

VA MEDICAL CENTER

Turned Away

How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges



ACKNOWLEDGEMENTS

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Legal Disclaimer

This report is neither a solicitation nor an offer to represent any individual concerning any legal problem. This report is not meant to constitute legal advice or legal services, nor is it intended to serve as a substitute for consulting with a lawyer. Individuals who have been denied access to veterans health care or other benefits are encouraged to consult with an attorney or non-attorney advocate.

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I. EXECUTIVE SUMMARY

Marine Corps veteran Dwayne Smith survived a deployment to Afghanistan, but almost did not make it through his transition back to civilian life when he returned stateside. Dwayne returned home with both Post-Traumatic Stress Disorder (PTSD) and a Traumatic Brain Injury (TBI)—the signature wounds of the wars in Iraq and Afghanistan. Yet, when Dwayne went to the Department of Veterans Affairs (VA) to get health care for his military injuries, VA turned him away. Why? Because when VA frontline staff looked at Dwayne’s discharge papers and saw that he had an Other Than Honorable discharge, they decided he would not get any VA care. Dwayne, who received his discharge after self-medicating to cope with PTSD and leaving his post when a family member was diagnosed with cancer, went on to seek help at multiple VA health care facilities. But each time, VA turned Dwayne away, in violation of the law. The law required that VA staff help Dwayne apply for health care and ensure that his application was properly reviewed and a written eligibility decision issued, including notice of appeal rights. It took more than five years and the assistance of a pro bono lawyer before Dwayne could apply and finally be approved for VA health care and benefits. Tragically, Dwayne is not alone—veterans with bad paper discharges get turned away by VA frontline staff every day without being allowed to apply for care.

Imagine trying to make an appointment with your doctor when you are sick, or your therapist when you are facing a mental health crisis, and the front desk staff tells you that they personally decided you cannot do so. For decades, that is what has happened to many thousands of former servicemembers with bad paper discharges when they attempted to seek care from VA. Importantly, an estimated 400,000 are currently at risk of being turned away from services they may be entitled to. Many frontline staff at VA health care facilities have improperly turned away former servicemembers seeking health care, telling them that they are ineligible due to their military discharge statuses—without even allowing them to apply. This is not just unfair, it is unlawful. VA must take immediate action to prevent this injustice from happening and to remedy past harms to servicemembers like Dwayne who went five years without the care he needed and deserved because VA failed to follow its own procedures.

Why are stories like Dwayne’s so common? Every servicemember is assigned a “character of service” or “discharge status” upon leaving military service. While most servicemembers receive Honorable discharge statuses, a substantial percentage—approximately 7 percent of veterans discharged since 1980—receive discharge statuses that are not Honorable, which are known as “bad paper.” Servicemembers usually get “bad paper” because of some alleged misconduct, though that misconduct frequently is minor, for a military-only offense, or not proved in any court. Studies also show that many servicemembers are separated with bad paper for misconduct related to a service-related mental or physical health condition or Military Sexual Trauma (MST).

Veterans with bad paper have higher rates of mental health conditions, suicide, homelessness, and unemployment.¹ Many have disabilities related to their service, which may in fact have led to their being discharged with bad paper. Many were discharged with bad paper under past discriminatory practices that targeted veterans because of their sexual

orientation or sexual identity. Veterans with bad paper therefore are some of the veterans most in need of VA's health care services—yet they are being wrongfully excluded from those services without due process.

A bad paper discharge affects whether and to what extent a former servicemember may be eligible for federal veterans benefits. For most benefits administered by VA, including health care, a bad paper discharge does not render a veteran categorically ineligible. Rather, it puts them in a “limbo” category that requires VA to conduct an individualized eligibility determination to decide whether the veteran was discharged under “dishonorable conditions” or “other than dishonorable conditions.” That determination process is itself beset by delays and inconsistent decisions.

But many veterans with bad paper report attempting to apply to VA for health care and simply being turned away. They are told by VA frontline staff that their discharge status makes them categorically ineligible for health care. Further, sometimes they are told to apply to the Department of Defense (DOD) to upgrade their discharge status, and to return to VA later if the discharge upgrade is successful. That DOD process typically is burdensome, is rarely successful, and takes years to resolve.

Every veteran—regardless of discharge status—has the right to apply to VA for health care. Every veteran has the right to receive a written decision on his or her application and information on how to appeal any denial.

Many veterans with bad paper are eligible for VA health care but are being wrongfully turned away. While there should be consequences for military misconduct, those consequences should not include being denied health care—especially if you have a service-related disability, are experiencing homelessness, or are dealing with the impact of MST, as so many veterans with bad paper are.

This report provides background information about why veterans get “bad paper” and about VA's health care eligibility standards and then documents, including through government data collected through Freedom of Information Act requests, how VA has been improperly turning away veterans with bad paper from receiving VA health care. The report concludes with recommendations about the steps VA must take to ensure that every veteran is afforded the right to apply for health care and to guarantee that no veteran is wrongly denied the care that the veteran needs and deserves.

The extensive research and investigation underlying this report, prepared on behalf of the veteran service organization OUTVETS, documents that the vast majority of veterans with bad paper are not currently enrolled in VA health care—many of them because they have been wrongly told by VA to just go away. For many veterans, this initial rejection leads them to end their search for care altogether. It is time for VA to stop this cycle of misinformation and stigma and to honor that every person who has served in the military has a right to apply for VA care.

II. BACKGROUND

A. What is “Bad Paper”?

Upon separation from military service, every servicemember is assigned a “character of service.” The character of service is set forth on the Department of Defense Form 214 (“DD 214”), sometimes referred to as discharge papers, which is issued to every servicemember as the servicemember leaves the military and enters civilian life. The military currently uses the following designations for a servicemember’s character of service: Honorable, Under Honorable Conditions (General), Other Than Honorable, Bad Conduct, or Dishonorable.*

Honorable, General, and Other Than Honorable characters of service are “administrative” discharges, meaning that the servicemember’s military command effectuated the discharge administratively and without a court-martial. This usually means the servicemember did not have the benefit of a court hearing to determine whether the discharge status was appropriate. Bad Conduct and Dishonorable discharges are “punitive” discharges because only a military court-martial can impose such status as punishment for a criminal conviction. A Bad Conduct discharge may be imposed through a special court-martial or a general court-martial; a Dishonorable discharge may be imposed only through a general court-martial. There are also some discharges that do not characterize an individual’s service and are therefore known as Uncharacterized discharges. These include Entry Level Separation and Void Enlistment.

An Honorable discharge is the only type of discharge that carries no stigma and imposes no impediments to the former servicemember’s ability to access veterans benefits, supports, and services.² The other characters of service—namely General, Other Than Honorable, Bad Conduct, and Dishonorable discharges—are stigmatizing to various degrees and can create substantial barriers to the former servicemember’s ability to access veterans benefits, supports, and services. Discharges such as these are known as “bad paper” discharges, because the harmful character of service is listed on each separating servicemember’s DD 214.†

As a note on terminology, there are many different definitions of who is a “veteran” under state and federal law or used by various veterans organizations. Many require that a former servicemember have a specific discharge status, usually Honorable or at least under honorable conditions. VA’s definition, as set forth in statute and regulation and described in detail below, requires that the discharge be under “other than dishonorable” conditions, which does include some former servicemembers with bad paper discharges.³ For purposes of this report, we will use an inclusive definition of the term “veteran” that encompasses any person who has served at least one day of active duty military service, without regard to their discharge status.

* In place of a Dishonorable discharge, officers are given a Dismissal. OTH used to be known as Undesirable.

† Note that a “bad paper” discharge is not synonymous with a Bad Conduct Discharge (BCD). “Bad paper” refers to discharges that are not honorable, and for purposes of this report, specifically includes Other Than Honorable (formerly Undesirable), Bad Conduct, and Dishonorable discharges. The vast majority of veterans with bad paper—more than 80 percent of such veterans discharged since 1980—have administrative Other Than Honorable discharges.

Similarly, the term “bad paper” has multiple definitions. Some include all veterans with less-than-fully-Honorable discharges, and some include veterans with Honorable discharges who have stigmatizing information on their DD 214s or military records. For purposes of this report, the term “bad paper” includes only those veterans with Other Than Honorable, Bad Conduct, and Dishonorable discharge characterizations, the large majority of whom are veterans with administrative Other Than Honorable discharges.

B. Why Do Servicemembers Get “Bad Paper”?

No single reason explains why servicemembers do not receive a fully Honorable discharge.

Some servicemembers exercise poor judgment and engage in misconduct without any mitigating circumstances. Other servicemembers, however, receive bad paper unjustly. Some had undiagnosed physical or mental health disabilities that contributed to behavior that was interpreted as unmitigated misconduct. Others may have been discharged with bad paper based on discriminatory policies, such as the now-repealed Don’t Ask, Don’t Tell (DADT) policy. Commanding officers at times are under pressure to be mission capable and ready, or to prepare for a deployment, leading to bad paper separations for servicemembers dealing with stresses or trauma, so that a new servicemember can replace them.⁴

Military Sexual Trauma (MST) is a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment that occurred while a veteran was serving on active duty, active duty for training, or inactive duty training. 38 U.S.C. § 1720D

Moreover, because the character of service assigned at discharge is determined by each servicemember’s chain of command, the issuance of bad paper can be arbitrary or influenced by personal philosophy or prejudice. So, too, are there disparities among the military branches in the frequency with which they issue bad paper and the reasons for which they do so. In short, a host of intersecting factors contribute to bad paper discharges, some of which are discussed in more detail below.

Jeff developed PTSD and TBI during his deployment to Afghanistan, which caused him to experience suicidal ideations and engage in reckless behaviors when he returned from deployment. After being discharged other-than-honorably, Jeff continued experiencing suicidal ideations and went to the VA to get help—but the VA turned him away because of his bad paper discharge. Jeff then went to a civilian hospital emergency department, where he was briefly hospitalized and then discharged to the street. Months later, Jeff finally began receiving mental health treatment at a civilian outpatient clinic for veterans that does not discriminate on the basis of discharge status.

a. Post-Traumatic Stress Disorder & Traumatic Brain Injury

Many servicemembers receive bad paper due to behavior that stems from an undiagnosed mental health or physical condition, or the experience of trauma, or both. One recent study found that 16% of the servicemembers separated for misconduct from fiscal year 2011 through 2015 had been diagnosed with Post-

Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) during the two years prior to separation⁵, and many more servicemembers likely had PTSD or TBI but went undiagnosed or were misdiagnosed. PTSD and TBI are considered the signature wounds of the Iraq and Afghanistan conflicts and both conditions can significantly impair a person's ability to conform their behavior to the military's standards. In particular, the symptoms of PTSD can lead to behaviors that are misinterpreted by military commanders, which in turn can lead to a bad paper discharge.

Servicemembers, especially servicemembers who deploy to combat zones or who experience Military Sexual Trauma (MST), are at higher risk for PTSD.⁶ Among the common symptoms of PTSD are sleep disorders, mood changes, reckless behavior, substance use, and isolation.⁷ These same symptoms can contribute to behavior—such as failure to carry out duties, being chronically late, or not complying with policies—deemed inconsistent with the standards of military service.⁸ Especially when a servicemember's PTSD is undiagnosed, a military command may discharge a servicemember with bad paper without any understanding of the true origin of the servicemember's conduct and without any consideration of the mitigating circumstances.⁹

This same troubling dynamic can occur for servicemembers who suffer from Traumatic Brain Injury (TBI). Just as military service can expose individuals to higher risks for PTSD, military service also poses higher risks for experiencing a TBI.¹⁰ In a similar manner to football players experiencing the consequences of chronic concussions that may not initially be evident, even with advances in science and medical care, the military has failed to diagnose TBI in substantial numbers of servicemembers who served in the Iraq and Afghanistan conflicts.¹¹ Indeed, the military has long struggled to understand, diagnose, and properly treat what is now known as TBI and related conditions.¹²

*More than
100,000
servicemembers
discharged because of
LGBTQ status.*

TBI can produce symptoms similar to PTSD. TBI is associated with other symptoms as well, including difficulty remembering, concentrating and making decisions, slowness in thinking, speaking, and acting, and fatigue.¹³ As in the case of PTSD, the symptoms of TBI can contribute to behaviors that military commanders deem to be misconduct and can prompt military commanders to discharge a servicemember with bad paper.¹⁴ For example, from 2009 to 2015, the Army discharged with bad paper 22,000 soldiers who had deployed and been diagnosed with PTSD or TBI.¹⁵

b. Don't Ask, Don't Tell & Prior Policies Affecting LGBTQ Servicemembers

The military has a long history of discriminating against servicemembers who either were or were perceived to be Lesbian, Gay, Bisexual, Transgender, or Queer (LGBTQ). That history of discrimination included the Don't Ask, Don't Tell (DADT) policy in place from 1994 to 2011, as well as predecessor policies that were even more harsh, and extends to the current ban on service by openly transgender individuals. Under DADT and prior policies, between the end of World War II and the repeal of DADT, over 100,000 servicemembers were discharged

with bad paper because of their actual or perceived LGBTQ status. In addition, thousands of LGBTQ servicemembers were discharged with bad paper for behaviors—interpreted as inexcusable misconduct—that stemmed from the trauma of having to conceal their sexual or gender identity or were discharged for pretextual reasons, such as minor misconduct, when the true cause was discrimination against them due to their LGBTQ status.¹⁶ The nation’s history of discrimination against LGBTQ servicemembers is therefore another cause of bad paper discharges that is perpetuated when these veterans are turned away from VA without being allowed to apply.

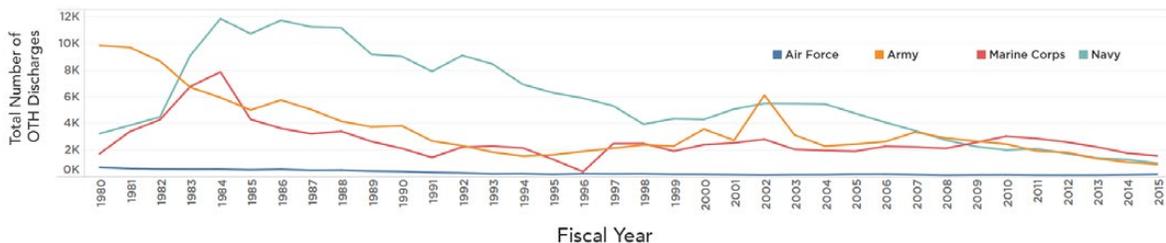
c. Arbitrary & Disparate Imposition of Bad Paper Discharges

Individual military commands possess wide discretion to decide what conduct justifies a bad paper discharge. This is especially true with respect to the Other Than Honorable discharge, which is an administrative discharge that can be imposed by a command relatively swiftly, without substantial oversight, and with minimal procedural protections for the servicemember. The same conduct is often not treated consistently across military commands, resulting in disparate treatment of similarly situated servicemembers. Behavior that one chain of command may decide should lead to a servicemember’s discharge with bad paper, may not lead to any discharge—let alone a discharge with bad paper—under another command’s oversight, even though the conduct of the servicemembers is essentially identical. Moreover, investigations have repeatedly found racial disparities in the imposition of military punishment and bad paper discharges.¹⁷ A 2017 study by Protect our Defenders showed that from 2006 to 2015, black soldiers were 61% more likely to face a general or special court-martial than white soldiers.¹⁸

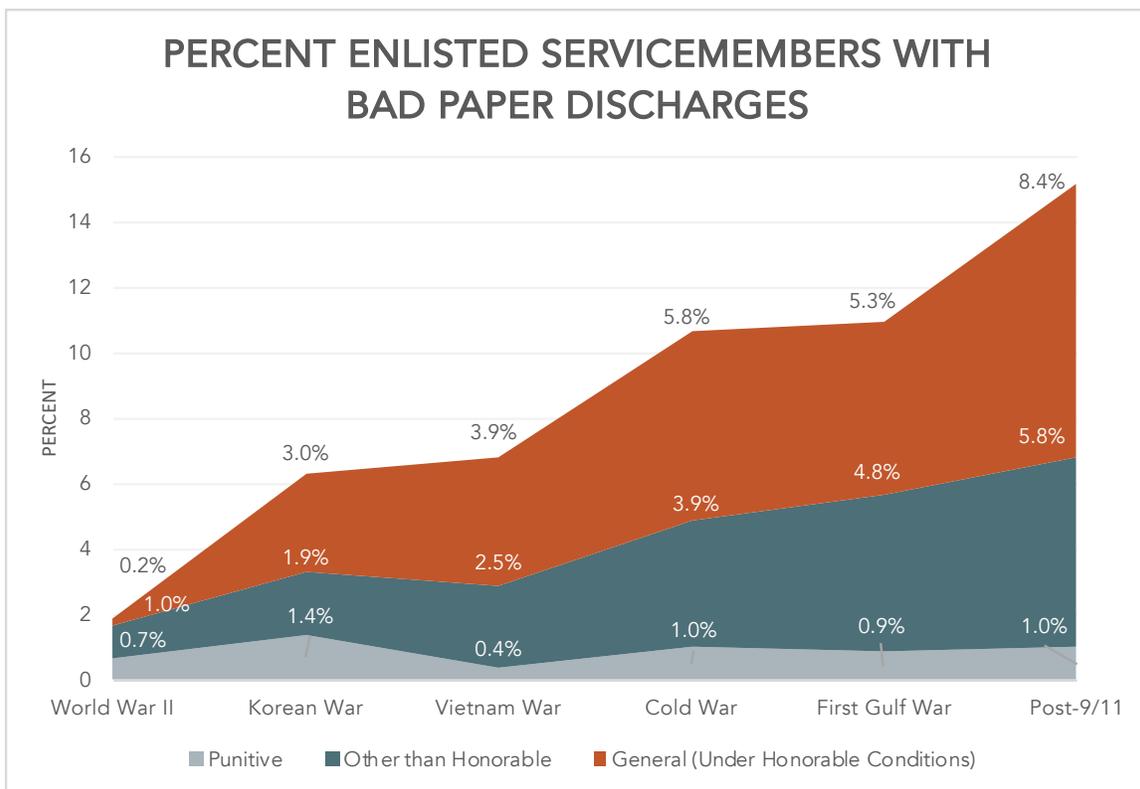
This disparity was confirmed by the Government Accountability Office, which found that servicemembers with similar service histories but in different service branches often received widely different discharge characterizations.¹⁹ For the same misconduct, one might get an Honorable discharge, another a General discharge, and a third an Other Than Honorable discharge, merely because of their branch’s and command’s leadership culture. While each branch of service has its own mission and philosophy, whether a person chose to serve in the Army or the Navy, the Air Force or the Marine Corps should not affect whether that person can access health care after discharge.

The disparities caused by such arbitrariness have been compounded in at least two ways. First, the military has increasingly used administrative discharges to issue bad paper to servicemembers. Since World War II, the percentage of servicemembers who receive an Other Than Honorable discharge has increased by a factor of five.²⁰ Second, wide variation exists across the service branches in the percentage of servicemembers who receive Other Than Honorable discharges. The chart below demonstrates this wide variation over a 36-year period. For example, although the Marine Corps is by far the smallest service branch in terms of active duty personnel, it has by a wide margin accounted for at least 40% of the military’s Other Than Honorable discharges issued each fiscal year from 2010 to 2015. Meanwhile, the Air Force has generally accounted for well under 5% of the military’s Other than Honorable discharges issued during that same period.

Administrative Other Than Honorable Discharges by Service Branch 1980-2015



Source: Department of Defense FOIA Response.



Source: Department of Defense FOIA response; Veterans Legal Clinic, *Underserved* (2016).

The increased use of administrative discharges and the disparate rates of bad paper discharges among the branches of service likely have complex origins. These trends may be driven, at least in part, by the transition from a conscription to an all-volunteer force, other changes in the overall size and structure of the military, and, of course, the unique culture and disciplinary philosophies of each branch of service.²¹

C. How Many Veterans Have a Bad Paper Discharge?

Since 1980, more than 575,000 servicemembers have received an Other Than Honorable, Bad Conduct, or Dishonorable discharge—what this report calls a “bad paper” discharge—representing about 7% of those with characterized discharges. The vast majority—81%—

of those bad paper discharges are administrative Other Than Honorable discharges, not punitive discharges by court-martial, meaning these veterans never received a court process to determine whether the discharge characterization was appropriate, even though that characterization can carry a lifetime of consequences.

Additionally, more than 600,000 servicemembers since 1980 have received General discharge characterizations. While such discharges do not preclude access to most VA benefits, such as disability compensation and health care, they do impose a stigma, bar access to some benefits, and impede employment prospects.[‡]

D. The Myth of the Easy Discharge Upgrade

A common myth in the military community is that a bad paper discharge can be easily changed once a servicemember joins the civilian world. This myth may account for why some servicemembers are willing to accept an Other Than Honorable discharge during the administrative separation process. It is true that the branches of service operate administrative boards—known as discharge review boards and boards for correction of military or naval records—and that these boards have the legal authority to upgrade a discharge that was previously imposed by the military. For example, these administrative boards have the authority to change the character of service on a veteran’s DD 214 from Other Than Honorable to Honorable and to correct other errors or injustices. However, it is inaccurate to say that the discharge review boards and boards for correction of records dispense such relief frequently or promptly.

Historically, the percentage rate of success before the boards is extremely low—in the single digits—with lower success rates for self-represented veterans, who make up the vast majority of petitioners to the boards due to a lack of free or affordable legal help. Although certain categories of petitioners, such as those who establish that they had unrecognized PTSD or TBI that contributed to the misconduct leading to discharge, have had higher rates of success in recent years, the odds of success remain low.²² Paradoxically, the veteran may also need access to VA to establish a PTSD or TBI diagnosis.

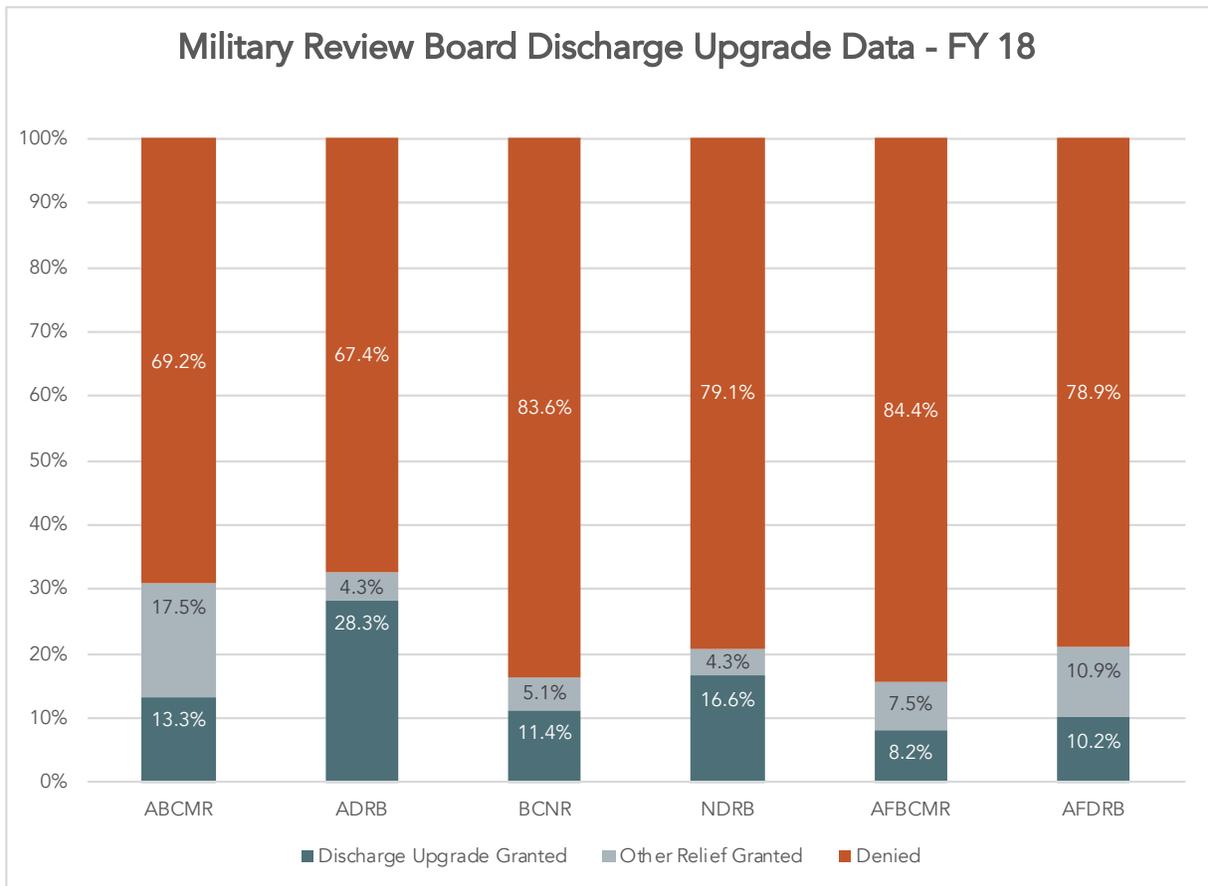
Percent of Veteran Applicants Granted a Discharge Upgrade - FY18

Army BCMR	13 %
Navy BCNR	11%
Air Force BCMR	8%

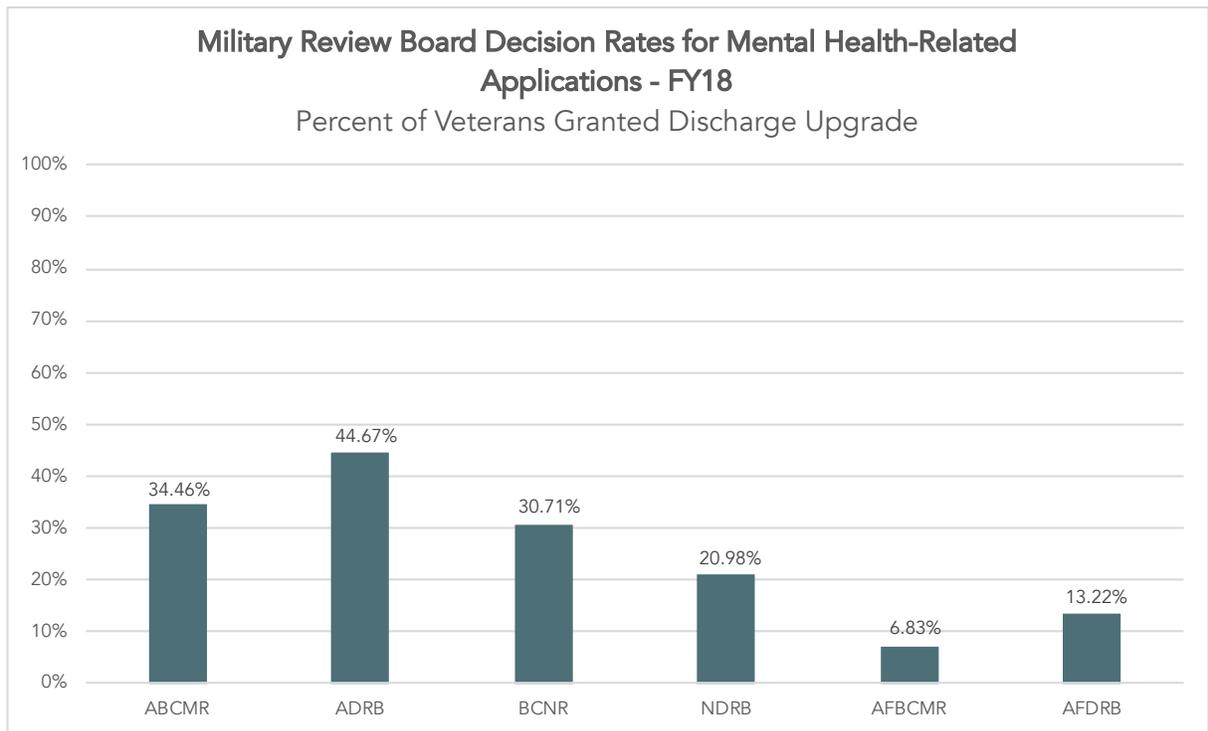
Petitioners can expect lengthy waits to receive a decision from these boards. The discharge review boards typically take 12 to 24 months to decide cases, and the boards for correction of records typically take 18 months to decide cases, though it frequently can take longer.

In sum, receiving a discharge upgrade is hardly certain or swift. Nor does the potential availability of a discharge upgrade excuse VA’s unlawful exclusion of eligible veterans from access to healthcare or compensate the veterans for the adverse health effects and financial expenses suffered while awaiting a discharge upgrade decision, as discussed below.

[‡] For example, access to Post-9/11 G.I. Bill education benefits may require a fully Honorable discharge, depending on the particular circumstances of the veteran’s service and discharge.



Source: Boards of Review Reading Rooms Board Statistics. See Appendix for additional data.



Source: Boards of Review Reading Rooms Board Statistics.

III. THE PROBLEM

A. The Importance of VA Access

The Department of Veterans Affairs (VA) was created to be a single, central agency that could fulfill our nation’s obligation to provide care and support to our veterans. VA has three main components: the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the National Cemetery Administration (NCA). VBA is responsible for deciding whether veterans and their survivors and dependents are eligible for benefits, such as service-connected disability compensation, pension, vocational rehabilitation, and home loans, and for then providing those benefits. VBA also adjudicates whether a veteran with a bad paper discharge was discharged under “other than dishonorable” conditions, as discussed below. VHA manages medical centers and health care facilities across the country and is responsible for enrolling veterans in VA health care and medical benefits. NCA maintains federal veteran cemeteries.

VA is supposed to be non-adversarial and “veteran friendly.” It was specially designed to meet veterans’ needs, especially those arising out of military service. VA medical facilities, for example, offer expert care for medical issues that are more prevalent in the veterans community, such as those associated with amputations, TBI, and PTSD. VA has dedicated programs to reintegrate servicemembers into the civilian world and to address homelessness and suicide risk, which disproportionately affect the veteran population.

For veterans with bad paper, access to VA is particularly critical. Studies have shown that veterans with bad paper are three times more likely to experience suicidal ideation. However, veterans with bad paper who have recently accessed VA mental health services are no more likely than other veterans to experience suicidal ideation.²³ Thus being excluded from VA mental health care leaves veterans at much higher risk of suicide.

NUMBER OF VETERANS USING VA HEALTH CARE (FY15)

6 million

PERCENT OF VETERANS WITH SERVICE-CONNECTED DISABILITIES ENROLLED IN VA HEALTH CARE

92.7 %

For those reasons, ensuring veterans’ access to VA services is essential to upholding the national duty to our veterans and in many cases, they are truly life-saving. Given that the primary way that veterans access VA services is through its health

care system, VA health care should receive priority attention to make sure that no veteran is wrongly denied access.

B. VA Obligations to Applicants

The law grants veterans certain rights and mandates that VA provide eligible veterans with certain benefits. Among other things, the law requires VA to provide any person seeking any veteran benefit with due process in the form of an application and instructions on how to apply.²⁴ VA also has a duty to assist—that is, VA has certain obligations to help applicants

with establishing eligibility, such as letting the veteran know what information VA needs to approve an application and helping the veteran obtain relevant evidence.²⁵ Further, VA must provide a written notice of any decision affecting benefits eligibility, along with information about how to appeal any unfavorable determination.²⁶

C. VA Eligibility Standards

Although the law provides a favorable legal standard and special procedural rights to help veterans prove their eligibility for benefits, there are numerous criteria that veterans must meet. That is, serving in the armed forces alone does not guarantee eligibility for VA benefits.

For VA health care, one eligibility criterion is a discharge under “other than *dishonorable*” conditions. By VA regulation, “other than dishonorable” status automatically includes veterans with Honorable and General discharge characterizations. It also can include some veterans with bad paper, depending on the nature of their service and the circumstances of their separation.

Moreover, veterans with bad paper may be eligible for full VA health care based on another enlistment that ended with an Honorable discharge, or they may be eligible for limited VA health care to treat service-connected disabilities or to provide evaluations or emergency treatment for mental health conditions.²⁷

Examples of Potential VA Eligibility for Veterans with Bad Paper

1. VA finds veteran’s service is “other than dishonorable”
2. Veteran has a prior honorable discharge
3. Veteran not barred by statute can receive health care for service-connected disabilities
4. Veterans in need of emergency mental health treatment for up to 90 days
5. Mental health evaluation for veterans who engaged in or supported combat operations or who experienced MST
6. Vet Center readjustment and bereavement counseling

* There are limits and additional eligibility requirements for each possibility listed. Not all veterans with bad paper can receive benefits.

Because VA health care eligibility is complicated, whether a particular veteran is ineligible often cannot—and should not—be determined by simply looking at the veteran’s DD 214. Thus, when a veteran with bad paper presents at a VA medical facility seeking to apply for VA health care, VA must follow a certain process to determine eligibility. Specifically, the following should occur:

1. VBA staff should fill out a Form 20-0986 (formerly Form 7131) and send it to VBA to conduct a Character of Discharge review
2. VBA staff should review the veteran’s military personnel and medical records and any other relevant records; solicit information and explanation from the veteran; and decide whether the veteran’s discharge was “other than dishonorable” and whether the veteran is otherwise barred by law from receiving benefits
3. VBA staff should inform VHA of its decision
4. VHA staff should inform the veteran of the decision, and if the veteran is eligible, help that veteran enroll in health care

VBA REGIONAL OFFICES	57
VHA MEDICAL FACILITIES	1,243

At present, the Character of Discharge review process can take a long time—two years, on average, as of 2016.²⁸ Under a July 2017 policy, VA aims to complete the process in ninety days if the veteran presents with an urgent mental health issue. However, while that process is ongoing, VA policy largely prevents the veteran from receiving other health care benefits or supportive services.²⁹ Moreover, the regulations VA applies during the review process are highly flawed—they are overbroad, vague, and fail to consider important factors like combat service or mental health conditions.³⁰

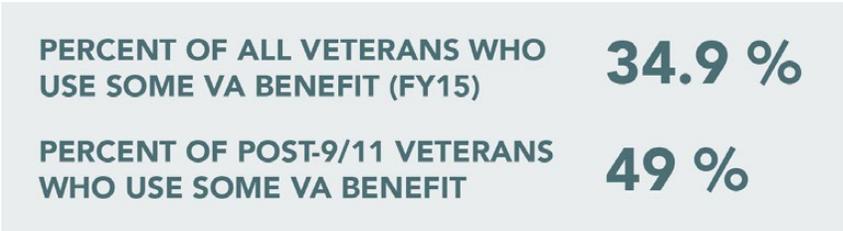
In sum, every person—regardless of military discharge status—has the right to apply for VA health care and to receive a written decision and notification of appeal rights, to ensure veterans are not wrongfully denied. A person with a bad paper discharge may be entitled to receive VA health care and other benefits under VA regulations and policies. There are processes that VA must follow and duties that VA owes to every former servicemember. Unfortunately, for thousands of veterans, from decades past to the present day, VA is turning them away without following these processes, and indeed without any consideration at all.

IV. METHODOLOGY

The data underlying this report were collected in three main ways. First, numerous veterans who were wrongfully turned away from VA medical facilities based on their discharge status were interviewed and their records reviewed. In some cases, the veterans were accompanied by a veterans advocate in going to a VA facility to attempt to access health care benefits, or a veterans advocate worked on the veteran’s behalf to gain that veteran health care access. Second, other veterans advocates and legal aid attorneys submitted reports of numerous incidents of veterans being turned away from VA facilities whenever they witnessed or heard of such an event. This included instances where the advocate accompanied the veteran to a VA healthcare facility and

PERCENT OF ALL VETERANS WITH A SERVICE-CONNECTED DISABILITY (FY15)	21.8 %
PERCENT OF POST-9/11 VETERANS WITH A SERVICE-CONNECTED DISABILITY	35.9 %

frontline staff still did not follow VA's own regulations. Third, data were obtained that relate to VA health care access and eligibility, as well as the size and demographics of the veteran population more generally, through Freedom of Information Act requests to the Department of Veterans Affairs and Department of Defense and through public data resources. The report further relies on and builds upon the work of other governmental and non-governmental organizations that have investigated issues that affect veterans with bad paper.



V. FINDINGS AND ANALYSIS

A. VHA Facilities Across the Country Deny Veterans Health Care Without Due Process or Proper Adjudication

As a basic matter of due process, every person seeking VA health care is entitled to apply, to have VA consider that person's application on the merits, and to receive a written decision. If the person seeks care at a VA medical facility and eligibility cannot immediately be determined, a VHA staff member must refer the person's application to the VBA for a determination as to whether the veteran is eligible.³¹

Yet, evidence shows that VA routinely denies potentially eligible veterans their right to apply for and receive critical health care benefits to which they may be entitled.

VA routinely denies potentially eligible veterans their right to apply for and receive critical health care benefits to which they may be entitled.

Numerous veterans reported presenting at VA medical facilities to seek care and being told by frontline staff that they were ineligible because of their discharge status. Most were not given any written decision but instead told orally that they were ineligible. Some were handed a denial letter that had incorrect eligibility information and that lacked information about their right to appeal the denial. Many were erroneously told that the only way to gain access to VA services was to obtain a discharge upgrade from the military review boards. In some cases, VHA staff did fill out a form to refer the veteran to the VBA for a Character of Discharge eligibility review, but no action was then taken on that referral and the veteran was provided no information about the referral or how to follow up.

Four examples illustrate different aspects of the problem:

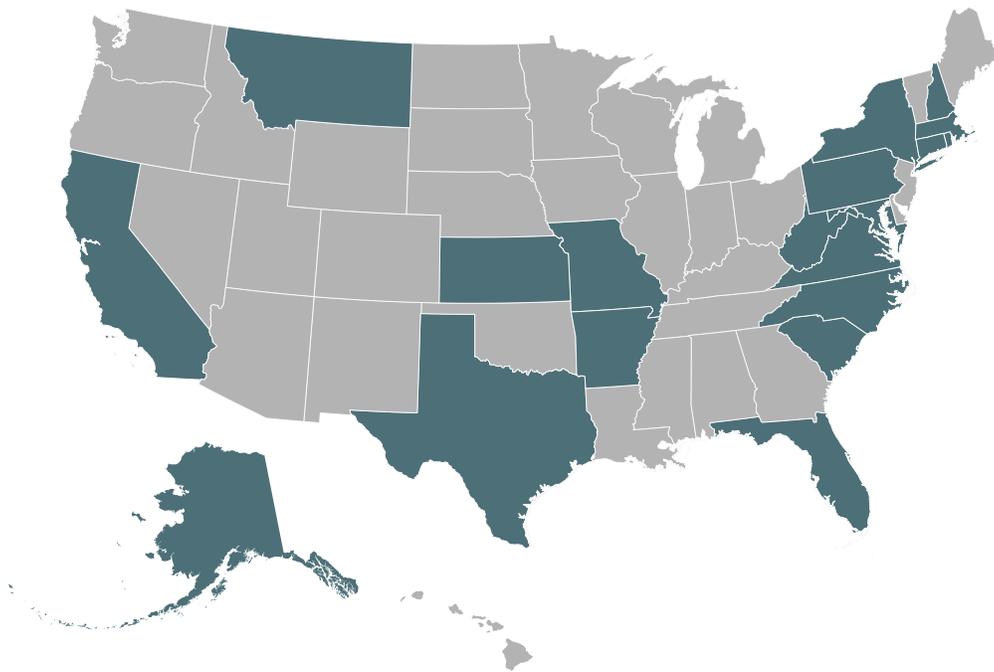
1. Kevin, an Air Force veteran honorably discharged from his first enlistment but later other-than-honorably discharged from a later enlistment, sought medical care from his local

VA medical facility when he first was discharged in the late 1980s. He was told that his discharge status made him ineligible, which left him feeling ashamed and with no place to turn. For more than twenty years, Kevin was excluded from the VA health care he earned through his service. After two decades, Kevin eventually tried again to apply for health care after losing his job and health insurance—and was again turned away. But he then returned after doing his own research about eligibility based on his first Honorable discharge, and VA finally allowed him to apply and eventually approved his application.

2. Jeff, a post-9/11 Army combat veteran diagnosed with PTSD and TBI, was at risk of homelessness and suicide when he sought VA health care shortly after being other-than-honorably discharged. After looking at Jeff's DD 214, a VA staff member told him he was not eligible and typed up a letter that said he needed an "Honorable or General" discharge status. Ultimately, with pro bono legal assistance, Jeff was approved for full VA health care benefits and granted a 100% service-connected disability rating for his deployment-related wounds. However, while waiting for VA's decision, Jeff went more than two years without access to VA care for his mental and physical wounds from service.
3. Robert, a Military Sexual Trauma survivor who received an Other Than Honorable discharge, sought mental health treatment at VA in 2019. The VA enrollment representative said that Robert would be eligible because of special eligibility rules for veterans who experienced MST and sent Robert to make an appointment at triage. However, the VA triage employee refused to schedule Robert for an appointment because of his OTH discharge. Only with the assistance of a pro bono attorney did VA eventually agree to grant Robert access to VA mental health treatment and schedule an appointment.
4. Dan, a post-9/11 Marine Corps combat veteran, went to a VA medical facility seeking health care and a VA eligibility officer filled out the Character of Discharge referral form. Dan himself gave a copy of that referral form to the local VA regional office. No action was taken on his application for more than a year. Finally, a pro bono legal advocate wrote numerous letters to VA, reached out to VA management, and scheduled an administrative hearing on Dan's character of discharge determination. After this extensive follow-up, VA granted Dan access to VA health care.

These reports of VA turning veterans away from medical care stretch back many years and originate from across the country. Veterans in more than a dozen states—and at multiple facilities in many states—were improperly told they were ineligible for benefits or were otherwise denied the right to apply. Importantly, for states from which there are no reports of veterans being turned away, one cannot conclude that no such turn-aways occurred; rather, this investigation was not able to reach out to veterans and veterans advocates in every state, and thus there are no reports of turn-aways from some states.

Every person—regardless of military discharge status—has the right to apply for VA health care and to receive a written decision and notification of appeal rights.



Above: Veterans from states across the country reported being unlawfully turned away by VA when they sought health care. Reports of turn-aways came from states shaded teal in the above map.

Veterans advocates across the country reported that veterans were turned away even when the advocate went with the veteran to the VHA health care facility to apply and explained the law’s requirements to the eligibility staff. One advocate recalled an enrollment worker stating that, in more than twenty years of working at VA, she had never seen or heard of a 7131 Form—the form then used to ask that VBA make a character of discharge eligibility decision for a veteran with bad paper.

Although VA does maintain records of who is enrolled in VA health care, it has no record of veterans with bad paper who sought health care but were denied the opportunity to apply. By its very nature, the turn-away problem is one in which usually no record is created, and as a result no VA documentation exists. It is therefore impossible to know definitively how many veterans were wrongly denied care, where they are located, and when it occurred.

The pattern, however, is clear: VA’s denial of care to veterans with bad paper discharges is national, persistent, and systemic. Its impact on some of our most vulnerable veterans can be harmful or even deadly.³²

In 2018, in response to pressure from Congress and veterans organizations, VA created a new form by which VHA can request that VBA render a character of discharge eligibility determination for a veteran with bad paper. Unlike the previous 7131 Form used for such requests, the new 20-0986 form is specifically and only used for requesting character of discharge determinations, and the form gathers additional information. The new form also has one part for VHA to fill out when transmitting it to VBA, and a second part for VBA to respond with its determination.



**DEPARTMENT OF VETERANS AFFAIRS
Edith Nourse Rogers
Veterans Memorial Hospital
200 Springs Rd
Bedford, MA 01730**

August 18,2015

RE: Ineligible – Discharge – Other Than Honorable

Dear

Thank you for your application for health benefits. After reviewing your discharge papers we have determined that you are ineligible for veteran's benefits due to that you were discharged "Other Than Honorable".

To be eligible for VA services the veteran must serve twenty-four consecutive months active service with an honorable, general, or under honorable condition discharge.

If you are looking for an up grade in your discharge you need to contact the Regional Office in Boston, MA at 800-827-1000 or you can contact your local VA Representative located in your town or city hall.

If you have any questions please contact the eligibility department at the Bedford Veterans Administration at 781-687-2275.

**[REDACTED]
Enrollment/Eligibility
Edith Nourse Rogers
Veterans Memorial Hospital**

Above: Denial letter VA provided to veteran with bad paper when he tried to get health care for deployment-related PTSD and TBI (emphasis and redactions added). The letter incorrectly states that a veteran must have an Honorable or General discharge to receive VA health care. In fact, a veteran with an Other Than Honorable discharge may be eligible for VA health care.

The new form appears to have a better design and to increase the likelihood that VBA will provide a response to VHA regarding its eligibility decision. The form does not, however, solve all communication issues. For example, it is an internal form that is not filled out by or provided to the veteran, and so its utility relies on VHA staff knowing that the form exists and using it—a problem that is discussed further in the next section. Further, the creation of new internal forms does nothing to remedy the widespread misinformation on this issue. Despite the new form, veterans with bad paper continue to report being turned away when they seek VA health care.

As one example of the lack of clarity of VA's current materials about eligibility for veterans with bad paper discharges, one advocate reported that an Iraq combat veteran—who had a first Honorable period of service but a final Other Than Honorable discharge—stated that he had done his own research on VA's website and determined on that basis that he was not eligible for any VA care or benefits because of his final discharge status. Only after repeated assurances from the advocate that the veteran was unquestionably eligible for health care and potentially other benefits based on his first Honorable enlistment did the veteran agree to attempt to apply to VA.

In most—but not all—cases, if VA has wrongfully turned away a veteran, a veterans advocate can work with that veteran to solve that issue. The advocate can provide the veteran the correction application form, can assist the veteran in filing the application form, and can follow up with VA to ensure that VA processes the application and provides a written decision with notice of appeal rights. However, that corrects the issue for that individual veteran only—it does not solve the systemic problem for veterans being turned away from health care, and it does not fix the turn-away issue for the majority of veterans who never speak with an advocate who can help them. Moreover, just as no one should need a lawyer to apply for a driver's license or enroll their child in public school, a veteran should not need an advocate to apply for VA health care.

B. VHA Staff Receive Incorrect or Inadequate Training and Guidance

The training that VHA Staff receive about the eligibility criteria for accessing VA health care is often brief, legally incorrect, or otherwise inadequate. It is also often inconsistent state to state and facility to facility. None of the trainings or manuals examined provided step-by-step instructions for frontline health care eligibility workers on how to process an application from a veteran with bad paper. None included a clear statement that providing those veterans with applications is required by law.

VA's denial of care to veterans with bad paper discharges is national, persistent, and systemic.

Numerous training presentations contain errors that could lead to a veteran with bad paper wrongly being turned away. For example, one VHA presentation listed "qualifying characteristics of service" and "non-qualifying characteristics of service," and incorrectly



DEPARTMENT OF VETERANS AFFAIRS
 El Paso VA Health Care System
 5001 N. Piedras Street
 El Paso, TX 79930-4211

In Reply Refer To: [Redacted]

[Redacted] 2014

Dear [Redacted]

Thank you for applying to the Department of Veterans Affairs Health Care System for medical care.

Veterans Affairs Regulations state that any person who originally entered active military service on or after September 7, 1980, does not qualify for medical benefits unless the following criteria are met.

- A. Completion of 24 months continuous active duty.
- B. Completion of the full period for which the person was called or ordered to active duty.
- C. Character of discharge from military service must be Honorable or General (Under Honorable Conditions).
- D. Possess a service-connected disability through the Department of Veterans Affairs.
- E. If military service is less than 24 months, can only be seen for service connected conditions applied for in Compensation & Pension.
- F. If military service is less than 24 months, can only be seen for service connected disabilities awarded if combined is 0%.

We regret to inform you that you are not eligible for medical care through the Veterans Affairs Health Care System, because of your OTH discharge.

If you receive care by the Veterans Affairs Health Care System or William Beaumont Army Medical Center, you will be billed for the full cost of the service provided in the amount of \$300.00. If you have incurred any service-connected injuries during your active duty service, you may file a claim for disabilities with the Veterans Benefits Administration and you may then reapply for medical benefits after any disability is awarded.

VA Form 4107 has been provided which list your procedural and appellate rights should you not agree with this decision. Should you have any questions regarding this matter, please contact a Health Benefits Advisor at (915)564-6100 ext. 6150.

[Redacted Signature]

[Redacted Signature]

Signature (HBA)

[Redacted] 2014

Date

[Redacted] 2014

Date

El Paso VAHCS
 5001 N. Piedras Street
 El Paso, TX 79930-4211
 915-564-6100

Eastside El Paso Outpatient Clinic
 2400 Trawood Drive, Suite 200
 El Paso, TX 79936
 915-217-2428

Las Cruces Outpatient Clinic
 1635 Don Roser
 Las Cruces, NM 88001
 575-522-1241

Social Media:
www.el Paso.va.gov
www.facebook.com/vael Paso

Above: Letter provided to a veteran by the El Paso VA when he sought health care for deployment-related PTSD and TBI (emphasis and redactions added). The letter incorrectly states that an Honorable or General discharge is required to be eligible for VA health care. An El Paso VA training entitled "What Every VA Employee Needs to Know About Eligibility" included no information about character of discharge or VA health care eligibility for veterans with bad paper.

recorded an “Other than Honorable” discharge as categorically “non-qualifying.” In fact, a veteran with an Other Than Honorable discharge could be eligible for full or partial health care benefits. Other presentations that provided training about VA health care eligibility lacked any information about character of discharge or eligibility for veterans with bad paper.

VHA reference manuals similarly included incorrect information about the eligibility standards. For example, one manual included cartoon “thumbs up” and “thumbs down” symbols, listing an “OTH” discharge next to a “thumbs down,” which in addition to being incorrect further stigmatizes an “Other Than Honorable” discharge status.

In other cases, important manuals lacked substantive guidance about the eligibility rules or what a frontline VHA eligibility worker should do when a veteran with bad paper seeks to apply for health care. The national VHA Eligibility Determination Handbook, which is distributed to all VA health care facilities, fails to include instructions about the steps to help a veteran with bad paper apply for health care and receive a written determination. Rather, the Handbook lists the relevant statute and regulation and suggests that an Honorable or General discharge is required. It is concerning that there is no consistent, legally correct guidance on this issue across all VA facilities nationwide.

Basic Eligibility Definition

➤ A Veteran meets basic eligibility requirements for VA healthcare, if they meet the following requirements:

- One day of active duty service, if enlisted before 9/7/1980 or
- 24 months of active duty service, if enlisted after 9/7/1980 or
- Reservist or National Guard member activated under a Title 10 executive order for any period of time and completed the period that they were called up to serve or
- Contracted for a 15 month enlistment (National Call to Service) “DD 214 narrative states “Completion of Service” or Expiration Term of Service (ETS)
- Honorable or under honorable conditions character of discharge
- 0% Service connected (SC) Non-compensable National Guard/Reservist

VETERAN HEALTH ADMINISTRATION 3

Above: VHA training materials that incorrectly state that an honorable discharge is required for VA health care eligibility (emphasis added).

Veteran is defined as: a person who served in the Active Military, Naval or Air Service and who Was discharged or released under conditions other than dishonorable (Active Duty / Reserves / National Guard)

“Under Conditions Other than Dishonorable” discharge is a “Good” discharge
Honorable,
Under Honorable Conditions (also known as: General)

Dishonorable discharges include: Dishonorable, Undesirable, Other than Honorable,
Under Other than Honorable Conditions, Bad Conduct, Dishonorable for VA purposes

Above: Excerpt from Pittsburgh VAMC training manual which lists an incorrect standard for health care eligibility (emphasis added).

ELIGIBILITY CHECK LIST

1. **CHECK I.D. / MATCH DD214**
2. **CHECK CHARACTER OF SERVICE**  (HONORABLE/GENERAL)  (OTH/DISHONORABLE)
3. **BRANCH OF REGULAR SERVICE (NO RESERVES OR NAT'L GUARD UNLESS CALLED TO ACTIVE DUTY OTHER THAN FOR TRAINING ONLY BY A FEDERAL ORDER AND COMPLETED THE FULL PERIOD FOR WHICH THEY WERE CALLED OR ORDERED TO ACTIVE DUTY)**
4. **LENGTH OF ACTIVE DUTY**
5. **DISCHARGE PAPERS**
6. **AWARD MEDALS**
7. **INCOME PROVIDED(IF NEEDED)**

Above: Excerpt from Pittsburgh VAMC training manual which lists an incorrect standard for health care eligibility (red emphasis added, yellow highlight in original).

c. **Character of Discharge Requirements.** In general, to qualify for VA health care benefits, an individual's discharge or release from service must be under conditions other than dishonorable. *NOTE: See 38 U.S.C. 101(2), 5303, and 38 CFR. 3.12 for general information on character of discharge requirements.*

Above: Excerpt of VHA Enrollment and Eligibility handbook that fails to offer meaningful guidance to VA staff on how to process the health care applications of veterans with bad paper discharges.

c. **Character of Discharge Requirements.** Unless an exception applies, to qualify for VA health care benefits, an individual's discharge or release from service must be under conditions other than dishonorable (Honorable, General, see 38 U.S.C. 101(2), 5303, and 38 CFR. 3.12). **NOTE:** *A discharge under honorable conditions satisfies this requirement. Some other discharges require VA to make a character of discharge determination in order to assess VA eligibility. VA Form 20-0986, Eligibility Determination for Character of Discharge (COD) Request, is the form completed by VA medical facility staff to request a character of service determination by the Veterans Benefits Administration (VBA). The form is available on the VA Forms Web site at <http://vaww.va.gov/vaforms/>. NOTE: This is an internal VA Web site that is not available to the public.*

Above: Excerpt of VHA Enrollment and Eligibility handbook that includes misleading information and fails to offer meaningful guidance to VA staff on how to process the health care applications of veterans with bad paper discharges (emphasis added).

The Handbook does have instructions relating to one subgroup of this population—veterans with Other Than Honorable discharges who are experiencing an emergency mental health crisis—regarding how to process them for temporary treatment. However, in the first year that the Handbook included these instructions, the total number of veterans with Other Than Honorable discharges who gained temporary access to care through this program was about 150—out of more than 500,000 potentially eligible veterans.³³ VA also has recently created some fact sheets and other resource materials about how veterans with bad paper may be able to access VA.³⁴ From this investigation and research, VHA facilities and their staff were rarely aware of those materials and did not reference them or have them on hand when veterans attempted to enroll in health care.

For those trainings that do provide correct information, the entire topic of access to VA for veterans with bad paper is usually addressed in one to two slides, and there is no clear statement emphasizing that such a veteran may be eligible for VA health care. It appears that the lack of detailed guidance and instruction from VHA and VBA about eligibility has led certain local VHA facilities to fill in that gap with their own manuals and instructions, which often contain inaccurate and misleading information. One advocate reported attending a VA training that addressed character of discharge health care eligibility rules: while the slides themselves did not contain any misinformation, the VA presenter erroneously stated that an Honorable or General discharge was required to be “VA health care eligible.”

Former Secretary of VA Robert McDonald referenced “[those] veterans that got bad paper discharges that we in the VA can’t serve by law.”

Address to the 2015 Veterans Court Conference

Former VA Undersecretary of Health David Shulkin stated that VA was “prohibited by law from treating someone [with] what we call bad paper.”

Senate Appropriations Committee Hearing 2016

The lack of information and the provision of misinformation to VA staff directly impacts the ability of veterans with bad paper to access health care. An uninformed or misinformed staff member may advise a veteran that it is not worth applying, that the only remedy is a discharge upgrade, or that there are no VA resources to provide support. The veteran then may go years—or perhaps an entire lifetime—without care that the veteran needs and to which the veteran is entitled by law.

Larry served as a combat engineer in the Vietnam War. After being hit with a grenade that failed to explode, he developed both physical and mental wounds. He was discharged with an Other Than Honorable discharge for going absent without leave after returning to the United States. He was told that his OTH discharge made him completely ineligible for any VA benefits, and so for years he struggled on his own with undiagnosed and untreated Post-Traumatic Stress Disorder. Nearly 50 years after returning from Vietnam, with the assistance of pro bono counsel, Larry finally applied for VA health care and was approved.



Photo: Larry during his deployment to Vietnam

C. VA's Turn-Away Problem Likely Disproportionately Impacts Veteran Subpopulations Including Navy and Marine Corps Veterans, Post-9/11 Veterans, Enlisted Veterans, and Veterans with PTSD or Other Service-Related Mental Health Conditions

Historically, certain groups of servicemembers have been more likely to receive a bad paper discharge than others. These disparately affected groups include veterans who served in the Navy or Marine Corps, Post-9/11 veterans, veterans who enlisted, and veterans with service-related mental health conditions, such as PTSD.

1. NAVY & MARINE CORPS VETERANS

Some service branches discharge servicemembers with bad paper discharges (which are presumptively VA-ineligible) at a much higher rate than other branches. Of all Other Than Honorable, Bad Conduct, and Dishonorable discharges since 1980, almost half—45%—were issued by the Navy. The Marine Corps accounts for 24% of the presumptively VA-ineligible discharges over that same period of time, even though the Marine Corps is the smallest of the service branches. In contrast, the Army, which has the most personnel, accounts for 27% of presumptively ineligible discharges and the Air Force accounts for less than 5%.

These disparate discharge practices are long-standing. Past studies of the different branches' separation policies have attributed the disparity to the branches' different philosophies about how best to discipline and punish their troops, not to any differences in the actual conduct of the troops. In other words, it is often the case that an Airman and a Marine with similar service records could engage in the same behavior, but the Airman would be separated with a General discharge and be able to easily gain access to VA, while the Marine would get an Other Than Honorable discharge that would create barriers to

receiving any support from VA.

Discharges under DADT and similar prior policies illustrate well the disparate practices of the service branches. From 1980 to 2011—when DADT was repealed—42% of the discharges for “homosexuality” were issued by the Navy. 7% of the Navy’s discharges for “homosexuality” were characterized as Other Than Honorable. Similarly, 9.5% of the Marine Corps’ discharges for “homosexuality” were Other Than Honorable. In contrast, less than 3% of Soldiers and less than 1% of Airmen who were discharged for “homosexuality” received an Other Than Honorable characterization. They were much more likely to receive Honorable or General characterizations.

2/3 of all veterans with bad paper discharges since 1980 served in the Navy or Marine Corps

Because some service branches are handing out more bad paper discharges than others, a former Sailor or Marine who tries to obtain health care from VA is much more likely to be turned away than a former Soldier or Airman.

Rather than resolving these inter-service disparities and applying a consistent standard of conduct,

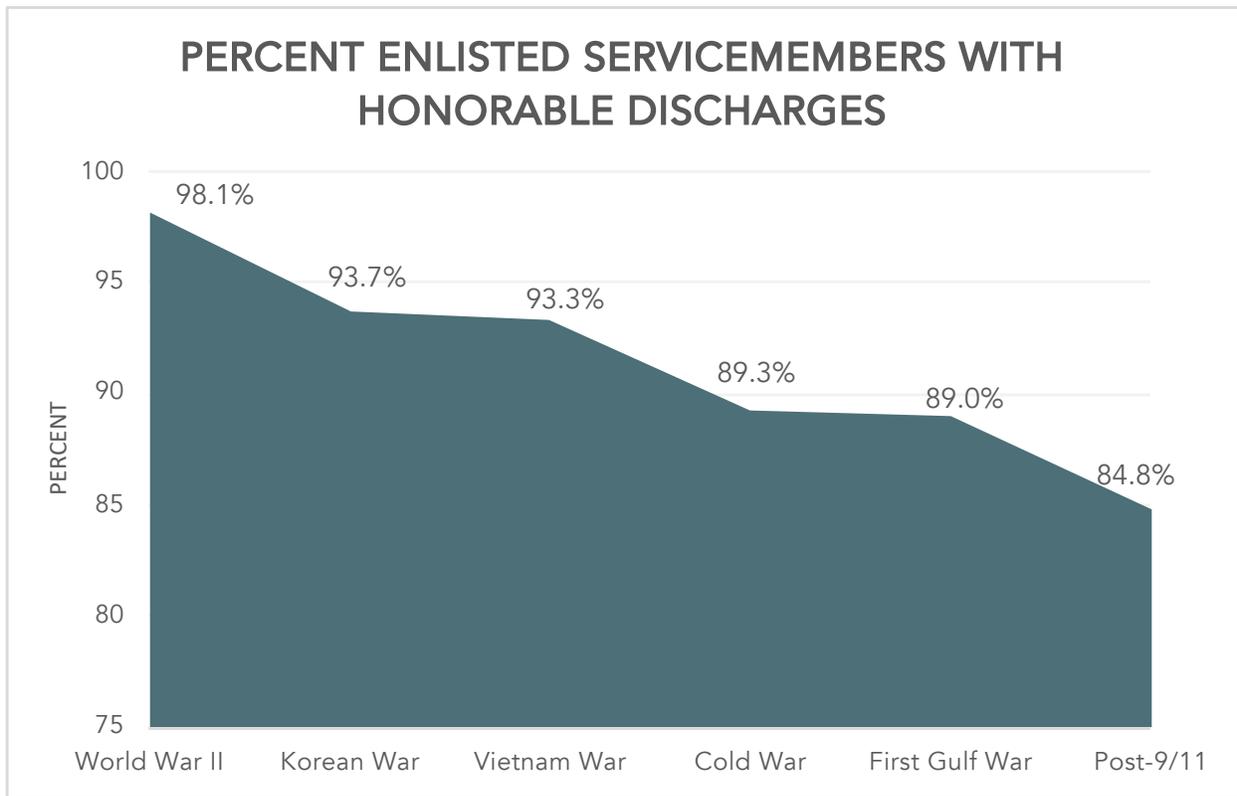
VA’s character of discharge review process exacerbates the problem. VA denies character-of-discharge claims by Marines at a higher rate than those of veterans from the other branches.³⁵

2. POST-9/11 VETERANS

The percentage of servicemembers discharged less-than-honorably has not remained steady over time. Rather, the percent of servicemembers receiving administrative General and Other Than Honorable discharges has significantly increased since World War II to the present, with a corresponding decrease in the percent of servicemembers receiving fully Honorable discharges. The percent of servicemembers receiving punitive discharges (Bad Conduct or Dishonorable) has been steadily low over that time period.

Focusing on enlisted servicemembers who completed at least six months in service, and thus received characterized discharges, the rate of servicemembers who received fully Honorable discharges has decreased from 98.1% during World War II, to 93.3% during the Vietnam War, to now only 84.8% in the post-9/11 era. Meanwhile, the rate of General discharges has increased from 0.2% (World War II) to 3.9% (Vietnam) to 8.4% (Post-9/11), and the rate of Other Than Honorable discharges has increased from 1% (World War II) to 2.5% (Vietnam) to 5.8% (Post-9/11). The punitive discharge rate averaged around 1% (between 0.4% and 1.4%) over that same period.

Brian, a 17-year OEF/OIF Marine Corps veteran with multiple deployments and four Honorable discharges, sought VA health care after receiving an Other Than Honorable discharge for his final enlistment. Despite Brian’s Honorable discharges, which clearly entitled him to VA health care benefits, VA staff denied him all medical treatment when he first went to apply. Only with pro bono legal assistance was Brian able to eventually gain full access to VA health care.



Source: Department of Defense FOIA response; Veterans Legal Clinic, *Underserved* (2016)

Post-9/11 veterans are thus disproportionately affected by bad paper discharges. They are also more likely to have multiple deployments than prior generations of veterans, while simultaneously being at the highest risk of being presumptively excluded from VA, given that 6.8% have Other Than Honorable or lower characterizations.

3. ENLISTED VETERANS

Servicemembers who enlist in the armed forces are much more likely to receive a bad paper discharge than officers or warrant officers. Of all the Other Than Honorable, Bad Conduct, and Dishonorable discharges since 1980, 99.8% were issued to enlisted servicemembers. While there are many more enlisted servicemembers than officers, which accounts for some of that disparity, the impact on enlisted servicemembers is disproportionate.

99.8% of veterans with bad paper were enlisted servicemembers, not officers

4. VETERANS WITH PTSD OR OTHER SERVICE-RELATED MENTAL HEALTH CONDITIONS

Many studies have established a strong correlation between a servicemember having a mental health condition, such as PTSD, and receiving a bad paper discharge.

Medical researchers have found that Marines who deployed to combat zones and were diagnosed with PTSD were 11 times more likely to be discharged for misconduct and 8 times more likely to be discharged for substance use, compared to Marines who did not deploy or were not diagnosed with a mental health condition.³⁶ Similarly, a study of Soldiers who were hospitalized in service for a mental health disorder were 9 times more likely to be discharged for misconduct than Soldiers hospitalized for a non-mental health condition.³⁷

John is a Navy veteran who served in Bosnia, where his experiences supporting bombing missions and witnessing others killed or injured in war led him to develop Post-Traumatic Stress Disorder, which contributed to him receiving an Other Than Honorable discharge. More than two decades later, with pro bono representation, he received a discharge upgrade to Honorable. However, when John went to VA to finally enroll in health care with the letter informing him of his upgraded discharge, VA turned him away—a VA eligibility representative and a VA patient advocate told him that he was not in the system because of his discharge status and they were unable to help him. Only later, after John repeatedly attempted to enroll, did VA finally acknowledge that he was eligible and approve his health care application.

The Government Accountability Office found in a 2017 study that, of the servicemembers discharged for “misconduct” from fiscal years 2011 to 2015, 62% had been diagnosed with a mental health condition in the past two years.³⁸ Of those, 23%—almost one in four—received an Other Than Honorable discharge.³⁹ Medical researchers similarly have found that early discharge from the service, including because of misconduct, is a significant risk factor for post-service mental health conditions.⁴⁰ Indeed, those discharged for misconduct were more than twice as likely to be diagnosed with a mental health or substance use disorder.⁴¹

VI. RECOMMENDATIONS AND CONCLUSIONS

VA’s practice of turning away veterans with bad paper is a long-standing, national, and systemic problem that demands immediate action. The steps proposed below to address this issue are all within VA’s existing authority and capacity. No legislation is needed, nor are new regulations required. VA can and should move swiftly to implement the following proposals to ensure that going forward no veteran is wrongfully denied needed care and support.

A. VA Must Improve its Training, Guidance & Oversight

VA currently provides very little training or guidance to its employees about bad paper discharges and how veterans with bad paper may establish eligibility for health care or other VA services. What trainings and guidance do exist often are inconsistent and contain misinformation. This lack of information and presence of misinformation directly harms veterans with bad paper who are seeking access to health care.

VA should create a comprehensive training on the many ways that a veteran with bad paper may establish eligibility for health care and other benefits. The training should be mandatory for all VA employees and should emphasize as the key point that veterans with bad paper—especially the large majority who have administrative Other Than Honorable characterizations—may be eligible for VA health care. The presumption should be one of potential eligibility, as opposed to the current status quo which is the opposite.

VA should design a special training directed specifically at frontline eligibility and enrollment staff that includes detailed instructions on how to process a health care application from a veteran with bad paper, and VA should require annual retraining. Another training should be designed for other frontline VHA staff, such as those in the Veterans Justice Outreach program and VA programs related to homelessness. All trainings should be standardized across VHA facilities nationwide, not created locally on an ad hoc basis. Regular trainings on enrollment standards are common in other government health care programs, such as Medicaid.

VHA should also update its Eligibility and Enrollment Handbook to provide detailed instructions to staff about how to process a health care application from a veteran with bad paper. These instructions must be detailed and concrete. They must also require the enrollment staff to provide clear and readily understandable information to the veteran about the process and the timeline for receiving a decision about health care eligibility. The information provided to the veteran should be accessible even if the veteran has limited education or a disability. The instructions in the Handbook must match the parallel instructions provided to VBA staff who are tasked with rendering the character of discharge eligibility determination.

All trainings and guidance should encourage staff to ask veterans who express any interest in or need for health care whether they require assistance in applying for VA health care, and should provide instructions about how to refer that veteran to available resources. VA must adopt a “no wrong door”

Jeff, a post-9/11 Army combat veteran with PTSD and TBI who was unlawfully turned away, was eventually able to establish eligibility for VA with the help of a pro bono advocate and to then access mental health treatment and other supportive services. However, after Jeff moved to another state a few years later and had to re-enroll in VA health care, the VA eligibility staffer told him he was not eligible because of his OTH discharge and that giving him health care before was a “mistake.” Only with help from a pro bono attorney and further advocacy was Jeff’s VA eligibility re-established.

Other Reform Efforts Affecting Veterans with Bad Paper Discharges

LITIGATION:

Shepherd v. McHugh & Monk v. Mabus: class action lawsuits on behalf of Vietnam veterans who developed PTSD during their service and received bad paper discharges, challenging the Department of Defense military review boards' systemic denial of their discharge upgrade applications, which suits led to the issuance of new Department of Defense guidance about granting "liberal consideration" to the discharge upgrade applications of such veterans.

Kennedy v. Esper & Manker v. Spencer: certified class action lawsuits on behalf of post-9/11 veterans who developed PTSD or other mental health conditions during their service and received bad paper discharges, challenging the Department of Defense military review boards' policies and practices in adjudicating their discharge upgrade applications.

LEGISLATION:

Honor Our Commitment Act: federal legislation extended VA mental health evaluation and treatment to veterans with Other Than Honorable discharges who have served in a combat zone or area of hostilities, worked as a drone operator, or experienced MST.

Albany County, New York: municipal action extended county veteran benefits to any veteran discharged based on LGBT status.

New York: legislation extended state veteran benefits to veterans who received a bad paper discharges on the basis of their sexual orientation or gender identity or as a result of MST, PTSD, or TBI.

Connecticut: legislation extended state and municipal veteran benefits to veterans who received Other Than Honorable discharges as a result of PTSD, TBI, or MST.

Nevada: legislation provided that no veteran discharged because of LGBT status may be denied access to a state program or service for veterans if the veteran is otherwise qualified.

Rhode Island: legislation provided that any veteran with a General or Other Than Honorable discharge based on LGBT status can petition the state to have the discharge recorded as honorable and can receive state veteran benefits and rights.

ADMINISTRATIVE ADVOCACY:

Petition for Rulemaking to Amend 38 C.F.R. 3.12: petition asking VA to update and revise its regulations about the standards under which veterans with bad paper discharges can access basic VA benefits such as health care and compensation, seeking to ensure that mitigating circumstances such as in-service mental health conditions are considered and that only severe misconduct results in exclusion.

2016 Commission on Care Report: commission of representatives from leading veteran service organizations, veterans advocacy groups, health care providers, and other stakeholders recommending that VA create a streamlined path to health care eligibility for certain veterans with Other Than Honorable discharges.

approach to connecting veterans with health care.

VA should log and track all veterans' requests to enroll in health care and the outcome of that request. The ability to ensure staff compliance with training and guidance depends upon having data to observe and measure.

A tracking system for VHA enrollment requests should help to ensure that the turn-away problem is resolved prospectively. However, for decades, VHA has been turning away veterans with bad paper and not tracking those encounters. The VA Inspector General should therefore initiate an investigation into past turn-aways to determine the issue's full scope, both currently and historically. This will best ensure that other remedial actions will be most successful and complete, so that no turned-away veteran is left outside of care.

VA Must Improve its Training, Guidance & Oversight

1. Create training about eligibility of veterans with bad paper for VA health care and other services.
2. Create special trainings on eligibility for VHA enrollment and eligibility staff and for VA outreach staff.
3. Promote a "no wrong door" approach to access VA health care.
4. Track all requests and decisions for health care enrollment.
5. Investigate and audit records to fully assess the scope of the turn-away problem, past and present.

B. VA Must Improve Communication Between VHA & VBA and Between VA & Veterans

Communications problems, both internal to VA and in VA's messages to veterans and the public, further impede the ability of veterans with bad paper to access VA health care.

Focusing first on the internal issues, as documented above, the health care eligibility and enrollment process breaks down at many points. For a significant number of a veterans who were orally told they were not eligible for VA health care, a 7131 Form to initiate a character of discharge review was filled out. However, VA staff neglected to transmit that form to VBA, or VBA never received it or did not act on it, or VBA did act on it and rendered a decision but then failed to inform VHA or the veteran of its decision. Both VBA and VHA must therefore improve the tracking and processing of health care applications from veterans with bad paper. Moreover, VBA and VHA must improve their computer systems and databases so that front-line eligibility workers can more quickly and accurately determine whether a veteran is eligible for limited or full services, for example on the basis of a prior honorable enlistment.

Externally, both VBA and VHA must create new letters, notices, and other resources to explain to veterans with bad paper what should happen and what is happening regarding their health care applications and eligibility determinations. When a veteran applies for health care, VA should provide the veteran a letter with a case number that explains the character of discharge determination process.

The letter should also notify the veteran of the legal standards that apply, the right to submit information and evidence in support of eligibility, the right to ask for a hearing, and the right to have assistance from a veteran service organization or veterans advocate.

VA must adopt a “no wrong door” approach to connecting veterans with health care

VHA and VBA must then make sure to notify the veteran once an eligibility determination is made and, if the veteran is found eligible, must assist the veteran in completing the eligibility and enrollment process. In any approval letter sent to the veteran, VBA should include a one-page form that clearly states that the veteran is eligible for VA health care and instruct the veteran to take the form to a VHA medical facility to complete the enrollment process and begin accessing health care.

With regard to external communications, VA should consider creating a separate application form to request a character of discharge determination and a Statement in Support of Claim Form specifically for character of discharge eligibility determinations. These forms should prompt the veteran for information that is especially relevant to that decision, such as whether there are any mitigating or extenuating circumstances that occurred in service, such as military sexual trauma or a mental health condition, or whether the veteran served multiple terms of service.

Another issue hampering effective communication with veterans is the length of time that it takes for VA to render a character of discharge eligibility determination, if VA ever does. One advocate reported that a veteran who first attempted to apply for VA health care in April 2013 did not receive a character of discharge determination until April 2016—three years later. When VA finally made that determination, the veteran did not get the notice because he had moved multiple times, which is not uncommon for this population of veterans who experience high rates of homelessness and unemployment. Compare this to another government health care program, Medicaid, where enrollment decisions usually take no more than 60 to 90 days and often can be made instantaneously.

Therefore, one important improvement that VA must undertake is decreasing the amount of time to render a character of discharge determination. This is especially important because, under current VA rules, veterans with bad paper generally cannot receive any health care services while their character of discharge decision is pending. Therefore, many veterans who are ultimately found eligible for VA health care nevertheless wait years without access to needed treatment. Reducing the amount of time that a veteran waits for a decision therefore is a key component to solving some of the turn-away problem. To accomplish this end, VBA should classify character of discharge determinations as “rating” claims—rather

than as deprioritized “non-rating” claims—and flag them for expedited processing if the veteran is homeless, at risk of suicide, experiencing extreme financial hardship, or facing other emergency circumstances.

VA Must Improve Communication Between VHA & VBA and Between VA and Veterans

1. Improve communication pathways between VBA and VHA regarding character of discharge eligibility determinations.
2. Create new form letters and resource materials for veterans with bad paper about the VHA enrollment process and character of discharge eligibility rules.
3. Provide eligible veterans with instructions on how to complete the enrollment process.
4. Classify character of discharge determinations as rating claims and flag them if the veteran is facing emergency circumstances.

C. VA Must Remedy Past Unlawful Turn-Aways by Conducting Outreach and Remediation Efforts

For many years, VA has improperly turned away former servicemembers with bad paper who sought health care. Because VA has not kept records relating to those whom it has turned away, we cannot know the exact number who have been affected. With over 550,000 servicemembers having received bad paper since 1980, it would be no stretch to think that the number unlawfully turned away could be in the tens of thousands, and an estimated 400,000 are currently at risk of being turned away from needed care.

The veteran told by VA that a bad paper discharge renders that veteran ineligible is not the only person harmed by that misinformation; that veteran may tell other veterans, who then decide not even to try to seek care at VA perpetuating a damaging cycle of stigma and misunderstanding. Misinformation about VA eligibility for veterans with bad paper is rampant in the veterans community.

VA must ensure not only that no individual veteran is wrongly turned away from care in the future, but also that those veterans previously turned away are now given the opportunity to apply for care. The turn-away problem requires remediation that is both prospective and retrospective.

VA therefore must undertake extensive, concerted, and sustained efforts to ensure that all veterans and organizations that serve veterans know that having a bad paper discharge does not necessarily prevent a veteran from accessing VA health care and other VA services. VA must encourage all veterans to apply to VA for an eligibility determination—adopting a “no wrong door” approach.

VA’s outreach should include a sustained public information campaign, using both traditional media and social media outlets. New materials that provide a clearer and more direct message about all veterans’ right to apply for health care must be created.

Furthermore, VA should send letters to all veterans not currently enrolled in VHA notifying them of their right to apply for health care. The letter, of course, would not guarantee that the veteran would be found eligible. Some veterans are not eligible for health care, not only because of their character of discharge but potentially because of their brief period of time in service or not having a service-connected disability. However, the letter should provide correct information about the standards for health care eligibility and emphasize that having a bad paper discharge does not necessarily disqualify a veteran from receiving health care. Sending such a letter is within the capacity of VA, as demonstrated by the congressionally mandated letters sent out in 2018 regarding the implementation of the Honor Our Commitment Act, which addressed eligibility for mental and behavioral health treatment for certain veterans with Other Than Honorable discharges.

Not long after being discharged, Dwayne, a post-9/11 Marine Corps veteran who served in Afghanistan, went to a VA hospital seeking treatment for Traumatic Brain Injury and Post-Traumatic Stress Disorder. VA staff told him that he could not get any health care because of his OTH discharge. A year later, Dwayne tried again at a different VA hospital, but again was told that he could not get any health care. Four years after that, now with help from a pro bono attorney, Dwayne finally gained access to VA health care and service-connected benefits. However, for more than six years, VA’s doors were shut to Dwayne, when he most needed mental health treatment and other services to transition back to civilian life. And when VA finally granted him access to health care, VA did not provide any remedy for or acknowledgment of having unlawfully excluded him for so long.



In conducting its outreach, VA must partner with other stakeholders, including veterans service organizations, veteran community organizations, state and local departments of veterans services, and veterans advocates. These organizations are often deeply embedded in their communities and are best able to find veterans who may have been turned away and to encourage them to approach VA to try applying again. They are also a key ally in the effort to reverse the widespread misinformation concerning this topic.

VA must also partner with the Department of Defense, which has its own important role in addressing unlawful and inequitable bad paper discharges. VA and DOD can and should work together on reforming the separation, transition, and discharge upgrade standards

and procedures. While most of this report’s recommendations are focused on the actions VA must take, we also call on other organizations who serve veterans to do their part in ensuring that no veteran is wrongfully turned away from needed care. We all have a role to play in remedying this long-standing, systemic problem that has affected generations of veterans—and in making sure that no future generation suffers the same harm.

VA Must Remedy Past Unlawful Turn-Aways by Conducting Outreach and Remediation Efforts

1. Conduct public information campaign
2. Send letters to veterans not currently enrolled in VHA to notify them of eligibility standards and the right to apply for health care.
3. Partner with organizations that serve veterans to enhance outreach efforts.

VII. APPENDIX

REVIEW BOARD OUTCOMES FOR FY2018

Army Board for Correction of Military Records

ABCMR Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	548	73	13.3%	96	17.5%	379	69.2%
Mental Health Applications	148	51	34.5%	25	16.9%	72	48.7%
Sexual Assault Applications	11	7	63.6%	3	27.3%	1	9.1%
All Other Applications	389	15	3.9%	68	17.5%	306	78.7%

Note: The Department of Defense released information only about the first and second quarters of 2018 for the Army Discharge Review Board. Therefore, the above tables reflect online a half year's data.

Army Discharge Review Board

ADRB Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	727	206	28.3%	31	4.3%	180	24.8%
Mental Health Applications	300	134	44.7%	13	44.7%	153	51.0%
Sexual Assault Applications	17	9	52.9%	3	17.7%	5	29.4%
All Other Applications	410	63	15.4%	15	3.7%	262	63.9%

Board for Correction of Naval Records

BCNR Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	1744	198	11.4%	88	5.1%	1458	83.6%
Mental Health Applications	267	82	30.7%	7	2.6%	178	66.7%
Sexual Assault Applications	61	21	34.4%	4	6.6%	36	59.0%
All Other Applications	1416	95	6.7%	77	5.4%	1244	87.9%

Naval Discharge Review Board

NDRB Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	837	139	16.6%	36	4.3%	662	79.1%
Mental Health Applications	286	60	21.0%	14	4.9%	212	74.1%
Sexual Assault Applications	25	8	32.0%	2	8.0%	15	60.0%
All Other Applications	526	71	13.5%	20	3.8%	435	82.7%

Air Force Board for Correction of Military Records

AFCMR Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	571	47	8.2%	43	7.5%	482	84.4%
Mental Health Applications	161	11	6.8%	26	16.2%	125	77.6%
Sexual Assault Applications	24	5	20.8%	4	16.7%	15	62.5%
All Other Applications	386	31	8.0%	13	3.4%	342	88.6%

Air Force Discharge Review Board

AFDRB Applications	Applications Adjudicated	Discharge Upgrade Granted	Percent Discharge Upgrade Granted	Other Relief Granted	Percent Other Relief Granted	No Relief Granted	Percent No Relief Granted
All Applications	384	39	10.2%	42	10.9%	303	78.9%
Mental Health Applications	227	30	13.2%	26	11.5%	171	75.3%
Sexual Assault Applications	7	3	42.9%	1	14.3%	3	42.9%
All Other Applications	150	6	4.0%	15	10.0%	129	86.0%

Source: Department of Defense Boards of Review Reading Rooms, <http://boards.law.af.mil/stats.htm> (data downloaded Nov. 2019).

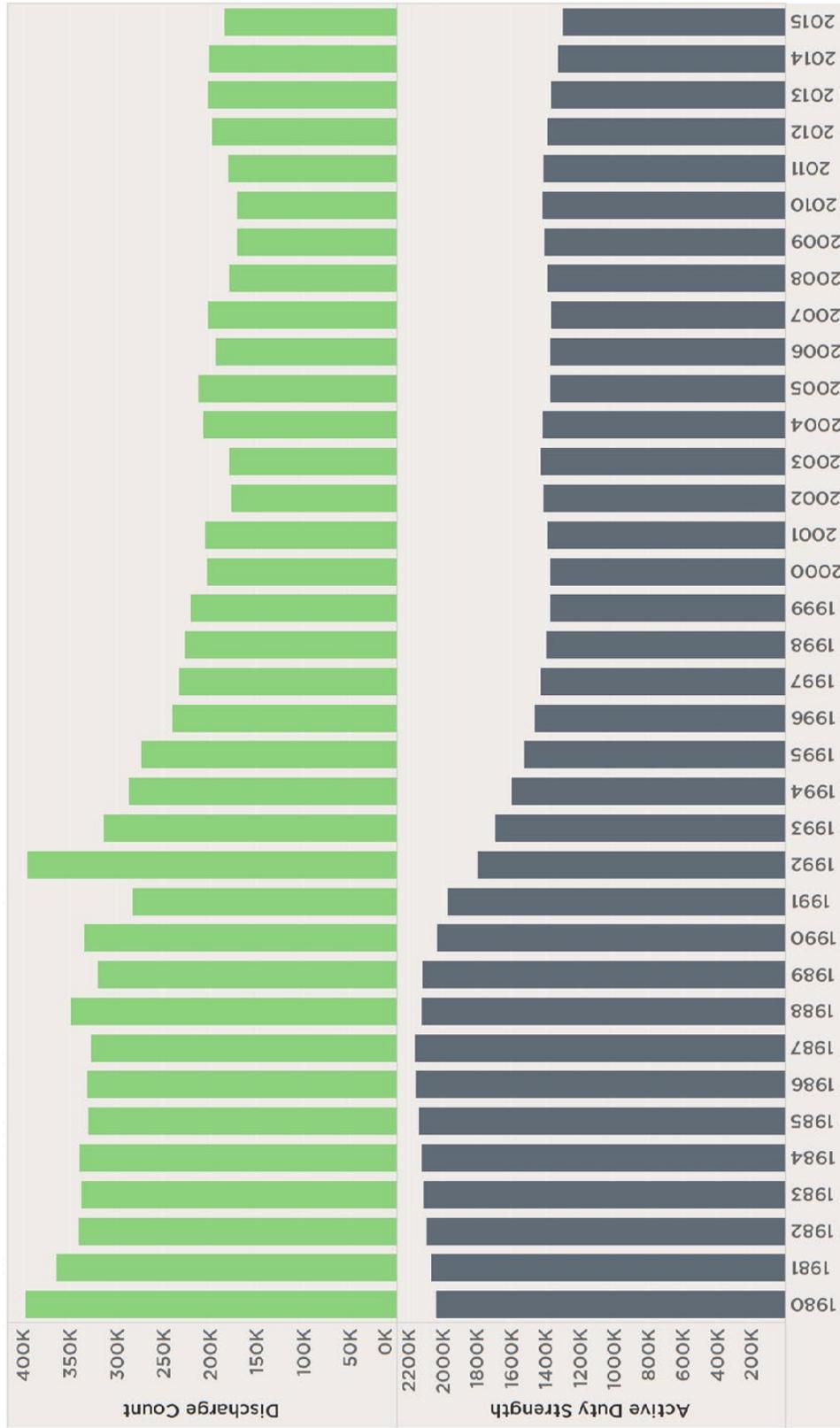
DEPARTMENT OF DEFENSE SEPARATION DATA FY1980 TO FY2015

In response to a request under the Freedom of Information Act, the Department of Defense's Defense Manpower Data Center provided more than thirty years of data on servicemember separations. Key findings from that data are included in the charts on the following pages.

As a note on methodology, the data were cross-checked with other known data sources and with responses to parallel records requests to attempt to ensure accuracy. However, in many places, information was missing or internally inconsistent, and there were a significant number of "unknown" or blank entries. In such cases, clarification was sought from DOD, and some data entries were excluded as unreliable. Furthermore, important data—such as about race, ethnicity, and gender/sex—were not provided in response to requests.

FY 1980-2015 Discharge & Active Duty Strength Data

(Air Force, Army, Marine Corps, & Navy Data Combined)



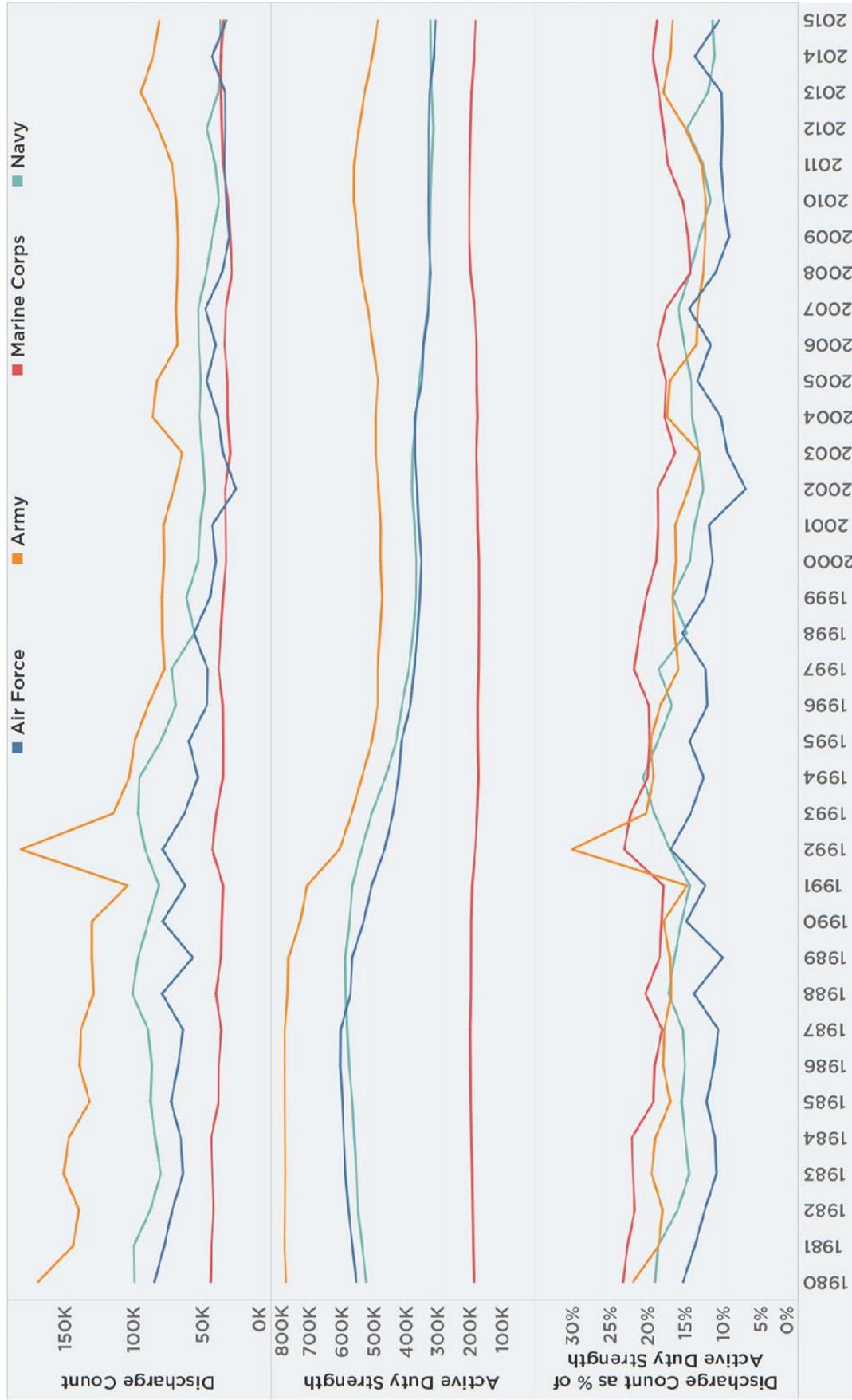
Data Summary

	Discharge Count	Active Duty Strength
Average:	258,619	1,653,121
Median:	230,378	1,425,448
Minimum:	170,080	1,301,014
Maximum:	397,334	2,160,727

“Discharge Count” is the number of servicemembers who were discharged from active duty, excluding enlisted servicemembers who immediately returned to active duty service as officers.

“Active Duty Strength” is the number of servicemembers who were serving on active duty as of the final day of the given fiscal year.

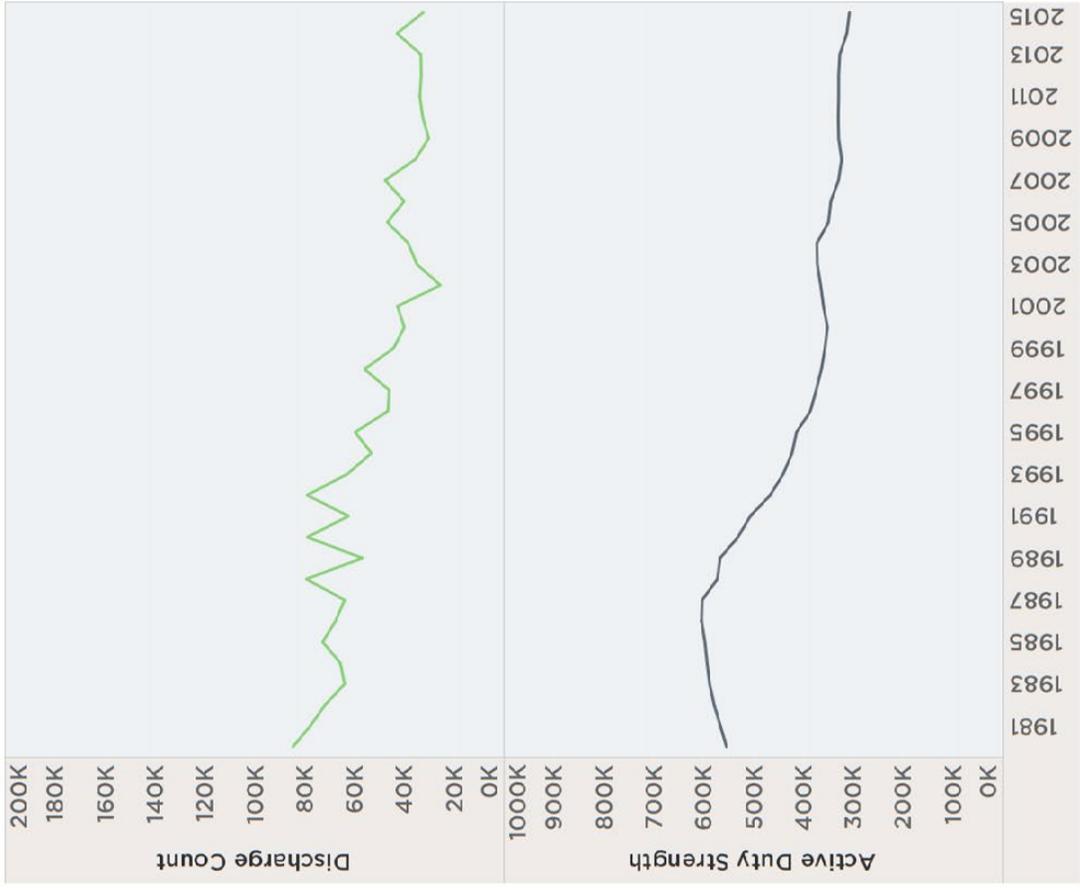
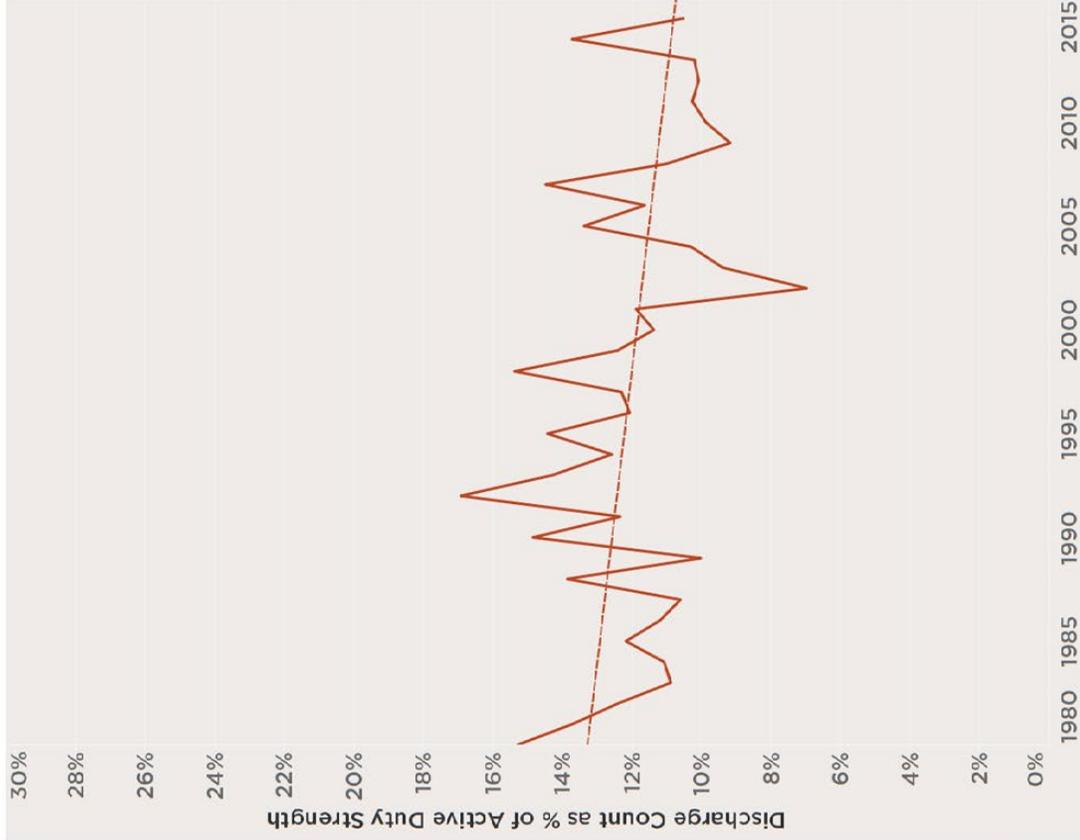
FY 1980-2015 Discharge Count & Active Duty Strength by Branch



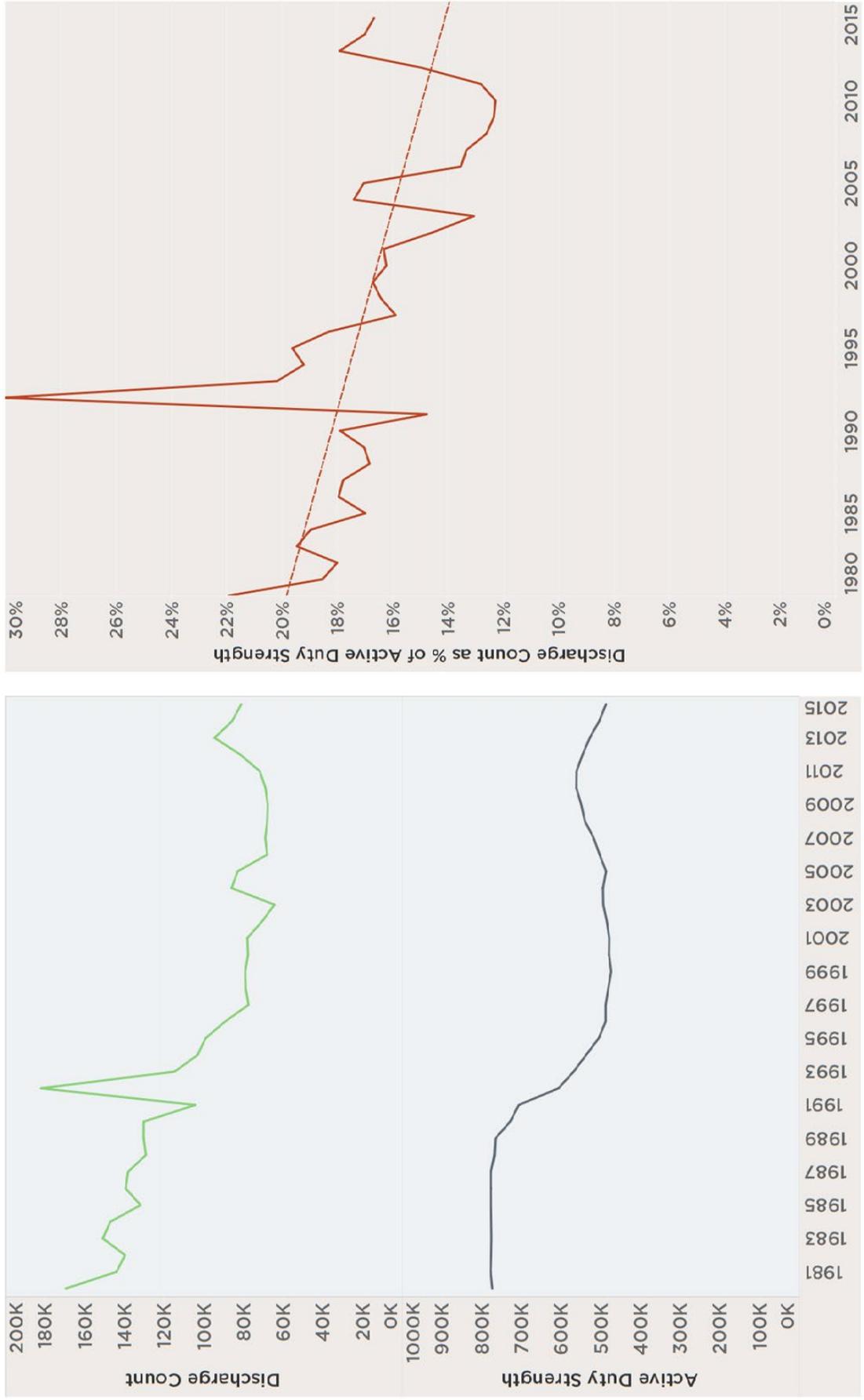
“Discharge Count as a % of Active Duty Strength” is “Discharge Count” divided by “Active Duty Strength” and shown as a percentage. This calculation provides context for the discharge count.

 In FY 1980 through FY 2015, 9,310,285 total discharges occurred.

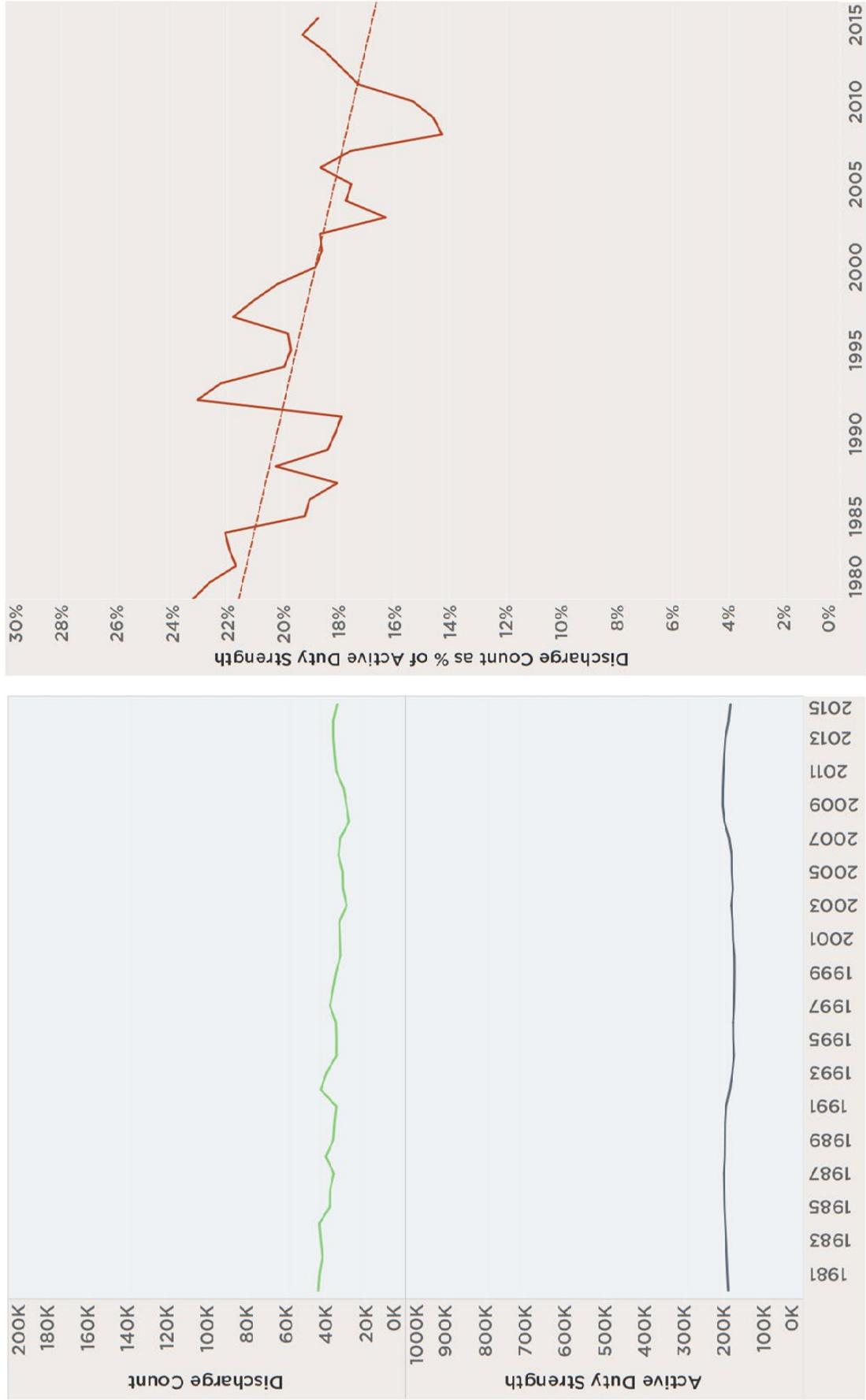
Air Force FY 1980-2015 Discharge Count & Active Duty Strength



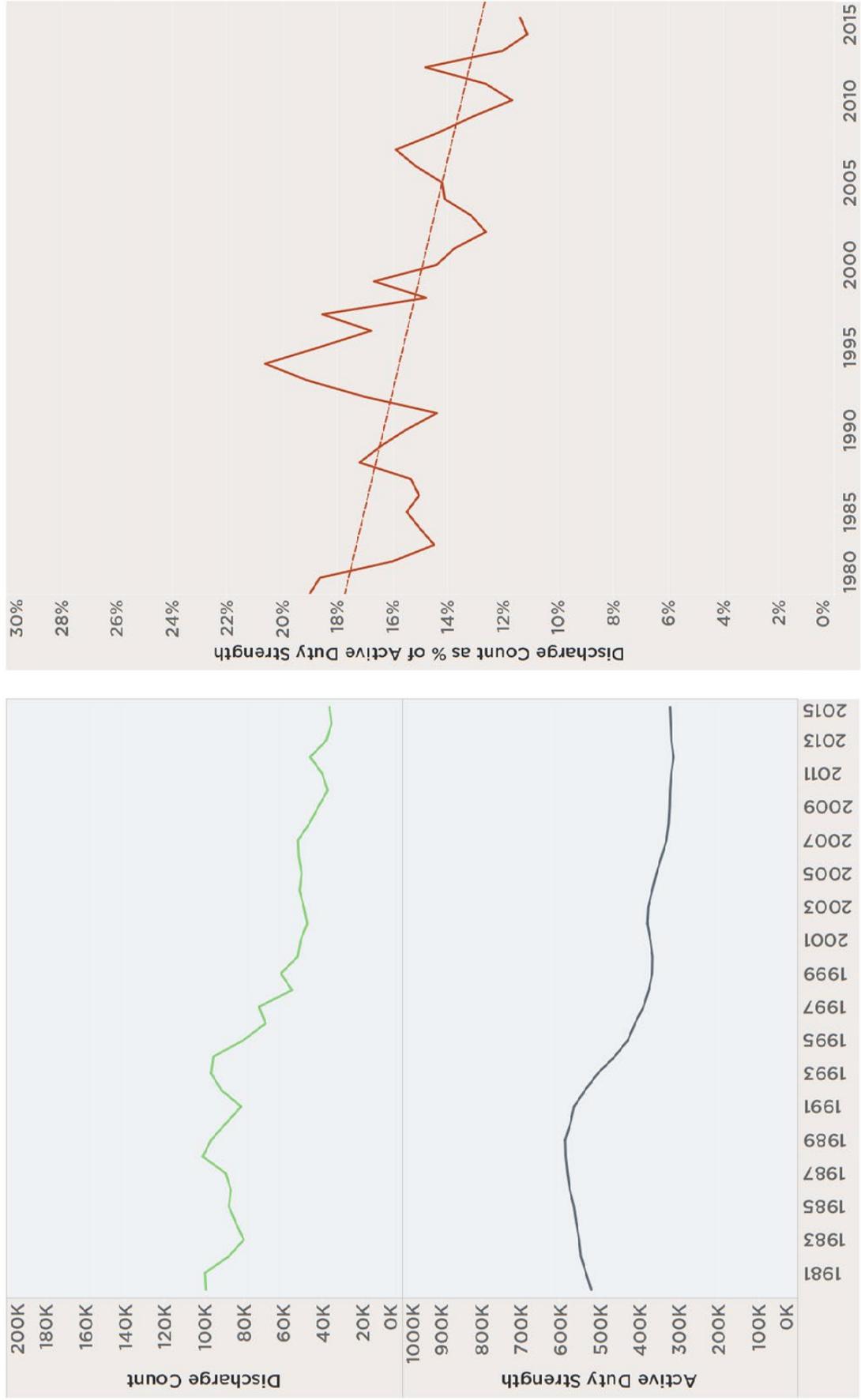
Army FY 1980-2015 Discharge Count & Active Duty Strength



Marine Corps FY 1980-2015 Discharge Count & Active Duty Strength

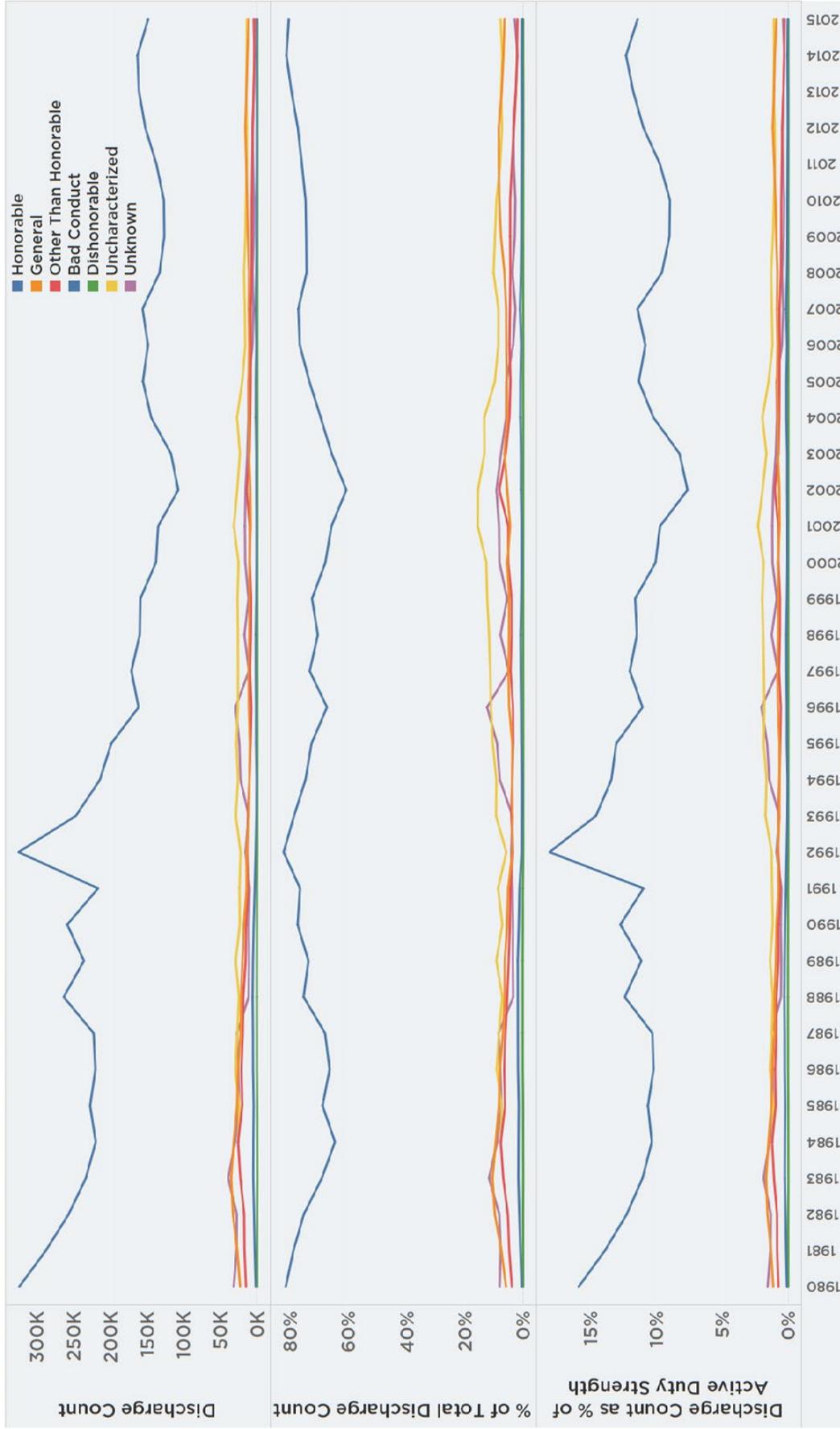


Navy FY 1980-2015 Discharge Count & Active Duty Strength



FY 1980-2015 Discharge by Character of Service

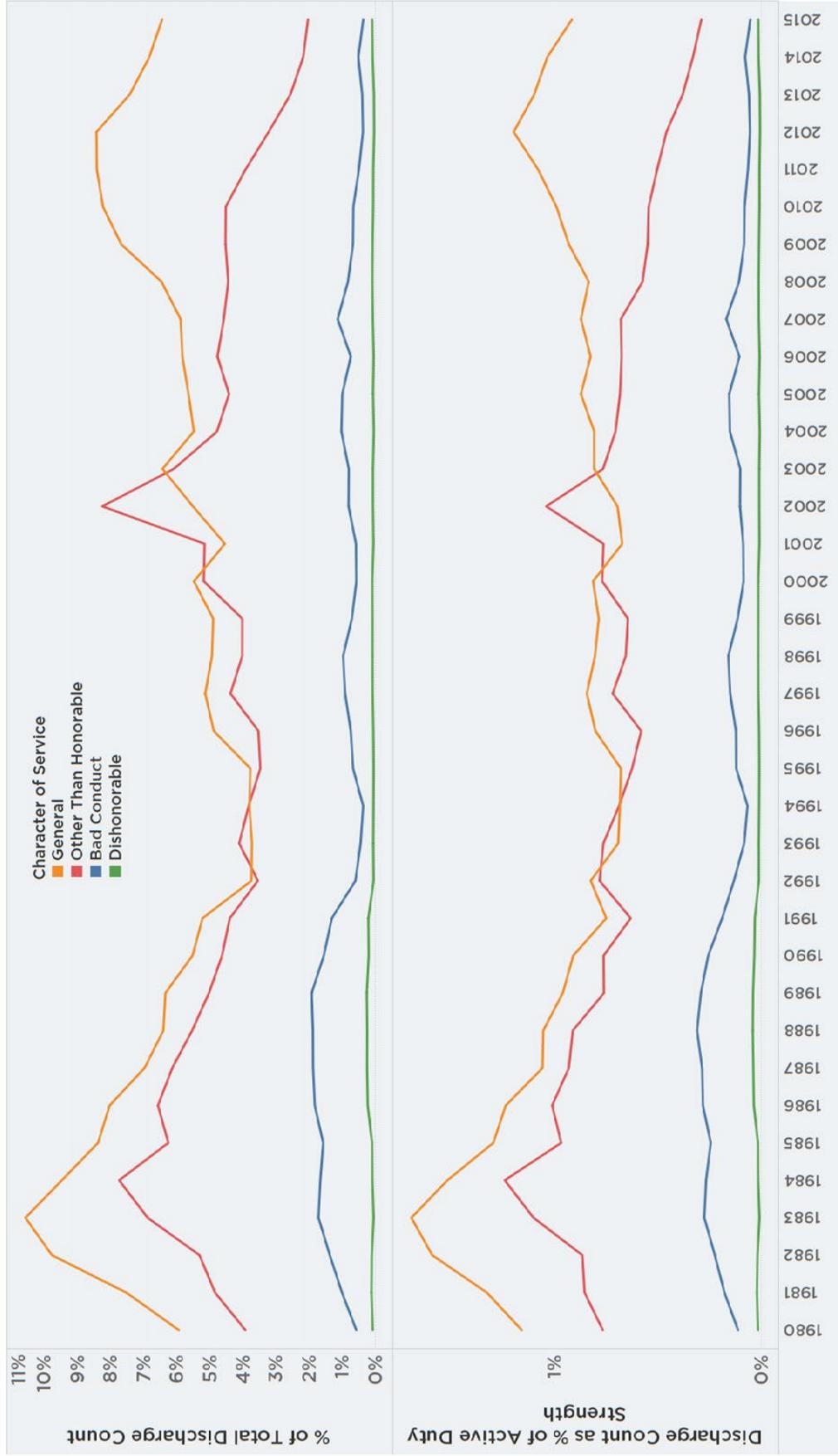
(Air Force, Army, Marine Corps, & Navy Data Combined)



Of the 9,310,285 discharges in FY 1980-2015, roughly 86 percent (7,995,647) are characterized—i.e., the character of service is known and is not listed as Uncharacterized. Of the characterized discharges, 93 percent (7,446,694) list a character of service that would lead to presumptive eligibility for VA benefits—i.e., Honorable (6,849,766) or General Under Honorable Conditions (596,928). There is no indication in the data that discharges related to presumptive ineligibility for VA benefits—i.e., Other than Honorable, Bad Conduct, or Dishonorable—increased during times of downsizing.

FY 1980-2015 Less Than Fully Honorable Discharges

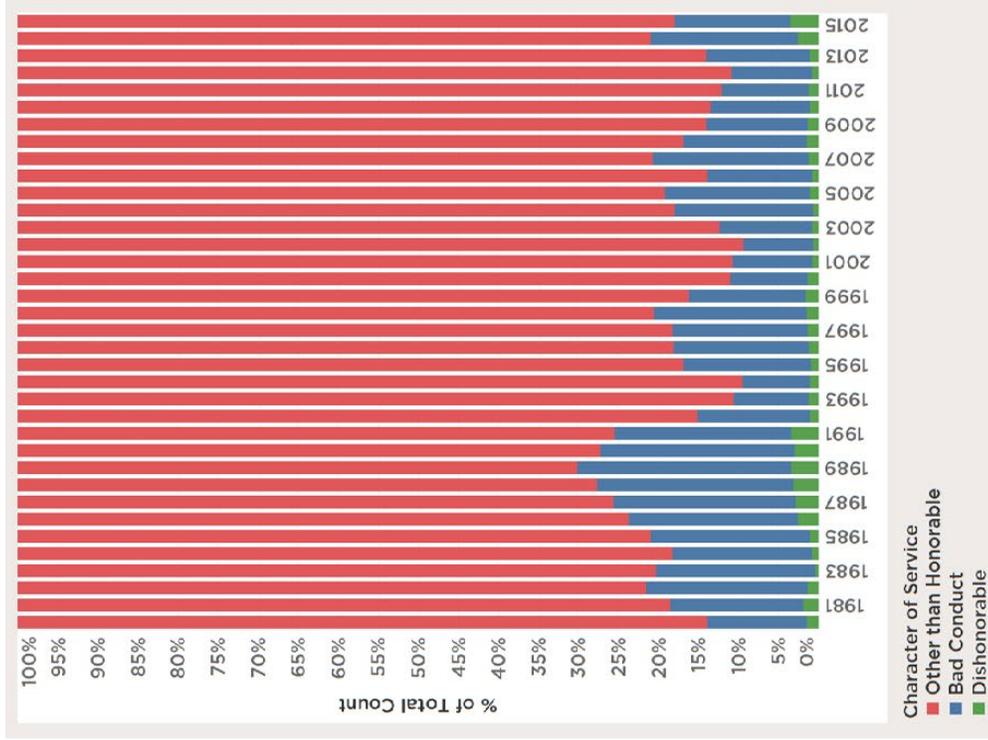
(Air Force, Army, Marine Corps, & Navy Data Combined)
 Uncharacterized and Unknown Not Shown



FY 1980-2015 Other Than Honorable, Bad Conduct, & Dishonorable Discharges

(Air Force, Army, Marine Corps, & Navy Data Combined)

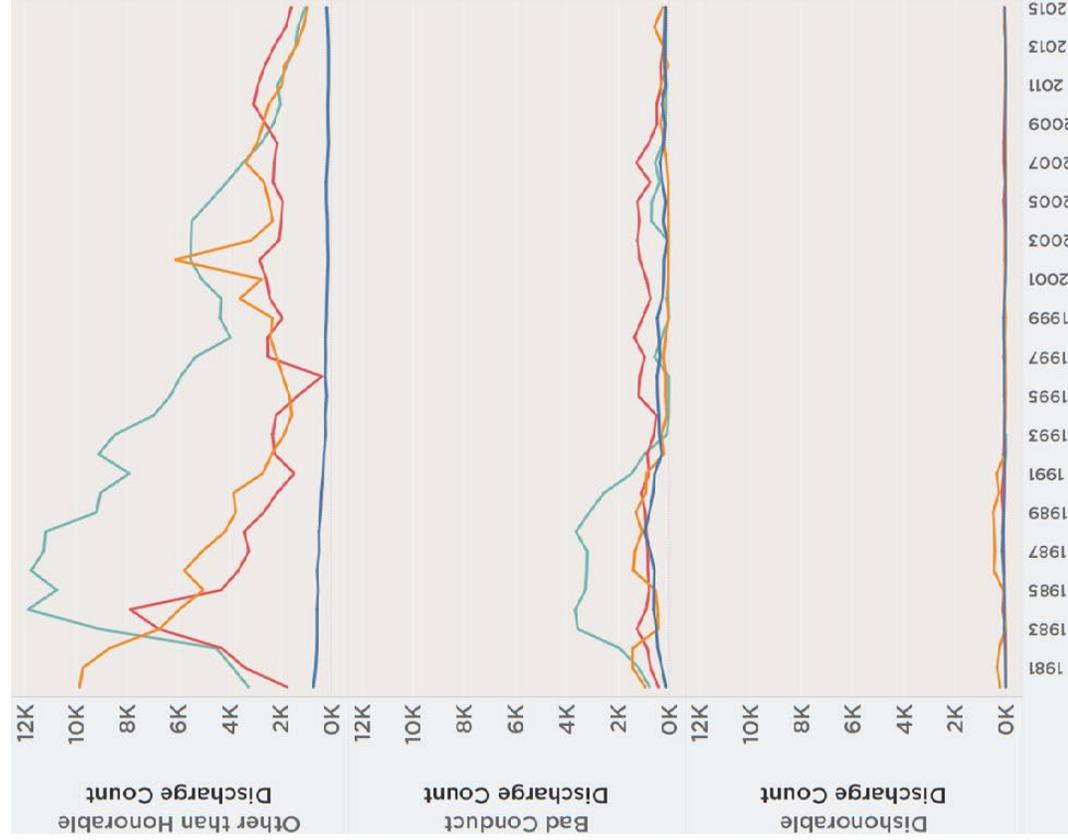
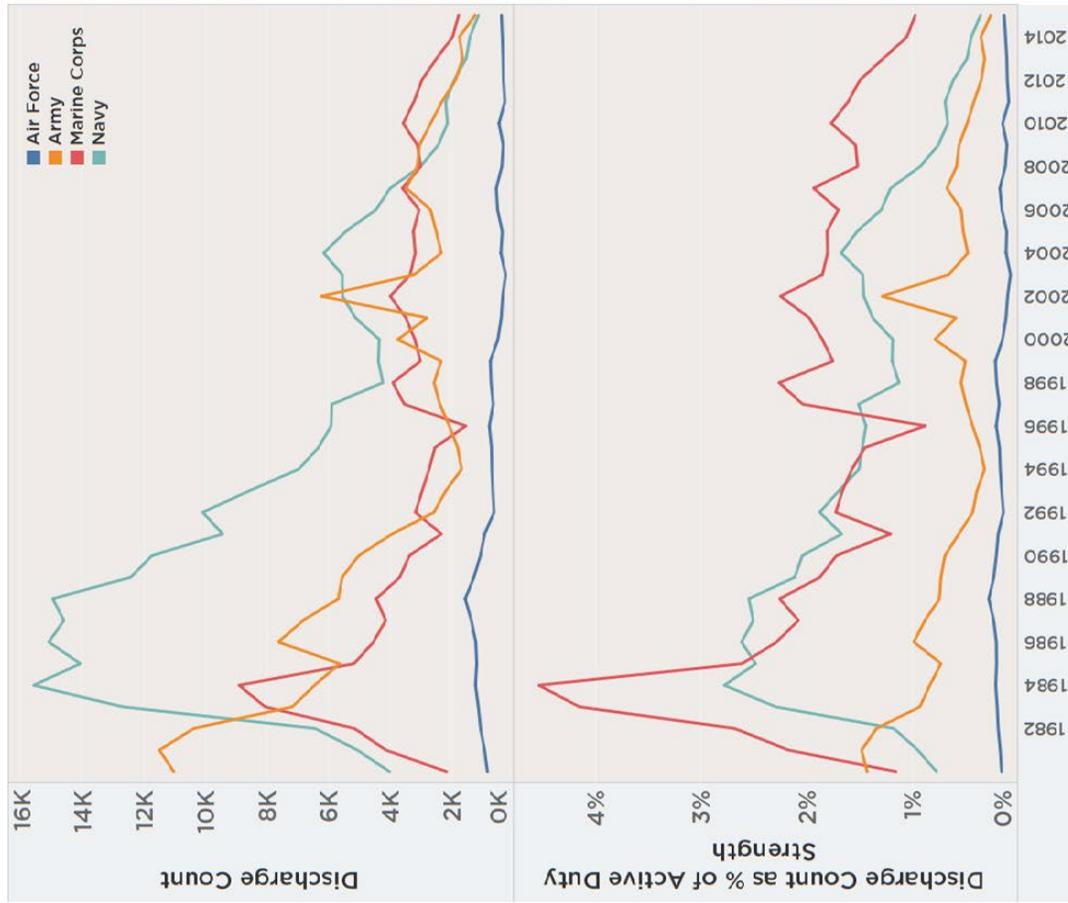
	Other than Honorable	Bad Conduct	Dishonorable	Grand Total
1980	15,560	2,242	272	18,074
1981	17,621	3,633	387	21,641
1982	18,071	4,653	330	23,054
1983	23,182	5,757	138	29,077
1984	26,293	5,617	268	32,178
1985	20,620	5,169	290	26,079
1986	21,735	6,029	725	28,489
1987	20,047	6,122	780	26,949
1988	19,293	6,549	822	26,664
1989	16,048	6,124	790	22,962
1990	15,425	5,160	633	21,218
1991	12,405	3,687	566	16,658
1992	13,982	2,330	168	16,480
1993	12,876	1,361	165	14,402
1994	10,935	1,024	132	12,091
1995	9,479	1,810	112	11,401
1996	8,451	1,756	122	10,329
1997	10,204	2,109	168	12,481
1998	9,103	2,184	173	11,460
1999	8,804	1,537	165	10,506
2000	10,508	1,139	168	11,815
2001	10,550	1,177	95	11,822
2002	14,606	1,416	109	16,131
2003	10,862	1,415	111	12,388
2004	9,914	2,107	74	12,095
2005	9,349	2,094	125	11,568
2006	9,237	1,419	79	10,735
2007	9,236	2,277	133	11,646
2008	7,930	1,461	144	9,535
2009	7,681	1,132	125	8,938
2010	7,677	1,112	92	8,881
2011	7,066	877	94	8,037
2012	6,328	718	51	7,097
2013	5,171	782	65	6,018
2014	4,348	1,006	144	5,498
2015	3,740	657	159	4,556
Grand Total	444,337	95,642	8,974	548,953



Of the characterized discharges, around 7 percent (548,953) list a character of service that would lead to presumptive ineligibility for VA benefits—i.e., Other than Honorable, Bad Conduct, and Dishonorable. Most of those discharges have an Other Than Honorable character of service—81 percent (444,337). Seventeen percent (95,642) have a Bad Conduct character of service, and roughly two percent (8,974) have a Dishonorable character of service.

FY 1980-2015 Discharges Leading to Presumptive VA Ineligibility

(excluding Uncharacterized discharges)



In comparison with the other branches, the Marine Corps often discharged a greater percentage of its servicemembers with characters of service that would lead to presumptive VA ineligibility.

VIII. ENDNOTES

- 1 Adi V. Fundlapalli et al., *Military Misconduct and Homelessness Among US Veterans Separated from Active Duty, 2001-2012*, *Journal of the American Medical Association* 314 (2015); Claire Hoffmire et al., *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans* *Am. J. Prev. Med.* 1,3 (2019); Sara Kintzle et al., *Exploring the Economic and Employment Challenges Facing U.S. Veterans: A Quantitative Study of Volunteers of America Service Providers and Veteran Clients* (May 2015).
- 2 However, some veterans with Honorable discharges may have other stigmatizing or personal information on their DD214s, such as a narrative reason of Personality Disorder.
- 3 38 U.S.C. § 101(2); 38 C.F.R § 3.12.
- 4 Ali R. Tayyeb & Jennifer Greenburg, “Bad Papers”: The Invisible and Increasing Costs of War for Excluded Veterans 9 (June 2017)
- 5 U.S. Gov’t Accountability Off., *GA-17-260, Actions Needed to Ensure Post-Traumatic Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations* 12 (2017)
- 6 Rajeev Ramchand et al., *Prevalence of, Risk Factors for, and Consequences of Posttraumatic Stress Disorder and Other Mental Health Problems in Military Populations Deployed to Iraq and Afghanistan*, *Current Psychiatry Reports* 17:37 (2015); Nancy Lutwak and Curt Dill, *Military Sexual Trauma Increases Risk of Post-Traumatic Stress Disorder and Depression Thereby Amplifying the Possibility of Suicidal Ideation and Cardiovascular Disease*, *Military Medicine*, 359-361 (April 2013).
- 7 Robert H. Pietrzak et al., *Functional Significance of a novel 7-factor model of DSM-5 PTSD Symptoms: Results from the National Health and Resilience in Veterans Study*, *Journal of Affective Disorders*, 522-26 (March 2015).
- 8 U.S. Gov’t Accountability Off., *GA-17-260, Actions Needed to Ensure Post-Traumatic Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations* 1 (2017) (“PTSD, TBI, and other mental and physical conditions can go unrecognized and unacknowledged by the military, family members, and society in general. Because these conditions can adversely affect servicemembers’ moods, thoughts, and behavior, they may lead to disciplinary infractions and subsequent separations for misconduct from the military.”).
- 9 *Id.*; Stephanie Smith Ledesma, *PTSD and Bad Paper Discharges: Why the Fairness to Soldiers Act is Too Little, Too Late*, *Elon L. Rev.*, 10:189, 198-206 (2018).
- 10 Ledesma, *supra* n. 5.
- 11 T. Christian Miller and Daniel Zwerdling, *Brain Injuries Remain Undiagnosed in Thousands of Soldiers*, *Pro Publica* (June 7, 2010), <https://www.propublica.org/article/brain-injuries-remain-undiagnosed-in-thousands-of-soldiers>.
- 12 E. Jones et al., *Shell Shock and Mild Traumatic Brain Injury: A Historical Review*, *Am J. Psychiatry* 1641-45 (2007).
- 13 Richard Bryant, *Post-Traumatic Stress Disorder vs Traumatic Brain Injury*, *Dialogues in Clinical Neuroscience*, 251-62 (Sept. 2011).
- 14 Ledesma, *supra* n. 6.
- 15 Daniel Zwerdling, *Thousands of Soldiers With Mental Health Disorders Kicked Out For “Misconduct”*, *NPR* (October 28, 2015) <https://www.npr.org/sections/thetwo-way/2015/10/28/452652731/thousands-of-soldiers-with-mental-health-disorders-kicked-out-for-misconduct>.
- 16 Brandon Alford & Shawna J. Lee, *Toward Complete Inclusion: Lesbian, Gay, Bisexual, and Transgender Military Service Members After Repeal of Don’t Ask, Don’t Tell*, 61 *Soc. Work* 257, 260 (2016).
- 17 See, e.g., Department of Defense, *Report of the Task Force on the Administration of Military Justice* (Nov. 1972).
- 18 Don Christensen et. al., *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities within the United States Military Justice System*, at ii (May 2017).

- 19 U.S. Gov't Accountability Off., FPCD-80-13, *Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review is Needed* (1980).
- 20 Veterans Legal Clinic, Legal Servs. Ctr. of Harvard Law Sch., *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper Discharges* 9 (2016), <https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf>
- 21 See Tayyeb & Greenburg, "Bad Papers" at 9, 14
- 22 See Chuck Hagel, Secretary of Defense, Memorandum, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (Sep. 3, 2014) ("Hagel Memorandum"); Brad Carson, Principal Deputy Under Secretary of Defense, Memorandum, Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) (Feb. 24, 2016) ("Carson Memorandum"); A.M. Kurta, Under Secretary of Defense, Memorandum, Clarifying Guidance to the Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (Aug. 25, 2017) ("Kurta Memorandum").
- 23 Claire Hoffmire et al. Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans *Am. J. Prev. Med* 1,3 (2019)
- 24 38 U.S.C. § 5102(a); 38 C.F.R. § 3.150.
- 25 38 U.S.C. § 5103A; 38 C.F.R. § 3.159.
- 26 38 U.S.C. § 5014.
- 27 38 U.S.C. §§ 101(2), 101(18); Pub. L. 95-126, 38 C.F.R. § 3.360. Under a VA policy effective July 2017, VA is authorized to provide 90 days of emergency care to veterans with Other Than Honorable discharges who are experiencing mental health crises. Press Release, U.S. Dep't of Veterans Affairs, VA Secretary Formalizes Expansion of Emergency Mental Health Care to Former Service Members with Other-Than-Honorable Discharges (June 27, 2017), <https://www.va.gov/OPA/pressrel/pressrelease.cfm?id=2923>. A recently enacted law also allows VA to provide mental health treatment to veterans with Other Than Honorable discharges who were diagnosed with a mental health condition during service or in the five years after discharge. 38 U.S.C. § 1712l.
- 28 Veterans Legal Clinic, *Underserved* at 11.
- 29 See 38 C.F.R. § 17.34.
- 30 VA is currently in the process of revising these substantive character of discharge regulations, 38 C.F.R. § 3.12.
- 31 Veterans Health Administration, IB 10-448, *Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits* (May 2017); Veterans Benefits Administration, M21-1 Manual § III.v.1.B (Feb. 19, 2019); Veterans Benefits Administration, M21-1 Manual § III.v.7.A (March 11, 2019).
- 32 Steve Walsh, *VA Struggles to Reach Other-Than-Honorable-Discharge Vets in Need of Help*, NPR (Oct. 18, 2018), available at <https://www.npr.org/2018/10/18/657789457/va-struggles-to-reach-other-than-honorable-discharge-vets-in-need-of-help>.
- 33 Steve Walsh, *VA Program to Lower Suicide Rate Has Few Takers*, KPBS (Sep. 4, 2018). This low number of veterans who used VA's 90-day emergency access policy stands in contrast to VA's estimate that 30,000 to 50,000 veterans per year would use such services. Committee to Evaluate the Dep't of Veterans Affairs Mental Health Services, *Evaluation of the Dep't of Veterans Affairs Mental Health Services: Consensus Study Report 301* (2018), available at <https://www.nap.edu/read/24915/>.
- 34 See, e.g., Veterans Health Administration, IB 10-448, *Other Than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits* (May 2017), available at https://www.va.gov/healthbenefits/resources/publications/IB10-448_other_than_honorable_discharges5_17.pdf; Veterans Benefits Administration, *Claims for VA Benefits & Character of Discharge: General Information* (March 2014), available at https://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf.
- 35 Veterans Legal Clinic, *Underserved*, supra note 14, at 13, 53.

- 36 Robyn Highfill-McRoy et al., Psychiatric Diagnoses and Punishment for Misconduct: the Effects of PTSD in Combat-Deployed Marines, 10 BMC Psychiatry 88 (2010)
- 37 Charles Hoge et al., Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care, 351 New England J Med. 13 (2004).
- 38 GAO, supra note 13, at 12
- 39 Id. at 14.
- 40 Emily Brignone et al., Non-Routine Discharge from Military Service: Mental Illness, Substance Use Disorders, and Suicidality, 52 Am J. Prev. Med., 557, 558
- 41 Id. at 561.

OUTVETS is a national nonpartisan, nonpolitical charitable organization dedicated to recognizing and honoring the contributions and sacrifices of LGBTQ veterans, active service members, and their families through social interaction, community service, and public awareness. Founded in 2014 on the anniversary of the repeal of Don't Ask, Don't Tell, OUTVETS's mission is to serve the community, educate the public about the sacrifices of LGBTQ service members, and provide its members with the camaraderie they experienced in service. For more information, go to www.outvets.com.

The Veterans Legal Clinic at the Legal Services Center of Harvard Law School provides pro bono representation to veterans and their family members in a range of veterans and military law matters, as well as pursues initiatives to reform the systems that serve the veterans community. Located at the crossroads of Jamaica Plain and Roxbury, the Legal Services Center is composed of six clinics—the Veterans Legal Clinic, Consumer Law/Predatory Lending Clinic, Housing Law Clinic, Family Law/Domestic Violence Clinic, Federal Tax Clinic, and LGBTQ+ Advocacy Clinic—and is Harvard Law School's largest clinical placement site. The Center's longstanding mission is to educate law students for practice and professional service while simultaneously meeting the critical legal needs of the community. For more information, go to www.legalservicescenter.org.

Veterans Legal Services (VLS) promotes self-sufficiency, stability, and financial security for veterans in Massachusetts through comprehensive and accessible legal services. VLS's unique model of delivering services on-site at homeless shelters and service centers allows it to reach veterans who would otherwise go without the legal help they need. Our partnerships with shelters, courts, and supportive services providers enable VLS to make legal services accessible and collaborate with other professionals, ensuring the best chance of veteran success. For more information, go to www.veteranslegalservices.org.