory standard combine to limit veteran services almost exclusively to servicemembers discharged under honorable conditions. Between 2001 and 2013, 93.2 percent of servicemembers received discharges under honorable conditions, and therefore received presumptive veteran eligibility.[309] Only an additional 0.26 percent of servicemembers were granted other discharges and found eligible through the VA's review process.[310] That figure may increase over time as more servicemembers obtain review, but data from prior eras suggest that the access rate will increase by no more than one percent.[311] An effective access rate that falls within one percent of an "honorable conditions" standard is effectively replicating an "honorable conditions" standard. This is not the standard provided by law.

Through regulation, the VA has largely reconstructed the standard that Congress specifically rejected and sought to replace in 1944. Beginning in 1917, Congress excluded from benefits veterans discharged for "mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he has been found guilty by court-martial, or that he is an enemy alien, conscientious objector, or a deserter."[312] In 1923, Congress barred access to VA services for veterans who were discharged for mutiny, treason, spying, an offense involving moral turpitude, "willful and persistent misconduct, of which he has been found guilty by a court-martial," or desertion.[313] In 1933, Congress enacted a veteran benefits statute that included no specific eligibility standard, which the VA interpreted as a delegation of authority to determine its own.[314] The VA then limited services to servicemembers

308. *Id.* (emphasis added).
309. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 46
310. *Id.*
311. *Id.* at 26.
312. Act of June 25, 1918, ch. 104, sec. 2, § 29, 40 Stat. 609, 610, *as amended by* World War Veterans' Act, ch. 320, § 23, 43 Stat. 607, 613 (1924).
313. Act of Mar. 4, 1923, ch. 291, sec. 1, § 29, 42 Stat. 1521, 1521–22; *see also* § 23, 43 Stat. at 613; Act of Mar. 4, 1925, sec. 3, § 23, 44 Stat. 1302, 1303.
314. Act of Mar. 20, 1933, ch. 3, § 1, 48 Stat. 8, 8.

discharged with honorable conditions, explicitly excluding veterans with any other type of discharge.[315]

It was with this historical background that Congress designed the G.I. Bill of Rights. By adopting the "other than dishonorable conditions" eligibility standard, Congress rejected the "honorable conditions" standard and any discretion the VA had to independently determine the substantive standard. Instead, Congress mandated the broader "other than dishonorable" standard. Through rulemaking, the VA initially adopted nearly identical language to what Congress had prescribed through its 1924 legislation, but the VA gradually watered down these regulations through amendment, interpretation, and adjudication. Today, as in 1943, agency regulations largely function as requiring a discharge under honorable conditions, thus contradicting the express intent of the 1944 G.I. Bill of Rights.

C. Congressional Response

Congress has never endorsed the VA's regulatory implementation of its eligibility standard. Neither of the two congressional committees with jurisdiction over this statute have ever held a hearing devoted to it. When the issue has arisen tangentially to other matters, congressional commentary has been neutral or disapproving.

In 1946, a House committee proposed to limit or eliminate the military services' practice of issuing intermediary discharge characterizations.[316] The committee studied how VA regulations treated servicemembers in this situation. The committee's report, which disapproved of the use of these discharges, also looked unfavorably on how VA policies tended to exclude them from eligibility:

> It would appear from the very awkwardness of the language employed, the phrase "under conditions other than dishonorable" instead of the more natural phrase "an [H]onorable discharge," that Congress was generously providing the benefits on as broad a base as possible and intended that all persons not actually given a [D]ishonorable discharge should profit by this generosity.
>
> The holder of a discharge which the Army itself tells him is not dishonorable (it being "neither honorable nor dishonorable") might be pardoned for thinking that he is covered by benefits which the law

315. Exec. Order No. 6089, pt. I, ¶ I(a) (Mar. 31, 1933); *id.* at pt. II, ¶ I(a); *id.* at pt. III, ¶ I(a); Exec. Order No. 6094, ¶ I (Mar. 31, 1933); Exec. Order No. 6095, ¶ I (Mar. 31, 1933); Exec. Order No. 6097, ¶¶ I–II (Mar. 31, 1933).

316. *See* H.R. REP. NO. 79-1510, at 13–14 (1946).

> assigns to those whose discharge is "under conditions other than dishonorable." He soon discovers his mistake. . . .
>
> . . . .
>
> . . . Veteran's Administration officials have made a point as follows: The blue-discharge man has a poor record in the Army, otherwise he would get an [H]onorable discharge. Soldiers who have been in combat service and made a good record will resent similar benefits to theirs going to men with poor records. Those who propound the argument are but ill acquainted with soldier psychology. Every soldier knows that many men, even in his own company, had poor records, but no one ever heard of a soldier protesting that only the more worthy should receive general veterans' benefits. "This man evaded duty, he has been a 'gold bricker,' he was hard to live with, yet he was a soldier. He wore the uniform. He is one of us." So they feel. Soldiers would rather some man got more than he deserves than that any soldier should run a chance of getting less than he deserves.[317]

The closest the Veteran Affairs committees have come to examining VA practice in this area came in 1977, in relation to legislation that would affect eligibility for servicemembers that had recently received discharge upgrades through unconventional presidential review programs.[318] Hearings for this legislation included presentations from VA officials describing their practice for implementing the "other than dishonorable conditions" standard. Legislators' observations were generally not favorable, highlighting for example the vagueness of VA standards.[319] However, the hearings did not directly evaluate the adequacy of the standards. Instead, the legislators' overriding interest was to avoid unequal treatment for different wartime eras. The outcome of that legislation was to ensure that servicemembers with discharges upgraded through these unconventional review programs, who were thereby presumptively eligible for VA services, would nevertheless be evaluated by the VA under existing "other than dishonorable conditions" standards. In some sense, this could be seen as an endorsement of VA practice. However, legislators made clear that their goal was uniformity, rather than defending the VA practice as such:

317. *Id.* at 8–9.

318. Act of Oct. 8, 1977, Pub. L. No. 95-126, § 4, 91 Stat. 1106, 1108.

319. "One of the problems frankly that we have is that these terms are very broad and very imprecise." *Eligibility for Veterans' Benefits Pursuant to Discharge Upgradings: Hearing on S. 1307 and Related Bills Before the S. Comm. on Veterans' Affairs*, 95th Cong. 355 (1977) (statement of Guy H. McMichael, General Counsel, Veterans' Administration).

> One of the most disturbing aspects of the special discharge review program is the singling out of a limited class of former military personnel as the beneficiaries of favorable treatment. . . .
>
> . . . .
>
> . . . [T]he President could partially remove one of the greatest injustices inherent in the program by providing that the same criteria for upgrading the discharges of this special class of former service persons as a matter of equity be made available to veterans of all *periods* of war . . . .[320]

Witnesses periodically raise the issue,[321] and occasionally the issue arises tangentially to a different matter under investigation.[322] But neither the House Veterans Affairs Committee nor the Senate Veterans Affairs Committee has directly investigated or debated the standard in a hearing.

V. PROPOSED CHANGES TO CURRENT AGENCY INTERPRETATION

The G.I. Bill of Rights was drafted and enacted with certain key principles and goals in mind. Congress was offering an unprecedented set of benefits to aid in new veterans' rehabilitation and reintegration into society. Congress sought to expand eligibility so that nearly all veterans would benefit. Only those with severe misconduct and no extenuating or mitigating factors would be excluded.

However, the VA's regulations interpreting and implementing the statute have strayed from the statutory language, statutory scheme, and congressional intent behind the G.I. Bill. Under VA regulations, minor misconduct can be disqualifying, and no provision allows for consideration of positive, extenuating, or mitigating circumstances.

Because the regulations are unfaithful to the statute, they should be reviewed and revised. Further changes should be made to better implement congressional intent and agency policy.

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320. H. REP. NO. 95-580, at 13 (1977), *reproduced in Eligibility for Veterans' Benefits Pursuant to Discharge Upgrading: Hearing on S. 1307 and Related Bills Before the S. Comm. on Veterans Affairs*, 95th Cong. 609 (1977).

321. *See, e.g.*, *Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs*, 103d Cong. 116 (1994) (written testimony of Jonathan Shay, M.D., Ph.D.); *Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents: A Community Perspective: Hearing Before the H. Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs*, 103d Cong. 106 (1993) (written testimony of Warren Quinlan, New England Shelter for Homeless Veterans).

322. *See, e.g.*, STAFF OF H. COMM. ON ARMED SERVS., 92D CONG., HEARINGS ON H.R. 523 TO LIMIT THE SEPARATION OF MEMBERS OF THE ARMED FORCES UNDER CONDITIONS OTHER THAN HONORABLE 6009–10 (Comm. Print 1971).

A. A Proposal for Revision

First, current regulations bar many veterans for minor misconduct, including conduct that never could have led to a Dishonorable discharge.[323] A study of BVA decisions showed that a majority of veterans are excluded under two regulatory provisions: the moral turpitude bar and the willful and persistent misconduct bar.[324] These bars are not only the most commonly used, but are also the most likely to exclude veterans for minor misconduct. The moral turpitude bar, at present, does not require any conviction after trial, can exclude misdemeanor-level as well as felony-level offenses, and encompasses not just severe harm to a person but also minor levels of harm to a person and harm to property—which are not within the traditional definition of "moral turpitude."[325] The willful and persistent misconduct bar does not require that offenses occur within a limited period of time, but instead could be spread out over years, and even multiple enlistments.[326] Nor does it require that the misconduct have been particularly severe or that the servicemember have been convicted by court-martial.[327]

By using a standard of "dishonorable" conduct as disqualifying and giving examples in the form of statutory bars, Congress set the bar for ineligibility high. Therefore, the moral turpitude and willful and persistent misconduct bars must be removed, or at least substantially revised. The former should at least require conviction of a felony-level offense that caused grave harm to a person. The latter should require numerous serious offenses within a limited period of time. For example, three or more offenses that could have led to a Bad Conduct discharge within a single year would satisfy as willful and persistent misconduct.

Second, the regulations should include consideration of positive, extenuating, or mitigating factors. Congress expressly discussed these factors in its hearings and debates, and under military law principles the term "dishonorable" requires a balancing of aggravating and mitigating factors. There is no provision for any such balancing under current regulations.

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323. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 23–25. *See generally* 38 C.F.R. § 3.12(d) (2017).

324. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 24.

325. 38 C.F.R. § 3.12(d)(3); Saavedra-Figueroa v. Holder, 625 F.3d 621, 626 (9th Cir. 2010) ("[T]he federal generic definition of a [crime involving moral turpitude] is a crime involving fraud or conduct that (1) is vile, base, or depraved and (2) violates accepted moral standards . . . [and (3)] 'almost always involve[s] an intent to harm someone.'") (citation omitted); Rodriguez-Herrera v. INS, 52 F.3d 238, 240 n.5 (9th Cir. 1995) ("Only truly unconscionable conduct surpasses the threshold of moral turpitude.").

326. 38 C.F.R. § 3.12(d)(4).

327. *Id.*

The VA should amend its regulations to mandate consideration of such factors. The regulations could include an illustrative list of factors: combat service, hardship service, those who experienced sexual assault or another crime, physical or mental health conditions, family or personal emergencies, awards for valor or meritorious service, and so on. The list should clearly indicate that it is not exhaustive and consideration of other factors is permitted.

B. Further Proposals

In order to fully accord with the statutory scheme and intent of the G.I. Bill of Rights, the VA should choose to make additional changes. These changes will further the VA's primary mission of serving veterans, particularly those who have been wounded in service, and its specific goals of reducing veteran homelessness, incarceration, and suicide. The VA may have some discretion in these areas, though its choices must be faithful to the original statute.

First, the regulations should reflect a presumption of eligibility for all who served on active duty in the armed forces, rather than a presumption of ineligibility for some veterans. That is, the phrasing should state that a former servicemember is a veteran unless specific conditions apply which render his or her service dishonorable. This accords with the G.I. Bill's statutory scheme that replaced a more restrictive eligibility regime, as well as the framing of the statutory bars, which serves as a model for how the regulatory bars should operate.

This change in presumption could be implemented through a presumption that all veterans with administrative discharges (Honorable, General, and Other Than Honorable) are eligible. That is, the VA could cease requiring that veterans with Other Than Honorable discharges undergo eligibility reviews prior to receiving benefits. However, the VA could propose to terminate eligibility if, upon closer scrutiny, it found that the specific circumstances of the veteran's service were dishonorable.[328]

The transition from servicemember to veteran can be difficult, as many studies have shown,[329] and the World War II-era Congress knew this

328. *Cf.* Linda Bilmes, *Soldiers Returning from Iraq & Afghanistan: The Long-Term Costs of Providing Veterans Medical Care and Disability Benefits* 19 (Harvard Law Sch. Faculty Research Working Paper Series, Paper No. RWP07-001, 2007), http://scholar.harvard.edu/files/lbilmes/files/soldiers_returning_from_irag_and_afghanistan_-_the_long-term_costs.pdf (proposing structural change to Veterans Benefits Administration's disability claims system such that the agency approves all claims as filed and audits a sample to weed out and deter fraudulent claims).

329. *See* CARL ANDREW CASTRO ET AL., USC SCH. OF SOC. WORK, CTR. FOR INNOVATION AND RESEARCH ON VETERANS & MILITARY FAMILIES, THE STATE OF THE AMERICAN VETERAN: THE ORANGE COUNTY VETERANS STUDY 14 (2015), http://cir.usc.edu/wp-content/uploads/2015/02/OC-Veterans-Study_USC-CIR_Feb-

well. To facilitate rehabilitation and reintegration, another option the VA could adopt is granting all veterans—except those with Dishonorable discharges—eligibility for the first three years (or other time period) after separation from service. At the three-year mark, the VA could conduct a more thorough character of discharge review and terminate benefits for those whose service was dishonorable. Provision of such benefits is permissible under the VA's "emergency" powers. If the eligibility review was favorable, the veteran could continue receiving benefits. If it was unfavorable, at least veterans would have had an opportunity to get on their feet.

In addition to shifting the eligibility adjudication framework, the VA should consider other procedural changes. For one, to stay true to the G.I. Bill's main goals of rehabilitation and reintegration through provision of supportive services, the VA should prioritize adjudication of questions of "veteran" status. This question has special importance because it is the door to all veteran benefits. However, at present, the VA's policies do not prioritize this question, and an initial-level adjudication often takes more than one or two years.[330] Even if a veteran is ultimately successful in establishing eligibility, the VA is essentially withholding benefits from a qualified veteran for years.

Another reasonable option is for the VA to provide access to basic healthcare for veterans while initial eligibility reviews are pending. One of the core tenets of American veteran policy, which the G.I. Bill of Rights carried forward, was caring for those injured in service to our country. But many veterans are denied care while their eligibility reviews are pending, leading to worsened health and deeper crisis for many.[331] Offering temporary care is reasonable and would further the VA's focus on addressing issues related to mental health, homelessness, and suicide. If the eligibility review is favorable, then the veteran can continue receiving care, with hopefully better outcomes for not having been deprived of care for months or years. If the eligibility review is unfavorable, the VA can transition the veteran to other providers. Because veterans may lose VA healthcare eligibility for reasons unrelated to discharge status, the VA already has procedures in place to facilitate this process that could easily be extended to this new situation.

There also may be actions that the Department of Defense and individual service branches could take to aid the eligibility review process

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2015.pdf; CARL ANDREW CASTRO ET AL., USC SCH. OF SOC. WORK, CTR. FOR INNOVATION AND RESEARCH ON VETERANS & MILITARY FAMILIES, THE STATE OF THE AMERICAN VETERAN: THE LOS ANGELES COUNTY VETERANS STUDY 7–10 (2014), http://cir.usc.edu/wp-content/uploads/2013/10/USC010_CIRLAVetReport_FPpgs.pdf.

330. VETERANS LEGAL CLINIC, UNDERSERVED, *supra* note 140, at 11.

331. *Id.* at 18, 31–32; *see* 38 U.S.C. § 17.34 (2012).

and better assist transitioning servicemembers. For example, the DD Form 214 discharge paper could better document whether a veteran has honorably completed a term of enlistment; distinguish whether discharges were because of or in lieu of a special court-martial or a general court-martial; and indicate whether any absences were without leave and more than 180 days consecutively. Including this information on all DD Form 214s would allow the VA to more quickly and accurately predict whether an individual veteran is eligible. Furthermore, veterans being separated could be allowed access to the Benefits Delivery at Discharge program, which allows servicemembers leaving the military to begin the VA claims adjudication process prior to separation, or a similar system. A veteran therefore might leave the military knowing whether VA benefits are available to him or her, rather than waiting years after being discharged to find out. Many more proposals could be imagined and are worth further study.

In sum, the VA must amend its eligibility regulations to require a more holistic evaluation of a veteran's service, weighing positive and mitigating factors against any severe, dishonorable misconduct. Furthermore, the VA could change its policies and procedures in myriad ways to better implement the G.I. Bill of Rights. The VA should review its programs and adopt changes to ensure it is faithfully implementing the law as Congress wrote it and upholding its obligation to those who have served our country in uniform.

VI. CONCLUSION

The VA eligibility standard, in regulation and in practice, has strayed far from the clear intent and instruction of Congress as expressed in the G.I. Bill of Rights. Rather than serving as a broad grant of access that excludes only those who engaged in severe or repeated misconduct without explanation, the standard operates to shut out hundreds of thousands of former servicemembers for minor misconduct, regardless of the value of their service, the difficulty of their circumstances, or the wounds they suffered in defense of our nation.

The drift of the regulatory standard from its authorizing statute happened over the course of many years, as memories of the World War II-era Congress faded. Then, the regulations essentially froze in time during the 1960s and have been almost unquestioningly accepted as correct since then without undergoing review or revision. Meanwhile, the military's administrative discharge practices have shifted, meaning that more servicemembers are caught in the eligibility standard's vast net.

Toward the end of most modern wars, Congress has confronted the same problem: what to do about all of the veterans with less-than-

Honorable discharges—and especially those who served in combat and who are experiencing mental health and reintegration crises. Various legislators propose bills that create narrow exceptions for certain veterans or develop special new programs. Somehow lost is that the World War II-era Congress's bill should have solved this issue: its "other than dishonorable" standard was expressly meant to allow most servicemembers, including those with war-related disabilities, to receive care and treatment from the VA. By forgetting our (legislative) history, we have been doomed to repeat it.

But all is not lost. What is needed is not new legislation, but revised regulations that better honor Congress's original intent. To be sure, faithfully translating statute into regulation is no easy task. Hopefully this article provides guidance for how the VA could faithfully interpret existing legislation to conform to Congress's original intent.

Our system of divided government relies on agencies adequately implementing congressional mandates, and it would be wise for agencies to periodically revisit old regulations to ensure their continued relevance and sufficiency. Yet, this exercise is not just academic. There are real consequences to a denial of "veteran" status—to the individual servicemember who cannot get healthcare or disability support, to the servicemember's family who must pick up the slack, and to our society which is losing promising young men and women to unemployment, homelessness, and suicide. This article shows how the VA can remedy those issues—indeed, how it must. The reality of our national promise to "care for him who shall have borne the battle," as President Lincoln said, weighs in the balance.[332]

332. Abraham Lincoln, U.S. President, Second Inaugural Address, *in* S. DOC. NO. 101-10, at 143 (1989).

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