



UNFINISHED BUSINESS

CORRECTING "BAD PAPER" FOR VETERANS WITH PTSD

The Defense Department's Adjudication of
Discharge Upgrade Applications One Year Since
Its September 2014 PTSD Directive



Prepared for
Vietnam Veterans of America
National Veterans Council for Legal Redress

by

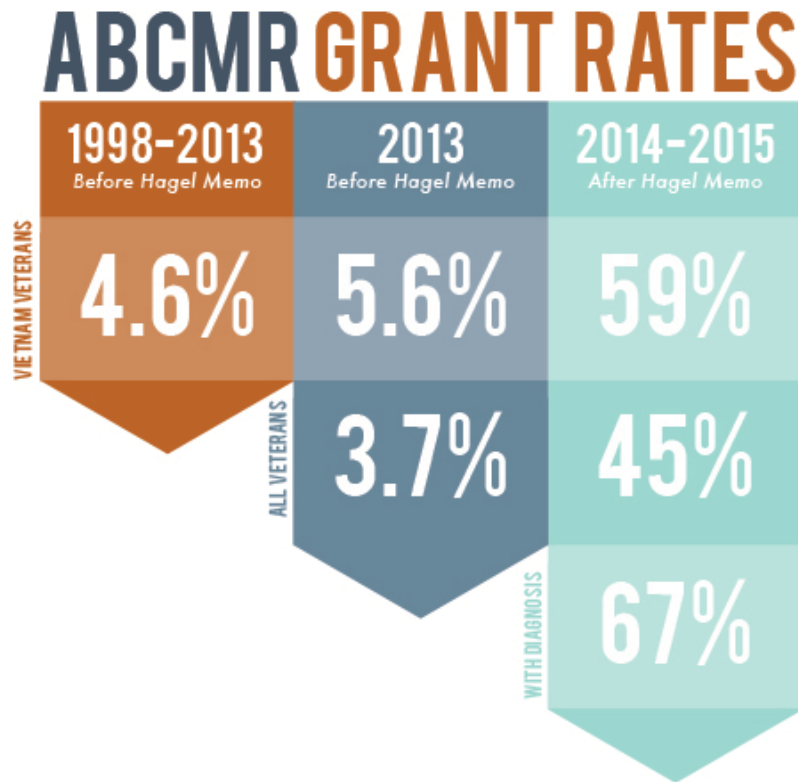
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EXECUTIVE SUMMARY

Veterans who receive less than fully honorable discharges can apply to administrative boards established by Congress for a review of their discharge status. These boards may upgrade a discharge status that is erroneous or unjust. A former service member's discharge status is hugely consequential, as those with Other Than Honorable or Bad Conduct Discharges (also known collectively as "bad paper") are generally ineligible for education, housing, employment, disability, and burial benefits from the U.S. Department of Veterans Affairs (VA), and in many cases even healthcare. Bad paper can also make it difficult for veterans to secure private employment and subject them to lingering stigma and shame.

Unfortunately, for decades, these record correction boards have failed to function as intended by Congress. They refused to permit veterans to appear before them personally, failed to disclose information about the boards' work, and most importantly, engaged in a near-categorical refusal to correct the discharge status of veterans suffering from post-traumatic stress disorder (PTSD), denying more than 95% of such applications from Vietnam veterans in the last 15 years. In September 2014, following criticism by veterans' organizations and the media, congressional scrutiny led by Senator Richard Blumenthal, and class-action litigation, Secretary of Defense Chuck Hagel ordered the boards to grant "liberal consideration" to applications from veterans with PTSD. This "PTSD Upgrade Memo" also required the boards to create a comprehensive public messaging campaign to inform veterans who have long suffered the stigma of bad paper of this new opportunity for redress. The PTSD Upgrade Memo sought to provide a legitimate chance at obtaining a record correction for hundreds of thousands of veterans who had received bad paper discharges when the effects of PTSD were unknown, as in the Vietnam War, or not fully understood.

To monitor implementation of the PTSD Upgrade Memo, Vietnam Veterans of America (VVA) and the National Veterans Council for Legal Redress (NVCLR) requested records from the Department of Defense (DOD) in December 2014 and June 2015. When DOD failed to disclose these records, the organizations brought suit under the Freedom of Information Act. Eventually, during the course of litigation, the Army released hundreds of pages of records. The Navy, which adjudicates applications for both the Navy and the Marines, and the Air Force have disclosed few responsive records. This report is based on the records newly-obtained by VVA and NVCLR and presents the first detailed look at compliance with the adjudication and outreach requirements of the PTSD Upgrade Memo.



KEY FINDINGS

Since Secretary Hagel issued the PTSD Upgrade Memo in September 2014:

- The overall grant rate for all veterans applying for PTSD-based discharge upgrades at the Army Board for the Correction of Military Records (ABCMR) has risen more than twelve-fold from 3.7% in 2013 to 45%.
- The grant rate for Vietnam veterans applying for PTSD-based discharge upgrades at the ABCMR has increased more than ten-fold from 5.6% in 2013 to 59%.
- Vietnam veterans are the most numerous applicants (67%) and have a higher grant rate at the ABCMR (59%) than veterans of other conflicts.
- The ABCMR granted 67% of applications by a veteran with a PTSD diagnosis (74/110) and 0% of applications by a veteran claiming to suffer PTSD but without medical records establishing that diagnosis (0/54).
- Total PTSD upgrade decisions across the military's record correction boards have increased from approximately 39 per year to approximately five times that number.
- Tens of thousands of eligible veterans appear not to have submitted applications.
- DOD has conducted little or no meaningful public outreach, a finding consistent with the low numbers of new applications when compared to the number of eligible veterans.
- Of upgrades awarded by the ABCMR, 97% have been to General Under Honorable Conditions (72/74) and 3% have been to Honorable (2/74).

RECOMMENDATIONS

To ensure compliance with the PTSD Upgrade Memo’s twin requirements of “liberal consideration” in adjudications and comprehensive outreach to eligible veterans, Congress should enact legislation that:

- 1) Codifies the presumption of an upgrade for those with a medical diagnosis of PTSD.
- 2) Directs the boards to refer veterans for mental health evaluations when their applications assert evidence of PTSD without a formal diagnosis, so that veterans without access to health care can still receive a fair adjudication.
- 3) Requires that a mental health professional serve on any board reviewing the application of a veteran asserting PTSD, traumatic brain injury, or other service-related mental health conditions.
- 4) Requires the DOD to implement a vigorous outreach program to identify eligible veterans and advise them how to apply for discharge upgrades successfully.
- 5) Directs the boards to release regular annual reports summarizing their application determinations in order to ensure accountability and transparency.

BACKGROUND

The service branches discharged roughly 260,000 Vietnam veterans with “bad paper”—i.e. an Undesirable Discharge (UD), which was later renamed an Other Than Honorable (OTH) discharge; a Bad Conduct Discharge (BCD); or a Dishonorable Discharge (DD)—stemming from misconduct during their service.¹ Many thousands more service members have received bad paper since then. A service member who receives an OTH, BCD, or DD is generally ineligible to receive VA benefits, including education, housing, employment, disability compensation, burial benefits, and, in many cases, even healthcare.² These former service members often face intense stigma, and in addition to their ineligibility for a wide range of VA benefits, they confront lifelong barriers to private employment³ and even membership in some veterans’ service organizations. Many veterans with bad paper suffer unemployment and homelessness.

**THE SERVICE
BRANCHES
DISCHARGED ROUGHLY
260,000
VIETNAM VETERANS
WITH “BADPAPER”**

Until 1980, PTSD was not recognized as a medical diagnosis. After 1980, some Vietnam and other veterans who realized that their undiagnosed PTSD symptoms had contributed to the misconduct resulting in their bad discharge applied for discharge upgrades to the administrative boards established by Congress to correct an error or injustice in a service member’s discharge.⁴ The record correction boards rejected these applications on a near-categorical basis, however. Between 1998 and 2013, for example, the ABCMR reviewed 371 upgrade applications from Vietnam veterans with an OTH asserting PTSD, and granted upgrades for only 4.6% of them.⁵ Moreover, the boards almost universally refused to permit veterans to appear before them for in-person hearings, denying them more comprehensive process to make their claims.⁶

In recent years and during contemporary conflicts, veterans' advocates and the armed service branches have paid greater attention to how PTSD contributes to misconduct that might result in a bad paper discharge. Tens of thousands of former service members had undiagnosed PTSD at the time of their discharge; in fact, a major study conducted by the VA estimates that 30.9% of Vietnam veterans have had PTSD in their lifetime.⁷

Since at least the early 1990s, the record correction boards' near-categorical rejection of applications by Vietnam veterans with undiagnosed PTSD has received criticism from veterans' organizations and the public and become the subject of congressional scrutiny, led by Senator Richard Blumenthal (D-CT) and the Senate Armed Services Committee.⁸ In March 2014, VVA, NVCLR, and five individual veterans filed a proposed nation-wide class-action lawsuit on behalf of Vietnam veterans with PTSD who received an OTH.⁹

In response, in September 2014, then-Secretary of Defense Chuck Hagel directed the boards to reform their practices. Specifically, he issued the PTSD Upgrade Memo, which ordered the boards to give "liberal consideration" to PTSD-based applications for discharge upgrades. The Memo also required military boards to create a comprehensive public messaging campaign to inform veterans of this new opportunity. Since the branches had historically failed to acknowledge the legitimacy of PTSD-based claims, the Upgrade Memo laid the groundwork for a radical change in how PTSD-based claims would be assessed. It also promised to encourage tens of thousands of veterans who had received bad discharges as a result of PTSD to apply to the boards in order to correct this injustice.

In order to monitor service branches' implementation of the PTSD Upgrade Memo and outreach efforts, VVA and NVCLR filed a series of Freedom of Information Act requests seeking policy documents and statistical data regarding PTSD upgrade applications and the outreach efforts mandated by Secretary Hagel. After DOD refused to produce timely, responsive records, in May 2015 the organizations brought suit in U.S. District Court for the District of Connecticut to enforce the public's right of access to this information.¹⁰ In addition, in May 2015 the Senate Armed Services Committee directed DOD to report statistical information regarding PTSD-based discharge applications since the Memo was issued.¹¹ DOD delivered its report in August 2015, stating that it had received 201 PTSD-based discharge upgrade applications as of that date, and of those that had been adjudicated, the boards granted upgrades in 38% of the cases.¹²

However, DOD's report lumped together the statistics of all three branches and disclosed no information about the grounds on which 62% of the applications were denied, making it difficult to evaluate each branch's individual performance. Nor did the report provide much insight into the boards' criteria or DOD's outreach efforts.

DOD'S REPORT LUMPED TOGETHER THE STATISTICS OF ALL THREE BRANCHES AND DISCLOSED NO INFORMATION ABOUT THE GROUNDS ON WHICH 62% OF THE APPLICATIONS WERE DENIED

In response to the FOIA lawsuit filed by VVA and NVCLR, the Army produced hundreds of records. Crucially, these records included a substantial number of decisions on PTSD upgrade applications issued by the ABCMR since issuance of the PTSD Upgrade Memo. The Navy and

the Air Force refused to produce similar documents from their respective boards, the Board for the Correction of Naval Records (BCNR) and the Air Force Board for the Correction of Military Records (AFBCMR), claiming that a manual search of their largely un-digitized records would be unduly burdensome.¹³

This report summarizes the results of the relevant ABCMR decisions, as well as the authors' own manual search of online databases maintained by the BCNR and AFBCMR. This report thus represents a first look at how the PTSD Upgrade Memo has been implemented, based on the records disclosed by the DOD to date as a result of the FOIA lawsuit.

FINDINGS AND ANALYSIS

1. The Army (ABCMR)

The Army provided by far the most comprehensive response to NVCLR and VVA's FOIA requests, disclosing, most importantly, copies of 164 post-PTSD Upgrade Memo decisions on PTSD-based discharge upgrade applications. Of these decisions, 74 resulted in discharge upgrades (45%). This grant rate represents a substantial improvement over the historically low grant rates for PTSD-based applications. (As noted above, between 1998 and 2013, the ABCMR granted only 4.6% of discharge upgrade applications from Vietnam veterans with an OTH who asserted PTSD).¹⁴

The 164 PTSD-based decisions released by the Army also represent a substantial increase in its annual PTSD-based applications from years past. In the year following the PTSD Upgrade Memo, it has adjudicated over five times the historical average of annual PTSD-based applications to all military boards combined.¹⁵

Examination of these decisions demonstrates that the ABCMR requires successful applications to make three showings: (1) a credible diagnosis of PTSD by a competent medical expert; (2) that an applicant was subjected to the "ordeals of war," or to trauma during service that could have plausibly caused PTSD; and (3) some indication that the applicant's misconduct is reasonably traceable to PTSD (in other words, the ABCMR looks for a causal nexus). These factors mean that ABCMR denials generally found that an application lacked a PTSD diagnosis, failed to show that PTSD was caused or exacerbated by a combat-related incident, or involved discharges due to misconduct that was not plausibly traced to PTSD.

Out of the 90 applications denied in this set of ABCMR cases, the Board stated that 54 (60%) lacked a credible PTSD diagnosis altogether. When the Board found that applicants had provided a PTSD diagnosis from a "competent medical authority," the ABCMR tended to grant the upgrade request. Of 110 such applications, 74 (67%) resulted in grants. Conversely, all 54 applications that the ABCMR concluded lacked a credible PTSD diagnosis were denied.

ABCMR DECISIONS BY THE NUMBERS

164

DECISIONS

67%

VIETNAM VETERANS

97%

WITH OTHER THAN
HONORABLE DISCHARGES

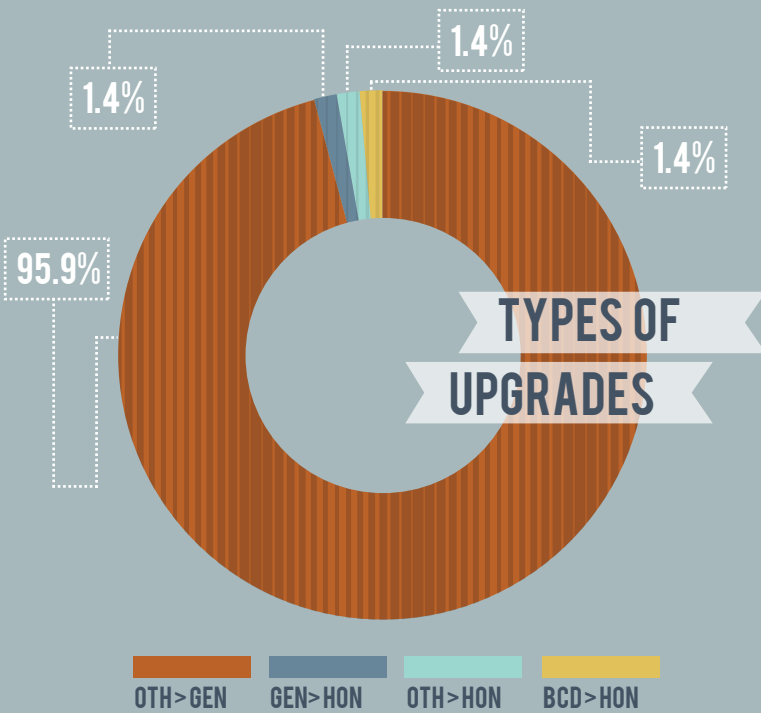
BY THE NUMBERS

The Army Board for Corrections of Military Records (ABCMR) is the only Board that provided copies of its post-Hagel Memo PTSD-based discharge upgrade decisions. These charts break down the ABCMR numbers.

90
DENIALS

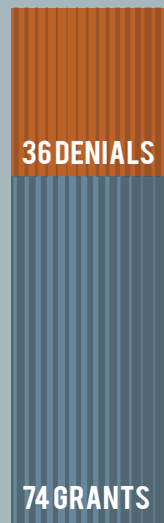
74
GRANTS

AFTER IMPLEMENTATION



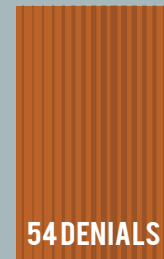
DIAGNOSED v. UNDIAGNOSED

WITH DIAGNOSIS



Having a credible PTSD diagnosis is often decisive. No applications were granted without one. This is problematic for Vietnam veterans, who were discharged before PTSD existed as a diagnosis.

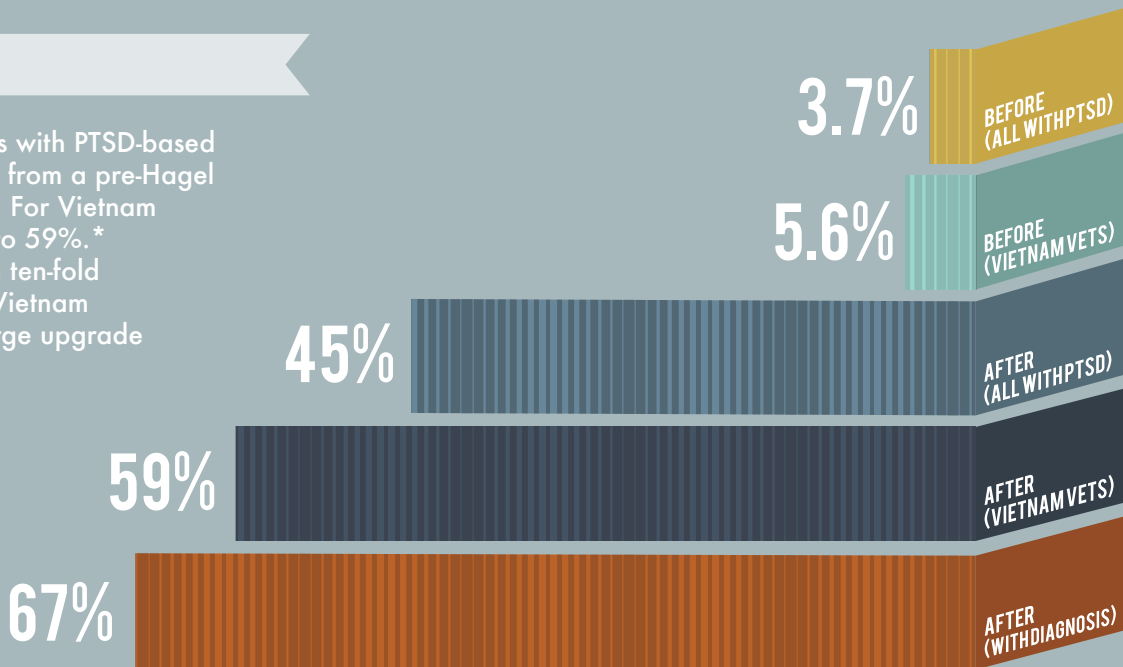
WITHOUT DIAGNOSIS



BEFORE & AFTER

The overall grant rate for all veterans with PTSD-based discharge upgrade applications rose from a pre-Hagel Memo rate of 3.7% in 2013 to 45%. For Vietnam veterans, it rose from 5.6% in 2013 to 59%.^{*} Although this constitutes a more than ten-fold increase for all veterans, as well as Vietnam veterans, the total number of discharge upgrade applications remains low due to the Department of Defense's failure to conduct public outreach to the tens of thousands eligible veterans.

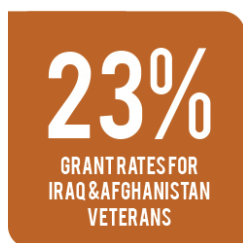
^{*}The 2013 numbers are based on a review by the Veterans Legal Services Clinic at Yale Law School of all ABCMR decisions available on the ABCMR website for that year.



As to the degree of upgrades granted in successful cases, 96% of grants were from an OTH/UD to General (71/74). Only 2 out of 74 grants resulted in an upgrade to Honorable (HON), and the ABCMR upgraded one BCD to General.



Vietnam veterans comprised a majority of PTSD-related discharge upgrade applications (67%) and also enjoyed a substantially higher grant rate (59%) compared to the general 45% grant rate for all applicants. The grant rate for Vietnam veterans was significantly higher than that for veterans of other wars. For example, veterans of Afghanistan and Iraq had a 23% grant rate.



This discrepancy may be explained by the ABCMR's greater willingness to accept belated PTSD diagnoses from Vietnam veterans than from veterans of more recent wars. The Board reasoned that as PTSD was not a known condition during the Vietnam War, soldiers could not possibly have been diagnosed with PTSD during their service. In the Afghanistan and Iraq conflicts, which came after the recognition of PTSD as a medical condition, the ABCMR tended to reason that if the soldier truly had PTSD during service, he or she would have been diagnosed by the military. This

reasoning is potentially problematic, as the full extent of PTSD's effects on behavior has only recently become better understood, delayed-onset PTSD may not manifest during service, and while improved, the Army's procedures for identifying soldiers with PTSD remain imperfect.

The most common reason given by the ABCMR when denying an application was the lack of a PTSD diagnosis, which accounted for 60% of the Board's denials. In a minority of denials, the ABCMR stated that the applicant's misconduct was too severe or extensive to warrant an upgrade. Such misconduct included rape, attempted murder or threats to kill, the use of certain drugs (e.g. heroin, cocaine, amphetamines), theft, and assault. The Board also generally held that misconduct it considered premeditated was presumptively unrelated to PTSD. In evaluating whether PTSD derived from an applicant's service, the ABCMR generally did not question applicants' stories, particularly when the applicant served in areas of intense conflict. The Board tended to recognize that Vietnam veterans, especially, were subjected to the "ordeal of war."

2. The Navy and Marines (BCNR)

The Navy oversees records corrections for both the Navy and the Marines. Like the Army, Marines supplied ground troops in Vietnam and other conflicts, making them account for a significant portion of the military's PTSD diagnoses.

The Navy has produced almost no records regarding implementation of the PTSD Upgrade Memo in response to the FOIA requests submitted by VVA and NVCLR. In other words, it has produced no statistics or copies of decisions related to post-

PTSD Upgrade Memo PTSD-based applications for discharge upgrades. (Though it did provide comprehensive data on pre-PTSD Upgrade Memo applications to the BCNR). It has insisted that to search for and disclose records for PTSD-based discharge upgrade cases or statistics would be "unduly burdensome."

**THE NAVY HAS PRODUCED
ALMOST NO RECORDS
REGARDING IMPLEMENTATION
OF THE PTSD UPGRADE MEMO**

The Navy's refusal to search for or release responsive records remains the subject of litigation. Nevertheless, a limited manual search of the non-digitized online BCNR database (a significant percentage of its contents cannot be searched electronically) yielded a rough estimate of post-PTSD Upgrade Memo grant rates of PTSD-based applications.

This non-exhaustive manual review of BCNR decisions posted online identified 12 post-PTSD Upgrade Memo PTSD-based discharge upgrade decisions. Of these, BCNR granted 33% (4/12). This rate, assuming it is indicative of the BCNR's general post-Memo statistical trend, could represent a significant improvement when compared with the BCNR's extremely low recent grant rate for OTH/UD applications, based on PTSD or otherwise. According to one of the few FOIA documents that the BCNR did release, the Board granted only 5% of all requests for an upgrade from OTH/UD in 2000-12, whether that application was based on PTSD or any other ground.¹⁶ Until the Navy makes its records and relevant statistics more accessible to the public, however, it will remain difficult to conduct a more comprehensive and accurate assessment of the branch's performance regarding PTSD-based claims.

3. The Air Force (AFBCMR)

The Air Force, like the Navy, contended that a search of AFBCMR records for PTSD-based discharge upgrade cases or statistics would be "unduly burdensome" given that its records remain largely un-digitized. That position remains subject to litigation. A manual search of the AFBCMR's online database did not turn up a sufficient number of post-PTSD Upgrade Memo PTSD-based discharge upgrade cases to yield an estimated grant rate. Of 3 PTSD cases identified, the AFBCMR denied 2 and granted 1, albeit on the basis of an equity claim rather than consideration of the applicant's PTSD.

The Air Force's minimal response to NVCLR and VVA's FOIA requests leaves unresolved the question of whether, and to what degree, the Air Force has complied with the PTSD Upgrade Memo. PTSD-based discharge upgrade cases appear to be far less prevalent in the Air Force, however, than in the other two branches.

4. Total volume of applications

It appears that in the wake of the PTSD Upgrade Memo, the number of PTSD-based applications to the boards has increased several-fold. It is difficult to calculate the extent of the increase with precision because no board disclosed records showing the annual rate of PTSD-based discharge upgrade applications in the years before issuance of the PTSD Upgrade Memo. Nevertheless, it is possible to estimate the pre-Memo rate of all PTSD-based applications by extrapolating from a prior study, which identified 375 PTSD-based decisions on applications in the years 1998-2013, but which counted only Vietnam veterans with an OTH/UD.¹⁷ The current analysis of post-Memo decisions by the ABCMR shows that non-Vietnam veterans made 33% of the applications. Applying this ratio to the pre-Memo period would suggest that the boards decided an additional 188 PTSD applications by non-Vietnam veterans in the 1998-2013 period, for an estimated total of 563 PTSD decisions on applications by veterans with an OTH/UD. In addition, the current analysis of post-Memo decisions by the ABCMR shows that 3% were made

by veterans with a discharge status other than OTH/UD. Applying this ratio to the pre-Memo period would suggest that the boards decided an additional 17 applications by veterans with a discharge status other than OTH/UD. This analysis yields an estimate that the boards collectively decided 580 PTSD-based applications from 1998-2013, including veterans from any conflict and with any discharge status. This yields an annual rate of approximately 39 PTSD-based decisions in the 15 years before Secretary Hagel issued the PTSD Upgrade Memo.

The data from the post-Hagel period shows a significant increase in the number of applications. DOD's August 2015 report to the Senate Armed Services Committee (SASC) reports that the boards collectively received 201 PTSD-based applications since issuance of the Upgrade Memo. This report's analysis of FOIA disclosures and BCNR online resources for approximately the same period covered by 2015 SASC report identifies 179 board decisions. Taken together, these figures indicate that PTSD-based applications to the boards have increased from approximately 39 per year to approximately 200 per year, approximately a five-fold increase.

5. Outreach

The branches' responses to FOIA requests asking for all records related to the outreach directed by Secretary Hagel were meager and suggest that DOD's outreach efforts have been perfunctory and inadequate. Concerning its outreach, the Army disclosed internal emails related to its outreach strategy (which involved, for example, sending a single letter to Veterans Service Organizations and Military Service Organizations in January 2015 as well as the publication of a few articles publicizing the PTSD Upgrade Memo in Army periodicals),¹⁸ but these emails gave no indication of any large-scale outreach effort. The Navy, for its part, stated that it did not possess any relevant records. The Air Force provided two short internal emails discussing its outreach strategy, as well as a one-page "Public Affairs Engagement Plan" including plans to publish a series of articles in military publications related to the PTSD Upgrade Memo and a plan to include application procedures and Frequently Asked Questions sections on the Air Force Veteran information webpage specifically aimed at veterans with PTSD.¹⁹ It is not clear from the Air Force FOIA response that any such articles were actually published or that slightly tweaking its webpage has actually resulted in meaningful outreach to eligible veterans. None of the branches produced any documentation suggesting that its outreach efforts under the PTSD Upgrade Memo have been adequate or sufficiently prioritized.

**DOD'S OUTREACH
EFFORTS HAVE BEEN
PERFUNCTORY
AND INADEQUATE**

DOD's 2015 report to the Senate Armed Services Committee also listed a series of modest initiatives, including: a brief initial public announcement; a single press interview given by a DOD official to *The Military Times*; a briefing (not well-defined in the report) to Veterans Service Organizations; a single speech given by the President of the NDRB to 30 civilian attorneys in Baltimore as part of the Maryland State Bar's continuing legal education program, followed by a single briefing of 50 civilian attorneys working with the Urban Justice Center's Veteran Advocacy Project in New York City; and a direct outreach effort by the VA, working in tandem with the DOD Physical Disability Board of Review (PDBR), to 5,100 veterans eligible to

apply to the PDBR -- a different body from the record corrections boards, which have jurisdiction to upgrade the discharge status of former service members.²⁰

The branches' underwhelming FOIA responses to requests for all records pertaining to outreach efforts, the low number of new applications, and DOD's own account of its piecemeal and inadequate outreach efforts, demonstrate that DOD is not doing nearly enough to identify and contact all eligible veterans. As such, it is failing to comply with the requirements of the PTSD Upgrade Memo.

CONCLUSIONS AND RECOMMENDATIONS

The results of this FOIA release present two diverging stories. The first is one of optimism for veterans with bad paper who currently seek discharge upgrades through the ABCMR. The Army's comprehensive disclosure of recent PTSD-based discharge upgrade decisions reveals a substantial rise in grant rates since September 2014. As described, veterans today who apply through the ABCMR for discharge upgrades are ten times more likely to receive an upgrade than veterans who applied prior to Secretary Hagel's directive, and those who apply with evidence of a diagnosis of PTSD are fifteen times more likely to succeed than before the directive. This new probability of success makes it even more critical for the Army and DOD to conduct significant coordinated outreach efforts so that eligible veterans know that discharge upgrades are possible, particularly if they possess a PTSD diagnosis.

Despite this demonstrated improvement, these results also reveal the tremendous work that must still be done to ensure that veterans with PTSD and less than honorable discharges receive the upgrades and benefits to which they are legally entitled. The Army's release highlights several obstacles to board reform, accountability, and transparency. Further, the release exposes the ABCMR's failure to adequately enable veterans to prepare applications that are more likely to be successful upon review. These obstacles, and their proposed solutions, are described below.

1. Legislation should codify a presumption of record correction for veterans with documented PTSD so that boards continue to improve their handling of PTSD-related discharge upgrade applications.

Since Secretary Hagel's directive, the ABCMR has approved PTSD-based discharge upgrade applications for Vietnam veterans at a rate almost ten times higher than previously, increasing from 5.6% for Vietnam veterans with PTSD in 2013 to 59%. The ABCMR grant rate increased even more dramatically for veterans who submitted a documented PTSD diagnosis to 67%. These figures confirm the powerful effect of Secretary Hagel's issuance of the Memo and also indicate how egregiously the Board mishandled PTSD-related applications in the past. The ABCMR has clearly modified its internal methods for reviewing applications from veterans with OTHs/UDs and BCDs when they include a PTSD diagnosis. However, further action is needed to ensure that veterans with PTSD consistently and *continually* receive special and liberal consideration by the boards. To solidify and promote the positive trend, Congress should enact legislation that (1) provides for a presumption of record correction for veterans with documented PTSD and (2) codifies liberal standards of consideration for evidence of PTSD.

2. Boards should refer veterans for mental health evaluations when their applications assert evidence of PTSD without a formal diagnosis so that veterans without access to health care may still successfully apply.

Only veterans with a formal diagnosis of PTSD successfully received discharge upgrades from the ABCMR. Undiagnosed veterans who asserted symptoms of PTSD were uniformly unsuccessful (0/54 at the ABCMR). Critically, veterans with bad paper face two obstacles to obtaining a formal diagnosis. First, it was impossible for a Vietnam veteran to be formally diagnosed with PTSD during and immediately after the war because PTSD did not exist as a recognized condition until 1980. Second, many veterans with OTHs and all veterans with BCDs are prohibited from accessing healthcare at VA hospitals or clinics, meaning these veterans cannot readily access mental health evaluations. Without the ability to seek out and acquire a diagnosis from a VA physician or other provider, these veterans face a major barrier to upgrading their discharges and receiving the benefits required for employment, education, housing, and healthcare.

To ensure that veterans have the opportunity to obtain a PTSD diagnosis, boards across the branches should refer discharge upgrade applicants to the Department of Veterans Affairs or another medical provider for a medical evaluation when veterans describe PTSD symptoms without a formal diagnosis. The medical evaluation would then be included with the veteran's overall application. If the evaluation produces a positive diagnosis for the disease, that veteran could then receive the special consideration required by the DOD.

3. A mental health professional should serve on the boards when reviewing applications where veterans assert PTSD, traumatic brain injury, and other service-connected mental health conditions.

No mental health professional participates in or consults for these boards when upgrade applications are reviewed. To empower the boards to better review upgrade petitions submitted by veterans with mental health conditions, a psychologist or psychiatrist must serve on the correction board when applicants raise PTSD and other mental health claims. Congress currently requires mental health professions to sit on Discharge Review Boards (DRBs) under 10 U.S.C. § 1553(d)(1) when applicants assert PTSD and traumatic brain injuries (TBIs). Extending this requirement to boards would allow older veterans who are time-barred from DRBs, as well as veterans appealing DRB decisions, to receive the same statutory due process as other veterans when submitting upgrade applications.

Notably, PTSD is only one of the many mental health conditions suffered by veterans in the United States. If the boards improperly denied nearly all PTSD-related discharge applications submitted prior to September 2014—applications which otherwise should have been approved—the boards likely mishandle upgrade applications submitted by veterans with other mental health conditions. As discussed above, veterans are typically barred from mental health care at VA hospitals and clinics when they receive bad paper discharges, meaning veterans often go undiagnosed and unable to substantiate mental health-related claims asserted in petitions for discharge upgrades. Without significant reform within these boards, veterans with TBIs and

psychological disorders will be unsuccessful in acquiring discharge upgrades and the attending benefits they deserve.

4. The DOD must implement a coordinated outreach program to ensure that veterans know how to apply for discharge upgrades successfully, particularly in light of the ABCMR's compliance with the liberal consideration standard.

Hundreds of thousands of veterans have an OTH/UD or BCD – approximately 260,000 from the Vietnam War alone. A third or more of these veterans have service-related PTSD. Yet the records disclosed by DOD in this FOIA litigation reveal that it has taken almost no steps to comply with Secretary Hagel's requirement that it develop a messaging and outreach campaign. Moreover, DOD own records reveal how infrequently veterans pursue upgrades through the boards. According to the 2015 SASC report, only 201 veterans applied to the boards since Secretary Hagel issued the PTSD Upgrade Memo. This small number of applicants strongly suggests that the DOD has failed to identify veterans with bad paper, inform them of the September 2014 directive, or communicate how they apply.

The DOD, its component branches, and the VA should engage in significant coordinated outreach efforts to identify eligible veterans and help them to submit applications to the boards. Critically, the DOD should also articulate how veterans can be successful when they submit petitions for upgrades. The ABCMR uniformly denied veterans without diagnoses of PTSD (0/54 granted). Accordingly, the DOD and VA should inform veterans that to secure a PTSD-based upgrade, they are strongly advised to first obtain a mental health examination and a diagnosis of PTSD.

Further, the DOD can direct the boards to implement other reforms that will enable veterans to advocate for themselves upon applying. Boards should offer in-person or video-conference correction board hearings, which Congress already requires of DRBs under 10 U.S.C. § 1553(c). Finally, Congress should promote access to legal services by permitting prevailing veterans to recover attorneys' fees.

5. Boards should release regular annual reports summarizing their application determinations in order to ensure accountability and transparency.

VVA and NVCLR submitted their FOIA requests because the boards provided no clear mechanism for determining how veterans could successfully apply for discharge upgrades. The boards do not publish statistics related to who submits applications, whether these applications are denied or approved, and why certain applications are more successful than others. Further, the boards provide no meaningful transparency with regards to their internal regulation and deliberations, effectively shielding themselves from scrutiny from the DOD, Congress, and the public. In each of the past two years, the Senate Armed Services Committee, at the initiative of Senator Blumenthal, has required some reporting by the boards in its committee report on the National Defense Authorization Act.²¹ Without more detailed information, however, veterans

and their advocates lack the tools to compile and submit successful petitions for upgrade. Moreover, Congress and legal advocates cannot hold boards accountable for consistent mistreatment and mishandling of upgrade applications. Thus, Congress should compel boards to issue annual reports on discharge upgrade approvals and denials, including details regarding applications based on TBI, PTSD, and other mental health conditions.

Notably, this report itself is insufficient in its characterization of how all three branches adjudicate petitions for discharge upgrades through correction boards. Due to the Navy and Air Force's refusal to provide determinations made by their respective boards, it is impossible to meaningfully evaluate whether the Navy or Air Force are adequately complying with Secretary Hagel's directives to give PTSD-related applications liberal consideration. In effect, the Navy and Air Force's refusal to release decisions, or to make decisions genuinely accessible and searchable, was a refusal to be held accountable. To ensure that upgrade applications submitted by veterans with documented PTSD are treated fairly into the future, Congress should require board accountability through legislated reporting requirements.

REFERENCES

¹ Rebecca Izzo, *In Need of Correction: How the Army Board for Correction of Military Records Is Failing Veterans with PTSD*, 123 YALE L.J. 1587, 1588 (2014).

² U. Moulta-Ali & S.V. Panangala, *Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility*, Cong. Res. Serv. (2015). Notably, veterans with a Bad Conduct Discharge (BCD) may not receive healthcare at a VA hospital. Those veterans with an OTH may receive VA healthcare if they receive a favorable character of discharge determination from the VA to receive other benefits, such as disability compensation. See *Veterans Discharge Upgrade Manual*, CONN. VETERANS LEGAL CTR. 9 (2011), <http://ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-2011.pdf>.

³ *Id.*

⁴ Izzo, *supra* note 1, at 1587, 1591-92.

⁵ This figure was developed through independent research conducted by Yale Law School students using the Department of Defense's public records dating back to 1993, available at <http://boards.law.af.mil>.

⁶ Eugene R. Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, 65 ADMIN. L. REV. 499, 502 (2013) (“[T]he boards rarely exercise their power to conduct evidentiary hearings. The Army Board for Correction of Military Records conducted no live hearings in fiscal year 2012. The BCNR has not conducted one in the last twenty years. The Coast Guard board has not conducted one in the last ten years.”).

⁷ PTSD: National Center for PTSD, *How Common is PTSD?*, U.S DEP'T FOR VETERANS AFFAIRS, (2015), <http://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp>. The Center for PTSD also reported rates of PTSD for veterans in other military theaters. Of veterans serving in operations Iraqi Freedom and Enduring Freedom, about 11-20% have PTSD in a given year. Of veterans who served in the Gulf War (Desert Storm), about 12% have PTSD in a given year.

⁸ See REPORT OF THE SENATE ARMED SERV. COMM. ON THE NAT'L DEFENSE AUTHORIZATION ACT, S. REP. No. 113-176, at 106-07 (2014); see also REPORT OF THE SENATE ARMED SERV. COMM. ON THE NAT'L DEFENSE AUTHORIZATION ACT, S. REP. No. 114-49, at 136-37 (2015).

⁹ Complaint, *Monk v. Mabus*, No. 3:14-cv-260-WWE (D. Conn. filed Mar. 3, 2014), ECF No. 1.

¹⁰ *Vietnam Veterans of America et al. v. Dept. of Defense*, No. 3:15-cv-658-VAB (D. Conn. filed May 4, 2015).

¹¹ See *supra* note 8, S. REP. No. 114-49, at 136-37; see also *Review of Petitions for Review of Discharge or Dismissal from the Armed Forces of Veterans With Mental Health Issues Connected with Post-Traumatic Stress Disorder or Traumatic Brain Injury*, DEP'T OF DEFENSE (August 24, 2015) [hereinafter *Review of Petitions for Review*].

¹² See *Review of Petitions for Review*, *supra* note 11.

¹³ The Navy did provide comprehensive pre-PTSD Upgrade Memo statistics on applications to the BCNR in its original FOIA response. See Navy Interim FOIA Response (February 13, 2015). (Containing, among other documents, BCNR Annual Report January 1980 to December 1989 (Pg. 7); BCNR Annual Report, January 1990 to

December 1999 (Pg. 9); BCNR Annual Report, January 2000 to December 2012 (Pg. 11). Each of these reports includes detailed statistics on applications to the board, BCNR grant rates, and breakdowns according to the nature of the claim.

¹⁴ This figure was developed through independent research conducted by Yale Law School students using the Department of Defense's public records dating back to 1993, available at <http://boards.law.af.mil>.

¹⁵ See *infra* Part 4: Total Volume of Applications.

¹⁶ See *supra* note 13.

¹⁷ This figure was developed through independent research conducted by Yale Law School students using the Department of Defense's public records dating back to 1993, available at <http://boards.law.af.mil>.

¹⁸ See Army Interim FOIA Response (March 17, 2015), FOIA FA-15-0089, at 13, 222, 227.

¹⁹ See Air Force Interim FOIA Response (September 18, 2015), VVA AF 024, at 24.

²⁰ See *Review of Petitions for Review*, *supra* note 11. It is not at all clear how many of these individuals had PTSD-related claims. According to the report, 1,845 responded with applications for review of their cases, a vastly greater number than the 201 PTSD-related discharge upgrade cases the DOD reported in 2015 to SASC.

²¹ *Report: Department of Defense Review of Vietnam Veteran Post Traumatic Stress Disorder Cases*, DEP'T OF DEFENSE (November 2014); *Review of Petitions for Review*, *supra* note 11.