MILITARY SEXUAL TRAUMA SURVIVORS' SECOND BATTLE

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Service members face an increased risk of sexual assault and harassment in the U.S. military when compared to American civilian society. Yet, Congress recently dialed back its efforts to help military sexual trauma (MST) survivors. Congress cut access to Department of Veterans Affairs (VA) health care for a subset of MST survivors—those who receive bad discharges. In doing so, Congress failed to appreciate the link between a survivor's trauma and how that trauma can manifest—often as misconduct resulting in a less than honorable discharge.

This Article is the first to shine a spotlight on the overlooked second battle that MST survivors must fight in gaining VA health care eligibility for their trauma-induced conditions. This Article not only highlights the less well-known history of VA eligibility rules for MST survivors, but it also proposes practical solutions to ensure VA health care access to all MST survivors, thereby ending the second battle they should never have been forced to fight.

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"Less well known is the second battle that many veterans who survive sexual violence must fight with the U.S. Department of Veterans Affairs (VA) when they return to civilian life."[1]

INTRODUCTION

Sexual assault and harassment remain prevalent in the U.S. military. Indeed, one in four active-duty women and one in twenty active-duty men reported being sexually harassed in fiscal year 2023 alone.[2] Congress has focused its efforts to combat sexual assault and harassment on changing the military from within. Recently, however, Congress has failed to provide health care at the Department of Veterans Affairs (VA) for all Military Sexual Trauma (MST) survivors for their trauma-induced conditions once they leave the military.[3]

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1 VETERANS LEGAL SERVICES CLINIC, YALE LAW SCHOOL, BATTLE FOR BENEFITS: VA DISCRIMINATION AGAINST SURVIVORS OF MILITARY SEXUAL TRAUMA 1 (2013).

2 *See* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2023 4 (2024).

3 Congress defines MST broadly as "a condition, which in the judgment of a health care professional employed by the [VA], resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the former member of the Armed Forces was serving on duty, regardless of duty status or line of duty determination." 38 U.S.C. § 1720D(a)(1) (2021).

Some scholars have described MST as an "imprecise term." Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 COLUM. J. GENDER & L. 343, 343 (2014). The Department of Defense has defined sexual assault and sexual harassment much more narrowly than the expansive VA MST definition (found in 38 U.S.C. § 1720D(a)(1) (2021)) for purposes of criminal prosecution in the military justice system. Article 120 of the UCMJ is an example. See 10 U.S.C. § 920 (omitting the term "military sexual trauma"). Because the focus of this Article is on access to VA health care, the VA definition articulated in 38 U.S.C. § 1720D(a)(1) (2021) will be used. This Article will also use the term

Prior to 2021, all MST survivors were eligible for VA health care for conditions related to their trauma. MST used to be an independent basis for VA eligibility. Yet, in 2021, Congress cut out some MST survivors when it dialed back efforts to expand access to VA health care. Specifically, Congress blocked those MST survivors who have been discharged pursuant to court-martial from accessing VA care when it passed 38 U.S.C. § 1720D(g)—a special treatment provision designed specifically for MST survivors. Then VA further restricted health care for an additional subset of MST survivors—those who face a statutory (or categorical) bar to VA benefits.[4]

This contraction in the law is emblematic of the recent cultural shift—a backlash to the #MeToo movement—and its impact can be the difference between life and death for this vulnerable and often overlooked subset of MST survivors.[5] Service members who do not receive VA health care have a far higher risk of dying by suicide than those who receive VA care.[6] Not expanding care to all MST survivors results in disparate outcomes, ultimately harming the most marginalized of our veteran population.

While nearly all legal scholarship assumes the MST survivor is eligible for VA benefits, this Article—for the first

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"survivor" in lieu of "victim" when referring to a service member who has endured an MST event.

[4] The phrase, "statutory bar to VA benefits," is a term of art in the VA-disability-eligibility context. The statutory bars to VA benefits are found in 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c) (2024) (listing the statutory bars to VA benefits as: (1) conscientious objection with refusal to perform duty; (2) sentence issued by a general court-martial; (3) resignation by an officer for the "good of the service[;]" (4) discharge due to a desertion conviction; (5) being an alien during a period of hostilities in which the Service member requested release; and (6) discharged with an other than honorable or bad conduct discharge for being absent without leave for a continuous period of at least 180 days). *See infra* note 92 and associated text for an explanation of the impact of statutory bars to VA benefits on a former service member's eligibility. *See infra* notes 36 and 327 and associated text for an explanation of an exception (called "insanity") that can overcome a statutory bar to benefits.

[5] *See* Tim Bower, *The #MeToo Backlash*, HARV. BUS. REV., Sep.–Oct. 2019 (conducting an empirical study documenting a backlash to the #MeToo movement); Constance Grady, *The Mounting, Undeniable Me Too Backlash*, VOX (Feb. 3, 2023) https://www.vox.com/culture/23581859/me-too-backlash-susan-faludi-weinstein-roe-dobbs-depp-heard [https://perma.cc/8TDP-52K4] (identifying several noteworthy cases and public opinion polls evidencing a backlash to the #MeToo movement).

[6] *See, e.g.*, OUTVETS ET AL., TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTH CARE TO VETERANS WITH BAD PAPER DISCHARGES 10 (2020) (concluding that VA health care access can lower the risk of suicidal ideation for service members initially ineligible for care).

time—focuses on the MST survivor who is not.[7] As such, this Article makes three distinct contributions. The piece highlights Congress and VA's contraction of VA health care for the most vulnerable MST survivors, drawing attention to how the recent change in the law tangibly impacts MST survivors. Secondly, the Article explains what likely led to Congress and VA's complete oversight of these MST survivors. Finally, informed by the author's professional experience representing MST survivors, it proposes practical solutions that enable all MST survivors to access health care at VA for their trauma-induced conditions.

Part I details two real-life stories of MST survivors and their denial of VA health care to illustrate the devastating effects of the current legislation and VA rules. Part II explains why MST survivors frequently do not report the crimes they endure and describes the complex legal framework that serves as the foundation for VA benefit eligibility. Part III examines the historical evolution of the VA eligibility framework for MST survivors, leading up to the statutory and regulatory changes in 2021.

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[7] Most legal scholarship focuses on easing the evidentiary burden for MST survivors in proving service connection for their MST-induced disabilities. *See, e.g.*, Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma*, 16 WM. & MARY J. WOMEN & L. 155, 156 (2009); Alexandra Besso, *Veterans as Victims of Military Sexual Assault: Unequal Access to PTSD Disability Benefits and Judicial Remedies*, 23 BUFF. J. GENDER L. & SOC. POL'Y 73, 75 (2014) (focusing on establishing a service-connection for MST related PTSD claims); Alexandra Yacyshyn, *"[Secretary Shulkin], Tear Down This Wall!" Tearing Down the Wall Between Veterans Suffering from PTSD Due to Military Sexual Trauma and Compensation Benefits*, 32 J. C.R. & ECON. DEV. 275, 277 (2019) (arguing that due to an "additional evidentiary requirement, veterans suffering from MST-related PTSD are denied benefits at a much higher rate than veterans suffering from PTSD due to combat, prisoner of war status, and fear of hostile military activity"); Brianne Ogilvie & Emily Tamlyn, *Coming Full Circle: How VBA Can Complement Recent Changes in DoD and VHA Policy Regarding Military Sexual Trauma*, 4 VETERANS L. REV. 1, 2 (2012). *Contra* John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 70–98 (2012); Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards' Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 CALIF. L. REV. 1357, 1364 (2020); Daniel Scapardine, *Leaving "Other than Honorable" Soldiers Behind: How the Department of Defense and Veterans Affairs Inadvertently Created a Health and Social Crisis*, 76 MD. L. REV. 1133, 1137–38 (2017). While these authors rightly point out this unfair barrier to VA care, this Article focuses on those MST survivors who are left out entirely due to their discharge characterization. That said, even if an MST survivor is eligible for benefits at VA, they may experience other barriers to care. Thus, not all who are eligible seek care at VA. *See* Seamone & Traskey, *supra* note 3, at 345–47; Marjan Ghahramanlou-Holloway et al., *An Evidence-Informed Guide for Working with Military Women and Veterans*, 42 PRO. PSYCH. 1, 5 (2011) (highlighting why women veterans may not seek treatment from VA, including "feeling some stigma" and "feeling unwelcomed").

Next, Part IV analyzes the current eligibility standard for MST survivors prescribed in § 1720D(g) and VHA directives. Part V explains why Congress should consider the link between survivors' trauma and their subsequent misconduct when prescribing MST eligibility rules. Finally, Part VI sets forth a practical solution: expanding VA health care eligibility to all so that no MST survivor is left behind.

I
Two Case Studies

Marine Corporal Thae Ohu's superior raped her while she was serving in Japan on active duty.[8] Her trauma later manifested in misconduct—an assault on her boyfriend (who was not her assaulter). Her misconduct was "the result of a severe mental health breakdown triggered by an alleged sexual assault suffered earlier in her Marine Corps career."[9] The Marine Corps criminally charged Corporal Ohu with several violations of the Uniform Code of Military Justice (UCMJ).[10] While in pre-trial confinement awaiting her general court-martial, Corporal Ohu's mental health continued to decline, and she attempted suicide.[11]

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8 Philip Athey, *Thae Ohu to Receive Bad Conduct Discharge After Marine General Denies Judge's Recommended Suspension*, Marine Corps Times (July 14, 2021), [hereinafter *Thae Ohu to Receive Bad Conduct Discharge*] https://www.marinecorpstimes.com/news/your-marine-corps/2021/07/14/thae-ohu-to-receive-bad-conduct-discharge-after-marine-general-denies-judges-recommended-suspension/ [https://perma.cc/9GYX-3VJB]. While Corporal Ohu later reported the rape, it was never prosecuted, and as of 2021, "the alleged rapist is now a staff sergeant working in the Pentagon's legal division." Philip Athey, *Marine Cpl. Thae Ohu out of the Brig, Final Decision on Discharge Delayed*, Mil. Times (May 17, 2021), [hereinafter *Thae Ohu out of the Brig*] https://www.militarytimes.com/news/your-marine-corps/2021/05/17/marine-cpl-thae-ohu-out-of-the-brig-decision-on-discharge-delayed/ [https://perma.cc/2LR6-VNPV].

9 Athey, *Thae Ohu to Receive Bad Conduct Discharge*, *supra* note 8.

10 The UCMJ is a collection of federal laws, composed of the code of military criminal law and procedure. It is codified at 10 U.S.C. Subtitle A, Part II, Chapter 47 (10 U.S.C. §§ 801–946a).

11 Thomas J. Brennan, *Senior Marine Corps Counsel Ridicules Sexual Assault Survivor at Court-Martial Hearing*, War Horse (Feb. 4, 2021), https://thewarhorse.org/senior-marine-corps-legal-counsel-ridicules-defendant-thae-ohu-court-martial-hearing/ [https://perma.cc/ZDY2-NWMA]. While it is unclear from the newspaper articles what level of court-martial Corporal Ohu was prosecuted in, we will assume she was tried at a general court-martial for purposes of this Article. A general court-martial is the most serious of the three levels of courts-martial as it exposes the accused to the most serious level of punishment available under the UCMJ. *See, e.g.*, Joint Serv. Comm. on Mil. Just., Manual for Courts-Martial, R.C.M. 1003(b)(8)(B)–(C) (2019) [hereinafter MCM] (stating that enlisted members can be subject to one of two types of punitive discharges at a general court-martial: bad conduct or dishonorable discharge). For a more in-depth discussion, *see infra* Subpart II.B.

Corporal Ohu pled guilty to assault charges.[12] A military judge sentenced her to 328 days imprisonment, reduction to the lowest enlisted grade (E-1), and a bad conduct discharge, with a recommendation to the convening authority to suspend this punitive discharge for six months.[13] The military judge recommended suspension of the discharge so that Corporal Ohu could still receive much-needed health care at VA for her documented mental health conditions.[14] The military judge cited her "'significant mental health history/diagnosis . . . as weighty extenuation and mitigation.'"[15] Yet, the convening authority, a Marine Corps General Officer, disagreed with the military judge's recommendation, denied the suspension, and instead, issued a bad conduct discharge.[16]

Seaman Robert Thompson, a nineteen-year-old sailor, was sexually assaulted while aboard a Navy ship. He did not report the crime.[17] He did not think anyone would believe him, and he felt ashamed. It was also the early 1990s—even consensual sexual conduct between two men was a crime and punishable under the UCMJ.[18] To escape his attacker, Seaman Thompson left the ship without permission as soon as it docked at a nearby port. He was eventually arrested, after being gone for almost a year, and brought back to naval authorities to be punished for his nearly one-year absence.[19] At a general court-martial, Seaman Thompson was sentenced to eleven months in prison, reduction

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12 Athey, *Thae Ohu out of the Brig*, *supra* note 8. Pursuant to a plea agreement, Corporal Ohu pleaded guilty to "one count of aggravated assault on an intimate partner with a dangerous weapon [knife], two counts of assault consummated by battery, one count of destruction of government property, and one count with two specifications of willfully disobeying a superior commissioned officer." *Id.*

13 *Id.*

14 *Id.*

15 Athey, *Thae Ohu to Receive Bad Conduct Discharge*, *supra* note 8.

16 *Id.* In the military justice system, convening authorities, who are senior military commanders and most often not lawyers, have the authority to decide what sentence recommendations to accept from the military judge. *See* 10 U.S.C. § 822; 10 U.S.C. § 860(c)(1) (2013) ("The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority"), *amended by* 10 U.S.C. § 860a (2019). *But cf.* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531–539G, 135 Stat. 1541, 1692 (2021) (establishing a special trial counsel that limits the convening authority's power).

17 Certain facts and identifiable information have been modified to protect client confidentiality.

18 10 U.S.C. § 925 (sodomy) (amended 2016). *But see Lawrence v. Texas*, 539 U.S. 558, 564–79 (2003) (holding that a Texas law criminalizing consensual private homosexual sodomy is unconstitutional).

19 Absence without leave (AWOL) is a crime still punishable today under the UCMJ. 10 U.S.C. § 886.

to the lowest enlisted grade (E-1), and a bad conduct discharge. Over two decades later, a clinical psychologist diagnosed Seaman Thompson with post-traumatic stress disorder (PTSD) caused by the sexual assault he endured while in the Navy.

Both cases share a tragic similarity: neither Corporal Ohu nor Seaman Thompson are eligible for treatment at VA for their service-incurred mental health conditions because of their punitive discharges.[20]

Broadly, § 1720D is a provision dedicated solely to VA counseling and treatment for sexual trauma in the military. Section 1720D(g) defines which MST survivors are eligible for this VA care, defining those eligible as "former member of the Armed Forces," as "(1) a veteran" or "(2) an individual described in section 1720I(b) of this title."[21] Section 1720I(b) further defines eligible MST survivors as:

> (b) [ELIGIBLE INDIVIDUALS.—] A former member of the Armed Forces described in this subsection is an individual who—
>
> (1) is a former member of the Armed Forces, including the reserve components;
>
> (2) while serving in the active military, naval, air, or space service, was discharged or released therefrom under a condition that is not honorable but not—
>
> (A) a dishonorable discharge; or
>
> (B) a discharge by court-martial;[22]

VA eligibility depends upon a service member having "veteran" status. A "veteran" is "a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable."[23]

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20 38 U.S.C. § 1720D(g); 38 U.S.C. § 1720I(b). For purposes of eligibility under § 1720D(g), it is irrelevant whether the MST survivor received the punitive discharge at a special court-martial empowered to adjudge a bad conduct discharge or a general court-martial. 38 U.S.C. § 1720D(g). A bad conduct discharge is distinct from a dishonorable discharge. *See* MCM, *supra* note 11, at R.C.M. 1003(b)(8)(C) (defining a bad conduct discharge as "less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature"); *id.* at R.C.M. 1003(b)(8)(B) (2024) ("A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment . . . .").

21 38 U.S.C. § 1720D(g).

22 38 U.S.C. § 1720I(b).

23 38 U.S.C. § 101(2); *see also* 38 C.F.R. § 3.1(d) (2021), *amended by* Inclusion of the Space Force as Part of the Armed Forces, 87 Fed. Reg. 26124, 26125 (May 3, 2022); Bradford Adams & Dana Montalto, *With Malice Toward None:*

This statute, 38 U.S.C. § 1720D(g), passed in 2021, restricts VA health care for MST survivors like Corporal Ohu and Seaman Thompson.[24] In other words, when Congress passed § 1720D(g), it made VA eligibility for MST survivors contingent upon one's discharge characterization, blocking survivors who were discharged pursuant to a court-martial from receiving VA care.[25]

In a limited way, Congress solidified an expansion of eligibility beyond those with veteran status. MST survivors with other than honorable discharges, but who do not have veteran status under Title 38, are now explicitly eligible for VA care pursuant to this amendment.[26] Although Congress solidified an expansion of eligibility for other than honorable MST recipients, it contracted eligibility for MST survivors with punitive discharges.

Soon after this statute passed, the Veterans Health Administration (VHA) further limited VA health care eligibility for MST survivors.[27] Specifically, VHA barred an additional subset of MST survivors—those who are statutorily denied benefits—from VA care through an interpretative rule.[28]

Revisiting the Historical and Legal Basis for Excluding Veterans From "Veteran" Services, 122 PENN ST. L. REV. 69, 105–12 (2017) (providing an in-depth discussion of the statutory and legislative background of the "other than dishonorable" requirement). For an in-depth explanation of VA benefit eligibility, *see infra* Subpart II.B.

24 38 U.S.C. § 1720D(g). This exclusion does not extend to service members with prior periods of honorable service. Put another way, service members who receive a punitive discharge may be eligible for VA benefits if they have a period of honorable service. For an in-depth explanation of how to determine whether a service member has a prior period of honorable service, see 38 U.S.C. § 101(2) and Brooker, Seamone & Rogall, *supra* note 7, at 70–98.

25 38 U.S.C. § 1720D(g). The sole focus of this Article is on VA health care eligibility, not on eligibility for other VA benefits including disability compensation.

26 38 U.S.C. § 1720I(b).

27 U.S. DEP'T OF VETERANS AFFS., VETERANS HEALTH ADMIN., VHA DIRECTIVE 1115(1), MILITARY SEXUAL TRAUMA (MST) PROGRAM T-1 (2021) [hereinafter VHA DIRECTIVE 1115(1)] (interpreting the eligibility requirement under 38 U.S.C. § 1720I(b) to former service members who "have been discharged or released from the above service under a condition that is not honorable but not a punitive discharge by court-martial *or subject to a statutory bar to VA benefits under 38 U.S.C. § 5303 or other provisions of Federal law*." (emphasis added)); *see also infra* Part IV. The Veterans Health Administration is a component of VA and provides health care to all eligible veterans.

28 VHA DIRECTIVE 1115(1), *supra* note 27, at T-1; *see also infra* Part IV. Interpretive rules are "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

Neither Congress nor VA accounted for how trauma can impact a survivor and how trauma can manifest as misconduct, resulting in a less than honorable discharge. Whether because of ignorance of this connection or a callous disregard of it, Congress and VA restricted a subset of MST survivors from receiving VA health care.

Congress further appears to have failed to appreciate the complex legal landscape they were legislating within, incorrectly assuming they were expanding care to all survivors. When passing § 1720D(g) in 2021, Congresswoman Nancy Pelosi declared that "we solemnly promise to leave no veteran behind."[29] Yet, what she and other Congresspeople failed to realize is that their new legislation did just that.

VA also did not acknowledge that its 2018 and 2021 VHA directives cut even more MST survivors out of care.[30] Indeed, the 2021 VHA directive impermissibly departed from the statutory eligibility standards Congress ultimately prescribed in § 1720D(g) by barring eligibility for benefits to MST survivors who were subject to a statutory bar to VA benefits under 38 U.S.C. § 5303 or other provisions of Federal law.[31] Thus, regardless of their intent otherwise, Congress and VA effectively left out this subset of MST survivors.

Prior to 2021, these restrictions did not explicitly exist in statute.[32] On the contrary, for the past several decades there has been a move towards expanding VA access for MST survivors. In fact, any MST survivor, regardless of their discharge characterization, was eligible for free VA health care for their service-incurred disabilities before these changes in 2021.[33] The expanded care under VHA Directive 2010-033 resulted in any service member who was a survivor of sexual assault or sexual harassment likely being able to access VA health care for their service-incurred disabilities if they chose

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29 166 CONG. REC. H7209–10 (daily ed. Dec. 16, 2020) (statement of Speaker Nancy Pelosi); Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. No. 116-315, § 5301(a)(2)–(3), 134 Stat. 5037 (2021).

30 VHA DIRECTIVE 1115(1), *supra* note 27, at 1–2; *see also infra* Part IV.

31 VHA DIRECTIVE 1115(1), *supra* note 27, at T-1; *see also infra* Part IV (explaining why this VHA directive is an invalid interpretive rule).

32 *See infra* Part III and associated text.

33 U.S. DEP'T OF VETERANS AFFS., VETERANS HEALTH ADMIN., VHA DIRECTIVE 2010-033, MILITARY SEXUAL TRAUMA (MST) PROGRAMMING 1 (2010) [hereinafter VHA DIRECTIVE 2010-033]; *see* Subpart II.B.; *see also* Brooker, Seamone & Rogall, *supra* note 7, at 99–105 (explaining that MST was an independent basis for VA benefit eligibility regardless of discharge type or discharge characterization).

to do so.[34] Even more broadly, Congress first passed 38 U.S.C. § 1720D over thirty years ago intending it to be a specific provision to offer counseling and treatment for MST survivors.[35]

The irony is that Corporal Ohu's and Seaman Thompson's sexual assaults and resulting severe mental health conditions likely caused their misconduct that led to their punitive discharge. Yet, due to this change in the law, the military's punishment of their misconduct now prohibits them from receiving VA treatment for their service-incurred mental health condition.[36]

The change in the law also results in an arbitrary application depending upon when a crime is committed—during service or after. MST survivors who commit crimes post-service are not precluded from VA benefits, yet those like Corporal Ohu and Seaman Thompson are completely barred from VA care simply because their post-MST crimes occurred during service.

Sadly, these two real-life cases are not an anomaly. While the number of service members who receive a punitive discharge or face a statutory bar to benefits is a small subset of MST survivors, one who does not get treatment is one too many.[37]

These service members are victims—they should all have access to free VA health care for mental or physical conditions connected to their assault or harassment regardless of their discharge characterization. Regardless of Congress' motive or cause for the change of the law, this injustice should be fixed. The list of collateral consequences for service members with punitive discharges is lengthy; however, excluding MST survivors from VA treatment for their trauma-induced disabilities

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34 VHA DIRECTIVE 2010-033, *supra* note 33, at 1; *see also infra* Part III.

35 38 U.S.C. § 1720D; *see also infra* Part III.

36 38 U.S.C. § 1720D(g). Service members who experience service-induced mental health conditions like Corporal Ohu and Seaman Thompson may be able to obtain VA benefits (even with a punitive discharge) if they can meet the VA definition of "insanity." 38 C.F.R. § 3.354 (2024). To prove "insanity," a service member must demonstrate that their behavior at the time of the misconduct was "more or less prolonged deviation from his normal method of behavior." 38 C.F.R. § 3.354 (2024). Importantly, "insanity" under VA disability law differs significantly from the heightened standard for insanity found in criminal law. *See, e.g.*, MODEL PENAL CODE § 4.01 (A.L.I, Proposed Official Draft 1962) ("A person is [insane] if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.").

37 The Department of Defense and Congress agree as they are concerned about what happens to service members who report a sexual assault and are separated from their military service early. *See generally* DEP'T OF DEF. INSPECTOR GEN., EVALUATION OF THE SEPARATION OF SERVICE MEMBERS WHO MADE A REPORT OF SEXUAL ASSAULT 4 (2016) (finding that 5,301 service members who made an unrestricted report of sexual assault from January 1, 2009, to June 30, 2015, were separated from service).

should not be one of them.[38] Pursuant to § 1720D(g) and the subsequent VHA directive, Congress and VA have now denied care to the very service members they intended to help—leaving out the most vulnerable of MST survivors.

II
The Military Sexual Assault Crisis

Sexual assault and sexual harassment are still a serious problem in the military.[39] According to a 2014 VA study, one in four women veterans reported that they had endured MST.[40] Another VA study found that "[a]bout half of women

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38 Hugh McClean, *Discharged and Discarded: The Collateral Consequences of a Less-Than-Honorable Military Discharge*, 121 Colum. L. Rev. 2203, 2237–41 (2021) (arguing that the collateral consequences of a less than honorable discharge are similar to the consequences stemming from a criminal conviction); Eleanor T. Morales & John W. Brooker, *Restoring Faith in Military Justice*, 55 Conn. L. Rev. 77, 109 (2022) (explaining that a "correlation exists between benefits-disqualifying discharges, mental health [issues], and homelessness"); Marcy L. Karin, *"Other than Honorable" Discrimination*, 67 Case W. Rsrv. L. Rev. 135, 160–61 (2016) (explaining how "an OTH separation significantly impacts employment opportunities").

39 *See, e.g.*, Dep't of Def., *supra* note 2, at 9 (finding "an estimated 6.8 percent of active duty women and 1.3 percent of active duty men indicated experiencing USC [unwanted sexual contact] in the year prior to being surveyed [October 1, 2022, to September 30, 2023]").

The murder of Army Specialist Vanessa Guillen, who was stationed at the largest U.S. military base, Fort Cavazos (formerly Fort Hood), Texas, and the military's handling of the criminal investigation in 2020 is emblematic of the ongoing nationwide crisis. Tom Vanden Brook, *Panel Blasts Fort Hood Leaders, Army After Disappearance*, Death of Spc. Vanessa Guillen; 14 Fired or Suspended, USA Today (Dec. 8, 2020), https://www.usatoday.com/story/news/politics/2020/12/08/fort-hood-panel-faults-army-ignoring-sexual-assaults-some-fired/6481836002/ [https://perma.cc/FZ6P-FATU]. For detailed accounts of service members' sexual assaults and rapes, and their chain of commands' failure to respond, see The Invisible War, Amazon Prime (Amy Ziering & Tanner King Barklow 2012). In response to Specialist Guillen's tragic death, the Secretary of the Army appointed an independent review committee to investigate "whether personnel at Fort Hood and the surrounding community have allowed a climate of sexual harassment and discrimination to flourish." Brook, *supra*. The committee found that it did, specifically concluding that "the command climate relative to the Sexual Harassment/Assault Response and Prevention (SHARP) Program at Fort Hood was ineffective, to the extent that there was a permissive environment for sexual assault and sexual harassment." Fort Hood Indep. Rev. Comm., Report of the Fort Hood Independent Review Committee ii (2020). The independent committee also determined that these failures led to an underreporting of sexual assault and harassment. *Id.*

40 Emily Wax-Thibodeaux, *Female Veterans Battling PTSD from Sexual Trauma Fight for Redress*, Wash. Post (Dec. 25, 2014), https://www.washingtonpost.com/politics/female-veterans-battling-ptsd-from-sexual-trauma-fight-for-redress/2014/12/25/f2f22d8e-7b07-11e4-b821-503cc7efed9e_story.html [https://perma.cc/MS7C-B8P3]; *see also* U.S. Gov't Accountability Off., GAO-14-477, Military Sexual Trauma: Improvements Made, but VA Can Do More to Track and Improve

sent to Iraq or Afghanistan report being sexually harassed, and nearly one in four says they were sexually assaulted."[41] These statistics have persisted over the past decade.[42] Because these numbers are derived only from those veterans who are eligible for VA benefits and using VA services, the statistics underestimate the number of service members who have experienced MST.[43]

Scholars have described the depth of the crisis as "pervasive."[44] New York Senator Kirsten Gillibrand stated that "[s]exual assault in our military is an epidemic . . . "[45] While some may quibble over the label or precise statistics, most now agree that service members are exposed to an increased risk of experiencing sexual assault or harassment while serving in the U.S. military.[46]

THE CONSISTENCY OF DISABILITY CLAIM DECISIONS 1 (2014) (finding that in 2012, 1 in 5 female veterans and 1 in 100 male veterans told the VA they had experienced sexual abuse in the military).

41 Gregg Zoroya, *VA Finds Sexual Assaults More Common in War Zones*, USA TODAY (Dec. 26, 2012) https://www.usatoday.com/story/news/nation/2012/12/26/va-finds-sexual-assaults-more-common-in-war-zones/1793253/ [https://perma.cc/438P-LB6P]; *see also* Brooker, Seamone & Rogall, *supra* note 7, at 99. For a more recent VA study from 2016 regarding the prevalence of MST among service members who served during Operation Enduring Freedom or Operation Iraqi Freedom, see *Military Sexual Trauma in Recent Veterans*, U.S. DEP'T OF VETERANS AFFS. (Aug. 6, 2021), https://www.publichealth.va.gov/epidemiology/studies/new-generation/military-sexual-trauma-infographic.asp [https://perma.cc/Q2P9-2TP4].

42 U.S. DEP'T OF VETERANS AFFS., MILITARY SEXUAL TRAUMA 1 (2025); *see also* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2019 3 (2020).

43 *See* Shannon K. Barth et al., *Military Sexual Trauma Among Recent Veterans: Correlates of Sexual Assault and Sexual Harassment*, 50 AM. J. PREVENTATIVE MED. 77, 79 (2016) (finding that among those who served during Operation Enduring Freedom and Operation Iraqi Freedom, over 40% of women and 4% of men endured sexual trauma).

44 Renee Burbank, *Stigmatizing Narratives in Military Sexual Trauma Cases*, 31 KAN. J.L. & PUB. POL'Y 185, 186 (2022); *see also* U.S. DEP'T OF VETERANS AFFS., *supra* note 42. *But see* Tricia D'Ambrosio-Woodward, *Military Sexual Assault: A Comparative Legal Analysis of the 2012 Department of Defense Report on Sexual Assault in the Military: What It Tells Us, What It Doesn't Tell Us, and How Inconsistent Statistic Gathering Inhibits Winning the "Invisible War,"* 29 WIS. J.L. GENDER & SOC'Y 173, 175 (2014) (criticizing the Department of Defense's information gathering of sexual assault statistics by failing to accurately understand the nuances in order to effectively combat these crimes).

45 Vanessa Romo, *Defense Secretary Will Back a Seismic Shift in Prosecuting Military Sex Assault Cases*, NPR (June 23, 2021), https://www.npr.org/2021/06/22/1009272055/defense-secretary-says-hell-support-removing-sexual-offense-cases-from-commander [https://perma.cc/83VM-AL9J].

46 Katherine Klingensmith et al., *Military Sexual Trauma in US Veterans: Results from the National Health and Resilience in Veterans Study*, J. CLINICAL PSYCH. e1133, e1137 (2014) (finding that "[w]hile the prevalence of MST is comparable

Congress has repeatedly expressed grave concern about the military sexual assault crisis. And Congress has done more than talk about these concerns—it has put its words into action, focusing its efforts on changing the military justice system in an effort to rectify perceived sexual assault underenforcement in the military.[47] Over the last decade, Congress has also afforded military sexual assault survivors more resources, including a free judge advocate (military attorney) to represent a survivor's interests.[48]

Despite these efforts, Congress changed the law to make it more difficult for MST survivors to obtain health care at VA post-service. In other words, Congress has failed to provide comprehensive VA resources for all MST survivors, like Corporal Ohu and Seaman Thompson, once they leave the military. But, it is even harder under today's rules for survivors with punitive discharges (or a statutory bar to benefits) to receive any care at VA for the MST related conditions they endure.[49]

This section will provide the necessary foundation for understanding the impact of 38 U.S.C. § 1720D(g), which makes VA health care eligibility for MST survivors contingent upon one's discharge characterization.[50] First, this section will explain

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to the prevalence of sexual assault in civilian populations, MST generally occurs within a briefer time span (eg, [sic] 2–6 years) compared to the lifetime assessment of sexual assault prevalence, thus suggesting increased risk for sexual assault in this population"); *see also* Irene Williams & Kunsook Bernstein, *Military Sexual Trauma Among U.S. Female Veterans*, 25 ARCHIVES PSYCH. NURSING 138, 141 (2011) (concluding that "both men and women who join the military have higher rates of sexual and physical abuse victimization history than the general population").

47 *See, e.g.*, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531–539G, 135 Stat. 1541, 1692 (2021) (taking prosecutorial discretion away from military commanders and giving it to military lawyers (judge advocates) for specific covered offenses, i.e., the most serious felony offenses). See also Morales & Brooker, *supra* note 38, for a discussion of the impact and significance of this legislation.

48 10 U.S.C. § 1044e (2024).

49 38 U.S.C. § 1720D(g)(2); U.S. DEP'T OF VETERANS AFFS., VETERANS HEALTH ADMIN., *supra* note 27. All punitive discharge recipients are statutorily ineligible for VA health care for that period of service—even for their service-connected injuries. 38 U.S.C. § 5303(e); *see* 38 C.F.R. § 3.12(c)(2) (2024) (precluding service members who are discharged "[b]y reason of the sentence of a general court-martial"); Veterans' Benefits. Entitlement, Denial to Certain Veterans with Upgraded Discharges, Pub. L. No. 95-126, 91 Stat. 1106, 1107–08 (1977) (stating that VA health providers "shall not provide such health care . . . for any disability incurred or aggravated during a period of service from which such person was discharged by reason of a bad conduct discharge"); 38 C.F.R. § 3.360(b) (2021) (prohibiting recipients of a bad conduct discharge, regardless of the level of court-martial, from receiving VA health care).

50 38 U.S.C. § 1720D(g).

why MST survivors frequently do not report the crimes inflicted upon them and the importance of recognizing that underreporting is the most common response for survivors. Next, this section will describe the legal framework for understanding how VA benefit eligibility operates to appreciate how an MST survivor could be restricted from receiving VA health care for their service-incurred disabilities.

A. Underreporting MST is the Norm

Sexual assault is significantly underreported—particularly in the U.S. military.[51] In fact, most survivors do not report. According to a Department of Defense (DOD) study in Fiscal Year 2023, only *one* in four service members reported their sexual assault.[52] The prevalence of underreporting continues despite the #Metoo movement, a nationwide movement giving voice to survivors of sexual assault and harassment, and now the cultural backlash against this movement.[53] Underreporting also persists even though the military implemented significant measures to address underreporting through the creation of a sexual assault response system with confidential and simplified

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51 DEP'T OF DEF., REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES 5–6 (2009); *see also* LYNN LANGTON ET AL., U.S. DEP'T OF JUST., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010 4 (2012) (finding that in the civilian context, "2 in 3 (65%) rape or sexual assault victimizations were not reported to police from 2006 to 2010").

52 DEP'T OF DEF., *supra* note 2, at 4. However, reporting of sexual assault in the military has increased from 2018, when only one-third of military sexual assaults were reported. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2018 3 (2019); *see also* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2011 28 (2012) (finding that only 14% of sexual assaults are reported); DEF. MANPOWER DATA CTR., 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: SURVEY NOTE AND BRIEFING 106–09 (2013) (concluding that in 2012, 67% of service women and 81% of service men stated they did not report unwanted sexual contact they had experienced).

53 Elizabeth Chuck, *#MeToo: Hashtag Becomes Anti-Sexual Harassment and Assault Rallying Cry*, NBC NEWS (Oct. 16, 2017), https://www.nbcnews.com/storyline/sexual-misconduct/metoo-hashtag-becomes-anti-sexual-harassment-assault-rallying-cry-n810986 [https://perma.cc/3AKB-EYHJ]; *see also* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html?searchResultPosition=1 [https://perma.cc/BH99-ZJRN]. *But see* David French, Opinion, *The Trouble Began When #MeToo Became #ChurchToo*, N.Y. TIMES (Dec. 15, 2024), https://www.nytimes.com/2024/12/15/opinion/me-too-trump-hegseth-churchtoo.html [https://perma.cc/JES5-X5TU] (explaining the recent backlash to the #MeToo movement and arguing that the movement has now passed).

reporting options.[54] The DOD has acknowledged that sexual assault and sexual harassment "are frequently unreported."[55]

Of course, each MST survivor has their own personal reasons for not reporting the crime.[56] Yet, fear of retaliation is one of the most cited barriers for underreporting.[57] In 2012, almost half of female service members and many male service members who did not report did not report out of fear of being retaliated against.[58] Retaliation in the military can come in many forms, personally or professionally, including discharging a survivor with a less than honorable discharge before their term of service is completed.[59] This fear persists

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54 *See supra* text accompanying note 52. The military now has two options when reporting sexual assault or harassment: unrestricted, which initiates a criminal investigation; and restricted, which does not trigger a criminal investigation, with the report remaining confidential and the survivor being allowed to access medical and mental health care. 10 U.S.C. § 1565(a)(4); 10 U.S.C. § 1565(b); *see* DEP'T OF DEF., DEPARTMENT OF DEFENSE DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 4–5 (2012); U.S. COMM'N ON C.R., SEXUAL ASSAULT IN THE MILITARY, 17–29 (2013) (detailing the array of options for sexual assault survivors including restricted and unrestricted reporting, expedited unit transfers, protective orders, and other resources afforded to victims).

55 Memorandum from A.M. Kurta, Acting Under Sec'y of Def. for Pers. & Readiness, Off. of the Under Sec'y of Def., to Sec'ys of the Mil. Dep'ts, 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 ¶ 26(d) (Aug. 25, 2017) [hereinafter Kurta Memo].

56 This Subpart is not intended to be an all-inclusive list of all the reasons a survivor may wish to not report.

57 *See* HUM. RTS. WATCH, EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY 29 (2015) (finding that "service members consistently cite fear of retaliation or negative impact on their careers as major reasons for their unwillingness to report sexual assaults"); *see also* DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT OF THE RESPONSE SYSTEM TO ADULT SEXUAL ASSAULT CRIMES PANEL 18 (2014); Nikki Levy, *Easing the Burden: Military Sexual Trauma, Retaliation, and Veterans Benefits*, 27 FED. CIR. BAR J. 377, 382–83 (2018).

58 *See* DEF. MANPOWER DATA CTR., *supra* note 52, at 106–08. Specifically, 47% of females feared retaliation. Other cited reasons for females included they thought their performance evaluation or chance for promotion would suffer (28%) or feared they or others would be punished for infractions/violations, such as underage drinking (23%), and fearing they would be assaulted again by the offender (23%), and that they might lose their security clearance/personnel reliability certification (15%). *Id.* For males, cited reasons include fearing that they or others would be punished for infractions, such as underage drinking (22%), fearing their performance evaluation or chance for promotion would suffer (16%), and that their security clearance/personnel reliability would be lost (15%). *Id.* For more recent data regarding sexual assault survivors reporting retaliation in the military, see DEP'T OF DEF., *supra* note 2, app. B at 39–43.

59 Some survivors of sexual assault have alleged that their other than honorable or bad conduct discharge was retaliatory. *See* HUM. RTS. WATCH, *supra* note 57,

despite the military prohibiting retaliation and criminalizing the behavior under the UCMJ.[60] Such fears are well-founded. A DOD study found that in both 2012 and 2014, 62% of women who filed such a report indicated that they perceived professional retaliation, social retaliation, adverse administrative actions, or punishments for violations associated with the sexual assault.[61]

Other significant barriers to reporting include: "(1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident."[62] Feelings of shame and embarrassment are also common reasons for not reporting.[63] These reasons become even more pronounced when considering how military service operates. In the civilian world, a person generally has the choice to leave one's job. In contrast, service members sign a contract obligating themselves to serve for a term of years, varying from two to six. Thus, simply quitting one's job is not an option—in fact, it is a crime punishable under the UCMJ.[64] These common reasons for not reporting may be heightened as the MST survivor likely does not feel they have the choice to leave their place of employment, the very place where they have suffered the assault or harassment.

In addition, MST survivors often fear that by reporting, they will be revealing their own (collateral) misconduct—defined

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at 47–50 (detailing MST survivors' accounts of being retaliated against for reporting their sexual assault by being discharged early and receiving a less than honorable discharge, often times for minor collateral misconduct). *But see* DEP'T OF DEFENSE, OFFICE OF THE UNDER SEC'Y FOR PERS. AND READINESS, DOD INSTRUCTION 1332.14 55 (2024) [hereinafter DODI 1332.14] (providing a survivor with the option of requesting a "general officer or flag officer . . . review" of an involuntary separation of a service member within one year of filing an unrestricted report of sexual assault).

60 10 U.S.C. § 932(a).

61 DEP'T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 116–17 (2014) (finding that for male service members data were not reportable). For more recent data regarding sexual assault survivors reporting retaliation in the military, see DEP'T OF DEF., *supra* note 2, app. B at 39–43.

62 U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-1013T, MILITARY PERSONNEL: PRELIMINARY OBSERVATIONS ON DOD'S AND THE COAST GUARD'S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS 14 (2008); *see also* Brooker, Seamone & Rogall, *supra* note 7, at 100.

63 Michelle A. Mengeling et al., *Reporting Sexual Assault in the Military: Who Reports and Why Most Servicewomen Don't*, 47 AM. J. PREVENTATIVE MED. 17, 21 (2014).

64 10 U.S.C. § 886. There are limited and specifically enumerated reasons why a service member's military service could end voluntarily prior to completing one's term of enlistment. *See generally* U.S. DEP'T OF THE ARMY, ARMY REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (2021) [hereinafter AR 635-200].

as "prohibited conduct that the victim engaged in around the same time, place, or circumstances as the sexual assault."[65] For example, if an MST survivor is drinking alcohol while underage the same evening that she is sexually assaulted, the survivor could be disciplined for this collateral misconduct if she were to report the crime. This possibility of being punished reinforces survivors' concern that reporting the crime could have a negative impact on their military career, operating as a "significant chilling effect on survivors' willingness to come forward to report."[66]

The pervasive underreporting contributes to the difficulty in understanding the true magnitude of the problem in the military. One can only assume that the current statistics underestimate how often sexual assault and harassment occurs in the armed forces. Thus, it is no surprise that some of these MST survivors are issued less than honorable discharges. Indeed, Part V of this Article explains how suffering from MST can contribute to the misbehavior that leads to bad discharges and the importance of providing VA health care to treat survivors. Before appreciating how an MST survivor could be barred from VA health care, however, one must first understand how a service member's discharge characterization can impact one's eligibility for VA benefits.

B. VA Benefit Eligibility Generally

Determining VA benefit eligibility is highly technical, complex, and confusing.[67] Importantly, VA's mission "is to care for those 'who shall have borne the battle' and for their families, caregivers, and survivors."[68] In carrying out that mission, VA is "required to provide disability benefits to any veteran with a

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65 HUM. RTS. WATCH, *supra* note 57, at 56. There is "conflicting evidence" as to how often a survivor is punished for collateral misconduct. *Id.* at 61; *see also* Levy, *supra* note 57, at 385. *But see* DEP'T OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION 6495.02, ADULT SEXUAL ASSAULT PREVENTION AND RESPONSE: PROGRAM PROCEDURES 91–92 (2013) (requiring any disciplinary action for collateral misconduct be withheld, but not dismissed, until a sexual assault investigation is completed).

66 HUM. RTS. WATCH, *supra* note 57, at 62.

67 The most comprehensive guide to determining VA benefit eligibility is Brooker, Seamone & Rogall, *supra* note 7. However, advocates and scholars should note that the law has changed since this book-length article was published. *See, e.g.*, 38 C.F.R. § 3.12(c)–(e) (2026).

68 U.S. DEP'T OF VETERANS AFFS., *Our VA Mission and Core Values*, https://www.va.gov/icare/#:~:text=Our%20mission%2C%20as%20the%20Department,actions%20toward%20service%20to%20others [https://perma.cc/99H5-KY9K] (last visited Sep. 20, 2025).

service-connected disability."[69] Contrary to popular belief, not all who serve in the military are eligible for VA benefits. Only "veterans," as specifically defined under 38 U.S.C. § 101(2), are eligible.[70] In other words, veteran status is the basis for eligibility for most VA benefits; it is the *only* key to unlocking the VA benefit eligibility door.[71]

Congress defined a "veteran" as "a person who served in the active military, naval, air, or space service and who was discharged or released under conditions other than dishonorable."[72] Thus, not all who serve in the military are "veterans"; rather, "veteran" status depends, in part, upon a service member's discharge characterization.[73]

When a service member separates or leaves the military after serving more than six months on active duty, the military branch will issue a discharge characterization.[74] Today, that discharge is recorded on a DD Form 214, serving as a report card of one's military service and providing a basis for VA eligibility or lack thereof.[75] Enlisted service members and commissioned officers can receive one of three discharges administratively: (1) honorable, (2) general, under honorable conditions, or (3) other than honorable.[76] The administrative discharge process can be voluntary or involuntary, sometimes

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69 Besso, *supra* note 7, at 76–77; *see also* 38 U.S.C. § 1710(a)(1); Cushman v. Shinseki, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (holding that those service members who meet the VA eligibility requirements have a protected property interest under the Due Process Clause of the federal Constitution).

70 38 U.S.C. § 101(2).

71 *Id.*; *see also* 38 C.F.R. § 3.1(d) (2021), *amended by* Inclusion of the Space Force as Part of the Armed Forces, 87 Fed. Reg. 26124, 26125 (May 3, 2022).

72 38 U.S.C. § 101(2); *see also* 38 C.F.R. § 3.1(d) (2021), *amended by* Inclusion of the Space Force as Part of the Armed Forces, 87 Fed. Reg. 26124, 26125 (May 3, 2022).

73 *See* Brooker, Seamone & Rogall, *supra* note 7, at 25–27 (describing in-depth additional VA eligibility requirements including active service). Once determined eligible for VA benefits, there are some benefits afforded to a veteran's spouse or veteran's qualifying dependent. *See* 38 C.F.R. § 3.5 (2024).

74 DoDI 1332.14, *supra* note 59, at 34–38, 60 (explaining that separation from service within the first 180 days of active duty is most often an uncharacterized separation).

75 *See* U.S. DEP'T OF THE ARMY, ARMY REG. 635-8, SEPARATION PROCESSING AND DOCUMENTS 2 (2019).

76 DoDI 1332.14, *supra* note 59, at 34–36. While most service members leave the military with an honorable discharge, a growing number of service members have left with general or other than honorable discharges. *See* OUTVETS ET AL., *supra* note 6, at 10. An other than honorable discharge used to be called "undesirable discharge." *See* U.S. DEP'T OF VETERANS AFFS., ADJUDICATION PROCEDURES MANUAL M21-1, pt. X, subpt. iv, 1.A.1.d (2021).

leading to an early termination of one's military career based upon the service member's conduct.[77]

Enlisted members can receive one of two types of punitive discharges—a bad conduct discharge or dishonorable discharge—pursuant only to the court-martial process.[78] A bad conduct discharge can be issued as punishment at either a special court-martial empowered to adjudge a bad conduct discharge (referred to as a BCD special) or a general court-martial.[79] In contrast, a dishonorable discharge can be issued as punishment only at a general court-martial.[80] Commissioned officers can only be issued a dismissal (at a general court-martial), which is the functional equivalent of a dishonorable discharge.[81] The chart below illustrates these foundational military justice concepts:

Discharge Characterization	**Type of Discharge**	**Type of Court-Martial**	**Eligible Service Members**
honorable	administrative	N/A	officers and enlisted
general	administrative	N/A	officers and enlisted
other than honorable	administrative	N/A	officers and enlisted
bad conduct discharge	punitive	BCD special or general court-martial	enlisted only
dishonorable discharge	punitive	general court-martial	enlisted only
dismissal	punitive	general court-martial	officers only

77 *See* DoDI 1332.14, *supra* note 59, at 34–56.

78 MCM, *supra* note 11, at R.C.M. 1003(b)(8)(B)–(C). After a service member is charged with a crime under the UCMJ, an accused service member can request an other than honorable (or general) discharge during the plea-bargaining process to avoid a court-martial conviction. *See, e.g.*, AR 635-200, *supra* note 64, at ch. 10-8a. For the Navy equivalent, see DEP'T OF THE NAVY, NAVAL MIL. PERS. MANUAL 1910-106, SEPARATION IN LIEU OF TRIAL BY COURT-MARTIAL 1 (2021).

79 *See* MCM, *supra* note 11, at R.C.M. 1003(a), (b)(8)(C); 10 U.S.C. § 816, 10 U.S.C. §§ 818–820. For enlisted members, there are three levels of court-martial: summary, special (or special empowered to adjudge a bad conduct discharge), and general, where the authorized punishments vary between these three. 10 U.S.C. § 816.

80 10 U.S.C. § 816; 10 U.S.C. §§ 818–820; MCM, *supra* note 11, at R.C.M. 1003(a), (b)(8)(B).

81 MCM, *supra* note 11, at R.C.M. 1003(b)(8)(A); 10 U.S.C. § 1161(a).

"Dishonorable" in the "veteran" definition for VA eligibility purposes under Title 38 of the U.S. Code and Code of Federal Regulations does *not* have the same meaning as a dishonorable discharge in the military justice context under Title 10 of the U.S. Code and Manual for Courts-Martial.[82] Unfortunately, the DOD and VA use the same word—"dishonorable"—to mean two very different things and thus language confusion frequently arises.[83] In the military justice context, a dishonorable discharge is the worst type of (punitive) discharge, resulting in the highest amount of exposure to the most severe punishments available under the law.[84] A dishonorable discharge—a term of art—is distinct from all other discharges, including other than honorable and bad conduct discharges, in the military justice system.

In contrast, VA defines the term "dishonorable" much more broadly, often concluding that other than honorable, bad conduct, and dishonorable discharges are all "dishonorable" for VA purposes.[85] Congress imposed statutory bars to VA benefits and then VA further expanded those eligibility bars adding regulatory bars to benefits to delineate between "honorable" and "dishonorable" conditions when determining eligibility for VA benefits.[86]

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82 *Contrast* 38 U.S.C. § 101; with MCM, *supra* note 11, at R.C.M. 1003(b)(8)(B) (establishing different definitions for "dishonorable" in different contexts). *But see* Adams & Montalto, *supra* note 23, at 99–105 (arguing that Congress intended the term "dishonorable," when used in the context of VA benefits, to mean dishonorable discharge as defined under Title 10).

83 In fact, VA has recently recognized this language is confusing and now issues eligibility letters to former service members stating "eligible" or "not eligible" (instead of "dishonorable" or "not dishonorable"). *VA Expands Access to Care and Benefits for Some Former Service Members Who Did Not Receive an Honorable or General Discharge*, VA NEWS (Apr. 25, 2024), https://news.va.gov/press-room/va-rule-amending-regulations-discharge-determinations/ [https://perma.cc/HU93-65PG].

84 MCM, *supra* note 11, at R.C.M. 1003(b)(8)(B).

85 For a more in-depth discussion of the language confusion around the word "dishonorable," see Adams & Montalto, *supra* note 23, at 105–12. *See also* Morales & Brooker, *supra* note 38, at 103–04 (also noting the language confusion around the word "dishonorable," depending upon the context in which it is used). As of November 2024, VA started using the terms, "eligible" or "ineligible" in lieu of "honorable" or "dishonorable" when rendering character of discharge (or eligibility) determinations. *See* U.S. DEP'T OF VETERANS AFFS., CHARACTER OF DISCHARGE ADVANCE LETTER 2 (2024).

86 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(d) (2024). Troublingly, prior to 2024, § 3.12(d) contained an additional regulatory bar for a "[h]omosexual act[] involving aggravating circumstances or other factors affecting the performance of duty." 38 C.F.R. § 3.12(d)(5) (2023). *See* Eleanor T. Morales, *Distinction Without a Difference: Other than Honorable vs. Bad Conduct Discharge*, 1 ARMY LAW. 38, 41 (2024)

VA, through lay adjudicators with no formal legal training, will analyze a service member's discharge to determine if he is a "veteran."[87] If a service member applies for benefits with an other than honorable, bad conduct, or dishonorable discharge (or dismissal), then VA is required to do a character of discharge determination to conclude whether the service member was discharged "under conditions other than dishonorable."[88] Analyzing the facts and circumstances of each case, VA will evaluate whether a statutory[89] or regulatory bar[90] to benefits applies.[91] There is a difference between a statutory and regulatory bar to benefits. If a statutory bar to benefits applies, then the service member is barred from *all* benefits for that period of service.[92] In contrast, if only a regulatory bar to benefits applies, then the service member will be barred from all benefits *except* VA health care for service-connected disabilities unless the service member has a punitive discharge.[93]

(explaining that "VA uses three proverbial 'buckets' to determine whether a former Service member has veteran status: (1) Honorable for VA Purposes; (2) Dishonorable for VA Purposes but Eligible for VA Healthcare for Service-Connected Conditions; and (3) Dishonorable for VA Purposes for All VA Benefits").

87 *See generally* U.S. DEP'T OF VETERANS AFFS., ADJUDICATION PROCEDURES MANUAL M21-1, Prologue (2026) (stating that VA adjudicators are charged with following guidance from M21-1 when determining eligibility); Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 KAN. L. REV. 513, 515–16 (2019).

88 U.S. DEP'T OF VETERANS AFFS., ADJUDICATION PROCEDURES MANUAL REWRITE, STATUTORY BARS TO BENEFITS AND CHARACTER OF DISCHARGE (COD) M21-1, pt. III, subpt. v, 1.B.1.c. (2019); 38 U.S.C. § 101(2). VA will also conduct a character of discharge determination if a statutory bar is possibly present. *See generally* Brooker, Seamone & Rogall, *supra* note 7, at 110–97.

89 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c) (2024); *see supra* text accompanying note 4 for a list of statutory bars to VA benefits.

90 38 C.F.R. § 3.12(d) (2024). The regulatory bars include: (1) acceptance of a discharge to avoid general court-martial; (2) discharge for offenses involving moral turpitude; (3) discharge for willful and persistent misconduct; and (4) discharge for mutiny or spying. *See id.*

91 U.S. DEP'T OF VETERANS AFFS., *supra* note 76, at pt. III, subpt. v, 1.B. Through this process, VA will request "records detailing the facts and circumstances surrounding a former service member's discharge" prior to making a formal decision. *Id.* at pt. III, subpt. v, 1.A.

92 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c) (2024). *But see supra* note 36 and *infra* note 327 and associated text for an explanation of an exception (called "insanity") that can overcome a statutory bar to benefits.

93 38 C.F.R. § 3.12(d) (2024); 38 C.F.R. § 3.360 (2025) (stating that "they may not be furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in § 3.12(c) applies."). In general, VA practice is that § 3.360 only applies to a service member if VA has found the service member ineligible for other VA benefits due to a regulatory bar. *Id.*

Despite the common misconception otherwise,[94] service members with an other than honorable or bad conduct discharge may not be precluded from VA benefits depending, in part, on whether a statutory or regulatory bar to benefits applies.[95] However, because this area of the law is so complicated, even described as "murky," service members and VA employees are frequently confused as to when a recipient of a less than honorable discharge is eligible for VA benefits.[96] Not surprisingly, VA frequently makes erroneous character of discharge eligibility decisions.[97] Compounding the confusion, VA recently promulgated changes to the regulatory bars to benefits that took effect on June 15, 2024.[98] And now that Congress passed § 1720D(g), this confusion extends to MST survivors applying for VA health care.[99]

A service member's military discharge characterization is permanent unless they successfully apply to the DOD records correction board with the military branch in which they served.[100] VA does not have the authority to change a discharge characterization or any military record.[101] Today, MST survivors

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94 *See* VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. HARV. L. SCH., UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 18 (2016) [hereinafter UNDERSERVED] ("[M]any VA employees, staff and volunteers with veteran community organizations, and veterans themselves have the misconception that veterans with bad-paper discharges are categorically ineligible for any VA services. The misconception that veterans without an [h]onorable or [g]eneral discharge are categorically ineligible is widespread. Sometimes, that misconception is even perpetuated by the VA's own statements.").

95 For an extensive discussion of what VA benefits a service member with a less than honorable discharge is entitled to, see generally Brooker, Seamone & Rogall, *supra* note 7. Service members who receive an honorable or general discharge are generally eligible for VA health care for service-connected disabilities. *Id.* at 25–27.

96 Trilles v. West, 13 Vet. App. 314, 330 (2000) (Kramer & Steinberg, JJ., concurring); *see* OUTVETS ET AL., *supra* note 6, at 11.

97 *See* OUTVETS ET AL., *supra* note 6, at 17–22.

98 38 C.F.R. § 3.12(d)–(e) (2024).

99 38 U.S.C. § 1720D(g).

100 10 U.S.C. §§ 1552–1553. For an in-depth discussion on how to submit a discharge upgrade, see generally MARGARET KUZMA ET AL., MILITARY DISCHARGE UPGRADE LEGAL PRACTICE MANUAL (2022). A service member's military discharge characterization is distinct from the VA's character of discharge determination—the latter is a VA-specific process where the VA interprets the service member's discharge for VA benefit eligibility purposes.

101 *See* 10 U.S.C. §§ 1552–1553. However, the VA does have the authority to determine whether a Title 10 military discharge characterization is "honorable for VA purposes" under Title 38 through the character of discharge determination process. Recently, the VA has changed the phrase, "honorable for VA purposes," to "eligible veteran." U.S. DEP'T OF VETERANS AFFS., POLICY LETTER 24-01 (2024).

are more likely to be successful in a discharge upgrade application than in the past due to recent changes in the law which now "provide new opportunities for military sexual trauma-related discharge upgrades."[102] Specifically, the law recognizes that MST can impact one's behavior, potentially mitigating or excusing the misconduct that led to their less than honorable discharge.[103] That said, the military records correction process is a difficult, long, and arduous one, with a low success rate.[104] Because discharge status is most often permanent, it is even more critical to afford all MST survivors, regardless of their discharge characterization, VA health care for their MST-caused conditions.[105]

Generally, once VA has determined a service member has "veteran" status, a veteran must satisfy a second step for a successful VA disability benefits claim.[106] A service member must demonstrate service-connection by proving the following: (1) current disability, (2) in-service event, and (3) connection between (1) and (2) whether it be caused or aggravated by that in-service event.[107] Proving service connection for a mental health VA disability claim, for example, "a claimant must show that a stressful event occurred during the course of active military service and that the in-service stressor was the cause of

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102 KUZMA ET AL., *supra* note 100, at 407.

103 Kurta Memo, *supra* note 55, at ¶ 25; *see also* 10 U.S.C. § 1553(d).

104 Only 13% of discharged soldiers were successful in having their discharges upgraded at the Army Board for Correction of Military Records (ABCMR) in Fiscal Year 2018. OUTVETS ET AL., *supra* note 6, at 8; *see also* McClean, *supra* note 38, at 2248 ("Despite DOD's laudable policy, liberal consideration did not produce the results that veterans' advocates had hoped to obtain.").

105 Allowing MST survivors VA health care access can also ensure proper and timely diagnoses of any mental health conditions, which can be used as evidence in a military records correction application to demonstrate that their mental health condition caused by their MST explains or mitigates the misconduct that led to their less than honorable discharge. *See* Kurta Memo, *supra* note 55 at ¶ 9–11.

106 In general, there are three primary VA disability benefits: VA health care, VA disability compensation, and Veteran Readiness and Employment (VR&E). *See* U.S. DEP'T OF VETERANS AFFS., *supra* note 76, at pt. XIII, subpt. i, 5.

107 *See* 38 U.S.C. § 1110, 38 U.S.C. § 1131. The third element is also called "nexus." *See* Ann-Marie Woods, *A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. REV. 1329, 1335 (2014) (citing Brooks v. United States, 337 U.S. 49, 51–52 (noting that "a close[] nexus between the injury and the conduct . . . must exist before that injury can be categorized as 'incident to service.')). There are other significant VA benefits that do not require a service-connection, including but not limited to the GI bill (if earned), and VA home loan. *See* 38 U.S.C. § 3702 (2024); 38 U.S.C. §§ 3301–3327 (2024).

a qualifying mental health diagnosis."[108] In other words, not all veterans are eligible for comprehensive or condition-specific cost-free VA health care—there must be a service connected disability in addition to veteran eligibility to establish this.[109]

If a veteran experiences an MST event and has a current disability as a result of that trauma, then the veteran has satisfied the required elements of a successful VA disability claim. Expanding the type of corroboration needed to establish that an MST event occurred, VA considers "evidence from sources other than the veteran's service records [to] corroborate the veteran's account of the stressor incident."[110] Importantly, there is no requirement that the survivor report the sexual assault or harassment to law enforcement.

Even today, sexual assault and harassment in the military persists.[111] Service members still experience significant barriers to reporting those crimes, particularly fearing retaliation if they were to report. The trauma from a survivor's sexual assault or harassment likely affects them long after their military service ends, making access to mental and physical health care paramount. Yet, despite MST persisting in the armed forces, Congress changed the law to make it more difficult for MST survivors to obtain health care at VA. But this was not always the case—prior to the implementation of § 1720D(g), access to VA health care was not contingent on MST survivors' discharge characterization.

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108 Seamone & Traskey, *supra* note 3, at 354. For proving service connection for PTSD, *see* 38 C.F.R. § 3.304(f). Filing a VA claim is supposed to be non-adversarial. *See* Gallegos v. Principi, 16 Vet. App. 551, 555 (2003) (Steinberg, J., concurring). VA has a statutory duty to assist the veteran in developing their claim. 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(b); 38 C.F.R. § 3.159(c)(1)–(2); Quartuccio v. Principi, 16 Vet. App. 183, 187 (2002).

109 38 U.S.C. § 1110; 38 U.S.C. § 1131. That said, a non-service-connected veteran can still be eligible for VA health care on a space available basis, and in those cases, the veteran will be responsible for copays, and it is not comprehensive health coverage. This is a VA benefit—not a VA disability benefit contingent on veteran status.

Even once a veteran has established a service-connected disability and is enrolled in VA health care, there is a rationing of health care through priority groups. *See VA Priority Groups*, U.S. DEP'T OF VETERANS AFFS (Apr. 3, 2024), https://www.va.gov/health-care/eligibility/priority-groups/ [https://perma.cc/S83X-SGJB].

110 38 C.F.R. § 3.304(f)(5).

111 *See* DEP'T OF DEF., *supra* note 2, at 1, 3 (concluding that while the prevalence for unwanted sexual contact for active-duty men and women decreased, 6.8% of female service members and 1.3% of male service members reported experiencing unwanted sexual contact).

III
HISTORICAL MST ELIGIBILITY FRAMEWORK

The line Congress and VA have drawn in the sand as to which MST survivors receive VA health care has changed over the last thirty years. Yet, that proverbial line was not always clearly defined, resulting in Congress and VA restricting some MST survivors from getting care. This section will describe when that line changed, and why it changed. It will also highlight how that line is often a broader reflection of society's evolving views of sexual assault, sexual harassment, and survivors.

A. MST Survivor Eligibility Prior to 2010

For the first time, in 1992, Congress authorized VA to provide "counseling to a woman veteran who the Secretary determines requires such counseling to overcome psychological trauma," resulting from sexual assault or sexual harassment while on active duty.[112] This special treatment provision, codified in 38 U.S.C. § 1720D, defined MST and outlined the scope of the treatment program.[113] Notably, the statute restricted care to women who had veteran status.[114] Initially, Congress was hesitant to make changes in VA eligibility rules.[115]

Congress was likely motivated to pass this legislation due to the infamous Tailhook Convention scandal, where at least 25 people were sexually assaulted at a Navy and Marine Corps

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112 Veterans Health Care Act of 1992, Pub. L. No. 102-585, § 102, 106 Stat. 4943, 4945-46 (1992) (codified at 38 U.S.C. § 1720D). This statute was amended by the Veterans Health Programs Extension Act of 1994, Pub. L. No. 103-452, § 101, 108 Stat. 4783, 4783-84 (1994) (codified at 38 U.S.C. § 1712 and 38 U.S.C. § 1720D) to make the services available to male service members. Congress defined "sexual trauma" as "psychological trauma, which in the judgment of a mental health professional employed by the Department [of Veterans Affairs], resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty." Veterans Health Care Act § 102. *See also* Brooker, Seamone & Rogall, *supra* note 7, at 100–01.

113 38 U.S.C. § 1720D. *See also supra* note 3, and associated text.

114 38 U.S.C. § 1720D(a)(1) (2009). *See supra* Subpart II.B. and associated text for a discussion of "veteran" status and its meaning.

115 *See* 138 CONG. REC. D482 (daily ed. July 21, 1992) (indicating that the "Senate disagreed to the amendment of the House to S. 2344, to improve the provision of health care and other services to veterans by the Department of Veterans Affairs, and agreed to a request of the House for a conference thereon, and the Chair appointed the conferees Senators Cranston, Rockefeller, and Spector"); Veterans Health Care Act § 102; Veterans Health Programs Extension Act § 101.

conference in Las Vegas, Nevada.[116] Once the scandal was brought to light, Congress held public hearings that exposed sexual misconduct in the military for the first time. As such, Congress decided VA should provide care, albeit limited, to some sexual assault survivors.[117]

Over the next several years, Congress expanded eligibility making VA health care accessible to more MST survivors. Specifically, in 1994, Congress extended eligibility for VA care to male veterans who experienced sexual trauma.[118] However, § 1720D still required veteran status.[119] Congress also eliminated the time limits on seeking VA treatment.[120] These legislative measures are likely reflective of the fact that society was beginning to recognize that sexual assault and harassment can afflict all people, regardless of gender, and that not all survivors report the crime right away, if at all.[121]

About a decade later, in 2004, Congress passed the Veterans Health Programs Improvement Act of 2004.[122] While U.S. House members and U.S. Senators reached a compromise, they described this new legislation as an authorization to "provide counseling and treatment for sexual trauma that may have been experienced by [] members while in the active military, naval, or air service."[123] This statute expanded eligibility to veterans who were Reservists experiencing MST while on active duty for training.[124] Congress also extended VA's authority to provide care indefinitely, including counseling and treatment,

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116 U.S. DEP'T OF DEF. OFF. INSPECTOR GEN., TAILHOOK 91: PART 1, REVIEW OF THE NAVY INVESTIGATIONS 1 (1992). For more details about the assaults and subsequent investigation, see John Lancaster, *Tailhook Probe Implicates 140 Officers: Pentagon Report Calls 90 Assaults at Navy Convention a 'Failure of Leadership'*, WASH. POST (Apr. 23, 1993), https://www.washingtonpost.com/archive/politics/1993/04/24/tailhook-probe-implicates-140-officers/e004554a-0440-4371-b8a9-a2ecaad05785/ [https://perma.cc/AX8L-LP8P] and Norman Kempster, *What Really Happened at Tailhook Convention: Scandal: The Pentagon Report Graphically Describes How Fraternity-Style Hi-Jinks Turned into Hall of Horrors*, L.A. TIMES (Apr. 24, 1993), https://www.latimes.com/archives/la-xpm-1993-04-24-mn-26672-story.html [https://perma.cc/SM28-PCFH].

117 Burbank, *supra* note 44, at 195.

118 Veterans Health Programs Extension Act § 101; *see also* Brooker, Seamone & Rogall, *supra* note 7, at 100.

119 38 U.S.C. § 1720D(a)(1) (2009).

120 Veterans Health Programs Extension Act § 101.

121 *See infra* Part II and associated text.

122 Veterans Health Programs Improvement Act of 2004, Pub. L. No. 108-422, 118 Stat. 2380 (2004).

123 Veterans Millennium Health Care and Benefits Act, Pub. L. No. 106-117, 113 Stat. 1546 (1999).

124 *Id.*

to MST eligible survivors.[125] Prior to this legislation, Congress had to extend the authority every several years.[126]

In 2005, VA published the Veteran Health Administration (VHA) Directive 2005-015 in response to the 2004 legislation.[127] This VA directive mandated universal MST screening for all veterans enrolled in VA health care.[128] The directive also required that each VA medical facility appoint an MST coordinator.[129] In summary, prior to 2010, eligibility for VA health care for MST survivors was contingent upon veteran status.[130] But, in 2010, VA changed the eligibility requirements.

B. MST Survivor Eligibility in 2010

After two decades of Congress and VA slowly expanding eligibility, VA—albeit questionably—removed the veteran status requirement for MST survivors. On July 14, 2010, VA issued VHA Directive 2010-033, broadly interpreting § 1720D eligibility requirements.[131] VA expanded eligibility despite the more restrictive text of § 1720D still requiring "veteran" status to provide care.[132]

This VHA directive was an interpretative rule—and legally questionable as the directive authorized care beyond what Congress prescribed in the statute. However, the statute afforded discretion to the VA Secretary to determine which "veterans . . . require[d] such counseling and care and services to overcome psychological trauma."[133]

The directive made clear its intended broad scope, stating "[i]t is VHA policy to provide Veterans and eligible individuals who report having experienced MST with free care for all physical and mental health conditions determined by their

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125 *Id.*

126 *See* Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 902, 112 Stat. 3315 (1998); Veterans Millennium Health Care and Benefits Act § 902.

127 U.S. DEP'T OF VETERANS AFFS., VETERANS HEALTH ADMIN., VHA DIRECTIVE 2005-015, MILITARY SEXUAL TRAUMA COUNSELING (2005) [hereinafter VHA DIRECTIVE 2005-015].

128 *Id.*; While VHA DIRECTIVE 2005-015 made the MST screening mandatory, VA started a "VHA universal screening program" in 2003. Jenny K. Hyun, Joanne Pavao & Rachel Kimerling, *Military Sexual Trauma*, 20 PTSD RSCH. Q. 1 (2009).

129 VHA DIRECTIVE 2005-015, *supra* note 127, at 1.

130 *See, e.g.*, 38 U.S.C. § 1720D(a)(1) (2009).

131 *See* VHA DIRECTIVE 2010-033, *supra* note 33, at 1. *See also* Brooker, Seamone & Rogall, *supra* note 7, at 101 (arguing that "VA interprets this statute [referring to 38 U.S.C. § 1720D] very broadly").

132 38 U.S.C. § 1720D(a)(1) (2009).

133 *Id.*

VA provider to be related to experiences of MST."[134] Adding a new category of eligible MST service members, the policy called them "eligible individuals."[135] This new category did not require veteran status; rather, the term was defined as "someone *without* Veteran status who experienced sexual trauma . . . while on active duty or active duty for training."[136] Similarly, the policy made clear that there was no minimum service requirement.[137]

VA's permissive language opened the door to MST survivors who received other than honorable discharges. The directive specifically acknowledged that "Veterans and eligible individuals who received an 'other than honorable' discharge may be able to receive free MST-related care with the Veterans Benefits Administration (VBA) Regional Office approval."[138] VA seemed to "recognize[] the reality that MST victims deserve treatment regardless of any collateral misconduct."[139]

That said, the policy did not further elaborate on the ambiguous language, "*may be able to receive . . .* "[140] Because eligibility was no longer contingent upon a service member's discharge characterization, one could argue that the directive went even further to include MST survivors who received punitive discharges as "eligible individuals."[141] The directive did not explicitly refer to those with punitive discharges, indicating

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134 VHA DIRECTIVE 2010-033, *supra* note 33, at 2; *see also* Ogilvie & Tamlyn, *supra* note 7, at 16 (explaining that this new VHA directive "mandated that VHA provide MST-related care to all veterans, despite whether the veteran was service connected or even eligible for VA care").

135 VHA DIRECTIVE 2010-033, *supra* note 33, at 1.

136 *Id.* at 1 (emphasis added). Brooker, Seamone & Rogall, *supra* note 7, at 101. *See also* UMAR MOULTA-ALI & SIDATH VIRANGA PANANGALA, CONG. RSCH. SERV., R43928, IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY 14 (2015) (stating that this "VHA policy interpreted this statute very broadly").

137 VHA DIRECTIVE 2010-033, *supra* note 33, at 1. "Because eligibility accrues as a result of events incurred in service and is not dependent on length of service some individuals may be eligible for MST-related care even if they do not have Veteran status." *Id.* Typically, most VA claims (except for health care) require an active service requirement of twenty-four months, if the servicemember enlisted after September 7, 1980. 38 U.S.C. § 5303A. *See also* Brooker, Seamone & Rogall, *supra* note 7, at 53.

138 VHA DIRECTIVE 2010-033, *supra* note 33, at ¶ 2b.

139 Brooker, Seamone & Rogall, *supra* note 7, at 103.

140 VHA DIRECTIVE 2010-033, *supra* note 33, at ¶ 2b; *see also* Brooker, Seamone & Rogall, *supra* note 7, at 102 (noting that "[t]he policy does not explain its use of the words 'may be able' and 'may be eligible.' The overarching policy statement does not qualify eligibility for 'eligible individuals.' Until clarifying case law or policy guidance is available, practitioners should advise potentially eligible victims of MST to apply for benefits.").

141 VHA DIRECTIVE 2010-033, *supra* note 33, at ¶ 2b.

that VA may have drafted the directive as unintentionally broad.[142]

Practically, however, the implementation of this VHA eligibility expansion was inconsistent across VA hospitals and clinics. This is likely in part because the training that VHA employees receive about VA eligibility criteria is not only "brief" and "legally incorrect," but it is also "inconsistent state to state and facility to facility."[143] Thus, despite the expansion on paper, it is likely that not all MST survivors were consistently getting access to care.

Nonetheless, this eligibility expansion made "this directive unique, as it creates one of the few situations for which VA benefit eligibility may not hinge on veteran status."[144] In other words, pursuant to this directive, MST was an independent basis for VA benefit eligibility, as it created an MST exception for VA eligibility.[145] VA's broad interpretation of § 1720D eligibility requirements appeared "to recognize the reality that hinging eligibility for MST-related care on veteran status could contribute to the problems related to the underreporting of sexual assault cases."[146]

In addition to broadening eligibility, the 2010 directive also eliminated other common VA prerequisites for MST survivors. The policy removed the requirement that VA adjudicate a disability as service connected and thus eliminated the need for a disability rating.[147] Even more, the policy removed the requirement for an MST survivor to file a disability claim to gain access to VA treatment.[148] MST survivors were not required to enroll in

142 *See* 38 U.S.C. § 5303a.

143 OUTVETS ET AL., *supra* note 6, at 17.

144 Brooker, Seamone & Rogall, *supra* note 7, at 101.

145 *Id.* at 99–101. *See* MOULTA-ALI & PANANGALA, *supra* note 136, at 14 (referring to MST as a "specific exception" to the general rule of requiring veteran status for VA health care eligibility). *See also* Seamone & Traskey, *supra* note 3, at 345 (explaining that "the current [in 2014 when the Article was written] free health care at VA facilities . . . has been made available to any person who claims to have suffered from MST, even if a former service member would otherwise be ineligible for the full array of VA benefits").

146 Brooker, Seamone & Rogall, *supra* note 7, at 102–03.

147 VHA DIRECTIVE 2010-033, *supra* note 33, at ¶ 2b. "VA has determined that because VA provides sexual trauma counseling and care pursuant to 38 U.S.C. Section 1720D only for sexual trauma-related disabilities that are incurred in service, there are no requirements for the condition to be adjudicated as service connected." *Id.*

148 VHA DIRECTIVE 2010-033, *supra* note 33, at ¶ 2b. *See also* Brooker, Seamone & Rogall, *supra* note 7, at 102.

VA health care to be eligible for free care related to their MST.[149] Thus, the MST survivor could go straight to a VA hospital or VA medical clinic for free health care rather than first having to obtain eligibility and service connection from Veterans Benefit Administration.[150]

Finally, the directive reduced the evidentiary burden on MST survivors. It removed any requirement to "provide evidence of the sexual trauma" so long as a VA provider finds that the MST caused the physical or mental trauma.[151] Reducing the evidentiary burden on survivors was likely a reaction to the increased awareness and media attention surrounding the prevalence of sexual assault and harassment in the military.[152] The change may also have been related to a better understanding of how survivors may reasonably not have more definitive evidence. With this VHA Directive expiring only five years later, however, the hope that all MST survivors could access free VA care was short-lived.[153]

C. MST Survivor Eligibility From 2010 to 2021

After 2010, Congress and VA briefly continued to incrementally expand eligibility for MST-related care. For example, in 2014, Congress passed the Veterans Access, Choice, and Accountability Act of 2014, extending MST-related treatment eligibility to active service members, including the National Guard and Reserves—no longer requiring the service member be discharged from the military to receive VA care.[154] The statute, codified in amendments to § 1720D, also extended care to those who experienced MST while on inactive duty training (i.e.,

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149 MOULTA-ALI & PANANGALA, *supra* note 136, at 14.

150 Veteran Benefit Administration (VBA) is a department within the VA; their primary role is to adjudicate VA claims. *See Veterans Benefit Administration*, U.S. DEP'T OF VETERANS AFFS. (Aug. 18, 2025), https://benefits.va.gov/benefits/ [https://perma.cc/LGU7-BBLY].

151 VHA DIRECTIVE 2010-033, *supra* note 33, at ¶ 2b. *See also* Brooker, Seamone & Rogall, *supra* note 7, at 102.

152 *See, e.g.*, Dahr Jamail, *Military Sexual Abuse 'Staggering,'* AL JAZEERA (Dec. 23, 2010), https://www.aljazeera.com/news/2010/12/23/military-sexual-abuse-staggering [https://perma.cc/7QZS-6P79].

153 VHA DIRECTIVE 2010-033, *supra* note 33, at 6; *see also* Alex Zielinski, *Thousands of Sexual Assault Victims in the Military Have Been Denied Veteran Health Care*, THINKPROGRESS (May 30, 2016), https://archive.thinkprogress.org/thousands-of-sexual-assault-victims-in-the-military-have-been-denied-veteran-health-care-cc0f702764ef/ [https://perma.cc/QD9C-TWEW].

154 Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, § 402(a)(2)(A), 128 Stat. 1754 (2014).

Reservists and National Guard members performing weekend drills).[155] When former U.S. President Barack Obama signed this legislation into law, he expressed his desire to improve care for veterans who were survivors of sexual assault.[156]

In 2015, Congress focused its efforts on reducing the burden of proof for MST survivors when submitting a VA disability claim. The legislation, known as the Ruth Moore Act, no longer required veteran MST survivors to provide corroborating evidence of an in-service event (i.e., MST) to obtain VA service-connection.[157] Instead, it allowed lay testimony to suffice for the MST for a disability claim.[158]

Despite VA's broad eligibility expansion for MST survivors, VA reversed course and restricted eligibility in 2016. After the 2010 VHA Directive expired in 2015, VA resumed excluding MST survivors who did not have veteran status from receiving VA treatment.[159] While 2014 amendments to § 1720D expanded care for individuals who experienced MST during periods of inactive training (Reserves or National Guard), they did not address eligibility criteria based on veteran status.[160]

In 2018, VA officially rescinded the 2010 VHA directive.[161] This new directive made clear that eligibility was restricted to service members who met the definition of "veteran" under 38

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155 Veterans Access, Choice, and Accountability Act § 402(c).

156 Remarks on Signing the Veterans Access, Choice, and Accountability Act of 2014 at Fort Belvoir, Virginia, 2014 DAILY COMP. PRES. DOC. 201400598 (Aug. 7, 2014). Former President Barack Obama stated, "[t]his bill covers a lot of ground, from expanding survivor benefits and educational opportunities to improving care for veterans struggling with traumatic brain injury and for victims of sexual assault." *Id.* at 2.

157 Ruth Moore Act of 2013, S. 294, 113th Cong. § 2(c)(1) (2013). Ruth Moore was a Navy veteran and MST survivor. *Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma: Hearing Before the H. Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 112th Cong. 30 (2012) (statement of Ruth Moore). *See also* Molly O'Toole, *Ruth Moore Act of 2013, Military Sexual Assault Bill, Highlights Survivors' Struggle for Benefits*, HUFFINGTON POST (Feb. 13, 2013), http://www.huffingtonpost.com/2013/02/13/ruth-moore-act-of-2013-militarysexual-assault_n_2674606.html [https://perma.cc/RPD4-PNPU].

158 *See* VETERANS LEGAL SERVICES CLINIC, YALE LAW SCHOOL, *supra* note 1, at 3, 17 (discussing H.R. 2088 and H.R. 2528 and providing details about Ruth Moore in the textbox titled "One Survivor's Story").

159 VHA DIRECTIVE 2010-033, *supra* note 33, at 6; *see also* Zielinski, *supra* note 153.

160 *See* Scapardine, *supra* note 7, at 1160–61 (arguing that "the VA erroneously interprets Congress' directive [referring to the 2014 amendments to 38 U.S.C. § 1720D] as a recission of MST treatment to OTH veterans").

161 VHA DIRECTIVE 1115(1), *supra* note 27, at T-3. In 2020, VA set forth the same "veteran" eligibility requirement as stated in VHA DIRECTIVE 1115. U.S. DEP'T

U.S.C. § 101(2).[162] Without Congressional intervention, VA reversed course and reinterpreted the same 2010 statute—now much more narrowly.[163]

The result of VA's reversal on MST eligibility criteria meant that any MST survivor with an other than honorable or punitive discharge was now required to go through the same character of discharge process as any other service member.[164] The character of discharge process is lengthy—often taking up to two years.[165] Even if an MST survivor is successful, that survivor must wait years for counseling and treatment that they were previously eligible for without delay.[166]

This new directive seemed to acknowledge some of the ramifications of VA's reversal stating, "[t]his means a former National Guard/Reserve member who did not serve on *federal active duty* . . . could have experienced MST during Guard or Reserves duty and yet not be eligible for MST-related care."[167]

That said, VA failed to address the impact on those MST survivors who do not have veteran status. It is unclear why VA reversed its earlier interpretation of the same statute. There is no equivalent to legislative history for VHA directives to offer any insight, and the policy itself fails to fully acknowledge the change, let alone offer any rationale for doing so. A logical supposition as to the reason for the reversal is that VA was correcting what it believed to be an overly expansive interpretation of the eligibility requirements contained in the statute.

VA's reversal on eligibility has undoubtedly contributed to the confusion and misapplication of the law surrounding VA eligibility determinations, making this area of the law even more complicated to the detriment of sexual assault and harassment survivors in our armed forces.[168] By issuing its new

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OF VETERANS AFFS., VETERANS HEALTH ADMIN., VHA DIRECTIVE 1601A.02(6), ELIGIBILITY DETERMINATION (2020).

162 VHA DIRECTIVE 1115(1), *supra* note 27, at 1. "Section 1720D(a)(1) authorizes VA to provide MST-related care to Veterans. To be eligible for care under this authority, individuals must meet the definition of Veteran provided in 38 U.S.C. § 101(2): 'an individual who served in the active military, naval, or air service and who was discharged or released from active duty under conditions other than dishonorable.'" *Id.* at 2b.

163 VHA DIRECTIVE 1115(1), *supra* note 27.

164 VHA DIRECTIVE 1115(1), *supra* note 27, at ¶ 2c. For an explanation of the character of discharge process, *see supra* notes 88–91 and associated text.

165 OUTVETS ET AL., *supra* note 6, at 12.

166 *Id.*

167 VHA DIRECTIVE 1115(1), *supra* note 27, at ¶ 2.b.(4) (emphasis added).

168 OUTVETS ET AL., *supra* note 6; *see supra* notes 96–97 and associated text.

2018 directive, VA overcorrected from its expansive view of eligibility and instead, swung the pendulum too far in the direction of restricting care. Unfortunately, this trend of restricting health care for MST survivors continues.

IV
Current Legal Landscape

Over the past four years, Congress and VA have restricted VA health care for MST survivors while simultaneously expressing an intent to expand care. This section will explain the current statutory scheme and how it frustrates congressional intent. It will also describe the subsequent VHA directive and how courts would likely view this interpretive rule. Finally, this section will explain how these changes in the law impact MST survivors.

A. Congress Limits MST Eligibility

In 2021, Congress aimed for a specific policy outcome—to expand VA care for MST survivors. As often happens, Congress did not hit the mark. While amending § 1720D, Congress restricted VA health care for MST survivors who received punitive discharges while failing to appreciate they were contracting the law.[169] In short, Congress appears to have failed to understand the nuanced and complicated legal framework it was modifying.

Congress removed the term "Veteran" and replaced it with "Former member of the Armed Forces" throughout 38 U.S.C. § 1720D.[170] At first glance, this change seemed to remove the eligibility requirement of a specific type of discharge characterization to qualify. However, Congress simultaneously added subsection § 1720D(g) further clarifying who was and was not eligible for MST-related care, defining the term "Former member of the Armed Forces" as: "(1) A veteran. (2) An individual described in section 1720I(b) of this title."[171]

Congress once again required veteran status to be eligible under § 1720D(g)(1), which defines "the term 'former member of the Armed Forces'" in part as a "veteran."[172] This amendment

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169 Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. No. 116-315, § 5301(a)(2)–(3), 134 Stat. 5037 (2021).

170 *Id.*

171 *Id.* at § 5301(a); 38 U.S.C. § 1720D(g).

172 38 U.S.C. § 1720D(g)(1).

was a return to the pre-2010 requirement that VA care depend upon the MST survivor's discharge characterization.

But, with the passage of § 1720D(g)(2), Congress created a new category of MST survivors eligible for VA treatment directing one to 38 U.S.C. § 1720I(b). Congress' creation of a new category signaled that Congress wanted to solidify an expansion for care for MST survivors. Section 1720I(b) describes eligible individuals as:

> (b) Eligible Individuals.—A former member of the Armed Forces described in this subsection is an individual who—
>
> (1) is a former member of the Armed Forces, including the reserve components;
>
> (2) while serving in the active military, naval, air, or space service, was discharged or released therefrom under a condition that is not honorable but not—
>
> (A) a dishonorable discharge; or
>
> (B) a discharge by court-martial;[173]

Congress passed § 1720I in 2018, a narrowly tailored statute that extended behavioral and mental health care to recipients of other than honorable discharges who endured MST or who served at minimum 100 cumulative days on active duty and deployed "in a theater of combat operations, in support of a contingency operation, or in an area at a time during which hostilities are occurring."[174]

Subsection 1720I (b)(1) and (2) incorporated similar language to the veteran definition used throughout Title 38, including the definition for "veteran" found in 38 U.S.C. § 101(2): "'veteran' means a person who served in *the active military, naval, air, or space service*, and who was *discharged or released therefrom under conditions other than dishonorable*."[175] Notwithstanding § 1720I (b)(2)(A) and (B), all that § 1720I appeared to do was to include "reserve components" members as eligible for VA care.[176] Yet, reservists had already been eligible for care

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173 38 U.S.C. § 1720I(b).

174 38 U.S.C. § 1720I(b)(4).

175 38 U.S.C. § 101(2) (emphasis added).

176 38 U.S.C. § 1720I(b)(1). Section 5301 also expanded 38 U.S.C. § 1720D to apply to physical conditions (in addition to mental health conditions). Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act, § 5301(b).

since 2014.[177] This is yet another example of Congress amending a statute appearing to expand eligibility but failing to realize that the statutory language did not in fact increase eligibility.

Moreover, the text of § 1720I(b)(2)(A) and (B) is confusing and superfluous. Some of the terms used in this subsection have more than one meaning and thus, language confusion abounds. For example, in § 1720I(b)(2), Congress used the term "honorable," which has a specific meaning in the military community and a different definition in VA benefit context.[178] Thus, it is unclear if Congress intended this term to mean an honorable discharge, as defined under Title 10 or if it intended "under honorable conditions" as defined and used throughout Title 38 pertaining to veteran benefits.[179]

Even more puzzling is Congress' use of the term "dishonorable" in § 1720I(b)(2)(A). It is unclear if Congress meant a dishonorable discharge under Title 10, which can only be issued pursuant to a general court-martial and is the worst of the five discharge characterizations for enlisted service members.[180] Alternatively, it is not clear whether Congress intended "dishonorable" to mean a much broader term, "under dishonorable conditions," as defined in 38 U.S.C. § 101(2) when defining the term "veteran."[181] Put another way, depending on the facts of each case, "under dishonorable conditions" under Title 38 could include an other than honorable, bad conduct, or dishonorable discharge—it could even include an honorable or general discharge depending on the reason for the service member's discharge.[182] If Congress intended "dishonorable" to mean the former (as defined under Title 10), then Congress did not need to add subsection (b)(2)(A) at all because a dishonorable discharge can only be issued pursuant to a (general) court-martial.[183]

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177 Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, § 402(a)(2)(A), 128 Stat. 1754 (2014).

178 38 U.S.C. § 1720I(b)(2).

179 *Cf.* 38 U.S.C. § 101(2) (stating "conditions other than dishonorable").

180 MCM, *supra* note 11, at R.C.M. 1003(b)(8)(A)–(B); 10 U.S.C. § 1161(a); *cf.* Adams & Montalto, *supra* note 23, at 99–100 (arguing that Congress intended the term "dishonorable" used in 38 U.S.C. § 101(2) to mean dishonorable discharge as defined under Title 10).

181 38 U.S.C. § 101(2).

182 38 C.F.R. § 3.12(c)(3)–(4) (listing two statutory bars to benefits as resignation by an officer for good of the service and desertion).

183 MCM, *supra* note 11, at R.C.M. 1003(b)(8)(B) (stating that a dishonorable discharge "may be adjudged only by a general court-martial"). *But see generally* Camarena v. Brown, 60 F.3d 843 (Ct. Vet. App. 1995) (finding that the phrase

In other words, § 1720I(b)(2)(A) and (B) are too ambiguous for a clear and precise application. Assuming that "dishonorable discharge" referenced in (b)(2)(A) is referring to a dishonorable discharge under Title 10, then (2)(A) is superfluous. Dishonorable discharge (or dismissal for officers) and bad conduct discharge are the only types of discharges available at a court-martial (referenced in (2)(B)), making the (2)(A) provision unnecessary.[184] Perhaps Congress intended to emphasize its desire to exclude all MST survivors with a dishonorable discharge by excluding them under both subparagraphs. Regardless, the sloppy wording in this statute demonstrates that Congress does not understand the meaning behind the words it is using in the statute enough to even recognize there could be such confusion or does not care enough to rectify the confusion.

The legislative history makes clear that the purpose of the statute was to expand eligibility for MST survivors in accessing VA treatment. The amendments that were incorporated into § 1720D were entitled, "Expansion of coverage by Department of Veterans Affairs of counseling and treatment for sexual trauma."[185] And when discussing the legislation, U.S. House Representative Nancy Pelosi stated, "[j]ust as the military pledges to leave no one behind on the battlefield, we solemnly promise to leave no veteran behind."[186]

In a limited way, Congress solidified an expansion of eligibility beyond those with veteran status. MST survivors with other than honorable discharges, but who do not have veteran status under Title 38, are eligible for VA care pursuant to this amendment.[187] While Congress expanded eligibility for MST

"under dishonorable conditions" in VA's veteran definition, pursuant to 38 U.S.C. § 101(2), did not mean "dishonorable discharge" as defined under Title 10).

184 MCM, *supra* note 11, at R.C.M. 1003(b)(8)(A)–(C). For enlisted service members, a bad conduct discharge can be imposed at either a general court-martial or a special court-martial empowered to adjudge a bad conduct discharge. *Id.* at R.C.M. 1003(b)(8)(C). Commissioned officers are only subject to dismissal at a general court-martial, which is the functional equivalent of a dishonorable discharge, or by order of the President during a time of war. *Id.* at R.C.M. 1003(b)(8)(A).

185 166 CONG. REC. S7333 (daily ed. Dec. 9, 2020). Numerous veterans bills were combined into a single omnibus bill, and the entire legislation was originally entitled the "Deborah Sampson Act." *Id.* at S7358. Deborah Sampson was a female service member who served during the Revolutionary War. 166 CONG. REC. H7205 (daily ed. Dec. 16, 2020).

186 166 CONG. REC. H7209–10 (daily ed. Dec. 16, 2020) (statement of Speaker Nancy Pelosi).

187 38 U.S.C. § 1720D(g). *But see infra* Subpart III.B (discussing a larger expansion of eligibility that was not solidified by Congress and expired after five

recipients with other than honorable discharge characterizations, it contracted eligibility for MST survivors with punitive discharge characterizations. Thus, Congress created three categories of MST survivors: (1) MST survivors with honorable or general discharges, (2) MST survivors with other than honorable discharges, and (3) MST survivors with punitive discharges.

Congress has effectively drawn a logically arbitrary line as to which MST survivors are eligible for VA health care. In fact, Congress did not discuss that it was drawing an eligibility line between MST survivors. There is no mention of MST survivors who received punitive discharges (or other than honorable discharges for that matter) when members of Congress discussed amending § 1720D in 2021. Based on the legislative history (or lack thereof), it is unclear whether Congress intended to leave *some* MST survivors behind, directly contrary to what Congresswoman Pelosi stated when advocating to pass § 1720D(g).[188]

However, when analyzing veteran eligibility legislation outside the MST context, Congress has a strong preference for denying eligibility to service members who were discharged pursuant to a court-martial.[189] This broad denial of eligibility to those who receive punitive discharges reflects Congress' desire to grant eligibility only to so-called "deserving" veterans. Thus, looking more broadly, it is possible that Congress may have intended to exclude MST survivors who were discharged pursuant to a court-martial.

Congress also failed to account for how VA was interpreting Congress' prior legislation—that is, since 2010, VHA was providing care to all MST survivors regardless of discharge.[190] The restrictive statutory language effectively closed the door on VA being able to take a more lenient stance on eligibility as it had done in 2010.[191] Indeed, it is unlikely that Congress was

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years); VHA DIRECTIVE 1115(1), *supra* note 27, at 2 (barring a subset of MST survivors through an interpretive rule).

188 166 CONG. REC. H7209-10 (daily ed. Dec. 16, 2020) (statement of Speaker Nancy Pelosi).

189 *See, e.g.*, 38 U.S.C. § 5303(a) (listing the first categorical or statutory bar as "discharge or dismissal by reason of the sentence of a general court-martial"); Veterans' Benefits. Entitlement, Denial to Certain Veterans with Upgraded Discharges, Pub. L. No. 95-126, 91 Stat. 1106, 1106–07 (1977).

190 *See infra* Subpart III.B. and associated text; VHA DIRECTIVE 2010-033, *supra* note 33.

191 *See infra* Subpart III.B. and associated text; VHA DIRECTIVE 2010-033, *supra* note 33.

aware VA was providing care to all MST survivors.[192] Based on the legislative history, it appears that Congress wanted to expand VA care to all MST survivors and believed it was expanding health care eligibility. Yet, with the implementation of § 1720D(g), Congress codified a contraction of eligibility—and left out these MST survivors.

The language of § 1720D(g) is clear: eligibility now depends on discharge characterization and those MST survivors with punitive discharges are cut out. Yet, the language of § 1720I(b)(2)(A) and (B), which § 1720D(g) incorporates, is drafted ambiguously. If Congress was trying to expand eligibility for all MST survivors as the legislative history indicates, it fell short of its intended goal. Instead, Congress made the law more convoluted, confusing, and exclusionary, failing to fulfill its stated promise of leaving no MST survivor behind.

B. VA Further Restricts MST Eligibility

Soon after Congress passed § 1720D(g), VA issued VHA Directive 1115(1). This directive is an interpretive rule, which is a rule or statement "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[193] It is an interpretive rule despite using mandatory language in its restatement of the terms of § 1720D(g).[194] For example, VHA directive states at the beginning that it "establishes authority and policy for clinical care . . . related to [MST] counseling, care, and services at all . . . [VA] medical facilities . . . ."[195] Notably, VA did not go through the notice and comment process when issuing this directive.[196]

VHA Directive 1115(1) further restricted care for MST survivors.[197] The directive states that eligible service members, labeled "former Service members," "refers exclusively" to how Congress defined eligibility in 38 U.S.C. § 1720D(g).[198] Despite that assertion, the directive adds an additional category of MST

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192 *See infra* Subpart III.B.

193 U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

194 *See* Flight Training Int'l, Inc. v. FAA, 58 F.4th 234, 242 (5th Cir. 2023).

195 *See* VHA DIRECTIVE 1115(1), *supra* note 27, at T-1.

196 *See generally* Beaudette v. McDonough, 93 F.4th 1361 (Fed. Cir. 2024).

197 *See* VHA DIRECTIVE 1115(1), *supra* note 27, at 1. This directive rescinded VHA DIRECTIVE 2010-033. *Id.* at T-3.

198 VHA DIRECTIVE 1115(1), *supra* note 27, at T-1, ¶ 2b (replacing the term "veteran" with "eligible former Service members" when describing VA eligibility for care for MST survivors).

survivors who are barred from VA health care: survivors who were discharged pursuant to a statutory bar enumerated in 38 U.S.C. § 5303(a).[199]

A statutory bar to VA benefits "bar[s] all rights" based on that period of service.[200] Put another way, if a service member was discharged based on one of the statutory bars, specifically enumerated in 38 U.S.C. § 5303(a), then that service member loses all benefits, including health care even for service-connected disabilities, for that period of service.[201] However, MST survivors were the exception to this general rule prior to this VHA directive.[202]

Courts have long relied on *Skidmore v. Swift & Co.* when determining the level of deference to give to an agency's interpretative rule.[203] Prior to overruling *Chevron*, the Supreme Court made clear that lower courts were to analyze the agency's justification for its interpretive rule pursuant to *Skidmore.*[204] And after overruling *Chevron*, the Supreme Court once again clarified that courts should continue to use the factors set forth in *Skidmore* to determine what weight they should give to an agency's interpretation.[205]

In *Skidmore*, the Supreme Court held that lower courts should consider the following factors when deciding the weight

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199 *See* VHA DIRECTIVE 1115(1), *supra* note 27, at ¶ 2b(2)(b). *See also* 38 U.S.C. § 5303(a) (listing six statutory bars to VA benefits: (1) "[t]he discharge or dismissal by reason of the sentence of a general court-martial," (2) "the discharge of any such person on the ground that such person was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority," (3) the discharge for being a "deserter," (4) the discharge "on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable," (5) discharge of an "officer by the acceptance of such officer's resignation for good of the service," and (6) "the discharge of any individual during a period of hostilities as an alien").

200 38 U.S.C. § 5303(a). Statutory bars to VA benefits differ from regulatory bars to benefits, found in 38 C.F.R. § 3.12(d) (2024), in that a service member who is regulatorily barred (but not statutorily barred) can still receive VA health care for service-connected disabilities. *See generally* Brooker, Seamone & Rogall, *supra* note 7, at 50. *But see* OUTVETS ET AL., *supra* note 6, at 17–22 (concluding that VA erroneously denies eligibility to less than honorable discharged service members, regardless of whether a statutory or regulatory bar to benefit applies).

201 *See* 38 U.S.C. § 5303(a). *See also* Brooker, Seamone & Rogall, *supra* note 7, at Part VIII. There are specific exceptions to some of the statutory bars to benefits. *See* 38 U.S.C. § 5303(b).

202 *See* Brooker, Seamone & Rogall, *supra* note 7, at Part VI.

203 *See generally* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

204 *See* Christensen v. Harris Country, 529 U.S. 576, 587 (2000).

205 *See* Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 394 (2024).

of an agency's judgment: "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[206] While courts are required to consider these factors when weighing an agency's justification, they are not bound by the agency's interpretation.[207]

Here, a court may find that the VHA Directive 1115(1) is an invalid interpretive rule after applying the *Skidmore* factors. First, it lacks thoroughness in its consideration because it contradicts the plain language of § 1720D(g)—adding an additional category of MST survivors who are barred from VA care that is nowhere to be found in the statute. Second, the VHA Directive 1115(1) lacks validity in its reasoning because it subverts the purpose of the statute which was to expand care. Finally, this VHA directive is inconsistent with its previous 2010 directive.

This VHA directive lacks thoroughness. Examining the plain language of § 1720D(g), there is no reference whatsoever to service members with statutory bars to benefits.[208] While § 1720I(b)(2) is drafted ambiguously as explained above, it in no way prohibits MST survivors who have statutory bars from VA care.[209] In fact, the text in § 1720D(g) shows that Congress included those MST survivors who have a statutory bar (so long as they did not have a punitive discharge) in VA care eligibility.[210]

A few examples will illuminate how the text in § 1720D(g) does not support VA's interpretation and therefore, lacks thoroughness in its consideration. Under VHA Directive 1115(1), an MST survivor who receives an other than honorable discharge for an over 180-day continuous period of absence without leave ("AWOL") (which is a statutory bar) will be barred from all benefits including health care for MST-related conditions.[211] This outcome contradicts the plain language contained in § 1720I(b)(2).[212] Congress specifically kept the door open to all other than honorable discharge recipients who

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206 Skidmore, 323 U.S. at 140.

207 *Id.*

208 *See* 38 U.S.C. § 1720D(g).

209 *See* 38 U.S.C. § 1720I(b)(2).

210 *See* 38 U.S.C. § 1720D(g).

211 VHA Directive 1115(1), *supra* note 27, at 2; 38 U.S.C. § 5303(a).

212 38 U.S.C. § 1720I(b)(2)(A)–(B).

endured MST.[213] Inexplicably, even VA recognizes this at the beginning of the directive, stating that VHA recognizes that § 1720D(g) solidified "[t]he scope of care for which MST survivors with an Other than Honorable discharge are eligible, to include MST-related medical care as well as mental health care."[214] Per the language in the statute, Congress only excluded those discharges issued pursuant to a court-martial; an other than honorable discharge *cannot* be issued pursuant to a court-martial.[215]

Under this VHA directive, moreover, it is possible that an MST survivor with an *honorable* discharge could be barred from VA health care.[216] For example, if an MST survivor receives an honorable discharge, but the reason for their discharge is for "conscientious objection with refusal to perform duty" (which is another statutory bar) then that service member could be barred from all benefits including health care.[217]

Similarly, if a commissioned officer who experienced MST "resigned for good of the service" (which is also a statutory bar) with an honorable, general, or other than honorable discharge then the officer could also be barred from VA health care.[218] This eligibility bar is particularly arbitrary because if an enlisted service member similarly submits a request for separation in lieu of court-martial—the functional equivalent of an officer's resignation for good of the service—and receives an honorable, general, or other than honorable discharge, then that enlisted member would not be barred from VA care as it is not a statutory bar to benefits.[219]

These hypotheticals demonstrate VA's lack of thoroughness in its consideration as the directive impermissibly departed from the statutory eligibility standard set forth in § 1720D(g). The directive bars even more survivors from receiving VA care than prescribed in the statute, adding an additional category of ineligible MST survivors.

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213 *Id.*

214 VHA DIRECTIVE 1115(1), *supra* note 27, at ¶ 2.a.(1)(c).

215 *See, e.g.*, AR 635-200, *supra* note 64, at ch. 10-8a. MST survivors who have a statutory bar would be ineligible pursuant to 38 U.S.C. § 1720D(g)(1) but may be eligible pursuant to § 1720D(g)(2).

216 *But see* 38 C.F.R. § 3.12(a) (2024) (stating that "[a] discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge").

217 Brooker, Seamone & Rogall, *supra* note 7, at 111; 38 U.S.C. § 5303(a). *See supra* note 199 for a complete list of the statutory bars to benefits.

218 38 U.S.C. § 5303(a).

219 *See id.*

However, VA may argue that the directive does not lack thoroughness in its consideration because it does *not* contradict the plain language of § 1720D(g). VA has long viewed statutory bars as operating independently (and regardless) of all other VA eligibility standards. In other words, VA may argue that it frequently applies statutory bars to benefits in all eligibility determinations unless Congress explicitly instructed otherwise.

Yet, VA has not applied statutory bars as part of the eligibility criteria when Congress has expanded the criteria in other contexts. For example, Congress carved out a specific and unique eligibility standard for "homeless veterans." Congress defined "homeless veteran" extraordinarily broad as "a person who served in the active military, naval, air, or space service, regardless of length of service, and who was discharged or released therefrom."[220] Congress further clarified that "the term 'veteran' *excludes* a person who—(A) received a dishonorable discharge from the Armed Forces; or (B) was discharged or dismissed from the Armed Forces by reason of the sentence of a general court-martial."[221]

In other words, Congress decided that only those discharged with a dishonorable discharge, or a bad conduct discharge issued at a general court-martial would be excluded from this eligibility criteria. Congress was clear about who was and was not eligible—including those who were statutorily barred—so long as they met the prescribed criteria. This is an example of where Congress intentionally drafted broad eligibility criteria for homeless veterans.

In line with the statute, VA issued policy guidance stating it does *not* apply statutory bars in this context. Thus, VA does *not* exclude homeless veterans who have a statutory bar to benefits so long as they otherwise meet the eligibility standard set forth in the statute.[222] This is a clear example of where VA implemented expanded eligibility criteria—beyond its "veteran" status definition.[223] This example further shows that "veteran" status is not always required for VA eligibility—that it can and should be changed in certain circumstances.

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220 38 U.S.C. § 2002(b)(1).

221 38 U.S.C. § 2002(b)(2) (emphasis added).

222 Kuzma et al., *supra* note 100, at 695–96 (stating that "the law excludes only former servicemembers discharged with a Dishonorable characterization or former servicemembers discharged by *general* court-martial with a Bad Conduct characterization; a Bad Conduct by *special* court-martial is not disqualifying, nor is an Other Than Honorable discharge").

223 *See* 38 U.S.C. § 101(2).

Congress likely drafted this intentionally broad definition to enable an expansive category of homeless veterans to access life-saving programs including the Supportive Services for Veteran Families (SSVF) and the Grant Per Diem (GPD) program. These two homeless veteran programs "provide grants to organizations to obtain, build, and operate transitional housing; provide temporary rental payments and security deposits for homeless veterans to secure and maintain housing; and offer other services to homeless veterans."[224]

Like the homeless veteran eligibility standard, § 1720D is a provision specifically drafted for MST survivors. The plain language of the homeless veteran definition is similar to § 1720D(g). Congress is clear about who is and is not eligible—excluding only those former service members who are discharged dishonorably or pursuant to a court-martial.[225] Likewise, VA should issue policy guidance that is in line with the eligibility criteria that Congress prescribed as it has done before in the homeless veteran context. VA has done it before, and it should do so in the MST context too.

Secondly, the VHA directive lacks validity in its reasoning because it undermines the purpose of this statute. The legislative history, and even the title of the amendment, illustrate that the intent was to expand VA care to MST survivors with service-incurred conditions. Barring MST survivors with honorable, general, or other than honorable discharges, as illustrated in the hypotheticals above, is certainly not what Congress intended when Representative Nancy Pelosi promised "to leave no veteran behind."[226] Unfortunately, the VHA directive did the exact opposite of what Congress intended.

The directive further lacks validity in its reasoning because it contains contradictory language indicating an intent to offer broad health care coverage to all MST survivors as prescribed in § 1720D(g). For example, the directive states that "Section 1720D is a special treatment authority; former Service members who meet the requirements in . . . this directive may receive MST-related care regardless of their eligibility for other VA services."[227] The VHA directive goes on to repeat the statutory eligibility standard set forth in § 1720D(g) stating that

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224 Kuzma et al., *supra* note 100, at 695.

225 38 U.S.C. § 1720D(g)(2) (incorporating a definition from 38 U.S.C. § 1720I(b)(2)(A)–(B)).

226 166 Cong. Rec. H7205, H7209 (daily ed. Dec. 16, 2020).

227 VHA Directive 1115(1), *supra* note 27, at 2.

"[t]wo cohorts are eligible: (1) Veterans, and (2) former members of the Armed Forces who meet the criteria described in 38 U.S.C. § 1720I(b)."[228] Moreover, the VHA directive repeatedly adopts the term of art, "former service member," defined in § 1720D(g) when describing who is eligible for care.[229]

Finally, the VHA directive lacks consistency with its earlier pronouncements. As explained in Part III, eligibility for VA health care was not predicated on an MST survivor's discharge characterization.[230] Rather, for over a decade, all MST survivors could access care for their trauma-incurred disabilities.

As such, a court may find that VA is not entitled to *Skidmore* deference in its interpretation of the statute.[231] VA failed to realize it was barring another category of MST survivors from receiving care. There is no acknowledgment in the directive that VA added an additional ineligibility category—those who have a statutory bar to VA benefits.[232] The requirement that the MST survivor not be statutorily barred is simply tacked on to the end of the repeated § 1720D(g) eligibility standard.[233]

Just like Congress, VA likely failed to appreciate the landscape—that is, its very own eligibility rules—it was operating within. Frankly, this directive is further evidence that VA does not understand how VA eligibility statutes and regulations interact.[234] VA has a blind spot in this area—it frequently fails to properly adjudicate eligibility claims where a service member with a less than honorable discharge applies for VA benefits.[235] Improper adjudication is likely because this area of law is incredibly complex and as a result, misinformation and incorrect assumptions are prevalent as the nuances are not understood.[236]

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228 *Id.* at 1.

229 *See id.*; 38 U.S.C. § 1720D(g).

230 *See supra* Part III and associated text; VHA DIRECTIVE 2010-033, *supra* note 33.

231 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

232 *See* VHA DIRECTIVE 1115(1), *supra* note 27, at 2.

233 *See id.* at 2.

234 *See* OUTVETS ET AL., *supra* note 6, at 17–22.

235 *Id.* at 13 (concluding that "evidence shows that VA routinely denies potentially eligible veterans their right to apply for and receive critical health care benefits to which they may be entitled").

236 *See id.* at 22 (finding that "[t]he lack of information and the provision of misinformation to VA staff directly impacts the ability of veterans with bad paper to access health care"); *see also* Morales, *supra* note 86, at 42 (noting that improper denials are also a result of "language confusion" where one term can have a different meaning in the military justice context versus in the VA benefit

Generally, it can take years of legal training in VA disability law and a deep understanding of the military justice system to accurately determine if a service member with a less than honorable discharge is eligible for VA benefits.[237] Yet, VA employs non-lawyers to make these complicated legal determinations.[238] Exacerbating the problem further, VHA staff receive "brief, legally incorrect, or otherwise inadequate" training on the "eligibility criteria for accessing VA health care."[239] Therefore, it is not surprising that VHA once again failed to appreciate the nuances of VA eligibility, resulting in its inadvertent barring of an additional category of MST survivors.

Thus, applying the *Skidmore* factors, VA's interpretative rule is invalid, and VA is not entitled to any deference.[240] VA not only fell short in issuing a directive that implemented § 1720D(g), but it also amplified the contraction of the law even more. VA exacerbated the problem—further leaving behind even more survivors. VA's improper expansion of § 1720D(g) eligibility criteria is yet another reason why Congress must redefine VA treatment eligibility requirements for MST survivors.

V
SIGNIFICANCE

Congress should pass legislation making it clear that all MST survivors, regardless of their discharge characterization, are eligible for health care at VA. First and foremost, the misconduct that led to MST survivors' less than honorable discharge was most likely caused by their sexual trauma in the first place. Secondly, making free VA health care accessible to MST survivors is not only beneficial for the individual, but it is also better for society. Finally, failing to provide health care to all MST survivors who served in our armed forces results in disparate outcomes, ultimately harming the most marginalized and vulnerable of our veteran population.

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context) (quoting Brian Gordon, *Turning Bad Paper Good: NC Veterans Seek Better Discharges for More Benefits, Honor*, FAYETTEVILLE OBSERVER (Sept. 23, 2020), https://www.fayobserver.com/story/news/2020/09/22/military-veteran-discharge-status-upgrade-process-goes-nc-unc-law/5856528002/ [https://perma.cc/9RFS-PHNH]).

237 Morales, *supra* note 86, at 42.

238 *Id.*

239 OUTVETS ET AL., *supra* note 6, at 17.

240 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

A. Misconduct is Trauma Related

An MST survivor's misconduct can be a manifestation of PTSD or another mental health condition developed because of their MST.[241] In fact, misconduct may be symptomatic of an MST-caused underlying mental health condition.[242]

Marine Corporal Ohu's and Navy Seaman Thompson's cases, which opened this Article, are stark examples of this connection.[243] Corporal Ohu may have been experiencing agitation and irritability, a common manifestation of PTSD, when she committed the assault.[244] In Seaman Thompson's case, he went AWOL to avoid his assaulter and was punitively discharged for that behavior. Avoidance behavior, such as going AWOL, is a classic symptom of PTSD.[245] While certainly not all misconduct can be excused by symptoms of PTSD or other mental health conditions, considering how the sexual trauma impacted the service member can certainly provide context to and explain the misbehavior.[246]

Medical research has found a strong association between experiencing MST and developing a mental health condition—"more than doubl[ing] the likelihood of receiving a mental health diagnosis."[247] Put another way, survivors of sexual trauma have a 60% increased chance of developing a mental

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241 While testifying before Congress, clinical psychiatrist Jonathan Shay recognized this connection in the context of combat-induced PTSD and subsequent misconduct as well as the importance of providing those service members with VA health care, stating that denying VA health care to these service members is "as unjust and irrational as if they had been drummed out for failure to stand at attention after their feet had been blown off. Most of these men committed offenses *because* of their combat PTSD." *Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affs.*, 103d Cong. 117 (1994) (statement of Jonathan Shay, M.D., Ph.D.).

242 *See generally* Tiffany M. Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans,* 204 MIL. L. REV. 1, 15 (2010) ("Another associated feature of PTSD is misconduct.").

243 *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STAT. MANUAL OF MENTAL DISORDERS, DSM-5-TR (5th ed., text revision 2022).

244 *Id.* at 302–03.

245 *Id.* at 303. Indeed, the Army Board for Correction of Military Records has recognized the link between AWOL and MST-induced post-traumatic stress disorder. *See* Army Bd. Corr. Mil. Records, AR20140021156 (Aug. 11, 2015) (on file with author).

246 *See* Kurta Memo, *supra* note 55, at ¶ 26(k).

247 Rachel Kimerling et al., *The Veterans Health Administration and Military Sexual Trauma*, 97 AM. J. PUB. HEALTH 2160, 2160 (2007) (concluding that among all mental health conditions, "PTSD had the strongest association with MST").

health condition.[248] According to the National Center for PTSD, "[e]xperiences of sexual assault during military service are associated with PTSD to a degree that is comparable to, or larger than, the likelihood of a PTSD diagnosis associated with severe combat exposure."[249] In fact, approximately half of MST survivors develop PTSD.[250] The increased likelihood of developing PTSD because of MST is not gender specific.[251] Not only does MST increase the likelihood of developing PTSD, but it also "increase[s] [the] risk for depressive disorders, anxiety disorders, eating disorders, dissociative disorders and substance use disorders."[252]

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248 Laura Fitzpatrick, *Landmark Bill Bolsters Care for Female Veterans*, TIME (May 5, 2010), https://time.com/archive/6916069/landmark-bill-bolsters-care-for-female-veterans/ [https://perma.cc/FLV3-K868].

249 Amy Street et al., *Military Sexual Trauma,* U.S. DEP'T OF VETERANS AFFS., PTSD: NATIONAL CENTER FOR PTSD, (Mar. 25, 2025), https://www.ptsd.va.gov/professional/treat/type/sexual_trauma_military.asp#one [https://perma.cc/3QM9-STNE]; *see also* Maureen Murdoch et al., *Prevalence of In-Service and Post-Service Sexual Assault among Combat and Noncombat Veterans Applying for Department of Veterans Affairs Posttraumatic Stress Disorder Disability Benefits*, 169 MIL. MED. 392, (2004) (concluding that about 70% of female service members who were seeking treatment at VA for PTSD were raped or sexually assaulted while in the military after conducting a study in 2004); Joanne Pavao et al., *Military Sexual Trauma Among Homeless Veterans*, 28 J. GEN. INTERNAL MED. 536, 539 (2013) (noting that "[s]exual trauma is amongst the traumatic events with the highest conditional risk for PTSD, and MST has been found in prior research to be a strong predictor of PTSD compared to civilian sexual assault"); Amitis Darabnia, *To Care for Him Who Shall Have Borne the Battle: Government's Response to PTSD*, 25 FED. CIR. B.J. 453, 457 (2016); Sara Kintzle et al., *Sexual Trauma in the Military: Exploring PTSD and Mental Health Care Utilization in Female Veterans*, 12 PSYCH. SERVS. 394, 394–95 (2015).

250 Carol O'Brien, Jessica Keith & Lisa Shoemaker, *Don't Tell: Military Culture and Male Rape*, 12 PSYCH. SERVS. 357, 357–58 (2015); *see also* Kimerling et al., *supra* note 247, at 2160, 2162 (concluding that "sexual trauma [in the military] poses a risk for developing PTSD as high or higher than combat exposure" and that "MST was significantly associated with 2 to 3 times greater odds of a mental health diagnosis"). For a discussion of how the VA system favors MST survivors who develop PTSD over those survivors who develop other mental health conditions, see Burbank, *supra* note 44, at 185 and Lisa M. Brownstone et al., *The Phenomenology of Military Sexual Trauma Among Women Veterans*, 42 PSYCH. WOMEN Q. 399, 400 (2018).

251 *See* Han Kang et al., *The Role of Sexual Assault on the Risk of PTSD Among Gulf War Veterans*, 15 ANNALS EPIDEMIOLOGY 191, 194 (2005) (finding "that given the same traumatic experience whether combat related or involving some form of sexual abuse, the risk for PTSD will be similar for both genders" after conducting a survey of over 11,000 Gulf War veterans).

252 Amy Street et al., *supra* note 249; *see also* Angela K. Drake & Charlotte R. Burgess-Mundwiller, *Military Sexual Trauma: A Current Analysis of Disability Claims Adjudication Under Veterans Benefits Law*, 84 MO. L. REV. 661, 688–95 (2019) (concluding that MST survivors may develop other mental health conditions as a result of their trauma, including but certainly not limited to, major depressive disorder, generalized anxiety disorder, or substance abuse disorders);

Medical evidence supports a presumption that the conduct that led to an MST survivor's punitive discharge was informed or caused by their mental health condition developed because of their sexual trauma. In other words, there should be a presumption that any post-MST misconduct was an expression of the survivor's trauma, absent evidence otherwise. Hurt people hurt people.

Not surprisingly, PTSD symptoms can manifest as criminal behavior.[253] Even VA acknowledges that behavior changes can be a manifestation of "an in-service personal assault," and that "examples of behavior changes that may constitute credible evidence of the stressor include, but are not limited to: a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes."[254]

Public policy further supports a presumption. In recent years, the DOD has recognized that sexual assault, sexual harassment, and mental health conditions "inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected."[255] In fact, the DOD acknowledged that "evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD, TBI [traumatic brain injury], or of behavior consistent with experiencing sexual assault or sexual harassment."[256]

Today, Congress requires the service branches to provide additional medical examination to service members who have reported they were sexually assaulted "during the previous 24 months" prior to being administratively separated for

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Betsy S. O'Brien & Leo Sher, *Military Sexual Trauma as a Determinant in the Development of Mental and Physical Illness in Male and Female Veterans*, 25 INT'L J. ADOLESCENT MED. & HEALTH 269, 269 (2013) (finding that MST is "related to an increase in psychiatric pathology, including posttraumatic stress disorder (PTSD), substance abuse and dependence, depression, anxiety, eating disorders, and suicidal behavior").

253 *See* Mark A. McCormick-Goodhart, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PENN. ST. L. REV. 895, 904–06 (2013) (arguing that PTSD can lead to criminal conduct).

254 38 C.F.R. § 3.304(f)(5).

255 Kurta Memo, *supra* note 55, at ¶ 26(e).

256 *Id.* at 2.

misconduct.[257] The purpose of this evaluation is to determine "whether the effects of post-traumatic stress disorder . . . constitute matters in extenuation that relate to the basis for administrative separation . . . or the overall characterization of service."[258]

Therefore, Congress and VA should presume an association between an MST event and subsequent misconduct. To overcome this presumption, VA must identify specific evidence to the contrary. This presumption would ensure VA treatment is accessible to all MST survivors, regardless of their discharge characterization.

B. Impact on the Individual Survivor and on Society

Ensuring access to VA health care for all MST survivors is beneficial for the individual service member and for society.[259] The effects of MST certainly do not end when the survivor leaves the military. MST survivors are more likely to experience houselessness, suicide, and an overall poorer quality of life than other service members.[260] This extremely vulnerable—and often overlooked—population would greatly benefit from access to VA treatment as would society.

First, MST survivors suffer from a disproportionate risk of houselessness.[261] In a nationwide study of over 125,000 homeless veterans, nearly 40% of women and over 3% of men experienced MST, revealing a higher prevalence of MST in comparison

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257 10 U.S.C. § 1177(a). However, this requirement does not apply to courts-martial. *Id.*; 10 U.S.C. § 1177(c). Despite this requirement, however, these medical examinations tend to be a cursory review.

258 10 U.S.C. § 1177(b).

259 That said, VA health care is not the end all be all and survivors may choose to seek health care elsewhere. Burbank, *supra* note 44, at 188 (arguing that "the VA system prioritizes certain types of victims with certain kinds of experiences: it prioritizes women; it prioritizes those who develop diagnosable PTSD as a result of their experience; and it prioritizes victims whose identities and experiences match the cultural norms and biases of VA decision makers").

260 Libby Perl, CONG. RSCH. SERV., RL34024, VETERANS AND HOMELESSNESS 13, 40 (2013) (connecting MST to increased rates of homelessness); *see generally* UNDERSERVED, *supra* note 94, at 21–22; Donna L. Washington et al., *Risk Factors for Homelessness Among Women Veterans*, 21 J. HEALTH CARE FOR POOR & UNDERSERVED 82, 86 (2010) (explaining that MST correlates to homelessness for female veterans); Emily Brignone et al., *Differential Risk for Homelessness Among US Male and Female Veterans with a Positive Screen for Military Sexual Trauma*, 73 JAMA PSYCHIATRY 582, 583 (2016).

261 Pavao et al., *supra* note 249, at 536–41; *see also* Klingensmith et al., *supra* note 46, at e1133 (noting that "female veterans who screen positive for MST report . . . higher rates of homelessness compared to female veterans without a history of MST").

to non-homeless veterans.[262] Even more, service members with other than honorable or punitive discharges are "estimated to be at seven times the risk of homelessness as other veterans."[263]

In light of MST survivors' elevated risk for houselessness, MST survivors with other than honorable or worse discharges are at an even higher risk. This disproportionately high number of homeless MST survivors is particularly notable given the national efforts and stated goal to end veteran homelessness.[264] VA has made extensive efforts to combat homelessness among veterans. Yet, most of its programs are conditioned upon the service member having veteran status, once again leaving this group of MST survivors behind.[265]

Suicide also disproportionately affects MST survivors.[266] Overall, "recent veterans have significantly higher rate of suicide than civilians;" veterans are approximately 1.5 times more likely to die by suicide.[267] Similarly, women who experience sexual assault or sexual victimization experience heightened risk of suicide.[268] Thus, not surprisingly, MST survivors are even more likely to die by suicide—indeed, they are "nearly 3 times more likely to have ever attempted suicide and twice as likely to report current suicidal ideation."[269]

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262 Pavao et al., *supra* note 249, at 538 (finding that 39.7% of homeless women veterans experienced MST as compared to 22% of non-homeless female veterans suffered from MST and that 3.3% of homeless male veterans experienced MST in contrast to 1% of non-homeless male veterans). This study included only those veterans who were using VHA outpatient care in Fiscal Year 2010. Unfortunately, those service members who were not eligible for care at VA are not included in this study.

263 UNDERSERVED, *supra* note 94, at 22.

264 *Fact Sheet: Biden-Harris Administration Takes Action to Address Veteran Homelessness*, THE WHITE HOUSE (June 29, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/29/fact-sheet-biden-harris-administration-takes-action-to-address-veteran-homelessness/ [https://perma.cc/FA28-EK85] (announcing that "President Biden has made clear that every veteran deserves a roof over their head").

265 *See, e.g.*, UNDERSERVED, *supra* note 94, at 22.

266 *See,* Alina Suris, Jessica Link-Malcom & Carol S. North, *Predictors of Suicidal Ideation in Veterans with PTSD Related to Military Sexual Trauma*, 24 J. TRAUMATIC STRESS 605, 605 (2011).

267 HUMAN RIGHTS WATCH, *supra* note 57, at 73. Tori DeAngelis, *Veterans Are at Higher Risk for Suicide. Psychologists Are Helping them Tackle Their Unique Struggles*, 53 AM. PSYCH. ASS'N 56 (2022), https://www.apa.org/monitor/2022/11/preventing-veteran-suicide [https://perma.cc/N7AG-6RJD].

268 *See generally* Sarah E. Ullman & Leanne R. Brecklin, *Sexual Assault History and Suicidal Behavior in a National Sample of Women*, 32 SUICIDE & LIFE-THREATENING BEHAVIOR 117 (2002) (finding a link between sexual assault and suicidal behavior).

269 Klingensmith et al., *supra* note 46, at e1133 (concluding that MST is associated with "elevated rates" of suicidality).

Similarly, service members with other than honorable or worse discharges suffer from a higher rate of suicide than military members who are discharged honorably.[270] According to VA, in 2024, approximately seventeen veterans die by suicide every day—but according to a Harvard study, service members with less than honorable discharges are "three times more likely to experience suicidal ideation" than other veterans.[271] Thus, an MST survivor's other than honorable or punitive discharge increases an already elevated suicide risk.

Suffering from MST results in a poorer quality of life overall. MST survivors are at an increased risk for developing PTSD or other mental health conditions.[272] And those with other than honorable or punitive discharges are more likely to suffer from a mental health condition, further exacerbating MST survivors' already heightened risk.[273] Not only does MST affect the survivor's mental health, but it also adversely affects their physical health and is "independently linked to worse mental and cognitive functioning, quality of life, and somatic symptoms."[274]

Health care for MST-induced mental health conditions can be lifesaving.[275] Indeed, service members who do not receive VA health care have a thirty percent higher rate of dying by suicide than those who receive VA care.[276] While PTSD is treatable, early therapeutic intervention is vital for treating this mental health condition effectively.[277] Thus, "early access to treatment

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270 OUTVETS ET AL., *supra* note 6, at 1.

271 U.S. DEP'T OF VETERANS AFFS., 2024 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, PART 1 OF 2: IN-DEPTH REVIEWS 4 (2024); OUTVETS ET AL., *supra* note 6, at 10.

272 *See supra* text accompanying note 249; O'Brien & Sher, *supra* note 252.

273 OUTVETS ET AL., *supra* note 6, at 1.

274 Klingensmith et al., *supra* note 46, at e1138.

275 *See Health Care, Economic Opportunities and Social Services for Veterans and Their Dependents—A Community Perspective: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affs.*, 103d Cong. 105 (1993) (statement of Warren Quinlan, Director of Operations, New England Shelter for Homeless Veterans). In light of the disproportionately high risk for homeless MST survivors in developing mental health conditions, "treatment for MST-related PTSD is especially important in this population." Pavao et al., *supra* note 249, at 539.

276 JANET E. KEMP, VETERANS HEALTH ADMIN., SUICIDE RATES IN VHA PATIENTS THROUGH 2011 WITH COMPARISONS WITH OTHER AMERICANS AND OTHER VETERANS THROUGH 2010 16–17 (2014). *But see* U.S. DEP'T OF VETERANS AFFS., 2024 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT, PART 2 OF 2: REPORT FINDINGS 4 (2024) (finding that "[s]uicide rates were higher among Recent Veteran VHA Users than for Other Veterans").

277 Joseph I. Ruzek et al., *Treatment of the Returning War Veteran*, IRAQ WAR CLINICIAN GUIDE, 33, 39 (2d ed. 2004), https://www.govinfo.gov/content/pkg/GOVPUB-VA-PURL-LPS76886/pdf/GOVPUB-VA-PURL-LPS76886.pdf [https://perma.cc/G4J2-J59S]; *see generally* EFFECTIVE TREATMENTS FOR PTSD: PRACTICE

can dramatically improve a survivor's long-term prognosis."[278] The wide-ranging adverse health consequences associated with MST "underscores the importance of integrated clinical care for this population."[279]

Beyond being beneficial for the individual survivor, providing counseling and treatment to survivors is also good for society. Treatment can serve as a form of crime prevention. While "the relationship between military service and criminal justice involvement among veterans is multifaceted," there are certain known risk factors.[280] Both MST and the development of mental health conditions are among some of the "service-related risk factors" for becoming justice involved.[281] Indeed, justice-involved service members frequently "have significant mental health concerns," most of whom "have likely experienced at least one traumatic event, and many have PTSD."[282]

Accessing mental health treatment can lower the likelihood of recidivism.[283] Not surprisingly, denying MST survivors treatment can exacerbate their mental health condition—making recidivism more likely and undermining public safety.[284] Put

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GUIDELINES FROM THE INTERNATIONAL SOCIETY FOR TRAUMATIC STRESS STUDIES (Edna B. Foa et al. eds., 2d ed. 2009).

278 HUMAN RIGHTS WATCH, *supra* note 57, at 74.

279 Klingensmith et al., *supra* note 46, at e1138.

280 Ugur Orak, *From Service to Sentencing: Unraveling Risk Factors for Criminal Justice Involvement Among U.S. Veterans*, COUNCIL ON CRIM. JUST. (Oct. 2023), https://counciloncj.org/from-service-to-sentencing-unraveling-risk-factors-for-criminal-justice-involvement-among-u-s-veterans/ [https://perma.cc/E694-DQ5C] (discovering that "[r]ecent studies show that approximately one-third of veterans report a history of arrest, compared to one-fifth of the non-veteran population").

281 *Id.* (noting that while "among more than 1.4 million justice-involved veterans, men were 200% more likely to report a history of MST compared to a control group who did not have a history of justice involvement, and women were 82% more likely," "more rigorous assessment of this connection [referring to MST and justice involvement] is needed").

282 Janet C. Blodgett et al., *Prevalence of Mental Health Disorders Among Justice-Involved Veterans*, 37 EPIDEMIOLOGIC REVS. 163, 172 (2015).

283 *See, e.g.*, Patrick Clark, *Preventing Future Crime with Cognitive Behavioral Therapy*, 265 NAT'L INST. JUST. J. 22, 22 (2010) (researchers discovered that a specific type of mental health treatment, "[c]ognitive behavioral therapy[,] reduces recidivism in both juveniles and adults"). *But cf.* J. Steven Lamberti, *Preventing Criminal Recidivism Through Mental Health and Criminal Justice Collaboration*, 67 PSYCHIATRIC SERVS. 1206, 1210 (2016) ("Outpatient mental health treatment *alone* is unlikely to reduce criminal recidivism." (emphasis added)).

284 *See* Joel L. Young, *Untreated Mental Illness*, PSYCH. TODAY (Dec. 30, 2015), https://www.psychologytoday.com/us/blog/when-your-adult-child-breaks-your-heart/201512/untreated-mental-illness [https://perma.cc/PC4Y-4UT7] (stating that post's statements about incarceration applies to both first time incarceration and recidivism).

another way, barring these service members from treatment for their service-induced conditions "create[s] a class of individuals whose untreated conditions endanger public safety and the veteran[s] as they grow worse over time."[285]

Excluding some MST survivors from VA health care also undermines their rehabilitation and ability to successfully reenter civilian society.[286] It "defies the moral obligation to advance the interests of both the veteran and the society he will rejoin."[287] In short, "[s]ociety suffers when the punishment of military misconduct trumps the demonstrated need for mental health treatment."[288]

In addition, as a society, we want survivors to report crimes. Excluding survivors from VA treatment may "contribute to the problems related to the underreporting of sexual assault cases."[289] Society continues to suffer when VA bars MST survivors with punitive discharges or statutory bars from VA health care they desperately need.

The burden of treating these survivors, who served in our armed forces, should not be shifted away from VA. At minimum, the government has a duty of care for all service members. Arguably, the government has a higher duty to its military members to ensure a safe environment because a service member cannot just "quit" their job—it is not at-will employment.[290] It is rare for individuals to be placed in such a vulnerable situation where the government has complete ownership and responsibility over the individual.[291] Yet, it was in this incredibly vulnerable government-controlled environment, that MST survivors were victimized. Now, the current

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285 Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 3, 28 (2011) ("Incarceration without adequate mental treatment leads to repeat offenses at a rate so alarming and harmful to society that it has created a 'national public health crisis' of 'epidemic' proportion.").

286 *See* Morales & Brooker, *supra* note 38, at 117–19.

287 Seamone, *supra* note 285, at 3 ("[C]ourts-martial function as problem-*generating* courts when they result in punitive discharges that preclude mentally ill offenders from obtaining Veterans Affairs (VA) treatment").

288 *Id.* at 27–28 ("The lack of concern for treatment [in the military justice system] is troublesome because of its inherent assumption that *somebody else,* outside of the military, will someday be responsible for dealing with aggravated psychological problems.").

289 Brooker, Seamone & Rogall, *supra* note 7, at 103.

290 Indeed, leaving one's job or position without permission is a crime punishable under UCMJ articles 85 and 86 (codified at 10 U.S.C. §§ 885–886).

291 A similarly vulnerable situation is incarceration.

eligibility rules appear to shift that job of caring for some survivors elsewhere.

Leaving out those with a punitive discharge—like Corporal Ohu and Seaman Thompson—does not make sense when thinking about purpose of VA benefits, which is to make the service member whole from a service-incurred injury.[292] Indeed, "[t]here is no logical nexus between character of service and VA health care for service-incurred disabilities."[293] Rather, "[t]he benefit is received based on the logical nexus between the service-incurred disability and the health care benefit."[294] It defies common sense that an MST survivor should be denied health care for sexual trauma they were subjected to in service—likely making them worse off than if they had never served.

Congress should not bar survivors of sexual assault—who endured victimization in the very environment the government should have protected them in—from receiving VA mental health treatment. By doing so, Congress "has [compelled the military to] create[] a double wound, first by placing the servicemember in a situation that caused the mental illness, and second, by preventing necessary treatment in the future."[295] After all, VA's mission is "[t]o care for him who shall have borne the battle . . . ."[296] It only makes sense that in this context, no matter what the discharge characterization or reason for it, VA should treat all MST survivors.[297]

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292 38 C.F.R. § 3.4.

293 Jeremy R. Bedford, *Other than Honorable Discharges: Unfair and Unjust Life Sentences of Decreased Earning Capacity*, 6 U. PA. J.L. & PUB. AFFS. 687, 697 (2021).

294 *Id.* at 698.

295 Seamone, *supra* note 285, at 33.

296 U.S. DEP'T OF VETERANS AFFS., *supra* note 68.

297 Barring MST survivors with punitive discharges or statutory bars from VA care has a disproportionate impact on service members of color. This disparate outcome is because those who receive punitive discharges are more likely to be service members of color, even to this day. Don Christensen & Yelena Tsilker, *Racial Disparities in Military Justice*, PROTECT OUR DEFS. (May 5, 2017), https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf [https://perma.cc/97RU-TY9Q] (finding that as recently as 2015 "across all service branches, black service members were substantially more likely than white service members to face military justice or disciplinary action"); *see also* Kristy N. Kamarck, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS (2019). For historical studies conducted by the DOD on the disproportionate issuance of less than honorable discharges and the intentional and unintentional discrimination of racial minorities in the military justice system, see generally DEP'T OF DEF., REP. OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES (1972) and U.S. GOV'T ACCOUNTABILITY OFF., FPCD-80-13, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE

Excluding MST survivors from VA health care also results in a disproportionate impact on subpopulations of service members. Some military branches discharge service members with punitive discharges at a higher rate than other service branches.[298] According to a Harvard study conducted in 2020, "of all Other Than Honorable, Bad Conduct, and Dishonorable discharges since 1980, almost half—45%—were issued by the Navy."[299] In other words, the same misconduct may result in a punitive discharge in one service branch but not in another branch. While the decision for how to punish misconduct across branches is for that service member's commander or military judge, the discharge decision should not have the downstream effect on whether or not that service member can access VA health care. Congress likely failed to account for "[t]hese disparate discharge practices" when drafting § 1720D.[300]

Congress and VA also failed to appreciate the link between MST and misconduct when prescribing MST eligibility rules. Moreover, MST survivors endure lifelong consequences from their trauma. Similarly, service members with other than honorable or worse discharges experience a "life sentence" because of bad discharge.[301] Excluding MST survivors with punitive discharges or statutory bars from free VA health care should not be one of them. Mental health treatment is a powerful tool to prevent future crime. Section 1720D(g) and the subsequent VA directive create an unnecessary barrier for these survivors to access VA treatment—a barrier that likely increases the risk of houselessness, suicide,

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DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED (1980). While the military has certainly made advancements in addressing racial discrimination and discriminatory practices in the military justice system, disparities remain. *See* U.S. DEP'T OF AIR FORCE INSPECTOR GEN., NO. S8918P, REPORT OF INQUIRY: INDEPENDENT RACIAL DISPARITY REVIEW (2020) (concluding that black Air Force service members are "57% more likely than white [Air Force] service members to face courts-martial"). Similarly, a nationwide study analyzing data from the Army, Navy, Air Force and Marine Corps from 2014 through 2020 revealed that black service members were more likely to receive less than honorable discharges than white service members. CONN. VETERANS LEGAL CTR., *Discretionary Injustice: How Racial Disparities in the Military's Administrative Separation System Harm Black Veterans* 4 (2022) (discovering "clear evidence of racial disparity in the [administrative separation] process").

298 OUTVETS ET AL., *supra* note 6, at 22.

299 *Id.* The Department of the Navy includes the Marine Corps.

300 *Id.*

301 PAUL STARR, THE DISCARDED ARMY, VETERANS AFTER VIETNAM: THE NADER REPORT ON VIETNAM VETERANS AND THE VETERANS ADMINISTRATION 175 (1974); *see also* Brooker, Seamone & Rogall, *supra* note 7, at 12; McClean, *supra* note 38, at 2237–41; Morales & Brooker, *supra* note 38, at 86; Karin, *supra* note 38, at 160–61; Michael J. Wishnie, *"A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1712 (2017).

and poorer quality of life for the survivor and the risk of criminal justice involvement to the detriment of society.[302]

VI
Return to Eligibility for All

This section proposes a statutory solution so that all MST survivors, regardless of their discharge characterization or reason for their discharge, can access VA health care for their service-incurred injuries. This solution achieves Congress' expressed intent to expand VA treatment eligibility for MST survivors.[303] Additionally, beyond the statutory solution, this section proposes practical advice to advocates and MST survivors to assist in successfully navigating the current legal landscape.

A. Proposed Statutory Solution

Admittedly, the law is not the "end all be all" and cannot always offer a comprehensive solution to a complex problem. But in this case, a simple statutory tweak can remove the unnecessary barrier to VA treatment. Because Congress solidified the narrower eligibility definition in § 1720D(g) in 2021, VA no longer has the freedom to interpret the statutory eligibility criteria broadly as VA had done so in 2010.[304] Thus, reissuing a VA directive like the one in 2010 will likely not suffice.[305] Congress should also clearly define who is eligible for VA care rather than use superfluous and confusing terms with multiple meanings.

The proposed statutory change to 38 U.S.C. § 1720D(g) more inclusively defines "former member of the Armed Forces" as stated below:

> (g) **For** this section, the term "former member of the Armed Forces" includes the following:
>
> (1) A veteran.
>
> (2) An individual **who (A) is a former member of the Armed Forces, including the reserve components; (B) while serving in the active military, naval, air, or space service, was discharged or released therefrom; and (C) is not enrolled in the health care system established by section 1705 of this title.**[306]

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302 Orak, *supra* note 280.

303 *See supra* note 186 and associated text.

304 38 U.S.C. § 1720D(g); VHA Directive 2010-033, *supra* note 33.

305 *See* VHA Directive 2010-033, *supra* note 33.

306 The text in bold is the proposed statutory change to 38 U.S.C. § 1720D(g).

The proposed solution keeps subsection (g)(1) as is, using the term "veteran."[307] This provision is still needed because it will include service members with veteran status who had a character of discharge determination without filing a VA disability claim. Pursuant to 38 U.S.C. § 5303B(a), a service member with a less than honorable discharge can request VA to make a determination of eligibility (through the character of discharge determination process) for benefits without that service member ever filing a VA disability claim.[308] This subsection would include those MST survivors who were deemed eligible for VA benefits but did not file a VA claim and were not eligible for VA health care under any other provision.

The recommended changes are to (g)(2). The proposed language incorporates some, but not all, of the language from the previously referenced 38 U.S.C. § 1720I(b).[309] Specifically, the language preventing those service members who received a "dishonorable discharge" or were "discharge[d] by court-martial" from being eligible for VA care was intentionally removed.[310] Rather, the new language, "discharged or released therefrom," makes clear that all MST survivors regardless of discharge characterization or reason for it, will be eligible for VA health care.[311] This added language also clarifies that MST related care is *not* contingent on the survivor having veteran status.[312]

The language from subsection 38 U.S.C. § 1720I(b)(4)(A) was also explicitly not included because the "more than 100 cumulative days" requirement is not applicable in this context.[313] Moreover, the requirement of being a victim of sexual assault or sexual harassment, as described in § 1720I(b)(4)(B) is superfluous as it is already defined and required in § 1720D(f).[314]

The proposed statutory language will enable *all* MST survivors to access VA medical care for their service-incurred

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307 38 U.S.C. § 1720D(g)(1).

308 38 U.S.C. § 5303B(a) ("The Secretary shall establish a process by which an individual who served in the Armed Forces and was discharged or dismissed therefrom may seek a determination from the Secretary with respect to whether such discharge or release was under a condition that bars the right of such individual to a benefit under the laws administered by the Secretary based upon the period of service from which discharged or dismissed.").

309 38 U.S.C. § 1720D(g)(2).

310 38 U.S.C. § 1720I(b)(2)(A)–(B).

311 *See supra* note 306 and associated text.

312 *See* 38 U.S.C. § 101(2).

313 38 U.S.C. § 1720I(b)(4)(A)(i)–(ii).

314 38 U.S.C. § 1720I(b)(4)(B); 38 U.S.C. § 1720D(f).

disabilities. It will further congressional intent of desiring to expand eligibility for survivors and will account for the frequent link between an MST survivor's trauma and subsequent misconduct.[315] Under the proposed language in § 1720D(g)(2), both Corporal Ohu and Seaman Thompson's bad conduct discharges will no longer serve as a barrier to receiving much-needed treatment; rather, they will now be eligible for free VA health care for their MST-induced disabilities.

B. Practical Advice

Convincing Congress to agree on and pass legislation is difficult, time-consuming, and sometimes nearly impossible.[316] Thus, it is important for advocates, lawyers, veterans service officers (VSOs), and MST survivors to know how to navigate the current legal framework to ensure broad access to VA care.

Currently, pursuant to § 1720D(g), MST survivors with punitive discharges (bad conduct discharge, dishonorable discharge or dismissal) are completely barred from all VA health care.[317] Additionally, pursuant to the 2021 VHA Directive, MST survivors who have a statutory bar to benefits are also ineligible for VA care.[318] Thus, advocates must not only examine the discharge characterization an MST survivor is issued, but they must also analyze the reason for the discharge.[319]

In theory, MST survivors with other than honorable discharges, who do not have a statutory bar to benefits, are eligible for VA care under § 1720D(g).[320] Practically, that is not the case. MST survivors with other than honorable discharges are frequently denied VA health care, even if they are legally eligible.[321] A 2020 study conducted by the Veterans Legal Clinic at Harvard Law School found that VA's denial of care to service members with other than honorable or worse discharge is a

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315 *See supra* Subpart IV.A.

316 *See generally* NEIL S. SIEGEL, *The Problem of Congressional Gridlock*, *in* THE COLLECTIVE ACTION-CONSTITUTION (2024).

317 38 U.S.C. § 1720D(g). Regardless of a service member's discharge, however, a service member can obtain emergency medical care at any Emergency Department, including VA. 38 U.S.C. § 1725; 38 C.F.R. § 17.1000.

318 VHA DIRECTIVE 1115(1), *supra* note 27; *see* 38 U.S.C. § 5303(a) (listing the statutory bars to VA benefits).

319 Brooker, Seamone & Rogall, *supra* note 7, at 110. *But see* 38 C.F.R. § 3.12(a) ("A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.").

320 38 U.S.C. § 1720D(g).

321 *See, e.g.*, Burbank, *supra* note 44, at 200–04.

"national, persistent, and systemic" problem.[322] Described in the 2020 study, the following is a tell-tale example of how this all-too common scenario plays out:

Robert, a Military Sexual Trauma survivor who received an Other Than Honorable discharge, sought mental health treatment at VA in 2019. The VA enrollment representative said that Robert would be eligible because of special eligibility rules for veterans who experienced MST and sent Robert to make an appointment at triage. However, the VA triage employee refused to schedule Robert for an appointment because of his OTH discharge. Only with the assistance of a pro bono attorney did VA eventually agree to grant Robert access to VA mental health treatment and schedule an appointment.[323]

It is important for advocates and MST survivors alike to be aware of the practical realities and difficulties in obtaining VA eligibility with less than honorable discharges.

But not all hope is lost. First and foremost, survivors of MST may be eligible to receive mental health treatment at their local Vet Center regardless of their discharge characterization.[324] Operated by VA, these centers offer "community-based counseling" with "a wide range of social and psychological services, including professional counseling."[325] MST survivors can also apply to the military records correction boards to change their discharge characterization and reason for discharge. While prevailing in a discharge upgrade case is certainly not guaranteed, a survivor or advocate can rely on the Department of Defense memo authored by a former Under Secretary of Defense Anthony Kurta to argue that their MST explains, mitigates and outweighs the reason for their bad discharge.[326]

In addition, advocates can and should make well-reasoned arguments tailored to their specific cases as to why their MST survivor clients should be entitled to VA care. For example, Congress created an exception to VA eligibility that overcomes all statutory bars to benefits. That exception is insanity.[327]

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322 OUTVETS ET AL., *supra* note 6, at 15.

323 *Id.* at 14.

324 *Vet Centers (Readjustment Counseling)*, U.S. DEP'T OF VETERANS AFFS. (Mar. 20, 2026), https://www.vetcenter.va.gov/ [https://perma.cc/7PJP-2H6L]; *see generally* 38 U.S.C. § 1712A (establishing "vet centers"). *But see* 38 C.F.R. § 17.2000(a)(1) (stating that eligibility is dependent upon veteran status).

325 *Id.*

326 Kurta Memo, *supra* note 55. *See also supra* note 103 and associated text.

327 38 U.S.C. § 5303(b). For purposes of VA benefits, "insanity" is defined in 38 C.F.R. § 3.354. The Author acknowledges the term "insanity" is pejorative, but it

Importantly, the meaning of "insanity" for VA benefits purposes differs *significantly* from the definition of insanity in criminal law.[328] In the VA benefits context, VA defines "insanity" as "a more or less prolonged deviation from his normal method of behavior."[329]

Thus, for MST survivors who are statutorily barred from benefits, advocates may wish to explore whether the insanity exception applies.[330] If the service member was insane at the time of the misconduct that led to the discharge, then the military member "will not be barred from receiving any benefits for that period of service."[331] Put another way, insanity overcomes a statutory bar to benefits and operates as an independent basis for VA benefits.[332] With the elimination of MST as an independent basis for eligibility, insanity is the only remaining "'defense' that allows a veteran to receive eligibility for VA benefits regardless of whatever bar may apply."[333]

Evidence of an MST survivor suffering from PTSD or another mental health condition at the time of the misconduct may be sufficient evidence to claim insanity under this lenient VA standard. Most recipients of less than honorable discharges believe they will never be entitled to VA benefits; therefore, it is critical that advocates inform these MST survivors of this potential legal avenue that could overcome their statutory bar to VA care.[334]

Turning to Corporal Ohu's case, an advocate may be successful in arguing that she meets the VA definition of "insanity"

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is not intended as such. It was a term developed in 1961, and the veteran clinic community has advocated to change this term. *See supra* note 199 and associated text.

328 *Cf.* 38 C.F.R. § 3.354 and 18 U.S.C. § 17(a) (defining insanity as "an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts"). *See also* MCM, *supra* note 11, at R.C.M. 916(k). For more information comparing the VA definition of "insanity" to the criminal definition of "insanity," *see* Stone, *supra* note 333, at 666–70.

329 38 C.F.R. § 3.354(a) (2024).

330 38 U.S.C. § 5303(b).

331 Brooker, Seamone & Rogall, *supra* note 7, at 105.

332 *Id.*

333 Caleb R. Stone, *Making the Best from a Mess: Mental Health, Misconduct, and the "Insanity Defense" in the VA Disability Compensation System*, 90 UMKC L. REV. 661, 663 (2022).

334 For more information on how insanity works in the VA context and practical advice for advocates on how to prove insanity, see Brooker, Seamone & Rogall, *supra* note 7, at 105–09.

at the time she committed the assault, thereby removing her bar to VA eligibility. Because she was discharged pursuant to a general court-martial, a statutory bar to benefits applies in her case.[335] An advocate could point to her documented mental health conditions at the time she engaged in the misconduct as evidence of her "prolonged deviation from [her] normal method of behavior."[336] If successful, then Corporal Ohu would be eligible not only for VA health care but also for VA disability compensation for service-connected conditions.

Another scenario where advocates may want to explore further is when their MST client has an other than honorable or bad conduct discharge for an AWOL over 180 continuous days.[337] For this specific statutory bar, advocates should analyze whether the compelling circumstances exception could apply.[338] If the MST survivor "can demonstrate 'to the satisfaction of the Secretary that there are compelling circumstances to warrant such prolonged absence,' this statutory bar to benefits will not apply."[339] According to VA regulations, the "compelling circumstances [must] mitigate the AWOL or misconduct at issue."[340] Some of the factors that VA considers mitigating are the "length and character of service exclusive of the period of prolonged AWOL or misconduct," "mental or cognitive impairment . . . to include but not limited to a clinical diagnosis of . . . posttraumatic stress disorder," "sexual abuse/assault," and "age, education, cultural background, and judgmental maturity."[341]

In Seaman Thompson's case, an advocate may argue that there were compelling circumstances that justified his unauthorized absence. Seaman Thompson was gone for over 180 continuous days, and he received a bad conduct discharge for that conduct; thus, he has a statutory bar to benefits for that period of service.[342] Seaman Thompson has several

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335 38 U.S.C. § 5303(a) (stating that "the discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces . . . shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed").

336 38 C.F.R. § 3.354(a) (2024). *See* Athey, *supra* note 8.

337 This is one of the six statutory bars to benefits. 38 U.S.C. § 5303(a).

338 *Id.* The compelling circumstances exception is not limited to MST survivors.

339 Brooker, Seamone & Rogall, *supra* note 7, at 136; 38 U.S.C. § 5303(a). The burden of proving compelling circumstances exception is on the veteran. *Id.*

340 38 C.F.R. § 3.12(e) (2024).

341 38 C.F.R. § 3.12(e)(1)–(2) (2024).

342 38 U.S.C. § 5303(a).

mitigating factors to support the application of the compelling circumstances exception, including, his post-service diagnosis of PTSD caused by his MST.[343] Thompson could also argue that it was reasonable for him to leave the ship to avoid being assaulted again and that his young age or judgmental maturity likely impacted that decision.[344] By successfully arguing that "there are compelling circumstances [that] warrant[ed] such prolonged absence," Seaman Thompson will no longer have an eligibility bar to VA benefits and could be eligible for VA health care and disability compensation for his service-connected PTSD.[345]

Finally, if an MST survivor has a bad conduct discharge for "willful and persistent misconduct" pursuant to a special court-martial, then the advocate should also analyze whether the compelling circumstances exception applies.[346] A bad conduct discharge at a special court-martial is a regulatory bar to benefits, if VA determines the conduct that led to the discharge is "[w]illful and persistent misconduct."[347] For the first time since 1980, VA recently changed several of the regulatory eligibility bars to benefits.[348] Among these changes, VA expanded the compelling circumstances exception to apply to the "[w]illful and persistent misconduct" regulatory bar, which

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343 Under these facts, Seaman Thompson may also have an argument that his PTSD caused a "prolonged deviation from normal behavior" and justifies the application of the "insanity" exception. 38 C.F.R. § 3.354(a) (2024).

344 *See* 38 C.F.R. § 3.12(e)(1)-(2) (2024).

345 *See* 38 C.F.R. § 3.12 (2024).

346 38 C.F.R. § 3.12(d) (2024) (defining "[w]illful and persistent misconduct" as "instances of minor misconduct occurring within two years of each other are persistent; an instance of minor misconduct occurring within two years of more serious misconduct is persistent; and instances of more serious misconduct occurring within five years of each other are persistent . . . minor misconduct is misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial"). The compelling circumstances exception also applies to "an offense involving moral turpitude." 38 C.F.R. § 3.12(d)(2)(ii) (2024).

347 38 C.F.R. § 3.12(d) (2024). The special court-martial referred to here is a special court-martial empowered to adjudge a bad conduct discharge (frequently called a "BCD-Special") and is distinct from a special court-martial (often called a "straight-special"). MCM, *supra* note 11, at R.C.M. 1003(b)(8)(C). *See supra* notes 92–93 and associated text regarding the difference between statutory and regulatory bars to VA benefits.

348 38 C.F.R. § 3.12 (2024). While the focus of this section is on the addition of the compelling circumstances exception to the regulatory bars, there were other noteworthy amendments including changing the definition of "[w]illful and persistent misconduct."

may provide an additional avenue for eligibility.[349] VA defines compelling circumstances, in the willful and persistent context, the same way as in the context of the 180-day continuous AWOL.[350] Because these amendments were only implemented in June of 2024, it is too early to tell if VA will follow these new regulations as they have a pattern of misapplying or ignoring the law when making VA eligibility determinations.[351]

The practical advice offered here demonstrates the nuances and complexity of this area of the law. These complexities raise the core question; did Congress and VA really intend to make it *this* difficult for a subset of MST survivors to access VA treatment for service-incurred disabilities? Certainly not. Implementing the proposed statutory solution would simplify an incredibly complex process for MST survivors to access VA treatment that they desperately need. It would also account for the link between trauma and misconduct that is prevalent in many of these MST cases. Finally, it will prevent VA from impermissibly barring even more MST survivors from accessing VA health care.

Conclusion

In 2021, Congress expressed a willingness to expand VA health care eligibility for MST survivors. However, Congress' intent was frustrated when it used confusing and conflicting statutory language resulting in barring those the most in need of VA health care—like Corporal Ohu and Seaman Thompson, whose cases opened this Article.

Shortly thereafter, VA impermissibly exacerbated the problem, barring even more MST survivors than prescribed in the

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349 38 C.F.R. § 3.12(d)(2)(ii) (2024). Service members with a bad conduct discharge pursuant to a special court-martial are barred from VA health care. Veterans' Benefits. Entitlement, Denial to Certain Veterans with Upgraded Discharges, Pub. L. No. 95-126, 91 Stat. 1106, 1108 (1977) (stating that VA "shall not provide such health care . . . for any disability incurred or aggravated during a period of service from which such person was discharged by reason of a bad conduct discharge"). However, when a service member has a bad conduct discharge (pursuant to a special court-martial) but no regulatory or statutory bars to benefits apply, VA frequently determines the veteran is eligible for all VA benefits including health care. Thus, VA appears to be interpreting Pub. L. No. 95-126 as barring health care only if a statutory or regulatory bar to benefits applies. However, the support for this is only anecdotal as this issue has never been affirmatively decided. *See generally* Brooker, Seamone & Rogall, *supra* note 7, at 145 (discussing the compelling circumstances exception to the AWOL benefits bar).

350 38 C.F.R. § 3.12(e) (2024).

351 *See generally* OUTVETS ET AL., *supra* note 6, at 20–25 (discussing the low quality and legal incorrectness of training for VHA staff).

statute. The arbitrary line that Congress has drawn, and VA has solidified, is nonsensical and immoral from a policy perspective. These rules fail to account for the all too often link between the survivor's trauma and subsequent (mis)behavior.

This Article spotlights the consequences of Congress' recent legislation and VA's interpretive rule—which prevents the most marginalized and vulnerable MST survivors from accessing VA health care for their trauma-induced disabilities. Congress and VA now know better. Now they must do better.