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## **For All Who Have Borne the Battle: A Wish List For the Incoming Secretary of the United States Department of Veterans Affairs**

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**FOR ALL WHO HAVE BORNE THE BATTLE: A WISH LIST  
FOR THE INCOMING SECRETARY OF THE UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS**

*Benjamin Pomerance*\*

**ABSTRACT**

The Secretary of the United States Department of Veterans Affairs (“VA”) possesses one of the most challenging job descriptions in the executive branch of the federal government.<sup>1</sup> To hold this position is to preside over the largest integrated healthcare system in the United States, one of the largest and most bureaucratically complex

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<sup>1</sup> See Tom Temin, *Former VA Secretary Shulkin Lays Out Challenges Agency Will Be Facing*, FED. NEWS NETWORK (Jan. 14, 2021, 11:49 AM), <https://federalnewsnetwork.com/veterans-affairs/2021/01/former-va-secretary-lays-out-challenges-agency-will-be-facing>; see also Jaden Urbi, *The VA’s History of Setbacks and Missteps*, CNBC (May 28, 2018, 3:16 PM), <https://www.cnbc.com/2018/05/28/va-veterans-affairs-history-setbacks-missteps.html> (discussing many of the longstanding challenges with which VA leaders must grapple).

systems of benefits in the federal government, and a vast network of national cemeteries.<sup>2</sup> Fulfilling this job successfully requires a high proficiency in medicine, law, technology, and military affairs, coupled with the organizational ability to manage all of the various moving parts within this sprawling agency to complete their duties efficiently and effectively.<sup>3</sup> A delicate tightrope walk comes with every aspect of this post, safeguarding federal dollars while simultaneously ensuring that the agency carries out the mission assigned to it by decades of statutes and affirmed by decades of case law: providing a pro-claimant, non-adversarial system for veterans and their families to receive the benefits earned by virtue of their military service.<sup>4</sup> Perhaps most challenging of all, stepping into this position means filling a seat that has been in the public eye throughout recent memory, attempting to reverse course and erase a troubled legacy of scandals, abuses of power, inefficiencies, and attempts to sweep under the rug systemic problems that directly contradicted the VA's duties of serving the interests of all who served in this nation's military.<sup>5</sup>

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<sup>2</sup> 38 U.S.C. § 301; Temin, *supra* note 1.

<sup>3</sup> Donovan Slack & Dennis Wagner, *6 Big Things The New Veterans Affairs Chief Will Have To Address*, USA TODAY (Mar. 29, 2018, 6:50 PM), <https://www.usatoday.com/story/news/politics/2018/03/29/veterans-affairs-failures-go-beyond-ousted-secoutlive-three-secretaries-soon-four-including-david-sh/470573002>; see generally Editorial, *Can Trump's Doctor Cure What Ails VA?: Ousted VA Secretary David Shulkin was Making Good Progress. Ronny Jackson's Lack of Management Experience Raises Serious Concerns: Our View*, USA TODAY (Apr. 1, 2018, 11:40 AM), <https://www.usatoday.com/story/opinion/2018/03/29/shuklin-trump-ronny-jackson-va-editorials-and-debates/469876002>.

<sup>4</sup> Natsumi Antweiler, *Creating an Unprecedented Number of Precedents at the U.S. Court of Appeals for Veterans Claims*, 60 WM. & MARY L. REV. 2311, 2319 (2019); Benjamin P. Pomerance & Katrina J. Eagle, *The Pro-Claimant Paradox: How the United States Department of Veterans Affairs Contradicts Its Own Mission*, 23 WIDENER L. REV. 1, 2–5 (2017); Rory E. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS L. REV. 77, 115 (2010); Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. UNIV. L. REV. 361, 375 (2009); see also 38 U.S.C. § 5103A; 38 C.F.R. § 3.103(a); 38 C.F.R. § 20.700(c); *Anderson v. Brown*, 5 Vet. App. 347, 354 (1993); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).

<sup>5</sup> See, e.g., Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72

Into this complex and multi-faced system steps Denis McDonough, the longtime advisor to former President Barack Obama whom President Joe Biden nominated to serve as the VA Secretary in his administration.<sup>6</sup> Already, several veterans-focused interest groups have poorly received the nominee, critiquing President Biden for selecting someone who is not a veteran and someone with no prior experience in navigating the difficult waters of the VA's policies and procedures.<sup>7</sup> However, plenty of former VA Secretaries who were military veterans failed to lead the agency effectively; meanwhile, the landscape of advocacy for veterans in the United States is filled with leaders who are not veterans themselves, meaning that McDonough's lack of veteran status is certainly not indicative of future failure.<sup>8</sup> When considering the VA's imposing bureaucratic maze, McDonough's history as a "crisis-tested" Washington insider and a

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SMU L. REV. 277, 278–81 (2019); Michael J. Wishnie, "A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism, 97 B.U. L. REV. 1709, 1716–22 (2017); Daniel L. Nagin, *The Credibility Trap: Notes on a VA Evidentiary Standard*, 45 UNIV. MEMPHIS L. REV. 887, 887–92 (2015); Robert N. Davis, *Veterans Fighting Wars At Home and Abroad*, 45 TEX. TECH L. REV. 389, 400–04 (2013); Brian Reese, *The VA Secretary Nominee Denis McDonough: Here's How We Fix the Broken VA*, MILITARY.COM (Jan. 13, 2021), <https://www.military.com/daily-news/opinions/2021/01/13/va-secretary-nominee-denis-mcdonough-heres-how-we-fix-broken-va.html>; Slack & Wagner, *supra* note 3; Temin, *supra* note 1; Urbi, *supra* note 1.

<sup>6</sup> Franco Ordoñez & Quil Lawrence, *Biden Selects Denis McDonough As VA Secretary*, NPR (Dec. 10, 2020, 2:25 PM), [https://www.npr.org/sections/biden-transition-updates/2020/12/10/944980660/biden-selects-denis-mcdonough-as-va-secretary&usg=AOvVaw3GzitVd8HEFOn8x\\_qxKsXO](https://www.npr.org/sections/biden-transition-updates/2020/12/10/944980660/biden-selects-denis-mcdonough-as-va-secretary&usg=AOvVaw3GzitVd8HEFOn8x_qxKsXO).

<sup>7</sup> Caitlin McFall, *Biden's Pick of Denis McDonough for VA Sparks Pushback from Veterans*, FOX NEWS (Dec. 10, 2020), <https://www.foxnews.com/politics/bidens-pick-of-denis-mcdonough-for-va-sparks-pushback-from-veterans>.

<sup>8</sup> See Carrie Ann Alford, *An Open Letter to VA Secretary-Designate McDonough*, MIL. TIMES (Jan. 11, 2021), <https://www.militarytimes.com/opinion/commentary/2021/01/11/an-open-letter-to-va-secretary-designate-mcdonough/&usg=AOvVaw3CZorE9nAXahFSf-Y1FCv&cshid=1610915238802499> (providing recommendations for the new VA Secretary based on the failures of past VA leaders); see also Steve Brock & Jeff Le, *Veterans Will Benefit if Denis McDonough is Confirmed as Veterans Affairs Secretary*, FOX, Dec. 26, 2020, <https://www.foxnews.com/opinion/veterans-denis-mcdonough-steve-brock-jeff-le> (providing recommendations for the new VA Secretary based on the failures of past VA leaders).

master organizer offers plenty of reasons to hope, as he will be leading an agency that requires successful deployment of these skills daily.<sup>9</sup>

Still, as former VA Secretary David Shulkin noted immediately after the nomination was announced, McDonough will face “a big learning curve on specific issues when it comes to the VA.”<sup>10</sup> Thankfully, the new VA Secretary will enter this position with a winning playbook already in his hands, courtesy of the wide-ranging veterans-focused omnibus bill signed into law in January 2021.<sup>11</sup> This legislation encompasses crucial improvements in multiple areas: improving VA services for women veterans, eliminating outmoded barriers to veterans seeking to access their earned benefits, preventing veterans from losing education benefits when their colleges and universities are adversely impacted by the COVID-19 pandemic, and much more.<sup>12</sup> By implementing these new provisions efficiently, effectively, and sustainably, McDonough will likely receive praise from veterans and their families from coast to coast.<sup>13</sup>

Beyond these vital measures, however, other critical issues linger. For the incoming VA Secretary, many of these matters offer additional opportunities to achieve victories for veterans and their families, since successful implementation does not require new legislation. Rather, these changes can occur by amending the provisions in Title 38 of the United States Code of Federal Regulations that govern the VA’s processes and procedures, by altering sections of the VA’s own directives and internal operating manual, or simply by providing the necessary direction and leadership that the VA Secretary

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<sup>9</sup> Megan Cassella & Alex Thompson, *Biden to Tap Denis McDonough for Veterans Affairs*, POLITICO (Dec. 10, 2020, 3:11 PM), <https://www.politico.com/news/2020/12/10/denis-mcdonough-veterans-affairs-secretary-444213>.

<sup>10</sup> *Id.*

<sup>11</sup> See Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. No. 116-315, 134 Stat. 4935.

<sup>12</sup> Nikki Wentling, *Sweeping Veterans Bill Becomes Law, Impacting ‘Every Corner’ of the Community*, STARS & STRIPES (Jan. 6, 2021), <https://www.stripes.com/theaters/us/sweeping-veterans-bill-becomes-law-impacting-every-corner-of-the-community-1.657643>.

<sup>13</sup> See *id.* (discussing the bipartisan, wide-ranging nature of this legislation, and encompassing improvements in many areas where enhancements for veterans were long-overdue).

possesses authority to execute.<sup>14</sup> Equally important, these measures do not impose an undue budgetary burden upon the VA, especially considering that the VA is the federal government's second-largest agency in terms of discretionary spending.<sup>15</sup>

This article provides a wish list of nine items for the incoming VA Secretary to address, each of which offers a cost-effective, low-risk, high-reward path to victory on behalf of veterans and their families nationwide. Each of these items addresses a longstanding need that remains unmet at the time of this writing. For Secretary McDonough, this list offers opportunities to rapidly silence the critics who condemned his nomination as “shockingly out of touch” by demonstrating his grasp of this agency's challenges and his desire to implement systemic pro-veteran changes, beginning with his first days at the helm and continuing for the duration of his tenure.<sup>16</sup>

#### **I. RECOMMENDATION NO. 1: ADOPTING A GENDER-INCLUSIVE AGENCY MOTTO**

At first, one might question why the incoming VA Secretary should prioritize amending the motto of his agency. To answer this question, Secretary McDonough should examine two facts from recent history. First, Secretary McDonough should review the data demonstrating that women are “the fastest-growing cohort of veterans” nationwide.<sup>17</sup> Then, the new VA Secretary should study the furor that his predecessor, Robert Wilkie, unnecessarily and insensitively caused through his dogmatic refusal to amend a motto that quotes from Abraham Lincoln's second inaugural address: “To care for him who shall have borne the battle, and for his widow, and his orphan.”<sup>18</sup>

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<sup>14</sup> 38 U.S.C. § 501(a) (“The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws . . .”).

<sup>15</sup> Lawrence J. Korb, *Caring for U.S. Veterans: A Plan for 2020*, CTR. FOR AM. PROGRESS (Dec. 4, 2019, 9:03 AM), <https://www.americanprogress.org/issues/security/reports/2019/12/04/478034/caring-u-s-veterans-plan-2020>.

<sup>16</sup> See Cassella & Thompson, *supra* note 9.

<sup>17</sup> Jennifer Brookland, *The VA Is Hoping to Build Awareness and Trust Among Female Veterans*, KPBS (July 20, 2020), <https://www.kpbs.org/news/2020/jul/20/va-hoping-build-awareness-and-trust-among-female-v>.

<sup>18</sup> Patricia Wilson, *Secretary Wilkie Refuses to Change VA's Sexist Motto*, SC TIMES (June 22, 2020, 5:00 PM),

Lincoln never intended his words to be sexist or to reflect gender-based bias.<sup>19</sup> They were simply a product of their time, focusing on the federal government's obligation to provide care for the military personnel who suffered during the Civil War.<sup>20</sup> Times have changed, however, and the words that Lincoln spoke on March 4, 1865, no longer accurately reflect the picture of this nation's military in 2021.<sup>21</sup> An estimated 1.64 million veterans living in the United States today are women who have served this nation with honor.<sup>22</sup> The tacit exclusion of these courageous women from the VA's motto through this repeated use of the pronoun "he" is, by itself, reason enough to amend this motto immediately.

Reinforcing this urgency are the damning reports that arose during Secretary Wilkie's leadership of the VA, addressing a toxic misogynistic culture within the VA.<sup>23</sup> Data from 2019 showed that one in four veterans experience sexual harassment on the premises of

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<https://www.sctimes.com/story/opinion/2020/06/22/secretary-wilkie-refuses-change-vas-sexist-motto/3224512001>.

<sup>19</sup> See Carl J. Asszony, *Don't Condemn VA Motto As Sexist*, MY CENT. JERSEY (Nov. 5, 2018, 3:28 PM), <https://www.mycentraljersey.com/story/opinion/2018/11/05/opinion-condemn-va-motto-sexist/38401003> (discussing the debate surrounding changing the VA's motto to be more gender-inclusive).

<sup>20</sup> Notably, women were not lawfully permitted to fight in the Civil War, although historians believe that more than four hundred women did serve on the battlefields of that war, usually disguising themselves as men to do so. See Jess Righthand, *The Women Who Fought in the Civil War*, SMITHSONIAN MAG. (Apr. 7, 2011), <https://www.smithsonianmag.com/history/the-women-who-fought-in-the-civil-war-1402680>. As women were not legally permitted to enter the Union Army, it makes historical sense that Lincoln would address his remarks about caring for veterans specifically to men. See *id.*

<sup>21</sup> Brookland, *supra* note 17.

<sup>22</sup> U.S. Veterans By Gender, STATISTA (Jan. 20, 2021), [https://www.statista.com/statistics/250271%2Fus-veterans-by-gender%2F&usg=AOvVaw1xRhNVLfsy\\_bfSayOTilww](https://www.statista.com/statistics/250271%2Fus-veterans-by-gender%2F&usg=AOvVaw1xRhNVLfsy_bfSayOTilww).

<sup>23</sup> See Hope Yen, *Vets Group Demand Wilkie's Dismissal After Scathing Audit*, DAILY CITIZEN (Dec. 12, 2020), [https://www.thedailycitizen.com/news/national/vets-groups-demand-wilkies-dismissal-after-scathing-audit/article\\_719ea28a-3c3f-11eb-8f3d-4f83026f418f.html](https://www.thedailycitizen.com/news/national/vets-groups-demand-wilkies-dismissal-after-scathing-audit/article_719ea28a-3c3f-11eb-8f3d-4f83026f418f.html); see also Jennifer Steinhauer, *Treated Like a 'Piece of Meat': Female Veterans Endure Harassment at the V.A.*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/politics/women-veterans-harassment.html>.

VA medical facilities.<sup>24</sup> In September 2019, when United States Navy veteran Andrea Goldstein — the senior policy advisor for the Women Veterans Task Force on the House Veterans' Affairs Committee — reported suffering sexual harassment at the largest VA medical facility in Washington, D.C., senior leaders at the VA quickly questioned the veteran's statement rather than investigating the incident, according to the VA Inspector General's Office.<sup>25</sup> The Inspector General's report, released in December 2020, found that Secretary Wilkie engaged in "unprofessional and disparaging" conduct toward this veteran.<sup>26</sup> "The evidence is replete with examples of VA senior leaders undertaking defensive actions and engaging in confrontational messaging while failing to recognize the need to take corrective action to address known problems," stated the authors of this report. "The tone set by Secretary Wilkie was at minimum unprofessional and at worst provided the basis for senior officials to put out information to national reporters to question the credibility and background of the veteran who filed the sexual assault complaint."<sup>27</sup>

Shortly after the Inspector General's Office released this report, leaders from every major veterans' service organization in the United States publicly called for Wilkie's resignation, demands which Wilkie did not heed.<sup>28</sup> Amid such a climate, one might think that the agency would affirm their commitment to serving the women who have served this nation by reflecting this commitment in the agency's motto, especially given that leading voices in the veterans' community had advocated for a gender-inclusive motto since at least 2017.<sup>29</sup> The

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<sup>24</sup> Kayla Williams, *End Harassment at VA Hospital*, THE HILL (Oct. 28, 2019, 1:30 PM), <https://thehill.com/opinion/healthcare/467714-end-harassment-at-va-hospitals>.

<sup>25</sup> Matt Stieb, *VA Secretary Tried to Smear Sexual Assault Accuser, Inspector General Finds*, N.Y. MAG. (Dec. 13, 2020), <https://nymag.com/intelligencer/2020/12/va-secretary-doubted-aides-sexual-assault-claim-report.html>.

<sup>26</sup> U.S. DEP'T OF VETERANS AFF., OFF. OF INSPECTOR GEN., SENIOR VA OFFICIALS' RESPONSE TO A VETERAN'S SEXUAL ASSAULT ALLEGATIONS 26 (2020), <https://www.va.gov/oig/pubs/VAOIG-20-01766-36.pdf>.

<sup>27</sup> *Id.* at viii.

<sup>28</sup> Alex Ward, *Why Veterans Groups Want Trump's VA Secretary to Resign*, VOX (Dec. 17, 2020, 4:30 PM), [https://www.vox.com/2020/12/17/22180501/veterans-affairs-wilkie-letter-resign&usg=AOvVaw3uW61GrSzBnaGOVvD72\\_em](https://www.vox.com/2020/12/17/22180501/veterans-affairs-wilkie-letter-resign&usg=AOvVaw3uW61GrSzBnaGOVvD72_em).

<sup>29</sup> Leo Shane III, *Plans to Change VA Motto to Include Women Draws Republican Support*, MIL. TIMES (July 30, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/07/30/plan-to->



Secretary, however, had dogmatically affirmed and reaffirmed his refusal to amend the VA's motto throughout his tenure in this position, intimating that such a change would represent an affront to Lincoln.<sup>30</sup> In August 2020, Secretary Wilkie traveled to Lincoln's birthplace of Springfield, Illinois, dedicating a plaque bearing the VA's motto in the Camp Butler National Cemetery.<sup>31</sup> "The words that brought us here should not be diluted, parsed or cancelled," Wilkie declared in his remarks at this dedication ceremony.<sup>32</sup> He then went on to state that "the words that brought us here ought to be preserved as they were spoken and displayed so every generation understands the origin of America's progress in becoming the most tolerant nation on earth."<sup>33</sup>

This was far from Wilkie's only act to saturate VA properties and facilities with Lincoln's words.<sup>34</sup> On Memorial Day 2020, Wilkie announced his intention to install plaques bearing the VA's motto at more than 140 national cemeteries, a decision that Service Women's Action Network CEO Deshauna Barber called "a permanent acknowledgment that women veterans are not seen and their contributions are not recognized" by the VA.<sup>35</sup> At a House Veterans' Affairs Committee hearing in February 2019, Wilkie declared that he was not "arrogant enough to say [that he] want[ed] to change Abraham Lincoln's words," opposing measures to create a more gender-inclusive motto.<sup>36</sup> In July 2018, Jacqueline Hayes-Byrd, serving as the agency's Acting Chief of Staff, issued an agency-wide message statement ordering VA employees to refrain from paraphrasing or

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change-va-motto-to-include-women-draws-republican-support%2F&usg=AOvVaw2RvVuv6159149CU8ghwR.

<sup>30</sup> Wilson, *supra* note 18.

<sup>31</sup> Richard Sisk, *VA Secretary Moves to Block Gender-Neutral Change to Motto*, MILITARY.COM (Aug. 26, 2020), <https://www.military.com/daily-news/2020/08/26/va-secretary-moves-block-gender-neutral-change-motto.html>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See *infra* notes 35–37 and accompanying text.

<sup>35</sup> Leo Shane III, *VA To Engrave Controversial Motto in Bronze At All Department Cemeteries*, MIL. TIMES (June 4, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/06/04/va-to-engrave-controversial-motto-in-bronze-at-all-department-cemeteries%2F&usg=AOvVaw1GCw2IecdKvzOEsRf2weIN>.

<sup>36</sup> Quil Lawrence, *As the Country Reexamines Statues and Symbols, the VA Resists a Gender-Neutral Motto*, NPR (June 28, 2020, 7:00 AM), <https://www.npr.org/2020/06/28/884043474/as-the-country-reexamines-statues-and-symbols-the-va-resists-a-gender-neutral-mo>.

altering the motto, stating that “VA is proud of Lincoln’s words as a historic tribute to all veterans, including women veterans, whose service and sacrifice inspire us all.”<sup>37</sup>

Secretary Wilkie’s stubbornness concerning this issue contradicts a bipartisan effort to force the VA to adopt a more gender-inclusive motto.<sup>38</sup> The Honoring All Veterans Act, introduced by New York Democrat Kathleen Rice and Florida Republican Brian Mast, would amend Title 38, Section 301, of the United States Code to establish the following mission statement for the VA: “To fulfill President Lincoln’s promise to care for those ‘who shall have borne the battle’ and for their families, caregivers, and survivors.”<sup>39</sup> In July 2020, the Honor Our Veterans Act passed in the House of Representatives by a voice vote.<sup>40</sup> However, the Senate never passed this legislation prior to the conclusion of the 116th Congress.<sup>41</sup>

The incoming VA Secretary can — and should — eliminate the need for Congress to enact a law ordering him to amend this exclusionary motto. He can issue his own order adopting the language proposed in the Honoring All Veterans Act as the VA’s new motto, halt Wilkie’s plan to print the old motto on bronze plaques in all of the national cemeteries, and ensure that all subsequent internal and public-facing VA communications contain this new motto. It is difficult to see how this new motto would unjustly overlook Lincoln’s foundational contributions in providing safeguards and services for veterans and their families. More importantly, it is evident that this more gender-inclusive motto would demonstrate a commitment to

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<sup>37</sup> Nikki Wentling, *VA Says It Made A ‘Mistake’ Using Gender-Neutral Motto*, STARS & STRIPES (Feb. 20, 2019), <https://www.stripes.com/news/veterans/va-says-it-made-a-mistake-using-gender-neutral-motto-1.569465>.

<sup>38</sup> See Honoring All Veterans Act, H.R. 3010, 116th Cong. (2020).

<sup>39</sup> *Id.* While this bill would amend 38 U.S.C. § 301 to establish this mission statement for the VA, the existing law does not contain any specified mission statement for the agency, meaning that Secretary McDonough possesses the legal ability to establish a new gender-inclusive motto for the VA without waiting for Congress to enact new legislation. See 38 U.S.C. § 301.

<sup>40</sup> Press Release, Kathleen Rice, U.S. House of Representatives, House Veterans’ Affairs Committee Passes Rice, Mast Legislation to Update Department of Veterans Affairs Mission Statement (July 30, 2020), <https://kathleenrice.house.gov/news/documentsingle.aspx?DocumentID=1552>.

<sup>41</sup> Honoring All Veterans Act, H.R. 3010, 116th Cong. (2020) (referencing, in the legislative history, that the final action on this bill was referral to the Committee on Veterans’ Affairs in the United States Senate).

ending the VA's poor legacy of disregarding women veterans and gender non-conforming veterans, a troubling heritage recently affirmed once again by the Inspector General's report described above.<sup>42</sup>

"With malice toward none[,] with charity for all," Lincoln stated at the beginning of the sentence in which he spoke the words that are now the VA's motto.<sup>43</sup> The time has come for the VA's motto to formally reflect the inclusivity that Lincoln intended. Amending the existing motto will certainly not overturn the VA's prior shortcomings, nor will it change the culture of the agency overnight. Yet, it will signal that the times are changing, representing to veterans and their families, who have felt excluded from the VA for too long, that brighter days are ahead.

## II. RECOMMENDATION NO. 2: ENDING BAD CONDUCT TOWARD VETERANS WITH "BAD PAPER"

Title 38, Section 101, subsection 2 defines the word "veteran" as someone "who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."<sup>44</sup> Too often, veterans and their families understandably interpret this definition as banning any veteran with any character of discharge lower than honorable from the benefits and services that the VA administers.<sup>45</sup>

Thankfully, federal law takes a more nuanced approach, recognizing that a veteran could receive a less-than-honorable discharge from the military — a discharge classification colloquially called a "bad paper" discharge — for reasons far beyond the veteran's

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<sup>42</sup> See *supra* notes 23–28 and accompanying text.

<sup>43</sup> Abraham Lincoln, Second Inaugural Address, (Mar. 4, 1865), in *Lincoln's Second Inaugural Address*, NAT'L PARK SERV. (Apr. 18, 2020), <https://www.nps.gov/linc/learn/historyculture/lincoln-second-inaugural.htm>.

<sup>44</sup> 38 U.S.C. § 101(2).

<sup>45</sup> See Meghann Myers, *VA Should Already Care For Veterans With Bad-Paper Discharges, Experts Say*, MIL. TIMES (July 9, 2020), <https://www.militarytimes.com/news/your-military/2020/07/09/va-should-already-care-for-veterans-with-bad-paper-discharges-experts-say>; see also Marisa Peñaloza & Quil Lawrence, *Path to Reclaiming Identity Steep for Vets With 'Bad Paper'*, NPR (Dec. 11, 2013, 4:58 AM), <https://www.npr.org/2013/12/11/249962933/path-to-reclaiming-identity-steep-for-vets-with-bad-paper>.

willful misconduct.<sup>46</sup> For instance, the VA possesses discretion to award most benefits, including disability compensation and non-service-connected pension payments, to a veteran with a less-than-honorable discharge if the veteran was “insane” at the time of committing the action(s) leading to that less-than-honorable discharge.<sup>47</sup> Given the high percentage of veterans with at least one mental health condition caused, or worsened, by the traumas of their military service, plenty of veterans suffer from conditions of “insanity” concurrent with acting in a manner that leads commanding officers to issue a less-than-honorable discharge for behavior that is not willful misconduct, but rather represents a manifestation of their mental health condition.<sup>48</sup> Banning such veterans from receiving VA benefits because of their less-than-honorable discharge is equivalent to punishing veterans for their mental health condition — a condition that they incurred or that was exacerbated by the traumas they suffered in defense of this nation.<sup>49</sup>

Another federal provision permits the VA to provide benefits for otherwise eligible veterans with a less-than-honorable discharge due to going absent without leave (“AWOL”) for 180 days or more, if “compelling circumstances” justify this absence.<sup>50</sup> This provision demands that the VA consider multiple factors when evaluating whether “compelling circumstances” existed, including “the person’s age, cultural background, educational level and judgmental maturity,” as well as “family emergencies or obligations, or similar types of

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<sup>46</sup> See Myers, *supra* note 45.

<sup>47</sup> See 38 U.S.C. § 5303(b).

[I]f it is established to the satisfaction of the Secretary that, at the time of the commission of an offense leading to a person’s court-martial, discharge, or resignation, that person was insane, such person shall not be precluded from benefits under laws administered by the Secretary based upon the period of service from which such person was separated.

*Id.* Importantly, the veteran’s “insanity need not be causally connected to the misconduct that led to the discharge, [but] it must be concurrent with that misconduct and requires competent medical evidence to establish a diagnosis.” Gardner v. Shinseki, 22 Vet. App. 415, 419 (2009).

<sup>48</sup> See, e.g., 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, 1587–91 (2014) (discussing the prevalence of post-traumatic stress disorder diagnoses among veterans with “bad paper” discharges).

<sup>49</sup> See, e.g., Wishnie, *supra* note 5, at 1725–27.

<sup>50</sup> 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c)(6).

obligations or duties owed to third parties.”<sup>51</sup> The governing regulation makes it clear that “[h]ardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.”<sup>52</sup> For example, a veteran who went AWOL to escape an abuser in the military, or a veteran who went AWOL to deal with a family emergency, should not face an instant barrier to VA benefits and services simply because they possess a less-than-honorable character of discharge.<sup>53</sup>

For decades, veterans received less-than-honorable discharges from military service for no reason other than the military's discriminatory policies concerning their sexual orientation or their gender identity, an issue that currently persists with the “transgender ban” that the Department of Defense instituted during the Trump administration.<sup>54</sup> Far too often, veterans who reported sexual assaults perpetrated by their fellow service members wound up receiving a less-than-honorable discharge as a way to force the military sexual trauma survivor out of military service.<sup>55</sup> The same holds true for too many veterans who attempt suicide while serving in the military, winding up with a less-than-honorable discharge rather than an in-service referral to mental health treatment and care.<sup>56</sup>

For many years, the military discharged veterans on the basis of alleged “adjustment disorder” or “personality disorder” diagnoses, labels that, in actuality, were misapplied to veterans who suffered from conditions such as post-traumatic stress disorder or the residual impacts of a traumatic brain injury caused during the course of military

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<sup>51</sup> 38 C.F.R. § 3.12(c)(6)(ii).

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See* Ryan Beals, *Decade After ‘Don’t Ask, Don’t Tell’ Repeal, A ‘Hurtful’ Legacy Remains*, NBC NEWS (Dec. 22, 2020, 2:02 PM), <https://www.nbcnews.com/feature/nbc-out/decade-after-don-t-ask-don-t-tell-repeal-hurtful-n1252104>.

<sup>55</sup> *See* VETERANS LEGAL SERVS. ET AL., TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTH CARE TO VETERANS WITH BAD PAPER DISCHARGES 1 (2020) [hereinafter TURNED AWAY].

<sup>56</sup> Alex Horton, *Army to Review Discharges for Soldiers Kicked Out for Suicide Attempts and Sexual Assault Trauma*, WASH. POST (Nov. 18, 2020, 1:27 PM), <https://www.washingtonpost.com/national-security/2020/11/18/army-review-discharges-soldiers-kicked-out-suicide-attempts-sexual-assault-trauma>.

service.<sup>57</sup> Racial and ethnic disparities likewise continue to persist in the number of veterans who receive less-than-honorable discharges from the military. Protect Our Defenders, a not-for-profit advocacy group, released a report in 2017 revealing that Black members of the military are twice as likely to face disciplinary action as their White counterparts.<sup>58</sup>

All of the reasons discussed above, and others not addressed in this article (in the interest of brevity), demonstrate the importance of the VA's discretion to award benefits to veterans who receive a less-than-honorable discharge when the circumstances warrant such a decision. Considering that veterans with a less-than-honorable discharge are at a higher risk of suicide, incarceration, unemployment, and homelessness than their honorably discharged counterparts, the VA's proper exercise of this discretion to provide these veterans with the medical care, financial benefits, and other resources that they have earned by virtue of their service is not only potentially life-changing, but potentially life-saving.<sup>59</sup>

Unfortunately, the VA does not exercise this discretion often enough. A comprehensive report published in 2020 by the Veterans Legal Clinic at the Legal Services Center of Harvard Law School documented decades-worth of bad practices by the Veterans Health Administration, such as rejecting applications from veterans with a less-than-honorable discharge without conducting any review of the circumstances as to why the veteran received this discharge characterization.<sup>60</sup> This report found that inadequate and flawed training, an absence of accurate guidance, and meager oversight of front-line staff at VA medical facilities deprived veterans of several

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<sup>57</sup> VETERANS LEGAL SERVS. CLINIC, JEROME N. FRANK LEGAL SERVS. ORG. AT YALE L. SCH. ET AL., *CASTING TROOPS ASIDE: THE UNITED STATES MILITARY'S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM* 2-3 (2012).

<sup>58</sup> Safia Samee Ali, *Black Troops More Likely to Face Military Punishment Than Whites, New Report Says*, NBC NEWS (June 7, 2017, 10:12 PM), <https://www.nbcnews.com/news/nbcblk/black-troops-more-likely-face-military-punishment-whites-new-report-n769411>; see also Phil Stewart et al., *U.S. Troops Battling Racism Report High Barrier to Justice*, REUTERS (Sept. 15, 2020, 3:00 PM), <https://www.reuters.com/investigates/special-report/usa-military-civilrights> (describing racial disparities throughout the military justice system despite several Department of Defense initiatives aimed at combating racism within the ranks).

<sup>59</sup> Claire Hoffmire et al., *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans*, 56 AM. J. OF PREVENTIVE MED 727, 728 (2019).

<sup>60</sup> TURNED AWAY, *supra* note 55, at 13–25.

legal rights – especially the right to apply for medical services from the VA and the right to receive a written decision after the VA evaluated the merits of their application in the context of all laws and regulations pertaining to their character of discharge.<sup>61</sup> According to the report, it is estimated that more than 400,000 veterans would be at risk of these unlawful instantaneous rejections if they attempted to enroll in the VA’s healthcare system.<sup>62</sup>

Similar research exists regarding how rarely the VA utilizes their discretion to provide financial benefits, such as disability compensation and non-service-connected pension, to veterans who received a less-than-honorable discharge characterization due to factors beyond their control. For instance, an analysis of all United States Board of Veterans’ Appeals decisions between 1992 and 2015 demonstrated that less-than-honorably discharged veterans seeking disability compensation for post-traumatic stress disorder caused or worsened by their military service concluded that the Board denied ninety-one percent of these appeals.<sup>63</sup> In at least seventeen percent of these cases, the Board failed to even consider the legal provisions granting the VA discretion to award benefits when a veteran’s “insanity” contributed to the acts leading to the less-than-honorable discharge.<sup>64</sup> Among the cases that remained, the Board ruled in the veteran’s favor in *only twelve percent* of the appeals, refusing to recognize the veteran’s “insanity” caused by their post-traumatic stress disorder (“PTSD”) as a mitigating factor in the rest of these decisions.<sup>65</sup>

Despite data proving that a significant number of veterans receive a “bad paper” discharge due to circumstances beyond their own purported misconduct, the VA rarely exercises its discretion under the law to award these veterans with access to medical care or financial benefits.<sup>66</sup> Nevertheless, VA leaders have asserted for decades that their top priorities include combatting suicide, homelessness, unemployment, and untreated mental health conditions among the

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<sup>61</sup> TURNED AWAY, *supra* note 55, at 13–25.

<sup>62</sup> TURNED AWAY, *supra* note 55, at 30.

<sup>63</sup> Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from “Veteran” Services*, 122 PENN. ST. L. REV. 69, 127 (2017).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> *Id.* at 139; *see supra* notes 46–58 and accompanying text.

people who have served this nation.<sup>67</sup> It is, therefore, tragically ironic that the VA has been so reluctant to exercise its discretion — and, even worse, so unwilling to meet its obligations under federal law — to grant benefits and services to veterans who are at a heightened risk of negative outcomes.<sup>68</sup>

The new VA Secretary possesses a golden opportunity to change this culture. Secretary McDonough should establish an independent review commission of attorneys with proven veterans' law expertise to examine every decision that the VA renders during the first year of the new Secretary's tenure for a veteran with a less-than-honorable discharge. At the conclusion of this year-long review period, this independent commission should publish a report detailing their findings. This report should publicize the percentages of applications from veterans with "bad paper" discharges denied for each type of VA benefit reviewed, and the percentage of denials that fail to provide a rationale of why the VA will not exercise its discretion to grant benefits for veterans with less-than-honorable discharges. It should also reveal to the public the categorical breakdown of the reasons that the VA uses to deny benefits for these veterans in decisions that do provide a rationale, and the percentage of decisions that, in the view of the independent review commission, were wrongfully decided.

There is no question that this work will be time-consuming. There is no question that it will come with a cost, as the members of this independent review commission should be justly compensated for their work. Yet, the benefits of this work will far outweigh these costs. The independent review commission's findings should guide Secretary McDonough to craft policies for the VA that better serve these long-underserved veterans. With the enhanced quality of policies, the VA's ability to achieve its long-standing objectives will undoubtedly improve in several areas such as suicide prevention, homelessness prevention, unemployment prevention, and providing access to mental health treatment.<sup>69</sup> For too long, VA leaders have pledged allegiance

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<sup>67</sup> See U.S. DEP'T OF VETERANS AFFAIRS, FY 2018 — 2024 STRATEGIC PLAN 23 (May 31, 2019), <https://www.va.gov/oei/docs/va2018-2024strategicplan.pdf>; Rory E. Riley-Topping, *Suicide Prevention Remains a Top Priority for the VA*, THE HILL (Sept. 25, 2019, 5:00 PM), <https://thehill.com/opinion/healthcare/463012-suicide-prevention-remains-a-top-national-priority-for-the-va>.

<sup>68</sup> See Hoffmire et al., *supra* note 59; see also 38 C.F.R. § 3.12(c)(1) (2021).

<sup>69</sup> See Hoffmire et al., *supra* note 59; see also 38 C.F.R. § 3.12(c)(1) (2021).



to these goals while doing little to improve the VA's services for segments of the veteran population that confront a heightened risk in all of these negative areas. By evaluating precisely what the VA is doing — and not doing — for veterans who unjustly received a “bad paper” discharge, the new VA Secretary will set the foundation for systemic reform that improves the agency's offerings to the veterans who are often in the greatest need of these services.<sup>70</sup>

### III. RECOMMENDATION NO. 3: HONORING THE “HONOR OUR COMMITMENT ACT”

In 2018, President Donald Trump signed the “Honor Our Commitment Act,” recognizing the often-fatal barriers that previously existed for veterans with a less-than-honorable discharge to receive mental health and behavioral health services from the VA.<sup>71</sup> Under this new law, veterans who served in combat, as well as survivors of military sexual trauma, could receive mental and behavioral health care from the VA as long as they held some level of administrative discharge from the military, even a discharge under “Other Than Honorable Conditions.”<sup>72</sup>

Unfortunately, implementation problems emerged quickly within the VA.<sup>73</sup> Later that year, United States Senator Chris Murphy contacted VA Secretary Wilkie and demanded to know why the VA still had not notified newly eligible veterans in compliance with the Honor Our Commitment Act's requirements.<sup>74</sup> In 2019, several

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<sup>70</sup> This work must not languish in the form of a task force of infinite duration. Rather, Secretary McDonough must ensure that the data reported from this yearlong study and the resulting report drive systemic change within the VA regarding their treatment of veterans with “bad paper” discharges. The findings of this independent commission, to borrow the words of Bradford Adams and Dana Montalto in their research on this topic, cannot show merely “how the VA can remedy these issues,” but rather “how they must.” Adams & Montalto, *supra* note 63, at 139.

<sup>71</sup> Diane Orson, *Omnibus Bill Includes Murphy's 'Honor Our Commitment Act'*, WNPR (Mar. 27, 2018), <https://www.wnpr.org/post/omnibus-bill-includes-murphy-s-honor-our-commitment-act>.

<sup>72</sup> 38 U.S.C. § 1720I (2021).

<sup>73</sup> See *infra* notes 74–76 and accompanying text.

<sup>74</sup> Press Release, Chris Murphy, Senate, Murphy Calls On VA Secretary to Notify Veterans of Mental and Behavioral Health Benefits, (Oct. 3, 2018),

senators, including the ranking member of the Senate Veterans Affairs Committee, sent a letter to Secretary Wilkie stating that the Veterans Health Administration was still not properly implementing the Honor Our Commitment Act's provisions.<sup>75</sup> These senators requested that "[t]he VA must immediately update its systems, retrain VA personnel on the eligibility changes under the Honor Our Commitment Act, and conduct routine inspections of VA intake personnel to ensure they are providing the correct information to OTH veterans [veterans discharged under Other Than Honorable conditions]."<sup>76</sup> Secretary Wilkie did not provide a response with any level of specificity concerning why the VA had not yet complied with these provisions of the law.

Today, the problems that the senators described in their letter persist.<sup>77</sup> Too often, VA medical facilities deny mental and behavioral health care to veterans who are eligible for these services under the Honor Our Commitment Act.<sup>78</sup> These denials show a lack of training, comprehension, and implementation of this policy throughout the VA.<sup>79</sup> Throughout his tenure, Secretary Wilkie insisted that enrolling

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<https://www.murphy.senate.gov/newsroom/press-releases/murphy-calls-on-vasecretary-to-notify-veterans-of-mental-and-behavioral-health-benefits>.

<sup>75</sup> Julia Bergman, *Murphy Leads Call for VA to Comply With Law Requiring Care for Bad-Paper Vets*, THE DAY (May 23, 2019, 12:05 AM), <https://www.theday.com/article/20190523/nws09/190529790>.

<sup>76</sup> *Id.*; see also Taylor Mirfendereski, *Veterans Group Blasts VA for Handling of Mental Health Mandate*, KING5, <https://www.king5.com/article/news/veterans-group-blasts-va-for-handling-of-mental-health-mandate/281-cbe6606d-802e-44ba-a1a0-f94fc0d3796e> (July 15, 2019, 1:46 PM) (describing the letter from national leadership of Vietnam Veterans of America criticizing VA leaders for missing Congress's deadline to notify veterans of their eligibility for mental health services under the new law and failed to treat the majority of other-than-honorably discharged veterans who qualified for services under the law).

<sup>77</sup> See, e.g., TURNED AWAY, *supra* note 55, at 31 (discussing the case of a combat Marine with an Other Than Honorable Discharge to whom the VA wrongly denied access to medical care until he received representation from a legal services organization to help him convince the VA that he qualified for this care).

<sup>78</sup> See, e.g., Frankie Graziano, *Study: 'Bad Paper' Veterans, Including Connecticut Man, Being Wrongfully Denied VA Care*, WNPR (Mar. 6, 2020), <https://www.wnpr.org/post/study-bad-paper-veterans-including-connecticut-man-being-wrongfully-denied-va-care>.

<sup>79</sup> TURNED AWAY, *supra* note 55, at 17–19 (“The training that VHA Staff receive about the eligibility criteria for accessing VA health care is often brief, legally incorrect, or otherwise inadequate. . . . Numerous training presentations contain errors that could lead to a veteran with bad paper wrongly being turned away. . . .

more veterans in the Veterans Health Administration's system would lead to more veterans receiving competent mental health services and, by extension, a reduction in the number of veterans committing suicide.<sup>80</sup> Ironically, through this failure to properly implement the Honor Our Commitment Act, the VA denied mental and behavioral health care to veterans seeking these services — the same veterans with less-than-honorable discharges who present a heightened risk of suicide.<sup>81</sup>

Secretary McDonough now possesses an opportunity to do the work that his predecessor neglected in properly implementing the Honor Our Commitment Act. By ensuring that all VA medical facility personnel — from facility directors to patient advocates to front-line admission staff — receive thorough training, there is increased accountability in the VA medical field, which is necessary to achieve the goals of this statute. Furthermore, doing so will ensure that the VA finally complies with this federal law. Most importantly, it will provide a pathway to mental and behavioral health care for veterans who served this nation in combat and survivors of military sexual trauma, regardless of their characterization of discharge, to obtain potentially life-saving services for groups of individuals who often face the greatest need for this care.

#### IV. RECOMMENDATION NO. 4: ENDING THE FINAL VESTIGES OF

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[I]mportant manuals lacked substantive guidance about the eligibility rules or what a frontline VHA eligibility worker should do when a veteran with bad paper seeks to apply for health care.”).

<sup>80</sup> Chris Wilson, *Program Seeks to Reduce Number of Veteran Suicides*, LAWTON CONST. (Nov. 15, 2020), [https://www.swoknews.com/news/program-seeks-to-reduce-number-of-veteran-suicides/article\\_4c9b2568-df0f-581e-b56a-cbba1f45c89f.html](https://www.swoknews.com/news/program-seeks-to-reduce-number-of-veteran-suicides/article_4c9b2568-df0f-581e-b56a-cbba1f45c89f.html) (“Wilkie said most of the suicides are veterans who are not in the VA system and most of those are Vietnam veterans. Wilkie said his department is working to reach those veterans and get them into the system.”).

<sup>81</sup> See Hoffmire et al., *supra* note 59; see also TURNED AWAY, *supra* note 55 at 1. VA leaders have also pledged a commitment to greater services to veterans who are survivors of military sexual trauma, regardless of that veteran's character of discharge. John W. Booker et. al., *Beyond “T.B.D.”: Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 20 (2012). Failures to provide access to mental health and behavioral health services under the Honor Our Commitment Act represents a critical shortcoming in the VA's treatment of these veterans, preventing them from receiving necessary care for which they are lawfully eligible.

**“DON’T ASK, DON’T TELL”**

In December 2020, veterans and their families throughout the nation celebrated the ten-year anniversary of the repeal of “Don’t Ask, Don’t Tell,” the federal policy that permitted the military to force a service member out of their ranks if military leadership learned that the service member’s sexual orientation was something other than “straight.”<sup>82</sup> At the time, Vice President Biden, in his remarks immediately prior to signing the bill repealing “Don’t Ask, Don’t Tell,” stated that the homophobic policy “actually weakens our national security, diminished our ability to have military readiness, and violates the fundamental American principle of fairness and equality - - that exact same set of principles that brave gay men and women will now be able to openly defend around the world.”<sup>83</sup> He concluded his remarks by directly addressing President Barack Obama, stating, “Mr. President, by signing this bill, you will be linking military might with an abiding sense of justice. You’ll be projecting power by promoting fairness, and making the United States military as strong as they can be at a time we need it to be the strongest.”<sup>84</sup>

Ten years later, President Biden now has the chance, working in close collaboration with his VA Secretary, to eradicate a lingering remnant of “Don’t Ask, Don’t Tell” that continues to harm veterans throughout the nation. To qualify for healthcare from the VA, veterans who enlisted in the military after September 7, 1980, or entered active duty after October 16, 1981, “must have served [twenty-four] continuous months or the full period for which they were called to active duty.”<sup>85</sup> This minimum length of service requirement may not apply to veterans discharged due to a disability incurred or aggravated

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<sup>82</sup> Beals, *supra* note 54.

<sup>83</sup> Chris Johnson, *Historic: Obama Signs ‘Don’t Ask, Don’t Tell’ Repeal*, WASH. BLADE (Dec. 22, 2010), <https://www.washingtonblade.com/2010/12/22/historic-obama-signs-dont-ask-repeal-bill>.

<sup>84</sup> Office of the Press Secretary, *Remarks By the President and Vice President at Signing of the Don’t Ask, Don’t Tell Repeal Act of 2010*, THE WHITE HOUSE (Dec. 22, 2010, 9:10 AM), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-act> [hereinafter *Don’t Ask, Don’t Tell Repeal Remarks*].

<sup>85</sup> DEP’T OF VETERANS AFFS., VETERANS HEALTH ADMIN., VHA DIRECTIVE 1601A.02(2)(m), ELIGIBILITY DETERMINATION (2020); *see also* 38 C.F.R. § 3.12a(a) (2021).

in the line of duty.<sup>86</sup> Similarly, the VA can exempt a veteran from this length of service mandate if the veteran was discharged for a “hardship,” as defined within Title 10 of the United States Code, before reaching twenty-four continuous months of active duty service.<sup>87</sup> The same concept applies for veterans who received an “early out” discharge within three months of the expiration of their term of enlistment.<sup>88</sup>

However, there is still no exception for veterans who were discharged under the mandates of “Don’t Ask, Don’t Tell” before attaining twenty-four continuous months of active-duty service. Consequently, veterans victimized by the discriminatory provisions of this now-repealed policy continue to be denied access to VA medical care. Ten years ago, the federal government publicly repudiated “Don’t Ask, Don’t Tell,” with Vice-President Biden joining President Obama in his outspoken opposition to the military’s institutionalized discrimination against service members who identify as lesbian, gay, bisexual, transgender, queer, or questioning.<sup>89</sup> Now, as the President of the United States, Biden should complete this mission by working with Secretary McDonough to amend the VA’s regulatory provisions regarding eligibility for VA medical care.<sup>90</sup> Just as the VA offers enrollment in their medical system for veterans who did not attain twenty-four continuous months of active duty service due to a disability, an “early out,” or a hardship discharge, fundamental fairness necessitates that the VA recognize the same type of exception for a veteran who failed to meet the statutory requirement solely because of

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<sup>86</sup> 38 C.F.R. § 3.12a(d)(2) (2021).

<sup>87</sup> 38 C.F.R. § 3.12a(d)(1) (2021); *see also* 10 U.S.C. § 1173 (2021) (“Under regulations prescribed by the Secretary concerned, a regular enlisted member of an armed force who has dependents may be discharged for hardship.”).

<sup>88</sup> 38 C.F.R. § 3.12a(d)(1) (2021); *see also* 10 U.S.C. § 1171 (2021) (“Under regulations prescribed by the Secretary concerned and approved by the President, any regular enlisted member of an armed force may be discharged within one year before the expiration of the term of his enlistment or extended enlistment.”).

<sup>89</sup> *Don’t Ask, Don’t Tell Repeal Remarks*, *supra* note 84.

<sup>90</sup> This would mean promulgating an amendment to 38 C.F.R. § 3.12a(d), creating a new exception for veterans who were discharged prior to meeting the minimum period of active duty stated in 38 C.F.R. § 3.12a(a) if the discharge were due to the military’s discriminatory policies regarding the veteran’s sexual orientation or gender identity or expression. The VA would then need to amend VHA Directive 1601A.02 to reflect this same exception to the minimum period of active-duty rule.

the military's now-repealed policies regarding that veteran's sexual orientation or gender identity.<sup>91</sup>

Ten years ago, Admiral Mike Mullen stated that military members who already sacrifice so much for our nation never should "have to sacrifice their integrity as well."<sup>92</sup> For the veterans who were told to sacrifice their integrity, and did so out of their devotion to the defense of this nation, it is impossible to turn back the clock and undo the discrimination they have suffered. Yet, at a time when access to medical care is more critical than ever, the federal government has the ability to heal these past wounds by ensuring that a premature discharge from military service due to discriminatory policies no longer prevents these veterans from enrolling in the VA's healthcare system. Ten years after the repeal of "Don't Ask, Don't Tell," the time is long overdue for the VA to implement this exception to the length of service requirement for VA medical care enrollment and exercise this long-awaited healing power.

#### **V. RECOMMENDATION NO. 5: STOP ENDING TELEHEALTH AT THE NATION'S BORDERS**

Approximately 28,000 veterans with disabilities live outside the United States but meet all of the eligibility requirements for VA medical care.<sup>93</sup> Some veterans who live outside the United States cross the border to receive their medical care from VA facilities on United States soil.<sup>94</sup> For more than a year-and-a-half, however, borders were closed due to COVID-19, preventing these veterans from entering the United States and receiving this medical care in person.<sup>95</sup> Even though borders have re-opened, veterans will still incur significant costs in both time and money when crossing the border to receive medical care. While it is impractical for VA medical professionals to travel outside

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<sup>91</sup> See 38 C.F.R. § 3.12a(d) (2021).

<sup>92</sup> *Don't Ask, Don't Tell Repeal Remarks*, *supra* note 84.

<sup>93</sup> Ken Adams, *Disabled American Vets Living Overseas Are Getting Screwed Out of Healthcare*, TASK & PURPOSE (May 1, 2018), <https://taskandpurpose.com/thelongmarch/disabled-veteran-overseas>.

<sup>94</sup> *Id.*

<sup>95</sup> See Jenna Ryu, *US Borders With Canada, Mexico to Stay Closed Through At Least Jan. 21*, USA TODAY (Dec. 11, 2020, 5:01 PM), <https://www.usatoday.com/story/travel/news/2020/12/11/us-canada-border-us-mexico-border-remain-closed-through-january/3895824001>.

of the nation's borders to provide medical services, a reasonable solution already exists: utilization of the VA's telemedicine program. The VA's telehealth program is widely touted as one of the finest in the nation.<sup>96</sup> When international borders closed due to COVID-19, veterans who were abruptly cut off from crossing into the United States for medical care at VA facilities sought to receive some measure of continued care from the VA via this telehealth system. The VA refused. In August 2020, the VA's Undersecretary for Health circulated a memo citing a federal statute preventing the VA from providing medical care to veterans on foreign soil.<sup>97</sup> According to the Undersecretary's memo, this statute not only prevented the VA from providing in-person medical care to these veterans but precluded the VA from providing telemedicine services to these veterans as well.<sup>98</sup>

Notably, Congress enacted the statute that the Undersecretary for Health cited before the VA established its telehealth program.<sup>99</sup> The drafters of this statute never could have intended to exclude telemedicine services to veterans living on foreign soil, because such services did not exist at the time of this law's creation.<sup>100</sup> Thus, it is improper for the Undersecretary for Health to hang his or her hat on

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<sup>96</sup> See Megan R. Gerber et al., *Trauma-Informed Telehealth in the COVID-19 Era and Beyond*, 37 FED. PRAC. 302, 302–08 (July 2020) (calling the Veterans Health Administration “a national telehealth exemplar” and stating that the VA’s telehealth system “has enabled veterans to participate in virtual visits from remote locations, including their homes.”); Benjamin Pomerance, *Fighting On Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 HAMLINE L. REV. 19, 73 (2014); Eric Wicklund, *VA’s Telehealth Clinic for Cancer Care Is the First in the Nation*, MHEALTHINTELLIGENCE (Jan. 3, 2020), <https://mhealthintelligence.com/news/vas-telehealth-clinic-for-cancer-care-is-the-first-in-the-nation>; Eric Wicklund, *VA Wants Its Doctors to Treat Veterans Anywhere With Telehealth*, MHEALTHINTELLIGENCE (Aug. 4, 2017), <https://mhealthintelligence.com/news/va-wants-its-doctors-to-treat-veterans-anywhere-with-telehealth>; Bryant Jordan, *VA Touts Telehealth Program Used By 80K Vets*, MILITARY.COM (July 31, 2013), <https://www.military.com/daily-news/2013/07/31/va-touts-telehealth-program-used-by-80k-vets.html>.

<sup>97</sup> Undersecretary for Health’s Memorandum (Aug. 5, 2020) (on file with author) (citing 38 U.S.C. § 1724(a)).

<sup>98</sup> *Id.*

<sup>99</sup> Veterans’ Benefits, Pub. L. No. 85-857 (1958).

<sup>100</sup> Gerber et al., *supra* note 96 (noting that the VA did not implement a virtual medical care program through the use of closed-circuit televisions until 1968, a decade after this law’s enactment, and did not start using computers as a method of providing telemedicine care until several decades after that).

the aforementioned statute as the reason to prohibit the VA from providing telehealth services to veterans who live outside the United States. As such, Secretary McDonough should stop applying this statute in this fashion during his tenure in office.

Instead, Secretary McDonough should recognize that the status of a veteran of the United States military does not end when that veteran chooses to live outside of this nation's borders.<sup>101</sup> VA's pioneering telehealth program can be used to help veterans overcome barriers to receiving medical care, regardless of where they currently reside.<sup>102</sup> This is simply one more set of barriers that the technological solutions of telehealth can effectively overcome, since a medical professional working at a VA medical facility in the United States does not bear any significant additional cost or logistical burden when using the telehealth system to provide services to a veteran who happens to live abroad.<sup>103</sup>

It is true that telehealth is not a panacea for every medical need and that veterans living outside of the United States will still need to establish medical connections in their nation of residence to receive in-person care when necessary.<sup>104</sup> However, the VA has a proven record of successfully using telehealth for a variety of treatments including periodic physical examinations, mental and physical therapy, and rehabilitation sessions.<sup>105</sup> Veterans living outside of the United States would benefit immensely from accessing these services offered through the VA's telemedicine system. Secretary McDonough holds the ability to make this possible, working with his General Counsel to issue a precedential opinion ending the prior administration's overbroad interpretation of the governing federal law. Issuing this precedential opinion will ensure that these veterans, who have been overlooked by the VA for too long, will receive through the telehealth

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<sup>101</sup> See Adams, *supra* note 93 (“Making the location of where you place your boots at night a condition of VA health care benefit eligibility is shameful at best; cruel and deceitful at worst. When we raised our hands and swore to uphold and protect the Constitution of the United States, there was no legal small print in our oath.”).

<sup>102</sup> See sources cited *supra* note 96.

<sup>103</sup> Gerber et al., *supra* note 96 at 303 (describing how the VA's telemedicine technologies have “enabled veterans to participate in virtual visits from remote locations, including their homes.”).

<sup>104</sup> See Adams, *supra* note 93 (noting that the VA runs the Foreign Medical Program specifically for veterans who are abroad to receive health care directly related to service-connected disabilities).

<sup>105</sup> See sources cited *supra* note 96.



program key medical services that they have earned by their service to this nation, regardless of what nation they presently call home.

# **VI. RECOMMENDATION NO. 6: ENGAGE IN RESEARCH TO UNDERSTAND MEDICAL IMPACTS OF CANNABIS**

Throughout the United States, thirty-six state governments and four territories have enacted laws, regulations, and policies permitting the use of cannabis for medicinal purposes.<sup>106</sup> Several peer-reviewed scientific studies demonstrate the potential benefits of cannabis to treat conditions that many veterans suffer from as a result of their in-service physical and mental injuries. These conditions span from chronic physical pain resulting from service-connected orthopedic maladies to the mental anguish that can arise from post-traumatic stress disorder.<sup>107</sup> While the federal government historically attaches a stigma to cannabis, in part due to its history as an illegal substance, these studies discuss the medical advantages that can result from the carefully controlled and clinically administered use of cannabis.<sup>108</sup>

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<sup>106</sup>*State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEG. (July 14, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>107</sup> See Emily M. LaFrance et al., *Short and Long-Term Effects of Cannabis on Symptoms of Post-Traumatic Stress Disorder*, 274 J. OF AFFECTIVE DISORDERS 298, 298–304 (2020); Paul A. Smith et al., *Medical Cannabis Use in Military and Police Veterans Diagnosed with Post-Traumatic Stress Disorder (PTSD)*, 10 J. OF PAIN MGMT. 397, 397–405 (2017); Tomer Mizrahi Zer-Aviv et al., *Cannabinoids and Post-Traumatic Stress Disorder: Clinical and Preclinical Evidence for Treatment and Prevention*, 27 J. OF BEHAV. PHARMACOLOGY 561, 561–69 (2016); John Hudak, *When the VA Lies to Congress About Medical Marijuana, It Lies To Our Wounded Warriors*, BROOKINGS INST. (Jan. 16, 2018), <https://www.brookings.edu/research/when-the-va-lies-to-congress-about-medical-marijuana-it-lies-to-our-wounded-warriors>.

<sup>108</sup> See sources cited *supra* note 107; see also Bruce Kennedy, *How Federal Marijuana Policy is Pushing Veterans Into the Black Market*, POLITICO (May 27, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/05/27/federal-marijuana-policy-veterans-black-market-271197>; Nick Etten, *Our Veterans Deserve the Well-Being That Medical Cannabis Can Provide*, MIL. TIMES (Dec. 17, 2019), [www.militarytimes.com/opinion/commentary/2019/12/17/our-veterans-deserve-the-well-being-that-medical-cannabis-can-provide](http://www.militarytimes.com/opinion/commentary/2019/12/17/our-veterans-deserve-the-well-being-that-medical-cannabis-can-provide); Patrick McKnight, *Veterans Struggle to Gain Access to Medical Marijuana*, NAT'L L. REV. (Oct. 18, 2019), <https://www.natlawreview.com/article/veterans-struggle-to-gain-access-to-medical-marijuana>.

Despite being this nation's largest integrated healthcare system, the Veterans Health Administration is presently conducting only one research study investigating the effects of cannabis on health outcomes.<sup>109</sup> Worse yet, the VA's lone study in this area is small in scale, involving only 136 participants.<sup>110</sup> The VA's failure to engage in substantial research about the effects of cannabis on health outcomes, despite the substantial presence of other credible medical research demonstrating the possible benefits of clinically administered cannabis in combating conditions from which veterans commonly suffer, is a scientific omission that Secretary McDonough now can remedy.<sup>111</sup>

Since states began enacting laws concerning the medicinal use of cannabis, the VA — and the federal government as a whole — has largely resisted this trend.<sup>112</sup> Consequently, veteran patients who could benefit from the medicinal use of cannabis cannot utilize their VA medical provider to obtain this treatment.<sup>113</sup> Instead, a veteran is forced to enroll within their state's medicinal cannabis program, if it even has such a program. Additionally, the veteran must receive this treatment from a doctor outside of the VA's healthcare system.<sup>114</sup> Since twenty percent of Veterans Health Administration enrollees rely solely upon the VA for their medical care, the VA's refusal to

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<sup>109</sup> Cong. Budget Office, H.R. 712, A Bill to Direct the Secretary of Veterans Affairs to Carry Out a Clinical Trial of the Effects of Cannabis on Certain Health Outcomes of Adults with Chronic Pain and Post-Traumatic Stress Disorder, and for Other Purposes, (Apr. 13, 2020), <https://www.cbo.gov/publication/56329>; *Veterans Health Administration*, U.S. DEP'T OF VETERANS AFFS., [www.va.gov/health/aboutvha.asp](http://www.va.gov/health/aboutvha.asp) (Apr. 23, 2021).

<sup>110</sup> *Id.*

<sup>111</sup> See *supra* notes 107–08 and accompanying text. Congress previously introduced legislation that would require the Veterans Health Administration to improve their research in this area, but the most recent bill was never passed, despite bipartisan support.

<sup>112</sup> See McKnight, *supra* note 108; Kennedy, *supra* note 108; Hudak, *supra* note 107.

<sup>113</sup> McKnight, *supra* note 108; Hudak, *supra* note 107.

<sup>114</sup> *VA and Marijuana – What Veterans Need to Know*, U.S. DEP'T OF VETERANS AFFS., <http://www.publichealth.va.gov/marijuana.asp> (last visited Jan. 18, 2021) (stating that because marijuana remains a Schedule One Controlled Substance in the eyes of the federal government, VA medical professionals cannot prescribe or even recommend medical marijuana, nor may VA pharmacies fill prescriptions for medical marijuana).

administer medicinal cannabis harms veterans who could benefit from this treatment but cannot afford it.<sup>115</sup>

During the next four years, Secretary McDonough is unlikely to transform the federal government's consistently wary attitude concerning the medical uses of cannabis.<sup>116</sup> However, the new Secretary would provide a great service to this nation's veterans if he forces his agency out of the scientific doldrums on this issue and encourages it to engage in clinical trials to research the effects of cannabis on health outcomes for veteran patients.<sup>117</sup> With the largest integrated healthcare system in the United States now under his leadership, ample resources exist for the new Secretary to devote substantial attention to this research, publicize the findings of these studies, and offer recommendations about how the VA can successfully integrate cannabis into their treatment protocols. Emphasizing that this research, and the resulting recommendations, focus on the administration of cannabis under the careful guidance of medical professionals — and not casual recreational usage — will hopefully help remove the stigma that has historically plagued cannabis in the fields of medical technology and treatment.

In the short term, a dedicated approach to this research from Secretary McDonough and other leaders in the Veterans Health Administration should change the conversation regarding the

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<sup>115</sup> Z. JOAN WANG ET AL., 2019 SURVEY OF VETERAN ENROLLEES' HEALTH AND USE OF HEALTH CARE 33 (2020).

<sup>116</sup> This may change, however, if President Biden fulfills his campaign statements about rescheduling marijuana as a Schedule Two Controlled Substance, opening pathways for greater acceptance of medicinal cannabis within the federal government, including within the VA. See Brendan Bures, *Congress Approves Bills That Will Expand Medical Marijuana Access for Veterans*, CHI. TRIB. (Mar. 16, 2020, 6:36 AM), <https://www.chicagotribune.com/marijuana/sns-tft-congress-veterans-marijuana-20200316-ds5fbo7crrhadkmbym3qbuhzse-story.html>.

<sup>117</sup> See McKnight, *supra* note 108; Kennedy, *supra* note 108; Hudak, *supra* note 107; see also Andy Harris & Earl Blumenauer, *Why Congress Should Pass the Medical Marijuana Research Act of 2019*, THE HILL (July 17, 2019, 6:30 PM), <http://thehill.com/blogs/congress-blog/politics/453612-why-congress-should-pass-the-medical-marijuana-research-act-of-2019> ("We may come from different sides of the issue, but we can agree on one thing—the federal government should not stand in the way of legitimate, scientific medical cannabis research. From pro-legalization advocates, to law enforcement, to the medical and scientific communities, and on down to policymakers, all factions can agree there exists foundational barriers within the current regulatory schema to conduct research and access objective evidence as to the medicinal properties of cannabis.").

medicinal use of cannabis for veterans, bringing the focus to the clinical data and medical benefits rather than the stereotypes and fears surrounding this substance. In the long term, this work will hopefully open a new avenue of successful treatment options for veterans adversely impacted by chronic pain, post-traumatic stress disorder, and other conditions common to individuals who have served in the military. Acceptance of the use of medical cannabis in the Veterans Health Administration will also hopefully end the practice of veterans going to seek out non-VA medical professionals to administer these essential treatments. These are not outcomes that will occur overnight. Still, when considering the possible benefits to Veterans Health Administration patients, the time is ripe for the VA to take the initial steps on this journey.<sup>118</sup>

## VII. RECOMMENDATION NO. 7: ENFORCING ACCEPTABLE CLINICAL EVIDENCE REQUIREMENTS

For the majority of veterans pursuing disability compensation claims with the VA, a Compensation and Pension Examination (“C&P Exam”) is arguably the most pivotal component of the process.<sup>119</sup> The Veterans Benefits Administration possesses the power to order a C&P Exam for a veteran when a claim adjudicator decides that more medical evidence is necessary to decide a disability claim in the claimant’s

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<sup>118</sup> Even former VA Secretary David Shulkin, an opponent of medicinal cannabis during his time in office, publicly amended his views on this topic, urging the VA to devote resources for more meaningful medical research on this topic. Bures, *supra* note 116 (“‘I think the time is now [to engage in this research],’ Shulkin added. ‘I believe that the VA should be involved in research on anything that could potentially help veterans and improve their health and well-being.’”).

<sup>119</sup> Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 301 (2008) (describing the standards by which the VA is supposed to abide for a Compensation and Pension Examination to be legally adequate); Green v. Derwinski, 1 Vet. App. 121, 124 (1990) (discussing the VA’s legal obligation to provide an examination that is thorough and contemporaneous when medical information to be gathered from this exam is necessary in a claim for disability compensation); Mark D. Worthen & Robert G. Moering, *A Practical Guide to Conducting VA Compensation & Pension Exams for PTSD and Other Mental Disorders*, 4 PSYCH. INJ. & L. 187, 187–88 (2011); Chris Attig, *When Was the Last Time the VA Sent You a Copy of Your VA C&P Exam?*, VETERANS L. BLOG, <https://www.veteranslawblog.org/va-cp-exam> (last visited July 15, 2021) (“The VA C&P Exam is crucial to a [v]eteran[’]s VA Claim or Appeal, because it is a single piece of evidence that can be used to build 2 of the 4 pillars of a VA Claim.”).

favor.<sup>120</sup> Due to the social distancing precautions necessitated by COVID-19, however, the VA suspended all in-person C&P Exams nationwide in early April 2020, with C&P Exams remaining unavailable at most facilities for nearly a year.<sup>121</sup> For certain medical conditions, the VA was able to successfully complete the C&P Exam virtually.<sup>122</sup>

Despite assurances from the VA's central office that the agency would not deny any claims due to a cancelled C&P Exam, a VA Inspector General's report issued in November 2020 demonstrated that far too many veterans had their claims denied due to their cancelled exams.<sup>123</sup> From April 6, 2020, through May 13, 2020, the Inspector General found that the VA improperly denied sixty-eight percent of the sampling of denied claims that the Inspector General reviewed.<sup>124</sup> From May 14, 2020, through June 16, 2020, the Inspector General found that the VA improperly denied forty-eight percent of the claims that the Inspector General reviewed.<sup>125</sup> This substantial number of

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<sup>120</sup> See 38 C.F.R. §4.1 (2021) ("For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition."). Importantly, though, this provision does not mean that the VA must possess medical evidence before it can possibly resolve a disability compensation claim in a veteran's favor. See *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) ("If the [VA] concludes that the lay evidence presented by a veteran is credible and ultimately competent, the lack of contemporaneous medical evidence should not be an absolute bar to the veteran's ability to prove his claim of entitlement to disability benefits based on that competent lay evidence.").

<sup>121</sup> Nikki Wentling, *VA Plans to Outsource All Compensation and Pension Exams*, STARS & STRIPES (Oct. 21, 2020), <https://www.stripes.com/news/us/va-plans-to-outsource-all-compensation-and-pension-exams-1.649356>.

<sup>122</sup> Kendall van Ameyde, *Virtual VA Examinations Become the New Norm During the Pandemic*, LEGAL HELP FOR VETERANS (May 5, 2020), <https://www.legalhelpforveterans.com/2020/05/08/virtual-va-examinations-become-the-new-norm-during-the-pandemic>. But see David Roza, *230,000 Veterans' Disability Ratings Are Stuck In Limbo Due to COVID-19*, TASK & PURPOSE (June 5, 2020), <https://taskandpurpose.com/news/veteran-disability-benefit-exam-coronavirus> (discussing the shortcomings of the VA's ability to provide C&P Exams for some conditions online).

<sup>123</sup> OFF. OF THE INSPECTOR GEN., DEP'T OF VETERANS AFFAIRS, ENHANCED STRATEGY NEEDED TO REDUCE DISABILITY EXAM INVENTORY DUE TO THE PANDEMIC AND ERRORS RELATED TO CANCELLED EXAMS (Nov. 19, 2020), <https://www.va.gov/oig/pubs/VAOIG-20-02826-07.pdf>.

<sup>124</sup> *Id.* at iv.

<sup>125</sup> *Id.* at v.

wrongfully denied claims will undoubtedly lead to many of these claimants filing appeals, further adding to the VA's existing appeals backlog.<sup>126</sup>

With the pandemic still not over, and the potential remaining for new barriers upon the VA's ability to conduct in-person C&P Exams, Secretary McDonough should use this opportunity to re-examine his agency's extreme emphasis on these examinations. The VA's internal operating manual provides the Veterans Benefits Administration with a pathway to decide disability compensation claims on the basis of "acceptable clinical evidence" submitted by the claimant without demanding that the claimant undergo a C&P Exam.<sup>127</sup> The provisions within this internal operating manual state that "in the interest of expediting the claims process, [Veterans Benefits Administration] employees should not routinely exclude the use of the ACE [(acceptable clinical evidence)] process absent a compelling reason."<sup>128</sup> Furthermore, the VA's operating manual affirms that deciding a claim based on acceptable clinical evidence, in lieu of an in-person C&P Exam, is "particularly" encouraged for any claim involving a veteran who is homeless; any veteran claiming service-connected hearing loss, tinnitus, cardiac conditions, Lou Gehrig's Disease; and any veteran suffering from "any terminal condition."<sup>129</sup>

There are manifold reasons for Secretary McDonough to ensure that all Veterans Benefits Administration adjudicators fully comprehend and fully adhere to these provisions. Even before the COVID-19 roadblocks, C&P Exams were time-consuming to schedule and conduct, which slowed the process for adjudicating disability compensation claims.<sup>130</sup> As of November 2020, the Veterans Benefits Administration faced a backlog of more than 300,000 initial disability

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<sup>126</sup> See Roza, *supra* note 122.

<sup>127</sup> U.S. DEP'T OF VETERAN AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL § III.iv.3.D.2.m (2021) (describing the criteria for the VA to grant a claim based on acceptable clinical evidence without necessitating that the claimant receive a C&P Exam).

<sup>128</sup> U.S. DEP'T OF VETERAN AFFS., M21-1 ADJUDICATION PROCEDURES MANUAL § III.iv.3.A.4.b (2021).

<sup>129</sup> *Id.*

<sup>130</sup> See Roza, *supra* note 122.

compensation claims awaiting a decision.<sup>131</sup> For Secretary McDonough, eliminating this backlog and providing claimants with decisions efficiently and accurately must be a top priority, as the financial and medical benefits that come with a favorable disability compensation claim are life-changing for a veteran during these difficult times.<sup>132</sup> By holding the Veterans Benefits Administration to the acceptable clinical evidence standards described in their operating manual, and ensuring that the VA mandates a C&P Exam only when the documentary evidence provided in the claim fails to prove the claimant's case, Secretary McDonough should be able to considerably reduce the disability backlog.

These unwarranted C&P Exams also impose millions of dollars in expenses upon the VA, which the agency could have avoided by properly adhering to their own requirements regarding acceptable clinical evidence.<sup>133</sup> Indeed, the VA's own Inspector General estimated that the agency was on course to waste more than \$100 million in unnecessary C&P Exams in five years "unless [the VA] ensures that employees only request [C&P Exams] when necessary."<sup>134</sup> Secretary McDonough would improve the fiscal situation confronting the VA if he followed the Inspector General's recommendation and ensured that his employees do not require claimants to receive a C&P Exam when acceptable evidence submitted with the claimant's case already supports a favorable decision.

C&P Exams are the most troubling component of the claims process for a veteran.<sup>135</sup> The examiners, all of whom are VA-contracted medical professionals, must obtain responses to questions on specific topics described in Title 38 of the United States Code of Federal Regulations.<sup>136</sup> This routinely leads to the veteran having to

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<sup>131</sup> Richard Sisk, *VA Disability Claims Backlog Spiked to 300,000 During Pandemic*, MILITARY.COM, (Nov. 17, 2020), <https://www.military.com/daily-news/2020/11/17/va-disability-claims-backlog-spiked-300000-during-pandemic.html>.

<sup>132</sup> *See id.*; *see also* Roza, *supra* note 122.

<sup>133</sup> DEP'T OF VETERANS AFF., OFF. OF THE INSPECTOR GEN., UNWARRANTED MEDICAL EXAMINATIONS FOR DISABILITY BENEFITS (2018) (finding that the VA spent \$10 million in just five months on unnecessary C&P Exams for veterans).

<sup>134</sup> *Id.*

<sup>135</sup> *See, e.g.,* Attig, *supra* note 119.

<sup>136</sup> *See The Do's and Don'ts of C&P Examinations*, CHISOLM, CHISOLM & KILPATRICK (Nov. 4, 2018), <https://cck-law.com/blog/the-dos-and-donts-of-cp-examinations> [hereinafter *Do's and Don'ts*].

describe some of the most traumatic moments of their life in detail to a complete stranger, often causing the veteran to become re-traumatized as a result of recounting these experiences.<sup>137</sup> Veterans who are survivors of military sexual trauma may confront questions about the details of the sexual assaults that they suffered.<sup>138</sup> Claimants filing for post-traumatic stress disorder may be asked about the “stressors” during their military service that caused the onset of this mental health condition.<sup>139</sup> A veteran who suffered a physical injury may be requested to retell the story of precisely how the veteran sustained that injury.<sup>140</sup> Far too often, examiners will ask a veteran claiming an orthopedic condition to bend or twist in a manner that causes that veteran physical pain.<sup>141</sup> For all these reasons, veterans can leave a C&P Exam mentally or physically worse than they were when they entered the examination room. Recognizing this, the VA should strictly follow their own procedures regarding acceptance of clinical evidence in lieu of a C&P Exam, preventing veterans from having to undergo this process unless it is necessary.

The provisions in the VA’s internal operating manual reinforce a foundational notion: the VA provides a pro-claimant, non-adversarial system for veterans.<sup>142</sup> Decades of statutes, precedential court decisions, and Congressional records verify that the VA is supposed to resolve matters, whenever possible, in favor of the claimant.<sup>143</sup> This principle demands that when VA receives sufficient evidence to grant a veteran’s claim, the adjudication of that claim ceases and the veteran

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<sup>137</sup> See *infra* notes 140–43 and accompanying text.

<sup>138</sup> Cassandra Crosby, *Coping with Re-Traumatization When Applying for Benefits Associated with Military Sexual Trauma*, HILL & PONTON (Sept. 21, 2016), <https://www.hillandponton.com/mst-retraumatization>; see also Kalee R. Gum, Note, *Military Sexual Trauma and Department of Veterans Affairs Disability Compensation for PTSD: Barriers, Evidentiary Burdens and Potential Remedies*, 22 WM. & MARY J. OF WOMEN & L. 689, 704–05 (2016) (“The VA also has a history of failing to maintain sensitivity to gender when addressing sexual assault.”).

<sup>139</sup> Worthen & Moering, *supra* note 119, at 189.

<sup>140</sup> *Do’s and Don’ts*, *supra* note 136.

<sup>141</sup> See, e.g., Jim Strickland, *C&P Examination Caused Physical Pain*, STATESIDE LEGAL, [https:// www.statesidelegal.org/cp-examination-caused-physical-pain](https://www.statesidelegal.org/cp-examination-caused-physical-pain) (last visited Jan. 18, 2021).

<sup>142</sup> 38 U.S.C. §5103A (2021); 38 C.F.R. §3.103(a) (2021); 38 C.F.R. §20.700 (2021); Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990); Pomerance & Eagle, *supra* note 4, at 2.

<sup>143</sup> Pomerance & Eagle, *supra* note 4, at 1-2.



receives a favorable determination.<sup>144</sup> Further development of the claim at this point, a concept that veterans' advocates call "developing to deny,"<sup>145</sup> goes against the VA's pro-claimant, non-adversarial mission.<sup>146</sup>

Based on all the foregoing legal and practical reasons, Secretary McDonough should work with his Undersecretary for Benefits to prevent the practice of "developing to deny" from occurring. For the new Secretary, the good news is that his agency's internal operating manual already provides the framework for properly adjudicating disability compensation claims without mandating a C&P Exam unless it is absolutely necessary to prove the claimant's case.<sup>147</sup> The mission for the Secretary now is to ensure that the VA follows what their own internal procedures concerning acceptable clinical evidence requires them to do.

### VIII. RECOMMENDATION NO. 8: COMPLETING THE CAREGIVING MISSION

In 2018, caregivers of veterans rejoiced with the passage of the MISSION Act, vowing to expand eligibility for the VA's Program of Comprehensive Assistance for Family Caregivers.<sup>148</sup> Two years later,

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<sup>144</sup> 38 C.F.R. § 3.304(c) (2021) ("The development of evidence in connection with claims for service connection will be accomplished when deemed necessary *but it should not be undertaken when evidence present is sufficient for this determination.*") (emphasis added).

<sup>145</sup> *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affs. of the H. Comm. on Veterans' Affs.*, 114th Cong. 37 (2015) (statement of Barton F. Stichman, Joint Executive Director, Nat'l Veterans Legal Services Program) ("Veterans advocates call this longstanding VA practice developing to deny. In addition to fostering the hamster wheel phenomenon, this practice is inconsistent with the pro-claimant adjudicatory process and the statutory benefit-of-the-doubt rule.").

<sup>146</sup> *Id.*; see also *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 30-31 (2015) (statement of James R. Vale, Director, Veterans Benefits Program) ("It shouldn't be easier and quicker [for the VA] to deny a claim than to grant one.").

<sup>147</sup> See *supra* notes 127-28.

<sup>148</sup> Austin Ingleheart, *Congress Passes VA Mission Act of 2018; President Trump Expected to Sign*, NAT'L ASSN. CNTY. VETERANS SERV. OFFICERS (May 25, 2018), <https://www.naco.org/blog/congress-passes-va-mission-act-2018-president-trump-expected-sign>.

in October 2020, the VA finally enacted its new rules to implement this program.<sup>149</sup> These new policies seemingly fulfilled what the MISSION Act promised by opening eligibility to caregivers of veterans whose service-connected disabilities were caused or worsened during their active duty service on or before May 7, 1975.<sup>150</sup> Before this, the Program of Comprehensive Assistance for Family Caregivers was available only for caregivers of veterans whose service-connected disabilities were caused or worsened on active duty on or after September 11, 2001.<sup>151</sup> The VA's October 2020 rules promised that, by October 2022, the VA would finally be able to provide access to the Caregiver Program to the caregivers of veterans from all eras of military service.<sup>152</sup> Upon closer examination, however, the October 2020 regulations actually narrowed the eligibility for their Caregiver Program, which violates the MISSION Act's apparent promises of a more inclusive future for this important initiative.<sup>153</sup>

Arbitrarily, the VA imposed a new requirement that a veteran must receive a service-connected disability compensation rating of at least 70% before that veteran's caregiver can become eligible for this program.<sup>154</sup> When Congress passed the "Caregivers and Veterans Omnibus Health Services Act (the "Caregiver Act") in 2010, it issued a joint statement regarding the definition of a "severely injured veteran" whose caregiver would qualify for this program.<sup>155</sup> The statement affirmed that "[s]everely injured veterans are defined as those who need personal care services because they are unable to perform one or more independent activities of daily living, require supervision as a result of neurological or other impairments, or need personal care services because of other matters specified by VA."<sup>156</sup> Nothing in this statement, or in any other declaration of Congressional intent,

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<sup>149</sup> DEP'T OF VETERANS AFFS., OFF. OF PUB. & INTERGOV. AFFS., VA PUBLISHES FINAL REGULATION FOR ITS PROGRAM OF COMPREHENSIVE ASSISTANCE FOR FAMILY CAREGIVERS (2020).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See *infra* notes 155–57 and accompanying text.

<sup>154</sup> 38 C.F.R. § 71.15 (2021).

<sup>155</sup> 156 CONG. REC. S2566-01, S2567 (daily ed. Apr. 22, 2010) (Joint Statement on Caregivers and Veterans Omnibus Health Services Act).

<sup>156</sup> *Id.*

establishes a specific disability compensation rating percentage that a veteran must attain before their caregiver can qualify for this program.<sup>157</sup> Instead, the history of this program focuses on the veteran's inability to independently perform one or more activities of daily living or the veteran's need for supervision due to a mental health condition.<sup>158</sup>

Furthermore, the VA stated six years ago that the Caregiver Program's services are "not designed to supplement, replace, or be dependent on the level of disability compensation received by the veteran."<sup>159</sup> In spite of this, the VA promulgated a new regulation that now makes access to the Caregiver Program entirely dependent on the level of disability compensation received by the veteran.<sup>160</sup> This new mandate for a veteran to have a service-connected disability compensation rating of at least 70% breaches Congress's intentions in establishing this program and violates the VA's own statement about the program's purpose.<sup>161</sup>

Similar to the discussions regarding the irrational geography-based VA telehealth restrictions, the VA's new Caregiver Program regulations permit eligibility only for those veterans who reside in a "State."<sup>162</sup> Nothing in the text of the Caregiver Act opens the door to this type of geographic restriction on eligibility for the Caregiver Program.<sup>163</sup> While the Caregiver Act does require the VA to consider a veteran's "geographic area," this information is used solely to determine the proper amount of benefits to award; for example, certain

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<sup>157</sup> *See id.*

<sup>158</sup> *See id.*

<sup>159</sup> Caregivers Program Final Rule, 80 Fed. Reg. 1357, 1368 (Jan. 9, 2015).

<sup>160</sup> 38 C.F.R. § 71.15 (2021).

<sup>161</sup> *Compare* 38 C.F.R. § 71.15 *with* 156 CONG. REC. S2566-01, S2567 (daily ed. Apr. 22, 2010).

<sup>162</sup> 38 C.F.R. § 71.10 (2021); *see also* 38 U.S.C. § 101(20) (2021) (limiting the definition of "State" to "each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.").

<sup>163</sup> *See* Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA MISSION Act of 2018, 85 Fed. Reg. 46226 (July 31, 2020) ("Several commenters raised concerns about restricting [the Caregiver Program] to a 'State' as that term is defined in 38 U.S.C. 101(20) because [the Caregiver Act] does not place any geographic restrictions on [the Caregiver Program], 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.").

geographic areas with a higher cost of living require a higher benefits award.<sup>164</sup> Until October 2020, the VA never conditioned Caregiver Program eligibility on geographic residence.<sup>165</sup> No basis in the enabling legislation from Congress gives the VA the authority to start imposing these geographic limits now.

The VA's new regulation also improperly narrowed the definition of "personal care services" by stating that a veteran's caregiver must perform these services "in-person" to qualify for the Caregiver Program.<sup>166</sup> Nothing in the Caregiver Act requires a caregiver to perform services "in-person" to qualify.<sup>167</sup> This is because, contrary to the VA's assertions, nothing in the Caregiver Act requires the caregiver "to be physically present to support eligible veterans in their home."<sup>168</sup> Furthermore, the Caregiver Act does not even impose the requirement that a family caregiver live in the same residence as the veteran.<sup>169</sup> Using technological solutions, a caregiver can successfully perform plenty of tasks remotely.<sup>170</sup> A caregiver who lives nearby can also remain "on call" to quickly come over to the veteran's residence and provide services when needed.<sup>171</sup> Indeed, during these times when social distancing is medically advantageous to avoid the spread of COVID-19, utilizing opportunities to perform

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<sup>164</sup> 38 U.S.C. § 1720G(a)(3)(C)(iii) (2021).

<sup>165</sup> See *supra* note 163.

<sup>166</sup> 38 C.F.R. § 71.15 (2021).

<sup>167</sup> 38 U.S.C. § 1720G(d)(4) (2021) (defining "personal care services" without imposing any requirements that these services take place "in-person.").

<sup>168</sup> See Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA MISSION Act of 2018, 85 Fed. Reg. 46227–29 (Jul. 31, 2020) (noting that several commentators raised objections to this new requirement of providing caregiving services "in-person" but concluding that the VA would not remove this additional requirement from the new regulation).

<sup>169</sup> See 38 U.S.C. § 1720G(d)(4) (2021).

<sup>170</sup> See Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA MISSION Act of 2018, 85 Fed. Reg. 46229 (Jul. 31, 2020) (discussing this issue but concluding that the VA would not amend their new regulation to remove this new requirement for "in-person" care). Tasks that a veteran's caregiver could perform remotely range from guiding the veteran through management of the veteran's medications to providing consistent emotional support to the veteran.

<sup>171</sup> See *id.*

caregiving functions that are not provided “in-person” may actually be beneficial for the veteran receiving the care.<sup>172</sup>

In addition, the October 2020 regulations impose new burdens of proof on the veteran and the caregiver to demonstrate the veteran’s need for care.<sup>173</sup> To qualify for the Caregiver Program based on a need for assistance with activities of daily living,<sup>174</sup> the VA now requires evidence that the veteran needs assistance 100% of the time with at least one activity of daily living.<sup>175</sup> To qualify for the Caregiver Program based on a need for supervision or protection, the new rule requires that the veteran demonstrates he or she possesses “a functional impairment that directly impacts the individual’s ability to maintain his or her personal safety on a daily basis.”<sup>176</sup>

Neither of these new requirements is supported by statutory authority. Nothing in the framework that the Caregiver Act established requires the veteran to have a clinical rating of one-hundred percent – total dependence – for at least one activity of daily living to achieve Caregiver Program eligibility.<sup>177</sup> Similarly, the VA raised the bar for determinations based on the veteran’s need for supervision or protection. The regulations now insist that the veteran proves an “impairment” to the veteran’s daily “personal safety,” even though the Caregiver Act requires only that the veteran show an “impairment” to their ability to “function” in “daily life.”<sup>178</sup>

Year after year, the VA acknowledges the crucial role that caregivers play in the lives of veterans whose medical conditions necessitate this level of assistance.<sup>179</sup> Secretary McDonough can

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<sup>172</sup> The federal government itself has promoted the use of telemedicine services as a safe way to provide certain forms of care during COVID-19. *Telehealth: Delivering Care Safely During COVID-19*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/coronavirus/telehealth/index.html> (last visited Jan. 18, 2021).

<sup>173</sup> See *infra* notes 174–77 and accompanying text.

<sup>174</sup> Activities of daily living include bathing, walking, basic grooming functions, toileting, and eating. See 38 C.F.R. § 51.2 (2021).

<sup>175</sup> 38 C.F.R. § 71.15 (2021).

<sup>176</sup> *Id.*

<sup>177</sup> See 38 U.S.C. § 1720G(a)(2)(C)(ii)-(iii).

<sup>178</sup> Compare 38 C.F.R. § 71.15 (2021), with 38 U.S.C. § 1720G(a)(2)(C)(ii)-(iii).

<sup>179</sup> See, e.g., U.S. DEP’T OF VETERANS AFFAIRS, *National Family Caregivers Month*, <https://www.caregiver.va.gov/NFCM.asp> (Feb. 1, 2021); Claude Benjamin, *Veteran Survived Battle of the Bulge*, U.S. DEP’T OF VETERANS AFFS. (Dec. 15, 2014), <https://www.va.gov/HEALTH/NewsFeatures/2014/December/Veteran-Survived-The-Battle-Of-The-Bulge.asp>; see also Nancy J. Dupke, Kathryn L. Plant & Julie

demonstrate to America's veterans and their caregivers that these statements are more than mere puffery by working with his Office of General Counsel and his Undersecretary for Health to immediately review these new Caregiver Program regulations. The new Secretary should insist on the repeal of regulations that restrict Caregiver Program eligibility in ways that are neither articulated by the Caregiver Act nor supported by the legislative history surrounding this program. He should work with his team to publish revised regulations for public comment within his first year in this position. Last, but definitely not least, Secretary McDonough should suspend the removal of any caregivers who are already participating in the Caregiver Program until after these new regulations are promulgated.<sup>180</sup> By taking these measures, the Secretary will finally guide the VA toward meeting the MISSION Act's objectives, at last expanding eligibility for this program that serves so many veterans who need consistent care without attaching the prior administration's array of damagingly restrictive policies.

#### **IX. RECOMMENDATION NO. 9: ENHANCING SERVICES AT STATE AND LOCAL LEVELS**

An old adage proclaims that "all government is local."<sup>181</sup> In the contemporary arena of veterans' services, this time-honored saying is truer than ever before. Veterans today face a galaxy of services

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Kosteas, *Supporting Caregivers of Veterans Online: A Partnership of the National Council on Aging and VA*, 33 FED. PRACT. 41, 41 (2016).

<sup>180</sup> Under the VA's new regulations that became effective in October 2020, veterans risk losing their caregivers in October 2021 if they do not qualify for continued participation in the program under these new regulations, including the regulations described in this section that are arbitrary and lack statutory authority. 38 C.F.R. § 71.20 (b)-(c) (2021).

<sup>181</sup> William Haupt III, *What Starts at the County Level Ends Up in D.C.*, THE CTR. SQUARE (Aug. 19, 2019), [https://www.thecentersquare.com/national/op-ed-what-starts-at-the-county-level-ends-up-in-d-c/article\\_8c620d5a-c201-11e9-ba0d-e39888178d4b.html](https://www.thecentersquare.com/national/op-ed-what-starts-at-the-county-level-ends-up-in-d-c/article_8c620d5a-c201-11e9-ba0d-e39888178d4b.html); Tod Newcombe, *Leaping Into The Spotlight*, GOV. TECH. (Sept. 30, 1999), <https://www.govtech.com/magazines/gt/Leaping-Into-the-Spotlight.html>. The origin for this adage appears to be another adage, provided by former Speaker of the House Tip O'Neill, stating that "[a]ll politics is local." Charles P. Pierce, *Tip O'Neill's Idea That All Politics Is Local Is How Government Dies*, ESQUIRE (Jul. 15, 2015), <https://www.esquire.com/news-politics/politics/news/a36522/how-all-government-is-local-and-thats-how-it-dies>.

jockeying for their attention.<sup>182</sup> Without a navigator, veterans and their families can easily become overwhelmed; lost; or pursue benefits, services, and resources that are not the best for them.<sup>183</sup> In this crowded field, the best navigators do not come from a centralized location in Washington, D.C.; rather, they come from the states and localities in which veterans live. This localized approach will provide services to veterans and their families on a more individualized basis, which will help connect them to the beneficial services that exist for them in their own backyards. This is what veterans, and their families, need in the twenty-first century, and this is an area of service delivery to which the VA should devote greater resources.

Every state in the nation, along with the District of Columbia, American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the Virgin Islands, has a government agency tasked with advocating for all of the veterans, service members, and military families within their jurisdiction.<sup>184</sup> Collectively, these agencies obtain billions of dollars every year in federal, state, and local benefits for the veterans, service members, and military families whom they serve.<sup>185</sup> They also maintain a critical role in establishing, implementing, and refining jurisdiction-wide policies impacting the individuals who serve in our nation's military and the members of their immediate families.<sup>186</sup> Likewise, Veterans Service Agencies, staffed by Veterans Service Officers at the county and municipal levels, play a vital part in meeting the needs and representing the interests of veterans, service members, and military families within their

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<sup>182</sup> See, e.g., JASON DEMPSEY & AMY SCHAFER, VETERAN PATHWAYS TO EMPLOYMENT: HURDLES AND OPPORTUNITIES 15 (2020) ("With the number and diversity of resources available [to veterans], the challenge is not mobilizing resources, but enabling veterans to navigate these resources in a way that best fits their interests, talents, and potential. Currently it is nearly impossible for veterans in transition to understand the full breadth of options available to them and which will best help them achieve their goals.").

<sup>183</sup> Steve Walsh, *Without Help, Navigating Benefits Can Be Overwhelming to Veterans*, NPR (Jan. 14, 2015, 3:18am), <https://www.npr.org/2015/01/14/374055310/indiana-s-veterans-service-officers-operate-on-a-shoe-string>.

<sup>184</sup> About NASDVA, NAT'L ASS'N OF STATE DIRS. OF VETERANS AFFS., <https://www.nasdva.us/About.aspx> (last visited Jan. 18, 2021).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

localities.<sup>187</sup> Last, but certainly not least, each state is home to Congressionally recognized not-for-profit Veterans Service Organizations that perform crucial advocacy and engage in direct services for Veterans, Service Members, and Military Families within their areas of coverage.<sup>188</sup>

Opportunities abound for Secretary McDonough to engage in partnerships with state and local veterans-focused government agencies, as well as Congressionally recognized Veterans Service Organizations, to enhance local-level services for veterans and their families.<sup>189</sup> While certain partnerships already exist, including agreements providing access and office space to local agencies and organizations within the VA's regional offices, the VA can – and should – do far more to equip these agencies and organizations to serve veterans and their families at the most localized levels possible.<sup>190</sup>

Specifically, the VA should invest federal funding to helping these entities improve their capacity to represent their local veterans. This will allow these local agencies and organizations to engage in efforts that they may not presently be able to afford with their state or local funds. These initiatives include bolstering their staffing to better cover their area of operations, improving the level of training that they are able to provide to their staff, increasing their outreach efforts to inform veterans and their families of their agency or organization's existence, and purchasing and utilizing web-enabled case management software for the efficient and secure electronic submission of claims

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<sup>187</sup> Bev Schlotterbeck, *A Closer Look at the Role of the County Veterans Service Officer*, COUNTY NEWS (Nov. 2, 2015), <https://www.naco.org/articles/closer-look-role-county-veterans-service-officer> (“County veterans services offices are the at-home, back-to-the-community stop for veterans who have served the nation, fighting its wars and keeping its peace. They are the local link in an intergovernmental chain serving the country’s 21.8 million veterans.”); *About Us*, NAT’L ASS’N OF CNTY. VETERANS SERV. OFFICERS, <https://www.nacvso.org/about/about-us> (last visited Jan. 18, 2021).

<sup>188</sup> *Veterans Service Officers*, MILITARY.COM (May 7, 2021), <https://www.military.com/benefits/veteran-benefits/veteran-service-officers.html>.

<sup>189</sup> See Jim McDonough, Danielle Applegate & Benjamin Pomerance, *One Team, One Fight: Serving Veterans in a Post-COVID-19 Era – A New Model Emerges*, UNIV. OF BUFFALO SCH. OF L. (Apr. 2020), <https://www.law.buffalo.edu/content/dam/law/content/cle/200501-veterans/serving-veteran-families.pdf>.

<sup>190</sup> *Id.*



and appeals to the VA.<sup>191</sup> Every fiscal year, the VA should designate funds for receiving applications from state, local, and not-for-profit entities seeking funds and distributing those funds in accordance with the outlined purpose(s) stated in the organizations' applications. To safeguard the sanctity of these taxpayer dollars, the VA should institute quality control and reporting requirements by which agency leaders confirm that the recipients are using them for these funds for their intended purposes. Importantly, though, the VA's leaders must police themselves, ensuring that they are not denying funds to a state, local, or not-for-profit entity due to political disagreements between the federal government and that state, locality, or organization. Likewise, the Secretary must ensure that any agreements between the VA and the recipients of these funds do not contain requirements that inhibit the recipient's ability to advocate zealously for veterans, service members, and military families, because this local-level advocacy will ultimately improve the VA's ability to serve their constituents most effectively.<sup>192</sup> Additionally, the VA should engage more actively in supporting and enhancing access to local legal services for veterans, service members, and their families. The VA's own research and reporting demonstrates that unmet legal needs are among the top challenges facing veterans who are homeless.<sup>193</sup> Other data shows that veterans confront a lack

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<sup>191</sup> *Id.*; see also *Digital Applications Reduce Veteran Claim Processing Time by 10 Days*, U.S. DEP'T OF VETERANS AFFAIRS, OFF. OF INFO. & TECH., (Sept. 10, 2019), <https://www.oit.va.gov/news/article/?read=digital-applications-reduce-veteran-claims-processing-time-by-10-days>; DEMPSEY & SCHAFER, *supra* note 182, at 15 (noting that due to lack of financial resources, smaller veterans-focused entities can face challenges in spreading general awareness about their services for veterans and military families); Walsh, *supra* note 183 ("Some counties have an officer who is part-time, works three days a week, part-time and doesn't even have an office or a computer.").

<sup>192</sup> Already, the VA has acknowledged the benefits for veterans and their families who receive this level of advocacy. See, e.g., Walsh, *supra* note 183 ("The VA's own data show vets who give VSOs [Veterans Service Officers] power of attorney receive more than double the disability benefits of vets who file their own claims.").

<sup>193</sup> *Fact Sheet, Community Homelessness Assessment, Local Education and Networking Groups (CHALENG)*, U.S. DEP'T OF VETERANS AFFS. (Feb. 2019), <https://www.va.gov/HOMELESS/docs/CHALENG-2018-factsheet-508.pdf> (listing legal assistance for child support issues, legal assistance to prevent eviction and foreclosure, legal assistance to help restore a driver's license, legal assistance for outstanding warrants and fines, and legal assistance with discharge upgrade appeals among the "Top Ten Highest Unmet Needs" for male veterans who are homeless, and listing legal assistance for child support issues, legal assistance to prevent

of legal representation in a wide range of critical areas including (but not limited to) landlord-tenant disputes, foreclosure prevention cases, family law matters, and appeals for an upgrade of their characterization of discharge.<sup>194</sup> Unresolved legal problems for veterans are often precursors for suicidal ideation and suicide attempts.<sup>195</sup>

In the veterans-focused omnibus bill signed into law in January 2021, new provisions exist for the VA to award funding for legal services for veterans who are homeless and for women veterans, all of which are steps in the right direction.<sup>196</sup> Still, there is more that Secretary McDonough should do. He possesses the opportunity to revitalize an effort that the VA started with fanfare, an endeavor that unfortunately seems to have waned in recent years: establishing medical-legal partnerships at VA medical facilities throughout the nation.<sup>197</sup> As of December 2020, the VA had established twenty-eight of these medical-legal partnerships across the country.<sup>198</sup> The majority

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eviction and foreclosure, and legal assistance with discharge upgrade appeals among the “Top Ten Highest Unmet Needs” for female veterans who are homeless).

<sup>194</sup> *Veterans Day, 2020: Message from John G. Levi, Chairman, Legal Services Corporation*, LEGAL SERVS. CORP. (Nov. 10, 2020), <https://www.lsc.gov/media-center/press-releases/2020/veterans-day-2020-message-john-g-levi-chairman-legal-services> (“LSC’s 2017 Justice Gap Report found that 71% of low-income households with veterans or other military personnel had experienced a civil legal problem within the past year.”); A.B.A. *President-Elect Linda Klein, Veterans Legal Services Initiative*, A.B.A. (May 5, 2016), [https://www.americanbar.org/groups/committees/veterans\\_benefits/veterans\\_goals](https://www.americanbar.org/groups/committees/veterans_benefits/veterans_goals); Nathan L. Hecht & Terry Tottenham, *Amid Pandemic, Vets’ Need for Legal Aid Rises*, SAN ANTONIO EXPRESS-NEWS (Nov. 10, 2020), <https://www.expressnews.com/opinion/commentary/article/Commentary-Amid-pandemic-vets-need-for-legal-15716961.php>; Alicia McCormick, *Want to Make a Real Difference for Struggling Vets? Ensure Access to Legal Aid*, MIL. TIMES, Aug. 5, 2017, <https://www.militarytimes.com/opinion/commentary/2017/08/05/commentary-want-to-make-a-real-difference-for-struggling-vets-ensure-access-to-legal-aid>.

<sup>195</sup> John D. Blosnich et al., *Social Determinants and Military Veterans Suicide Ideation and Attempt: A Cross-Sectional Analysis of Electronic Health Record Data*, 35 J. OF GEN. INTERNAL MED. 1759, 1763 (2020).

<sup>196</sup> H.R. 7105, 116th Cong. (2021) (“Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020”).

<sup>197</sup> See Jack Tsai et al., *Medical-Legal Partnerships At Veterans Affairs Medical Centers Improved Housing and Psychosocial Outcomes for Vets*, 36 HEALTH AFFS. 2195, 2196 (2017).

<sup>198</sup> KIMBERLY LATTIMORE, JENNIFER TROTT & JOEL TEITELBAUM, *ISSUE BRIEF, EXPANDING VA-HOUSED LEGAL CLINICS TO SERVE VETERANS 1* (Dec. 2020).

of states still lack any VA medical-legal partnerships, however, which represents a missed opportunity for collaborative services.<sup>199</sup> The new administration should ensure that this chance no longer goes underutilized.

Medical-legal partnerships are centered on eight core elements: a memorandum of understanding between the partners, on-site staffing, dedicated legal resources, funding, processes for screening legal needs, training of healthcare staff in legal concepts, information sharing, and a defined population for the partnership's services.<sup>200</sup> Secretary McDonough should direct the leaders of every Veterans Integrated Service Network ("VISN") to require every VA Medical Center director within their jurisdiction to actively engage in a search for locally-based legal services providers and devote adequate funding to encourage and sustain these new partnerships.<sup>201</sup> The Secretary should establish a goal that every state in the nation has at least one medical-legal partnership at a VA medical facility within their borders by the conclusion of his first year of service. By building these partnerships, VA medical facilities can turn into one-stop shops where veterans can receive assistance for medical needs and for legal needs. This effort to expand VA medical facilities will attract more veterans, which is achieving another longstanding objective for the agency.<sup>202</sup> It will also help to address the access to justice barriers that too many veterans continue to face. Most importantly, it will deliver these services at an accessible and localized level, preventing veterans from having to scramble through nationwide and statewide searches when they need legal assistance and providing them with quality legal resources close to home.

Finally, Secretary McDonough should improve relations with the United States Department of Defense to gain information about veterans who are nearing their date of discharge from the military. He should then share the information regarding local VA medical and legal services for veterans who are willing to "opt in" to this exchange of data with the veteran-focused agencies in the location where a new

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 2.

<sup>201</sup> See Tsai et al., *supra* note 197, at 2202 ("The VA is continuing to expand cross-sector, community-based partnerships with outside entities to serve veterans, and the partnerships would fit well within the portfolio of these services to address social determinants of health.").

<sup>202</sup> See *supra* note 80 and accompanying text.

veteran is coming home. Veterans face a heightened risk of suicide, self-harm, homelessness, and other negative outcomes during the challenging period of change and adaptation from military service to civilian life.<sup>203</sup> Through this collaboration to provide enhanced state and local services, veterans will return to a network that is ready, willing, and able to serve their needs and help them work toward their goals, rather than facing the overwhelming task of navigating all of these pathways alone.

The VA and the Department of Defense are already piloting an initiative that focuses on this objective. The newly formed Expiration Term of Service (“ETS”) Sponsorship Program offers military members the chance to be connected with a trained “community integration” sponsor in the region where the service member is transitioning after discharge.<sup>204</sup> The VA selects the community sponsor based on the service member’s job interests, gender, interests, needs, and other characteristics.<sup>205</sup> Initial sessions between the service member and the community sponsor occur virtually, shifting to in-person sessions after the military member receives their discharge.<sup>206</sup> Sponsors are required to contact the veteran they are working with at least once a week to ensure that their needs are being met and to proactively work with the veteran to meet the veteran’s post-military goals.<sup>207</sup> Some meetings even come with added benefits. For example, meetings at Starbucks come with the incentive of free beverages and food, thanks to Starbucks’s partnership with the ETS Sponsorship Program.<sup>208</sup>

Secretary McDonough should strive to make this program available for transitioning service members from every branch of the United States military. The Secretary should also make it a priority to expand the geographic reach of this initiative beyond the pilot program

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<sup>203</sup> Chandru Ravindran et al., *Association of Suicide Risk With Transition To Civilian Life Among U.S. Military Service Members*, 3 J. AM. MED. ASS’N NETWORK OPEN 1, 1 (2020); Lisa A. Brenner & Sean M. Barnes, *Facilitating Treatment Engagement During High-Risk Transition Periods: A Potential Suicide Prevention Strategy*, 102 AM. J. PUB. HEALTH SUPP. S12, S12–S13 (2012).

<sup>204</sup> *VA Program Helps Service Members Transition to Civilian Life*, VANTAGE POINT (Nov. 27, 2019), <https://www.blogs.va.gov/VAntage/68723/va-program-helps-service-members-transition-to-civilian-life>.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

locations of San Antonio and New York City.<sup>209</sup> This is an initiative that will improve lives, and even save lives, of service members who are coming home by providing them with this much-needed community-based guide.<sup>210</sup> Whenever possible, state and local veteran-focused agencies should play a key role with the implementation of these programs; specifically, these agencies should be allowed to proactively reach out to the veterans coming home to their states and their localities rather than waiting for the veteran to contact them.

All government is indeed local, particularly when it comes to the best contemporary approaches to veterans' services. The VA will become the best possible leader that it can be in this realm when it embraces this concept and focuses greater attention on the types of collaborations that are discussed in this section, while incorporating the appropriate structures for the sharing of funds and data. For the VA to best serve the veterans of this nation and their families, the agency needs to become more active than ever in empowering and enhancing the abilities of agencies and organizations at the state and local levels to serve the veterans who live in their backyards. Secretary McDonough now has the chance to lead the way in this initiative to provide a more-localized focus to veteran affairs, an opportunity that he hopefully will utilize well.

## X. CONCLUSION

Secretary McDonough inherits a daunting task as the Secretary of the VA, a challenge made even steeper by the fact that he must undertake this work in the midst of the unprecedented medical and

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<sup>209</sup> *Id.*

<sup>210</sup> See, e.g., Joseph C. Geraci et al., *Expanded Roles and Recommendations for Stakeholders to Successfully Reintegrate Modern Warriors and Mitigate Suicide Risk*, 11 FRONTIERS IN PSYCH. 1, 2, 7–11 (2020); Gail Dwyer, *Program Eases Soldier-Civilian Transition*, BELVOIR EAGLE (July 22, 2020), [http://www.belvoireagleonline.com/news/program-eases-soldier-civilian-transition/article\\_2733f120-cc53-11ea-88d9-fb89592012ce.html](http://www.belvoireagleonline.com/news/program-eases-soldier-civilian-transition/article_2733f120-cc53-11ea-88d9-fb89592012ce.html); Matthew J. Louis, *Why Veterans Need More Than Just Transition Assistance Programs*, MIL. TIMES (May 12, 2020), <https://www.militarytimes.com/education-transition/2020/05/12/why-veterans-need-more-than-transition-assistance-programs> (describing why the military's transition assistance efforts at the time of discharge need to be augmented by sustainable community-based transition resources for the move from military service back to civilian life to be successful).

financial crises of the COVID-19 pandemic. He arrives at a time when the need for efficient, effective, and inclusive delivery of services to veterans, service members, and military families is greater than ever, with prior existing difficulties only exacerbated by this global crisis. Certainly, there are reasons for hopefulness, as the new Secretary's background as a leader with strong organizational talents and knowledge of the inner procedural workings of the federal government should help to conquer the "learning curve" that he will face.<sup>211</sup>

The nine recommendations summarized in this article will help build a new era of the VA. These measures will advance the VA's reputation as an agency that respects and serves all veterans, a stance of welcoming inclusivity for which the VA is not presently known. They will enhance the ability of veterans to receive the medical care and financial benefits that they need, and have earned, by virtue of their military service. They will increase the VA's collaboration with, and augmentation of, state and local agencies that can serve as navigators for veterans in the places where they live and work; by doing so, the recommendations will improve the agencies' ability to connect veterans and their families to better and more efficient services better and, by extension, increasing the VA's overall success at achieving their mission.

These measures are not cost-neutral, but they are cost-effective, because they provide a strong return on investment for the federal government's second-largest agency in terms of discretionary spending.<sup>212</sup> They are progressive, but not radical. They address longstanding VA objectives, such as preventing of suicide and homelessness among veterans and bringing more veterans to the care provided in the VA medical system. They revitalize and build upon existing VA initiatives, such as the cultivation of medical-legal partnerships and the strengthening of the ETS Sponsorship Program. They do not demand the enactment of new laws, but rather focus on implementation of – and, in some cases, proper adherence to – existing federal statutes.

Most importantly of all, these measures focus on the VA's mission for the individuals whom the agency is designated to serve. Through proper implementation of the initiatives described in this

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<sup>211</sup> Temin, *supra* note 1; Brock & Le, *supra* note 8.

<sup>212</sup> See Slack & Wagner, *supra* note 3 (discussing the size of the VA's operating budget and the importance of using these funds efficiently and effectively).

article, the VA will improve its ability to truly be an agency that serves all who have borne the battle. If Secretary McDonough is able to achieve this overriding goal in the next four years, veterans and their families should rightfully deem his tenure to be a success.