FCBA - MATERIALS & REFERENCES
VETERANS LAW AND FEDERAL PRACTICE
CLE PROGRAM – 8/25/2020

I. Veterans Affairs:

a. Generally
   i. Veterans' Judicial Review Act of 1988 (Pub. L. No. 100-687)
   ii. 38 U.S. Code Title 38 – Veterans' Benefits, available in full at https://www.benefits.va.gov/warms/topic-title38.asp

b. Constitutionality Claims:
   i. *Veterans for Common Sense v. Shineski*, 678 F. 3d. 1013 (9th Cir. 2012)
   ii. *Disabled Amer. Veterans v. Dep't of Veterans Affairs*, 962 F. 2d 136, 140-141 (2nd Cir. 1992)

c. National Service Life Insurance Program Claims:
   i. *Young v. Derwinski*, 1 Vet. App. 70 (1990)
   ii. 38 U.S.C.S. § 1975
   iii. 38 U.S.C.S. § 1984(a)

d. VA Loan Guarantee Program:
   i. *Smith v. Derwinski*, 1 Vet. App. 267 (1991)
   ii. 38 U.S.C.S. § 511(b)(1)-(3)

II. Discharge Review Boards:

a. Standards of Review
   i. 32 C.F.R. § 70.9
   ii. 10 U.S.C. § 1553

b. Review
   i. C.F.R. § 724.701(b) Part III.A.2

c. Statute of Limitations to Federal Court
   i. 28 U.S.C. § 2401

III. Boards of Correction for Military Records:

a. 10 U.S.C. § 1552
b. 32 C.F.R. § 581.3(b)(4)(i)
c. 32 C.F.R. § 723.1
d. 32 C.F.R. § 865.0
e. 33 C.F.R. § 52.12(a)
f. *Mudd v. White*, 309 F.3d 819 (D.C. Cir. 2002)
g. Little Tucker Act
   i. 28 U.S.C. § 1346(a)(2)
h. Statute of Limitations
   i. 28 U.S.C. § 2401
i. "Wilkie Memo"
   i. Wilkie, R. (2018) *Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations* [Memorandum]

j. DODI 1332.28 Discharge Review Board Procedures and Standards (2004, April 4)

IV. New Caregiver Regulations

a. Available at: https://www.federalregister.gov/documents/2020/07/31/2020-15931/program-of-comprehensive-assistance-for-family-caregivers-improvements-and-amendments-under-the-va

V. Additional Helpful References:

a. Swords to Plowshares Discharge Upgrade Manual: https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5e66de94ac18eedbdf7a9bd0_Upgrading-Your-Discharge.pdf
b. Connecticut Legal Services Discharge Upgrade Manual: https://ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-2011.pdf
c. Veterans Benefits Manual: electronic search and content available via Lexis Nexis, print copies purchased through Lexis Nexis

Public Law 100-687
100th Congress

An Act

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to establish a Court of Veterans' Appeals and to provide for judicial review of certain final decisions of the Board of Veterans' Appeals; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; to increase the rates of compensation payable to veterans with service-connected disabilities; and to make various improvements in veterans' health, rehabilitation, and memorial affairs programs; and for other purposes.

Nov. 18, 1988
[S. 11]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A—VETERANS' JUDICIAL REVIEW

Veterans' Judicial Review Act.

SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

38 USC 101 note.

(a) SHORT TITLE.—This division may be cited as the "Veterans' Judicial Review Act".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATIVE AND RULEMAKING AUTHORITY OF THE VETERANS' ADMINISTRATION

SEC. 101. DECISIONS BY ADMINISTRATOR.

(a) MATTERS TO BE DECIDED BY ADMINISTRATOR.—Subsection (a) of section 211 is amended to read as follows:

"(a)(1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

"(2) The second sentence of paragraph (1) of this subsection does not apply to—

"(A) matters subject to section 223 of this title;

"(B) matters covered by sections 775 and 784 of this title;

"(C) matters arising under chapter 37 of this title; and

"(D) matters covered by chapter 72 of this title.".

(b) CONFORMING AMENDMENT.—Section 4004(a) is amended by striking out "All questions on claims involving benefits under laws administered by the Veterans' Administration" and inserting in lieu thereof "All questions in a matter which under section 211(a) of this title is subject to decision by the Administrator".

SEC. 102. VETERANS' ADMINISTRATION RULEMAKING.

(a) APA PROCEDURES.—(1) Chapter 3 is amended by inserting after section 222 the following new section:

"§ 223. Rulemaking: procedures and judicial review

"(a) In applying section 552(a)(1) of title 5 to the Veterans' Administration, the Administrator shall ensure that subparagraphs (C), (D), and (E) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel.

"(b) The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Administrator.

"(c) An action of the Administrator to which section 552(a)(1) or 553 of title 5 (or both) refers (other than an action relating to the adoption or revision of the schedule of ratings for disabilities adopted under section 355 of this title) is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 222 the following new item:

"223. Rulemaking: procedures and judicial review.".

(b) REPORT ON IMPLEMENTATION.—Not later than May 1, 1989, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the implementation of section 223(a) of title 38, United States Code, as added by subsection (a)(1). Such report shall set forth the actions the Administrator is taking to ensure that such section is carried out.

SEC. 103. VETERANS' ADMINISTRATION ADJUDICATION PROCEDURES.

(a) IN GENERAL.—(1) Chapter 51 is amended by adding at the end of subchapter I the following new sections:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 3006 of this title.

"(b) When, after consideration of all evidence and material of record in a case before the Veterans' Administration with respect to

benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Administrator the burden specified in subsection (a) of this section.

"§ 3008. Reopening disallowed claims

"If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Administrator shall reopen the claim and review the former disposition of the claim.".

"§ 3009. Independent medical opinions

"(a) When, in the judgment of the Administrator, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in a case being considered by the Veterans' Administration, the Administrator may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

"(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions. Any such arrangement shall provide that the actual selection of the expert or experts to give the advisory opinion in an individual case shall be made by an appropriate official of such institution.

"(c) The Administrator shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Administrator.".

(2) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new items:

"3007. Burden of proof; benefit of the doubt.
"3008. Reopening disallowed claims.
"3009. Independent medical opinions.".

(b) CONFORMING AMENDMENTS.—Section 4009 is amended—

(1) in subsection (a), by striking out "is authorized to" and inserting in lieu thereof "may";

(2) in subsection (b)—

(A) by striking out "Such arrangement will" and inserting in lieu thereof "Any such arrangement shall"; and

(B) by striking out "any individual case will" and inserting in lieu thereof "an individual case shall"; and

(3) by adding at the end the following new subsection:

"(c) The Board shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Board.".

(c) TECHNICAL AMENDMENTS.—(1) The items relating to chapter 51 in the table of chapters before part I, and in the table of chapters at the beginning of part IV, are amended by striking out "Applications" and inserting in lieu thereof "Claims".

(2) The heading of chapter 51 is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(3) The item relating to subchapter I in the table of sections at the beginning of chapter 51 is amended by striking out "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(4) The heading of subchapter I of chapter 51 is amended to read as follows:

"SUBCHAPTER I—CLAIMS".

SEC. 104. ATTORNEYS FEES.

(a) REVISION OF ATTORNEY FEE LIMITATION.—Section 3404 of title 38, United States Code, is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c)(1) In connection with a proceeding before the Veterans' Administration with respect to benefits under laws administered by the Veterans' Administration, a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case. Such a fee may be charged, allowed, or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. The limitation in the preceding sentence does not apply to services provided with respect to proceedings before a court.

"(2) A person who, acting as agent or attorney in a case referred to in paragraph (1) of this subsection, represents a person before the Veterans' Administration or the Board of Veterans' Appeals after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board at such time as may be specified by the Board. The Board, upon its own motion or the request of either party, may review such a fee agreement and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the United States Court of Veterans Appeals under section 4063(d) of this title.

"(d)(1) When a claimant and an attorney have entered into a fee agreement described in paragraph (2) of this subsection, the total fee payable to the attorney may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(2)(A) A fee agreement referred to in paragraph (1) of this subsection is one under which (i) the amount of the fee payable to the attorney is to be paid to the attorney by the Administrator directly from any past-due benefits awarded on the basis of the claim, and (ii) the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant.

"(B) For purposes of subparagraph (A) of this paragraph, a claim shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted.

"(3) To the extent that past-due benefits are awarded in any proceeding before the Administrator, the Board of Veterans' Appeals, or the United States Court of Veterans Appeals, the Administrator may direct that payment of any attorneys' fee under a fee arrangement described in paragraph (1) of this subsection be made out of such past-due benefits. In no event may the Administrator

withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Administrator, the Board of Veterans' Appeals, or Court of Veterans Appeals making (or ordering the making of) the award.".

(b) VIOLATION TO BE A MISDEMEANOR.—Section 3405 of such title is amended by striking out "shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both" and inserting in lieu thereof "shall be fined as provided in title 18, or imprisoned not more than one year, or both".

TITLE II—BOARD OF VETERANS' APPEALS

SEC. 201. APPOINTMENT AND REMOVAL OF THE CHAIRMAN AND MEMBERS.

(a) IN GENERAL.—Subsection (b) of section 4001 is amended to read as follows:

"(b)(1) The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of six years. The Chairman may be removed by the President for misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties. The Chairman may not be removed from office by the President on any other grounds. Any such removal may only be made after notice and opportunity for hearing. President of U.S.

"(2)(A) The other members of the Board (including the Vice Chairman) shall be appointed by the Administrator, with the approval of the President, based upon recommendations of the Chairman. Each such member shall be appointed for a term of nine years.

"(B) A member of the Board (other than the Chairman) may be removed by the Administrator upon the recommendation of the Chairman. In the case of a removal that would be covered by section 7521 of title 5 in the case of an administrative law judge, a removal of a member of the Board under this paragraph shall be carried out subject to the same requirements as apply to removal of an administrative law judge under that section. Section 554(a)(2) of title 5 shall not apply to a removal action under this subparagraph. In such a removal action, a member shall have the rights set out in section 7513(b) of such title.

"(3) Members (including the Chairman) may be appointed under this subsection to more than one term.

"(4) The Administrator shall designate one member of the Board as Vice Chairman. The Vice Chairman shall perform such functions as the Chairman may specify. Such member shall serve as Vice Chairman at the pleasure of the Administrator.".

(b) SALARY OF CHAIRMAN.—(1) Section 5315 of title 5, United States Code, is amended by adding at the end the following:

"Chairman, Board of Veterans' Appeals.".

(2) The amendment made by paragraph (1) shall take effect when the President first appoints an individual as Chairman of the Board of Veterans' Appeals under section 4001(b)(1) of title 38, United States Code (as amended by subsection (a)). Effective date. 5 USC 5315 note.

(c) TRANSITION TO NEW BOARD.—(1) Appointments of members of the Board of Veterans' Appeals under subsection (b)(2) of section 38 USC 4001 note.

4001 of title 38, United States Code (as amended by subsection (a)), may not be made until a Chairman is appointed under subsection (b)(1) of that section.

(2) An individual who is serving as a member of the Board on the date of the enactment of this Act may continue to serve as a member until the earlier of—

(A) the date on which the individual's successor (as designated by the Administrator) is appointed under subsection (b)(2) of that section, or

(B) the end of the 180-day period beginning on the day after the date on which the Chairman is appointed under subsection (b)(1) of such section.

38 USC 4001 note.

(d) INITIAL TERMS OF OFFICE.—Notwithstanding the second sentence of section 4001(b)(2) of title 38, United States Code (as amended by subsection (a)), specifying the term for which members of the Board of Veterans' Appeals shall be appointed, of the members first appointed under that section—

(A) 22 shall be appointed for a term of three years;

(B) 22 shall be appointed for a term of six years; and

(C) 22 shall be appointed for a term of nine years,

as determined by the Administrator at the time of the initial appointments.

SEC. 202. DETERMINATIONS BY THE BOARD.

(a) MAJORITY VOTE IN SECTIONS.—Section 4003 is amended to read as follows:

"§ 4003. Determinations by the Board

"(a) Decisions by a section of the Board shall be made by a majority of the members of the section. The decision of the section is final unless the Chairman orders reconsideration of the case.

"(b) If the Chairman orders reconsideration in a case, the case shall upon reconsideration be heard by an expanded section of the Board. When a case is heard by an expanded section of the Board after such a motion for reconsideration, the decision of a majority of the members of the expanded section shall constitute the final decision of the Board.

"(c) Notwithstanding subsections (a) and (b) of this section, the Board on its own motion may correct an obvious error in the record.".

(b) RESOURCES TO DISPOSE OF APPEALS IN A TIMELY MANNER.—Section 4001(a) is amended—

(1) by inserting "and" after "Vice Chairman,";

(2) by striking out "necessary, and" and inserting in lieu thereof "necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner. The Board shall have"; and

(3) by adding at the end the following new sentence: "The Board shall have sufficient personnel under the preceding sentence to enable the Board to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner.".

SEC. 203. DECISIONS OF THE BOARD.

(a) DECISIONS BASED ON THE RECORD.—Section 4004(a) is amended by adding at the end the following new sentences: "The Board shall decide any such appeal only after affording the claimant an oppor-

tunity for a hearing. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.".

(b) CONFORMING AMENDMENT.—Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

SEC. 204. REOPENING OF DISALLOWED CLAIMS.

Subsection (b) of section 4004 is amended to read as follows:

"(b) Except as provided in section 3008 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.".

SEC. 205. NOTICE AND CONTENT OF DECISIONS.

Section 4004 is amended by striking out subsection (d) and inserting in lieu thereof the following:

"(d) Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and

"(2) an order granting appropriate relief or denying relief.

"(e) After reaching a decision in a case, the Board shall promptly mail a copy of its written decision to the claimant and the claimant's authorized representative (if any) at the last known address of the claimant and at the last known address of such representative (if any).".

SEC. 206. STATEMENT OF THE CASE.

(a) MATTERS TO BE INCLUDED.—Paragraph (1) of section 4005(d) is amended in the second sentence by striking out "will prepare" and all that follows and inserting in lieu thereof the following: "shall prepare a statement of the case. A statement of the case shall include the following:

"(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

"(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

"(C) The decision on each issue and a summary of the reasons for such decision.".

(b) PROHIBITION AGAINST PRESUMPTION OF AGREEMENT.—Paragraph (4) of such section is amended to read as follows:

"(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.".

SEC. 207. TRAVELING SECTIONS OF THE BOARD.

(a) IN GENERAL.—Chapter 71 is further amended by adding at the end the following new section:

"§ 4010. Traveling sections

"A claimant may request a hearing before a traveling section of the Board. Any such hearing shall be scheduled for hearing before such a section within the area served by a regional office of the Veterans' Administration in the order in which the requests for

hearing are received by the Veterans' Administration with respect to hearings in that area.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"4010. Traveling sections.".

SEC. 208. ANNUAL REPORT ON BOARD ACTIVITIES AND RESOURCES.

Section 4001 is amended by adding at the end the following new subsection:

"(d)(1) After the end of each fiscal year, the Chairman shall prepare a report on the activities of the Board during that fiscal year and the projected activities of the Board for the fiscal year during which the report is prepared and the next fiscal year. Such report shall be included in the documents providing detailed information on the budget for the Veterans' Administration that the Administrator submits to the Congress in conjunction with the President's budget submission for any fiscal year pursuant to section 1105 of title 31.

"(2) Each such report shall include, with respect to the preceding fiscal year, information specifying—

"(A) the number of cases appealed to the Board during that year;

"(B) the number of cases pending before the Board at the beginning and at the end of that year;

"(C) the number of such cases which were filed during each of the 36 months preceding the current fiscal year;

"(D) the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year; and

"(E) the number of members of the Board at the end of the year and the number of professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the preceding fiscal year.

"(3) The projections in each such report for the current fiscal year and for the next fiscal year shall include (for each such year)—

"(A) an estimate of the number of cases to be appealed to the Board; and

"(B) an evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by section 4003(d) of this title.".

SEC. 209. LIMITATIONS ON AWARDING PERFORMANCE INCENTIVES TO BOARD MEMBERS.

Section 4001 (as amended by section 208) is further amended by adding at the end the following new subsection:

"(e) A performance incentive that is authorized by law for officers and employees of the Federal Government may be awarded to a member of the Board (including a temporary or acting member) by reason of that member's service on the Board only if the Chairman of the Board determines that such member should be awarded that incentive. A determination by the Chairman for such purpose shall be made taking into consideration the quality of performance of the Board member.".

TITLE III—UNITED STATES COURT OF VETERANS APPEALS

SEC. 301. UNITED STATES COURT OF VETERANS APPEALS.

(a) ESTABLISHMENT OF COURT.—Part V is amended by inserting after chapter 71 the following new chapter:

"CHAPTER 72—UNITED STATES COURT OF VETERANS APPEALS

"SUBCHAPTER I—ORGANIZATION AND JURISDICTION

"SUBCHAPTER II—PROCEDURE

"SUBCHAPTER III—MISCELLANEOUS PROVISIONS

"SUBCHAPTER IV—DECISIONS AND REVIEW

"SUBCHAPTER I—ORGANIZATION AND JURISDICTION

"§ 4051. Status

"There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals.

"§ 4052. Jurisdiction; finality of decisions

"(a) The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Administrator may not seek review of any such decision. The court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

"(b) Review in the Court shall be on the record of proceedings before the Administrator and the Board. The extent of the review shall be limited to the scope provided in section 4061 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 355 of this title or any action of the Administrator in adopting or revising that schedule.

"(c) Decisions by the Court are subject to review as provided in section 4092 of this title.

"§ 4053. Composition

"(a) The Court of Veterans Appeals shall be composed of a chief judge and at least two and not more than six associate judges.

President of U.S.

"(b) The judges of the Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. A person may not be appointed to the Court who is not a member in good standing of the bar of a Federal court or of the highest court of a State. Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.

"(c) The term of office of the judges of the Court of Veterans Appeals shall be 15 years.

"(d) The chief judge is the head of the Court.

"(e)(1) The chief judge of the Court shall receive a salary at the same rate as is received by judges of the United States Courts of Appeals.

"(2) Each judge of the Court, other than the chief judge, shall receive a salary at the same rate as is received by judges of the United States district courts.

"(f)(1) A judge of the Court may be removed from office by the President on grounds of misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability which, in the opinion of the President, prevents the proper execution of the judge's duties. A judge of the Court may not be removed from office by the President on any other ground.

"(2) Before a judge may be removed from office under this subsection, the judge shall be provided with a full specification of the reasons for the removal and an opportunity to be heard.

"§ 4054. Organization

"(a) The Court of Veterans Appeals shall have a seal which shall be judicially noticed.

"(b) The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court. Any such panel shall have not less than three judges. The Court shall establish procedures for the assignment of the judges of the Court to such panels and for the designation of the chief of each such panel.

"(c)(1) A majority of the judges of the Court shall constitute a quorum for the transaction of the business of the Court. A vacancy in the Court shall not impair the powers or affect the duties of the Court or of the remaining judges of the Court.

"(2) A majority of the judges of a panel of the Court shall constitute a quorum for the transaction of the business of the panel. A vacancy in a panel of the Court shall not impair the powers or affect the duties of the panel or of the remaining judges of the panel.

"§ 4055. Offices

District of Columbia.

"The principal office of the Court of Veterans Appeals shall be in the District of Columbia, but the Court may sit at any place within the United States.

"§ 4056. Times and places of sessions

"The times and places of sessions of the Court of Veterans Appeals shall be prescribed by the chief judge.

"SUBCHAPTER II—PROCEDURE

"§ 4061. Scope of review

"(a) In any action brought under this chapter, the Court of Veterans Appeals, to the extent necessary to its decision and when presented, shall—

"(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(2) compel action of the Administrator unlawfully withheld;

"(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Administrator, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law; and

"(4) in the case of a finding of material fact made in reaching a decision in a case before the Veterans' Administration with respect to benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding if the finding is clearly erroneous.

"(b) In making the determinations under subsection (a) of this section, the Court shall take due account of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator or the Board of Veterans' Appeals be subject to trial de novo by the court.

"(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Administrator, the Court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4062. Fee for filing appeals

"(a) The Court of Veterans Appeals may impose a fee of not more than $50 for the filing of any appeal with the Court. The Court shall establish procedures under which such a fee may be waived in the case of an appeal filed by or on behalf of a person who demonstrates that the requirement that such fee be paid will impose a hardship on that person. A decision as to such a waiver is final and may not be reviewed in any other court.

"(b) The Court may from time to time adjust the maximum amount permitted for a fee imposed under subsection (a) of this

section based upon inflation and similar fees charged by other courts established under Article I of the Constitution.

"§ 4063. Representation of parties; fee agreements

"(a) The Administrator shall be represented before the Court of Veterans Appeals by the General Counsel of the Veterans' Administration.

"(b) Representation of appellants shall be in accordance with the rules of practice prescribed by the Court under section 4064 of this title. In addition to members of the bar admitted to practice before the Court in accordance with such rules of practice, the Court may allow other persons to practice before the Court who meet standards of proficiency prescribed in such rules of practice.

"(c) A person who represents an appellant before the Court shall file a copy of any fee agreement between the appellant and that person with the Court at the time the appeal is filed. The Court, on its own motion or the motion of any party, may review such a fee agreement.

"(d) In reviewing a fee agreement under subsection (c) of this section or under section 3404(c)(2) of this title, the Court may affirm the finding or order of the Board and may order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable. An order of the Court under this subsection is final and may not be reviewed in any other court.

"§ 4064. Rules of practice and procedure

"(a) The proceedings of the Court of Veterans Appeals shall be conducted in accordance with such rules of practice and procedure as the Court prescribes.

"(b) The mailing of a pleading, decision, order, notice, or process in respect of proceedings before the Court shall be held sufficient service of such pleading, decision, order, notice, or process if it is properly addressed to the address furnished by the appellant on the notice of appeal filed under section 4066 of this title.

"§ 4065. Contempt authority; assistance to the Court

"(a) The Court shall have power to punish by fine or imprisonment such contempt of its authority as—

"(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) misbehavior of any of its officers in their official transactions; or

"(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

"(b) The Court shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for a district in which the Court is sitting shall, if requested by the chief judge of the Court, attend any session of the Court in that district.

"§ 4066. Notice of appeal

"(a) In order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date on which notice of the decision is mailed pursuant to section 4004(e) of this title.

"(b) The appellant shall also furnish the Administrator with a copy of such notice, but a failure to do so shall not constitute a failure of timely compliance with subsection (a) of this section.

"§ 4067. Decisions

"(a) A decision upon a proceeding before the Court of Veterans Appeals shall be made as quickly as practicable. In a case heard by a panel of the Court, the decision shall be made by a majority vote of the panel in accordance with the rules of the Court. The decision of the judge or panel hearing the case so made shall be the decision of the Court except as provided in subsection (d) of this section.

"(b) The Court shall include in its decision a statement of its conclusions of law and determinations as to factual matters.

"(c) A judge or panel shall make a determination upon any proceeding before the Court, and any motion in connection with such a proceeding, that is assigned to the judge or panel. The judge or panel shall make a report of any such determination which constitutes the judge or panel's final disposition of the proceeding. Reports.

"(d)(1) In the case of a proceeding determined by a single judge of the Court, the decision of the judge shall become the decision of the Court unless before the end of the 30-day period beginning on the date of the decision by the judge the Court, upon the motion of either party or on its own initiative, directs that the decision be reviewed by a panel of the Court. In such a case, the decision of the judge initially deciding the case shall not be a part of the record.

"(2) In the case of a proceeding determined by a panel of the Court, the decision of the panel shall become the decision of the Court unless before the end of the 30-day period beginning on the date of the decision by the panel the Court, upon the motion of either party or on its own initiative, directs that the decision be reviewed by an expanded panel of the Court (or the Court en banc). In such a case, the decision of the panel initially deciding the case shall not be a part of the record.

"(e) The Court shall designate in its decision in any case those specific records of the Government on which it relied (if any) in making its decision. The Administrator shall preserve records so designated for not less than the period of time designated by the Administrator of the National Archives and Records Administration. Records. Historic preservation.

"§ 4068. Availability of proceedings Records.

"(a) Except as provided in subsection (b) of this section, all decisions of the Court of Veterans Appeals and all briefs, motions, documents, and exhibits received by the Court (including a transcript of the stenographic report of the hearings) shall be public records open to the inspection of the public. Public information.

"(b)(1) The Court may make any provision which is necessary to prevent the disclosure of confidential information, including a provision that any such document or information be placed under seal to be opened only as directed by the Court. Classified information.

"(2) After the decision of the Court in a proceeding becomes final, the Court shall permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, submitted to the Court before the Court may, on its own motion, make such other disposition thereof as it considers advisable.

"§ 4069. Publication of decisions

Public information.

"(a) The Court of Veterans Appeals shall provide for the publication of decisions of the Court in such form and manner as may be best adapted for public information and use. The Court may make such exceptions, or may authorize the chief judge to make such exceptions, to the requirement for publication in the preceding sentence as may be appropriate.

"(b) Such authorized publication shall be competent evidence of the decisions of the Court of Veterans Appeals therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

"(c) Such publications shall be subject to sale in the same manner and upon the same terms as other public documents.

"SUBCHAPTER III—MISCELLANEOUS PROVISIONS

"§ 4081. Employees

"The Court of Veterans Appeals may appoint such employees as may be necessary to execute the functions vested in the Court. Such appointments shall be made in accordance with the provisions of title 5 governing appointment in the competitive service, except that the Court may classify such positions based upon the classification of comparable positions in the judicial branch. The basic pay of such employees shall be fixed in accordance with subchapter III of chapter 53 of title 5.

"§ 4082. Budget and expenditures

"(a) The budget of the Court of Veterans Appeals as submitted by the Court for inclusion in the budget of the President for any fiscal year shall be included in that budget without review within the executive branch.

"(b) The Court may make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodicals) as may be necessary to execute efficiently the functions vested in the Court.

"(c) All expenditures of the Court shall be allowed and paid upon presentation of itemized vouchers signed by the certifying officer designated by the chief judge. Except as provided in section 4085 of this title, all such expenditures shall be paid out of moneys appropriated for purposes of the Court.

"§ 4083. Disposition of fees

"Except for amounts received pursuant to section 4085 of this title, all fees received by the Court of Veterans Appeals shall be covered into the Treasury as miscellaneous receipts.

"§ 4084. Fee for transcript of record

"The Court of Veterans Appeals may fix a fee, not in excess of the fee authorized by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record of any proceeding before the Court, or for copying any record, entry, or other paper and the comparison and certification thereof.

"§ 4085. Practice fee

"(a) The Court of Veterans Appeals may impose a periodic registration fee on persons admitted to practice before the Court. The frequency and amount of such fee shall be determined by the Court, except that such amount may not exceed $30 per year.

"(b) Amounts received by the Court under subsection (a) of this section shall be available to the Court for the purposes of (1) employing independent counsel to pursue disciplinary matters, and (2) defraying administrative costs for the implementation of the standards of proficiency prescribed for practice before the Court.

"SUBCHAPTER IV—DECISIONS AND REVIEW

"§ 4091. Date when United States Court of Veterans Appeals decision becomes final

"(a) A decision of the United States Court of Veterans Appeals shall become final upon the expiration of the time allowed for filing, under section 4092 of this title, a notice of appeal from such decision, if no such notice is duly filed within such time. If such a notice is filed within such time, such a decision shall become final—

"(1) upon the expiration of the time allowed for filing a petition for certiorari with the Supreme Court of the United States, if the decision of the Court of Veterans Appeals is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit and no petition for certiorari is duly filed;

"(2) upon the denial of a petition for certiorari, if the decision of the Court of Veterans Appeals is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit; or

"(3) upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if that Court directs that the decision of the Court of Veterans Appeals be affirmed or the appeal dismissed.

"(b)(1) If the Supreme Court directs that the decision of the Court of Veterans Appeals be modified or reversed, the decision of the Court of Veterans Appeals rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Administrator or the petitioner has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Court of Veterans Appeals shall become final when so corrected.

"(2) If the decision of the Court of Veterans Appeals is modified or reversed by the United States Court of Appeals for the Federal Circuit and if—

"(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

"(B) the petition for certiorari has been denied, or

"(C) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,

then the decision of the Court of Veterans Appeals rendered in accordance with the mandate of the United States Court of Appeals for the Federal Circuit shall become final upon the expiration of 30 days from the time such decision of the Court of Veterans Appeals was rendered, unless within such 30 days either the Administrator

or the petitioner has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Court of Veterans Appeals shall become final when so corrected.

"(c) If the Supreme Court orders a rehearing, or if the case is remanded by the United States Court of Appeals for the Federal Circuit to the Court of Veterans Appeals for a rehearing, and if—

"(1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

"(2) the petition for certiorari has been denied, or

"(3) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,

then the decision of the Court of Veterans Appeals rendered upon such rehearing shall become final in the same manner as though no prior decision of the Court of Veterans Appeals had been rendered.

"(d) As used in this section, the term 'mandate', in case a mandate has been recalled before the expiration of 30 days from the date of issuance thereof, means the final mandate.

"§ 4092. Review by United States Court of Appeals for the Federal Circuit

"(a) After a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 355 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Veterans Appeals within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

"(b)(1) When a judge or panel of the Court of Veterans Appeals, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Administrator with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Veterans Appeals. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Veterans Appeals, unless a stay is ordered by a judge of the Court of Veterans Appeals or by the Court of Appeals for the Federal Circuit.

"(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Veterans Appeals.

"(c) The United States Courts of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation

thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

"(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any statute or regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law.

"(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

"(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Veterans Appeals is not in accordance with law, to modify or reverse the decision of the Court of Veterans Appeals or to remand the matter, as appropriate.

"(2) Rules for review of decisions of the Court of Veterans Appeals shall be those prescribed by the Supreme Court under section 2072 of title 28.".

(b) CLERICAL AMENDMENT.—The tables of chapters before part I and at the beginning of part V are each amended by inserting after the item relating to chapter 71 the following new item:

"72. Court of Veterans Appeals ..... 4051".

SEC. 302. INITIAL APPOINTMENT OF JUDGES TO COURT OF VETERANS APPEALS.

38 USC 4053 note.

(a) CHIEF JUDGE TO BE APPOINTED FIRST.—The President may not appoint an individual to be an associate judge of the United States Court of Veterans Appeals under section 4053(b) of title 38, United States Code, as added by section 301, until the chief judge of such Court has been appointed. The President shall, during the period beginning on January 21, 1989, and ending on April 1, 1989, nominate an individual for appointment to the position of chief judge of such Court.

President of U.S.

(b) JUDGES.—Subject to subsection (a), judges of the Court of Veterans Appeals may be appointed after February 1, 1989.

SEC. 303. FACILITY FOR PRINCIPAL OFFICE OF COURT.

38 USC 4055 note.

In the implementation of section 4055 of title 38, United States Code (as added by section 301), the principal office of the Court of Veterans Appeals shall initially be located, if practicable, in a facility existing on the date of the enactment of this Act that, as determined by the Administrative Office of the United States Courts, would facilitate maximum efficiency and economy in the operation of the Court. The Administrative Office of the United

States Courts shall take into consideration the convenience of the location of such facility to needed library resources, clerical and administrative support equipment and personnel, and other resources available for shared use by the Court and other courts or agencies of the Federal Government.

TITLE IV—EFFECTIVE DATES AND APPLICABILITY

38 USC 4051 note.

SEC. 401. EFFECTIVE DATES.

(a) GENERAL EFFECTIVE DATE.—Except as otherwise provided in this section, this division (and the amendments made by this Act) shall take effect on September 1, 1989.

(b) EFFECTIVE DATE FOR CERTAIN TRANSITION PROVISIONS.—The amendment made by section 201(a) shall take effect on February 1, 1989.

(c) DATE OF ENACTMENT.—Sections 201 (other than subsection (a)), 208, 209, 302, and 303, and the amendments made by those sections, shall take effect on the date of the enactment of this Act.

(d) BOARD OF VETERANS' APPEALS.—Sections 202 through 207 shall take effect on January 1, 1989.

(e) COMMENCEMENT OF OPERATION OF COURT OF VETERANS APPEALS.—Notwithstanding subsection (a), the United States Court of Veterans Appeals established pursuant to chapter 72 of title 38, United States Code (as added by section 301) shall not begin to operate until at least three judges have been appointed to the court.

38 USC 4051 note.

SEC. 402. APPLICABILITY TO CASES AFTER DATE OF ENACTMENT.

Chapter 72 of title 38, United States Code, as added by section 301, shall apply with respect to any case in which a notice of disagreement is filed under section 4005 of title 38, United States Code, on or after the date of the enactment of this Act.

38 USC 3404 note.

SEC. 403. APPLICABILITY TO ATTORNEYS FEES.

The amendment to section 3404(c) of title 38, United States Code, made by section 104(a) shall apply only with respect to services of agents and attorneys in cases in which a notice of disagreement is filed with the Veterans' Administration on or after the date of the enactment of this division.

DIVISION B—VETERANS' BENEFITS IMPROVEMENT

Veterans' Benefits Improvement Act of 1988.

SEC. 1001. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

38 USC 101 note.

(a) SHORT TITLE.—This division may be cited as the "Veterans' Benefits Improvement Act of 1988".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this division an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

38 USC 101 note.

SEC. 1002. DEFINITION OF ADMINISTRATOR.

For purposes of this division, the term "Administrator" means the Administrator of Veterans' Affairs.

TITLE XI—COMPENSATION RATE INCREASES

SEC. 1101. DISABILITY COMPENSATION.

(a) IN GENERAL.—Section 314 is amended—

(1) by striking out "$71" in subsection (a) and inserting in lieu thereof "$73";

(2) by striking out "$133" in subsection (b) and inserting in lieu thereof "$138";

(3) by striking out "$202" in subsection (c) and inserting in lieu thereof "$210";

(4) by striking out "$289" in subsection (d) and inserting in lieu thereof "$300";

(5) by striking out "$410" in subsection (e) and inserting in lieu thereof "$426";

(6) by striking out "$516" in subsection (f) and inserting in lieu thereof "$537";

(7) by striking out "$652" in subsection (g) and inserting in lieu thereof "$678";

(8) by striking out "$754" in subsection (h) and inserting in lieu thereof "$784";

(9) by striking out "$849" in subsection (i) and inserting in lieu thereof "$883";

(10) by striking out "$1,411" in subsection (j) and inserting in lieu thereof "$1,468";

(11) by striking out "$1,754" and "$2,459" in subsection (k) and inserting in lieu thereof "$1,825" and "$2,559", respectively;

(12) by striking out "$1,754" in subsection (l) and inserting in lieu thereof "$1,825";

(13) by striking out "$1,933" in subsection (m) and inserting in lieu thereof "$2,012";

(14) by striking out "$2,199" in subsection (n) and inserting in lieu thereof "$2,289";

(15) by striking out "$2,459" each place it appears in subsections (o) and (p) and inserting in lieu thereof "$2,559";

(16) by striking out "$1,055" and "$1,572" in subsection (r) and inserting in lieu thereof "$1,098" and "$1,636", respectively; and

(17) by striking out "$1,579" in subsection (s) and inserting in lieu thereof "$1,643".

(b) SPECIAL RULE.—The Administrator may adjust administratively, consistent with the increases authorized by this section, the rates of disability compensation payable to persons within the purview of section 10 of Public Law 85-857 who are not in receipt of compensation payable pursuant to chapter 11 of title 38, United States Code. 38 USC 314 note.

SEC. 1102. ADDITIONAL COMPENSATION FOR DEPENDENTS.

Section 315(1) is amended—

(1) by striking out "$85" in clause (A) and inserting in lieu thereof "$88";

(2) by striking out "$143" and "$45" in clause (B) and inserting in lieu thereof "$148" and "$46", respectively;

(3) by striking out "$59" and "$45" in clause (C) and inserting in lieu thereof "$61" and "$46", respectively;

(4) by striking out "$69" in clause (D) and inserting in lieu thereof "$71";

(5) by striking out "$155" in clause (E) and inserting in lieu thereof "$161"; and

(6) by striking out "$131" in clause (F) and inserting in lieu thereof "$136".

SEC. 1103. CLOTHING ALLOWANCE FOR CERTAIN DISABLED VETERANS.

Section 362 is amended by striking out "$380" and inserting in lieu thereof "$395".

SEC. 1104. DEPENDENCY AND INDEMNITY COMPENSATION FOR SURVIVING SPOUSES.

Section 411 is amended—

(1) by striking out the table in subsection (a) and inserting in lieu thereof the following:

"Pay grade	Monthly rate	Pay grade	Monthly rate
E-1	$539	W-4	$ 773
E-2	555	O-1	682
E-3	570	O-2	704
E-4	606	O-3	754
E-5	622	O-4	797
E-6	636	O-5	879
E-7	667	O-6	991
E-8	704	O-7	1,071
E-9	[1] 735	O-8	1,174
W-1	682	O-9	1,259
W-2	709	O-10	[2] 1,381
W-3	730		

"[1] If the veteran served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $794.

"[2] If the veteran served as Chairman or Vice-Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, or Commandant of the Coast Guard, at the applicable time designated by section 402 of this title, the surviving spouse's rate shall be $1,480.";

(2) by striking out "$60" in subsection (b) and inserting in lieu thereof "$62";

(3) by striking out "$155" in subsection (c) and inserting in lieu thereof "$161"; and

(4) by striking out "$76" in subsection (d) and inserting in lieu thereof "$79".

SEC. 1105. DEPENDENCY AND INDEMNITY COMPENSATION FOR CHILDREN.

(a) DIC FOR ORPHAN CHILDREN.—Section 413(a) is amended—

(1) by striking out "$261" in clause (1) and inserting in lieu thereof "$271";

(2) by striking out "$376" in clause (2) and inserting in lieu thereof "$391";

(3) by striking out "$486" in clause (3) and inserting in lieu thereof "$505"; and

(4) by striking out "$486" and "$97" in clause (4) and inserting in lieu thereof "$505" and "$100", respectively.

(b) SUPPLEMENTAL DIC FOR DISABLED ADULT CHILDREN.—Section 414 is amended—

(1) by striking out "$155" in subsection (a) and inserting in lieu thereof "$161";
(2) by striking out "$261" in subsection (b) and inserting in lieu thereof "$271"; and
(3) by striking out "$133" in subsection (c) and inserting in lieu thereof "$138".

SEC. 1106. EFFECTIVE DATE FOR RATE INCREASES. 38 USC 314 note.

The amendments made by this title shall take effect on December 1, 1988.

TITLE XII—AGENT ORANGE AND RELATED PROVISIONS

Vietnam.

SEC. 1201. FUNDING FOR AGENT ORANGE BLOOD TESTING.

Funds appropriated to the Veterans' Administration in Public Law 98-181 for medical and prosthetic research and obligated through the Centers for Disease Control for a contract for the conduct of an epidemiological study relating to exposure of veterans to the herbicide known as Agent Orange shall, upon the cancellation of that contract, be available for obligation until September 30, 1989, in the amounts of—

(1) $3,000,000 for payment of expenses of the Department of the Air Force in connection with blood tests of individuals who, while serving in the Air Force, participated in the spraying of Agent Orange in Vietnam during the Vietnam era; and
(2) $1,000,000 for payment of expenses of a survey of scientific evidence, studies, and literature relating to health effects of possible exposure to toxic chemicals contained in herbicides used in the Republic of Vietnam during the Vietnam era, which survey shall be conducted by an independent scientific entity under contract to the Veterans Administration pursuant to a law enacted after the date of the enactment of this Act.

SEC. 1202. EXTENSION OF HEALTH-CARE ELIGIBILITY BASED ON AGENT ORANGE OR IONIZING RADIATION EXPOSURE.

Section 610(e)(3) is amended by striking out "September 30, 1989" and inserting in lieu thereof "December 31, 1990".

SEC. 1203. TREATMENT FOR NEEDS-BASED BENEFITS PURPOSES OF AMOUNTS RECEIVED UNDER AGENT ORANGE LITIGATION SETTLEMENT.

Any payment received by any person pursuant to the settlement in the case of In re Agent Orange Product Liability Litigation in the United States District Court for the Eastern District of New York (MDL No. 381) shall be treated for purposes of laws administered by the Veterans' Administration as reimbursement for prior unreimbursed medical expenses, and no such payment shall be countable as income for any such purpose.

SEC. 1204. OUTREACH SERVICES. 38 USC 241 note.

(a) ONGOING OUTREACH PROGRAM.—The Administrator shall conduct an active, continuous outreach program for furnishing to veterans of active military, naval, or air service who served in the Republic of Vietnam during the Vietnam era information relating to—

(1) the health risks (if any) resulting from exposure during that service to dioxin or any other toxic agent in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era, as such information on health risks becomes known; and

(2) services and benefits available to such veterans with respect to such health risks.

(b) INFORMATION IN AGENT ORANGE REGISTRY.—The Administrator shall take reasonable actions to organize and update the information contained in the Veterans' Administration Agent Orange Registry in a manner that enables the Administrator promptly to notify a veteran of any increased health risk for such veteran resulting from exposure of such veteran to dioxin or any other toxic agent referred to in subsection (a) during Vietnam-era service in the Republic of Vietnam whenever the Administrator determines, on the basis of physical examination or other pertinent information, that such veteran is subject to such an increased health risk.

SEC. 1205. RANCH HAND STUDY.

(a) ADVISORY COMMITTEE PERSONNEL AND SUPPORT.—(1) After February 28, 1989, not less than one-third of the total number of members of the Ranch Hand Advisory Committee shall be individuals selected by the Secretary of Health and Human Services from among scientists who are recommended by veterans' organizations for membership on the committee and are determined by the Secretary to be qualified for service on the committee.

(2) A scientist shall be considered to be qualified for service on the Ranch Hand Advisory Committee if (A) the scientist has earned a doctor of medicine degree or a doctorate or other advanced degree from an institution of higher education in a field relevant to the responsibilities of the Advisory Committee and has written one or more articles relevant to those responsibilities which have appeared in scientific publications following a peer-review process, or (B) the scientist has qualifications equivalent to those set forth in clause (A).

(b) CHAIRMAN.—After February 28, 1989, the Chairman of the Ranch Hand Advisory Committee may be an officer or employee of the Federal Government (other than by reason of service as a member of the Advisory Committee) only if the Secretary of Health and Human Services determines, after affirmatively seeking to recruit a chairman who is not an officer or employee of the Federal Government, that there is no individual qualified and available to serve as Chairman who is not an officer or employee of the Federal Government. The Secretary shall report any such determination to the Committees on Veterans' Affairs of the Senate and the House of Representatives.

Reports.

(c) SCHEDULE OF REPORTS.—(1) Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Veterans' Affairs and the Committees on Armed Services of the Senate and the House of Representatives a schedule of reports to be prepared by the Secretary of the Air Force or the Secretary of Defense on the progress and findings of the Ranch Hand Study.

(2) Each report referred to in paragraph (1) shall include the following:

(A) A discussion of the progress made in the Ranch Hand Study during the period covered by the report.

(B) A summary of the scientific activities conducted during that period and the findings resulting from those activities, to be prepared by the scientists conducting those activities.

(3) Such a report need not contain (A) a discussion of progress discussed in any other report prepared by the Department of Defense (under this section or otherwise) regarding the Ranch Hand Study, or (B) a scientific summary included in any other such report, unless modification of such discussion or summary is appropriate for completeness, accuracy, and currency.

(4) The Secretary of Defense shall submit to the committees referred to in paragraph (1) a copy of each report referred to that paragraph.

(d) DEFINITIONS.—For purposes of this section:

(1) The term "Ranch Hand Advisory Committee" means the committee known as the "Advisory Committee on Special Studies Relating to the Possible Long-term Health Effects of Phenoxy Herbicides and Contaminants" established by the Secretary of Defense to monitor the conduct of the Ranch Hand Study.

(2) The term "Ranch Hand Study" means the special study conducted by the Secretary of the Air Force relating to the possible long-term health effects of phenoxy herbicides and contaminants on Air Force personnel who participated in Operation Ranch Hand in the Republic of Vietnam during the Vietnam era.

TITLE XIII—REHABILITATION PROVISIONS

SEC. 1301. TEMPORARY PROGRAMS OF TRIAL WORK PERIODS AND VOCATIONAL-REHABILITATION EVALUATIONS.

(a) THREE-YEAR EXTENSION.—Subsection (a)(2)(B) of section 363 is amended by striking out "January 31, 1989" and inserting in lieu thereof "January 31, 1992".

(b) VOLUNTARY PARTICIPATION.—Subsection (c) of such section is amended—

(1) by striking out paragraphs (2), (3), and (4);

(2) by striking out "(1)(A) Except as provided in paragraph (4) of this subsection, in" and inserting in lieu thereof "(1) In"; and

(3) in paragraph (1)—

(A) by redesignating clauses (i), (ii), and (iii) as clauses (A), (B), and (C), respectively; and

(B) by striking out subparagraph (B) and inserting in lieu thereof the following:

"(2) After providing the notice required under paragraph (1) of this subsection, the Administrator shall offer the veteran the opportunity for an evaluation under section 1506(a) of this title.".

SEC. 1302. FUNDING OF EDUCATIONAL AND VOCATIONAL COUNSELING SERVICES.

(a) IN GENERAL.—Subchapter II of chapter 36 is amended by adding at the end the following new section:

"§ 1797. Funding of contract educational and vocational counseling

"(a) Subject to subsection (b) of this section, educational or vocational counseling services obtained by the Veterans' Administration by contract and provided to an individual applying for or receiving benefits under section 524 or chapter 30, 32, 34, or 35 of this title, or chapter 106 of title 10, shall be paid for out of funds appropriated, or otherwise available, to the Veterans' Administration for payment of readjustment benefits.

"(b) Payments under this section shall not exceed $5,000,000 in any fiscal year.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 36 is amended by inserting after the item relating to section 1796 the following new item:

"1797. Funding of contract educational and vocational counseling.".

SEC. 1303. VOCATIONAL TRAINING FOR PENSION RECIPIENTS.

(a) ELIGIBILITY.—Subsection (a)(2) of section 524 is amended by striking out "who is awarded pension during the program period" and inserting in lieu thereof "is awarded pension during the program period, or a veteran who was awarded pension before the beginning of the program period,".

(b) EXTENSION OF PROGRAM PERIOD.—Subsections (a)(4) and (b)(4)(A) of such section are each amended by striking out "January 31, 1989" and inserting in lieu thereof "January 31, 1992".

(c) HEALTH-CARE ELIGIBILITY.—Section 525(b)(2) is amended by striking out "January 31, 1989" and inserting in lieu thereof "January 31, 1992".

TITLE XIV—MISCELLANEOUS BENEFIT PROVISIONS

SEC. 1401. LIFE INSURANCE PROGRAMS.

(a) AUTHORITY FOR PAYMENT OF INTEREST ON INSURANCE SETTLEMENTS.—(1) Subchapter I of chapter 19 is amended by adding at the end the following new section:

"§ 728. Authority for payment of interest on settlements

"(a) Subject to subsection (b) of this section, the Administrator may pay interest on the proceeds of a participating National Service Life Insurance, Veterans' Special Life Insurance, and Veterans Reopened Insurance policy from the date the policy matures to the date of payment of the proceeds to the beneficiary or, in the case of an endowment policy, to the policyholder.

"(b)(1) The Administrator may pay interest under subsection (a) of this section only if the Administrator determines that the payment of such interest is administratively and actuarially sound for the settlement option involved.

"(2) Interest paid under subsection (a) of this section shall be at the rate that is established by the Administrator for dividends held on credit or deposit in policyholders' accounts under the insurance program involved.".

(2) Subchapter II of chapter 19 is amended by adding at the end the following new section:

"§ 763. Authority for payment of interest on settlements

"(a) Subject to subsection (b) of this section, the Administrator may pay interest on the proceeds of a United States Government Life Insurance policy from the date the policy matures to the date of payment of the proceeds to the beneficiary or, in the case of an endowment policy, to the policyholder.

"(b)(1) The Administrator may pay interest under subsection (a) of this section only if the Administrator determines that the payment of such interest is administratively and actuarially sound for the settlement option involved.

"(2) Interest paid under subsection (a) shall be at the rate that is established by the Administrator for dividends held on credit or deposit in policyholders' accounts.".

(3) The amendments made by this subsection shall take effect with respect to insurance policies maturing after the date of the enactment of this Act. 38 USC 728 note.

(b) AUTHORITY TO ADJUST DISCOUNT RATES FOR ADVANCE PAYMENT OF PREMIUMS.—(1) Subchapter I of chapter 19, as amended by subsection (a)(1), is further amended by adding at the end the following new section:

"§ 729. Authority to adjust premium discount rates

"(a) Notwithstanding sections 702, 723, and 725 of this title and subject to subsection (b) of this section, the Administrator may from time to time adjust the discount rates for premiums paid in advance on National Service Life Insurance, Veterans' Special Life Insurance, and Veterans Reopened Insurance.

"(b)(1) In adjusting a discount rate pursuant to subsection (a) of this section, the Administrator may not set such rate at a rate lower than the rate authorized for the program of insurance involved under section 702, 723, or 725 of this title.

"(2) The Administrator may make an adjustment under subsection (a) of this section only if the Administrator determines that the adjustment is administratively and actuarially sound for the program of insurance involved.".

(2) The amendment made by paragraph (1) shall take effect with respect to premiums paid after the date of the enactment of this Act. 38 USC 729 note.

(c) CLERICAL AMENDMENTS.—The table of sections at the beginning of chapter 19 is amended—

(1) by inserting after the item relating to section 727 the following new items:

"728. Authority for payment of interest on settlements.
"729. Authority to adjust premium discount rates.";

and

(2) by inserting after the item relating to section 762 the following new item:

"763. Authority for payment of interest on settlements.".

SEC. 1402. INCOME EXCLUSION FOR CASUALTY LOSS REIMBURSEMENTS.

(a) PARENTS DIC.—Clause (I) of section 415(f)(1) is amended to read as follows:

"(I) reimbursements of any kind for any casualty loss (as defined in regulations which the Administrator shall prescribe), but the amount excluded under this clause may not exceed the greater of the fair market value or the reasonable replacement Regulations.

value of the property involved at the time immediately preceding the loss;".

(b) PENSION.—Clause (5) of section 503(a) is amended to read as follows:

Regulations.

"(5) reimbursements of any kind for any casualty loss (as defined in regulations which the Administrator shall prescribe), but the amount excluded under this clause may not exceed the greater of the fair market value or reasonable replacement value of the property involved at the time immediately preceding the loss;".

SEC. 1403. RECODIFICATION OF PROVISIONS RELATING TO CERTAIN BENEFITS FOR SURVIVORS OF CERTAIN VETERANS.

(a) IN GENERAL.—(1) Subchapter II of chapter 13 is amended by adding at the end the following new section:

"§ 418. Benefits for survivors of certain veterans rated totally disabled at time of death

"(a) The Administrator shall pay benefits under this chapter to the surviving spouse and to the children of a deceased veteran described in subsection (b) of this section in the same manner as if the veteran's death were service connected.

"(b) A deceased veteran referred to in subsection (a) of this section is a veteran who dies, not as the result of the veteran's own willful misconduct, and who was in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive) compensation at the time of death for a service-connected disability that either—

"(1) was continuously rated totally disabling for a period of 10 or more years immediately preceding death; or

"(2) if so rated for a lesser period, was so rated continuously for a period of not less than five years from the date of such veteran's discharge or other release from active duty.

"(c) Benefits may not be paid under this chapter by reason of this section to a surviving spouse of a veteran unless—

"(1) the surviving spouse was married to the veteran for two years or more immediately preceding the veteran's death; or

"(2) a child was born of the marriage or was born to them before the marriage.

"(d) If a surviving spouse or a child receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the death of a veteran described in subsection (a) of this section, benefits under this chapter payable to such surviving spouse or child by virtue of this section shall not be paid for any month following a month in which any such money or property is received until such time as the total amount of such benefits that would otherwise have been payable equals the total of the amount of the money received and the fair market value of the property received.

"(e) For purposes of sections 1448(d) and 1450(c) of title 10, eligibility for benefits under this chapter by virtue of this section shall be deemed eligibility for dependency and indemnity compensation under section 411(a) of this title.".

(2) The table of sections at the beginning of chapter 13 is amended by inserting after the item relating to section 417 the following new item:

"418. Benefits for survivors of certain veterans rated totally disabled at time of death.".

(b) CONFORMING AMENDMENTS.—Section 410 is amended by striking out subsection (b) and redesignating subsection (c) as subsection (b).

SEC. 1404. SPECIFICATION IN BUDGET SUBMISSIONS OF FUNDS FOR CERTAIN VETERANS BENEFITS. 38 USC 210 note.

(a) BUDGET INFORMATION.—In the documentation providing detailed information on the budgets for the Veterans' Administration and the Department of Labor that the Administrator and the Secretary of Labor, respectively, submit to the Congress in conjunction with the President's budget submission for each fiscal year pursuant to section 1105 of title 31, United States Code, the Administrator and the Secretary shall identify, to the maximum extent feasible, the estimated amount in each of the appropriation requests for Veterans' Administration accounts and Department of Labor accounts, respectively, that is to be obligated for the furnishing of each of the following services or benefits only to, or with respect to, veterans who performed active military, naval, or air service in combat with the enemy or in a theatre of combat operations during a period of war or other hostilities:

(1) Employment services and other employment benefits under programs administered by the Secretary of Labor.

(2) Compensation under chapter 11 of title 38, United States Code.

(3) Dependency and Indemnity Compensation under chapter 13 of such title.

(4) Pension under chapter 15 of such title.

(5) Inpatient hospital care under chapter 17 of such title.

(6) Outpatient medical care under chapter 17 of such title.

(7) Nursing home care under chapter 17 of such title.

(8) Domiciliary care under chapter 17 of such title.

(9) Readjustment counseling services under section 612A of such title.

(10) Insurance under chapter 19 of such title.

(11) Specially adapted housing for disabled veterans under chapter 21 of such title.

(12) Burial benefits under chapter 23 of such title.

(13) Educational assistance under chapters 30, 32, and 34 of such title and chapter 106 of title 10, United States Code.

(14) Vocational rehabilitation services under chapter 31 of title 38, United States Code.

(15) Survivors' and dependents' educational assistance under chapter 35 of such title.

(16) Home loan benefits under chapter 37 of such title.

(17) Automobiles and adaptive equipment under chapter 39 of such title.

(b) REPORT ON FEASIBILITY.—If the Administrator or the Secretary of Labor determines that, with respect to any services or benefits referred to in subsection (a), it is not feasible to identify an estimated dollar amount to be obligated for furnishing such services or benefits only to veterans described in that subsection for any fiscal year, the Administrator and the Secretary shall, with respect to an appropriation request for such fiscal year relating to such services or benefits, report to the Committees on Veterans' Affairs of the Senate and the House of Representatives the reasons for the infeasi-

bility. The report shall be submitted contemporaneously with the budget submission for such fiscal year. The report shall specify (1) the information, systems, equipment, or personnel that would be required in order for it to be feasible for the Administrator or the Secretary to identify such amount, and (2) the actions to be taken in order to ensure that it will be feasible to make such an estimate in connection with the submission of the budget request for the next fiscal year.

TITLE XV—HEALTH CARE

SEC. 1501. READJUSTMENT COUNSELING FACILITIES.

(a) RELOCATIONS FOR CIRCUMSTANCES BEYOND CONTROL OF VETERANS' ADMINISTRATION.—Section 612A(g)(1) is amended—

(1) in subparagraph (A), by striking out "The" and inserting in lieu thereof "Except as provided in subparagraph (C) of this paragraph, the"; and

(2) by adding at the end the following new subparagraph:

"(C) The Administrator may relocate a center in existence on January 1, 1988, without regard to the national plan (including any revision to such plan) if such relocation is to a new location away from a Veterans' Administration general health-care facility when such relocation is necessitated by circumstances beyond the control of the Veterans' Administration. Such a relocation may be carried out only after the end of the 30-day period beginning on the date on which the Administrator notifies the Committees on Veterans' Affairs of the Senate and the House of Representatives of the proposed relocation, of the circumstances making it necessary, and of the reason for the selection of the new site for the center.".

38 USC 612A note.

(b) AUTHORIZATION FOR RELOCATION OF CERTAIN FACILITIES.—The requirements of section 612A(g)(1) of title 38, United States Code, shall not apply with respect to the relocation of 17 Veterans' Administration Readjustment Counseling Service Vet Centers from their locations away from general Veterans' Administration health-care facilities to other such locations, as described in letters dated July 25, 1988, from the Chief Medical Director of the Veterans' Administration to the Chairmen of the Committees on Veterans' Affairs of the Senate and the House of Representatives.

SEC. 1502. CONTRACTS AND GRANTS FOR MEDICAL CARE FOR VETERANS IN THE PHILIPPINES.

(a) ONE-YEAR EXTENSION.—Subsections (a) and (b)(1) of section 632 are each amended by striking out "September 30, 1989" and inserting in lieu thereof "September 30, 1990".

(b) INCREASE IN ANNUAL AUTHORIZATION.—Subsection (b)(1) of such section is further amended by striking out "$500,000" and inserting in lieu thereof "$1,000,000,".

(c) REPORTS.—(1) Not later than February 1, 1989, and not later than February 1, 1990, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing detailed information describing the use of funds provided to the Republic of the Philippines under section 632(b) of title 38, United States Code, during the preceding fiscal year.

(2) Not later than May 1, 1989, the Administrator shall submit to those committees a report with respect to the furnishing of health-

care services to United States veterans in the Republic of the Philippines. That report shall include the following:

(A) Information for each of fiscal years 1986, 1987, and 1988 (shown in total and separately for veterans being furnished care or treatment for service-connected disabilities and veterans being furnished care or treatment for non-service-connected disabilities) as to—

(i) the number of United States veterans furnished care at Veterans' Administration expense pursuant to sections 624 and 632(a) of title 38, United States Code;

(ii) the numbers of inpatient days of care and outpatient visits so furnished for United States veterans; and

(iii) the amounts of such care and visits so furnished at the Veterans Memorial Medical Center or at other facilities in the Republic of the Philippines.

(B) An analysis comparing (i) the cost-effectiveness of furnishing care and treatment to such veterans through the Veterans Memorial Medical Center or other facilities in the Republic of the Philippines, and (ii) the quality of care available at the Center and such other facilities.

(C) A projection of the needs for care and treatment of United States veterans in the Republic of the Philippines during each of fiscal years 1990, 1991, 1992, and 1993.

(D) A projection of the needs of the Veterans Memorial Medical Center for each of those fiscal years for the replacement and upgrading of equipment and the rehabilitation of the physical plant and facilities in order to maintain the provision of an appropriate quality of care for United States veterans at the Veterans Memorial Medical Center.

(E) The plans of the Veterans' Administration for meeting the needs for care and treatment of United States veterans residing in the Philippines.

(F) Any planned administrative action, and any recommendation for legislation, that the Administrator considers appropriate.

(3) The report under paragraph (2) shall include any comment the Secretary of State may wish to make on the contents of the report.

SEC. 1503. TECHNICAL CORRECTIONS.

(a) CORRECTIONS NECESSITATED BY AMENDMENTS MADE BY PUBLIC LAW 100-322.—(1) Section 603(a)(2)(B) is amended—

(A) by striking out "612(a)(4)" and inserting in lieu thereof "paragraph (2), (3), or (4) of section 612(a)"; and

(B) by striking out "612(a)(5)" and inserting in lieu thereof "612(a)(5)(B)".

(2) Section 4114(a) is amended—

(A) in paragraph (1)—

(i) in clause (A), by inserting "pharmacists, occupational therapists," after "vocational nurses,"; and

(ii) in clause (B), by inserting "pharmacists and occupational therapists," after "vocational nurses,"; and

(B) in paragraph (3)(D), by striking out "the category" and all that follows through "vocational nurses" and inserting in lieu thereof "a category of personnel described in such section 4104(3)".

(3) Subsections (c) and (d) of section 4323 are each amended by striking out "section 4322(f)" and inserting in lieu thereof "section 4322(e)".

(4) Section 4324 is amended—

(A) in subsection (a)(2)—

(i) by striking out "completion" and all that follows through "quarter" and inserting in lieu thereof "participation in the program";

(ii) by inserting "or is payable" after "paid"; and

(iii) by inserting before the period at the end the following: ", reduced by the proportion that the number of days served for completion of the service obligation bears to the total number of days in the participant's period of obligated service"; and

(B) in subsection (b)—

(i) by striking out paragraph (1); and

(ii) by striking out "(2)".

38 USC 603 note.

(b) EFFECTIVE DATE.—The amendments made by subsection (a)(1) shall apply with respect to the furnishing of medical services by contract to veterans who apply to the Veterans' Administration for medical services after June 30, 1988.

38 USC 603 note.

(c) RATIFICATION.—Any action of the Administrator in contracting with facilities other than Veterans' Administration facilities for the furnishing of medical services (as defined in section 601(6) of title 38, United States Code), for the purpose described in section 612(a)(5)(B) of such title, to an individual described in paragraph (2) or (3) of section 612 of title 38, United States Code, who applied to the Veterans' Administration for such services during the period beginning on July 1, 1988, and ending on the date of enactment of this Act is hereby ratified.

SEC. 1504. LAND TRANSFER, RUTHERFORD, TENNESSEE.

(a) AUTHORITY.—Subject to subsections (b) and (c) and any conditions required by the Administrator under subsection (d), the Administrator shall transfer all right, title, and interest of the United States in and to a tract of land consisting of (not to exceed) seven acres, together with improvements thereon, in the Southeast corner of the Alvin C. York Veterans' Administration Medical Center in Rutherford County, Tennessee. Such transfer shall be made without consideration. Such transfer shall be made without regard to section 5022(a)(2)(A) of title 38, United States Code.

(b) PERMITTED USE.—The transfer under subsection (a) may be made only if it is subject to the condition that the property transferred be used by the State of Tennessee for a nursing care facility in accordance with the conditions and limitations applicable to State home facilities constructed with assistance under subchapter III of chapter 81 of title 38, United States Code, and that if such property is used at any time for any other purpose, all right, title, and interest in the property shall revert to the United States.

(c) AVAILABILITY OF RESOURCES.—The transfer under subsection (a) may be made only if the Administrator has determined that the State of Tennessee has provided sufficient assurance that it has the resources (including any resources which are reasonably likely to be available to the State under subchapter III of chapter 81 of title 38, United States Code and section 641 of such title) necessary to construct and operate a State home nursing facility.

(d) ADDITIONAL CONDITIONS.—The transfer under subsection (a) shall be made under such additional terms and conditions as the Administrator considers appropriate to protect the interests of the United States.

SEC. 1505. TRANSFERS OF EXCESS PROPERTIES FOR STATE HOME FACILITY USES.

Section 5022(a) is amended—

(1) in paragraph (2)(A), by striking out "The" and inserting in lieu thereof "Except as provided in paragraph (3) of this subsection, the"; and

(2) by adding at the end the following new paragraph:

"(3)(A) Subject to subparagraph (B) of this paragraph, the Administrator may, without regard to paragraph (2) of this subsection or any other provision of law relating to the disposition of real property by the United States, transfer to a State for use as the site of a State home nursing-home or domiciliary facility real property described in subparagraph (E) of the paragraph which the Administrator determines to be excess to the needs of the Veterans' Administration.

"(B) A transfer of real property may not be made under this paragraph unless—

"(i) the Administrator has determined that the State has provided sufficient assurance that it has the resources (including any resources which are reasonably likely to be available to the State under subchapter III of chapter 81 of this title and section 641 of this title) necessary to construct and operate a State home nursing or domiciliary care facility; and

"(ii) the transfer is made subject to the conditions (I) that the property be used by the State for a nursing-home or domiciliary care facility in accordance with the conditions and limitations applicable to State home facilities constructed with assistance under subchapter III of chapter 81 of this title, and (II) that, if the property is used at any time for any other purpose, all right, title, and interest in and to the property shall revert to the United States.

"(C) A transfer of real property may not be made under this paragraph until—

"(i) the Administrator submits to the Committees on Veterans' Affairs of the Senate and House of Representatives, not later than June 1 of the year in which the transfer is proposed to be made (or the year preceding that year), a report providing notice of the proposed transfer; and Reports.

"(ii) a period of 90 consecutive days elapses after the report is received by those committees.

"(D) A transfer under this paragraph shall be made under such additional terms and conditions as the Administrator considers appropriate to protect the interests of the United States.

"(E) Real property described in this subparagraph is real property that is owned by the United States and administered by the Veterans' Administration.".

SEC. 1506. CONVERSION OF NON-PHYSICIAN MEDICAL CENTER DIRECTORS TO SENIOR EXECUTIVE SERVICE.

(a) CONVERSION.—Section 4101(e) is amended by striking out "and persons appointed under section 4103(a)(8) of this title".

(b) CONFORMING AMENDMENTS.—(1) Section 4103(a) is amended—

(A) by striking out paragraph (8); and

(B) by redesignating paragraph (9) as paragraph (8).

(2) Section 4107(c) is amended to read as follows:

"(c) Notwithstanding the provisions of section 4101(e) of this title, any person appointed under section 4103 of this title who is not eligible for special pay under section 4118 of this title shall be deemed to be a career appointee for the purposes of sections 4507 and 5384 of title 5.".

38 USC 4103 note.

(c) APPLICABILITY TO CURRENT DIRECTORS.—(1) Except as provided in paragraph (2), each person who, on the day before the date of enactment of this Act, holds an appointment as a director under section 4103(a)(8) of title 38, United States Code, shall, on such date of enactment, become a career appointee in the Senior Executive Service established pursuant to chapter 31 of title 5, United States Code. The preceding sentence applies without regard to the provisions of subsections (b), (c), and (e) of section 3393 of title 5, United States Code, or any other provision of law. The provisions of section 3393(d) of such title shall not apply to a director who becomes a career appointee pursuant to this paragraph.

(2) Any person who, on the day before the date of the enactment of this Act, holds an appointment as such a director may, not later than 60 days after such enactment date, elect to retain the terms and conditions of that appointment for as long as that person continues to serve as such a director.

38 USC 4103 note.

(d) PRESERVATION OF PAY.—This section and the amendments made by this section shall not result in a reduction in the rate of pay payable to any person.

SEC. 1507. PROCUREMENT THROUGH LOCAL CONTRACTS.

(a) EFFECTIVE DATES OF PROVISIONS ENACTED IN PUBLIC LAW 100-322.—Section 403(b)(1) of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; 102 Stat. 545) is amended by striking out "Subsection (b)(1)" and inserting in lieu thereof "Subsections (a), (b)(1), and (b)(2)".

38 USC 5025 note.

(b) TRANSITION TO CERTAIN REPORT REQUIREMENTS.—Section 5025(d) is amended—

(1) in paragraph (1), by inserting "(beginning in 1992)" after "of each year";

(2) in paragraph (2), by inserting "(beginning in 1993)" after "of each year"; and

(3) by adding at the end the following new paragraph:

"(3) Not later than February 1 of each year from 1989 through 1992, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the experience in carrying out this section during the preceding fiscal year. The first such report shall contain information showing the percentage (measured by cost) of the total of all health-care items procured by the Veterans' Administration during fiscal year 1988 that were procured through local contracts. The other reports under this paragraph shall contain information showing the percentage (measured by cost) of the total of all health-care items procured by the Veterans' Administration, and by each Veterans' Administration medical center, during the fiscal year covered by the report that were purchased through local contracts and, in the case of each medical center at which the percentage was greater than 20 percent, an explanation of the reasons why that occurred.".

(c) DEFINITION OF HEALTH-CARE ITEM.—Section 5025(e)(1) is amended—

(1) by striking out "65, 66, or 73" and inserting in lieu thereof "65 or 66"; and

(2) by inserting after the first sentence the following new sentence: "Effective December 1, 1992, such term also includes any item listed in, or (as determined by the Administrator) of the same nature as an item listed in, Federal Supply Classification (FSC) Group 73.".

SEC. 1508. STANDARDIZATION OF COVERAGE OF MEDICAL AND PHARMACEUTICAL ITEMS.

Section 402 of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; 102 Stat. 543) is amended in the first sentence by striking out "medical and pharmaceutical items" and inserting in lieu thereof "health-care items (as defined in section 5025(e)(1) of title 38, United States Code)". 38 USC 5025 note.

SEC. 1509. TECHNICAL CLARIFICATION OF PERIOD OF CLINICAL EVALUATION OF ALCOHOL AND DRUG ABUSE PROGRAM.

Section 620A(f)(1) (as amended by section 502 of the Veterans' Benefits and Programs Improvement Act of 1988) is amended by striking out "before October 1, 1997" and inserting in lieu thereof "during the period beginning on December 1, 1988, and ending on October 1, 1997".

TITLE XVI—CEMETERY AND MEMORIAL PROVISIONS

SEC. 1601. EXTENSION OF AUTHORIZATION OF APPROPRIATIONS FOR STATE CEMETERY GRANT PROGRAM.

Paragraph (2) of section 1008(a) is amended by striking out "four" the second place it appears and inserting in lieu thereof "nine".

SEC. 1602. PACIFIC WAR MEMORIAL AND OTHER HISTORICAL AND MEMORIAL SITES ON CORREGIDOR IN THE REPUBLIC OF THE PHILIPPINES. 36 USC 125b.

(a) OPERATION BY ABMC.—Subject to subsection (b) and to the agreement referred to in such subsection, the American Battle Monuments Commission shall restore, operate, and maintain the Pacific War Memorial and other historical and memorial sites on Corregidor in the Republic of the Philippines.

(b) CONDITION.—The Commission may carry out this section only after an agreement has been entered into between the Republic of the Philippines and the United States with respect to the restoration, operation, and maintenance of the Memorial and other historical and memorial sites referred to in subsection (a).

(c) PERSONNEL.—The Commission may employ personnel as may be necessary to carry out this section.

(d) USE OF OTHER AGENCIES.—Departments, agencies, and other instrumentalities of the United States are authorized to assist the Commission, on a reimbursable basis, in carrying out this section.

(e) FUNDING.—The American Battle Monuments Commission shall carry out this section with private funds except to the extent funds are appropriated pursuant to subsection (h).

(f) AUTHORITY TO SOLICIT FUNDS.—For the purpose of carrying out this section, the Commission may solicit and accept private contributions and shall deposit such contributions in the fund established by subsection (g).

(g) FUND.—(1) There is hereby established in the Treasury a fund which shall be available to the American Battle Monuments Commission only for carrying out this section. The fund shall consist of—

(A) amounts deposited into, and interest and proceeds credited to, the fund under paragraph (2); and

(B) obligations obtained under paragraph (3).

(2) The Chairman of the Commission shall deposit into the fund the amounts that are accepted under subsection (f). The Secretary of the Treasury shall credit to the fund the interest on, and the proceeds from sale or redemption of, obligations held in the fund.

(3) The Secretary of the Treasury shall invest any portion of the fund that, as determined by the Chairman of the Commission, is not required to meet current expenses. Each investment shall be made in an interest-bearing obligation of the United States or an obligation guaranteed as to principal and interest by the United States that, as determined by the Chairman of the Commission, has a maturity suitable for the fund.

(4) Amounts in the fund that are in excess of the costs of carrying out this section, as determined by the Chairman of the Commission, shall be deposited in the Treasury as miscellaneous receipts to reimburse the United States for funds appropriated pursuant to subsection (h).

(h) AUTHORIZATION OF FUNDING.—There are hereby authorized to be appropriated—

(1) $6,000,000 for site preparation, design, planning, construction, and associated administrative costs for the restoration of the Memorial and other historical and memorial sites referred to in subsection (a); and

(2) such sums as may be necessary for the operation and maintenance of such Memorial and other historical and memorial sites.

Approved November 18, 1988.

LEGISLATIVE HISTORY—S. 11 (H.R. 5288):

HOUSE REPORTS: No. 100-963, Pt. 1, accompanying H.R. 5288 (Comm. on Veterans' Affairs).

SENATE REPORTS: No. 100-418 (Comm. on Veterans' Affairs).

CONGRESSIONAL RECORD, Vol. 134 (1988):

July 11, considered and passed Senate.

Oct. 3, H.R. 5288 considered and passed House; proceedings vacated and S. 11, amended, passed in lieu.

Oct, 18, Senate concurred in certain House amendment with an amendment and disagreed to another.

Oct, 19, House receded and concurred in Senate amendment with amendments.

Oct. 20, Senate concurred in House amendments.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 24 (1988):

Nov. 18, Presidential statement.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VETERANS FOR COMMON SENSE, a District of Columbia nonprofit organization; VETERANS UNITED FOR TRUTH, INC., a California nonprofit organization, representing their members and a class of all veterans similarly situated,

Plaintiffs-Appellants,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; STEVEN L. KELLER, Acting Chairman, Board of Veterans' Appeals; ALLISON A. HICKEY, Under Secretary, Veterans Benefits Administration; BRADLEY G. MAYES, Director, Compensation and Pension Service; ROBERT A. PETZEL, Under Secretary, Veterans Health Administration; ULRIKE WILLIMON, Veterans Service Center Manager, Oakland Regional Office, Department of Veterans Affairs; UNITED STATES OF AMERICA,

Defendants-Appellees.

No. 08-16728

D.C. No. 3:07-cv-03758-SC

OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, Senior District Judge, Presiding

Argued and Submitted En Banc
December 13, 2011—San Francisco, California

Filed May 7, 2012

Before: Alex Kozinski, Chief Judge, Mary M. Schroeder, Sidney R. Thomas, Susan P. Graber, M. Margaret McKeown, Kim McLane Wardlaw, Johnnie B. Rawlinson, Jay S. Bybee, Consuelo M. Callahan, Sandra S. Ikuta, and N. Randy Smith, Circuit Judges.

Opinion by Judge Bybee;
Dissent by Judge Schroeder

COUNSEL

Gordon P. Erspamer, Morrison & Foerster LLP, San Francisco, California, for the plaintiffs-appellants.

Charles W. Scarborough, United States Department of Justice, Civil Division, Appellate Section, Washington, D.C., for the defendants-appellees.

OPINION

BYBEE, Circuit Judge:

After a decade of war, many of our veterans are returning home with physical and psychological wounds that require competent care. Faced with the daunting task of providing that care, as well as adjudicating the claims of hundreds of thousands of veterans seeking disability benefits, the Department of Veterans Affairs ("VA")[1] is struggling to provide the care and compensation that our veterans deserve. *See, e.g.*, *Review of Veterans' Claims Processing: Are Current Efforts Working? Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. 9 (2010) (statement of Michael Walcoff, Acting Under Secretary for Benefits, U.S. Dep't of Veterans Affairs) ("Secretary Shinseki, the Veterans Benefits Administration (VBA), and the entire VA leadership fully share the concerns of this Committee, Congress as a whole, the Veterans Service Organizations (VSOs), the larger Veteran community, and the American public regarding the timeliness and accuracy of disability benefit claims processing.").

Two nonprofit organizations, Veterans for Common Sense and Veterans United for Truth (collectively "VCS"), ask us to remedy delays in the provision of mental health care and the adjudication of service-connected disability compensation claims by the VA. VCS's complaint leaves little doubt that affording VCS the relief it seeks would require the district court to overhaul the manner in which the VA provides mental health care and adjudicates claims for benefits. VCS would have the district court, among other things, order the implementation of new procedures for handling mental health care

[1]In 1988, Congress reorganized the Veterans Administration as a cabinet-level executive department and redesignated it as the Department of Veterans Affairs. Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988). As used here, "VA" may refer to the Department and its predecessor, the Veterans Administration.

requests, create an accelerated appeals process for claims, and convert the claims-adjudication process into an adversarial proceeding.

We conclude that we lack jurisdiction to afford such relief because Congress, in its discretion, has elected to place judicial review of claims related to the provision of veterans' benefits beyond our reach and within the exclusive purview of the United States Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit. *See* 38 U.S.C. §§ 511, 7252, 7292; *see also Yakus v. United States*, 321 U.S. 414, 443 (1944). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). We conclude that the majority of VCS's claims must be dismissed for lack of jurisdiction. And where we do have jurisdiction to consider VCS's claims, we conclude that granting VCS its requested relief would transform the adjudication of veterans' benefits into a contentious, adversarial system—a system that Congress has actively legislated to preclude. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985). The Due Process Clause does not demand such a system.

As much as we as citizens are concerned with the plight of veterans seeking the prompt provision of the health care and benefits to which they are entitled by law, as judges we may not exceed our jurisdiction. We conclude that the district court lacked jurisdiction to resolve VCS's claims for system-wide implementation of the VA's mental health care plans, as well as VCS's request for procedures intended to address delays in the provision of mental health care. We similarly determine that the district court lacked jurisdiction to consider VCS's statutory and due process challenges to delays in the system of claims adjudication. We do conclude, however, that the district court had jurisdiction to consider VCS's claims related

to the adjudication procedures in VA Regional Offices and that the district court properly denied those claims on the merits.

We therefore affirm the district court in part, reverse in part, and remand with instructions to dismiss the case.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

There are approximately 25 million veterans in the United States and, as of May 2007, between 5 and 8 million of those veterans were enrolled with the VA.[3] A significant number of veterans, many of whom have returned recently from operations in Iraq and Afghanistan, suffer from service-related disabilities, and therefore seek mental health care from the Veterans Health Administration ("VHA") and disability compensation from the Veterans Benefits Administration ("VBA").[4]

A. *The Suit*

In 2007, two nonprofit organizations, Veterans for Common Sense and Veterans United for Truth, filed suit in the Northern District of California. On behalf of themselves, their members, and a putative class of veterans with post-traumatic stress disorder ("PTSD") eligible for or receiving medical services, and veterans applying for or receiving service-

[2]Parts of this opinion are drawn from the three-judge panel majority's opinion. The panel's contribution should be noted and is appreciated.

[3]The district court found these facts. We take judicial notice of current official figures provided by the VA: 23 million veterans, a third of whom are enrolled for health care with the VHA and of whom 3 million receive disability benefits. *See* Nat'l Ctr. for Veterans Analysis of Statistics, VA Benefits & Health Care Utilization (July 30, 2010), *available at* http://www.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf.

[4]The VA is divided into three branches: the Veterans Benefits Administration, Veterans Health Administration, and the National Cemetery Administration.

connected disability benefits, VCS seeks sweeping declaratory and injunctive relief. Such relief is warranted, VCS alleges, because the VA's handing of mental health care and service-related disability claims deprives VCS of property in violation of the Due Process Clause of the Constitution and violates the VA's statutory duty to provide timely medical care and disability benefits. VCS specifically disavows seeking relief on behalf of any individual veteran, but instead challenges "average" delays in the VA's provision of mental health care and disability benefits. Compl. ¶¶ 12, 38-39. We briefly summarize VCS's claims.

First, with respect to the VHA's duty to provide veterans with mental health care, VCS challenges VHA procedures that allegedly result in delayed care. *Id.* ¶¶ 31, 184-200, 277. VCS also challenges the lack of procedures for veterans to expedite that care. *Id.* ¶¶ 31, 277. VCS therefore asked the district court to declare, among other things, that the lack of procedures to remedy delays in the provision of medical care and treatment violates due process. *Id.* ¶¶ 31, 258-60. VCS also seeks to enjoin the VA from permitting protracted delays in the provision of mental health care and to compel the VHA to implement governmental recommendations for improving the provision of mental health care.[5] *Id.* ¶¶ 31, 277.

Second, VCS challenges VBA delays in the adjudication and resolution of disability-compensation claims under both the Administrative Procedure Act ("APA") and the Due Process Clause of the Fifth Amendment. *Id.* ¶¶ 31, 145-83, 277. VCS asserts that the adjudication of those claims, which begins at one of the VA's 57 Regional Offices and proceeds through the Board of Veterans' Appeals, the Court of Appeals

[5]Those recommendations are found in the VA's 2004 Mental Health Strategic Plan ("Plan") and a June 2007 memorandum from the then-Deputy Under Secretary for Health Operations and Management, William Feeley. Both documents set out specific recommendations intended to improve the VA's provision of mental health care services to veterans.

for Veterans Claims ("Veterans Court"),[6] an Article I court, 38 U.S.C. §§ 7251, 7266(a), and the Federal Circuit, 38 U.S.C. § 7292(a), is plagued by unreasonable delays that result in a functional denial of benefits. Compl. ¶¶ 31, 145-83, 277. VCS therefore seeks both declaratory and injunctive relief to remedy those delays. *Id.* ¶ 277.

Finally, VCS challenges the constitutionality of numerous VBA practices and procedures, including the absence of trial-like procedures at the VA's Regional Offices. *Id.* ¶¶ 30, 201-03, 262-63. VCS also seeks to enjoin the VBA from prematurely denying PTSD and other service-connected disability compensation claims. *Id.* ¶¶ 31, 277.[7]

B. *The District Court Denies VCS Relief*

After the district court denied in large part the VA's motion to dismiss, VCS requested a preliminary injunction on its mental health claims. The district court held an evidentiary hearing, but deferred ruling on the preliminary injunction, instead merging the request with a bench trial on the merits that would address all of VCS's claims.[8]

The district court held a seven-day bench trial and, two months later, issued a comprehensive Memorandum of Deci-

[6]The court as initially established was called the United States Court of Veterans Appeals. The name was later changed by the Veterans Programs Enhancement Act of 1998 to the U.S. Court of Appeals for Veterans Claims. Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341.

[7]In its complaint, VCS brought other challenges to VA procedures, including a challenge to the absence of class action procedures in the adjudication of benefits claims, as well as a challenge arguing that VA practices deny veterans access to the courts. Compl. ¶¶ 202, 261-63. VCS, however, appears to have abandoned these claims on appeal, and thus we address only those claims that VCS has preserved on appeal.

[8]VCS objected to the trial schedule, as well as the limitations on discovery the district court imposed, and the district court overruled those objections.

sion, Findings of Fact and Conclusions of Law. *See Veterans for Common Sense v. Peake* ("*Veterans*"), 563 F. Supp. 2d 1049 (N.D. Cal. 2008). The district court denied VCS's various claims and concluded that ordering the relief requested by VCS would draw the district court into resolving when and how care is provided—a role that it was not equipped to undertake. *Id.* at 1080-82. First, with respect to the VHA's provision of mental health care, the district court rejected VCS's challenge because VCS failed to identify a discrete, final agency action that the VA was required to take. *Id.* at 1082-83; *see* 5 U.S.C. § 706(1); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Similarly, the district court rejected VCS's due process claims challenging the VA's failure to provide timely and effective mental health care because the VA's health care system reflected "an appropriate balance between safeguarding the veteran's interest in medical treatment and permitting medical treatment without overly burdensome procedural protections." *Veterans*, 563 F. Supp. 2d at 1082.

With respect to the VBA's administration of service-related disability compensation, the district court denied VCS relief on the grounds that both 38 U.S.C. § 511 and § 502 precluded its review. The court reasoned that, because "[t]he issue . . . of whether a veteran's benefit[s] claim adjudication has been substantially delayed will often hinge on specific facts of that veteran's claim," it lacked jurisdiction under 38 U.S.C. § 511(a) to review the causes of delayed adjudication. *Id.* at 1083-84. It likewise found that ordering the VBA to remedy delays by implementing new procedures would "invariably implicate VA regulations," review of which may be conducted only by the Federal Circuit under 38 U.S.C. § 502. *Id.* at 1084. The district court, however, reached the merits of VCS's disability-based claims, but concluded that neither delays in the VBA's Regional Offices' adjudication of disability-related claims, nor the lack of trial-like protections for veterans raising such claims, was unreasonable under the APA or violative of due process. *Id.* at 1085-86. The district

court therefore denied VCS's request for a permanent injunction and declaratory relief, and granted judgment in favor of the VA. *Id.* at 1092.

VCS appealed. A panel of this court, by a 2-1 majority, reversed on the constitutional claims. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 878 (9th Cir. 2011). The panel affirmed the district court's conclusion that the VA's procedures at its Regional Offices satisfied due process. *Id.* at 887-88. We granted the VA's petition for rehearing en banc. *Veterans for Common Sense v. Shinseki*, 663 F.3d 1033 (9th Cir. 2011).

II. JURISDICTION

Before we may address VCS's claims on the merits, we must consider the government's argument that the Veterans' Judicial Review Act, Pub. L. No. 100-687, div. A, 102 Stat. 4105 (1988) ("VJRA"), codified at various sections in Title 38, deprives us of jurisdiction over these claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (holding that a court must have jurisdiction to reach the merits). We first review the history of the VJRA and Congress's long-held concern with judicial intrusion into the VA's handling of veterans' requests for benefits. We then consider the way in which the courts have construed the provision in the VJRA that precludes review of VA decisions, 38 U.S.C. § 511.

A. *Jurisdiction over Veterans Benefits*

Article III confers "[t]he judicial Power of the United States" on a supreme court and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The "judicial Power" vested in such courts "extend[s] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made." *Id*. art. III, § 2, cl. 1. Article III is not self-executing, however, so the jurisdiction of inferior federal courts depends

on an affirmative statutory grant. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812) ("[Only] the Supreme Court[ ] possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer."). Article III's "federal question jurisdiction" is statutorily conferred on federal district courts in 28 U.S.C. § 1331, which VCS cites as the source of the district court's jurisdictional authority. That section provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. But the fact that federal courts are vested with such jurisdiction over "all civil actions" does not mean that all federal courts may exercise jurisdiction over all such civil actions. The Constitution also grants to Congress the power to control federal court jurisdiction through "such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2, cl. 2; *see Palmore v. United States*, 411 U.S. 389, 400-01 (1973) (holding that Congress is not required to vest inferior federal courts "with all the jurisdiction it was authorized to bestow under Art. III"). And Congress is under no obligation to confer jurisdiction upon inferior federal courts equally; indeed, no court "can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.").

In cases involving benefits owed to veterans, Congress has created a scheme conferring exclusive jurisdiction over claims affecting veterans' benefits to some federal courts, while denying all other federal courts any jurisdiction over such claims. The source of that statutory scheme is the Veterans'

Judicial Review Act of 1988. To understand the import of the VJRA, and how it affects our jurisdiction to consider VCS's claims here, it is helpful to examine the history of judicial review of VA decisions.

1. History of Judicial Review

Our discussion will be brief because the history of judicial review of VA decisionmaking is a short one. Congress established the VA in 1930. Act of July 3, 1930, ch. 863, § 1, 46 Stat. 1016, 1016. Three years later, Congress prohibited judicial review of the VA's benefits decisions. Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 8, 9 ("All decisions rendered by the Administrator under . . . this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review . . . any such decision."); *see also Lynch v. United States*, 292 U.S. 571, 587 (1934) (construing the statute to "remove the possibility of judicial relief"). Congress has "consistently precluded judicial review of veterans' benefits determinations" thereafter. *Larrabee ex rel. Jones v. Derwinski*, 968 F.2d 1497, 1499 (2d Cir. 1992).

Over time, however, exceptions to the preclusion provision began to appear. This development occurred most notably in the D.C. Circuit, *see, e.g.*, *Tracy v. Gleason*, 379 F.2d 469, 472-73 (D.C. Cir. 1967), where a "procession of decisions . . . 'significantly narrow[ed] the preclusion statute' " and limited its application to bar review of challenges related to initial filing of claims. *Larrabee ex rel. Jones*, 968 F.2d at 1500 (quoting Note, *Judicial Review of Allegedly* Ultra Vires *Actions of the Veterans' Administration: Does 38 U.S.C. § 211(a) Preclude Review?*, 55 Fordham L. Rev. 579, 596 (1987) (alteration in original)). In response to the D.C. Circuit's "fairly tortured construction" of the jurisdictional limitation, in 1970 Congress reemphasized its "clear" intent that the "exemption from judicial review . . . be all inclusive," and it amended the

statute to "provide that except for certain contractual benefits, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration" shall be unreviewable. H.R. Rep. No. 91-1166 at 10 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3723, 3730-31. The result was 38 U.S.C. § 211,[9] the precursor to § 511, which we construe here.

Four years later, the Supreme Court interpreted § 211 in the context of an equal protection challenge to statutes related to veterans' benefits. *Johnson v. Robison*, 415 U.S. 361 (1974). The Supreme Court held that § 211 precluded only review of decisions "that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans." *Id.* at 367 (emphasis added). Declaring that construing § 211 to eliminate all federal court review of constitutional challenges to veterans' benefits legislation would raise "serious questions concerning the constitutionality of § 211," and invoking the constitutional avoidance doctrine, the Court construed § 211 to allow federal court review of a challenge to the constitutionality of the statute itself. *Id.* at 366-67. The *Robison* Court therefore concluded that district courts had jurisdiction to consider a direct facial challenge to statutes affecting veterans' benefits. *Id.* at 367.

Fourteen years after deciding *Robison*, the Supreme Court revisited the jurisdictional limitations of § 211 in *Traynor v. Turnage*, 485 U.S. 535 (1988). There, the Court held that

[9]That section provided:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1970).

§ 211 did not bar federal courts from reviewing whether the VA's regulations conflicted with § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which requires that federal programs not discriminate against handicapped individuals solely because of their handicap. *Traynor*, 485 U.S. at 545. Section 211(a), the Court said, "insulates from review decisions of law and fact . . . made in interpreting or applying a particular provision of that statute to a particular set of facts." *Id.* at 543. The Court noted that the VA had no "special expertise in assessing the validity of its regulations" against "a later passed statute of general application." *Id.* at 544. The Court doubted that permitting federal court review would interfere with the VA or burden the agency with "expensive and time-consuming litigation." *Id.* (internal quotation marks omitted). The Court invited the VA to "seek[ ] appropriate relief from Congress" if "experience proves otherwise." *Id.* at 544-45.

2. The Veterans' Judicial Review Act

Congress responded almost immediately to the Court's invitation in *Traynor*. For Congress, *Traynor* threatened to increase the judiciary's involvement in "technical VA decision-making." *See* H.R. Rep. No. 100-963, at 20-21, 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5802-03, 5809-10. In order to dissuade the judiciary from ignoring "the explicit language that Congress used in isolating decisions of the Administrator from judicial scrutiny," *id.* at 21, 1988 U.S.C.C.A.N. at 5802, Congress overhauled both the internal review mechanism and § 211 in the VJRA. Pub. L. No. 100-687, 102 Stat. 4105.

[1] The VJRA made three fundamental changes to the procedures and statutes affecting review of VA decisions. First, the VJRA placed responsibility for reviewing decisions made by VA Regional Offices and the Board of Veterans' Appeals in a new Article I court, the United States Court of Appeals for Veterans Claims. 38 U.S.C. §§ 7251, 7261. As Congress explained, the creation of the Veterans Court was "intended

to provide a more independent review by a body which is not bound by the Administrator's view of the law, and that will be more clearly perceived as one which has as its sole function deciding claims in accordance with the Constitution and laws of the United States." H.R. Rep. No. 100-963, at 26, 1988 U.S.C.C.A.N. at 5808. The statute also "provide[d] claimants with an avenue for the review of VA decisions that would otherwise have been unreviewable" under prior veterans-related legislation. *Beamon v. Brown*, 125 F.3d 965, 972 (6th Cir. 1997).

Congress indicated that the Veterans Court's authority would extend to "*all* questions involving benefits under laws administered by the VA. This would include factual, legal, and constitutional questions." H.R. Rep. No. 100-963, at 5, 1988 U.S.C.C.A.N. at 5786 (emphasis added). To that end, Congress conferred on the Veterans Court "*exclusive* jurisdiction" to review decisions of the Board of Veterans' Appeals, 38 U.S.C. § 7252(a) (emphasis added), and its powers include the authority to decide any question of law relevant to benefits proceedings, *id*. § 7261(a)(1), and "compel action of the Secretary unlawfully withheld or unreasonably delayed," *id.* § 7261(a)(2). The Veterans Court also has authority under the All Writs Act to issue "writs necessary or appropriate in aid of [its] jurisdiction[ ]." 28 U.S.C. § 1651(a); *see also Erspamer v. Derwinski*, 1 Vet. App. 3, 7 (1990) (holding "that this court has jurisdiction to issue extraordinary writs under the All Writs Act").

Second, decisions of the Veterans Court are reviewed exclusively by the Federal Circuit, which "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(a), (c), (d)(1).[10] Although the Federal Circuit may not review factual determi-

[10]The VJRA also vested the Federal Circuit with exclusive jurisdiction over challenges to VA rules, regulations, and policies. 38 U.S.C. §§ 502, 7292.

nations, it may review the application of law to facts if a constitutional issue is implicated. *Id.* § 7292(d)(2). The decisions of the Federal Circuit are final and only "subject to review by the Supreme Court upon certiorari." *Id.* § 7292(c). As the Second Circuit observed, "[b]y providing judicial review in the Federal Circuit, Congress intended to obviate the Supreme Court's reluctance to construe [§ 211] as barring judicial review of substantial statutory and constitutional claims, while maintaining uniformity by establishing an exclusive mechanism for appellate review of decisions of the Secretary." *Larrabee ex rel. Jones*, 968 F.2d at 1501 (citations omitted).

Third and finally, Congress expanded the provision precluding judicial review, formerly § 211. Under the new provision, eventually codified at 38 U.S.C. § 511,[11] the VA "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a).[12] Whereas § 211(a) prohibited review of "decisions . . . under any law . . . providing benefits for veterans," 38 U.S.C. § 211(a) (1970), § 511(a) prohibits review of "all questions of law and fact necessary to a decision . . . that affects the provision of benefits," 38 U.S.C. § 511(a) (2006). With this change, Congress intended to "broaden the scope of section 211" and limit

[11]Section 211 was recodified as § 511 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378 (1991). We will refer to the pre-VJRA provision as § 211 and the post-VJRA provision as § 511.

[12]38 U.S.C. § 511(a) states in full:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

outside "court intervention" in the VA decisionmaking process. *See* H.R. Rep. No. 100-963, at 27, 1988 U.S.C.C.A.N. at 5809; *see also Larrabee ex rel. Jones*, 968 F.2d at 1501 ("The VJRA . . . broadens section 211's preclusion of judicial review by other courts."). The nonreviewability provision in § 511(a) is subject to four exceptions, one of which is relevant here and we have previously discussed: The Veterans Court and the Federal Circuit may review the Secretary's decisions regarding veterans' benefits. 38 U.S.C. § 511(b)(4); *see id.* §§ 7252, 7292.

[2] In sum, the VJRA supplies two independent means by which we are disqualified from hearing veterans' suits concerning their benefits. First, Congress has expressly disqualified us from hearing cases related to VA benefits in § 511(a) ("may not be reviewed by any . . . court"), and second, Congress has conferred exclusive jurisdiction over such claims to the Veterans Court and the Federal Circuit, *id*. §§ 511(b)(4), 7252(a), 7292(c). The provisions may not be co-extensive, so if a claim comes within either provision, the district court is divested of jurisdiction that it otherwise might have exercised under 28 U.S.C. § 1331, and we are divested of any power of appellate review. *See* H.R. Rep. No. 100-963, at 28, 1988 U.S.C.C.A.N. at 5810 ("By vesting jurisdiction of challenges brought under the APA solely in the Court of Appeals for the Federal Circuit, the bill deprives United States District Courts of jurisdiction to hear such matters under 28 U.S.C. 1331."). Together, these provisions demonstrate that Congress was quite serious about limiting our jurisdiction over anything dealing with the provision of veterans' benefits.

B. *Judicial Construction of § 511*

We have had limited opportunity to address the scope of the jurisdictional limitation in § 511. In *Chinnock v. Turnage*, we noted that § 511 precluded our review of the VA's interpretation of a regulation that affected the denial of a veteran's disability benefits. 995 F.2d 889, 893 n.2 (9th Cir. 1993).

Then, in *Hicks v. Small*, we concluded that § 511 prevented us from considering a veteran's state tort claims brought against a VA doctor because adjudication of those claims "would necessitate a 'consideration of issues of law and fact involving the decision to reduce Hicks' benefits,' a review specifically precluded by 38 U.S.C. § 511(a)." 69 F.3d 967, 970 (9th Cir. 1995) (quoting *Hicks v. Small*, 842 F. Supp. 407, 413-14 (D. Nev. 1993)). And in *Littlejohn v. United States*, we concluded that, although "the Federal Circuit [is] the only Article III court with jurisdiction to hear challenges to VA determinations regarding disability benefits," we could consider a veteran's Federal Tort Claims Act ("FTCA") claim alleging negligence against VA doctors because doing so would not "possibly have any effect on the benefits he has already been awarded." 321 F.3d 915, 921 (9th Cir. 2003).[13] In neither *Chinnock*, *Hicks*, nor *Littlejohn* did we articulate a clear standard for evaluating our jurisdiction when a party raises claims regarding VA benefits.

[3] Similarly, most other circuits have not articulated a comprehensive test to determine the preclusive contours of § 511. That being said, a survey of cases from various circuits that have analyzed § 511 demonstrates some consistent, largely undisputed conclusions as to what § 511 does (and does not) preclude. In general, review of decisions made in the context of an individual veteran's VA benefits proceedings are beyond the jurisdiction of federal courts outside the review scheme established by the VJRA. This is true even if the veteran dresses his claim as a constitutional challenge, *see Zuspann v. Brown*, 60 F.3d 1156, 1159-60 (5th Cir. 1995) (finding no remedy for alleged constitutional violations because veteran was ultimately "complaining about a denial of benefits"); *Sugrue v. Derwinski*, 26 F.3d 8, 10-11 (2d Cir.

[13]The FTCA specifically confers jurisdiction on federal district courts to hear such claims. *See* 28 U.S.C. § 1346(b)(1). We also noted that the VA had separate procedures for dealing with FTCA claims. *See Littlejohn*, 321 F.3d at 921 n.5.

1994) ("[T]he courts do not acquire jurisdiction to hear challenges to benefits determinations merely because those challenges are cloaked in constitutional terms."); *Larrabee ex rel. Jones*, 968 F.2d at 1498 (dismissing veteran's due process challenge where "[t]he gravamen of the amended complaint [was] that the VA ha[d] failed to provide [the veteran] with adequate care"); *Hicks v. Veterans Admin.*, 961 F.2d 1367, 1369-70 (8th Cir. 1992) (veteran's claim that his benefits were reduced because he exercised his First Amendment rights was ultimately a "challenge to a decision affecting benefits" and precluded by § 511), and even where the veteran has challenged some other wrongful conduct that, although unrelated to the VA's ultimate decision on his claim, affected his or her benefits proceeding, *see Weaver v. United States*, 98 F.3d 518, 519-20 (10th Cir. 1996) (finding no jurisdiction where the claimant sued for conspiracy and fraud, claiming that VA employees concealed his medical records); *cf. In re Russell*, 155 F.3d 1012, 1013 (8th Cir. 1998) (per curiam) (court could not issue writ of mandamus ordering the Board of Veterans' Appeals and Veterans Court to act on veteran's request for benefits). *But see Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992) ("[S]ince the Veterans neither make a claim for benefits nor challenge the denial of such a claim, but rather challenge the constitutionality of a statutory classification drawn by Congress, the district court had jurisdiction . . . .").

The Federal Circuit has also addressed the scope of § 511, albeit primarily in cases that do not involve a veteran's challenge to the VA's administration of benefits. In *Hanlin v. United States*, an attorney sued the VA for attorney's fees in the Court of Federal Claims, claiming a breach of implied contract under a fee arrangement with a veteran. 214 F.3d 1319, 1320 (Fed. Cir. 2000). Although the government argued that § 511 precluded review in that court, the Federal Circuit disagreed, holding that "§ 511(a) does not require the Secretary to address such a claim and thus does not provide the VA with exclusive jurisdiction over [the attorney]'s claim." *Id.* at

1321. Then, in *Bates v. Nicholson*, the Federal Circuit held that a determination of whether to terminate the certification of an attorney to practice before the VA was subject to the jurisdiction of the Board of Veterans' Appeals. 398 F.3d 1355, 1365-66 (Fed. Cir. 2005). Rejecting the concurrence's criticism that its decision needlessly expanded § 511, the court noted that § 511's preclusion "contemplates a formal 'decision' by the Secretary or his delegate" and does not apply to every decision that may indirectly affect benefits. *Id.* at 1365.

The D.C. Circuit, in a series of cases, and the Sixth Circuit, in a case very similar to this one, have articulated the most comprehensive and relevant standard for determining the scope of § 511. *See Broudy v. Mather*, 460 F.3d 106, 115 (D.C. Cir. 2006); *Thomas v. Principi*, 394 F.3d 970, 974 (D.C. Cir. 2005); *Price v. United States*, 228 F.3d 420, 422 (D.C. Cir. 2000) (per curiam); *Beamon*, 125 F.3d at 971. In *Price*, the D.C. Circuit held that § 511 precluded the district court's jurisdiction to consider a veteran's claim for reimbursement of medical expenses because, in order for the court to resolve whether the VA had failed to reimburse the veteran, it "would require the district court to determine first whether the VA acted properly in handling Price's request for reimbursement." 228 F.3d at 422. As the court noted, "courts have consistently held that a federal district court may not entertain constitutional or statutory claims whose resolution would require the court to intrude upon the VA's exclusive jurisdiction." *Id.*[14]

The D.C. Circuit confirmed this analysis in *Thomas*. There, the veteran brought an action under the FTCA in which he alleged that the VA had "failed to render the appropriate medical care services" and thereby denied him "medical care treatment." *Thomas*, 394 F.3d at 975 (internal quotation

[14]We previously cited *Price* with approval in *Littlejohn*, 321 F.3d at 921.

marks omitted). Relying on *Price*, the D.C. Circuit held that the relevant test was "whether adjudicating Thomas's claims would require the district court 'to determine first whether the VA acted properly in handling' Thomas's benefits request." *Id.* at 974 (quoting *Price*, 228 F.3d at 422). The court concluded that some of Thomas's tort claims were barred by § 511, while others survived. *Id.* at 974-75.

The D.C. Circuit confirmed this test again in *Broudy*, 460 F.3d at 114-15, and also identified a situation in which § 511 did not preclude its jurisdiction. There, the plaintiffs sued the VA for allegedly withholding radiation test results, effectively denying the plaintiffs access to the courts. *Id*. at 109-10. The plaintiffs requested, among other things, the "immediate release of all relevant records and documents" and an injunction preventing future instances of such misconduct. *Id.* at 110. Distinguishing the case from *Price* and *Thomas*, the D.C. Circuit held that it had jurisdiction to consider the plaintiffs' claims because those claims did not require the district court "to decide whether any of the veterans whose claims the Secretary rejected [we]re entitled to benefits." *Id.* at 115. Nor did their claims require the court to "revisit any decision made by the Secretary *in the course of making* benefits determinations." *Id.* (emphasis added). Thus, the D.C. Circuit concluded that it had jurisdiction. *Id.*

In addition to these cases from the D.C. Circuit, we find a closely analogous case in the Sixth Circuit's decision in *Beamon v. Brown*. In *Beamon*, the plaintiffs claimed that "the VA's procedures for processing claims cause[d] unreasonable delays, thereby violating their rights under the Administrative Procedure Act . . . and under the Due Process Clause of the Fifth Amendment." 125 F.3d at 966. The Sixth Circuit held that "the VJRA explicitly granted comprehensive and exclusive jurisdiction to the [Veterans Court] and the Federal Circuit over claims seeking review of *VA decisions that relate to benefits decisions* under § 511(a)." *Id*. at 971 (emphasis added). The court therefore concluded that it could not hear

"constitutional issues and allegations that a VA decision has been unreasonably delayed" by the inadequacies of the VA's procedures. *Id.* Because adjudicating the plaintiffs' claims would require the district court to "review individual claims for veterans' benefits, the manner in which they were processed, and the decisions rendered by the regional office of the VA" and the Board of Veterans' Appeals, "[t]his type of review falls within the exclusive jurisdiction of the [Veterans Court] as defined by [38 U.S.C.] § 7252(a)." *Id.* at 970-71.

[4] Synthesizing these cases, we conclude that § 511 precludes jurisdiction over a claim if it requires the district court to review "VA decisions that relate to benefits decisions," *Beamon*, 125 F.3d at 971, including "any decision made by the Secretary in the course of making benefits determinations," *Broudy*, 460 F.3d at 115. This standard is consistent with Congress's intention to "broaden the scope" of the judicial preclusion provision, H.R. Rep. No. 100-963, at 27, 1988 U.S.C.C.A.N. at 5809, and is reflected in § 511(a)'s plain statement that we may not review a "decision by the Secretary under a law that affects the provision of [veterans'] benefits," 38 U.S.C. § 511(a). This preclusion extends not only to cases where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases. *See Price*, 228 F.3d at 422; *Thomas*, 394 F.3d at 974; *Broudy*, 460 F.3d at 114-15; *accord Beamon*, 125 F.3d at 971. If that test is met, then the district court must cede any claim to jurisdiction over the case, and parties must seek a forum in the Veterans Court and the Federal Circuit.

III. APPLICATION

In this case, we must determine whether VCS has raised claims that involve "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary." 38 U.S.C. § 511(a). Under the VA's regulations, "benefit" is defined as "any payment,

service, . . . or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." 38 C.F.R. § 20.3(e). Here, VCS claims that delays in the VHA's provision of mental health care and the VBA's adjudication of service-related disability benefits violate the VA's statutory obligations to provide veterans with care and, therefore, deprive veterans of "property" under the Due Process Clause. Mental health care and disability compensation are clearly "benefits," so any "question of fact or law" that "affects the provision of [them] by the Secretary" falls under the ambit of § 511. Accordingly, we turn first to VCS's various mental health claims and then to VCS's disability compensation claims to determine whether the district court had jurisdiction under § 511.

A. *Mental Health Care Claims*

VCS claims that delays in the VHA's provision of mental health care violate the APA and the Due Process Clause.[15] VCS also requests the adoption of a formal appeals process to allow veterans to challenge an administrator's decision to place a veteran on a wait list for mental health care, more transparent clinical appeals procedures, and an expedited procedure for veterans presenting PTSD symptoms to receive access to mental health care.[16]

[15]The district court exercised jurisdiction but denied VCS's APA claim because, among other things, VCS's claim did not pertain to a "final agency action," and thus could not be brought under the APA. *Veterans*, 563 F. Supp. 2d at 1059 (citing *Norton*, 542 U.S. at 64). The district court denied VCS's due process challenge to the VHA's failure to provide timely care on the merits because VCS "did not prove a systemic denial or unreasonable delay in mental health care." *Id.* at 1082. We do not address these conclusions because we hold that the district court lacked jurisdiction.

[16]So, for example, VCS argues that the VA should be compelled to implement remedial measures recommended in the VA's Mental Health Strategic Plan and the Feeley Memorandum. VCS claims that these measures would improve the circumstances of veterans experiencing delays in the provision of mental health care, and the failure to adopt them violates the Due Process Clause of the Fifth Amendment.

[5] Section 511 undoubtedly would deprive us of jurisdiction to consider an individual veteran's claim that the VA unreasonably delayed his mental health care. VCS attempts to circumvent this jurisdictional limitation by disavowing relief on behalf of any individual veteran, and instead proffering evidence of *average* delays to demonstrate statutory and constitutional violations.[17] VCS emphasized in its complaint that the "constitutional defects with the VA's systems, as set forth herein, are . . . divorced from the facts of any individual claim." Compl. ¶ 12. On appeal, VCS repeats that its claims regarding average delays do not involve questions of law or fact necessary to a decision about providing benefits to an individual veteran.

VCS's allegations bear a close resemblance to those made by veterans' organizations who "went out of their way to forswear any individual relief for" veterans in a challenge to the VA's adjudication of benefits appeals recently considered by the D.C. Circuit. *See Viet. Veterans of Am. v. Shinseki*, 599 F.3d 654, 662 (D.C. Cir.), *cert. denied*, 131 S. Ct. 195 (2010). There, much like here, the veterans' organizations alleged that "[n]othing in this complaint is intended as . . . an attempt to obtain review of an individual determination by the VA or its appellate system," *id.* at 658 (internal quotation marks omitted), and they submitted evidence of average delays in the VA's appellate process, *id.* at 657, 662. But, noting the plaintiffs' "rather apparent effort to avoid the preclusive bite" of

[17]For example, VCS alleges:

> The facts herein pertaining to the [veterans and organizational plaintiffs] are included for the specific purpose[ ] of . . . illustrating the Challenged VA Practices, and not for the purpose of obtaining review of decisions by the VA or [the Veterans Court]. Nothing herein is intended or should be construed as an attempt to obtain review of any decision relating to benefits sought by any veteran . . . or to question the validity of any benefits decisions made by the Secretary of the VA.

Compl. ¶ 39.

§ 511(a), the D.C. Circuit concluded that, by disavowing relief based on any individual veteran, the plaintiffs overlooked the fact that "the average processing time does not cause [veterans] injury; it is only *their* processing time that is relevant." *Id.* at 661-62. The court reasoned that even "assuming the alleged 'illegality'—that the average processing time at each stage is too long—that illegality does not cause the [plaintiffs] injury." *Id.* at 662. This analysis led the D.C. Circuit to conclude that the plaintiffs lacked standing to pursue their claims. *Id.* ("If the affiants were suing by themselves—which is how we must analyze the claim—asserting that the average time of processing was too long, it would be apparent that they were presenting a claim not for themselves but for others, indeed, an unidentified group of others. But one can not have standing in federal court by asserting an injury to someone else.").

Here, it may be that VCS similarly does not have standing for its claims, because a claim based on average harm seems contrary to the Supreme Court's requirement of a "particularized" harm that "affect[s] the plaintiff in a personal and individual way." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561 n.1 (1992). Nevertheless, because it is clear that there is an independent statutory bar to our jurisdiction, we need not reach the standing issue.

[6] The fact that VCS couches its complaint in terms of *average* delays cannot disguise the fact that it is, fundamentally, a challenge to thousands of individual mental health benefits decisions made by the VA. In order to determine whether the average delays alleged by VCS are unreasonable, the district court would have to review the circumstances surrounding the VA's provision of benefits to individual veterans. The district court does not acquire jurisdiction over VCS's complaint just because VCS challenges many benefits decisions rather than a single decision. Indeed, an *average* processing time tells us nothing about the causes for such processing time. VCS alleges that the average processing time for

mental health claims is too long, but the district court would have no basis for evaluating that claim without inquiring into the circumstances of at least a representative sample of the veterans whom VCS represents; then the district court would have to decide whether the processing time was reasonable or not as to each individual case. *Cf. Viet. Veterans of Am.*, 599 F.3d at 662; *Price*, 228 F.3d at 422.

Moreover, in order to provide the relief that VCS seeks, the district court would have to prescribe the procedures for processing mental health claims and supervise the enforcement of its order. To determine whether its order has been followed, the district court would have to look at individual processing times. In addition to our general concern that "this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action," *Laird v. Tatum*, 408 U.S. 1, 15 (1972), it would embroil the district court in the day-to-day operation of the VA and, of necessity, require the district court to monitor individual benefits determinations.

[7] In sum, there is no way for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests properly. We therefore lack jurisdiction to consider VCS's various claims for relief related to the VA's provision of mental health care, including its challenge to the lack of procedures by which veterans may appeal the VA's administrative scheduling decisions. *See* 38 U.S.C. § 511(a).[18]

[18]Of course, to the extent that any individual veteran claims unreasonable delay in the provision of his benefits, he may file a claim in the Veterans Court, which has the power to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2); *see also Stegall v. West*, 11 Vet. App. 268, 271 (1998) (concluding that its authority to " 'compel action of the Secretary unlawfully withheld or

B. *Disability Benefits Claims*

VCS next claims that the VA's system for adjudicating veterans' eligibility for disability benefits suffers from unconscionable delays and therefore violates the statutory and constitutional rights of veterans. The district court concluded that, because "determination of whether the delay [in benefits adjudication] is unreasonable may depend on the facts of each particular claim, § 511 prevents this Court from undertaking such a review." *Veterans*, 563 F. Supp. 2d at 1083-84 (citation omitted).[19] We agree with the district court for the same rea-

unreasonably delayed' " gave the Veterans Court authority to "remand the claim with directions that the Secretary order an additional medical examination that complies with all pertinent statutory and regulatory requirements" (quoting 38 U.S.C. § 7261(a)(2))); *cf. Ebert v. Brown*, 4 Vet. App. 434, 436-37 (1993) (considering but denying as moot the claimant's challenge to the VA's two-year delay in the scheduling of medical appointments). Likewise, both the Veterans Court and the Federal Circuit have confirmed their jurisdiction to hear challenges to administrative decisions by the VHA that affect the provision of benefits to veterans, such as the VHA "scheduling decisions" challenged by VCS. *See E. Paralyzed Veterans Ass'n v. Sec'y of Veterans Affairs*, 257 F.3d 1352, 1358 (Fed. Cir. 2001) (holding that a veteran's "right of appeal covers a challenge to the priority [treatment] category to which the veteran has been assigned," as well as " 'decisions regarding enrollment and disenrollment' " in systems providing for hospital and medical care (quoting Enrollment—Provision of Hospital and Outpatient Care to Veterans, 64 Fed. Reg. 54,207, 54,211 (Oct. 6, 1999))); *Meakin v. West*, 11 Vet. App. 183, 187 (1998) (reversing the Board's conclusion that it lacked jurisdiction to resolve a veteran's eligibility for fee-basis medical care because, inter alia, such review would require only "an administrative decision as to whether the VA facility is capable of furnishing a previously determined course of care, services, or treatment"); *accord* 38 C.F.R. § 20.101(b) (permitting Board review of "questions of eligibility for hospitalization, outpatient treatment, . . . and for other benefits administered by the [VHA]" that do not involve "[m]edical determinations").

[19]The district court also concluded that resolving VCS's claims would "invariably implicate VA regulations," *Veterans*, 563 F. Supp. 2d at 1084, such as regulations requiring the VA to assist the veteran in collecting evi-

son that we explained earlier with respect to delays in mental health care—we simply lack jurisdiction.

[8] Like VCS's challenge to delays in the VA's provision of mental health care, VCS's challenge to delays in the VA's adjudication of veterans' disability benefits plainly implicates questions of law and fact regarding the appropriate method of providing benefits to individual veterans. The district court cannot decide such claims without determining whether the VA acted properly in handling individual veterans' benefits requests at each point in the process. Section 511 deprives the district court of jurisdiction over such questions.

In reaching this conclusion, we find ourselves in accord with the Sixth Circuit, which resolved a similar question in *Beamon v. Brown*. There, a group of veterans "asked the district court to review the legality and constitutionality of the procedures that the VA uses to decide benefits claims." *Beamon*, 125 F.3d at 970. The Sixth Circuit concluded that the plaintiffs' claims raised questions of law and fact regarding the provision of benefits by the VA and that "[d]etermining the proper procedures for claim adjudication is a necessary precursor to deciding veterans benefits claims. Under § 511(a), the VA Secretary shall decide this type of question." *Id.* Because the plaintiffs alleged that "VA procedures cause unreasonable delays" in the resolution of benefits claims, "[t]o adjudicate this claim, the District Court would need to review individual claims for veterans' benefits, the manner in

dence, 38 C.F.R. § 3.159(c), and regulations establishing the procedural requirements for an appeal, *id.* §§ 20.200-.202. Because "38 U.S.C. § 502 permits litigation of challenges to VA regulations only in the Federal Circuit," the district court viewed § 502 as an independent bar to its jurisdiction. *Veterans*, 563 F. Supp. 2d at 1084. Because we find § 511 controlling and dispositive of VCS's disability benefits claims, we express no view on the impact of § 502.

which they were processed, and the decisions rendered by the regional office of the VA and the BVA." *Id.* at 970-71.[20]

VCS claims that no such review is required here because it challenges *average* delays in the adjudication of service-related disability benefits (as opposed to delay in the processing of any one individual claim). For reasons we previously discussed, that is a distinction without difference. Whether the average delays of which VCS complains are reasonable depends on the facts of individual veterans' claims, such as the complexity of the claim (PTSD claims being some of the most difficult to resolve), the severity of the disability, and the

[20]The dissent's answer to the jurisdictional question is to distinguish between "direct or indirect challenges to actual benefit decisions," which the dissent agrees are beyond the district court's jurisdiction, and "claims that would have no effect on the substance of any actual benefit award," which the dissent argues are not precluded by § 511 and are the type of claims raised by VCS here. Dissenting Op. at 4869-70; *see also id.* at 4869 ("Plaintiffs' concern is not with the substance of any benefits decision. Their concern is with process."). VCS, even if it could, is not asking for process for its own sake but rather process to ensure timely and accurate benefits decisions. *Cf. Gometz v. Henman*, 807 F.3d 113, 116 (7th Cir. 1986) ("The right of access to the courts, like all procedural rights under the due process clause of the fifth amendment, is an entitlement to enough process to ensure a reasonable likelihood of an accurate result, not to process for its own sake.").

In this respect, VCS is much like the three veterans in *Beamon* who sought to represent a "class of similarly-situated veterans, to challenge the manner in which the [VA] processes claims for veterans' benefits," 125 F.3d at 966, which makes the dissent's reliance on that case all the more perplexing, Dissenting Op. at 4870-71. There, by the time the veterans' appeal reached the Sixth Circuit, two of the representative plaintiffs had received final decisions on the merits of their claims and the third was still waiting for a final decision. *Beamon*, 125 F.3d at 966. Those plaintiffs sought, like VCS here, to do more than merely litigate their individual claims to conclusion; rather, they challenged the "legality and constitutionality of the procedures that the VA uses to decide benefits claims." *Id.* at 970. The Sixth Circuit held exactly as we do here: "Determining the proper procedures for claim adjudication is a necessary precursor to deciding veterans benefits claims," and "[u]nder § 511(a), the VA Secretary shall decide this type of question." *Id.*

availability and quality of the evidence. As the district court noted, "a veteran who raises seven or eight issues in his or her claim will likely face a more protracted delay than a veteran who raises only one or two issues." *Veterans*, 563 F. Supp. 2d at 1083. Because the district court lacks jurisdiction to review the circumstances or decisions that created the delay in any one veteran's case, it cannot determine whether there has been a systemic denial of due process due to unreasonable delay.[21]

VCS asserts that if the district court lacks jurisdiction to hear its claims, then it will be unable to secure adequate relief because compelling the VA to issue a decision on individual benefits is not the same as curing the deficiencies that cause widespread delay. To that end, VCS contends that the district court must retain jurisdiction over its "challenge to the administrative gridlock plaguing the adjudication" of benefits claims under the Supreme Court's decision in *Johnson v. Robison*, 415 U.S. 361. VCS notes that the drafters of § 511 recognized that *Robison* "was correct in asserting judicial authority to decide whether statutes meet constitutional muster." H.R. Rep. No. 100-963, at 22, 1988 U.S.C.C.A.N. at 5803.

[21]VCS relies on the D.C. Circuit's decision in *Broudy*, 460 F.3d at 115, for the proposition that its challenge to the VA's delays avoids the preclusive effect of § 511. But *Broudy* does not support VCS's position. *Broudy* involved a challenge to the VA's withholding of radiation test results and the plaintiffs' request for a release of those records and an injunction against future misconduct. *Id*. at 109-10. The D.C. Circuit held that it had jurisdiction over these claims only after finding that resolving them did not require the district court "to decide whether any of the veterans whose claims the Secretary rejected [we]re entitled to benefits" or to "revisit any decision made by the Secretary *in the course of making* benefits determinations." *Id.* at 115 (emphasis added). Conversely, adjudicating VCS's claims here would require us to revisit the decisions the VA made in handling a veteran's request "in the course of making benefits determinations." *Id*. According to *Broudy*, such claims are beyond the district court's jurisdiction, and on this we agree.

Although we discussed *Robison* in the context of § 511's history, it requires further discussion here. In *Robison*, a conscientious objector who completed alternative service was denied veterans' educational benefits under a program granting such benefits to persons who served full-time duty in the Armed Forces. 415 U.S. at 362-64. He claimed that this violated the equal protection component of the Due Process Clause. *Id.* at 364-65. The government argued that § 211, the predecessor to § 511, deprived the district court of jurisdiction. *Id.* Indeed, under the government's view of § 211, no court had jurisdiction to review the plaintiff's equal protection claims.[22] *Id.* at 366.

The Supreme Court held that the district court had jurisdiction. Although § 211 provided that "no court of the United States shall have power or jurisdiction to review" the VA's decisions concerning veterans' benefits, *id.* at 367 (internal quotation marks omitted), the Court held that precluding federal court review of constitutional questions would "raise serious questions concerning the constitutionality of § 211(a)," *id.* at 366 & n.8. The Court construed § 211 to bar only federal review of challenges to "the *administration*" of the benefits program. *Id.* at 367. Because the conscientious objector had challenged *Congress's* design on constitutional grounds, § 211's preclusion of review of the *Secretary's* actions did not bar the exercise of jurisdiction.[23] *Id.* Following *Robison*, the

[22]Significantly, the Board of Veterans' Appeals had "expressly disclaimed authority to decide constitutional questions." *Robison*, 415 U.S. at 368. Construing § 211 to preclude judicial review would have meant that neither the VA nor any court would have been able to consider the constitutional challenges.

[23]In *Moore v. Johnson*, we concluded that *Robison* "established the principle that 38 U.S.C. § 211(a) does not bar the determination by a federal court of the constitutionality of veterans' benefits legislation." 582 F.2d 1228, 1232 (9th Cir. 1978). We interpreted *Robison* to require an examination of the "substance" of an action to determine whether it challenges a "decision of the Administrator on a 'question of law or fact concerning a benefit" provided by the VA, or instead challenges the constitutionality of an act of Congress. *Id.* Under our precedent, "[o]nly actions within the latter category are reviewable" under § 211. *Devine v. Cleland*, 616 F.2d 1080, 1084 (9th Cir. 1980).

Supreme Court confirmed that "district courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems" under the precursor to § 511. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 n.3 (1985).

Robison's warning of "serious questions" concerning statutes that preclude all judicial review is of limited application here. First, the fact that VCS drapes its claims in constitutional terms is not itself sufficient to confer jurisdiction on us. Numerous courts have recognized that § 511 broadly divests district courts of jurisdiction over constitutional claims related to benefits even where those claims concern agency procedures and do not challenge specific VA benefits determinations. *See, e.g.*, *Beamon*, 125 F.3d at 971 ("[T]he VJRA explicitly granted comprehensive and exclusive jurisdiction to the CVA and the Federal Circuit over claims seeking review of VA decisions that relate to benefits decisions under § 511(a). This jurisdiction includes constitutional issues . . . ."); *Hall v. U.S. Dep't Veterans' Affairs*, 85 F.3d 532, 535 (11th Cir. 1996) (per curiam) (holding that a direct constitutional challenge to a VA regulation must be brought in the Federal Circuit); *Hicks*, 961 F.2d at 1370 ("These provisions amply evince Congress's intent to include all issues, even constitutional ones, necessary to a decision which affects benefits in this exclusive appellate review scheme."); *Addington v. United States*, 94 Fed. Cl. 779, 783 (2010) ("The exclusive remedy for claims of due process violations lies in the [Veterans Court].").

More importantly, nothing in the VJRA forecloses judicial review of constitutional questions as VCS suggests. After *Robison* read § 211 broadly, Congress "subsequently established the [Veterans Court], effectively stripping district courts of any such jurisdiction," *Beamon*, 125 F.3d at 973 n.4; *cf. Bates*, 398 F.3d at 1364 (explaining that the VJRA's "specialized review process" exchanged court review for "independent judicial review of the [VA]'s final decisions by a new Article I Court"). But Congress did not leave veterans without

a forum for their constitutional claims. When Congress created the Veterans Court, it expressly empowered that court to "decide all relevant questions of law, interpret *constitutional*, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary." 38 U.S.C. § 7261(a)(1) (emphasis added). That same statute leaves no doubt that the Veterans Court has the authority to adjudicate veterans' constitutional claims that benefits have been "unlawfully withheld or unreasonably delayed." *Id.* § 7261(a)(2); *Vietnam Veterans of Am.*, 599 F.3d at 659-60 & n.6; *see also Beamon*, 125 F.3d at 968 (finding that the Veterans Court "has the power to provide adequate relief for the plaintiffs" seeking to challenge the VA's "unreasonably delayed benefits decisions"). The Veterans Court's power is such that its orders not only affect how a single veteran's claim is handled, but will dictate how similar claims are handled by the VA in the future. *See Beamon*, 125 F.3d at 970 ("Plaintiffs may bring their claims individually, and the [Veterans Court]'s decisions of individual claims will have a binding effect on the manner in which the VA processes subsequent veterans' claims."). That power, together with the authority to issue extraordinary writs pursuant to the All Writs Act, 28 U.S.C. § 1651(a); *see Vietnam Veterans of Am.*, 599 F.3d at 659-60 & n.6; *see also Erspamer*, 1 Vet. App. at 7, makes the Veterans Court an adequate forum for this type of claim.

Beyond the Veterans Court, Congress also ensured that an Article III court can review such claims. Congress granted the Court of Appeals for the Federal Circuit the "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). To drive the point home, Congress affirmed that the Federal Circuit "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions." *Id.* § 7292(d)(1). In tandem, the

availability of review by both the Veterans Court and the Federal Circuit evinces Congress's intent to protect the federal courts and the VA from time-consuming veterans' benefits litigation, while providing a specialized forum wherein complex decisions about such benefits can be made. Congress has fully answered the Supreme Court's "serious question" concerning the constitutionality of § 511's limitation on our jurisdiction.

[9] In sum, Congress may have foreclosed *our* review of the VA's decisions related to claims adjudication, but it has not foreclosed federal judicial review *in toto*.[24] Whatever "serious questions," *Robison*, 415 U.S. at 366, might arise if Congress were to preclude all review of constitutional challenges, there can be no question that Congress may eliminate our jurisdiction to review the VA's decisions, while preserving such review elsewhere. U.S. Const. art. III, § 2, cl. 2. As the Supreme Court stated in *Lockerty v. Phillips*, "[t]he Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " 319 U.S. 182, 187 (1943) (quoting *Cary v. Curtis*, 44 U.S. (3 Howe) 236, 245 (1845)). We lack jurisdiction over VCS's claims challenging delays in the VA's adjudication of service-related disability benefits.

C. *Regional Office Procedures*

[10] VCS argues that there is a lack of adequate procedures when veterans file their claims for service-related dis-

[24]Although the dissent accuses us of "leav[ing] millions of veterans" without an available remedy to address delays affecting benefits determinations, it has failed to acknowledge (let alone analyze) the versatility of the VA system. Dissenting Op. at 4868. The dissent is correct that there is a "forum" available for veterans to challenge the operation of the VA system, *id.*, but that forum does not involve the district court.

ability benefits at VA Regional Offices. In its complaint, VCS framed this claim as a challenge to the constitutionality of the VJRA, claiming that the statutes codified by the act deny veterans adequate procedural safeguards. *See* Compl. ¶ 202 ("The VJRA violates Plaintiffs' due process rights in a multitude of respects . . . ."). On appeal, VCS argues that its members are denied due process because existing procedures do not provide necessary protections to veterans during the initial claims process. Procedures that VCS wishes to see implemented include a pre-decision hearing, discovery and subpoena power, and the retention of paid counsel to assist in the submission of an initial claim. The district court denied this claim on the merits, holding that the VA's procedures did not violate the Due Process Clause of the Fifth Amendment. *Veterans*, 563 F. Supp. 2d at 1088-89. We agree with the district court.

1. Jurisdiction

The jurisdictional question is a complex and close one, but we conclude that we have jurisdiction over these claims. As we have discussed, we lack jurisdiction either if § 511 prohibits our jurisdiction, or if review of VCS's claim is entrusted to the exclusive review mechanism established by the VJRA. We first hold that § 511 does not bar our jurisdiction to consider this claim. We then conclude that VCS's claim does not fall within the exclusive jurisdiction of the Veterans Court or the Federal Circuit.

First, VCS has carefully structured its complaint to avoid § 511's preclusive effect. As pled, VCS asserts a facial challenge to the constitutionality of the VJRA based not on any average delays experienced by veterans, but on the absence in the statute of certain procedures VCS claims are necessary to safeguard veterans' rights. Were the former 38 U.S.C. § 211 applicable here, there is little doubt that we would have jurisdiction to hear this claim because the Supreme Court held that facial constitutional challenges were exempted from § 211's

jurisdictional preclusion. *See Robison*, 415 U.S. at 366-74. But since the enactment of the VJRA, the courts of appeals appear split on the issue of whether that portion of *Robison*'s analysis survives the VJRA. We question, however, whether these courts have thoroughly analyzed the efforts Congress undertook to broaden § 511 and the concurrent effort it took to establish an exclusive review scheme for claims related to veterans' benefits. The Second and Fifth Circuits, as well as the Veterans Court, have affirmed that facial constitutional challenges to acts of Congress—including challenges brought by individual claimants—may be brought in federal district court despite § 511's broad preclusive mandate. *See, e.g.*, *Zuspann*, 60 F.3d at 1159 (addressing whether the claimant's "complaint challenges the VA's decision to deny him benefits, or whether it makes a facial challenge to an act of Congress"); *Larrabee ex rel. Jones*, 968 F.2d at 1500 (the VJRA "precludes judicial review of non-facial constitutional claims"); *Disabled Am. Veterans*, 962 F.2d at 141 (same); *Dacoron v. Brown*, 4 Vet. App. 115, 119 (1993). The Eighth Circuit appears to have taken a different view. *See Hicks*, 961 F.2d at 1369-70 (concluding that provisions of the VJRA "amply evince Congress's intent to include all issues, even constitutional ones, necessary to a decision which affects benefits in [an] exclusive appellate review scheme"); *see also Hall*, 85 F.3d at 534-35 (recognizing that "[t]he Eighth Circuit Court of Appeals appears to have taken a different view" as to whether *Robison*'s preservation of facial constitutional challenges survives the VJRA). And in the case most analogous to the claims presented here, *Beamon v. Brown*, the Sixth Circuit appears to have equivocated on the matter, holding that "district court jurisdiction over facial challenges to acts of Congress survived [§ 511]," 125 F.3d at 972, yet concluding that "Congress . . . effectively stripp[ed] district courts of any such jurisdiction" over "constitutional attacks on the operation of the claims system," *id.* at 973 n.4 (internal quotation marks omitted). *Beamon*, however, involved a putative class action brought by three veterans challenging delays

in the processing of veterans' benefits, *id.* at 966, and the Sixth Circuit concluded that the plaintiffs' own claims could be brought in the Veterans Court, *id.* at 972-74.

[11] Ultimately, we need not decide whether an individual seeking benefits would be barred by § 511 from bringing a facial constitutional challenge in the district court. The immediate question before us is whether VCS's challenge to the VJRA is similar to its claims challenging the conduct of the VHA and the delays in adjudication of service-related disability claims, which we have already concluded would require review of the circumstances of individual requests for benefits by veterans. Unlike those previous claims, reviewing the VA's procedures for filing and handling benefits claims at the Regional Offices does not require us to review "decisions" affecting the provision of benefits to any individual claimants. 38 U.S.C. § 511; *see also id.* § 5104 (requiring notice to a veteran of a "decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant"). Indeed, VCS does not challenge decisions at all. A consideration of the constitutionality of the procedures in place, which frame the system by which a veteran presents his claims to the VA, is different than a consideration of the decisions that emanate through the course of the presentation of those claims. In this respect, VCS does not ask us to review the decisions of the VA in the cases of individual veterans, but to consider, in the "generality of cases," the risk of erroneous deprivation inherent in the existing procedures compared to the probable value of the additional procedures requested by VCS. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Evaluating under the Due Process Clause the need for subpoena power, the ability to obtain discovery, or any of the other procedures VCS requests is sufficiently independent of any VA decision as to an individual veteran's claim for benefits that § 511 does not bar our jurisdiction.[25]

[25]To that extent, VCS's claim bears a close resemblance to other due process challenges we are institutionally competent to evaluate, for exam-

Second, unlike VCS's challenge to delays in the administration of the benefits program, the exclusive review scheme established by the VJRA in 38 U.S.C. §§ 7252, 7261, and 7292 does not deprive us of jurisdiction over this claim. Although an individual veteran may challenge "VA procedures during the adjudication of individual claims contesting delayed benefits decisions," *Beamon*, 125 F.3d at 969, in the Veterans Court or the Federal Circuit, the VJRA does not provide a mechanism by which the organizational plaintiffs here might challenge the absence of system-wide procedures, which they contend are necessary to afford due process. This case does not involve individual veterans seeking to challenge the lack of procedures in place at VA Regional Offices, but rather organizations representing their members claiming a system-wide risk of erroneous deprivation. *See Dacoron*, 4 Vet. App. at 119 (noting that constitutional challenges could be "presented to this Court only in the context of a proper and timely appeal taken from such decision made by the VA Secretary through the [Board]"). In other words, because VCS cannot bring its suit in the Veterans Court, that court cannot claim exclusive jurisdiction over the suit. Because VCS would be unable to assert its claim in the review scheme established by the VJRA, *see* 38 U.S.C. §§ 7252, 7261, 7292, that scheme does not operate to divest us of jurisdiction.[26]

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ple, whether the lack of notice or a hearing requires us to order specific procedures capable of implementation, *see Goldberg v. Kelly*, 397 U.S. 254, 285 (1970); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18-19 (1978) (hearing required before terminating utilities for nonpayment); *Gagnon v. Scarpelli*, 411 U.S. 778, 789-91 (1973) (there is no automatic right to an attorney at probation revocation hearings), or whether *any* process is due in the first place, *e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 680-82 (1977) (due process does not require a hearing before corporal punishment is inflicted); *Goss v. Lopez*, 419 U.S. 565, 581-83 (1975) (requiring a hearing before a student is suspended or as soon thereafter as practicable).

[26]Even if an individual veteran could raise these claims in an appeal in the Veterans Court or the Federal Circuit, that fact alone does not deprive us of jurisdiction here. The Veterans Court has exclusive jurisdiction over decisions of the Board of Veterans' Appeals, not over every issue capable of being raised in an appeal from the Board. *See* 38 U.S.C. § 7252(a).

[12] We conclude that we have jurisdiction over VCS's claim related to procedures affecting adjudication of claims at the Regional Office level. We are not precluded from exercising jurisdiction by either § 511 or the provisions conferring exclusive jurisdiction on the Veterans Court and the Federal Circuit.

2. Merits

[13] Satisfied of our jurisdiction, we turn to the merits of this claim. We affirm the district court because the non-adversarial procedures at the Regional Office level are sufficient to satisfy due process. The district court conducted an analysis of the *Mathews v. Eldridge* factors and ruled that although "veterans and their families have a compelling interest in" their benefits, and "the consequences of erroneous deprivation can be devastating," the risk of error was low and the government's interest weighed strongly in favor of denying VCS the additional procedures requested.[27] *Veterans*, 563 F. Supp. 2d at 1087-88.

We agree with the district court's analysis on this point and reproduce it here:

> Under the *Mathews* factors, the current system for adjudicating veterans' [disability] claims satisfies due process. It is without doubt that veterans and their families have a compelling interest in receiving disability benefits and that the consequences of erroneous deprivation can be devastating. In looking at the totality of [disability] claims, however, the risk of erroneous deprivation is relatively small. 11% of

[27] In evaluating whether a procedure satisfies due process, courts balance (1) the private interest; (2) the risk of erroneous deprivation and the likely value, if any, of extra safeguards; and (3) the government's interest, especially in avoiding the burden any additional safeguards would impose. *Mathews*, 424 U.S. at 335.

> veterans file Notices of Disagreement upon adjudication of their claims by [Regional Offices]. Only 4% proceed past the NOD to a decision by the [Board]. Thus, while the avoidable remand rates at the VA are extraordinarily high, only 4% of veterans who file benefits claims are affected. Plaintiffs here "confront the constitutional hurdle posed by the principle enunciated in cases such as *Mathews* to the effect that a process must be judged by the generality of cases to which it applies, and therefore, process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985).
>
> Moreover, although the additional safeguards Plaintiffs seek would likely reduce the number of avoidable remands and erroneous deprivations, the fiscal and administrative burdens of these additional procedural requirements are significant. Plaintiffs seek, in essence, to transform the claims adjudication process at the [Regional Office] level from an ostensibly non-adversarial proceeding into one in which the full panoply of trial procedures that protects civil litigants is available to veterans. For example, Plaintiffs seek the general right of discovery, including the power to subpoena witnesses and documents, the ability to examine and cross-examine witnesses, the ability to pay an attorney, and the right to a hearing. Implementation and maintenance of such a system would be costly in terms of the resources and manpower that the VA would need to commit to the [Regional Office] proceedings.

Id. (footnotes omitted).

[14] We emphasize, as the district court did, that Congress purposefully designed a non-adversarial system of benefits

administration. *See Walters*, 473 U.S. at 323-24 (VA matters should be kept "as informal and nonadversarial as possible"); *see also Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588-89 (9th Cir. 1992) ("[I]n passing the [V]JRA Congress reaffirmed the government's interest [in an informal benefits administration system] . . . ."). This is particularly true as it pertains to the retention of counsel during the initial claim phase, which the Supreme Court found "would seriously frustrate the oft-repeated congressional purpose" to maintain the non-adversarial bent of benefits administration. *Walters*, 473 U.S. at 323. Although VCS challenges more procedural restrictions than just the lack of an attorney at the Regional Office stage, the Supreme Court's analysis in *Walters* compels a similar outcome. Subpoena power, discovery, pre-decision hearings, and the presence of paid attorneys would transform the VA's system of benefits administration into an adversarial system that would tend to reflect the rigorous system of civil litigation that Congress quite plainly intended to preclude. The choice between a vigorously adversarial system and a less adversarial one reflects serious policy considerations and is a permissible one. Congress must be afforded "considerable leeway to formulate" additional processes and procedures to cure deficiencies in the VA's administration of benefits "without being forced to conform to a rigid constitutional code of procedural necessities." *Walters*, 473 U.S. at 326. Because VCS cannot overcome the paramount interest Congress has in preserving a non-adversarial system of veterans' benefits administration, we affirm the district court's ruling.

IV. CONCLUSION

VCS's complaint sounds a plaintive cry for help, but it has been misdirected to us. As much as we may wish for expeditious improvement in the way the VA handles mental health care and service-related disability compensation, we cannot exceed our jurisdiction to accomplish it. The Constitution "protects us from our own best intentions" by "divid[ing]

power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). There can be no doubt that securing exemplary care for our nation's veterans is a moral imperative. But Congress and the President are in far better position "to care for him who shall have borne the battle, and for his widow and his orphan." Abraham Lincoln, President of the United States of America, Second Inaugural Address (Mar. 4, 1865), *available at* http://www.loc.gov/rr/program/bib/ourdocs/Lincoln2nd.html. We would work counter to the political branches' own efforts by undertaking the type of institutional reform that VCS requests. Such responsibilities are left to Congress and the Executive, and to those specific federal courts charged with reviewing their actions; that is the overriding message of the VJRA, and it is one that we must respect here.

We conclude that the district court lacks jurisdiction to reach VCS's statutory and due process challenges to the alleged delays in the provision of mental health care and to the absence of procedures to challenge such delays. We likewise conclude that the district court lacks jurisdiction to reach VCS's claims related to delays in the adjudication of service-related disability benefits. We conclude that the district court has jurisdiction to consider VCS's challenges to the alleged inadequacy of the procedures at the Regional Office level, and properly exercised that jurisdiction to deny VCS's claim on the merits.[28]

AFFIRMED in part, REVERSED in part, and

[28]VCS contends that the district court erred in refusing to compel discovery of additional instances of suicide incident briefs (some of which had already been produced) and refusing to compel a response to an interrogatory seeking the average number of days PTSD claims take at the Regional Office level. But because we have disposed of VCS's claims, we do not reach VCS's challenge to the district court's discovery rulings.

REMANDED with instructions to DISMISS. The panel opinion, *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), is hereby VACATED and shall not be cited as precedent by or to any court of the Ninth Circuit. Costs on appeal awarded to Defendants-Appellees.

SCHROEDER, Senior Circuit Judge, dissenting:

> "Let me see if I've got this straight: in order to be grounded, I've got to be crazy and I must be crazy to keep flying. But if I ask to be grounded, that means I'm not crazy any more and I have to keep flying." *Catch-22* (Paramount Pictures 1970), *adaptation of the novel by* Joseph Heller (1961).

I agree with the majority's holding that the district court had jurisdiction to consider the claim brought by the plaintiff-veterans organizations that the procedures used in the handling of the initial filing of benefits claims are inadequate. I further agree with affirming the denial of that claim on the merits, because what Plaintiffs seek is inconsistent with the congressional purpose of simplified, nonadversarial proceedings. *See Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305 (1985).

Because I agree with the majority's holding that there is jurisdiction to consider that claim of inadequate procedures, however, I am confounded by the majority's holding that the district court lacked jurisdiction to consider claims that other procedural inadequacies are causing intolerable systemic delays in the VA's processing of benefits claims and in providing mental health services. While review of substantive benefits decisions is, of course, limited to the Court of Appeals for Veterans Claims (the "Court of Veterans Appeals") and the Federal Circuit under 38 U.S.C. § 511, the

claims of systemic delay do not, in my view, require any review of the VA's actual benefits decisions.

The majority thus leaves millions of veterans—present, past, and future—without any available redress for claims that they face years of delay in having their rights to hard-earned benefits determined. No one could think this is just or what Congress intended.

The language and history of § 511 demonstrate instead to me that Congress did not leave veterans without any forum to challenge the way the system is operating. The district court should be able to hear a systemic challenge, because § 511 does not pertain to such a challenge. Section 511 is about actual benefits decisions. It refers to "questions of law and fact necessary to a decision by the Secretary." It then provides that the "decision of the Secretary as to any such question" shall be subject only to review by the veterans courts and Federal Circuit. *See* 38 U.S.C. §§ 7104(a), 7252(a), 7266(a), 7292(a). The purpose of the administrative veterans courts is to decide whether individual veterans are entitled to benefits. The statute therefore must be referring to an actual decision by the Secretary granting or denying benefits.

This is apparent from Congress' use of the term "decision" in the provision that requires the Secretary to give a claimant notice "of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant." 38 U.S.C. § 5104(a). This must mean a decision granting or denying benefits. It cannot include a decision to delay making a decision. Yet that is the senseless majority conclusion. *See* slip op. at 4846, 4853 n. 20.

Plaintiffs do not challenge any "decision of the Secretary." Plaintiffs seek injunctive relief affecting the procedures that the Regional Offices, the Board of Veterans Appeals, and the Court of Veterans Appeals utilize to process and decide claims. The complaint alleges a denial of due process because

allegedly unreasonable delays deprive Plaintiffs' members of property, i.e. benefits, without due process of law. Such a claim can be established by showing that there is a risk of wrongful deprivation. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Accordingly, I conclude the district court had jurisdiction to consider all of the claims alleged in Plaintiffs' complaint.

The fundamental flaw in the majority's reasoning is its mistaken assumption that adjudication of Plaintiffs' systemic delay claims requires individualized examination of actual benefits determinations. Plaintiffs' concern is not with the substance of any benefits decision. Their concern is with process. Courts have routinely considered claims that excessive delay has resulted in a denial of due process. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (delay of administrative hearing would at some point become a constitutional violation); *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) (length of delay important factor); *Kraebel v. NYC Dep't of Housing Pres. and Dev.*, 959 F.2d 395, 405 (2d Cir. 1992); *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991) ("Justice delayed is justice denied, the saying goes: and at some point delay must ripen into deprivation, because otherwise a suit alleging deprivation would be forever premature"); *Coe v. Thurman*, 922 F.2d 528, 530-31 (9th Cir. 1990) (delay in state appeal); *Rodrigues v. Donovan*, 769 F.2d 1344, 1348-49 (9th Cir. 1985); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 490-91 (3d Cir. 1980) (four year delay in reviewing disability application). Indeed, the district court did decide the merits of Plaintiffs' claim of unreasonable delay in the VA's provision of mental health services, and a majority of the three-judge panel held it should have fashioned some relief. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 878 (9th Cir. 2011).

There may be sound reasons for courts to be wary of intruding too much on the day-to-day operation of the executive branch. *See Heckler v. Day*, 467 U.S. 104 (1984). But § 511 should not be an absolute bar to district court jurisdic-

tion for claims of due process denials on account of systemic delay. The principle which the majority announces for its contrary holding is that because of § 511, veterans cannot bring any constitutional challenge in district court that might affect a benefits decision, including the way it is processed. The case law does not support that principle.

The case law, as I understand it, reflects a clear delineation between claims that represent direct or indirect challenges to actual benefits decisions, and for which district court jurisdiction is lacking, and claims that would have no effect on the substance of any actual benefit award, and thus where § 511 is no bar. In the Ninth Circuit, our decisions in *Chinnock v. Turnage*, 995 F.2d 889 (9th Cir. 1993), and *Hicks v. Small*, 69 F.3d 967 (9th Cir. 1995), represent direct and indirect challenges to actual benefits decisions, where we properly found that district court jurisdiction was lacking. In *Chinnock*, the plaintiff-veteran brought a direct challenge in district court to the denial of his benefits by asking that court to review the VA's interpretation of a regulation that resulted in the denial. 995 F.2d at 890. We held the district court lacked jurisdiction. *Id.* In *Hicks*, the plaintiff filed a *Bivens* action in district court against a VA doctor for conduct that allegedly reduced his benefits, and we held this was also a challenge, albeit indirect, to the denial of benefits. 69 F.3d at 968-70. In contrast, we have held that a veteran can sue in district court for tort claims unrelated to his benefits determination. *See Littlejohn v. United States*, 321 F.3d 915 (9th Cir. 2003). In *Littlejohn*, the plaintiff brought a Federal Tort Claims Act ("FTCA") action against VA doctors for negligence. *Id.* at 918. We held there was jurisdiction because adjudication of the tort claim would have no effect on his benefits award. *Id.* at 921.

The decisions of other circuits are in accord. In *Weaver v. United States*, 98 F.3d 518, 520 (10th Cir. 1996), the Tenth Circuit held that where the veteran tried to sue the VA for conspiracy and fraud in concealing records that resulted in a denial of benefits, the district court lacked jurisdiction. Like

our decision in *Hicks*, *Weaver* reflected an indirect challenge to the denial of benefits. The Eighth Circuit in *In re Russell*, 155 F.3d 1012 (8th Cir. 1998) (per curiam), refused to issue a writ of mandamus to require the VA courts to act on a request for benefits pending in the Court of Veterans Appeals. Relying on *Beamon v. Brown*, 125 F.3d 965, 974 (6th Cir. 1997), the *Russell* court reasoned that under the Veterans Judicial Review Act and the All Writs Act, only the Court of Veterans Appeals and Federal Circuit had the power to require the VA to act with respect to a particular claim for benefits. 155 F.3d at 1012-13.

Beamon is relied upon by the majority to support its holding, but *Beamon* is, in fact, consistent with my understanding of the cases. *Beamon* concerned a claim in the district court for injunctive relief by plaintiffs who were pursuing their individual claims for benefits in the VA administrative courts. 125 F.3d at 966. The Sixth Circuit held that under § 511, the plaintiffs' avenue of relief from the delay in each of their cases was to seek a writ of mandamus from the Court of Veterans Appeals pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Beamon*, 125 F.3d at 968-70. The Sixth Circuit, however, did not view the plaintiffs' allegations to be a systemic due process challenge similar to the one before us. It characterized the plaintiffs' "bare allegations" of procedural delays as being "closer to challenges to individual benefit decisions than a constitutional" attack on VA procedures. *Id.* at 973 n.5. That is why I believe it does not support the majority's conclusion that Plaintiffs here cannot sue for the systemic denial of due process. As the majority does recognize, slip op. at 4862-63, the plaintiffs in *Beamon* were individuals whose interests were primarily personal and not, as here, organizations whose concerns must reflect the operation of the system in all cases. Thus although the majority attempts to draw from the cases a rule that any claim concerning the VA's conduct during benefits proceedings is outside the jurisdiction of the district court, the cases actually establish only that challenges to particular benefits decisions cannot be

brought in district court and must be brought in the VA administrative courts.

The federal courts have, in fact, repeatedly entertained challenges to statutes or procedures affecting the conduct of VA claims adjudication. The Second Circuit in *Disabled American Veterans v. U.S. Department of Veterans Affairs*, 962 F.2d 136, 137-38 (2d Cir. 1992), considered an equal protection challenge to a statute that eliminated the availability of veterans' family benefits in certain circumstances. The Second Circuit held there was jurisdiction to consider the equal protection challenge, because consideration of such a constitutional claim did not involve review of any individual benefits determination. *Id.* at 140-41; *see also Larrabee ex rel. Jones*, 968 F.2d 1497, 1501 (2d Cir. 1992) (rejecting a challenge of inadequate care and noting that "district courts continue to have jurisdiction to hear *facial* challenges of legislation affecting veterans' benefits" (internal quotation marks and citation omitted) (emphasis in original)); *Zuspann v. Brown*, 60 F.3d 1156, 1159 (5th Cir. 1995) (district court would have jurisdiction over a facial challenge to an act of Congress).

Applying a similar principle, the D.C. Circuit in *Broudy v. Mather*, 460 F.3d 106, 108, 115 (D.C. Cir. 2006), held the district court had jurisdiction to consider claims of veterans who contended VA officials denied them their constitutional right of meaningful access to administrative proceedings. The veterans alleged the VA withheld accurate information about their exposure to radiation and thereby rendered access to VA administrative proceedings meaningless. *Id.* at 108-11. Jurisdiction existed because the case was "not about whether they should have received Government compensation for their sickness," but whether they were denied meaningful access to administrative proceedings before the VA. *Id.* at 108.

The D.C. Circuit's decision in *Broudy* is particularly instructive here, because the court there reviewed its prior

decisions in *Price v. United States*, 228 F.3d 420 (D.C. Cir. 2000) (per curiam), and *Thomas v. Principi*, 394 F.3d 970 (D.C. Cir. 2005). These are decisions on which the majority here relies in concluding that § 511 has nearly universal sweep. Yet, as *Broudy* recognized, those cases actually concern attempts to second guess actual benefits determinations. *See* 460 F.3d at 114-15.

In *Price*, an individual veteran filed a complaint in the district court alleging that the VA wrongfully failed to reimburse him for certain medical expenses. 228 F.3d at 421. The D.C. Circuit held that even construing his complaint as alleging a federal tort claim for intentional or negligent failure to pay medical bills, the district court lacked jurisdiction because the plaintiff was indirectly seeking review of his benefits determination. *Id.* at 422. This was because "a necessary predicate of [the plaintiff's] claim [was] a determination that the [VA] acted in bad faith." *Id.* Since determining whether the VA acted in bad faith, or was negligent, would require the district court to determine first whether the VA acted properly in handling Price's request for reimbursement, i.e. awarded proper benefits, judicial review was foreclosed by § 511(a). *Id.* The court explained that "the district court lacked jurisdiction to consider [the plaintiff's] federal claim because the underlying claim [was] an allegation that the VA unjustifiably denied him a veterans' benefit." *Id.* at 421.

Similarly, in *Thomas*, the VA had denied an individual veteran's claim for benefits, and the plaintiff-veteran filed a federal tort claim in district court. 394 F.3d at 972. He alleged claims that the VA committed medical malpractice by failing to inform him that he had a mental illness and in failing to provide him with medical services appropriate for his condition. *Id.* The court, following *Price*, held that only those allegations that the VA deprived him of medical care were barred by § 511, because review of such claims would require the "district court to determine first whether the VA acted properly in providing Thomas benefits." *Id.* at 974-75 (quoting

Price, 228 F.3d at 422). The court held it did have jurisdiction over the claims alleging failure-to-inform, because they did not involve reviewing any issues decided by the VA in the benefits determination. *Id.* The *Price* and *Thomas* cases therefore do not support the majority.

The D.C. Circuit in *Broudy* later summed it up when it said that district courts "have jurisdiction to consider questions arising under laws that affect the provision of benefits so long as the Secretary has not actually decided them in the course of a benefits proceeding." 460 F.3d at 114. *Broudy* expressly rejected the government's argument (that had been premised on a phrase used in *Price* and quoted in *Thomas*) that § 511 barred any district court consideration of procedural matters relating to the conduct of benefits proceedings. *Id.* at 114-15. The relevant phrase in those cases described § 511's preclusive scope as encompassing "whether the VA 'acted properly' in handling" the veterans claims for benefits. *Id.* at 115. The Government had contended that the phrase "acted properly" meant that the district court lacked jurisdiction to consider any suit that challenged any aspect of the handling of claims, including procedures. *Id.* at 114-15.

The D.C. Circuit in *Broudy* went to some pains to make it clear that the district court lacked jurisdiction to review only the "actual decisions" denying benefits. The court said:

> Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits. Rather, it simply gives the VA authority to consider such questions when making a decision about benefits, . . . and, more importantly for the question of our jurisdiction, prevents district courts from reviewing the Secretary's decision once made . . . .

Broudy, 460 F.3d at 112 (internal quotation marks and citations omitted) (emphasis in original). The D.C. Circuit has since confirmed this narrow interpretation of § 511's bar. *See Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 (D.C. Cir. 2010) (noting that in *Broudy*, it deemed "that only questions '*explicitly* considered' by the Secretary [in making a benefits determination] would be barred by § 511, not questions he could be 'deemed to have decided' or, presumably, implicitly decided" (emphasis in the original)).

The upshot of the majority's holding with respect to the claims of systemic delay is that veterans have no place to go to adjudicate such claims. The majority may believe that there is an adequate remedy for unreasonable delay by means of individual mandamus proceedings in the Court of Veterans Appeals or the Federal Circuit to require the VA administrative courts to act more promptly. Slip op. at 4850-51 n. 18, 4857-58. Yet such an extraordinary writ is rarely granted. *See Erspamer v. Derwinski*, 1 Vet. App. 3, 9-11 (1990) (declining to issue the writ even after concluding that a delay of ten years for benefits was unreasonable). The writ is not binding in any case other than the case in question, see *Star Editorial, Inc. v. United States Dist. Court*, 7 F.3d 856, 859 (9th Cir. 1993) (reasoning that whether to grant the writ is based on the facts of the individual case), and thus would have no affect on the procedures that apply to the millions of potential claims represented by these Plaintiffs.

The majority's position appears to rest principally upon another aspect of the D.C. Circuit's opinion in *Vietnam Veterans of America*. The plaintiffs in that case framed their attack on the appeals process as an attack on "average" delay, rather than on delay in the handling of any particular case. *Vietnam Veterans of Am.*, 599 F.3d at 661-62. The court held that since no plaintiff could show an injury caused by "average" delay, the plaintiffs lacked standing to assert the claim. *Id.* at 662. The court did not discuss whether the plaintiffs might use past evidence of aggregate delay to demonstrate a risk of a wrong-

ful deprivation of property in the future. *See Mathews*, 424 U.S. at 335.

Vietnam Veterans focused on the causal relationship of the harm alleged in the complaint, "average delay," to the actual harm suffered by individuals. 599 F.3d at 661-62. The court concluded there was no causal nexus sufficient to confer standing. *Id.* The majority accepts this reasoning and goes much further to conclude that any claim to remedy a systemic delay must be treated as a challenge to individual benefits determinations, hence reviewable only in the Veterans Court of Appeals and Federal Circuit, and thus condemning veterans to suffer intolerable delays inherent in the VA system.

The majority's holding thus reduces itself to a "Catch 22": To challenge delays in the system, you must bring a systemic claim and not just an individual claim. But if you bring a systemic claim, it has to be treated as an individual claim and you must suffer the delays in the system. Get it?

Disabled American Veterans v. United States Dep't of Veterans Affairs

United States Court of Appeals for the Second Circuit

March 18, 1992, Argued ; March 19, 1992, Decided ; April 13, 1992, Filed

Docket No. 92-6043

Reporter
962 F.2d 136 *; 1992 U.S. App. LEXIS 7614 **

DISABLED AMERICAN VETERANS, ET AL., Appellees, -v.- UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, Appellants.

Subsequent History: As Amended April 27, 1992.

Prior History: [1]** Appeal from an order entered February 3, 1992 in the *Southern District of New York, Shirley Wohl Kram, District Judge, 1992 U.S. Dist. LEXIS 925 (S.D.N.Y. 1992)*, granting appellees' motion for a preliminary injunction in a class action in which appellees challenge the constitutionality of § 8001 of the Omnibus Budget Reconciliation Act of 1990, 38 U.S.C. § 3205 (Supp. II 1990).

Disposition: Vacated and remanded.

Core Terms

veterans, incompetent, district court, benefits, funds, fiduciary, heirs, classification, inheritance, remote, preliminary injunction, non-dependent, spouses, equal protection of the law, disabled veteran, deprives, dependent parent, budget deficit, rational basis, underinclusive, challenges, facial, similarly situated, judicial review, merits

Case Summary

Procedural Posture
Appellant, the United States, challenged the decision of the United States District Court for the Southern District of New York, which granted appellee veterans' motion for a preliminary injunction in a class action in which appellees challenged the constitutionality of 38 U.S.C.S. §§ 3205, 8001 of the Omnibus Budget Reconciliation Act of 1990.

Overview

The court vacated holding that the trial court abused its discretion in granting a motion by appellees veterans for preliminary injunction because appellees failed to demonstrate a likelihood of success on their claim that the application of 38 U.S.C.S. § 3205 unconstitutionally deprived them of equal protection of the law. The court remanded for a determination of whether a motion by appellant, the United States, under *Fed. R. Civ. P. 12(b)(6)* should have been granted. The court held that the trial court had jurisdiction to hear the claim because appellee challenged the constitutionality of a statutory classification drawn by congress. The court concluded that § 3205 should have been scrutinized under a rational basis test, and that there was no precedent that suggested appellees had a fundamental right to the benefits. The court held that § 3205 reasonably furthered legitimate governmental objectives, such as reducing the federal deficit, preventing the inheritance of appellant's derived funds by remote or non-dependent heirs who may have had little or no contact with the veteran recipient, and did not deserve a taxpayer-funded windfall, and preventing fiduciary abuse.

Outcome
The court vacated holding that the statute reasonably furthered legitimate governmental objectives, such as reducing the federal deficit, preventing the inheritance of derived funds by remote or non-dependent heirs who may have had little or no contact with appellee veterans, and preventing fiduciary abuse. The court remanded for a determination of whether a motion to dismiss by appellant, the United States, should have been granted.

LexisNexis® Headnotes

Military & Veterans Law > Veterans > Department of Veterans Affairs

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Eligibility

HN1 **Veterans, Department of Veterans Affairs**

See 38 U.S.C.S. § 3205.

Business & Corporate Compliance > ... > Contract Formation > Capacity of Parties > Mental Capacity

Military & Veterans Law > Veterans > Claim Procedures

Military & Veterans Law > Veterans > Department of Veterans Affairs

HN2 **Capacity of Parties, Mental Capacity**

Department of Veterans Affairs' regulations define "incompetent" as a person who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation. *38 C.F.R. § 3.353 (1991)*.

Military & Veterans Law > Veterans > Department of Veterans Affairs

Military & Veterans Law > Veterans > General Benefits > General Overview

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Eligibility

HN3 **Veterans, Department of Veterans Affairs**

38 U.S.C.S. § 3205(b) provides that, if veterans denied benefits subsequently are rated competent for a period of at least 90 days, they are entitled to payment of a lump sum in the amount denied pursuant to 38 U.S.C.S. § 3205(a). 38 U.S.C.S § 3205 overlays 38 U.S.C.S. § 3203(b)(1)(A), which terminates compensation to mentally incompetent disabled veterans who live in publicly funded institutions at public expense.

Military & Veterans Law > Veterans > Claim Procedures

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Eligibility

Military & Veterans Law > Veterans > Department of Veterans Affairs

HN4 **Veterans, Claim Procedures**

See 38 U.S.C.S § 211(a)(1).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN5 **Standards of Review, Abuse of Discretion**

The appellate court reviews the district court's grant of the preliminary injunction under the abuse of discretion standard, but it reviews de novo the district court's conclusions of law in connection with its issuance of the

preliminary injunction.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Constitutional Law > The Judiciary > General Overview

Governments > Federal Government > US Congress

HN6[] Jurisdiction, Jurisdictional Sources

United States' district courts possess only that jurisdiction which has been conferred on them by the U.S. Congress. The U.S. Const. art. III district courts have power to rule on the constitutionality of acts of Congress.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

HN7[] Jurisdiction, Jurisdictional Sources

38 U.S.C.S. § 211(a)(2)(D) deprives the district court of judicial review over any decision of the secretary under a law that affects the provision of benefits by the secretary. Review of such decisions by the secretary is reserved to U.S. Court of Veterans' Appeals. 38 U.S.C.S. § 211(a)(2)(D).

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN8[] Fundamental Rights, Procedural Due Process

The due process clause of *U.S. Const. amend V* embodies equal protection principles. The guarantee of equal protection of the law directs that all persons in similar circumstances shall be treated alike. Congress cannot legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. The type of classification drawn by the legislature determines the appropriate level of judicial scrutiny.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN9[] Judicial Review, Standards of Review

When the U.S. Congress legislates in the area of economics and social welfare, review by the courts generally is limited to determining whether there is a rational basis for the classifications drawn. Strict scrutiny is required where the classification drawn impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.

Business & Corporate Compliance > ... > Discrimination > Disability Discrimination > Federal & State Interrelationships

Constitutional Law > Equal Protection > National Origin & Race

Immigration Law > Duties & Rights of Noncitizens > Protection Against Discrimination

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN10[] Disability Discrimination, Federal & State Interrelationships

Suspect classifications are those drawn on the basis of race, alienage, or national origin, or which discriminate against a group saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Constitutional Law > Elections, Terms & Voting > Gender & Sex Voting Restrictions

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN11 **Elections, Terms & Voting, Gender & Sex Voting Restrictions**

Certain personal rights that are not specifically protected by the U.S. Constitution are fundamental such as the constitutional underpinnings of the right to equal treatment in the voting process, even though the right to vote, per se, is not a constitutionally protected right. The right to vote is fundamental because its free and unimpaired exercise is preservative of other basic civil and political rights.

Constitutional Law > Equal Protection > Parentage

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN12 **Equal Protection, Parentage**

An intermediate level of scrutiny is used in determining whether legislation violates the guarantee of equal protection of the law. Intermediate scrutiny, which requires that the statutory classification be substantially related to an important governmental objective, generally has been applied only where the classification drawn by a statute is based on sex or illegitimacy.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN13 **Equal Protection, Nature & Scope of Protection**

A legislative enactment such as 38 U.S.C.S. § 3205 fails the rational basis test if the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that one can only conclude that the legislature's actions were irrational. Legislation in the area of social welfare does not violate the *equal protection clause* merely because the classification made is imperfect. If the classification has some reasonable basis, it does not offend the U.S. Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. It is the responsibility of Congress, not the courts, to determine how public funds should be spent and how they should be raised.

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > General Overview

Military & Veterans Law > Veterans > Department of Veterans Affairs

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Eligibility

HN14 **Will Contests, Testamentary Capacity**

A veteran rated "incompetent" by the Department of Veterans' Affairs lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation. *38 C.F.R. § 3.353*.

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RONALD S. HAMBURG, Arlington, VA., submitted a brief, for amici curiae National Alliance for the Mentally Ill, et al.

Judges: Before: TIMBERS, MESKILL, and PRATT, Circuit Judges.

Opinion by: TIMBERS

Opinion

[*137] TIMBERS, Circuit Judge:

Appellant United States Department of Veterans Affairs (VA) appeals from an order **[**2]** entered February 3, 1992 in the Southern District of New York, Shirley Wohl Kram, *District Judge, 1992 U.S. Dist. LEXIS 925 (S.D.N.Y. 1992)*, granting a motion by appellees Disabled American Veterans, et al. (Veterans) for a preliminary injunction preliminarily enjoining the VA from applying or enforcing Section 8001 of the Omnibus Budget Reconciliation Act of 1990, 38 U.S.C § 3205 (Supp. II 1990), and denying the VA's motion to dismiss. (Section 3205, as well as other sections of Title 38, recently were recodified by Pub. L. No. 102-40, Title IV, § 402(b)(1), 105 Stat. 187, 238 (May 7, 1991). Section 3205 is now *38 U.S.C. § 5505*. For clarity, all references to sections of Title 38 will be to their old section numbers.)

HN1[] Section 3205, which became effective on November 1, 1990 and expires on September 30, 1992, provides:

"In any case in which a veteran having neither spouse, child, nor dependent parent is rated by the Secretary in accordance with regulations as being incompetent and the value of the veteran's estate (excluding the value of the veteran's home) exceeds $ 25,000, further payment of compensation to which the veteran would otherwise be entitled may **[**3]** not be **[*138]** made until the value of such estate is reduced to less than $ 10,000."

The Veterans contend that § 3205 is facially unconstitutional in that it denies them equal protection of the law and due process of law in violation of the *Fifth Amendment of the United States Constitution*. The VA asserts that the district court lacked subject matter jurisdiction and that the Veterans failed to state a claim upon which relief might be granted. The court held that it had jurisdiction to entertain the Veterans' action, and that the Veterans had demonstrated sufficient risk of irreparable harm and likelihood of success on the merits of their equal protection claim so that their motion for a preliminary injunction should be granted.

On appeal, the VA contends (1) that the district court lacked jurisdiction over the subject matter of this action; and (2) that § 3205 reflects a rational exercise of the legislative powers of Congress and therefore does not violate the Veterans' constitutional right to equal protection of the law.

For the reasons that follow, we vacated, by a separate order entered March 19, 1992, the preliminary injunction enjoining application and enforcement of § 3205.

I.

We shall **[**4]** summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Section 3205(a) suspends payment of compensation benefits to veterans who (1) have no spouse, child or dependent parent; (2) have estates (excluding the veteran's home) valued in excess of $ 25,000; and (3) are rated incompetent by the Secretary of the VA in accordance with VA regulations, until the value of such veterans' estates is reduced to less than $ 10,000. ***HN2***[] VA regulations define "incompetent" as a person who "because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation." *38 C.F.R. § 3.353 (1991)*. ***HN3***[] Section 3205(b) provides that, if veterans denied benefits subsequently are rated competent for a period of at least 90 days, they are entitled to payment of a lump sum in the amount denied pursuant to § 3205(a). Section 3205 overlays § 3203(b)(1)(A), which terminates compensation to mentally incompetent disabled veterans who live in publicly funded institutions at public expense.

Section 3205 was enacted partly as a means of reducing the federal budget deficit and partly **[**5]** due to concerns that VA benefits were "enriching distant relatives who may have had very little to do with the veteran and were not affected by his service to the United States." (September 1980 letter from the Chairman of the House Committee on Veterans' Affairs requesting an audit by the Comptroller General). The General Accounting Office (GAO) conducted an audit and found that an estimated $ 541 million in VA-derived funds in incompetent veterans' estates would be inherited by heirs other than spouses, children, or dependent parents. The GAO recommended that Congress enact legislation barring the inheritance of VA-derived funds by individuals other than veterans' surviving spouses, children, or dependent parents. Although such legislation was introduced by the

Chairman of the House Committee on Veterans' Affairs in March 1982, it was not enacted into law.

In 1987, the VA's Office of Inspector General (OIG) completed an audit of estates maintained for incompetent veterans in four of the VA's fifty-eight regions in order "to assess the need for program changes to minimize inheritance of VA-derived funds by remote heirs." The OIG estimated that some $ 648 million in assets derived **[**6]** from such veterans' VA compensation benefits were under the control of fiduciaries who control the estates of a vast majority of mentally incompetent veterans receiving compensation benefits. Fiduciaries typically receive a fee for their services based on a small percentage of the income to, or value of, a veteran's estate. The OIG found that upon the death of these veterans, their assets largely would be distributed under the laws of the various states which permit inheritance by remote heirs. In order to minimize the inheritance **[*139]** of VA-derived funds by remote heirs, the OIG recommended legislation that would reduce the amount of available assets under the direct control of incompetent veterans' fiduciaries.

The OIG also stated that "in addition to reducing funds in veterans' estates subject to inheritance by remote heirs, the recommended legislative change would reduce funds subject to misappropriation by fiduciaries." In support of its statement, the OIG reported that between 1983 and 1987 it had investigated 112 cases, involving funds totalling $ 1.4 million, where fiduciaries either had misused or stolen the veterans' funds.

In considering the Veterans' motion for a preliminary **[**7]** injunction, the district court assumed that rational basis scrutiny applied to the Veterans' equal protection claim. The district court stated, however, that it reserved judgment on the Veterans' contention, to be made on their motion for summary judgment, that some heightened form of scrutiny is appropriate.

Before reaching the merits of the Veterans' application for a preliminary injunction, the district court addressed the VA's assertion that the district court lacked subject matter jurisdiction. The VA contended that 38 U.S.C. § 211(a) (1988), as recently amended, when read in *pari materia* with 38 U.S.C. §§ 4061 and 4092 (1988), vests exclusive jurisdiction over this controversy in the newly-created U.S. Court of Veterans' Appeals (COVA). Section 211(a) provides in pertinent part:

HN4[↑] "(1) The [Secretary of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the [Secretary] under a law that affects the provision of benefits by the [Secretary] to veterans or the dependents or survivors of veterans. . . . The decision of the [Secretary] as to any such question shall be final and conclusive and may not be reviewed by any other official or any **[**8]** other court. . . ."

The district court held that the plain language of § 211(a) indicates that, while it precludes judicial review of decisions of the Secretary, it does not preclude judicial review of facial challenges to federal legislation affecting veterans' benefits such as those asserted by the Veterans in this action. Moreover, the court held that §§ 4061 and 4092, which provide the COVA and the Court of Appeals for the Federal Circuit with "exclusive jurisdiction" over decisions of the Board of Veterans' Appeals and empower the COVA to "decide all relevant questions of law, [and] interpret constitutional, statutory, and regulatory provisions. . . ." do not extend to the COVA *exclusive* jurisdiction to decide facial constitutional challenges to legislation affecting veterans. The district court therefore proceeded to address the merits of the Veterans' claims that § 3205 deprives them of equal protection of the law.

The court, observing that the legislative history of § 3205 is limited, identified its legitimate legislative objectives as (1) reducing the federal budget deficit; and (2) preventing non-dependent and/or remote heirs of disabled veterans from inheriting VA-funded **[**9]** estates from such veterans. The court rejected the VA's contention that there is a further purpose served by § 3205--namely, preventing misconduct by incompetent veterans' fiduciaries--since it held that "there is no evidence that this was a legislative purpose ever proffered, debated or considered by Congress," and, even if the prevention of fiduciary misconduct were an objective of the legislation, "there is at best anecdotal evidence of a statistically negligible number of *investigations* of fiduciary misconduct which does not . . . provide a rational basis for the classification drawn by Section 3205." (emphasis in original).

The court recognized that the ultimate goal of the Omnibus Budget Reconciliation Act of 1990 was reduction of the federal budget deficit. The court held, however, that, because § 3205 targets 13,500 incompetent veterans out of a total of 2.2 million disabled veterans receiving compensation, and will result in a projected savings of only approximately $ 125 million in fiscal 1991 (or about 1% of the $ 10.7 billion spent on compensation to disabled veterans), § 3205 will have only a small impact on **[*140]** achieving the

deficit reduction goal. The court stated that **[**10]** "such underinclusiveness is a strong indication that the classification violates equal protection."

The court also held that, because § 3205 targets 13,500 disabled veterans with no immediate dependents (spouses, minor children, or dependent parents), while leaving undisturbed at least 263,000 (and perhaps as many as 611,700) similarly situated *competent* disabled veterans, § 3205 is "patently underinclusive" since the statute can achieve only in a small way, if at all, the objective of reducing the incidence of inheritance of VA funds by non-dependent heirs.

Moreover, the court held that neither of the reports relied upon by the VA (those of the OIG and GAO, discussed above) "provide a basis for distinguishing the incompetent veterans, who were the subject of the reports, from similarly situated competent veterans *who were not studied*." (emphasis in original). Finally, the court held that the record "contains no evidence that incompetence is relevant to achieving Congress' objective"; that there was no rational basis for the assumption that the estates of mentally incompetent disabled veterans are more likely to be inherited by remote heirs than are the estates of competent **[**11]** veterans, since incompetency is not the equivalent of lacking testamentary capacity; and incompetent veterans therefore are not necessarily incapable of having or executing wills.

Since the court determined that there is no rational basis for treating incompetent veterans who have no dependents and who possess estates valued in excess of $ 25,000 differently than similarly situated competent veterans, it held that appellees had made a strong showing of success on their claim that § 3205 violates their right to equal protection of the law. The court also concluded that appellees had made a strong showing of irreparable harm because (1) deprivation of a constitutional right in itself is irreparable harm, and (2) they faced the imminent loss of fiduciary services as a result of their diminished VA benefits.

The court therefore granted appellees' motion for a preliminary injunction enjoining the VA from enforcing or applying § 3205, and denied the VA's motion to dismiss. This appeal followed.

II.

Before turning to the merits, we set forth our standard of review. ***HN5***[⬆] We review the district court's grant of the preliminary injunction under the abuse of discretion standard, *Fireman's Fund Ins. Co. v. Leslie & Elliott Co., 867 F.2d 150, 150-51* (2 Cir. 1989); **[**12]** but we review *de novo* the district court's conclusions of law in connection with its issuance of the preliminary injunction. *Guaranty Fin. Services, Inc. v. Ryan, 928 F.2d 994, 998* (11 Cir. 1991).

III.

With the foregoing in mind, we turn first to the VA's contention that 38 U.S.C § 211(a) deprives the district court of subject matter jurisdiction over this action. We agree with the district court that § 211(a) does not deprive it of jurisdiction to hear facial challenges of legislation affecting veterans' benefits.

While it is well established that ***HN6***[⬆] the district courts possess only that jurisdiction which has been conferred on them by Congress, *Finley v. United States, 490 U.S. 545, 548, 104 L. Ed. 2d 593, 109 S. Ct. 2003 (1989)*, it also is clear that the Article III district courts have power to rule on the constitutionality of acts of Congress. *Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875, 890* (3 Cir. 1986), *cert. dismissed, 488 U.S. 918, 109 S. Ct. 297, 102 L. Ed. 2d 264 (1988)*. The VA contention that, pursuant to the Veterans' Judicial Review Act of 1988 (which amended § 211(a)), Congress vested exclusive jurisdiction in the COVA over constitutional challenges **[**13]** to federal statutes affecting veterans' benefits, implicates issues of constitutional separation of powers. *Mistretta v. United States, 488 U.S. 361, 382-83, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)* (court must exercise vigilance to ensure that no provision of law threatens the integrity of the judicial branch); *Johnson v. Robison, 415 U.S. 361, 366, 39 L. Ed. 2d 389, 94 S. Ct. 1160 (1974)*. The district court, cognizant of the principle that courts should "avoid an interpretation of a federal statute that engenders **[*141]** constitutional issues if a reasonable alternative interpretation poses no constitutional question," *Gomez v. United States, 490 U.S. 858, 864, 104 L. Ed. 2d 923, 109 S. Ct. 2237 (1989)*, determined that there was such a reasonable alternative here: § 211(a) could be literally construed to exclude judicial review only of "decisions by the Secretary," and not of facial constitutional challenges. *Robison, supra, 415 U.S. at 366-74* (holding that prior version of the statute did not preclude judicial review of action challenging the constitutionality of veterans' benefits legislation).

As amended by the 1988 Act, ***HN7***[⬆] § 211(a) deprives the district court of judicial review over any "decision of the [Secretary] **[**14]** under a law that affects the provision of benefits by the [Secretary]. . . ."

Review of such decisions by the Secretary is reserved to COVA. 38 U.S.C. § 211(a)(2)(D). Here, since the Veterans neither make a claim for benefits nor challenge the denial of such a claim, but rather challenge the constitutionality of a statutory classification drawn by Congress, the district court had jurisdiction to consider their claim.

IV.

We turn next to the Veterans' contention that § 3205 deprives them of equal protection of the law. The district court held that the Veterans had demonstrated sufficient likelihood of success on their equal protection claim to warrant preliminarily enjoining the VA from applying or enforcing that provision of the statute. We disagree.

(A)

It is well established that ***HN8***[⬆] the *due process clause of the Fifth Amendment* embodies equal protection principles. *Mathews v. De Castro, 429 U.S. 181, 182, 50 L. Ed. 2d 389, 97 S. Ct. 431 n.1 (1976)*; *Weinberger v. Salfi, 422 U.S. 749, 768-70, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975)*; *Bowen v. Owens, 476 U.S. 340, 341, 90 L. Ed. 2d 316, 106 S. Ct. 1881 (1986)*; *Bolling v. Sharpe, 347 U.S. 497, 499, 98 L. Ed. 884, 74 S. Ct. 693 (1954)*. The guarantee of equal protection of the law "directs **[**15]** that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)* (quoting *F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560 (1920)*); *Cleburne v. Cleburne Living Center Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)*. Congress cannot "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Eisenstadt v. Baird, 405 U.S. 438, 447, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972)* (citation omitted). Under the equal protection analysis developed by the Supreme Court, the type of classification drawn by the legislature determines the appropriate level of judicial scrutiny. *Clark v. Jeter, 486 U.S. 456, 461, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988)*. Here, the district court assumed, without deciding, that § 3205 should be scrutinized under the rational basis test. We hold that the rational basis standard governs our review of the constitutionality of § 3205.

HN9[⬆] When Congress legislates in the area of economics and social welfare, review by the courts generally is limited to determining whether there is a rational basis **[**16]** for the classifications drawn. *Bowen v. Owens, supra, 476 U.S. at 345*; *Cleburne, supra, 473 U.S. at 440*; *Mathews, supra, 429 U.S. at 185*. Strict scrutiny is required where the classification drawn "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976)* (footnotes omitted). Neither of those circumstances is present in this case. ***HN10***[⬆] Suspect classifications are those drawn on the basis of race, alienage, or national origin, *Cleburne, supra, 473 U.S at 440*, or which discriminate against a group "'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Murgia, supra, 427 U.S. at 313* (citation omitted). Fundamental rights generally are those either explicitly or implicitly recognized in the Constitution itself. *Cleburne, supra, 473 U.S. at 440*; **[**17]** *Plyler, supra, 457 U.S. at 217 n.15*; *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973)*. The Supreme Court, to a limited extent, has recognized as fundamental ***HN11***[⬆] certain **[*142]** personal rights that are not specifically protected by the Constitution. For example, in *Rodriguez, supra, 411 U.S. 1*, the Court recognized the "constitutional underpinnings of the right to equal treatment in the voting process," *id. at 34 n.74*, even though "the right to vote, *per se,* is not a constitutionally protected right. . . .," *Id. at 35 n.78*; *see also Dunn v. Blumstein, 405 U.S. 330, 336, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972)*. The right to vote is fundamental because its free and unimpaired exercise "is preservative of other basic civil and political rights. . . .," *Reynolds v. Sims, 377 U.S. 533, 562, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964)*. While veterans obviously "deserve" the benefits they receive, we are aware of no precedent that would suggest that veterans have a fundamental right to those benefits. *Cf.* *Dandridge v. Williams, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970)* (rational basis standard applies even **[**18]** to legislation involving "the most basic economic needs of impoverished human beings").

The Supreme Court has utilized ***HN12***[⬆] an intermediate level of scrutiny in determining whether legislation violates the guarantee of equal protection of the law. Intermediate scrutiny, which requires that the statutory classification be substantially related to an important governmental objective, *Jeter, supra, 486 U.S. at 461*, generally has been applied only where the classification drawn by a statute is based on sex or

illegitimacy. *Id.;* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 459, 108 S. Ct. 2481, 101 L. Ed. 2d 399 (1988); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982). Although in Plyler, supra, 457 U.S. 202, the Court applied a heightened level of equal protection scrutiny in striking down a statute which withheld from local school districts funding for the education of children who were not legally admitted into the United States, the Court has been reluctant to extend its analysis in *Plyler* "beyond the 'unique circumstances' that provoked its 'unique confluence of theories and rationales.'" Kadrmas, supra, 487 U.S. at 459 **[**19]** (quoting *Plyler*) (citations omitted). Indeed, *Plyler* appears to draw its essence in part from *Rodriguez* and its progeny in that Plyler rests in part on the assumption that children who are denied an education will be barred forever from "any meaningful degree of individual political equality. . . ." Plyler, supra, 457 U.S. at 233 (Blackmun, J., concurring).

Since § 3205 classifies neither on the basis of sex nor illegitimacy, nor denies meaningful participation in the political process, we hold that heightened scrutiny is not appropriate in this case.

(B)

HN13[] A legislative enactment such as § 3205 fails the rational basis test if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [one] can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979). Legislation, such as this, in the area of social welfare "does not violate the Equal Protection Clause merely because the classification[] made . . . [is] imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because **[**20]** the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 55 L. Ed. 369, 31 S. Ct. 337 . 'The problems of government are practical ones and may justify, if they do not require, rough accommodations illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 57 L. Ed. 730, 33 S. Ct. 441 ." Dandridge, supra, 397 U.S. at 485. Moreover, "it is the responsibility of Congress, not the courts, to determine how public funds should be spent and how they should be raised. . . . Lines must inevitably be drawn, and it is the legislature's province to draw them." Brown v. Bowen, 905 F.2d 632, 635 (2 Cir. 1990), *cert. denied, 111 S.Ct. 979 (1991)*.

The district court held § 3205 to be irrational in large part because "the record" did not provide sufficient empirical evidence that incompetent veterans with no immediate dependents were any more likely than competent veterans with no immediate dependents to leave their VA-benefit-enhanced estates to non-dependent or remote heirs. Although the Supreme Court, **[*143]** in **[**21]** applying the rational basis test, on rare occasions has required a factual basis in "the record" for the policy assertedly underlying the statute in question, *e.g.,* Cleburne, supra, 473 U.S. 432 (Court held that record did not support zoning requirement that home for mentally retarded acquire a special permit), these departures from the near absolute deference generally accorded legislative judgments under the rational basis test appear "based on factors the Court evidently regards as in some sense 'suspect' but appears unwilling to label as such." Tribe, *American Constitutional Law* § 16-3, at 1445 (2d ed. 1988); *see also* Cleburne, supra, 473 U.S. at 459 (Marshall, J., dissenting) ("The refusal to acknowledge that something more than minimum rationality review is at work here is. . . unfortunate.") More traditional rational scrutiny does not require the sort of empirical evidence thought necessary by the district court. *E.g.,* Lyng v. Castillo, 477 U.S. 635, 91 L. Ed. 2d 527, 106 S. Ct. 2727, 643 (1986) (Court upheld classification on basis of what Congress "might have reasoned."); Bowen v. Owens, supra, 476 U.S. at 348 (Court upheld **[**22]** distinction between widowers and divorcees who outlived their spouses because the former "presumably were more likely to depend on their spouses for financial support."); Kotch v. Board of River Port Pilot Comm'rs., 330 U.S. 552, 563, 91 L. Ed. 1093, 67 S. Ct. 910 (1947) (Court sustained a law which allegedly encouraged nepotism on the ground that "the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute . . . *might* have prompted the legislature to permit . . . pilot officers to select those with whom they would serve.") (emphasis added).

There are at least three identifiable legitimate purposes that might have prompted Congress to enact § 3205. First, Congress was concerned with reducing the federal budget deficit. H.R. Rep. No. 881, at 224, *reprinted in* 1990 U.S. Code Cong. & Admin News 2228. The district court held § 3205 underinclusive because the savings projected to result from § 3205--$ 125 million in the 1991 fiscal year and $ 154 million in the 1992 fiscal year-constitute only 1% of the total compensation paid

to veterans during that time period. Moreover, the court held that "such under-inclusiveness is a strong indication that § **[**23]** 3205 violates equal protection." We disagree.

In this age of annual federal budget deficits in the vicinity of $ 400 billion, the temptation may well exist to dismiss any effort to achieve fiscal integrity as ineffectual or "underinclusive." The wiser course, in our view, is to recognize that steps to control the budget deficit, however modest in degree, nonetheless are legitimate, and perhaps necessary, objectives of the Congress and the President. *Lyng v. Automobile Workers, 485 U.S. 360, 373 (1988)*; *Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 493, 52 L. Ed. 2d 513, 97 S. Ct. 1898 (1977)*. Although the reduction of benefits often leaves some "comparably needy person outside the favored circle," line drawing is best left to the Congress. *Schweiker v. Wilson, 450 U.S. 221, 238, 67 L. Ed. 2d 186, 101 S. Ct. 1074 (1981)*; *Brown v. Bowen, supra, 905 F.2d at 635*.

Section 3205 also addressed the concern that the VA benefits of incompetent veterans who have no dependents and who have estates valued in excess of $ 25,000 were "enriching distant relatives who may have had very little to do with the veteran and were not affected by his service to the United States." **[**24]** (September 1980 letter from Chairman of the House Committee on Veterans' Affairs). The audit conducted by the GAO revealed that an estimated $ 541 million in VA-derived funds in incompetent veterans' estates would be inherited by heirs other than spouses, children, or dependent parents. The OIG found that some $ 648 million in assets derived from the benefits of incompetent veterans were under the control of fiduciaries and would be distributed under

The district court recognized that preventing inheritance by remote and/or non-dependent heirs is a legitimate governmental objective. The court concluded, however, that to the extent § 3205 was intended to reduce the incidence of inheritance by non-dependent and/or remote heirs, the section is "patently underinclusive," since **[*144]** it leaves undisturbed similarly situated competent veterans. Moreover, the court held that the reports of the GAO and OIG do not "provide a basis for distinguishing incompetent veterans who were the subject of the reports, from similarly situated competent veterans *who were not studied*." (emphasis in original). As stated above, we believe the court erred in requiring empirical evidence clearly demonstrating **[**25]** that the estates of incompetent veterans are more likely to pass to remote or non-dependent heirs who may have had very little to do with the veterans and who may have been unaffected by the veterans' military service. In our view, the classification drawn by § 3205 should be upheld if it is based on a reasonable assumption in light of the known facts. *McGowan v. Maryland, 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961)* ("A statutory discrimination will not be set aside if any state of facts *reasonably may be conceived to justify it.*") (emphasis added). By definition, ***HN14***[↑] a veteran rated "incompetent" by the VA "lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation." *38 C.F.R. § 3.353*. Although incompetency is not the equivalent of lacking testamentary capacity, Congress reasonably could have assumed that an incompetent person is less likely than a competent person to die without having executed a will or a codicil to an existing will. Congress therefore reasonably could have concluded that the VA-based assets of incompetent veterans are more likely to be left to non-dependent and/or remote heirs.

Similarly, we hold **[**26]** that the district court erred in rejecting the VA's contention that § 3205 reasonably furthers a legitimate governmental interest in preventing fiduciary abuse. The court held that "there is no evidence that this was a legislative purpose ever proffered, debated or considered by Congress," and that "there is at best anecdotal evidence" of fiduciary misconduct. The court, citing *Hancock Industries v. Schaeffer, 811 F.2d 225, 239* (3 Cir. 1987), concluded that "the trend of recent caselaw" requires that only those objectives articulated by Congress may be considered in determining whether a statute survives equal protection scrutiny. We disagree.

In *Hancock,* the court recognized that it "has no occasion to inquire into the subjective motives of the decisionmakers," and must "accept[] at face value contemporaneous declarations of the legislative purposes, or, in the absence thereof, rationales constructed after the fact, unless 'an examination of the circumstances forces [the court] to conclude that they could not have been a goal of the legislation.'" *Id. at 237* (quoting *Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463, 66 L. Ed. 2d 659, 101 S. Ct. 715 n.7 (1981))* **[**27]** (other citation and footnote omitted). Here, Congress may well have been concerned with preventing fiduciary abuse, since the OIG had reported in 1987 that it had investigated 112 cases, involving funds of $ 1.4 million, where fiduciaries had misappropriated incompetent veterans' funds.

We hold that § 3205 survives rational basis scrutiny because it reasonably furthers legitimate governmental interests in reducing the federal budget deficit, preventing the inheritance of VA-derived benefits by remote and/or non-dependent relatives who may have had very little or no contact with the recipient veteran, and limiting the incidence of fiduciary abuse. Since we hold that the Veterans failed to demonstrate a likelihood of success on the merits of their claim, it is unnecessary for us to consider whether they in fact would be irreparably harmed absent the preliminary injunction we have vacated.

V.

To summarize:

We hold that the district court properly exercised jurisdiction over the Veterans' facial constitutional challenge to § 3205. We further hold that § 3205 reasonably furthers several legitimate governmental objectives, namely, reducing the federal deficit; preventing the inheritance **[**28]** of VA derived funds by remote and/or non-dependent heirs who may have had little or no contact with the veteran recipient and are therefore undeserving of a taxpayer-funded windfall; and preventing fiduciary abuse. Since the Veterans therefore failed **[*145]** to demonstrate a likelihood of success on their claim that § 3205 unconstitutionally deprives them of equal protection of the law, we hold that the district court abused its discretion when it granted the Veterans' motion for a preliminary injunction. The order of the district court granting their motion for a preliminary injunction has been vacated. We remand the case to the district court to determine, in light of this opinion, whether the VA's motion for a *Rule 12(b)(6)* dismissal should be granted.

Vacated and remanded.

End of Document

Oct. 12, 1982, 96 Stat. 1313; Pub. L. 99–576, title VII, § 701(41), Oct. 28, 1986, 100 Stat. 3294; Pub. L. 102–54, § 14(b)(18), June 13, 1991, 105 Stat. 284; renumbered § 1974, Pub. L. 102–83, § 5(a), Aug. 6, 1991, 105 Stat. 406; Pub. L. 104–275, title IV, § 405(b)(1)(G), (2)(B), Oct. 9, 1996, 110 Stat. 3339; Pub. L. 108–183, title VII, § 708(a)(4), Dec. 16, 2003, 117 Stat. 2673.)

AMENDMENTS

2003—Subsec. (a)(5). Pub. L. 108–183 substituted ''Secretary of Homeland Security'' for ''Secretary of Transportation''.

1996—Pub. L. 104–275, § 405(b)(2)(B), substituted ''Servicemembers' Group'' for ''Servicemen's Group'' in section catchline.

Subsec. (a). Pub. L. 104–275, § 405(b)(1)(G), substituted ''Servicemembers' Group'' for ''Servicemen's Group'' in introductory provisions.

1991—Pub. L. 102–83 renumbered section 774 of this title as this section.

Pub. L. 102–54 amended section generally. Prior to amendment, section read as follows: ''There is hereby established an Advisory Council on Servicemen's Group Life Insurance consisting of the Secretary of the Treasury as Chairman, the Secretary of Defense, the Secretary of Commerce, the Secretary of Health and Human Services, the Secretary of Transportation, and the Director of the Office of Management and Budget each of whom shall serve without additional compensation. The Council shall meet once a year, or oftener at the call of the Administrator, and shall review the operations under this subchapter and advise the Administrator on matters of policy relating to the Administrator activities thereunder.''

1986—Pub. L. 99–576 substituted ''the Administrator'' for ''his'' before ''activities''.

1982—Pub. L. 97–295 substituted ''Health and Human Services'' for ''Health, Education, and Welfare''.

1974—Pub. L. 93–289 substituted ''Office of Management and Budget'' for ''Bureau of the Budget''.

1970—Pub. L. 91–291 added the Secretary of Transportation to the membership of the Advisory Council on Servicemen's Group Life Insurance.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–291 effective June 25, 1970, see section 14(a) of Pub. L. 91–291, set out as a note under section 1317 of this title.

TERMINATION OF ADVISORY COUNCILS

Advisory councils in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a council established by the President or an officer of the Federal Government, such council is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a council established by the Congress, its duration is otherwise provided by law. See sections 3(2) and 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

§ 1975. Jurisdiction of District Courts

The district courts of the United States shall have original jurisdiction of any civil action or claim against the United States founded upon this subchapter.

(Added Pub. L. 89–214, § 1(a), Sept. 29, 1965, 79 Stat. 885, § 775; renumbered § 1975, Pub. L. 102–83, § 5(a), Aug. 6, 1991, 105 Stat. 406.)

AMENDMENTS

1991—Pub. L. 102–83 renumbered section 775 of this title as this section.

§ 1976. Effective date

The insurance provided for in this subchapter and the deductions and contributions for that purpose shall take effect on the date designated by the Secretary and certified by the Secretary to each Secretary concerned.

(Added Pub. L. 89–214, § 1(a), Sept. 29, 1965, 79 Stat. 885, § 776; amended Pub. L. 99–576, title VII, § 701(42), Oct. 28, 1986, 100 Stat. 3294; renumbered § 1976 and amended Pub. L. 102–83, §§ 4(b)(1), (2)(E), 5(a), Aug. 6, 1991, 105 Stat. 404–406.)

AMENDMENTS

1991—Pub. L. 102–83, § 5(a), renumbered section 776 of this title as this section and substituted ''Secretary'' for ''Administrator'' in two places.

1986—Pub. L. 99–576 substituted ''the Administrator'' for ''him'' after ''certified by''.

INTERIM COVERAGE UNTIL EFFECTIVE DATE OF GROUP PLAN; $5,000 DEATH GRATUITY

Pub. L. 89–214, § 3, Sept. 29, 1965, 79 Stat. 886, as amended by Pub. L. 89–730, § 6(a)–(d), Nov. 2, 1966, 80 Stat. 1159, provided for payment of a death gratuity of up to $5,000 in certain cases of death of veterans while in active military, naval, or air service during the period from Jan. 1, 1957, to the date immediately preceding the date on which the Servicemen's Group Life Insurance program was placed in effect under this section, and required that an application for such gratuity had to be made within one year after Sept. 29, 1965.

Pub. L. 89–730, § 6(e), Nov. 2, 1966, 80 Stat. 1159, provided that any waiver of future benefits executed by any person under section 3(a) of Pub. L. 89–214 (see above), as in effect prior to Nov. 2, 1966, was to have no effect.

Pub. L. 89–730, § 6(f), Nov. 2, 1966, 80 Stat. 1159, provided that in any case in which the death gratuity paid to any person under section 3 of Pub. L. 89–214 (see above), was reduced pursuant to clause (B) of subsection (c)(1) of such section, as in effect prior to Nov. 2, 1966, the Administrator of Veterans' Affairs was to pay to such person an amount equal to the amount by which such death gratuity was reduced.

Pub. L. 89–730, § 6(g), Nov. 2, 1966, 80 Stat. 1159, provided that notwithstanding the time limitation prescribed in section 3(a) of Pub. L. 89–214 (see above), any application for death gratuity filed under such section shall be valid if filed within one year after Nov. 2, 1966.

§ 1977. Veterans' Group Life Insurance

(a)(1) Except as provided in paragraph (3), Veterans' Group Life Insurance shall be issued in the amounts specified in section 1967(a) of this title. In the case of any individual, the amount of Veterans' Group Life Insurance may not exceed the amount of Servicemembers' Group Life Insurance coverage continued in force after the expiration of the period of duty or travel under section 1967(b) or 1968(a) of this title. No person may carry a combined amount of Servicemembers' Group Life Insurance and Veterans' Group Life Insurance at any one time in excess of the maximum amount for Servicemembers' Group Life Insurance in effect under section 1967(a)(3)(A)(i) of this title.

(2) If any person insured under Veterans' Group Life Insurance again becomes insured under Servicemembers' Group Life Insurance but dies before terminating or converting such person's Veterans' Group Insurance, Veterans' Group Life Insurance shall be payable only if such person is insured under Servicemembers'

1991—Pub. L. 102–83 renumbered section 782 of this title as this section and substituted ''Secretary'' for ''Administrator''.

§ 1983. Settlements for minors or incompetents

When an optional mode of settlement of National Service Life Insurance or United States Government life insurance heretofore or hereafter matured is available to a beneficiary who is a minor or incompetent, such option may be exercised by such beneficiary's fiduciary, person qualified under the Act of February 25, 1933 (25 U.S.C. 14), or person recognized by the Secretary as having custody of the person or the estate of such beneficiary, and the obligation of the United States under the insurance contract shall be fully satisfied by payment of benefits in accordance with the mode of settlement so selected.

(Pub. L. 85–857, Sept. 2, 1958, 72 Stat. 1165, § 783; Pub. L. 99–576, title VII, § 701(45), Oct. 28, 1986, 100 Stat. 3294; Pub. L. 102–54, § 14(b)(19), June 13, 1991, 105 Stat. 284; renumbered § 1983 and amended Pub. L. 102–83, §§ 4(b)(1), (2)(E), 5(a), Aug. 6, 1991, 105 Stat. 404–406.)

AMENDMENTS

1991—Pub. L. 102–83 renumbered section 783 of this title as this section and substituted ''Secretary'' for ''Administrator''.

Pub. L. 102–54 substituted ''the Act of February 25, 1933 (25 U.S.C. 14)'' for ''section 14 of title 25''.

1986—Pub. L. 99–576 substituted ''such beneficiary's'' for ''his''.

§ 1984. Suits on insurance

(a) In the event of disagreement as to claim, including claim for refund of premiums, under contract of National Service Life Insurance, United States Government life insurance, or yearly renewable term insurance between the Secretary and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court of the United States in and for the district in which such person or any one of them resides, and jurisdiction is conferred upon such courts to hear and determine all such controversies. All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the Secretary acknowledges the indebtedness of the United States upon any such contract of insurance and there is a dispute as to the person or persons entitled to payment, a suit in the nature of a bill of interpleader may be brought at the request of the Secretary in the name of the United States against all persons having or claiming to have any interest in such insurance in the United States District Court for the District of Columbia or in the district court in and for the district in which any such claimant resides; however, no less than thirty days before instituting such suit the Secretary shall mail a notice of such intention to each of the persons to be made parties to the suit. The courts of appeals for the several circuits, including the District of Columbia, shall respectively exercise appellate jurisdiction and, except as provided in section 1254 of title 28, the decrees of such courts of appeals shall be final.

(b) No suit on yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made. For the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded. The limitation of six years is suspended for the period elapsing between the filing with the Secretary of the claim sued upon and the denial of the claim. However, if a claim is timely filed the claimant shall have not less than ninety days from the date of mailing of notice of denial within which to file suit. After June 28, 1936, notice of denial of the claim under a contract of insurance shall be by registered mail or by certified mail directed to the claimant's last address of record. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Secretary shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitation has elapsed. No State or other statute of limitations shall be applicable to suits filed under this section.

(c) In any suit, action, or proceeding brought under the provisions of this section subpenas for witnesses who are required to attend a court of the United States in any district may run into any other district. However, no writ of subpena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the court being first had upon proper application and cause shown. The word ''district'' and the words ''district court'' as used in this section shall be construed to include the District of Columbia and the United States District Court for the District of Columbia.

(d) Attorneys of the Department, when assigned to assist in the trial of cases, and employees of the Department when ordered in writing by the Secretary to appear as witnesses, shall be paid the regular travel and subsistence allowance paid to other employees when on official travel status.

(e) Part-time and fee-basis employees of the Department, in addition to their regular travel and subsistence allowance, when ordered in writing by the Secretary to appear as witnesses in suits under this section, may be allowed, within the discretion and under written orders of the Secretary, a fee in an amount not to exceed $50 per day.

(f) Employees of the Department who are subpenaed to attend the trial of any suit, under the provisions of this section, as witnesses for a party to such suit shall be granted court leave

or authorized absence, as applicable, for the period they are required to be away from the Department in answer to such subpenas.

(g) Whenever a judgment or decree shall be rendered in an action brought under the provisions of this section, the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered and to be paid by the Department out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid; except that, in a suit brought by or on behalf of an insured during the insured's lifetime for waiver of premiums on account of total disability, the court, as part of its judgment or decree, shall determine and allow a reasonable fee to be paid by the insured to the insured's attorney.

(h) The term ''claim'' as used in this section means any writing which uses words showing an intention to claim insurance benefits; and the term ''disagreement'' means a denial of the claim, after consideration on its merits, by the Secretary or any employee or organizational unit of the Department heretofore or hereafter designated therefor by the Secretary.

(i) The Attorney General of the United States is authorized to agree to a judgment to be rendered by the chief judge of the United States court having jurisdiction of the case, pursuant to compromise approved by the Attorney General upon the recommendation of the United States attorney charged with the defense, upon such terms and for sums within the amount claimed to be payable, in any suit brought under the provisions of this section, on a contract of yearly renewable term insurance, and the Secretary shall make payments in accordance with any such judgment. The Comptroller General of the United States shall allow credit in the accounts of disbursing officers for all payments of insurance made in accordance with any such judgment. All such judgments shall constitute final settlement of the claim and no appeal therefrom shall be authorized.

(Pub. L. 85–857, Sept. 2, 1958, 72 Stat. 1165, § 784; Pub. L. 86–507, § 1(32), June 11, 1960, 74 Stat. 202; Pub. L. 97–295, § 4(32), Oct. 12, 1982, 96 Stat. 1307; Pub. L. 99–576, title VII, § 701(46), Oct. 28, 1986, 100 Stat. 3294; renumbered § 1984 and amended Pub. L. 102–83, §§ 4(a)(2)(A)(iii)(VII), (VIII), (D)(ii), (3), (4), (b)(1), (2)(E), 5(a), Aug. 6, 1991, 105 Stat. 403–406.)

AMENDMENTS

1991—Pub. L. 102–83, § 5(a), renumbered section 784 of this title as this section.

Subsec. (a). Pub. L. 102–83, § 4(a)(2)(A)(iii)(VII), substituted ''Secretary'' for ''Veterans' Administration'' wherever appearing.

Subsec. (b). Pub. L. 102–83, § 4(a)(2)(D)(ii), substituted ''with the Secretary'' for ''in the Veterans' Administration''.

Pub. L. 102–83, § 4(a)(2)(A)(iii)(VIII), substituted ''Secretary'' for ''Veterans' Administration'' before ''shall''.

Subsec. (d). Pub. L. 102–83, § 4(b)(1), (2)(E), substituted ''Secretary'' for ''Administrator''.

Pub. L. 102–83, § 4(a)(3), (4), substituted ''Department'' for ''Veterans' Administration'' in two places.

Subsec. (e). Pub. L. 102–83, § 4(b)(1), (2)(E), substituted ''Secretary'' for ''Administrator'' in two places.

Pub. L. 102–83, § 4(a)(3), (4), substituted ''Department'' for ''Veterans' Administration''.

Subsecs. (f), (g). Pub. L. 102–83, § 4(a)(3), (4), substituted ''Department'' for ''Veterans' Administration'' wherever appearing.

Subsec. (h). Pub. L. 102–83, § 4(b)(1), (2)(E), substituted ''Secretary'' for ''Administrator'' in two places.

Pub. L. 102–83, § 4(a)(3), (4), substituted ''Department'' for ''Veterans' Administration''.

Subsec. (i). Pub. L. 102–83, § 4(b)(1), (2)(E), substituted ''Secretary'' for ''Administrator''.

1986—Subsec. (g). Pub. L. 99–576 substituted ''the insured's'' for ''his'' in two places.

1982—Subsec. (b). Pub. L. 97–295, § 4(32)(A), substituted ''the claim. However, if'' for ''said claim: *Provided*, That in any case in which''.

Subsec. (c). Pub. L. 97–295, § 4(32)(B), substituted ''district. However,'' for ''district: *Provided*, That'', and substituted ''in this section'' for ''herein'' after ''as used''.

1960—Subsec. (b). Pub. L. 86–507 inserted ''or by certified mail'' after ''registered mail''.

§ 1985. Decisions by the Secretary

Except in the event of suit as provided in section 1984 of this title, or other appropriate court proceedings, all decisions rendered by the Secretary under the provisions of this chapter shall be final and conclusive on all questions of law or fact, and no other official of the United States shall have jurisdiction to review any such decisions.

(Pub. L. 85–857, Sept. 2, 1958, 72 Stat. 1167, § 785; renumbered § 1985 and amended Pub. L. 102–83, §§ 4(b)(1), (2)(E), 5(a), (c)(1), Aug. 6, 1991, 105 Stat. 404–406.)

AMENDMENTS

1991—Pub. L. 102–83, § 5(a), renumbered section 785 of this title as this section.

Pub. L. 102–83, § 5(c)(1), substituted ''1984'' for ''784''.

Pub. L. 102–83, § 4(b)(1), (2)(E), substituted ''Secretary'' for ''Administrator'' in section catchline and in text.

§ 1986. Deposits in and disbursements from trust funds

All cash balances in the United States Government Life Insurance Fund and the National Service Life Insurance Fund on January 1, 1959, together with all moneys thereafter accruing to such funds, including premiums, appropriated moneys, the proceeds of any sales of investments which may be necessary to meet current expenditures, and interest on investments, shall be available for disbursement for meeting all expenditures and making investments authorized to be made from such funds.

(Pub. L. 85–857, Sept. 2, 1958, 72 Stat. 1167, § 786; renumbered § 1986, Pub. L. 102–83, § 5(a), Aug. 6, 1991, 105 Stat. 406.)

AMENDMENTS

1991—Pub. L. 102–83 renumbered section 786 of this title as this section.

§ 1987. Penalties

(a) Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in anywise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing pur-

Smith v. Derwinski

United States Court of Veterans Appeals

March 21, 1991, Argued ; May 24, 1991, Decided

No. 90-306

Reporter
1 Vet. App. 267 *; 1991 U.S. Vet. App. LEXIS 40 **

Barbara C. Smith, Appellant, v. Edward J. Derwinski, Secretary Of Veterans Affairs, Appellee

Notice: [1]** PURSUANT TO 38 U.S.C. § 4067(d) (1988), THIS DECISION WILL BECOME THE DECISION OF THE COURT THIRTY DAYS FROM THE DATE HEREOF.

Prior History: On Appeal from the Board of Veterans' Appeals.

Core Terms

veterans, notice, guaranty, mortgagee, foreclosure, divorce, waive, subrogation, default, conscience, decree, ascertainable, indebtedness, collateral, tribunal, holder, mortgage, capricious, successor, personam

Case Summary

Procedural Posture
Appellant debtor sought review of a decision of the Board of Veterans' Appeals regarding the collection of a deficiency resulting from a mortgage foreclosure and the payment of a guaranty under the Loan Guaranty Program.

Overview
The debtor and her then husband, a veteran, were granted a home loan guaranteed by the Veterans' Administration (VA). In their divorce, the debtor executed a quit-claim deed for the home to her husband, with the divorce agreement providing that he would hold her harmless on any liability. Husband subsequently defaulted on the loan and declared bankruptcy. The VA sought to recoup its loss from debtor. The court held that (1) it had jurisdiction to review the conclusions of the board, (2) the Board of Veterans' Appeals did not err when it concluded that the divorce decree did not relieve the debtor of liability on the underlying debt and that debtor had failed to carry the burden of demonstrating that the Indiana state court did not acquire jurisdiction of her person in the foreclosure proceeding through notice of process by publication, and (3) the decision that recovery of all but $ 5,000 of the deficiency would not offend equity or good conscience was neither arbitrary, capricious, nor an abuse of discretion.

Outcome
The judgment requiring the debtor to pay a portion of the loan indebtedness was affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN1[] Jurisdiction, Jurisdictional Sources

U.S. Const. art. I, § 8(9) gives to Congress the power to constitute tribunals inferior to the Supreme Court. The test used to determine whether this power has been unconstitutionally exercised is whether, in creating a non-Article III tribunal and defining its jurisdiction, Congress diminished or usurped judicial power reserved by Article III of the Constitution for courts with judges having lifetime tenure. The traditional distinction between an Article I (or legislative) court and an Article III court is whether the tribunal exercised jurisdiction over private rights or public rights. A matter of public rights must at a minimum arise between the government and others. In contrast, the liability of one individual to another under the law as defined, is a matter of private rights. Private rights could only be determined in an Article III court but public rights could be adjudicated in a tribunal created by Congress under its Article I authority.

Military & Veterans Law > ... > Employment & Reemployment > Job Counseling, Placement & Training > Educational Assistance Program

Military & Veterans Law > Veterans > General Overview

Military & Veterans Law > Veterans > General Benefits > General Overview

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

HN2[] Job Counseling, Placement & Training, Educational Assistance Program

Veterans benefits are a classic example of public rights. Title 38 of the United States Code consists of a comprehensive benefits program for veterans and their dependents including, inter alia, compensation and pension, home loan guaranties, health care, insurance, and educational assistance. The Secretary of Veterans Affairs is responsible for the proper execution and administration of all laws administered by the Veterans' Administration, 38 U.S.C.S. § 210(b)(1), and the Secretary is directed to decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. 38 U.S.C.S. § 211(a)(1).

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

Military & Veterans Law > Veterans > General Overview

Military & Veterans Law > Veterans > General Benefits > General Overview

HN3[] Readjustment & Related Benefits, Loans

It is beyond dispute that the Loan Guaranty Program for veterans, chapter 37 of title 38 of the United States Code, is a federal regulatory program Congress has the power to enact. In addition to defining the basic substantive entitlement of veterans to loan benefits, chapter 37 defines the authority and responsibility of the Secretary of Veterans Affairs and establishes procedural requirements. For example, the Secretary has been given the authority to pay, compromise, waive or release any right, title, claim, lien or demand, however acquired, including any equity or any right of redemption. 38 U.S.C.S. § 1820(a)(4). The Secretary is specifically authorized to waive indebtedness or forego collection upon a determination that such collection would be against equity and good conscience. 38 U.S.C.S. § 3102(a). However, the Secretary cannot waive indebtedness if there is any indication of fraud, misrepresentation or bad faith on the part of the person or persons having an interest in obtaining a waiver. 38 U.S.C.S. § 3102(c).

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

HN4[] Readjustment & Related Benefits, Loans

There is also a procedural mechanism for the handling of defaults which vests a statutory right of subrogation in the Secretary of Veterans Affairs: In the event of a default in the payment of any loan guaranteed under this chapter, the holder of the obligation shall notify the Secretary of such default. Upon receipt of such notice, the Secretary may pay to such holder the guaranty not

in excess of the pro rata portion of the amount originally guaranteed. Except as provided in 38 U.S.C.S. § 1803(e), if the Secretary makes such a payment, the Secretary shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty. 38 U.S.C.S. § 1832(a)(1). To enforce and interpret 18 U.S.C.S. § 1832, the Secretary promulgated regulations on subrogation and indemnity.(a) The Secretary shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guaranty. (b) The holder, upon request, shall execute, acknowledge and deliver an appropriate instrument tendered for that purpose, evidencing any payment received from the Secretary and the Secretary's resulting right of subrogation.(c) The Secretary shall cause the instrument to be filed for record in accordance with the applicable state law.38 C.F.R. § 36.4323 (a)-(c) (1990).

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

Military & Veterans Law > Veterans > General Benefits > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN5[] Reviewability of Lower Court Decisions, Adverse Determinations

By regulation, the Veterans' Administration (VA) has established a mechanism which permits an alleged debtor to dispute the VA's conclusion that a debt actually exists. Once the VA has determined that there is a debt, the debtor must be advised of the fact of the debt and that he or she has the right to informally dispute the existence or amount of the debt as well as the right to request waiver of the collection of the debt. 38 C.F.R. § 1.911(c). These rights can be exercised separately or simultaneously. If the alleged debtor elects to informally dispute the existence of the debt, he or she need only write to the VA, which will as expeditiously as possible, review the accuracy of the debt determination. 38 C.F.R. § 1.911(c)(1). If the decision is adverse to the debtor, he or she may appeal in accordance with Part 19 of title 38 of the Code of Federal Regulations the decision underlying the debt. 38 C.F.R. § 1.911(c)(3). Part 19 of title 38 of the Code of Federal Regulations, consists of the regulations dealing with appeals of decisions regarding veterans benefits to the Board.

Military & Veterans Law > Veterans > Claim Procedures

Military & Veterans Law > Veterans > General Benefits > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN6[] Veterans, Claim Procedures

Under 38 U.S.C.S. § 4004 (1988), the Board of Veterans' Appeals has the jurisdiction, and the obligation, to review on appeal decisions made by the Secretary of Veterans Affairs with respect to benefits. All questions in a matter which under § 211(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the board. 38 U.S.C.S. § 4004(a). In reviewing a benefits decision, the board must consider the entire record, all of the evidence, and all of the applicable laws and regulations.

Administrative Law > Judicial Review > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Military & Veterans Law > Veterans > General Overview

Military & Veterans Law > Veterans > General Benefits > General Overview

Military & Veterans Law > Veterans > Claim Procedures

HN7 **Administrative Law, Judicial Review**

The Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, 102 Stat. 4105 (1988), created the Article I court and assigned it the responsibility for reviewing the decisions of the Board of Veterans' Appeals (BVA). The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the BVA. 38 U.S.C.S. § 4052(a). While the court's review of factual determinations is not subject to further review, any party may appeal our decisions to the United States Court of Appeals for the Federal Circuit, an Article III court, with respect to the validity of any statute or regulation or any interpretation thereof that was relied on by the court in making the decision. 38 U.S.C.S. § 4092(a). The creation of this comprehensive mechanism for the judicial review of decisions affecting the public rights of veterans to benefits was well within the authority of Congress under Article I of the Constitution. It is now beyond question that Congress can create a structure for the adjudication of public rights outside of the Article III courts.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

HN8 **Separation of Powers, Constitutional Controls**

The constitutionality of Article I tribunals could not be determined by the simple application of a bright line rule. Instead, the United States Supreme Court looked beyond form to the substance of what the quasi-judicial body accomplished.

Business & Corporate Compliance > ... > Environmental Law > Hazardous Wastes & Toxic Substances > Federal Insecticide, Fungicide & Rodenticide Act

HN9 **Hazardous Wastes & Toxic Substances, Federal Insecticide, Fungicide & Rodenticide Act**

Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN10 **Appeals & Review, US Court of Appeals for Veterans Claims**

It would not offend the Constitution if an Article I court determined private rights if such rights were closely integrated into a public regulatory scheme over which the Article I tribunal had been assigned jurisdiction by Congress. However, where a private right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN11 **Readjustment & Related Benefits, Loans**

The regulations promulgated by the Veterans' Administration make clear that they were intended to create a uniform system for determining the administration's obligation as guarantor, which in its operation would displace state law. The determination of such private rights by the board and the Article I court within the context of the judicial review of a Board of Veterans' Appeals decision does not offend the principles of Article III of the Constitution. There is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries.

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN12 **Appeals & Review, US Court of Appeals for Veterans Claims**

The United States Court of Veterans' Appeals does not offend the Constitution in reviewing determinations of

private rights, including those arising out of a state court judgment, when such rights are closely integrated into a public regulatory scheme over which the Article I court exercises judicial review pursuant to statute.

HN13[] Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.

Military & Veterans Law > Veterans > Department of Veterans Affairs

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN14[] **Veterans, Department of Veterans Affairs**

38 U.S.C.S. § 1820 specifically provides that:(a) Notwithstanding the provisions of any other law, with respect to matters arising by reason of chapter 37, the Secretary of Veterans Affairs may (1) sue and be sued in the Secretary's official capacity in any court of competent jurisdiction, State or Federal.

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN15[] **Appeals & Review, US Court of Appeals for Veterans Claims**

The United States Court of Veterans' Appeals a court of review and its jurisdiction is derivative; it can review only what was -- or should have been -- decided below.

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN16[] **Readjustment & Related Benefits, Loans**

Decisions underlying a debt, i.e., the existence or amount of a debt, may be appealed to the Board of Veterans' Appeals (BVA). Indeed, *38 C.F.R. § 1.911* not once but twice notes that a debtor may appeal the decision underlying the debt to the BVA. *38 C.F.R. § 1.911(c)(3)* and *(f)(1)*. The board has jurisdiction to hear such appeals under 38 U.S.C.S. § 4004 and, because the United States Court of Veterans' Appeals' jurisdiction derives from the board's jurisdiction, 38 U.S.C.S. § 4052(a), it has appellate jurisdiction to hear appeals of the BVA's decisions with respect to the existence or amount of a debt.

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

HN17[] **Readjustment & Related Benefits, Loans**

As *38 U.S.C.S. § 1832* and *38 C.F.R. § 36.4323 (1990)* make clear, any right the Secretary of Veterans Affairs has to collect the deficiency from a nonveteran party to a loan is not original but derivative. If the Secretary makes such a payment, the Secretary shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty. *38 U.S.C.S. § 1832(a)(1)*.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN18[] **Preclusion of Judgments, Full Faith & Credit**

Article IV, Section 1, of the Constitution provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. Similarly, *28 U.S.C.S § 1738* provides that judicial proceedings shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory or possession from which they are taken.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

HN19[] **Jurisdiction, Jurisdictional Sources**

The concept of full faith and credit is central to our system of jurisprudence. A judgment is entitled to full faith and credit when those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. However, the full faith and credit doctrine is not without limits. Before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN20[] **Judgments, Pretrial Judgments**

Where the defendant has appeared in the original action, the judgment in that cause is res judicata on the issue of personal jurisdiction, whether the defendant actually litigated the question or merely permitted it to pass without objection. In those cases, however, in which the defendant makes no appearance and the judgment goes by default, the defendant may defeat subsequent enforcement in another forum by demonstrating that the judgment issued from a court lacking personal jurisdiction. Of course, the burden of undermining the judgment rests heavily upon the assailant.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > True In Rem Actions

HN21[] **In Rem & Personal Jurisdiction, Constitutional Limits**

The state is required to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only in in personam actions.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN22[] **In Rem & Personal Jurisdiction, In Personam Actions**

Before the state conducts any proceeding that will affect the legally protected property interests of any party, the state must provide notice to that party by means certain to ensure actual notice as long as the party's identity and location are reasonably ascertainable.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN23[] In Rem & Personal Jurisdiction, In Personam Actions

A judgment presumes jurisdiction over the subject matter and over the persons.

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

HN24[] Readjustment & Related Benefits, Loans

In addition to challenging the existence or amount of the debt, a prospective debtor may seek a waiver of the collection of the debt. 38 C.F.R. § 1.911(c)

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

HN25[] Readjustment & Related Benefits, Loans

The statutory phrase "equity and good conscience," without any other limiting or definitional statutory provisions, effectively commits decisions on requests for waivers to the discretion of the Secretary of Veterans' Affairs.

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

HN26[] Readjustment & Related Benefits, Loans

The phrase "equity and good conscience" means arriving at a fair decision between the obligor and the government. In making this determination, consideration will be given to the following elements, which are not intended to be all inclusive:(1) Fault of debtor, (2) Balancing of faults, (3) Undue hardship, (4) Defeat the purpose, (5) Unjust enrichment, and (6) Changing position to one's detriment. 38 C.F.R. § 1.965 (1990).

Administrative Law > Agency Rulemaking > General Overview

Military & Veterans Law > Veterans > Appeals & Review > US Court of Appeals for Veterans Claims

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Military & Veterans Law > Veterans > Claim Procedures

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

HN27[] Administrative Law, Agency Rulemaking

Waiver decisions, and the review of such decisions by the Board of Veterans' Appeals, are subject to review by the court to determine whether the statutory standard was applied in accordance with the regulatory guidance or whether the decision was made in an arbitrary or capricious manner. 38 U.S.C.S. § 4061(a)(3)(A). The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.

Military & Veterans Law > Veterans > Claim Procedures

Military & Veterans Law > Veterans > Readjustment & Related Benefits > Loans

HN28[] Veterans, Claim Procedures

In determining the issue of whether or not repayment of the loan guaranty indebtedness would violate the principle of equity and good conscience, consideration will be given to all the cited elements with emphasis on the concept of undue hardship. In order to find undue hardship, the evidence must demonstrate the appellant's ability to provide herself and any dependents

with the necessities of life is seriously impaired.

Counsel: Ronald L. Smith for appellant.

Angela Foehl, with whom Raoul L. Carroll, General Counsel, Barry M. Tapp, Assistant General Counsel, and Pamela L. Wood, Deputy Assistant General Counsel, were on the brief, for appellee.

Judges: Nebeker, Chief Judge, and Farley and Mankin, Associate Judges.

Opinion by: FARLEY

Opinion

[*269] *This appeal is from a decision of the Board of Veterans' Appeals (BVA or Board) regarding the collection of a deficiency resulting from a mortgage foreclosure and the payment of a guaranty under the Loan Guaranty Program, chapter 37 of title 38, United States Code. The Court concludes that it has jurisdiction under 38 U.S.C. § 4052(a) to review on appeal the Board's determination that a valid lawful debt exists and the Board's affirmance of the refusal to waive the entire debt. In the appeal now before this Court, we uphold the determination by the BVA that appellant is indebted to the United States. In addition, the Court holds that the decision to waive $ 5,000 of that debt, thereby rendering appellant liable for $ 1,916.88* **[**2]** *plus interest, was neither arbitrary, capricious, nor an abuse of discretion. 38 U.S.C. § 4061(a)(3)(A).*

I.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant, Barbara C. Smith, was married to David L. Nolton, a veteran. Mr. Nolton is not a party to this proceeding. During the course of their marriage, they purchased a home in the State of Indiana and were jointly and severally liable on a note held by Mercantile Mortgage Company (original mortgagee). The Veterans' Administration (now the Department of Veterans Affairs) (VA) guaranteed 60 percent of the total loan amount of $ 22,900 on the application of Mr. Nolton, who listed appellant as jointly liable on the loan; however, only Mr. Nolton signed the VA guaranty application.

The loan went into default as of March 1, 1981, after a check tendered as payment was returned for insufficient funds. Appellant and her husband were divorced on June 1, 1981. The divorce decree, R. at 104-06, reflects that appellant assigned all her rights in the property to the veteran and executed a quitclaim deed to that effect. In return for the award of the house subject to the underlying mortgage, the veteran promised to hold appellant "harmless" **[**3]** from the indebtedness. R. at 105. The decree does not indicate that appellant was released from liability on the note. Appellant relocated to Florida immediately after the divorce.

Since the loan was in default and the premises were vacant, the original mortgagee initiated foreclosure proceedings on August 21, 1981. R. at 33. The original mortgagee moved the Madison Superior Court, Division I, State of Indiana (hereafter the Indiana state court) to allow notice by publication. An attorney for the mortgagee stated in an affidavit that:

Plaintiff does not know and with reasonable inquiry and diligence is unable to ascertain the present residence, mailing address or place of employment of said Defendants. Diligent search has been made for said Defendants, but said Defendants cannot be found and Plaintiff reasonably believes that the whereabouts of said Defendants cannot be discovered upon further reasonable inquiry.

R. at 41. The Indiana state court granted the motion and allowed service by publication. The record indicates that the notice was published three times during October, 1981. R. at 43-44. Appellant never responded to the notice of process and did not appear; however, her **[**4]** former husband did enter a personal appearance.

During the course of the foreclosure proceedings, appellant's former husband filed a petition in bankruptcy. He was granted a discharge by the bankruptcy court, the effect of which was to relieve him of personal liability. Mercantile Mortgage Company assigned its

interest in the mortgage note and the property to Citicorp Homeowners, Inc. (Citicorp or successor mortgagee). The Indiana state court issued an **[*270]** order substituting Citicorp for the original mortgagee. R. at 54.

A judgment and decree of foreclosure were issued by the Indiana state court on January 29, 1982. R. at 55-59. In the judgment, the Indiana court stated that it had subject matter jurisdiction, and that it was exercising its jurisdiction over the property and the persons of appellant and her former husband. The Indiana state court awarded the plaintiff an *in rem* judgment against the property and authorized its sale. The foreclosure proceedings resulted in a deficiency of $ 6,916.88 owing to the mortgagee. Citicorp moved the Indiana state court to enter a default judgment against appellant for the deficiency. R. at 64.

As guarantor, the VA paid the deficiency on April **[**5]** 13, 1982, R. at 78, and became subrogated to the rights of Citicorp pursuant to *38 U.S.C. § 1832(a)(1) (1988)*. The VA, as noted on a form entitled "Advice Regarding Indebtedness of Obligors on Guaranteed or Insured Loans," concluded that the veteran was released from any liability for the deficiency because of the discharge in bankruptcy and that the VA was therefore precluded from seeking indemnification of the $ 6,916.88 from the veteran. However, the VA also concluded that appellant was liable for the entire deficiency. R. at 87.

In 1988, six years after the VA's payment of the deficiency to Citicorp, the VA contacted appellant and requested repayment of the $ 6,916.88 plus interest. Appellant claimed to have no knowledge of the foreclosure, her former husband's bankruptcy, or any debt. She requested a hearing and specifically disputed that she was in debt to the United States; alternatively, she requested that the VA waive any indebtedness. R. at 89. Appellant wrote: "This waiver is requested on the grounds of inability to pay. But I also dispute the claim." R. at 89.

By regulation, requests for waivers are considered by a VA Regional Office Committee on Waivers and Compromises. **[**6]** *38 C.F.R. §§ 1.955-1.970 (1990)*. The Committee discussed whether appellant had received adequate notice of the foreclosure as well as the effect of the divorce decree on appellant's obligation to pay. It found that appellant was liable for the debt and able to pay the balance; however, the Committee did grant a partial waiver of $ 5,000 of the principal. R. at 109.

Appellant appealed to the Board. In her Notice of Disagreement (NOD), appellant stated: "I refute the statement that my divorce decree could not release me from liability. The judge gave me no right of redemption. I was not informed of the sale, nor was I made a party to the foreclosure." R. at 118. The BVA addressed appellant's concerns of inadequate notice and the effect of the divorce on her liability. In its February 13, 1990, decision, the BVA upheld the Committee's action, finding that appellant had received adequate notice and that her divorce had not relieved her of liability on the debt. A timely appeal to this Court followed.

Appellant's position has been consistent throughout. Before the Regional Office, the Board, and this Court, she has continued to challenge both the existence of any debt and, if such a **[**7]** debt does exist in fact and in law, the amount of that debt which should have been waived in equity and good conscience. There is no dispute that this Court has jurisdiction under 38 U.S.C. § 4052(a) (1988) to review the BVA's determination of the latter issue. There is a significant dispute as to jurisdiction regarding the former. Because they involve distinct considerations, we will discuss separately the Board's determinations upholding the existence of a debt and the waiver of only a portion of that debt.

II.

APPELLANT'S CHALLENGE TO THE EXISTENCE OF THE DEBT

The Secretary of Veterans Affairs (Secretary) contends that this Court lacks jurisdiction to review the threshold question of whether appellant owes a debt to the United States. We are told no less than three times, Br. at 3, 22, 24, that the BVA only had authority to review the waiver **[*271]** decision and that this Court's jurisdiction is similarly circumscribed. Appellant disagrees, noting that the Secretary has not advanced a single case, statute, or regulation to support his position. From our review of the relevant authorities, we are compelled to agree with appellant: This Article I Court has the jurisdiction, and **[**8]** the responsibility, to review on appeal the determination made by the VA that appellant owes a debt to the United States.

A. JURISDICTION

1.

HN1[↑] *Article I, Section 8, Clause 9, of the Constitution* gives to Congress the power "To constitute Tribunals inferior to the supreme Court." The test used to determine whether this power has been unconstitutionally exercised is whether, in creating a non-Article III tribunal and defining its jurisdiction, Congress diminished or usurped judicial power reserved by Article III of the Constitution for courts with judges having lifetime tenure. Prior to *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)*, the traditional distinction between an Article I (or legislative) court and an Article III court was whether the tribunal exercised jurisdiction over private rights or public rights. *See Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856)*; *Crowell v. Benson, 285 U.S. 22 (1932)*. "[A] matter of public rights must at a minimum arise 'between the government and others.' In contrast, 'the liability of one individual to another under the law **[**9]** as defined,' is a matter of private rights." *Northern Pipeline, 458 U.S. at 69-70* (quoting *Ex parte Bakelite Corp., 279 U.S. 438, 458 (1929)*. Private rights could only be determined in an Article III court but public rights could be adjudicated in a tribunal created by Congress under its Article I authority.

HN2[↑] Veterans benefits are a classic example of public rights. Title 38 of the United States Code consists of a comprehensive benefits program for veterans and their dependents including, *inter alia*, compensation and pension, home loan guaranties, health care, insurance, and educational assistance. The Secretary is "responsible for the proper execution and administration of all laws administered by" the VA, *38 U.S.C. § 210(b)(1) (1988)*, and the Secretary is directed to "decide all questions of law and fact necessary to a decision by the [Secretary] under a law that affects the provision of benefits by the [Secretary] to veterans or the dependents or survivors of veterans." 38 U.S.C. § 211(a)(1) (1988).

HN3[↑] It is beyond dispute that the Loan Guaranty Program for veterans, chapter 37 of title 38 of the United States Code, is "a federal regulatory **[**10]** program Congress has the power to enact." *Granfinanciera v. Nordberg, 492 U.S. 33, 54 (1989)*. In addition to defining the basic substantive entitlement of veterans to loan benefits, *see, e.g.*, *38 U.S.C. §§ 1802*, *1803*, 1810 (1988), chapter 37 defines the authority and responsibility of the Secretary and establishes procedural requirements. For example, the Secretary has been given the authority to "pay, compromise, waive or release any right, title, claim, lien or demand, however acquired, including any equity or any right of redemption." 38 U.S.C. § 1820(a)(4) (1988). The Secretary is specifically authorized to waive indebtedness or forego collection upon a determination that such collection would be "against equity and good conscience." *38 U.S.C. § 3102(a) (1988)*. However, the Secretary cannot waive indebtedness if there is any "indication of fraud, misrepresentation or bad faith on the part of the person or persons having an interest in obtaining a waiver." *38 U.S.C. § 3102(c)*.

HN4[↑] There is also a procedural mechanism for the handling of defaults which vests a statutory right of subrogation in the Secretary:

> In the event of a default in the payment of any **[**11]** loan guaranteed under this chapter, the holder of the obligation shall notify the Secretary of such default. Upon receipt of such notice, the Secretary may . . . pay to such holder the guaranty not in excess of the pro rata **[*272]** portion of the amount originally guaranteed. Except as provided in *section 1803(e)* of this title, if the Secretary makes such a payment, the Secretary shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty.

38 U.S.C. § 1832(a)(1) (1988). To enforce and interpret *section 1832*, the Secretary promulgated regulations on subrogation and indemnity.

> (a) The Secretary shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guaranty . . . .
>
> (b) The holder, upon request, shall execute, acknowledge and deliver an appropriate instrument tendered for that purpose, evidencing any payment received from the Secretary and the Secretary's resulting right of subrogation.
>
> (c) The Secretary shall cause the instrument . . . to be filed for record . . . in accordance with the applicable State law.

38 C.F.R. § 36.4323 (a)-(c) (1990).

HN5[↑] By regulation, the VA has established **[**12]** a mechanism which permits an alleged debtor to dispute the VA's conclusion that a debt actually exists. *See 38 C.F.R. §§ 1.900-1.994 (1990)*; *Bahnmiller v. Derwinski, 923 F.2d 1085, 1087 (4th Cir. 1991)*. Once the VA has determined that there is a debt, the debtor must be

advised of the fact of the debt *and* that he or she has the right to "informally dispute the existence or amount of the debt" as well as the right "to request waiver of the collection of the debt." 38 C.F.R. § 1.911(c). "These rights can be exercised separately or simultaneously." *Id.* If the alleged debtor elects to informally dispute the existence of the debt, he or she need only write to the VA, which will "as expeditiously as possible, review the accuracy of the debt determination." 38 C.F.R. § 1.911(c)(1). If the decision is adverse to the debtor, he or she "may appeal in accordance with Part 19 of [title 38 of the Code of Federal Regulations] the decision underlying the debt." 38 C.F.R. § 1.911(c)(3). Part 19 of title 38 of the Code of Federal Regulations, consists of the regulations dealing with appeals of decisions regarding veterans benefits to the Board.

HN6[] Under 38 U.S.C. § 4004 **[**13]** (1988), the BVA has the jurisdiction, and the obligation, to review on appeal decisions made by the Secretary with respect to benefits. "All questions in a matter which under section 211(a) of this title is subject to decision by the [Secretary] shall be subject to one review on appeal to the [Secretary]. Final decisions on such appeals shall be made by the Board." 38 U.S.C. § 4004(a). In reviewing a benefits decision, the Board must consider the entire record, all of the evidence, and all of the applicable laws and regulations. *Id.*

HN7[] The Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, 102 Stat. 4105 (1988) (VJRA), created this Article I court and assigned it the responsibility for reviewing the decisions of the BVA. "The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." 38 U.S.C. § 4052(a). While this Court's review of factual determinations is not subject to further review, any party may appeal our decisions to the United States Court of Appeals for the Federal Circuit, an Article III court, "with respect to the validity of any statute or regulation . . . or any interpretation thereof . . . that was **[**14]** relied on by the Court in making the decision." 38 U.S.C. § 4092(a) (1988); Prenzler v. Derwinski, 928 F.2d 393 (Fed. Cir. 1991). The creation of this comprehensive mechanism for the judicial review of decisions affecting the public rights of veterans to benefits was well within the authority of Congress under Article I of the Constitution. It is now beyond question that Congress can create a structure for the adjudication of public rights outside of the Article III courts. *See* Northern Pipeline, 458 U.S. 50 (bankruptcy courts); Thomas v. Union Carbide Agricultural Prod. Co., 473 U.S. 568 (1985) (arbitrators); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (agency determination of private counter-claim).

[*273] 2.

This case presents a question of first impression for this Court since any right the Secretary has to collect from this appellant rests, in part, upon the Secretary's subrogation to the private rights of the mortgagee. Moreover, appellant's challenge to the existence of any debt essentially consists of a collateral attack upon the judgment of the Indiana state court. The threshold **[**15]** jurisdictional question, therefore, is whether this Article I Court has the authority under the Constitution to review decisions which in fact and in law determine private rights.

The distinction between public rights and private rights provided an easy rule of thumb for determining whether an adjudication by an administrative agency or non-Article III court intruded upon the judicial power of Article III courts. However, enthusiasm for this pristine distinction waned when it failed to gather a majority of the Court in *Northern Pipeline*. Shortly thereafter, in *Thomas*, the Court ruled that HN8[] the constitutionality of Article I tribunals could not be determined by the simple application of a "bright line" rule. Instead, the Court "looked beyond form to the substance of what" the quasi-judicial body accomplished. Thomas, 473 U.S. at 589.

In *Thomas*, the Court considered legislation which enabled the Environmental Protection Agency (EPA) to adjudicate a private contract action during the course of a binding arbitration. Limited Article III judicial scrutiny was provided, making the arbitrator's decision subject to judicial review only for "'fraud, misrepresentation, **[**16]** or other misconduct.'" Thomas, 473 U.S. at 573-74 (citing Federal Pesticide Act of 1978, Pub. L. No. 95-396, § 3(c)(1)(D)(ii), 92 Stat. 819 (codified at 7 U.S.C. §§ 136-136y (1976 Supp. I))). The Court held that the award of such quasi-judicial authority to determine a private right to a non-Article III tribunal did not "contravene Article III."

HN9[] Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.

Thomas, 473 U.S. at 593-94.

After *Thomas*, ***HN10***[] it would not offend the Constitution if an Article I court determined private rights if such rights were "closely integrated into a public regulatory scheme" over which the Article I tribunal had been assigned jurisdiction by Congress. *See Thomas, 473 U.S. at 586*. However, where a private right "is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists **[**17]** against the Federal Government, then it must be adjudicated by an Article III court." *Granfinanciera, 492 U.S. at 54, 55* (footnote omitted).

Private rights to which the United States is subrogated and state court judgments which impact upon the administration of the federal Loan Guaranty Program are inextricably "intertwined" with the public rights resulting from the benefits conferred upon veterans by statute. Indeed, the federal Loan Guaranty Program displaces state law to the extent that federal law is inconsistent with state law. *United States v. Shimer, 367 U.S. 374 (1961)*; *see United States v. Whitney, 602 F. Supp. 722 (W.D.N.Y. 1985)*. ***HN11***[] "The Regulations promulgated by the Veterans' Administration make clear that they were intended to create a uniform system for determining the Administration's obligation as guarantor, which in its operation would displace state law." *Shimer, 367 U.S. at 377*. The determination of such private rights by the Board and this Article I court within the context of the judicial review of a BVA decision does not offend the principles of Article III of the Constitution. "There **[**18]** is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in **[*274]** Article III inquiries." *Schor, 478 U.S. at 853*.

We therefore hold that ***HN12***[] we do not offend the Constitution in reviewing determinations of private rights, including those arising out of a state court judgment, when, as here, such rights are "closely integrated into a public regulatory scheme" over which this Article I court exercises judicial review pursuant to statute. *Thomas, 473 U.S. at 594*.

3.

Even if appellant was entitled to a ruling by an Article III court on her collateral attack upon the Indiana judgment, such an entitlement is subject to waiver. As Justice O'Connor has noted:

Our precedents also demonstrate, however, that ***HN13***[] Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. *See, e.g., Thomas,*[473 U.S.] at 583, 105 S.Ct., at 3334; *Crowell v. Benson, [285 U.S. 22]*. Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, **[**19]** just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.

Schor, 478 U.S. at 848-49.

Decisions of the Secretary with respect to "matters arising under chapter 37 of [title 38]," the Loan Guaranty Program, have been, and remain, subject to challenge in state and Article III federal courts. *See* 38 U.S.C. § 211(2)(C). Indeed, ***HN14***[] 38 U.S.C. § 1820 (1988) specifically provides that:

(a) Notwithstanding the provisions of any other law, with respect to matters arising by reason of [chapter 37], the [Secretary] may --

(1) sue and be sued in the [Secretary's] official capacity in any court of competent jurisdiction, State or Federal . . . .

The net result of these statutory provisions is that appellant could have taken the initiative and challenged the Secretary's assertion that she owed a debt to the United States by suing the Secretary in an appropriate state court or in a United States district court. Alternatively, appellant could have waited until the Secretary sought judicial enforcement of the debt and defended by collaterally attacking the Indiana judgment. The availability of an alternative **[**20]** forum is not unique to suits under the federal Loan Guaranty Program. *See Young v. Derwinski*, U.S. Vet. App. No. 90-53 (Oct. 25, 1990) (claimant dissatisfied with the VA's resolution of an insurance claim can either sue in a United States district court or appeal to the BVA and seek judicial review in this Court of an adverse BVA decision.)

In *Schor*, the Supreme Court was faced with a situation similar to that presented by this appeal; the Court held that the litigant's

election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC [Commodity Futures Trading Commission] reparations proceeding constituted an effective waiver. . . . Thus, Schor had the option of having the common law counterclaim against him adjudicated in a federal Article III court, but, with full knowledge that the CFTC would exercise jurisdiction over that claim, chose to avail himself of the quicker and less expensive procedure Congress had provided him. In such circumstances, it is clear that Schor effectively agreed to an adjudication by the CFTC of the entire controversy by seeking relief in this alternative forum.

Schor, 478 U.S. at 849-50. **[**21]**

Appellant here also chose to forgo a right to proceed in state or federal court; instead, she exercised the right afforded her by *38 C.F.R. § 1.911(c)* to "informally dispute the existence or amount of the debt." When that informal dispute was not resolved in her favor, appellant sought review by the BVA and then by this Court. By choosing to follow this route, it would appear that, under *Thomas*, appellant may have waived any right she might have had to a determination by an Article III court **[*275]** on her collateral attack upon the Indiana judgment.

4.

Our holding that we may constitutionally exercise our appellate jurisdiction does not end our jurisdictional inquiry. ***HN15***[⬆] This Court is a court of review and our jurisdiction is derivative; we can review only what was -- or should have been -- decided below. We must first determine whether the BVA adequately addressed and resolved the issue raised by appellant or whether a remand is required.

The comprehensive regulatory scheme for the administration of benefits under the Loan Guaranty Program compels the conclusion that ***HN16***[⬆] decisions underlying a debt, *i.e.*, the existence or amount of a debt, may be appealed to the Board of Veterans' **[**22]** Appeals. Indeed, *38 C.F.R. § 1.911* not once but twice notes that a debtor may appeal "the decision underlying the debt" to the BVA. *See* *38 C.F.R. § 1.911(c)(3)* and *(f)(1)*. The Board has jurisdiction to hear such appeals under 38 U.S.C. § 4004 and, because this Court's jurisdiction derives from the Board's jurisdiction, *see* 38 U.S.C. § 4052(a), we have appellate jurisdiction to hear appeals of the BVA's decisions with respect to the existence or amount of a debt.

By its statement of the issue to be considered in this case, the Board purported to confine itself solely to a review of the action of the Committee on the waiver request. The actual decision, however, ranges far beyond the self-described limit. Indeed, the Board specifically directed

its attention to contentions raised by the appellant concerning her lack of notice concerning the default and also her lack of interest in the subject property as a result of the divorce determination. The Board has reviewed all the evidence in this case concerning the lack of notice. We agree that, under the circumstances in this case, when . . . the appellant moved to Florida and remarried, her address would not have been reasonably **[**23]** ascertainable. Moreover, attempts were made to notify the veteran and the appellant in 1981. Therefore, the Board agrees that the requirements pertaining to notice and due process have been met.

Barbara C. Smith, loc. no. 004165, at 6-7 (BVA Feb. 13, 1990).

Although the Secretary argues that the Board confined itself to the Committee's decision on waiver, we cannot agree. The Board stated that it "reviewed all the evidence in this case concerning the lack of notice" and specifically ruled that "the requirements pertaining to notice and due process have been met." The disclaimer that the validity of appellant's debt was not at issue is belied by the BVA's decision in which the issue was clearly articulated and definitively resolved against appellant. We have appellate jurisdiction to review that decision under 38 U.S.C § 4052(a).

B. REVIEW ON THE MERITS

This is not a case in which the VA can seek indemnification from a veteran who defaulted on a VA guaranteed loan. This case arises by virtue of a right of subrogation resulting from a judgment in a foreclosure proceeding entered by a state court. It is not disputed that the Secretary paid the guaranty to Citicorp, the successor **[**24]** in interest to the original mortgagee. R. at 78. ***HN17***[⬆] As *38 U.S.C. § 1832* and *38 C.F.R. § 36.4323 (1990)* make clear, any right the Secretary has to collect the deficiency from appellant is not original but derivative. "If the Secretary makes such a payment, the Secretary shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the

guaranty." 38 U.S.C. § 1832(a)(1). The Secretary, therefore, stands in the shoes of the successor mortgagee, and we must look to the successor mortgagee's rights resulting from the Indiana judgment to determine whether there is a debt which the Secretary can collect from appellant.

1.

Appellant's first argument is that she was absolved of any personal liability on the note when she divested herself of ownership of the property and executed a quitclaim deed in return for an agreement from her then former husband to hold her harmless. This argument misperceives the **[*276]** precise nature of the transaction or transactions in which appellant was involved.

Appellant's liability to the successor mortgagee, and thus to the Secretary by virtue of the right of subrogation, stems not from her original ownership of the property **[**25]** which secured the loan but from the loan itself. The Indiana divorce decree does not by its terms purport to release appellant from liability on the note; moreover, it could not have done so because the original mortgagee, an indispensable party, was not made a party to the action. Copeland v. Copeland, 145 Ind. App. 73, 248 N.E.2d 571 (1969) (citing Shula v. Shula, 235 Ind. 210, 214, 132 N.E.2d 612 (1956)). Simply put, there is no basis in fact or in law for the argument of appellant that her debt to the mortgagee was canceled upon her relinquishment of interest in the property. Appellant is in a position no different from that in which all too many former homeowners have found themselves in recent years when subsequent purchasers defaulted on assumed home loans subject to VA guaranties. *See, e.g.*, Whitney, 602 F. Supp. 722 (W.D.N.Y. 1985); Vail v. Derwinski, 742 F. Supp. 1039 (D. Minn. 1990), *appeal filed*, No. 90-5559 (8th Cir. Nov. 26, 1990), *appeal filed*, No. 91-1026 (8th Cir. Jan. 4, 1991).

The Board properly concluded that even though the divorce decree terminated **[**26]** appellant's interest in the property, "the appellant remained liable to the loan holder on the mortgage agreement. This liability remained in effect even when the appellant no longer had a property interest in the subject property." *Smith*, loc. no. 004165, at 7.

2.

Appellant's second argument consists of a collateral attack on the Indiana judgment on the ground that the Indiana state court did not have jurisdiction over her person. ***HN18***[↑] Article IV, Section 1, of the Constitution provides that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State." Similarly, 28 U.S.C. § 1738 (1988) provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or possession from which they are taken." Therefore, this Court, "a court within the United States," is required to give full faith and credit to the judgment entered by the Indiana state court. *See, e.g.*, Miniafee v. United States, 17 Cl. Ct. 571, 574 (1989) (citing Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982)) **[**27]** (holding that the Claims Court must give full faith and credit to a state court judgment).

As the Supreme Court has noted: ***HN19***[↑] "The concept of full faith and credit is central to our system of jurisprudence." Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n, 455 U.S. 691, 703 (1982). "[A] judgment is entitled to full faith and credit . . . when . . . those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." Durfee v. Duke, 375 U.S. 106, 111 (1963). However, the full faith and credit doctrine is not without limits.

Before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.

Underwriters Nat'l Assurance Co., 455 U.S. at 705.

The essence of appellant's collateral attack is that she was entitled to actual notice of the Indiana foreclosure proceedings under the Due Process Clause of the Fourteenth Amendment **[**28]** to the Constitution. In the absence of such notice, the argument continues, the Indiana court lacked jurisdiction over her person; therefore, the Indiana court could not extinguish her interest in property securing a note which, in turn, is the basis of the alleged debt to the United States. The Secretary does not dispute appellant's contention that the first she learned about the Indiana proceedings **[*277]** was in 1988 when the VA notified her that she was in debt to the United States. Since appellant never appeared before the Indiana state court, that issue was

never litigated. Therefore, whether the Indiana state court acquired *in personam* jurisdiction over appellant through notice of process by publication must be resolved in order to determine whether the judgment is entitled to full faith and credit.

HN20[↑] Where the defendant has appeared in the original action, the judgment in that cause is res judicata on the issue of personal jurisdiction, whether the defendant actually litigated the question or merely permitted it to pass without objection. . . . In those case [sic], however, in which the defendant makes no appearance and the judgment goes by default, the defendant may defeat subsequent **[**29]** enforcement in another forum by demonstrating that the judgment issued from a court lacking personal jurisdiction. Of course, "the burden of undermining [the judgment] rests heavily upon the assailant," *Williams v. North Carolina, 1945, 325 U.S. 226, 233-34, 65 S.Ct. 1092, 1097, 89 L. Ed. 1577*.

Hazen Research Inc. v. Omega Minerals, Inc., 497 F.2d 151, 153-54 (5th Cir. 1974).

When foreclosure proceedings were initiated in Indiana and under Indiana law, it is not disputed that appellant resided in Florida. The judgment is not a model of clarity, but it appears that the Indiana court intended that its judgment be both *in rem* as to the property and *in personam* as to the individual defendants. There can be no question as to the validity of the *in rem* judgment with respect to the property because it was within the jurisdiction of the Indiana court, but that does not end the matter. As Justice Marshall noted in *Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983)*: "Our cases have required ***HN21***[↑] the State to make efforts to provide actual notice to all interested parties comparable to the efforts **[**30]** that were previously required only in in personam actions." *Id. at 796 n.3*. Thus, regardless whether the Indiana judgment is viewed as *in rem*, *in personam*, or a combination of both, the issue, properly framed, is whether appellant was entitled to receive "actual notice" in order to satisfy the Constitutional requirement of due process.

Service on appellant was by publication, which is permitted in a foreclosure proceeding under Indiana law. *United States v. Murdock, 627 F. Supp. 272, 275 (N.D. Ind. 1985)*. The Supreme Court, in *Mennonite*, considered the effect of notice by publication in an analogous situation where the real property, also located within the State of Indiana, was the subject of a tax sale. In the words of Justice O'Connor, who was joined in her dissent by Justice Powell and then-Justice Rehnquist, the majority held that ***HN22***[↑] before the State conducts *any* proceeding that will affect the legally protected property interests of *any* party, the State must provide notice to that party by means certain to ensure actual notice as long as the party's identity and location are "reasonably ascertainable."

Mennonite, 462 U.S. 791, 800-01 (1983) **[**31]** (O'Connor, J., dissenting) (quoting majority opinion, *462 U.S. at 800*). After *Mennonite*, therefore, notice by publication satisfies the *Due Process Clause of the Fourteenth Amendment* only when the party's identity and location are not "reasonably ascertainable."

It bears repeating that this Court is a court of review, not a trial court. Our task is not to determine in the first instance whether appellant's address was reasonably ascertainable. Rather, it is our responsibility to determine whether the BVA's finding that "her address would not have been reasonably ascertainable," *Smith*, loc. no. 004165, at 6-7, was clearly erroneous. 38 U.S.C. § 4061(a)(4) (1988). The record indicates that the attorney for the original mortgagee filed an affidavit, R. at 41-42, stating: "Diligent search has been made for said Defendants, but said Defendants cannot be found and plaintiff reasonably believes that the whereabouts of said Defendants cannot be discovered upon further reasonable inquiry." R. at 41. Based upon this affidavit, the Indiana court authorized service by publication for both appellant and her former husband. Appellant's former husband entered an appearance; **[**32]** **[*278]** appellant did not. The judgment of the Indiana court states that appellant "is in default for failing to plead or otherwise defend." R. at 55. The record before this Court, and presumably before the Board, is totally devoid of any evidence which would provide a basis for questioning the representations contained in the affidavit of counsel that a "diligent search" and a "reasonable inquiry" were conducted as to appellant's location. Although appellant in her brief to this Court opines that "her address in the State of Florida was reasonably ascertainable through either her former husband or her local counsel," Br. at 11, appellant has offered nothing of evidentiary value which would support her conjecture or counter the affidavit. Bare allegations that her former husband would have known or should have been asked or that her counsel for her divorce should have been contacted to determine appellant's location are inadequate and do not satisfy the burden

which "rests heavily" upon one seeking to collaterally attack a judgment of a state court. ***HN23***[⬆] "A judgment presumes jurisdiction over the subject matter and over the persons." *Cook v. Cook, 342 U.S. 126, 128 (1951)*. **[**33]**

We are compelled to hold on this record that the BVA was not clearly erroneous when it concluded that appellant's location in Florida in 1981 was not reasonably ascertainable and that notice by publication pursuant to the law of the State of Indiana was sufficient notice of process to satisfy the *Due Process Clause of the Fourteenth Amendment*. Therefore, the Indiana state court exercised *in personam* jurisdiction over appellant and the judgment of that court is entitled to full faith and credit. The decision of the BVA that appellant was indebted to the United States is affirmed.

III.

APPELLANT'S CHALLENGE TO THE SECRETARY'S REFUSAL TO WAIVE THE FULL AMOUNT OF THE DEFICIENCY

A. JURISDICTION

HN24[⬆] In addition to challenging "the existence or amount of the debt," a prospective debtor may seek a waiver of the collection of the debt. *38 C.F.R. § 1.911(c)*. The procedures for making a decision on a request for a waiver are not the same as those used by the VA to adjudicate a claim for benefits. Pursuant to *38 C.F.R. §§ 1.955-1.970 (1990)*, decisions on waivers are committed to a Committee on Waivers and Compromises (Committee) established in each VA regional office. Such **[**34]** committees are specifically authorized "to consider and determine . . . settlement, compromise and/or waiver concerning . . . debts arising out of the loan program under 38 U.S.C. Ch. 37 after liquidation of security, if any." *38 C.F.R. § 1.956(a)(1)(ii) (1990)*. Since the Committees operate in a manner and under authority wholly distinct from that governing ordinary benefits decisions, the authority with respect to the appeal of Committee action is also distinct. *Section 1.958* provides that a "decision . . . denying waiver of all or a part of an overpayment is subject to appeal." *38 C.F.R. § 1.958 (1990)*. Prospective debtors under the Loan Guaranty Program are reminded of this authority by *38 C.F.R. § 1.911(f)(3)*: "Right to appeal a waiver decision, in *§ 1.958*." *See also 38 C.F.R. § 19.2 (1990)* (Board's appellate jurisdiction includes claims involving waiver or recovery of overpayments). Again, this Court's appellate jurisdiction is derivative in that it has exclusive jurisdiction to review BVA decisions. 38 U.S.C. § 4052(a). Since the BVA has specific authority to review waiver decisions, this Court, in turn, has appellate jurisdiction to review the BVA's decisions on waivers.

[35]** *B. REVIEW ON THE MERITS*

Once the Secretary determined that appellant did in fact and law owe the debt, Supp. R. at 1-2, appellant's request for a waiver was referred to the Regional Office Committee to determine if appellant was entitled, in "equity and good conscience," to a complete or partial waiver. *See 38 U.S.C. § 3102(b)*; *38 C.F.R. § 1.964(a)(2) (1990)*. ***HN25***[⬆] The statutory phrase "equity and **[*279]** good conscience," without any other limiting or definitional statutory provisions, effectively commits decisions on requests for waivers to the discretion of the Secretary. Our review with respect to the statutory standard is therefore limited to determining whether the Secretary abused his discretion in refusing to waive the entire amount of the debt. *See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)*; *Heckler v. Chaney, 470 U.S. 821 (1985)*; *contra United States v. Church, 736 F. Supp. 1494 (N.D. Ind. 1990)* ("This court can clearly determine [under the Administrative Procedure Act, *5 U.S.C. §§ 701-706 (1988)*] whether the Administrator was required by *§ 3102* to waive Church's liability because collection would **[**36]** be against equity and good conscience.").

The statutory phrase "equity and good conscience" does not, however, stand in isolation. By regulation, the Secretary has defined the phrase and issued guidance as to its application to particular cases by the Committees.

HN26[⬆] The phrase 'equity and good conscience' means arriving at a fair decision between the obligor and the Government. In making this determination, consideration will be given to the following elements, which are not intended to be all inclusive:

(1) *Fault of debtor*. . . .

(2) *Balancing of faults*. . . .

(3) *Undue hardship*. . . .

(4) *Defeat the purpose*. . . .

(5) *Unjust enrichment*. . . .

(6) *Changing position to one's detriment*. . . .

38 C.F.R. § 1.965 (1990).

HN27[] Waiver decisions, and the review of such decisions by the BVA, are subject to review by this Court to determine whether the statutory standard was applied in accordance with the regulatory guidance or whether the decision was made in an arbitrary or capricious manner. 38 U.S.C. § 4061(a)(3)(A) (1988); *see* Service v. Dulles, 354 U.S. 363 (1957) (holding that a decision committed to the "absolute discretion" of an agency head **[**37]** is subject to judicial review when the agency has promulgated regulations governing the exercise of such discretion.)

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

In deciding appellant's request for a waiver, the Committee stated as follows:

We have reviewed the circumstances surrounding the occurrence of this debt and find no material fault on your part, because you awarded the property to your husband in the divorce proceedings in good faith. We have reviewed your financial statement and find that you could repay at least part of the debt within a reasonable time. A decision has been made to grant a waiver of part of the principal indebtedness in the amount of $ 5,000.00. You will remain **[**38]** liable for the balance.

R. at 109.

Pursuant to 38 C.F.R. § 1.958, appellant appealed to the Board which affirmed the decision of the Committee to grant only a partial waiver.

HN28[] In determining the issue of whether or not repayment of the loan guaranty indebtedness would violate the principle of equity and good conscience, consideration will be given to all the cited elements with emphasis on the concept of undue hardship . . . . In order to find undue hardship, the evidence must demonstrate the appellant's ability to provide herself and any dependents with the necessities of life is seriously impaired. . . .

[*280] In this regard, the Board notes that the financial status report prepared in May 1988 disclosed a positive monthly balance of approximately $ 200. We are aware that on the subsequent financial status report prepared on October 1988, she listed installment contracts and other debts with an unpaid balance of $ 13,505 and a total monthly amount due of $ 413. The Board noted, however, that none of these debts were reported past due. . . . Also, the record indicates that the appellant is still a young woman who can reasonably anticipate many years of substantially gainful employment **[**39]** in her profession as a registered nurse. Therefore, considering the amount of the debt, the Board's judgment is that the appellant should be able to repay the loan guaranty debt in installments without impairing her ability to provide for the basic necessities of life.

Smith, loc. no. 004165, at 7.

This well-reasoned discussion demonstrates that the decision to waive only $ 5,000 of the total indebtedness was neither arbitrary, capricious, nor an abuse of the Secretary's discretion.

IV.

CONCLUSION

We hold that this Court has jurisdiction to review the conclusions of the Board (1) that appellant owed a debt to the United States, and (2) that the recovery of a portion of that debt was not against equity and good conscience. The Court further holds that the BVA did not err when it concluded that the divorce decree did not relieve appellant of liability on the underlying debt and that appellant has failed to carry the burden of demonstrating that the Indiana state court did not acquire jurisdiction of her person in the foreclosure proceeding through notice of process by publication The Court also holds that the decision that recovery of all but $ 5,000 of the deficiency **[**40]** would not offend equity or good conscience was neither arbitrary, capricious,

nor an abuse of discretion. Therefore, the BVA decision of February 13, 1990, is affirmed.

It is so ordered.

End of Document

covered field office or facility, or between components of the Veterans Benefits Administration and the Veterans Health Administration at a Department medical and regional office center, if after the consolidation or redistribution the same number of full-time equivalent employees continues to perform the affected functions at that field office, facility, or center.

(f) For purposes of this section:

(1) The term ''covered field office or facility'' means a Department office or facility outside the Central Office that is the permanent duty station for 25 or more employees or that is a free-standing outpatient clinic.

(2) The term ''detailed plan and justification'' means, with respect to an administrative reorganization, a written report that, at a minimum, includes the following:

(A) Specification of the number of employees by which each covered office or facility affected is to be reduced, the responsibilities of those employees, and the means by which the reduction is to be accomplished.

(B) Identification of any existing or planned office or facility at which the number of employees is to be increased and specification of the number and responsibilities of the additional employees at each such office or facility.

(C) A description of the changes in the functions carried out at any existing office or facility and the functions to be assigned to an office or facility not in existence on the date that the plan and justification are submitted pursuant to subsection (b).

(D) An explanation of the reasons for the determination that the reorganization is appropriate and advisable in terms of the statutory missions and long-term goals of the Department.

(E) A description of the effects that the reorganization may have on the provision of benefits and services to veterans and dependents of veterans (including the provision of benefits and services through offices and facilities of the Department not directly affected by the reorganization).

(F) Estimates of the costs of the reorganization and of the cost impact of the reorganization, together with analyses supporting those estimates.

(Added Pub. L. 102–83, §2(a), Aug. 6, 1991, 105 Stat. 387; amended Pub. L. 104–262, title III, §304, Oct. 9, 1996, 110 Stat. 3194.)

PRIOR PROVISIONS

Prior section 510, Pub. L. 85–857, Sept. 2, 1958, 72 Stat. 1135, provided monthly pension for persons who served in military or naval forces of Confederate States of America, prior to repeal by Pub. L. 94–169, title I, §101(2)(F), Dec. 23, 1975, 89 Stat. 1014, effective Jan. 1, 1976.

Provisions similar to those in this section were contained in section 210(b)(1), (2) of this title prior to repeal by Pub. L. 102–83, §2(a).

AMENDMENTS

1996—Subsec. (b). Pub. L. 104–262 substituted ''a 45-day period following the date of the submission of the report, not less than 30 days of which shall be days during which Congress shall have been in continuous session'' for ''a 90-day period of continuous session of Congress following the date of the submission of the report'' in second sentence and ''any period of continuity of session'' for ''such 90-day period'' in third sentence.

AUTHORITY OF SECRETARY OF VETERANS AFFAIRS TO CARRY OUT SPECIFIED ADMINISTRATIVE REORGANIZATION

Pub. L. 102–54, §12, June 13, 1991, 105 Stat. 273, provided that:

''(a) AUTHORITY FOR ADMINISTRATIVE REORGANIZATION.—The Secretary of Veterans Affairs may carry out the administrative reorganization described in subsection (b) without regard to section 210(b)(2) of title 38 [38 U.S.C. 510(b)–(f)], United States Code.

''(b) SPECIFIED REORGANIZATION.—Subsection (a) applies to the organizational realignment of management responsibility for the Department of Veterans Affairs Data Processing Centers, together with the corresponding organizational realignment of associated Information Resources Management operational components and functions within the Department of Veterans Affairs central office, as such realignment was described in the detailed plan and justification submitted by the Secretary of Veterans Affairs in [sic] January 4, 1991, letters to the Chairmen of the Committees on Veterans' Affairs of the Senate and the House of Representatives.''

INAPPLICABILITY OF RESTRICTIONS

Pub. L. 101–312, June 25, 1990, 104 Stat. 271, provided: ''That (a) the Secretary of Veterans Affairs may proceed with the administrative reorganization described in subsection (b) of this Act without regard to section 210(b) [see 303, 510, 711] of title 38, United States Code.

''(b) The administrative reorganization referred to in subsection (a) is the reorganization of the regional field offices of the Veterans Health Services and Research Administration of the Department of Veterans Affairs as that reorganization and related activity are described in (1) letters dated January 22, 1990, and the detailed plan and justification enclosed therewith, submitted by the Secretary to the Committees on Veterans' Affairs of the Senate and the House of Representatives pursuant to such section 210(b) [see 303, 510, 711], and (2) letters dated April 17, 1990, submitted in supplementation thereof by the Secretary to such Committees.''

Section 15(b) of Pub. L. 100–527 provided that: ''Section 210(b) [see 303, 510, 711] of title 38, United States Code (as amended by subsection (a)), shall not apply to a reorganization of a unit of the Central Office of the Department of Veterans' Affairs if the reorganization—

''(1) is necessary in order to carry out the provisions of or amendments made by this Act [see Tables for classification]; and

''(2) is initiated within 6 months after the effective date of this Act [Mar. 15, 1989].''

§ 511. Decisions of the Secretary; finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to—

(1) matters subject to section 502 of this title;

(2) matters covered by sections 1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.

(Added Pub. L. 102–83, § 2(a), Aug. 6, 1991, 105 Stat. 388.)

PRIOR PROVISIONS

Prior section 511 was renumbered section 1511 of this title.

Provisions similar to those in this section were contained in section 211(a) of this title prior to repeal by Pub. L. 102–83, § 2(a).

FEDERAL RULES OF CIVIL PROCEDURE

Writ of mandamus abolished in United States district courts, but relief available by appropriate action or motion, see rule 81, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 512. Delegation of authority; assignment of functions and duties

(a) Except as otherwise provided by law, the Secretary may assign functions and duties, and delegate, or authorize successive redelegation of, authority to act and to render decisions, with respect to all laws administered by the Department, to such officers and employees as the Secretary may find necessary. Within the limitations of such delegations, redelegations, or assignments, all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Secretary.

(b) There shall be included on the technical and administrative staff of the Secretary such staff officers, experts, inspectors, and assistants (including legal assistants) as the Secretary may prescribe.

(Added Pub. L. 102–83, § 2(a), Aug. 6, 1991, 105 Stat. 389.)

PRIOR PROVISIONS

Prior section 512 was renumbered section 1512 of this title.

Provisions similar to those in this section were contained in section 212 of this title prior to repeal by Pub. L. 102–83, § 2(a).

§ 513. Contracts and personal services

The Secretary may, for purposes of all laws administered by the Department, accept uncompensated services, and enter into contracts or agreements with private or public agencies or persons (including contracts for services of translators without regard to any other law), for such necessary services (including personal services) as the Secretary may consider practicable. The Secretary may also enter into contracts or agreements with private concerns or public agencies for the hiring of passenger motor vehicles or aircraft for official travel whenever, in the Secretary's judgment, such arrangements are in the interest of efficiency or economy.

(Added Pub. L. 102–83, § 2(a), Aug. 6, 1991, 105 Stat. 389.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 213 of this title prior to repeal by Pub. L. 102–83, § 2(a).

§ 515. Administrative settlement of tort claims

(a)(1) Notwithstanding the limitations contained in section 2672 of title 28, the Secretary may settle a claim for money damages against the United States cognizable under section 1346(b) or 2672 of title 28 or section 7316 of this title to the extent the authority to do so is delegated to the Secretary by the Attorney General. Such delegation may not exceed the authority delegated by the Attorney General to United States attorneys to settle claims for money damages against the United States.

(2) For purposes of this subsection, the term ''settle'', with respect to a claim, means consider, ascertain, adjust, determine, and dispose of the claim, whether by full or partial allowance or by disallowance.

(b) The Secretary may pay tort claims, in the manner authorized in the first paragraph of section 2672 of title 28, when such claims arise in foreign countries in connection with Department operations abroad. A claim may not be allowed under this subsection unless it is presented in writing to the Secretary within two years after the claim accrues.

(Added Pub. L. 102–83, § 2(a), Aug. 6, 1991, 105 Stat. 389.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in sections 224 and 236 of this title prior to repeal by Pub. L. 102–83, § 2(a).

§ 516. Equal employment responsibilities

(a) The Secretary shall provide that the employment discrimination complaint resolution system within the Department be established and administered so as to encourage timely and fair resolution of concerns and complaints. The Secretary shall take steps to ensure that the system is administered in an objective, fair, and effective manner and in a manner that is perceived by employees and other interested parties as being objective, fair, and effective.

(b) The Secretary shall provide—

(1) that employees responsible for counseling functions associated with employment discrimination and for receiving, investigating, and processing complaints of employment discrimination shall be supervised in those functions by, and report to, an Assistant Secretary or a Deputy Assistant Secretary for complaint resolution management; and

(2) that employees performing employment discrimination complaint resolution functions at a facility of the Department shall not be subject to the authority, direction, and control of the Director of the facility with respect to those functions.

(c) The Secretary shall ensure that all employees of the Department receive adequate education and training for the purposes of this section and section 319 of this title.

(d) The Secretary shall, when appropriate, impose disciplinary measures, as authorized by law, in the case of employees of the Department who engage in unlawful employment discrimination, including retaliation against an employee asserting rights under an equal employment opportunity law.

(e)(1)(A) Not later than 45 days after the end of each calendar quarter, the Assistant Secretary for Human Resources and Administration shall

reasons for (or both) which the DRB or the Secretary concerned granted or denied relief.

(i) The reading file index shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason and authority for the discharge. It shall also include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions, and reasons.

(ii) The index shall be maintained at selected permanent locations throughout the United States. This ensures reasonable availability to applicants at least 30 days before a traveling panel review. A list of these locations shall be published in the FEDERAL REGISTER by the Department of the Army. The index shall also be made available at sites selected for traveling panels or hearing examinations for such periods as the DRB or a hearing examiner is present and in operation. An applicant who has requested a traveling panel review or a hearing examination shall be advised in the notice of such review of the permanent index locations.

(iii) The Armed Forces Discharge Review/Correction Board Reading Room shall publish indexes quarterly for all DRBs. All DRBs shall be responsible for timely submission to the Reading Room of individual case information required for update of the indexes. In addition, all DRBs shall be responsible for submission of new index categories based upon published changes in policy, procedures, or standards. These indexes shall be available for public inspection or purchase (or both) at the Reading Room. When the DRB has accepted an application, information concerning the availability of the index shall be provided in the DRB's response to the application.

(iv) Copies of decisional documents will be provided to individuals or organizations outside the NCR in response to written requests for such documents. Although the Reading Room shall try to make timely responses to such requests, certain factors such as the length of a request, the volume of other pending requests, and the impact of other responsibilities of the staff assigned to such duties may cause some delays. A fee may be charged for such documents under appropriate DoD and Department of the Army directives and regulations. The manual that accompanies the index of decisions shall notify the public that if an applicant indicates that a review is scheduled for a specific date, an effort will be made to provide requested decisional documents before that date. The individual or organization will be advised if that cannot be accomplished.

(v) Correspondence relating to matters under the cognizance of the Reading Room (including requests for purchase of indexes) shall be addressed to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(m) *Privacy Act information.* Information protected under the Privacy Act is involved in the discharge review functions. The provisions of part 286a of this title shall be observed throughout the processing of a request for review of discharge or dismissal.

(n) *Information requirement.* Each Military Department shall provide the Deputy Assistant Secretary of Defense (Military Personnel and Force Management) DASD (MP&FM), Office of the ASD (MRA&L), with a semiannual report of discharge review actions in accordance with § 70.11.

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9855, Mar. 9, 1983; 48 FR 35644, Aug. 5, 1983]

§ 70.9 Discharge review standards.

(a) *Objective of review.* The objective of a discharge review is to examine the propriety and equity of the applicant's discharge and to effect changes, if necessary. The standards of review and the underlying factors that aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service. No factors shall be established that require automatic change or denial of a change in discharge. Neither a DRB nor the Secretary of the Military Department concerned shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the DRB or the Secretary of the Military Department concerned shall give full, fair, and impartial considerations to all applicable factors before reaching a decision. An

applicant may not rceive a less favorable discharge than that issued at the time of separation. This does not preclude correction of clerical errors.

(b) *Propriety*. (1) A discharge shall be deemed proper unless, in the course of discharge review, it is determined that:

(i) There exists an error of fact, law, procedure, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

(ii) A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

(2) When a record associated with the discharge at the time of issuance involves a matter in which the primary responsibility for corrective action rests with another organization (for example, another Board, agency, or court), the DRB will recognize an error only to the extent that the error has been corrected by the organization with primary responsibility for correcting the record.

(3) The primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis. Prior decisions in which the DRB exercised its discretion to change a discharge based on issues of equity (including the factors cited in such decisions or the weight given to factors in such decisions) do not bind the DRB in its review of subsequent cases because no two cases present the same issues of equity.

(4) The following applies to applicants who received less than fully Honorable administrative discharges because of their civilian misconduct while in an inactive reserve component and who were discharged or had their discharge reviewed on or after April 20, 1971: the DRB shall either recharacterize the discharge to Honorable without any additional proceedings or additional proceedings shall be conducted in accordance with the Court's Order of December 3, 1981, in *Wood v. Secretary of Defense* to determine whether proper grounds exist for the issuance of a less than Honorable discharge, taking into account that;

(i) An Other than Honorable (formerly undesirable) Discharge for an inactive reservist can only be based upon civilian misconduct found to have affected directly the performance of military duties;

(ii) A General Discharge for an inactive reservist can only be based upon civilian misconduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.

(c) *Equity*. A discharge shall be deemed to be equitable unless:

(1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that:

(i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(ii) There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.

(2) At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member.

(3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this section and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:

(i) Quality of service, as evidenced by factors such as:

(A) Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative);

(B) Awards and decorations;

(C) Letters of commendation or reprimand;

(D) Combat service;

(E) Wounds received in action;

(F) Records of promotions and demotions;

(G) Level of responsibility at which the applicant served;

(H) Other acts of merit that may not have resulted in a formal recognition through an award or commendation;

(I) Length of service during the service period which is the subject of the discharge review;

(J) Prior military service and type of discharge received or outstanding postservice conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review;

(K) Convictions by court-martial;

(L) Records of nonjudicial punishment;

(M) Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in military service records;

(N) Records of periods of unauthorized absence;

(O) Records relating to a discharge instead of court-martial.

(ii) Capability to serve, as evidenced by factors such as:

(A) *Total capabilities.* This includes an evaluation of matters, such as age, educational level, and aptitude scores. Consideration may also be given whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to military service.

(B) *Family and Personal Problems.* This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

(C) *Arbitrary or capricious action.* This includes actions by individuals in authority that constitute a clear abuse of such authority and that, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.

(D) *Discrimination.* This includes unauthorized acts as documented by records or other evidence.

§ 70.10 Complaints concerning decisional documents and index entries.

(a) *General.* (1) The procedures in this section—are established for the sole purpose of ensuring that decisional documents and index entries issued by the DRBs of the Military Departments comply with the decisional document and index entry principles of this part.

(2) This section may be modified or supplemented by the DASD(MP&FM).

(3) The following persons may submit complaints:

(i) A former member of the Armed Forces (or the former member's counsel) with respect to the decisional document issued in the former member's own case; and

(ii) A former member of the Armed Forces (or the former member's counsel) who states that correction of the decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(4) The Department of Defense is committed to processing of complaints within the priorities and processing goals set forth in paragraph (d)(1)(iii) of this section. This commitment, however, is conditioned upon reasonable use of the complaint process under the following considerations. The DRBs were established for the benefit of former members of the Armed Forces. The complaint process can aid such persons most effectively if it is used by former members of the Armed Forces when necessary to obtain correction of their own decisional documents or to prepare for discharge reviews. If a substantial number of complaints submitted by others interferes with the ability of the DRBs to process applications for discharge review in a timely fashion, the Department of Defense

tion * * * hereafter taken pursuant to subsection (a) of this section'', in 5:191a and 275. The words ''heretofore taken pursuant to this section'', in 5:191a and 275, are omitted as executed. The words ''of any persons, their heirs at law or legal representative as hereinafter provided'', ''(including retired or retirement pay)'', ''as the case may be'', ''duly appointed'', ''otherwise due hereunder'', ''decedent's'', ''precedence or succession'', and ''of precedence'', in 5:191a and 275, are omitted as surplusage. The last sentence is substituted for 5:191a(c) and 275(c).

In subsection (d), the word ''but'' is substituted for the words ''That, continuing payments are authorized to be made to such personnel'', in 5:191a and 275. The words ''if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate'' are substituted for the words ''without the necessity for reenlistment, appointment, or reappointment to the grade, rank, or office to which such pay (including retired or retirement pay), allowances, compensation, emoluments, and other monetary benefits are attached'', in 5:191a and 275. The words ''or one year following the date of enactment of this section'', in 5:191a and 275, are omitted as executed. The words ''for payment of such sums as may be due for'', in 5:191a and 275, are omitted as surplusage. The words ''(including retired or retirement pay)'', in 5:191a and 275, are omitted as covered by the definition of ''pay'' in section 101(27) of this title.

In subsection (e), the words ''No payment may be made under this section'' are substituted for the words ''Nothing in this section shall be construed to authorize the payment of any amount as compensation'', in 5:191a and 275.

REFERENCES IN TEXT

The Uniform Code of Military Justice (Public Law 506 of the 81st Congress), referred to in subsec. (f), is act May 5, 1950, ch. 169, §1, 64 Stat. 107, which was classified to chapter 22 (§551 et seq.) of Title 50, War and National Defense, and was repealed and reenacted as chapter 47 (§801 et seq.) of this title by act Aug. 10, 1956, ch. 1041, §53, 70A Stat. 641, the first section of which enacted this title.

AMENDMENTS

2008—Subsec. (c). Pub. L. 110–417 designated existing provisions as pars. (1) to (3), redesignated former pars. (1) to (3) as subpars. (A) to (C), respectively, of par. (2), and added par. (4).

2002—Subsec. (a)(1). Pub. L. 107–296 substituted ''Secretary of Homeland Security'' for ''Secretary of Transportation''.

1998—Subsec. (c). Pub. L. 105–261, §545(a), inserted '', or on account of his or another's service as a civilian employee'' before period at end of first sentence.

Subsec. (g). Pub. L. 105–261, §545(b), added subsec. (g).

1992—Subsec. (a)(2). Pub. L. 102–484 substituted ''announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade'' for ''announcing a decision not to promote an enlisted member to a higher grade''.

1989—Subsec. (a). Pub. L. 101–189, §514(a), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.''

Subsec. (b). Pub. L. 101–189, §514(b), substituted ''subsection (a)(1)'' for ''subsection (a)'' in two places.

Subsec. (e). Pub. L. 101–189, §1621(a)(2), substituted ''Secretary of Veterans Affairs'' for ''Administrator of Veterans' Affairs''.

1988—Subsec. (b). Pub. L. 100–456, §1233(a)(1), substituted ''for the correction within three years after he discovers the error or injustice'' for ''therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later''.

Subsec. (c). Pub. L. 100–456, §1233(a)(2), substituted ''The Secretary concerned'' for ''The department concerned''.

1983—Subsec. (f). Pub. L. 98–209 added subsec. (f).

1980—Subsec. (a). Pub. L. 96–513 substituted ''Secretary of Transportation'' for ''Secretary of the Treasury''.

1960—Subsec. (f). Pub. L. 86–533 repealed subsec. (f) which required reports to the Congress every six months with respect to claims paid under this section.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–417, [div. A], title V, §592(c), Oct. 14, 2008, 122 Stat. 4475, provided that: ''The amendment made by subsection (a) [amending this section] shall apply with respect to any sentence of a court-martial set aside by a Corrections Board on or after October 1, 2007, when the Corrections Board includes an order or recommendation for the payment of a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, that arose as a result of the conviction. In this subsection, the term 'Corrections Board' has the meaning given that term in section 1557 of title 10, United States Code.''

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see section 1704(g) of Pub. L. 107–296, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–513 effective Dec. 12, 1980, see section 701(b)(3) of Pub. L. 96–513, set out as a note under section 101 of this title.

BOARD FOR CORRECTION OF MILITARY RECORDS

Pub. L. 101–225, title II, §212, Dec. 12, 1989, 103 Stat. 1914, provided that: ''Not later than 6 months after the date of the enactment of this Act [Dec. 12, 1989], the Secretary of Transportation shall—

''(1) amend part 52 of title 33, Code of Federal Regulations, governing the proceedings of the board established by the Secretary under section 1552 of title 10, United States Code, to ensure that a complete application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt; and

''(2) appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the board, which are adequate to ensure compliance with paragraph (1) of this subsection.''

§ 1553. Review of discharge or dismissal

(a) The Secretary concerned shall, after consulting the Secretary of Veterans Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal. With respect to a discharge or dismissal adjudged by a court-martial case

tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge for purposes of clemency.

(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Secretary of Veterans Affairs under chapter 59 of title 38.

(d)(1) In the case of a former member of the armed forces who, while serving on active duty as a member of the armed forces, was deployed in support of a contingency operation and who, at any time after such deployment, was diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing post-traumatic stress disorder or traumatic brain injury as a consequence of that deployment, a board established under this section to review the former member's discharge or dismissal shall include a member who is a physician, clinical psychologist, or psychiatrist.

(2) In the case of a former member described in paragraph (1) or a former member whose application for relief is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury as supporting rationale or as justification for priority consideration, the Secretary concerned shall expedite a final decision and shall accord such cases sufficient priority to achieve an expedited resolution. In determining the priority of cases, the Secretary concerned shall weigh the medical and humanitarian circumstances of all cases and accord higher priority to cases not involving post-traumatic stress disorder or traumatic brain injury only when the individual cases are considered more compelling.

(Added Pub. L. 85–857, § 13(v)(2), Sept. 2, 1958, 72 Stat. 1266; amended Pub. L. 87–651, title I, § 110(a), Sept. 7, 1962, 76 Stat. 509; Pub. L. 98–209, § 11(b), Dec. 6, 1983, 97 Stat. 1407; Pub. L. 101–189, div. A, title XVI, § 1621(a)(2), Nov. 29, 1989, 103 Stat. 1603; Pub. L. 111–84, div. A, title V, § 512(b), Oct. 28, 2009, 123 Stat. 2281.)

HISTORICAL AND REVISION NOTES

Sections 1553 and 1554 are restated, without substantive change, to conform to the style adopted for title 10.

REFERENCES IN TEXT

The Uniform Code of Military Justice (Public Law 506 of the 81st Congress), referred to in subsec. (a), is act May 5, 1950, ch. 169, § 1, 64 Stat. 107, which was classified to chapter 22 (§ 551 et seq.) of Title 50, War and National Defense, and was repealed and reenacted as chapter 47 (§ 801 et seq.) of this title by act Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641, the first section of which enacted this title.

AMENDMENTS

2009—Subsec. (d). Pub. L. 111–84 added subsec. (d).

1989—Subsecs. (a), (c). Pub. L. 101–189 substituted ''Secretary of Veterans Affairs'' for ''Administrator of Veterans' Affairs''.

1983—Subsec. (a). Pub. L. 98–209 inserted provision that with respect to a discharge or dismissal adjudged by a court-martial case tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge for purposes of clemency.

1962—Pub. L. 87–651 amended section generally without substantive change to conform to the style adopted for the revision of this title.

EFFECTIVE DATE

Section effective Jan. 1, 1959, see section 2 of Pub. L. 85–857, set out as a note preceding Part I of Title 38, Veterans' Benefits.

§ 1554. Review of retirement or separation without pay for physical disability

(a) The Secretary concerned shall from time to time establish boards of review, each consisting of five commissioned officers, two of whom shall be selected from officers of the Army Medical Corps, officers of the Navy Medical Corps, Air Force officers designated as medical officers, or officers of the Public Health Service, as the case may be, to review, upon the request of a member or former member of the uniformed services retired or released from active duty without pay for physical disability, the findings and decisions of the retiring board, board of medical survey, or disposition board in the member's case. A request for review must be made within 15 years after the date of the retirement or separation.

(b) A board established under this section has the same powers as the board whose findings and decision are being reviewed. The findings of the board shall be sent to the Secretary concerned, who shall submit them to the President for approval.

(c) A review by a board established under this section shall be based upon the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Secretary of Veterans Affairs under chapter 59 of title 38.

(Added Pub. L. 85–857, § 13(v)(2), Sept. 2, 1958, 72 Stat. 1267; amended Pub. L. 87–651, title I, § 110(a), Sept. 7, 1962, 76 Stat. 510; Pub. L. 101–189, div. A, title XVI, § 1621(a)(2), Nov. 29, 1989, 103 Stat. 1603; Pub. L. 111–383, div. A, title V, § 533(a), Jan. 7, 2011, 124 Stat. 4216.)

HISTORICAL AND REVISION NOTES

Sections 1553 and 1554 are restated, without substantive change, to conform to the style adopted for title 10.

AMENDMENTS

2011—Subsec. (a). Pub. L. 111–383 substituted ''a member or former member of the uniformed services'' for ''an officer'' and ''the member's case'' for ''his case''.

(c) If it appears that the applicant was discharged under one or more of the circumstances outlined in § 724.504b, a written notification will be sent which informs the applicant that:

(1) An initial service record review reveals that the discharge may have been awarded under circumstances which make the applicant ineligible for receipt of VA benefits regardless of any action taken by the NDRB.

(2) Separate action by the Board for Correction of Naval Records (BCNR) and/or the VA, in case of 180 days consecutive UA disqualification, may confer eligibility for VA benefits. Instructions for making application to the BCNR and for contacting the VA are provided.

Subpart F—Naval Discharge Review Board Mission and Functions

§ 724.601 General.

The NDRB is a component of the Naval Council of Personnel Boards and has its offices located in the NCR. The NDRB conducts documentary reviews and personal appearance reviews in the NCR and, on a traveling basis, at selected sites within the 48 contiguous states. Regional site selection is predicated on the number of pending applications accumulated from a given geographical area and the resources available to support distant personal appearance reviews. The NDRB does not maintain facilities other than at its NCR offices. The primary sites of NCR are: Chicago, IL; Dallas, TX; and San Francisco, CA.

§ 724.602 Mission.

To decide, in accordance with standards of naval law and discipline and the standards for discharge review set forth in subpart I, whether a discharge or dismissal from the naval service is proper and equitable, or whether it should be changed.

§ 724.603 Functions.

(a) Meet as frequently as necessary to provide expeditious review of naval discharges.

(b) Meet at locations within the 48 contiguous states as determined appropriate on the basis of the number of discharge review applications received from various geographical areas and of available resources and facilities.

(c) Review applications for review of discharges.

(d) In consonance with directives of higher authority and the policies set forth in this Manual, grant or deny change of discharges.

(e) Promulgate decisions in a timely manner.

(f) Maintain a system of records.

(g) Maintain liaison in discharge review matters with:

(1) General Counsel of the Navy.

(2) Commandant of the Marine Corps.

(3) Chief of Naval Operations.

(i) Commander, Naval Reserve Force.

(ii) Commander, Naval Medical Command.

(iii) Commander, Naval Military Personnel Command, under the Chief of Naval Personnel.

(4) Judge Advocate General of the Navy.

(5) Veterans' service organizations.

(6) Discharge review boards of the other services, using the Army Discharge Review Board as the focal point for service coordination.

(h) Protect the privacy of individuals whose records are reviewed.

(i) Maintain for public access a reading file and associated index of records of NDRB proceedings in all reviews undertaken subsequent to July 1, 1975.

Subpart G—Organization of the Naval Discharge Review Board

§ 724.701 Composition.

The NDRB acting in plenary review session shall be composed of five members. Normally the members shall be career military officers, assigned to the Naval Council of Personnel Boards or otherwise made available; inactive duty officers of the Navy and Marine Corps Reserve may serve as members when designated to do so by the President, NDRB.

(a) Presiding officers of the NDRB shall normally be Navy or Marine Corps officers in the grade of Captain/Colonel or above.

(b) The remaining NDRB membership shall normally be not less than the grade of Lieutenant Commander/Major

with preference being given to senior grades.

(c) At least three of the five members of the NDRB shall belong to the service from which the applicant whose case is under review was discharged.

(d) Individual membership in the NDRB may vary within the limitations of the prescribed composition.

(e) Any member of a panel of the NDRB other than the presiding officer may act as recorder for cases assigned. The recorder will participate as a voting member of the panel.

§ 724.702 Executive management.

The administrative affairs of the NDRB shall be managed by the Executive Secretary. This responsibility shall include schedules, records, correspondence and issuance of NDRB decisions.

§ 724.703 Legal counsel.

Normally, the NDRB shall function without the immediate attendance of legal counsel. In the event that a legal advisory opinion is deemed appropriate by the NDRB, such opinion shall be obtained routinely by reference to the senior Judge Advocate assigned to the Office of the Director, Naval Council of Personnel Boards. In addition, the NDRB may request advisory opinions from staff offices of the Department of the Navy, including, but not limited to the General Counsel and the Judge Advocate General.

Subpart H—Procedures of Naval Discharge Review Board

§ 724.801 Matters to be considered in discharge review.

In the process of its review of discharges, the NDRB shall examine available records and pertinent regulations of the Department of the Navy, together with such information as may be presented by the applicant and/or representative, which will normally include:

(a) The application for discharge review;

(b) Statements, affidavits or documentation, if any, accompanying the application or presented during hearings;

(c) Testimony, if any, presented during hearings;

(d) Service and health records;

(e) A brief of pertinent facts extracted from the service and health records, prepared by the NDRB recorder.

§ 724.802 Applicant's responsibilities.

(a) *Request for change of discharge.* An applicant may request a change in the character of or reason for discharge (or both).

(1) *Character of discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in character of discharge (for example, General Discharge to Honorable Discharge; Other than Honorable Discharge to General or Honorable Discharge). A person separated on or after 1 October 1982 while in an entry level status may request a change from Other Than Honorable Discharge to Entry Level Separation. A request for review from an applicant who does not have an Honorable Discharge will be treated as a request for a change to an Honorable Discharge unless the applicant requests a specific change to another character of discharge.

(2) *Reason for discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in the reason for discharge. If an applicant does not request a specific change in the reason for discharge, the NDRB will presume that the request for review does not involve a request for change in the reason for discharge. Under its responsibility to examine the propriety and equity of an applicant's discharge, the NDRB will change the reason for discharge if such a change is warranted.

(3) The applicant must ensure that issues submitted to the NDRB are consistent with the request for change in discharge set forth in block 7 of the DD Form 293. If an ambiguity is created by a difference between and applicant's issue and the request in block 7, the NDRB will respond to the issue in the context of the action requested in block 7. In the case of a personal appearance hearing, the NDRB will attempt to resolve the ambiguity under § 724.802(c).

1954—Act July 30, 1954, ch. 648, §2(b), 68 Stat. 589, struck out ''denied'' in item 2402.

1949—Act May 24, 1949, ch. 139, §118, 63 Stat. 105, substituted ''Interest'' for ''Interest on judgments against United States'' in item 2411.

§ 2401. Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, §1, 63 Stat. 62; Pub. L. 86–238, §1(3), Sept. 8, 1959, 73 Stat. 472; Pub. L. 89–506, §7, July 18, 1966, 80 Stat. 307; Pub. L. 95–563, §14(b), Nov. 1, 1978, 92 Stat. 2389; Pub. L. 111–350, §5(g)(8), Jan. 4, 2011, 124 Stat. 3848.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§41(20), 942 (Mar. 3, 1911, ch. 231, §24, part 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, §420, 60 Stat. 845).

Section consolidates provision in section 41(20) of title 28, U.S.C., 1940 ed., as to time limitation for bringing actions against the United States under section 1346(a) of this title, with section 942 of said title 28.

Words ''or within one year after the date of enactment of this Act whichever is later'', in section 942 of title 28, U.S.C., 1940 ed., were omitted as executed.

Provisions of section 41(20) of title 28, U.S.C., 1940 ed., relating to jurisdiction of district courts and trial by the court of actions against the United States are the basis of sections 1346(a) and 2402 of this title.

Words in subsec. (a) of this revised section, ''person under legal disability or beyond the seas at the time the claim accrues'' were substituted for ''claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim.'' (See reviser's note under section 2501 of this title.)

Words in section 41(20) of title 28, U.S.C., 1940 ed., ''nor shall any of the said disabilities operate cumulatively'' were omitted. (See reviser's note under section 2501 of this title.)

A provision in section 41(20) of title 28, U.S.C., 1940 ed., that disabilities other than those specifically mentioned should not prevent any action from being barred was omitted as superfluous.

Subsection (b) of the revised section simplifies and restates said section 942 of title 28, U.S.C., 1940 ed., without change of substance.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

Subsection (b) amended in the Senate to insert the 1 year limitation on the bringing of tort actions and to include the limitation upon the time in which tort claims not exceeding $1000 must be presented to the appropriate Federal agencies for administrative disposition. 80th Congress Senate Report No. 1559, Amendment No. 48.

AMENDMENTS

2011—Subsec. (a). Pub. L. 111–350 substituted ''chapter 71 of title 41'' for ''the Contract Disputes Act of 1978''.

1978—Subsec. (a). Pub. L. 95–563 inserted Contract Disputes Act of 1978 exception.

1966—Subsec. (b). Pub. L. 89–506 struck out provisions dealing with a tort claim of $2,500 or under as a special category of tort claim requiring preliminary administrative action and substituted provisions requiring presentation of all tort claims to the appropriate Federal agency in writing within two years after the claim accrues and commencement of an action within six months of the date of mailing of notice of final denial of the claim by the agency to which it was presented for provisions requiring commencement of an action within two years after the claim accrues.

1959—Subsec. (b). Pub. L. 86–238 substituted ''$2,500'' for ''$1,000'' in two places.

1949—Subsec. (b). Act Apr. 25, 1949, the time limitation on bringing tort actions from 1 year to 2 years.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95–563, Nov. 1, 1978, 92 Stat. 2391, formerly set out as an Effective Date note under section 601 of former Title 41, Public Contracts.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

§ 2402. Jury trial in actions against United States

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

(June 25, 1948, ch. 646, 62 Stat. 971; July 30, 1954, ch. 648, §2(a), 68 Stat. 589; Pub. L. 104–331, §3(b)(3), Oct. 26, 1996, 110 Stat. 4069.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§41(20), 931(a) (Mar. 3, 1911, ch. 231, §24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, §410(a), 60 Stat. 843).

Section consolidates non-jury provisions of sections 41(20) and 931(a) of title 28, U.S.C., 1940 ed. For other provisions of said section 931(a) relating to tort claims, see Distribution Table.

Word ''actions'' was substituted for ''suits'', in view of Rule 2 of the Federal Rules of Civil Procedure.

Provisions of title 28, U.S.C., 1940 ed., §41(20) relating to jurisdiction of district courts and time for bringing actions against the United States are the basis of sections 1346 and 2401 of this title.

AMENDMENTS

1996—Pub. L. 104–331 substituted ''Subject to chapter 179 of this title, any action'' for ''Any action''.

1954—Act July 30, 1954, permitted a jury trial at the request of either party in actions under section 1346(a)(1) of this title.

§ 1524. Posthumous commissions and warrants: determination of date of death

For the purposes of sections 1521 and 1522 of this title, in any case where the date of death is established or determined under section 551–558 of title 37, the date of death is the date the Secretary concerned receives evidence that the person is dead, or the date the finding of death is made under section 555 of title 37.

(Added Pub. L. 89–718, § 12(a)(1), Nov. 2, 1966, 80 Stat. 1117.)

CHAPTER 79—CORRECTION OF MILITARY RECORDS

AMENDMENTS

2008—Pub. L. 110–181, div. A, title XVI, § 1643(a)(2), Jan. 28, 2008, 122 Stat. 467, added item 1554a.

2002—Pub. L. 107–314, div. A, title V, § 552(b), Dec. 2, 2002, 116 Stat. 2552, added item 1559.

2001—Pub. L. 107–107, div. A, title V, § 503(a)(2), Dec. 28, 2001, 115 Stat. 1083, added item 1558.

1998—Pub. L. 105–261, div. A, title V, §§ 542(a)(2), 543(a)(2), 544(b), Oct. 17, 1998, 112 Stat. 2020–2022, added items 1555 to 1557.

1962—Pub. L. 87–651, title I, § 110(b), Sept. 7, 1962, 76 Stat. 510, substituted ''discharge or dismissal'' for ''discharges or dismissals'' in item 1553, and ''retirement or separation without pay for physical disability'' for ''decisions of retiring boards and similar boards'' in item 1554.

1958—Pub. L. 85–857, § 13(v)(3), Sept. 2, 1958, 72 Stat. 1268, added items 1553 and 1554.

§ 1551. Correction of name after separation from service under an assumed name

The Secretary of the military department concerned shall issue a certificate of discharge or an order of acceptance of resignation in the true name of any person who was separated from the Army, Navy, Air Force, or Marine Corps honorably or under honorable conditions after serving under an assumed name during a war with another nation or people, upon application by, or on behalf of, that person, and upon proof of his identity. However, a certificate or order may not be issued under this section if the name was assumed to conceal a crime or to avoid its consequences.

(Aug. 10, 1956, ch. 1041, 70A Stat. 116.)

HISTORICAL AND REVISION NOTES

Revised section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1551	5:200. 34:597.	Apr. 14, 1890, ch. 80; restated June 25, 1910, ch. 393, 36 Stat. 824.

HISTORICAL AND REVISION NOTES—CONTINUED

Revised section	*Source (U.S. Code)*	*Source (Statutes at Large)*
		Aug. 22, 1912, ch. 329, 37 Stat. 324.

The word ''shall'' is substituted for the words ''is authorized and required''. The word ''separated'' is substituted for the word ''discharged'', since the revised section covers acceptances of resignations as well as certificates of discharge. The words ''enlisted or'' and ''while minors or otherwise'' are omitted as surplusage. The words ''the War of the Rebellion'' are omitted as obsolete. The word ''with'' is substituted for the words ''between the United States and''. The words ''honorably or under honorable conditions'' are substituted for the word ''honorably''.

PERSONNEL FREEZE FOR SERVICE REVIEW AGENCIES

Pub. L. 105–261, div. A, title V, § 541, Oct. 17, 1998, 112 Stat. 2019, provided that, during fiscal years 1999, 2000, and 2001, the Secretary of a military department could not carry out any reduction in the number of military and civilian personnel assigned to duty with the service review agency for that military department below the baseline number for that agency until: (1) the Secretary had submitted to Congress a report that described the reduction to be made and the rationale for that reduction, and specified the number of such personnel that would be assigned to duty with that agency after the reduction; and (2) a period of 90 days had elapsed after the date on which such report had been submitted.

§ 1552. Correction of military records: claims incident thereto

(a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c)(1) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee.

(2) If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(A) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(B) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(C) as otherwise prescribed by the law applicable to that kind of payment.

(3) A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(4) If the correction of military records under this section involves setting aside a conviction by court-martial, the payment of a claim under this subsection in connection with the correction of the records shall include interest at a rate to be determined by the Secretary concerned, unless the Secretary determines that the payment of interest is inappropriate under the circumstances. If the payment of the claim is to include interest, the interest shall be calculated on an annual basis, and compounded, using the amount of the lost pay, allowances, compensation, emoluments, or other pecuniary benefits involved, and the amount of any fine or forfeiture paid, beginning from the date of the conviction through the date on which the payment is made.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

(g) In this section, the term ''military record'' means a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, or a dependent or current or former spouse of any such person. Such term does not include records pertaining to civilian employment matters (such as matters covered by title 5 and chapters 81, 83, 87, 108, 373, 605, 607, 643, and 873 of this title).

(Aug. 10, 1956, ch. 1041, 70A Stat. 116; Pub. L. 86–533, § 1(4), June 29, 1960, 74 Stat. 246; Pub. L. 96–513, title V, § 511(60), Dec. 12, 1980, 94 Stat. 2925; Pub. L. 98–209, § 11(a), Dec. 6, 1983, 97 Stat. 1407; Pub. L. 100–456, div. A, title XII, § 1233(a), Sept. 29, 1988, 102 Stat. 2057; Pub. L. 101–189, div. A, title V, § 514, title XVI, § 1621(a)(2), Nov. 29, 1989, 103 Stat. 1441, 1603; Pub. L. 102–484, div. A, title X, § 1052(19), Oct. 23, 1992, 106 Stat. 2500; Pub. L. 105–261, div. A, title V, § 545(a), (b), Oct. 17, 1998, 112 Stat. 2022; Pub. L. 107–296, title XVII, § 1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub. L. 110–417, [div. A], title V, § 592(a), (b), Oct. 14, 2008, 122 Stat. 4474, 4475.)

HISTORICAL AND REVISION NOTES

Revised section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1552(a)	5:191a(a) (less 2d and last provisos). 5:275(a) (less 2d and last provisos).	Aug. 2, 1946, ch. 753, § 207; restated Oct. 25, 1951, ch. 588, 65 Stat. 655.
1552(b)	5:191a(a) (2d and last provisos). 5:275(a) (2d and last provisos).	
1552(c)	5:191a(b), (c). 5:275(b), (c).	
1552(d)	5:191a(d). 5:275(d).	
1552(e)	5:191a(f). 5:275(f).	
1552(f)	5:191a(e). 5:275(e).	

In subsection (a), the words ''and approved by the Secretary of Defense'' are substituted for 5:191a(a) (1st proviso). The words ''when he considers it'' are substituted for the words ''where in their judgment such action is'', in 5:191a and 275. The words ''officers or employees'' and ''means of'', in 5:191a and 275, are omitted as surplusage. The word ''naval'', in 5:191a and 275, is omitted as covered by the word ''military''.

In subsection (b), the words ''before October 26, 1961'' are substituted for the words ''or within ten years after the date of enactment of this section'', in 5:191a and 275. The last sentence of the revised subsection is substituted for 5:191a(a) (last proviso) and 275(a) (last proviso).

In subsection (c), the words ''if, as a result of correcting a record under this section * * * the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be'' are substituted for the words ''which are found to be due on account of military or naval service as a result of the ac-

tion * * * hereafter taken pursuant to subsection (a) of this section'', in 5:191a and 275. The words ''heretofore taken pursuant to this section'', in 5:191a and 275, are omitted as executed. The words ''of any persons, their heirs at law or legal representative as hereinafter provided'', ''(including retired or retirement pay)'', ''as the case may be'', ''duly appointed'', ''otherwise due hereunder'', ''decedent's'', ''precedence or succession'', and ''of precedence'', in 5:191a and 275, are omitted as surplusage. The last sentence is substituted for 5:191a(c) and 275(c).

In subsection (d), the word ''but'' is substituted for the words ''That, continuing payments are authorized to be made to such personnel'', in 5:191a and 275. The words ''if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate'' are substituted for the words ''without the necessity for reenlistment, appointment, or reappointment to the grade, rank, or office to which such pay (including retired or retirement pay), allowances, compensation, emoluments, and other monetary benefits are attached'', in 5:191a and 275. The words ''or one year following the date of enactment of this section'', in 5:191a and 275, are omitted as executed. The words ''for payment of such sums as may be due for'', in 5:191a and 275, are omitted as surplusage. The words ''(including retired or retirement pay)'', in 5:191a and 275, are omitted as covered by the definition of ''pay'' in section 101(27) of this title.

In subsection (e), the words ''No payment may be made under this section'' are substituted for the words ''Nothing in this section shall be construed to authorize the payment of any amount as compensation'', in 5:191a and 275.

REFERENCES IN TEXT

The Uniform Code of Military Justice (Public Law 506 of the 81st Congress), referred to in subsec. (f), is act May 5, 1950, ch. 169, §1, 64 Stat. 107, which was classified to chapter 22 (§551 et seq.) of Title 50, War and National Defense, and was repealed and reenacted as chapter 47 (§801 et seq.) of this title by act Aug. 10, 1956, ch. 1041, §53, 70A Stat. 641, the first section of which enacted this title.

AMENDMENTS

2008—Subsec. (c). Pub. L. 110–417 designated existing provisions as pars. (1) to (3), redesignated former pars. (1) to (3) as subpars. (A) to (C), respectively, of par. (2), and added par. (4).

2002—Subsec. (a)(1). Pub. L. 107–296 substituted ''Secretary of Homeland Security'' for ''Secretary of Transportation''.

1998—Subsec. (c). Pub. L. 105–261, §545(a), inserted '', or on account of his or another's service as a civilian employee'' before period at end of first sentence.

Subsec. (g). Pub. L. 105–261, §545(b), added subsec. (g).

1992—Subsec. (a)(2). Pub. L. 102–484 substituted ''announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade'' for ''announcing a decision not to promote an enlisted member to a higher grade''.

1989—Subsec. (a). Pub. L. 101–189, §514(a), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.''

Subsec. (b). Pub. L. 101–189, §514(b), substituted ''subsection (a)(1)'' for ''subsection (a)'' in two places.

Subsec. (e). Pub. L. 101–189, §1621(a)(2), substituted ''Secretary of Veterans Affairs'' for ''Administrator of Veterans' Affairs''.

1988—Subsec. (b). Pub. L. 100–456, §1233(a)(1), substituted ''for the correction within three years after he discovers the error or injustice'' for ''therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later''.

Subsec. (c). Pub. L. 100–456, §1233(a)(2), substituted ''The Secretary concerned'' for ''The department concerned''.

1983—Subsec. (f). Pub. L. 98–209 added subsec. (f).

1980—Subsec. (a). Pub. L. 96–513 substituted ''Secretary of Transportation'' for ''Secretary of the Treasury''.

1960—Subsec. (f). Pub. L. 86–533 repealed subsec. (f) which required reports to the Congress every six months with respect to claims paid under this section.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–417, [div. A], title V, §592(c), Oct. 14, 2008, 122 Stat. 4475, provided that: ''The amendment made by subsection (a) [amending this section] shall apply with respect to any sentence of a court-martial set aside by a Corrections Board on or after October 1, 2007, when the Corrections Board includes an order or recommendation for the payment of a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, that arose as a result of the conviction. In this subsection, the term 'Corrections Board' has the meaning given that term in section 1557 of title 10, United States Code.''

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see section 1704(g) of Pub. L. 107–296, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–513 effective Dec. 12, 1980, see section 701(b)(3) of Pub. L. 96–513, set out as a note under section 101 of this title.

BOARD FOR CORRECTION OF MILITARY RECORDS

Pub. L. 101–225, title II, §212, Dec. 12, 1989, 103 Stat. 1914, provided that: ''Not later than 6 months after the date of the enactment of this Act [Dec. 12, 1989], the Secretary of Transportation shall—

''(1) amend part 52 of title 33, Code of Federal Regulations, governing the proceedings of the board established by the Secretary under section 1552 of title 10, United States Code, to ensure that a complete application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt; and

''(2) appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the board, which are adequate to ensure compliance with paragraph (1) of this subsection.''

§ 1553. Review of discharge or dismissal

(a) The Secretary concerned shall, after consulting the Secretary of Veterans Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal. With respect to a discharge or dismissal adjudged by a court-martial case

(3) *ADRB panels and members.* The ADRB will have one or more panels. Each panel, when in deliberation, will consist of five officers. The senior officer (or as designated by the president ADRB) will act as the presiding officer.

(4) *Secretary Recorder (SR) Branch.* The Chief, SR—

(i) Ensures the efficient overall operation and support of the ADRB panels.

(ii) Authenticates the case report and directives of cases heard.

(5) *Secretary Recorder.* The SR is an officer assigned to the SR Branch whose duties are to—

(i) Schedule, coordinate, and arrange for panel hearings at a designated site.

(ii) Administer oaths to applicants and witnesses under Article 136 UCMJ.

(iii) Ensure that the proceedings of the cases heard and recorded into the case report and directive of cases.

(6) *Administrative Specialist.* An Administrative Specialist is an enlisted member assigned to the SR Branch whose duties are to—

(i) Assist the SR in arranging panel hearings.

(ii) Operate and maintain video and voice recording equipment.

(iii) Aid the SR in the administrative operations of the panels.

(7) *Administrative personnel.* Such administrative personnel as are required for the proper functions of the ADRB and its panels will be furnished by the SA.

(d) *Special standards.* (1) Under the November 27, 1979, order of the United States District Court for the District of Columbia in ''Giles v. Secretary of the Army'' (Civil Action No. 77–0904), a former Army service member is entitled to an honorable discharge if a less than honorable discharge was issued to the service member who was discharged before 1 January 1975 as a result of an administrative proceeding in which the Army introduced evidence developed by or as a direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers (either for the purpose of entry into a treatment program or to monitor progress through rehabilitation or follow up).

(2) Applicants who believe they fall within the scope of paragraph (d)(1) of this section should place the work CATEGORY ''G'' in block 7, DD Form 293, (Application for Review of Discharge or Dismissal from the Armed Forces of the United States). Such applications will be reviewed expeditiously by a designated official who will either send the individual an honorable discharge certificate if the individual falls within the scope of paragraph (d)(1) of this section or forward the application to the ADRB if the individual does not fall within the scope of paragraph (d)(1) of this section. The action of the designated official will not constitute an action or decision by the ADRB.

[50 FR 33035, Aug. 16, 1985]

§ 581.3 Army Board for Correction of Military Records.

(a) *General*—(1) *Purpose.* This section prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR).

(2) *Statutory authority.* Title 10 U.S.C Section 1552, Correction of Military Records: Claims Incident Thereto, is the statutory authority for this regulation.

(b) *Responsibilities*—(1) *The Secretary of the Army.* The Secretary of the Army will oversee the operations of the ABCMR. The Secretary will take final action on applications, as appropriate.

(2) *The ABCMR Director.* The ABCMR Director will manage the ABCMR's day-to-day operations.

(3) *The chair of an ABCMR panel.* The chair of a given ABCMR panel will preside over the panel, conduct a hearing, maintain order, ensure the applicant receives a full and fair opportunity to be heard, and certify the written record of proceedings in pro forma and formal hearings as being true and correct.

(4) *The ABCMR members.* The ABCMR members will—

(i) Review all applications that are properly before them to determine the existence of error or injustice.

(ii) If persuaded that material error or injustice exists, and that sufficient evidence exists on the record, direct or recommend changes in military records to correct the error or injustice.

(iii) Recommend a hearing when appropriate in the interest of justice.

(iv) Deny applications when the alleged error or injustice is not adequately supported by the evidence, and when a hearing is not deemed proper.

(v) Deny applications when the application is not filed within prescribed time limits and when it is not in the interest of justice to excuse the failure to file in a timely manner.

(5) *The director of an Army records holding agency*. The director of an Army records holding agency will—

(i) Take appropriate action on routine issues that may be administratively corrected under authority inherent in the custodian of the records and that do not require ABCMR action.

(ii) Furnish all requested Army military records to the ABCMR.

(iii) Request additional information from the applicant, if needed, to assist the ABCMR in conducting a full and fair review of the matter.

(iv) Take corrective action directed by the ABCMR or the Secretary of the Army.

(v) Inform the Defense Finance and Accounting Service (DFAS), when appropriate; the applicant; applicant's counsel, if any; and interested Members of Congress, if any, after a correction is complete.

(vi) Return original records of the soldier or former soldier obtained from the Department of Veterans Affairs (VA).

(6) *The commanders of Army Staff agencies and commands*. The commanders of Army Staff agencies and commands will—

(i) Furnish advisory opinions on matters within their areas of expertise upon request of the ABCMR, in a timely manner.

(ii) Obtain additional information or documentation as needed before providing the opinions to the ABCMR.

(iii) Provide records, investigations, information, and documentation upon request of the ABCMR.

(iv) Provide additional assistance upon request of the ABCMR.

(v) Take corrective action directed by the ABCMR or the Secretary of the Army.

(7) *The Director, Defense Finance and Accounting Service (DFAS)*. At the request of the ABCMR staff, the Director, DFAS, will—

(i) Furnish advisory opinions on matters within the DFAS area of expertise upon request.

(ii) Obtain additional information or documentation as needed before providing the opinions.

(iii) Provide financial records upon request.

(iv) On behalf of the Army, settle claims that are based on ABCMR final actions.

(v) Report quarterly to the ABCMR Director on the monies expended as a result of ABCMR action and the names of the payees.

(c) *ABCMR establishment and functions*—(1) *ABCMR establishment*. The ABCMR operates pursuant to law (10 U.S.C. 1552) within the Office of the Secretary of the Army. The ABCMR consists of civilians regularly employed in the executive part of the Department of the Army (DA) who are appointed by the Secretary of the Army and serve on the ABCMR as an additional duty. Three members constitute a quorum.

(2) *ABCMR functions*. (i) The ABCMR considers individual applications that are properly brought before it. In appropriate cases, it directs or recommends correction of military records to remove an error or injustice.

(ii) When an applicant has suffered reprisal under the Military Whistleblower Protection Act 10 U.S.C. 1034 and Department of Defense Directive (DODD) 7050.6, the ABCMR may recommend to the Secretary of the Army that disciplinary or administrative action be taken against any Army official who committed an act of reprisal against the applicant.

(iii) The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing in 10 U.S.C. 1034 and DODD 7050.6) or request additional evidence or opinions.

(d) *Application procedures*—(1) *Who may apply*. (i) The ABCMR's jurisdiction under 10 U.S.C. 1552 extends to any military record of the DA. It is the nature of the record and the status of the

applicant that define the ABCMR's jurisdiction.

(ii) Usually applicants are soldiers or former soldiers of the Active Army, the U.S. Army Reserve (USAR), and in certain cases, the Army National Guard of the United States (ARNGUS) and other military and civilian individuals affected by an Army military record. Requests are personal to the applicant and relate to military records. Requests are submitted on DD Form 149 (Application for Correction of Military Record under the Provisions of 10 U.S.C. 1552). Soldiers need not submit applications through their chain of command.

(iii) An applicant with a proper interest may request correction of another person's military records when that person is incapable of acting on his or her own behalf, missing, or deceased. Depending on the circumstances, a child, spouse, parent or other close relative, heir, or legal representative (such as a guardian or executor) of the soldier or former soldier may be able to demonstrate a proper interest. Applicants must send proof of proper interest with the application when requesting correction of another person's military records.

(2) *Time limits.* Applicants must file an application within 3 years after an alleged error or injustice is discovered or reasonably should have been discovered. The ABCMR may deny an untimely application. The ABCMR may excuse untimely filing in the interest of justice.

(3) *Administrative remedies.* The ABCMR will not consider an application until the applicant has exhausted all administrative remedies to correct the alleged error or injustice.

(4) *Stay of other proceedings.* Applying to the ABCMR does not stay other proceedings.

(5) *Counsel.* (i) Applicants may be represented by counsel, at their own expense.

(ii) See DODD 7050.6 for provisions for counsel in cases processed under 10 U.S.C. 1034.

(e) *Actions by the ABCMR Director and staff*—(1) *Criteria.* The ABCMR staff will review each application to determine if it meets the criteria for consideration by the ABCMR. The application may be returned without action if—

(i) The applicant fails to complete and sign the application.

(ii) The applicant has not exhausted all other administrative remedies.

(iii) The ABCMR does not have jurisdiction to grant the requested relief.

(iv) No new evidence was submitted with a request for reconsideration.

(2) *Burden of proof.* The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

(3) *ABCMR consideration.* (i) A panel consisting of at least three ABCMR members will consider each application that is properly brought before it. One panel member will serve as the chair.

(ii) The panel members may consider a case on the merits in executive session or may authorize a hearing.

(iii) Each application will be reviewed to determine—

(A) Whether the preponderance of the evidence shows that an error or injustice exists and—

(*1*) If so, what relief is appropriate.

(*2*) If not, deny relief.

(B) Whether to authorize a hearing.

(C) If the application is filed outside the statute of limitations and whether to deny based on untimeliness or to waive the statute in the interest of justice.

(f) *Hearings.* ABCMR hearings. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

(g) *Disposition of applications*—(1) *ABCMR decisions.* The panel members' majority vote constitutes the action of the ABCMR. The ABCMR's findings, recommendations, and in the case of a denial, the rationale will be in writing.

(2) *ABCMR final action.* (i) Except as otherwise provided, the ABCMR acts for the Secretary of the Army, and an ABCMR decision is final when it—

(A) Denies any application (except for actions based on reprisals investigated under 10 U.S.C. 1034).

(B) Grants any application in whole or in part without a hearing when—

(*1*) The relief is as recommended by the proper staff agency in an advisory opinion; and

(*2*) Is unanimously agreed to by the ABCMR panel; and

(*3*) Does not involve an appointment or promotion requiring confirmation by the Senate.

(ii) The ABCMR will forward the decisional document to the Secretary of the Army for final decision in any case in which—

(A) A hearing was held.

(B) The facts involve reprisals under the Military Whistleblower Protection Act, confirmed by the DOD Inspector General (DODIG) under 10 U.S.C. 1034 and DODD 7050.6.

(C) The ABCMR recommends relief but is not authorized to act for the Secretary of the Army on the application.

(3) *Decision of the Secretary of the Army*. (i) The Secretary of the Army may direct such action as he or she deems proper on each case. Cases returned to the Board for further consideration will be accompanied by a brief statement of the reasons for such action. If the Secretary does not accept the ABCMR's recommendation, adopts a minority position, or fashions an action that he or she deems proper and supported by the record, that decision will be in writing and will include a brief statement of the grounds for denial or revision.

(ii) The Secretary of the Army will issue decisions on cases covered by the Military Whistleblower Protection Act (10 U.S.C. 1034 and DODD 7050.6). In cases where the DODIG concluded that there was reprisal, these decisions will be made within 180 days after receipt of the application and the investigative report by the DODIG, the Department of the Army Inspector General (DAIG), or other Inspector General offices. Unless the full relief requested is granted, these applicants will be informed of their right to request review of the decision by the Secretary of Defense.

(4) *Reconsideration of ABCMR decision*. An applicant may request the ABCMR to reconsider a Board decision under the following circumstances:

(i) If the ABCMR receives the request for reconsideration within 1 year of the ABCMR's original decision and if the ABCMR has not previously reconsidered the matter, the ABCMR staff will review the request to determine if it contains evidence (including, but not limited to, any facts or arguments as to why relief should be granted) that was not in the record at the time of the ABCMR's prior consideration. If new evidence has been submitted, the request will be submitted to the ABCMR for its determination of whether the new evidence is sufficient to demonstrate material error or injustice. If no new evidence is found, the ABCMR staff will return the application to the applicant without action.

(ii) If the ABCMR receives a request for reconsideration more than 1 year after the ABCMR's original decision or after the ABCMR has already considered one request for reconsideration, then the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction.

(h) *Claims/Expenses*—(1) *Authority*. (i) The Army, by law, may pay claims for amounts due to applicants as a result of correction of military records.

(ii) The Army may not pay any claim previously compensated by Congress through enactment of a private law.

(iii) The Army may not pay for any benefit to which the applicant might later become entitled under the laws and regulations managed by the VA.

(2) *Settlement of claims*. (i) The ABCMR will furnish DFAS copies of decisions potentially affecting monetary entitlement or benefits. The DFAS will treat such decisions as claims for payment by or on behalf of the applicant.

(ii) The DFAS will settle claims on the basis of the corrected military record. The DFAS will compute the amount due, if any. The DFAS may require applicants to furnish additional information to establish their status as proper parties to the claim and to aid in deciding amounts due. Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted. The applicant's acceptance of a settlement fully satisfies the claim concerned.

(3) *Payment of expenses*. The Army may not pay attorney's fees or other expenses incurred by or on behalf of an

applicant in connection with an application for correction of military records under 10 U.S.C. 1552.

(i) *Miscellaneous provisions*—(1) *Special standards.* (i) Pursuant to the November 27, 1979 order of the United States District Court for the District of Columbia in *Giles* v. *Secretary of the Army* (Civil Action No. 77–0904), a former Army soldier is entitled to an honorable discharge if a less than honorable discharge was issued to the soldier on or before November 27, 1979 in an administrative proceeding in which the Army introduced evidence developed by or as a direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers (either for the purposes of entry into a treatment program or to monitor progress through rehabilitation or follow-up).

(ii) Applicants who believe that they fall within the scope of paragraph (i)(1)(i) of this section should place the term ''CATEGORY G'' in block 11b of DD Form 149. Such applications should be expeditiously reviewed by a designated official, who will either send the individual an honorable discharge certificate if the individual falls within the scope of paragraph (i)(1)(i) of this section, or forward the application to the Discharge Review Board if the individual does not fall within the scope of paragraph (i)(1)(i) of this section. The action of the designated official will not constitute an action or decision by the ABCMR.

(2) *Public access to decisions.* (i) After deletion of personal information, a redacted copy of each decision will be indexed by subject and made available for review and copying at a public reading room at Crystal Mall 4, 1941 Jefferson Davis Highway, Arlington, Virginia. The index will be in a usable and concise form so as to indicate the topic considered and the reasons for the decision. Under the Freedom of Information Act (5 U.S.C. 552), records created on or after November 1, 1996 will be available by electronic means.

(ii) Under the Freedom of Information Act and the Privacy Act of 1974 (5 U.S.C. 552a), the ABCMR will not furnish to third parties information submitted with or about an application unless specific written authorization is received from the applicant or unless the Board is otherwise authorized by law.

[65 FR 17441, Apr. 3, 2000, as amended at 70 FR 67368, Nov. 7, 2005]

PART 583—FORMER PERSONNEL [RESERVED]

PART 584—FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY

Sec.

AUTHORITY: 10 U.S.C. 3012.

SOURCE: 50 FR 52447, Dec. 24, 1985, unless otherwise noted.

§ 584.1 General.

(a) *Purpose.* This regulation sets forth the Department of the Army (DA) policy, responsibilities, and procedures on—

(1) Support and nonsupport of family members.

(2) Child custody.

(3) Paternity claims.

(4) Adoption proceedings involving the children of soldiers.

(b) *References.* Required and related publications and prescribed and referenced forms are listed in appendix A.

(c) *Explanation of abbreviations and terms.* Abbreviations and special terms used in this regulation are explained in the glossary.

(d) *Responsibilities.* (1) The Deputy Chief of Staff for Personnel will set policy for processing—

(i) Nonsupport complaints.

(ii) Child custody complaints.

(iii) Paternity claims.

(iv) Requests on adoption proceedings of children of soldiers.

(2) The Commanding General (CG), U.S. Army Community and Family Support Center (USACFSC) will—

to which the family member's sponsor is attached, or by which the employee is employed, will carry out the following steps:

(i) An employee shall be strongly encouraged to comply with the court order or other request for return. Failure to comply may be the basis for adverse action to include removal from Federal service. Adverse action should only be taken after coordination with the cognizant civilian personnel office and legal counsel and in compliance with Civilian Personnel Instruction 752.

(ii) If a family member of either a member or an employee is the subject of a request for return, the family member shall be strongly encouraged to comply with the court order. Failure to respond may be the basis for withdrawal of command sponsorship of the family member.

(10) Report promptly to the ASN(M&RA) any actions taken under § 720.45 (a) or (b).

(i) The ASN(M&RA):

(1) May grant delays of up to 45 days from the date of a request for delay in accordance with § 720.45(e).

(2) Will report promptly all delays of requests for the return of members to the ASD(FM&P) and to the General Counsel of the Department of Defense.

(3) Will request from the ASD(FM&P), when warranted, exception to the policies and procedures of DoD Directive 5525.9 of December 27, 1988.

(4) Consolidate and forward reports of action taken under § 720.45 (a) or (b) to the ASD(FM&P) and the General Counsel, DoD as required by DoD Directive 5525.9 of December 27, 1988.

§ 720.46 Overseas screening programs.

The Chief of Naval Operations (CNO) and the CMC shall incorporate procedures requiring members and employees to certify they have legal custody of all minor dependents accompanying them outside the United States into service overseas screening programs.

§ 720.47 Report.

The report requirement in this instruction is exempt from reports control by SECNAVINST 5214.2B.

PARTS 721–722 [RESERVED]

PART 723—BOARD FOR CORRECTION OF NAVAL RECORDS

Sec.

AUTHORITY: 10 U.S.C. 1034, 1552.

SOURCE: 62 FR 8166, Feb. 24, 1997, unless otherwise noted.

§ 723.1 General provisions.

This part sets up procedures for correction of naval and marine records by the Secretary of the Navy acting through the Board for Correction of Naval Records (BCNR or the Board) to remedy error or injustice. It describes how to apply for correction of naval and marine records and how the BCNR considers applications. It defines the Board's authority to act on applications. It directs collecting and maintaining information subject to the Privacy Act of 1974 authorized by 10 U.S.C. 1034 and 1552.

§ 723.2 Establishment, function and jurisdiction of the Board.

(a) *Establishment and composition.* Under 10 U.S.C. 1034 and 1552, the Board for Correction of Naval Records is established by the Secretary of the Navy. The Board consists of civilians of the executive part of the Department of the Navy in such number, not less than three, as may be appointed by the Secretary and who shall serve at the pleasure of the Secretary. Three members present shall constitute a quorum of the Board. The Secretary of the Navy will designate one member as Chair. In the absence or incapacity of the Chair, an Acting Chair chosen by the Executive Director shall act as Chair for all purposes.

SUBCHAPTER G—ORGANIZATION AND MISSION—GENERAL

PART 865—PERSONNEL REVIEW BOARDS

Subpart A—Air Force Board for Correction of Military Records

Sec.

Subpart B—Air Force Discharge Review Board

Subpart A—Air Force Board for Correction of Military Records

SOURCE: 75 FR 596132, Sept. 28, 2010, unless otherwise noted.

§ 865.0 Purpose.

This subpart sets up procedures for correction of military records to remedy error or injustice. It tells how to apply for correction of military records and how the Air Force Board for Correction of Military Records (AFBCMR, or the Board) considers applications. It defines the Board's authority to act on applications. It directs collecting and maintaining information subject to the Privacy Act of 1974 authorized by 10 U.S.C. 1034 and 1552. System of Records notice F035 SAFCB A, Military Records Processed by the Air Force Correction Board, applies.

§ 865.1 Setup of the Board.

The AFBCMR operates within the Office of the Secretary of the Air Force according to 10 U.S.C. 1552. The Board consists of civilians in the executive part of the Department of the Air Force who are appointed and serve at the pleasure of the Secretary of the Air Force. Three members constitute a quorum of the Board.

§ 865.2 Board responsibilities.

(a) *Considering applications.* The Board considers all individual applications properly brought before it. In appropriate cases, it directs correction of military records to remove an error or injustice, or recommends such correction.

(b) *Recommending action.* When an applicant alleges reprisal under the Military Whistleblowers Protection Act, 10 U.S.C. 1034, the Board may recommend to the Secretary of the Air Force that disciplinary or administrative action be taken against those responsible for the reprisal.

(c) *Deciding cases.* The Board normally decides cases on the evidence of the record. It is not an investigative body. However, the Board may, in its discretion, hold a hearing or call for

§ 52.2 Authority.

(a) The Secretary of Homeland Security, acting through boards of civilians, is authorized to correct any military record of the Coast Guard when the Secretary considers it necessary to correct an error or remove an injustice. 10 U.S.C. 1552. The Secretary shall ensure that final action on a complete application for correction is taken within 10 months of its receipt.

(14 U.S.C. 425)

(b) Corrections made under this authority are final and conclusive on all officers of the Government except when procured by fraud. 10 U.S.C. 1552(a)(4).

[OST Doc. No. 2002–13439, 68 FR 9886, Mar. 3, 2003, as amended by USCG–2003–15404, 68 FR 37740, June 25, 2003]

Subpart B—Establishment, Function, and Jurisdiction of Board

§ 52.11 Establishment and composition.

(a) Pursuant to 10 U.S.C. 1552, the Board for Correction of Military Records of the Coast Guard is established in the Office of the Secretary of Homeland Security.

(b) The Secretary appoints a panel of civilian officers or employees of the Department of Homeland Security to serve as members of the Board, and designates one such member to serve as Chair of the Board. The Chair designates members from this panel to serve as the Board for each case requiring consideration by a Board. The Board consists of three members, and two members present constitute a quorum of the Board.

(c) The Deputy Chair of the Board exercises the functions prescribed by these regulations and such other duties as may be assigned by the Chair.

[OST Doc. No. 2002–13439, 68 FR 9886, Mar. 3, 2003, as amended by USCG–2003–15404, 68 FR 37740, June 25, 2003]

§ 52.12 Function.

The function of the Board is to consider all applications properly before it, together with all pertinent military records and any submission received from the Coast Guard or other Government office under subpart E, to determine:

(a) Whether an error has been made in the applicant's Coast Guard military record, whether the applicant has suffered an error or injustice as the result of an omission or commission in his or her record, or whether the applicant has suffered some manifest injustice in the treatment accorded him or her; and

(b) Whether the Board finds it necessary to change a military record to correct an error or remove an injustice.

§ 52.13 Jurisdiction.

(a) The Board has jurisdiction to review and determine all matters properly brought before it, consistent with existing law and such directives as may be issued by the Secretary.

(b) No application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant.

Subpart C—General Provisions Regarding Applications

§ 52.21 General requirements.

(a) An application for correction of a Coast Guard record shall be submitted on DD Form 149 (Application for Correction of Military or Naval Record) or an exact copy thereof, and shall be addressed to: DHS Office of the General Counsel, Board for Correction of Military Records, Mailstop 485, 245 Murray Lane, Washington, DC 20528. Forms and explanatory material may be obtained from the Chair of the Board.

(b) The application shall be signed by the person alleging error or injustice in his or her military record, except that an application may be signed by a family member or legal representative with respect to the record of a deceased, incapacitated, or missing person. The family member or legal representative must submit proof of his or her proper interest with the application.

(c) No application shall be docketed or processed until it is complete. An application for relief is complete when

Mudd v. White

United States Court of Appeals for the District of Columbia Circuit

September 3, 2002, Argued ; November 8, 2002, Decided

No. 01-5103

Reporter
309 F.3d 819 *; 2002 U.S. App. LEXIS 23227 **; 353 U.S. App. D.C. 428

THOMAS B. MUDD, SON OF RICHARD D. MUDD AND GREAT-GRANDSON OF SAMUEL A. MUDD, AS HEIR AND SUCCESSOR TO SAMUEL A. MUDD, DECEASED, APPELLANT v. THOMAS A. WHITE, SECRETARY OF THE ARMY, ET AL., APPELLEES

Prior History: [1]** Appeal from the United States District Court for the District of Columbia. (No. 97cv02946).

Mudd v. Caldera, 134 F. Supp. 2d 138, 2001 U.S. Dist. LEXIS 2849 (D.D.C. 2001).

Disposition: Appeal denied and case dismissed.

Core Terms

military record, military, armed forces, prudential, military tribunal, former member, civilians, records, zone

Case Summary

Procedural Posture
Plaintiff, whose great-grandfather was convicted by a military tribunal for his alleged role in the assassination of an United States President, sought judicial review of the Army's refusal to reverse that conviction more than a century later. The United States District Court for the District of Columbia granted summary judgment for defendant Secretary of the Army. The great-grandson appealed.

Overview

The appellate court agreed that the great-grandson could not prevail on his claim, but relied on different grounds than those advanced by the district court. In the appellate court's view, the great-grandson's claim was to be dismissed for want of standing. Under *10 U.S.C.S. § 1552(g)*, "military record" pertained only to an individual member or former member of the armed forces. The great-grandfather was never a member of the armed forces. Therefore, even if the great-grandson could establish U.S. Const. art. III standing, his action was still dismissed for want of prudential standing. The great-grandson's insurmountable problem in the case was that his claim, resting on *10 U.S.C.S. § 1552(a)(1)*, was not arguably within the zone of interests to be protected or regulated by the statute in question. The statute plainly contemplated that only the claimant member of the armed forces (or his heir or legal representative) could seek to alter a "military record" pertaining to the claimant. The great-grandfather was not a member or former member of the armed forces and the great-grandson was not an heir or legal representative of the type of "claimant" contemplated by the statute.

Outcome
The appeal was denied and the case was dismissed.

LexisNexis® Headnotes

Military & Veterans
Law > Servicemembers > Records

HN1 **Servicemembers, Records**

See 10 U.S.C.S. § 1552(a)(1).

Civil
Procedure > ... > Justiciability > Standing > General Overview

Military & Veterans
Law > Servicemembers > Records

Civil Procedure > Preliminary
Considerations > Justiciability > General Overview

HN2 **Justiciability, Standing**

Under 10 U.S.C.S. § 1552(g), "military record" pertains only to an individual member or former member of the armed forces.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > Preliminary
Considerations > Justiciability > General Overview

HN3 **Justiciability, Case & Controversy Requirements**

There are two principal forms of standing: "U.S. Const. art. III (case or controversy)" and "prudential."

Constitutional Law > ... > Case or Controversy > Standing > Elements

Evidence > Burdens of Proof > Allocation

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN4 **Standing, Elements**

The U.S. Const. art. III (case or controversy) standing, which is jurisdictional and cannot be modified by Congress, entails three requirements: First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Civil
Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Environmental Law > Land Use & Zoning > Constitutional Limits

Civil Procedure > Preliminary
Considerations > Justiciability > General Overview

HN5 **Justiciability, Standing**

Prudential standing denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. In addition to the immutable requirements of U.S. Const. art. III, the federal judiciary has also adhered to a set of prudential principles that

bear on the question of standing. Like their constitutional counterparts, these judicially self-imposed limits on the exercise of federal jurisdiction are founded in concern about the proper--and properly limited--role of the courts in a democratic society; but unlike their constitutional counterparts, they can be modified or abrogated by Congress. Numbered among these prudential requirements is the doctrine that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.

Military & Veterans
Law > Servicemembers > Records

HN6[] **Servicemembers, Records**

See *10 U.S.C.S. § 1552(g)*.

Military & Veterans
Law > Servicemembers > Records

HN7[] **Servicemembers, Records**

10 U.S.C.S. § 1552(b) makes it clear that only a claimant or his heir or legal representative may file a petition under *§ 1552(a)* to correct a "military record." Therefore, the statute plainly contemplates that only the claimant member of the armed forces (or his heir or legal representative) may seek to alter a "military record" pertaining to the claimant.

Counsel: Philip A. Gagner argued the cause and filed the briefs for appellant.

R. Craig Lawrence, Assistant United States Attorney, argued the cause for appellees. With him on the briefs were Roscoe C. Howard Jr., United States Attorney, Wyneva Johnson, Assistant United States Attorney, and James R. Agar II, Attorney, Office of the Judge Advocate General.

Judges: Before: EDWARDS and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge Edwards.

Opinion by: EDWARDS

Opinion

[*820] EDWARDS, *Circuit Judge*: The appellant, Thomas B. Mudd, * whose great-grandfather, Dr. Samuel Mudd, was convicted by a military tribunal for his alleged role in the assassination of President Abraham Lincoln, seeks judicial review of the Army's refusal to reverse that conviction more than a century later. Appellant bases his claim on *HN1*[] *10 U.S.C. § 1552(a)(1) (2002)*, pursuant to which "the Secretary of a military department may correct any military record … when the Secretary considers it necessary to correct an error or remove an injustice." The Army Board for Correction **[**2]** of Military Records ("ABCMR"), upon reviewing appellant's application, recommended that Dr. Samuel Mudd's conviction before a military commission be set aside. The Assistant Secretary of the Army (the "Secretary"), however, denied appellant's request for relief. Appellant then filed suit in the District Court, claiming that the action of the Secretary was arbitrary and capricious under the Administrative Procedure Act ("APA"), *5 U.S.C. § 706(1)(A) (2002)*. The District Court heard the case twice, *see* *Mudd v. Caldera, 134 F. Supp. 2d 138 **[*821]** (D.D.C. 2001)* ("*Mudd II*"); *Mudd v. Caldera, 26 F. Supp. 2d 113 (D.D.C. 1998)* ("*Mudd I*"), ultimately finding that the Secretary's decision was not arbitrary, capricious, or otherwise in violation of law. The District Court therefore granted summary judgment for the Army. *Mudd II, 134 F. Supp. 2d at 147*.

[3]** We agree that appellant cannot prevail on his claim. But we rely on different grounds than those advanced by the District Court. In our view, appellant's claim must be dismissed for want of standing. *HN2*[] Under *10 U.S.C. § 1552(g)*, "military record" pertains only to "an individual member or former member of the

* Richard D. Mudd, the original complainant in this case, passed away earlier this year, leaving his son - the great-grandson of Dr. Samuel Mudd - to pursue this appeal. *See Richard D. Mudd, 101 Grandson of Booth Doctor,* WASH. POST, May 22, 2002, at B07.

armed forces." Dr. Samuel Mudd was never a member of the armed forces. Therefore, even if appellant can establish Article III standing, his action must be still dismissed for want of prudential standing. Appellant's interest in correcting the military record that relates to his great-grandfather's conviction is not within the "zone of interests" protected by the statute covering the correction of military records.

I. BACKGROUND

The factual and procedural history in this case are recounted fully and thoughtfully in the District Court's opinions in *Mudd I* and *Mudd II*. We will thus not repeat the extensive details of the actions before ABCMR, the Secretary, or the District Court. Rather, we will focus on the portions of the record that are most pertinent to this appeal.

On May 9, 1865, a special military tribunal charged eight parties with conspiring **[**4]** to murder President Abraham Lincoln. One of these individuals was Dr. Samuel Mudd ("Dr. Mudd"), a non-military physician who owned a tobacco farm in Charles County, Maryland. *Mudd II, 134 F. Supp. 2d at 140*; *Mudd I, 26 F. Supp. 2d at 116*. Dr. Mudd was visited by John Wilkes Booth and an accomplice following the well-known events at Ford's Theater on April 14, 1865. After fatally wounding President Lincoln on that evening, Booth stopped at Dr. Mudd's farm - possibly in disguise - to receive medical treatment for an injury that he sustained during the escape. *Id.* Dr. Mudd told others about this encounter, and authorities soon thereafter arrested him for assisting in the infamous assassin's flight.

President Andrew Johnson convened a special military tribunal to try all cases having to do with the plot to kill President Lincoln. Known as the Hunter Commission, the nine appointed members of this body considered the evidence on the charges against Dr. Mudd. *Id.* Attorney General James Speed announced his opinion that a military court could preside over these hearings because the object of the conspiracy was the murder of President Lincoln, who acted **[**5]** as commander in chief. *See* 12 Op. Att'y Gen. 297-317 (1865), *reprinted in* Joint Appendix ("J.A.") 19-25.

In his defense, Dr. Mudd argued that allowing the Commission to assert jurisdiction over his case was unlawful. *Mudd I, 26 F. Supp. 2d at 116*. He reasoned that a non-military citizen was entitled to adjudication in the civilian courts during peace time. Since the state of Maryland was not part of the Confederacy and local civilian courts remained open, a military tribunal had no power to try the case. The Hunter Commission rejected this argument, issued a final judgment against Dr. Mudd, and then sentenced him to life imprisonment. *Id*.

During his incarceration, Dr. Mudd petitioned the federal courts for habeas relief. *See Mudd II 134 F. Supp. 2d at 140*; *Mudd I, 26 F. Supp. 2d at 117*; *see also Ex Parte Mudd, 17 F. Cas. 954*, F. Cas. No. 9899 (S.D. Fla. 1868), *reprinted in* J.A. 41-43. Dr. Mudd relied on the Supreme Court's holding in *Ex Parte Milligan, 71 U.S. 2, 18 L. Ed. 281* ***[*822]*** *(1866)*, a case adopting a limited view of a military tribunal's jurisdiction over civilians from non-secessionist **[**6]** states. *See also Ex Parte Quirin, 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942)*. The District judge rejected these arguments and denied the habeas petition. J.A. 43. An appeal of that ruling on the merits never occurred due to intervening events leading to Dr. Mudd's release from prison. On February 8, 1869, President Andrew Johnson issued a full and unconditional pardon to Dr. Mudd in recognition of his efforts to assist medical officers during an epidemic of yellow fever. *See* Pres. Pardon of Samuel A. Mudd, *reprinted in* J.A. 44-48; *Mudd I, 26 F. Supp. 2d at 117*; *see also* Mudd Compl. at P 26.

More than a century later, Richard D. Mudd, Dr. Samuel Mudd's grandson, filed a formal petition with the Army to overturn the judgment of the Hunter Commission. *Mudd II, 134 F. Supp. 2d at 140*; *Mudd I, 26 F. Supp. 2d at 117*. Richard Mudd based his claim solely on *10 U.S.C. § 1552(a)(1)*, pursuant to which "the Secretary of a military department may correct any military record … when the Secretary considers it necessary to correct an error or remove an injustice." He asked the Army to expunge **[**7]** the official documents relating to his grandfather's conviction. He specifically argued that the judgment of the Hunter Commission was invalid, because his grandfather was factually innocent of the conspiracy charge and because a military tribunal had no jurisdiction to try civilians during times of peace. *Mudd II, 134 F. Supp. 2d at 140*; *Mudd I, 26 F. Supp. 2d at 117*.

ABCMR conducted a hearing on the petition and determined that circumstances warranted a reversal of Dr. Mudd's conviction on the ground that the Hunter Commission's jurisdiction did not extend to noncombatant civilians like Dr. Mudd. *Mudd I, 26 F. Supp. 2d at 122*. On January 22, 1992, ABCMR recommended that the Secretary of the Army alter the necessary records and void the 19th Century conviction.

Id.

The Secretary rejected ABCMR's recommendation and declined to alter the records relating to Dr. Mudd's conviction. *Mudd II 134 F. Supp. 2d at 141*. Following a remand from the District Court to conduct additional administrative proceedings, *see* *Mudd I, 26 F. Supp. 2d at 120*, the Secretary held steadfast to the view that the Hunter **[**8]** Commission acted within its lawful jurisdiction in convicting Dr. Mudd. *Mudd II, 134 F. Supp. 2d at 142*. The Secretary reasoned that John Wilkes Booth was an unlawful belligerent who had committed the Lincoln assassination as an act of war. Therefore, according to the Secretary, the military tribunal's power to try Dr. Mudd was appropriate because the laws of war applied to all parts of the underlying conspiracy. *Id.*

Richard Mudd then sought judicial review in District Court, claiming that the Secretary's action in denying relief under *10 U.S.C. § 1552(a)(1)* was arbitrary and capricious under the Administrative Procedure Act ("APA"), *5 U.S.C. § 706(1)(A)*. On March 14, 2001, the District Court granted summary judgment in favor of the Army. *Mudd II, 134 F. Supp. 2d at 147-48*. The trial judge found that the Army reached its decision after properly weighing the evidence presented in favor of reversing the conviction. *Id. at 143-44*. The District Court also found that the Secretary's application of the "law of war" principle instead of the martial law principle found in *Milligan* was **[**9]** not arbitrary, capricious, or contrary to law. *Id. at 146-47*. Appellant then sought review in this court.

Richard D. Mudd died earlier this year, leaving his son the great-grandson of Dr. Mudd - to pursue this appeal. On August 20, 2002, after the initial submission of **[*823]** briefs, the court directed the parties to provide supplemental briefing on the issue as to whether appellant lacked standing to seek judicial relief in federal court. *Mudd v. White, 309 F.3d 819, 2002 U.S. App. LEXIS 23227*, No. 01-5103 (D.C. Cir. Aug. 20, 2002) (Order).

II. ANALYSIS

Most of the oral argument before this court focused on appellant's standing to sue. Because standing is a threshold requirement, and because (as we explain below) appellant has failed to demonstrate standing in this case, this will be the sole focus of our decision.

HN3[↑] There are two principal forms of standing: "Article III (case or controversy)" and "prudential." ***HN4***[↑] The former, which is jurisdictional and cannot be modified by Congress, entails three requirements:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' **[**10]** or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly … traceable to the challenged action of the defendant, and not … the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (citations omitted).

HN5[↑] Prudential standing "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit **[**11]** the suit." *Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987)*. The Court has amplified the doctrine, as follows:

> In addition to the immutable requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." Like their constitutional counterparts, these "judicially self-imposed limits on the exercise of federal jurisdiction" are "founded in concern about the proper--and properly limited--role of the courts in a democratic society"; but unlike their constitutional counterparts, they can be modified or abrogated by Congress. Numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff's grievance

must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.

Bennett v. Spear, 520 U.S. 154, 162, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997) (citations omitted).

The Government argues strenuously that appellant cannot satisfy the "case" or "controversy" requirements of Article III, because he has **[**12]** not demonstrated that his alleged injury is fairly traceable to the actions of the Secretary, or that the alleged injury will likely be redressed by a decision from this court ordering the Army to correct its records. In particular, the Government argues that the reputational injury alleged by appellant is more likely **[*824]** the result of the ravages of history than of any official decision by the Secretary. The Government also contends that an action by the Army to change its records will not remedy the alleged reputational harm suffered by appellant. We need not address these arguments, however, because we find that appellant's claim assuredly fails for want of prudential standing.

Appellant's insurmountable problem in this case is that his claim, resting on *10 U.S.C. § 1552(a)(1)*, is not "arguably within the zone of interests to be protected or regulated by the statute … in question." *Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)*. The "zone of interests" requirement has neither been eliminated nor adjusted by Congress with respect to the coverage of claims arising under *10 U.S.C. § 1552(a)(1)* **[**13]** . Therefore, appellant must show that his asserted interest is among the group of claims that is envisioned by the relevant statute. *See* *Sierra Club v. EPA, 292 F.3d 895, 902 (D.C. Cir. 2002)*; *Cement Kiln Recycling Coalition v. EPA, 347 U.S. App. D.C. 127, 255 F.3d 855, 870 (D.C. Cir. 2001)*. He fails this test if his interests are so marginally related to or inconsistent with the implicit purposes in the statute "that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n, 479 U.S. at 399*; *see also* *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def., 318 U.S. App. D.C. 347, 87 F.3d 1356, 1359 (D.C. Cir. 1996)*.

In this case, appellant asserts an interest in correcting records to vacate the criminal conviction of his great-grandfather. The applicable federal statute that gives rise to appellant's claim was last amended by Congress before the present lawsuit was initiated. *Compare* *10 U.S.C. § 1552 (1998)* (amending subsection (g)), *with* *Mudd I, 134 F. Supp. 2d at 140* (noting Army's final denial of Richard Mudd's petition **[**14]** on Mar. 6, 2000). ***HN6***[⬆] The amended subsection 1552(g) defines a "military record" as a document that "pertains to (1) an individual member or former member of the armed forces, or (2) … any other military matter affecting a member or former member of the armed forces…." *10 U.S.C. § 1552(g)*. And ***HN7***[⬆] *10 U.S.C. § 1552(b)* makes it clear that only a "claimant or his heir or legal representative" may file a petition under *§ 1552(a)* to correct a "military record." *See also* *32 C.F.R. § 581.3(d)(1)(iii) (2002)*. Therefore, the statute plainly contemplates that only the claimant member of the armed forces (or his heir or legal representative) may seek to alter a "military record" pertaining to the claimant. We assume *arguendo* that Dr. Mudd's grandson and great-grandson indeed qualify as heirs or legal representatives. However, as Dr. Mudd was not a "member or former member of the armed forces," neither the grandson nor the great-grandson is an heir or legal representative of the type of "claimant" contemplated by the statute. In other words, their petition does not pertain to "a member or former member of the armed services. **[**15]** " Appellant is thus not within the "zone of interests" protected or regulated by the statute.

III. CONCLUSION

For the reasons enumerated above, the appeal is denied and the case is dismissed.

End of Document

§ 1344. Election disputes

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(15) (Mar. 3, 1911, ch. 231, § 24, par. 15, 36 Stat. 1092).

Words ''civil action'' were substituted for ''suits,'' in view of Rule 2 of the Federal Rules of Civil Procedure.

Words ''United States Senator'' were added, as no reason appears for including Representatives and excluding Senators. Moreover, the Seventeenth amendment, providing for the popular election of Senators, was adopted after the passage of the 1911 law on which this section is based.

Changes were made in phraseology.

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 933.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1354, and 1359 of this title.

Words ''civil actions, suits or proceedings'' were substituted for ''suits of a civil nature, at common law or in equity'' in view of Rules 2 and 81(a)(7) of the Federal Rules of Civil Procedure.

Word ''agency'' was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

The phrase ''Except as otherwise provided by Act of Congress,'' at the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in the absence of special provisions conferring it elsewhere.

Changes were made in phraseology.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall

have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

(June 25, 1948, ch. 646, 62 Stat. 933; Apr. 25, 1949, ch. 92, §2(a), 63 Stat. 62; May 24, 1949, ch. 139, §80(a), (b), 63 Stat. 101; Oct. 31, 1951, ch. 655, §50(b), 65 Stat. 727; July 30, 1954, ch. 648, §1, 68 Stat. 589; Pub. L. 85–508, §12(e), July 7, 1958, 72 Stat. 348; Pub. L. 88–519, Aug. 30, 1964, 78 Stat. 699; Pub. L. 89–719, title II, §202(a), Nov. 2, 1966, 80 Stat. 1148; Pub. L. 91–350, §1(a), July 23, 1970, 84 Stat. 449; Pub. L. 92–562, §1, Oct. 25, 1972, 86 Stat. 1176; Pub. L. 94–455, title XII, §1204(c)(1), title XIII, §1306(b)(7), Oct. 4, 1976, 90 Stat. 1697, 1719; Pub. L. 95–563, §14(a), Nov. 1, 1978, 92 Stat. 2389; Pub. L. 97–164, title I, §129, Apr. 2, 1982, 96 Stat. 39; Pub. L. 97–248, title IV, §402(c)(17), Sept. 3, 1982, 96 Stat. 669; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 102–572, title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 104–134, title I, §101[(a)] [title VIII, §806], Apr. 26, 1996, 110 Stat. 1321, 1321–75; renumbered title I, Pub. L. 104–140, §1(a), May 2, 1996, 110 Stat. 1327; Pub. L. 104–331, §3(b)(1), Oct. 26, 1996, 110 Stat. 4069; Pub. L. 111–350, §5(g)(6), Jan. 4, 2011, 124 Stat. 3848.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§41(20), 931(a), 932 (Mar. 3, 1911, ch. 231, §24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, ch. 234, §1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, §§410(a), 411, 60 Stat. 843).

Section consolidates provisions of section 41(20) conferring jurisdiction upon the district court, in civil actions against the United States, with the first sentence of section 931(a) relating to jurisdiction of the district courts in tort claims cases, and those provisions of section 932 making the provisions of said section 41(20), relating to counterclaim and set-off, applicable to tort claims cases, all of title 28, U.S.C., 1940 ed.

Provision in section 931(a) of title 28, U.S.C., 1940 ed., for trials without a jury, is incorporated in section 2402 of this revised title. For other provisions thereof, see Distribution Table.

Words ''commencing an action under this section'' in subsec. (c) of this revised section cover the provision in section 932 of title 28, U.S.C., 1940 ed., requiring that the same provisions ''for counterclaim and set-off'' shall apply to tort claims cases brought in the district courts.

The phrase in section 931(a) of title 28, U.S.C., 1940 ed., ''accruing on and after January 1, 1945'' was omitted because executed as of the date of the enactment of this revised title.

Provisions in section 41(20) of title 28, U.S.C., 1940 ed., relating to time for commencing action against United States and jury trial constitute sections 2401 and 2402 of this title. (See reviser's notes under said sections.)

Words in section 41(20) of title 28, U.S.C., 1940 ed., ''commenced after passage of the Revenue Act of 1921'' were not included in revised subsection (a)(1) because obsolete and superfluous. Actions under this section involving erroneous or illegal assessments by the collector of taxes would be barred unless filed within the 5-year limitation period of section 1113(a) of the Revenue Act of 1926, 44 Stat. 9, 116. (See *United States v. A. S. Kreider Co.*, 1941, 61 S.Ct. 1007, 313 U.S. 443, 85 L.Ed. 1447.)

Words in section 41(20) of title 28, U.S.C., 1940 ed., ''if the collector of internal revenue is dead or is not in office at the time such action or proceeding is commenced'' were omitted.

The revised section retains the language of section 41(20) of title 28, U.S.C., 1940 ed., with respect to actions against the United States if the collector is dead or not in office when action is commenced, and consequently maintains the long existing distinctions in practice between actions against the United States and actions against the collector who made the assessment or collection. In the latter class of actions either party may demand a jury trial while jury trial is denied in actions against the United States. See section 2402 of this title. In reality all such actions are against the United States and not against local collectors. (See *Lowe v. United States*, 1938, 58 S.Ct. 896, 304 U.S. 302, 82 L.Ed. 1362; *Manseau v. United States*, D.C.Mich. 1943, 52 F.Supp. 395, and *Combined Metals Reduction Co. v. United States*, D.C.Utah 1943, 53 F.Supp. 739.)

The revised subsection (c)(1) omitted clause: ''but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision,'' contained in section 41(20) of title 28, U.S.C., 1940 ed., as obsolete and superfluous. The words contained in section 41(20) of title 28, U.S.C., 1940 ed., ''claims growing out of the Civil War, and commonly known as 'war-claims,' or to hear and determine other claims which had been reported adversely prior to the 3d day of March 1887 by any court, department, or commission authorized to have and determine the same,'' were omitted for the same reason.

The words ''in a civil action or in admiralty,'' in subsection (a)(2), were substituted for ''either in a court of law, equity, or admiralty'' to conform to Rule 2 of the Federal Rules of Civil Procedure.

Words in section 41(20) ''in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable'' were omitted from subsection (a)(2) of this revised section as unnecessary. See reviser's note under section 1491 of this title.

For jurisdiction of The Tax Court to review claims for refunds of processing taxes collected under the unconstitutional Agriculture Adjustment Act, see sections 644–659 of title 7, U.S.C., 1940 ed., Agriculture, and the 1942 Revenue Act, Act Oct. 21, 1942, ch. 610, title V, §510(a), (c), (d), 56 Stat. 667. (See, also, *Lamborn v. United States*, C.C.P.A. 1939, 104 F.2d 75, certiorari denied 60 S.Ct. 115, 308 U.S. 589, 84 L.Ed. 493.)

See, also, reviser's note under section 1491 of this title as to jurisdiction of the Court of Claims in suits against the United States generally. For venue of actions under this section, see section 1402 of this title and reviser's note thereunder.

Minor changes were made in phraseology.

SENATE REVISION AMENDMENT

The provision of title 28, U.S.C., §932, which related to application of the Federal Rules of Civil Procedure, were originally set out in section 2676 of this revised title, but such section 2676 was eliminated by Senate amendment. See 80th Congress Senate Report No. 1559, amendment No. 61.

1949 ACT

This section corrects typographical errors in section 1346(a)(1) of title 28, U.S.C., and in section 1346(b) of such title.

REFERENCES IN TEXT

Sections 6226, 6228(a), 7426, 7428, and 7429 of the Internal Revenue Code of 1986, referred to in subsec. (e), are classified to sections 6226, 6228(a), 7426, 7428, and 7429, respectively, of Title 26, Internal Revenue Code.

AMENDMENTS

2011—Subsec. (a)(2). Pub. L. 111–350 substituted ''sections 7104(b)(1) and 7107(a)(1) of title 41'' for ''sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978''.

1996—Subsec. (b). Pub. L. 104–134 designated existing provisions as par. (1) and added par. (2).

Subsec. (g). Pub. L. 104–331 added subsec. (g).

1992—Subsec. (a). Pub. L. 102–572 substituted ''United States Court of Federal Claims'' for ''United States Claims Court''.

1986—Subsec. (e). Pub. L. 99–514 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954''.

1982—Subsec. (a). Pub. L. 97–164 substituted ''United States Claims Court'' for ''Court of Claims''.

Subsec. (e). Pub. L. 97–248 substituted ''section 6226, 6228(a), 7426, or'' for ''section 7426 or section''.

1978—Subsec. (a)(2). Pub. L. 95–563 excluded from the jurisdiction of district courts civil actions or claims against the United States founded upon any express or implied contract with the United States or for damages in cases not sounding in tort subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

1976—Subsec. (e). Pub. L. 94–455 inserted ''or section 7429'' and ''or section 7428 (in the case of the United States district court for the District of Columbia)'', after ''section 7426''.

1972—Subsec. (f). Pub. L. 92–562 added subsec. (f).

1970—Subsec. (a)(2). Pub. L. 91–350 specified that the term ''express or implied contracts with the United States'' includes express or implied contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.

1966—Subsec. (e). Pub. L. 89–719 added subsec. (e).

1964—Subsec. (d). Pub. L. 88–519 struck out provisions which prohibited district courts from exercising jurisdiction of civil actions or claims to recover fees, salary, or compensation for official services of officers or employees of the United States.

1958—Subsec. (b). Pub. L. 85–508 struck out reference to District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1954—Subsec. (a)(1). Act July 30, 1954, struck out language imposing jurisdictional limitation of $10,000 on suits to recover taxes.

1951—Subsec. (d). Act Oct. 31, 1951, inserted references to ''claim'' and ''employees''.

1949—Subsec. (a)(1). Act May 24, 1949, § 80(a), inserted '', (i) if the claim does not exceed $10,000 or (ii)''.

Subsec. (b). Acts Apr. 25, 1949, and May 24, 1949, § 80(b), made a technical change to correct ''chapter 173'' to read ''chapter 171'', and inserted ''on and after January 1, 1945'' after ''for money damages''.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–331 effective Oct. 1, 1997, see section 3(d) of Pub. L. 104–331, set out as an Effective Date note under section 1296 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1982 AMENDMENTS

Amendment by Pub. L. 97–248 applicable to partnership taxable years beginning after Sept. 3, 1982, with provision for the applicability of the amendment to any partnership taxable year ending after Sept. 3, 1982, if the partnership, each partner, and each indirect partner requests such application and the Secretary of the Treasury or his delegate consents to such application, see section 407(a)(1), (3) of Pub. L. 97–248, set out as an Effective Date note under section 6221 of Title 26, Internal Revenue Code.

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–563 effective with respect to contracts entered into 120 days after Nov. 1, 1978 and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95–563, Nov. 1, 1978, 92 Stat. 2391, formerly set out as an Effective Date note under section 601 of former Title 41, Public Contracts.

EFFECTIVE DATE OF 1970 AMENDMENT

Section 2 of Pub. L. 91–350 provided that:

''(a) In addition to granting jurisdiction over suits brought after the date of enactment of this Act [July 23, 1970], the provisions of this Act [amending this section and section 1491 of this title and section 724a of former Title 31, Money and Finance] shall also apply to claims and civil actions dismissed before or pending on the date of enactment of this Act if the claim or civil action is based upon a transaction, omission, or breach that occurred not more than six years prior to the date of enactment of this Act [July 23, 1970].

''(b) The provisions of subsection (a) of this section shall apply notwithstanding a determination or judgment made prior to the date of enactment of this Act that the United States district courts or the United States Court of Claims did not have jurisdiction to entertain a suit on an express or implied contract with a nonappropriated fund instrumentality of the United States described in section 1 of this Act.''

EFFECTIVE DATE OF 1966 AMENDMENT

Section 203 of title II of Pub. L. 89–719 provided that: ''The amendments made by this title [amending this section and sections 1402 and 2410 of this title] shall apply after the date of the enactment of this Act [Nov. 2, 1966].''

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85–508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, set out as a note under section 542 of Title 6.

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the ''transition period'', being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1347. Partition action where United States is joint tenant

The district courts shall have original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants.

(June 25, 1948, ch. 646, 62 Stat. 933.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(25) (Mar. 3, 1911, ch. 231, § 24, par. 25, 36 Stat. 1094).

1954—Act July 30, 1954, ch. 648, §2(b), 68 Stat. 589, struck out ''denied'' in item 2402.

1949—Act May 24, 1949, ch. 139, §118, 63 Stat. 105, substituted ''Interest'' for ''Interest on judgments against United States'' in item 2411.

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, §1, 63 Stat. 62; Pub. L. 86–238, §1(3), Sept. 8, 1959, 73 Stat. 472; Pub. L. 89–506, §7, July 18, 1966, 80 Stat. 307; Pub. L. 95–563, §14(b), Nov. 1, 1978, 92 Stat. 2389.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§41(20), 942 (Mar. 3, 1911, ch. 231, §24, part 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, §420, 60 Stat. 845).

Section consolidates provision in section 41(20) of title 28, U.S.C., 1940 ed., as to time limitation for bringing actions against the United States under section 1346(a) of this title, with section 942 of said title 28.

Words ''or within one year after the date of enactment of this Act whichever is later'', in section 942 of title 28, U.S.C., 1940 ed., were omitted as executed.

Provisions of section 41(20) of title 28, U.S.C., 1940 ed., relating to jurisdiction of district courts and trial by the court of actions against the United States are the basis of sections 1346(a) and 2402 of this title.

Words in subsec. (a) of this revised section, ''person under legal disability or beyond the seas at the time the claim accrues'' were substituted for ''claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim.'' (See reviser's note under section 2501 of this title.)

Words in section 41(20) of title 28, U.S.C., 1940 ed., ''nor shall any of the said disabilities operate cumulatively'' were omitted. (See reviser's note under section 2501 of this title.)

A provision in section 41(20) of title 28, U.S.C., 1940 ed., that disabilities other than those specifically mentioned should not prevent any action from being barred was omitted as superfluous.

Subsection (b) of the revised section simplifies and restates said section 942 of title 28, U.S.C., 1940 ed., without change of substance.

Changes were made in phraseology.

Senate Revision Amendment

Subsection (b) amended in the Senate to insert the 1 year limitation on the bringing of tort actions and to include the limitation upon the time in which tort claims not exceeding $1000 must be presented to the appropriate Federal agencies for administrative disposition. 80th Congress Senate Report No. 1559, Amendment No. 48.

References in Text

The Contract Disputes Act of 1978, referred to in subsec. (a), is Pub. L. 95–563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

Amendments

1978—Subsec. (a). Pub. L. 95–563 inserted Contract Disputes Act of 1978 exception.

1966—Subsec. (b). Pub. L. 89–506 struck out provisions dealing with a tort claim of $2,500 or under as a special category of tort claim requiring preliminary administrative action and substituted provisions requiring presentation of all tort claims to the appropriate Federal agency in writing within two years after the claim accrues and commencement of an action within six months of the date of mailing of notice of final denial of the claim by the agency to which it was presented for provisions requiring commencement of an action within two years after the claim accrues.

1959—Subsec. (b). Pub. L. 86–238 substituted ''$2,500'' for ''$1,000'' in two places.

1949—Subsec. (b). Act Apr. 25, 1949, the time limitation on bringing tort actions from 1 year to 2 years.

Effective Date of 1978 Amendment

Amendment by Pub. L. 95–563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95–563, set out as an Effective Date note under section 601 of Title 41, Public Contracts.

Effective Date of 1966 Amendment

Amendment by Pub. L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89–506, set out as a note under section 2672 of this title.

§ 2402. Jury trial in actions against United States

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

(June 25, 1948, ch. 646, 62 Stat. 971; July 30, 1954, ch. 648, §2(a), 68 Stat. 589; Pub. L. 104–331, §3(b)(3), Oct. 26, 1996, 110 Stat. 4069.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§41(20), 931(a) (Mar. 3, 1911, ch. 231, §24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, §410(a), 60 Stat. 843).

Section consolidates non-jury provisions of sections 41(20) and 931(a) of title 28, U.S.C., 1940 ed. For other provisions of said section 931(a) relating to tort claims, see Distribution Table.

Word ''actions'' was substituted for ''suits'', in view of Rule 2 of the Federal Rules of Civil Procedure.

Provisions of title 28, U.S.C., 1940 ed., §41(20) relating to jurisdiction of district courts and time for bringing actions against the United States are the basis of sections 1346 and 2401 of this title.

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

JUL 25 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

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

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

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

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

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

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

Robert L. Wilkie

Attachment:
As stated

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

Attachment

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

Generally

1. This document provides standards for Discharge Review Boards (DRBs) and Boards for Correction of Military / Naval Records (BCM/NRs) in determining whether relief is warranted on the basis of equity, injustice, or clemency.

2. DRBs are authorized to grant relief on the basis of issues of equity or propriety. BCM/NRs are authorized to grant relief for errors or injustices. These standards, specifically equity for DRBs and relief for injustice for BCM/NRs, authorize both boards to grant relief in order to ensure fundamental fairness.

3. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority that DRBs and BCM/NRs have to ensure fundamental fairness. BCM/NRs may grant clemency regardless of the court-martial forum; however, DRBs are limited in their exercise of clemency in that they may not exercise clemency for discharges or dismissals issued at a general court-martial.

4. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

5. This guidance does not mandate relief, but rather provides standards and principles to guide DRBs and BCM/NRs in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each board.

6. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, DRBs and BCM/NRs shall consider the following:

a. It is consistent with military custom and practice to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds.

b. Relief should not be reserved only for those with exceptional aptitude; rather character and rehabilitation should weigh more heavily than achievement alone. An applicant need not, for example, attain high academic or professional achievement in order to demonstrate sufficient rehabilitation to support relief.

c. An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.

d. Evidence in support of relief may come from sources other than a veteran's service record.

e. A veteran or Service member's sworn testimony alone, oral or written, may establish the existence of a fact supportive of relief.

f. Changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received, may be grounds for relief.

g. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct in the case of the mitigating evidence in a case. For example, marijuana use is still unlawful in the military, but it is now legal under state law in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.

h. Requests for relief based in whole or in part on a mental health condition, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety.

i. Evidence submitted by a government official with oversight or responsibility for the matter at issue and that acknowledges a relevant error or injustice was committed, provided that it is submitted in his or her official capacity, should be favorably considered as establishing a grounds for relief.

j. Similarly situated Service members sometimes receive disparate punishments. A Service member in one location could face court-martial for an offense that routinely is handled administratively across the Service. This can happen for a variety of lawful reasons, for example, when a unit or command finds it necessary to step up disciplinary efforts to address a string of alcohol- or drug-related incidents, or because attitudes about a particular offense vary between different career fields, units, installations, or organizations. While a court-martial or a command would be within its authority to choose a specific disposition forum or issue a certain punishment, DRBs and BCM/NRs should nevertheless consider uniformity and unfair disparities in punishments as a basis for relief.

k. Relief is generally more appropriate for nonviolent offenses than for violent offenses.

l. Changes to tbe narrative reason for a discharge and/or an upgraded character of discharge granted solely on equity, injustice, or clemency grounds normally should not result in

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

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

a. An applicant's candor

b. Whether the punishment, including any collateral consequences, was too harsh

c. The aggravating and mitigating facts related to the record or punishment from which the veteran or Service member wants relief

d. Positive or negative post-conviction conduct, including any arrests, criminal charges, or any convictions since the incident at issue

e. Severity of misconduct

f. Length of time since misconduct

g. Acceptance of responsibility, remorse, or atonement for misconduct

h. The degree to which the requested relief is necessary for the applicant

i. Character and reputation of applicant

j. Critical illness or old age

k. Meritorious service in government or other endeavors

l. Evidence of rehabilitation

m. Availability of other remedies

n. Job history

o. Whether misconduct may have been youthful indiscretion

p. Character references

q. Letters of recommendation

r. Victim support for, or opposition to relief, and any reasons provided

Department of Defense

INSTRUCTION

NUMBER 1332.28
April 4, 2004

USD(P&R)

SUBJECT: Discharge Review Board (DRB) Procedures and Standards

References: (a) DoD Directive 1332.41, "Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs)," March 8, 2004
(b) Section 1553 of title 10, United States Code
(c) through (g), see enclosure 1

1. REISSUANCE AND PURPOSE

This Instruction:

1.1. Issues uniform procedures and standards for the review of discharges under the authority of reference (a), reference (b), and reference (c).

1.2. Provides for public inspection, searching, and downloading of DRB decisional documents through the DoD Boards' Electronic Reading Room.

2. APPLICABILITY

The provisions of this Instruction apply to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense (DoD IG), the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereinafter referred to as the "DoD Components").

3. DEFINITIONS

Terms used herein are defined in enclosure 2.

4. RESPONSIBILITIES

4.1. The Deputy Under Secretary of Defense (Program Integration) (DUSD(PI)), under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness shall:

4.1.1. Resolve all issues concerning DRBs that may not be resolved among the Military Departments.

4.1.2. Ensure uniformity among the Military Departments in the rights afforded applicants in discharge reviews.

4.1.3. Modify or supplement the enclosures to this Instruction.

4.2. The Secretaries of the Military Departments have the authority for final decision and the responsibility for the operation of their respective discharge review programs under reference (b).

4.3. The Secretary of the Army, as the designated DoD lead and administrative focal point for DRB matters (under reference (b)), shall:

4.3.1. Effect necessary coordination with other governmental agencies regarding continuing applicability of this Instruction and resolve administrative procedures.

4.3.2. Review suggested modifications to this Instruction, including implementing documents; monitor the implementing documents of the Military Departments; resolve differences, when practicable; recommend specific changes; provide supporting rationale to the DUSD(PI) for decision; and include appropriate documentation through the Office of the DUSD(PI) and the OSD Federal Register liaison officer to effect publication in the Federal Register.

4.3.3. Maintain the DD Form 293, "Application for the Review of Discharge from the Armed Forces of the United States," and republish, as necessary, with appropriate coordination of the other Military Departments and the Office of Management and Budget.

4.3.4. Respond to all inquiries from private individuals, organizations, or public officials with regard to DRB matters. When the specific Military Service may be identified, refer such correspondence to the appropriate DRB for response or designate an appropriate activity to perform this task.

4.3.5. Provide overall guidance and supervision to the DoD Boards' Electronic Reading Room to ensure decisional documents and application forms are available for applicants.

5. PROCEDURES

5.1. Discharge review procedures are prescribed in enclosure 3.

5.2. Discharge review standards are prescribed in enclosure 4 and constitute the basic guidelines for determining the granting or denying of relief in a discharge review.

5.3. Complaint procedures about decisional documents are prescribed in enclosure 5.

6. EFFECTIVE DATE

This Instruction is effective immediately.

David S. C. Chu
Under Secretary of Defense
(Personnel and Readiness)

Enclosures - 5
- E1. References, continued
- E2. Definitions
- E3. Discharge Review Procedures
- E4. Discharge Review Standards
- E5. Complaints Concerning Decisional Documents

E1. ENCLOSURE 1

REFERENCES, continued

(c) Section 5303 of title 38, United States Code
(d) DoD Directive 1332.14, "Enlisted Administrative Separations," December 21, 1993
(e) DoD Directive 5400.7, "DoD Freedom of Information Act (FOIA) Program," September 29, 1997
(f) DoD Directive 5400.11, "DoD Privacy Program," December 13, 1999
(g) Chapter 47 of title 10, United States Code, "Uniform Code of Military Justice"

E2. ENCLOSURE 2

DEFINITIONS

E2.1.1. Applicant. A former member of the Armed Forces previously discharged in accordance with Military Service regulations or by sentence of a court-martial (other than a general court-martial) whose application is accepted by the DRB concerned or whose case is heard on the DRB's own motion. If the former member is deceased or incompetent, the term "applicant" includes the surviving spouse, next-of-kin, or legal representative who is acting on behalf of the former member. The term "applicant" used in enclosures 3 through 5, includes the applicant's counsel or representative, except that the counsel or representative may not submit an application for review, waive the applicant's right to be present at a hearing, or terminate a review without providing the DRB an appropriate power of attorney or other written consent of the applicant.

E2.1.2. Complainant. A former member of the Armed Forces (or the former member's counsel) submitting a complaint under enclosure 5 with respect to the decisional document issued in the former member's own case; or a former member of the Armed Forces (or the former member's counsel) submitting a complaint under enclosure 5 stating that correction of the decisional document shall assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

E2.1.3. Counsel or Representative. An individual or agency designated by the applicant who agrees to represent the applicant in a case before the DRB. It includes, but is not limited to: a lawyer admitted to the bar of a Federal court or of the highest court of a State; an accredited representative designated by an organization recognized by the Secretary of Veterans Affairs; a representative from a State agency concerned with veterans affairs; and representatives of a private organization or local government agency.

E2.1.4. Discharge. The complete severance from all military status gained by the enlistment or induction concerned, including the assignment of a reason for such discharge and characterization of service (DoD Directive 1332.14 (reference (d)).

E2.1.5. Discharge Review. The evaluation of the reason for separation, the procedures followed in accomplishing separation, and the characterization of service. This includes determinations made under the provisions of 38 U.S.C. 5303(e)(2) (reference (c)).

E2.1.6. Discharge Review Board (DRB). An administrative board constituted by the Secretary of the Military Department concerned and vested with discretionary authority to review discharges under the provisions of 10 U.S.C. 1553 (reference (b)). It

may be configured as one element or two or more elements as designated by the Secretary concerned.

E2.1.7. DoD Boards' Electronic Reading Room: A public website, located at http://boards.law.af.mil, where potential complainants are able to review prior decisional documents issued by their respective Boards and obtain application forms to process a complaint.

E2.1.8. DRB Panel. An element of a DRB, consisting of five members, authorized by the Secretary concerned to review discharges.

E2.1.9. DRB Traveling or Regional Panel. A DRB panel conducting discharge reviews in a location outside the National Capital Region (NCR).

E2.1.10. Hearing. A review involving an appearance before the DRB by the applicant or on the applicant's behalf by a counsel or representative.

E2.1.11. Hearing Examination. The process for a designated panel member or official of a DRB to prepare a presentation for consideration by a DRB in accordance with regulations prescribed by the Secretary concerned.

E2.1.12. National Capital Region (NCR). The District of Columbia; Prince Georges and Montgomery Counties in Maryland; Arlington, Fairfax, Loudoun, and Prince William Counties in Virginia; and all cities and towns included within the outer boundaries of the foregoing counties.

E2.1.13. President, DRB. A person designated by the Secretary concerned and responsible for the supervision of the discharge review function and other duties as assigned.

E3. ENCLOSURE 3

DISCHARGE REVIEW PROCEDURES

E3.1. APPLICATION FOR REVIEW

E3.1.1. General. Applications shall be submitted to the appropriate DRB on DD Form 293, "Application for the Review of Discharge from the Armed Forces of the United States," or computer-generated equivalent, with such other statements, affidavits, or documentation as desired. The DD Form 293 is available for downloading on the DoD Boards' Electronic Reading Room website at http://boards.law.af.mil, at most DoD installations, and at regional offices of the Veterans Administration, or by writing to:

Army Review Boards Agency, Attention: SFBA (Reading Room)
Room 211
1941 Jefferson Davis Highway, 2nd Floor
Arlington, VA 22202-4508

E3.1.2. Timing. A motion or request for review must be made within 15 years after the date of discharge.

E3.1.3. Applicant's Options. An applicant may request a change in the character of or reason for discharge (or both).

E3.1.3.1. Reason for Discharge. An applicant may request a specific change in the reason for discharge. If an applicant does not request a specific change in the reason for discharge, the DRB shall presume that the request for review does not involve a request for change in the reason for discharge. The DRB shall change the reason for discharge if such a change is warranted.

E3.1.3.2. Character of Discharge. An applicant may request a specific change in character of discharge. A request for review from an applicant without an Honorable Discharge shall be treated as a request for a change to an Honorable Discharge unless the applicant requests a specific change to another character of discharge.

E3.1.4. Request for Consideration of Specific Issues. An applicant may request the DRB to consider specific issues which, in the opinion of the applicant, form a basis for changing the character of or reason for discharge, or both.

E3.1.5. Use of DD Form 293. DD Form 293 provides applicants with a standard format for submitting issues to the DRB, and its use:

E3.1.5.1. Provides a means for an applicant to set forth clearly and specifically those matters that, in the opinion of the applicant, provide a basis for changing the discharge;

E3.1.5.2. Assists the DRB in focusing on those matters considered to be important by an applicant;

E3.1.5.3. Assists the DRB in distinguishing between a matter submitted by an applicant in the expectation that it shall be treated as a decisional issue under section E3.5., below, and those matters submitted simply as background or supporting materials;

E3.1.5.4. Provides the applicant with greater rights in the event that the applicant later submits a complaint under section E5.4., of enclosure 5, concerning the decisional document; and

E3.1.5.5. Reduces the potential for disagreement as to the content of an applicant's issue.

E3.1.6. Relationship of Issues to the Standards for Discharge Review. The DRB reviews discharges on the basis of issues of propriety and equity. The standards used by the DRB are set forth in enclosure 4. The applicant shall review those standards before submitting any issue that the applicant believes a change in discharge should be based.

E3.1.6.1. Issues Concerning the Equity of the Discharge. An issue of equity is a matter that involves a determination whether a discharge should be changed under the equity standards of enclosure 4. This includes any issue, submitted by the applicant, that is addressed to the discretionary authority of the DRB.

E3.1.6.2. Issues Concerning the Propriety of a Discharge. An issue of propriety is a matter that involves a determination whether a discharge should be changed under the propriety standards of enclosure 4. This includes an applicant's issue in which the applicant's position is that the discharge must be changed because of an error in the discharge pertaining to a regulation, statute, constitutional provision, or other source of law (including a matter that requires determining if the action by military authorities was arbitrary, capricious, or an abuse of discretion). The context of the regulation or a description of the procedures allegedly violated normally must be set forth in order to inform the DRB adequately of the basis for the applicant's position.

E3.1.6.3. The Applicant's Identification of an Issue. The applicant is encouraged, but not required, to identify an issue as pertaining to the propriety or the equity of the discharge. This will assist the DRB in assessing the relationship of the issue to propriety or equity under subparagraph E3.5.1.3., below.

E3.1.7. Citation of Matter From Decisions. Applicants are not required to cite prior decisions as the basis for a change in discharge. If the applicant wishes to bring to the

DRB's attention a prior decision as background or illustrative material, the citation shall be placed in a brief or other supporting document. If, however, it is the applicant's intention to submit an issue that sets forth specific principles and facts from a specific cited decision, the following requirements apply:

E3.1.7.1. The issue must be set forth or expressly incorporated in DD Form 293.

E3.1.7.2. If an applicant's issue cites a prior decision (of the DRB, another Board, an agency, or a court), the applicant shall describe the specific principles and facts contained in the prior decision and explain the relevance of cited matter to the applicant's case.

E3.1.7.3. Applicants must provide the DRB with copies of unpublished decisions or of the relevant portion of the treatise, manual, or similar source in which the principles were discussed. At the applicant's request, such materials shall be returned.

E3.1.7.4. If the applicant fails to comply with the above requirements, the decisional document shall note the defect, and respond to the issue without regard to the citation.

E3.1.8. Issues on DD Form 293. The DRB shall consider all items submitted as issues by an applicant on DD Form 293 or incorporated therein.

E3.1.8.1. Amendment of Issues. Any amendment or withdrawal of an issue shall be submitted by the applicant in writing. The applicant may amend or withdraw any issue before the DRB closes the review process for deliberation.

E3.1.8.2. Nothing in this provision prevents the DRB from presenting an applicant with a list of proposed decisional issues and written information concerning the right of the applicant to add to, amend, or withdraw the applicant's submission. The written information shall state that the applicant's decision to take or decline action shall not be used against the applicant in the consideration of the case.

E3.1.8.3. Additional Issues Identified During a Hearing. The following additional procedure shall be used during a hearing to promote the DRB's understanding of an applicant's presentation. If, before closing the case for deliberation, the DRB believes that an applicant has presented an issue not listed on DD Form 293, the DRB may inform the applicant, and the applicant may submit the issue in writing or add additional written issues at that time. This does not preclude the DRB from developing its own decisional issues.

E3.2. CONDUCT OF REVIEWS

E3.2.1. Members. As designated by the Secretary concerned, the DRB and its panels, if any, shall consist of five members. One member of the DRB shall be designated as the DRB President and may serve as a presiding officer. Other members may be designated to serve as presiding officers for DRB panels under regulations prescribed by the Secretary concerned.

E3.2.2. Locations. Reviews by a DRB shall be conducted in the NCR and such other locations as designated by the Secretary concerned.

E3.2.3. Types of Review. An applicant, upon request, is entitled to a records review and a hearing. If the applicant elects and receives a hearing first, the applicant is no longer eligible for a records review.

E3.2.3.1. Records Review. A review of the application, available Service records, and additional documents (if any) submitted by the applicant.

E3.2.3.2. Hearing. A review involving an appearance before the DRB by the applicant and the applicant's counsel or representative, if so designated.

E3.2.4. Applicant's Expenses. Unless otherwise specified by law or regulation, expenses incurred by the applicant, witnesses, counsel or representative shall not be paid by the Department of Defense.

E3.2.5. Withdrawal of Application. An applicant shall be permitted to withdraw an application without prejudice at any time before the scheduled review.

E3.2.6. Failure to Appear at a Hearing or Respond to a Scheduling Notice

E3.2.6.1. Except as otherwise authorized by the Secretary concerned, further opportunity for a hearing shall not be available to an applicant requesting a hearing when:

E3.2.6.1.1. The applicant receives a letter containing the time and place of a proposed hearing and fails to make a timely response; or

E3.2.6.1.2. The applicant, after being notified by letter of the time and place of the hearing, fails to appear at the appointed time, either in person or by representative, without having made a prior, timely request for a continuation, postponement, or withdrawal.

E3.2.6.2. In such cases, the applicant shall be deemed to have waived the right to a hearing, and the DRB shall complete its review of the discharge. Any further request

for a hearing shall not be granted unless the applicant can demonstrate the failure to appear or respond was due to circumstances beyond the applicant's control.

E3.2.7. Continuance and Postponement

E3.2.7.1. A continuance of a discharge review hearing may be authorized by the President of the DRB or presiding officer of the panel concerned, provided that such continuance is of reasonable duration and is essential to achieving a full and fair hearing. When a proposal for continuance is indefinite, the pending application shall be returned to the applicant with the option to resubmit when the case is fully ready for review.

E3.2.7.2. Postponement of a scheduled review normally shall not be permitted other than for demonstrated good and sufficient reason set forth by the applicant in a timely manner, or for the convenience of the Government.

E3.2.8. Reconsideration. A discharge review shall not be subject to reconsideration except:

E3.2.8.1. When the only previous consideration of the case was on the motion of the DRB;

E3.2.8.2. When the original discharge review did not involve a hearing and a hearing is now desired, and the provisions of paragraph E3.2.6. of this enclosure do not apply;

E3.2.8.3. When changes in discharge policy are announced after an earlier review of an applicant's discharge, and the new policy is made expressly retroactive;

E3.2.8.4. When the DRB determines that policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that such changes in policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; or

E3.2.8.5. On the basis of presentation of new, substantial, relevant evidence not available to the applicant at the time of the original review. The decision on whether evidence offered by an applicant in support of a request for reconsideration is in fact new, substantial, relevant, and was not available to the applicant during the original review shall be based on a comparison of such evidence with the evidence considered in the previous discharge review. The request for reconsideration shall be granted if this comparison shows that the evidence submitted would have had a probable effect on matters concerning the propriety or equity of the discharge.

E3.2.9. Availability of Records and Documents

E3.2.9.1. Before applying for discharge review, potential applicants or their designated representatives should obtain copies of their military personnel records by submitting a General Services Administration Standard Form 180, "Request Pertaining to Military Records," to the appropriate address indicated on the form. Once the application for discharge review (DD Form 293) is submitted, an applicant's military records are forwarded to the DRB where they cannot be reproduced. Submission of a request for an applicant's military records, including a request under the Freedom of Information Act (reference (e)) or Privacy Act (reference (f)) after the DD Form 293 has been submitted, shall result automatically in the temporary suspension of processing of the application for discharge review until the requested records are sent to an appropriate location for copying, and copies are returned to the headquarters of the DRB. Processing of the application shall then be resumed at whatever stage of the discharge review process is practicable. Applicants are encouraged to submit any request for their military records before applying for discharge review rather than after submitting DD Form 293 to avoid delays in processing of applications and scheduling of reviews. Applicants and their counsel may examine their military personnel records at the site of their scheduled review before the hearing. DRBs shall notify applicants when the records are available for examination in their standard scheduling information.

E3.2.9.2. If the DRB is not authorized to provide copies of documents that are under the control of other Government Agencies, then the applicant must apply for such information with the appropriate authority. The DRB shall advise the applicant of the mailing address of the Government Agency to which the request must be submitted.

E3.2.9.3. If the official records relevant to the discharge review are not available at the Agency having custody of the records, the applicant shall be so notified and requested to provide such information and documents as may be desired in support of the request for discharge review. A period of not fewer than 30 days shall be allowed for such documents to be submitted. At the expiration of this period, the review may be conducted with information available to the DRB.

E3.2.9.4. The DRB may obtain additional evidence relevant to the discharge under consideration beyond the contents of the official military records or evidence submitted by the applicant, if a review of available evidence suggests that it would be incomplete without the additional information, or when the applicant presents testimony or documents requiring additional information to evaluate properly. Such information shall be made available to the applicant, upon request, with appropriate modifications regarding classified material.

E3.2.9.4.1. In any case heard on request of an applicant, the DRB shall provide the applicant, at a reasonable time before initiating the decision process, a notice of the availability of all regulations and documents to be considered in the discharge review, except for documents in the official personnel or medical records and any documents submitted by the applicant. The DRB shall notify the applicant of the right to examine such documents or to be provided with copies of the documents upon request; of

the date by which such requests must be received; and of the opportunity to respond within a reasonable period of time to be set by the DRB.

E3.2.9.4.2. When an applicant requires access to a classified document, the classifying authority, on the request of the DRB, shall prepare a summary of or an extract from the document, deleting all references to sources of information and other matters, the disclosure of which would be detrimental to the National Security interests of the United States. If a summary is deemed impracticable by the classifying authority, then the information from the classified source shall not be considered by the DRB in its review of the case.

E3.2.9.5. Regulations of a Military Service may be obtained at many installations under the jurisdiction of the Military Service concerned or by writing to the following address:

National Technical Information Service
5285 Port Royal Road (Reading Room)
Springfield, VA 22161

E3.2.10. Recorder/Secretary or Assistant. Such a person shall be designated to assist in the functioning of each DRB in accordance with the procedures prescribed by the Secretary of the Military Department concerned.

E3.2.11. Hearings. The individual's right to privacy shall be recognized at all hearings (including hearing examinations). Accordingly, presence at hearings of individuals shall be limited to persons authorized by the Secretary concerned or expressly requested by the applicant, subject to reasonable limitations based on available space. If, in the opinion of the presiding officer, the presence of other individuals could be prejudicial to the interests of the applicant or the Government, hearings may be closed to all but required participants.

E3.2.12. Evidence and Testimony

E3.2.12.1. The DRB may consider any evidence obtained in accordance with this Instruction.

E3.2.12.2. Formal rules of evidence shall not be applied in DRB proceedings. The presiding officer shall rule on matters of procedure and shall ensure that reasonable bounds of relevancy and materiality are maintained in the taking of evidence and presentation of witnesses.

E3.2.12.3. Applicants undergoing hearings shall be permitted to make sworn or unsworn statements or to introduce witnesses, documents, or other information on their behalf, at no expense to the Department of Defense.

E3.2.12.4. Applicants may also make oral or written arguments personally or through counsel or representatives.

E3.2.12.5. Applicants and witnesses presenting sworn statements may be questioned by the DRB. All testimony shall be taken under oath or affirmation unless the applicant specifically requests to make an unsworn statement. If an applicant or witness makes an unsworn statement, the DRB may not ask questions unless such questions are agreed upon.

E3.2.12.6. There is a presumption of regularity in the conduct of governmental affairs. This presumption shall be applied in any review unless there is substantial credible evidence to rebut the presumption.

E3.3. DECISION PROCESS

E3.3.1. The DRB or the DRB panel, as appropriate, shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standards set forth in enclosure 4.

E3.3.2. The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the DRB panel, as appropriate, and shall maintain an atmosphere of dignity and decorum at all times.

E3.3.3. Each DRB member shall act under oath or affirmation requiring careful, objective consideration of the application. DRB members are responsible for eliciting all facts necessary for a full and fair hearing. They shall consider all information presented by the applicant. In addition, the DRB shall consider available military service and health records, other records that may be in the files of the Military Service concerned and relevant to the issues before the DRB, and any other evidence obtained in accordance with this Instruction.

E3.3.4. The DRB shall identify and address issues after a review of the following: available official records, documentary evidence submitted by or on behalf of an applicant, the hearing examiner's presentation, testimony by or on behalf of an applicant, oral or written arguments presented by or on behalf of an applicant, and any other relevant evidence obtained and presented in accordance with this Instruction and the implementing instructions of the DRB.

E3.3.5. If an applicant requests a hearing and does not respond to a notification letter or does not appear for a scheduled hearing, the DRB may complete the review on the basis of material previously submitted.

E3.3.6. Application of Standards

E3.3.6.1. When a DRB determines an applicant's discharge was improper (enclosure 4, section E4.2.), the DRB shall determine which reason for discharge should have been assigned based upon the facts and circumstances before the discharge authority, including the Service regulations governing reasons for discharge at the time the applicant was discharged. Unless it is also determined that the discharge was inequitable (enclosure 4, section E4.3.), the provisions as to characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

E3.3.6.2. When the DRB determines that an applicant's discharge was inequitable (see enclosure 4, section E4.3.), any change shall be based on the evaluation of the applicant's overall record of service and relevant regulations of the applicant's Military Service.

E3.3.7. Voting shall be conducted in closed session, a majority of the five members' votes constituting the DRB decision. Voting procedures shall be prescribed by the Secretary of the Military Department concerned.

E3.3.8. Details of closed session deliberations of a DRB are privileged information and shall not be divulged.

E3.3.9. There is no requirement for a statement of minority views in the event of a split vote. The minority, however, may submit a brief statement of its views under procedures established by the Secretary concerned.

E3.3.10. DRBs may request advisory opinions from staff officers of their Military Service. These opinions are advisory in nature and are not binding on the DRB in its decision-making process.

E3.3.11. The preliminary determinations required by reference (c) shall be made upon majority vote of the DRB concerned on an expedited basis. Such determination shall be based upon the standards set forth in enclosure 4 of this Instruction.

E3.3.12. The DRB shall:

E3.3.12.1. Address items submitted as issues by the applicant under section E3.4., below;

E3.3.12.2. Address decisional issues under section E3.5., below; and

E3.3.12.3. Prepare a decisional document in accordance with section E3.8., below.

E3.4. RESPONSE TO ITEMS SUBMITTED AS ISSUES BY THE APPLICANT

E3.4.1. General Guidance

E3.4.1.1. If an issue submitted by an applicant contains two or more clearly separate issues, the DRB should respond separately to each issue under the guidance of this paragraph.

E3.4.1.2. If an applicant uses a "building block" approach (that is, setting forth a series of conclusions on issues leading to a single conclusion purportedly warranting a change in the applicant's discharge), normally, there should be a separate response to each issue.

E3.4.1.3. Nothing in this paragraph precludes the DRB from making a single response to multiple issues when such action would enhance the clarity of the decisional document, but such response must reflect an adequate response to each separate issue.

E3.4.2. Decisional Issues. An item submitted as an issue by an applicant in accordance with this Instruction shall be addressed as a decisional issue under section E3.5., below, in the following circumstances:

E3.4.2.1. When the DRB decides a change in discharge shall be granted, and the DRB bases its decision in whole or in part on the applicant's issue; or

E3.4.2.2. When the DRB does not provide the applicant with the full change in discharge requested, and the decision is based in whole or in part on the DRB's disagreement on the merits with an issue submitted by the applicant.

E3.4.3. Response to Items Not Addressed as Decisional Issues

E3.4.3.1. If the applicant receives the full change in discharge requested or a more favorable change, that fact shall be noted and the basis shall be addressed as a decisional issue. No further response is required to other issues submitted by the applicant.

E3.4.3.2. If the applicant does not receive the full change in discharge requested with respect to either the character of or reason for discharge (or both), the DRB shall address the items submitted by the applicant under section E3.5., below (decisional issues) unless one of the following responses is applicable:

E3.4.3.2.1. Duplicate Issues. The DRB may state that a full response to the issue submitted by the applicant is under a specified decisional issue. This response may be used only if one issue clearly duplicates another or the issue clearly requires discussion in conjunction with another issue.

E3.4.3.2.2. Citations Without Principles and Facts. The DRB may state that the applicant's issue, consisting of a citation to a decision without setting forth any

principles and facts from the decision that the applicant states are relevant to the applicant's case, does not comply with the requirements of paragraph E3.1.7., above.

E3.4.3.2.3. Unclear Issues. The DRB may not be able to respond to an item submitted by the applicant as an issue because the meaning of the item is unclear. An issue is unclear if it cannot be understood by a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph E3.3.4., above.

E3.4.3.2.4. Nonspecific Issues. The DRB may not be able to respond to an item submitted by the applicant as an issue because it is not specific. A submission is considered not specific if a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph E3.3.4., above, cannot determine the relationship between the applicant's submission and the particular circumstances of the case. This response may only be used if the submission is expressed in such general terms that no other response is applicable. For example, if the DRB disagrees with the applicant as to the relevance of matters set forth in the submission, the DRB normally shall set forth the nature of the disagreement under the guidance in section E3.5., below, with respect to decisional issues, or it shall reject the applicant's position on the basis of subparagraphs E3.4.3.2.1. or E3.4.3.2.2., above. If the applicant's submission is so general that none of those provisions is applicable, then the DRB may state that it cannot respond because the item is not specific.

E3.5. DECISIONAL ISSUES

E3.5.1. General. Under the guidance in this section, the decisional document shall discuss the issues that provide a basis for the decision whether there should be a change in the character of or reason for discharge. To enhance clarity, the DRB shall not address matters other than issues relied upon in the decision or raised by the applicant.

E3.5.1.1. Partial Change. When the decision changes a discharge, but does not provide the applicant with the full change in discharge requested, the decisional document shall address both the granted and denied issues decided by the DRB.

E3.5.1.2. Relationship of Issue to Character of or Reason for Discharge. Generally, the decisional document shall specify whether a decisional issue applies to the character of or reason for discharge (or both), but it is not required to do so.

E3.5.1.3. Relationship of an Issue to Propriety or Equity

E3.5.1.3.1. If an applicant identifies an issue as pertaining to both propriety and equity, the DRB shall consider it under both standards.

E3.5.1.3.2. If an applicant identifies an issue as pertaining to the propriety of the discharge (for example, by citing a propriety standard or otherwise claiming that a change in discharge is required as a matter of law), the DRB shall consider the issue solely as a matter of propriety. Except as provided in subparagraph E3.5.1.3.4., below, the DRB is not required to consider such an issue under the equity standards.

E3.5.1.3.3. If the applicant's issue contends that the DRB is required as a matter of law to follow a prior decision by setting forth an issue of propriety from the prior decision and describing its relationship to the applicant's case, the issue shall be considered under the propriety standards and addressed under paragraphs E3.5.2. or E3.5.3., below.

E3.5.1.3.4. If the applicant's issue sets forth principles of equity contained in a prior DRB decision, describes the relationship to the applicant's case, and contends that the DRB is required as a matter of law to follow the prior case, the decisional document shall note that the DRB is not bound by its discretionary decisions in prior cases under the standards in enclosure 4. However, the principles cited by the applicant, and the description of the relationship of the principles to the applicant's case, shall be considered under the equity standards and addressed under paragraphs E3.5.5. or E3.5.6., below.

E3.5.1.3.5. If the applicant's issue cannot be identified as a matter of propriety or equity, the DRB shall address it as an issue of equity.

E3.5.2. Change of Discharge: Issues of Propriety. If a change in the discharge is warranted under the propriety standards in enclosure 4, the decisional document shall state that conclusion and list the errors or expressly retroactive changes in policy that provide a basis for the conclusion. The decisional document shall cite the facts in the record that demonstrate the relevance of the error or change in policy to the applicant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not granting the full change shall be addressed under the guidance in paragraphs E3.5.3. or E3.5.6., below.

E3.5.3. Denial of the Full Change Requested: Issues of Propriety

E3.5.3.1. If the decision rejects the applicant's position on an issue of propriety, or if it is decided on the basis of an issue of propriety that the full change in discharge requested by the applicant is not warranted, the decisional document shall note that conclusion.

E3.5.3.2. The decisional document shall list reasons for its conclusion on each issue of propriety under the following guidance:

E3.5.3.2.1. If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB

shall cite the pertinent source of law and the facts in the record that are relevant to the particular circumstances in the case.

E3.5.3.2.2. If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Military Service regulations to be considered for determination of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

E3.5.3.2.2.1. For each such finding, the decisional document shall list the specific source of the information relied upon. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

E3.5.3.2.2.2. If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain the reasons the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain the reasons the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

E3.5.3.2.3. If the DRB disagrees with the position of the applicant on an issue of propriety, the following guidance applies in addition to the guidance in subparagraphs E3.5.3.2.1. and E3.5.3.2.2., above:

E3.5.3.2.3.1. The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph E3.1.7., above).

E3.5.3.2.3.2. The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with subparagraph E3.1.7., above) are not relevant to the applicant's case.

E3.5.3.2.3.3. The DRB may reject an applicant's position by stating that the applicant's issue of propriety is not a matter upon which the DRB grants a change in discharge, and by providing an explanation for this position. When the applicant

indicates that the issue is to be considered in conjunction with one or more other specified issues, the explanation shall address all such specified issues.

E3.5.3.2.3.4. The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of the DRB's agreement with the applicant's position.

E3.5.3.2.3.5. If the applicant takes the position that the discharge shall be changed because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it shall presume the validity of the record in the absence of such corrective action. If the organization empowered to correct the record is within the Department of Defense, the DRB shall provide the applicant with a brief description of the procedures for requesting correction of the record. If the DRB on its own motion cites this issue as a decisional issue on the basis of equity, it shall address the issue under paragraphs E3.5.5. or E3.5.6., below.

E3.5.3.2.3.6. When an applicant's issue contains a general allegation that a certain course of action violated his or her constitutional rights, the DRB may respond in appropriate cases by noting that the action was consistent with statutory or regulatory authority, and by citing the presumption of constitutionality that attaches to statutes and regulations. If the applicant makes a specific challenge to the constitutionality of the action by challenging the application of a statute or regulation in a particular set of circumstances, it is not sufficient to respond solely by citing the presumption of constitutionality of the statute or regulation when the applicant is not challenging the constitutionality of the statute or regulation. Instead, the response must address the specific circumstances of the case.

E3.5.4. Denial of the Full Change in Discharge Requested When Propriety Is Not at Issue. If the applicant has not submitted an issue of propriety and the DRB has not otherwise relied upon an issue of propriety to change the discharge, the decisional document shall contain a statement to that effect. The DRB is not required to provide any further discussion as to the propriety of the discharge.

E3.5.5. Change of Discharge: Issues of Equity. If the DRB concludes that a change in the discharge is warranted under the equity standards in enclosure 4, the decisional document shall list each issue of equity upon which this conclusion is based. The DRB shall cite the facts in the record that demonstrate the relevance of the issue to the applicant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not giving the full change requested shall be discussed under the guidance in paragraph E3.5.6., below.

E3.5.6. Denial of the Full Change in Discharge Requested: Issues of Equity

E3.5.6.1. If the DRB rejects the applicant's position on an issue of equity, or if the decision otherwise provides less than the full change in discharge requested by the applicant, the decisional document shall note that conclusion.

E3.5.6.2. The DRB shall list reasons for its conclusion on each issue of equity under the following guidance:

E3.5.6.2.1. If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB shall cite the pertinent source of law and the facts in the record that demonstrate the relevance of the source of law to the exercise of discretion on the issue of equity in the applicant's case.

E3.5.6.2.2. If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Service regulations to be considered for determination of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

E3.5.6.2.2.1. For each such finding, the decisional document shall list the specific source of the information. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

E3.5.6.2.2.2. If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

E3.5.6.2.3. If the DRB disagrees with the position of the applicant on an issue of equity, the following guidance applies in addition to the guidance in subparagraphs E3.5.6.2.1. and E3.5.6.2.2., above:

E3.5.6.2.3.1. The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph E3.1.7., above).

E3.5.6.2.3.2. The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant) are not relevant to the applicant's case.

E3.5.6.2.3.3. The DRB may reject an applicant's position by explaining why the applicant's issue is not a matter upon which the DRB grants a change in discharge as a matter of equity. When the applicant indicates that the issue is to be considered in conjunction with other specified issues, the explanation shall address all such specified issues.

E3.5.6.2.3.4. The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the DRB agreed with the applicant's position.

E3.5.6.2.3.5. If the applicant takes the position that the discharge should be changed as a matter of equity because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it shall presume the validity of the record in the absence of such corrective action. The DRB shall consider whether it should exercise its equitable powers to change the discharge on the basis of the alleged error. If it declines to do so, it shall explain why the applicant's position did not provide a sufficient basis for the change in the discharge requested by the applicant.

E3.5.6.2.4. The DRB may conclude that aggravating factors outweigh mitigating factors by setting forth reasons such as the seriousness of the offense, specific circumstances surrounding the offense, the number of offenses, lack of the mitigating circumstances, or similar factors. The DRB is not required to explain why it relied on any such factors, unless the applicability or weight of such a factor is expressly raised as an issue by the applicant.

E3.5.6.2.5. If the applicant has not submitted any issues and the DRB has not otherwise relied upon an issue of equity for a change in discharge, the decisional document shall contain a statement to that effect, and shall note that the major factors upon which the discharge was based are set forth in the service record portion of the decisional document.

E3.6. THE RECOMMENDATION OF THE DRB PRESIDENT

E3.6.1. General. The President of the DRB may forward cases for consideration by the Secretarial Reviewing Authority (SRA) under rules established by the Secretary concerned. The DRB President is not required to submit a recommendation for cases forwarded to the SRA. If the DRB President makes a recommendation based on the

character of or reason for discharge, the recommendation shall be prepared under the guidance in paragraph E3.6.2., below.

E3.6.2. Format for Recommendation. If a recommendation is provided, it shall contain the DRB President's views on whether there should be a change in the character of or reason for discharge (or both). If the DRB President recommends such a change, the particular change to be made shall be specified. The recommendation shall set forth the DRB President's position on decisional issues and issues submitted by the applicant under the following guidance:

E3.6.2.1. Adoption of the DRB's Decisional Document. The recommendation may state that the DRB President has adopted the decisional document prepared by the majority. The DRB President shall ensure that the decisional document meets the requirements of this enclosure.

E3.6.2.2. Adoption of the Specific Statements From the Majority. If the DRB President adopts the views of the majority only in part, the recommendation shall cite the specific matter adopted from the majority. If the DRB President modifies a statement submitted by the majority, the recommendation shall set forth the modification.

E3.6.2.3. Response to Issues Not Included in Matter Adopted From the Majority. The recommendation shall set forth the following if not adopted in whole or in part from the majority:

E3.6.2.3.1. The issues on which the DRB President's recommendation is based. Each such decisional issue shall be addressed by the DRB President under section E3.5., above;

E3.6.2.3.2. The DRB President's response to items submitted as issues by the applicant under section E3.4., above;

E3.6.2.3.3. Reasons for rejecting the conclusions of the majority with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in greater relief for the applicant than that afforded by the DRB President's recommendation. Such issues shall be addressed under the principles in section E3.5., above.

E3.7. SECRETARIAL REVIEWING AUTHORITY (SRA)

E3.7.1. Review by the SRA. The SRA is the Secretary concerned or the official to whom Secretary's discharge review authority has been delegated.

E3.7.1.1. The SRA may review the following types of cases before issuance of the final notification of a decision:

E3.7.1.1.1. Any specific case in which the SRA has an interest.

E3.7.1.1.2. Any specific case the DRB President believes is of significant interest to the SRA.

E3.7.1.2. Cases reviewed by the SRA shall be considered under the standards set forth in enclosure 4.

E3.7.2. Processing the Decisional Document

E3.7.2.1. The decisional document shall be transmitted by the DRB President under section E3.5., above.

E3.7.2.2. The following guidance applies to cases forwarded to the SRA, except for cases reviewed on the DRB's own motion without the participation of the applicant or the applicant's counsel:

E3.7.2.2.1. The applicant shall be provided with a copy of the proposed decisional document, including the DRB President's recommendation to the SRA, if any. Classified information shall be summarized.

E3.7.2.2.2. The applicant shall be provided with a reasonable period of time, but not less than 25 calendar days, to submit a rebuttal to the SRA. An issue in rebuttal consists of a clear and specific statement by the applicant in support of or in opposition to the statements of the DRB or DRB President on decisional issues and other clear and specific issues submitted by the applicant. The rebuttal shall be based solely on matters in the record before when the DRB closed the case for deliberation or in the DRB President's recommendation.

E3.7.3. Review of the Decisional Document. If corrections in the decisional document are required, the decisional document shall be returned to the DRB for corrective action. The corrected decisional document shall be sent to the applicant, but a further opportunity for rebuttal is not required unless the correction produces a different result or includes a substantial change in the discussion by the DRB (or DRB President) of the issues raised by the majority or the applicant.

E3.7.4. The Addendum of the SRA. The SRA's decision shall be in writing and be appended as an addendum to the decisional document under the guidance in this paragraph.

E3.7.4.1. The SRA's Decision. The addendum shall set forth the SRA's decision as to whether there shall be a change in the character of or reason for discharge (or both); if the SRA concludes that a change is warranted, the particular change to be made shall be specified. If the SRA adopts the decision recommended by the DRB or the DRB President, the decisional document shall contain a reference to the matter adopted.

E3.7.4.2. Discussion of Issues. In support of the SRA's decision, the addendum shall set forth the SRA's position on decisional issues, items submitted as issues by an applicant, and issues raised by the DRB and the DRB President in accordance with the following guidance:

E3.7.4.2.1. Adoption of the DRB President's Recommendation. The addendum may state that the SRA has adopted the DRB President's recommendation.

E3.7.4.2.2. Adoption of the DRB's Proposed Decisional Document. The addendum may state that the SRA has adopted the proposed decisional document prepared by the DRB.

E3.7.4.2.3. Adoption of Specific Statements From the Majority or the DRB President. If the SRA adopts the views of the DRB or the DRB President only in part, the addendum shall cite the specific statements adopted. If the SRA modifies a statement submitted by the DRB or the DRB President, the addendum shall set forth the modification.

E3.7.4.2.4. Response to Issues Not Included in Matter Adopted From the DRB or the DRB President. The addendum shall set forth the following if not adopted in whole or in part from the DRB or the DRB President:

E3.7.4.2.4.1. A list of the issues on which the SRA's decision is based. Each such decisional issue shall be addressed by the SRA. This includes reasons for rejecting the conclusion of the DRB or the DRB President with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in a change to the discharge more favorable to the applicant than that afforded by the SRA's decision. Such issues shall be addressed under the principles in section E3.5., above.

E3.7.4.2.4.2. The SRA's response to items submitted as issues by the applicant under section E3.4., above.

E3.7.4.3. Response to the Rebuttal

E3.7.4.3.1. If the SRA grants the full change in discharge requested by the applicant (or a more favorable change), that fact shall be noted, the decisional issues shall be addressed under section E3.5., and no further response to the rebuttal is required.

E3.7.4.3.2. If the SRA does not grant the full change in discharge requested by the applicant (or a more favorable change), the addendum shall list each issue in rebuttal submitted by an applicant in accordance with this section, and shall set forth the response of the SRA under the following guidance:

E3.7.4.3.2.1. If the SRA rejects an issue in rebuttal, the SRA may respond in accordance with the principles in section E3.5.

E3.7.4.3.2.2. If the matter adopted by the SRA provides a basis for the SRA's rejection of the rebuttal material, the SRA may note that fact and cite the specific matter adopted that responds to the issue in rebuttal.

E3.7.4.3.2.3. If the matter submitted by the applicant does not meet the requirements for rebuttal material in subparagraph E3.7.2.2.2., above, that fact shall be noted.

E3.8. THE DECISIONAL DOCUMENT

A decisional document shall be prepared for each review. At a minimum, this document shall contain:

E3.8.1. The circumstances and character of the applicant's service as extracted from available service records, including health records, and information provided by other Government authorities or the applicant, such as, but not limited to:

E3.8.1.1. Information concerning the discharge at issue in the review, including:

E3.8.1.1.1. Date (YYYYMMDD) of discharge.

E3.8.1.1.2. Character of discharge.

E3.8.1.1.3. Reason for discharge.

E3.8.1.1.4. The specific regulatory authority under which the discharge was issued.

E3.8.1.2. Date (YYYYMMDD) of enlistment.

E3.8.1.3. Period of enlistment.

E3.8.1.4. Age at enlistment.

E3.8.1.5. Length of service.

E3.8.1.6. Periods of unauthorized absence.

E3.8.1.7. Conduct and efficiency ratings (numerical or narrative).

E3.8.1.8. Highest rank achieved.

E3.8.1.9. Awards and decorations.

E3.8.1.10. Educational level.

E3.8.1.11. Aptitude test scores.

E3.8.1.12. Incidents of punishment pursuant to Article 15, Uniform Code of Military Justice (reference (g)) (including nature and date (YYYYMMDD) of offense or punishment).

E3.8.1.13. Convictions by court-martial.

E3.8.1.14. Prior military service and type of discharge received.

E3.8.2. A list of the type of documents submitted by or on behalf of the applicant (including a written brief, letters of recommendation, affidavits concerning the circumstances of the discharge, or other documentary evidence), if any.

E3.8.3. A statement whether the applicant testified, and a list of the type of witnesses, if any, who testified on behalf of the applicant.

E3.8.4. A notation whether the application pertained to the character of discharge, the reason for discharge, or both.

E3.8.5. The DRB's conclusions on the following:

E3.8.5.1. Whether the character of or reason for discharge should be changed.

E3.8.5.2. The specific changes to be made, if any.

E3.8.6. A list of the items submitted as issues on DD Form 293 or expressly incorporated therein and any other issues submitted by the applicant. Issues withdrawn or modified with the consent of the applicant need not be listed.

E3.8.7. The response to the items submitted as issues by the applicant under the guidance in section E3.4., above.

E3.8.8. A list of decisional issues and a discussion of such issues under the guidance in section E3.5., above.

E3.8.9. Minority views, if any, when authorized under rules of the Military Services concerned.

E3.8.10. The recommendation of the DRB President when required by section E3.6., above.

E3.8.11. The addendum of the SRA when required by section E3.7., above.

E3.8.12. Advisory opinions (including those containing factual information), when such opinions have been relied upon for final decision or have been accepted as a basis for rejecting any of the applicant's issues. Such advisory opinions or relevant portions not fully set forth in the discussion of decisional issues or otherwise in response to items submitted as issues by the application shall be incorporated by reference. A copy of opinions incorporated by reference shall be appended to the decision and included in the record of proceedings.

E3.8.13. A record of the voting, including:

E3.8.13.1. The number of votes for the DRB's decision and the number of votes in the minority, if any.

E3.8.13.2. The DRB members' names (last name, first initial and middle initial) and votes. The copy provided to the applicant may substitute a statement that the names and votes shall be available at the applicant's request.

E3.8.14. An authentication of the document by an appropriate official.

E3.9. ISSUANCE OF DECISIONS FOLLOWING DISCHARGE REVIEW

The applicant shall be provided with a copy of the decisional document and of any further action in review. The applicant shall be notified of the availability of the complaint process under enclosure 5. Final notification of decisions shall be issued to the applicant and to the Military Service concerned.

E3.9.1. Notification to applicants shall normally be made through the U.S. Postal Service. Such notification shall consist of a notification of decision, and a copy of the decisional document.

E3.9.2. The Military Service concerned shall be notified for appropriate action and inclusion of review matter in personnel records. Such notification shall bear appropriate certification of completeness and accuracy.

E3.9.3. Actions on review by superior authority shall be provided to the applicant in the same manner as the notification of the review decision.

E3.10. RECORD OF DRB PROCEEDINGS

E3.10.1. When the DRB proceedings have been concluded, a record shall be prepared. Records may include written records, electromagnetic records, videotape recordings, or a combination thereof.

E3.10.2. At a minimum, the record shall include the following:

E3.10.2.1. The application for review.

E3.10.2.2. A record of the testimony in verbatim, summarized, or recorded form at the option of the DRB concerned.

E3.10.2.3. Documentary evidence or copies thereof, considered by the DRB other than the Military Service record.

E3.10.2.4. Briefs and arguments submitted by or on behalf of the applicant.

E3.10.2.5. Advisory opinions considered by the DRB, if any.

E3.10.2.6. The findings, conclusions, and reasons developed by the DRB.

E3.10.2.7. Notification of the DRB's decision to the cognizant custodian of the applicant's records, or reference to the notification document.

E3.10.2.8. Minority reports, if any.

E3.10.2.9. A copy of the decisional document.

E3.11. FINAL DISPOSITION OF THE RECORD OF PROCEEDINGS

The original record of proceedings and all appendices shall in all cases be incorporated in the Military Service record of the applicant, which shall be returned to the custody of the appropriate records holding facility. If a portion of the original record of the proceedings cannot be stored with the Military Service record, the Military Service record shall contain a notation as to the place where the record is stored. Other copies shall be filed and disposed of in accordance with appropriate Military Service regulations.

E3.12. AVAILABILITY OF DISCHARGE REVIEW BOARD DOCUMENTS

E3.12.1. A copy of the decisional document prepared in accordance with section E3.4. of this enclosure shall be made available promptly for public access after a notice of final decision is sent to the applicant.

E3.12.2. To prevent a clearly unwarranted invasion of personal privacy, identifying details of the applicant and other persons shall be deleted from documents made available for public access.

E3.12.2.1. Names, addresses, social security numbers, and military service numbers must be deleted. Written justification shall be made for all other deletions and be available to the public.

E3.12.2.2. Each DRB shall ensure that there is a means for relating a decisional document number to the name of the applicant, to permit retrieval of the applicant's records when processing a complaint under enclosure 5.

E3.12.3. All classified or For Official Use Only (FOUO) material contained in or appended to any documents required by this Instruction shall be deleted prior to publication. A written statement of the basis for the deletions shall be made available to the applicant and the public. The statement need not detail the nature of the withheld material.

E3.12.4. DRB documents shall be made available for public inspection and downloading via the DoD Boards' Electronic Reading Room located at http://boards.law.af.mil.

E3.12.4.1. The documents shall be retrievable in a usable and concise form so as to enable the public, and those representing applicants before the DRBs, to isolate from all decisions those cases that may be similar to an applicant's case and that indicate the circumstances under or reasons for (or both) which the DRB or the Secretary concerned granted or denied relief.

E3.12.4.2. DRB decisional documents shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason, and authority for the discharge. It shall also include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions, and reasons.

E3.13. PRIVACY ACT INFORMATION

Information protected under reference (f) is involved in the discharge review function. The provisions of reference (e) shall be complied with throughout the processing of a request for review of discharge.

E4. ENCLOSURE 4

DISCHARGE REVIEW STANDARDS

E4.1. OBJECTIVE OF REVIEW

The objective of a discharge review is to examine the propriety and equity of the applicant's discharge. The standards of review and the underlying factors that aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service. No factors shall be established that require automatic change or denial of a change in discharge. In each case, the DRB or the Secretary of the Military Department concerned shall give full, fair, and impartial considerations to all applicable factors before reaching a decision. An applicant may not receive a less favorable discharge than issued at the time of separation. This does not preclude correction of clerical errors.

E4.1.1. The primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis.

E4.1.2. The DRB is not bound by prior decisions in its review of subsequent cases because no two cases present the same issues of equity.

E4.2. PROPRIETY

E4.2.1. A discharge shall be deemed proper unless, in the course of discharge review, it is determined that:

E4.2.1.1. An error of fact, law, procedure, or discretion exists associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

E4.2.1.2. A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

E4.2.2. When a record associated with the discharge at the time of issuance involves a matter in which the primary responsibility for corrective action rests with another organization (for example, another board, agency, or court), the DRB shall recognize an error only to the extent that the error has been corrected by the organization with primary responsibility for correcting the record.

E4.3. EQUITY

A discharge shall be deemed to be equitable unless:

E4.3.1. In a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from those currently applicable on a Service-wide basis to discharges of the type under consideration provided that:

E4.3.1.1. Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

E4.3.1.2. There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.

E4.3.2. At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member.

E4.3.3. In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this paragraph and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:

E4.3.3.1. Quality of service, as evidenced by factors such as:

E4.3.3.1.1. Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative);

E4.3.3.1.2. Awards and decorations;

E4.3.3.1.3. Letters of commendation or reprimand;

E4.3.3.1.4. Combat service;

E4.3.3.1.5. Wounds received in action;

E4.3.3.1.6. Records of promotions and demotions;

E4.3.3.1.7. Level of responsibility at which the applicant served;

E4.3.3.1.8. Other acts of merit that may not have resulted in a formal recognition through an award or commendation;

E4.3.3.1.9. Length of service during the service period that is the subject of the discharge review;

E4.3.3.1.10. Prior military service and type of discharge received or outstanding post-service conduct that may provide a basis for a more thorough understanding of the performance of the applicant during the period of service that is the subject of the discharge review;

E4.3.3.1.11. Convictions by court-martial;

E4.3.3.1.12. Records of nonjudicial punishment;

E4.3.3.1.13. Convictions by civil authorities while a member was in military service, reflected in the discharge proceedings or otherwise noted in Military Service records;

E4.3.3.1.14. Records of periods of unauthorized absence;

E4.3.3.1.15. Records relating to a discharge instead of court-martial.

E4.3.3.2. Capability to serve, as evidenced by factors such as:

E4.3.3.2.1. Total Capabilities. This includes an evaluation of matters, such as age, educational level, and aptitude scores. Consideration may also be given to whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to military service.

E4.3.3.2.2. Family and Personal Problems. This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

E4.3.3.2.3. Arbitrary or Capricious Action. This includes actions by individuals in authority constituting a clear abuse of such authority and, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.

E4.3.3.2.4. Discrimination. This includes unauthorized acts as documented by records or other evidence.

E5. ENCLOSURE 5
COMPLAINTS CONCERNING DECISIONAL DOCUMENTS

E5.1. GENERAL

E5.1.1. The procedures in this enclosure are established for the sole purpose of ensuring that decisional documents issued by the DRBs comply with the decisional document principles of this Instruction.

E5.1.2. This enclosure may be modified or supplemented by the DUSD(PI).

E5.1.3. The following persons may submit complaints:

E5.1.3.1. A former member of the Armed Forces with respect to the decisional document issued in the former member's own case; and

E5.1.3.2. A former member of the Armed Forces stating that correction of a decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

E5.1.4. The DUSD(PI) is the final authority with respect to action on such complaints.

E5.2. THE JOINT SERVICE REVIEW ACTIVITY (JSRA)

A three member JSRA consisting of one judge advocate from each Military Department shall advise the DUSD(PI). The operations of the JSRA shall be coordinated by an administrative director, who shall serve as recorder during meetings of the JSRA. The members and the administrative director shall serve at the direction of the DUSD(PI).

E5.3. CLASSIFICATION AND CONTROL OF CORRESPONDENCE

E5.3.1. Address of the JSRA. Correspondence with the JSRA concerning decisional documents issued by the DRBs shall be addressed as follows:

E5.3.2. All such correspondence shall be controlled by the administrative director through the use of a docketing procedure.

E5.3.3. Classification. Correspondence shall be reviewed by the administrative director and categorized either as a complaint or an inquiry in accordance with the following:

E5.3.3.1. Complaints. A complaint is any correspondence in which it is alleged that a decisional document issued by a DRB or SRA contains a specifically identified violation of the principles of this Instruction.

E5.3.3.2. Inquiries. An inquiry is any correspondence other than a complaint.

E5.4. REVIEW OF COMPLAINTS

E5.4.1. Standards. Complaints shall be considered under the following standards:

E5.4.1.1. The Applicant's Case. A complaint by an applicant with respect to the decisional document issued in the applicant's own discharge review shall be considered under decisional document requirements applicable at the time the document was issued. If the authority empowered to take corrective action has a reasonable doubt whether a decisional document meets applicable requirements, the complaint shall be resolved in the applicant's favor.

E5.4.1.2. Other Cases. With respect to all other complaints, the standard shall be whether a reasonable person familiar with the discharge review process can understand the basis for the decision, including the disposition of issues raised by the applicant. This standard is designed to ensure that the complaint process is not burdened with correcting minor errors in the preparation of decisional documents.

E5.4.2. Use of DD Form 293. A complaint alleging failure of the DRB to address adequately matters not submitted on DD Form 293 or expressly incorporated therein shall be resolved in the complainant's favor only if the failure to address the issue was arbitrary, capricious, or an abuse of discretion.

E5.4.3. Scope of Review. When a complaint concerns a specific issue in the applicant's own discharge review, the complaint review process shall involve a review of all the evidence that was before the DRB or SRA, including the testimony and written submissions of the applicant, to determine whether the issue was submitted, and if so, whether it was addressed adequately. With respect to all other complaints about specific issues, the complaint review process may be based solely on the decisional document.

E5.4.4. Allegations Pertaining to an Applicant's Submission. The following additional requirements apply to complaints about modification of an applicant's issue or the failure to list or address an applicant's issue:

E5.4.4.1. When the complaint is submitted by the applicant, and the record of the hearing is ambiguous on the question of whether there was a meeting of minds between the applicant and the DRB as to modification or omission of the issue, the ambiguity shall be resolved in favor of the applicant.

E5.4.4.2. Complaints submitted by a person other than the applicant must set forth facts (other than the mere omission or modification of an issue) demonstrating a reasonable likelihood that the issue was omitted or modified without the applicant's consent.

E5.4.4.3. Complaints rejected on the basis of the presumption of regularity shall set forth in the decisional document the reasons why the evidence submitted by the complainant was not sufficient to overcome the presumption.

E5.4.4.4. Any references in the decisional document to matters not raised by the applicant and not otherwise relied on in the decision, do not require that such matters be accompanied by a statement of findings, conclusions, or reasons. For example, when the DRB discusses an aspect of the service record not raised as an issue by the applicant, and the issue is not a basis for the DRB's decision, the DRB is not required to discuss the reasons for declining to list that aspect of the service record as an issue.

E5.4.5. Guidance as to Other Types of Complaints. The following guidance governs other types of complaints:

E5.4.5.1. Only those facts that are essential to the decision must be listed in the decisional document.

E5.4.5.2. When an applicant submits a brief containing material in support of a proposed conclusion on an issue, the DRB is not required to address each aspect of the supporting material in the brief. However, the decisional document should permit the applicant to understand the DRB's position on the issue and provide reviewing authorities with a sufficient explanation to permit review of the DRB's decision. When an applicant submits specific issues and later makes a statement before the DRB that contains matter in support of that issue, it is not necessary to list such supporting matter as a separate issue.

E5.4.5.3. When a case is reviewed upon request of an applicant, and the DRB upgrades the discharge to a General Discharge, the DRB must provide reasons why it did not upgrade to an Honorable Discharge unless the applicant expressly requests lesser relief. This requirement applies to all requests for corrective action submitted by an applicant with respect to his or her decisional document. When a discharge is upgraded to a General Discharge, the explanation for not upgrading to an Honorable Discharge may consist of reference to adverse matters from the applicant's military record. When a discharge is upgraded to a General Discharge in a review on the DRB's own motion, there is no requirement to explain why the discharge was not upgraded to an Honorable Discharge.

E5.4.5.4. If an uncontested issue of fact forms the basis for a grant or denial of a change in discharge, the decisional document shall list the specific source of

information used in reaching the conclusion, except when the information is listed in the portion of the decisional document that summarizes the service record.

E5.4.6. Duties of the Administrative Director. The administrative director shall take the following actions:

E5.4.6.1. Acknowledge receipt of the complaint;

E5.4.6.2. Note the date of receipt; and

E5.4.6.3. Forward the complaint to the Military Department concerned, except that the case may be forwarded directly to the DUSD(PI) when the administrative director makes an initial determination that corrective action is not required.

E5.4.7. The administrative director is responsible for monitoring compliance with the following processing goals:

E5.4.7.1. The administrative director normally shall forward correspondence to the Military Department concerned within 3 working days after the date of receipt. Correspondence forwarded directly to the DUSD(PI) under paragraph E5.3.1., above, normally shall be transmitted within 7 working days after the date of receipt.

E5.4.7.2. The Military Department normally shall request the necessary records within 5 working days after the date of receipt from the administrative director. The Military Department normally shall complete action under paragraph E5.4.8., below, 45 calendar days after receipt of all necessary records. If action by the Military Department is required under paragraph E5.4.13., below, normally it shall be completed within 45 calendar days after action is taken by the DUSD(PI).

E5.4.7.3. The JSRA normally shall complete action under paragraph E5.4.11., below, at the first monthly meeting held during any period commencing 10 calendar days after the administrative director receives the action of the Military Department under paragraph E5.4.9., below.

E5.4.7.4. The DUSD(PI) normally shall complete action under paragraph E5.4.12., below, within 30 calendar days after action is taken by the JSRA under paragraph E5.4.11., below, or by the administrative director under subparagraph E5.4.6.3., above.

E5.4.7.5. If action is not completed within the overall processing goals specified in this paragraph, the complainant shall be notified of the reason for the delay by the administrative director and be provided with an approximate date for completion of the action.

E5.4.8. Review of Complaints by the Military Departments. The Military Departments shall review the complaint under the following guidance:

E5.4.8.1. Rejection of Complaint. If the Military Department determines all allegations contained in the complaint are not specific or without merit, it shall address the allegations using the format at attachment 1 (Review of Complaint).

E5.4.8.2. Partial Agreement. If the Military Department determines that some of the allegations contained in the complaint are not specific or have no merit and that some of the allegations contained in the complaint have merit, it shall address the allegations using the format at attachment 1, and its DRB shall take appropriate corrective action in accordance with subparagraph E5.4.8.5., below.

E5.4.8.3. Full Agreement. If the Military Department determines all allegations contained in the complaint have merit, its DRB shall take appropriate corrective action in accordance with subparagraph E5.4.8.5., below.

E5.4.8.4. Other Defects. If, during the course of its review, the Military Department notes any other defects in the decisional document or under this Instruction, the DRB shall take appropriate corrective action under subparagraph E5.4.8.5., below. This does not establish a requirement for the Military Department to review a complaint for any purpose other than to determine whether the allegations contained in the complaint are specific and have merit; rather, it simply provides a format for the Military Department to address other defects noted during the course of processing the complaint.

E5.4.8.5. Appropriate Corrective Action. The following procedures govern appropriate corrective action:

E5.4.8.5.1. If a complaint concerns the decisional document in the complainant's own discharge review case, appropriate corrective action consists of amending the decisional document or providing the complainant with an opportunity for a new discharge review. An amended decisional document shall be provided if requested by the applicant.

E5.4.8.5.2. If a complaint concerns a decisional document in which the applicant received an Honorable discharge and the full relief requested, if any, with respect to the reason for discharge, appropriate corrective action consists of amending the decisional document.

E5.4.8.5.3. In all other cases, appropriate corrective action consists of amending the decisional document or providing the applicant with the opportunity for a new review, except that an amended decisional document shall be provided when the complainant expressly requests that form of corrective action.

E5.4.8.6. Amended Decisional Documents. One that reflects a determination by a DRB panel (or the SRA) as to what the DRB panel (or SRA) that prepared the defective decisional document would have entered on the decisional document to support its decision in this case.

E5.4.8.6.1. The action of the amending authority does not necessarily reflect substantive agreement with the decision of the original DRB panel (or SRA) on the merits of the case.

E5.4.8.6.2. A corrected decisional document created by amending a decisional document in response to a complaint shall be based upon the complete record before the DRB (or the SRA) at the time of the original defective statement was issued, including, if available, a transcript, tape recording, videotape or other record of a hearing.

E5.4.8.6.3. When an amended decisional document is required under subparagraph E5.4.8.5., above, and the necessary records may not be located, a notation shall be made on the decisional document, and the applicant shall be afforded an opportunity for a new review, and the complainant shall be informed of the action.

E5.4.8.7. Time Limit for Requesting a New Review. An applicant who is afforded an opportunity to request a new review should do so at the earliest opportunity after receipt of the decisional document.

E5.4.8.8. Interim Notification. When the Military Department determines that some or all of the allegations contained in the complaint are not specific or without merit, but its DRB takes corrective action under subparagraphs E5.4.8.2. or E5.4.8.4., above, the DRB's notification to the applicant or complainant shall include the following or similar wording: "This is in partial response to (your)/(a) complaint to the Office of the Deputy Under Secretary of Defense (Program Integration) dated _____ concerning _____ Discharge Review Board decisional document _____. A final response to (your)/(the) complaint, which has been returned to the Office of the Deputy Under Secretary of Defense (Program Integration) for further review, will be provided to you in the near future."

E5.4.8.9. Final Notification. When the DRB takes corrective action under subparagraph E5.4.8.3., above, and paragraph E5.4.13., below, its notification to the applicant and counsel, if any, and to the complainant, if other, than the applicant or counsel, shall include the following or similar wording: "This is in response to (your)/(a) complaint to the Office of the Deputy Under Secretary of Defense (Program Integration) dated _____concerning _____ Discharge Review Board decisional document _____."

E5.4.9. Transmittal to the Administrative Director. The Military Department shall return the complaint to the administrative director with a copy of the decisional document and, when applicable, any of the following documents:

E5.4.9.1. The "Review of Complaint."

E5.4.9.2. A copy of the amendment to the decisional document and the accompanying transmittal letter or letters to the applicant or complainant.

E5.4.9.3. A copy of the notification to the applicant of the opportunity to request a new review, and a copy of the notification to the complainant that the applicant has been authorized a new review.

E5.4.10. Review by the Administrative Director. The administrative director shall review the complaint and accompanying documents to ensure the following:

E5.4.10.1. If the Military Department determined that any of the allegations contained in the complaint are not specific or without merit, the JSRA shall review the complaint and accompanying documents. The JSRA shall address the allegations using the format at attachment 2 (Review of and Recommended Action on Complaint) and shall note any other defects in the decisional document not previously noted by the Military Department. This does not establish a requirement for the JSRA to review such complaints for any purpose other than to address the allegations contained in the complaint; rather, it simply provides a format for the JSRA to address other defects noted in the course of processing the complaint.

E5.4.10.2. If the Military Department determined that all of the allegations contained in the complaint have merit and its DRB amended the decisional document, the amended decisional document shall be subject to review by the JSRA using the format at attachment 3 (Review of any Recommendation on Amended Decisional Document).

E5.4.10.3. If the Military Department determined that all of the allegations contained in the complaint have merit and its DRB notified the applicant of the opportunity to request a new review, review of such corrective action is not required.

E5.4.11. Review by the JSRA. The JSRA shall conduct the reviews required in subparagraphs E5.4.10.1. and E5.4.10.2., above, and E5.4.13.3.1., below. The administrative director shall call meetings once a month, or as necessary. Matters before the JSRA shall be presented to the members by the recorder. Each member shall have one vote in determining matters before the JSRA, a majority vote of the members determining all matters. Determinations of the JSRA shall be reported to the DUSD(PI) as JSRA recommendations using the prescribed format. If a JSRA recommendation is not unanimous, the minority member may prepare a separate recommendation for consideration by the DUSD(PI) using the same format. Alternatively, the minority member may indicate "dissent" next to his signature on the JSRA recommendation.

E5.4.12. Review by the DUSD(PI). The DUSD(PI) shall review all recommendations of the JSRA and the administrative director as follows:

E5.4.12.1. The DUSD(PI) shall review complaints using the format at attachment 4 (Review of and Action on Complaint). The DUSD(PI) is the final authority in determining whether the allegations contained in a complaint are specific and have merit. If the DUSD(PI) determines that no further action by the Military Department is warranted, the complainant and the Military Department shall be so informed. If the DUSD(PI) determines that further action by the Military Department is required, the Military Department shall be directed to ensure that appropriate corrective action is taken by its DRB and the complainant shall be provided an appropriate interim response.

E5.4.12.2. The DUSD(PI) shall review amended decisional documents using the format at attachment 5 (Review of and Action on Amended Decisional Document). The DUSD(PI) is the final authority in determining the compliance of an amended decisional document with this Instruction. The Military Department shall be informed if no further corrective action is warranted by the DUSD(PI). The Military Department shall ensure that appropriate corrective actions are taken by its DRB, if determined necessary by the DUSD(PI).

E5.4.13. Further Action By the Military Department

E5.4.13.1. When the DUSD(PI) determines further action by the Military Department is required, its DRB shall take appropriate corrective action in accordance with paragraph E5.4.8., above.

E5.4.13.2. The Military Department shall provide the administrative director with the following documents when relevant to corrective action taken in accordance with paragraph E5.4.8., above:

E5.4.13.2.1. A copy of the amendment to the decisional document and the accompanying transmittal letter or letters to the applicant or to the complainant.

E5.4.13.2.2. A copy of the notification to the applicant of the opportunity to request a new review, and a copy of the notification to the complainant that the applicant has been authorized a new review.

E5.4.13.3. The administrative director shall review the documents relevant to corrective action taken in accordance with paragraph E5.4.8., above, and ensure the following:

E5.4.13.3.1. If the DRB amended the decisional document, the amended decisional document shall be subject to review by the JSRA using the format at attachment 3 (Review of and Recommended Action on Amended Decisional Document).

E5.4.13.3.2. If the DRB notified the applicant of the opportunity to request a new review, review of such corrective action is not required.

E5.4.14. Documents Required by the JSRA or the DUSD(PI). Upon request, the Military Department shall provide the administrative director with other documents required by the JSRA or the DUSD(PI) in the conduct of their reviews.

E5.5. RESPONSES TO INQUIRIES

The following procedures shall be used in processing inquiries:

E5.5.1. The administrative director shall assign a docket number to the inquiry.

E5.5.2. The administrative director shall forward the inquiry to the Military Department concerned.

E5.5.3. The Military Department shall prepare a response to the inquiry and provide the administrative director with a copy of the response.

E5.5.4. The Military Department's response shall include the following or similar wording: "This is in response to your inquiry to the Office of the Deputy Under Secretary of Defense (Program Integration) dated _____concerning _____."

E5.6. DISPOSITION OF DOCUMENTS

The DRB concerned shall provide copies of the amendments to the decisional documents to the DoD Boards' Electronic Reading Room. The administrative director is responsible for the disposition of all Military Department, DRB, JSRA, and DUSD(PI) documents relevant to processing complaints and inquiries.

E5.7. DECISIONAL DOCUMENT PRINCIPLES

The DUSD(PI) shall identify significant principles concerning the preparation of decisional documents as derived from decisions under this section. The significant principles identified in the review shall be coordinated as proposed amendments to the enclosures to this Instruction.

Attachments - 5
E5.A1. Review of the Complaint
E5.A2. Review of the Joint Service Review Activity
E5.A3. Review of Amended Decisional Document
E5.A4. Review of Complaint (DUSD(PI))
E5.A5. Review of Amended Decisional Document (DUSD(PI))

E5.A1. ATTACHMENT 1 TO ENCLOSURE 5

REVIEW OF COMPLAINT

Military Service:

Decisional Document Number:

Name of Complainant:

Docket Number:

Date of this Review:

1. Specific allegation(s) noted:

2. With respect in support of the conclusion, enter the following information:

a. Conclusion whether corrective action is required.

b. Reasons in support of the conclusion, including findings of fact upon which the conclusion is based.

3. Other defects noted in the decisional document:

(AUTHENTICATION)

E5.A2. ATTACHMENT 2 TO ENCLOSURE 5

JOINT SERVICE REVIEW ACTIVITY
OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE
(PROGRAM INTEGRATION)
REVIEW OF THE JOINT SERVICE REVIEW ACTIVITY

Military Service:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

1. The Military Service's "Review of Complaint" is attached as enclosure 1.

2. Specific Allegations: See Part 1 of Military Service's "Review of Complaint" (enclosure 1).

3. Specific allegation(s) not noted by the Military Service:

4. With respect to each allegation, enter the following information:

a. Conclusion on corrective action required.
b. Reasons supporting the conclusion, including findings of fact upon which conclusion is based.

5. Other defects in the decisional document not noted by the Military Services:

6. Recommendation:

[ ] The complainant and the Military Service shall be informed that no further action on the complaint is warranted.

[ ] The Military Service shall take corrective action consistent with the above comments.

Army Member, JSRA Navy Member, JSRA

Air Force Member, JSRA Recorder, JSRA

E5.A3. ATTACHMENT 3 TO ENCLOSURE 5

JOINT SERVICE REVIEW ACTIVITY
OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE
(PROGRAM INTEGRATION)
REVIEW OF AMENDED DECISIONAL DOCUMENT

Military Service:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

Recommendation:

[ ] The amended decisional document complies with the requirements of DoD Instruction 1332.28. The Military Service shall be informed that no further corrective action is warranted.

[ ] The amended decisional document does not comply with DoD Instruction 1332.28, as noted herein. The Military Service shall ensure that corrective action consistent with the defects noted is taken by its DRB.

Army Member, JSRA Navy Member, JSRA

Air Force Member, JSRA Recorder, JSRA

YES	NO	NA	ITEM	SOURCE
			1. Date of Discharge.	1. DoD Instruction 1332.28, enclosure 3
[ ]	[ ]		a. Date of discharge	
[ ]	[ ]		b. Character of discharge	
[ ]	[ ]		c. Reason for discharge	
[ ]	[ ]		d. Specific regulatory authority under which discharge was issued	
			2. Service data.	2. DoD Instruction 1332.28, enclosure 3
[ ]	[ ]	[ ]	a. Date of enlistment	
[ ]	[ ]	[ ]	b. Period of enlistment	
[ ]	[ ]	[ ]	c. Age at enlistment	
[ ]	[ ]	[ ]	d. Length of service	
[ ]	[ ]	[ ]	e. Periods of unauthorized absence*	
[ ]	[ ]	[ ]	f. Conduct and efficiency ratings (numerical and narrative)*	
[ ]	[ ]	[ ]	g. Highest rank achieved	
[ ]	[ ]	[ ]	h. Awards and decorations*	
[ ]	[ ]	[ ]	i. Educational level	
[ ]	[ ]	[ ]	j. Aptitude test scores	
[ ]	[ ]	[ ]	k. Art. 15s (including nature and date of offense or punishment)*	
[ ]	[ ]	[ ]	l. Convictions by court-martial*	
[ ]	[ ]	[ ]	m. Prior military service and type of discharge(s) received*	
[ ]	[ ]	[ ]	3. Reference to materials presented by applicant.	3. DoD Instruction 1332.28, enclosure 3
[ ]	[ ]	[ ]	a. Written brief*	
[ ]	[ ]	[ ]	b. Documentary evidence*	
[ ]	[ ]	[ ]	c. Testimony*	
[ ]	[ ]	[ ]	4. Items submitted as issues. (See issues worksheet)	4. DoD Instruction1332.28, enclosure 3
[ ]	[ ]	[ ]	5. Conclusions. The decisional document must indicate clearly clearly the DRB's conclusion concerning:	5. DoD Instruction1332.28, enclosure 2

[ ] [ ] [ ]	a. Character of discharge, when applicable.[1]	
[ ] [ ] [ ]	b. Reason for discharge, when applicable.[2]	
	6. Reasons for conclusions. The decisional document must list and discuss the items submitted as issues by the applicant; and list and discuss the decisional issues providing the basis for the DRB's conclusion concerning:	6. DoD Instruction1332.28, enclosure 3
[[[ ]]]	a. Character of discharge, where applicable.[1]	
[[[ ]]]	b. Reason for discharge, where applicable.[2]	
[[[ ]]]	7. Advisory opinions.*	7. DoD Instruction1332.28, enclosure 3
[[[ ]]]	8. Recommendation of DRB President.	8. DoD Instruction 1332.28, enclosure 3
[[[ ]]]	9. A record of voting.	9. DoD Instruction1332.28, enclosure 3
[[[ ]]]	10. Authentication of decisional document. (This requirement applies only to discharge reviews conducted on or after March 29, 1978.)	10. DoD Instruction1332.28, enclosure 3
[[[ ]]]	11. Other.	11. As appropriate

Explanation of items marked "No"

ISSUES WORKSHEETS[3]

	LISTED	ADDRESSED	CORRECTIVE ACTION REQUIRED
A. Decisional issues providing a basis for the			

conclusion regarding a change in the character of or reason for discharge. (DoD Instruction 1332.28, enclosure 3)

1. _____	[ ]	[ ]	[ ]
2. _____	[ ]	[ ]	[ ]
3. _____	[ ]	[ ]	[ ]

B. Items submitted as issues by the applicant that are not identified as decisional issues. (DoD Instruction 1332.28, enclosure 2)

1. _____	[ ]	[ ]	[ ]
2. _____	[ ]	[ ]	[ ]
3. _____	[ ]	[ ]	[ ]

C. Remarks: _____

KEY

YES: The decisional document meets the requirements of DoD Instruction 1332.28.

NO: The decisional document does not meet the requirements of DoD Instruction 1332.28.

NA: Not applicable

*Items marked by an asterisk do not necessarily pertain to each review. If the decisional document contains no reference to such an item, NA shall be indicated. When there is a specific complaint addressed to an item, the underlying discharge review record shall be examined to address the complaint.

FOOTNOTES

[1] In this instance "when applicable" means all reviews except:

a. Reviews in which the applicant requested only a change in the reason for discharge and the DRB did not raise the character of discharge as a decisional issue.

[2] In this instance "when applicable" means all reviews in which:

a. The applicant requested a change in the reason for discharge.

b. The DRB raised the reason for discharge as a decisional issue.

c. A change in the reason for discharge is a necessary component of a change in the character of discharge.

[3] This review may be made based upon the decisional document without reference to the underlying discharge review record except as follows: if there is an allegation that a specific contention made by the applicant to the DRB was not addressed by the DRB. In such a case, the complaint review process shall involve a review of all the evidence that was before the DRB, including the testimony and written submissions of the applicant, to determine whether the contention was made, and if so, whether it was addressed adequately with respect to DoD Instruction 1332.28.

This review may be based upon the decisional document without reference to the regulation governing the discharge in question except as follows: if there is a specific complaint that the DRB failed to address a specific factor required by applicable regulations to be considered for determination of the character of and reason for the discharge in question where such factors are a basis for denial of any of the relief requested by the applicant.

E5.A4. ATTACHMENT 4 TO ENCLOSURE 5
OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE (PROGRAM INTEGRATION)
REVIEW OF COMPLAINT (DUSD(PI))

Military Service:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

1. Each allegation is addressed as follows:
   a. Allegation.
   b. Conclusion whether corrective action is required.
   c. Reasons in support of the conclusion, including findings of fact upon which the conclusion is based.

NOTE: If the DUSD(PI) agrees with the JSRA, he/she may respond by entering a statement of adoption.

2. Other defects noted in the decisional document:

3. Determinations:

[ ] No further action on the complaint is warranted.
[ ] Corrective action consistent with the above comments is required.

Deputy Under Secretary of Defense
(Program Integration)

E5.A5. ATTACHMENT 5 TO ENCLOSURE 5

OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE

Military Service:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

Recommendation:

[ ] The amended decisional document complies with the requirements of DoD Instruction 1332.28. No further corrective action is warranted.

[ ] The amended decisional document does not comply with DoD Instruction 1332.28, as noted herein. Further corrective action is required consistent with the defects noted in the attachment.

Deputy Under Secretary of Defense
(Program Integration)

Remarks:

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 71

RIN 2900–AQ48

Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA MISSION Act of 2018

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as final, with changes, a proposed rule to revise its regulations that govern VA's Program of Comprehensive Assistance for Family Caregivers (PCAFC). This final rule makes improvements to PCAFC and updates the regulations to comply with the recent enactment of the VA MISSION Act of 2018, which made changes to the program's authorizing statute. This final rule allows PCAFC to better address the needs of veterans of all eras and standardize the program to focus on eligible veterans with moderate and severe needs.

DATES: The effective date is October 1, 2020.

FOR FURTHER INFORMATION CONTACT: Cari Malcolm, Management Analyst, Caregiver Support Program, Care Management and Social Work, 10P4C, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420, (202) 461–7337. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Title I of Public Law 111–163, Caregivers and Veterans Omnibus Health Services Act of 2010 (hereinafter referred to as ''the Caregivers Act''), established section 1720G(a) of title 38 of the United States Code (U.S.C.), which required VA to establish a program of comprehensive assistance for Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty on or after September 11, 2001. The Caregivers Act also required VA to establish a program of general caregiver support services, pursuant to 38 U.S.C. 1720G(b), which is available to caregivers of covered veterans of all eras of military service. VA implemented the program of comprehensive assistance for Family Caregivers (PCAFC) and the program of general caregiver support services (PGCSS) through its regulations in part 71 of title 38 of the Code of Federal Regulations (CFR). Through PCAFC, VA provides Family Caregivers of eligible veterans (as those terms are defined in 38 CFR 71.15) certain benefits, such as training, respite care, counseling, technical support, beneficiary travel (to attend required caregiver training and for an eligible veteran's medical appointments), a monthly stipend payment, and access to health care (if qualified) through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA). 38 U.S.C. 1720G(a)(3), 38 CFR 71.40.

On June 6, 2018, the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 or the VA MISSION Act of 2018, Public Law 115–182, was signed into law. Section 161 of the VA MISSION Act of 2018 amended 38 U.S.C. 1720G by expanding eligibility for PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, establishing new benefits for designated Primary Family Caregivers of eligible veterans, and making other changes affecting program eligibility and VA's evaluation of PCAFC applications. The VA MISSION Act of 2018 established that expansion of PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, will occur in two phases. The first phase will begin when VA certifies to Congress that it has fully implemented a required information technology system (IT) that fully supports PCAFC and allows for data assessment and comprehensive monitoring of PCAFC. During the 2-year period beginning on the date of such certification to Congress, PCAFC will be expanded to include Family Caregivers of eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service on or before May 7, 1975. Two years after the date of submission of the certification to Congress, PCAFC will be expanded to Family Caregivers of all eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service, regardless of the period of service in which the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. This final rule implements section 161 of the VA MISSION Act of 2018 as well as makes improvements to PCAFC to improve consistency and transparency in decision making.

On March 6, 2020, VA published a proposed rule to revise its regulations that govern PCAFC to make improvements to PCAFC and update the regulations to comply with section 161 of the VA MISSION Act of 2018. 85 FR 13356 (March 6, 2020). In response to this proposed rule, VA received 273 comments, of which one comment was withdrawn by the submitter and one comment was a duplicate submission, for a total of 271 unique comments. More than 37 comments expressed general support for the proposed rule, in whole or in part. We appreciate the support of such comments, and do not address them below. Other comments expressed support or disapproval, in whole or in part, with substantive provisions in the proposed rule, and we discuss those comments and applicable revisions from the proposed rule below. We note that the discussion below is organized by the sequential order of the provisions as presented in the proposed rule; however, we only address the provisions that received comments below. Additionally, we have included a section on miscellaneous comments received. We further note that numerous commenters raised individual matters (*e.g.,* struggles they may currently be having) which are informative to VA, and to the extent these individuals provided their personal information, we did attempt to reach out to them to address their individual matters outside of this rulemaking.

In the proposed rule and in this final rule, we provide various examples to illustrate how these regulations will be applied, but we emphasize here that clinical evaluation is complex and takes into account a holistic picture of the individual; therefore, we note that examples provided are for illustrative purposes only and should not be construed to indicate specific veterans and servicemembers and their caregivers will or will not meet certain regulatory criteria or requirements.

§ 71.10 Purpose and Scope

Several commenters raised concerns about restricting PCAFC to a ''State'' as that term is defined in 38 U.S.C. 101(20) because 38 U.S.C. 1720G does not place any geographic restrictions on PCAFC, and such restriction would be in the view of the commenters, arbitrary, unreasonable, and without sufficient justification, particularly as VA provides other benefits and services to veterans who reside outside of a State. One commenter shared that they lived in the United Kingdom (U.K.), but believed that they should be eligible for

PCAFC as many of the PCAFC processes and requirements can be completed in the U.K. despite being outside of a State (for example, the application can be submitted by mail or online; caregiver training is available online; assessments and monitoring can be done via telehealth, Foreign Medical Program (FMP), social media, or through the use of a contract with a home health agency); and benefits such as a stipend can be based on a U.K. locality rate. This same commenter recommended revising the language in this section to state that ''these benefits are provided to those individuals residing in a State as that term is defined in 38 U.S.C. 101(2). Individuals who reside outside a State will be considered for benefits on a case by case basis.'' While this commenter referenced section 101(2), we believe the commenter meant to reference section 101(20) as the definition of State, for purposes of title 38, is contained in section 101(20). Section 101(20) defines State, in pertinent part, to mean each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. In suggesting that the program could be administered through VA's FMP, we generally disagree. The legal authority for the FMP bars VA from furnishing ''hospital care'' and ''medical services'' outside of a State except in the case of the stated exceptions. 38 U.S.C. 1724. This authority, as implemented, generally covers only hospital care and medical services, as those terms are defined in 38 U.S.C. 1701 and 38 CFR 17.30, that are required to treat a service-connected disability or any disability held to be aggravating a service-connected condition. Because PCAFC involves benefits that do not constitute ''hospital care'' or ''medical services'' and accounts for the care needs of eligible veterans unrelated to their service-connected disability or disabilities, PCAFC could not be administered through FMP. Lastly, telehealth services are medical services and therefore not available outside a ''State,'' except as provided for under the FMP.

As stated in the proposed rule, it has been VA's practice since the launch of PCAFC and PGCSS in 2011 to only provide benefits to those individuals residing in a State; thus, the proposed changes merely codify an existing practice. In addition, it is currently not feasible for VA to provide benefits under part 71 outside of a State, specifically because ''requirements of this part include in-home visits such as an initial home-care assessment under current 38 CFR 71.25(e) and the provision of certain benefits that can be provided in-home such as respite care under current § 71.40(a)(4) and (c)(2), which would be difficult to conduct and provide in a consistent manner outside of a State.'' 85 FR 13358 (March 6, 2020). Also, as noted in the proposed rule, administrative limitations prevent us from providing certain benefits under this part even in remote areas within the scope of the term ''State.'' Additionally, ''ensuring oversight of PCAFC and PGCSS outside of a State would be resource-intensive and we do not believe there is sufficient demand to warrant the effort that would be required.'' Id. Furthermore, we do not believe the use of contracted services would provide standardized care for participants and would hinder our ability to provide appropriate oversight and monitoring. While we understand the commenters' concerns and appreciate the suggested changes, we are not making any changes based on this comment.

§ 71.15 Definitions

We received many comments that either suggested revisions to or clarification of some terms defined in the proposed rule. We address these comments below as they relate to the term in the order they were presented in § 71.15 as proposed.

Financial Planning Services

We received multiple comments about financial planning services. One commenter was pleased with VA's proposal to include financial planning services in the menu of Family Caregivers' supports and services under PCAFC and we thank the commenter for their feedback. One commenter questioned why this service is being provided, whether it is indicative of a deeper problem, and what precautions and safety nets will be in place to ensure veterans are not exploited or abused. Furthermore, one commenter asserted that regardless of what services are provided to help with budgeting, families will become accustomed to and spend according to the monthly stipend received each month.

As stated in the proposed rule, we are adding this term to address changes made to 38 U.S.C. 1720G by the VA MISSION Act of 2018. Specifically, the VA MISSION Act of 2018 added financial planning services relating to the needs of injured veterans and their caregivers as a benefit for Primary Family Caregivers. Accordingly, financial planning services will be added to the benefits available to Primary Family Caregivers under 38 CFR 71.40(c)(5). Legislative history reflects that the addition of financial planning services to PCAFC assistance was influenced by the 2014 RAND Corporation-published report, Hidden Heroes: America's Military Caregivers, which identified that few military caregiver-specific programs provided long-term planning assistance, including legal and financial planning, for military caregivers. S. Rep No. 115–212, at 58 (2018) (accompanying S.2193, which contained language nearly identical to that enacted in sections 161–163 of the VA MISSION Act of 2018). The purpose of this benefit is to increase the financial capability of Primary Family Caregivers to be able to manage their own personal finances and those of the eligible veteran, as applicable. Furthermore, we will include in any contracts requirements such as minimum degree attainment and national certifications for individuals providing financial planning services, as well as mechanisms that would prohibit exploitation or abuse of caregivers and veterans (*e.g.,* prohibit any form of compensation from the eligible veteran or Family Caregiver for the services provided) and that allow us to take any appropriate actions necessary to address related breaches of contract. We note that the contractor would be responsible for any liability arising from the financial planning services provided by it. Further, contractors are not VA employees and therefore not covered by the Federal Tort Claims Act.

We are not making any changes to the regulation based on these comments.

In Need of Personal Care Services

We proposed to define ''in need of personal care services'' to mean that the eligible veteran requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements (including respite care or assistance of an alternative caregiver) would be required to support the eligible veteran's safety. A few commenters supported this definition of in need of personal care services, and we appreciate their support. Others raised concerns with the definition, and we address those comments below.

One commenter found this definition too restrictive, and to be a major change to PCAFC that would result in exclusion of current participants from the program. Similarly, another commenter further explained that this definition may unfairly discriminate against veterans who served on or after September 11, 2001 (referred to herein

as post-9/11) who currently qualify for the program but may not yet need this required level of care, and also may result in younger veterans believing they are not ''disabled enough'' for PCAFC. The same commenter noted that this definition would exclude veterans who may need assistance with activities of daily living (ADL), but do not otherwise need a professional home health aide or nursing home care. While we appreciate the commenters' concerns, we believe these changes are supported by the statute and would help to reduce clinical subjectivity in PCAFC eligibility determinations. As provided in the proposed rule:

The statute makes clear the importance of regular support to an eligible veteran by allowing more than one Family Caregiver to be trained to provide personal care services. 38 U.S.C. 1720G(a)(5) and (6). Likewise, eligible veterans are provided protections under the statute in the absence of a Family Caregiver such as respite care during a family member's initial training if such training would interfere with the provision of personal care services for the eligible veteran. 38 U.S.C. 1720G(a)(6)(D). Thus, we believe ''in need of personal care services'' under section 1720G(a)(2)(C) means that without Family Caregiver support, VA would otherwise need to hire a professional home health aide or provide other support to the eligible veteran such as adult day health care, respite care, or facilitate a nursing home or other institutional care placement.85 FR 13359 (March 6, 2020).

Also, as previously stated we are standardizing PCAFC to focus on eligible veterans with moderate and severe needs, and we believe this definition supports this focus. Furthermore, ''alternative in-person caregiving arrangements'' are not limited to a professional home health aide, or nursing home care. There are many types of alternative caregiving arrangements that a veteran or servicemember may utilize or require in the absence of his or her Family Caregiver providing in-person personal care services. The personal care needs of eligible veterans participating in PCAFC vary and as such, so would the types of alternative caregiving arrangements they may require. Such arrangements may include adult day health care or other similar day treatment programs, assistance provided by a friend or family member informally or formally through a VA or community Veteran-Directed care program, or through volunteer organizations that train individuals to provide respite care. Thus, we believe this definition would not discriminate against post-9/11 veterans and servicemembers who may utilize other alternative in-person caregiving arrangements other than a professional home health aide or nursing home care in the absence of their Family Caregiver. We note that PCAFC has been and will remain available to post-9/11 eligible veterans, and that the changes we are making are intended to support veterans of all eras of service, consistent with expansion of the program under the VA MISSION Act of 2018. We further refer commenters to the discussion of § 71.20 addressing commenters' concerns that the proposed regulations would negatively impact post-9/11 veterans. Additionally, we recognize that there may be reluctance by some veterans, including post-9/11 veterans, to seek care and assistance because of perceived stigma or a belief that they are not ''disabled enough,'' and our goal is to reduce those concerns through outreach and education on all VA programs and services, to include PCAFC, that may help meet the needs of veterans and servicemembers and their caregivers. We are not making any changes based on these comments.

One commenter supported our definition of ''in need of personal care services'' because it clarified that such services are required in person. In contrast, another commenter disagreed with our assertion that the PCAFC was ''intended to provide assistance to Family Caregivers who are required to be physically present to support eligible veterans in their homes.'' 85 FR 13360 (March 6, 2020). They asserted that the statute is intended to enable a veteran to obtain care in his or her home regardless of where the caregiver is located, such that he or she could receive care remotely ''such as when the caregiver checks in to remind the veteran to take his or her medication, guide the veteran through a task that he or she can complete without physical assistance, or provide mental and emotional support should the need arise.'' VA's requirement that the eligible veteran requires ''in-person personal care services'' is supported by the statute, and we are not persuaded by the commenter's arguments to the contrary. Even putting aside the meaning of ''personal,'' with which the commenter takes issue, we believe the statute makes clear the importance of providing in-person personal care services by indicating that personal care services are provided in the eligible veteran's home (38 U.S.C. 1720G(a)(9)(C)(i)) and by establishing an expectation that Family Caregivers are providing services equivalent to that of a home health aide, which are generally furnished in-person and at home (38 U.S.C. 1720G(a)(3)(C)(ii), (iv)). See 85 FR 13360 (March 6, 2020). Also, rather than supporting the commenter's argument that VA's definition is unduly restrictive, we believe that 38 U.S.C. 1720G(d)(3)(B) also illustrates the importance of in-person personal care services by only authorizing a non-family member to be a Family Caregiver if the individual lives with the eligible veteran. We do not discount the importance of remote support that caregivers provide to veterans, such as medication reminders, remote guidance through a task via telephone, and mental and emotional support, but we do not believe that type of support alone rises to the level of support envisioned by the statute for eligible veterans who are in need of personal care services in PCAFC. This is particularly true as we standardize PCAFC to focus on eligible veterans with moderate and severe needs. 85 FR 13356 (March 6, 2020). VA's definition of ''in need of personal care services'' is a reasonable interpretation of the statute, and we are not making any changes based on this comment. We do, however, recognize the commenter's concern regarding consistency between PCAFC and PGCSS. As noted in VA's proposed rule, the definition of ''in need of personal care services'' will not apply to restrict eligibility under 38 U.S.C. 1720G(b), which governs PGCSS, or any other VA benefit authorities. VA will consider whether changes to the regulations governing PGCSS are appropriate in the future.

One commenter agreed with the definition to the extent that VA is not requiring the Family Caregiver to always be present. It is not our intent to require a Family Caregiver to be present at all times, rather this definition establishes that the eligible veteran requires in-person personal care services, and without such personal care services provided by the Family Caregiver, alternative in-person caregiver arrangements would be required to support the eligible veteran's safety. As stated by the commenter, this definition speaks to the type of personal care services needed by the eligible veteran, as the kind that must be delivered in person. We appreciate this comment and make no changes based upon it.

One commenter asked (1) whether a legacy participant determined to need in-person care services from another person, but who does not require assistance daily and each time an ADL is performed, would still be eligible to continue to participate in the PCAFC; and (2) whether a veteran who served

before September 11, 2001 (referred to herein as pre-9/11) who VA determines needs in-person care services from another person, but does not require assistance daily and each time, would be eligible for PCAFC. The commenter's questions and examples seem to merge and possibly confuse separate PCAFC eligibility requirements. To qualify for PCAFC under § 71.20(a)(3), a veteran or servicemember would need to be in need of personal care services (meaning the veteran or servicemember requires ''in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements . . . would be required to support the eligible veteran's safety'') based on either (1) an inability to perform an activity of living, or (2) a need for supervision, protection, or instruction, as such terms are defined in § 71.15 and discussed further below. The definition of ''inability to perform an activity of daily living'' refers to the veteran or servicemember requiring personal care services ''each time'' one or more ADLs is completed, and the definition of ''need for supervision, protection, or instruction'' refers to the individual's ability to maintain personal safety on a ''daily basis.'' The veteran or servicemember could qualify on both of these bases, but would be required to qualify based on only one of these bases. To the extent the commenter is concerned about these other definitions, we further address comments about those definitions separately in their respective sections below. We are not making any changes based on this comment.

Another commenter acknowledged an understanding of the ''in person'' requirement, but requested that we clearly state that the care does not need to be hands-on, physical care, and that assistance can be provided through supervision, protection, or instruction while the veteran completes an ADL. A veteran or servicemember that is eligible for PCAFC based on the definition of need for supervision, protection, or instruction would require in-person personal care services. However, that does not always mean hands-on care is provided or required. We note that if an eligible veteran is eligible for PCAFC because he or she meets the definition of inability to perform an ADL, the in-person personal care services required to perform an ADL would be hands-on care. We further refer that commenter to the discussion on the definition of inability to perform an ADL, where we address similar comments regarding veterans who may require supervision, protection, or instruction to complete ADLs. We make no changes based on this comment.

One commenter asked whether the use of community support professionals and resources (*e.g.,* art therapy services, life skills coaching) that provide active supervision to the eligible veteran while performing other activities when the designated Family Caregiver is not present would affect eligibility for PCAFC. It was recommended VA clarify the role that non-designated individuals or organizations such as those identified in the previous sentence may play in an eligible veteran's life, and the commenter advocated that use of such services should not disqualify a veteran from PCAFC. As previously explained, it is not our intent to require that a Family Caregiver be present at all times. We acknowledge that all caregivers need a break from caregiving. It is important to note that respite care is a benefit provided to assist Family Caregivers, and we encourage the use of respite care by Family Caregivers. The definition of ''in need of personal care services'' ensures that PCAFC is focused on veterans and servicemembers who require in-person personal care services, and that in the absence of such personal care services, such individuals would require alternative in-person caregiving arrangements. This definition as well as all other PCAFC eligibility criteria are not intended to discourage the utilization of community support resources or community-based organizations who may provide care or supervision to the eligible veteran while the Family Caregiver is not present. We note, however, it is our expectation that the Family Caregiver actually provide personal care services to the eligible veteran. The requirements in §§ 71.20(a)(5) and 71.25(f) make clear that personal care services must be provided by the Family Caregiver, and that personal care services will not be simultaneously and regularly provided by or through another individual or entity. We further refer the commenter to the discussion of § 71.25 below. We are not making any changes based on these comments.

One commenter asserted that VA's definition is further clarified by other regulatory requirements concerning neglect of eligible veterans, specifically § 71.25(b)(3) (''[t]here must be no determination by VA of . . . neglect of the eligible veteran by the [Family Caregiver] applicant'') and § 71.45(a)(1)(i)(B) (authorizing VA to revoke the designation of a Family Caregiver for cause when the Family Caregiver has neglected the eligible veteran). We used the ''in-person'' language to address the eligible veteran's level of need, which is distinct from §§ 71.20(a)(5) and 71.25(f), which establish the expectations of the Family Caregiver to provide personal care services, and §§ 71.25(b)(3) and 71.45(a)(1)(i)(B), which address neglect. If the veteran or servicemember does not require in-person personal care services, there may be other VA health care programs more suitable to meet his or her needs. If the Family Caregiver is not providing care, which pursuant to ''in need of personal care services'' will include in-person care, we could initiate revocation based on noncompliance under § 71.45(a)(1)(ii)(A), or for cause under § 71.45(a)(1)(i), depending on the circumstances. We note that these are distinct criteria and considerations. To the extent the commenter was remarking that the presence of requirements regarding neglect generally mean that the Family Caregiver is providing care in person rather than remotely, we agree. We make no changes based on this comment.

One commenter disagreed with the creation of the definition because of the existing statutory and regulatory definition of ''personal care services,'' and asserted that VA, by defining ''in need of personal care services,'' is restricting the bases upon which an eligible veteran can be deemed in need of personal care services in section 1720G(a)(2)(C). The commenter also asserted that VA has never created a definition for other programs and services in which similar language is used. We note that section 1720G(a)(2)(C) provides the bases upon which an individual may be deemed in need of personal care services; however, it does not define an objective standard for what it means to be in need of personal care services, and we found it necessary to define this term for purposes of PCAFC. We reiterate from the proposed rule that our interpretation of the term ''in need of personal care services'' for purposes of PCAFC would not apply to other sections in title 38, U.S.C., that use the phrase ''in need of'' in reference to other types of VA benefits that have separate eligibility criteria. We are not required to interpret ''in need of'' in the same manner in every instance the phase is used in title 38, U.S.C. See *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427, 433 (1932) ([although] ''there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . the presumption is not rigid and readily yields whenever there

is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent''). We are not making any changes based on this comment.

One commenter that supported the definition suggested that eligibility assessment teams include an occupational therapist or have applicants evaluated by an occupational therapist to help ensure a more objective assessment. The commenter believes PCAFC disproportionately relies on self-reporting of functioning. We note that centralized eligibility and appeals team (CEAT) will determine eligibility, including whether the veteran is determined to be unable to self-sustain in the community, for purposes of PCAFC. These teams will be comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend, and will include occupational therapists, as appropriate. We thank the commenter for their suggestion; however, as this specific commenter did not make any suggestions regarding the proposed rule itself, we are not making any changes based on this comment.

Two commenters restated our belief, as indicated in the proposed rule, that under 38 U.S.C. 1720G(a)(2)(C), ''in need of personal care services'' means that without Family Caregiver support, VA would otherwise need to hire a professional home health aide or provide other support to the eligible veteran, such as adult day health care, respite care, nursing home, or other institutional care. These two commenters further opined that this description does not include jail or prison. One of these commenters also referred to Veterans Health Administration (VHA) policy on Geriatric and Extended Care Services, eligibility for homemaker/home aide or related respite care services and home hospice services, and an Office of Inspector General (OIG) report related to caregivers being incarcerated or hospitalized. These commenters provide no further context as to their concerns related to the definition of ''in need of personal care services.'' To the extent that these comments concern incarcerated or hospitalized veterans and caregivers, we refer the commenter to the discussion on discharge and revocations under § 71.45 further below. It is unclear why these comments refer to other VA health care programs, but we note that PCAFC is one of many VHA programs available to meet the needs of eligible veterans. We make no changes based on these comments.

Another commenter noted that VA added a definition of ''in need of personal care services,'' but also referred to the definition for ''personal care services'' as it is currently defined in § 71.15, then stated the terminology ''is not specific and very narrow.'' The commenter asserted that it could therefore ''disqualify many veterans'' and ''allows one to think that family caregiver support is not allowed and only qualifies for a hired professional home health aide or provide other support to the eligible veteran such as adult day health care, respite care, or facilitate a nursing home or other institutional care placement.'' It is unclear if these comments were in reference to the proposed definition of ''in need of personal care services'' or to the current definition of ''personal care services.'' To the extent the commenter believes the definition for ''personal care services'' in current § 71.15 is too narrow, we did not propose to change that definition in this rulemaking and consider such comment outside the scope of this rulemaking. To the extent the commenter believes the definition for ''in need of personal care services'' is too narrow such that it would disqualify many veterans, lead one to believe that that Family Caregiver support is not allowed, and allow only a hired professional home health aide or other similar support, we disagree and we refer the commenter to the previous paragraphs in this section discussing this definition. We are not making any changes based on this comment.

One commenter also requested that VA clearly state in regulation that working is not an exclusion criterion for either the veteran or the Family Caregiver. This commenter stated that while VA has often publicly stated that working is not an exclusion criterion, they are aware of many situations when a Family Caregiver was discharged from PCAFC because either the veteran or Family Caregiver worked. We also received a similar comment in response to the definition of inability to perform an ADL, in which another commenter urged VA to include in the PCAFC regulations that employment does not exclude the veteran or the Family Caregiver from PCAFC, and noted they are aware of several instances where participants have been discharged from PCAFC because of employment. This commenter further stated that a veteran's ability to work does not mean that he or she does not need the same or higher level of assistance with ADLs as those catastrophically disabled veterans who are unable to work. Relatedly, some commenters opposed allowing veterans to be eligible for PCAFC if they work full time.

Employment is not an automatic disqualifier for PCAFC. However, we decline to include language in the regulation to explicitly state that, as doing so could suggest that employment is not considered by VA in determining eligibility for PCAFC, which is not the case. While maintaining employment would not automatically disqualify a veteran or servicemember for PCAFC, employment and other pursuits, such as volunteer services and recreational activities, can and do inform VA regarding an individual's functional ability and would be considered during the evaluation of the veteran or servicemember. For example, if a veteran or servicemember travels for work or leisure and can independently manage alone for weeks at a time without the presence of a caregiver, that would likely indicate that the individual does not require personal care services ''each time'' he or she completes one or more ADLs.

Creating any specific requirements regarding employment for eligible veterans or Family Caregivers would be difficult because of the unique needs of every individual and the vast employment options, both with and without accommodations. For example, an eligible veteran in need of personal care services due to an inability to perform multiple ADLs because of quadriplegia may be able to maintain any number of professional opportunities with proper accommodations, and still qualify for PCAFC. As the needs and condition for each veteran or servicemember and his or her caregiver are unique, we do not believe it is reasonable to place restrictions on a veteran's or servicemember's ability to work.

In regards to the Family Caregiver's employment, it is not our intent to prevent Family Caregivers from obtaining and maintaining gainful employment as we are cognizant that the monthly stipend is an acknowledgement of the sacrifices made by Family Caregivers, but may fall short of the income a Family Caregiver would otherwise earn if gainfully employed. The Family Caregiver may have the ability to provide the required personal care services to the eligible veteran while maintaining employment. We acknowledge that each Family Caregiver's situation is unique, such that he or she may be able to work from home, have a flexible work schedule, or have a standard workplace and schedule. We understand that Family Caregivers may not be present all of the

time to care for the eligible veteran, and we do not expect them to provide care 24/7. However, they would be required to be available to provide the required personal care services to the eligible veteran. Thus, we decline to include language to state that employment is not an exclusionary factor for eligibility under part 71, and make no changes based on these comments.

In the Best Interest

We proposed to revise the current definition of in the best interest to mean a clinical determination that participation in PCAFC is likely to be beneficial to the veteran or servicemember, and such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran's or servicemember's ability to live safely in a home setting, supports the veteran's or servicemember's potential progress in rehabilitation, if such potential exists, increases the veteran's or servicemember's potential independence, if such potential exists, and creates an environment that supports the health and well-being of the veteran or servicemember.

Multiple commenters stated that they believe the focus on the potential for independence in the proposed definition of ''in the best interest'' is contradictory to the proposed definition of ''serious injury,'' which would require a service-connected disability rating of 70 percent or more, and the requirement that the veteran or servicemember be in need of personal care services for a minimum of 6 months. One commenter further explained that contradiction, stating that not all serious injuries become less over time and therefore, independence should not be the highest achievable goal for PCAFC. The commenter stated that focusing on the veteran's ability for improvement does not fully acknowledge that a veteran's condition may never heal or get better over time. First, we note that while the comments appear to focus on serious injury, we are not requiring that the serious injury be connected to the eligible veteran's need for personal care services. Conditions other than the serious injury may be the reason the eligible veteran has a need for personal care services. We agree with the commenters that some eligible veterans may have serious injuries or other conditions, for which they are in need of personal care services, that may never improve over time, and PCAFC will continue to be available to such veterans and their caregivers if eligible. However, each individual is unique, and some eligible veterans may have serious injuries that improve over time, and we want to support such veterans if they are able to recover or improve over time. Furthermore, ''in some cases a clinician may determine that other care and maintenance options would be better to promote the [veteran's or servicemember's] functional capabilities and potential for independence.'' 76 FR 26149 (May 5, 2011). We also want to emphasize that the potential for independence is only one factor that will be considered by VA in determining whether the program is in the veteran's or servicemember's best interest. We are not making any changes based on these comments.

Several commenters raised concerns about the definition including potential for rehabilitation, in particular the ''if such potential exists'' language, as some veterans may have little or no potential for rehabilitation and should not be excluded from PCAFC. One commenter recommended that while the language ''if such potential exists'' provides some comfort, new language should be added to more explicitly state that veterans who fail to show improvement will not be excluded from the program. Another commenter noted that the phrase ''if such potential exists'' is confusing as to whether the program is intended to be permanent or rehabilitative; the commenter explained the language implies the program is permanent if the potential for independence does not exist. One commenter also raised concerns that this language can lead to VA removing veterans from PCAFC when they are benefitting from it due to having better access to an advocate for their medical care.

The current definition for in the best interest includes a consideration of whether participation in the program supports the veteran's or servicemember's potential for rehabilitation, if such potential exists, and we did not propose any changes to this part of the definition. Rather, we proposed to include an additional consideration of whether participation in the program increases the veteran's or servicemember's potential independence, if such potential exists. While we appreciate the commenters' concerns regarding the potential for rehabilitation, we believe these comments are beyond the scope of this rulemaking as we did not propose any changes to this part of the definition. However, we would like to clarify that the use of the phrase ''if such potential exists'' is intended to acknowledge that due to the conditions and impairments of some participants, a potential for rehabilitation or improved independence may not be reasonable, achievable, or expected. Many veterans participating in PCAFC will have injuries, conditions, or diseases that worsen over time that do not afford them the opportunity for rehabilitation or improved independence. Others, however, may indeed be able to achieve a level of increased functioning beyond their current abilities. We wish to make it clear that PCAFC is a clinical program, and the goal of clinical programs is to maximize health and well-being. If it is determined that participation in PCAFC is providing a disincentive for a veteran's well-being, PCAFC may be determined to not be in the individual's best interest. Similarly, we wish to make it clear that when such potential for improved functioning is not deemed reasonable, the lack of potential does not disqualify an individual from PCAFC. We make no changes based on these comments.

Several commenters expressed concern that eligibility determinations are based on a veteran's ability to recover. Commenters further asserted that it is unlawful for VA to deny or revoke eligibility based on a standard that focuses only on those who will recover or are likely to recover. While these commenters did not specifically provide these comments in the context of the definition for in the best interest, we believe these comments are best addressed in the discussion of this definition. We note that we are not basing eligibility decisions based on a veteran's ability to recover, and PCAFC eligibility is not dependent on a veteran's or servicemember's ability to recover. However, we do want to support an eligible veteran if they are able to recover, rehabilitate, or improve over time. There are many instances in which an eligible veteran has minimal ability to recover, rehabilitate or improve, and PCAFC will continue to be available to such veterans and their caregivers. We further note that as part of this rulemaking, we are extending eligibility to those with progressive illnesses (see definition of serious injury), from which an eligible veteran may never recover. We make no changes based on these comments.

One commenter explained that this definition perpetuates a paternalistic and condescending approach of how the Department should provide care to veterans, assuming a veteran is incapable of understanding what health care is and what is not in their best interest, and that the veteran is incapable of making their own health care decisions. Additionally, another commenter recommended that the definition focus on decision-making capacity and competence, and surrogate

decision making, consistent with VHA policy regarding informed consent for clinical treatments and procedures.

Under 38 U.S.C. 1720G(a)(1)(B), VA ''shall only provide support under [PCAFC] to a family caregiver of an eligible veteran if [VA] determines it is in the best interest of the eligible veteran to do so.'' As stated in VA's interim final rule establishing part 71, VA concludes that determinations of ''in the best interest'' must be clinical determinations, guided by VA health professionals' judgment on what care will best support the health and well-being of the veteran or servicemember. 76 FR 26149 (May 5, 2011). While we appreciate the commenters' concerns and suggestions, which seem to concern the overall purpose and scope of this definition, the commenters did not specifically address our proposed changes to this definition regarding the additional consideration of whether participation in the program increases the veteran's or servicemember's potential independence, if such potential exists. We make no changes based on these comments.

One commenter suggested that this definition not focus on the quality of the veteran and caregiver relationship, particularly as it is not appropriate or ethical to do so, except in circumstances that meet the definition of substantiated abuse or neglect consistent with applicable, related VHA policy on elder abuse and vulnerable adults. While we appreciate the commenter's concern, this definition is not focused on the relationship and quality of a veteran's or servicemember's relationship with their Family Caregiver; rather, it is focused on whether it is in the best interest of the eligible veteran to participate in PCAFC. The relationship of the veteran or servicemember and the Family Caregiver is considered, but is not a determining factor when deciding if participation in PCAFC is in the best interest of the veteran or servicemember. We make no changes based on this comment.

Another commenter recommended that the definition be revised to automatically presume a veteran's participation in PCAFC is in their best interest unless VA determines such participation is not in their best interest. As previously explained, we did not propose a new definition for ''in the best interest.'' Rather, we proposed to add an additional criterion to an already existing definition in § 71.15. Therefore, we believe this comment is beyond the scope of this rulemaking and we make no changes based on this comment.

Several commenters expressed concern about which clinician should be allowed to make the determination of whether PCAFC is in the best interest for a veteran or servicemember. Specifically, commenters were concerned that the clinician making the determination may not be the treating physician nor have any prior knowledge or experience with the veteran or servicemember. Additionally, one commenter suggested that the determination should be made with both the eligible veteran's primary care doctor and primary provider of care to ensure those who have knowledge of the veteran's needs are involved. As explained throughout this final rule, CEATs, composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the eligibility requirements for PCAFC, will make determinations of eligibility, including ''in the best interest,'' and whether the veteran is determined to be unable to self-sustain in the community. Clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. This information will be provided to the CEATs for use in making eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. As explained in the discussion on primary care team, we are revising the definition of primary care team in this final rule to ensure that those medical professionals, including a VA primary care provider, who care for the veteran and have knowledge of the veteran's needs and treatments, are part of the primary care team. We further note that any documentation from a non-VA provider that the veteran or servicemember provides will be available to VA for purposes of PCAFC evaluation and eligibility determinations. We make no changes based on these comments.

A few commenters questioned why VA did not provide the proposed revised definition for in the best interest so that the public could review and comment. As indicated in the proposed rule, the current language in the definition would generally remain; however, we are replacing the phrase ''veteran or servicemember's'' with ''veteran's or servicemember's'' and adding that a clinician would also consider whether participation in PCFAC ''increases the veteran's or servicemember's potential independence, if such potential exists.'' 85 FR 13360 (March 6, 2020). Furthermore, the proposed rule provided the revised definition for the public to review and comment on:

> In the best interest means, for the purpose of determining whether it is in the best interest of the veteran or servicemember to participate in the Program of Comprehensive Assistance for Family Caregivers under 38 U.S.C. 1720G(a), a clinical determination that participation in such program is likely to be beneficial to the veteran or servicemember. Such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran*'s* or servicemember's ability to live safely in a home setting, supports the veteran*'s* or servicemember's potential progress in rehabilitation, if such potential exists, *increases the veteran's or servicemember's potential independence, if such potential exists,* and creates an environment that supports the health and well-being of the veteran or servicemember.

85 FR 13405 (March 6, 2020) (emphasis added). We are not making any changes based on these comments.

Inability To Perform an Activity of Daily Living (ADL)

VA proposed to modify its definition of inability to perform an activity of daily living (ADL) to mean that a veteran or servicemember requires personal care services each time he or she completes one or more of the specified ADLs, and would thereby exclude veterans and servicemembers who need help completing an ADL only some of the time the ADL is completed. VA received numerous comments about this proposed definition. Many commenters believe this definition to be too limiting and some suggested a less restrictive definition. Others requested clarification or suggested alternative approaches.

Several commenters raised concerns with the part of this definition that would require that a veteran or servicemember require personal care services ''each time'' he or she completes one or more ADL, and urged VA to not impose this requirement. Specifically, their concerns are that this definition is too limiting, is more restrictive than the current PCAFC, is too narrow to properly evaluate a veteran's disability and symptoms, and may result in veterans being ineligible for PCAFC when they may need more assistance than those who are determined eligible. Several commenters asserted that some veterans may not need assistance with one or more ADLs each time every day; they may only need assistance some or most of the time; and that the assistance needed can vary over time, may fluctuate (even throughout the day, based on medication or repeated motion, etc.), and can vary based on

circumstances (*e.g.,* weather, after surgery or physical therapy, seasonally). Numerous examples were provided by commenters of situations in which they assert a veteran may need caregiving on a regular basis (and potentially more so than others who would qualify under the definition) but would not meet the definition of inability to perform an ADL because they do not need assistance every time they perform an ADL. For example, one commenter indicated a veteran with severe traumatic brain injury (TBI) who has an inability to regulate mood, memory loss, or an inability to follow proper hygiene standards may not require assistance every day, but still requires caregiving on a regular basis. Another commenter asserted that the proposed criteria ''would discriminate against severely disabled veterans with musculoskeletal and/or neurological conditions that limit muscle endurance,'' that is, ''veterans with sufficient muscle force to complete one ADL instance without assistance but due to having to repeat the ADL throughout the course of the day would eventually require assistance would therefore not be eligible,'' and ''would also discriminate against other severe disabilities that relapses and remits, or that waxes and wanes, including mental health and cognitive impairments.'' One commenter asserted that this ''all or nothing'' approach is contrary to how health care and caregiving should be treated, resulting in harm to veterans. One commenter recommended the definition should use ''requires personal care services most of the time when attempting to complete one or more of the following . . .'' or similar language. Other commenters recommended clarifying that required assistance may vary over time or from one day to the next. Another commenter asserted that the requirement is not consistent with VA's ''long-established acknowledgement that an injury is not stable and changes,'' and specifically cited to VBA's Schedule for Rating for the musculoskeletal system at 38 CFR 4.40 and 4.45 in asserting that a veteran with functional loss of the musculoskeletal system may experience additional loss of function during repeated motions over time and flare-ups.

Other commenters requested clarification on how VA would consider ADLs that are not completed every day, including a commenter who recognized that that the frequency with which some ADLs are completed can vary based on the individual's clinical needs, such as bathing.

Some commenters asserted that the definition fails to support efforts by a catastrophically disabled veteran to exert even a small level of independence, when possible, and that because some veterans have spent years and decades striving for a degree of independence, an ability to infrequently perform ADLs should not disqualify a veteran from PCAFC.

While we appreciate the commenters' concerns, we make no changes based on these comments, and address them below.

First, we note that the definition of inability to perform an ADL is an objective standard used to evaluate eligibility for PCAFC. This determination is specific to PCAFC and does not indicate whether a veteran or servicemember is in need of, and eligible for, other health care benefits and services. If a veteran or servicemember does not meet this definition, they may not otherwise be eligible for PCAFC. However, it does not mean that he or she does not require, or is ineligible for, other VA benefits and services. For veterans and servicemembers who are not eligible for PCAFC, we will assist them, as appropriate, in considering what other health care programs may best meet their needs.

As explained in the proposed rule and reiterated here, this definition requires that a veteran or servicemember need personal care services each time he or she completes any of the ADLs listed in the definition. 85 FR 13360 (March 6, 2020). We would not require the veteran or servicemember qualifying for PCAFC based on an inability to perform an ADL need personal care services on a daily basis. As stated in the proposed rule:

Although the statute refers to an eligible veteran's inability to perform one or more activities of daily living as a basis upon which he or she can be deemed in need of personal care services (38 U.S.C. 1720G(a)(2)(C)(i)), we recognize that not all activities of daily living need to be performed every day. For example, bathing is included in the current § 71.15 definition of ''[i]nability to perform an activity of daily living,'' but bathing may not be required every day. A veteran may be able to maintain health and wellness by adhering to a less frequent bathing routine. Id. at 13361.

As we also explained in the proposed rule, this definition is not met if a veteran or servicemember needs help completing an ADL only some of the time that the ADL is completed. Id. We believe the proposed definition delineates an objective frequency requirement that will enable VA to operationalize and standardize PCAFC across the country and is consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. The definition sets forth a consistent, standardized, and clear requirement, by specifying that a veteran or servicemember requires personal care services each time the ADL is completed, regardless of which ADL it is. We believe that the requirement that assistance be needed each time the ADL is completed equates to a veteran or servicemember requiring a moderate amount of personal care services. Each ADL is treated the same irrespective of the specific tasks required to complete the ADL or frequency with which it is completed. Reliance on a Family Caregiver for any one of the seven ADLs results in a self-care deficit that affects the veteran's or servicemember's quality of life.

The definition of an inability to perform an ADL would only be met if a veteran or servicemember needs personal care services each time that he or she completes an ADL as indicated through a clinical evaluation of the veteran's functional abilities, with input by the veteran or servicemember and caregiver. We acknowledge the degree of assistance may vary; however, a degree of hands-on assistance will be required each time the ADL is performed. In some cases, the degree of assistance that a veteran or servicemember may need to complete the ADL may vary throughout the day. In some instances, the veteran or servicemember may only need minimal assistance completing the ADL, but in other instances throughout the day may require moderate assistance. For example, veterans and servicemembers who have muscle weakness, lack of dexterity, or fine motor skills, may only need assistance with removing clothing when toileting at the beginning of the day, but later in the day they may require assistance with removing clothing, performing appropriate hygiene and redressing when completing the task of toileting.

We considered whether we should require the definition of inability to perform an ADL include daily assistance with an ADL instead of assistance each time an ADL is completed, but we have determined that use of daily instead of each time would result in less consistency and clarity, as it would require us to include exceptions for certain ADLs, such as grooming and bathing, that may not be completed on a daily basis. These exceptions would create confusion in applying the definition and result in less consistency and standardization in the application of this definition.

Similarly, we did not define inability to perform an ADL to require assistance

with an ADL most or majority of the time because we believe such terms are too vague and subjective, leading to inconsistencies in interpretation and application. Using most or majority of the time instead of each time would be difficult to quantify, and would require us to establish an arbitrary threshold.

To the extent that a commenter was concerned that this definition would exclude veterans who may need more assistance than those who cannot independently accomplish one ADL, we respectfully disagree for the reasons described above. We believe that if a veteran or servicemember needs assistance with multiple ADLs, it is likely that at least one of those ADLs requires assistance each time the ADL is completed.

Furthermore, the monthly stipend provided to a Primary Family Caregiver under 38 U.S.C. 1720G is not disability compensation and it is not designed to supplement or replace the disability compensation received by the veteran. Therefore, we disagree with the assertion that this definition must maintain consistency with the rating schedule in 38 CFR part 4, subpart B.

Commenters raised concerns that catastrophically disabled veterans would not meet this definition. We assume these commenters are referring to the definition of catastrophically disabled veterans as used by VHA in 38 CFR 17.36(b). We disagree that catastrophically disabled veterans will inevitably be excluded based upon this definition. Veterans who are catastrophically disabled are those with a severely disabling injury, disorder, or disease that permanently compromises their ability to carry out activities of daily living. See 38 CFR 17.36(e). Some veterans with such a designation will be in need of personal care services based on an inability to perform an ADL (*i.e.,* requiring personal care services each time one or more ADLs is completed). However, through adaptive equipment, home modifications, or other resources, there may be veterans who do not require another individual to perform personal care services, or otherwise do not qualify for PCAFC. VA will evaluate each veteran and servicemember based on the eligibility criteria set forth in § 71.20.

We are not making any changes based on these comments.

One commenter provided data they collected from veterans concerning the performance of ADLs and noted that there were extremely few veterans who were completely dependent on caregivers to complete ADLs. Another commenter similarly asserted that even veterans with moderate and severe needs ''may not meet this high threshold, and the proposed revision may exclude vast numbers of veterans from the program,'' noting that ''even a veteran who needs assistance with an ADL nine times out of ten would nonetheless fail to meet the requirement.'' Additionally, one commenter believed the definition of inability to perform an ADL to suggest the program would be limited to veterans requiring 24/7 care, and that 95 percent of current PCAFC participants would fail to qualify based on the definition of inability to perform an ADL.

We appreciate the concerns raised by these commenters and the data provided by one of the commenters, as these are informative. However, we cannot verify that the data provided are accurate. We do not currently track and maintain data on how many current PCAFC participants qualify for PCAFC based on the current definition of inability to perform an ADL versus the current definition of need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury. While inability to perform an ADL is one way in which an individual can qualify for PCAFC, it is not the only way, as individuals may meet the definition of need for supervision, protection, or instruction (*i.e.,* an individual may have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis). We do know that a majority of current PCAFC participants have a mental health diagnosis amongst their diagnoses, but we do not track if that mental health diagnosis is the reason they are eligible for PCAFC. We do not believe this definition of inability to perform an ADL will be as restrictive as the commenters assert, but we cannot verify if the data provided by the commenters is accurate. This does not change our decision to use the definition of inability to perform an ADL as we proposed and now make final, as we find the benefits (*e.g.,* clarity, objectivity, consistency) of using this definition outweigh any potential risks identified by the commenters. We will track and monitor PCAFC participants to determine the basis for their eligibility for PCAFC (*i.e.,* whether it is because he or she has an inability to perform an ADL or a need for supervision, protection, or instruction) moving forward. Additionally, VA will also track individuals who apply and are not eligible based on the definition of in need of personal care services. If over time we find that this definition is as restrictive as the commenters assert it will be, we will adjust and revise the definition accordingly in a future rulemaking.

Further, we do not believe that the definition of inability to perform an ADL will exclude vast numbers of veterans and servicemembers from PCAFC, as there will be veterans and servicemembers who meet this definition with regards to only one ADL. We believe requiring assistance with one ADL each time such ADL is performed encompasses a broad and inclusive range of injuries and illnesses which may cause an individual to require the care and assistance of another. For example, a veteran with Parkinson's disease who needs assistance with grooming each time, but does not need assistance with other ADLs, may meet this definition. A veteran who requires assistance donning prosthetic equipment, but once equipment is in place is otherwise independent, may also meet this definition. Similarly, a veteran with mobility impairment may meet this definition if he or she requires assistance with lower body dressing, but is otherwise independent. While some veterans may need assistance with more than one ADL, others will not but would still qualify so long as they need assistance with at least one ADL each time it is performed.

Contrary to the commenter's statement that PCAFC would be limited to veterans requiring 24/7 care, we note that it is not our intent that PCAFC be limited to only those veterans and servicemembers that require 24/7 care and we refer the commenter to the previously-cited examples above. We further note that we do not expect or require Family Caregivers to provide 24/7 care as part of PCAFC. This definition would not restrict PCAFC to only those requiring 24/7 care, as this definition requires that assistance be needed each time the ADL is completed, which we believe equates to a veteran or servicemember requiring a moderate amount of personal care services.

We make no changes based on these comments.

One commenter stated that they believe this definition of inability to perform an ADL is more aligned with the definition of ''incapability'' rather than ''inability'' because they interpret the definition of inability as contemplating degrees along a spectrum. This commenter further asserted that VA's definition of inability to perform an ADL does not align with Congressional intent for PCAFC. While we acknowledge that incapability and inability may have similar definitions,

we interpret and define inability to perform an ADL, as required by 38 U.S.C. 1720G, to mean that the veteran or servicemember needs personal care services each time an ADL is completed. We believe this interpretation is reasonable and rational, because it will provide objective criteria for evaluating this term and will ensure those with moderate and severe needs are eligible for PCAFC. It is also important to note that while ''ability'' can be considered along a spectrum, that does not mean that ''inability'' or ''lack'' of ability must similarly be considered along a spectrum. We make no changes based on this comment.

One commenter asserted that VA failed to state if the care provided must be hands-on, physical care to meet the definition of inability to perform an ADL and recommended VA state that assistance can also be in the form of supervision, protection, or instruction as the veteran completes each ADL. Relatedly, another commenter, in addressing the definition of ''need for supervision, protection, or instruction,'' suggested that VA had muddled the statutory language, which the commenter asserted ''neither limits the inability to perform one or more [ADLs] to physical impairments nor excludes physical impairments from causing the need for supervision or protection.'' Other commenters provided examples that seemed to confuse the definitions of ''inability to perform an activity of daily living'' and ''need for supervision, protection, or instruction,'' which are separate bases upon which an eligible veteran can be deemed in need of personal care services under § 71.20(a)(3). For example, one commenter referred to veterans who may not be able to remember to take medication, eat, or bathe unless directed to do so and supervised.

We reiterate from the proposed rule that VA considers inability to perform an ADL separate from a need for supervision, protection, or instruction, and that an inability to perform an ADL would involve physical impairment, while need for supervision, protection, or instruction would involve cognitive, neurological, or mental health impairment. See 85 FR 13363 (March 6, 2020). That does not mean, however, that veterans or servicemembers who require assistance with ADLs cannot qualify for PCAFC based on a need for supervision, protection, or instruction, as they may have a functional impairment that directly impacts their ability to maintain personal safety on a daily basis. It is important to note that when we evaluate veterans and servicemembers for PCAFC, we make a clinical determination that is comprehensive and holistic, and based on the whole picture of the individual.

We also note that the care required under the definition of inability to perform an ADL is hands-on, physical care. If that requirement of hands-on, physical care is not met, a veteran or servicemember may still qualify under the definition of need for supervision, protection, or instruction, as that definition does not require hands-on, physical care. To the extent that commenters suggested we include need for supervision, protection, or instruction as the level of assistance required for the definition of inability to perform an ADL, we decline to adopt that suggestion. The definition of need for supervision, protection, or instruction already includes a type of assistance, which we believe would accurately capture veterans with a functional impairment that impacts their ability to maintain their personal safety on a daily basis due to an inability to perform an ADL.

We are not making any changes based on these comments.

One commenter explained that posttraumatic stress disorder (PTSD) and TBI can lead to fluctuations in a veteran's level of functioning and requested VA clearly define what it means to require assistance with an ADL each time it is completed. The commenter also requested VA clarify how VA will consistently assess, across VA, a veteran's inability to perform an ADL. This will be a clinical determination based on a clinical assessment and evaluation of the veteran and include input from the Family Caregiver or Family Caregiver applicant. Additionally, we will provide ongoing education and training to field staff and CEATs. We anticipate fluctuations in functioning, especially with mental health conditions such as PTSD, but if such fluctuations mean that a veteran or servicemember does not require personal care services each time an ADL is completed, then the veteran or servicemember would not meet this definition. A veteran or servicemember could require only a minimal amount of assistance with an ADL on some occasions and a lot of assistance with an ADL on other occasions. However, they must require some amount of assistance with an ADL each time. Thus, if the veteran or servicemember can complete the ADL independently and without personal care services, even on remote occasions, the veteran or servicemember would not meet the requirement of this definition to require assistance ''each time'' with regards to an ADL. However, we note that if a veteran or servicemember does not meet the definition of inability to perform an ADL, they may be eligible under the definition of need for supervision, protection, or instruction. We are not making any changes based on this comment.

One commenter stated that this definition fails to consider the detrimental effect that delayed care would have on the veteran's or servicemember's health, and further raised concerns with the definition in suggesting that it conditions eligibility on deterioration of the veteran's or servicemember's health, which would be detrimental to the veteran or servicemember and create higher health care costs for the VA system. While we understand the commenter's concern, we believe that excluding veterans and servicemembers who need help completing an ADL only some of the time he or she completes any of the ADLs listed in the definition is consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. As stated in the proposed rule:

> This distinction is especially important for eligible veterans whose care needs may be more complex, particularly as personal care service needs related to a physical impairment can evolve over time. For example, infrequent assistance may be needed in the immediate time period following the onset of a disease (such that the individual needs help completing an ADL only some of the time it's completed), but over time and as the individual begins to age, the individual's care needs can progress. We would thus distinguish between veterans and servicemembers needing assistance with an ADL only some of the time from those who need assistance every time the ADL is completed, those who we believe have an ''inability'' to perform an ADL. 85 FR 13361 (March 6, 2020).

Furthermore, we note that PCAFC is just one of many VA programs available to support veterans and his or her caregiver, as VA offers a menu of supports and services that support caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of eligible veterans through PGCSS including access to Caregiver Support Coordinators (CSCs) located at every VA medical center, a caregiver website, training and education offered on-line and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA's Caregiver Support Line. A determination that a veteran or servicemember is not eligible

for PCAFC would not exclude the veteran or servicemember and his or her caregiver from receiving VA support through alternative support and services as applicable. We are not making any changes based on this comment.

One commenter further noted that a veteran's use of an assistive device to perform an ADL should not be used against them. This same commenter also advocated that inability to perform an ADL should mean that the veteran or servicemember is unable to perform an ADL at any point of time, and suggested that this could be monitored in the wellness checks or annual assessment, and where assistance is required indefinitely, a permanent status could be noted in the record. First, use of an assistive device would not alone exclude a veteran or servicemember from PCAFC. However, we note that to qualify for PCAFC, the veteran or servicemember must be in need of personal care services, which means, in part, that the individual requires in-person care or assistance from another person. If the veteran's or servicemember's needs with respect to ADLs are met with an assistive device, the individual would not be in need of personal care services based on an inability to perform an ADL. Second, annual reassessments will include an assessment of whether an eligible veteran has an inability to perform an ADL, as appropriate, as the eligible veteran may have improved or worsened. While VA does not intend to assess PCAFC eligibility through wellness contacts, including whether an eligible veteran has an inability to perform an ADL, the need for a reassessment may be identified through a wellness contact. VHA is not imposing the ''each time'' requirement for purposes of oversight. We believe recurring reassessment and wellness checks are appropriate regardless of the frequency with which an eligible veteran is in need of personal care services. The ''each time'' requirement is solely for the purposes of determining whether a veteran or servicemember meets the definition of inability to perform an ADL. As discussed below with respect to other commenters who advocated for a permanent designation, we will not designate individuals as permanently eligible for PCAFC in their medical records, even for eligible veterans who are expected to need assistance indefinitely; however, there would be documentation of the eligible veteran's on-going needs in the medical record. Additionally, we note that the frequency of reassessments would be annually, unless there is a determination made and documented by VA to conduct reassessments on a more or less frequent basis. 85 FR 13379, 13408 (March 6, 2020). We make no changes based on these comments.

One commenter who objected to the definition of ''unable to self-sustain in the community'' (discussed further below) provided descriptions and examples of mobility or transferring, feeding or eating, toileting, and shower/bathing, to include descriptions of progressive stages of assistance. It is not clear what the commenter is recommending; however, we do not believe it is necessary for VA to further describe the ADLs listed in this definition as the individual needs for each veteran and servicemember are unique. It is important to note that the definition of inability to perform an ADL and the list of ADLs are based on widely-accepted and commonly understood definitions of ADL needs in the clinical context. Thus, we find it unnecessary to add any further descriptors, particularly as doing so could lead to confusion.

We are not making any changes based on this comment.

One commenter asked why certain instrumental activities of daily living (IADL) were not addressed in the PCAFC eligibility criteria. While we understand and recognize that many caregivers may assist with IADLs, we are required by the authorizing statute to consider ADLs specifically. As stated in the final rule implementing PCAFC and PGCSS, we believe that Congress specifically considered and rejected the use of the term ''instrumental activities of daily living'' in the Caregivers Act. See 80 FR 1357, at 1367 (January 9, 2015). Moreover, in section 162(b)(1) of the VA MISSION Act of 2018, Congress replaced the term ''independent activities of daily living'' with the term ''activities of daily living'' in the statutory definition of ''personal care services'' in 38 U.S.C. 1720G(d)(4) removing any doubt regarding the scope of the term ''activities of daily living.'' We are not making any changes based on this comment.

One commenter recommended VA use the guidance set forth in a procedural guide for the administration of the Servicemembers' Group Life Insurance Traumatic Injury Protection (TSGLI) program, which is authorized under 38 U.S.C. 1980A. Specifically, in the context of determining whether an individual has a loss of ADL, the TSGLI procedural guide states that the member must require assistance to perform at least two of the six ADLs. The TSGLI procedural guide defines ''requires assistance'' as: (1) Physical assistance: When a patient requires hands-on assistance from another person; (2) stand-by assistance: When a patient requires someone to be within arm's reach because the patient's ability fluctuates and physical or verbal assistance may be needed; and (3) verbal assistance: When a patient requires verbal instruction in order to complete the ADL due to cognitive impairment and without these verbal reminders, the patient would not remember to perform the ADL. See TSGLI Procedural Guide, Version 2.46 at 19–20 (June 12, 2019).

First, we note that TSGLI and PCAFC are two distinct programs with distinct purposes, as TSGLI provides ''monetary assistance to help the member and the member's family through an often long and arduous treatment and rehabilitation period.'' 70 FR 75940 (December 22, 2005). TSGLI is modeled after Accidental Death and Dismemberment (AD&D) insurance coverage. Id. These programs also have distinct eligibility criteria. For example, qualifying losses for TSGLI include, but are not limited to, total and permanent loss of sight; loss of a hand or foot by severance at or above the wrist or ankle; total and permanent loss of speech; total and permanent loss of hearing; loss of thumb and or other four fingers of the same hand by severance at or above the metacarpophalangeal joints; quadriplegia, paraplegia, hemiplegia, uniplegia; certain burns; coma or the inability to carry out the ADLs resulting from traumatic injury to the brain. 38 U.S.C. 1980A(b)(1); 38 CFR 9.20(f). While TSGLI does provide payments for an inability to carry out ADLs, those are limited to where that inability results from traumatic injury, including traumatic brain injury, and coma. See 38 U.S.C. 1980A; 38 CFR 9.20(f)(17) and (20). Additionally, inability to carry out ADLs is defined in section 1980A to mean the inability to independently perform two or more of the following six functions: Bathing, continence, dressing, eating, toileting, and transferring. 38 U.S.C. 1980A(b)(2)(D).

Under PCAFC, a veteran with TBI could be considered to be in need of personal care services; that is, because of either physical disabilities resulting in an inability to perform an ADL, or a cognitive, neurological, or mental health impairment resulting in a need for supervision, protection, or instruction. Stand-by and verbal assistance are covered under the need for supervision, protection, or instruction definition. Thus, we do not believe it is necessary to add these under the definition of inability to perform an ADL.

As we explained in the proposed rule, rather than quantifying losses, PCAFC is

designed to support the health and well-being of eligible veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. Unlike TSGLI, which is limited to lump-sum monetary assistance, PCAFC provides eligible Family Caregivers with training and technical support to assist Family Caregivers in their role as a caregiver for an eligible veteran.

Additionally, we note that the monthly stipend provided to a Primary Family Caregiver under 38 U.S.C. 1720G is part of a clinical program rather than a rider to an insurance policy, thus we do not believe that this definition must maintain consistency with TSGLI. We are not making any changes based on this comment.

One commenter recommended that VA not evaluate inability to perform an ADL for those veterans receiving Special Monthly Compensation (SMC) for housebound status or aid and attendance, as they have already been certified by both medical providers and VBA to be in need of another person to perform an ADL, thereby suggesting that veterans in receipt of such benefits should be considered to meet the ''inability to perform an activity of daily living'' definition for purposes of PCAFC eligibility. SMC for aid and attendance is payable when a veteran, due to mental or physical disability, requires the regular aid and attendance of another person. 38 U.S.C. 1114(l), (r); 38 CFR 3.350(b), (h). SMC for housebound status is payable when a veteran, due to mental or physical disability, has a service-connected disability rated as total and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or (2) by reason of service-connected disability or disabilities, is permanently housebound. 38 U.S.C. 1114(s); 38 CFR 3.350(i). Section 3.352 of title 38, CFR, provides criteria for determining the need for regular aid and attendance, which include inability to perform ADLs such as dressing, eating, and continence, or requiring supervision or protection on a regular basis, for purposes of determining eligibility for SMC and special monthly pension.

While the eligibility requirements for SMC referenced by the commenter may seem similar, they are not synonymous with VA's definition of ''inability to perform an ADL.'' The regulatory criteria for aid and attendance under 38 CFR 3.352(a) provide that inability to perform certain specified ADLs ''will be accorded consideration in determining the need for regular aid and attendance.'' Further, whether an individual is ''substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises'' for purposes of housebound status, see 38 CFR 3.350(i)(2), does not correlate directly with the more objective ADL criteria we proposed for PCAFC eligibility. Consequently, the part 3 criteria fail to provide the level of objectivity VA seeks in order to ensure that its caregiver program is administered in a fair and consistent manner for all participants, and we do not believe criteria for those benefits should be a substitute for a clinical evaluation of whether a veteran or servicemember is eligible for PCAFC due to an inability to perform an ADL as set forth in § 71.15. We believe that in order to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, each veteran or servicemember must be evaluated based on the eligibility criteria in § 71.20. To that end, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant. Additionally, we do not believe it would be appropriate to consider certain disability ratings as a substitute for a clinical evaluation of whether a veteran or servicemember has an inability to perform an ADL, as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and because VA has not considered whether additional VA disability ratings or other benefits determinations other than those recommended by the commenters may be appropriate for establishing that a veteran or servicemember has an inability to perform an ADL for purposes of PCAFC. We are not making any changes based on this comment.

Institutionalization

Several commenters opposed the inclusion of jail or prison in the proposed definition of institutionalization. Specifically, commenters stated this definition conflicts with the common use of the term by health care providers and other VHA and federal programs. Furthermore, commenters raised concerns about the application of this definition in 38 CFR 71.45(b)(1) and (2) (related to discharge of the Family Caregiver due to the eligible veteran or Family Caregiver, respectively). We note that this definition will only be used in the context of § 71.45, Revocation and Discharge of Family Caregivers, and refer the commenters to the discussion below regarding discharge due to incarceration under section § 71.45.

Joint Application

One commenter raised concerns about the definition of joint application, in particular that an application is considered incomplete when all mandatory sections are not completed, since many veterans may not be able to easily access information due to the passage of time or may have health issues that make it difficult or impossible to complete the application without assistance. This commenter also opined that delays will still result as VA will need to inform applicants that their applications are incomplete. While this commenter noted that, pursuant to 38 CFR 21.1032, VA has a duty to assist veterans in obtaining evidence in claims for other VA benefits, they suggested VA adopt a less punitive approach by instituting a process that includes notifying the applicant as promptly as possible that their application is incomplete. By defining the joint application to mean an application that has all fields within the application completed, including signature and date by all applicants, and providing for certain exceptions within the definition, it was not VA's intent to create a burden on veterans and caregivers; rather we are establishing the date on which VA can begin evaluating the applicants' eligibility for PCAFC. As stated in the proposed rule, the required fields are necessary for VA to begin evaluating the eligibility of veterans and servicemembers and their family members for PCAFC. The date the joint application received by VA is also the date on which certain PCAFC benefits are effective (unless another date applies under § 71.40(d)). It would not be reasonable to provide PCAFC benefits back to the date an incomplete application is received by VA; we need a complete application. This is a common requirement for the administration of benefits and services. We further note that the information required within the application (*i.e.,* names, address of veteran's or servicemember's residence, dates of birth, certifications, and signatures) is specific to the veteran and caregiver and is information they would have readily available. They are not required to further submit other supporting documentation that they may not have readily available, such as a DD–214 or medical records, as part of the application. As mentioned, the mandatory information should be readily available to them and the

application should be relatively easy to complete. However, if assistance with the application is needed, caregivers and veterans can ask VA staff for help, guidance, and support, and we will assist applicants as needed. In the application, we will include instructions that will provide information on requesting assistance with filling out the form, and various VA touchpoints including the National Caregiver Support line, VA's website, and a link to VA's Caregiver Support Coordinator (CSC) locator. We also note that it has been our practice to contact the caregiver and veteran when applications are incomplete, and we will continue to do so. Additionally, we will consider inclusion in policy of requirements for prompt notification in instances of incomplete applications. While we understand the commenter's concerns and appreciate the suggested changes, we make no changes to the regulations based on this comment.

Legal Services

One commenter asserted that VA's proposed definition of legal services is inconsistent with 38 U.S.C. 1720G and the VA MISSION Act of 2018. This commenter specifically stated that ''instead of creating a program which would provide free, broadly accessible legal services to PCAFC veterans and their caregivers that covers a broad range of civil legal issues, including full representation matters where warranted, the proposed regulations impose a set of arbitrary limits on the types of matters to be covered.'' While this commenter acknowledged that there are existing programs that provide legal services to veterans, servicemembers, and their families, the commenter asserted that such programs are insufficient; and inclusion of legal services in the VA MISSION Act of 2018 recognized the need for legal services by PCAFC veterans and their caregivers. This commenter praised VA for including preparation and execution of wills and other advance directives, but recommended VA expand the definition to include free legal services, and full representation as warranted, in areas of law where veterans and caregivers commonly face issues, including affordable housing, eviction and foreclosure, consumer debt, access to and maintaining local and federal government benefits, and family law.

We do not agree that the definition of legal services is inconsistent with our statutory authority, as 38 U.S.C. 1720G, as amended by the VA MISSION Act of 2018, did not define this term further than to state that legal services included legal advice and consultation, relating to the needs of injured veterans and their caregivers. We have the authority to further define this term, and did so in the proposed rule. Through a **Federal Register** Notice published on November 27, 2018, we solicited feedback from the public in order to develop this definition, and we also held meetings and listening sessions to obtain input from stakeholders. The responses received were varied, as we explained in the proposed rule. See 85 FR 13362 (March 6, 2020). For example, some feedback acknowledged the potential for conflicts of interest between the eligible veteran and Family Caregiver regarding certain legal issues, including divorce or child custody, while other feedback specified that legal services should include advanced directives, power of attorney, wills, and guardianship. Id. We considered the feedback received and, consistent with that feedback, we defined legal services to include assistance with advanced directives, power of attorney, simple wills, and guardianship; education on legal topics relevant to caregiving; and a referral service for other legal services. Id. We determined this would be the most appropriate way to define legal services, as this would allow us to provide assistance with the most common matters that Family Caregivers face in providing personal care services to eligible veterans (*i.e.,* advanced directives, power of attorney, simple wills, and guardianship), providing education on legal topics relevant to caregiving, and a referral service for other legal services. As explained in the proposed rule, this definition would address these important needs, while also being mindful of VA resources. Id. Paying for legal services for matters other than those described in the definition would be cost prohibitive and may limit our ability to provide the same level of services to as many Family Caregivers as possible, and would not be focused on those matters that Family Caregivers most commonly face in providing personal care services to eligible veterans. Providing limited legal assistance, education, and referrals would ensure we consistently provide an equitable level of legal services to all Primary Family Caregivers. As we explained in the proposed rule and reiterate here, we will provide as legal services assistance with advanced directives, power of attorney, simple wills, and guardianship; education on legal topics relevant to caregiving; and a referral service for other legal services. These services would be provided only in relation to the personal legal needs of the eligible veteran and the Primary Family Caregiver. This definition of legal services excludes assistance with matters in which the eligible veteran or Primary Family Caregiver is taking or has taken any adversarial legal action against the United States government, and disputes between the eligible veteran and Primary Family Caregiver.

We make no changes to the definition based on this comment, but will continue to assess the need for legal services by Family Caregivers to determine if VA should propose changes to the definition in the future.

Another commenter similarly praised VA for the inclusion of assistance with advanced directives, power of attorney, simple wills, and guardianship; educational opportunities on legal topics relevant to caregiving; and referrals to community resources and attorneys for legal assistance or representation in other legal matters. We appreciate the comment and are not making any changes based on this comment.

One commenter asked for clarification on whether legal services would be available regarding family members of the Family Caregiver and eligible veteran, such as children. While the benefit is for the Primary Family Caregiver, a family member of the Primary Family Caregiver and the eligible veteran may indirectly benefit from the legal services. However, they are not directly eligible for the benefit if they are not approved and designated as the Primary Family Caregiver. We make no changes based on this comment.

Another commenter questioned why legal services will be available to caregivers, whether it is indicative of a deeper problem, and asked what precautions and safety nets will be put in place to ensure veterans are not exploited or abused. As stated in the proposed rule, we are adding this term to address changes made to 38 U.S.C. 1720G by the VA MISSION Act of 2018. Specifically, the VA MISSION Act of 2018 added legal services as a benefit for Primary Family Caregivers. Accordingly, legal services will be added to the benefits available to Primary Family Caregivers under § 71.40(c)(6). Similar to financial planning services, we will include in any contracts requirements such as minimum degree attainment and certifications for individuals providing legal services, as well as mechanisms that would prohibit exploitation or abuse of caregivers and veterans (*e.g.,* prohibit any form of compensation from the eligible veteran or Family Caregiver for the services provided) and that allow us to take any appropriate actions

necessary to address related breach of contracts. We note that the contractors would be responsible for any liability arising from legal services provided. Further, contractors are not VA employees and therefore not covered by the Federal Tort Claims Act. We also plan to provide resources to the Family Caregiver to report any concerns of abuse or exploitation that may arise in the course of receiving the legal services, such as links to State and local bar discipline reporting sites, as appropriate. We make no changes based on this comment.

Monthly Stipend Rate

Several commenters expressed concern about VA's definition of monthly stipend rate. Specifically, some commenters believe it is too high, some believe it is too low, and others disagree with using the Office of Personnel Management's (OPM) General Schedule (GS) scale. We note that this definition will only be applied in the context of 38 CFR 71.40(c), Primary Family Caregiver benefits. Therefore, we address the comments in the section below regarding § 71.40.

Need for Supervision, Protection, or Instruction

VA's proposed rule added ''need for supervision, protection, or instruction'' as a new term and basis upon which a veteran or servicemember can be deemed in need of personal care services under § 71.20(a)(3). This term and its definition serve to implement the statutory phrases ''a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' and ''a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired'' in clauses (ii) and (iii) of section 1720G(a)(2)(C) of title 38, U.S.C. VA received numerous comments about this proposed definition. Some commenters supported the definition, while others believed it is too restrictive or disagreed with VA's interpretation of the statutory requirements, and others requested VA provide clarification.

Commenters stated that quantifying the amount of time for supervision needed under this definition is difficult, and that some veterans may need constant supervision because of their health conditions. Commenters also requested VA clarify the frequency with which a veteran would need supervision, protection, or instruction for purposes of PCAFC eligibility. One commenter opined that the definition is extremely narrow in scope. Another commenter stated that the ''daily basis'' requirement will place an undue hurdle on veterans otherwise eligible for PCAFC. Another commenter opined that the definition is too restrictive, particularly as a veteran with ''severe TBI may have symptoms that affect their function in a major way, but does not require assistance with functioning every day,'' which does not diminish their need for caregiving on a regular basis. Additionally, commenters questioned how we would operationalize this definition, as individuals may have daily a potential need for supervision, protection, or instruction but intervention may only be required a few times a week.

As indicated in the proposed rule, we would define need for supervision, protection, or instruction to mean an individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis. 85 FR 13363 (March 6, 2020). We revised the definition because we found the term ''need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' and its definition unduly restricted our ability to consider all functional impairments that may impact a veteran's or servicemember's ability to maintain his or her personal safety on a daily basis. Id. Contrary to some of the comments, it was not our intent to narrow and restrict eligibility with this change, and we believe that these revisions will broaden the current criteria since it will no longer be limited to a predetermined list of impairments. Additionally, the revised definition will be consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. Id. at 13364.

As we indicated in the proposed rule, ''[w]hether a veteran or servicemember would qualify for PCAFC on this basis would depend on whether his or her functional impairment directly impacts the individual's ability to maintain his or her personal safety on a daily basis.'' Id.

Some commenters raised concerns about the reference to ''daily'' in this definition, and we agree that additional clarification is needed. While ''daily basis'' in the definition refers to the individual's ability to maintain personal safety, most individuals determined to qualify on this basis will also require personal care services from a caregiver on a daily basis. The proposed rule was not clear in this regard, but it did allude to such individuals requiring personal care services on a daily basis. For example, we explained that a veteran or servicemember meeting this definition may not need supervision, protection, or instruction continuously during the day, but would need such personal care services on a daily basis, even if just intermittently each day. See 85 FR 13364 (March 6, 2020). This requirement for daily personal care services under the definition of ''need for supervision, protection, or instruction'' was also referenced in the context of explaining the definition of inability to perform an ADL, which does not require the veteran or servicemember need daily personal care services. See id. at 13361.

By focusing the definition of need for supervision, protection, or instruction on individuals who require personal care services on a daily basis, we will help ensure that PCAFC targets eligible veterans with moderate and severe needs. While we acknowledge that veterans with needs at a lower level may also benefit from the assistance of another individual, we believe PCAFC was intended to support those with moderate and severe needs. For applicants that apply to PCAFC and do not qualify, VA will assist the applicant in identifying and making referrals to other available resources that may meet their needs. Thus, we do not believe that the ''daily basis'' requirement in the definition creates an ''undue hurdle''. Also, as we explained above, we are broadening the definition beyond a predetermined list of impairments, which will remove an existing barrier for many veterans and servicemembers who would meet the definition of need for supervision, protection, or instruction but do not have one of the listed impairments in the current regulation.

As part of this discussion, we would like to further correct and clarify the meanings of daily and continuous for purposes of the terms need for supervision, protection, or instruction, and unable to self-sustain in the community, respectively. We note that those who have a need for supervision, protection, or instruction on a continuous basis would meet the definition of unable to self-sustain in the community for purposes of the monthly stipend payment.

The terms daily and continuous relate to the frequency with which intervention is required in order to maintain an individual's personal safety that is directly impacted by his or her functional impairment. PCAFC is a clinical program and as such the determination of whether the frequency of intervention is daily or continuous is a clinical decision. Clinical decision making is highly individualized based on the specific needs of the individual

veteran or servicemember. As previously stated, it is important to note that when we evaluate veterans and servicemembers for PCAFC, we make a clinical determination that is comprehensive and holistic, and based on the whole picture of the individual. Factors VA will consider when evaluating the frequency of intervention required, specifically daily or continuous, include the factors set forth in 38 U.S.C. 1720G(a)(3)(C)(iii)(II) and (III), that is, the ''extent to which the veteran [or servicemember] can function safely and independently in the absence of such supervision, protection, or instruction,'' and the ''amount of time required for the family caregiver to provide such supervision, protection, or instruction to the veteran [or servicemember].''

In addition to frequency, VA determinations of whether a veteran or servicemember is in need of supervision, protection, or instruction, and whether such need is on a continuous basis for purposes of the higher-level stipend, which are clinical determinations, also account for the degree of intervention required to support the safety of the veteran or servicemember. Individuals whose functional impairment directly impacts their personal safety on a daily basis generally require at least one active intervention each day. In contrast to passive interventions that may include the mere proximity of a caregiver, active intervention requires the caregiver to be actively involved and engaged in providing supervision, protection, or instruction. Whether the need is daily or continuous will also depend on the individual's demonstrated pattern of need.

For example, an eligible veteran with moderate cognitive impairment may need a Family Caregiver to provide step-by-step instruction when dressing in the morning and in the evening. Such active intervention is required on a daily basis, takes a finite amount of time, and the veteran can maintain their personal safety without additional active interventions from a caregiver for the remainder of the day. This veteran may be found to meet the definition of ''need for supervision, protection, or instruction.'' In contrast, an eligible veteran with advanced cognitive impairment may require supervision, protection, or instruction on a daily basis due to the need for step-by-step instruction in dressing each morning and because of a demonstrated pattern of wandering outside the home at various times throughout the day. In this example, the Family Caregiver would provide step-by-step instruction for dressing each morning, which is a planned intervention. In addition, because of the demonstrated pattern of wandering outside the home at various and unpredictable times, the veteran cannot function safely and independently in the absence of a caregiver. The Family Caregiver actively intervenes through verbal and physical redirection multiple times during the day. This veteran would have a continuous need for an active intervention to ensure his or her daily safety is maintained. Such veteran may meet the definition of unable to self-sustain in the community because of a need for supervision, protection, or instruction on a continuous basis.

We make no changes based on these comments.

One commenter expressed concern that the proposed definition would exclude from PCAFC veterans who require minimal assistance with supervision and provided an example of a veteran who can be alone, but would need to call his or her caregiver to be talked down when they begin to spiral or have an episode. As previously explained, we are standardizing PCAFC to focus on eligible veterans with moderate and severe needs. If a veteran or servicemember does not have a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis (or have an inability to perform an ADL), they would not qualify for PCAFC. In addition, the definition of in need of personal care services specifies that the eligible veteran requires in-person personal care services, among other requirements. We note that PCAFC is intended to focus on veterans with moderate and severe needs who need the assistance of a Family Caregiver, and is not intended to be a program for individuals who may only need a minimal amount of assistance. Further, this definition is not intended to cover the potentiality that someone may have a need for supervision, protection, or instruction at some point in the future, but rather instead is meant to cover those servicemembers and veterans who have a demonstrated pattern of having a need for supervision, protection, or instruction.

For individuals who do not meet these requirements, including an individual who does not require in-person personal care services but instead requires only minimal assistance through an occasional or even daily phone call, there may be other VA health care programs and services that would help meet their needs and those of their caregivers. VA offers a menu of supports and services that supports caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of eligible veterans through PGCSS including access to CSCs located at every VA medical center, a caregiver website, training and education offered online and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA's Caregiver Support Line.

We are not making any changes based on this comment.

Several commenters raised concerns about how this definition incorporates mental health conditions, cognitive impairments, and ''invisible injuries'' (*e.g.,* TBI, PTSD, mental illness), particularly related to veterans with conditions that may not meet the definition of inability to perform an ADL. As we stated in the proposed rule, determining eligibility on the basis of this definition would not focus on the individual's specific diagnosis or conditions, but rather whether the veteran or servicemember has impairment in functioning that directly impacts the individual's ability to maintain his or her personal safety on a daily basis and thus requires supervision, protection, or instruction from another individual. 85 FR 13364 (March 6, 2020). We further provided examples to include an individual with schizophrenia who has active delusional thoughts that lead to unsafe behavior, and an individual with dementia who may be unable to use the appropriate water temperature when taking a bath and may thus require step-by-step instruction or sequencing to maintain his or her personal safety on a daily basis. Individuals with TBI or mental health conditions may also qualify for PCAFC on this basis. For example, a veteran or servicemember with TBI who has cognitive impairment resulting in difficulty initiating and completing complex tasks, such as a grooming routine, may require step-by-step instruction in order to maintain his or her personal safety on a daily basis. Additionally, eligibility on the basis of this definition may result from multiple conditions or diagnoses. Therefore, we believe this definition incorporates mental health conditions, cognitive impairments, and ''invisible injuries'' (*e.g.,* TBI, PTSD, mental illness). We are not making any changes based on these comments.

One commenter was specifically concerned that an individual with

dementia who is forgetful or misplaces items but can adapt and manage successfully without compromising his or her personal safety on a daily basis may not qualify for PCAFC under this definition. Another commenter inquired into whether an individual who is 100 percent service-connected disabled due to PTSD will qualify under this definition if the individual does not meet the inability to perform an ADL definition. Relatedly, this commenter stated that this definition needs to be better defined for mental health conditions or cognitive impairments when that person does not have a specific ADL deficit. As explained above, eligibility on this basis is focused on whether the veteran or servicemember has an impairment in functioning that directly impacts the individual's ability to maintain his or her personal safety on a daily basis and thus requires supervision, protection, or instruction from another individual, rather than a specific diagnosis or condition. The definition of ''need for supervision, protection, or instruction'' is consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. Thus, for an individual who is forgetful or misplaces items but does not have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis (and who is not determined to be in need of personal care services based on an inability to perform an ADL), there may be other VA programs and resources available to meet the individual's needs. An individual with 100 percent service-connected disability due to PTSD may be eligible under this definition if the individual has a functional impairment that directly impacts his or her ability to maintain his or her personal safety on a daily basis. We are not making any changes based on these comments.

Several commenters requested VA provide clarification about this definition, including a commenter who noted that this definition is vague. One commenter suggested that VA define the terms ''on a daily basis, even if just intermittently each day'' and ''ability to maintain his or her personal safety'' to ensure consistent implementation. One commenter asserted that VA proposed no objective criteria for supervision, protection, or instruction, and another commenter suggested that VA failed to provide an objective operational definition of need for supervision, protection, or instruction. One commenter indicated that while the supervision, protection, and instruction standards need to be more inclusive, they set up a point of confusion in what elements are to be considered and not considered. This commenter further asserted that any assessment tool used to determine PCAFC eligibility would have to define the elements considered for supervision, protection, and instruction, and asked why VA did not define those elements in the regulation. Another commenter asserted that although the characterization of being unable to self-sustain in the community is relatively clear, it appears likely that eligibility for the lower tier stipend will be contentious for both VA and veterans' families, and the definition of need for supervision, protection, or instruction should be clarified further if the program is to serve its targeted population. Furthermore, the commenter asserted that VA's explanation that a veteran or servicemember meeting this criterion may only need such personal care services intermittently each day opens the door to a variety of interpretations and increases the potential for complex and time-consuming eligibility decisions. The commenter also questioned if a caregiver reminding one's spouse that he or she has an upcoming appointment constitutes instruction and if it should be considered indicative of a severe impairment in functioning, in the absence of any objective cognitive deficits.

First, we disagree with the commenters who believe that this definition is vague. While we broadened this definition to remove the predetermined list of functional impairments associated with ''need for supervision or protection based on symptoms or residuals of neurological or other impairment of injury,'' so that ''need for supervision, protection, or instruction'' can cover more diagnoses and conditions, we believe the revised definition is specific enough to allow us to make objective determinations about whether a veteran or servicemember has a need for supervision, protection, or instruction, consistent with the authorizing statute and intent of PCAFC. When assessing personal care needs, VA will assess and document the support the veteran or servicemember needs to maintain personal safety, if such needs exist, and the frequency with which he or she requires interventions by the caregiver. This will include consideration of, among other factors, the veteran's or servicemember's functional ability as it relates to such things as: Medication management, self-preservation, safety, and self-direction. We recognize this is not a comprehensive list of functions in which a veteran or servicemember may experience impairment. We also note that the reasons a functional impairment will directly impact an individual's ability to maintain his or her personal safety on a daily basis will vary (*e.g.,* due to memory loss, delusion, uncontrolled seizure disorder). How an individual's ability to maintain his or her personal safety is impacted by his or her functional impairments will vary based on those impairments and diagnoses. In the regulation, we would not list the elements to be considered as doing so could potentially be more restrictive than intended. These are clinical decisions that are dependent on each individual's unique situation and it would be impractical for the regulation to list and account for every functional impairment that may directly impact an individual's ability to maintain his or her personal safety on a daily basis. As explained above, we would require that a veteran or servicemember have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis, but the type, degree, and frequency of intervention may vary.

We would not define the terms ''on a daily basis, even if just intermittently each day'' and ''ability to maintain his or her personal safety'' because this a clinical program, and how these criteria are met will vary based on each veteran's or servicemember's unique situation. The phrase ''on a daily basis, even if intermittently each day'' in the proposed rule was used to clarify that a veteran or servicemember may require supervision, protection, or instruction when completing certain tasks but may not require a caregiver to be present the remainder of the day. We further refer the commenters to the earlier discussion in this section regarding VA's clinical assessment of whether a veteran or servicemember has a need for supervision, protection, or instruction, and whether such need is continuous for purposes of the definition of ''unable to self-sustain in the community.''

We provided many examples in the proposed rule to explain the phrase ''ability to maintain his or her personal safety,'' and added a further example above regarding an individual with TBI. These examples were provided to illustrate situations in which a veteran or servicemember may require another individual to provide supervision, protection, or instruction to ensure the veteran or servicemember is able to maintain his or her personal safety on a daily basis.

Furthermore, we provided examples of when an individual may not be in

need of supervision, protection, or instruction, to include ''an individual with dementia who is forgetful or misplaces items but can adapt and manage successfully without compromising his or her personal safety on a daily basis (*e.g.,* by relying on lists or visual cues for prompting).'' 85 FR 13364 (March 6, 2020). We also note that a veteran whose only need from a caregiver is to be reminded of appointments or to take medications, would likely not be determined to be in need of personal care services based on a need for supervision, protection, or instruction, as that alone would not demonstrate that the veteran or servicemember requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements would be required, based on a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis.

We make no changes based on these comments.

One commenter took issue with VA combining 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) under one term and asserted that retaining the previous basis of ''need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' and its associated definition and adding a new definition for ''need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired'' would better align with Congressional intent. Relatedly, one commenter stated that VA did not provide data, or sufficient information and analysis to justify combining clauses (ii) and (iii) of 38 U.S.C. 1720G(a)(2)(C). This commenter asserted that this definition is incongruent with the plain reading of the law and Congressional intent, which the commenter stated requires VA utilize at least three separate eligibility criteria to serve as the bases upon which a veteran or servicemember can be deemed in need of personal care services.

As indicated in the proposed rule, we believe that the current definition for ''need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' unduly restricts VA's ability to consider all functional impairments that may impact a veteran's or servicemember's ability to maintain his or her personal safety on a daily basis. Additionally, it is VA's intent to broaden the current criteria by removing the predetermined list of impairments, such that veterans and servicemembers with impairments not listed in the current definition who may otherwise meet the definition of need for supervision, protection, or instruction may be eligible for PCAFC. This change will allow us to consider additional impairments that are not listed in the current definition. Additionally, as we explained in the discussion on the definition of inability to perform an ADL, it may be the assistance needed for an ADL that results in a need for supervision, protection, or instruction.

We disagree with the commenters that combining clauses (ii) and (iii) of 38 U.S.C. 1720G(a)(2)(C) is not consistent with the statute and Congressional intent. As we explained in the proposed rule, we combined these two bases for PCAFC eligibility because we believe these two bases capture the personal care service needs of veterans and servicemembers with a significant cognitive, neurological, or mental health impairment, as opposed to an inability to perform an ADL, which covers physical impairments. 85 FR 13363 (March 6, 2020). We sought input from the public on how to differentiate and define these two bases in a **Federal Register** Notice that was published on November 27, 2018. See 83 FR 60966 (November 27, 2018). We also held meetings with various stakeholders from February through May of 2019. We appreciate the feedback we received from these efforts. However, we did not receive any meaningful recommendations in addition to what we had identified and considered internally for defining these bases. We were unable to distinguish them in a meaningful way and determined that the most logical approach was to broaden the current definition of ''need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' under a new term that would also capture veterans and servicemembers who have ''a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired.'' We further note that in response to this proposed rule, while some commenters objected to combining these two bases, no specific recommendations or suggestions on how to define and distinguish these two bases were submitted. We make no changes based on these comments.

Primary Care Team

In the proposed rule, we proposed to revise the definition of ''primary care team'' to mean one or more VA medical professionals who care for a patient based on the clinical needs of the patient. We also proposed to remove the reference to the primary care team in various sections, including current §§ 71.20(c) and (d), 71.20(g), 71.25(c)(1)–(2), 71.25(f), and 71.40(b)(2). Instead, we would reference primary care team in one section, § 71.25(a)(2)(i), to state that PCAFC eligibility evaluations being performed in collaboration with the primary care team to the maximum extent practicable.

We received comments on the definition of primary care team, the role of the primary care team in PCAFC processes, and the centralized eligibility and appeals teams, which are addressed below.

Primary Care Team Definition

We received multiple comments stating that the proposed definition of ''primary care team'' is too broad and requested that the definition remain the same or be more specific with regard to which type of VA medical professional would serve on the primary care team for a veteran or servicemember. Specifically, the commenters raised concerns that the proposed definition would not require the primary care team to include a physician, nurse practitioner, or physician assistant to oversee the care of the veteran or servicemember but rather would allow any medical professional who is licensed or certified to provide health care services such as nurses, hospice workers, emergency medical technicians, optometrists, social workers, clinical dietitians, occupational or physical therapists, and other trained caregivers. Commenters asserted that the lack of specificity would result in no requirement for any type of medical evaluation encounter to determine if personal care services are medically necessary during the evaluation of the joint application, and referred to evaluation and management guidelines that require services to be rendered by a physician or other qualified health care professional who may report evaluation and management services. We address these comments below.

We appreciate the comments and agree that the proposed definition was not specific enough. As indicated in the proposed rule, our intent was to expand the definition to account for veterans and servicemembers who ''receive their primary care in the community and may only utilize VA for a portion of their care, such as mental health or specialty services.'' 85 FR 13365 (March 6, 2020). However, it was not our intent to imply that the primary care team may be

comprised of any medical professional (*e.g.,* nurses, hospice workers, emergency medical technicians) in the absence of a physician, advanced practice nurse, or a physician assistant. Additionally, after reviewing the comments, we agree with their concerns that we should maintain the reference to a primary care provider. Therefore, we are revising the definition of primary care team to mean ''one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant.'' We make no further changes based on these comments.

Multiple commenters asserted that the removal of the phrase ''provider who coordinates the care'' is contradictory and is not aligned with existing VA national policy. One commenter asserted that ''responsibility for coordination of care must reside with a primary care provider or team of providers,'' and suggested that one mechanism to facilitate this coordination is through the establishment of an information system that can be accessed by providers in the same or different locations that provides a record on each enrollee to include his or her socio-demographic characteristics, a minimum data set on all clinical encounters and an identifier that permits linkage of the individual's encounter data over time. Commenters further expounded that primary care is the day-to-day health care given by a health care provider and that the provider typically acts as the first contact and principal point of continuing care for patients within a health care system and coordinates other specialty care.

As we explained in the proposed rule, we would remove this phrase, ''provider who coordinates the care,'' because it can lead to misinterpretation, and it does not specify whether the care coordinated is specific care to PCAFC or all of the eligible veteran's care coordination needs. 85 FR 13365 (March 6, 2020). Additionally, because of the role that the primary care team plays in coordinating an eligible veteran's care, we believe continuing to include this language would be unnecessary and redundant. Additionally, as explained above, we are revising the definition to include a requirement that a VA primary care provider who is a physician, advanced practice nurse or physician assistant must be on the team; thus the commenters' concerns regarding the removal of the phrase ''provider who coordinates the care'' because a primary care provider is responsible for care coordination is moot. Furthermore, VA has an electronic medical record system that allows VA providers from multiple locations to access a patient's medical record. To the extent the commenter is suggesting we build a medical record system specific for PCAFC, we believe this is beyond the scope of this rulemaking. We are not making any changes based on these comments.

Multiple commenters asserted that the proposed definition does not align with industry standards such as the American Medical Associations (AMA) Code of Medical Ethics and the American Academy of Family Physicians, particularly as it does not clearly define the prescribing authority for a VA medical professional. We appreciate the commenters concerns; however, the definition of primary care team is only used for purposes of part 71, and not for the general provision of health care at VA. Additionally, there are multiple definitions for primary care teams in health care. Therefore, we do not believe VA has a requirement to align the definition of primary care team with industry or other federal or non-federal programs. We make no changes based on these comments.

Several commenters expressed concern that the proposed definition is inconsistent with VA's provision of care in the community. One commenter asserted that the definition does not align with VA's statutory requirements to accommodate veterans and servicemembers who may receive care in the community. One commenter asserted that VA has not consulted with non-VA treating physicians when making eligibility determinations and that given pending legislation that is likely to expand fee-for-service programs and third-party providers, it is imperative that VA primary care teams consult these doctors and utilize their assessments. The same commenter noted that they do not believe non-VA providers should determine eligibility; but rather PCAFC must consult with clinicians who are actually treating the veteran or servicemember.

First, we note that, as explained above, we are revising the definition to require that a VA primary care provider must be on the team; however, we removed ''VA'' from the phrase ''one or more medical professionals'' which we believe allows other medical professionals (including non-VA medical professionals) who care for the patient based on the clinical needs of the patient, to be part of the team. We believe this definition is inclusive of veterans or servicemembers who receive care in the community, and thus is consistent with our statutory authority.

We further note that neither the veteran's VA primary care provider nor his or her non-VA provider would determine PCAFC eligibility; CEATs will determine eligibility for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community. Clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. This information will be provided to the CEATs for use in making eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for purposes of PCAFC. The CEAT will be composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the determinations of eligibility and the criteria for the higher-level stipend. We believe the use of CEATs will improve standardization in eligibility determinations across VA. While primary care teams will not collaborate directly with the CEAT on determining eligibility, documentation of their input in the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEAT to help inform eligibility determinations for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. Any documentation from a non-VA provider that the veteran or servicemember provides will be available to VA for purposes of PCAFC evaluation and eligibility determinations. We are not making any changes based on these comments.

Role of Primary Care Team in PCAFC Processes

Many commenters raised concerns that these changes relating to the primary care team will reduce or eliminate the important role of a veteran's team of medical professionals in PCAFC processes, and instead rely on a single medical provider who may not have full knowledge of a veteran's medical needs, medical history, or involvement in a veteran's treatment, especially as this can lead to inconsistencies in PCAFC determinations. Some commenters allege this would be inconsistent with and exceed VA's authority under 38 U.S.C. 1720G. Commenters were also concerned that a veteran's medical evaluation will be performed by a professional who is ill-equipped to

correctly assess the veteran, especially when determining when a veteran has an inability to perform ADLs.

Some commenters raised concerns about the removal of primary care team specifically from various paragraphs in §§ 71.20 and 71.25. These concerns included a fear that it will give VA too much flexibility in determining who will conduct eligibility assessments, it will provide too much deference to non-medical personnel who do not have the qualifications of the medical practitioners on the primary care team, will result in medical professionals making eligibility determinations outside the scope of their practice, will provide the CSCs and uninvolved parties who do not treat the veteran or servicemember with too much discretion, and will create inconsistencies. Additionally, one commenter asserted that VA did not provide justification for why it would be more appropriate to remove the primary care team from the eligibility assessment process. Relatedly, several commenters disagreed with VA's claim that current references to the primary care team are unclear. However, one of those commenters agreed that authorizations by the primary care team have not been applied consistently between facilities.

We address these comments below.

As we explained directly above and based on the comments received, we are revising the primary care team definition to mean ''one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant.'' As Congress did not provide a definition for primary care team in 38 U.S.C. 1720G, we define the term as previously described, which we believe is rational and reasonable for purposes of PCAFC. This definition, as revised in this final rule, will ensure that those medical professionals, including a VA primary care provider, who care for the veteran and have knowledge of the veteran's needs and treatments, are part of the primary care team and have the opportunity to provide input into determinations of whether the veteran or servicemember is eligible for PCAFC.

As explained previously in this section, clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. The CEAT, composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend, will use those evaluations to inform PCAFC eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community. While primary care teams will not collaborate directly with the CEAT on determining eligibility, including whether the veteran is determined to be unable to self-sustain in the community, documentation of their input with the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEAT to help inform eligibility determinations for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community. We believe the use of CEATs will improve standardization in eligibility determinations across VA. These teams will have access to the documentation of the evaluations conducted in order to inform eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. We also note that we will provide robust training and education to those staff conducting evaluations, and CEAT members who are determining eligibility. We further refer the commenters to our discussion on ''Staff training on eligibility determinations'' in the miscellaneous comments section of this rule.

We disagree with the commenters' assertion that we are eliminating the primary care team from PCAFC processes, which some allege is inconsistent with and exceeds our authority under 38 U.S.C. 1720G. The primary care team has not been entirely removed from eligibility determinations; rather as indicated in the proposed rule, instead of referencing the primary care team in various paragraphs of §§ 71.20 and 71.25, we will reference the primary care team in § 71.25(a)(2)(i) to indicate that PCAFC eligibility evaluations will be performed in collaboration with the primary care team to the maximum extent practicable. 85 FR 13364 (March 6, 2020).

We proposed to reference primary care team in § 71.25(a)(2)(i), to be consistent with 38 U.S.C. 1720G(a)(5), which requires that PCAFC applications be evaluated by VA in collaboration with the primary care team for the eligible veteran to the maximum extent practicable. As we explained in the proposed rule, this would ensure collaboration with the VA medical professionals involved in the patient's care during VA's evaluation of the joint application. Id. However, it may be appropriate to consider care requirements prescribed by providers other than the veteran's or servicemember's primary care team, such as a non-VA provider, or other appropriate individual or individuals in VA. We reiterate here that these changes would give us more flexibility in how we evaluate PCAFC eligibility and approve and designate Family Caregivers while also ensuring that joint applications are evaluated in collaboration with the primary care team of the veteran or servicemember to the maximum extent practicable, consistent with the authorizing statute. We make no changes based on these comments.

Several commenters also expressed general disagreement with the removal of primary care team from § 71.40(b)(2). Specifically, one commenter asserted PCAFC is proposing to fundamentally alter accepted medical standards for provision of primary care services, clinical staff conducting home visits have an ethical and legal responsibility to communicate directly the functional status and well-being of the eligible veteran directly to the eligible veteran's primary care team, and that such staff do not have the same qualifications as medical professionals in order to make medical determinations about the eligible veteran. The same commenter opined that VA must recognize that collaboration among providers which includes clinical staff conducting home visits is a desirable characteristic of primary care.

We disagree with the assertion that the removal of primary care team from § 71.40(b)(2) conflicts with accepted medical standards. As indicated in the proposed rule, it may not always be appropriate for the clinical staff conducting home visits to collaborate directly with the primary care team; however, collaboration will still occur with the primary care team either directly with the provider conducting wellness contacts or through intermediaries such as the CSC. We make no changes based on these comments.

Several commenters were critical of our implied belief that primary care teams are ''too close'' to veterans and their caregivers to provide unbiased eligibility determinations, while several commenters agreed with the removal of the primary care team from eligibility determinations because the primary care team may not oversee the eligible veteran's care and may not have a relationship with the eligible veteran. One commenter specifically opined that there is a conflict and danger of involving the primary care team in a

decision that has a financial consequence. The same commenter asserted that VA has historically separated VHA from VBA to ensure health care and benefits are not enmeshed with a provider's ability to provide quality care. We agree that requiring a primary care provider to make eligibility determinations that have a financial impact on a veteran or servicemember and his or her Family Caregiver, places them in an undesirable situation, and may have a negative impact on the provider-patient relationship. Thus, we believe that the use of CEATs to make eligibility determinations, as described above, will help preserve the veteran-provider relationship. We make no changes based on this comment.

One commenter generally disagreed with removing the reference to the primary care team maintaining the eligible veteran's treatment plan and opined that it does not align with the American Medical Association Code of Medical Ethics. We note that CSP does not have responsibility for the totality of the veteran's medical treatment plan, as that would still be maintained by the primary care team consistent with what we stated in the proposed rule. See 85 FR 13365 (March 6, 2020). We make no changes based on this comment.

Centralized Eligibility and Appeals Team (CEAT)

Several commenters opposed the use of CEATs and expressed concerns that it will be composed of individuals who are not medically qualified or providers not familiar with the veteran's history. Two commenters asserted that the use of CEATs is similar to a disability benefits review board. One commenter asserted that use of CEATs is contrary to health care standards for delivering medical care and standards for authorizing and certifying that personal care services are medically necessary. This same commenter referenced the requirements for an independent medical examination (IME) and explained that the goal of an IME may be to poke holes in a patient's story for purposes of evaluating a workers' compensation claim or disability benefits.

As previously discussed, the CEATs will be composed of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend. We note that the CEATs will receive training to conduct eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC; and we further refer the commenters to our discussion on staff training on eligibility determinations within the miscellaneous comments section of this rule. We believe the use of CEATs to determine eligibility for PCAFC will improve standardization in these determinations across VA. We make no changes based on these comments.

Serious Injury

VA received many comments on its proposed definition of serious injury, including VA's inclusion of any service-connected disability, regardless of whether it resulted from an injury, illness, or disease, and removal of the requirement that the serious injury renders the eligible veteran in need of personal care services. Most comments on VA's proposed definition, however, concerned VA's proposed requirement that the eligible veteran have a singular or combined service-connected disability rating of 70 percent or more, and suggested other potential measures for establishing a serious injury. These comments have been grouped accordingly and addressed in turn.

Many commenters supported VA's expansion of the term ''serious injury'' to include any service-connected disabilities, including illnesses and diseases, and we thank them for their comments. One commenter raised concerns that the definition does not address illnesses (*e.g.,* cancers, hypertension, hypothyroidism, parkinsonism, multiple sclerosis, amyotrophic lateral sclerosis (ALS)) that may prevent a veteran from carrying out ADLs or impede on their safety and welfare. This commenter urged VA to revise the definition to include such illnesses. Another commenter requested VA include service-connected diseases. We believe these commenters misunderstood VA's proposed definition, and we are not making any changes based on these comments. As indicated in the proposed rule, this definition will now include any service-connected disability regardless of whether it resulted from an injury or disease. Therefore, a veteran or servicemember with illnesses incurred or aggravated in the line of duty (*e.g.,* cancers, hypertension, hypothyroidism, parkinsonism, multiple sclerosis, ALS) may be eligible for PCAFC if he or she has a single or combined service-connected rating of 70 percent or more and meets the other applicable PCAFC eligibility criteria, including being in need of personal care services for a minimum of six continuous months based on an inability to perform an activity of daily living, or a need for supervision, protection, or instruction.

Several commenters opposed the change to the definition to include illnesses and diseases and asserted that doing so is improper and unfair. Commenters noted that many of these conditions will not be from injuries and may have occurred before service, were not in the line of duty, or may have been due to the veteran's own fault or misconduct. One commenter stated that only those who suffer true injuries should be eligible and that those should only be those injuries that were incurred in the line of duty. VA's proposed rule sets forth VA's rationale for deviating from the plain meaning of ''injury'' to include illnesses and diseases. Among other reasons set forth in the proposed rule, VA explained that this change is necessary to reduce subjective clinical judgement and improve consistency in PCAFC eligibility determinations and ensure that eligible veterans who served both before and after September 11, 2001 have equitable access to PCAFC. While Congress may have originally intended to focus PCAFC on the signature disabilities of veterans and servicemembers who served after September 11, 2001, the VA MISSION Act of 2018 expanded this program to veterans and servicemembers of earlier eras, and the signature disabilities of earlier conflicts include illnesses and diseases such as diseases presumed to be the result of herbicide exposure in Vietnam and other places, and chronic multi-symptom illness experienced by Persian Gulf veterans. VA believes caregivers of veterans and servicemembers with illnesses and diseases incurred or aggravated in the line of duty should benefit from PCAFC in the same manner as caregivers of veterans with injuries such as TBI or spinal cord injury. Thus, we believe the definition of serious injury for purposes of PCAFC should be as inclusive as possible by recognizing any service-connected disability. Additionally, this change will help to reduce inequities between veterans and servicemembers from different eras. To the extent commenters are concerned that a veteran could meet the serious injury requirement based on a disability not incurred or aggravated in line of duty or that resulted from the veteran's willful misconduct, we note that VA's definition of serious injury requires the veteran have a service-connected disability rated by VA. See 38 CFR 3.1(k) (defining ''[s]ervice-connected'') and 3.301 (addressing line of duty and misconduct). To the extent commenters opposed including service-connected

disabilities in the serious injury definition, we note that having an injury or disease incurred or aggravated in the line of duty in the active military, naval, or air service means the injury or disease is service-connected. See 38 U.S.C. 101(16) and 38 CFR 3.2(k). For purposes of PCAFC, service-connected disability ratings are the primary method we use to determine whether an injury was incurred or aggravated in the line of duty. We are not making any changes based on these comments.

Several commenters supported the removal of the language that required a connection between the need for personal care services and the serious injury and we thank them for their comments. One commenter disagreed with removing the language that ''couples'' the serious injury with the need for personal care services, as the ''particular injury should be the exact reason the [v]eteran requires a caregiver.'' This commenter expressed concern that this change will result in overburdening the program with false or undeserving cases and would be contrary to Congressional intent. Similarly, another commenter expressed concern that decoupling would greatly increase the number of veterans that will be eligible for this program.

As indicated in the proposed rule, many veterans have complex needs as a result of multiple medical conditions, and we find this even more true among older veterans. The complexity of assessing each specific medical condition and whether it renders the veteran or servicemember in need of personal care services has resulted in inconsistency in how ''serious injury'' is interpreted. We believe this inconsistency would be exacerbated as PCAFC expands to the pre-9/11 population. For example:

[A]n individual may have leg pain due to a service-connected spinal cord injury but be able to manage his or her symptoms. After a number of years, the individual is diagnosed with diabetes unrelated to his or her military service. Over time, the individual develops neuropathy in his or her lower extremities, which results in the individual being unable to complete his or her ADLs independently. The onset of neuropathy could be related to either the spinal cord injury or diabetes. This example illustrates the difficulty of these clinical decisions because the determination of whether the onset of neuropathy is related to the qualifying serious injury or the illness unrelated to military service would be a subjective clinical determination. 85 FR 13369 (March 6, 2020). Therefore, we believe it is necessary to decouple serious injury from the need for personal care services. We also recognize that this ''decoupling'' will expand PCAFC eligibility, thus increasing participation in PCAFC.

Furthermore, we disagree with the commenter's assertion that this decoupling would be contrary to Congressional intent as the ''serious injury'' criterion and ''need for personal care services'' requirement are separate under 38 U.S.C. 1720G(a)(2)(B) and (C), as VA articulated in its 2011 Interim Final Rule. 76 FR 26150 (May 5, 2011) (''the statute does not clearly state that the need for personal care services must relate to the 'serious injury' required under section 1720G(a)(2)(B)''). Rather serious injury was coupled with the need for personal services through VA's regulations based on VA's interpretation of the overall purpose and language of the statute as it was originally enacted. Id. However, as explained above, we no longer believe the coupling of serious injury and the need for personal care services is reasonable. This is especially true as we expand to older veterans from earlier service eras whose clinical needs are even more complex. Moreover, expanding this definition will not exclude veterans and servicemembers whose needs for personal care services stem from an injury incurred or aggravated in the line of duty in the active military, naval, or air service. We are not making any changes based on these comments.

VA received numerous comments about its proposed reliance on a single or combined service-connected disability rating of 70 percent or more in establishing whether an eligible veteran has a serious injury. In the discussion that follows, we have grouped comments that opposed VA's use of a service-connection rating in general or expressed concern about the different purposes of PCAFC and VA disability compensation, and those that opposed the use of the 70 percent threshold specifically or suggested other alternatives.

Several commenters opposed use of a service-connected rating to determine PCAFC eligibility by asserting that doing so is contrary to Congressional intent, particularly as the statutory authority does not require a minimum rating, or contending that a service-connected rating is not an appropriate consideration for determining whether a veteran or servicemember requires personal care services from a Family Caregiver. One commenter requested VA eliminate this requirement because the statute does not provide VA with authority to curtail specified eligibility. Two commenters asserted that eligibility was intended to be based on a clinical determination of a veteran's need, which is not a rating decision adjudicated by a non-health care professional at the Veterans Benefits Administration, and this should not be left to an administrative process entirely separate from VHA. Relatedly, another commenter stated that VA should not suggest to the public that the 70 percent rating is an objective ''clinical standard'' associated with an applicant's potential need for personal care services. Another commenter was similarly concerned about use of a disability rating since disability compensation is intended to compensate for loss of ability of veteran to earn income by working which is different than the intent of PCAFC. Relatedly one commenter noted that service connection and injury are two separate things and urged VA to keep the definition as it currently is. Another commenter noted that the veteran should be looked at ''on the whole'' by a clinician.

VA acknowledges that 38 U.S.C. 1720G does not set forth a specific service-connected disability rating as a minimum requirement to establish PCAFC eligibility, and that imposing one through this rulemaking is a departure from the position taken by VA in its January 9, 2015 Final Rule. However, VA's proposed definition is a reasonable interpretation of the statutory requirement that an eligible veteran has an injury that is serious, particularly in the context of other changes VA is making to the definition of serious injury.

Heretofore, the only meaning applied to establish whether an injury was serious was that the injury render the eligible veteran in need of personal care services. VA's proposed rule explained why it is necessary to ''decouple'' these requirements as PCAFC expands to veterans of earlier eras (as discussed above), but doing so removed the only guidance informing the meaning of whether the eligible veteran's injury was serious. Therefore, VA must replace the definition with some standard that distinguishes a ''serious injury'' from an ''injury'' to give effect to the statutory requirement. *Williams* v. *Taylor,* 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

In considering how to define ''serious injury'' for purposes of PCAFC, VA sought to impose a definition that would be easily understood by veterans and caregivers and consistently applied by VA. A specific service-connected disability rating threshold serves those purposes. As noted by one commenter in support of VA's proposed definition, ''disability ratings are a more common

standard used for eligibility across other VA programs.'' Establishing an objective baseline for PCAFC eligibility will increase transparency and assist the program in adjudicating applications efficiently.

VA agrees that the purpose of disability compensation is quite different than the purpose of providing benefits to Family Caregivers under PCAFC, and it was not VA's intent to suggest that a single or combined 70 percent service-connected disability rating establishes or suggests a need for personal care services from a Family Caregiver. On the contrary, many veterans with disability ratings of 70 percent or higher are fully independent and able to function in the absence of support from a caregiver. Instead, a single or combined service-connected disability rating of 70 percent or more serves as an objective standard to determine whether an eligible veteran has a ''serious injury . . . incurred or aggravated in the line of duty in the active, military, naval, or air service'' and thereby demonstrates that a veteran's or servicemember's disability or disabilities rise to the level of serious. Other criteria in part 71 will establish a veteran's or servicemember's need for personal care services (*i.e.,* whether the veteran or servicemember is ''in need of personal care services . . . based on [a]n inability to perform an activity of daily living; or . . . [a] need for supervision, protection, or instruction''). We note that approximately 98 percent of the current PCAFC population across all three tiers have a 70 percent or higher service-connected disability rating, and would meet this definition of serious injury. VA agrees that applicants should be looked at holistically by clinicians considering PCAFC eligibility, and will work to ensure that practitioners determining PCAFC eligibility are trained to understand that ''serious injury'' is only one component of the PCAFC eligibility criteria. We are not making any changes based on these comments.

Several commenters expressed concerns about the ability of veterans and servicemembers without VA disability ratings or with VA disability ratings less than 70 percent to obtain an expedited review of their claims and appeals in order to qualify for PCAFC. Several commenters were particularly concerned about how delays in processing claims and appeals will impact veterans applying for PCAFC, and how this rating requirement will impact the processing of claims and appeals, particularly in light of backlogs and delays in processing such claims and appeals. One such commenter suggested that without a plan to expedite claims for individuals applying to PCAFC, VA would be imposing a roadblock to timely admission into PCAFC, and that bureaucracy and red tape should never be a barrier to a veteran's ability to receive needed in-home care. One commenter expressed concern that the proposed rule did not provide any data or analysis about how the claims and appeals process will impact the administration of this requirement, and urged VA to establish an expedited VBA claims and appeals process for veterans submitting a joint application for PCAFC.

VA agrees with the commenters and acknowledges that this requirement may result in some delays in adjudicating PCAFC eligibility; however, we do not believe these concerns outweigh the advantages of this approach that are outlined above and in VA's proposed rule. Furthermore, compensation claims processing time has continued to decrease over the years. Specifically, the average number of days to process a claim, as of March 2, 2020, was 78.5 days, compared to 91.8 days on October 1, 2018. We acknowledge that, as of July 4, 2020, the average number of days to process a claim has increased to 114.4 days. This increase was due to the COVID–19 national emergency and the inability to conduct in-person medical exams. However, we note that in-person medical exams have begun again. In addition, VA currently prioritizes certain compensation claims from any claimant who is: Experiencing extreme financial hardship; homeless; terminally ill; a former prisoner of war; more than 85 years old; became very seriously ill or injured/seriously ill or injured during service as determined by the Department of Defense; diagnosed with ALS or Lou Gehrig's Disease; or in receipt of a Purple Heart or Medal of Honor. In addition, VA has modernized its appeals process since February 19, 2019 to create different claims lanes (higher level reviews, supplemental claims, and appeals to the Board of Veterans' Appeals) that help ensure that claimants receive a timely decision on review when they disagree with a VA claims adjudication. We note that VA currently does not provide priority processing of disability compensation benefits for aid and attendance and other ancillary benefits such as a housebound benefit. As to whether claims can be expedited for PCAFC program applicants, VA does not have an already available method for collecting data on veterans to know whether or not they are also applying for PCAFC. Therefore, VA cannot currently prioritize disability compensation claims for PCAFC claimants, as doing so would be administratively challenging.

We also note that VA offers a menu of supports and services that supports veterans and their caregivers that may be available PCAFC applicants who are awaiting a VA disability rating decision. Such services include PGCSS, homemaker and home health aides, home based primary care, veteran directed care, and adult day care health care to name a few. We appreciate the commenters' concerns; however, we are not making any changes based on these comments.

One commenter expressed concern that many veterans from earlier eras of military service were not treated right by this country and the government, so they have not had interactions with VA and do not have a VA disability rating. We agree that veterans from earlier eras of military service have encountered challenging experiences with our government and VA. We believe expansion of PCAFC to eligible veterans who served before September 11, 2001 is one step to help remedy the challenges veterans from those eras have faced. Other changes to the definition of serious injury were designed to ensure PCAFC is inclusive of veterans from all eras by including all service-connected disabilities, regardless of whether they resulted from an injury, illness or disease, and removing the link between the serious injury and the individual's need for personal care services. We encourage veterans who do not yet have an existing relationship with VA to contact VA, through *www.va.gov,* your local VA location using the Find a VA Location on *www.va.gov,* or 844–698–2311, to find out about the services and benefits that may be available to them, including VA disability compensation, pension, and health care benefits. This is especially important for veterans and servicemembers seeking to qualify for PCAFC because in addition to requiring that an eligible veteran have a single or combined service-connected disability rating of 70 percent or more, the PCAFC eligibility criteria under § 71.20 also require the eligible veteran to receive ongoing care from a primary care team, which includes a VA primary care provider, or to do so if VA approves and designates a Family Caregiver. Thus, veterans and servicemembers would need to establish a relationship with VA (by obtaining a service-connected disability rating and receiving ongoing care from a primary care team) to qualify for PCAFC. We appreciate the commenter's concern; however, we are

not making any changes based on this comment.

Other commenters raised concerns about use of the 70 percent service-connected disability threshold specifically, as being either too high or too low, or suggested alternative bases for establishing whether an eligible veteran has a serious injury.

Numerous commenters were concerned that using a singular or combined service-connected disability rating of 70 percent was too high and arbitrary, and those with lower ratings may need assistance. Several commenters suggested VA lower the minimum rating requirement to 50 percent for consistency with the requirements for priority group one eligibility for purposes of enrollment in VA health care. One commenter asserted that Congress believed these veterans were of highest concern by assigning them to priority group one, and utilizing a threshold of 50 percent or more would allow more veterans with sustained serious service-connected disabilities to have access to PCAFC. A few commenters suggested revising the criterion to include any disabled veteran with a 50 percent or more service-connected disability rating that served prior to 1975. Relatedly, one commenter suggested using a rating of 60 percent based on the commenter's belief that this is the threshold for qualifying for no cost VA medical care and VA disability pension.

Other commenters asserted that using a 70 percent rating would expand the program beyond what Congress intended. Likewise, another commenter noted that a 70 percent rating is not difficult to achieve, and the need for a caregiver is not hard to prove, as these are normally granted because they are subjective.

In determining how to revise the definition of serious injury, VA considered other service-connected disability rating levels to establish whether an eligible veteran has a serious injury, but found a single or combined rating of 70 percent or more to be the best approach, as approximately 98 percent of current participants meet this requirement. Similarly, we note that one commenter that represents a veterans service organization conducted a survey of their ''warriors'' (*i.e.,* veteran members) and concluded that ''over 96 percent—2,333 out of 2,410 applicable warriors—of survey respondents enrolled in the PCAFC reported a service-connected disability rating of 70 percent or higher.''

We believe that a single or combined rating of 70 percent or more would demonstrate that a veteran's or servicemember's injuries rise to the level of serious, at least for purposes of establishing eligibility for PCAFC. While we understand that lower ratings are used to determine eligibility for various other VA services (*i.e.,* Priority Group 1 eligibility for VA health care), we reiterate that PCAFC is one of many services offered to veterans and servicemembers, as applicable, that are complementary but are not required to be identical in terms of eligibility requirements. VA considered applying a minimum service-connection rating lower than 70 percent, such as 50 percent or 60 percent, but determined, based on reviewing the rating criteria in 38 CFR part 4, that not every 50 or 60 percent rating may be indicative of a serious injury. Additionally, for the reasons set forth in the proposed rule and this final rule, we believe the threshold of 70 percent is a reasonable and appropriate interpretation of the ''serious injury'' requirement in 38 U.S.C. 1720G(a)(2)(B). Moreover,

> [a]s the Supreme Court has noted, ''[t]he 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.''' *United States R.R. Retirement Bd.* v. *Fritz,* 449 U.S. 166, 179 (1980) (quoting *Mathews* v. *Diaz,* 426 U.S. 67, 83–84 (1976)). Provided there is a legitimate basis for the general classification established by Congress or the agency, it is not arbitrary or capricious simply because it may be overinclusive or underinclusive on some applications. *See Weinberger* v. *Salfi,* 422 U.S. 749, 776 (1975) (''[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases'').
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> Brief for Respondent-Appellant at 15–16, *Haas* v. *Peake*, 525 F.3d 1168 (2008) (No. 2007–7037), 2007 U.S. Fed. Cir. Briefs LEXIS 1048, at 21–22.

VA also considered applying a minimum service-connected rating higher than 70 percent, such as 100 percent, but determined that would be too narrow and restrictive. For instance, a 70 percent rating for PTSD would require: Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: Suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships. 38 CFR 4.130 DC 9411. We believe that veterans who have symptomology that manifest to that level should not be denied admittance to the program on the basis that their injury or disease would not be considered ''serious,'' which would result if we used a service-connected disability rating higher than 70 percent. Furthermore, applying a 100 percent rating would result in approximately 40 percent of the current participants no longer being eligible because they would not meet that higher threshold.

VA elected not to apply different criteria to veterans and servicemembers depending on the date their serious injury was incurred or aggravated in the line of duty because this would be inequitable and would lead to treating eligible veterans differently based on their era of service. We are not making any changes based on these comments.

Another commenter noted that 70 percent is the rating required for nursing home care, but asserted that Congress considered and rejected limiting PCAFC to only those who would otherwise require nursing home care. We would like to clarify that although having a single or combined service-connection rating of 70 percent or more is one basis upon which eligibility can be established for VA nursing home care under 38 U.S.C. 1710A, we are not suggesting that the eligibility criteria for PCAFC and nursing home care are identical. As we noted in the proposed rule, there may be instances when nursing home care would be more appropriate for a veteran or servicemember than PCAFC. 85 FR 13369 (March 6, 2020). We are requiring a 70 percent or more service-connected disability rating because of the reasons stated in the proposed rule and additionally outlined above and note that it is the minimum threshold that must be met for PCAFC eligibility. As explained in the proposed rule and reiterated in this final rule, additional criteria must also be met before an individual is determined to be eligible for PCAFC. We are not making any changes based on this comment.

Several commenters raised concerns about potential abuse of the program by individuals who may not really need it but qualify, nonetheless. Similarly, one commenter asserted that the amount of service connection should not be considered because there are veterans with 100 percent service-connection ratings but do not need a caregiver. A

separate commenter who asserted that a 70 percent rating is not difficult to achieve, also indicated that the need for a caregiver is not hard to prove, and because eligibility determinations are subjective, benefits are normally granted. However, this commenter also raised concerns about how staff may review these determinations later and decide to remove participants from PCAFC.

First, we note that many of the changes we are making in this final rule are aimed at improving standardization and reducing subjectivity in PCAFC eligibility determinations. We agree that an eligible veteran's service-connection rating does not establish a need for personal care services from a Family Caregiver, and it was not VA's intent to suggest that it does. As indicated above, a single or combined 70 percent or more service-connected rating is just one component of the PCAFC eligibility determination. Separate eligibility criteria in § 71.20 would establish whether a veteran or servicemember is in need of personal care services (based on an inability to perform an activity of daily living or a need for supervision, protection, or instruction) and whether participation in PCAFC is in the veteran's or servicemember's best interest, among other criteria. Therefore, a veteran or servicemember would not be eligible for PCAFC solely for having a service-connected disability rating. Instead, the definition of serious injury will provide a transparent and objective standard for determining whether a veteran's or servicemember's injury is serious. Also, as indicated in the proposed rule, any changes to a veteran's or servicemember's service-connected rating that results in a rating less than 70 percent for a single or combined service-connected disability will result in the veteran or servicemember no longer being eligible for PCAFC. In such instance, the veteran or servicemember would be discharged in accordance with § 71.45(b)(1)(i)(A) for no longer meeting the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise (*e.g.,* no longer meeting the definition of serious injury). To the extent that commenters raised concerns about how staff may review these determinations later and decide to remove participants from PCAFC, we note that we will provide training to VA staff who are making eligibility determinations to ensure that the same criteria that are used to determine eligibility at the time of application are the same as those used during reassessments. We are not making any changes based on these comments.

One commenter was concerned about how VA would fund this program as a result of using this criterion, suggesting there must be millions of veterans with a 70 percent service-connected rating, and believed this funding could be better spent elsewhere (*e.g.,* on aging families affected by the COVID–19 national emergency). This same commenter was concerned that this criterion is excessive and would create dependency on VA. Thus, this commenter suggested limiting this program to 12 months per one's lifetime or conditioning PCAFC participation on the veteran subsequently participating in one of the other VA in-home care programs.

We thank the commenter for their concerns and refer them to the regulatory impact analysis accompanying this rulemaking for a detailed analysis of the estimated costs for this program. As noted previously, the serious injury requirement is only one criterion that must be met under § 71.20 for a veteran or servicemember to qualify for PCAFC. To the extent that this commenter is concerned that the criteria set forth in § 71.20 are too broad, we disagree. VA has tailored the eligibility criteria to target veterans and servicemembers with moderate and severe needs through new definitions for the terms ''in need of personal care services,'' ''inability to perform an activity of daily living,'' and ''need for supervision, protection, or instruction,'' in particular. PCAFC is a clinical program that addresses the unique needs of each eligible veteran and his or her caregiver which may change over time. Also, the potential for rehabilitation or independence among PCAFC eligible veterans will likely decrease as the program expands to veterans and servicemembers from earlier eras of military service who have more progressive illness and injuries, such as dementia or Parkinson's disease. Therefore, we do not believe limiting this program to a specific time period or mandating the use of other VA in-home care programs is appropriate. Furthermore, PCAFC is one of many in-home services that are complementary but not necessarily exclusive to one another. As a result, an eligible veteran and his or her caregiver may also participate in other home-based VA programs, such as home based primary care, respite care, and adult day health care, as applicable.

To the extent that this commenter is concerned that the criteria will create dependency, we note that we proposed, and make final, § 71.30 which establishes the requirement for reassessments of eligible veterans and Family Caregivers to determine their continued eligibility for participation in PCAFC under part 71. The reassessment includes consideration of the PCAFC eligibility criteria, including whether PCAFC participation is in the best interest of the veteran or servicemember. As proposed and explained previously in this rulemaking, ''in the best interest'' is a clinical determination that includes consideration of whether PCAFC participation supports the veteran's or servicemember's potential progress in rehabilitation, if such potential exists, and increases the veteran's or servicemember's potential independence, if such potential exists, among other factors. We believe that this reassessment process, which will occur annually (unless a determination is made and documented by VA that more of less frequent reassessment is appropriate), will reduce the risk of dependency in instances where the eligible veteran may have the potential for improvement. We are not making any changes based on this comment.

One commenter was supportive of including consideration of any service-connected disability and VA no longer requiring a connection between the need for personal care services and the qualifying serious injury, but recommended VA consider including in the definition of serious injury service-connected veterans in receipt of individual unemployability (IU), which the commenter described as a benefit reserved for veterans whose service-connected condition(s) is so severe as to render them unable to obtain and maintain ''substantially gainful'' employment. Section 4.16(a) of 38 CFR, establishes the requirements for IU (referred therein as schedular IU), which includes that the veteran have at least one service-connected disability rated at least 60 percent disabling, or have two or more service-connected disabilities, with at least one rated at least 40 percent disabling and a combined rating of at least 70 percent. According to the commenter, ''[t]here are numerous disabilities warranting IU that would require a [F]amily [C]aregiver to provide personal services to maintain the veteran's independence in his or her community.'' IU allows VA to pay certain veterans compensation at the 100 percent rate, even though VA has not rated his or her service-connected disabilities at that level. To qualify, a veteran must, in addition to meeting the service-connection rating requirements identified by the commenter, be unable

to secure or follow a substantially gainful occupation as a result of service-connected disabilities. We note that veterans who are unemployable by reason of service-connected disabilities but who fail to meet the requirements of § 4.16(a), may still qualify for IU based on additional consideration under § 4.16(b). Simply put, a veteran can be in receipt of an IU rating irrespective of a specific service-connected rating.

We do not find it appropriate to use IU as a substitute for the single or combined 70 percent rating as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and if VA were to create an exception to the ''serious injury'' requirement for individuals with an IU rating, VA would also need to consider whether other exceptions (based on disability rating criteria or otherwise) should also satisfy the ''serious injury'' requirement. In addition, IU has proven to be a very difficult concept to apply consistently in the context of disability compensation and has been the source of considerable dissatisfaction with VA adjudications and of litigation. Consequently, we choose not to import this rather subjective standard and its potential for inconsistency into the PCAFC program. As stated above, we believe the requirement that a veteran or servicemember have a single or combined service-connected disability rating of 70 percent or more is a reasonable and appropriate interpretation of the ''serious injury'' requirement in 38 U.S.C. 1720G(a)(2)(B). See Brief for Respondent-Appellant at 15–16, Haas, 525 F.3d 1168 (2008) (No. 2007–7037) (citing *Fritz,* 449 U.S. at 179 (concerning regulatory line drawing); *Weinberger,* 422 U.S. at 776).

One commenter recommended that VA add specific injuries and disabilities to the list of requirements for PCAFC which is similarly done for Special Home Adaptation (SHA) or Specially Adapted Housing (SAH) grants (*e.g.,* loss or loss of use of more than one limb, blindness, severe burns, loss or loss of use of certain extremities). The commenter further opined that a clear requirement could be that a veteran have a Purple Heart, an award of combat related special compensation, concurrent retirement and disability pay, a medical retirement/discharge, be a TSGLI recipient, or have a line of duty investigation for the injury. Relatedly, one commenter requested VA tie eligibility to award of the Purple Heart, as there are other programs available to veterans. As previously explained, having a serious injury is only one component of the PCAFC eligibility criteria, and the serious injury will no longer be tied to the veteran's or servicemember's need for personal care services. Therefore, we respectfully decline to include a specific list of injuries, disabilities, awards, or compensations that may suggest a need of personal care services. Moreover, because VA is expanding the definition of serious injury to include any singular or combined service-connected disability rated 70 percent or higher, regardless of whether it resulted from an injury, illness, or disease, it is not necessary to provide examples of potentially qualifying conditions. Doing so could cause unnecessary confusion by suggesting that listed conditions are somehow more applicable. Additionally, we believe limiting PCAFC eligibility to recipients of the Military Order of the Purple Heart would be too restrictive as it is associated only with combat injuries, such awards have historically discriminated against minorities and women, and recordkeeping on these awards has been inconsistent. Further, as indicated in the proposed rule, we considered the TSGLI definition of ''traumatic injury'' in defining serious injury; however, we determined it would be too restrictive and result in additional inequities, and noted the inherit differences between the two programs—TSGLI is modeled after Accidental Death and Dismemberment insurance coverage, whereas PCAFC is a clinical benefit program designed to provide assistance to Family Caregivers that provide personal care services to eligible veterans. We are not making any changes based on these comments.

One commenter recommended VA consider defining serious injury consistent with the definition of serious injury or illness contained in 29 CFR 825.127(c). We note this commenter is referring to the Department of Labor's (DOL) regulations for the Family and Medical Leave Act (FMLA). This definition is defined, in part, to mean: a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in PCAFC.

FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The section and definition referenced by this commenter relate specifically to when a military caregiver may use FMLA leave to care for a covered servicemember with a serious injury or illness. We note that FMLA is entirely different from PCAFC as FMLA protects workers when they need to take leave to care for certain family and medical reasons, while PCAFC is a clinical program that provides benefits to Family Caregivers. While DOL's definition of serious injury or illness includes veterans participating in PCAFC, we do not believe that requires us to adopt DOL's definition for purposes of defining serious injury in PCAFC. We note that the authorizing statutes (*i.e.,* 38 U.S.C. 1720G and 29 U.S.C. 2611) vary in how they define serious injury and serious injury or illness, respectively. We make no changes based on this comment.

One commenter recommended that in order to remain consistent with the definition of serious injury, VA must improve its education and communication about two of the most common conditions affecting veterans, specifically mild traumatic brain injury (mTBI or concussion) and PTSD. This commenter noted that a service-connected rating for a mTBI will not automatically confer a need for supervision, and that PTSD symptoms can be managed and even resolved completely; and explained that family care is a complement to, not a substitute for professional treatment and expertise. The commenter asserted that while a spouse can help a veteran work toward his or her mental health goals, and may be involved in treatment planning, relying on a spouse to manage a veteran's mental health symptoms is clinically inappropriate and cannot be the basis for acceptance into PCAFC.

First, we would like to clarify that participation in PCAFC is not meant to replace medical or mental health treatment and agree with the commenter that a Family Caregiver is not expected to provide such treatment, but rather required personal care services, for mTBI or PTSD. Further, part of the eligibility criteria for the program require the eligible veteran to receive ongoing care from a primary care team, which will help ensure the eligible veteran is engaged in appropriate care based on his or her clinical needs.

Second, as discussed above, the veteran's or servicemember's serious injury does not need to be related to his or her need of personal care services, which is separately considered (*i.e.,* whether the veteran or servicemember is ''in need of personal care services for a minimum of six continuous months based on . . . [a]n inability to perform an activity of daily living; or . . . [a] need for supervision, protection, or instruction''). Finally, we agree with the commenter that education and training is important for staff, eligible veterans and their Family Caregivers, and we note that we currently provide such training on many conditions, such as TBI, PTSD, and dementia. We will continue to provide a robust training plan for staff and PCAFC participants. Specifically, we will ensure that training on conditions, such as TBI, PTSD, and dementia will continue to be provided. We make no changes based on this comment.

Unable To Self-Sustain in the Community

Several commenters expressed confusion and concern about this definition and how it will be used to determine whether a Primary Family Caregiver will receive the lower- or higher-level stipend. We note that this definition will only be used in the context of § 71.40(c), Primary Family Caregiver benefits, and refer to the discussion of that section below regarding unable to self-sustain in the community.

§ 71.20 Eligible veterans and servicemembers

Two-Phase Eligibility Expansion

Multiple commenters disagreed with the phased eligibility expansion. They also opined that this phased eligibility expansion discriminated against pre-9/11 veterans, that pre-9/11 veterans should not be treated differently than post-9/11 veterans, that veterans from all eras require assistance from caregivers, and that PCAFC expansion for all pre-9/11 veterans should not be delayed and should be immediate to veterans from all eras. Many commenters expressed that they felt that veterans who served between May 8, 1975 and September 10, 2001 should not have to wait another two years to be part of the PCAFC expansion. One commenter asked if there was any way the two-year time frame for this group of veterans could be changed to a year or less. Also, commenters expressed that they would like to see veterans with a terminal illness or 100 percent disability rating be eligible for PCAFC immediately, irrespective of their service date, while another commenter suggested that immediate eligibility for PCAFC should be viewed on a case-by-case basis instead of service dates.

In response to the above comments, the initial eligibility distinction between pre- and post-9/11 veterans and servicemembers in the current program was mandated by Congress by the Caregivers Act, as established by 38 U.S.C. 1720G. Furthermore, as previously stated, the VA MISSION Act of 2018 further modified section 1720G by expanding eligibility for PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001. However, Congress mandated that this expansion occur in two phases. The first phase of expansion will include eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service on or before May 7, 1975, and will begin on the date the Secretary submits a certification to Congress that VA has fully implemented a required IT system that fully supports PCAFC and allows for data assessment and comprehensive monitoring of PCAFC. The second phase will occur two years after the date the Secretary submits certification to Congress that VA has fully implemented the required IT system, and will expand PCAFC to all eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service, regardless of the period of service in which the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. Therefore, we lack authority to eliminate the two-phase eligibility expansion and make the changes suggested by these comments. See 38 U.S.C 1720G(a)(2)(B).

Multiple commenters also expressed confusion as to when Vietnam veterans would be eligible for PCAFC and asked for clarification. Other commenters expressed confusion about when other pre-9/11 era veterans would be eligible for PCAFC and asked for clarification. One commenter asked if VA will use ''the same standard as the [Veterans Benefits Administration (VBA)] of having to serve at least one day during the time period.'' While the commenter did not provide any further detail as to this standard, we note that in the VBA context, similar language is found in various parts of VA's Adjudication Procedures Manual, M21–1, to include parts regarding eligibility determinations for pension, consideration of presumptive service-connection based on active duty for training and inactive duty for training, and jurisdiction of Camp Lejeune claims.

As previously explained, the authorizing statute, 38 U.S.C. 1720G, as amended by section 161 of the VA MISSION Act of 2018, bases eligibility for PCAFC, in part, on the date the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. 38 U.S.C. 1720G(a)(2)(B). In this regard, eligibility is not based only on the dates of active military, naval, or air service. Instead, it is focused on when the veteran or servicemember incurred or aggravated a serious injury in the line of duty while in the active military, naval, or air service. Currently, only those whose serious injury was incurred or aggravated in the line of duty in the active military, naval or air service on or after September 11, 2001, are eligible for PCAFC. 38 U.S.C. 1720G(a)(2)(B)(i). In the first phase of expansion (that will begin on the date the Secretary submits to Congress certification that VA has fully implemented the required IT system), those veterans and servicemembers will continue to be eligible for PCAFC, and additionally, those veterans and servicemembers who incurred or aggravated a serious injury in the line of duty in the active military, naval or air service on or before May 7, 1975 will also become eligible (subject to the other applicable eligibility criteria). 38 U.S.C. 1720G(a)(2)(B)(ii). Two years after the date the Secretary submits to Congress certification that VA has fully implemented the required IT system, all veterans and servicemembers, that otherwise meet eligibility criteria, including those who have a serious injury incurred or aggravated in the line of duty in the active military, naval, or air service after May 7, 1975 but before September 11, 2001, will be eligible for PCAFC (*i.e.,* May 8, 1975 to September 10, 2001). See 38 U.S.C. 1720G(a)(2)(B)(iii). We also note that because eligibility under 38 U.S.C. 1720G(a)(2)(B) is based on the date the serious injury was incurred or aggravated, and not merely on the dates of a veteran's or servicemember's service, we would not, nor would there be a need, to apply language that the veteran or servicemember serve ''at least one day'' during the time periods outlined above for eligibility for the first phase of the PCAFC expansion. We

make no changes based on these comments.

Multiple commenters asked how VA will determine eligibility for veterans with service dates that overlap the time periods set forth in 38 U.S.C. 1720G(a)(2)(B)(i)–(iii), and specifically, those who served both before and after May 7, 1975; and commenters asked how VA will determine eligibility for veterans who have presumptions of service-connection for conditions that are not diagnosed until years after their service. Commenters provided specific scenarios and asked under which phase of expansion veterans would qualify for PCAFC. One commenter asked if a veteran with a 100 percent service rating who served from 1974 to 1994 could be eligible for PCAFC in the first phase of expansion or in the second phase of expansion. Another commenter asked which phase of expansion would apply for a veteran with active military service from 1972 to 1992, who has a combined rating from several service-connected disabilities of 70 percent or greater with one disability at 30 percent due to service in Vietnam and the other disabilities incurred in active service during the Lebanon conflict and the Persian Gulf War. Another commenter asked which phase of expansion would apply for a veteran who served from prior to May 7, 1975, until April 30, 1980, developed ALS and was awarded presumptive service connection for ALS last year. A different commenter asked whether a veteran would be included under phase one of expansion if the veteran served in Vietnam prior to May 7, 1975, was exposed to Agent Orange, left the military in August 1975, was diagnosed with ALS several years later, is service-connected at 100 percent, and meets all additional eligibility criteria.

As previously explained in this section, the authorizing statute, 38 U.S.C. 1720G, as amended by section 161 of the VA MISSION Act of 2018, bases eligibility for PCAFC, in part, on the date the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. Thus, while there may be veterans and servicemembers who have service dates that cover more than one of the time periods set forth in 38 U.S.C. 1720G(a)(2)(B)(i)–(iii), their eligibility under section 1720G(a)(2)(B) is dependent on the date the serious injury was incurred or aggravated. In this rulemaking, the term ''serious injury'' means ''any service-connected disability that: (1) Is rated at 70 percent or more by VA; or (2) Is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA.'' This means a veteran with a service-connected disability incurred or aggravated in the line of duty before May 7, 1975, would qualify for the first phase of expansion so long as the veteran's service-connected disability is rated at 70 percent or more by VA or is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA, and the veteran meets all the other PCAFC eligibility criteria. If a veteran has a serious injury, as defined in this rulemaking, that was incurred or aggravated after May 7, 1975, but before September 11, 2001, and meets all other eligibility criteria for PCAFC, then he or she would be eligible for PCAFC in the second phase of expansion.

Additionally, there may be instances in which a veteran's or servicemember's condition is not diagnosed until years after they served and years after the condition was actually incurred or aggravated, such that it may be difficult to identify when the serious injury was incurred or aggravated. We note that there may be a lack of documentation identifying the date on which an applicant's serious injury was incurred or aggravated. For example, a veteran may have served before and after May 7, 1975, and been diagnosed with ALS several years after the veteran was discharged from active military, naval, or air service. If that veteran has received a presumption of service-connection for ALS, but the rating decision does not specify the dates of service to which the ALS is attributable, VA would determine on a case-by-case basis whether the veteran could qualify for PCAFC under the first or second phase of expansion. The dates of service, along with other documentation such as rating decisions, service treatment records, VBA claims files, and review of medical records will help inform VA of when the serious injury was incurred or aggravated. It is important to note that such issues regarding the date the serious injury was incurred or aggravated will arise only during the first phase of expansion, only when the veteran has dates of service before and after May 7, 1975, and only in instances in which the date of the serious injury is not documented. We make no changes based on these comments.

Implementation Delay

Commenters asked why it is taking so long to get the eligibility expansion started, to include implementation of an IT system, and expressed dissatisfaction that the expansion was not being implemented now or in a more timely manner. Commenters urged that the expansion be sped up, especially before most pre-9/11 veterans pass away. Multiple commenters asserted that VA has missed its statutory deadline to expand. In this regard, commenters explained that the VA MISSION Act of 2018 required VA to certify implementation of the required IT system no later than October 1, 2019, and as such, VA was required to implement phase one by October 1, 2019 and phase two by October 1, 2021. Accordingly, one commenter requested VA implement phase one no later than September 2020. Another commenter asked VA to clarify why an additional two years is needed for evaluating phase two applicants and recommended that VA commit to a shorter timeline for phase two expansion. Other commenters asserted that VA must implement phase two by October 1, 2021, to be consistent with Congressional intent. Furthermore, one commenter specifically asked, given the delays to the IT system, that VA publish monthly updates on the progress towards implementation of the required IT system and on the progress towards publishing a final rule.

We acknowledge that the full implementation of the new IT system has been delayed. This is due to VA's pivot from developing a home grown IT system to configuration of a commercial platform (Salesforce) which, among other things, has required migration of data from the legacy web-based application to the new Salesforce platform, development of new functionality to automate monthly stipend calculations, as well as integration with other VA systems. However, as required by law, the phases of expansion are explicitly tied to the date VA submits to Congress a certification that the Department has fully implemented the required IT system, and VA has not yet submitted to Congress that certification. The phases of expansion are not tied to the October 1, 2019 due date for such certification in section 162(d)(3)(A) of the VA MISSION Act of 2018. See 38 U.S.C. 1720G(a)(2)(B). Accordingly, the first phase of expansion will begin when VA submits to Congress certification that it has fully implemented the required IT system, and the second phase will begin two years after the date VA submits that certification to Congress. Therefore, we are unable to expand immediately or expedite the second phase of expansion once VA submits its certification to Congress.

Further, we will not provide the requested monthly updates on the progress towards implementation of the

required IT system and on the progress of the final rule, as these are actions we typically do not take, and it would divert our energy and resources in making progress towards fully implementing the required IT system and the final rule. We note that we will provide the public with notification upon certification of the required IT system and the publication of the final rule. We make no changes based on these comments.

Legacy Participants

VA received multiple comments concerning eligibility for legacy participants, as that term will be defined in § 71.15. We will address the comments below.

One commenter inquired into the reasons VA was providing a transition period for legacy participants who the commenter believes will not be reassessed for a year and will receive an additional five months to transition out of PCAFC even though they may no longer be eligible for PCAFC. The commenter suggested this is a misuse of taxpayer dollars and recommended current PCAFC participants be reassessed immediately to determine their continued eligibility, and if found ineligible, only be allowed two to three months to transition out of PCAFC.

We believe the transition period set forth in the proposed rule for legacy participants and legacy applicants who do not meet the requirements of § 71.20(a), and their Family Caregivers is a fair and reasonable amount of time. To clarify, VA will not wait one year after the effective date of the rule to evaluate the eligibility of legacy participants and legacy applicants. VA will begin the reassessments of such individuals when this final rule becomes effective, but VA estimates that it will need a full year to ensure all such reassessments are completed. The one-year period beginning on the effective date of the rule (set forth in § 71.20(b) and (c)) will allow VA to conduct reassessments of legacy participants and legacy applicants, while also adjudicating an influx of applications as a result of the first phase of expansion. VA would allow legacy participants and legacy applicants to remain in the program for a full year after the effective date of the final rule so that they all have the same transition period, regardless of when during the one-year transition period the reassessment is completed. As VA cannot assess all legacy participants at the same time, this ensures equitable treatment for everyone.

As to the commenter's suggestion that there only be a two- or three-month transition compared to the five-month transition, we believe that the transition period proposed by VA is appropriate and not a misuse of taxpayer dollars. The five-month period referenced by the commenter consists of a 60-day advanced notice followed by a 90-day extension of benefits for discharge based on the legacy participant or legacy applicant no longer qualifying for PCAFC as set forth in § 71.45(b)(1). The 60-day advanced notice requirement provides an opportunity for PCAFC participants to contest VA's findings before a stipend decrease takes effect, and in certain instances of revocation or discharge which we believe would benefit both VA and eligible veterans and Family Caregivers. 85 FR 13394 (March 6, 2020). The 90-day extension of benefits pursuant to § 71.45(b)(1)(iii) would permit the eligible veteran and his or her Family Caregiver a reasonable adjustment time to adapt and plan for discharge from PCAFC. Further, while continuing benefits for 90 days after discharge is not contemplated under the authorizing statute, we believe it is an appropriate and compassionate way to interpret and enforce our authorizing statute. See 85 FR 13399 (March 6, 2020).

VA believes that the transition period is both fair and reasonable and also an appropriate use of taxpayer dollars. As indicated in the proposed rule, the Primary Family Caregivers of legacy participants, in particular, may have come to rely on the benefits of PCAFC, to include the monthly stipend payments based on the combined rate authorized under current § 71.40(c)(4). Our proposed transition period would allow time for VA to communicate potential changes to affected individuals and assist them in preparing for any potential discharge from PCAFC or reduction in their stipend payment before such changes take effect. We are not making any changes based on this comment.

Several commenters suggested VA ''grandfather'' in current PCAFC participants, such that they not be subject to the new requirements in § 71.20(a). Two commenters suggested that the new criteria in § 71.20(a) should only apply to new applicants and VA establish a separate program for these individuals. Relatedly, one commenter suggested that if current participants are only subjected to existing criteria, the proposed sections on legacy participants will not be needed. Another commenter stated that VA should retain the current standard for legacy participants and use the new standard for new applicants. This commenter noted that this would be permissible under law and would protect the interest of severely disabled veterans and their Family Caregivers that are current PCAFC participants. Similarly, many commenters expressed concern about the negative impact of losing the PCAFC benefits that they have come to rely on. Additionally, other commenters suggested that legacy participants should not be reassessed. In particular, two commenters referred to the often-long-term nature of veterans' disabilities, including veterans whose clinical conditions are not expected to improve over time. Another commenter suggested that instead of reassessments, VA should review the initial application of current PCAFC participants to determine if the participants meet the new criteria, especially given the challenges of seeking medical care during the COVID–19 national emergency.

As indicated in the proposed rule, we are shifting the focus of PCAFC to eligible veterans with moderate and severe needs and making other changes that will allow PCAFC to better address the needs of veterans of all eras and improve and standardize the program. However, we are mindful of the potential impact these changes may have on legacy participants and legacy applicants, as those terms are defined in § 71.15, and appreciate the commenters recommendations. Specifically, we considered whether VA could continue applying the current criteria to legacy participants and legacy applicants, and apply the new criteria in § 71.20(a) only to new applicants, but decided against it. Doing so would require VA to run two separate PCAFC programs, which would be administratively prohibitive; would lead to confusion among veterans, caregivers, and staff; and would result in inequities between similarly situated veterans and caregivers. Instead, VA proposes to reassess legacy participants and legacy applicants under the new eligibility criteria in § 71.20(a) within the one-year period following the effective date of this final rule. As explained above, VA is providing a transition period that consists of one year for VA to complete reassessments, followed by a period of 60-day advanced notice, and 90-day extension of benefits. The purpose of this transition period is to reduce any negative impact these changes may have on current PCAFC participants. To the extent the commenters believe PCAFC should be a permanent program, we discuss similar comments further below.

As to the specific concerns about reassessments, consistent with other changes VA is making to improve PCAFC discussed above, we believe it is reasonable to reassess legacy

participants and legacy applicants to determine their continued eligibility under § 71.20(a). We understand that reassessments may cause anxiety for some individuals, but we are adding reassessment requirements to improve consistency and transparency in the program. We note that reassessments are not just for current participants but will be an ongoing part of PCAFC under § 71.30. Moreover, as the personal care needs for current participants and their Family Caregiver(s) continue to evolve, we believe it is prudent to reassess legacy participants and legacy applicants, as opposed to only reviewing the initial application for PCAFC, for continued eligibility as well as to identify changes in their condition that may impact the monthly stipend payment amount. We note that the initial application includes basic information, primarily demographic in nature and does not capture clinical information related to the needs of the veteran or servicemember. Additionally, eligibility determinations are complex, and we are establishing consistent processes and practices which include the CEATs to review evaluations conducted at the local medical centers and make eligibility determinations under § 71.20(a). For the foregoing reasons, we believe it is necessary for legacy participants and legacy applicants to participate in reassessments to determine their continued eligibility under § 71.20(a). We are not making any changes based on these comments.

One commenter opposed requiring legacy participants to reapply for PCAFC based on the assertion that recipients of VA disability compensation and social security benefits do not have to reapply for those programs after they have been approved. As indicated in the proposed rule and reiterated above, VA will not require legacy participants or legacy applicants to reapply to PCAFC, rather they will be reassessed within the one-year transition period beginning on the effective date of the final rule to determine continued eligibility under the new eligibility criteria in § 71.20(a). We are not making any changes based on this comment.

Several commenters raised concerns that a number of current PCAFC participants would not meet the definition of serious injury specifically and would be deemed ineligible for the program. VA assessed the service-connected disability rating of eligible veterans currently participating in PCAFC and found that approximately 98 percent have a single or combined service-connected disability rating of 70 percent or more and would therefore meet the definition of ''serious injury.'' As explained above, VA will provide a transition period for those who would not qualify under the new PCAFC eligibility criteria, including those who do not have a single or combined service-connected disability rating of 70 percent or more. Furthermore, PCAFC is just one of many services offered to veterans and servicemembers, as VA offers a menu of supports and services that supports caregivers caring for veterans such as PGCSS, homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. We will assist legacy participants and legacy applicants who are transitioning out of PCAFC by identifying and making referrals to additional supports and services, as applicable. We are not making any changes based on these comments.

One commenter asked why the proposed rule did not provide equitable relief to current participants who will be adversely affected by the changes to eligibility. Similarly, another commenter recommended VA provide equitable relief for current PCAFC participants whose eligibility would be adversely affected by the new definition of serious injury. The Secretary of Veterans Affairs is authorized to grant equitable relief when the Secretary determines that: (a) Benefits administered by VA have not been provided by reason of administrative error; or (b) a person has suffered loss as a consequence of reliance upon a determination by VA of eligibility or entitlements to benefits, without knowledge that it was erroneously made. See 38 U.S.C. 503. It is unlikely the Secretary would consider VA's lawful implementation of new regulatory requirements in 38 CFR part 71 to constitute an administrative error on the part of VA or application of new regulatory criteria to constitute erroneous eligibility determinations. Therefore, equitable relief would likely not be appropriate as recommended by the commenters because the changes to PCAFC eligibility would not be the result of an error but rather a deliberate decision to change the eligibility requirements for this program. Furthermore, we note that the regulations provide a period of transition for legacy participants and legacy applicants, as those terms are defined in § 71.15, who may no longer be eligible or whose Primary Family Caregivers will have their monthly stipends decreased as a result of changes to PCAFC in this rulemaking, as discussed further above. We are not making any changes based on these comments.

Unclear Eligibility Requirements

Several commenters suggested VA better clarify eligibility by having clear and defined standards, and by providing examples of qualifying conditions, such as spinal cord injury and paralysis. Commenters stated the eligibility requirements were confusing, vague, and contained discrepancies. Commenters also stated that there is too much subjectivity and inconsistency across VA and asserted that who does the eligibility determination varies, as does what they consider. One commenter raised concerns that the proposed eligibility criteria was more general than the current criteria which would turn PCAFC into a ''free for all.'' Similarly, another commenter indicated fraud is prevalent in the program and recommended VA ensure the requirements are clear. VA recognizes that improvements to PCAFC are required and this recognition was the catalyst for the changes in the proposed rule to improve consistency and transparency in how the program is administered. As indicated in the proposed rule, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs while at the same time revising the eligibility criteria to encompass the care needs for veterans and servicemembers of all eras rather than only post-9/11 veterans and servicemembers. Also, it is VA's intent to broaden the current criteria so as not to limit eligibility to a predetermined list of injuries or impairments. Thus, changes to the eligibility criteria include revising definitions such as serious injury, in the best interest, and inability to complete an ADL; creating a new definition for in need of personal care services and need for supervision, protection, or instruction; and establishing a transition period for legacy participants and legacy applicants who no longer qualify or whose stipends would be reduced by these regulatory changes. VA will further address subjectivity and inconsistency across VA by creating a centralized infrastructure for eligibility determinations, standardizing eligibility determinations and appeals processes, and implementing uniform and national outcome-based measures to identify successes, best practices, and opportunities for improvement. Furthermore, in addition to standardizing the eligibility determination process, VA is revising the criteria for revocation to hold an

eligible veteran and his or her Family Caregiver(s) accountable for instances of fraud or abuse under §§ 71.45(a) and 71.47, as applicable. We thank these commenters for their input; however, we are not making any changes based on these comments.

One commenter described PCAFC as an alternative to the Homemaker and Home Health Aide (H/HHA) program, H/HHA as an alternative to nursing home care, and PCAFC as VHA's version of two Center for Medicare and Medicaid (CMS) programs: Home and Community-Based Services (HCBS) and Self-Directed Personal Assistance Services. To the extent that this commenter believes that PCAFC should operate similar to VA's H/HHA program, and CMS's Home and Community-Based Services and Self-Directed Personal Assistance Services, we note that these are programs distinct from PCAFC, as explained directly below.

VA's H/HHA program provides community-based services through public and private agencies under a system of case management by VA staff. H/HHA services enable frail or functionally impaired persons to remain in the home. An H/HHA is a trained person who can come to a veteran's home and help the veteran take care of themselves and their daily activities. The H/HHA program is for veterans who need assistance with activities of daily living, and who meet other criteria such as those who live alone.

The Veteran-Directed Home and Community Based Services (VD–HCBS) is a type of H/HHA that provides veterans of all ages the opportunity to receive home and community-based services in lieu of nursing home care and continue to live in their homes and communities. In VD–HCBS, the veteran and veteran's caregiver will: Manage a flexible budget; decide for themselves what mix of services will best meet their personal care needs; hire their own personal care aides, including family or neighbors; and purchase items or services to live independently in the community. VD–HCBS is offered as a special component to the Administration for Community Living's (ACL) Community Living Program (CLP). The ACL–VA joint partnership combines the expertise of ACL's national network of aging and disability service providers with the resources of VA to provide veterans and their caregivers with more access, choices and control over their long-term services and supports.

While there may be some veterans that are eligible for PCAFC as well as H/HHA and/or VD–HCBS, these programs are distinct as they are intended to provide different services to different groups. For example, PCAFC provides benefits directly to Family Caregivers whereas H/HHA and VD–HCBS provide services directly to veterans. Additionally, as described above, these benefits and services differ, as PCAFC provides such benefits as a monthly stipend to Primary Family Caregivers and access to healthcare benefits through the CHAMPVA for those who otherwise are eligible.

As further described below, H/HHA and VD–HCBS are more aligned with CMS's HCBS and Self-Directed Personal Assistance Services programs, and vice versa, than with PCAFC.

CMS' HCBS programs provide opportunities for Medicaid beneficiaries to receive services in their own home or community rather than institutions or other isolated settings. These programs serve a variety of targeted populations, such as people with intellectual or developmental disabilities, physical disabilities, and/or mental illnesses. While HCBS programs can address the needs of individuals who need assistance with ADLs (similar to certain eligible veterans in PCAFC), HCBS programs are intended to cover a broader population as they serve Medicaid beneficiaries and target a variety of populations groups, such as people with intellectual or developmental disabilities, physical disabilities, and/or mental illnesses. We note that HCBS eligibility varies by state, as these programs are part of a state's Medicaid program. Additionally, the health care and human services that may be provided to beneficiaries can vary based on each state, and may include such services as skilled nursing care; occupational, speech, and physical therapies; dietary management; caregiver and client training; pharmacy; durable medical equipment; case management; hospice care; adult day care; home-delivered meals; personal care; information and referral services; financial services; and legal services. The services are provided by lead agencies and other service providers and are much broader than those that we are authorized to provide pursuant to 38 U.S.C. 1720G for purposes of PCAFC. Whereas PCAFC provides benefits to the Family Caregiver of the eligible veteran (in support of the wellbeing of the eligible veteran), HCBS provides health care and human services directly to the Medicaid beneficiary (who is more similar to the eligible veteran than the Family Caregiver in terms of their needs). As explained previously, we consider HCBS to be more like other programs we offer such as H/HHA and VD–HCBS than with PCAFC. Thus, because PCAFC and HCBS are distinct programs with different requirements and services, we make no changes based on this comment.

This commenter also referenced CMS's Self-Directed Personal Assistance Services program, which falls under the larger umbrella of CMS's HCBS program. We note that this is a self-directed Medicaid services program that permits participants, or their representatives if applicable, to have decision-making authority over certain services and take direct responsibility to manage their services with the assistance of a system of available supports, instead of relying on state agencies to provide these services. Services covered include those personal care and related services provided under the state's Medicaid plan and/or related waivers a state already has in place, and participants are afforded the decision-making authority to recruit, hire, train and supervise the individuals who furnish their services. As is the case with the overall HCBS program, eligibility and the services covered under the Self-Directed Personal Assistance Services program vary by state. We note that the Self-Directed Personal Assistance Services program operates similarly to VD–HCBS, in providing individuals with more autonomy over community-based services they receive. Because PCAFC and Self-Directed Personal Assistance Services are distinct programs with different requirements and services, we make no changes based on this comment.

Because this commenter provided no additional context or arguments related to this specific comment, which is otherwise unclear, we are unable to further respond. We are not making any changes based on this comment.

Negative Impact on Post-9/11 Veterans

Many commenters supported expansion of PCAFC to include veterans of all eras of military service, and ensuring that those with the greatest need are eligible for PCAFC, regardless of era served. We thank them for their comments. On the other hand, several commenters opposed the proposed eligibility criteria because they believe it focuses on pre-9/11 and geriatric veterans at the expense of post-9/11 and younger veterans. Commenters stated that this is unfair, punitive, and inconsistent with Congressional intent, and would result in current participants being ineligible for PCAFC. Some commenters specifically asserted that the VA MISSION Act of 2018 only

expanded PCAFC eligibility, and that making changes that restrict eligibility are not in line with Congress's intent in enacting the VA MISSION Act of 2018. One of the commenters also noted that the proposed changes to the regulations have affected their own health. One commenter opposed the new criteria and asserted that it would result in current participants who receive stipends at tier one no longer being eligible for PCAFC, which they allege was VA's intention. This commenter asserts that because Congress did not provide the necessary funds for expansion, VA found it necessary to revise the eligibility criteria, and this commenter requests VA be transparent about that rationale. Relatedly, one commenter requested additional funding be provided to support expansion of the program.

We acknowledge the commenters' concerns and thank veterans and caregivers for sharing their personal stories and experiences with PCAFC. We also note that commenters raised concerns about their mental health. We encourage such veterans and caregivers to seek assistance through their health care provider. If you are a veteran in crisis or you are concerned about one, free and confidential support is available 24/7 by calling the Veterans Crisis Line at 1–800–273–8255 and Press 1 or by sending a text message to 838255.

As indicated in the proposed rule, VA recognizes that improvements to PCAFC are needed to improve consistency and transparency in decision making. We note that many of the changes we proposed were made in response to complaints that VA has received about the administration of the program and these changes are designed to ensure improvement in the program for all eligible veterans—to include current and future participants, from all eras of service. Further, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs while at the same time revising the eligibility criteria to encompass the care needs for veterans and servicemembers of all eras rather than only post-9/11 veterans and servicemembers.

We note that we are not expanding PCAFC to pre-9/11 veterans at the expense of post-9/11 veterans and servicemembers; rather, the changes to PCAFC's eligibility criteria are intended to ensure that PCAFC is inclusive of veterans and servicemembers of all eras, consistent with the VA MISSION Act of 2018.

Additionally, we disagree with the assertion that Congress did not provide the necessary funds for expansion. The 2020 President's Budget included estimated funding to meet the caregiver population expansion from the MISSION Act. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94) included sufficient funding to meet the Caregiver Program cost estimates. The 2021 President's Budget included a funding request for the Caregiver Program based on the same updated projection model as used to formulate the regulatory impact analysis budget impact for this rulemaking. Future President's Budget requests will incorporate new data and updated cost projections as they become available. For a detailed analysis of the costs of this program, please refer to the regulatory impact analysis accompanying this rulemaking.

We are not making any changes based on these comments.

One commenter suggested that if budgetary concerns are the basis for the changes in eligibility requirements, then VA should start by excluding those veterans who can work and still get VA benefits, salary, and caregiver benefits. As stated above, budgetary concerns did not form the basis for changing the eligibility criteria; rather, VA's proposed changes recognized and addressed opportunities for improvement and the need to make PCAFC more inclusive to veterans and servicemembers of all eras. Further, we note that the authorizing statute does not condition eligibility for PCAFC on whether a veteran or servicemember cannot work or is not in receipt of other VA benefits; instead, it is based on specific criteria such as whether the veteran or servicemember has a serious injury and is in need of personal care services. Thus, we do not believe that it is reasonable to regulate PCAFC eligibility based on employment status, individual financial situations, or eligibility for other programs; but rather PCAFC eligibility focuses on the need for personal care services, among other factors, consistent with 38 U.S.C. 1720G.

To the extent this commenter believes that veterans who can work should not be eligible for PCAFC, we refer the commenter to the section on the definition of ''in need of personal care services'' in which we discuss employment of eligibility veterans and Family Caregivers.

We also do not believe PCAFC eligibility should be conditioned on whether a veteran or servicemember is not in receipt of other VA benefits as eligibility for PCAFC is, in part, conditioned upon the veteran or servicemember having a serious injury, which we define in this rulemaking as a single or combined service-connected disability rating of 70 percent or more. This level of service-connected disability means that a veteran is in receipt of VA disability compensation. Thus, we do not find it appropriate to exclude those in receipt of other VA benefits since that would exclude the population of eligible veterans on which we are focusing PCAFC. We are not making any changes based on this comment.

Another commenter requested VA elaborate on the number of post-9/11 veterans who will still be eligible for PCAFC under the new requirements. We note that the regulatory impact analysis for the final rule includes information on current participants who may no longer be eligible for PCAFC, based on specific assumptions we have made. We make no changes based on this comment.

Physical Disabilities Versus Mental Health and Cognitive Disabilities

Multiple commenters expressed concern that the eligibility requirements focus more on physical disabilities rather than mental health and cognitive disabilities, and requested the eligibility criteria account for non-physical disabilities (including mental, emotional, and cognitive disabilities), such as TBI, PTSD, and other mental health conditions, as the commenters asserted that veterans with these conditions often need as much, if not more, caregiver assistance as those with physical disabilities. Other commenters opposed removal of the phrase ''including traumatic brain injury, psychological trauma, or other mental disorder'' from current § 71.20 because they believe doing so would be contrary to the authorizing statute and Congressional intent. One commenter raised concerns that veterans may not be eligible for PCAFC despite being 100 percent disabled for conditions such as PTSD, particularly as ADLs do not take into account flash backs, dissociation, panic attacks, or other PTSD-related issues. One commenter opined that veterans with mental health conditions should not have to show they are physically unable to do something particularly if they do not mentally know how to do so. However, one commenter noted that if VA wants to elaborate on the specific injuries that would qualify for PCAFC, that would be appropriate.

We are not seeking to restrict PCAFC to veterans and servicemembers with only physical disabilities. Section 1720G(a)(2)(B) of title 38, U.S.C. is clear that the term ''serious injury'' includes TBI, psychological trauma, and other

mental disorders for purposes of PCAFC. Consistent with the statutory authority, the current and new PCAFC regulations are inclusive of the caregiving needs of veterans with cognitive, neurological and mental health disabilities, including those who suffer from PTSD and TBI. While we are removing the phrase ''including traumatic brain injury, psychological trauma, or other mental disorder'' from § 71.20, we are doing so because such conditions would be captured by our proposed definition of serious injury (*i.e.,* requiring a single or combined percent service-connected disability rating of 70 percent or more). Under the new regulations, we will still consider cognitive, neurological, and mental health disabilities as part of the definition of serious injury, and veterans who have such disabilities will still be eligible to apply for PCAFC. We further note that mental health care is among VA's top priorities in providing health care to veterans.

Additionally, VA's regulations, as revised through this rule, make clear that a veteran or servicemember can be deemed to be in need of personal care services based on either: (1) An inability to perform an ADL, or (2) a need for supervision, protection, or instruction. The term ''need for supervision, protection, or instruction'' means the individual has a functional impairment that impacts the individual's ability to maintain his or her personal safety on a daily basis. This term ''would represent and combine two of the statutory bases upon which a veteran or servicemember can be deemed in need of personal care services—'a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury,' and 'a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired.' See 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii), as amended by Public Law 115–182, section 161(a)(2).'' 85 FR 13363 (March 6, 2020). We believe these two bases of eligibility are inclusive of the personal care service needs of veterans and servicemembers with a cognitive, neurological, or mental health impairment, to include TBI or PTSD. Furthermore, we do not believe elaborating or listing specific injuries that would qualify a veteran or servicemember for PCAFC would serve to broaden the bases upon which an individual may meet criteria for PCAFC, as doing so could suggest that PCAFC is limited to only those listed conditions. In defining ''need for supervision, protection, or instruction,'' it was VA's intent to broaden the current criteria so as not to limit eligibility to veterans and servicemembers with a predetermined list of impairments. Id. Instead of focusing on specific injuries, symptoms, or diagnoses, this term allows us to consider all functional impairments that may impact the veteran's or servicemember's ability to maintain his or her personal safety on a daily basis, among other applicable eligibility criteria. We are not making any changes based on these comments.

One commenter viewed the program as intended for older veterans, and felt that because the commenter is younger, he or she is viewed as being able to do things themselves when that is not the case. The commenter questioned how a veteran can have a 100 percent service-connected disability rating, but ''barely qualify'' for PCAFC. This commenter suggested the eligibility determinations should consider a list of diagnoses, including those listed in the DSM–5, instead of blanket questions that do not apply to each diagnosis. As previously discussed, we are standardizing the program to focus on veterans and servicemembers with moderate and severe needs based on their need for personal care services, not on their specific diagnoses. Further, as explained in the preceding paragraph, the definition need for supervision, protection, or instruction, allows VA to focus on the veteran's level of impairment and functional status as opposed to specific injuries, symptoms, or diagnoses, which could be too restrictive and limiting, and fail to focus on the specific needs of the eligible veteran. For example, two veterans have similar service-connected disability ratings for PTSD. One veteran has been engaged in treatment, has progressed in his or her level of independence such that he or she no longer requires a Family Caregiver, and thus is not in need of personal care services at this time. The other veteran has recently been diagnosed with PTSD, with symptoms that negatively impact his or her cognitive function such that personal care services are needed to maintain his or her safety on a daily basis. In this example, two veterans have similar service-connected disability ratings and diagnoses; however, they have vastly different levels of independence and needs for personal care services. Thus, we do not believe considering a list of specific diagnoses that would qualify a veteran or servicemember for PCAFC would be appropriate, as it would not account for the eligible veteran's need for personal care services. We make no changes based on this comment.

One commenter noted that PTSD is often accompanied by other health conditions that can exacerbate the underlying health condition (for example, PTSD with blindness, hearing problems, and diabetes), and suggested that we ''raise the percentage for additional handicaps compounded by PTSD.'' To the extent that this commenter is stating that veterans and servicemembers may have comorbid conditions that exacerbate one another and that such individuals may be in need of a caregiver, we agree. We encourage these individuals and their caregivers to contact their local VA treatment team and/or the local CSC to learn more about supports and services available to provide assistance, including PCAFC. If this commenter is requesting an increase to VA disability ratings for purposes of other VA benefit programs, such comment is outside the scope of this rulemaking. We make no changes based on this comment.

One commenter noted that VA should have better training and tools to assess dementia. To the extent the commenter believes VA should provide better training and tools to VA providers who assess dementia in general, unrelated to PCAFC, we believe this comment is beyond the scope of this rulemaking. To the extent the commenter believes such training and tools are necessary for purposes of determining PCAFC eligibility, we note that the PCAFC eligibility criteria do not focus on veterans' or servicemembers' specific diagnoses, but we believe an individual with dementia could qualify for PCAFC if the individual is determined to be in need of personal care services based on a need for supervision, protection, or instruction, for example, among other applicable eligibility criteria. Additionally, as we explain throughout this discussion, eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center based upon input from the primary care team to the maximum extent practicable. These evaluations include assessments of the veteran's functional status and the caregiver's ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran or servicemember. When all evaluations are completed, the CEAT will review the evaluations and pertinent medical records, in order to render a determination. We note that we will provide in depth training and education

to clinical staff at local VA medical centers and CEATs to perform PCAFC assessments and evaluations, and eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC, respectively.

We make no changes based on this comment.

Removal of Current § 71.20(c)(4)

Several commenters expressed concern over the removal of current § 71.20(c)(4) (*i.e.,* a veteran rated 100 percent disabled for a serious injury and awarded SMC that includes an aid and attendance (A&A) allowance) as an eligibility criterion. Specifically, commenters were concerned that these veterans would be wrongly removed from PCAFC by CSP staff at medical centers or at the VISNs, and one commenter questioned why VA would not keep this as a criterion that meets eligibility and asserted that it serves as a safety net for those at most risk. Also, commenters asserted that an A&A allowance is paid to the veteran while the monthly stipend is paid to the caregiver so it would not be a duplication of benefits. Additionally, commenters incorrectly asserted that this criterion is a statutory requirement.

We agree that an A&A allowance and the monthly stipend rate would not be a duplication of benefits; however, to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, we believe each veteran or servicemember must be evaluated based on whether he or she has an inability to perform an ADL or a need for supervision, protection, or instruction pursuant to § 71.20(a)(3)(i) and (ii). As discussed above regarding the definition for an inability to perform an ADL, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant, and not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for the ratings described in current § 71.20(c)(4). Thus, while we believe any veteran or servicemember who would qualify for PCAFC based on current § 71.20(c)(4) would likely be eligible under the other criteria in § 71.20(a)(3)(i) and (ii) (see 85 FR 13372 (March 6, 2020)), VA will still require a reassessment pursuant to § 71.30 to determine continued eligibility under § 71.20(a).-Also, as explained above regarding legacy participants and legacy applicants, VA will provide a transition period for those who do not meet the new eligibility criteria under § 71.20(a). Additionally, we are standardizing eligibility determinations and appeals to include the use of a CEAT to reduce the possibility of errors in PCAFC eligibility determinations, revocations, and discharges.

Finally, this criterion has never been a requirement under 38 U.S.C. 1720G, rather it is authorized by 38 U.S.C. 1720G(a)(2)(C)(iv) as a possible basis upon which an individual can be deemed in need of personal care services. As explained above and in VA's proposed rule, the Part 3 regulatory criteria governing award of SMC fail to provide the level of objectivity VA seeks in order to ensure that PCAFC is administered in a fair and consistent manner for all participants, and, we no longer believe this criterion is necessary or appropriate. We are not making any changes based on these comments.

Alternative Eligibility Requirements

One commenter suggested that all veterans have caregivers so all should qualify and be paid based on the percentage of their service-connected disability rating such that a caregiver for a veteran with a 10 percent service-connected rating would receive 10 percent of the monthly stipend rate. VA disability compensation provides monthly benefits to veterans in recognition of the effects of disabilities, disease, or injuries incurred or aggravated during active military service and the eligibility criteria are specific to determining a disability compensation. This is different from a clinical evaluation for determining whether a veteran or servicemember is eligible for PCAFC. PCAFC is a clinical program that requires a veteran or servicemember to have a serious injury and be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction. A veteran with a service-connected disability rating may or may not have a serious injury and be in need of personal care services from a caregiver for purposes of PCAFC. While a service-connected disability rating is part of the definition of serious injury, it is not used to determine a veteran's or servicemember's need for personal care services for purposes of PCAFC eligibility. Instead, we assess the clinical needs of the individual to determine whether he or she is in need for personal care services. Service-connected disability ratings are not commensurate with a need for personal care services. For example, a veteran may be 100 percent service-connected for PTSD however through consistent, ongoing treatments, has developed the tools to effectively manage symptoms associated with PTSD to the level of not requiring personal care services from another individual. Furthermore, the stipend rate for Primary Family Caregivers is based upon the amount and degree of personal care services provided. See 38 U.S.C. 1720G(a)(3)(C)(i). Therefore, it would not be appropriate for VA to pay a caregiver using the service-connected disability rating percentage as the percentage of the monthly stipend rate. In addition, we have separately addressed the commenter's recommendation for the stipend amount in the section discussing the monthly stipend rate and 38 CFR 71.40(c)(4). We are not making any changes based on this comment.

One commenter suggested veterans and servicemembers should apply on a case-by-case basis. Every application is reviewed individually; however, we believe standard eligibility criteria are necessary to increase transparency and ensure consistency nationwide. We are not making any changes based on this comment.

Permanent Program

Multiple commenters suggested that this should be a permanent program and requested we add language to the regulation to automatically determine those who are permanently and totally disabled as eligible for PCAFC. One commenter favored a permanent eligibility designation but inquired what that would be, while several others suggested that those with 100 percent permanent and total (P&T) disability ratings should receive automatic and/or permanent eligibility for PCAFC and that PCAFC eligibility should be treated similar to disability compensation ratings in which VA provides payment but otherwise leaves veterans alone, such that they are not further monitored, evaluated, or reassessed. Relatedly, one commenter suggested that those with 100 percent P&T disability rating, in addition to being enrolled in PCAFC for more than five years, should be permanently admitted to PCAFC. A 100 percent P&T disability rating applies to disabilities that are total (*i.e.,* any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation) and permanent (*i.e.,* impairment is reasonably certain to continue throughout the life of the disabled person). See 38 CFR 3.340. However, we reiterate that PCAFC is a

clinical program that requires a veteran or servicemember to have a serious injury incurred or aggravated in the line of duty, and be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction, and is designed to support the health and well-being of such veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. See 85 FR 13367 (March 6, 2020). Thus, PCAFC is intended to be a program under which the eligible veteran's eligibility may shift depending on the changing needs of the eligible veteran. We do acknowledge that while some eligible veterans may improve over time, others may not, and PCAFC and other VHA services are available to ensure the needs of those veterans continue to be met. We note that participation in PCAFC may not always be appropriate to meet the needs of a veteran who has a 100 P&T disability rating. We conduct ongoing wellness contacts and reassessments to ensure the needs of the eligible veteran and Family Caregiver are met over time, and other care needs may be addressed through referrals to other VA and non-VA services, as appropriate. For example, over time, personal care services from a Family Caregiver at home may not be appropriate because nursing home care or other institutional placement may be more appropriate. Furthermore, it is also important to note that 38 U.S.C. 1720G(c)(2)(B) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements. We are not making any changes based on these comments.

Another commenter supported having a permanent designation for PCAFC as caregivers often give up their careers to care for a veteran. As explained above, PCAFC is a clinical program that requires a veteran or servicemember to be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction. Furthermore, the monthly stipend payment provided under PCAFC is meant to be an acknowledgement of the sacrifices that Primary Family Caregivers make to care for eligible veterans. 76 FR 26155 (May 5, 2011). Thus, PCAFC is not intended to replace or supplement a caregiver's loss of income by giving up their careers. While we understand that some veterans and servicemembers may remain in PCAFC indefinitely, eligibility for PCAFC is based on the level of personal care needs of the eligible veteran, among other criteria, and not based on whether a caregiver has given up their career to care for the eligible veteran. We are not making any changes based on this comment.

Paying People To Not Get Better

Commenters raised concerns that PCAFC incentivizes veterans to not ''get better'' and remain sick and debilitated, when it should focus instead on improving health. Commenters were concerned that PCAFC benefits, such as the stipend, are too generous, cause dependency and discourage participants from working or contributing to society, resulting in depression and low self-esteem. We note that PCAFC is a clinical program and as such, the safety, health and wellbeing of those served by the program is a core objective. The potential for rehabilitation or increased independency occurs on a spectrum. While some eligible veterans have the ability to rehabilitate or gain independence from his or her caregiver, which we do support if there is such potential, we recognize that some eligible veterans may remain eligible for PCAFC on a long-term basis. This is particularly true as we expand to veterans and servicemembers of earlier eras. Thus, while we understand the commenters' concerns, we must be cognizant of the reality that not all eligible veterans will improve to the point of no longer being in need of personal care services. We note that our definition of in the best interest requires a consideration of whether participation in the program supports the veteran's or servicemember's potential progress in rehabilitation or potential independence, if such potential exists. Therefore, we will continue to evaluate whether PCAFC is in the best interest of eligible veterans and support those who have the potential for improvement, when such potential exists. Further, eligible veterans and Family Caregivers participating in PCAFC will engage in wellness contacts, which focus on supporting the health and wellbeing of both the eligible veteran and his or her Family Caregivers. During wellness contacts, VA clinical staff will engage with eligible veterans and their Family Caregivers to identify any current needs. For example, during a wellness contact, a clinician may recognize an eligible veteran struggling with depression or low self-esteem and intervene accordingly. Such intervention may include referrals to support groups or other services to address the specific needs of the eligible veteran. We also note that PCAFC is just one way VA supports eligible veterans and Family Caregivers and that PCAFC is not meant to replace an eligible veteran's ongoing engagement with his or her treatment team. We are not making any changes based on these comments.

PCAFC Should Operate Similar to Welfare Type Programs

One commenter suggested that PCAFC operate similar to welfare type programs, in which individuals are required to apply every time they have a need and have a responsibility to check-in with the agency. As indicated in the proposed rule, we will require both the eligible veteran and Family Caregiver(s) to participate in periodic reassessments for continued eligibility as well as to participate in wellness contacts, which focus on supporting the health and wellbeing of eligible veterans and his or her Family Caregivers. We note that failure to participate in either may lead to revocation from the program under § 71.45 Revocation and Discharge of Family Caregivers. We believe these requirements are sufficient to ensure continued eligibility and maintain open communication with VA. We are not making any changes based on this comment.

Technical Question

One commenter was confused about our reference to proposed § 71.20(a)(4) when explaining in the best interest under current § 71.20(d), and asserted that there is no § 71.20(a)(3) which would make (a)(4) impossible. As indicated in the proposed rule, we are restructuring current § 71.20 to accommodate temporary eligibility for legacy participants (§ 71.20(b)) and legacy applicants (§ 71.20(c)). As such, the current eligibility criteria under current § 71.20 have been revised and redesignated under § 71.20(a). Thus, current § 71.20(a) has been redesignated as § 71.20(a)(1); current § 71.20(b) has been revised and redesignated as § 71.20(a)(2); § 71.20(c) has been revised and redesignated as § 71.20(a)(3); and current § 71.20(d) has been revised as redesignated as § 71.20(a)(4). We make no changes based on this comment.

§ 71.25 Approval and Designation of Primary and Secondary Family Caregivers

Several commenters questioned how VA will conduct eligibility assessments, including who will conduct these assessments and requested additional information. Specifically, commenters asserted VA needs to identify who will conduct eligibility assessments and have limitations on who this may be. One commenter questioned how VA will ensure standardization for eligibility assessments and

reassessments. One commenter opined that VA has no consistent protocols for evaluating PCAFC applicants. Another commenter asked how VA will hold employees accountable for errors and asserted the need for independent reviews. We address these comments below.

Eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center. These evaluations include assessments of the veteran's or servicemember's functional status and the caregiver's ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran or servicemember. When all evaluations are completed, the CEAT will review the evaluations and pertinent medical records, in order to render a determination on eligibility for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC.

The CEATs are comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC. Furthermore, we will provide in depth training and education to clinical staff at local VA medical centers and CEATs, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation including conducting regular audits of eligibility determinations. We make no changes based on these comments.

One commenter incorrectly asserted that neither the Caregivers Act nor VA's current regulations impose a time limit for completion by the Family Caregiver of such instruction, preparation, and training. Current § 71.40(d) provides a 45-day timeline to ''complete all necessary education, instruction, and training so that VA can complete the designation process no later than 45 days after the date that the joint application was submitted.'' Furthermore, VA may provide an extension for up to 90 days after the date the joint application was submitted. Additionally, current § 71.25(a)(3) permits an application to be put on hold for no more than 90 days, from the date the application was received, for a veteran or servicemember seeking to qualify through a GAF test score of 30 or less but who does not have a continuous GAF score available. As indicated in the proposed rule, we are proposing to eliminate use of the GAF score as a basis for eligibility under current § 71.20(c)(3). Therefore, we remove the language in current § 71.25(a)(3) referencing that an application may be put on hold for no more than 90 days. Additionally, while we already have the authority in § 71.40(d)(1) to extend the designation timeline for up to 90 days, we remove the 45-day designation timeline in current paragraph (d)(1) and add the 90-day designation timeline in § 71.25(a)(2)(ii), as we proposed and now make final. We are not making any changes based on this comment.

Several commenters took issue with the use of the word ''may'' in proposed § 71.25(a)(2)(ii). Specifically, one commenter stated it is clearly arbitrary to allow VA to reserve the right to deny an application even where the failure to meet the 90-day timeline is due to VA's own fault. Another commenter asserted it contradicts the preamble which states VA would not penalize an applicant if he or she cannot meet the 90-day timeline as a result of VA's delay in completing eligibility evaluations. While we would not penalize an applicant if he or she cannot meet the 90-day timeline as a result of VA's delay in completing eligibility evaluations, providing necessary education and training, or conducting the initial home-care assessment, we believe it is prudent to make this determination on a case-by-case basis. For example, we do not believe an applicant who is non-responsive to repeated attempts to conduct an initial in-home assessment through day 89 and then responds to VA on day 90 that he or she is available should receive an extension. However, an applicant who is responsive and agrees to an initial in-home assessment but VA cancels or reschedules the initial in-home assessment beyond the 90-day timeline, would receive an extension. We are not making any changes based on these comments.

One commenter expressed disappointment by the lack of description on the process by which current participants will be evaluated. We direct the commenter to our previous description of the eligibility process in this section. As indicated in the proposed rule, legacy participants and legacy applicants will be reassessed under § 71.30(e) for continued eligibility under § 71.20(a) within the one-year period beginning on the effective date of this rule. Further, § 71.40(c) provides a transition plan for Primary Family Caregivers who may experience a reduction in the monthly stipend or discharge from PCAFC as a result of the eligibility criteria in § 71.20(a). We make no changes based on this comment.

One commenter applauded VA for including assessment of the caregiver's wellbeing and we appreciate the comment. Another commenter questioned how VA will determine the competence of a caregiver to provide personal care services. The same commenter questioned whether VA will assess competence by demonstration and whether it will be a verbal or physical demonstration of the required personal care services. The determination that a caregiver is competent to provide personal care services is a clinical judgement which may include verbal or physical demonstration as necessary based on the individual circumstances of the veteran or servicemember and his or her caregiver. We make no changes based on this comment.

One commenter suggested we revise the regulation text to allow VA the flexibility to sub-contract a provider or providers to complete the initial home-care assessment to ensure that the 90-day period for application review is met by stating, ''VA, or designee, will visit the eligible veteran's home . . .'' in § 71.25(e). The same commenter further noted that the designee language can also be added to the reassessments and the wellness contacts sections. As previously discussed, VA does not believe the use of contracted services would provide standardized care for participants and would hinder VA's ability to provide appropriate oversight and monitoring. We make no changes based on this comment.

One commenter disagreed with the language ''the Family Caregiver(s) providing the personal care services required by the eligible veteran'' in § 71.25(f). Specifically, this commenter noted that insufficient justification was provided for this requirement, and it would be impossible based on the ''continuous'' requirement in the definition of unable to self-sustain in the community. This commenter asserted that there are numerous situations where excellent care is provided to the veteran where the designated ''caregiver'' acts like a caregiving manager by monitoring the quality of the care given by third parties with whom the designated caregiver may contract and pay for using the stipend provided. The same commenter further opined that nothing in Congressional deliberations and the proposed rule included a discussion of how caregivers who manage and monitor caregiving provided by others have been providing inadequate quality of care. Further, the same commenter stated that VA has been unable to provide a response to this issue during various meetings and follow-up requests

for information. We respond to this comment below.

As indicated in the proposed rule, part of the eligibility requirements for veterans and servicemembers is that they are in need of personal care services; thus, we believe it is reasonable to require that a Family Caregiver actually provides personal care services to an eligible veteran. 85 FR 13378 (March 6, 2020). Further, current § 71.20(e), which we are redesignating as § 71.20(a)(5), requires that personal care services that would be provided by the Family Caregiver will not be simultaneously and regularly provided by or through another individual or entity. This requirement is to ensure that the designation of a Primary Family Caregiver is authorized for those who do not simultaneously and regularly use other means to obtain personal care services. 76 FR 26151 (May 5, 2011). Additionally, 38 U.S.C. 1720G(a)(3)(A)(ii) specifically uses the phrase ''the primary provider of personal care services for an eligible veteran . . .'' Further, it is our intent to ensure that a Family Caregiver is not dependent on VA or another agency to provide personal care services that the Family Caregiver is expected to provide. 76 FR 26151 (May 5, 2011). If there is a desire by a veteran or servicemember and his or her caregiver to manage personal care services provided through other services, such as H/HHA, then we will refer applicants to other VA or non-VA services available to them. We make no changes based on this comment.

One commenter stated that it makes sense to require that the Primary Caregiver provide the personal care services to the veteran, but was concerned about the inclusion of the language that the Family Caregiver only be absent for ''brief'' periods of time. This commenter requested VA remove language that the Family Caregiver only be absent for ''brief'' periods of time or clearly define ''continuous'' and ''brief absences'' to ensure caregivers are not penalized for seeking employment or respite care. This commenter asserted that caregiving takes a significant toll on caregivers. Commenters also expressed concerns about whether VA expects the caregiver to always be present, including those who work. We clarify that it is not our intent to prevent caregivers from working as we are cognizant that the monthly stipend is an acknowledgement of the sacrifices made by caregivers but may fall short of the income a caregiver could receive if they were employed. The situation for each veteran or servicemember and his or caregiver is unique, and we understand that caregivers may not be present all of the time as long as they are available to provide the required personal care services. Furthermore, respite care is a benefit provided to Family Caregivers; thus, we would not penalize a Family Caregiver for the use of respite care. To the extent this commenter had concerns about the use of ''continuous'' in the definition of ''unable to self-sustain in the community,'' we further refer the commenter to the related discussions in the section on the definitions of ''need for supervision, protection, or instruction,'' and ''unable to self-sustain in the community.'' We are not making any changes based on these comments.

We received several comments that the proposed rule did not provide enough information to provide informed comments on the eligibility determination process and the initial assessment, and the lack of this information has forced commenters to accept a fundamentally flawed regulation because of the inability of VA to meet the legislative deadlines for PCAFC expansion. One commenter specifically stated that after the proposed rule was published, they requested additional information from VA about how the proposed eligibility evaluation/reassessment process will work, including any assessment instruments that VA staff will use. The same commenter stated that because VA did not adequately explain how the process will work, they still had questions and concerns about it and believe that VA should publish a supplemental notice of proposed rulemaking (NPRM) or an interim final rule (IFR) with this process explained to provide an opportunity for public comment. Additionally, commenters expressed concern that PCAFC has been marked by deep systemic structural defects which can only be resolved by placing these procedures into regulation as opposed to policy. We believe we provided sufficient information within the proposed rule and disagree with the assertion that VA should publish a supplemental NPRM or an IFR. Additionally, VA has the ability to determine certain aspects of PCAFC through policy and we believe it is necessary to have the flexibility to modify processes to address the changing needs of the program, which we are able to do more quickly through policy change than through rulemaking. We are not making any changes based on these comments.

Several commenters asserted that a Family Caregiver should live with the eligible veteran regardless of whether they are a family member. We appreciate the commenters' concerns; however, the restrictions that a Family Caregiver be a member of the eligible veteran's family (*i.e.,* spouse, son, daughter, parent, step-family member, or extended family member), or if not a family member, live with the eligible veteran, or will do so if designated as a Family Caregiver, are set forth in 38 U.S.C. 1720G(d)(3). We make no changes based on these comments.

One commenter expressed concern that there are no rules regarding how many veterans a caregiver can care for and that seems to be more of a business model versus a family caregiving model as the caregiver will be at high risk for burn out. The commenter is correct that we do not have restrictions in place for how many eligible veterans a Family Caregiver may be assigned to as the individual circumstances for each eligible veteran and his or her Family Caregiver are unique. However, we believe that the criteria in part 71 to include a determination of in the best interest, wellness contacts, and revocation based on a Family Caregiver's neglect, abuse, or exploitation of the eligible veteran, establish safeguards to protect both the eligible veteran and his or her Family Caregiver in circumstances where the Family Caregiver provides personal care services to more than one eligible veteran. We make no changes based on this comment.

One commenter emphasized the need for continued training for Family Caregivers, beyond the initial eligibility requirements. Another commenter asserted VA should partner with the National Alliance for Mental Illness (NAMI) to provide mandatory training to an eligible veteran's care team and Family Caregiver. Although we do not have an explicit requirement for continued education, we do provide continuing instruction, preparation, training and technical support to caregivers; this includes training outside of the core curriculum. Also, we are establishing an explicit requirement for both the eligible veteran and his or her Family Caregiver to participate in reassessments and wellness contacts, pursuant to § 71.30 and § 71.40(b)(2) respectively. Additionally, these reassessments and wellness contacts will allow VA to assess whether a Family Caregiver requires any additional training to provide the personal care services required by the eligible veteran. We appreciate the suggestion to partner with NAMI and will consider it. We make no changes based on these comments.

Multiple commenters expressed concern over the vetting process for Family Caregivers and one suggested that VA verify the identity of a Family

Caregiver and conduct background checks (*e.g.,* criminal, financial, legal). As part of VA Form 10–10CG, Application for the Program of Comprehensive Assistance, veterans and Family Caregivers are required to provide identifying information including name, and date of birth. Further, applicants are required to certify the information provided is true and sign the form. While we do not require a Social Security Number (SSN) or Tax Identification Number (TIN) for the application, an SSN or TIN is required in order for a stipend payment to be issued. These commenters were also concerned about the potential for abuse of the eligible veteran and asserted VA should do its due diligence prior to providing a stipend to Family Caregivers. We believe a veteran or their surrogate has the right to designate a caregiver of their choosing and that as long as we do not determine there is neglect, abuse, or exploitation of the eligible veteran, we will approve the caregiver the eligible veteran designates, if all other eligibility requirements are met. As part of PCAFC, we have mechanisms in place, and regulated in part 71, to ensure that there is no fraud, neglect, abuse, or exploitation. For example, when determining eligibility for PCAFC, a determination of no abuse or neglect is part of the clinical evaluation. Additionally, pursuant to § 71.45, we can revoke or discharge an eligible veteran or Family Caregiver in instances of fraud, or neglect, abuse, or exploitation. We note that background checks are typically conducted for purposes of determining suitability for employment and we note that participation in PCAFC is specifically not considered an employment relationship. We make no changes based on these comments.

§ 71.30 Reassessment of Eligible Veterans and Family Caregivers

Several commenters expressed general disagreement with VA's proposal to conduct reassessments and asserted that once a veteran or servicemember is admitted into the program, it should be permanent with no annual reassessments. Specifically, one commenter asserted VA is making the false comparison to the most severely and catastrophically disabled veterans, to whom the commenter asserts we believes this permanent designation should apply, and the entire population of veterans. Another commenter asserted that they do not accept the Department's contention that ''we do not believe that Congress intended for PCAFC participants' eligibility to never be reassessed after the initial assessment determination, particularly as an eligible veteran's and Family Caregiver's continued eligibility for the program can evolve.'' The same commenter asserted the closest the law comes to identifying any such requirement is 38 U.S.C. 1720G(a)(9) which only says ''The Secretary shall monitor the well-being of each eligible veteran . . .'' and ''Visiting an eligible veteran in the eligible veteran's home to review directly the quality of personal care services provided . . .'' The same commenter further stated that nowhere does it say there has to be any type of reevaluation or review, let alone of any particular periodicity. We address these comments below.

PCAFC is a clinical program, and similar to any other clinical program, a reassessment is appropriate to assess both the condition and needs of the eligible veteran and the Family Caregiver. This is particularly true given the unique circumstances for each eligible veteran and his or her Family Caregiver as we expand to include veterans and servicemembers from all eras. For example, an eligible veteran may be admitted into PCAFC at the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate) and eventually be determined to be unable to self-sustain in the community and thus his or her Primary Family Caregiver would be eligible to receive the higher-level stipend (*i.e.,* 100 percent of the monthly stipend rate). Also, an eligible veteran's condition may deteriorate to the point where it is no longer safe to maintain the eligible veteran in the home because he or she requires hospitalization or a higher level of care. Additionally, the condition of an eligible veteran who is initially determined to be unable to self-sustain in the community may improve to the point where he or she no longer meets this definition but is still in need of personal care services and thus his or her Primary Family Caregiver would receive a lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate). Furthermore, an eligible veteran's condition may improve such that he or she is no longer in need of personal care services and thus his or her Family Caregiver would be discharged from the program. Although we agree that some eligible veterans may not have the opportunity for improvement due to the nature of their condition/disease progression, we do not agree that VA has no obligation to continue to reassess the eligible veteran and Family Caregiver ''as eligible veterans' needs for personal care services may change over time as may the needs and capabilities of the designated Family Caregiver(s).'' 85 FR 13378 (March 6, 2020). Additionally, 38 U.S.C. 1720G(c)(2)(A) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements; thus, VA may conduct reassessments for PCAFC to determine continued eligibility under § 71.20(a). Further, we believe the VA MISSION Act of 2018 clearly articulated Congress's intent to ensure continued engagement between VA and PCAFC participants by requiring VA to ''periodically evaluate the needs of the eligible veteran and the skills of the [F]amily [C]aregiver of such veteran to determine if additional instruction, preparation, training, or technical support . . . is necessary.'' 38 U.S.C. 1720G(a)(3)(D), as amended by Public Law 115–182, section 161(a)(5). For these reasons, we believe VA has the statutory authority to require reassessments for all PCAFC participants regardless of the condition of the eligible veteran. We are not making any changes based on these comments.

Several commenters stated that a yearly reassessment would be too burdensome, specifically for veterans or servicemembers who have a 100 percent P&T disability rating, and one commenter stated it would be insulting to require periodic assessments, even if annually. Another commenter stated that it would not be a good use of taxpayer resources or the precious time of caregivers and veterans to require those with certain conditions (*e.g.,* ALS, MS) to be reassessed annually or even on a less frequent basis and that VA should develop a list of these serious injuries that do not warrant continued reassessment for purposes of eligibility. As explained above, VA believes it is necessary to conduct reassessments for all PCAFC participants regardless of the condition of the eligible veteran, and this same principle applies regardless of whether he or she has a 100 percent P&T disability rating or a specific health condition. However, as indicated in the proposed rule, we recognize that an annual reassessment may not be required for each eligible veteran (*e.g.,* an eligible veteran whose condition is expected to remain unchanged long-term because he or she is bed-bound and ventilator dependent, and requires a Family Caregiver to perform tracheotomy care to ensure uninterrupted ventilator support). Therefore, § 71.30(b) states that reassessments may occur on a less than annual basis if a determination is made by VA that an annual reassessment is unnecessary. We note, that even if VA

is conducting a reassessment less frequently than annually, VA would continue to conduct ongoing wellness contacts pursuant to § 71.40(b)(2). We are not making any changes based on these comments.

One commenter asserted that VA should re-evaluate more often and increase stipends accordingly should the eligible veteran's personal care needs justify such an increase. As indicated in the proposed rule, VA will conduct annual reassessments, however such reassessments may occur more frequently if a determination is made and documented by VA that a more frequent reassessment is appropriate. Examples that may necessitate a more frequent assessment include treatment or clinical intervention that reduces an eligible veteran's level of dependency on his or her Family Caregiver, or instances in which there is a significant increase in the personal care needs of the eligible veteran due to a rapidly deteriorating condition or an intervening medical event, such as a stroke, that results in further clinical impairment. Additionally, VA would continue to conduct ongoing wellness contacts pursuant to § 71.40(b)(2) which may result in a reassessment. We are not making any changes based on these comments.

One commenter questioned why an annual reassessment would ever be found unnecessary when this program was designed to be a rehabilitative program. As previously explained, VA recognizes that not all eligible veterans have the potential for rehabilitation or independence, and this is particularly true as we expand to veterans and servicemembers of all eras. Therefore, we believe it is necessary to allow some flexibility in conducting reassessments to address the individual circumstances for each eligible veteran and his or her Family Caregiver(s). We are not making any changes based on this comment.

Another commenter stated it was not clear how many staff visits will be done and when. As previously explained, VA will conduct annual reassessments that may include a home visit, but reassessments may occur more or less frequently than annually as determined and documented by VA based on the individual circumstances of the eligible veteran and the Family Caregiver(s). We are not making any changes based on this comment.

Several commenters opined about how reassessments will be conducted, including suggestions to include specific guidelines about the process. Specifically, one commenter asserted that there needs to be a quantitative assessment and that decisions not be left to staff's subjective opinions. Another commenter encouraged VA to develop specific guidelines around which veterans would not require an annual reassessment as their status will not change in the future. Also, one commenter suggested VA limit assessments to not more than annually since more frequent assessments would otherwise be left to local providers to determine. While we appreciate and understand the commenter's concerns with regard to establishing objective and specific guidelines, PCAFC is a clinical program and as a result, we will not be able to eliminate all subjectivity. However, we will standardize the process as much as possible to include the use of standardized assessments for both the eligible veteran and the Family Caregiver. Reassessments will be conducted by trained and licensed clinical providers. Additionally, reassessment determinations will be determined by the CEATs, that are specifically trained in the eligibility criteria for PCAFC. As previously explained, VA will conduct annual reassessments, but these reassessments may occur more or less frequently than annually as determined and documented by VA based on the individual circumstances of the eligible veteran and the Family Caregiver(s). VA's determination of the need for reassessment more or less frequently may stem from information gleaned during a routine medical appointment, through a planned or unplanned interaction with a CSC, or even at the request of the eligible veteran or Family Caregiver, if appropriate. As mentioned below, through policy we would require documentation of the clinical factors relied upon in concluding that a less than or more frequent reassessment is needed. As stated above more or less frequent annual reassessments can be conducted due to the changing needs of the eligible veteran in order to provide the necessary support and services. We are not making any changes based on these comments.

We received multiple comments regarding the inclusion of the primary care team during reassessments. Specifically, one commenter stated that collaboration among providers, which include clinical staff conducting home visits, is a desirable characteristic of primary care. Another commenter requested VA preserve the role of the veteran's or servicemember's treating clinician in the eligibility and reassessment process. While we note these comments were primarily focused on the use of primary care teams during the initial eligibility assessment, we believe these comments are equally applicable to a reassessment, the results of which will determine an eligible veteran's continued eligibility for participation in PCAFC and whether an eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A). Thus, we believe it is necessary to collaborate with the primary care team during reassessments in addition to the initial evaluation of PCAFC applicants to the maximum extent possible. For these reasons, we are revising § 71.30(a) and (e) by replacing the phrase ''the eligible veteran and Family Caregiver will be reassessed by VA'' with ''the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable)''. We make no other changes based on these comments.

One commenter stated that the lack of specificity in the proposed rule for extending that periodicity is very likely to introduce huge variance into assessment and re-eligibility decisions. Specifically, it could even introduce corruption if caregiver eligibility assessment officials decided they could exact benefits from veterans or caregivers in exchange for longer periods between reassessments. To the extent the commenter is concerned about the determination of how frequently reassessments will occur, we refer to the previous paragraphs that provide examples for when a reassessment may be conducted more or less frequently than on an annual basis. Also, PCAFC will refer all suspected fraudulent or illegal activities, including such situations that may involve VA employees, to VA's OIG and actively participate in VA OIG cases. We are not making any changes based on this comment.

One commenter suggested that VA have a well-defined process to monitor the documented changes by all entities who monitor the eligible veterans' health conditions to warrant a reassessment. VA is responsible for determining and documenting the frequency requirements for assessments that deviate from the annual schedule. Additionally, through policy we would require documentation of the clinical factors relied upon in concluding that a less than or more frequent reassessment is needed. Furthermore, clinical providers are subject to chart and peer reviews to ensure proper documentation in VA's electronic health care record. We are not making any changes based on this comment.

One commenter asked if the caregiver can be with the veteran when they are

reassessed since the caregiver has a better view of what the veteran needs and what the veteran can and cannot do. Relatedly, one commenter asserted that VA should pay attention to feedback from caregivers and their concerns. VA does and will continue to accept and consider feedback from Family Caregivers. Specifically, Family Caregiver(s) are required to participate in reassessments and wellness contacts pursuant to §§ 71.30 and 71.40(b)(2), respectively. VA will also incorporate the Family Caregiver(s) feedback both during the initial assessment and annual reassessment. We are not making any changes based on these comments.

Another commenter asserted that the rule is missing 38 U.S.C. 1720G(a)(3)(C)(iii)(I), *i.e.,* assessment by the Family Caregiver of the needs and limitations of the veteran; and requested that VA should strike down the rule because VA ignored this requirement. First, we note that it is not a legal requirement to explicitly regulate the requirement of section 1720G(a)(3)(C)(iii)(I) in 38 CFR part 71; however, VA does have a legal duty to meet this requirement. Second, as indicated in the proposed rule, a ''reassessment would provide another opportunity for Family Caregivers and eligible veterans to give feedback to VA about the health status and care needs of the eligible veteran. Such information is utilized by VA to provide additional services and support, as needed, as well as to ensure the appropriate stipend level is assigned.'' 85 FR 13379 (March 6, 2020). We also note that we would take the information from the caregiver into account when determining whether a veteran or servicemember is unable to self-sustain in the community (as defined in § 71.15). We are not making any changes based on this comment.

One commenter requested clarification on the impact a reassessment will have on a legacy participant. Specifically, the commenter asked if a legacy participant will no longer be eligible for PCAFC and revoked if a reassessment determines that he or she does not meet the new eligibility requirements under § 71.20(a). As indicated in the proposed rule, all legacy participants and legacy applicants will be reassessed within one year of the effective date of the final rule to determine continued eligibility in PCAFC. Upon the completion of the one-year period, legacy participants and legacy applicants who are no longer eligible pursuant to § 71.20(a) will be provided a discharge notice of not less than 60 days and will receive a 90-day extension of benefits. We are not making any changes based on this comment.

§ 71.35 General Caregivers

One commenter opined that PGCSS is good but should only be contained to veterans enrolled in VA care and not any caregiver that exists because that is what community programs are for. PGCSS is only provided to a general caregiver providing personal care services to a covered veteran (*i.e.,* a veteran who is enrolled in the VA health care system). 38 U.S.C. 1720G(b)(1) and 38 CFR 71.30(b). Additionally, we did not propose any changes to this section other than to redesignate current § 71.30 as new § 71.35. We are not making any changes based on this comment.

Another commenter suggested that VA should not be overly restrictive with the eligibility requirements of PGCSS and provide training and education, selfcare courses, peer support, and the Caregiver Support Line to caregivers of covered veterans. The same commenter also asserted that there is no statutory or regulatory requirement that a general caregiver must provide personal care services in person. Further, the same commenter suggested VA consider allowing an enrolled veteran to participate in PGCSS if he or she is a caregiver to a non-veteran spouse, partner, friend, or relative and that this would increase the veteran's wellbeing and health. We appreciate the commenter's suggestions and note that the definition for personal care services as used by PGCSS does not require a general caregiver to provide in person personal care services. As indicated in the proposed rule, we believe the definition for ''personal care services'' is still appropriate for purposes of 38 U.S.C. 1720G(b) with respect to PGCSS and a new definition of ''in need of personal care services'' has been added to delineate whether such services must be provided in person for purposes of PCAFC.

Additionally, as explained above, PGCSS is only provided to a general caregiver providing personal care services to a covered veteran (*i.e.,* a veteran who is enrolled in the VA health care system). 38 U.S.C. 1720G(b)(1) and 38 CFR 71.30(b). Thus, we do not have the authority to provide PGCSS to veterans providing personal care services to a non-covered veteran. Furthermore, we did not propose any changes to § 71.30 other than to redesignate current § 71.30 as new § 71.35. We are not making any changes based on this comment.

§ 71.40 Caregiver Benefits

Wellness Contacts

One commenter suggested VA include language in the final rule to state that a wellness visit cannot result in reassessment of a veteran, unless it would result in being assigned to a higher tier. It is VA's intent that the purpose of wellness contacts is to review both the eligible veteran's and Family Caregiver's wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. During a wellness contact, the clinical staff member conducting such contact may identify a change in the eligible veteran's condition or other such change in circumstances whereby a need for a reassessment may be deemed necessary and arranged accordingly pursuant to § 71.30. We note that wellness contacts and reassessments are distinct and separate processes. As explained above in the discussion on § 71.30, a reassessment may occur more or less frequently than on an annual basis based on the individual care needs of the eligible veteran. Furthermore, 38 U.S.C. 1720G(c)(2)(A) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements; thus, the monthly stipend rate may be decreased based on a reassessment and the determination of whether an eligible veteran is unable to self-sustain in the community or no longer meets the eligibility requirements under § 71.20(a). Therefore, we disagree with the commenter's suggestion that a wellness visit cannot result in a reassessment, unless it would result in being assigned a higher tier. We make no changes based on this comment.

Several commenters opposed the change from 90 days to 180 days for monitoring (*i.e.,* wellness contacts) and encouraged VA to continue the 90-day requirement to ensure veterans and their caregivers needs are met. Specifically, commenters asserted that maintaining the 90-day monitoring requirement will provide effective oversight to ensure the well-being and safety of the eligible veteran and Family Caregiver, especially those veterans who are most vulnerable and susceptible to abuse. Relatedly, we note that one commenter stated that they do not find the 90-day requirement to be burdensome and do not wish for the visits to change because the commenter relies on the visits for support. The same commenter noted that prior to being part of PCAFC, they struggled with not being able to obtain caregiver support. Commenters also asserted that VA has provided no medically sound justification for this

change, and they believe it is an inadequate time period for monitoring veterans who are seriously ill or injured, especially those who are in the aging population with increased and evolving needs. These commenters note that more frequent wellness checks would ensure PCAFC participants have the support and resources needed to remain safe in their home setting. Commenters further noted that VA should retain the current 90-day monitoring requirements as this would be consistent with acceptable industry standards, including HHS and CMS, whereas the proposed wellness contacts of once every 180 days would not. We address these comments below.

We appreciate the comments received and agree with the commenters that increasing the frequency of these visits from 90 days to 180 days may not provide adequate monitoring of an eligible veteran and his or her caregiver, especially as we expand to an aging population. Therefore, we have revised the regulation to state that wellness contacts ''will occur, in general, at a minimum of once every 120 days,'' as we believe this is reasonable. We note that 120 days establishes a minimum baseline for the frequency of wellness contacts and that these contacts may occur more frequently, if needed, to address the individual needs of the eligible veteran and his or her Family Caregiver. Additionally, we have added the phrase ''in general'' to provide scheduling flexibility for both VA and the eligible veteran and his or her caregiver. As indicated in the proposed rule, eligible veterans and his or her Family Caregiver are required to participate in wellness contacts. Furthermore, we believe a 120-day frequency will accommodate those eligible veterans whose conditions are generally unchanged and would experience a significant disruption in the daily routine when having to make scheduling changes to accommodate a wellness contact. We make no additional changes based on these comments.

Another commenter encouraged VA to require wellness contacts on at least a quarterly basis, to ensure that wellness contacts include a full assessment of a veteran's health needs based on the input of the primary care team providing treatment to the veteran, and adjust the eligible veteran's and caregiver's benefits without having to wait for an annual reassessment if warranted based on the wellness contact. This commenter believes that these changes would be consistent with the overall intent of PCAFC and will better serve the veteran, especially in light of VA OIG's findings that VA has not consistently monitored current veterans in PCAFC. As explained above, the purpose of a wellness contact is to review both the eligible veteran's and Family Caregiver's wellbeing, the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver, and provide the opportunity to offer additional support, services, or referrals for services needed by the eligible veteran or Family Caregiver. Additionally, as explained above, reassessments may occur on a more or less frequent basis than annually and a wellness contact may result in a reassessment pursuant to § 71.30, as necessary, which would include a determination of whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate. We are not making any changes based on this comment.

Commenters also opined that requiring a minimum of one annual in home/in person wellness contact is substandard for purposes of monitoring and evaluating the eligible veteran and Family Caregiver, and suggested VA provide the same level of staff monitoring as would be expected if VA needed to hire a professional home health aide for a veteran. Additional commenters noted that CSP does not know whether and to what extent personal care services are being provided, and thus it is impossible to assess the well-being of the eligible veteran and Family Caregiver without direct observation by a qualified medical professional. Commenters also asserted that VA will be unable to properly monitor veteran's and caregiver's well-being or determine whether personal care services are being provided appropriately if VA is conducting wellness contacts semi-annually via phone. Commenters noted that CMS requires onsite visits, by a registered nurse or other appropriate skilled professional, ranging from 14 days to 60 days in instances when home health aide services are provided to a patient. We appreciate the commenters' concerns; however, we note that the regulation establishes a minimum baseline for how many visits must occur in the eligible veteran's home on an annual basis and that additional or all of the these contacts may occur in the eligible veteran's home, if needed, to address the individual needs of the eligible veterans and his or her Family Caregiver. We are not making any changes based on these comments.

Commenters stated that these wellness contacts would contradict VHA policy for patients residing in a community nursing home, which requires that a registered nurse or social worker from the contracting VA facility conduct follow-up visits on all patients at least every 30 days except in certain situations. As explained above, we are revising the frequency of contacts from 180 days to 120 days. Additionally, 120 days establishes a minimum baseline for the frequency of wellness contacts, and these contacts (including home visits) may occur more frequently, if needed, to address the individual needs of the eligible veteran and his or her Family Caregiver. Furthermore, PCAFC is a distinct program that provides benefits to Family Caregiver(s) for the provision of personal care services to an eligible veteran in his or her home; thus, we do not believe the frequency of wellness contacts must align with VHA policy for patients residing in a community nursing home, with which we contract. We are not making any changes based on this comment.

Commenters identified there has been a lack of monitoring and accountability with the administration of PCAFC, resulting in fraud, waste, and abuse (which has been documented by VA OIG), however, they opined that the wellness contacts will do little to address these issues, as VA has failed to effectively run PCAFC by not establishing a governance system to promote accountability. Some commenters noted that the program has become too large as a result of this lack of accountability, which they believe led to participants being kicked out of PCAFC in 2015. As indicated in the proposed rule, we acknowledge that we have experienced difficulty conducting monitoring due to limited resources. 85 FR 13380 (March 6, 2020). Transitioning the frequency of wellness contacts to generally every 120 days as well as increased staffing for the program is expected to mitigate resource limitations. In addition, we have developed an improved infrastructure at the VISN and medical center level to better oversee the delivery of PCAFC. Further, as explained previously in this rulemaking, we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation. We also anticipate that the regulations and additional training will create more consistency and standardization across VA, which believe will reduce any fraud, waste, and abuse within PCAFC. We thank the commenters for their concerns;

however, we make no changes based on these comments.

One commenter implied that the proposed rule stated that OIG found monitoring is resource intensive and burdensome. We correct this commenter's misunderstanding by stating that OIG did not determine that monitoring was resource intensive or burdensome, rather the proposed rule acknowledged that we have failed to meet the 90-day requirement due to limited resources, and we note that some PCAFC participants have informed VA that they find the 90-day requirement to be burdensome. As explained above, we will be conducting wellness contacts every 120 days, which we believe is a reasonable frequency for wellness contacts. We make no changes based on this comment.

One commenter opined that these proposed wellness contacts do not meet the requirements in 38 U.S.C. 1720G(a), as VA is required to monitor the well-being of eligible veterans by directly reviewing the quality of the personal care services in the veteran's homes and taking corrective action. This commenter also asserted that reassessments of veteran eligibility for PCAFC and monitoring the well-being of the eligible veteran are simply not analogous. First, 38 U.S.C. 1720G does not require VA conduct monitoring of the eligible veteran's wellbeing in the home or take related corrective action; instead, section 1720G(a)(9) requires VA establish procedures to ensure appropriate follow-up, which may include monitoring the wellbeing of the eligible veteran in the home and taking corrective action, including suspending or revoking the approval of a Family Caregiver. We note these latter provisions are discretionary. Second, we note that we currently perform periodic monitoring pursuant to 38 CFR 71.40(b)(2) and consistent with 38 U.S.C. 1720G(a)(9)(A). Section 161(a)(5) of the VA MISSION Act of 2018 amended 38 U.S.C. 1720G(a)(3)(D) to additionally require VA to periodically evaluate the needs of the eligible veteran and the skills of the Family Caregiver to determine if additional instruction, preparation, training, and technical support is necessary. Consistent with section 1720G, the purpose of wellness contacts is to review both the eligible veteran's and Family Caregiver's wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. We note that we would require at least one wellness contact occur in the eligible veteran's home on an annual basis. Reassessments will be conducted to evaluate the eligible veteran's and Family Caregiver's eligibility, including the Family Caregiver's continued eligibility to perform the required personal care services, and whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend. As indicated in the proposed rule, we believe the combination of wellness contacts and reassessments meet the periodic evaluation requirement in 38 U.S.C. 1720G(a)(3)(D), as we would determine whether any additional instruction, preparation, training, and technical support is needed in order for the eligible veteran's needs to be met by the Family Caregiver. We further note that to the extent that we would need to take corrective action pursuant to section 1720G(a)(9), we may revoke or discharge a caregiver or veteran from PCAFC pursuant to 38 CFR 71.45, as appropriate. We are not making any changes based on this comment.

A commenter incorrectly stated that VA has never met the statutory requirement to complete monitoring assessments no less than every 90 days; however, that is not a requirement established in the statute, but rather in regulation by VA. We are not making any changes based on this comment.

Several commenters stated that the proposed 180-day requirement is too much and that these visits can be easily conducted by the phone rather than in person. Additionally, commenters asserted that these visits be waived for eligible veterans who have a 100 percent P&T service-connected disability rating or receive other VBA or SSA disability benefits. As previously explained, the purpose of wellness contacts is to review both the eligible veteran's and Family Caregiver's wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. Also, while we understand that the condition of some eligible veterans will remain unchanged, VA has a statutory requirement to periodically evaluate the needs of the eligible veteran and the skills of the Family Caregiver to determine if additional instruction, preparation, training, or technical support is necessary. See 38 U.S.C. 1720G(a)(3)(D). Additionally, as explained above, we are revising the requirement from 180 days to 120 days, which we believe will accommodate those eligible veterans whose condition is generally unchanged and would experience a significant disruption in the daily routine when having to make scheduling changes to accommodate a wellness contact. Further, while we agree that some visits can be conducted by phone or other telehealth modalities, we believe that at least one wellness contact should occur in the eligible veteran's home to provide direct observation of the personal care services provided and assess the wellbeing of the veteran and Family Caregiver. We are not making any changes based on these comments.

Several commenters requested clarification on frequency of contacts and one commenter suggested that the frequency of these contacts be adjusted to accommodate individual circumstances for eligible veterans and Family Caregivers. As previously explained, 120 days establishes a minimum baseline for the frequency of wellness contacts and these contacts may occur more frequently if needed, to address the individual needs of the eligible veteran and Family Caregiver. We are not making any changes based on these comments.

One commenter stated that using the term ''wellness contact'' is inconsistent with the provision of Home and Community Based Services and standard medical terminology, specifically the annual wellness visit which is a yearly appointment with a primary care provider to create or update a personalized prevention plan. The commenter asserts that when all members of the healthcare team use the same terminology, they can understand what is on the patient's chart and provide them with the best possible care. As indicated in the proposed rule, we believe changing the terminology from ''monitoring'' to ''wellness contacts'' is a more accurate description of the purpose of these visits as it includes a review of the wellbeing for both the eligible veteran and Family Caregiver. Additionally, we have found that people find the term ''monitoring'' to be punitive. We are not making any changes based on this comment.

Monthly Stipend Rate

VA proposed several changes to the methodology and calculation of monthly stipend payments for Primary Family Caregivers. In particular, we proposed to use the OPM's GS Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12. We further proposed to discontinue the use of the combined rate, which is based on the Bureau of Labor Statistics (BLS) hourly wage rate for home health aides at the 75th percentile in the eligible veteran's geographic area of residence, multiplied by the Consumer Price Index for All Urban Consumers (CPI–U).

One commenter supported the use of the OPM GS Annual Rate for grade 4,

step 1, and stated that it will lend significant standardization and greatly increase the ease of program administration. Another commenter similarly supported this change and described the GS rate as more accurate and standardized. We appreciate these comments and do not make any changes based upon them.

Some commenters were concerned with VA using GS instead of BLS. In particular, commenters stated that the transition from BLS to GS is wholly inadequate, unreasonable, illogical, arbitrary, inconsistent with law, and an effort to reduce the amount of stipends that will be paid. Other commenters opposed transitioning from the combined rate (using BLS rates) to the monthly stipend rate (using GS rates), and one commenter urged VA to keep the current rate. Another commenter expressed concern that using the GS rate would treat caregivers like government employees.

We disagree with the commenters above and find that the use of the GS scale is not only reasonable and consistent with the law but will also result in an equal or increased payment for the majority of participants. As we explained in the proposed rule, we believe it is reasonable to use the GS rate instead of the combined rate because of challenges we had using the BLS rate. 85 FR 13382 (March 6, 2020). We tried to identify other publicly available rates that we could use for calculating the monthly stipend that would meet the statutory requirements in 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), but were unable to locate any. We found that the GS wage rates address some of the challenges we have had using the BLS rate. Id. We further found that the GS wage rates meet our needs for administering the stipend payment, as it is publicly available, easy to locate, is developed entirely outside of VA with a defined process for updating the rates, and provides geographic variation. However, after publication of the proposed rule and in considering public comments such as the reference to caregivers being treated like federal employees, VA examined the challenges associated with making retrospective pay corrections in instances when OPM announces retrospective changes to the GS scale tables later in the year. Such adjustments would complicate VA's goal, as stated in the proposed rule, of adopting the GS wage rates to ''ensure more consistent, transparent, and predictable stipend payments,'' (85 FR 13382 (March 6, 2020)) and our proposal to pay stipends monthly by dividing the annual rate by 12 (rather than using the same pay period structures that most federal employees are paid through). Such retrospective payments would increase the risk of improper payments, be administratively impracticable for VA, and would be anticipated to only represent a few percentage points' change in retrospective pay over a relatively short period of time. Thus, VA will not make retroactive stipend payments resulting from retrospective changes to GS wage rates by OPM and accordingly amends the regulation text to indicate that adjustments under § 71.40(c)(4)(ii)(A) take effect ''prospectively following the date the update to such rate is made effective by OPM.'' This change only applies to § 71.40(c)(4)(ii)(A) and would not impact the retroactive adjustments in § 71.40(c)(4)(ii)(C)(*2*)(*i*) as a result of a reassessment conducted by VA under § 71.30.

In addition, we analyzed the GS and BLS wage rates to determine whether the GS wage rates tracked the private sector wages for home health aides, and we found that these closely tracked in the past both at a national level and for GS adjusted localities. Id. As we explained in the proposed rule, we determined the appropriate GS grade and step for stipend payments by comparing against BLS wage rates for commercial home health aides, and found that for 2020, the BLS national median wage for home health aides (adjusted for inflation) is equivalent to the base GS rate at grade 3, step 3 (without a locality pay adjustment). Id. We also found that in most U.S. geographic areas for 2020, the GS rate at grade 3, step 3 would be equal to or higher than the BLS median wage for home health aides in the same geographic areas. Id. at 13383. We considered using a unique GS grade and step based on the median home health aide wage rate in each of the geographic areas where the 2020 GS rate at grade 3, step 3 was less, but determined that would not be appropriate or practicable for the reasons previously explained in the proposed rule. Id. As a result, we proposed to use the slightly higher GS rate at grade 4, step 1 for all localities, which is consistent with the requirements of section 1720G(a)(3)(C)(ii), (iv) (*i.e.,* that to the extent practicable, the stipend rate is not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living).

We note that we do not view Family Caregivers as government employees, and use of the monthly stipend rate (*i.e.,* GS Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12) instead of the combined rate using the BLS rate does not change our view. The stipend payment is not intended to compensate Family Caregivers as if they were government employees, but rather acknowledge the sacrifices these Family Caregivers have made to care for eligible veterans. The benefits of using the GS Annual Rate, as explained in the proposed rule and further described herein, outweigh any potential concerns that use of this rate could result in caregivers being treated like government employees. Additionally, we expressly state in 38 CFR 71.40(c)(4)(iii), as made final within this rule, that nothing in this section shall be construed to create an employment relationship between VA and a Family Caregiver. We make no further changes based on these comments.

Other commenters were concerned that the monthly stipend rate would be too low. In particular, commenters were concerned that the rate will not properly compensate Primary Family Caregivers for the care they provide, does not reflect the actual rates of home health aides, and is less than the proposed minimum wage of $15 per hour. Another commenter found the GS rate to be inadequate because the USA National Average for cost of in-home care is $52,624 as reported in the AARP Genworth Study. Others emphasized sacrifices made by caregivers to take care of loved ones, including lost employment wages.

We reiterate from the proposed rule that the stipend rate is consistent with the statutory requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), which requires that to the extent practicable, the stipend rate be not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living. See 85 FR 13382–13383 (March 6, 2020).

In response to the commenters who shared their personal stories and expressed concern that the stipend rate is too low, we understand and appreciate the many sacrifices these caregivers make on a daily basis to care for our nation's veterans. We are incredibly grateful for the care and valuable service they provide. These caregivers greatly impact veterans' ability to remain safely in their homes for as long as possible. We note that PCAFC is just one of the ways in which VA is able to recognize and thank these caregivers for their service and sacrifice.

In particular, the monthly stipend is an acknowledgement for the sacrifice Family Caregivers make to care for eligible veterans. See 76 FR 26155 (May 5, 2011). It was never intended to compensate Primary Family Caregivers for their services or lost wages.

In response to the commenter who was concerned that the monthly stipend rate may be less than the proposed minimum wage of $15 per hour, we note that the stipend payment, to the extent practicable, must be no less than the annual salary paid to home health aides in the commercial sector. 38 U.S.C. 1720(G)(3)(C)(ii), (iv). Thus, by law, we are required to look at the national median for home health aides. We reviewed 2018 data of the national median for home health aides (adjusted for inflation to 2020), and found that the national median was $12.60 per hour. The higher monthly stipend rate of 100 percent of the GS Annual Rate at grade 4, step 1 would receive $14.95 per hour in 2020. We note that that is the hourly rate for the Rest of the United States, and that Primary Family Caregivers may receive more based on their locality since the Rest of the United States would be the lowest rate possible for purposes of calculating the stipend rate based on locality. However, Primary Family Caregivers may receive a lower stipend payment if they receive the lower stipend rate (*i.e.,* 62.5 percent of the GS Annual Rate at grade 4, step 1.) It is also important to further note that the monthly stipend payment is a nontaxable benefit. We recognize that some Primary Family Caregivers will receive less than $15 an hour however, we believe that the stipend rate meets the statutory requirement for payment and is appropriate given the intent of the benefit. As previously explained, the monthly stipend is intended to acknowledge the sacrifices Family Caregivers make and was never intended to compensate for their services.

In response to AARP Genworth Study, we note that this study reflects the cost of contracted in-home care (as the rate listed is the rage charged by a non-Medicare certified, licensed agency), and is not reflective of the actual wages of the home health aides who provide care. The cost of contracted in-home care also includes both overhead and profits for the agency, which are not passed on to home health aides. Second, we acknowledge that the cost of institutional or in-home care is more than the monthly stipend. Pursuant to 38 U.S.C. 1720G(a)(3)(C)(ii),(iv), we are required to look at the wages of home health aides to determine the stipend rate, and the stipend rate must be no less than the monthly amount a commercial home health care entity would pay an individual. While the Primary Family Caregiver and the services he or she provides complement the clinical care provided by commercial home health care entities to eligible veterans, the Primary Family Caregiver is not intended to be a replacement or substitute for such care. We also note that the Primary Family Caregiver does not necessarily have the same specialized training and education as those providing clinical care, and that the cost of care billed by a licensed agency may include multiple caregivers. Thus, we do not believe it would be reasonable or consistent with the statute to pay Primary Family Caregivers the cost of care billed by licensed agencies. We make no changes based on these comments.

One commenter noted that the reduction in the stipend amount may result in the caregiver working outside the home which can hurt the veteran who cannot survive without the caregiver. While we recognize that some current participants may have a reduced stipend amount based on changes we are making to the stipend methodology, the transition from BLS to GS should result in the majority of current participants receiving an increase in their stipend amount. As we explained in the proposed rule and reiterate within this final rule, we will provide a period of transition for legacy participants to minimize any negative impact. We further note that as part of this rulemaking, we are providing financial planning services as an additional benefit available to Primary Family Caregivers. This new benefit can assist these Family Caregivers with managing their finances. To the extent an eligible veteran requires more care than the Primary Family Caregiver is able to provide, PCAFC is one of many programs that may be available to meet the needs of eligible veterans. In such instances, we recommend speaking with VA about other care options that may be available, such as home based primary care, and Veteran-Directed care. We make no changes based on this comment.

Other commenters asserted that VA's proposed changes will result in stipend amounts that are too high. In particular, one commenter expressed concern that the stipend payments are in some cases higher than disability compensation that veterans receive. Other commenters believe the stipend payments can result in the veteran or caregiver mismanaging the stipend, encourage individuals not to work, and are inconsistent with the purpose of the stipend to assist the Family Caregiver rather than pay for mortgages and similar expenses.

Consistent with our explanation in the proposed rule and as explained directly above, we believe the monthly stipend rate will not result in stipend rates that are too high because the monthly stipend rate is consistent with the statutory requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), by being not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living. See 85 FR 13382 (March 6, 2020). Additionally, as explained in the proposed rule and in this section, we determined that the monthly stipend rate tracks with the national median wage for home health aides. Id.

To the extent that commenters were concerned that monthly stipend payments can be higher than the disability compensation that veterans receive, we recognize that this may possibly occur. However, it is important to note that disability compensation and PCAFC are two distinct and separate programs with different purposes. In deciding the monthly stipend methodology, we considered whether disability compensation payments would be less than Primary Family Caregiver monthly stipend payment, but determined that the advantages of using the GS rate to calculate the monthly stipend payment outweigh any concerns with respect to the veteran's disability compensation payment compared to the monthly stipend payment.

To the extent that commenters asserted that the monthly stipend encourages individuals not to work, we respectfully disagree. We are aware that many Primary Family Caregivers have already given up employment so that they can care for eligible veterans. For those who are unable to afford to care for an eligible veteran without working, we recognize that this monthly stipend may provide Primary Family Caregivers with the flexibility to care for the eligible veteran. The monthly stipend is one of many benefits available to Primary Family Caregivers as a way to acknowledge their sacrifices in caring for eligible veterans and their valuable contributions to society. We also note that since the monthly stipend for Primary Family Caregivers is a benefit payment, and not based on an employment relationship, it does not involve employer contributions to old-age, survivors, and disability Insurance (commonly known as ''Social Security'') or participation in a defined-contribution or defined-benefit

retirement program. Given this and the fact that the stipend is nontaxable (and thus is not taxed at a higher tax bracket if there is other taxable income from employment or other sources), we do not believe there is an incentive for Primary Family Caregivers who would otherwise work outside of the caregiving role to leave the labor market because of their participation in PCAFC.

To the extent that commenters believe the stipend payment will lead to mismanagement and it can be used to pay a mortgage or other similar expenses, we do not impose any requirements or limitations on how a Primary Family Caregiver spends the monthly stipend he or she receives, and we decline to establish such requirements or limitations. However, we do note that as part of the improvements we are making to part 71 as part of this rulemaking, Primary Family Caregivers will be eligible to receive financial planning services, which can assist the Primary Family Caregiver with managing the stipend payment.

Other commenters recommended alternative approaches to determine the monthly stipend amount. Specifically, one commenter requested that the stipend be the rate of the salary the caregiver earned in their past occupation and commensurate with the caregiver's education, because many caregivers leave their jobs to become a caregiver, and many are healthcare providers providing high level of care that a home health aid is not trained or permitted to perform. This commenter also noted that this would be cost efficient for VA since they would not have to put the veteran in a skilled nursing home at VA's expense. Another commenter recommended the stipend more closely align to the pay of a VA registered nurse. This same commenter urged VA to compare the salary of a home health care worker (with a median pay in 2018 of $24,060) to a live-in home health care worker (which can average $4,800 per month for 40 hours per week of in-home care costs). Additionally, one commenter recommended that VA assign the GS–4, Step 10 rate to those with extreme disabilities that require 24/7, 365 care. Another commenter suggested caregivers should be paid as if enlisted in active duty. One commenter recommended the stipend be calculated by what it would cost to the government for institutionalization or inpatient care of the eligible veteran reduced by 10–20 percent. Finally, another commenter suggested the percentage of the GS rate at grade 4, step 1, be based on the veteran's service-connected disability rating percentage, and further suggested that caregivers provide care full time and should be recognized more like a social worker or nurse.

We reiterate that the monthly stipend is an acknowledgement for the sacrifices Family Caregivers make to care for eligible veterans. See 76 FR 26155 (May 5, 2011). While we recognize that some individuals may give up their jobs to become a Family Caregiver, the monthly stipend is not meant to be commensurate with the income a Family Caregiver received from previous employment (including as a healthcare provider) or with their education. It is also not meant to transfer any savings VA may receive by not paying for a skilled nursing home or other institutionalization or inpatient care of the veteran to the Family Caregiver. The monthly stipend is also not meant to replace or substitute clinical care that eligible veterans receive. The care that Family Caregivers provide to eligible veterans is in addition to and supportive of the increased quality of life or maintenance of such. We note that services that Family Caregivers provide is not meant to replace institutional or inpatient care, and that, in addition to PCAFC, eligible veterans may be eligible for additional VHA services such as skilled nursing home care, home based primary care, and Veteran-Directed care. We acknowledge that there are commenters that believe their contributions exceed that of a home health aide. However, the reason that we use the wages of a home health aide for determining the stipend rate is based on the requirement in 38 U.S.C. 1720G(a)(3)(C)(ii), (iv) (to the extent practicable, the stipend is not less than the ''amount a commercial home health care entity would pay an individual in the geographic area of the eligible veteran [or similar area]''). Additionally, as indicated in the proposed rule and reiterated in this section, we believe the GS rate for grade 4, step 1 is, to the extent practicable, not less than the annual salary paid to home health aides in the commercial sector, particularly after considering that the monthly personal caregiver stipend is a nontaxable benefit. 85 FR 13383 (March 6, 2020).

To the extent that commenters suggested VA base the stipend on other occupations, such as nurses (including registered nurses) and social workers, we decline to do so as 38 U.S.C. 1720G(a)(3)(C)(ii) is clear that the stipend be no less than the salary paid to a home health aide. Similarly, we decline to adopt the suggestion that we compare the salary of a home health care worker (with a median pay in 2018 of $24,060) to a live-in home health care worker (which can average $4,800 per month for 40 hours per week of in-home care costs). Section 1720G(a)(3)(C)(ii) is clear that the stipend be no less than the salary paid to a home health aide, not a live-in home health care worker. Thus, we used home health aide wages for determining the rate to use for the monthly stipend.

To the extent that a commenter suggested that we base the stipend on enlisted active duty, we are unclear as to this commenter's specific suggestion since they did not provide any additional information, and their comment was in the context of providing caregivers benefits similar to veterans. We note that active duty enlisted pay is based on military rank (*i.e.,* E–1 to E–9) and years of service. As the commenter did not suggest the level of active duty enlisted pay we should consider using for the stipend rate (or whether to include non-wage forms of compensation received by active duty enlisted personnel), we cannot further address their comment. Additionally, we did not consider the pay of active duty enlisted because the statute requires us to determine the stipend rate based on the salary paid to a home health aide.

With regards to the commenter that suggested we use the GS Annual Rate at grade 4, step 10 for the stipend payment for Primary Family Caregivers who care for eligible veterans with extreme disabilities that require 24/7, 365 days of care, we decline to do so as those with the highest level of need, which we believe would likely include an individual who needs around-the-clock care, would fall under the higher stipend level (*i.e.,* 100 percent of the monthly stipend rate) under 38 CFR 71.40(c)(4)(i)(A)(2). The intent of having higher and lower stipend levels was to distinguish between those who are determined to be unable to self-sustain in the community and those who are not, as these are different levels of need. We decided not to use multiple GS grades and steps as we wanted to ensure we had standardization and transparency about the rate that we were using. More levels of pay would result in more subjectivity in the assignment of rates. To the extent that this commenter believes that 24/7 care is required, we note that this is not the level of care we expect to be provided. We believe it is likely that an individual who needs 24/7 care would need additional clinical care from a skilled health care provider. We also note that this level of care would be beyond the scope of the level of personal care services that is intended under PCAFC,

particularly as that is not the level of training we provide to Family Caregivers for the purpose of PCAFC. If an individual needs 24/7 care, we are willing to provide referrals to other VHA services that may be appropriate.

Lastly, in response to the commenter that suggested the percentage of the GS rate at grade 4, step 1, be based on the veteran's service-connected disability rating percentage, we decline to do so. We note that as part of this final rule, and explained previously in this rulemaking, we are defining serious injury to mean any service-connected disability that (1) is rated at 70 percent or more by VA; or (2) is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA. If we adopted this suggestion, only Primary Family Caregivers of those veterans with a 70 percent or higher service-connected disability rating would be eligible for the stipend rate so veterans that do not meet the definition of serious injury would not qualify for PCAFC. We note that while service-connected disability rating is part of the definition of serious injury, it is not used to determine a veteran's or servicemember's need for personal care services for purposes of PCAFC eligibility. Instead, we assess the clinical needs of individuals to determine whether he or she has a need for personal care services. Service-connected disability rating is not commensurate with a need for personal care services, and to use the disability rating for that purpose would not be appropriate. We also note that we will have two levels for the stipend payment, with the higher level (*i.e.,* 100 percent) based on whether the eligible veteran is unable to self-sustain in the community. All other Primary Family Caregivers will receive the stipend payment at the lower rate (*i.e.,* 62.5 percent). These stipend levels are not based on service-connected disability rating, but rather whether the veteran is unable to self-sustain in the community. Having two levels for the stipend rate will ensure that those Primary Family Caregivers of eligible veterans with severe needs receive the higher stipend rate.

We make no changes to the regulation based on these comments.

Multiple commenters took issue with VA's statement that reliance on the combined rate has resulted in stipend rates well above the average hourly rate of a home health aide in certain geographic areas, including one commenter who suggested that this has been ''solved by the current *BLS.gov/oes* contracting process which eliminated outliers in the May 2019 Survey.'' We address these comments below.

We recognize that BLS data has been adjusted to account for outliers. However, as explained previously in this discussion on the monthly stipend rate, we have determined that OPM's GS rate will better address the needs of PCAFC. We note that the current combined rate uses the most recent data from the BLS on hourly wage rates for home health aides as well as the most recent CPI–U, unless using this most recent data for a geographic area would result in an overall BLS and CPI–U combined rate that is lower than that applied in the previous year for the same geographic area, in which case the BLS hourly wage rate and CPI–U that was applied in the previous year for that geographic area will be utilized to calculate the Primary Family Caregiver stipend. See 80 FR 1397 (January 9, 2015). This was put in place to ensure that Primary Family Caregivers would not unexpectedly lose monetary assistance upon which they had come to rely. Id. In contrast to the BLS rate, OPM's GS scale provides a more stable data set from year to year, drastically reducing the probability of geographic regions experiencing inflated stipend rates. A more detailed explanation is provided within the regulatory impact analysis.

We make no changes based on these comments.

Consequences of Potential Decrease in Stipend

One commenter asked that Primary Family Caregivers of legacy participants continue to be paid based on the BLS rate (*i.e.,* combined rate) while in the program. The commenter believes BLS to be more comprehensive in calculating living wages and indicated that the transition to the monthly stipend rate will cut their stipend in half and they use their current stipend to cover in home treatments and other treatments out-of-state that would otherwise be unavailable to them.

Initially, we note that PCAFC is complementary to other VHA health care services and we encourage PCAFC participants to learn about other health care benefits that may help meet the needs of the eligible veteran. Similar to our earlier discussion about grandfathering in PCAFC participants, we believe it would be inequitable to allow the Primary Family Caregivers of legacy participants to receive their previous stipend rate indefinitely while applying the monthly stipend rate for legacy applicants and new participants. Doing so would result in Primary Family Caregivers of post-9/11 veterans and pre-9/11 veterans who are similarly situated in all respects receiving different stipend amounts, which would continue the inequity between different eras of service. It would also be administratively prohibitive to utilize two different stipend payment methodologies as we expand PCAFC to pre-9/11 veterans. As mentioned further above, the majority of Primary Family Caregivers of legacy participants will receive increases in the amount of their stipend as a result of the transition from BLS to GS. However, some may experience a decrease in their stipend amount, which is why we provide a period of transition (*i.e.,* to minimize the negative impact of changes to the stipend methodology). We note that the stipend amount for the Primary Family Caregivers of legacy participants will generally remain unchanged during the one-year period beginning on the effective date of this rule, unless it is to their benefit, and so long as the legacy participant does not relocate to a new address. We are not making any changes based on this comment.

Another commenter indicated that VA's changes will result in a decrease in the commenter's stipend amount. The commenter indicated an understanding of the transition period outlined in the proposed rule, but asked whether there will be a cost of living increase for those who ''already make to [sic] much'' under the previous stipend payment methodology. On the effective date of this rule, part 71 will no longer refer to the combined rate, and as explained in VA's proposed rule, VA will no longer make annual adjustments to the combined rate (85 FR 13358 (March 6, 2020)), including for Primary Family Caregivers of legacy participants who continue (for one year after the effective date) to receive the same stipend amount they were eligible to receive the day before the effective date of the final rule pursuant to the special rule in § 71.40(c)(4)(i)(D). To the extent the commenter is asking about adjustments to stipend payments under the new stipend payment methodology (based on the monthly stipend rate) that result from OPM's updates to the GS scale, this is addressed in § 71.40(c)(4)(ii)(B). As explained in VA's proposed rule, the GS pay schedule is usually adjusted annually each January based on nationwide changes in the cost of wages and salaries of private industry workers. 85 FR 13388 (March 6, 2020). Any adjustment to stipend payments that result from OPM's updates to the GS Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides, will take effect

prospectively following the date the update to such rate is made effective by OPM. See § 71.40(c)(4)(ii)(A). We are not making any changes based on this comment.

Periodic Assessments

One commenter requested VA include a statement in the final rule that VA will post the findings of its assessments of the monthly stipend rates on a public website so that stakeholders are able to easily evaluate the impact of this change on Family Caregivers in the program. We proposed to add § 71.40(c)(4)(iv) which states that in consultation with other appropriate agencies of the Federal government, VA shall periodically assess whether the monthly stipend rate meets the requirements of 38 U.S.C. 1720G(a)(3)(ii) and (iv). We will consider making findings of these assessments publicly available in an effort to be as transparent as possible. We are not making any changes based on this comment.

Unable To Self-Sustain in the Community

VA proposed to add a new definition for the phrase ''unable to self-sustain in the community,'' for purposes of determining the monthly stipend level under § 71.40(c)(4)(i)(A). Unable to self-sustain in the community was proposed as the sole criterion to establish eligibility for the higher level stipend and would mean that an eligible veteran (1) requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in § 71.15, and is fully dependent on a caregiver to complete such ADLs; or (2) has a need for supervision, protection, or instruction on a continuous basis. Commenters raised numerous concerns with the definition, including but not limited to the definition lacking clarity and objectivity, use of a double negative in the proposed rule discussion, that few veterans will be eligible for the higher stipend level and that it will promote total reliance on caregiver, that it is arbitrary and too strict, and that it is economically unfair. Commenters also provided suggested edits to parts of the definition and requested we continue to use the current three tiers instead of two levels for purposes of the monthly stipend rate. While we make no changes to the regulation based on these comments, we address them in the discussion below.

One commenter stated that the new definitions seem to be easier to understand, but is concerned the requirements may still be left to interpretation. While the commenter did not specify which definitions were easier to understand, we believe the commenter to be referring to unable to self-sustain in the community, as the comment also referred to the new stipend levels. Another commenter stated that the proposed rule lacked adequate information on what being unable to self-sustain in the community means although it is a determining factor for which level a veteran is assigned. Relatedly, an additional commenter raised concerns about the definition of ''unable to self-sustain in the community'' as being meaningless and flawed, in part because there are no objective criteria for need for supervision, protection, or instruction. Another commenter, seeking clarification of the definition, said that ''VA's failure to provide an objective operational definition of supervision, protection or instruction . . . seems quite contradictory based on the examples offered,'' and asked if VA has an objective clinical reference for this definition. One commenter noted that this definition is problematic because it is based on the definition of the ''need for supervision, protection, or instruction'' of which they believe there are no objective criteria. Lastly, one commenter also expressed concern that without clear protocols and definitions for determining whether a veteran or servicemember is unable to self-sustain in the community, inconsistency would persist across VA.

We appreciate the commenters' concerns, but note that this definition is intended to distinguish between the level and amount of personal care services that an eligible veteran needs for purposes of determining the appropriate stipend level. We note that at least one commenter stated that they found the definition of ''unable to self-sustain in the community'' to be clear.

We believe the definition of ''unable to self-sustain in the community'' contains objective, clear, and standardized requirements that can be consistently implemented across PCAFC. We believe it is specific enough to allow us to make objective determinations about whether a veteran or servicemember has a higher level of need such that he or she meets the definition of unable to self-sustain in the community. The definition provides the frequency with which personal care services need to be provided by a Family Caregiver of an eligible veteran who is determined to be ''unable to self-sustain in the community,'' and can be distinguished, for purposes of determining the monthly stipend level, from a Family Caregiver of an eligible veteran who does not meet this threshold. For example, an eligible veteran that qualifies for PCAFC under the definition of ''inability to perform an ADL'' would meet the definition of ''unable to self-sustain in the community'' if he or she requires personal care services each time he or she completes three or more ADLs, and is fully dependent on a caregiver to complete such ADLs. This is distinct from the definition of ''inability to perform an ADL'' which only requires assistance with at least one ADL each time the ADL is completed. This distinction between the definitions allows us to differentiate between those who have moderate needs versus those who have a higher level of need for purposes of determining the appropriate monthly stipend level, as we are required by 38 U.S.C. 1720G(a)(3)(C)(i) to base the stipend rate on the amount and degree of personal care services provided.

Additionally, an eligible veteran that qualifies for PCAFC under the definition of ''need for supervision, protection, or instruction'' would meet the definition of ''unable to self-sustain in the community'' if they have a need for supervision, protection, or instruction on a continuous basis. This is distinct from the definition of ''need for supervision, protection, or instruction'' as such definition does not require the same frequency of personal care services needed. As previously discussed, the terms daily and continuous relate to the frequency of intervention required in order to maintain an individual's personal safety that is directly impacted by his or her functional impairment at the lower and higher stipend levels, respectively. Veterans and servicemembers who are eligible for PCAFC based on a need for supervision, protection, or instruction may only require intervention at specific and scheduled times during the day to maintain their personal safety on a daily basis. In contrast, a veteran or servicemember who is unable to self-sustain in the community, has a need for supervision, protection, or instruction on a continuous basis.

Distinguishing a daily versus a continuous need for supervision, protection, or instruction is a clinical decision, based upon an evaluation of the individual's specific needs. This distinction is discussed in more detail above in the discussion of the definition of need for supervision, protection, or instruction in § 71.15.

As we explained in the proposed rule, in determining whether an eligible veteran is in need of supervision,

protection or instruction on a continuous basis, VA would consider the extent to which the eligible veteran can function safely and independently in the absence of such personal care services, and the amount of time required for the Family Caregiver to provide such services to the eligible veteran consistent with 38 U.S.C. 1720G(a)(3)(C)(iii)(II) and (III), as amended by section 161(a)(4)(B) of the VA MISSION Act of 2018. Id. For example, an individual with dementia would have a need for supervision, protection, or instruction on a continuous basis if such individual requires daily instruction for dressing, wanders outside the home when left unattended for more than a few hours, and has a demonstrated pattern of turning on the stove each time the individual enters the kitchen due to disorientation; however, an individual with dementia who only requires step-by-step instruction with dressing daily which includes some physical demonstration of the tasks, would not have a need for supervision, protection, or instruction on a continuous basis.

We also note that we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation, to include this definition.

To the extent commenters raised specific concerns about the definition of ''unable to self-sustain in the community'' based on concerns they had with the underlying definitions of inability to perform an ADL or need for supervision, protection, or instruction, we refer the commenters to those specific sections that discuss the definitions of inability to perform an ADL and need for supervision, protection, or instruction.

We make no changes based on these comments.

While we are not entirely certain, it appeared that one commenter, in the context of their comment concerning the lower-level stipend, suggested that the definition of ''need for supervision, protection, or instruction'' focuses on supervision and safety necessary due to cognitive or mental health issues. As discussed above in the context of ''inability to perform an activity of daily living,'' a need for supervision, protection, or instruction is inclusive of a veteran or servicemember with cognitive, neurological, or mental health issues. We are not making any changes based on this comment.

Another commenter was confused about this definition in the proposed regulation and the FAQs posted on VA's website about the proposed rule because this commenter asserts that in the FAQs we use a double negative for explaining when someone meets the lower stipend level, and the examples we provided are not consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs and providing more objective criteria for clinicians evaluating PCAFC eligibility. We are unclear which examples the commenter is referring to but note that we provide examples throughout the proposed rule in order to help explain how certain criteria may be applied. Relatedly, another commenter raised similar concerns about the language, ''not determined to be unable to self-sustain in the community'' because they assert this definition is circular.

To the extent that the commenter asserts that the examples we provided for purposes of this definition are inconsistent with our intent to focus on veterans with moderate and severe needs and to provide more objective criteria for PCAFC, we respectfully disagree, and note that we are unable to further respond since this commenter did not identify the examples to which they are referring. In response to the commenters' concerns that we used a double negative for explaining the lower stipend, we acknowledge that we did state that an individual would meet the lower stipend level if they are determined not to be unable to self-sustain in the community. While we understand that this use of ''determined not to be unable to self-sustain in the community'' can be confusing and appear circular, we used this language to clearly distinguish between those who are determined to be ''unable to self-sustain in the community,'' and those who are not, for purposes of determining the stipend level. Those eligible veterans who meet the definition of ''unable to self-sustain in the community'' are those with severe needs while those eligible veterans who do not meet this definition would be those with moderate needs. We intentionally did not use the phrase ''able to self-sustain in the community'' in reference to those veterans eligible at the lower stipend level. We note that the ability to self-sustain is considered on a continuum with unable to self-sustain at one end. If an eligible veteran does not meet the definition of unable to self-sustain in the community, that does not mean that he or she is able to self-sustain in the community, as he or she may fall somewhere in between on the continuum. We are not making any changes based on these comments.

Some commenters raised concerns about using ''continuous'' in the definition of unable to self-sustain in the community. One commenter recommended using ''frequent'' instead of ''continuous'' based on the assertion that continuous creates a presumption that conditions must have continuous symptomatology in order to qualify for the higher level stipend. The same commenter asserted that a continuous requirement would create an unrealistic standard that few, if any, veterans would be able to meet; and the term frequent is more aligned with how symptoms of impairments actually occur. One commenter raised concerns about what ''continuous'' means in the context of this definition, and asserted that a veteran who needs 24/7 care is in crisis and would need higher level care or hospitalization. This commenter recommended that VA better define this higher tier for veterans requiring a severe level of supervision, protection, or instruction. Relatedly, one commenter noted that use of ''continuous'' sets an untenable standard when the only alternative is ''daily'' for purposes of consistently administering a national program. The commenter also asserted that ''varying types of functional impairment that can give rise to a need for supervision, protection, or instruction do not lend themselves to clear distinctions when attempting to distinguish between daily and continuous needs'' and that the ''definition would fail to provide intended improvements to PCAFC consistency and transparency.'' Another commenter alleged that the definition of unable to self-sustain in the community may require continuous supervision, which they allege is contrary to prior regulatory statements VA has made about considering and rejecting requests to increase the amount of caregiving to more than 40 hours per week.

We appreciate the commenters' concerns and suggestions; however, as indicated in the proposed rule, ''continuous'' is used to address the frequency with which an eligible veteran is in need of supervision, protection, or instruction, rather than the frequency of symptomatology of a specific condition. For example, an individual with a diagnosis of moderate to severe dementia may require instruction with dressing daily and due to a demonstrated pattern of wandering during the day, may meet the criteria for the higher level due to a ''continuous'' need for active intervention to ensure his or her daily safety is maintained. That does not mean the individual would be required to actually wander

on a constant basis in order to be determined as unable to self-sustain in the community. We find the use of continuous to be sufficient for purposes of distinguishing between the higher and lower levels of stipend when a veteran has a need for supervision, protection, or instruction. As we explained in the proposed rule and reiterated in this discussion, the distinction of ''continuous'' in this definition in contrast to ''daily'' in the definition of ''need for supervision, protection, or instruction'' allows us to differentiate between those who have moderate needs versus those who have a higher level of need for purposes of determining the appropriate monthly stipend level. 85 FR 13384 (March 6, 2020). We believe that the discussion above regarding ''need for supervision, protection, or instruction'' under § 71.15 provides clarification to explain how VA will distinguish between veterans and servicemembers who have a need for supervision, protection, or instruction (*i.e.,* whose functional impairment directly impacts the individual's ability to maintain his or her personal safety on a daily basis) versus those who meet the definition of unable to self-sustain in the community (*i.e.,* those who have a need for supervision, protection, or instruction on a continuous basis).

We note that ''continuous'' does not mean constant or 24/7 supervision, protection, or instruction, and it is not our intent for PCAFC to require 24/7 care from a Family Caregiver. The definition is not meant to imply that an individual requires hospitalization or nursing home care; rather, eligible veterans meeting this definition will qualify for the higher-level stipend based on a higher level of personal care needs. Need for supervision, protection, or instruction on a continuous basis could be demonstrated by a regular, consistent, and prevalent need. We note that services provided by Family Caregivers are meant to supplement or complement clinical services provided to eligible veterans. As part of PCAFC, we do not require Family Caregivers provide 24/7 care to eligible veterans. PCAFC is one of many in-home VA services that are complementary but not necessarily exclusive to each other. As a result, an eligible veteran and his or her caregiver may participate in more than one in-home care program, as applicable and based on set requirements, and we can refer such individuals to other VA services and programs as needed.

We make no changes based on these comments.

One commenter appeared to confuse the different levels of the monthly stipend rate and questioned how a veteran with a serious cognitive impairment who is unable to self-sustain in the community would not require a caregiver to be physically present the remainder of the day. First, we clarify that the definition of need for supervision, protection, or instruction does not require such supervision, protection, or instruction be provided on a continuous basis, but in order to qualify for the higher stipend level, an individual would be required to have a need for supervision, protection, or instruction on a continuous basis. To the extent the commenter is referring to a veteran or servicemember who meets the definition of unable of self-sustain in the community due to a need for supervision, protection, or instruction on a continuous basis, we agree with the commenter that such individual may require a caregiver to be physically present the remainder of the day. For example, an eligible veteran with dementia who needs step-by-step instruction in dressing each morning and has a demonstrated pattern of wandering outside the home at various times throughout the day may meet this definition. Because of the demonstrated pattern of wandering outside the home at various times, the veteran cannot function safely and independently in the absence of a caregiver, and the Family Caregiver would actively intervene through verbal and physical redirection multiple times throughout the day. This veteran would have a continuous need for an active intervention to ensure his or her daily safety is maintained. In discussing the definition of need for supervision, protection, or instruction above, we also provided an example of a veteran or servicemember with TBI who has cognitive impairment resulting in difficulty initiating and completing complex tasks, such as a grooming routine, who may require step-by-step instruction in order to maintain his or her personal safety on a daily basis. If such veteran or servicemember also experiences daily seizures because of an uncontrolled seizure disorder due to the TBI, such that seizures occur at unpredictable times during the day, the individual may be determined to be in need of supervision, protection, or instruction on a continuous basis. In another example, a veteran or servicemember who has a diagnosis of schizophrenia who experiences active delusions or hallucinations and requires daily medications for those symptoms may require daily support with medication management from another individual due to the paranoid thoughts that prevent the individual from independently taking the medication (that is, he or she may think the medication is harmful), and thus may be determined to have a need for supervision, protection, or instruction to maintain his or her personal safety on a daily basis. If such veteran or servicemember also responds to the delusions or hallucinations in a manner such as engaging in violent or self-harm behaviors at various and unpredictable times during the day, the individual may be determined to have a need for supervision, protection, or instruction on a continuous basis. We are not making any changes based on this comment.

One commenter stated that the definition does not meet the intended or accepted health care industry standards, including those related to safely remaining in the home or community. We are unclear as to what intended or accepted health care industry standards the commenter is referring. However, we note that PCAFC is a program unique to VA, and the statute requires us base the stipend payment on ''the amount and degree of personal care services provided.'' 38 U.S.C. 1720G(a)(3)(C)(i). The intent of this definition of ''unable to self-sustain in the community'' is to meet this statutory requirement by distinguishing between two levels of care. This definition is intended to cover those eligible veterans with severe needs, consistent with PCAFC's focus on veterans with moderate and severe needs.

One commenter appeared to allege that the lower stipend level for ADLs was too low of a bar and, thus this definition would be inconsistent with current VA Case Mix Tools for Homemaker and/or H/HHA service authorizations. To the extent that this commenter is referring to the purchased HCBS Case-Mix and Budget Tool, that tool is an instrument that provides a uniformed and standard way of allocating Purchased HCBS to veterans based on functional need that allows them to remain independently in their homes and communities. Completion of the tool results in a case-mix score or level that correspond to a monthly dollar amount; inclusive of costs for selected Purchased HCBS programs. The Purchased HCBS programs covered by the Purchased HCBS Case-Mix and Budget Tool includes H/HHA, Community Adult Day Health Care (CADHC), In-Home Respite and Veteran-Directed Home and Community Base Services (VD–HCBS). We note that the intent and use of this tool is distinct

from PCAFC as the tool is used to determine hours of care for services other than PCAFC.

To the extent the commenter is referring to H/HHA eligibility requirements under VHA Handbook 1140.6 Purchased Home Health Care Services Procedures, we respectfully disagree with the commenter's assertion. Eligibility determinations for H/HHA under VHA Handbook 1140.6, target the population of eligible veterans who are most in need of H/HHA services as an alternative to nursing home care. An interdisciplinary assessment is used to determine whether a veteran has specific clinical conditions to include three or more ADL dependencies, or significant cognitive impairment. Also, in the instance a veteran only has two ADL dependencies, an additional two conditions are considered including a dependency in three or more IADLs or if the veteran is seventy-five years old, or older. We believe the definition of unable to self-sustain in the community is not a departure from the clinical conditions listed with respect to H/HHA services in VHA Handbook 1140.6, as it similarly includes certain eligible veterans that require assistance with three or more ADLs or have a need for supervision, protection, or instruction on a continuous basis which is similar to having a significant cognitive impairment. Additionally, we note that the definition for ''unable to self-sustain in the community'' is used to determine the higher level stipend (*i.e.,* 100 percent of the monthly stipend rate) for the Primary Family Caregiver. A Primary Family Caregiver would receive the stipend at the lower-level if the eligible veteran does not meet the definition of unable to self-sustain in the community but is still in need of personal care services for a minimum of six continuous months based on either an inability to perform an ADL, which means the eligible veteran requires personal care services each time he or she completes one or more of the seven listed ADLs in § 71.15, or a need for supervision, protection or instruction, which means the individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis. Further, PCAFC is one of many clinical programs available to veterans and servicemembers, as applicable, that are complementary but are not required to be identical in terms of eligibility requirements. We are not making any changes based on this comment.

One commenter was not supportive of definitions to ensure that veterans can ''self-sustain'' in the community and urged VA to define eligibility to ensure that veterans and Family Caregivers not only self-sustain but thrive in the community. First, we note that the definition of unable to self-sustain in the community is focused on the eligible veteran; not the Family Caregiver. Second, we note that ''self-sustain'' is meant to describe the eligible veteran's clinical condition, while thriving in the community may be open to various interpretations and is not a recognized or specific clinical term. ''Unable to self-sustain in the community'' is used only for the purposes of defining eligibility for the higher level stipend and is not intended to describe clinical objectives or long-term treatment goals. We do not think it would be appropriate to add the language ''thrive in the community'' to the definition since not all veterans and servicemembers who qualify for PCAFC will be able to ''thrive'' in the community. We also note that it may also not be their goal. We are not making any changes based on this comment.

Another commenter stated that the inequity in the two stipend levels would be economically unfair to Primary Family Caregivers of eligible veterans who are determined to be unable to self-sustain in the community. We refer this commenter to the related discussions in this section on the monthly stipend rate and on the specific number of caregiver hours or tasks.

Another commenter noted that VA should reconsider this requirement because few veterans will be eligible for the higher-level stipend, and the definition will work against VA's efforts to foster independence among veterans and will promote total reliance on a caregiver. The commenter recommended that VA remove the requirement for ''full dependence.'' Similarly, another commenter opined that the fully dependent language was too strict, but appeared to confuse the requirement of ''fully dependent'' for three ADLs in the definition of unable to self-sustain in the community with the definition of inability to perform an ADL.

First, we note that the definition of ''unable to self-sustain in the community'' requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in § 71.15, and is fully dependent on a caregiver to complete such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition, and in particular the requirement to be ''fully dependent'' on a caregiver to complete at least three ADLs, is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level. The definition of inability to perform an ADL, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember need assistance each time that he or she completes at least one ADL; it does not require the eligible veteran be ''fully dependent'' on a caregiver to complete at least three ADLs. Thus, an eligible veteran who does not require personal care services each time he or she completes three or more ADLs, could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate).

This recommendation to remove the ''fully dependent'' language relates to the first part of the definition of unable to self-sustain in the community that refers to the eligible veteran requiring personal care services each time he or she completes three or more of the seven ADLs listed in the definition of an inability to perform an ADL, and is fully dependent on a caregiver to complete such ADLs. We decline to make this change to the definition to remove the ''fully dependent'' language because we believe this language is necessary. We clarify in this rulemaking that fully dependent is the degree of need required for this prong of the definition. To be fully dependent means the eligible veteran requires the assistance of another to perform each step or task related to completing the ADL. We acknowledge this may be a high standard to meet, but it will target those eligible veterans with severe needs. We note that ''fully dependent'' is consistent with the clinical term, dependence, which is used to define and assess a higher level of care needed by a veteran, and ensures that the public understands this term. While dependence is considered along a spectrum, fully dependent is at the top of the spectrum. Thus, the fully dependent language is intended to cover those eligible veterans with severe needs for purposes of determining the higher stipend level. While we support each eligible veteran's ability to be as functional and independent as possible, we acknowledge that we do not anticipate that many eligible veterans who qualify under this definition will have much independence, as these would be those eligible veterans with

the highest needs. We do not make any changes based on these comments.

One commenter disagrees with the requirements of this definition and requests that VA retain the clinical ratings for determining stipend tiers in the current regulations. The same commenter asserts that this change from the current regulations unnecessarily and arbitrarily limits the flexibility of VA to consider all relevant factors in determining how much help an eligible veteran needs. The commenter further asserts that VA's proposed approach impedes VA's ability to consider the factors in 38 U.S.C. 1720G(a)(3)(C)(iii) by allowing VA to ignore a Family Caregiver's input and based on their assertion that the amount of time required to provide supervision, protection, and instruction would be irrelevant. One commenter stated that the language suggests that in order to be considered for the higher tier, a veteran would likely need to be in or nearing the geriatric based population, a requirement that would omit many of the program's current participants from being eligible or qualifying for the higher tier. Similarly, another commenter was concerned that this change for determining stipend levels and the definition of unable to self-sustain in the community will arbitrarily and adversely impact veterans PCAFC is intended to help, contrary to Congressional intent, as it will be harder for Family Caregivers to qualify for the higher stipend level which will reduce the benefit they receive and result in family members being less likely to serve as a Family Caregiver. This commenter asserted that an eligible veteran may be fully dependent on a Family Caregiver for assistance with performing only two ADLs or need supervision for 18 hours a day, but would not qualify under the definition of unable to self-sustain in the community, even though they need a caregiver for 40 hours per week. Another commenter stated that the higher level was too stringent, and appeared to confuse the definitions of ''inability to perform an ADL'' and ''unable to self-sustain in the community,'' such that they believed the requirements related to ADLs under the definition of ''unable to self-sustain in the community'' must be met in order to qualify for PCAFC.

First, we note that the definition of ''unable to self-sustain in the community'' requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in 71.15, and is fully dependent on a caregiver to complete such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level and is intended to cover those eligible veterans with severe needs. The definition of inability to perform an ADL, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember need assistance each time that he or she completes at least one ADL. Thus, an eligible veteran who does not require personal care services each time he or she completes three or more ADLs and may only need assistance with two, could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend).

We note that the higher level is not intended to cover only those eligible veterans who are geriatric or nearing geriatric, and age is not a determining factor for purposes of the definition of unable to self-sustain in the community. Instead, the higher level is based on whether the eligible veteran meets the definition of unable to self-sustain in the community, which considers the amount and degree of need for personal care services. This definition is meant to address those eligible veterans that have severe needs, regardless of age, and this definition of unable to self-sustain in the community provides a way for us to distinguish between those who have severe needs and those who have moderate needs for purposes of the stipend level.

This definition will be used to determine the higher- and lower-level stipend payments, and VA believes it is necessary to establish a clear delineation between the amount and degree of personal care services provided to eligible veterans, as required by 38 U.S.C. 1720G(a)(3)(C)(i). We believe two levels will allow us to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers, and will address the challenges we identified in using three levels. As we explained in the proposed rule and reiterate here, the utilization of three tiers has resulted in inconsistent assignment of ''amount and degree of personal care services provided,'' and a lack of clear thresholds that are easily understood and consistently applied has contributed to an emphasis on reassessment to ensure appropriate stipend tier assignment. 85 FR 13383 (March 6, 2020). We believe that such issues would be exacerbated by the addition of more tiers or levels, and that using only two levels will allow VA to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers. We believe that two levels will provide the clearest delineation between the amount and degree of personal care services provided by the Family Caregiver.

As we explained in the proposed rule, while the changes we proposed to the PCAFC stipend methodology and levels would result in an increase in stipend payments for many Primary Family Caregivers of legacy participants, for others, these changes may result in a reduction in the stipend amount that they were eligible to receive before the effective date of the rule. 85 FR 13385 (March 6, 2020). We acknowledge that some legacy participants that are currently receiving stipend payment at tier three may not meet this definition of unable to self-sustain in the community for purposes of the stipend payment and may receive the stipend payment at the lower level. To help minimize the impact of such changes, we would make accommodations for Primary Family Caregivers of eligible veterans who meet the requirements of proposed § 71.20(b) and (c) (*i.e.,* legacy participants and legacy applicants) to ensure their stipend is not reduced for one year beginning on the effective date of the rule, except in cases where the reduction is the result of the eligible veteran relocating to a new address. Id. We do not agree that the changes to the stipend levels will deter family members from caring for eligible veterans, who may have been providing care to the eligible veteran even before approval and designation as a Family Caregiver under PCAFC. Additionally, the stipend is not intended to incentivize family members to be caregivers, but rather an acknowledgment of the sacrifices caregivers make to care for eligible veterans. 76 FR 26155 (May 5, 2011).

Further, the determination of whether an eligible veteran is unable to self-sustain in the community will occur during the initial assessment of eligibility and during reassessments, both of which will provide the Family Caregiver with the opportunity to provide input on the needs and limitations of the eligible veteran, and consider the assistance the Family Caregiver provides, including both assistance with ADLs and supervision, protection, and instruction.

For all of these reasons as explained above, we believe this definition fulfills VA's statutory requirement, and allows for VA consideration of those factors in

38 U.S.C. 1720G(a)(3)(C)(iii). We are not making any changes based on these comments.

One commenter noted that Family Caregivers do not have the skills or extensive training to assist veterans in need of assistance with 3 ADLs, and that veterans that qualify for these services should receive care from in-home care providers. We note that PCAFC provides additional options to eligible veterans and their Family Caregivers who may wish to remain in the home. Family Caregivers receive training and education to help them support the eligible veteran's care needs. We do not expect Family Caregivers to replace the need for medical professionals that provide specialized medical care that requires advanced skill and training. PCAFC is one of many options available for veterans who wish to remain in the home. Other programs available include Veteran-Directed care, home based primary care services, and adult day health care. As necessary and appropriate, we will make referrals to other VA programs and services. We make no changes based on this comment.

One commenter disagreed with the definition of ''unable to self-sustain in the community,'' based on the experience of one of their fellows who is the Family Caregiver of a paraplegic, who has suffered significant muscle damage in his lower extremities. They noted that while this individual can complete most ADLs independently, he has shoulder damage resulting from overuse, and the Family Caregiver provides support and assistance on most days. They further noted that without the Family Caregiver's support on completing less than three ADLs, this individual would not be able to remain in the community. As we explained in the proposed rule and reiterated in this discussion, the definition of unable to self-sustain in the community is intended to provide a distinction for purposes of the higher- and lower-level stipend rate; it is not used for determining whether an individual is eligible for PCAFC. It is our intent that those eligible veterans with severe needs would meet the definition of unable to self-sustain in the community and qualify for the higher-level stipend. As we explained above, if an eligible veteran does not meet the definition of unable to self-sustain in the community, that does not mean they are ineligible for PCAFC. To determine eligibility for PCAFC, VA would assess the veteran or servicemember's eligibility under 38 CFR 71.20(a), including whether the individual is in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction. We make no changes based on this comment.

One commenter raised concerns about language in the proposed rule, in which we explained the difference between the need for supervision, protection, or instruction on a daily basis versus continuous basis by stating that ''. . . an individual with dementia who only experiences changes in memory or behavior at certain times of the day, such as individuals who experience sundowning or sleep disturbances, may not be determined to have a need for supervision, protection, or instruction on a continuous basis.'' See 85 FR 13384 (March 6, 2020). This commenter further stated that ''[t]he standard should was, in the veteran were not care for by a caregiver, would the VA or a Social Service division have to provide some type of regular aid.'' We are unable to determine whether this commenter thinks this ''standard'' should be for PCAFC eligibility or for the higher stipend level, but note that the commenter's examples repeat examples VA provided in the context of explaining ''unable to self-sustain in the community.''

First, we note that the definition of ''unable to self-sustain in the community'' requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in 71.15, and is fully dependent on a caregiver to complete such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level. The definition of need for supervision, protection, or instruction, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember have a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis; it does not require the eligible veteran to need supervision, protection, or instruction on a continuous basis. Thus, an eligible veteran who does not require need for supervision, protection, or instruction on a continuous basis could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate).

As we explained in the proposed rule, an eligible veteran who has a need for supervision, protection, or instruction on a continuous basis, thus qualifying them for the higher stipend level, would require more frequent and possibly more intensive care and the Family Caregiver would thus provide a greater amount and degree of personal care services to the eligible veteran. 85 FR 13384 (March 6, 2020). We refer the commenter to the discussion of ''need for supervision, protection, or instruction'' above where we distinguish the terms ''daily'' and ''continuous.''

We make no changes based on this comment.

Two Stipend Levels

VA proposed to establish two levels for the stipend payments versus the three tiers that are set forth in current § 71.40(c)(4)(iv)(A) through (C). Whether a Primary Family Caregiver qualifies for a stipend at the higher level will depend on whether the eligible veteran is determined to be ''unable to self-sustain in the community'' (as that term will be defined in § 71.15). The lower stipend level will apply to all other Primary Family Caregivers of eligible veterans such that the eligibility criteria under proposed § 71.20(a) will establish eligibility at the lower level. VA received multiple comments about the two stipend levels that are addressed below.

We received several comments that indicate confusion about the two levels for stipend payments. In particular, some commenters believed that the eligible veteran's type of disability, whether it be physical or related to cognition, neurological or mental health, will be a determinative factor in the stipend level. One commenter stated the higher- level leans too heavily on physical disabilities and believes that the lower level was for eligible veterans with needs related to supervision and safety. The commenter noted how difficult it is to perform the tasks associated with supervision and protection. The commenter further inquired as to how VA will address veterans who are eligible for both levels. The commenter was also concerned that by assuming that physical disabilities are greater than invisible injuries, VA would not be helping the suicide problem. Relatedly, another commenter believed that the higher level focused on ADLs. Another commenter also expressed general confusion about the lower stipend level.

To clarify, all eligible veterans who qualify for PCAFC will meet the criteria for the lower-level stipend. However, a Primary Family Caregiver will receive the higher-level monthly stipend rate if the eligible veteran is determined to be unable to self-sustain in the

community.as defined in § 71.15. The definition of ''unable to self-sustain in the community'' covers both ''inability to perform an ADL'' and ''need for supervision, protection and instruction'' and this accounts for both physical disabilities and cognitive, neurological, and mental health disabilities. Thus, eligible veterans can meet the requirements of unable to self-sustain in the community because of physical disabilities leading to impairments or disabilities leading to cognitive, neurological or mental health impairment. Therefore, we do not believe that the higher stipend level is primarily for or focused on veterans with physical disabilities. To the extent a commenter raised concerns that VA would not be helping the suicide problem, we refer the commenter to the discussion on veteran suicide in the miscellaneous comments section. We are not making any changes based on these comments.

Several commenters expressed concern with VA's proposal to have more than one level of stipend payment. Multiple commenters disagreed with placing percentages on how much help a veteran can receive. One commenter asserted that everyone should be paid equally. Another commenter recommended there be one level, and that having two will present challenges, appeals, and confusion. The determination of whether a Primary Family Caregiver receives the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate) or the high level stipend (*i.e.,* 100 percent of the monthly stipend rate) is based on whether the eligible veteran is unable to self-sustain in the community. The percentages are assigned only for the purposes of calculating stipend payments. While we believe the percentages are consistent with the time and level of personal care services required by an eligible veteran from a Family Caregiver at each level (85 FR 13384 (March 6, 2020)), the percentages are not intended to equate to a specific amount of care related to the personal care services being received by the eligible veteran.

While we understand the commenters' concern that having multiple levels could present challenges, appeals, or confusion, section 1720G of title 38, U.S.C., requires that the amount of the monthly personal caregiver stipend be determined in accordance with a schedule established by VA that specifies stipends based on upon the amount and degree of personal care services provided. See 38 U.S.C. 1720G(a)(3)(C)(i). We interpret this to mean that the schedule must account for variation between the amount and degree of personal care services provided. Accordingly, we believe the statute requires VA to establish at least two PCAFC stipend levels; thus, we are unable to pay every Primary Family Caregiver the same monthly stipend. We are not making any changes based on these comments.

One commenter was concerned that because the veteran the commenter cares for suffers from PTSD, TBI, depression, and pain-related issues, they may no longer qualify for the program and requested more tiers, not less. We wish to clarify that the assignment of tiers (in the current regulations) or levels (as the regulations are revised by this rulemaking) is used to determine the amount of the monthly stipend payment issued to the designated and approved Primary Family Caregiver and is not used to determine eligibility. To the extent that the commenter is requesting that we add additional stipend tiers or levels for additional stipend rates, we decline to make those changes. As VA explained in the proposed rule, the utilization of three tiers has resulted in inconsistent assignment of ''amount and degree of personal care services provided,'' and a lack of clear thresholds that are easily understood and consistently applied has contributed to an emphasis on reassessment to ensure appropriate stipend tier assignment. 85 FR 13383 (March 6, 2020). We believe that such issues would be exacerbated by the addition of more tiers or levels, and that using only two levels will allow VA to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers. We believe that two levels will provide the clearest delineation between the amount and degree of personal care services provided by the Family Caregiver. We also note that the eligibility criteria for PCAFC and the higher stipend level account for veterans and servicemembers with personal care needs related to cognitive, neurological, and mental health conditions are considered under the definition of serious injury, and further refer the commenter to our discussion of the eligibility criteria in § 71.20(a) and in the discussion of the term unable to self-sustain in the community. We make no changes based on this comment.

Several commenters suggested that certain VA disability ratings, including a 100 percent permanent and total service-connected disability rating and certain aid and attendance awards, should automatically qualify an eligible veteran for the highest stipend rate. While the eligibility requirements for these disability ratings and awards referenced by the commenters may seem similar, we note these are not synonymous with VA's definition of ''unable to self-sustain in the community,'' and we do not believe the criteria for those benefits are a substitute for a clinical evaluation of whether a veteran or servicemember is unable to self-sustain in the community. We believe that in order to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, each veteran or servicemember must be evaluated based on the same criteria, including the criteria to qualify for the higher-level stipend. To that end, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC and the applicable stipend level, as applicable. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant.

Additionally, we do not believe it would be appropriate to consider certain disability ratings as a substitute for a clinical evaluation of whether a veteran or servicemember is unable to self-sustain in the community, as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and because VA has not considered whether additional VA disability ratings or other benefits determinations other than those recommended by the commenters may be appropriate for establishing that a veteran or servicemember is unable to self-sustain in the community for purposes of PCAFC. Finally, it should be noted in that VA disability ratings under VA's schedule for rating disabilities are intended to evaluate the average impairment in earning capacity in civil occupations resulting from various disabilities or combinations of disabilities. 38 U.S.C. 1155. They are not designed to take into account the amount and degree of personal care services provided the eligible veteran. Thus, they would provide a very imprecise guide to determining stipend rates. We are not making any changes based on these comments.

Several commenters raised concerns about the hours or responsibilities associated with the stipend levels. Multiple commenters provided their personal stories about caring for a veteran in the current program and believed that the current hours were not indicative of the how long the caregiver actually spends taking care of the eligible veteran or expressed concerns

that the new stipend level would be insufficient for the number of hours required. Some stated that the 10-hour category was insufficient, another shared that the tasks required 14 hours a day, every day and that the new program would not adequately compensate for the required hours, another commenter explained that the care required was 24/7 and requested that VA require caregivers to provide a log of the activities that they perform, and another stated that the current system was insufficient and the regulations do not account for the amount of time required. Another commenter questioned whether that there will be an expectation for caregivers to provide 24/7 care. One commenter was concerned that most of the current caregivers receiving stipends at tier three will be excluded because the higher stipend level will require 24/7 care.

Foremost, we thank the caregivers who are providing personal care services to their family members and the sacrifices that they make. Further, it has never been VA's intent that the monthly stipend directly correlates with a specific number of caregiving hours. See 80 FR 1369 (January 9, 2015). We note that to the extent commenters are dissatisfied with the current criteria, we understand and have removed the references to numbers of hours, and instead will rely on a percentage of the GS rate when determining the monthly stipend. While we know that some Family Caregivers provide in excess of 40 hours or more of caregiving a week, we reiterate that the stipend payment does not represent a direct correlation to the number of hours a Family Caregiver provides. Additionally, eligible veterans who require 24/7 care may be eligible for additional support services, such as homemaker or home health aide, to supplement the personal care services provided by the Family Caregiver. In addition, we note that the reference in the definition of ''unable to self-sustain in the community'' to an eligible veteran who has a need for supervision, protection, or instruction on a ''continuous basis,'' was not intended to mean that the eligible veteran requires or that the Family Caregiver provides 24/7 or nursing home level care. This is not VA's intent or expectation of Family Caregivers. Further, VA does not believe it is necessary to require caregivers to provide a log of the activities they perform. Participation in PCAFC is conditioned, in part, upon the Family Caregiver providing personal care services to the eligible veteran. Through wellness contacts and reassessments, VA will provide oversight and monitoring of the adequacy of care and supervision being provided by the Family Caregiver. We are making no changes based on these comments.

One commenter expressed concern over how VA plans to adjust for bias towards those with higher ratings in the new two-level system. This commenter asked whether the individual conducting the assessment would have access to the veteran's rating decision and be persuaded to place the veteran in the more financially beneficial category if the veteran has a higher rating than 70 percent, and asserted that this factor and others must be addressed. We thank the commenter for their concern and clarify that a 70 percent single or combined service-connected disability rating is used to determine whether an eligible veteran has a serious injury; however, an eligible veteran's service-connected disability rating has no bearing on the determination of whether an eligible veteran is in need of personal care services or whether he or she is unable to self-sustain in the community for purposes of the monthly stipend. Determinations of whether an eligible veteran is unable to self-sustain in the community are made by CEATs, which are informed by evaluations and assessments of the veteran's functional needs for which the specific service-connected rating has no bearing. Through training, VA will ensure this is clear to those rendering determinations of whether an eligible veteran is unable to self-sustain in the community. We are not making any changes based on this comment.

One commenter recommended that assessment of the stipend level be completed ''with the Primary doctor and Primary Caregiver,'' and potentially a licensed occupational therapist, but disagreed with allowing others such as a nurse, social worker, physical therapist, or kinesiologist to complete such assessments as that can lead to inconsistencies. As stated above, eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center, with input from the primary care team, including the veteran's primary care provider, to the maximum extent practicable. These evaluations include assessments of the veteran's functional status and the caregiver's ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran. When all evaluations are completed, the CEAT will review the evaluations and pertinent medical records, in order to render a determination regarding eligibility, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. The CEATs are comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend.

While primary care teams will not collaborate directly with the CEATs on determining eligibility, documentation of their input in the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEATs to help inform eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. We are not making any changes based on this comment.

One commenter commended VA for proposing a more streamlined approach to determining the monthly stipend, and we appreciate the comment. However, multiple commenters believed that VA did not provide sufficient rationale for going from three tiers to two levels. One commenter asserted that little information and rationale was provided on why it is necessary to move from three tiers to two levels, and that this change will disadvantage veterans and their caregivers. Similarly, one commenter stated that the two levels should be better defined to ensure the program is consistently implemented across VHA. One commenter stated that VA provided no explanation on why the current evaluation and scoring is no longer sufficient. Another commenter disagreed with the change to two levels and asked for the theoretical or conceptual basis for this change. Two commenters expressed concern that there are no specific criteria defining the two levels and asserted that VA provided no explanation as to why the current clinical scoring is no longer sufficient.

As indicated in the proposed rule, VA has found that the utilization of the current three tiers has resulted in inconsistent assignment of the ''amount and degree of personal care services provided.'' See 85 FR 13383 (March 6, 2020). Further, there can often be little variance in the personal care services provided by Primary Family Caregivers between assigned tier levels (*e.g.,* between tier 1 and tier 2, and between tier 2 and tier 3) which has led to a lack of clear thresholds. Id. These tier assignments were based on criteria and

a subsequent score that were subjective in nature due to the lack of clear delineations between the amount and degree of required personal care services based on the veteran's or servicemember's inability to perform an ADL or need for supervision and protection based on symptoms or residuals of neurological or other impairment or injury. For example, providers surmised the difference between the level of assistance needed to complete a task or activity when assigning a ''score.'' Additionally, the sum of all ratings lacked clear delineation between tiers. For example, the difference between a rating of 12 and 13 was the difference between tier one and tier two. This subjectivity has led to lack of clear threshold and thus confusion and frustration for both PCAFC participants and VA staff. Assessing the needs and functional impairments of a veteran is complex and we believe transitioning from a subjective rating which attempts to delineate degrees of need in specific ADLs and impairments, to an assessment of the veteran's overall level of impairment will simplify the determination, which will in turn result in consistency and standardization throughout PCAFC in determining the appropriate level for stipend payments. Additionally, as previously explained, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs. Therefore, VA believes it is necessary to base stipend payments on only two levels of need that establish a clear delineation between the amount and degree of personal care services provided to eligible veterans. Id. We are not making any changes based on these comments.

Concern for Current Legacy Participants, Including Those Receiving Lowest Tier Stipend

Several commenters expressed concern for current participants who may no longer be eligible for PCAFC or whose stipends may be reduced. In recognizing the focus on eligible veterans with moderate and severe needs, one commenter recommended that VA identify other services and supports available to current participants who may be impacted by this change and verify that these other programs are available consistency across the country and effective in delivering support. The commenter specifically mentioned Veteran-Directed care, home based primary care, respite care, and homemaker and home health aide services, and asserted that they are often underfunded by VA, and urged VA to ensure the success and viability of these programs. Another commenter urged VA to rethink the adjustment from three tiers to two levels, and asserted that VA needs to ensure eligible veterans and their caregivers do not fall through the cracks and jeopardize their financial stability, specifically current PCAFC participants. Another commenter believed that, although the role is not changing, VA was changing the acknowledgement of the validity of the role and indicating that it is not worth as much. The commenter further stated that by removing the necessary funding the access to the program will be greatly diminished.

While we are making no changes based on these comments, we emphasize that we do not believe that the sacrifices made by caregivers are not worthwhile. Family Caregivers play a significant role in the lives of veterans and servicemembers, and we thank them for their service. We wish to emphasize that PCAFC is one way VA supports eligible veterans and the Family Caregivers. For those who may no longer qualify, CSCs are available to assist in identifying the needs of the veterans and their caregivers, and making referrals and connections to alternative services as appropriate. VA offers a menu of supports and services that supports caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of covered veterans through PGCSS including access to CSCs located at every VA medical center, a caregiver website, training and education offered online and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA's Caregiver Support Line.

While offering assurance of funding and availability of specific services in specific areas is outside the scope of this rulemaking, we note that VA is actively improving and expanding PGCSS, including the establishment of General Caregiver Support staff to ensure nationwide support at each medical center.

In addition, as explained in the proposed rule, we understand that Primary Family Caregivers may have their stipend amount impacted by changes to the stipend payment calculation. We take this opportunity to highlight that the VA MISSION Act of 2018 expanded benefits available to Primary Family Caregivers, which includes Primary Family Caregivers of legacy participants and legacy applicants, to include financial planning services, as that term is defined in § 71.15. These services may be helpful to those who will be adjusting to a lower stipend amount. Family Caregivers also have access to mental health services that can provided support as needed. We are not making any changes based on these comments.

Several commenters disagreed with the change in the tiers, especially the elimination of current PCAFC participants who qualify at the lowest tier (tier one). Another commenter noted that VA presumes the lowest tier does not include veterans with moderate to severe needs for personal care services, and asserted that VA provided no data, literature, or study to support this presumption. This commenter disagrees with this presumption and asserted that VA must provide data and analysis to support it. To further clarify, VA's assumption that the current tier one participants will be removed from PCAFC as a result of eligibility changes in part 71 was used for estimating the potential impact of the regulation on VA's budget. VA made this assumption because per the current rating criteria, Tier 1 is indicative of a low amount of need. As VA expands PCAFC to include eligible veterans of all eras and makes other changes to focus on veterans with moderate and severe needs it is possible that the current tier one participants may not meet the eligibility criteria in § 71.20(a). VA will not automatically discharge current PCAFC participants whose Primary Family Caregivers receive stipends at tier one. Instead, VA will conduct reassessments for all legacy participants and legacy applicants, regardless of assigned tier to determine continued eligibility in PCAFC, and for those who are eligible, the applicable stipend rate. We are not making any changes based on these comments.

Specific Number of Caregiver Hours or Tasks

One commenter appreciated the idea of moving into different tiers but was not sure if this was the appropriate direction, especially as it is difficult to calculate time providing care. Other commenters raised concerns about being placed in the lowest tier level when they provide more than 10 hours of caregiving per week. Some commenters noted that the stipend is based on 40 hours of care per week, when they may be providing more than that and otherwise the veteran would have to be institutionalized. This new pay scale would not cover those situations, and one commenter recommended basing the stipend amount on the actual number of hours of care provided.

Relatedly, one commenter stated that VA should consider the daily, weekly, monthly tasks caregivers perform when determining the level of stipend. One commenter asserted that the two levels is economically unfair to caregivers of eligible veterans who are unable to self-sustain in the community. We respond to these comments below.

As indicated in the proposed rule, it has never been VA's intent that the monthly stipend directly correlates with a specific number of caregiving hours. See 80 FR 1369 (January 9, 2015). Further, VA recognizes that the reference to a number of hours in the current regulation has caused confusion; therefore, we are seeking to change the stipend calculation to use a percentage of the monthly stipend rate based on the eligible veteran's level of care need. See 85 FR 13384 (March 6, 2020). Similarly, as we standardize PCAFC to focus on veterans and servicemembers with moderate and severe needs, we do not believe it is necessary to consider the number of tasks a Family Caregiver performs as we believe a determination on the level of care need (*i.e.,* whether an eligible veteran is unable to self-sustain in the community) is appropriate for determining the monthly stipend amount that is commensurate with the needs of the veteran. We are not making any changes based on these comments.

Multiple Residences

One commenter asked for clarification that families who live at more than one address during the year are eligible for PCFAC and for the calculation method that would be used to determine their stipend rate. Living in multiple locations during the year does not disqualify an otherwise eligible participant from participation in PCFAC. The address on record with PCAFC determines the geographic location for purposes of calculating the monthly stipend rate. It is presumed that the address on record is where the eligible veteran consistently spends the majority of his or her time and where they receive VA care. Therefore, a temporary move or vacation would not affect the monthly stipend rate. However, we note that we require notification of a relocation within 30 days from the date of relocation and will seek to recover overpayments of benefits if VA does not receive timeline notification of a relocation. We recognize that in some cases, a temporary move to an out-of-town relative may be planned as respite for a short period, say one month, but perhaps unforeseen circumstances could arise, whereby the return to the veteran's home is delayed. In this instance, the veteran's home remains their intended permanent address. Additionally, we are aware of cases in which a veteran may have a 'summer' residence and a 'winter residence.' In these cases, VA would expect notification of the veteran's address change, not only for the purposes of calculating the stipend payment but also to allow VA to conduct the required wellness contact, which is required generally every 120 days. Such cases would be reviewed on a case by case basis. VA will develop written guidance to guide consistent determinations of these circumstances.

Change to Heading in § 71.40(c)(4)(i)(D)

In the proposed rule, we included a heading for new § 71.40(c)(4)(i)(D) which establishes a special rule for Primary Family Caregivers of legacy participants subject to decrease as a result of VA's transition from the combined rate to the new monthly stipend rate. As part of this final rule, we are removing the heading, ''Special rule for Primary Family Caregivers subject to decrease because of monthly stipend rate'' as this heading is unnecessary. We make no other changes to this paragraph.

Additional Benefits

Several commenters requested VA provide additional benefits for Primary Family Caregivers to include, Military Airlift Command flights, retirement options, dental care (for both an eligible veteran who is rated below 100 percent service-connected disability and his or her caregiver), long-term care benefits, assistance with mortgage and survivor benefits. We address these comments below.

Section 71.40(b) and (c) of 38 CFR implement the benefits provided to Secondary Family Caregivers and Primary Family Caregivers, respectively, under 38 U.S.C. 1720G(a)(3)(A). Secondary Family Caregivers are generally eligible for all of the benefits authorized for General Caregivers, based on our interpretation and application of section 1720G(a)(3)(A) and (B), in addition to benefits specific to the Secondary Family Caregiver provided in § 71.40(b)(1)–(6). See 76 FR 26153 (May 5, 2011). Similarly, Primary Family Caregivers are authorized by section 1720G(a)(3)(A)(ii)(I) to receive all of the benefits that VA provides to Secondary Family Caregivers in addition to a higher level of benefits authorized only for Primary Family Caregivers provided in § 71.40(c)(2)–(6). Id. VA is unable to provide additional benefits as suggested above (*e.g.,* Military Airlift Command flights, retirement options, dental care, long-term care benefits, assistance with mortgage, survivor benefits) because these benefits are not authorized under 38 U.S.C. 1720G(a)(3)(A). Furthermore, to the extent one commenter believes VA should provide dental care to veterans who have less than 100 percent service-connected disability rating, we believe this is beyond the scope of this rulemaking. We make no changes based on these comments.

One commenter requested that Secondary Family Caregivers be allowed to obtain CHAMPVA benefits. Additionally, one commenter requested that CHAMPVA include coverage for pre-existing conditions due to natural disasters after suffering dental injury from a hurricane. 38 U.S.C. 1720G(3)(A) delineates between benefits provided to ''family caregivers of an eligible veteran'' and ''family caregivers designated as the primary provider of personal care services for an eligible veteran.'' Under section 1720G(a)(3)(A)(ii)(IV), VA must provide certain Primary Family Caregivers with medical care under 38 U.S.C. 1781 and VA administers section 1781 authority through the CHAMPVA program and its implementing regulations. See 76 FR 26154 (May 5, 2011). Therefore, VA lacks the statutory authority required to provide CHAMPVA benefits to Secondary Family Caregivers as they are not designated as the primary provider of personal care services. To the extent the commenter believes CHAMPVA should provide coverage for pre-existing conditions, there is currently no restriction in the services provided under CHAMPVA based on pre-existing conditions. To the extent commenters further suggest or request that VA should revise the CHAMPVA regulations, those comments are beyond the scope of this rulemaking. We are not making any changes based on these comments.

One commenter requested more access to caregiver support groups. Another commenter asserted that in addition to offering financial services, VA should include increased vocational rehabilitation services to those who are no longer eligible for the monthly stipend to help them find meaningful employment. While we are making no changes based on these comments, we note that as part of PGCSS, we offer peer support mentoring, local caregiver support groups, education and skills training for caregivers, REACH (Resources for enhancing All Caregivers Health) VA Telephone support groups and Spanish-Speaking telephone support groups. We are ensuring that a consistent menu of these services is

available across all VA facilities to any caregiver providing personal care services to an enrolled veteran. We also note that VA has a toll-free Caregiver Support Line, staffed by licensed social workers to provide information about services that are available to caregivers. Social workers assess caregiver's psychosocial needs, and provide counseling, education, and advocacy to problem solve stressors associated with caregiving. The Caregiver Support Line can also connect caregivers with CSCs at local VA medical facilities and with other VA and community resources.

§ 71.45 Revocation and Discharge of Family Caregivers

General

One commenter asserted that it is extremely difficult to discharge a veteran or caregiver in PCAFC but did not provide any additional information regarding that assertion. The changes to 38 CFR 71.45 that we proposed and now make final are intended to clarify for eligible veterans, Family Caregivers, and staff the various reasons for which a Family Caregiver may be subject to discharge and revocation from PCAFC, and will allow VA to take any appropriate action that is necessary when those situations described in § 71.45 occur. We make no changes based on this comment.

One commenter asked what veterans and caregivers can expect from VA in terms of being discharged from PCAFC, as VA has strict guidelines for clinical discharge planning, and how VA plans to smoothly transition veterans and Family Caregivers after PCAFC benefits, supports, and services are terminated to ensure that the veteran's need for personal care services are met. As explained in the proposed rule, we would establish a transition plan for legacy participants and legacy applicants who may or may not meet the new eligibility criteria and whose Primary Family Caregivers may have their stipend amount impacted by changes to the stipend payment calculation. We also described in proposed § 71.45 instances when VA would provide 60 days advanced notice of discharge and when benefits would continue for a period of time, as we believe both advanced notice of discharge and extended benefits would assist with the adjustment of being discharged from PCAFC. We also note that Family Caregivers can transition to PGCSS, which provides a robust array of services such as training, education, peer support, and ability to connect with VA Caregiver Program staff, who can refer Family Caregivers and veterans to local VA and community resources. We make no changes based on this comment.

One commenter requested that VA ensure both eligible veterans and Family Caregivers are aware and comprehend the revocation and discharge procedures as part of the initial PCAFC training. We agree with this commenter and will provide information on revocation and discharge procedures as part of the roles, responsibilities, and requirements that are discussed with Family Caregivers and eligible veterans when approved for PCAFC. However, we would not make any changes to the regulation based on this comment, as training information would be more appropriate for internal VA policy and training materials. We make no changes based on this comment.

One commenter asserted that the changes we are making to part 71 will provide VA avenues to remove veterans from the existing program. We note that we have had the ability to revoke the Family Caregiver from PCAFC pursuant to 38 CFR 71.45 in multiple instances, including when an eligible veteran or Family Caregiver no longer meets the requirements of part 71. We make no changes based on this comment.

Revocation for Cause

One commenter recommended discharge be swifter, as fraud is fraud. We believe this commenter was referring to revocation, as we proposed using fraud as a basis for revoking the Family Caregiver's designation. Another commenter was concerned about numerous instances they are aware of in which individuals are abusing PCAFC and committing fraud, and generally suggested VA do more to address fraud. As explained in the proposed rule, we would revoke Family Caregiver designation when fraud has been committed, discontinue benefits on the date the fraud began (or if VA cannot identify when the fraud began, the earliest date that the fraud is known by VA to have been committed, and no later than the date on which VA identifies that fraud was committed), and would seek to recover overpayment of benefits (benefits provided after the fraud commenced). We believe that the revocation date in cases of fraud in the proposed rule is swift, and that any earlier date would be premature. Also, we do not tolerate fraud in PCAFC, and believe that this is reflected in the revocation actions outlined in the proposed rule. However, we also acknowledge that PCAFC is a clinical program and PCAFC staff are not investigators; thus, we refer instances of potential fraud to VA's OIG and work with OIG to the fullest extent to identify and address instances of fraud within PCAFC. We make no changes based on these comments.

Revocation Due to VA Error

One commenter did not oppose revocation of the Family Caregiver due to VA error if the error was designating a Family Caregiver who is not actually a family member and who does not live with the veteran. However, this commenter asked what if VA erred in determining the veteran's eligibility for PCAFC. This commenter expanded upon this question by further asking what action VA would take if VA made an administrative error in the veteran's eligibility and later determined the veteran was not eligible, and would VA discharge the veteran and his or her caregiver from the program. While we note that the reasons for VA error may vary based on individual cases, if VA erred in determining a veteran eligibility for PCAFC, we would revoke the Family Caregiver's designation from PCAFC pursuant to § 71.45(a)(1)(iii). For example, we would revoke their status if VA erred in finding a veteran eligible for PCAFC despite the veteran not meeting the minimum service-connected disability rating. We make no changes based on this comment.

One commenter appeared to suggest that VA should fully recoup benefits provided in instances in which VA erred in determining a veteran or servicemember and his or her Family Caregiver eligibility for PCAFC when they never met the requirements of part 71, and suggested VA error include legacy participants who never met the requirements of part 71. As we explained in the proposed rule, eligibility under new § 71.20 (b) or (c) would not exempt the Family Caregiver of a legacy participant or legacy applicant from being revoked or discharged pursuant to proposed § 71.45 for reasons other than not meeting the eligibility criteria in proposed § 71.20(a) in the one-year period beginning on the effective date of the rule. For example, the Family Caregiver could be revoked for cause, non-compliance, or VA error, or discharged due to death or institutionalization of the eligible veteran or the Family Caregiver, as discussed in the context of § 71.45 below. 85 FR 13373 (March 6, 2020).

We assume this commenter was suggesting recoupment of overpayments of all benefits received; not just those as of the date of the error. As explained further in the proposed rule, the date of revocation would be the date of the error, and if VA cannot identify when the error was made, the date of

revocation would be the earliest date that the error is known by VA to have occurred, and no later than the date on which the error is identified. This is our current practice, which we would continue, unless the error is due to fraud which is separately addressed in the regulation and in which case, we could make revocation effective retroactively and recoup overpayments of benefits provided after the fraud commenced. We believe this is reasonable to prevent VA from providing any more benefits to a Family Caregiver and veteran, including legacy participants, who are not eligible for PCAFC. We note that we would not recoup all overpayments of benefits received as that could result in hardship to the Family Caregiver and veteran, and as a matter of fairness, as the error was on the part of VA, and the Family Caregiver and/or veteran may not have been aware of the error. We do not make any changes based on this comment.

Revocation for Noncompliance

One commenter expressed concern with ''noncompliance,'' stating that it would become VA's new ''in the best interest of'' and requesting VA provide a detailed set of data for dismissals, and that noncompliance particularly be scrutinized. While it is not entirely clear what aspect of § 71.45(a)(1)(ii) the commenter's concern is directed towards, we assume this commenter is expressing concern over the language in § 71.45(a)(1)(ii)(E). We believe that this commenter is requesting that this language be further defined, so that all the reasons for revocation based on noncompliance be included in this section. Another commenter generally opposed any catch-all language in the proposed rule. As such, we believe that the commenter was expressing objection to the language in § 71.45(a)(1)(ii)(E), which amounts to a catch-all provision, as we explained in the preamble for the proposed rule. This commenter seemed to indicate that such language is problematic because it gives VA too much discretion to do what they want or cover circumstances as they see fit.

We disagree that this language gives VA too much discretion, as this language is consistent with VA's authority to revoke the Family Caregiver under 38 U.S.C. 1720G(a)(7)(D)(i) and (a)(9)(C)(ii)(II). In addition, this language is meant to ensure that PCAFC is available only to eligible veterans and Family Caregivers who meet the requirements of part 71. Also, to the extent that the commenter indicated that all the reasons for revocation based on noncompliance be included in this section, we do not believe that this is necessary. As we proposed, 38 CFR 71.45(a)(1)(ii) describes all the reasons for revocation from PCAFC due to noncompliance. In paragraph (a)(1)(ii), we further describe the areas of noncompliance under part 71 that would lead to revocation, which included a catch-all category in paragraph (a)(1)(ii)(E). Paragraphs (a)(1)(ii)(A) through (D) of § 71.45 are the most common reasons for noncompliance that we have identified, which is why they are specifically enumerated here. However, there may be other instances of noncompliance that may arise, and as such, a catch-all category would be appropriate as such other instances may not be as frequent, and to list all the requirements of Part 71 under paragraph (a)(1) would be overly lengthy. This catch-all category would allow us to have a clear basis for revocation if the eligible veteran or Family Caregiver(s) are not in compliance with part 71 outside of those that are enumerated in § 71.45(a)(1)(ii)(A) through (D). Moreover, we do intend to monitor the usage of paragraph (a)(1)(ii)(E). As we noted in the preamble to the proposed rule, if we find that this basis for revocation is frequently relied upon, we would consider proposing additional specific criteria for revocation under this section in a future rulemaking. We make no changes based on these comments.

Discharge Due to no Longer in the Best Interest

One commenter opposed VA determining that the caregiver relationship is not in the veteran's ''best interest,'' particularly if both individuals are consenting adults with capacity to make informed decisions, and that the best interest standard is only applicable in situations in which the veteran lacks decision-making capacity. As discussed above, the definition for ''in the best interest'' here is not focused on the relationship and quality of a veteran's or servicemember's relationship with their Family Caregiver, rather it is focused on whether it is in the best interest of the eligible veteran to participate in PCAFC, and this is a clinical decision guided by the judgement of a VA health professional on what care will best support the health and well-being of the veteran or servicemember. Moreover, 38 U.S.C. 1720G(a)(1)(B) provides that support under PCAFC will only be provided if VA determines it is in the best interest of the eligible veteran to do so. We make no changes based on this comment.

Discharge Due to Incarceration

Several commenters suggested VA discharge veterans from PCAFC, without extended benefits, when the eligible veteran has been incarcerated for 60 or more days. Commenters opposed VA providing eligible veterans and Family Caregivers who are incarcerated with extended benefits because they indicated that it was inappropriate and contradicted 38 CFR 17.38, and similarly opposed VA's inclusion of jail and prison in the proposed definition of institutionalization. Other commenters opposed the inclusion of jail or prison in the definition of institutionalization because it conflicts with the common use of the term by health care providers and other federal programs. Additionally, commenters asserted that VHA does not have independent access to city, county, state, or Federal prison databases and questioned whether PCAFC can leverage existing Federal databases or agreements, similar to VBA, to obtain veteran incarceration data.

We disagree with the comments indicating that providing extended benefits to Family Caregivers who are discharged due to the Family Caregiver or veteran being in jail or prison contradicts § 17.38, since the authorities for the provision of VA health care and PCAFC differ. Promulgated pursuant to 38 U.S.C. 1710, 38 CFR 17.38 describes the medical care and services (*i.e.,* the medical benefits package) for which eligible veterans under §§ 17.36 and 17.37 may receive, and excludes the provision of hospital and outpatient care for a veteran who is either a patient or inmate in an institution of another government agency if that agency has a duty to give the care or services. Paragraph (h) of 38 U.S.C. 1710 explicitly authorizes such exclusion of providing care to veterans, such as those who are incarcerated, when another agency of Federal, State, or local government has a duty under law to provide care to the veteran in an institution of such government. We note that PCAFC is governed by section 1720G, which does not contain any similar language to section 1710 authorizing exclusion of the provision of PCAFC benefits in the instance of incarceration. It is also important to note that PCAFC is a program unique to VA, and that no other Federal, State, or local government agencies have a duty under law to provide these same benefits. Thus, we find the authorizing statutes, 38 U.S.C. 1710 and 1720G, to be distinguishable.

We acknowledge that institutionalization in the health care context, including in other federal health care programs, usually refers to long-term health care and treatment; not jail or prison. However, we include jail and prison in the definition of institutionalization, as referenced for purposes of continuation of benefits in cases of discharge from PCAFC, because it provides Family Caregivers time to transition and minimizes the negative impact that may result from their discharge from PCAFC due to an eligible veteran being placed in jail or prison, which may often happen unexpectedly. We note that PCAFC is intended to support the Family Caregiver, and we believe continuation of benefits in such an instance would be consistent with that intent. Also, we include jail and prison in the definition of institutionalization, as referenced for purposes of continuation of benefits in cases of discharge from PCAFC, because it provides a period of transition for the veteran to replace the Primary Family Caregiver due to the Family Caregiver being placed in jail or prison, which may also often happen unexpectedly.

We also note that it is administratively difficult to treat institutionalization due to jail or prison differently from other reasons for institutionalization (*e.g.,* nursing home, assisted living facility). Further, the eligible veteran or Family Caregiver being placed in jail or prison is a very rare occurrence.

While we understand the support and rationale for the position that those who are incarcerated should not be discharged from PCAFC with extended benefits, we are not making any changes to 38 CFR 71.45 or the definition of institutionalization based on these comments, as we would need to spend more time collecting and reviewing data to better understand this issue and determine whether benefits should not be extended and whether we should revise the definition of institutionalization. Based on this review, we would then consider proposing changes to the definition of institutionalization and the revocation and discharge section in a future rulemaking.

We are not making changes based on these comments.

Discharge Due to Family Caregiver Request

One commenter asserted that the proposed rule provides incentive to caregivers to make false allegations of abuse and does not adequately protect eligible veterans from abuse and exploitation. This same commenter inquired as to the required burdens of proof for caregivers who allege abuse to receive extended benefits. Additionally, this commenter asked about the measures that will be taken to ensure veterans receive continuity of care so that a veteran who is being abused/exploited can discharge the caregiver without fear of being left without assistance with necessary Activities of Daily Living. This same commenter also opined that there are inherent risks associated with providing a spouse with the veteran's health information and asked how VA will protect the veteran's health information from unauthorized use or disclosure for non-medical purposes.

While Primary Family Caregiver allegations of abuse could result in discharge from PCAFC with extended benefits, we disagree that that creates an incentive to make false allegations as Family Caregiver designation will still be discharged, which will ultimately lead to discontinuation of benefits. It is also important to note that we require certain documentation to be provided if the Family Caregiver requests discharge due to domestic violence or intimate partner violence, such as police reports or records of arrest, protective orders, or disclosures to a treating provider, which we believe further acts as a disincentive for making false allegations. See 85 FR 13356, at 13410–13411 (March 6, 2020).

In order to protect eligible veterans from abuse and exploitation, we would conduct wellness contacts and reassessments (including in home visits) in which we would be able to identify potential vulnerabilities for the eligible veteran. If we determine there is abuse occurring, participation in PCAFC may be revoked under 38 CFR 71.45(a)(1)(i)(B). Current 38 CFR 71.45(c) addresses actions we may take if we suspect that the safety of the eligible veteran is at risk. In order to better describe the appropriate protocol and response to be taken in such situations, we proposed revising this paragraph to state that VA may suspend the caregiver's responsibilities, and facilitate appropriate referrals to protective agencies or emergency services is needed, to ensure the welfare of the eligible veteran, prior to discharge or revocation. See 85 FR 13411 (March 6, 2020). Measures that VA may take to ensure eligible veterans continue to receive care when a Primary Family Caregiver is discharged may include assisting the eligible veteran, or surrogate, in identifying another individual to perform the required personal care services, or assist with the designation of a new Primary Family Caregiver. Additionally, local VA staff can work with the eligible veteran to determine whether their needs may be met by other VA programs or community resources, and can further refer, as appropriate. We note that when requesting discharge, benefits continue for a period of time so that the eligible veteran has time to adjust to the discharge.

To the extent that the commenters raised concerns about protecting veterans' health information from Primary Family Caregivers, we consider such comments out of the scope of this rulemaking. We note that being a Primary Family Caregiver does not necessarily mean such individuals have access to the health records of the veteran, as generally the veteran would need to consent to such access by the Primary Family Caregiver, although there may be exceptions to this, such as instances in which the Primary Family Caregiver is the legal guardian. We do not provide information on the eligible veteran to the Primary Family Caregiver solely on their status as the Primary Family Caregiver, and VA has procedures in place for authorizing release of records in compliance with Federal laws. It is also important to note that we cannot protect against all risks that may exist when an eligible veteran's caregiver is their spouse and the parties enter into divorce proceedings, in which the eligible veteran's information may be used against them. We make no changes based on these comments.

One commenter suggested VA allow other reasonable standards of proof to substantiate claims of intimate partner violence for purposes of extended benefits, as the proposed standard of proof differs from those accepted for the arrest of a perpetrator (*i.e.,* witness statements, videos, taped 911 calls, photographs of injuries or destroyed property, medical treatment records), and differs from those required for receipt of benefits for conditions related to physical assault, such as military sexual trauma. We decline to make any changes based on this comment, as it would put us in an awkward position of assessing and evaluating the authenticity and legitimacy of statements, videos, and 911 calls; and could lead to further confusion about what documentation would be sufficient. However, if the Primary Family Caregiver presented such information to VA to request discharge and establish an extension of benefits, but they did not have the documents required under § 71.45, we would refer them to the intimate partner violence/domestic violence (IPV/DV) office and/or to a therapist or counselor to assess

his or her safety and provide assistance in obtaining any required documentation.

This same commenter opposed treating family caregivers who are dismissed ''for cause'' better than those who relinquish caregiving duties due to unsubstantiated IPV. This commenter noted that those dismissed for cause must receive notice of revocation from VA within 60 days and may receive 90 days of continued services. This commenter also noted that when a veteran dies, is institutionalized or whose condition improves to the extent that services are no longer necessary, the Primary Family Caregiver is provided 60 days to notify VA of the change followed by 90 days of continued benefits. This commenter thus suggested providing Primary Family Caregivers a minimum of 60 days to notify VA of their request for discharge when it is due to abuse. Under § 71.45(b)(3)(i), a Primary Family Caregiver who requests discharge due to unsubstantiated IPV can provide the present or future date of discharge. If they do not, VA will contact the Primary Family Caregiver to request a date. As a result, the Primary Family Caregiver is able to set the date of discharge, after which they will receive 30 days of continued benefits. We do not agree that a Primary Family Caregiver whose designation is revoked for cause will receive more favorable treatment than a Primary Family Caregiver discharged due to unsubstantiated IPV, as a Primary Family Caregiver who is revoked for cause will not receive an advanced notice of findings and would not receive continued benefits per § 71.45(a)(2) and (3). Also, as previously mentioned, a Primary Family Caregiver who requests discharge due to unsubstantiated IPV can select a future date to be discharged. Additionally, as explained in the response to the preceding comment, if a Primary Family Caregiver does not have the documents required under § 71.45(b)(3)(iii)(B) to substantiate IPV/DV, we would refer them to the IPV/DV office and/or to a therapist or counselor to assess his or her safety and provide assistance in obtaining any required documentation. Also, we would like to clarify that, contrary to the commenter's statement concerning improvement in the veteran's condition, death, and institutionalization, the minimum of 60 day notice that is provided for discharge due to improvement in the veteran's condition is provided by VA and not the Primary Family Caregiver, and there is no minimum of 60 day advanced notice from VA for discharge due to death or institutionalization.

One commenter commended VA for extending services and support to caregivers dealing with IPV/DV, but requested VA add shelter coordinators and safe home coordinators to the list of those designated to provide documentation to VA to allow for a more inclusive list of professionals who work with those who have experienced IPV/DV. We make no changes based on this comment, as the regulation lists VA clinical professionals that may directly treat individuals experiencing IPV/DV and those that frequently work with individuals experiencing IPV/DV and have necessary and important expertise in this area to be able to assess and address these issues. While this list of professionals is not intended to be an exhaustive list, we note that shelter coordinators and safe home coordinators are not treating providers, as they generally are not required to hold licenses like those professionals listed in the regulation.

Advanced Notice

One commenter supported VA's proposal to provide advanced notice of decisions, which would also provide veterans and family caregivers the opportunity to voice disagreement with VA's findings before benefits are reduced or terminated. We thank this commenter for their support.

Another commenter suggested VA provide 90 days' notice to an eligible veteran before reducing any PCAFC benefit or revoking their participation in PCAFC, particularly in cases of non-compliance. As explained in the proposed rule, we believe 60 days is a sufficient and appropriate period of time to give notice that the stipend is being decreased or that a Family Caregiver is revoked or discharged since this would balance the desire to provide sufficient opportunity for eligible veterans and Family Caregivers to dispute VA's findings while ensuring benefits are not provided beyond a reasonable time to participants who are determined to be eligible at a lower stipend rate or no longer eligible for PCAFC. Consistent with that rationale, we believe that 90 days is too long, and we make no changes based on this comment.

This commenter also recommended that such notice should include the following information, to the extent applicable: The specific reduction in benefit, if any; a detailed explanation of the basis for the determination to reduce the benefit; each specific eligibility requirement with respect to which VA claims the veteran or caregiver is noncompliant; a detailed explanation for how the veteran or caregiver is noncompliant with each such requirement; the identity of all personnel involved in the decision to reduce the benefit or revoke the veteran's participation in PCAFC; all information and copies of all documentation relied upon by VA in making its determination to reduce the benefit or in making its determination of noncompliance. This commenter also recommended VA allow the veteran to respond to any such notice and provide information or explanations for why the reduction in benefits or revocation should not be implemented; and such response should generally be due within 60 days of receipt of the notice, but the veteran should be permitted to request an extension of 60 days to provide the response, which should be granted in the absence of any determination that such request is being made in bad faith. This commenter added that if a veteran requests a 60-day extension, VA should not be permitted to implement the reduction in benefits or revocation until at least 30 days after such extension. This commenter also recommended that VA give good-faith consideration to any response provided by the veteran, and to consider additional input from the veteran's primary care team. Lastly, this commenter recommended VA be required to provide a written decision, after considering the veteran's response; and if VA still determines to reduce the veteran's benefits or revoke the veteran's participation in PCAFC, such action should not be effective until at least 30 days after VA provides its written decision to the veteran.

The commenter mentioned above who supported VA's proposal to provide advanced notice of decisions also urged VA to propose a standard format containing a minimum set of information required in these notices, such as those elements described under 38 U.S.C. 5104(b) (identification of the issues adjudicated; a summary of the evidence considered by the Secretary; a summary of the applicable laws and regulations; identification of findings favorable to the claimant; in the case of a denial, identification of elements not satisfied leading to the denial; an explanation of how to obtain or access evidence used in making the decision; and if applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation). We appreciate both commenters' feedback, and will consider this when developing any future changes to the appeals process and related policies. We note that this would be in policy rather than regulation to be consistent with how we

handle clinical appeals within VHA. Because PCAFC decisions are medical determinations, we provide PCAFC participants with the opportunity to dispute decisions made under PCAFC through the VHA clinical appeals process, which is already established in VHA Directive 1041, Appeal of VHA Clinical Decisions. Also, as explained in the proposed rule and reiterated in this final rule, we will issue advanced notices before stipend payment decreases and certain revocations and discharges. We make no changes based on these comments.

§ 71.47 Collection of Overpayment

Several commenters disagreed with VA's definition of overpayment as it would allow VA to collect any overpayments due to VA errors, such as erroneous determinations of eligibility. These commenters opined that VA should not collect in such circumstances as it would be contrary to VA's authority to provide equitable relief pursuant to 38 U.S.C. 503(b) and 38 CFR 2.7. One commenter noted that if VA sought collection of overpayments, caregivers would file requests for equitable relief, which would cost VA time and resources to process and would not be in VA's or the taxpayers' best interest. That same commenter noted that collecting overpayments when it was VA's error creates financial hardship for the caregiver, the veteran, and their family.

While we understand the concerns the commenters raise, VA is required to create a debt even in instances when overpayments are due to VA error, and may collect on such overpayment. Collection of overpayments is not unique to PCAFC, and does occur in other VA programs, such as compensation and pension, as well as with employees who incur debts as a result of overpayment in salary and benefits. Individuals who incur a debt that VA attempts to collect can seek equitable relief from VA as well as waiver of the debt. As one of the commenters noted, VA's authority to grant equitable relief is found at 38 U.S.C. 503(b) and 38 CFR 2.7. VA may provide equitable relief due to administrative errors made by VA. Section 2.7 specifically states that if the Secretary determines that any. . . person, has suffered loss, as a consequence of reliance upon a determination by the Department of Veterans Affairs of eligibility or entitlement to benefits, without knowledge that it was erroneously made, the Secretary is authorized to provide such relief as the Secretary determines equitable, including the payment of moneys to any person equitably entitled thereto. Additionally, VA has the authority to waive debts that are incurred from participation in a benefit program, including PCAFC, administered under any law by VA when it is determined by a regional office Committee on Waivers and Compromises that collection would be against equity and good conscience. See 38 CFR 1.962. In evaluating whether collection is against equity and good conscience, these local committees consider the following elements: The fault of the debtor, balancing of faults, undue hardship, defeat the purpose, unjust enrichment, changing position to one's detriment. See 38 CFR 1.965.

While we anticipate that we should not have errors in PCAFC that would result in overpayment, especially in light of the changes we are making as part of this rulemaking, we acknowledge that errors can occur. In the instance that VA has erred resulting in overpayment, an individual can still seek equitable relief or waiver of the debt to avoid collection by VA. However, there is no guarantee that either of these will be granted, as the individual facts of such requests will need to be reviewed and determined on a case by case basis. We make no changes based on these comments.

One commenter requested VA clarify that it will not initiate collections of overpayments to legacy participants when it is determined they do not meet eligibility requirements, including situations when they were initially approved in error. Another commenter agreed with collecting overpayments due to VA error to ensure VA is being a good financial steward of the taxpayers' dollar, and that VA should similarly collect overpayments from legacy participants who have never met the requirements of part 71. This commenter asserted that VA has a duty to recover overpayments due to erroneous determinations by VA, as all improper payments degrade the integrity of government programs and compromise trust in the government.

We agree that we should collect overpayments pursuant to 31 U.S.C. 3711 and in accordance with the Federal Claims Collection Standards, and 38 U.S.C. 5302 and 5314. In instances of VA error, we would go back to the earliest date possible to collect improper payments that we made to individuals. This determination will vary based on the facts of each individual case. For example, if a Family Caregiver is determined eligible for PCAFC under the new criteria and VA erred in making that determination, VA would need to collect that overpayment from the date VA erred (*i.e.,* the date the determination of eligibility for PCAFC was made). However, we note that this may vary for legacy participants depending on the circumstances. For example, if a legacy participant is reassessed under the new eligibility criteria, and is determined to be ineligible under the new criteria, they will be discharged from PCAFC and we will not recoup any benefits previously received based on the fact that they are ineligible under the new criteria. If a legacy participant is reassessed under the new criteria and we erred in our initial determination that the participant was eligible for PCAFC when they were not, and they do not qualify for PCAFC under the new eligibility criteria, we would discharge them from PCAFC. We would not recoup any benefits received as a matter of fairness and because we believe that would result in hardship to the participant.

We further note that waiver of the debt and equitable relief may be available to eliminate the debt that VA is trying to collect. However, we cannot guarantee that either debt waiver or equitable relief would be granted since these will need to be evaluated on a case by case basis.

We make no changes based on these comments.

One commenter opined that PCAFC is a program susceptible to significant improper payments; and the Office of Management and Budget (OMB) should identify PCAFC as such and put in place measures to determine the amount and causes of improper payments, which will allow PCAFC to focus on corrective action plans to address these issues. We consider this comment outside the scope of this rulemaking and note that we cannot direct OMB to take any action. We make no changes based on this comment.

Another commenter requested that VA provide eligible veterans and Family Caregivers with information during the initial training to fully understand collection of overpayments. We make no changes to the regulation based on this comment. We would not provide this information during initial training, but we will provide this information in fact sheets which will be available to eligible veterans and Family Caregivers upon approval for PCAFC.

One commenter noted that there are multiple instances of catch-all within the proposed regulations (*e.g.,* in the preamble discussion of proposed § 71.47) of which they have concerns that this will allow VA to do what it wants, which the commenter considers a ''red flag.'' We responded to this

comment in the discussion on revocation and discharge, above, and refer the commenter to that response. We make no changes based on this comment.

Miscellaneous Comments

We received many comments that did not directly relate to any regulatory sections from the proposed rule, but that expressed concerns with VA's administration of PCAFC and PGCSS. Although we do not make changes to the proposed rule based on these comments because they are beyond the scope of the proposed rule or address issues that would be best addressed through policy, we summarize the comments below by topic.

Appeals

We received many comments related to VA's appeals process with regard to PCAFC, which primarily argued that PCAFC determinations should be subject to the jurisdiction of the Board of Veterans' Appeals (BVA) and expressed concerns with the current PCAFC appeals process. Commenters asserted that PCAFC services are benefits that should be subject to BVA review to ensure consistency and fairness across PCAFC. Specifically, some commenters suggested that the first sentence in 38 CFR 20.104(b) allows for PCAFC determinations to be appealed to BVA. One commenter specifically suggested it is contrary to 38 U.S.C. 7104 and 511(a) to restrict PCAFC determinations from the jurisdiction of BVA, and that VA should amend or waive 38 CFR 20.104(b) to allow PCAFC determinations to be appealed to BVA (we note that although the commenter referred to both 38 CFR 20.10(b) and 20.101(b), based on the content of the comment, we believe that the intended reference was § 20.104(b) as § 20.10(b) does not exist and § 20.101(b) was redesignated as § 20.104(b) (84 FR at 177 (January 18, 2019)). Several commenters asserted that applicants are deprived of due process if they cannot further appeal PCAFC determinations to BVA. One commenter opined that the authorizing statute, 38 U.S.C. 1720G, does not consider all decisions under PCAFC to be medical determinations; only those ''affecting the furnishing of assistance or support,'' thus those non-medical determinations should be appealable to BVA. Other commenters suggested that BVA should have jurisdiction over PCAFC determinations because they are more similar to other VHA determinations over which BVA has jurisdiction. One commenter asserted that because VHA provides expert medical review of cases for BVA, VA should be able to utilize BVA in reviewing its cases of PCAFC clinical appeals decisions. Additionally, some commenters asserted that by expanding the definition of serious injury to include a service-connected disability that is 70 percent or more, or a combined rating of 70 percent or more, VA should expand the ability to appeal PCAFC decisions to BVA since PCAFC would be using VBA criteria and decisions to influence VHA clinical determinations. Commenters also expressed that the current appeals process for PCAFC determinations, the VHA clinical appeals process, was unfair and inconsistent; and some commenters recommended that PCAFC establish its own unique appeals process. Some commenters also recommended setting forth the appeals process for PCAFC determinations in regulation, in order to provide clarity, consistency, and an opportunity for public comment. We address these comments below.

First, we note that while 38 U.S.C. 1720G confers benefits, which would typically be subject to 38 U.S.C. 7104(a) and 511(a) and confer BVA jurisdiction, Congress specifically intended to further limit review of PCAFC determinations with the language set forth by section 1720G(c)(1), which states that ''[a] decision by the Secretary under this section affecting the furnishing of assistance or support shall be considered a medical determination.'' Medical determinations are not subject to BVA's jurisdiction under 38 CFR 20.104(b) which describes BVA's appellate jurisdiction over VHA determinations. The first sentence in § 20.104(b) states that BVA's appellate jurisdiction extends to questions of eligibility for hospitalization, outpatient treatment, and nursing home and domiciliary care; for devices such as prostheses, canes, wheelchairs, back braces, orthopedic shoes, and similar appliances; and for other benefits administered by VHA. However, the second sentence of § 20.104(b) clarifies that medical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, are not adjudicative matters and are beyond BVA's jurisdiction. Id. Therefore, because 38 U.S.C. 1720G establishes that PCAFC decisions are medical determinations, such decisions are not appealable to BVA. Accordingly, we disagree with the assertion that the first sentence in 38 CFR 20.104(b) allows for PCAFC determinations to be appealed to BVA. For these same reasons, regardless of whether or not PCAFC determinations are more similar to other VHA determinations that BVA has jurisdiction over and despite the extent to which VHA provides expert medical review of cases for BVA, PCAFC determinations cannot be appealed to BVA. Accordingly, we disagree with commenters asserting that BVA should have jurisdiction over PCAFC determinations on these grounds.

We also disagree with the assertion that 38 CFR 20.104(b) as applied to PCAFC determinations is contrary to 38 U.S.C. 7104(a) and 511(a), thus requiring that PCAFC appeals be reviewed by BVA. In addition, we disagree with the assertion that 38 U.S.C. 1720G does not consider all decisions under the PCAFC to be medical determinations (*e.g.,* procedural and factual questions, such as whether an applicant has furnished all required information, whether VA has contributed to a delay in an applicant caregiver completing his or her training and education requirements in a timely manner, whether a veteran's serious injury was incurred or aggravated in the line of duty, when a serious injury was incurred or aggravated, or whether an applicant's disability rating meets or exceeds 70 percent). As mentioned above, while 38 U.S.C. 1720G confers benefits, which would typically be subject to 38 U.S.C. 7104(a) and 511(a), Congress specifically intended to further limit review of PCAFC determinations by designating such determinations as ''medical determinations.'' Congress also specifically intended that all decisions under PCAFC be considered medical determinations by stating broadly that decisions ''affecting the furnishing of assistance or support'' under section 1720G would be considered a medical determination. PCAFC benefits under section 1720G consist of assistance and support services, and as such, any decision under the PCAFC would affect the furnishing of assistance or support under this section, including the examples relating to PCAFC eligibility provided by the commenter. As explained in the final rule implementing PCAFC and PGCSS, ''[t]he plain language of section 1720G(c)(1) removes any doubt that Congress intended to insulate even decisions of eligibility from appellate review under [PCAFC], and VA's regulation at § 20.10[4](b) cannot circumvent a statutory requirement. 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress.' *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984). Further, Congress is presumed to know what laws and regulations exist when it enacts new legislation, and it is reasonable to infer that Congress knew that medical determinations were not appealable under § 20.10[4], and subsequently used that precise phrase in the statute to limit appeals of decisions in the [PCAFC]. *See California Indus. Products, Inc.* v. *United States,* 436 F.3d 1341, 1354 (Fed. Cir. 2006) ('These regulations are appropriately considered in the construction of [this particular statute] because Congress is presumed to be aware of pertinent existing law.').'' 80 FR at 1366 (January 9, 2015).

We further note that, to the extent commenters contend that the exclusion of medical determinations from the jurisdiction of BVA is invalid and that VA should amend or waive 38 CFR 20.104(b), we believe that this is beyond the scope of this rulemaking. As previously explained, § 20.104(b) restricts medical determinations from BVA's appellate jurisdiction. However, we did not propose changes to this regulation as part of this rulemaking; therefore, any requests to amend or waive § 20.104(b) is beyond the scope of this rulemaking.

Additionally, we believe that expanding the definition of serious injury to include a 70 percent service-connected disability rating, or a combined rating of 70 percent or more, does not change the jurisdictional limitations of BVA concerning PCAFC determinations discussed above. A determination under PCAFC that a veteran or servicemember does not have a serious injury because he or she has a service-connected disability rating, or a combined rating, below 70 percent, is still a PCAFC determination and would therefore still be deemed a medical determination and not subject to BVA's jurisdiction. However, if a veteran or servicemember believes that his or her service-connection rating is incorrect, he or she may seek correction of their service-connection rating from VBA or appeal their rating to BVA, if appealable.

Commenters asserted that applicants are deprived of due process if they cannot further appeal PCAFC determinations to BVA. In particular, one commenter suggested that PCAFC creates an entitlement, such that applicants have a constitutional right to due process to further appeal PCAFC determinations. However, we note that PCAFC is not an entitlement. Section 1720G(c)(2)(B) of 38 U.S.C. specifically states that the statute does not create any entitlement to any assistance or support provided under PCAFC. Notwithstanding this explicit language, the commenter contends that this provision is not dispositive of whether otherwise nondiscretionary, statutorily mandated benefits create an entitlement protected by the constitution. However, these benefits are not nondiscretionary; they are discretionary, as they can be granted or denied within VA's discretion. In this regard, 38 U.S.C. 1720G(a)(1)(B) specifically states, ''[t]he Secretary shall only provide support under the program required by subparagraph (A) to a family caregiver of an eligible veteran if the Secretary determines it is in the best interest of the eligible veteran to do so.'' Therefore, we disagree with the commenter's assertion that PCAFC benefits create a constitutional due process right to further appeal such determinations to BVA. *See Cushman* v. *Shinseki,* 576 F.3d 1290, 1297 (2009) (''A benefit is not a protected entitlement if government officials may grant or deny it in their discretion.''). However, we further note that despite this, VA nonetheless provides applicants with due process through the VHA clinical appeals process. Under the VHA clinical appeals process, veterans and Family Caregivers have access to a fair and impartial review of disputes regarding clinical decisions. Thus, because the process for appealing clinical decisions, such as PCAFC determinations, is set forth in policy rather than regulation, we would make no changes to the regulations to include appeals of PCAFC decisions. Moreover, VA has provided a new advanced notice provision in the PCAFC regulations where VA must provide no less than 60-days advanced notice prior to a decrease in the monthly stipend payment, revocation, or discharge (as applicable) from PCAFC. This 60-day period will provide an opportunity to contest VA's findings before a stipend decrease, revocation, or discharge (as applicable) become effective. We believe providing advanced notice and opportunity to contest VA's findings before benefits are reduced or terminated would benefit both VA and eligible veterans and Family Caregivers. 85 FR 13394 (March 6, 2020)). By adding a requirement for advanced notice before stipend payment decreases and certain revocations and discharges, it is our hope that communication between VA and eligible veterans and their Family Caregivers would improve, and that PCAFC participants would have a better understanding of VA's decision-making process. Id.

To the extent that commenters recommended that the appeals process for PCAFC determinations be set forth in regulation and that PCAFC have its own unique appeals process, as we explained above, all decisions under PCAFC are considered medical determinations pursuant to 38 U.S.C. 1720G; and disputes of medical determinations (*i.e.,* clinical disputes) are subject to the VHA clinical appeals process per VHA Directive 1041, Appeal of VHA Clinical Decisions. We note that while we generally follow the VHA clinical appeals process outlined in VHA Directive 1041 for appeals of PCAFC decisions, there are some processes unique to PCAFC, which will be addressed in an appendix to VHA Directive 1041. The updated directive with that appendix will be published at a future date on VHA's publication website. Thus, because the clinical appeals process is already established in VHA Directive 1041, we do not find it necessary to establish an entirely separate appeals process for PCAFC decisions or set forth in regulation the appeals process for PCAFC decisions. For these reasons, at this time, we decline to establish an entirely separate appeals process for PCAFC decisions or set forth in regulation the appeals process for PCAFC decisions.

A commenter also encouraged VA to utilize mediation and online dispute resolutions for clinical appeals pursuant VHA Directive 1041, Appeal of VHA Clinical Decisions. Commenters also opined that the VHA clinical appeals process is not fair as there is no neutral party to impartially adjudicate appeals and inconsistent as clinical review could vary from provider to provider, VAMC to VAMC, and VISN to VISN. We do not address these as these comments are outside the scope of this rulemaking and apply to all of VHA clinical appeals, not just PCAFC. However, we will take these under consideration for future changes to VHA Directive 1041, or subsequent directive.

Electronic Communications

One commenter opined that it is necessary to include the ability of caregivers to electronically be in touch with the ones they are giving care to. The same commenter asserted that being unable to see or speak to the person you have been taking care of for years puts stress on the caregiver and the client. Further, the commenter stated that the recreation group in a nursing home can accommodate the use social media platforms. We do not understand the exact concerns of this commenter and

encourage anyone encountering these issues to contact their local CSC.

Contracting

One commenter stated they have not received any patients from VA despite having a contract for over three years and questioned what they should do. We consider this comment outside the scope of this rulemaking and would recommend this commenter reach out to the contracting officer for the contract.

Current Execution of PCAFC

Several commenters did not suggest specific changes to the proposed rule but rather expressed frustration with the current execution and management of PCAFC, to include inconsistent application of program requirements, problematic eligibility determinations, inappropriate discharges, and a general lack of knowledge and accountability by CSCs. Other commenters provided general information about their circumstances. We make no changes based on these comments; however, we note that we are implementing processes to standardize and improve PCAFC eligibility determinations to include a robust staff education and training plan, centralized eligibility, and enhanced oversight. Additionally, as we shift eligibility determinations to the CEATs, we will shift the role of the CSCs to providing care and advocacy for the eligible veteran and his or her caregiver. Also, eligible veterans and his or her caregivers who believe they have been inappropriately discharged from the program may contact their local facility patient advocate as well as appeal PCAFC determinations through the VHA clinical appeals process. Furthermore, individuals interested in applying to PCAFC may contact their local VA medical facility CSC or refer to *https://www.caregiver.va.gov/* for additional information about the program and the application process.

Denial of Aide and Attendance Benefit

One commenter stated that they have submitted VA Form 21–2680 three times and have been denied by VA. We note that PCAFC is a VHA clinical program that is separate from a VBA aide and attendance allowance. For questions regarding eligibility please contact your nearest VBA regional office.

Funding for PCAFC and Regulatory Impact Analysis

Multiple commenters questioned how VA will pay for the expansion of PCAFC. One commenter raised concerns that the program has too many holes it in and may likely be financially unsustainable. The 2020 President's Budget included estimated funding to meet the caregiver population expansion from the MISSION Act. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94) included sufficient funding to meet the Caregiver Program cost estimates. The 2021 President's Budget included a funding request for the Caregiver Program based on the same updated projection model as used to formulate the regulatory impact analysis budget impact. Future President's Budget requests will incorporate new data and updated cost projections as they become available. For a detailed analysis of the costs of this program, please refer to the regulatory impact analysis accompanying this rulemaking. We make no changes based on these comments.

Another comment requested VA explain the discrepancy between the economically significant description of the proposed rule and the regulatory impact analysis that states 2022 is not economically significant. The commenter further opined that after unloading all of the post-9/11 veterans, the costs of all previous era veterans equal out so that this rule is not economically significant. First, with regards to the commenter's statement that the regulatory impact analysis states that 2022 is not economically significant, we are unclear as to what this commenter is referring by ''2022.'' As the regulatory impact analysis states, we determined that this regulatory action is economically significant. Further, as previously discussed, we are not expanding to pre-9/11 eligible veterans at the expense of post-9/11 veterans and servicemembers, rather we are building one program to encompass veterans and servicemembers of all eras.

Intent of Program

One commenter requested VA ''get back'' to the original intent of the program, which the commenter stated is for home bound veterans from military service injury, and that most veterans with qualifying issues do not require a caregiver for 24/7 care and thus will not be eligible. This commenter also asserted that PCAFC may enable veterans and their caregivers, causing negative impacts on veteran/caregiver mental health.

First, we note that the intent of PCAFC has always been to provide comprehensive assistance to Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty on or after September 11, 2001. It was never intended to be solely for ''home bound veterans'' nor was it intended to require caregivers provide 24/7 care. PCAFC was intended to provide supportive services, and education and training to Family Caregivers of injured veterans. Services provided by Family Caregivers are meant to supplement or complement clinical services provided to eligible veterans. As part of PCAFC, we do not require Family Caregivers provide 24/7 care to eligible veterans. The changes we previously proposed and now make final do not alter that intent. However, we note that the changes we are making to PCAFC are necessary as a result of the VA MISSION Act of 2018 which requires PCAFC to be expanded to veterans of all eras. Thus, because veterans of different eras have different needs, we need to adapt PCAFC to meet the needs of these veterans and are doing so by making such changes as decoupling serious injury and the need for personal care services. We believe these changes are consistent with the original intent of PCAFC.

We respectfully disagree with the commenter's assertion that PCAFC will enable veterans and their caregivers, causing negative impacts on veteran and caregiver mental health. We reiterate that PCAFC is meant to provide certain assistance to Family Caregivers and recognize the sacrifices caregivers make to care for veterans. It is intended to help veterans and servicemembers achieve their highest level of health, quality of life, and independence. 85 FR 13360 (March 6, 2020). While we understand and recognize that being a Family Caregiver can be challenging, Family Caregivers can receive respite care and counseling, including individual and group therapy, and peer support groups, under PCAFC. Primary Family Caregivers may also receive health care and services through CHAMPVA. Additionally, eligible veterans would be enrolled in VA healthcare and would be able to seek mental health care through VA. We make no changes based on this comment.

Interaction With Other Programs

Multiple commenters requested clarification on how PCAFC interacts with other VA and federal programs (*e.g.,* VHA Homemaker and Home Health Aide, VHA Home Based Primary Care, VHA Veteran-Directed Care, VBA Aid and Attendance, programs administered by the Social Security Administration (SSA)). Additionally, one commenter requested information about services available to them to use now until they are eligible for PCAFC as a result of expansion. PCAFC is one of many in-home VA services that are complementary but not necessarily

exclusive to one another. As a result, an eligible veteran and his or her caregiver may participant in more than one in-home care program, as applicable. Furthermore, older veterans or servicemembers awaiting expansion for his or her service era, may be eligible for other VA programs and benefits (*e.g.,* PGCSS, Homemaker and Home Health Aide, Veteran-Directed Care, home based primary care, SMC). As we have noted throughout this rule, VA offers a menu of supports and services that supports caregivers caring for veterans such as PGCSS, homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. We note that the definition of serious injury requires a single or combined service-connected disability rating of 70 percent, which is the minimum threshold we will use for determining eligibility for PCAFC. As explained previously, other criteria, including that the individual be in need of personal care services and that PCAFC be in the best interest of the veteran, must be further met to be eligible for PCAFC. Eligibility for SSA benefits does not impact eligibility for PCAFC. It is also important to note that stipend payments received under PCAFC do not earn credits toward Social Security retirement as stipend payments are non-taxable. We further note that all income counts against eligibility for Supplemental Security Income, but not against eligibility for Social Security Disability Income or Social Security retirements. Because we do not administer SSA benefits, we would further refer commenters to SSA's website (at *https://www.ssa.gov/*) for more information on eligibility for SSA benefits. We will also consider these comments in determining requirements in contracts for personal financial services. We are not making any changes to the regulation based on these comments.

Meeting Notes

One commenter requested VA provide the meetings notes from a current employee from February 25, 2019. If the commenter is referring to the February 25, 2019 meeting notes identified in the proposed rule, the meeting notes titled ''Meeting Notes 02.25.19'' is posted in the docket folder for this rulemaking (*i.e.,* AQ48—Proposed Rule—Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments under the VA MISSION Act of 2018) at *https://www.regulations.gov.* The commenter may need to select ''View All'' beside the Primary Documents heading in the docket. We make no changes based on this comment.

Electronic Medical Record and Health Insurance Portability and Accountability Act (HIPAA)

One commenter asserted that access to a patient's medical record, including the ability to insert a document into a patient's medical record should be limited to only the medical provider(s) who treat the veteran or servicemember. The same commenter further opined that introducing this security method to the Computerized Patient Record System (CPRS) would help eliminate HIPAA violations and cross provider communication that crowds up the medical record. The commenter also asserted that the medical records should only consist of the patient's medical information. We consider this comment outside the rulemaking, but note that VA has implemented security mechanisms, including access and audit controls, within VA's Veterans Health Information System Technology Architecture (VistA)/CPRS that comply with the HIPAA Security Rule. All staff with access to patient information are required, in the performance of their duties, to know their responsibilities in maintaining the confidentiality of VA sensitive information, especially patient information, by completing the annual Cyber Security and Privacy training. We note that the health record consists of the patient's medical information, including the individual's health history, examinations, tests, treatments, and outcomes. It also includes an administrative component that is an official record pertaining to the administrative aspects involved in the care of a patient, including: Demographics, eligibility, billing, correspondence, and other business-related aspects. Such information is necessary, particularly, as individuals other than a treating provider utilize the information contained in the VHA health record on a daily basis for eligibility determinations and other health care functions, such as coding and billing; thus, we cannot limit access to the medical record to only the treating providers. We make no changes based on this comment.

One commenter stated this is ludicrous and a clear HIPAA violation for said caregiver. As the commenter did not provide further information, we cannot address this comment. We make no changes based on this comment.

Move PCAFC to VBA

Several commenters asserted that PCAFC is a permanent benefits program and questioned whether the program should be administered by VBA. Commenters further expounded that VHA has shown it is unable to consistently administer the program and that VHA medical facility staff should not be involved with decisions that have financial implications to veterans and his or her caregiver. While we agree that PCAFC does provide benefits to the Family Caregivers of eligible veterans, PCAFC is a clinical program that provides assistance to Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty, and is designed to support the health and well-being of such veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. See 85 FR 13356, at 13367 (March 6, 2020). Thus, PCAFC is intended to be a program under which assistance may shift depending on the changing needs of the eligible veteran. We do acknowledge that while some eligible veterans may improve over time, others may not, and PCAFC and other VHA services are available to ensure the needs of those veterans continue to be met. Given the placement of authority for the PCAFC program in Chapter 17 of title 38, U.S. Code—Hospital, Nursing Home, Domiciliary, and Medical Care, VHA has the exclusive authority to carry out the PCAFC program. See 38 U.S.C. 7301. Any relocation of the program to VBA would require statutory change. Further, section 1720G does not create any entitlement to any assistance or support provided under PCAFC and PGCSS. See 38 U.S.C. 1720G(c)(2)(B). In administering PCAFC pursuant to VHA's statutory authority in section 1720G, as explained in the proposed rule, we have recognized that improvements to PCAFC were needed to improve consistency and transparency within the PCAFC. See 85 FR 13356 (March 6, 2020). We believe the changes that we are making in this rule will improve PCAFC, especially with regards to eligibility determinations. We also note that we are implementing processes to standardize and improve PCAFC eligibility determinations to include a robust staff education and training plan, centralized eligibility, and enhanced oversight.

Most In Need

Several commenters expressed concern over the phrase ''most in need.'' In particular, one commenter asserted that the purpose and application of this phrase ''eliminates participation because the word 'most' [implies] not all who are eligible.'' We note that, although the comment used the word

''entitles,'' based on the content of the comment, we believe that the intended word was ''implies.'' This commenter further asserted that it is unlawful for VA to deny or revoke eligibility to focus on those who are most in need. We do not have unlimited resources to provide PCAFC to all caregivers of veterans, and note that the purpose and intent of PCAFC is to provide benefits to Family Caregivers who make sacrifices to care for veterans, who would otherwise not be able to manage without that caregiver's assistance. We note that the phrase ''most in need'' was only used in the proposed rule in reference to a **Federal Register** Notice published on January 5, 2018, requesting information and comments from the public on how to improve PCAFC. We note that the changes we are making through this rulemaking are intended to better address the needs of veterans of all eras and standardize the program to focus on eligible veterans with moderate and severe needs. 84 FR 13356 (March 6, 2020). We also further refer the commenter to the discussion directly above addressing that PCAFC is not an entitlement program.

We do not make any changes based on these comments.

Not Veteran-Centric

One commenter asserted that the proposed rule is VA-centric versus veteran centric. Specifically, this commenter asserted that the changes will lead to veterans not receiving the quality care they deserve, and deny eligibility to other veterans under expansion who would be previously eligible.

As we explained in the proposed rule, we are making changes to the current regulations in part 71 to improve the PCAFC to ensure consistency and transparency in decision making within the program, to update the regulations to comply with amendments made to 38 U.S.C. 1720G by the VA MISSION Act of 2018, and to allow PCAFC to better address the needs of veterans of all eras and standardize PCAFC to focus on eligible veterans with moderate and severe needs. These efforts to standardize PCAFC will ensure that eligible veterans and Family Caregivers will receive a high level of care through PCAFC. Thus, we disagree that the proposed rule is VA centric. We do not believe this will lead to veterans not receiving the quality of care they deserve, as veterans who are not eligible for PCAFC may be eligible for other VHA care and services, such as home based primary care, Veteran-Directed, and adult day health care. Similarly, we acknowledge there may be veterans who would be eligible for PCAFC under the previous eligibility criteria but will not be eligible under the new eligibility criteria. However, for the reasons described in this paragraph, we believe these changes are necessary.

We make no changes based on this comment.

Veteran Suicide

Commenters expressed concern that the proposed changes will result in an increase in veteran suicides. One commenter also requested that VA refrain from proposing another rule change before addressing why veterans are committing suicide on VA hospital property. While we consider these comments out of scope and make no changes based on these comments, it is important to note that PCAFC is focused on providing support and services to caregivers of veterans, and does not replace appropriate clinical services from which a veteran may benefit. We also note that suicide prevention is VA's top clinical priority. More information on VA's suicide prevention efforts can be found at: *https://www.mentalhealth.va.gov/MENTALHEALTH/suicide_prevention/index.asp.* If you are a veteran in crisis or you are concerned about one, free and confidential support is available 24/7 by calling the Veterans Crisis Line at 1–800–273–8255 and Press 1 or by sending a text message to 838255. We make no changes based on these comments.

Overhaul of Existing Program

Multiple commenters expressed frustration that this rulemaking is a complete overhaul rather than fixing issues with the current program. Specifically, commenters noted that the proposed rule does nothing to address non-compliance and inconsistency in the implementation and management of the current program and questioned the purpose of the moratorium on tier reductions and discharges based on clinical determinations. As indicated in the proposed rule, VA has recognized the need to improve consistency and transparency since the implementation of PCAFC in 2011 and the current moratorium was put in place to prevent discharges and tier reductions while PCAFC focused on education, guidance and conducted audits. We note that this moratorium is still in place, and will be lifted once this regulation is final and effective. Additionally, the current regulations are focused on post-9/11 veterans and servicemembers and as discussed above we believe the eligibility requirements must be revised to be inclusive of veterans and servicemembers of all eras. Furthermore, we will continue to provide robust training and education to our staff, implement an audit process to review assessments at medical centers as well as centralized eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation. We make no changes based on these comments.

PCAFC Is Not a VBA Nonmedical Benefit

One commenter urged VA to stop modeling PCAFC as though it is a VBA nonmedical benefit, and cited to *Tapia* v. *United States,* 146 Fed. Cl. 114 (2016), in which the United State Court of Federal Claims affirmed that PCAFC determinations are clinical and thus subject to VHA's clinical appeals process. We do not understand this comment, and to the extent that this commenter is asserting that PCAFC is a clinical program operated by VHA, we agree. To the extent that this commenter is asserting that PCAFC determinations are subject to the clinical appeals process and are not within BVA's jurisdiction, we also agree. We make no changes based on this comment.

PCAFC Staffing

Several commenters expressed concern that VA does not have the staff to handle the wave of applications that will come once expansion occurs. Specifically, commenters noted that VA staff are already overwhelmed serving current PCAFC participants. We thank the commenters for their concerns and note that we are actively increasing PCAFC staff nationwide in anticipation of expansion. We make no changes based on these comments.

Plain Writing Act and FAQs

Two commenters requested VA better explain PCAFC by using plain language consistent with the Plain Writing Act of 2010. A separate comment indicated VA should follow the plain language guidelines of Plain Writing. Two commenters indicated that the rule was difficult to understand and one of those commenter's requests FAQs. We are aware of the complexity of the proposed changes; however, we conformed the regulation to the Office of Federal Register guidelines which where were developed to help agencies produce clear, enforceable regulation documents. Additionally, we have and will continue to provide FAQs on various aspects of the program. We are not making any changes based on this comment.

Pilot Program

One commenter requested that VA pilot the proposed changes before implementing the changes. The same commenter asserted that veterans of all eras should join under the current regulations. As amended by section 163 of the VA MISSION Act of 2018, 38 U.S.C. 1720G requires VA expand eligibility for PCAFC to all veterans in two phases. We would not pilot the proposed changes before implementing them as that would not be appropriate in this instance. Pilot programs are conducted to determine whether an approach may work and whether such an approach is the correct one to use. However, the changes we have proposed and are making final as part of this rulemaking are based on challenges and issues we have seen and identified over the years since PCAFC was first implemented. We have conducted thorough analysis to determine what changes to make and to support those changes. In addition, running two separate and distinct programs for different groups of veterans will lead to confusion for caregivers, veterans, and staff. We do not make any changes based on this comment but will continue to review and analyze PCAFC and make any changes we deem necessary.

Requirement To Reapply After Moving

One commenter opposed the current practice and requirement for participants to reapply for the program because they have moved, as this has resulted in denial of PCAFC benefits. We wish to clarify that an eligible veteran and the Family Caregiver are not required to submit a new joint application if or when they relocate; that is, move to another address. However, we will require a wellness contact be conducted in the eligible veteran's home to determine if the new environment meets the care needs of the eligible veteran. During the wellness contact, the clinical staff member conducting such contact may identify a change in the eligible veteran's condition or other such change in circumstances whereby a need for a reassessment may be deemed necessary and arranged accordingly pursuant to § 71.30 if necessary. We note that wellness contacts and reassessments are distinct and separate processes.

Further, as explained above, we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation. We are not making any changes based on this comment.

Special Compensation for Assistance With Activities of Daily Living (SCAADL)

Several commenters asserted that DoD's SCAADL program was intended to be a part of a servicemembers' seamless transition to PCAFC. One commenter provided SCAADL performance metrics and stated that there has been little coordination with SCAADL by PCAFC or the Recovery Coordination Program despite a Memorandum of Understanding between VA and DoD for interagency complex care coordination requirements for servicemembers and veterans. The commenter further asserted that the Congressional intent of PCAFC was very clear following the passage of three crucial laws: Caregivers Act, section 603 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), and the Veterans' Benefits Act of 2010 (Pub. L. 111–275).

While we consider these comments outside the scope of the proposed rule, we will briefly explain SCAADL and PCAFC, and the coordination between VA and DoD to meet the needs of servicemembers and veterans. Authorized by section 603 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84) and codified at 37 U.S.C. 439, SCAADL is taxable financial compensation that DoD provides to eligible permanent catastrophically injured or ill servicemembers who require caregiver support for assistance with activities of daily living or for constant supervision and protection, without which they would require hospitalization or residential institutional care. It is important to note that PCAFC and SCAADL are distinct programs, as the statutory authorities set forth different requirements and benefits for each program. For example, unlike PCAFC, SCAADL does not provide benefits directly to the Family Caregiver nor does it provide benefits other than financial compensation.

These commenters also refer to the Recovery Coordination Program, and we assume they are referring to the joint DoD/VA Federal Recovery Coordination Program, which is a joint effort between the Departments to coordinate the clinical and nonclinical services needed by severely wounded, ill, and injured servicemembers and veterans.

DoD and VA continue to take efforts to support a smooth transition as servicemembers leave active duty and become veterans. Through the Transition Assistance Program, every year approximately 200,000 servicemembers, who are preparing to transition to civilian life, receive information, resources, and tools to help prepare for this transition. VA's portion of this program includes an in-person course called VA Benefits and Services, which helps servicemembers understand how to navigate VA and the benefits and services they have earned through their military careers. This includes information on PCAFC. It is important to note that if a servicemember has been discharged from the military or has a date of medical discharge, he or she is eligible to apply for PCAFC. We note that CSP partners with VA's Transition and Care Management through their partnership with the Federal Recovery Program and DoD Medical Treatment Facilities. We make no changes based on these comments.

These same commenters also recommended that PCAFC be more aligned with SCAADL, including definitions, application timelines, and eligibility determinations. As explained in response to the comments directly above, there are differences between the two programs based on the authorizing statutes. Thus, the definitions and eligibility determinations for these programs are necessarily different. Additionally, the application timelines differ as a result of differences between the programs' processes. For example, initial eligibility for SCAADL is certified by a DoD- or VA-licensed physician, after which time, DoD recommends that all responsible parties complete the SCAADL application form within 30 days. In contrast, PCAFC does not provide a recommended a timeline for completing the PCAFC application form. Because we view these as distinct programs with different requirements, we make no changes based on these comments.

Staff Training on Eligibility Determinations

Several commenters asserted that current PCAFC staff are unable to make accurate eligibility determinations because they have been improperly trained. Specifically, one commenter asserted that training provided was not properly vetted by VA's Chief Education Officer to ensure the training meets the standards of the Caregiver Omnibus Act of 2010. We are preparing multi-day trainings to be provided to staff that will be making eligibility determinations. These trainings will be approved by VA's Employee Education Service (EES), and will be tailored to the various disciplines of the staff that will be determining eligibility for PCAFC.

These trainings will be accredited by EES as these will be considered continuing education credits for staff licenses, as applicable. We currently provide in VA's employee training system, the Talent Management System, standardized trainings on many portions of PCAFC, including caregiver support and eligibility. These standardized trainings have been approved by EES. We are also developing trainings on how to use assessment instruments. We will ensure that quality assurance and peer reviews are conducted to ensure that eligibility determinations are made appropriately and consistently. Where we determine improvement is needed, we will remediate and provide re-training of staff. We make no changes based on these comments.

VA Should Pay all Veterans Before Caregivers

One commenter asserted that there should be some type of compensation for all veterans who served regardless of whether they have a service-connected disability prior to providing a stipend and health care services to Family Caregivers. The same commenter further opined that veterans with a certain percentage of service-connected disability are free to schedule multiple VA medical appointments and questioned why able-bodied veterans are not compensated nor able to use VA for medical care. To the extent the commenter requests VA to revise how veterans are compensated and priority designation for access to VA medical care, this is beyond the scope of this rulemaking. We make no changes based on this comment.

Veteran Functional Assessment Instrument

One commenter specifically stated that after the proposed rule was published, they requested additional information from VA about how the proposed eligibility evaluation and reassessment process will work, including any assessment instruments that VA staff will use. This commenter recommended that because VA did not adequately explain how the process will work, VA should publish a supplemental notice of proposed rulemaking or an interim final rule to explain this process, upon which to provide the public the opportunity to comment. One commenter recommended VA use an interrater reliability measure to determine the level of standardization of the veteran functional assessment instrument that VA staff may use to inform eligibility determinations, recommended the current assessment instrument be revised to ensure standardization and yield consistency, and further suggested that the current assessment instrument be independently validated, subject to public scrutiny, which should prove the instrument's reliability, validity, responsiveness as an outcome measure, and interpretability. This commenter also asked VA to provide justification to prove the current assessment instrument was so fatally flawed and beyond repair such that any necessary improvements would cause greater burden than deploying a new assessment instrument or undue burden on the public and the government. This commenter also noted that VA has not provided the public with any valid and reliable data or research to prove that the new veteran functional assessment instrument has equivalent interrater reliability and validity as the three assessment instruments on which it is based. Another commenter opined that the current assessment tool used for evaluating the level of assistance required by a veteran to complete ADLs or to determine a veteran's need for supervision or protection is a good instrument and asked what assessment/evaluation guidelines will be put in place now. Additionally, one of the commenters referenced our current use of the Katz Basic Activities of Daily Living Scale; the UK Functional Independence Measure and Functional Assessment Measure; and the Neuropsychiatric Inventory for conducting assessments of veterans. One commenter raised concerns about using a new tool as VA staff is not using the current tool properly. Two commenters requested VA provide a detailed list of requirements and the scoring methodology to determine eligibility.

We consider these comments to be outside the scope of the rule and do not make any changes based on these comments nor will we publish a supplemental notice of proposed rulemaking or an interim final rule; however, we provide additional information as follows. The exact processes and instruments that will be used to assess eligible veterans and Family Caregivers for PCAFC would best be handled through policy. While we note that commenters specifically inquired, or raised concerns about the veteran functional assessment instrument, we note that it is one of several factors that may be used by staff to inform determinations for PCAFC eligibility. There will be no scoring methodology for determining eligibility. Because these determinations are clinical, the indicators and information used to make the determinations will vary on a case by case basis depending on the veteran's situation. After the regulation is published, we will publish related policies that will describe the assessment process, including any assessment instruments VA staff may use when PCAFC applicants are evaluated for the program. We will ensure VA staff utilizing the any assessment instruments are properly trained. We further note that we will continue to monitor to ensure that any instruments used to assist in assessing a veteran's needs for purposes of PCAFC are reliable and valid. We make no changes based on these comments.

Several comments copied and pasted SMAG committee minutes, with no further explanation or discussion. We concur that these are the minutes from the SMAG Committee meetings. However, because no further context to these comments were provided, we cannot address them further. We make no changes based on these comments.

Other

Several commenters posted comments that did not provide additional information beyond what appears to be a news release from Senator Patty Murray on March 9, 2019 regarding PCAFC and minutes from the 1999 Archives of the U.S. Senate Taskforce on Hispanic Affairs, Veteran Advisory Committee. Another commenter posted their interpretation of the major takeaways for the proposed rule. One commenter posted information on an herbal formula that can be used for ALS. One commenter posted what appears to be excerpts from VA OIG reports. As no further explanation or discussion was provided by the commenters, we cannot further address. We make no changes based on these comments.

Technical Edits

We would make a technical edit to §§ 71.10 through 71.40, and 71.50. We would remove the statutory authority citations at the end of each of these sections and amend the introductory ''Authority'' section of part 71 to include the statutory citations listed in these sections that are not already provided in the ''Authority'' section of part 71 to conform with publishing guidelines established by the Office of the Federal Register. We note that current §§ 71.20 and 71.30 include a citation to 38 U.S.C. 1720G(a)(2) and 1720G(b)(1), (2), respectively. However, we would reference 38 U.S.C. 1720G, not specific subsections and paragraphs. We would also add a reference to 31 U.S.C. 3711, which pertains to collections; 38 U.S.C. 5302, which

pertains to waiver of benefits overpayments; and 38 U.S.C. 5314, which pertains to the offset of benefits overpayments. These references would be added for purposes of proposed § 71.47, Collection of overpayment.

Paperwork Reduction Act

This final rule contains provisions that would constitute a revised collection of information under 38 CFR 71.25, which is currently approved under Office of Management and Budget (OMB) Control #2900–0768. This rule also contains provisions that constitute a new collection of information under 38 CFR 71.40, which will be added under OMB Control #2900–0768. As required by 44 U.S.C. 3507(d), VA will submit, under a separate document, the revised collection of information associated with §§ 71.25 and 71.40 to OMB for its review and approval. Notice of OMB approval for this revised collection of information will be published in a future **Federal Register** document.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. We note that caregivers are not small entities. However, this final rule may directly affect small entities that we would contract with to provide financial planning services and legal services to Primary Family Caregivers; however, matters relating to contracts are exempt from the RFA requirements. Any effects on small entities would be indirect. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Congressional Review Act

This regulatory action is a major rule under the Congressional Review Act, 5 U.S.C. 801–808, because it may result in an annual effect on the economy of $100 million or more. In accordance with 5 U.S.C. 801(a)(1), VA will submit to the Comptroller General and to Congress a copy of this regulatory action and VA's Regulatory Impact Analysis.

Executive Order 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is an economically significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm/,* by following the link for ''VA Regulations Published.''

This rulemaking is considered an E.O. 13771 regulatory action. VA has determined that the net costs are $483.4 million over a five-year period and $70.5 million per year on an ongoing basis discounted at 7 percent relative to year 2016, over a perpetual time horizon. Details on the estimated costs of this final rule can be found in the rule's economic analysis.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits.

List of Subjects in 38 CFR Part 71

Administrative practice and procedure, Caregivers program, Claims, Health care, Health facilities, Health professions, Mental health programs, Travel and transportation expenses, Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Acting Chief of Staff, Department of Veterans Affairs, approved this document on July 17, 2020, for publication.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 71 as follows:

PART 71—CAREGIVERS BENEFITS AND CERTAIN MEDICAL BENEFITS OFFERED TO FAMILY MEMBERS OF VETERANS

■ 1. The authority citation for part 71 is revised to read as follows:

Authority: 38 U.S.C. 501, 1720G, unless otherwise noted.
Section 71.40 also issued under 38 U.S.C. 111(e), 1720B, 1782.
Section 71.47 also issued under 31 U.S.C. 3711; 38 U.S.C. 5302, 5314.
Section 71.50 also issued under 38 U.S.C. 1782.

■ 2. Amend § 71.10 by revising paragraph (b) and removing the authority citation at the end of the section.

The revision reads as follows:

§ 71.10 Purpose and scope.

* * * * *

(b) *Scope.* This part regulates the provision of benefits under the Program of Comprehensive Assistance for Family Caregivers and the Program of General Caregiver Support Services authorized by 38 U.S.C. 1720G. Persons eligible for such benefits may be eligible for other VA benefits based on other laws or other parts of this title. These benefits are provided only to those individuals residing in a State as that term is defined in 38 U.S.C. 101(20).

■ 3. Amend § 71.15 by:
■ a. Removing the definition of ''Combined rate'';
■ b. Adding in alphabetical order definitions for ''Domestic violence (DV)'', ''Financial planning services'', and ''In need of personal care services'';
■ c. Redesignating in proper alphabetical order the definition of ''In the best interest'' and revising it;
■ d. Revising the definition of ''Inability to perform an activity of daily living (ADL)'';
■ e. Adding in alphabetical order definitions for ''Institutionalization'', ''Intimate partner violence (IPV)'', ''Joint application'', ''Legacy applicant'', ''Legacy participant'', ''Legal services'', and ''Monthly stipend rate'';

■ f. Removing the definition of ''Need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'';
■ g. Adding in alphabetical order definitions for ''Need for supervision, protection, or instruction'' and ''Overpayment'';
■ h. Revising the definitions of ''Primary care team'' and ''Serious injury'';
■ i. Adding in alphabetical order a definition of ''Unable to self-sustain in the community''; and
■ j. Removing the authority citation at the end of the section.

The revisions and additions read as follows:

§ 71.15 Definitions.

* * * * *

Domestic violence (DV) refers to any violence or abuse that occurs within the domestic sphere or at home, and may include child abuse, elder abuse, and other types of interpersonal violence.

* * * * *

Financial planning services means services focused on increasing financial capability and assisting the Primary Family Caregiver in developing a plan to manage the personal finances of the Primary Family Caregiver and the eligible veteran, as applicable, to include household budget planning, debt management, retirement planning review and education, and insurance review and education.

* * * * *

In need of personal care services means that the eligible veteran requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements (including respite care or assistance of an alternative caregiver) would be required to support the eligible veteran's safety.

In the best interest means, for the purpose of determining whether it is in the best interest of the veteran or servicemember to participate in the Program of Comprehensive Assistance for Family Caregivers under 38 U.S.C. 1720G(a), a clinical determination that participation in such program is likely to be beneficial to the veteran or servicemember. Such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran's or servicemember's ability to live safely in a home setting, supports the veteran's or servicemember's potential progress in rehabilitation, if such potential exists, increases the veteran's or servicemember's potential independence, if such potential exists, and creates an environment that supports the health and well-being of the veteran or servicemember.

Inability to perform an activity of daily living (ADL) means a veteran or servicemember requires personal care services each time he or she completes one or more of the following:

(1) Dressing or undressing oneself;

(2) Bathing;

(3) Grooming oneself in order to keep oneself clean and presentable;

(4) Adjusting any special prosthetic or orthopedic appliance, that by reason of the particular disability, cannot be done without assistance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.);

(5) Toileting or attending to toileting;

(6) Feeding oneself due to loss of coordination of upper extremities, extreme weakness, inability to swallow, or the need for a non-oral means of nutrition; or

(7) Mobility (walking, going up stairs, transferring from bed to chair, etc.).

Institutionalization refers to being institutionalized in a setting outside the home residence to include a hospital, rehabilitation facility, jail, prison, assisted living facility, medical foster home, nursing home, or other similar setting.

Intimate partner violence (IPV) refers to any violent behavior including, but not limited to, physical or sexual violence, stalking, or psychological aggression (including coercive acts or economic harm) by a current or former intimate partner that occurs on a continuum of frequency and severity which ranges from one episode that might or might not have lasting impact to chronic and severe episodes over a period of years. IPV can occur in heterosexual or same-sex relationships and does not require sexual intimacy or cohabitation.

Joint application means an application that has all fields within the application completed, including signature and date by all applicants, with the following exceptions: social security number or tax identification number, middle name, sex, email, alternate telephone number, and name of facility where the veteran last received medical treatment, or any other field specifically indicated as optional.

Legacy applicant means a veteran or servicemember who submits a joint application for the Program of Comprehensive Assistance for Family Caregivers that is received by VA before October 1, 2020 and for whom a Family Caregiver(s) is approved and designated on or after October 1, 2020 so long as the Primary Family Caregiver approved and designated for the veteran or servicemember on or after October 1, 2020 pursuant to such joint application (as applicable) continues to be approved and designated as such. If a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy applicant.

Legacy participant means an eligible veteran whose Family Caregiver(s) was approved and designated by VA under this part as of the day before October 1, 2020 so long as the Primary Family Caregiver approved and designated for the eligible veteran as of the day before October 1, 2020 (as applicable) continues to be approved and designated as such. If a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy participant.

Legal services means assistance with advanced directives, power of attorney, simple wills, and guardianship; educational opportunities on legal topics relevant to caregiving; and referrals to community resources and attorneys for legal assistance or representation in other legal matters. These services would be provided only in relation to the personal legal needs of the eligible veteran and the Primary Family Caregiver. This definition excludes assistance with matters in which the eligible veteran or Primary Family Caregiver is taking or has taken any adversarial legal action against the United States government, and disputes between the eligible veteran and Primary Family Caregiver.

Monthly stipend rate means the Office of Personnel Management (OPM) General Schedule (GS) Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12.

Need for supervision, protection, or instruction means an individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis.

Overpayment means a payment made by VA pursuant to this part to an individual in excess of the amount due, to which the individual was not eligible, or otherwise made in error. An overpayment is subject to collection action.

* * * * *

Primary care team means one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant.

* * * * *

Serious injury means any service-connected disability that:

(1) Is rated at 70 percent or more by VA; or

(2) Is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA.

Unable to self-sustain in the community means that an eligible veteran:

(1) Requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in this section, and is fully dependent on a caregiver to complete such ADLs; or

(2) Has a need for supervision, protection, or instruction on a continuous basis.

* * * * *

■ 4. Revise § 71.20 to read as follows:

§ 71.20 Eligible veterans and servicemembers.

A veteran or servicemember is eligible for a Family Caregiver under this part if he or she meets the criteria in paragraph (a), (b), or (c) of this section, subject to the limitations set forth in such paragraphs.

(a) A veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she meets all of the following requirements:

(1) The individual is either:

(i) A veteran; or

(ii) A member of the Armed Forces undergoing a medical discharge from the Armed Forces.

(2) The individual has a serious injury incurred or aggravated in the line of duty in the active military, naval, or air service:

(i) On or after September 11, 2001;

(ii) Effective on the date specified in a future **Federal Register** document, on or before May 7, 1975; or

(iii) Effective two years after the date specified in a future **Federal Register** document as described in paragraph (a)(2)(ii) of this section, after May 7, 1975 and before September 11, 2001.

(3) The individual is in need of personal care services for a minimum of six continuous months based on any one of the following:

(i) An inability to perform an activity of daily living; or

(ii) A need for supervision, protection, or instruction.

(4) It is in the best interest of the individual to participate in the program.

(5) Personal care services that would be provided by the Family Caregiver will not be simultaneously and regularly provided by or through another individual or entity.

(6) The individual receives care at home or will do so if VA designates a Family Caregiver.

(7) The individual receives ongoing care from a primary care team or will do so if VA designates a Family Caregiver.

(b) For one year beginning on October 1, 2020, a veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she is a legacy participant.

(c) For one year beginning on October 1, 2020, a veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she is a legacy applicant.

■ 5. Amend § 71.25:

■ a. By revising paragraph (a);

■ b. In paragraph (c)(1) introductory text, by removing the phrase ''a VA primary care team'' and adding in its place ''VA''; and

■ c. By revising paragraphs (c)(1)(i) and (ii), (c)(2), (e), and (f); and

■ d. By removing the authority citation at the end of the section.

The revisions read as follows:

§ 71.25 Approval and designation of Primary and Secondary Family Caregivers.

(a) *Application requirement.* (1) Individuals who wish to be considered for designation by VA as Primary or Secondary Family Caregivers must submit a joint application, along with the veteran or servicemember. Individuals interested in serving as Family Caregivers must be identified as such on the joint application, and no more than three individuals may serve as Family Caregivers at one time for an eligible veteran, with no more than one serving as the Primary Family Caregiver and no more than two serving as Secondary Family Caregivers.

(2)(i) Upon receiving such application, VA (in collaboration with the primary care team to the maximum extent practicable) will perform the evaluations required to determine the eligibility of the applicants under this part, and if eligible, determine the applicable monthly stipend amount under § 71.40(c)(4). Notwithstanding the first sentence, VA will not evaluate a veteran's or servicemember's eligibility under § 71.20 when a joint application is received to add a Secondary Family Caregiver for an eligible veteran who has a designated Primary Family Caregiver.

(ii) Individuals who apply to be Family Caregivers must complete all necessary eligibility evaluations (along with the veteran or servicemember), education and training, and the initial home-care assessment (along with the veteran or servicemember) so that VA may complete the designation process no later than 90 days after the date the joint application was received by VA. If such requirements are not complete within 90 days from the date the joint application is received by VA, the joint application will be denied, and a new joint application will be required. VA may extend the 90-day period based on VA's inability to complete the eligibility evaluations, provide necessary education and training, or conduct the initial home-care assessment, when such inability is solely due to VA's action.

(3)(i) Except as provided in this paragraph, joint applications received by VA before October 1, 2020 will be evaluated by VA based on 38 CFR 71.15, 71.20, and 71.25 (2019). Notwithstanding the previous sentence, the term ''joint application'' as defined in § 71.15 applies to applications described in this paragraph.

(ii) Joint applications received by VA on or after October 1, 2020 will be evaluated by VA based on the provisions of this part in effect on or after October 1, 2020.

(A) VA will deny any joint application of an individual described in § 71.20(a)(2)(ii), if such joint application is received by VA before the date published in a future **Federal Register** document that is specified in such section. A veteran or servicemember seeking to qualify for the Program of Comprehensive Assistance for Family Caregivers pursuant to § 71.20(a)(2)(ii) should submit a joint application that is received by VA on or after the date published in a future **Federal Register** document that is specified in § 71.20(a)(2)(ii).

(B) VA will deny any joint application of an individual described in § 71.20(a)(2)(iii), if such joint application is received by VA before the date that is two years after the date published in a future **Federal Register** document that is specified in § 71.20(a)(2)(ii). A veteran or servicemember seeking to qualify for the Program of Comprehensive Assistance for Family Caregivers pursuant to § 71.20(a)(2)(iii) should submit a joint application that is received by VA on or after the date that is two years after the date published in a future **Federal**

Register document that is specified in § 71.20(a)(2)(ii).

* * * * *

(c) * * *

(1) * * *

(i) Whether the applicant can communicate and understand the required personal care services and any specific instructions related to the care of the eligible veteran (accommodation for language or hearing impairment will be made to the extent possible and as appropriate); and

(ii) Whether the applicant will be capable of performing the required personal care services without supervision, in adherence with the eligible veteran's treatment plan in support of the needs of the eligible veteran.

(2) Complete caregiver training and demonstrate the ability to carry out the specific personal care services, core competencies, and additional care requirements.

* * * * *

(e) *Initial home-care assessment.* VA will visit the eligible veteran's home to assess the eligible veteran's well-being and the well-being of the caregiver, as well as the caregiver's competence to provide personal care services at the eligible veteran's home.

(f) *Approval and designation.* VA will approve the joint application and designate Primary and/or Secondary Family Caregivers, as appropriate, if the applicable requirements of this part are met. Approval and designation is conditioned on the eligible veteran and designated Family Caregiver(s) remaining eligible for Family Caregiver benefits under this part, the Family Caregiver(s) providing the personal care services required by the eligible veteran, and the eligible veteran and designated Family Caregiver(s) complying with all applicable requirements of this part, including participating in reassessments pursuant to § 71.30 and wellness contacts pursuant to § 71.40(b)(2). Refusal to comply with any applicable requirements of this part will result in revocation from the program pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

§ 71.30 [Redesignated as § 71.35]

■ 6. Redesignate § 71.30 as § 71.35.

■ 7. Add a new § 71.30 to read as follows:

§ 71.30 Reassessment of Eligible Veterans and Family Caregivers.

(a) Except as provided in paragraphs (b) and (c) of this section, the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) on an annual basis to determine their continued eligibility for participation in PCAFC under this part. Reassessments will include consideration of whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A). Reassessment may include a visit to the eligible veteran's home.

(b) Reassessments may occur more frequently than annually if a determination is made and documented by VA that more frequent reassessment is appropriate.

(c) Reassessments may occur on a less than annual basis if a determination is made and documented by VA that an annual reassessment is unnecessary.

(d) Failure of the eligible veteran or Family Caregiver to participate in any reassessment pursuant to this section will result in revocation pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

(e)(1) If the eligible veteran meets the requirements of § 71.20(b) or (c) (*i.e.,* is a legacy participant or a legacy applicant), the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) within the one-year period beginning on October 1, 2020 to determine whether the eligible veteran meets the requirements of § 71.20(a). This reassessment may include a visit to the eligible veteran's home. If the eligible veteran meets the requirements of § 71.20(a), the reassessment will consider whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A).

(2) Notwithstanding paragraph (e)(1) of this section, a reassessment will not be completed under paragraph (e)(1) if at some point before a reassessment is completed during the one-year period beginning on October 1, 2020 the individual no longer meets the requirements of § 71.20(b) or (c).

§ 71.35 [Amended]

■ 8. In newly redesignated § 71.35, remove the authority citation at the end of the section.

■ 9. Amend § 71.40 by revising paragraphs (b)(2), (c) introductory text, and (c)(4), adding paragraphs (c)(5) and (6), revising paragraph (d), and removing the authority citation at the end of the section.

The revisions and additions read as follows:

§ 71.40 Caregiver benefits.

* * * * *

(b) * * *

(2) Wellness contacts to review the eligible veteran's well-being, adequacy of personal care services being provided by the Family Caregiver(s), and the well-being of the Family Caregiver(s). This wellness contact will occur, in general, at a minimum of once every 120 days, and at least one visit must occur in the eligible veteran's home on an annual basis. Failure of the eligible veteran and Family Caregiver to participate in any wellness contacts pursuant to this paragraph will result in revocation pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

* * * * *

(c) *Primary Family Caregiver benefits.* VA will provide to Primary Family Caregivers all of the benefits listed in paragraphs (c)(1) through (6) of this section.

* * * * *

(4) Primary Family Caregivers will receive a monthly stipend for each month's participation as a Primary Family Caregiver.

(i) *Stipend amount.* (A) Except as provided in paragraph (c)(4)(i)(C) of this section, if the eligible veteran meets the requirements of § 71.20(a), the Primary Family Caregiver's monthly stipend is the amount set forth in paragraph (c)(4)(i)(A)(*1*) or (*2*) of this section.

(*1*) The Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.625.

(*2*) If VA determines that the eligible veteran is unable to self-sustain in the community, the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 1.00.

(B) Except as provided in paragraph (c)(4)(i)(C) of this section, for one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(b) or (c), (*i.e.,* is a legacy participant or a legacy applicant), the Primary Family Caregiver's monthly stipend is calculated based on the clinical rating in 38 CFR 71.40(c)(4)(i) through (iii) (2019) and the definitions applicable to such paragraphs under 38 CFR 71.15 (2019). If the sum of all of the ratings assigned is:

(*1*) 21 or higher, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 1.00.

(*2*) 13 to 20, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.625.

(*3*) 1 to 12, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.25.

(C) For one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(a) and (b) or (c), the Primary Family Caregiver's monthly stipend is the amount the Primary Family Caregiver is eligible to receive under paragraph (c)(4)(i)(A) or (B) of this section, whichever is higher. If the higher monthly stipend rate is the amount the Primary Family Caregiver is eligible to receive under paragraph (c)(4)(i)(A) of this section, the stipend rate will be adjusted and paid in accordance with paragraph (c)(4)(ii)(C)(*2*)(*i*) of this section.

(D) Notwithstanding paragraphs (c)(4)(i)(A) through (C) of this section, for one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(b), the Primary Family Caregiver's monthly stipend is not less than the amount the Primary Family Caregiver was eligible to receive as of the day before October 1, 2020 (based on the eligible veteran's address on record with the Program of Comprehensive Assistance for Family Caregivers on such date) so long as the eligible veteran resides at the same address on record with the Program of Comprehensive Assistance for Family Caregivers as of the day before October 1, 2020. If the eligible veteran relocates to a different address, the stipend amount thereafter is determined pursuant to paragraph (c)(4)(i)(A), (B), or (C) of this section and adjusted in accordance with paragraph (c)(4)(ii)(B) of this section.

(ii) *Adjustments to stipend payments.* (A) Adjustments to stipend payments that result from OPM's updates to the General Schedule (GS) Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides take effect prospectively following the date the update to such rate is made effective by OPM.

(B) Adjustments to stipend payments that result from the eligible veteran relocating to a new address are effective the first of the month following the month in which VA is notified that the eligible veteran has relocated to a new address. VA must receive notification within 30 days from the date of relocation. If VA does not receive notification within 30 days from the date of relocation, VA will seek to recover overpayments of benefits under this paragraph (c)(4) back to the latest date on which the adjustment would have been effective if VA had been notified within 30 days from the date of relocation, as provided in § 71.47.

(C) The Primary Family Caregiver's monthly stipend may be adjusted pursuant to the reassessment conducted by VA under § 71.30.

(*1*) If the eligible veteran meets the requirements of § 71.20(a) only (and does not meet the requirements of § 71.20(b) or (c)), the Primary Family Caregiver's monthly stipend is adjusted as follows:

(*i*) In the case of a reassessment that results in an increase in the monthly stipend payment, the increase takes effect as of the date of the reassessment.

(*ii*) In the case of a reassessment that results in a decrease in the monthly stipend payment, the decrease takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

(*2*) If the eligible veteran meets the requirements of § 71.20(b) or (c), the Primary Family Caregiver's monthly stipend may be adjusted as follows:

(*i*) In the case of a reassessment that results in an increase in the monthly stipend payment, the increase takes effect as of the date of the reassessment. The Primary Family Caregiver will also be paid the difference between the amount under paragraph (c)(4)(i)(A) of this section that the Primary Family Caregiver is eligible to receive and the amount the Primary Family Caregiver was eligible to receive under paragraph (c)(4)(i)(B) or (D) of this section, whichever the Primary Family Caregiver received for the time period beginning on October 1, 2020 up to the date of the reassessment, based on the eligible veteran's address on record with the Program of Comprehensive Assistance for Family Caregivers on the date of the reassessment and the monthly stipend rate on such date. If there is more than one reassessment for an eligible veteran during the one-year period beginning on October 1, 2020, the retroactive payment described in the previous sentence applies only if the first reassessment during the one-year period beginning on October 1, 2020 results in an increase in the monthly stipend payment, and only as the result of the first reassessment during the one-year period.

(*ii*) In the case of a reassessment that results in a decrease in the monthly stipend payment and the eligible veteran meets the requirements of § 71.20(a), the new stipend amount under paragraph (c)(4)(i)(A) of this section takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after the date that is one year after October 1, 2020. On the date that is one year after October 1, 2020, VA will provide advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

Note to paragraph (c)(4)(ii)(C)(2): If an eligible veteran who meets the requirements of § 71.20(b) or (c) is determined, pursuant to a reassessment conducted by VA under § 71.30, to not meet the requirements of § 71.20(a), the monthly stipend payment will not be increased under paragraph (c)(4)(ii)(C)(*2*)(*i*) of this section or decreased under paragraph (c)(4)(ii)(C)(*2*)(*ii*) of this section. Unless the Family Caregiver is revoked or discharged under § 71.45 before the date that is 60 days after the date that is one year after October 1, 2020, the effective date for discharge of the Family Caregiver of a legacy participant or legacy applicant under § 71.45(b)(1)(ii) will be no earlier than 60 days after the date that is one year after October 1, 2020. On the date that is one year after October 1, 2020, VA will provide advanced notice of its findings to the eligible veteran and Family Caregiver.

(D) Adjustments to stipend payments for the first month will take effect on the date specified in paragraph (d) of this section. Stipend payments for the last month will end on the date specified in § 71.45.

(iii) *No employment relationship.* Nothing in this section shall be construed to create an employment relationship between the Secretary and an individual in receipt of assistance or support under this part.

(iv) *Periodic assessment.* In consultation with other appropriate agencies of the Federal government, VA shall periodically assess whether the monthly stipend rate meets the requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv). If VA determines that adjustments to the monthly stipend rate are necessary, VA shall make such adjustments through future rulemaking.

(5) Primary Family Caregivers are eligible for financial planning services as that term is defined in § 71.15. Such services will be provided by entities authorized pursuant to any contract entered into between VA and such entities.

(6) Primary Family Caregivers are eligible for legal services as that term is defined in § 71.15. Such services will be provided by entities authorized pursuant to any contract entered into between VA and such entities.

(d) *Effective date of benefits under the Program of Comprehensive Assistance for Family Caregivers.* Except for paragraphs (b)(6) and (c)(3) and (4) of this section, caregiver benefits under

paragraphs (b) and (c) of this section are effective upon approval and designation under § 71.25(f). Caregiver benefits under paragraphs (b)(6) and (c)(3) and (4) are effective on the latest of the following dates:

(1) The date the joint application that resulted in approval and designation of the Family Caregiver is received by VA.

(2) The date the eligible veteran begins receiving care at home.

(3) The date the Family Caregiver begins providing personal care services to the eligible veteran at home.

(4) In the case of a new Family Caregiver applying to be the Primary Family Caregiver for an eligible veteran, the day after the effective date of revocation or discharge of the previous Primary Family Caregiver for the eligible veteran (such that there is only one Primary Family Caregiver designated for an eligible veteran at one time).

(5) In the case of a new Family Caregiver applying to be a Secondary Family Caregiver for an eligible veteran who already has two Secondary Family Caregivers approved and designated by VA, the day after the effective date of revocation or discharge of a previous Secondary Family Caregiver for the eligible veteran (such that there are no more than two Secondary Family Caregivers designated for an eligible veteran at one time).

(6) In the case of a current or previous Family Caregiver reapplying with the same eligible veteran, the day after the date of revocation or discharge under § 71.45, or in the case of extended benefits under § 71.45(b)(1)(iii), (b)(2)(iii), (b)(3)(iii)(A) or (B), and (b)(4)(iv), the day after the last date on which such Family Caregiver received caregiver benefits.

(7) The day after the date a joint application is denied.

■ 10. Revise § 71.45 to read as follows:

§ 71.45 Revocation and discharge of Family Caregivers.

(a) *Revocation of the Family Caregiver*—(1) *Bases for revocation of the Family Caregiver*—(i) *For cause.* VA will revoke the designation of a Family Caregiver for cause when VA determines any of the following:

(A) The Family Caregiver or eligible veteran committed fraud under this part;

(B) The Family Caregiver neglected, abused, or exploited the eligible veteran;

(C) Personal safety issues exist for the eligible veteran that the Family Caregiver is unwilling to mitigate;

(D) The Family Caregiver is unwilling to provide personal care services to the eligible veteran or, in the case of the Family Caregiver's temporary absence or incapacitation, fails to ensure (if able to) the provision of personal care services to the eligible veteran.

(ii) *Noncompliance.* Except as provided in paragraph (f) of this section, VA will revoke the designation of a Family Caregiver when the Family Caregiver or eligible veteran is noncompliant with the requirements of this part. Noncompliance means:

(A) The eligible veteran does not meet the requirements of § 71.20(a)(5), (6), or (7);

(B) The Family Caregiver does not meet the requirements of § 71.25(b)(2);

(C) Failure of the eligible veteran or Family Caregiver to participate in any reassessment pursuant to § 71.30;

(D) Failure of the eligible veteran or Family Caregiver to participate in any wellness contact pursuant to § 71.40(b)(2); or

(E) Failure to meet any other requirement of this part except as provided in paragraph (b)(1) or (2) of this section.

(iii) *VA error.* Except as provided in § 71.45(f), VA will revoke the designation of a Family Caregiver if the Family Caregiver's approval and designation under this part was authorized as a result of an erroneous eligibility determination by VA.

(2) *Revocation date.* All caregiver benefits will continue to be provided to the Family Caregiver until the date of revocation.

(i) In the case of revocation based on fraud committed by the Family Caregiver or eligible veteran under paragraph (a)(1)(i)(A) of this section, the date of revocation will be the date the fraud began. If VA cannot identify when the fraud began, the date of revocation will be the earliest date that the fraud is known by VA to have been committed, and no later than the date on which VA identifies that fraud was committed.

(ii) In the case of revocation based on paragraphs (a)(1)(i)(B) through (D) of this section, the date of revocation will be the date VA determines the criteria in any such paragraph has been met.

(iii) In the case of revocation based on noncompliance under paragraph (a)(1)(ii) of this section, revocation takes effect as of the effective date provided in VA's final notice of such revocation to the eligible veteran and Family Caregiver. The effective date of revocation will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Family Caregiver.

(iv) In the case of revocation based on VA error under paragraph (a)(1)(iii) of this section, the date of revocation will be the date the error was made. If VA cannot identify when the error was made, the date of revocation will be the earliest date that the error is known by VA to have occurred, and no later than the date on which VA identifies that the error occurred.

(3) *Continuation of benefits.* In the case of revocation based on VA error under paragraph (a)(1)(iii) of this section, caregiver benefits will continue for 60 days after the date of revocation unless the Family Caregiver opts out of receiving such benefits. Continuation of benefits under this paragraph will be considered an overpayment and VA will seek to recover overpayment of such benefits as provided in § 71.47.

(b) *Discharge of the Family Caregiver*—(1) *Discharge due to the eligible veteran*—(i) *Bases for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers when VA determines any of the following:

(A) Except as provided in paragraphs (a)(1)(ii)(A) and (b)(1)(i)(B) of this section, the eligible veteran does not meet the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise; or

(B) Death or institutionalization of the eligible veteran. Note: VA must receive notification of death or institutionalization of the eligible veteran as soon as possible but not later than 30 days from the date of death or institutionalization. Notification of institutionalization must indicate whether the eligible veteran is expected to be institutionalized for 90 or more days from the onset of institutionalization.

(ii) *Discharge date.* (A) In the case of discharge based on paragraph (b)(1)(i)(A) of this section, the discharge takes effect as of the effective date provided in VA's final notice of such discharge to the eligible veteran and Family Caregiver. The effective date of discharge will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Family Caregiver that the eligible veteran does not meet the requirements of § 71.20.

(B) For discharge based on paragraph (b)(1)(i)(B) of this section, the date of discharge will be the earliest of the following dates, as applicable:

(*1*) Date of death of the eligible veteran.

(*2*) Date that institutionalization begins, if it is determined that the eligible veteran is expected to be institutionalized for a period of 90 days or more.

(*3*) Date of the 90th day of institutionalization.

(iii) *Continuation of benefits.* Caregiver benefits will continue for 90 days after the date of discharge.

(2) *Discharge due to the Family Caregiver*—(i) *Bases for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers due to the death or institutionalization of the Family Caregiver. Note: VA must receive notification of death or institutionalization of the Family Caregiver as soon as possible but not later than 30 days from the date of death or institutionalization. Notification of institutionalization must indicate whether Family Caregiver is expected to be institutionalized for 90 or more days from the onset of institutionalization.

(ii) *Discharge date.* The date of discharge will be the earliest of the following dates, as applicable:

(A) Date of death of the Family Caregiver.

(B) Date that the institutionalization begins, if it is determined that the Family Caregiver is expected to be institutionalized for a period of 90 days or more.

(C) Date of the 90th day of institutionalization.

(iii) *Continuation of benefits.* Caregiver benefits will continue for 90 days after date of discharge in paragraph (b)(2)(ii)(B) or (C) of this section.

(3) *Discharge of the Family Caregiver by request of the Family Caregiver*—(i) *Request for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers if a Family Caregiver requests discharge of his or her caregiver designation. The request may be made verbally or in writing and must provide the present or future date of discharge. If the discharge request is received verbally, VA will provide the Family Caregiver written confirmation of receipt of the verbal discharge request and the effective date of discharge. VA will notify the eligible veteran verbally and in writing of the request for discharge and the effective date of discharge.

(ii) *Discharge date.* The date of discharge will be the present or future date provided by the Family Caregiver or the date of the Family Caregiver's request for discharge if the Family Caregiver does not provide a date. If the request does not include an identified date of discharge, VA will contact the Family Caregiver to request a date. If unable to successfully obtain this date, discharge will be effective as of the date of the request.

(iii) *Continuation of benefits.* (A) Except as provided in paragraph (b)(3)(iii)(B) of this section, caregiver benefits will continue for 30 days after the date of discharge.

(B) If the Family Caregiver requests discharge due to domestic violence (DV) or intimate partner violence (IPV) perpetrated by the eligible veteran against the Family Caregiver, caregiver benefits will continue for 90 days after the date of discharge when any of the following can be established:

(*1*) The issuance of a protective order, to include interim, temporary and/or final protective orders, to protect the Family Caregiver from DV or IPV perpetrated by the eligible veteran.

(*2*) A police report indicating DV or IPV perpetrated by the eligible veteran against the Family Caregiver or a record of an arrest related to DV or IPV perpetrated by the eligible veteran against the Family Caregiver; or

(*3*) Documentation of disclosure of DV or IPV perpetrated by the eligible veteran against the Family Caregiver to a treating provider (*e.g.,* physician, dentist, psychologist, rehabilitation therapist) of the eligible veteran or Family Caregiver, Intimate Partner Violence Assistance Program (IPVAP) Coordinator, therapist or counselor.

(4) *Discharge of the Family Caregiver by request of the eligible veteran or eligible veteran's surrogate*—(i) *Request for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Caregivers if an eligible veteran or the eligible veteran's surrogate requests discharge of the Family Caregiver. The discharge request may be made verbally or in writing and must express an intent to remove the Family Caregiver's approval and designation. If the discharge request is received verbally, VA will provide the eligible veteran written confirmation of receipt of the verbal discharge request and effective date of discharge. VA will notify the Family Caregiver verbally and in writing of the request for discharge and effective date of discharge.

(ii) *Discharge date.* The date of discharge will be the present or future date of discharge provided by the eligible veteran or eligible veteran's surrogate. If the request does not provide a present or future date of discharge, VA will ask the eligible veteran or eligible veteran's surrogate to provide one. If unable to successfully obtain this date, discharge will be effective as of the date of the request.

(iii) *Rescission.* VA will allow the eligible veteran or eligible veteran's surrogate to rescind the discharge request and have the Family Caregiver reinstated if the rescission is made within 30 days of the date of discharge. If the eligible veteran or eligible veteran's surrogate expresses a desire to reinstate the Family Caregiver more than 30 days from the date of discharge, a new joint application is required.

(iv) *Continuation of benefits.* Caregiver benefits will continue for 30 days after the date of discharge.

(c) *Safety and welfare.* If VA suspects that the safety of the eligible veteran is at risk, then VA may suspend the caregiver's responsibilities, and facilitate appropriate referrals to protective agencies or emergency services if needed, to ensure the welfare of the eligible veteran, prior to discharge or revocation.

(d) *Overpayments.* VA will seek to recover overpayments of benefits provided under this section as provided in § 71.47.

(e) *Transition and bereavement counseling.* VA will, if requested and applicable, assist the Family Caregiver in transitioning to alternative health care coverage and mental health services. In addition, in cases of death of the eligible veteran, bereavement counseling may be available under 38 U.S.C. 1783.

(f) *Multiple bases for revocation or discharge.* In the instance that a Family Caregiver may be both discharged pursuant to any of the criteria in paragraph (b) of this section and have his or her designation revoked pursuant to any of the criteria in paragraph (a) of this section, the Family Caregiver's designation will be revoked pursuant to paragraph (a). In the instance that the designation of a Family Caregiver may be revoked under paragraph (a)(1)(i) and paragraph (a)(1)(ii) or (iii) of this section, the designation of the Family Caregiver will be revoked pursuant to paragraph (a)(1)(i). In the instance that the designation of a Family Caregiver may be revoked under paragraphs (a)(1)(ii) and (iii) of this section, the designation of the Family Caregiver will be revoked pursuant to paragraph (a)(1)(iii). In the instance that a Family Caregiver may be discharged under paragraph (b)(1), (2), (3), or (4) of this section, the Family Caregiver will be discharged pursuant to the paragraph most favorable to the Family Caregiver.

■ 11. Add § 71.47 to read as follows:

§ 71.47 Collection of overpayment.

VA will collect overpayments as defined in § 71.15 pursuant to the Federal Claims Collection Standards.

§ 71.50 [Amended]

■ 12. Amend § 71.50 by removing the statutory authority citation at the end of the section.

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Swords to Plowshares

VETS HELPING VETS SINCE 1974

UPGRADING YOUR MILITARY DISCHARGE AND CHANGING THE REASON FOR YOUR DISCHARGE

This guide provides step-by-step advice on how to pursue a discharge upgrade or change in your reason for discharge.

A discharge upgrade changes the **"character of service"** shown on your DD-214 discharge certificate. Today, most certificates show the "character of service" as either Honorable, General (Under Honorable Conditions), Other Than Honorable, Bad Conduct or Dishonorable.

A change in the reason for your discharge is a change in the **"narrative reason for separation"** shown on your DD-214. Among the many possible "narrative reasons for separation" are "misconduct," "disability," "personality disorder," and "homosexual conduct."

Along with the basics about how to apply for corrections, this guide covers important developments—"Hagel & Kurta Memos"—that might increase your chance of success:

1) If the circumstances of your discharge were the result of **Post-Traumatic Disorder (PTSD)**, your request may be eligible for "liberal" consideration under the *"Hagel Memo"* and related laws.

2) If the circumstances of your discharge were the result of a **mental health condition (including PTSD)**, **Traumatic Brain Injury (TBI)**, or **sexual assault/harassment**, you may be able to strengthen your application by submitting special types of evidence, in addition to service records, that will also be given "liberal" consideration under the "Kurta Memo."

Before we get started, an important note:

You may be able to get most VA benefits even if your discharge isn't upgraded, through a process known as a **Character of Discharge Determination (COD)**. In addition, if you stayed in the military beyond your original ETS date, there are special rules that help you to get most VA benefits. For more information, review the memos on COD's and Back-to-Back and Conditional Discharges at **https://www.swords-to-plowshares.org/guides/va-character-of-service-determination-an-alternative-to-discharge-review/** and **https://www.swords-to-plowshares.org/guides/back-to-back-and-conditional-discharges/**.

UPGRADING YOUR MILITARY DISCHARGE

Though it can be difficult to win a change to your discharge status, with the right evidence and arguments the chances of success increase greatly. To the extent possible, follow the steps below to increase your own likelihood of success.

STEP ONE: Figure out where you need to apply to get an upgrade.

Where you should apply depends on your branch of service, date of discharge, and the type of change(s) you want to be made to your military record.

What are the types of review Boards?

The Air Force, Army, and Coast Guard have their own Discharge Review Boards **(DRBs)**. The Navy and Marine Corps have a joint **DRB**.

The Air Force, Army, and Coast Guard also have their own Boards for Correction of Military Records **(BCMRs)**. The Navy and Marine Corps have a joint Board for Correction of Naval Records **(BCNR)**.

What powers do the Boards have?

A **DRB** has limited powers. It can upgrade a discharge, **unless** the discharge resulted from a General Court-Martial. It can also change the reason for a discharge, **except** that it can't change the reason to—or from—a disability discharge. And that's all a **DRB** can do.

If you're seeking anything else, you must apply to a **BCMR** or **BCNR** to correct your military records.

A **BCMR** or **BCNR** won't accept your application unless you've tried the other possible ways of getting what you're after. (A lawyer would say that you must "exhaust your other remedies.") This means that if you are requesting something that a DRB can do – a discharge upgrade, a change in the reason for your discharge, or both – you must first apply to a DRB, unless the deadline for applying to the DRB has passed. If you are requesting anything else, you can bypass the **DRB** and apply directly to a **BCMR** or **BCNR**.

What are the deadlines to apply to the Boards?

DRB deadline: You have **15 years** from the date of your discharge to apply to a **DRB**.

BCMR or BCNR deadline: You are required to apply within **three years** of the date you first discover the "error or injustice" that you're seeking to correct. But there are **three exceptions** to this rule:

- **First,** if a **DRB** reviews your application and denies it, you then have three years from the date of the denial to apply to a BCMR or BCNR. That's true even if you first discovered the error or

injustice much earlier than three years ago.

•**Second,** a **BCMR** or **BCNR** has the power to ignore, or "waive," the three-year deadline "in the interest of justice"—and it often does, especially if you've laid out a good case for upgrading your discharge or give other good reasons, such as honestly explaining that you didn't know you were eligible to apply.

•**Third,** a **BCMR** or **BCNR** will waive the deadline if you are raising issues that involve PTSD and related conditions such as TBI. This rule is included in the new guidelines covered in **STEP THREE**.

A note about applying again after a denial: If a Board denied an application that raised **PTSD, other mental health conditions**, **TBI**, or **sexual assault/harassment** you are entitled to have a DRB or BCMR/BCNR consider those issues again under new the guidelines discussed in **STEP THREE**.

STEP TWO: Explain why you should get an upgrade.

In most cases, the Board won't be able to see why you should get an upgrade from reviewing your military records alone. It is important that you explain why your request should be granted, using specific legal language and concepts.

A **DRB** considers two basic issues: **"equity"** (fairness) and **"propriety"** (legal error).

If you believe your discharge was unfair, or **"inequitable,"** you'll need to explain why. The Department of Defense Instruction, Discharge Review Board (DRB) Procedures and Standards, has a list of examples for why a discharge might qualify as inequitable that can be helpful guidance for writing an explanation of your circumstances. Some common examples might include:

• You received an Other Than Honorable discharge for a single offense after years of faithful service to your country.

•Your branch's polices have changed since you were discharged, and if current policies had been in place when you served, you likely would not have been discharged.

•You were experiencing significant personal or family problems or discrimination that affected your ability to serve.

If you're claiming illegality, or **"impropriety,"** you're claiming that the military didn't follow its own rules when it discharged you. You'll need to explain how the military ignored or misapplied a specific rule, regulation, law, or procedure that was in effect at the time of your discharge.

The **BCMR** and **BCNR** use different terms for the same concepts of fairness and legal error: **"injustice"** and **"error."**

"Injustice," like the DRBs' "inequity," is about *unfairness* and **"error,"** like the **DRBs'** "impropriety," is about illegality. So the types of arguments you should make to the BCMR or BCNR are basically the same as those for DRBs, simply with different terminology.

Including evidence with your request will increase your chance of success. Think creatively about what kinds of evidence might demonstrate unfairness or legal error. For instance, this evidence could include:

- **A detailed statement** from you explaining your experiences and reasons for your upgrade request.

- Copies of **your military records** (see **STEP FIVE** below for information on requesting your records), particularly:

    - o Positive evaluations, length of service, and any deployments and awards;

    - o Health records showing any medical or mental health issues that may have affected your service and/or demonstrate the hardships you experienced; or

    - o Details of discharge, including any evidence that proper rules were not followed or outdated rules were inappropriately applied.

- Copies of **documents that demonstrate events that affected you** during service (such as divorce papers, or a death certificate or hospital records of a family member/loved one).

- **Statements from friends, family members, or service buddies** confirming the reasons why your request should be granted, including in-service events and/or post-service achievements.

For both types of Boards it can be helpful to present information showing a **"positive" post-service history** in your application, though this is not a requirement. This could include evidence of educational or professional achievement, dedication to family or religious matters, or volunteer activities in your community.

Although a positive post-service history is not necessary to succeed, it's important if you're trying to upgrade a punitive discharge—a Bad Conduct, Dishonorable, or other discharge imposed after a court-martial. The only basis for upgrading a punitive discharge is **clemency**. In other words, the Board must find good reason for treating you compassionately, and upgrading your discharge despite your court-martial conviction. For that reason, it's essential to present the strong evidence of compelling achievements since your military discharge.

STEP THREE: Look at important new Department of Defense rules that may help you show why you should get an upgrade.

There are special rules the Boards are required follow if your discharge was related to PTSD, other mental health conditions, TBI, and/or sexual assault/harassment. These rules are strongly to your advantage: they require the Boards to expedite your request and also to generously read evidence that you submit. Therefore, it is worthwhile to familiarize yourself with these rules and submit arguments about how they apply to you.

HAGEL MEMO: One rule, known as the "Hagel Memo," concerns PTSD and related conditions such as TBI. It tells the Boards that they must give "liberal consideration" to upgrade requests based on these conditions. Under this rule, it is helpful to submit evidence of your diagnosis from a clinical psychologist, psychiatrist, or other specialist and to pinpoint any evidence in your service records that you experienced an event that might have caused your condition. You should also include relevant medical and mental health records, if available. If the Board finds sufficient evidence that your PTSD or related condition stems from service, it will consider whether your PTSD excuses the misconduct that led to your discharge. A second memo that clarifies some of these procedures is the "Carson Memo."

Note that if you applied for an upgrade before the Hagel Memo was issued in 2014 and were denied, you can reapply now with the benefit of these newer liberal rules. Explain this circumstance in your application.

The *Hagel Memo* can be read in full here:

http://arba.army.pentagon.mil/documents/SECDEF%20Guidance%20to%20BCMRs%20re%20Vets%20Claiming%20PTSD.pdf

The *Carson Memo* can be read in full here:

https://www.defense.gov/Portals/1/Documents/pubs/Consideration_on_Discharge_Upgrade_Requests.pdf

Several years after the Department of Defense issued the *Hagel Memo*, Congress made many of its provisions law. You can mention this law in your application to emphasize the strength of your arguments. This law, 10 U.S.C. 1553, is available here:

https://www.law.cornell.edu/uscode/text/10/1553

KURTA MEMO: Another rule, known as the *"Kurta Memo,"* expands the favorable provisions in the *Hagel Memo*. It makes clear that the Boards must sympathetically consider applications based on all mental health conditions (including PTSD), TBI, and also those based on sexual assault/harassment.

To guide Boards in giving this generous reading, the *Kurta Memo* sets out **four questions** that you should answer in your application:

(1) Did the veteran have a condition or experience that may excuse or mitigate the discharge?

(2) Did that condition exist/experience occur during military service?

(3) Does that condition or experience actually excuse or mitigate the discharge?

(4) Does that condition or experience outweigh the discharge?

The *Kurta Memo* also has some helpful rules about discharges resulting from substance use. If your discharge was based on substance use that was actually an attempt to self-treat your mental health condition, explain this in your application. Also, if the substance that led to your discharge was minor, like marijuana, you can point out that such substances are relatively less severe than others. This argument should carry particular weight if you were discharged a long time ago, when marijuana was considered to be a more serious substance than it generally is today.

The Kurta Memo also contains important rules about the types of evidence you can submit, broadening the scope of what the Boards will consider in your favor:

The Memo explains that the Boards must seriously consider evidence relevant to the four listed questions, even if it is not in your service records, so it is particularly important to think about submitting additional evidence in this context. For example, you can submit statements from family members, friends, co-workers, and fellow service-members, as well as current mental health treatment records, to help prove you had a condition or experience in service that excuses your discharge. For tips on how others can write support statements on your behalf, see this guide: **https://www.swords-to-plowshares.org/guides/ptsd-statements-from-friends-and-family-members/**. Although the guide discusses PTSD specifically, the tips apply widely.

The Boards are also required to give a lot of weight to a statement by you explaining your condition in service and its effects on your behavior, so spending time to write a detailed statement is to your advantage.

If you have a mental health diagnosis from the VA, or have been service-connected by the VA for a mental health condition, you should include evidence of this in your application. Under the *Kurta Memo*, the Boards must consider this as persuasive evidence of your condition.

The *Kurta Memo* can be read in full here:

https://www.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf

PRE-DISCHARGE EXAMINATION requirements for PTSD, TBI, and sexual assault: In addition to the rules above, there are other laws related to PTSD, TBI, and sexual assault that might help your case. In some circumstances, the military must give you a pre-discharge examination if there are indications you suffered from PTSD, TBI, or experienced sexual assault in service. If there was some evidence you had one of these conditions or experienced a sexual assault and you did not receive an exam for the military to account for this in your discharge characterization, you may have an argument that your discharge was improper/error. The law, *10 USC 1177*, can be read in full here: **https://www.law.cornell.edu/uscode/text/10/1177**

STEP FOUR: Decide whether it makes sense to request a hearing.

It is important to note up front that though hearings might increase your chance of success, requesting one may delay a decision on your application.

With a DRB, you have a choice. You can choose between a **Documentary Review** and a **Personal Appearance Review** (aka, an in-person hearing).

In a Documentary Review, the **DRB** considers evidence from your service records, together with any other written evidence or argument that you submit. You tell your story on paper, and explain why you think your discharge should be upgraded.

In a Personal Appearance Review, the **DRB** also considers evidence from your service records, together with any other paperwork you submit, but you're also able to tell your story and make your arguments directly to a panel of military personnel. They'll have a chance to judge your case in person.

If you apply to a **DRB**, it's almost always better to request a Documentary Review first ⟶ **If you choose a Personal Appearance Review first, you'll forfeit the right to a Documentary Review later.**

On the other hand, if the Board turns you down after a Documentary Review, you can then apply for a Personal Appearance Review, as long as you're still within the applicable deadlines. That gives you two chances for an upgrade at the **DRB**. And if there is an unfavorable Documentary Review, the decision may give you clues to the evidence and arguments that you should present at the Personal Appearance Review.

All of the **DRBs** hold Personal Appearance Review hearings in or near Washington, D. C. The Air Force and Army **DRBs** occasionally visit other cities to conduct hearings. In some cases, you may be able to get a telephonic hearing.

Most BCMR and BCNR decisions are based on paperwork only. These Boards look at your military records, together with any other written evidence or arguments you submit. Very rarely will they give you permission to tell your story in person at a hearing. If they do give you that option, you'll need to travel to the Board headquarters, in or near Washington, D. C., at your own expense.

STEP FIVE: Put together your application forms and supporting materials.

It's easy to download the forms you'll need:

For a **BCMR** or **BCNR** application (DD Form 149), visit

http://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf

For a DRB application (DD Form 293), visit

http://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0293.pdf

But **before** you begin to fill out the form, you'll need to do some homework. The first step is to make certain you have all the documents you'll need.

Your ***Official Military Personnel File (OMPF)*** is crucial. Play it safe: order a complete copy—even if you think you already have one. A missing document could be the one that makes—or torpedoes—your case. For information about ordering your OMPF, review our guide. It's at **https://www.swords-to-plowshares.org/guides/requesting-copies-of-military-records/.**

Court-martial transcripts and records of military investigations may also be crucial to your case. For information about ordering these documents, including sample request letters you can use, review our guide on this topic at **https://www.swords-to-plowshares.org/guides/ordering-courts-martial-transcripts-and-military-investigative-records/.**

But please note: You may not be able to obtain copies of your service personnel and medical records once you file your application. The Board may obtain these records to adjudicate your application. **At that point, you may not be able to order your own copies of these records.** That's why it's important to get all of your records before you submit your application.

If a deadline is near, you may need to file an application before you have all the documents you need. Do your best with what you have. You may be able to supplement your application after you submit it. However, it's best to submit all of your paperwork at once, if possible.

If you move while your application is pending, notify the Board of your new address. Otherwise, you may not get a copy of its decision. Write to the Board at the address at the end of its application form.

Check the status of your application and timeline for a decision by contacting the appropriate Board:

Air Force BCMR:

Website: **http://www.afpc.af.mil/board-for-correction-of-military-records**

Phone: 240-612-5379

E-mail: usaf.pentagon.saf-mr.mbx.saf-mrbc@mail.mil

Air Force DRB:

Website: **http://www.afpc.af.mil/board-for-correction-of-military-records**

Phone: 240-612-0995

E-mail: usaf.pentagon.saf-mr.mbx.saf-mrb@mail.mil

Army BCMR:

Website: **http://arba.army.pentagon.mil/**

E-mail: army.arbainquiry@mail.mil

Army DRB:

Website: **http://arba.army.pentagon.mil**

E-mail: army.arbainquiry@mail.mil

Navy BCNR:

Website: **http://www.secnav.navy.mil/mra/bcnr/Pages/home.aspx**

Phone: 703-607-6111

E-mail: BCNR_Application@navy.mil

Navy DRB:

Website: **http://www.secnav.navy.mil/mra/CORB/Pages/NDRB/default.aspx**

Phone: 202-685-6600

E-mail: NDRB@navy.mil

STEP SIX: If you are currently a military prisoner, read our special guide.

Current military prisoners interested in upgrading their discharges will find helpful information at **https://www.swords-to-plowshares.org/guides/discharge-upgrade-information-for-military-prisoners/**

CHANGING THE REASON FOR YOUR DISCHARGE

The forms and procedures for applying for a change in the narrative reason are the same as the forms and procedures for applying for a discharge upgrade.

As long as you're within the deadlines discussed above, a DRB has the authority to change the narrative reason for separation shown on your DD-214, unless you're trying to change the reason to—or from—a disability discharge.

If the **DRB** lacks the authority to change the reason, or if it denies your application for a change, you can apply to a **BCMR** or the **BCNR**.

Note that the evidence you need to submit may be somewhat different from what you would submit for a discharge upgrade. For example, if the military discharged you with a narrative reason of "personality disorder" but a psychiatrist or psychologist later diagnosed you with PTSD, you'll certainly want to submit evidence showing the new diagnosis.

In all cases, you'll need to tell the Board not only why the narrative reason that the military assigned is wrong, but also **what the correct reason should be**.

Start by reviewing the separation regulations that were in effect at the time of your discharge: What were the stated requirements for the reason that was assigned? Were all of those requirements met? Which ones weren't? In what way(s) weren't they met? Be sure to indicate exactly what regulations you're relying on—for example, AFI 36-3208, Section 5.32.1.2.3.

It's also possible that the separation regulations have changed since the time of your discharge in a way that will help you. Look at the regulations in effect today. You may be able to argue that if they'd been in effect when you were discharged, the military would have assigned a more favorable reason.

The following links are to separation regulations for enlisted personnel who served on active duty:

Air Force: AFI 36-3208

http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3208/afi36-3208.pdf

Army: AR 635-200

http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/AR635-200_Web_FINAL_18JAN2017.pdf

Coast Guard: COMDTINST M1000.4

https://media.defense.gov/2017/Apr/27/2001738816/-1/-1/0/CIM_1000_4.PDF

Marines: MCO P1900.16F

http://www.dd214.us/reference/MARCORSEPMAN.pdf

Navy: MILPERSMAN 1900-1999

https://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Pages/default.aspx

If you served in the Reserves or National Guard, or were an officer, use an Internet search engine to find the applicable regulations.

STEP SEVEN: Figure out if you want or can get help with your application.

The Boards won't appoint an attorney to represent you. If you want an attorney or representative, you'll need to find one on your own. Be sure to find an advocate with experience in discharge upgrades.

A Veterans Service Organization (VSO) may be able to give you free assistance. For a list of VSOs visit **https://www.swords-to-plowshares.org/guides/veteran-service-organizations/**. In most cases, however, the assistance may be limited. It's likely you'll still need to do much of the work on your own, or with the help of a friend or relative. Legal aid offices and law school clinics in some communities have recently expanded their services to veterans, so you can search for those resources. You may want to ask private attorneys in your area if they can assist you in applying for an upgrade. Private attorneys will likely charge you, and may be expensive, so make sure that you understand this up front.

The Board cannot order witnesses to appear at the hearing, and it will seldom help you to obtain records that might be important to your case. If there are witnesses or records that you need, you'll need to secure them on your own, or with the assistance of an attorney or representative.

If you do proceed on your own, the information in this guide should help you to prepare persuasive evidence and arguments for upgrading your character of discharge or changing the "narrative reason for separation" on your DD-214.

Disclaimer

This memorandum provides general information only. It does not constitute legal advice, nor does it substitute for the advice of an expert representative or attorney who knows the particulars of your case. Any use you make of the information in this memorandum is at your own risk. We have made every effort to provide reliable, up-to-date information, but we do not guarantee its accuracy. The information in this memorandum is current as of December 2012.

Because our legal staff is small and our resources are limited, Swords to Plowshares can represent only a small number of veterans who seek our assistance with VA claims. Please do not appoint Swords to Plowshares to represent you before the VA without our express consent.

Veterans Discharge Upgrade Manual

CONNECTICUT VETERANS
LEGAL CENTER

Veterans Discharge Upgrade Manual

Connecticut Veterans Legal Center, 2011

This manual was prepared on behalf of the Connecticut Veterans Legal Center by Laura Keay and Kathryn Cahoy, students in the Yale Law School Veterans Legal Services Clinic, working under the supervision of Professor Jeffrey Selbin.

We are grateful to Kathleen Gilberd, David Addlestone, Eugene Fidell, and Margaret Middleton for their helpful insights and revisions to this manual. We would also like to thank David Addlestone and Bart Stichman for granting us permission to reprint portions of their authoritative 1982 and 1990 treatises on this subject. The treatises are reproduced at http://ctveteranslegal.org/resources/.

DISCLAIMER: This guide is intended as an introductory tool for attorneys and other advocates representing veterans in discharge upgrade cases. This guide does not purport to provide legal advice or to give an opinion as to the appropriate course of action in a particular case. Veterans' advocates should always conduct their own research on the best course of action for their particular case and should always check any information contained in this guide against the relevant statute or regulation to ensure its accuracy.

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Veterans Discharge Upgrade Manual

Connecticut Veterans Legal Center, 2011

I. Introduction

Most of Connecticut's 250,000 veterans received an "honorable" discharge when they left the military. However, thousands of veterans in the state received a less than honorable discharge, which can prevent them from obtaining educational, medical or pension benefits from the Department of Veterans Affairs and can limit their civilian employment opportunities. Post-traumatic stress disorder, traumatic brain injury, or other service-related injuries may have led to the unfavorable discharge. As a result, many otherwise deserving veterans are ineligible for the very benefits that would help them cope with their in-service trauma.

Veterans can upgrade their discharge status through administrative procedures established by the service branches and in federal court. However, these administrative and judicial processes are complicated, confusing, and time-consuming for many veterans. Fortunately, lawyers and other trained advocates can help veterans apply for discharge upgrades and receive critical services. This manual provides a basic overview of military discharges and how advocates can help veterans upgrade their discharges through administrative procedures:

Part II explains the types of military discharges and why veterans seek upgrades.

Part III describes Discharge Review Boards and Boards for Correction of Military Records, the two main administrative avenues of relief for veterans seeking discharge upgrades.

Part IV provides instruction for preparing applications to these boards.

Part V identifies other potential sources of judicial relief that may be appropriate in certain cases.

Part VI summarizes the information presented in the manual.

Part VII includes sample forms and other helpful materials.

Part VIII lists additional resources for advocates who want to learn more about discharge upgrades.

II. Military Discharge Overview

All servicemembers are discharged when their military term of service expires. A discharge may occur when a servicemember elects or is forced to leave the military as a result of a medical disability, punishment, administrative reason, or simply the end of a term of service. This section describes the paperwork veterans receive when they are discharged, the types of discharges, who administers discharges, and why veterans may want a discharge upgrade.

A. Discharge Documents (DD-214)

When veterans leave the service, they receive discharge documents, the most important of which is the DD-214. This document comes in a short form, which is edited to display only basic information, and a long form.[1] Both forms contain general information including dates of entry and discharge, total time in service, rank, decorations, and military education. Additionally, the long form includes the characterization of service (e.g. honorable, dishonorable, etc.), reason for discharge (e.g. completion of term of service, medical disability, etc.), re-enlistment code (indicating the circumstances under which the veteran can reenter the service), and a code matching the reason for discharge.

Because the long form contains more detailed information, it is usually the one required by the Department of Veterans Affairs and employers who request to see the DD-214 of prospective employees. Therefore, the information that appears on this simple document can significantly affect many aspects of a veteran's life, including the ability to find employment or obtain VA benefits. Veterans usually seek discharge upgrades to change the information that appears on their DD-214.

[1] The military did not begin to issue a short form DD-214 until 1974.

B. Types of Discharges

Discharges before the end of term of service are classified as *administrative* or *punitive*.[2] This point is often confused, but is central to understanding the discharge process.

1. Administrative discharges are less serious in nature and can only be given, as their name implies, administratively, and cannot be given by court-martial. In order of desirability, from most to least, administrative discharges are classified as follows:

a. Honorable Discharge [HD];
b. General Discharge (Under Honorable Conditions) [GD]; and
c. Discharge Under Other Than Honorable Conditions [OTH] (referred to as Undesirable Discharge [UD] until the early 1980s).

Most servicemembers receive an honorable discharge. Today, only a few specifically defined categories warrant OTH; and in cases where commanders may issue an OTH, procedural rights are greater. Because of restrictions on issuing this type of discharge, opportunities for legal error in the discharge proceedings may be greater.

2. Punitive discharges are more serious and can only be given as a sentence from a court-martial with the requisite authority. Courts-martial can issue punitive discharges but do not have the authority to grant the less serious administrative discharges. In order of severity, from least to most, punitive discharges are classified as follows:

a. Bad Conduct Discharge [BCD];
b. Dishonorable Discharge [DD]; and
c. Dismissal (for officers only).

Not all courts-martial have the authority to issue both of these discharges as punishment. A summary court-martial cannot issue any discharge, and a special court-martial [SPCM] may only issue a Bad Conduct Discharge. Only a general court-martial can issue a Dishonorable Discharge. Courts-martial do not have the power to discharge officers, so an officer may instead be sentenced to dismissal. A dismissal is considered the equivalent of a Dishonorable Discharge.

[2] There are exceptions to these two categories, including a medical discharge, which is not classified as administrative or punitive and is handled through another process.

Types of Military Discharges	
Administrative Discharges	***Punitive Discharges***
1. Honorable (HD)	1. Bad Conduct (BCD)
2. General (GD)	2. Dishonorable (DD)
3. Under Other than Honorable Conditions (OTH, previously known as UD)	3. Dismissal (for officers)

Veterans are not only discharged due to misconduct. They may be discharged for a variety of other reasons, including medical disability. For example, when a veteran has been discharged after being diagnosed with a personality disorder, the diagnosis will appear on the DD-214. The diagnosis could be incorrect, contested, or unjustly stigmatizing for the veteran, and the veteran may want to remove such a reference. Veterans may also want to remove other stigmatizing reasons for discharge from the DD-214 including misconduct/drug abuse or unsatisfactory performance. Administrative agencies that handle discharge upgrade applications can also consider requests to change the reason for discharge.

C. Potential Consequences of Discharges

This section presents a few common reasons why a veteran may pursue a discharge upgrade. The specific reason for pursuing a discharge upgrade may be different for each veteran, and even the general categories presented below may affect each veteran in a different way. Thus, this section is meant to provide advocates with a general overview of common motivations for pursuing discharge upgrades and is not meant to be exhaustive.

1. VA Benefits

An important concern for veterans pursuing a discharge upgrade may be eligibility for benefits from the Department of Veterans Affairs (VA). A discharge upgrade may qualify a veteran for VA medical care, disability compensation benefits, educational benefits, home loans, or a pension. Advocates should be careful to understand what type of benefits the veteran wants, whether he/she may already be eligible for other benefits, and whether the reviewing body's decision will affect the veteran's eligibility for VA purposes. A discharge upgrade may not be the only way to

obtain benefits; and, depending on the case, it may not qualify a veteran for the desired benefits. Therefore, understanding a client's ultimate goal can be central to advising the client and making strategic decisions.

VA benefits law is complex and evolving, and we do not intend to review it comprehensively here. However, some generalizations on how discharges affect benefits may be beneficial to understanding why clients may be seeking upgrades. Please keep in mind that none of these rules are without exception.

Veterans with an HD or GD are almost always eligible for most VA benefits, even if the discharge characterization resulted from an upgrade. Those with an OTH can usually obtain VA medical care for disabilities incurred in the line of duty but must receive a favorable character of discharge determination from VA to receive any other benefits, including disability compensation benefits. If a BCD is issued by a special court-martial, the veteran may be eligible for some benefits if VA makes a favorable character of discharge determination. However, a BCD issued by a general court-martial or a DD makes the veteran ineligible for all benefits.[3] VA has an adjudicatory process through which it can award benefits in some cases despite these rules, so veterans should also consider submitting an application to VA.[4]

2. Stigma

Any less than honorable discharge can carry stigma. "Since about 90% of all discharges issued are Honorable, a discharge of that type is commonly regarded as indicating acceptable, rather than exemplary service. In consequence, anything less than an Honorable Discharge is viewed as derogatory, and inevitably stigmatizes the recipient."[5] This "unmistakable social stigma . . . greatly limits the opportunities for both public and private civilian employment."[6] In addition to social stigma, many veterans feel the character of their discharge does not reflect the overall service and sacrifice they made for their country.

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[3] Except in cases of insanity at the time of discharge. BARTON F. STICHMAN AND RONALD B. ABRAMS, VETERANS BENEFITS MANUAL 29 (2009).
[4] *See infra* Part V.C.
[5] DAVID ADDLESTONE ET AL., MILITARY DISCHARGE UPGRADING, AND INTRODUCTION TO VETERANS ADMINISTRATION LAW: A PRACTICE MANUAL DUP81-1.2 fn.6 (1982) (quoting Bland v. Connally, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961)).

Some discharges relate to stigmatizing medical conditions. As noted above, a veteran discharged for a personality disorder diagnosis will have a DD-214 that clearly displays "personality disorder." Anyone who views the DD-214, including potential employers, will see that the veteran has been diagnosed with this disorder, regardless of whether the veteran wished to share that private health information. Some of these diagnoses are incorrect or inconclusive, and a veteran may not want her records to include such a diagnosis.

III. Choosing a Venue

Discharge upgrade cases can proceed through two main administrative avenues. First, each military branch has a Discharge Review Board (DRB). These boards specialize in reviewing discharge upgrade applications and applications for changes in reason for discharge, and they tend to be a more successful route to obtaining a discharge upgrade, although statistics vary depending on the service branch and the individual case. However, the DRBs have strict 15-year statutes of limitation, and veterans who were discharged or dismissed by general court-martial cannot apply to the DRBs.

Veterans applying after the DRB statute of limitations expires must proceed to the second option – applying for a discharge upgrade to their service department's Board for Correction of Military Records (BCMR). BCMRs have a waivable 3-year time limit and the authority to upgrade discharges issued by general courts-martial or to change a discharge to or from disability discharge or retirement. BCMRs have authority to make other changes that DRBs cannot. However, if a veteran is eligible to apply to a DRB, the BCMR will require the veteran to apply to the DRB first.

Each service department has its own DRB and BCMR. Therefore, there are four DRBs and four BCMRs – one each for the Army, Navy, Air Force, and Coast Guard. Marine Corps veterans apply to the Navy boards. The following sections refer generally to the DRBs and BCMRs, though each service department's standards and practices may differ slightly.

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[6] *Id.* at 858.

Discharge Upgrade Boards		
	Discharge Review Boards (DRBs)	**Boards for Correction of Military Records (BCMRs)**
Army:	Army Review Boards Agency ADRB 1901 South Bell Street Arlington, VA 22202-4508 (See http://arba.army.pentagon.mil)	Army Review Boards Agency Army Board for Correction of Military Records 1901 South Bell Street, 2nd Floor Arlington, VA 22202-4508
Navy & Marine Corps:	Secretary of the Navy Council of Review Boards ATTN: Naval Discharge Review Board 720 Kennon Ave S.E., Suite 309 Washington Navy Yard, DC 20374-5023	Board for Correction of Naval Records 2 Navy Annex Washington, DC 20370-510
Air Force:	Air Force Review Boards Agency SAF/MRBR 550-C Street West, Suite 40 Randolph AFB, TX 78150-4742	Board for Correction of Air Force Records SAF/MRBR 550-C Street West, Suite 40 Randolph AFB, TX 78150-474
Coast Guard:	Commandant (CG-122) Attn: Office of Military Personnel US Coast Guard 2100 2nd Street S.W., Stop 7801 Washington, DC 20593-7801	Department of Homeland Security Office of the General Counsel Board for Correction of Military Records 245 Murray Lane, Stop 0485 Washington, DC 20528-048

A. The Discharge Review Board (DRB) Upgrade Process

1. Jurisdiction and Eligibility Requirements

DRBs have jurisdiction both to upgrade the character of a discharge (e.g. from General to Honorable) and to change the reason for discharge (e.g., to remove "homosexuality" from the DD-214 as the reason for discharge).[7] Any former member of the Armed Forces may apply, but veterans who were discharged or dismissed by general court-martial (including all veterans with dishonorable discharges) are ineligible for DRB review.[8] Veterans discharged by special court-martial may only request a change of characterization of their discharge, and they will only be granted discharge upgrades for clemency reasons: DRBs do not have the power to overturn the findings of a court-

[7] 32 C.F.R. §70.8(a)(3).

martial. DRBs also do not have the power to lower discharges, change re-enlistment codes, make decisions regarding disability and retirement, reinstate veterans into military service, or recall any person to active duty.[9]

Veterans must apply within 15 years of the date of discharge.[10] Any requests for discharge upgrades after 15 years must go through the appropriate BCMR.

2. Standards of Review

Standards of review for the DRBs are codified in 32 C.F.R. § 70.9 and 10 U.S.C. § 1553. Generally, DRBs will only upgrade discharges on grounds of *equity* or *propriety*.[11] However, if an applicant was discharged by special court-martial, the discharge may be upgraded only for purposes of clemency.[12]

A DRB may upgrade a discharge on grounds of propriety for two reasons:

(1) An error of fact, law, procedure, or discretion occurred, and the error was prejudicial to the veteran during the discharge process; or

(2) A change in policy has been enacted and the change is expressly made retroactive to the type of case.[13]

A DRB may upgrade a discharge on grounds of equity for three reasons:

(1) The current discharge policies and procedures are materially different than those that led to the applicant's discharge.[14] For example, a discharge may be deemed inequitable if "[t]here is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration;"[15]

(2) The discharge was inconsistent with disciplinary standards at the time of discharge;[16] or

(3) Based on evidence relating to quality of service or capability to serve.[17] For determinations based on quality of service, DRBs may consider, but are not limited to considering, factors such as the applicant's service history; military ranks, ratings, awards, and decorations; letters of commendation or reprimand; wounds received in action; acts of merit; length of service; prior military service; convictions by court-

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[8] Dep't. of Def. Instruction 1332.28, April 4, 2004. at E2.1.1 [hereinafter DoDI 1332.28].
[9] 32 C.F.R. § 70.9.
[10] 32 C.F.R. § 70.8.
[11] 32 C.F.R. § 70.9.
[12] 10 U.S.C. § 1553(a).
[13] 32 C.F.R. § 70.9(b).
[14] 32 C.F.R. § 70.9(c)(1).
[15] 32 C.F.R. § 70.9(c)(1)(ii); DoDI 1332.28, at E4.3.1.2.
[16] 32 C.F.R. § 70.9(c)(2); DoDI 1332.28, at E4.3.2.
[17] 32 C.F.R. § 70.9(c)(3); DoDI 1332.28, at E4.3.3.

martial; non-judicial punishments; civil convictions; records of unauthorized absence; and records relating to the discharge.[18] Evidence relating to prior military service or outstanding post-service conduct (including character references) is applicable if it can help "provide a basis for a more thorough understanding of the performance of the applicant during the period of service that is the subject of the discharge review."[19]

Equitable relief based on capability to serve may take into account the applicant's:

- "Total capabilities," including age, education, and ability to adjust to military service;
- "Family and personal problems" that may have affected the applicant's ability to serve;
- "Arbitrary or capricious action" by individuals in authority over the applicant; and
- "Discrimination" as documented by records or other evidence.[20]

Equitable considerations based on quality of service or capability to serve suggest that the DRB will take into account mitigating circumstances surrounding any offenses that led to an unfavorable discharge. For example, a servicemember with undiagnosed PTSD could have committed offenses that were a result of the disease rather than intentional misconduct. Also, a servicemember who received news of a family emergency might have gone AWOL due to short-term loss of judgment rather than a desire to desert his or her fellow servicemembers. Consequently, a veteran should mention and explain any mitigating factors to the DRB.

Discharge Review Boards may reconsider previously denied applications that meet certain standards of review. According to 32 C.F.R. § 70.8(8), a board may reconsider an application when:

- Previous consideration was on the motion of the DRB, rather than the veteran;
- The applicant did not have a personal appearance hearing for the first application, but the applicant now requests a hearing;
- The relevant discharge policy has changed and has been made expressly retroactive;
- Current discharge policies and procedures are substantially more favorable to the applicant than the discharge policies and procedures under which the applicant was discharged;

[18] 32 C.F.R. § 70.9(c)(3)(i); DoDI 1332.28, at E4.3.3.1.
[19] DoDI 1332.28, at E4.3.3.1.10.
[20] 32 C.F.R. § 70.9(c)(3)(ii); DoDI 1332.28, at E4.3.3.2.

- The veteran was not represented by counsel or a representative in a previous application but will be for the reconsideration; or
- The applicant presents new, substantial, and relevant evidence that was not available to the applicant at the time of original review by the DRB.

Discharge Review Boards operate with a "presumption of regularity in the conduct of governmental affairs."[21] This means that the DRBs function with legal presumptions that government officials act properly in carrying out their duties, that military records are correct, and that the statutes and regulations are constitutional. Where error is not apparent in the military record, the applicant carries the burden of proof to show "substantial credible evidence" that the discharge was inequitable or improper.[22] Court opinions are binding on DRBs, but prior DRB decisions are merely persuasive and are not binding precedent.[23]

3. Composition of Panels

In general, DRB panels consist of 5 military officers chosen by the Secretary of each military department.[24] Three favorable votes are needed to change any aspect of the discharge.[25]

Some special rules apply in certain situations. For example, if the veteran served during a period of war or contingency operation and was later diagnosed with post-traumatic stress disorder or traumatic brain injury, the review board must include a physician, clinical psychologist, or psychiatrist, and the case must be expedited.[26] Also, Naval DRB panels that review either Navy or Marine Corps cases must include at least three panel members who belong to applicant's service branch (Navy or Marine Corps).[27]

4. Personal Appearances Before the DRB

DRB applicants can choose to apply for a records review, for a personal hearing in the Washington, D.C. area, or for a hearing before a traveling board (Army and Air Force only). Generally, applicants who have hearings have been more likely to receive

[21] 32 C.F.R. § 70.8 (b)(12)(vi); DoDI 1332.28, at E3.2.12.
[22] 32 C.F.R. § 70.8 (b)(12)(vi); DoDI 1332.28, at E3.2.12.
[23] 32 C.F.R. § 70.8(e)(1)(iii)(D); DoDI 1332.28, at E3.5.1.3.
[24] 10 U.S.C. § 1553(a); 32 C.F.R. § 70.8(b)(1).
[25] 32 C.F.R. § 70.8(c)(8).
[26] 10 U.S.C. § 1553(d).

upgrades than applicants who only have records reviews. When deciding whether to apply for a records review or a hearing, an advocate should take into account the strength of arguments (and whether they can be presented well in a written application), the client's personality and ability to present the case well before a board of officers, the costs of travel or ability to be seen by a traveling board, and the timing of the application (especially if the fifteen year statute of limitations is about to run and the applicant will not have another chance to personally appear before the Board).

If DRB applicants apply for a records review first and then are denied a discharge upgrade, they are entitled to apply again for a personal hearing (Army, Air Force, and Navy only). This effectively gives applicants two opportunities for review, but only if applicants apply for a records review first. The veteran will receive the decisional document explaining why the application was denied during the records review, and this document could be an advantage when preparing for the subsequent personal hearing because the veteran will know why the board made its initial denial and can tailor the personal hearing application to address those concerns. On the other hand, the Boards have all prior applications on file, so any flaws in the first application will still be available to the board the second time around. Since not all can be explained away in a second application, the prejudice of a prior denial could outweigh the benefit of two chances before the board.

5. Options for Reconsideration

In rare cases, DRB decisions might be automatically reviewed by the Secretary of the relevant military department, in which case the applicant either will be permitted to participate (in some Navy cases) or will be notified of the final decision after review (in Army, Air Force, and some Navy cases).

Applicants have the right to an entirely new DRB review if any of the conditions listed in 32 C.F.R. § 70.8(8) are met.[28] Veterans may appeal DRB decisions in federal court under the Administrative Procedure Act, which carries a 6-year statute of limitations from the date of the DRB decision.[29] Appeals may be brought in the district

[27] 32 C.F.R. § 724.701(b).
[28] *See supra* Part III.A.2.
[29] 28 U.S.C. § 2401.

where the veteran was discharged, where the veteran currently resides, or in Washington, D.C., where the Secretaries of the service departments are located. However, advocates should consult controlling case law in these districts because some circuit courts have required veterans to exhaust their administrative remedies, including application to the BCMR, before seeking review in federal district court.

B. The Board for Correction of Military Records (BCMR) Upgrade Process

1. Jurisdiction and Eligibility Requirements

BCMRs have more extensive authority to alter military discharges than DRBs.[30] BCMRs can upgrade any discharge characterization and change any reason for discharge. In addition, they can void discharges; change them to or from medical retirement; change re-enlistment codes; change the date of issue of a discharge (which may result in back pay); remove inaccurate performance evaluations or other damaging documents from the record; and, under rare circumstances, reinstate veterans into military service. Discharge upgrade cases make up only a fraction of the extensive caseload of the BCMRs.

BCMRs cannot lower discharges, compel the attendance of witnesses, expunge a special or general court-martial conviction,[31] or award payment to veterans for expenses incurred in preparing an application and presenting a case to the board.[32]

Veterans must apply to a BCMR within three years of "discover[ing] the error or injustice" for which they seek relief.[33] Jurisdictions sometimes conflict about when this time period begins, but the Court of Appeals for the District of Columbia expressly held that an applicant must have *actual knowledge* of the error or injustice – constructive notice is not enough.[34] This actual knowledge may occur on the date of discharge, the date of the most recent unsuccessful DRB application, or another date when the applicant discovered the error or injustice. The time period also cannot begin while the

[30] 10 U.S.C. § 1552.
[31] However, court-martial convictions that were issued before the Uniform Code of Military Justice (UCMJ) was enacted in May 31, 1951, may be expunged by BCMRs.
[32] 10 U.S.C. § 1552.
[33] 10 U.S.C. § 1552(b).
[34] Ridgely v. Marsh, 866 F.2d 1526, 1529 (D.C. Cir. 1989); *see also* Dickson v. Sec'y of Def., 68 F.3d 1396, 1405 (D.C. Cir. 1995).

servicemember is on active duty.[35] BCMRs can waive the three-year time limit "in the interest of justice,"[36] so veterans should not hesitate to submit applications after the time limit has passed. The Boards are required to make at least a cursory review of the merits of the case before deciding whether to waive the three-year time limit.[37]

2. Standards of Review

Unlike DRBs, BCMRs have not clearly codified or published their standards of review. Nevertheless, 10 U.S.C. § 1552 and the federal regulations corresponding to each branch of the military state that BCMRs may change military records of any member or former member of the armed forces to correct any "error or injustice."[38] Discharges issued by a special or general court-martial may only be upgraded on "clemency" grounds.[39] As noted above, the three-year time limit may be waived by any BCMR if it is "in the interest of justice" to do so.[40]

The terms "error," "injustice," "clemency," and "in the interest of justice" are not clearly defined by statute. However, one expert has identified parallels between the BCMR's "error" and the DRB's "impropriety" standard and between the BCMR's "injustice" and the DRB's "inequity" standard.[41] Others have noted that BCMRs consider post-service conduct to be very important when deciding whether to grant a discharge upgrade, especially when an applicant seeks to upgrade a discharge issued by a court-martial on "clemency" grounds.[42] Mitigating circumstances surrounding offenses, evidence of subsequent rehabilitation, good post-service conduct, and evidence of exemplary citizenship and character are also taken very seriously by BCMRs in discharge

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[35] Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-96; Detweiler v. Peña, 38 F.3d 591 (D.C. Cir. 1994).
[36] 10 U.S.C. § 1552(b).
[37] Dickson, 68 F.3d at 1405; Allen v. Card, 799 F. Supp. 158, 166 (D.D.C. 1992).
[38] 10 U.S.C. §1552(a)(1); 32 C.F.R. §§ 581.3(b)(4)(i), 723.1, 865.0; 33 C.F.R. § 52.12(a). *See also* Mudd v. White, 309 F.3d 819 (D.C. Cir. 2002), holding that applicants must be members or former members of the armed forces (or their heirs or legal representatives) to have standing under 10 U.S.C. § 1552(g).
[39] 10 U.S.C. §1552(f)(2).
[40] 10 U.S.C. §1552(b).
[41] Kathleen Gilberd, *Upgrading Less-Than-Fully-Honorable Discharges*, *in* THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE 346, 353-54 (Veterans for America ed., 2009) [hereinafter *Survival Guide*].
[42] *Survival Guide* at 353; Military Law Task Force, National Lawyer's Guild, *Discharge Upgrading and Discharge Review* 3, *available at* www.dd214.us/reference/**DischargeUpgrade**_Memo.pdf [hereinafter *Discharge Upgrading*].

upgrade cases.[43] Otherwise, BCMRs generally consider the same factors that are important to DRBs. Applicants seeking a waiver of the time limit "in the interest of justice" are generally advised to simply argue that the merits of the case warrant the waiver.[44]

The presumptions and burdens of proof are the same in BCMR cases as they are in DRB cases. Boards presume the records are correct as issued, and applicants must provide material evidence showing that their records should be corrected.[45]

3. Composition of Panels

Each branch of the military has from 40 to 115 BCMR members, and individual BCMR panels are comprised from these pools.[46] By regulation, members of BCMR panels should be high-ranking civilians in the executive part of their military branch.[47] Three members constitute a quorum for conducting reviews of applications, except in the Coast Guard where three members make up each board, but only two members are necessary to constitute a quorum.[48] Although most applications must be reviewed by a panel of Board members, BCMR staff members may return applications without such review in the following cases:

- If the applicant does not complete and sign the application;
- If the applicant failed to exhaust all other administrative remedies (such as the DRB, if the fifteen-year DRB time limit has not expired);
- If the Board does not have jurisdiction; or
- If the application is a request for reconsideration but no new material evidence has been submitted.[49]

4. BCMR Application Review

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[43] *Survival Guide* at 354.
[44] *See Discharge Upgrading* at 2.
[45] 32 C.F.R. §§ 581.3(e)(2), 723.3, 865.4; 33 C.F.R. § 52.24(b).
[46] For 2009 data, see the following responses to Raymond J. Toney's FOIA requests:
Army – http://rjtlaw.net/ABCMR%20FOIA%20Responses.pdf
Navy – http://rjtlaw.net/BCNR%20FOIA%20Responses.pdf
Air Force – http://rjtlaw.net/Air%20Force%20FOIA%20Responses.pdf
Coast Guard – http://rjtlaw.net/CG%20BCMR%20FOIA.pdf
[47] 32 C.F.R. §§ 581.3(c)(1), 723.2(a), 865.1; 33 C.F.R. § 52.11.
[48] *Id.*
[49] 32 C.F.R. § 581.3(e)(1).

Unlike DRBs, BCMRs rarely grant personal appearances. In fact, applications to BCMRs must pass through several stages of review before a board will even render a decision. According to the Army Review Board Agency's website, after a DD Form 149 application is received, the Army BCMR will generally go through the following steps in order:

1. Attempt to obtain records. If records are unavailable (for example, if the records are checked out by another government agency), then the ABCMR might ask the veteran to produce records or return the application.
2. The ABCMR may obtain advisory opinions from other Army staff elements. If that happens, the advisory opinions will be sent to the applicant for comment before further consideration.
3. The ABCMR may make administrative corrections without the need for a Board decision.
4. Board staff members called examiners prepare a brief for the Board's consideration, and the Board renders a decision that is "final and binding."[50]

Therefore, it is very important for an applicant to make sure that the records are complete and available so that the application will not be returned at the first stage. The applicant should request a copy of all records that the BCMR obtains, and the applicant should review those records to see if there are any documents the applicant did not already have. If the Board requests that the applicant provide a full record, then the applicant should include all materials that would be included in the official military personnel record. The applicant should carefully review and respond to advisory opinions issued by staff (item 2 above) so that any inaccuracies or unfairly prejudicial statements are noted before the Board makes a decision. Similarly, applicants should always ask for a copy of the examiner's brief (item number 4 above) in advance of the Board decision so that they may have a chance to respond to inaccurate or unfair contentions raised by the examiner.

5. Options for Reconsideration

If an application has been denied by a BCMR, the applicant may request reconsideration. The Army BCMR has a one-year time limit for such requests for reconsideration, and there is conflicting information on whether the time limit can be

waived. Neither the controlling statute[51] nor the controlling DOD Instruction[52] provide information on the legality of time limits for requests for reconsideration to the BCMRs. Federal regulations state that if the request for reconsideration is received more than one-year after the ABCMR has issued a decision, then "the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction."[53] However, the Army Review Board Agency's "Applicant's Guide to Applying to the ABCMR" states that the time limit can be waived "if substantial relevant new evidence has been discovered."[54]

In any case, a request for reconsideration must contain new material evidence, and generally an applicant must show the evidence was not reasonably available at the time of the previous application.[55] Technically, BCMR denials of applications without hearings are not considered final decisions, and applicants may submit new applications at any time.[56] As long as such applications are submitted with substantial new material evidence and/or argument not previously considered by the board, the BCMRs should reconsider the veteran's assertions. Advocates might also want to explain in the request for reconsideration why the evidence and/or arguments are new and material to ensure the boards do not classify the evidence or new documents as merely cumulative.

Veterans can also appeal BCMR decisions in federal court under the Administrative Procedure Act, which has a 6-year statute of limitations from the date of the board decision.[57] Veterans may file suit in the district where the veteran was discharged, where the veteran currently resides, or in Washington, D.C., where the Secretaries of the service departments are located.

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[50] The Army Board for Correction of Military Records, http://arba.army.pentagon.mil/abcmr-overview.cfm (last visited April 24, 2011).
[51] 10 U.S.C. § 1552.
[52] DoD Directive 1332.41, March 8, 2004.
[53] 32 C.F.R. § 581.3(4)(ii); DoD Directive 1332.41, March 8, 2004, at 2–15.
[54] Army Review Boards Agency, *Applicant's Guide to Applying to the Army Board for Correction of Military Records* 13 (2008), *available at* http://arba.army.pentagon.mil/abcmr-overview.cfm.
[55] 32 C.F.R. §§ 581.3(4), 723.9, 865.6; 33 C.F.R. § 52.67.
[56] DAVID ADDLESTONE ET AL., MILITARY DISCHARGE UPGRADING, AND INTRODUCTION TO VETERANS ADMINISTRATION LAW : A PRACTICE MANUAL §9.4.15.1 (1982).
[57] 28 U.S.C. § 2401.

IV. Preparing a Case

The Boards have a highly variable and in some cases quite low approval rate for the tens of thousands of applications they process each year:

> In the last several years, overall success rates in discharge upgrade cases at the Navy Discharge Review Board have run around 4%. The Army DRB success rate in upgrades is 41%. The Air Force rate is 19% (that breaks down to 15% for upgrade applicants who don't have a personal appearance and 45% for those who have an appearance). The Coast Guard DRB has a success rate of only 1%. The Board for Correction of Naval Records upgrades approximately 15-20% of cases, while the Army Board for Correction of Military Records (BCMR) upgrades 10-15% and the Air Force BCMR upgrades 20%. Coast Guard BCMR rates are 15-20%.[58]

According to the American Legion, there are two primary reasons for this high denial rate. First, the "boards are required, by law, to review applications under the presumption of the regularity in the conduct of government affairs."[59] Second, applicants often complete their application incorrectly, and, more importantly, they do not "fully develop their cases and submit viable issues for review."[60] For example, many applications consist of only a DD Form 149 or 293 plus a personal statement and a few character references. Often, veterans or their advocates do not understand that applicants bear the burden of proof before the Boards and must present material evidence to support their claims.[61] A successful application consists not only of the required forms but also of accompanying evidence and arguments that convince a Board that a discharge upgrade is warranted. Although the particular facts of a veteran's case are important, anecdotal evidence suggests that a trained attorney or advocate who can thoughtfully prepare the application and synthesize evidence greatly increases a veteran's likelihood of success.

A. Forms to Prepare

Veterans interested in pursuing a discharge upgrade should immediately obtain their military personnel and medical records by submitting a Standard Form 180 (SF 180)

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[58] *Survival Guide* at 349 (reporting statistics obtained by the National Veterans Legal Services Program).
[59] The American Legion, *Guide to Filing Military Discharge Review Board and Board for Correction of Military Records Applications* 1 (2001), *available at* http://wearevirginiaveterans.org/images/About-Us--Exec-Leadership/Resources--clinicians/dodguide.aspx.
[60] *Id.*
[61] *See Survival Guide* at 353.

or completing an online request at http://www.archives.gov/veterans/military-service-records/. Obtaining the records may take weeks, or even months in some cases. Practitioners also often make second requests for records because the military services (especially the Army and Navy) frequently provide more complete records in response to a second request. Practitioners may also want to include language referring to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, in any records requests from executive branch government agencies, such as the branches of the armed forces.

In addition to the first SF 180, veterans should submit another SF 180 form to the VA records center in St. Louis for any recent medical records. If the veteran has been treated at a VA Regional Office or Medical Center, additional SF 180s should be submitted to each of those facilities. Veterans should also try to obtain military inpatient medical records, rehabilitation records, brig or stockade records, trial records, and post-service criminal records if possible by tracking down their location and the method for requesting them. The Boards themselves will likely only order the personnel and outpatient medical records, so any additional records that are obtained by the veteran could be submitted as useful evidence to support the application. The Boards might also obtain the FBI criminal records sheet of the applicant, so it is important for an applicant to organize or acquire any criminal records.

After receiving and reviewing the records, applicants to the DRBs should submit a DD Form 293 and applicants to the BCMRs should submit a DD Form 149 to the appropriate military branch's DRB or BCMR as indicated on the form. Generally, applications take several months to be reviewed, and supporting documents can be submitted for weeks after the application has been filed as long as the Board has not yet reviewed the application.

*If the 15-year DRB deadline is approaching, the applicant should consider submitting a DD Form 293 before obtaining military records or fully preparing the case.

*If the 3-year BCMR deadline is approaching and the applicant has already gone through the DRB process or is ineligible for DRB review, an applicant should consider quickly submitting a DD Form 149.

B. Additional Materials to Submit

Although the only document required for DRB or BCMR review is the DD Form 293 or DD Form 149, applicants increase their chances of obtaining a discharge upgrade if they submit additional materials, such as:

- A brief that emphasizes favorable aspects of the applicant's military service, highlights factors that may mitigate disciplinary records, and explains the reasons why an upgrade should be given. The brief should be submitted at least one month before the hearing date, and the applicant should submit as many copies of the brief as there are Board members (5 for the DRBs, 3 for the BCMRs). The applicant should request in a cover letter that one copy be given to each Board member before review.
- A Statement of Material Contentions, which lays out the issues that the applicant wants the DRB or BCMR to address. The Board must respond to all issues raised by the applicant, so it is very important to clearly separate and explain all material issues. The Statement of Material Contentions may double as the Table of Contents for the brief.
- A statement by the veteran, which should be sworn or notarized if possible, to be used as evidence before the Board. The statement should explain discrepancies in the record, add or reaffirm facts supported by other evidence in the application, and dispute errors or prejudices in the record. If the veteran has criminal convictions, the personal declaration is a good place for the veteran to express remorse for their actions, explain how they have changed, and ask for clemency from the board.
- Evidence of in-service conduct, including:
  - Witness statements from fellow servicemembers or other persons;
  - Good performance reviews; and
  - Any evidence of misinformation from command officials that caused the servicemembers to waive important rights in disciplinary or discharge proceedings. For example, veterans might be able to obtain letters from others in command, or they might have email records, diary records, or friends or family who can attest to the fact that the servicemember waived important rights.
- Evidence of good post-service conduct, in the form of:
  - Character references from members of the community, which should always be submitted with an application;
  - Employment documents, including letters from employers;
  - Educational documents, including diplomas and transcripts;
  - Police clearance showing the absence of a criminal record, where applicable;

- Rehabilitation documents, where applicable;
- Family responsibility documents, including birth and marriage certificates;
- Awards and other documentation of personal and professional achievements, including newspaper articles, announcements in church bulletins, and letters recognizing achievements; and
- Similar evidence of involvement in charitable or civic activities, useful in all cases but particularly important in punitive discharge cases.

Gilberd offers the following example of how an advocate could argue a fact pattern to a DRB:

1. My discharge is inequitable, and should be upgraded to honorable and changed to discharge by reason of hardship/dependency in that serious family problems led to my A.W.O.L. and other than honorable discharge.
2. My discharge is improper in that I was denied the rights available to me in the administrative discharge proceedings.
    a. My command denied me the opportunity to submit a statement on my own behalf in the discharge proceedings, by forwarding the discharge recommendation prior to the time allowed to submit my statement.
    b. I was denied proper review of my discharge in that the separation authority was not provided a copy of my statement and my evidence of a severe family hardship, and was unaware of the facts warranting a more favorable discharge.[62]

In the example, the equity and propriety issues are clearly separated; and the propriety argument is subdivided further into two separate contentions for the Board to address. This clear separation of issues forces the Board to address each and provide separate analysis and reason for denial for each contention. The Board must respond to all arguments that are not facially frivolous.[63] Advocates should use this example to form the Statement of Material Contentions in the brief accompanying a veteran's discharge upgrade application. The DRBs and BCMRs for each military service department maintain searchable databases of past decisions, so advocates should also consult these to understand how the boards analyze applications and make decisions.[64]

While there are no inherently easy cases, anecdotal evidence suggests that some interesting issues have developed in the discharge upgrade field that may cause boards to

[62] *Survival Guide* at 360.
[63] Frizelle v. Slater, 111 F.3d 172 (D.C. Cir. 1997); Pettiford v. Sec'y of the Navy, 2011 U.S. Dist. LEXIS 34487 (D.D.C. Mar. 31, 2011).
[64] Boards of Review Reading Rooms, http://boards.law.af.mil/ (last visited April 25, 2011).

consider certain arguments more seriously than they have in the past. Some of these emerging issues include the following:

- Personality disorder discharges given to combat veterans (hazardous duty pay area veterans) with PTSD or TBI, particularly if the discharge occurred without a second opinion and service Surgeon General review as is currently required.
- Personality disorder discharges given on the basis of minimal psychiatric evaluation or in violation of rights during involuntary psychiatric evaluations when multiple, equally trained professionals have rejected the diagnosis soon after service.
- OTH discharges of combat area veterans for misconduct if the veteran suffers from PTSD or TBI and the misconduct appears related to the condition.
- OTH discharges for misconduct where servicemembers suffered from unrecognized HIV neurological problems or dementia (non-HIV dementia may similarly be used).
- Other designated physical or mental condition discharges where medical problems were determined to be insufficient for disability discharge/retirement but extensive medical evidence soon after discharge shows the condition warranted disability proceedings.

If any of these applies to a veteran's case, advocates may consider emphasizing that issue and providing the board with as much supporting evidence as possible.

V. Alternate Avenues for Relief

A. Appeals to Federal Court

When the military discharges a veteran against her will, it has made a decision to separate the veteran from the service early. The veteran may bring claims for reinstatement and/or back pay in federal court. Early separation challenges with monetary claims can be brought in federal district court under the "Little" Tucker Act.[65] For claims over $10,000, the Court of Federal Claims has exclusive jurisdiction under the Tucker Act (more below), but for claims under $10,000 the Court of Federal Claims and federal district courts have concurrent jurisdiction.

District courts can also hear challenges limited to the character or reason for discharge that do not involve a monetary claim. They may also hear challenges to DRB or BCMR decisions under the Administrative Procedure Act. District court may be more

[65] 28 U.S.C. § 1346(a)(2).

accessible to many veterans because venue exists where the veteran was discharged, where the veteran currently resides, and in Washington, D.C. However, monetary claims must be limited to $10,000, so veterans may not be able to fully recover if their back pay claim would be more than that amount.

Some district courts have required veterans to exhaust administrative remedies before applying to federal court for relief; however, this seems improper in light of *Darby v. Cisneros*, a case holding that it is improper for courts to require exhaustion of administrative remedies when neither statute nor administrative rule specifically mandates exhaustion.[66] District courts have a six-year statute of limitations, which runs from the date of denial from the reviewing board.[67]

B. Litigation in the Court of Federal Claims

Veterans can bring early separation claims against the government in excess of $10,000 under the Tucker Act in the Court of Federal Claims.[68] The Court of Federal Claims has the power to reinstate the veteran into military service, award back pay, correct military records to remove any references to the illegal separation, and award accrual of active duty days.

Advantages of bringing an action in the Court of Federal Claims include that the court does not require a veteran to exhaust all administrative remedies and that it generally allows *de novo* review on issues of military pay. However, many veterans may be ineligible for relief. With rare exceptions, the six-year statute of limitations begins to run on the date of discharge, and it is not tolled by application to DRBs or BCMRs. Also, the court may apply the doctrine of laches to dismiss the case even before the six-year statute of limitations has run if the court finds unreasonable delay in the veteran's claim. The court usually sits only in Washington, D.C.

C. Veterans Benefits Application

VA has an adjudicatory process through which it can decide to award a veteran benefits despite the discharge characterization of the veteran's service. So a veteran

[66] Darby v. Cisneros, 509 U.S. 137 (1993).
[67] 28 U.S.C. § 2401.
[68] 28 U.S.C. § 1491.

pursuing a discharge upgrade in order to obtain VA benefits should also look into submitting an application to VA. An application may be submitted concurrently with a discharge upgrade application. This may be advantageous because both processes can be time consuming, and a VA application may help the veteran receive benefits sooner.

However, advocates should be careful to check with the agencies before submitting concurrent applications because an application to one agency can preclude the other from obtaining the veteran's official military records. This occurs because the Military Personnel Records office only keeps one copy of a veteran's personnel file, which it loans out to agencies upon request. Consequently, if an agency insists on obtaining the veteran's official military records before processing an application (as does the ABCMR), then the military records must not be out on loan to another agency. Representing veterans before VA requires accreditation and veterans' benefits is a complex body of law in itself, so we do not attempt to cover it here. However, if the ultimate goal is to help the veteran obtain VA benefits, advocates should actively explore this route themselves or with experts in their community.

VI. Summary

Advocates can improve the lives of veterans through the discharge upgrade process. Discharge upgrades can make veterans eligible for VA benefits, including medical and disability benefits, and may help reduce stigmatization of veterans with low discharge characterizations. Many veterans do not know how to navigate through the convoluted administrative and judicial procedures to obtain the relief they desire, so informed advocates are essential for them to obtain a favorable outcome.

Advocates can help veterans determine the appropriate avenue for relief, whether through the discharge upgrade procedures described in this manual or through VA benefits procedures covered thoroughly in other resources.[69] If discharge upgrade procedures are appropriate, advocates can help veterans prepare and submit materials to the DRB, BCMR, or federal court.

[69] *See, e.g.,* BARTON F. STICHMAN AND RONALD B. ABRAMS, VETERANS BENEFITS MANUAL 29 (2009).

Avenues for Relief in Discharge Upgrade Cases		
	Statute of Limitations	
Discharge Review Boards (DRBs)	15 years	Begins at the date of discharge.
Boards for Correction of Military Records (BCMRs)	3 years, waivable	Begins at the date of discovery of error or injustice.
Appeals to Federal Courts	6 years	Begins at the date of DRB or BCMR decision.
Court of Federal Claims	6 years	Begins at the date of discharge.

VII. Supplemental Material

This section includes samples of Standard Form 180 (for requesting military service and medical records), DD Form 149 (for applying to the BCMRs for a discharge upgrade), and DD Form 293 (for applying to the DRBs for a discharge upgrade). Also included are charts summarizing material on preparing discharge upgrade requests. The charts cover (1) records requests and client intake, (2) choosing a venue, and (3) preparing the application.

A. Standard Form 180

Standard Form 180 (Rev. 10/10) (Page 1)
Prescribed by NARA (36 CFR 1228.168(b))

Authorized for local reproduction
Previous edition unusable

OMB No. 3095-0029 Expires 10/31/2011

REQUEST PERTAINING TO MILITARY RECORDS

* Requests from veterans or deceased veteran's next-of-kin may be submitted online by using eVetRecs at http://www.archives.gov/veterans/evetrecs/ *

(To ensure the best possible service, please thoroughly review the accompanying instructions before filling out this form. Please print clearly or type.)

SECTION I - INFORMATION NEEDED TO LOCATE RECORDS (Furnish as much as possible.)

1. NAME USED DURING SERVICE (last, first, and middle)	2. SOCIAL SECURITY NO.	3. DATE OF BIRTH	4. PLACE OF BIRTH

5. SERVICE, PAST AND PRESENT (For an effective records search, it is important that all service be shown below.)

	BRANCH OF SERVICE	DATE ENTERED	DATE RELEASED	OFFICER	ENLISTED	SERVICE NUMBER (If unknown, write "unknown")
a. ACTIVE COMPONENT						
b. RESERVE COMPONENT						
c. NATIONAL GUARD						

6. IS THIS PERSON DECEASED? If "YES" enter the date of death.
☐ NO ☐ YES

7. IS (WAS) THIS PERSON RETIRED FROM MILITARY SERVICE?
☐ NO ☐ YES

SECTION II – INFORMATION AND/OR DOCUMENTS REQUESTED

1. CHECK THE ITEM(S) YOU WOULD LIKE TO REQUEST A COPY OF:

☐ **DD Form 214 or equivalent.** This form contains information normally needed to verify military service. A copy may be sent to the veteran, the deceased veteran's next of kin, or other persons or organizations if authorized in Section III, below. NOTE: If more than one period of service was performed, even in the same branch, there may be more than one DD214. **Check the appropriate box below to specify a deleted or undeleted copy.** When was the DD Form(s) 214 issued? YEAR(S):

- ☐ **UNDELETED:** Ordinarily required to determine eligibility for benefits. Sensitive items, such as, the character of separation, authority for separation, reason for separation, reenlistment eligibility code, separation (SPD/SPN) code, and dates of time lost are usually shown.
- ☐ **DELETED:** The following items are deleted: authority for separation, reason for separation, reenlistment eligibility code, separation (SPD/SPN) code, and for separations after June 30, 1979, character of separation and dates of time lost.

☐ **All Documents in Official Military Personnel File (OMPF)**

☐ **Medical Records** (Includes Service Treatment Records (outpatient), inpatient and dental records.) If hospitalized, the facility name and date for each admission **must** be provided:

☐ **Other** (Specify):

2. PURPOSE: (An explanation of the purpose of the request is **strictly voluntary**; however, such information may help to provide the best possible response and may result in a faster reply. Information provided will in no way be used to make a decision to deny the request.) Check appropriate box:

☐ Benefits ☐ Employment ☐ VA Loan Programs ☐ Medical ☐ Medals/Awards ☐ Genealogy ☐ Correction ☐ Personal
☐ Other, explain:

SECTION III - RETURN ADDRESS AND SIGNATURE

1. REQUESTER IS: (*Signature Required in # 3 below of veteran, next of kin, legal guardian, authorized government agent or "other" authorized representative. If "other" authorized representative, provide copy of authorization letter.)*

☐ Military service member or veteran identified in Section I, above
☐ Next of kin of deceased veteran **(Must provide proof of death).**
Show relationship: _____
(See item 2a on accompanying instructions.)
☐ Legal guardian (Must submit copy of court appointment.)
☐ Other (specify)

2. SEND INFORMATION/DOCUMENTS TO:
(Please print or type. See item 4 on accompanying instructions.)

Name

Street Apt.

City State Zip Code

3. AUTHORIZATION SIGNATURE REQUIRED *(See items 2a or 3a on accompanying instructions.)* I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the information in this Section III is true and correct.

Signature Required - Do not print

Date of this request ( ) Daytime phone

Email address

*This form is available at *http://www.archives.gov/research/order/standard-form-180.pdf* on the National Archives and Records Administration (NARA) web site.*

B. DD Form 149

APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552
(Please read instructions on reverse side BEFORE completing this application.)

OMB No. 0704-0003

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 1155 Defense Pentagon, Washington, DC 20301-1155 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 US Code 1552, EO 9397.

PRINCIPAL PURPOSE: To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record.

ROUTINE USE(S): None.

DISCLOSURE: Voluntary; however, failure to provide identifying information may impede processing of this application. The request for Social Security number is strictly to assure proper identification of the individual and appropriate records.

1. APPLICANT DATA *(The person whose record you are requesting to be corrected.)*

a. BRANCH OF SERVICE *(X one)*	ARMY	NAVY	AIR FORCE	MARINE CORPS	COAST GUARD

b. NAME *(Print - Last, First, Middle Initial)*	c. PRESENT OR LAST PAY GRADE	d. SERVICE NUMBER *(If applicable)*	e. SSN

2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES *(Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)*	3. TYPE OF DISCHARGE *(If by court-martial, state the type of court.)*	4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY *(YYYYMMDD)*

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: *(Entry required)*

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: *(Entry required)*

7. ORGANIZATION AND APPROXIMATE DATE *(YYYYMMDD)* **AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED** *(Entry required)*

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY *(YYYYMMDD)*	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: *(If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)*

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. *(At no expense to the Government) (X one)*	YES. THE BOARD WILL DETERMINE IF WARRANTED.	NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.

11.a. COUNSEL *(If any)* NAME *(Last, First, Middle Initial)* and ADDRESS *(Include ZIP Code)*	b. TELEPHONE *(Include Area Code)* c. E-MAIL ADDRESS d. FAX NUMBER *(Include Area Code)*

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name *(print)* _____ **and relationship by marking one box below.**

SPOUSE	WIDOW	WIDOWER	NEXT OF KIN	LEGAL REPRESENTATIVE	OTHER *(Specify)*

13.a. COMPLETE CURRENT ADDRESS *(Include ZIP Code)* OF APPLICANT OR PERSON IN ITEM 12 ABOVE *(Forward notification of all changes of address.)*	b. TELEPHONE *(Include Area Code)* c. E-MAIL ADDRESS d. FAX NUMBER *(Include Area Code)*

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. *(U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)*

CASE NUMBER *(Do not write in this space.)*

15. SIGNATURE *(Applicant must sign here.)*	16. DATE SIGNED *(YYYYMMDD)*

DD FORM 149, JUN 2010 PREVIOUS EDITION IS OBSOLETE. Adobe Designer 8.0

C. DD Form 293

APPLICATION FOR THE REVIEW OF DISCHARGE FROM THE ARMED FORCES OF THE UNITED STATES
(Please read instructions on Pages 3 and 4 BEFORE completing this application.)

OMB No. 0704-0004

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, Executive Services Directorate, Information Management Division, 1155 Defense Pentagon, Washington, DC 20301-1155 (0704-0004). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. **PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON BACK OF THIS PAGE.**

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 1553; E.O. 9397.
PRINCIPAL PURPOSE(S): To apply for a change in the characterization or reason for military discharge issued to an individual.
ROUTINE USE(S): None.
DISCLOSURE: Voluntary; however, failure to provide identifying information may impede processing of this application. The request for Social Security Number is strictly to assure proper identification of the individual and appropriate records.

1. APPLICANT DATA *(The person whose discharge is to be reviewed).* **PLEASE PRINT OR TYPE INFORMATION.**

a. BRANCH OF SERVICE *(X one)*	☐ ARMY	☐ MARINE CORPS	☐ NAVY	☐ AIR FORCE	☐ COAST GUARD

b. NAME *(Last, First, Middle Initial)*	c. GRADE/RANK AT DISCHARGE	d. SOCIAL SECURITY NUMBER

e. CURRENT MAILING ADDRESS OF APPLICANT OR PERSON NAMED IN ITEM 11 *(Forward notification of any change in address.)*	f. TELEPHONE NUMBER *(Include Area Code)* g. E-MAIL h. FAX NUMBER *(Include Area Code)*

2. DATE OF DISCHARGE OR SEPARATION *(YYYYMMDD) (If date is more than 15 years ago, submit a DD Form 149)*

3. UNIT AND LOCATION AT DISCHARGE OR SEPARATION

4. DISCHARGE CHARACTERIZATION RECEIVED *(X one)*

- ☐ HONORABLE
- ☐ GENERAL/UNDER HONORABLE CONDITIONS
- ☐ UNDER OTHER THAN HONORABLE CONDITIONS
- ☐ BAD CONDUCT *(Special Court-Martial only)*
- ☐ UNCHARACTERIZED
- ☐ OTHER *(Explain)*

5. BOARD ACTION REQUESTED *(X all that apply)*

- ☐ CHANGE TO HONORABLE
- ☐ CHANGE TO GENERAL/UNDER HONORABLE CONDITIONS
- ☐ CHANGE TO UNCHARACTERIZED *(Not applicable to Air Force or service members with over 6 months of service)*
- ☐ CHANGE NARRATIVE REASON FOR SEPARATION:

6. ISSUES: WHY AN UPGRADE OR CHANGE IS REQUESTED AND JUSTIFICATION FOR THE REQUEST *(Continue in Item 13. See instructions on Page 3.)*

☐ **7.** *(X if applicable)* **AN APPLICATION WAS PREVIOUSLY SUBMITTED ON** *(YYYYMMDD)* _____
AND THIS FORM IS SUBMITTED TO ADD ADDITIONAL ISSUES, JUSTIFICATION, OR EVIDENCE.

8. IN SUPPORT OF THIS APPLICATION, THE FOLLOWING ATTACHED DOCUMENTS ARE SUBMITTED AS EVIDENCE: *(Continue in Item 14. If military documents or medical records are relevant to your case, please send copies.)*

9. TYPE OF REVIEW REQUESTED *(X one)*

- ☐ **CONDUCT A RECORD REVIEW OF MY DISCHARGE BASED ON MY MILITARY PERSONNEL FILE AND ANY ADDITIONAL DOCUMENTATION SUBMITTED BY ME. I AND/OR** *(counsel/representative)* **WILL NOT APPEAR BEFORE THE BOARD.**
- ☐ **I AND/OR** *(counsel/representative)* **WISH TO APPEAR AT A HEARING AT NO EXPENSE TO THE GOVERNMENT BEFORE THE BOARD IN THE WASHINGTON, D.C. METROPOLITAN AREA.**
- ☐ **I AND/OR** *(counsel/representative)* **WISH TO APPEAR AT A HEARING AT NO EXPENSE TO THE GOVERNMENT BEFORE A TRAVELING PANEL CLOSEST TO** *(enter city and state)* _____ **(NOTE:** The Naval and Coast Guard Discharge Review Boards do not have traveling panels.)

10.a. COUNSEL/REPRESENTATIVE *(If any)* NAME *(Last, First, Middle Initial)* AND ADDRESS *(See Item 10 of the instructions about counsel/representative.)*	b. TELEPHONE NUMBER *(Include Area Code)* c. E-MAIL d. FAX NUMBER *(Include Area Code)*

11. APPLICANT MUST SIGN IN ITEM 12.a. BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name *(print)* _____ **and relationship by marking a box below.**

☐ SPOUSE ☐ WIDOW ☐ WIDOWER ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER *(Specify)*

12. CERTIFICATION. I make the foregoing statements, as part of my claim, with full knowledge of the penalties involved for willfully making a false statement or claim. *(U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)*

a. SIGNATURE - REQUIRED *(Applicant or person in Item 11 above)*	b. DATE SIGNED - REQUIRED *(YYYYMMDD)*	CASE NUMBER *(Do not write in this space.)*

DD FORM 293, JUN 2010 PREVIOUS EDITION IS OBSOLETE. Page 1 of 4 Pages
Adobe Professional 8.0

13. CONTINUATION OF ITEM 8, ISSUES *(If applicable)*

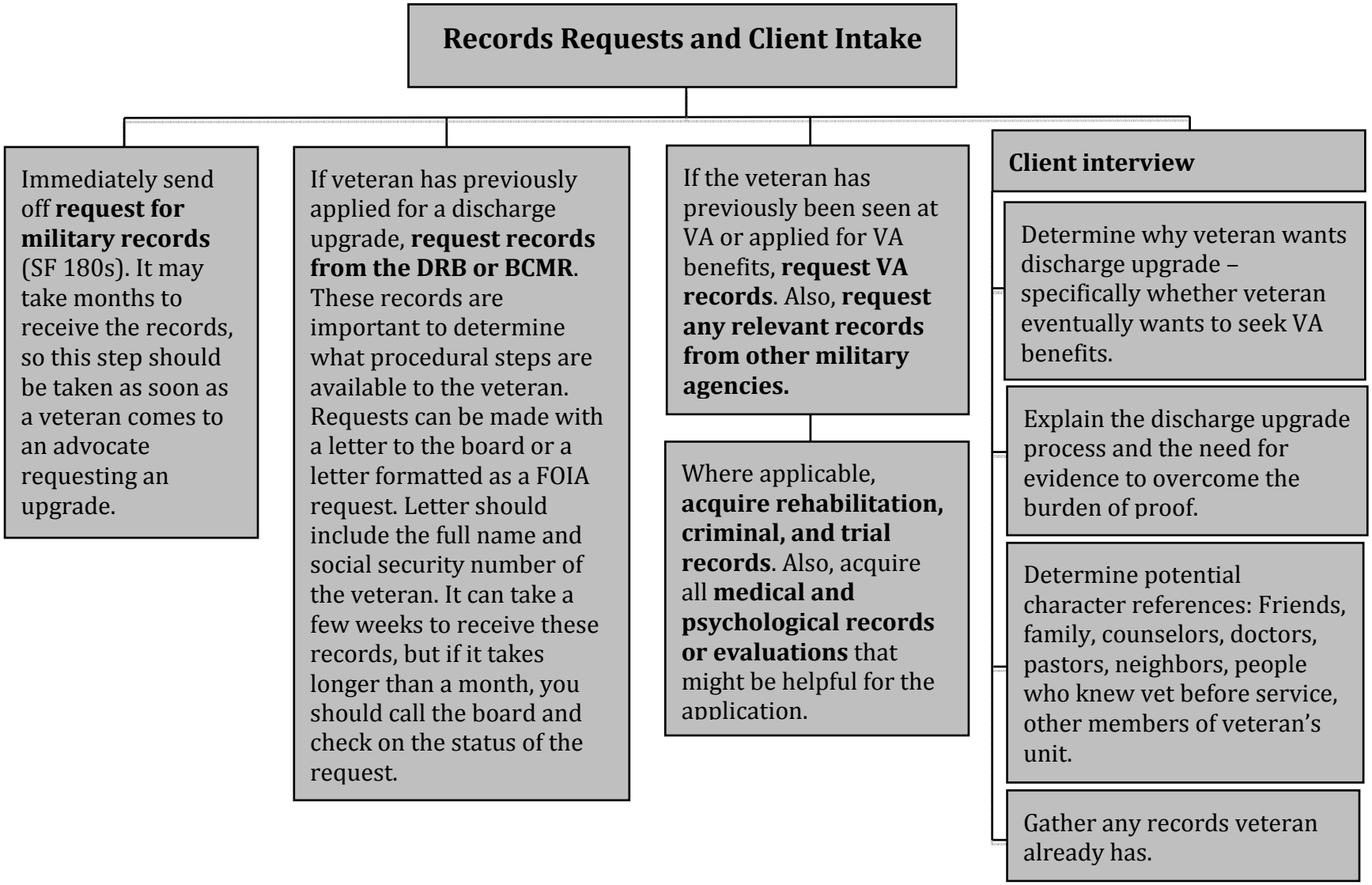
14. CONTINUATION OF ITEM 8, SUPPORTING DOCUMENTS *(If applicable)*

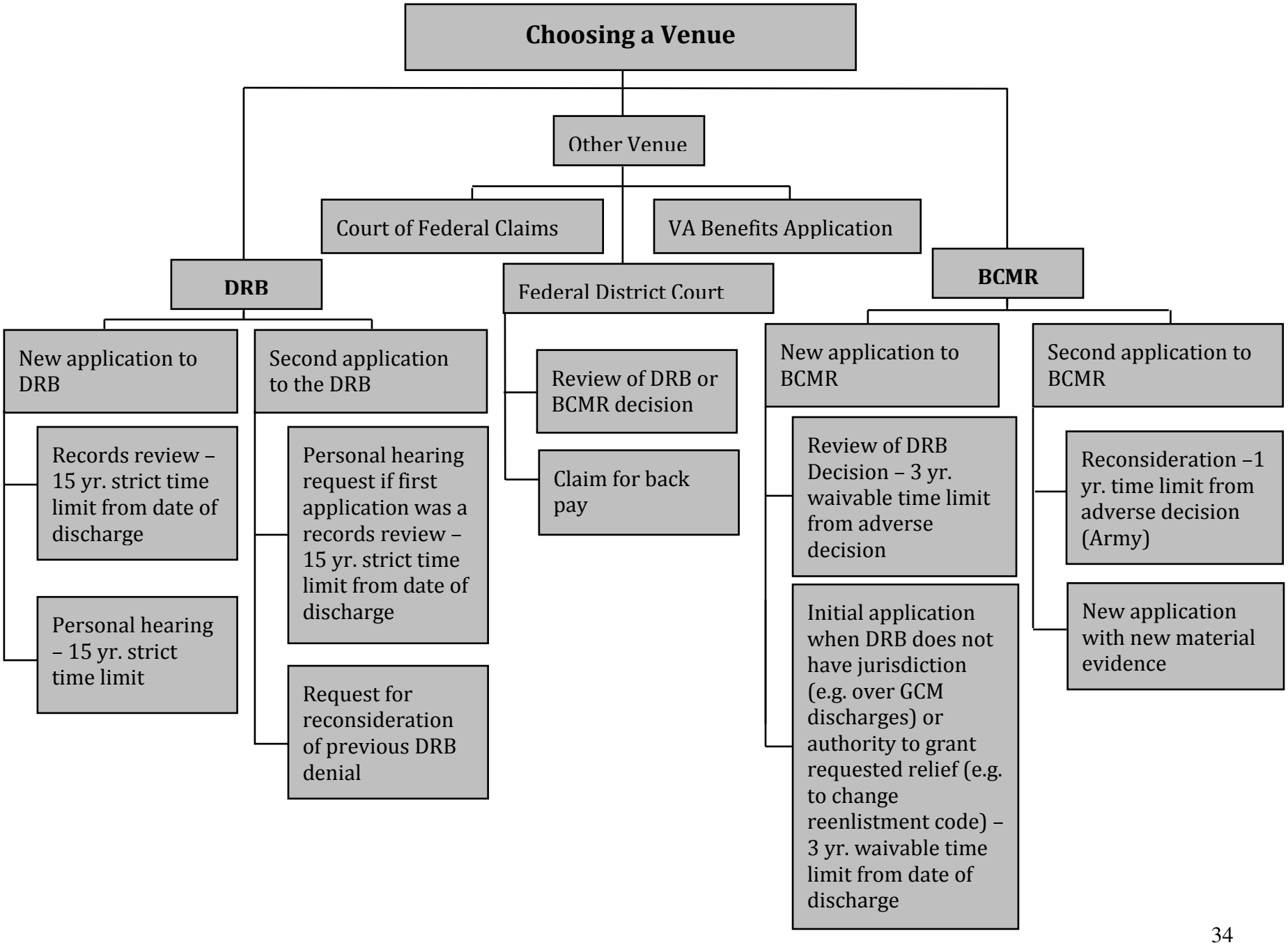
15. REMARKS *(If applicable)*

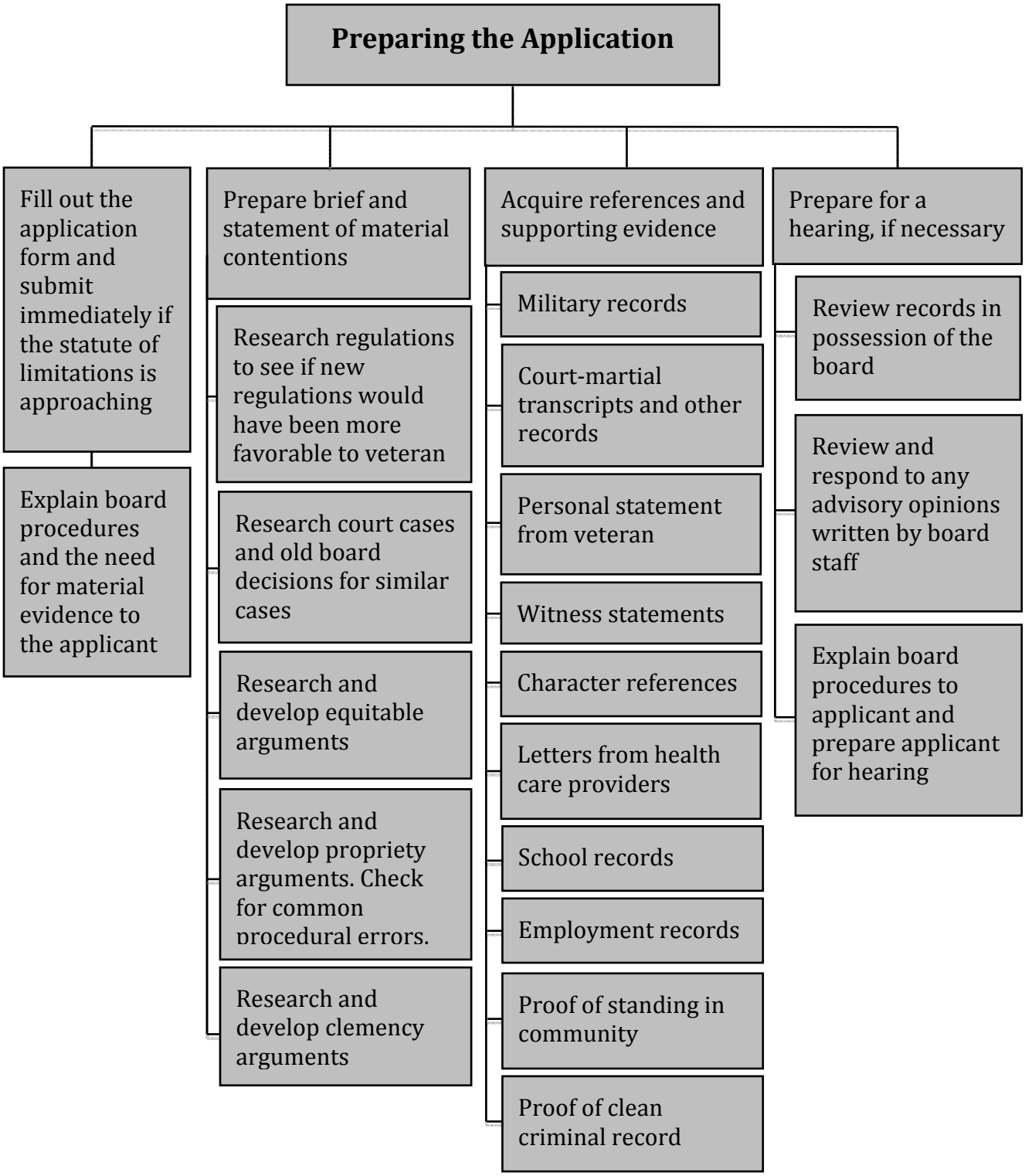
MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW.

ARMY	NAVY AND MARINE CORPS
Army Review Boards Agency ADRB 1901 South Bell Street Arlington, VA 22202-4508 (See http://arba.army.pentagon.mil)	Secretary of the Navy Council of Review Boards ATTN: Naval Discharge Review Board 720 Kennon Ave S.E., Suite 309 Washington Navy Yard, DC 20374-5023
AIR FORCE	**COAST GUARD**
Air Force Review Boards Agency SAF/MRBR 550-C Street West, Suite 40 Randolph AFB, TX 78150-4742	Commandant (CG-122) Attn: Office of Military Personnel US Coast Guard 2100 2nd Street S.W., Stop 7801 Washington, DC 20593-7801

D. Preparing a Discharge Upgrade Application







VIII. Additional Resources

A. Forms

Records Request Form: Standard Form 180.
<www.archives.gov/research/order/standard-form-180.pdf>

BCMR Application: DD Form 149.
<http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0149.pdf>

DRB Application: DD Form 293.
<http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0293.pdf>

B. Statutes and Regulations

10 USC §1551 to 1559. General statutory authority for discharge upgrades and the correction of military records.

C. BCMR Statutes and Regulations

General

10 U.S.C. § 1552.

DoD Directive 1332.41. 8 March 2004. <http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf>. 4 pages. Establishes policies for the uniform review of discharges or dismissals.

Army

32 C.F.R. § 581.3.

Army Regulation 15–185. 31 March 2006. Army Board for Correction of Military Records. <http://armypubs.army.mil/epubs/pdf/R15_185.pdf>. 10 pages. Rapid action revision which updates ABCMR to comply with the decision of Lipsman v. Secretary of the Army (Civil Action No. 02-0251, 2004 U.S. Dist. Lexis 17866).

Navy

32 C.F.R. Part 723.

Secretary of the Navy (SECNAV) Instruction 5420.193. 19 November 1997. Department of the Navy. <http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5420.193.pdf>. 14 pages. Establishes policies for consideration of Navy and Marine Corps applications for correction of military records to the BCNR.

Air Force

32 C.F.R. § 865.0–.8.

Air Force Instruction 36-2603. 1 March 1996. Air Force Board for Correction of Military Records. Web. <http://www.af.mil/shared/media/epubs/AFI36-2603.pdf>. 8 pages. Establishes policies and procedures for corrections of military records to remedy error or injustice.

Coast Guard

33 C.F.R. Part 52.

D. DRB Statutes and Regulations

General

10 U.S.C. § 1553.

32 C.F.R. Part 70.

DoD Instruction 1332.28. 4 April 2004. <http://www.dtic.mil/whs/directives/corres/pdf/133228p.pdf>. 52 pages. Instruction on Discharge Review Board procedures and standards.

DoD Directive 1332.41. 8 March 2004. <http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf>. 4 pages. Establishes policies for the uniform review of discharges or dismissals.

Army

32 C.F.R. § 581.2.

Army Regulation 15–180. 20 March 1998. Army Discharge Review Board. <http://armypubs.army.mil/epubs/pdf/R15_180.PDF>. 73 pages. Regulation that implements 10 USC 1553, Public Law 95-126, and DOD Directive 1332.28.

Navy

32 C.F.R. Part 724.

Secretary of the Navy (SECNAV) Instruction 5420.174D. December 22 2004. <http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5420.174D.pdf>. 82 pages. Policies and procedures for the Naval Discharge Review Board.

Air Force

32 C.F.R. § 865.100 – .126.

Coast Guard

33 C.F.R. Part 51.

E. Current Discharge Regulations

General

DoD Instruction 1332.14. 28 August 2008 with updates. <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>. 60 pages. Policies and procedures governing enlisted administrative separations from the military.

Army

Army Regulation 635–200. 19 December 2003 with rapid action changes. <http://www.redstone.army.mil/legal/data/AR635-200.pdf>. 136 pages. Regulations for administrative discharges from the Army.

Navy

Marine Corps Separation and Retirement Manual (MARCORSEPMAN) with updates. 6 June 2007. <http://www.marines.mil/news/publications/Documents/MCO%20P1900.16F%20W%20CH%201-2.pdf>. 534 pages. Marine Corps regulations for administrative discharges are found in chapter 6.

Milpersman 1900 and 1910 series. 13 April 2005 with updates <http://advancement.corpsman.com/files/MILPERSMAN_1910_-_ENLISTED_ADMINISTRATIVE_SEPARAT.pdf>. 265 pages. Regulations for administrative discharges from the Navy.

Secretary of the Navy (SECNAV) Instruction 1910.4B. <http://neds.nebt.daps.mil/Directives/1910_4b.pdf>. Instruction regarding separations from the Navy.

Air Force

Air Force Instruction 36-3208 with updates. 9 July 2004. <http://www.af.mil/shared/media/epubs/AFI36-3208.pdf>. 233 pages. Regulations governing separations from the Air Force.

F. Publications

Addlestone, David, National Veterans Law Center (U.S.), Veterans Education Project (Washington, D.C.), et al. *Military Discharge Upgrading, and Introduction to Veterans Administration Law : a Practice Manual.* Washington, D.C.: Veterans Education Project, 1982 with 1990 update. Print. 700+ pages. Comprehensive practice manual for attorneys with detailed chapters on military structure and the discharge review process, how to obtain and interpret military records, and how to prepare discharge upgrade cases for the DRB, BCMR, and federal court. The manual is very dated, and so parts of the manual are inaccurate (for example, the discharge upgrade regulations have since changed). However, the practice manual is still the most comprehensive resource to date, and it is still considered a very good starting point for attorneys to learn how to approach discharge upgrade cases.

The American Legion. ***Guide to Filing Military Discharge Review Board and Board for Correction of Military Records Applications*****. Guide. Web. <http://wearevirginiaveterans.org/images/About-Us--Exec-Leadership/Resources--clinicians/dodguide.aspx>. 18 pages.** Condensed guidebook for veterans with information on which board to apply to (DRB or BCMR), which forms to use, and basic strategies for developing and presenting a case to the boards. Hypothetical cases and a discussion of case strategy, presented at the end, are substantial part of the guide.

Boards of Review Reading Rooms**. Web. 26 Feb. 2011. <http://boards.law.af.mil/index.htm>.** Access to Air Force, Army, Navy, and Coast Guard BCMR and DRB decisional documents made since October 1998. A search function on the front page allows attorneys to search for similar cases from particular review boards.

National Veterans Legal Services Program - Veterans Benefits - Medical Health Disability Claims (NVLSP)**. Web. 26 Feb. 2011. <http://www.nvlsp.org/>.** Website maintained by the National Veterans Legal Services Program, with links and information relating to veterans' legal needs and entitlements.

Oppenheimer, Carol. ***Model Brief for Discharge Upgrading before the United States Army Discharge Review Board*****. Washington, D.C.: National Veterans Law Center, American University, Washington College of Law, 1980. Print. 108 pages.** Sample brief submitted to the Army DRB in 1980 on behalf of an applicant with a multitude of Article 15 violations and an Undesirable Discharge.

Powers, Rod. "Upgrading Your Military Discharge." ***United States Military Information*****. Web. 26 Feb. 2011. <http://usmilitary.about.com/cs/generalinfo/a/dischargeupg.htm>. 5 pages.** Compact overview of the process of discharge upgrades through the DRB written by Rod Powers, retired Air Force First Sergeant who is the author of several books and articles about military regulations and veterans benefits. Explains how to apply, how to get help, who decides discharge upgrade cases, and what to expect in a hearing, among other things.

Powers, Rod. "Military Justice 101 - Part 3, Enlisted Administrative Separations." ***United States Military Information*****. Web. 26 Feb. 2011. <http://usmilitary.about.com/od/justicelawlegislation/l/aadischarge1.htm>. 5 pages.** General information about discharges from the military, with a focus on administrative discharge processes (as opposed to punitive discharge processes via court martial). Includes information about voluntary and involuntary separations, with information about the Administrative Discharge Board and common reasons for involuntary separation.

Powers, Rod. "Military Justice 101 - Part 7, The Court-Martial Process." ***United States Military Information*****. Web. 26 Feb. 2011. <http://usmilitary.about.com/od/justicelawlegislation/l/aacmartial1.htm>. 5 pages.** General information about court martials, largely focusing on the rules and procedures of the court martial process. There is also a broad overview of appellate review procedures.

Stichman, Barton F., and Ronald B. Abrams. ***Veterans Benefits Manual*****. Charlottesville, VA: LexisNexis, 2010. Print. 2,050 pages.** Comprehensive practice

manual for attorneys working with Veterans Benefits cases. Chapter 19 describes the BCMR process in detail and Chapter 20 describes the DRB discharge upgrade process.

Toney, Raymond J. "Texas State Bar Association, Military Law Committee Correction of Military Records and Judicial Review." State Bar of Texas Military Law Section. Web. <http://www.militarylawsection.com/documents/toney.pdf>. 11 pages. Article for attorneys that focuses on applying to the BCMR. Includes statutory authorities, common types of claims brought to BCMRs, advice on submission of applications, and information on appellate procedures and DRB procedures. Contains links to recent FOIA data on BCMR practices and procedures in each military branch.

Turcotte, Tom, and Kathleen Gilberd. "Discharge Upgrading and Discharge Review: Introductory Materials and Forms for Attorneys and Counselors." ***The Military Law Task Force*****. National Lawyers Guild. Web. <http://www.nlgmltf.org/pdfs/DischargeUpgrade_Memo.pdf>. 10 pages.** Short memorandum and outline explaining the features of the discharge review system, with information and advice for advocates preparing applications for veterans.

Veterans for America. ***The American Veterans and Servicemembers Survival Guide*****. National Veterans Legal Services Program, 2009. Veterans for America. Web. 26 Feb. 2011. <http://www.nvlsp.org/images/Survival%20Guide-102309.pdf>. 649 pages.** Free online book targeted towards veterans with detailed information about veterans' benefits, rights, entitlements, programs and organizations. Several chapters contain useful information on the discharge upgrade process including: Chapter 15 (discharge upgrades), Chapter 16 (correcting military records), Chapter 17 (obtaining military records), and Chapter 18 (general information on discharges).

"The VVA Veteran." ***Welcome To Vietnam Veterans of America*****. Web. 25 Mar. 2011. <http://www.vva.org/veteran.html>.** Website for *The VVA Veteran*, a bimonthly publication for veterans. Vietnam era veterans and their attorneys can search for, and potentially contact, people with whom the veterans served through a locator service. Specifically, veterans may send a Locator request to *The VVA Veteran*, 8605 Cameron St., Suite 400, Silver Spring, MD 20910 or to the e-mail addresses mkeating@vva.org or veteranlocator@gmail.com. Veterans or attorneys may also use the search bar on the website to search for specific people or units that might have appeared in Locator ads in previous editions of *The VVA Veteran*.

G. BCMR Publications

General

Powers, Rod. "Changing Your Military Records." ***United States Military Information*****. Web. 26 Feb. 2011. <http://usmilitary.about.com/cs/airforcebase/a/chgrecords.htm>. 3 pages.** Brief overview of the process of discharge upgrades through the BCMR. Explains how to apply, how to get help, and how decisions are made, among other things.

Army

"Army Board for Correction of Military Records (ABCMR)." ***Army Review Board Agency*****. Web. 25 Mar. 2011. <http://arba.army.pentagon.mil/abcmr-faq.cfm>.** Website with brief information and links on how to apply to the ABCMR for corrections of military records.

Applicant's Guide to Applying to the Army Board for Correction of Military Records (ABCMR)**. Army Board for Correction of Military Records. Web. <http://arba.army.pentagon.mil/documents/ABCMR%20Applications%20Guide%202005.pdf>. 17 pages.** Publication by the ABCMR with instructions for Veteran applicants, and answers to frequently asked questions.

Army Review Board Agency**. Web. 26 Feb. 2011. <http://arba.army.pentagon.mil/index.cfm>.** Website maintained by the Army Reviews Board Agency, with many links relating to the DRB and ABCMR application processes.

Navy

"BCNR, Board for Correction of Naval Records." ***Assistant for Administration, Secretary of the Navy*****. Web. 26 Feb. 2011. <http://www.donhq.navy.mil/bcnr/bcnr.htm>.** Website maintained by the Board for Correction of Naval Records (the Navy BCMR), with links.

Air Force

Air Force Pamphlet 36-260: Applicants' Guide to the Air Force Board for Correction of Military Records. **U.S. Air Force, 3 Nov. 1994. Web. 26 Feb. 2011. <http://www.e-publishing.af.mil/shared/media/epubs/AFPAM36-2607.pdf>. 3 pages.** Basic guide to applying to the AFBCMR, published by the Air Force.

"Factsheets: Air Force Board for Correction of Military Records." ***Air Reserve Personnel Center - Home*****. Web. 26 Feb. 2011. <http://www.arpc.afrc.af.mil/library/factsheets/factsheet.asp?id=9018>.** Basic guide to the AFBCMR process, with links and information.

Coast Guard

"USCG: Board for Correction of Military Records." ***U. S. Coast Guard Home Page*****. Web. 26 Feb. 2011. <http://www.uscg.mil/legal/BCMR.asp>.** Webpage maintained by the US Coast Guard, with basic application instructions and links relating to the CGBCMR process.

H. DRB Publications

Army

Army Review Board Agency**. Web. 26 Feb. 2011. <http://arba.army.pentagon.mil/index.cfm>.** Website maintained by the Army

Reviews Board Agency, with many links relating to the DRB and ABCMR application processes.

Navy

"NDRB." ***Assistant for Administration, Secretary of the Navy*****. Web. 26 Feb. 2011. <http://www.donhq.navy.mil/corb/ndrb/ndrbmainpage1.htm>.** Website maintained by the Naval Discharge Review Board, with information and links relating to the Navy DRB process.

Air Force

Air Force Pamphlet 31-5: Administrative Discharge Upgrade. **U.S. Air Force. Web. <www.scott.af.mil/shared/media/document/AFD-090930-041.doc>. 5 pages.** Basic information about the Air Force Discharge Review Board process.