

# Chapter 8

## Military Discipline and the Incarcerated Veteran



Evan R. Seamone

*Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.*

– A. M. Kurta (2017, ¶ 6)  
U.S. Department of Defense

### Introduction

Since the origins of the naval and land forces, militaries have relied upon a unique system of discipline to keep troops in line (Winthrop, 1920). Severe penalties for breaches of order within the ranks—often including death—served as leverage to enforce command directives and overcome the powerful instinct of self-preservation impulses on the battlefield (Gabriel, 1987). When dispensing justice, these differences have stood in stark contrast to the traditional civilian justice system's objective to balance society's interests against the offender's interest (Seamone et al., 2014).

In a widely publicized court-martial, Army Sergeant Robert “Bowe” Bergdahl was sentenced by a military judge to a Dishonorable Discharge, reduction to the lowest rank, forfeiture of \$1000 per month for 10 months, and no term of confinement for misbehavior before the enemy and desertion (Oppel, 2017). While some

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E. R. Seamone (✉)  
Veterans Benefits Attorney, Loxley Services, and Major, U.S. Army Reserve,  
Gainesville, FL, USA

seasoned military veterans believed that Bergdahl should have been confined for many years or the maximum term of life given the deaths of soldiers on search parties (Oppel, 2017), others argued that he should be spared military punishment due to his severe Posttraumatic Stress Disorder (PTSD) from being held captive by the Taliban in deplorable conditions for many years (Cuthbert, 2017a, 2017b). This puzzling sentence underscores the isolated and incomparable nature of the military justice system.

One question that emerged was whether Mr. Bergdahl should be spared a punitive discharge from the court, which would likely bar him from receiving benefits and treatment from the Department of Veterans Affairs (VA), given that he would require such care for years to come (Cuthbert, 2017a). While the military judge's sentence included the worst type discharge Mr. Bergdahl could receive, cementing his ineligibility for future care (Brooker, Seamone, & Rogall, 2012), Mr. Bergdahl still left the courtroom as a free man.

Bergdahl's court-martial echoes some key themes that characterize the military justice system: First, military discipline operates with different considerations in mind. That is, while civilian justice requires the balance of the interests of society against the interest of the defendant, military justice considers preservation of good order and discipline within the ranks as a necessary third element. As the Court of Federal Claims confirmed long ago, "The power to command depends upon discipline, and discipline depends upon the power to punish" (*Swaim v. United States*, 1893, p. 221). Second, military sentencing authorities need to consider various factors in arriving at the appropriate punishment, including mental health conditions sustained during the course of one's service (Seamone, 2011; Seamone et al., 2014; Seamone et al., 2017). Finally, even with the exception of strict sentencing protocols for sex crimes, there is great variability and subjectivity in the outcome that is ultimately doled out at a court-martial or a separation board (Seamone, 2011, 2013).

This chapter explores the procedures and consequences of the military justice system and the manner in which it impacts incarcerated veterans, sometimes long after their service. Part II explores the different types of disciplinary proceedings and the range of punishments that can result from each one. Part III discusses the most severe form of military discipline through trial by court-martial. Part IV then describes the impact of less-than-honorable discharge characterizations ("bad paper"), to include consequences on veterans' benefits and in civilian life. This part also explores a growing body of research linking stigmatizing discharge characterizations to poor health outcomes, criminal justice involvement, and significant social consequences. Part IV further discusses standards for obtaining VA benefits or upgrading discharges through military review boards despite bad paper designations. Part V concludes by summarizing different measures within confined settings to assist veterans impacted by the military justice system in a manner that assists re-entry and reduces criminal recidivism.

## Pathways to Military Discipline

Unlike the civilian criminal justice system, in which district attorneys are responsible for pursuing criminal charges and considering alternative disposition of cases, the military justice system reserves ultimate decision-making authority to military commanders at all stages of the process (Seamone, 2011). In this “command controlled” system, the same general officer who decides to send a case to court-martial also selects the members of the military jury and decides whether to approve the conviction and sentence (Seamone, 2011). While the general receives advice from a military lawyer throughout the process, the legal guidance is not binding. With the exception of sexual assault,<sup>1</sup> substantial command discretion still exists. Rule for Court-Martial 306(c)(1) explicitly states that a commander has the inherent authority to “decide to take no action on an offense” after a violation is known or suspected.

In practice, most military discipline never reaches the level of a court-martial. All military leaders are encouraged to resolve issues at the lowest level and they enjoy a wide arsenal to address minor misconduct (Seamone et al., 2014). Rule for Court-Martial 306(c)(2) describes a host of administrative actions that are supposed to be “corrective” in nature rather than punitive, including any combination of “counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, rebuke, extra duty, military instruction, or the administrative withholding of privileges....” The discussion to the Rule further includes administrative action authorized through the service secretaries, such as “efficiency reports, academic reports, and other reports; rehabilitation and reassignment; career field reclassification; administrative reduction for inefficiency; bar to reenlistment; personnel reliability program reclassification; security classification changes; pecuniary liability for negligence or misconduct; and administrative separation” (Rule for-Court-Martial 306, Discussion).

Because most recruits are young, have just graduated high school, and may face challenges adjusting to the transition from civilian to warrior, flexibility is required to deal with offenses like the failure to report for duty on time, underage drinking, a disrespectful comment, or the failure to be in the appropriate uniform. Minor misconduct does not normally lead to court-martial or even less formal administrative sanctions. The six command options below describe progressively severe forms of administrative action commonly used by commanders. Commanders can impose multiple options simultaneously.

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<sup>1</sup>In 2013, through the 2014 National Defense Authorization Act, Congress fundamentally altered the commander’s clemency powers in the face of outrage over an Air Force General’s decision to reverse a military jury’s conviction of an officer for the crime of rape (Simms, 2014). Scrutiny over command discretion led to new standards mandating special procedures in sexual assault cases and stripping commanders of post-conviction clemency in serious cases (National Defense Authorization Act of 2014, 2013).

## *Written Counseling*

The first step along the continuum of military discipline is a written counseling statement in which a responsible leader gives the service member an opportunity to respond, identifies a plan to address the behavior, and warns the service member about the potential consequences of military misconduct (e.g., U.S. Department of Army, 2014, p. 1–2 ¶ 1–7). The language below is a representative counseling template, which may vary based upon the Service and the counselor:

You are being counseled for the above indicated misconduct and/or unsatisfactory duty performance IAW AR 635-200, 1-16b. Continued behavior of this kind may result in initiation of separation action to eliminate you from the Army or non-judicial punishment. Any further acts of misconduct or unsatisfactory performance may cause you to be eliminated without further counseling. If you are administratively separated from the Army, you could receive an Honorable (HON), General Under Honorable (GEN) or an Other Than Honorable (OTH) Conditions Discharge. Any less than Honorable discharge could deprive you of many or all military and Veterans Administration (VA) benefits including loss of both education benefits and civil service retirement credit. A negative characterization of your service can have lasting negative impact on future civilian employment. Should you receive a discharge less favorable than Honorable you may apply to have your characterization of service upgraded by the Army Board for the Correction of Military Records and/or the Army Discharge Review Board (Army Writer, n.d.)

In some cases, such as the service member who has engaged in multiple instances of misconduct, regulations may require notice and the opportunity to correct one's deficiencies prior to involuntary separation. Commanders have different ways of documenting counseling, but such statements usually record the bases that later result in administrative or judicial action. Beyond the written counseling, leaders can require the service member to take corrective action at the individual level.

## *Corrective Training*

Commanders can deter unwanted behavior by assigning corrective training. The classic example might be to assign push-ups or other physical exercises as an “on-the-spot” correction for an infraction. While this is common practice in basic training environments, regulations emphasize the importance of tailoring the corrective training to a specific deficiency. For example, a service member who fails to show up on time to morning training may be required to write an essay about the importance of showing up to work on time and then report to scheduled formations a half-hour early for a week. Whatever the form, corrective training aims “to correct a deficiency in the servicemember’s ability to perform the mission” (Gilligan & Lederer, 2017, § 3-20.00).

### *Letters of Reprimand*

Commanders can recommend or issue written reprimands, normally signed by a general officer. This officer can file the letter in the service member's official military personnel file, where it will follow the individual throughout his or her career, or in the local file, which is normally destroyed upon the service member's departure to a new command. The Manual for Court-Martial recognizes that such reprimands are "corrective," rather than "punitive" measures (Department of Defense, 2012, Part V, p. 1g). Issuance of a General Officer Memorandum/Letter of Reprimand ("GOMOR") usually marks the end of one's military career and may trigger administrative separation (Bojan, 2016). Commanders often have policies that mandate the issuance of a GOMOR, such as an arrest for driving under the influence on or off the military installation, or negligently discharging a firearm either in training or a combat setting. While service members may submit rebuttal matters prior to the filing determination in support of a request for local filing, governing standards will support official filing in all but the rarest of circumstances, such as demonstrably false statements in the memorandum (Bojan, 2016).

### *Nonjudicial Punishment*

Commanders can also impose nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (10 U.S.C. § 815). In these more formal proceedings, the commander advises the service member that there is enough evidence to bring charges at a court-martial and the service member will agree to participate in the proceedings or reject the administrative punishment and demand a court-martial. During Article 15 proceedings, the imposing commander presides and holds a hearing to determine the issue of guilt and punishment, including reduction of rank, fines, and restrictions on one's liberty but nothing approaching a federal conviction or imprisonment (Gilligan & Lederer, 2017).<sup>2</sup> Many service members elect the administrative process to avoid the possibility of court-martial and a federal conviction. A service member electing NJP can ask for a hearing on the merits of the charges or plead guilty. While he or she may normally consult with a military attorney to review the strength of the case, there is no right to representation from a military lawyer at the NJP proceedings.

Even though the military generally considers NJP appropriate for minor offenses (Gilligan & Lederer, 2017), these proceedings can have lasting consequences. Officially filed NJP records often lead to non-selection for promotion or the initiation

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<sup>2</sup>The severity of punishment depends on the level of NJP and the recipient's rank, with a summary court-martial imposing the least punishment and a General Officer Article 15 imposing the greatest punishment (Article 15, Uniform Code of Military Justice).

of involuntary separation proceedings. Very often, commanders will issue a punishment, such as rank reduction or a fine, and immediately suspend the punishment, providing an incentive for the NJP recipient to improve his or her performance. Suspensions can be removed (vacated) for future acts of misconduct, leaving the service member with the original punishment and exposure to additional NJP for the more recent misconduct.

### ***Summary Courts-Martial***

The Summary Court-Martial is the least severe form of court-martial (compared to the Special and General Court-Martial). A Summary Court-Martial does not result in a federal conviction, even if the hearing officer finds the service member guilty of certain offenses. The proceeding is administrative, as opposed to punitive, because the authorized punishment at this low level cannot include any type of discharge from the Service. A punitive discharge is only available when the law authorizes discharge as a lawful punishment for a conviction. Even with these limitations in mind, the Summary Court-Martial represents the most aggressive form of administrative discipline short of being kicked out of the military (10 U.S.C. § 820).<sup>3</sup> As one of several other limitations, lower ranking service members may be exposed to 30 days' confinement and reduction in rank, which exceed the maximum punishment authorized at NJP proceedings.

Because the stakes are lower than a punitive court-martial, the accused has fewer rights at a Summary Court-Martial. The service member is not eligible for representation from a military attorney during the hearing proceedings and he or she is not entitled to the fact-finding of a military judge. Instead, a non-lawyer officer is usually appointed to find facts and adjudge punishment with the aid of an advising attorney. This officer acts "as judge, factfinder, prosecutor, and defense counsel" (*Middendorf v. Henry*, 1976, p. 32). For a number of reasons, including conservation of time and resources, a commander might choose a summary court-martial followed by an administrative separation, rather than a court-martial. The commander may desire the deterrent effect of sending the offender to jail in shackles closer to the time of his or her offense, rather than waiting for many months of proceedings that are required for a special or general court-martial.

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<sup>3</sup>The U.S. Supreme Court has observed that the Summary Court-Martial "occupies a position between informal nonjudicial disposition under Article 15 and the courtroom type procedure of the general and special courts-martial" (*Middendorf v. Henry*, 1976, p. 32).

## *Administrative Separation Proceedings*

The administrative separation (ADSEP) proceeding is the military's method of terminating a service member's military status prior to the completion of a contractual term of enlistment. Although some service members request ADSEPs for a host of reasons, commanders can involuntarily separate a service member based upon civilian or military misconduct. Not all service members have the right to a hearing when the command initiates involuntary separation. Moreover, many who have the right to a hearing do not exercise the right.

Separation proceedings have evolved over time since their origin in the 1800s (Sandel, 1984). First, a board of leaders will hear the facts and circumstances and determine whether the service member committed the alleged misconduct. Second, the board members will determine whether the misconduct should result in involuntary separation and a specific type of discharge classification (e.g., Honorable, General, or Other-Than Honorable (OTH)). The administrative nature of these proceedings signifies that the discharge from such proceedings was not supposed to be considered as punishment.

Despite this purely administrative nature, any discharge prior to the completion of one's service brings some degree of stigma in society because it reveals that the military deemed the service member as unfit for military service (Sandel, 1984). The military's own standards recognize the gravity of this consequence by according service members the right to defend against an involuntary separation at an official hearing as long as the service member has 6 or more years of prior service in the military or has been recommended for a discharge that could lead to an OTH characterization.

Aside from recent requirements mandating OTH discharges at administrative separation proceedings related to sexual offenses, not all involuntary separations can or must lead to a bad paper discharge. For example, when the military discharges a service member solely on the basis of unsatisfactory performance or failing to meet the standards required of a soldier, sailor, airman, or marine, the service member will receive a fully honorable discharge if the board votes for separation. Presently, bad paper discharges are reserved for acts of misconduct or are given in lieu of trial by court-martial (U.S. Department of Defense, 2017).

## *Discharge Characterizations at Administrative Separation Proceedings*

### **Honorable Discharge**

Modernly, there are three types of administrative discharge: Honorable, General, and OTH (formerly known as Undesirable until the mid-70s). The Honorable Discharge represents the best characterization and the greatest number of discharges among veterans—usually over 90% (Legal Services Center, 2016). While this discharge

does not indicate perfect performance, it means that “the quality of the ... Service member’s service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate” (Department of Defense, 2017, Enclosure 4, p. 30 ¶ 3.b(2)(a)).

### **General Under Honorable Conditions Discharge**

The General Discharge represents a discharge under honorable conditions, which is not as meritorious as an Honorable Discharge. The Department of Defense Directive on administrative separations explains that the General Discharge denotes “service that is honest and faithful ... when the positive aspects of the enlisted Service member’s conduct or performance of duty outweigh negative aspects of the enlisted Service member’s conduct or performance of duty as documented in their service record” (Department of Defense, 2017, Enclosure 4, p. 30 ¶ 3.b(2)(b)). The biggest consequence of a General Discharge is ineligibility for G.I. Bill educational benefits. Aside from this limitation, the General Discharge still permits a recipient to enjoy the same host of veterans’ benefits that are available to the recipient of an Honorable Discharge. Despite eligibility for almost all veteran rights and privileges, anything besides Honorable brings stigma, as the District of Columbia Circuit Court of Appeals observed:

Job application forms almost universally require a statement as to military service and the type of discharge received; since about ninety per cent of the discharges issued are honorable, disclosure of discharge in any other form is ordinarily certain to produce further inquiry with predictable results (*Bland v. Connally*, 1961, p. 858 n.10)

Courts have routinely declined to find the same type of stigma from a General Discharge as an OTH.

### **Undesirable and Other-Than-Honorable Discharges**

The Other-Than-Honorable Discharge began with the name “Undesirable.” The military changed the name and the corresponding certificate in 1977 (Editorial, 1977, p. 52; Egeland, 1977, p. 198). The current Department of Defense Directive on administrative separations authorizes an OTH under two circumstances: when (1) a pattern of behavior or (2) one or more acts or omissions “constitute a significant departure from the conduct expected of enlisted Service members of the Military Services” (Department of Defense, 2017, Enclosure 4, pp. 30–31 ¶¶ 2c(1)(a)–(b)). The Directive provides examples of specific factors surrounding conduct including,

use of force or violence to produce bodily injury or death; abuse of a special position of trust; disregard by a superior of customary superior-subordinate relationships; acts or omissions that endanger the security of the United States or health and welfare of other Service members of the Military Services; and deliberate acts or omissions that seriously endanger the health and safety of other persons (Department of Defense, 2017, Enclosure 4, p. 31 ¶2c(1)(b))



In light of widespread decriminalization of possession of small amounts of marijuana, officials in the Department of Defense have questioned whether this offense should result in an OTH (e.g., Kurta, 2017).

Troubling studies reporting increased OTH discharges among veterans diagnosed with service-connected mental health conditions (Legal Services Center, 2016; U.S. Government Accountability Office, 2017) have led the DoD to revise the administrative discharge process because of post-service consequences. This seriousness is evident in the requirement that any service member who faces the possibility of an OTH discharge has the choice to demand that his or her case be heard by a separation board. Practical consequences of the OTH discharge is automatic reduction of the service member's rank to the lowest enlisted grade, E-1, eviscerating any benefits that would have accumulated due to seniority, elimination of all accrued leave, termination of the ability to have one's goods shipped home, and loss of the right to even wear the uniform on special occasions.

Additionally, the OTH will prevent a veteran from receiving veterans preference for public sector hiring determinations, could result in the loss of naturalization for immigrant veterans, and may prevent licensure or bonding in a given professional field. These significant consequences have remained relatively unchanged through the decades (Brooker et al., 2012; Doan, 1976; Effron, 1974; Jones, 1973). Given the potential consequences of an OTH, commanders can normally recommend an OTH only if the underlying offense would have made the service member eligible for a punitive discharge at a court-martial (Department of Defense, 2017). An exception to this rule is the cumulative effect of an ongoing pattern of minor misconduct over a period of time that would warrant an OTH.

### **The Service Member's Rights When Facing Involuntary Administrative Separation**

Most service members recommended for involuntary separation have the right to consult with military attorneys in deciding whether to demand or waive board proceedings. Since Vietnam, the military has realized that administrative separations can be cost and time saving over pursuing charges at a court-martial (Brooker et al., 2012). Compared with courts-martial, administrative separation proceedings offer service members fewer rights and procedural protections. For example, the rules of evidence do not apply, permitting written statements without the need to bring witnesses. Also, the standard of proof is preponderance of the evidence—more likely than not—rather than beyond a reasonable doubt (Irwin, 2017). In many cases, evidence obtained in violation of one's rights may still be admissible at a separation proceeding even if it would have been barred by rules of evidence in a court-martial (Irwin, 2017).

After media and government investigations and reports, the military recognized that military misconduct may be related to a service member's military trauma (Seamone et al., 2017). Starting in 2009, Congress responded to significant numbers of service members separated with OTH discharges after having been diagnosed

with PTSD. The legislation instituted a requirement to determine whether the service member had been diagnosed with PTSD or Traumatic Brain Injury (TBI) after having deployed in support of a contingency operation (deployed to a war-zone) within the last 24 months prior to the separation proceedings (10 U.S.C. § 1177, P. L. 111–84). In such cases, commanders must evaluate whether there is a relationship between the mental health condition and the underlying misconduct that forms the basis of the discharge.

This provision does not divest commanders of their ample discretion. Even when a service member's PTSD or TBI did contribute to the misconduct, a commander may still elect to continue with the separation and the law requires only that he or she *consider* such information. However, it is an important difference. In 2016, Congress further imposed a new requirement to evaluate whether the subject of a proposed separation was a victim of Military Sexual Trauma (MST) and had made an unrestricted report of the assault within 24 months of the separation proceedings (10 U.S.C. § 1177, P. L. 114–328). Like a diagnosis of deployment-related PTSD, the commander is merely required to *consider* evidence of a nexus and is not prohibited from instituting a separation with an OTH.

Despite these standards, a comprehensive study published by the Government Accountability Office in 2017 revealed that, “the Army and Marine Corps may not have adhered to their own screening, training, and counseling policies relating to PTSD and TBI” (U.S. Government Accountability Office, 2017, Executive Summary). The same study described other significant shortfalls in Air Force and Navy practices.

## **Trial by Courts-Martial**

Unlike administrative proceedings, courts-martial permit a military judge or military panel (jury) to make separation from the Service part of one's punishment for violating the law. The power to punish is limited by the type of court-martial ordered by the commander. Military courts-martial are unlike civilian criminal trials (Seamone, 2011). Not only does the military eschew distinctions between misdemeanors and felonies, military jury verdicts need not be unanimous. Unlike the civilian sector, military judges are not permanently sitting in a single place with the ability to revisit a given case. Instead, the court-martial is a temporary court that exists only long enough to determine guilt or innocence and then, once guilt is established, to determine a punishment (Seamone, 2011).

A service member facing a court-martial has the right to request a hearing by a military judge alone or by a military jury (a “panel”). If the service member elects a hearing by panel, the panel, and not the military judge, will determine the sentence for the service member. A service member cannot switch from jury to judge alone after guilt has been established. While civilian juries are drawn from a large pool of one's peers, military juries are made up of military members, usually assigned to the same base or installation, but not within one's immediate command. The general

who ordered the court-martial into existence essentially picks the members of the jury based on a host of factors including the candidate's maturity and experience.

Military courts give accused service members special rights during jury selection based upon the unique manner in which a general selects the panel. The defense may strike one potential military juror for any reason and any number of jurors for cause. Beyond this, under the "liberal grant mandate," the defense may challenge juries for implied bias, i.e., where an outside observer would have reason to doubt the reliability of the proceedings (*United States v. Smart*, 1985). The military courts liberally apply this rule in recognition that the commander who convened the court-martial gets an unlimited number of challenges based on the members he or she eventually recommends for the venire. If the service member is enlisted, he or she has a right to request a panel composed of one-third enlisted members or to request a panel of all officer members.

Courts-martial are distinct from civilian trials in other important ways. Because the court-martial only exists for a limited time, military trials normally transition directly from the verdict on the merits to sentencing without the traditional delay present in civilian criminal cases (Seamone, 2011). Probation is not permitted as part of the sentence of a court-martial, even when a judge or panel members recommend suspension of an adjudged punishment (Seamone, 2011). The main reason why there is no military probation is the inability of a judge to revisit a case after sentencing. While military juries often ask if they can adjudge an administrative discharge rather than a punitive discharge, this too is not an option. A panel can either adjudge no punitive discharge, allowing the service member to be retained in the service, or the panel can adjudge a punitive discharge if permitted (Seamone, 2011). Judges routinely instruct military jurors that they should not attempt to anticipate what a commander or the military service might do following their verdict. So, for example, even if a commander plans to administratively separate the service member upon retention by the panel, the panel should not anticipate that the command will actually take these steps when fashioning its sentence (Seamone, 2011).

Punitive discharges generally bar many or *all* of the benefits administered by the VA. Like the administrative OTH, a punitive discharge can create substantial hardships in civilian life (Brooker et al., 2012). Accordingly, the military judge will advise the panel of the following information before they deliberate on a sentence: "This court may adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment" (U.S. Department of Army, 2010, p. 99).

The Special Court-Martial and the more severe General Court-Martial are the only courts empowered to adjudge a punitive discharge. The Special Court-Martial has limitations on punishment with possible confinement capped at 12 months, a reduction to the lowest enlisted grade, and forfeiture of 2/3 pay per month for 12 months. While a Special Court-Martial can result in a Bad-Conduct Discharge, it cannot result in a Dishonorable Discharge. Military officers may not be discharged by a Special Court-Martial and must be tried by a General Court-Martial to be punitively separated. At a General Court-Martial, officers are subject to Dismissal, which is the equivalent of a Dishonorable Discharge (Brooker et al., 2012).

The Special Court-Martial does not require preliminary investigation of the charges and may proceed faster than a General Court-Martial. While there is lack of clarity on the difference between a Bad-Conduct Discharge and a Dishonorable Discharge, the Bad-Conduct Discharge is recognized as: “a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who, in the discretion of the court, warrants severe punishment for bad conduct” (Department of Army, 2010, p. 1068 ¶ 8-3-25). The more severe Dishonorable Discharge is “reserved for those who, in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such punishment” (Department of Army, 2010, p. 1068 ¶ 8-3-24). Since June 24, 2014, as a result of efforts to increase the severity of punishments for sex offenses, any conviction relating to sex offense at a court-martial automatically results in a Dishonorable Discharge (2014 National Defense Authorization Act of 2014, 2013 §1705).

A General-Court Martial removes the sentencing limitation on Special Courts-Martial, exposing offenders to sentences greater than a year, a Dishonorable Discharge, and total forfeitures of pay and allowances. While there is no grand jury in the military, the Uniform Code of Military Justice requires a preliminary investigation of all charges before a General Court-Martial can take place (Gilligan & Lederer, 2017). Unless the accused service member waives such proceedings, an Article 32 Investigating Officer, who may be a military lawyer, will conduct an inquiry to determine whether there is evidence to support the charges and whether the charges accurately reflect the nature of the offenses. The Article 32 Investigating Officer may recommend that the charges be sent to a different, less severe, forum than a General Court-Martial. However, the general who ordered the court-martial is not obligated to adopt the Article 32 Investigating Officer’s recommendations (Gilligan & Lederer, 2017).

When charges are serious, it may take months—or even years—before a court-martial takes place. During this time, the command is responsible for paying for experts out of the unit’s operational funds. The command must also pay for production of witnesses, including travel from remote locations or combat zones to testify in person. Contemporary scholarship suggests that military defendants are often able to avoid court-martial in combat zones by making the process of investigating the charges and seating a panel too demanding to simultaneously meet mission requirements (Rosenblatt, 2010).

Whether it is the sheer expense of conducting a court-martial or the nuisance of removing senior leaders from their duties to serve as military jurors, the military has decreased its use of courts-martial as the Global War on Terror progressed. What trials do occur usually involve the prosecution of sexual offenses or homicides. Whereas the military services conducted 4350 courts-martial empowered to punitively discharge accused service members in Fiscal Year 2003 (U.S. Court of Appeals for the Armed Forces, 2003), by Fiscal Year 2011, they convened nearly half the number at 2351—just more than half (U.S. Court of Appeals for the Armed Forces, 2011). Meanwhile, the number of administrative discharges for misconduct has increased exponentially (Legal Services Center, 2016). Between 2011 and 2015 alone, the military branches 91,764 service members for misconduct (Government Accountability Office, 2017, Executive Summary).

Following the sentence of a court-martial, if the military member received a punitive discharge or 1 year or more of confinement, he or she is entitled to automatic appellate review by a military court, though a service member can waive review (Baker, 2014). Each Service has its own appellate courts, presided over by active duty military judges. Beyond that first level of appellate review, some cases may be suitable for review by the military's highest court, the Court of Appeals for the Armed Forces, which is presided over by civilian judges who are appointed to multi-year terms by the President. Final review is available at the U.S. Supreme Court, though rarely do military cases get heard there. Because a service member is permitted to have attorney representation at a court-martial, it is rare that a military review board will grant relief that was not provided through the military's own legal process.

### **Five Major Reasons to Identify Incarcerated Veterans with “Bad Paper” and Empower Them to Upgrade Discharges as Early as Possible**

Five justifications support the identification of incarcerated veterans with bad paper and efforts to assist them in obtaining upgrades or benefits. First, a veteran may be incarcerated because a Veterans Treatment Court program deemed the veteran ineligible to participate specifically due to his or her bad paper. Second, an upgrade to one's discharge may open the door to the receipt of benefits that increase the chances of successful re-entry and decrease criminal recidivism. Third, the military discharge may have been a byproduct of the veteran's loyal and faithful military service rather than intentional decisions to violate the law. Fourth, new DoD guidance on discharge upgrading has improved the chances of upgrading success for those veterans most in need of continued mental health care. Finally, veterans with bad paper can use their confinement time to maximize the chances of discharge upgrading success.

#### ***Bad Paper as the Basis for Incarceration***

Incarcerated veterans are more likely to have bad paper discharges than their non-incarcerated veteran peers (e.g., Brignone et al., 2017). This increased likelihood of incarceration is explained, in part, by the consequences of bad paper, which have limited recipients' success in the civilian community following discharge from the Armed Forces. Studies consistently reveal that bad paper increases the chances of mental health and substance use disorders, homelessness, criminal involvement and incarceration, and suicide (Brignone et al., 2017). On average, 20% of justice-involved veterans tracked by the VA are ineligible for VA benefits as a result of their military discharge characterization (Rosenthal & McGuire, 2013). In some incarcerated settings, the majority of inmates with military experience have bad paper discharges (Schwartz & Levitas, 2011, p. 53).

Benefit ineligibility as a result of bad paper can have a direct impact on eligibility for programs that divert veterans from confinement to treatment. The purpose of Veterans Treatment Courts is “*decarceration*”—to avoid incarceration and provide superior mental health treatment over community resources for non-veterans (McLoed, 2012, pp. 1590–1591). A major lesson from the development and growth of Veterans Treatment Courts is that they are built upon the foundation of VA treatment resources and entitlements (Blue-Howells, Clark, Berk-Clark, & McGuire, 2012). When veterans are ineligible for VA services, this impairs the ability to provide high quality services and may be the factor that results in a veteran’s ineligibility.

While Veterans Treatment Courts have varied participation criteria depending upon a host of program-specific factors, in a recent study of 114 Veterans Treatment Courts, over 35% of programs excluded participants with dishonorable discharges. Further, nearly a quarter excluded recipients of BCDs, and 24.1% of the of the programs barred enrollment of veterans who did not qualify for VA benefits based on their discharges (Baldwin, 2016, p. 723). With these considerations in mind, it would be advantageous to identify incarcerated veterans with bad paper and enable them to obtain discharge upgrades as a method to broaden their eligibility for alternatives to incarceration.

In considering questions of eligibility, veterans often have multiple discharges from their time in service. The VA is required to honor prior periods of successfully completed service. If a veteran obtained an Honorable Discharge for the first term and an OTH for the second, the first discharge may qualify the veteran for VA services despite the later OTH (Brooker et al., 2012). The VA could grant treatment for any service-related conditions that occurred during the honorable period of service and then deny treatment for injuries that arose from the subsequent period of service. Thus, it is wise to review all prior periods of military service to determine eligibility for VA benefits and potential enrollment in diversion programs.

### *The VA’s Character of Discharge Review Process*

Veterans with bad paper are limited in receipt of various state and federal benefits, not simply VA benefits (Brooker et al., 2012). If a veteran desires eligibility for all types of benefits that depend upon discharge characterization, he or she may petition for a discharge upgrade with the secretary of his or her Service. An upgrade to General or Honorable Discharge will be binding on the VA for the purpose of benefit eligibility (Brooker et al., 2012).

Separate from the military review boards’ upgrading process, the VA has its own process for evaluating bad paper discharges to determine VA benefit eligibility. Often, VA employees will recommend that veterans apply for secretarial upgrades prior to applying for VA benefits. Such advice is misleading to the extent that it ignores other procedures (Adams & Montalto, 2017; Legal Services Center, 2016). Discharge upgrades are not the exclusive avenue for obtaining VA benefits notwithstanding bad paper. It is possible for the VA to grant VA benefits to the recipient of bad paper who is unsuccessful in obtaining a discharge upgrade. In fact, some veterans with OTHs are receiving disability compensation because the VA deemed their service to be sufficiently honorable.

According to the VA, a veteran must have a discharge that is “under conditions other than dishonorable” (38 U.S.C. § 101(2)). Since 1944s passage of the Servicemen’s Readjustment Act, the VA has operated a distinct “Character of Discharge” evaluation process to address this standard (Brooker et al., 2012). Notably, the VA uses different definitions and concepts than DoD and “conditions other than dishonorable” is not solely limited to a Dishonorable Discharge. When a former-service member with bad paper requests VA services or benefits, VA adjudicators should consider a number of vague regulations and statutes to determine whether he or she had a military term that can be characterized as conditions other than dishonorable.

The statute 38 U.S.C. § 5303(a) provides a number of *statutory bars* to VA benefits that will disqualify an ex-service member from benefits. One notable example of a statutory bar is the recipient of any punitive discharge resulting from a General Court-Martial. Beyond this, the Code of Federal Regulations also contains VA’s own administrative guidance adding distinct *regulatory bars* to the analysis (38 C.F.R. § 3.12(d)). A common regulatory bar is the service member who accepts an Undesirable Discharge in lieu of a General Court-Martial. A detailed description of the COD process and its factors would require more pages than this entire volume. The major difficulty with VA’s COD process is lack of consistent and uniform standards across regional offices with inconsistent outcomes for similarly situated applicants (Brooker et al., 2012). Although precise numbers are hard to find, it is generally the case that an applicant is more likely to be denied VA benefits through the COD process (Brooker et al., 2012; Legal Services Center, 2016). Corrections professionals should know that the VA process offers another opportunity for veterans to obtain VA benefits, even if they have been denied upgrades by the military review boards.

The VA’s COD process may take months or years to complete, raising questions about the nature of services that these veterans can receive while they wait. The need for more immediate access to healthcare has resulted in special rules providing limited access to mental health treatment for purposes of emergency stabilization. In 2017, the VA Secretary liberalized eligibility rules after he learned of the VA’s refusal to provide mental health services to veterans at risk of suicide based on OTH discharge characterizations. The new standard, effective June 5, 2017, permitted VA Medical Centers to provide emergency stabilization healthcare to OTH recipients in order to encourage these veterans to seek necessary services and to prevent suicide (U.S. Department of Veterans Affairs, 2017). The policy only applies to temporary care for mental health emergencies and may do little to impact chronic homelessness or physical health conditions among less-than-honorably discharged veterans.

Because the VA’s emergency stabilization policy does not actually ensure long-term mental health recovery, in 2018, Congress passed the Honor Our Commitment Act to extend mental health care beyond 90 days in some cases (Press Release, 2018). Qualifying veterans must have experienced sexual victimization, served in a combat or hostile fire zone, been involved in drone operations in combat environments (Press Release, 2018). Similar to emergency stabilization benefits, the legislation is limited to mental health conditions and does not provide care for physical injuries or disability compensation.

Another alternative for OTH recipients is mental health treatment at Vet Centers for combat veterans, survivors of MST, those in need of bereavement services, and drone crew members (U.S. Department of Veterans Affairs, [n.d.](#)). Vet Centers operate in locations apart from VA Medical Centers. They were established by Congress to assist Vietnam Veterans and others with alternatives to traditional VA treatment. Vet Centers are unique in the way they also provide family counseling for family members of qualifying veterans.

### ***Discharge Upgrades as the Means to Obtain VA Benefits***

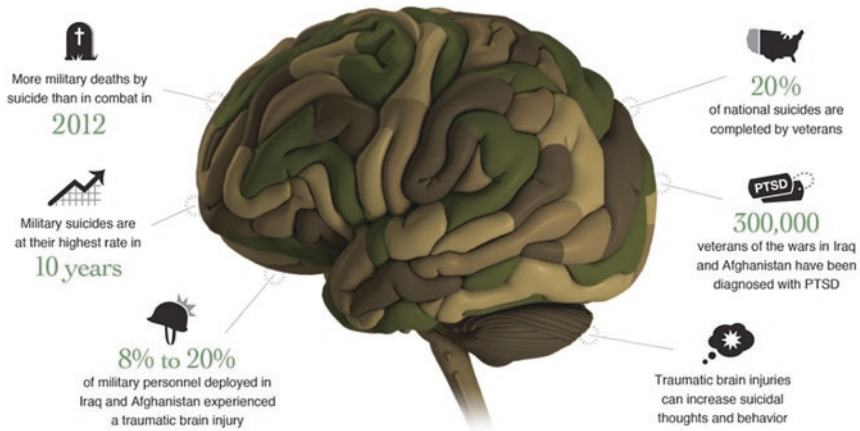
As an alternative to the VA COD process, military discharge review boards provide an additional method for bad paper veterans to upgrade their discharges. Beyond giving criminally-involved veterans better chances for diversion from incarceration, discharge upgrades can provide several other federal and state benefits that can increase the chances of successful re-entry and decrease criminal recidivism. Military review boards bring the benefit of more objective guidance. If the incarcerated veteran was discharged within 15 years, he or she can appeal to the appropriate discharge review board (10 U.S.C. § 1553). If more than 15 years have passed since the discharge, the veteran must apply to a different board of correction for records for that service (10 U.S.C. § 1552). These bodies exist to determine whether legal errors impacted the separation process or whether equitable considerations favor upgrading the discharge (Connecticut Veterans Legal Center, [2011](#)). For veterans who had mental health conditions at the time of the commission of the underlying offenses that led to their discharges, the recent Kurta ([2017](#)), discussed below, offers new hope for upgrading success.

### ***Discharges Due to Consequences of Faithful Military Service***

To understand the impact of military discharges, it is necessary to appreciate the context from which they originate: military discipline, which has no analogue in civilian society or the civilian criminal justice system. It is also vital to understand the unique and disproportionate manner in which military discipline has criminalized the very symptoms of mental illness that can be expected as operational hazards of military service (Seamone, [2013](#); Seamone et al., [2014](#), [2017](#)). Because military discipline is essential in the Armed Forces, there is a tendency to demonize those who detract from it. Service members who use narcotics are seen as selfish individuals who would rather serve themselves than their peers. Yet, not all military offenses have their genesis in willful misconduct by service members who decided to place their needs over the military's. In many cases, service members get caught up in the military justice and disciplinary system as a result of behavior that represents symptoms of untreated service-related mental health conditions (Seamone, [2011](#), [2013](#); Seamone et al., [2014](#), [2017](#)). The American Psychiatric Association developed a diagram of the Veteran's Brain, below, to highlight the cumulative risks of mental health conditions facing today's military veterans:



## A VETERAN'S WORST WOUNDS MAY BE THE ONES YOU CAN'T SEE.



Recognizing mental illness is the first step toward recovery. Show returning soldiers that seeking help is a sign of strength. Learn more at [psychiatry.org/mentalhealth](http://psychiatry.org/mentalhealth)



(American Psychiatric Association, 2013). As depicted above, combat trauma can result in a variety of conditions—aside from PTSD, TBI, and Major Depression—that result in maladaptive behaviors, including subthreshold PTSD and moral injury (Brooker et al., 2012; Seamone, 2011, 2013).

The military now formally acknowledges the impact of mental health conditions on behavior. In the current era, Army Manuals on combat stress began to identify a distinct form of “misconduct stress behaviors,” which were acts of misconduct that are directly attributable to the stressful environments in combat (Brooker et al., 2012; Seamone, 2013). Interestingly, the same manuals acknowledged that service members could actually transport those behaviors home following combat and continue to engage in misconduct (Seamone, 2013). Misconduct stress is somewhat predictable as a result of experiences which may include the act of killing, feelings of tremendous guilt for wounded or killed comrades, or perceptions of having to violate one’s own moral code (Brooker et al., 2012; Seamone, 2013). Strong and pervasive stigmas prevent those impacted by misconduct stress from requesting assistance (Seamone, 2013).

Military members are governed by a set of special rules that make them more likely to be considered criminal offenders when they experience such symptoms. Whereas a civilian employee might be fired for failing to come to work on time or having an angry outburst at a demanding boss, a military member could face significant penalties, including punitive discharge and years of confinement (Seamone, 2013; Seamone et al., 2014). Given the reluctance to seek help until it is too late, many describe a “military misconduct catch-22” phenomenon in which it is only

after a service member is being processed for separation for misconduct that he or she realizes the need to obtain mental health care (Seamone et al., 2017).

Congress became increasingly concerned with the impact of misconduct discharges on former service members who could not access benefits after the media shared concerns that a substantial number of service members had been discharged with OTH characterizations after they had been diagnosed with PTSD. Recognizing that this would lead to initial exclusion from healthcare amongst those with the most desperate needs, in 2014, Congress requested the Government Accountability Office to research the extent of the problem and whether commanders were even aware of the impact of their disciplinary decisions on service members' futures. The resulting May 2017 report found that "62 percent, or 57,141 of the 91,764 servicemembers separated for misconduct from fiscal years 2011 through 2015 had been diagnosed within the 2 years prior to separation with [PTSD], [TBI], or certain other conditions that could be associated with misconduct" (U.S. Government Accountability Office, 2017, Executive Summary). Moreover, 23% of these veterans were discharged with Other-Than-Honorable characterizations that imperiled the receipt of VA benefits (U.S. Government Accountability Office, 2017, Executive Summary).

While some are waiting for the military to address its own problems, other lawmakers have exerted more pressures. Joined by 11 senators in November 2015, Senator Chris Murphy voiced the concern that "it may be easier to discharge service members for minor misconduct—possibly related to mental health issues—than to evaluate them for conditions that may warrant a medical discharge" (Murphy et al., 2015). Later, in February 2016, he and three other senators called for the Army to impose a moratorium on OTH discharges for military members with mental illness until more reliable standards could be established (Zwerdling & De Yoanna, 2016).

In June 2017, Defense Undersecretary Kurta provided the clearest guidance yet for the manner to evaluate discharges in cases involving underlying mental health conditions. On balance, the increasing recognition of the nexus between faithful military service, combat trauma, and misconduct stress raises the very real possibility that an incarcerated veteran's bad paper discharge may simply reflect the fact that he or she did not have the opportunity to obtain necessary or effective treatment for service-connected trauma. As emphasized elsewhere in this volume, many Veterans Treatment Courts and Specialized Housing Units for incarcerated veterans recognize the importance of diversion opportunities on the basis of treatment needs (see also Blue-Howells et al., 2012). The same rationale would support opportunities to upgrade discharges.

### *The Game-Changing Kurta Memorandum*

August 2017 marked a watershed moment in discharge upgrading: the articulation of specific standards to upgrade discharges based on mitigating factors related to MST, sexual harassment, PTSD, TBI, and other "mental health conditions" (Kurta, 2017). The Kurta Memorandum would not exist without prior efforts to encourage discharge review boards and boards of correction to consider mitigating factors.

Most notably, in 2014, then-Defense Secretary Chuck Hagel issued a memorandum in response to widespread criticisms and a lawsuit highlighting how Vietnam veterans with PTSD were routinely denied discharge upgrades even when their discharges stemmed from the symptoms of untreated service-related trauma (Veterans Legal Services Clinic, 2015). For example, Secretary Hagel underscored how military records from periods before PTSD was officially recognized by the psychiatric profession often lack “substantive information concerning medical conditions” (Hagel, 2014, p. 1). Accordingly, he stressed that review boards should give “special consideration” to post-service diagnoses of PTSD by the VA and liberal consideration to any service-related records revealing “one or more symptoms” associated with a PTSD diagnosis (Hagel, 2014, Attachment p. 1). Despite this new guidance, the boards continued to deny upgrade requests, even in cases that appeared to be on all fours with the mitigating factors Secretary Hagel articulated.

In 2016, the Acting Principal Deputy Under Secretary of Defense, Brad Carson, issued guidance to supplement the Hagel Memorandum clarifying that Hagel’s guidance “remain[e]d exceptionally important” and that the boards “must renew and re-double . . . efforts” to ensure that applicants received the benefits of such guidance. Carson’s memorandum underscored that applicants whose petitions were denied without the benefit of such guidance should have the chance to reapply under the new standards and further that the Boards of Correction should waive bars to their consideration of such petitions (Carson, 2016, p. 1). Yet, widespread denial rates persisted.

In an unexpected but extremely helpful move, Undersecretary Kurta’s memorandum provides new hope for veterans hoping to upgrade discharges, specifically for the purpose of obtaining needed healthcare benefits from the VA. The full five-page Kurta Memorandum is reprinted at Appendix 1. For the purposes of this chapter, six of its revelations provide guidance that can substantially increase the chances of success in discharge upgrading petitions. First, the Kurta Memorandum recognizes that:

Invisible wounds . . . are some of the most difficult cases to review and there are frequently limited records for the boards to consider. [The boards] should rightfully consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later (Kurta, 2017, p. 1)

Second, consistent with the theory of misconduct stress behavior, the Kurta Memorandum highlights the fact that “[e]vidence of misconduct, including any misconduct underlying a veteran’s discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment” (Kurta, 2017, Attachment p. 1 ¶ 6). Third, the Memorandum explains that “[e]vidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge” (Kurta, 2017, Attachment p. 2 ¶ 10).

Fourth, with regard to mental health conditions, those “that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge” (Kurta, 2017, Attachment p. 2 ¶ 16). Fifth, in applying the concept of “liberal consideration,” the Kurta Memorandum notes that “[i]t is unreasonable to expect the same level of proof for injustices committed years ago when TBI; mental

health conditions, such as PTSD; and victimology were far less understood than they are today” (Kurta, 2017, Attachment p. 3 ¶ 26.b). Finally, the Memorandum clarifies the scope of an Honorable Discharge by explaining, “An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct” (Kurta, 2017, Attachment p. 4 ¶ 26.h.). In sum, by addressing these various heretofore unaddressed issues, the Kurta Memorandum offers the clearest guidance yet for those hoping to upgrade their military discharges. The Kurta Memorandum also offers incarcerated veterans a much-needed roadmap for supporting their applications with necessary and competent evidence.

The Kurta Memorandum, in clarifying multiple issues that impacted practice before the military review boards, also paved the way for subsequent clarifications. In July 2018, Robert Wilkie, acting in his capacity as a DoD official, issued separate guidance on the boards’ standards for considering “equity, injustice, or clemency determinations.” Although these factors apply to many forms of discharge upgrade, the clemency standards are appropriate for upgrading punitive discharges from courts-martial (Wilkie, 2018, p. 1). The Wilkie Memorandum articulates specific considerations that present a framework for evaluating a veteran’s rehabilitation over the years since his or her discharge. The Wilkie Memorandum is reprinted in Appendix 2, and should be read in conjunction with the Kurta Memorandum.

### *Time as a Commodity in Developing Evidence*

Commanders may have given less than a few moments to the consideration of the discharge to pursue and any mitigating evidence marshalled by the service member. Yet, it can take decades to undo errors in the process. Veterans often see the short discharge upgrade forms and believe that it is sufficient to use the small textbox provided to plead their case (see Appendices 3 and 4). It is often lost on veterans that the most successful applications contain written briefs/reports which cite standards for upgrading and explain how the evidence they have collected supports a given standard (Connecticut Veterans Legal Clinic, 2011). It can take months to obtain one’s official military personnel records, and even more time to obtain separate mental health records or records related to criminal investigations.

Veterans who succeed in upgrading their discharges must understand the standards of review, where to obtain supporting information, and, most importantly, they must have the time to devote to the collection, evaluation, and assembly of the supporting evidence. As a captive audience with time to spare, incarcerated veterans have a competitive advantage over non-incarcerated veterans to effectively obtain discharge upgrades. Moreover, with the added benefits of Under Secretary Kurta’s standards, incarcerated veterans can maximize their time with the greatest advantage that any applicants have ever enjoyed in discharge upgrading proceedings.

As a caveat, it is possible that the military review boards will consider post-discharge conduct, including the applicant’s criminal history, when deciding on a discharge upgrade petition. In such cases, the veteran’s confinement could be a factor

that works against his or her chances of success. Veterans who wish to apply for a discharge upgrade from a confined setting should consider this risk. If they have mental health conditions from military service, inmates should address how criminal involvement may have resulted from the same mental health issues that surrounded the military discharge years ago. Input from a mental health provider is likely to make such observations more persuasive.

The possibility of a denial based on inmate status should not stop the veteran from requesting the necessary records, obtaining supporting evidence, and drafting the petition that he or she will ultimately file. Preparation or filing of the petition has a special, independent value. Bruce Pentland, who ran the Veterans Incarcerated Program throughout Los Angeles in the 1970s and 1980s, observed that the process of requesting benefits not only reiterates to veterans the importance of following rules and procedures, but also offers an opportunity for renewed faith in government systems (Pentland, 1979, p. 525; Pentland & Scurfield, 1982, p. 25). This observation also applies to contemporary times.

## Conclusion

This chapter highlighted several reasons why it is vital to identify veterans with bad paper and support them with resources to upgrade their discharges as early as possible during the course of their incarceration. Discharge characterizations arise from a distinct system of military justice that is based upon the discretion of military commanders. Given their broad discretion in the exercise of discipline, it is nearly impossible to identify the aims of a specific commander in pursuing the discharge that an inmate ultimately received. While it is possible that the inmate acted in a reprehensible manner and fully deserved the bad paper designation, it is equally possible that this discharge type was the result of discrimination or the random determination to make this individual an example to others in the unit despite the fact that the underlying conduct was widespread. This chapter also explained how many veterans may have been punished for the untreated symptoms of mental health conditions that arose from their loyal and faithful service.

For these reasons, the veteran with bad paper deserves a presumption of worthiness for assistance in discharge upgrading. Given the immense value of time incarcerated in developing the evidence necessary to support discharge upgrading requests, corrections professionals should permit veterans to learn about the standards for upgrading and prepare their own applications as early as possible during their term of confinement. An investment of minimal resources may result in the opportunity for diversion they would have had but for their discharge characterization. Moreover, resulting receipt of benefits will assist those inmates in reentering society and abstaining from further criminal conduct based on the success of treatment for which they would now be eligible. Appendix 5 summarizes various resources that will benefit incarcerated veterans in preparing their discharge upgrading requests.

## Appendix 1: A.M. Kurta Memorandum



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

AUG 25 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

**SUBJECT:** Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment

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

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

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

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

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

Attachment:  
As stated

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

Attachment

**Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment**

*Generally*

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

7. The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.

8. Cases falling under this guidance will receive timely consideration consistent with statutory requirements.

*Was there a condition or experience?*

9. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge.

10. Evidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge.

11. A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.

12. Review Boards are not required to find that a crime of sexual assault or an incident of sexual harassment occurred in order to grant liberal consideration to a veteran that the experience happened during military service, was aggravated by military service, or that it excuses or mitigates the discharge.

*Did it exist/occur during military service?*

13. A diagnosis made by a licensed psychiatrist or psychologist that the condition existed during military service will receive liberal consideration.

14. A determination made by the Department of Veterans Affairs (VA) that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the Department of Defense, is persuasive evidence that the condition existed or experience occurred during military service.

15. Liberal consideration is not required for cases involving pre-existing conditions which are determined not to have been aggravated by military service.

*Does the condition/experience excuse or mitigate the discharge?*

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.

17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally



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

*Does the condition/experience outweigh the discharge?*

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

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

**Additional Clarifications**

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

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

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

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

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

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

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

- a. Some circumstances require greater leniency and excusal from normal evidentiary burdens.
- b. It is unreasonable to expect the same level of proof for injustices committed years ago when TBI; mental health conditions, such as PTSD; and victimology were far less understood than they are today.

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

## Appendix 2: Robert L. Wilkie Memorandum



PERSONNEL AND  
READINESS

### UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON  
WASHINGTON, D.C. 20301-4000

JUL 25 2018

#### MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

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

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

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

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

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

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

Robert L. Wilkie

Attachment:  
As stated

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

Attachment

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

*Generally*

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

- c. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.
- d. Evidence in support of relief may come from sources other than a veteran's service record.
- e. A veteran or Service member's sworn testimony alone, oral or written, may establish the existence of a fact supportive of relief.
- f. Changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received, may be grounds for relief.
- g. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct in the case of the mitigating evidence in a case. For example, marijuana use is still unlawful in the military, but it is now legal under state law in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.
- h. Requests for relief based in whole or in part on a mental health condition, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety.
- i. Evidence submitted by a government official with oversight or responsibility for the matter at issue and that acknowledges a relevant error or injustice was committed, provided that it is submitted in his or her official capacity, should be favorably considered as establishing a grounds for relief.
- j. Similarly situated Service members sometimes receive disparate punishments. A Service member in one location could face court-martial for an offense that routinely is handled administratively across the Service. This can happen for a variety of lawful reasons, for example, when a unit or command finds it necessary to step up disciplinary efforts to address a string of alcohol- or drug-related incidents, or because attitudes about a particular offense vary between different career fields, units, installations, or organizations. While a court-martial or a command would be within its authority to choose a specific disposition forum or issue a certain punishment, DRBs and BCM/NRs should nevertheless consider uniformity and unfair disparities in punishments as a basis for relief.
- k. Relief is generally more appropriate for nonviolent offenses than for violent offenses.
- l. Changes to the narrative reason for a discharge and/or an upgraded character of discharge granted solely on equity, injustice, or clemency grounds normally should not result in

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

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

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

### Appendix 3: DD Form 293

<b>APPLICATION FOR THE REVIEW OF DISCHARGE OR DISMISSAL FROM THE ARMED FORCES OF THE UNITED STATES</b> <i>(Please read instructions on Pages 3 and 4 BEFORE completing this application.)</i>		<i>Form Approved OMB No. 0704-0004 Expires Aug 31, 2006</i>
The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0004), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.		
<b>PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON BACK OF THIS PAGE.</b>		
<b>PRIVACY ACT STATEMENT</b>		
AUTHORITY: 10 U.S.C. 1553; E.O. 9397. PRINCIPAL PURPOSE(S): To apply for a change in the characterization or reason for military discharge issued to an individual. ROUTINE USE(S): None. DISCLOSURE: Voluntary; however, failure to provide identifying information may impede processing of this application. The request for Social Security Number is strictly to assure proper identification of the individual and appropriate records.		
<b>1. APPLICANT DATA (The person whose discharge is to be reviewed). PLEASE PRINT OR TYPE INFORMATION.</b>		
a. BRANCH OF SERVICE (X one)	<input type="checkbox"/> ARMY	<input type="checkbox"/> MARINE CORPS
	<input type="checkbox"/> NAVY	<input type="checkbox"/> AIR FORCE
	<input type="checkbox"/> COAST GUARD	
b. NAME (Last, First, Middle Initial)	c. GRADE/RANK AT DISCHARGE	d. SOCIAL SECURITY NUMBER
2. DATE OF DISCHARGE OR SEPARATION (YYYYMMDD) (If date is more than 15 years ago, submit a DD Form 149)	4. DISCHARGE CHARACTERIZATION RECEIVED (X one)	5. BOARD ACTION REQUESTED (X one)
	<input type="checkbox"/> HONORABLE	<input type="checkbox"/> CHANGE TO HONORABLE
	<input type="checkbox"/> GENERAL UNDER HONORABLE CONDITIONS	<input type="checkbox"/> CHANGE TO GENERAL UNDER HONORABLE CONDITIONS
	<input type="checkbox"/> UNDER OTHER THAN HONORABLE CONDITIONS	<input type="checkbox"/> CHANGE TO UNCHARACTERIZED (Not applicable for Air Force)
	<input type="checkbox"/> BAD CONDUCT (Special court-martial only)	<input type="checkbox"/> CHANGE NARRATIVE REASON FOR SEPARATION TO:
	<input type="checkbox"/> UNCHARACTERIZED	
	<input type="checkbox"/> OTHER (Explain)	
3. UNIT AND LOCATION AT DISCHARGE OR SEPARATION	6. ISSUES: WHY AN UPGRADE OR CHANGE IS REQUESTED AND JUSTIFICATION FOR THE REQUEST (Continue in Item 14. See instructions on Page 3.)	
7. (X if applicable) AN APPLICATION WAS PREVIOUSLY SUBMITTED ON (YYYYMMDD) _____ AND THIS FORM IS SUBMITTED TO ADD ADDITIONAL ISSUES, JUSTIFICATION, OR EVIDENCE.		
8. IN SUPPORT OF THIS APPLICATION, THE FOLLOWING ATTACHED DOCUMENTS ARE SUBMITTED AS EVIDENCE: (Continue in Item 17. If military documents or medical records are relevant to your case, please send copies.)		
9. TYPE OF REVIEW REQUESTED (X one)		
<input type="checkbox"/> CONDUCT A RECORD REVIEW OF MY DISCHARGE BASED ON MY MILITARY PERSONNEL FILE AND ANY ADDITIONAL DOCUMENTATION SUBMITTED BY ME. I AND/OR (counsel/representative) WILL NOT APPEAR BEFORE THE BOARD.		
<input type="checkbox"/> I AND/OR (counsel/representative) WISH TO APPEAR AT A HEARING AT NO EXPENSE TO THE GOVERNMENT BEFORE THE BOARD IN THE WASHINGTON, D.C. METROPOLITAN AREA.		
<input type="checkbox"/> I AND/OR (counsel/representative) WISH TO APPEAR AT A HEARING AT NO EXPENSE TO THE GOVERNMENT BEFORE A TRAVELING PANEL CLOSEST TO (enter city and state) (NOTE: The Navy Discharge Review Board does not have a traveling panel.)		
10.a. COUNSEL REPRESENTATIVE (If any) NAME (Last, First, Middle Initial) AND ADDRESS (See Item 10 of the instructions about counsel/representative.)	b. TELEPHONE NUMBER (Include Area Code)	
	c. E-MAIL	
	d. FAX NUMBER (Include Area Code)	
11. APPLICANT MUST SIGN IN ITEM 13.a. BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) _____ and relationship by marking a box below.		
<input type="checkbox"/> SPOUSE <input type="checkbox"/> WIDOW <input type="checkbox"/> WIDOWER <input type="checkbox"/> NEXT OF KIN <input type="checkbox"/> LEGAL REPRESENTATIVE <input type="checkbox"/> OTHER (Specify) _____		
12.a. CURRENT MAILING ADDRESS OF APPLICANT OR PERSON ABOVE (Forward notification of any change in address.)	b. TELEPHONE NUMBER (Include Area Code)	
	c. E-MAIL	
	d. FAX NUMBER (Include Area Code)	
13. CERTIFICATION. I make the foregoing statements, as part of my claim, with full knowledge of the penalties involved for willfully making a false statement or claim. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)	CASE NUMBER (Do not write in this space.)	
a. SIGNATURE - REQUIRED (Applicant or person in Item 11 above)	b. DATE SIGNED - REQUIRED (YYYYMMDD)	

14. CONTINUATION OF ITEM 6, ISSUES *(If applicable)*

15. CONTINUATION OF ITEM 8, SUPPORTING DOCUMENTS *(If applicable)*

16. REMARKS *(If applicable)*

**MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW.**

<p style="text-align: center;"><b>ARMY</b></p> <p>Army Review Boards Agency          Support Division, St. Louis          9700 Page Avenue          St. Louis, MO 63132-5200          (See <a href="http://arba.army.pentagon.mil">http://arba.army.pentagon.mil</a>)</p>	<p style="text-align: center;"><b>NAVY AND MARINE CORPS</b></p> <p>Naval Council of Personnel Boards          720 Kennon Street, S.E.          Room 309 (NDRB)          Washington Navy Yard, DC 20374-5023</p>
<p style="text-align: center;"><b>AIR FORCE</b></p> <p>Air Force Review Boards Agency          SAF/MRBR          550 C Street West, Suite 40          Randolph AFB, TX 78150-4742</p>	<p style="text-align: center;"><b>COAST GUARD</b></p> <p>U.S. Coast Guard          Commandant (G-WPM)          2100 Second Street, S.W. Room 5500          Washington, DC 20593</p>



INSTRUCTIONS FOR COMPLETION OF DD FORM 293

REQUESTING COPIES OF YOUR OFFICIAL MILITARY PERSONNEL FILE

Information on how to obtain military or health records is available at the National Personnel Records Center website at [www.nara.gov/regional/mpr.html](http://www.nara.gov/regional/mpr.html) or at your local Veterans Administration office.

Applicants are strongly encouraged to submit any request for their military records prior to applying for a discharge review rather than after submitting a DD Form 293 in order to avoid substantial delays in processing of the application and scheduling of review. Applicants and their counsel may also examine their military personnel records at the site of their scheduled review prior to the review. The Board shall notify applicants of the date of availability of the records for examination in their standard scheduling information.

Submission of a request for an applicant's military records (including a request pursuant to the Freedom of Information Act or Privacy Act) after the DD Form 293 has been submitted will automatically result in the suspension of processing of the application for discharge review until the requested records are sent to an appropriate location for copying, are copied, and are returned to the possession of the headquarters of the Discharge Review Board. Processing of the application shall then be resumed at whatever stage of the discharge review process is practicable.

**DD FORM 293 - PLEASE PRINT OR TYPE INFORMATION.** (Items on the form are self-explanatory unless otherwise noted below.)

**ITEM 1b.** Use the name which you served under while in the Armed Forces. If your name has since changed, then also include your current name after adding the abbreviation "AKA". If the former member is deceased or incompetent, see Item 11.

**ITEM 2.** If you received more than one discharge, the information in this item should refer to the discharge that you want changed. **Discharge Review Boards cannot consider any type of discharge resulting from a sentence given by a general court-martial.**

**ITEM 3.** If the discharge you want reviewed was issued over 15 years ago, instead of applying on a DD Form 293, you must petition the appropriate Board for Correction of Military Record using DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552.*

**ITEM 5.** If you request a change of narrative reason for separation, you must list the specific reason for discharge that you believe to be appropriate, otherwise the Board will presume that you do not want a change in reason for discharge. If you do not request a change of discharge characterization in this item, the Board will presume you want to change discharge to Honorable.

If you were separated on or after 1 October 1982 while in an entry level status with an under other than honorable conditions discharge and less than 180 days of active service, you can request a change of discharge characterization to "Uncharacterized" and discharge reason to "Entry Level Separation".

**ITEM 6.** "Issues" are the reasons why you think your discharge should be changed. You are not required to submit any issues with your application. However, if you want the Board to respond in writing to the issues of concern, you must list your specific issues in accordance with those instructions and regulations governing the Board. Issues must be stated clearly and specifically. Your issues should address the reasons why you believe that the discharge received was improper or inequitable. It is important to focus on matters that occurred while you served in the Armed Forces.

The following examples demonstrate one way in which issues may be stated (the example issues do not indicate, in any way, the only type of issues that should be submitted to the Board):

Example 1. My discharge was inequitable because it was based on one isolated incident in 28 months of service with no other adverse action.

Example 2. The discharge is improper because the applicant's pre-service civilian conviction, properly listed on his enlistment documents, was used in the discharge proceedings.

In Item 6 list each of your issues that you want the Board to address. There is no limit to the number of issues that you may submit. If you need additional space, continue in Item 14 or on a plain sheet of paper and attach it to this application.

**NOTE:** If an issue is not listed in Item 6, it may result in the Board not addressing the issue even if the issue is discussed in a legal brief or other written submissions or at the hearing. Changes or additions to the list may be made on the DD Form 293 anytime before the Discharge Review Board closes the review process for deliberation. Please be sure that your issues are consistent with the Board Action Requested (Item 5). If there is a conflict between what you say in your issues and what you requested in Item 5, the Board will respond to your issue in the context of the action requested in Item 5. For example, if you request a General Discharge in Item 5 but your issue in Item 6 indicated you want an Honorable Discharge, the Board will respond to the issue in terms of your request for a General Discharge. Therefore, if you are submitting issues for the purpose of obtaining an Honorable Discharge, be sure to mark the box for an Honorable Discharge in Item 5.

**Incorporation by Reference.** Issues that are listed on a legal brief or other written submissions may be incorporated by reference in Item 6. The reference must be specific enough for the Board to clearly identify the matter being submitted as an issue. At a minimum, it shall identify the page, paragraph, and sentence incorporated. Example: Issue 1. Brief, page 2, paragraph 1, sentences one and two.

Applicants should be as specific as possible with all references so the Board can clearly distinguish the scope of the issue. Because it is to your benefit to bring such issues to the Board's attention as early as possible in the review, if you submit a brief, you are strongly urged to set forth all such issues as a separate item at the beginning of the brief.

**INSTRUCTIONS FOR COMPLETION OF DD FORM 293 (Continued)**

**ITEM 8.** Evidence not in your official records should be submitted to the Board before the review date. It is to your advantage to submit such documentation with this application. This also applies to legal briefs or counsel submissions. However, you have the right to submit evidence until the time the Discharge Review Board closes the review process for deliberation. Documents that are of the most benefit are those which substantiate or relate directly to your issues in Item 6. Other documents that may be helpful are character references, educational achievements, exemplary post-service conduct, and medical reports. You should add your name and Social Security Number to each document submitted. The Board will consider all documents submitted in your behalf, but will respond in writing only to those issues set forth in Item 6.

**ITEM 9. TYPE OF REVIEW REQUESTED**

A Discharge Review is conducted in two basic ways:  
(1) Records Review or (2) Hearing.

1. **Records Review.** You may have the Board conduct a discharge review based solely on military records and any additional documentation that you provide. This review is conducted without personal appearance by you and/or your counsel appearing.

2. **Hearing.** You may appear personally (alone or assisted by a representative/counsel) before the Board in the Washington, D.C. Metro Area or before a Traveling Panel of the Board in selected locations throughout the U.S., if appropriate. The Department of Defense is not responsible for, nor will it pay for, any costs incurred by the applicant or representative/counsel for appearance or providing testimony or documentation. Detailed notification and/or scheduling information for all personal appearances will be provided after the application has been processed. In addition, without appearing yourself, you may have your case presented by a representative/counsel of your choice.

Applicants participating in a personal appearance or hearing examination may make sworn or unsworn statements, introduce witnesses, documents, or other information on their behalf. Applicants may make oral or written arguments personally and/or through representative/ counsel. Applicants and witnesses who present sworn or unsworn statements may be questioned by the Board.

**FAILURE TO APPEAR AT A HEARING OR RESPOND TO A SCHEDULING NOTICE.** If you do not appear at a scheduled hearing or respond as required to a scheduling notice, and you did not make a prior, timely request for a continuance, postponement, or withdrawal of the application, you will forfeit the right to a personal appearance and the Board shall complete its review of the discharge based upon the evidence of record.

**ITEM 10.a - d.** Omit if you do not have a representative/ counsel. If you later obtain the services of either, inform the Board immediately.

The military services do not provide counsel representation or evidence for you, nor do they pay the cost of such representation under any circumstance. The following organizations regularly furnish representation at no charge to you. Representatives may or may not be lawyers.

1. American Legion
2. Disabled American Veterans
3. Veterans of Foreign Wars
4. State or Regional Veterans Offices

In addition, there are other organizations willing to assist you in completing this application and to provide representation at no cost. It is to your advantage to coordinate with your counsel prior to submitting this application. This will insure that your counsel is able to appear at the location you listed in Item 9. Please note that some of the organizations listed above only represent applicants who appear before the Board in the Washington, D.C. Metro Area. Contact your local veterans affairs office, Veterans Administration Office or veterans service organization for further information.

**ITEM 11.** If the former member is deceased or incompetent, the application may be submitted by the next of kin, a surviving spouse or a legal representative. Legal proof of death or incompetency and satisfactory evidence of the relationship to the former member must accompany this application.

**ITEM 12.a.** Indicate the address to be used for all future correspondence regarding this application. If you change this address while this application is pending, you must notify the Discharge Review Board immediately. Failure to attend a hearing as a result of an unreported change in address may result in a waiver of your right to a hearing.

**ITEM 13.a. and b.** A signature and date entered by the applicant or person identified in Item 11 are required.

# Appendix 4: DD Form 149

<b>APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552</b> <i>(Please read Privacy Act Statement and instructions on back BEFORE completing this application.)</i>		OMB No. 0704-0003 OMB approval expires Dec 31, 2017	
<small>The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Alexandria, VA 22304-3103 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</small>			
<b>RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.</b>			
1. APPLICANT DATA <i>(The person whose record you are requesting to be corrected.)</i>			
a. BRANCH OF SERVICE <i>(X one)</i>		ARMY	NAVY
		AIR FORCE	MARINE CORPS
			COAST GUARD
b. NAME <i>(Print - Last, First, Middle Initial)</i>		c. PRESENT OR LAST PAY GRADE	d. SERVICE NUMBER <i>(if applicable)</i>
			e. SSN
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES <i>(Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)</i>		3. TYPE OF DISCHARGE <i>(if by court-martial, state the type of court.)</i>	4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY <i>(YYYYMMDD)</i>
5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED AS FOLLOWS: <i>(Entry required)</i>			
6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: <i>(Entry required)</i>			
a. IS THIS A REQUEST FOR RECONSIDERATION OF A PRIOR APPEAL?		YES	b. IF YES, WHAT WAS THE DOCKET NUMBER?
		NO	c. DATE OF THE DECISION
7. ORGANIZATION AND APPROXIMATE DATE <i>(YYYYMMDD)</i> AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED <i>(Entry required)</i>			
8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE			
a. DATE OF DISCOVERY <i>(YYYYMMDD)</i>	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.		
9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: <i>(if military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)</i>			
10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. <i>(At no expense to the Government)</i> <input checked="" type="checkbox"/> YES. THE BOARD WILL DETERMINE IF WARRANTED. <input type="checkbox"/> NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.			
11. a. COUNSEL <i>(if any)</i> NAME <i>(Last, First, Middle Initial)</i> and ADDRESS <i>(Include ZIP Code)</i>		b. TELEPHONE <i>(Include Area Code)</i>	
		c. E-MAIL ADDRESS	
		d. FAX NUMBER <i>(Include Area Code)</i>	
e. I WOULD LIKE ALL CORRESPONDENCE/DOCUMENTS SENT TO ME ELECTRONICALLY.		YES	NO
12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name <i>(print)</i> and relationship by marking one box below.			
<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN
		<input type="checkbox"/> LEGAL REPRESENTATIVE	<input type="checkbox"/> OTHER <i>(Specify)</i>
13. a. COMPLETE CURRENT ADDRESS <i>(Include ZIP Code)</i> OF APPLICANT OR PERSON IN ITEM 12 ABOVE <i>(Forward notification of all changes of address.)</i>		b. TELEPHONE <i>(Include Area Code)</i>	
		c. E-MAIL ADDRESS	
		d. FAX NUMBER <i>(Include Area Code)</i>	
14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. <i>(U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)</i>			CASE NUMBER <i>(Do not write in this space.)</i>
15. SIGNATURE <i>(Applicant must sign here)</i>			16. DATE SIGNED <i>(YYYYMMDD)</i>

PRIVACY ACT STATEMENT			
<p><b>AUTHORITY:</b> 10 U.S.C. 1552 and E.O. 9397, as amended (SSN).</p> <p><b>PRINCIPAL PURPOSE(S):</b> To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service. The DoD Systems of Records Notices can be located at: <a href="http://dpclo.defense.gov/Privacy/SORNsindex/DODComponentNotices.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/DODComponentNotices.aspx</a>.</p> <p><b>ROUTINE USE(S):</b> The DoD Blanket Routine Uses at <a href="http://dpclo.defense.gov/Privacy/SORNsindex/BlanketRoutineUses.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/BlanketRoutineUses.aspx</a> may apply to this collection.</p> <p><b>DISCLOSURE:</b> Voluntary. However, failure by an applicant to provide the information not annotated as "optional" may result in a denial of your application. An applicant's SSN is used to retrieve these records and links to the member's official military personnel file and pay record.</p> <p><b>Applicable SORNs:</b>  Army (<a href="http://dpclo.defense.gov/Privacy/SORNsindex/DODComponentArticleView/tabid/7489/Article/6000/a0015-185-sfmr.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/DODComponentArticleView/tabid/7489/Article/6000/a0015-185-sfmr.aspx</a>)  Navy and Marine Corps (<a href="http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/8510/mm01000-1.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/8510/mm01000-1.aspx</a>)  Air Force (<a href="http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/6904/f036-safpc-d.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/6904/f036-safpc-d.aspx</a>)  Defense Finance and Accounting Service (<a href="http://privacy.defense.gov/notices/dfas/f5015a.shtm">http://privacy.defense.gov/notices/dfas/f5015a.shtm</a>)  Coast Guard (<a href="http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/html/2011-27881.htm">http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/html/2011-27881.htm</a>)</p> <p><b>Official Military Personnel Files:</b>  Army (<a href="http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/6131/a0600-8-104-ahrc.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/6131/a0600-8-104-ahrc.aspx</a>)  Navy (<a href="http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/6405/n01070-3.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/6405/n01070-3.aspx</a>)  Marine Corps (<a href="http://dpclo.defense.gov/Privacy/SORNsindex/DODComponentArticleView/tabid/7489/Article/6775/m01070-6.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/DODComponentArticleView/tabid/7489/Article/6775/m01070-6.aspx</a>)  Air Force (<a href="http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/5876/f036-af-pc-c.aspx">http://dpclo.defense.gov/Privacy/SORNsindex/DODwideSORNArticleView/tabid/6797/Article/5876/f036-af-pc-c.aspx</a>)  Coast Guard (<a href="http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/html/2011-27881.htm">http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/html/2011-27881.htm</a>)</p>			
INSTRUCTIONS			
<p>Under Title 10 United States Code Section 1552, Active Duty and Reserve Component Service members, Coast Guard, former Service members, their lawful or legal representatives, spouses of former Service members on issues of Survivor Benefit Program (SBP) benefits, and civilian employees with respect to military records other than those related to civilian employment, who feel that they have suffered an injustice as a result of error or injustice in military records may apply to their respective Boards for Correction of Military Records (BCMR) for a correction of their military records. These Boards are the highest level appellate review authority in the military. The information collected is needed to provide the Boards the basic data needed to process and act on the request.</p> <ol style="list-style-type: none"> <li>All information should be typed or printed. Complete all applicable items. If the item is not applicable, enter "None."</li> <li>If space is insufficient on the front of the form, use the "Remarks" box below for additional information or attach an additional sheet.</li> <li>List all attachments and enclosures in item 9. Do not send original documents. Send clear, legible copies. Send copies of military documents and orders related to your request, if you have them available. Do not assume that they are all in your military record.</li> <li>The applicant must exhaust all administrative remedies, such as corrective procedures and appeals provided in regulations, before applying to the Board of Corrections.</li> <li>ITEM 5. State the specific correction of record desired. If possible, identify exactly what document or information in your record you believe to be erroneous or unjust and indicate what correction you want made to the document or information.</li> <li>ITEM 6. In order to justify correction of a military record, it is necessary for you to show to the satisfaction of the Board by the evidence that you supply, or it must otherwise satisfactorily appear in the record, that the alleged entry or omission in the record was in error or unjust. Evidence, in addition to documents, may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting the application. All evidence not already included in your record must be submitted by you. The responsibility of securing evidence rests with you.</li> <li>ITEM 8. U.S. Code, Title 10, Section 1552b, provides that no correction may be made unless a request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.</li> <li>ITEM 10. Personal appearance before the Board by you and your witnesses or representation by counsel is not required to ensure full and impartial consideration of your application. If the Board determines that a personal appearance is warranted and grants approval, appearance and representation are permitted before the Board at no expense to the government.</li> <li>ITEM 11. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.</li> <li>ITEM 12. The person whose record correction is being requested must sign the application. If that person is deceased or incompetent to sign, the application may be signed by a spouse, widow, widower, next of kin (son, daughter, mother, father, brother, or sister), or a legal representative that has been given power of attorney. Other persons may be authorized to sign for the applicant. Proof of death, incompetency, or power of attorney must accompany the application. Former spouses may apply in cases of Survivor Benefit Plan (SBP) issues.</li> <li>For detailed information on application and Board procedures, see: Army Regulation 15-185 and <a href="http://www.arba.army.pentagon.mil">www.arba.army.pentagon.mil</a>; Navy - SECNAVINST 5420.193 and <a href="http://www.hq.navy.mil/bcmr/bcmr.htm">www.hq.navy.mil/bcmr/bcmr.htm</a>; Air Force Instruction 39-2603, Air Force Pamphlet 36-2607, and <a href="http://www.afpc.randolph.af.mil/safmrbr">www.afpc.randolph.af.mil/safmrbr</a>; Coast Guard - Code of Federal Regulations, Title 33, Part 52.</li> </ol>			
MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW			
<b>ARMY</b>	<b>NAVY AND MARINE CORPS</b>	<b>AIR FORCE</b>	<b>COAST GUARD</b>
Army Review Boards Agency 251 18th Street South, Suite 385 Arlington, VA 22202-3531	Board for Correction of Naval Records 701 S. Courthouse Road, Suite 1001 Arlington, VA 22204-2490	Board for Correction of Air Force Records SAF/MRBR 550-C Street West, Suite 40 Randolph AFB, TX 78150-4742	Department of Homeland Security Office of the General Counsel Board for Correction of Military Records 245 Murray Lane, Stop 0485 Washington, DC 20528-0485
<b>17. REMARKS</b>			

## Appendix 5: Resources for Discharge Upgrading Assistance

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