

PETITION FOR RULEMAKING

TO AMEND

38 C.F.R. §§ 3.12(a), 3.12(d), 17.34, 17.36(d)

REGULATIONS INTERPRETING 38 U.S.C. § 101(2)

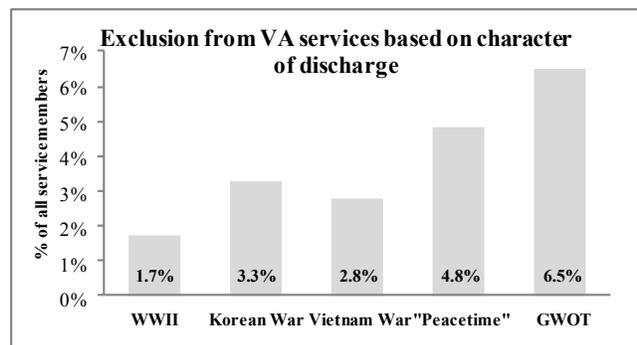
REQUIREMENT FOR SERVICE “UNDER CONDITIONS OTHER THAN DISHONORABLE”

- I. EXECUTIVE SUMMARY 2**
- II. THE STATUTORY REQUIREMENT FOR DISCHARGE “UNDER CONDITIONS OTHER THAN DISHONORABLE” AUTHORIZES THE VA TO EXCLUDE ONLY SERVICE MEMBERS WHOSE CONDUCT WOULD JUSTIFY A DISHONORABLE DISCHARGE CHARACTERIZATION 5**
- III. CURRENT REGULATIONS 35**
- IV. THE CURRENT REGULATORY SCHEME IS UNJUST, INCOMPATIBLE WITH STATUTORY OBLIGATIONS, AND UNDULY BURDENSOME ON BOTH VETERANS AND THE VA 49**
 - A. VA REGULATIONS ARE EXCLUDING CURRENT-ERA SERVICE MEMBERS AT A HIGHER RATE THAN AT ANY OTHER PERIOD IN THE NATION’S HISTORY 49
 - B. THE REGULATIONS ARE AN IMPERMISSIBLE INTERPRETATION OF STATUTE BECAUSE THEY DO NOT ADOPT MILITARY “DISHONORABLE” DISCHARGE STANDARDS 55
 - C. THE REGULATIONS FAIL TO ACCOUNT FOR BEHAVIORAL HEALTH ISSUES SUCH AS PTSD OR TBI 64
 - D. OVERBROAD AND VAGUE REGULATIONS PRODUCE INCONSISTENT OUTCOMES 67
 - E. THE REGULATIONS ARE INCONSISTENT WITH THE VA'S PUBLIC AND OFFICIAL COMMITMENTS 71
 - F. VA REGULATIONS PREVENT THE VA FROM SERVING HOMELESS, SUICIDAL OR JUSTICE-INVOLVED SERVICE MEMBERS 73
 - G. THE PROCEDURES TO OBTAIN AN INDIVIDUAL REVIEW ARE EXTREMELY BURDENSOME ON SERVICE MEMBERS AND ON THE VA 75
 - H. THE REGULATIONS UNFAIRLY DISADVANTAGE SERVICE MEMBERS FROM CERTAIN MILITARY BRANCHES 79
 - I. THE REGULATION UNLAWFULLY DISCRIMINATES AGAINST HOMOSEXUAL CONDUCT 82
 - J. THE GOVERNMENT COST ASSOCIATED WITH INCREASED ELIGIBILITY WOULD BE LARGELY OFFSET BY REDUCTIONS IN NON-VETERAN ENTITLEMENT PROGRAMS AND HEALTH CARE SAVINGS 83
- V. EXPLANATION OF PROPOSED AMENDMENTS TO ALIGN VA REGULATIONS WITH STATUTORY AUTHORITY, OFFICIAL COMMITMENTS, AND PUBLIC EXPECTATIONS FOR THE FAIR TREATMENT OF VETERANS 86**
- VI. CONCLUSION 106**

I. EXECUTIVE SUMMARY

The Department of Veterans Affairs (VA) does not recognize all former service members as veterans. Since 2001, about 125,000 people have been discharged from active military service who do not have veteran status at the VA. This includes at least 30,000 service members¹ who deployed to a contingency operation during their service. The rate of exclusion from VA services is higher now than at any earlier period: it is three times as high as for Vietnam-era services and four times as high as for WWII-era service members.

Almost all of these exclusions are the result of discretionary policies that the VA itself chose and that the VA is free to modify. Congress identified certain forms of misconduct that must result in an exclusion from VA services. In addition, Congress gave the VA authority to exclude other service members at its own discretion. The VA decides which service members will require an evaluation, and it decides the standards to apply. These discretionary standards are responsible for 85% of exclusions; only 15% are due to standards set by Congress.



These are some of the veterans most in need of its support. One study showed that Marine Corps combat veterans with PTSD diagnoses were eleven times more likely to get misconduct discharges, because their behavior changes made them unable to maintain military discipline. Since 2009, the Army gave non-punitive misconduct discharges to over 20,000 soldiers after diagnosing them with PTSD. Yet they can access almost no services because the VA does not recognize them as veterans. They have access to almost no health care or disability assistance from the VA, they do not have access to services that address chronic homelessness, and they generally do not have access to specialized services like veterans treatment courts. The

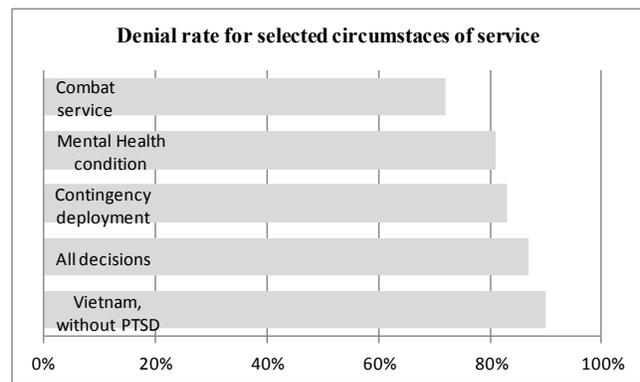
¹ The term “service members” will be used throughout the petition to refer to all individuals who served in the armed forces at any point in their lives, not merely those currently serving, and including both those who meet the statutory definition of “veteran” and those who do not.

effects of this exclusion are devastating: the suicide rate among these veterans is twice as high as for other veterans; the rates of homelessness and incarceration are at least 50% higher.

The VA requires an individual eligibility review for about 7,000 service members discharged each year. This currently takes an average of approximately 1,200 days to complete, and VA regulations do not provide tentative eligibility for health care in the meantime. These reviews are not automatic, though, and most service members do not receive this review at all: only 10% of the post-2001 service members who require a review have received one.

The denial rate is remarkably high. In FY2013, the VA denied eligibility in 90% of the cases it reviewed. The VA's standards fail to account for essential information about a veteran's service:

- Mental health.** The VA's standards only account for mental health problems that rise to the level of "insanity." This typically does not account for behavioral health problems associated with military service. An analysis of 999 BVA eligibility decisions issued between 1992 and 2015 found that the VA denied eligibility in 81% of cases where the veteran reported PTSD.



- Duration and quality of service.** The VA's standards do not consider duration of service, and consider quality of service only in limited circumstances. When quality of service is considered, it applies a high standard that does not treat combat service as inherently meritorious. VA appeals decisions denied eligibility to 77% of claimants who had combat service.
- Hardship service.** The VA's standards do not consider whether the person's service included hardship conditions such as overseas deployment. VA appeals decisions denied eligibility to 83% of those who served in Vietnam, Iraq, Afghanistan or other contingency operations.

- **Extenuating circumstances.** The VA's standards do not consider extenuating circumstances such as physical health, operational stress, or other personal events that might explain behavior changes.

The regulation's vague terms produce inconsistent outcomes. In FY2013, denial rates at different Regional Offices varied between 100% in Los Angeles and 65% in Boston. Between 1992 and 2015, denial rates by individual Veterans Law Judges varied between 100% and 45%.

The VA's standards and practices violate the express instructions of Congress. Congress instructed the VA to exclude only service members whose conduct in service would have justified a dishonorable discharge characterization. Military law contains guidance about what conduct warrants a dishonorable characterization. Yet the VA's regulations depart drastically from the military-law standard. They exclude tens of thousands of service members for minor or moderate discipline problems that never would have justified a punitive characterization. Because of differences in discharge practices between service branches, the VA excludes Marines more than ten times as frequently as Airmen.

This Petition proposes amendments to regulations that will remedy these deficiencies. The proposed amendments make the following changes:

- Standards of review. Adopt standards for "dishonorable conditions" that consider severity of misconduct, overall quality of service, behavioral health, and other mitigating factors.
- Scope of review. Require individual evaluation only for service members with punitive discharges and those with administrative discharges issued in lieu of court-martial.
- Access to health care. Instruct VA medical centers to initiate eligibility reviews for service members who require it, and to provide tentative eligibility.