Preface

By David F. Addlestone[1]

After law school and bar admission in 1965, I sought a job with several federal agencies. Along came conscription (the "draft") which altered my plans—and life—as it did to millions of others.

I chose to join the Air Force JAG Corps, which, for a brief period, offered a direct commission as a First Lieutenant for a three-year commitment. Little did I suspect that I would spend a career in the field of military and veterans law, with a "sub-specialty" in military discharge upgrading. I forgot about my plan to pursue a PhD in history when I saw an opportunity to become an advocate for a group of people badly in need of some legal representation. I did not realize how significant the need was, and that the need would continue today.

This preface is largely based upon my experiences during the Vietnam era and the period of transition to the "all-volunteer" armed forces, but several basic factors have remained constant from World War II to today:

- Conscription—by law or by the best economic option—continues to disproportionately affect the economically disadvantaged and minorities. ("It's a rich man's war and a poor man's fight" is the old trope.)
- Returning combat troops do not make good barracks soldiers and are the most likely affected adversely during a downsizing of a post-war (or "emergency") force.
- Forms of "amnesty" or clemency ultimately exist for a few of those adversely affected by the military's engagement in, or support of, hostilities or those on standby to so engage.[2]

Since World War II, during certain periods of "declared" war, the United States has had a mandatory Selective Service System registration requirement and draft

1. I would like to acknowledge Margaret Kuzma and Dana Montalto for their invaluable role in producing this preface. Not only did their editing make the text more readable, but also their suggestions led to additions and clarifications that improved the flow of the final text. They encouraged me to use my personal story for the purpose of creating a useful, practical analysis of the history of military discharge upgrading, which will hopefully lead to today's advocates being better able to provide assistance to veterans adversely affected by "bad paper."

2. Gloria Emerson lists 35 amnesties, pardons, clemencies, or similar actions in American history by the U.S. government from 1795 to 1952. Gloria Emerson, Winners and Losers: Battles, Retreats, Gains, Losses and Ruins from a Long War 384–86 (Random House, New York 1977). This Manual deals in detail with the two Vietnam-era programs.

for men, resulting in military service as the need occurred.[3] Approximately 27 million draft-age men came of age (18 to 26 years old) during the Vietnam War era.[4] Approximately nine million served (active duty and reserves), and three million actually served in the combat zone.[5] Most who served as a result of the draft could not afford assistance in applying for a deferment or exemption,[6] or they simply did not wish to avoid military service.[7] A majority of "volunteers" facing the draft's two-year obligation enlisted for an additional one to two years to increase the chances of being classified in a field other than combat-related duty. Many others opted for the Air Force, Navy, or Coast Guard if they could not get into the National Guard or Reserves. The majority of those assigned to active duty combat-related "military occupational specialties" were from economically disadvantaged, minority, rural, or isolated communities.

Of course, many people from all backgrounds voluntarily served out of a sense of duty, a desire for adventure, the chance to leave small-town life, the promise of educational benefits, and a myriad of other reasons (e.g., avoiding a pending criminal sentencing or believing a recruiter's promises of great opportunities). Whatever their reason for joining, in the end, they all became veterans with discharges that could significantly affect their post-service lives in ways they could not have imagined.[8]

Attorneys were not immune from the draft. They either volunteered for the Judge Advocate General (JAG) Corps of the military service of their choice, or took their chances with the draft. In the latter case, once drafted, most lawyers extended their tours of duty (usually four years instead of the standard two) to be assigned to the JAG Corps.[9] Quite a few lawyers drafted after the 1968 change to the Uniform Code of Military Justice (UCMJ) took a chance on the likelihood that their law degree would result in assignment to a JAG office and that the legal duties assigned to them would require only the two years of obligated service. The vast majority of military lawyers did not stay in the JAG Corps for more than their initially obligated term of service. In total, an estimated 40,000 lawyers served during the Vietnam era.[10]

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3. Regarding earlier challenges to the male-only draft, *see* Rostker v. Goldberg, 453 U.S. 57 (1981). For current challenges to the current male-only standby registration, *see, e.g.*, National Coalition for Men v. Selective Service System (9th Cir. 2015); National Coalition for Men v. Selective Service System, 355 F. Supp. 2d 568 (S.D. Tex. 2019); and Kyle-Labell v. Selective Service System, 364 F. Supp. 3d 394 (D.N.J. 2019).

4. Lawrence M. Baskir & William A. Strauss, Chance and Circumstance: The Draft, the War, and the Vietnam Generation 3 (Alfred A. Knopf, New York, 1978) [hereinafter Chance and Circumstance].

5. It is widely believed that anyone with a good lawyer and/or doctor could avoid active duty service. *Id.* at 5–6.

6. *Id.*

7. *Id.* at 1201.

8. *Id.*

9. The Military Justice Act of 1968 amended the Uniform Code of Military Justice (UCMJ) to require lawyer counsel at almost all courts-martial. Manual for Courts Martial, United States, pt. III ¶ 6(a)–(d) (1968).

10. Frederic L. Borch III, Judge Advocates in Vietnam: Army Lawyers in Southeast Asia 1959–1975, at 85 (2003).

Life as a JAG Attorney

My experience as a JAG in the 1960s led me to conclude quickly that the administrative system that produced the most less-than-fully honorable discharges was seriously lacking in "due process." I was to begin the practice of law in a system about which I was lectured: "Lieutenant Addlestone, you do not understand, the burden of proof at an administrative discharge proceeding is less than that in a court-martial." I was in a system that would base decisions on searches that did not satisfy the Fourth Amendment and that would likely have led to suppression at a court-martial. A system that often denied meaningful confrontation of witnesses. In addition, a system in which meaningful notice was frequently absent, and assigned counsel was very often inexperienced—or, in some cases, were not lawyers at all. The result for servicemembers was too often a life sentence of a less-than-fully honorable discharge and the loss of most valuable state and federal veterans benefits.

Two of my early cases give concrete illustrations of just a few of the inequities common in such a system.

The first case involved a charge of possession of marijuana, which usually at that time led to a punitive discharge (Bad Conduct or Dishonorable) by court-martial or an Undesirable discharge at an administrative proceeding for "unfitness." The proposed discharge of my client was based on the allegation that, while on leave, he threw a lit "joint" to the sidewalk in New York City. The arresting police officer testified to "never losing sight of the lit cigarette as it was thrown to the ground by the defendant," etc., etc. The New York judge hearing the case dismissed it based on this "evidence." Most civilian courts were skeptical of these so-called dropsy cases, involving the familiar charge often used to stop and search young African American men. Nevertheless, upon return from leave, the servicemember's command chose to ignore the New York court's action and initiated an administrative discharge proceeding.

The Airman's family hired the same civilian attorney who was counsel in the New York proceedings. I was able to convince the attorney that challenging the legality of the search was not the only route to follow. Instead, the attorney testified under oath that "dropsy" cases, such as the one at hand, were common, and that the New York judge dismissed the case because he did not believe that our client actually was in possession of drugs. The "evidence" at the proceeding was the police report, but no live witnesses. The administrative discharge board found that there was insufficient evidence to prove the unfitness allegation. The board recommended retention in the Air Force—a victory for the servicemember. However, I wondered whether the result would have been the same if the civilian attorney and I had not been involved; and instead the first time the Airman received competent civilian counsel had been at a post-discharge review of an undesirable discharge. How much of the Airman's life would have been tarnished by an unfair discharge while he waited for that opportunity for review?

The second case was a general court-martial for multiple thefts of government property. The backstory was a command suspicion that the Airman was stealing property, and perhaps weapons, to give to the Black Panthers. This was my first general court-martial. Despite the fact that I had no formal training during my one year of active duty, I was facing a highly experienced prosecutor brought in from another command.[11] The accused was convicted of all counts save one and was sentenced to several months' confinement, but no punitive discharge (Bad Conduct or Dishonorable) was imposed. The administrative discharge regulations prohibited imposition of an Undesirable discharge if the discharge was based, in whole or in part, on an offense for which the servicemember had been acquitted.[12] The command had not read the relevant regulations as I had. The command decided to initiate an administrative discharge board seeking separation based, in part, on the offense for which the Airman had been acquitted—which led the separation board's panel of officers to recommend an Undesirable discharge. As I later pointed out to the command, the Airman could not be given an Undesirable discharge because the Undesirable discharge recommended by the board, by regulation, could not be imposed. The command was not happy with the result but was too embarrassed to ask the Secretary of the Air Force to use the plenary power of that office,[13] which would have allowed the Secretary to ignore the recommendations of the panel of officers and discharge the Airman regardless.

These two cases demonstrate how the system was flawed with little avenue for relief. My first client could not be proven guilty beyond a reasonable doubt at a court-martial, yet it was deemed proper to "sentence" him for life with an Undesirable discharge at an administrative proceeding. In the second case, my client was convicted at a court-martial but not sentenced to a punitive discharge. Nevertheless, the command tried, even though Air Force regulations prohibited it, to give him an Undesirable discharge at a subsequent administrative proceeding.

The facts of these two cases also illustrate significant issues that are present in many administrative discharge cases: race, class, and lack of access to qualified counsel. Racism, overt or unconscious, played a role in how many cases were handled.[14] An experienced defense counsel was frequently unavailable or overloaded with cases, and most servicemembers lacked the funds needed to retain civilian counsel. What to do in these cases?

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11. To augment the correspondence course on military justice taken by most officers, the first Staff Judge Advocate for whom I worked told me that the best way to get up to speed was to take home and read the decisions of the Court of Military Appeals, reported in the 15 volumes of the court-martial reports (1951–1966)! Earlier in my first solo court-martial, I had lost my case as the prosecutor. I was quickly designated defense counsel in all subsequent cases.

12. U.S. Dep't of Air Force, Manual 39-12, Separation for Unsuitability, Unfitness, Misconduct, Resignation, or Request for Discharge for the Good of the Service and Procedures for the Rehabilitation Program, 32 C.F.R. § 865.101 (Sept. 1966) [hereinafter AFM 39-12]; U.S. Dep't of Def., Instr. 1332.14, Enlisted Administrative Separations, § V, para. A-7 (Dec. 1965, current through Change 5 of August 13, 1969).

13. *See* AFM 39-12, 32 C.F.R § 865.113.

14. It is important to remember that most senior officers and noncommissioned officers serving in the mid-1960s had served when the armed forces were still segregated.

In addition to advocacy work, I was assigned to review all disciplinary actions involving civilian personnel. This introduced me to relevant federal administrative and court case law. These cases generally required strict compliance with the governing regulatory requirements. There were very few court cases requiring similar results in cases involving adverse personnel actions involving uniformed personnel. As I had observed, the Air Force did not seem overly concerned about the importance of regulatory compliance in military discharge cases, despite the severe consequences attached to a less-than-fully honorable discharge.

I wondered why did we not place the same emphasis on regulatory compliance at the administrative level? I began to seriously and carefully study the relevant regulations to enable me to make an "appellate" record for the clients being administratively discharged to be used at post-discharge appeals.

In most criminal cases, in the absence of a plea deal, counsel spends as much energy trying to squeeze under the burden of proof as they spend making an appellate record. The same focus, it seemed logical, could be applied in administrative discharge proceedings if no "plea deal" were available.[15] Thus, in addition to gathering evidence to defeat the "charges," I looked carefully at what the applicable regulations required in administrative discharge proceedings such as adequate notice of "charges," the right to be heard, meaningful confrontation of witnesses, and to call witnesses who were reasonably available—in essence the right to mount a real defense. There were other regulatory requirements that could be used to the advantage of the servicemember. For example, because an Undesirable discharge could not be based upon a charge for which the servicemember was acquitted at a court-martial, one could make certain that the administrative board based its recommendations in part on the charge for which the servicemember was acquitted. As my client in the case just discussed took the stand to beg for mercy, he was careful to make certain the board was aware of the offense of which he had been acquitted at the prior court-martial.

15. The typical "plea deal" in the military administrative process consisted of a servicemember waiving all rights in exchange for a discharge better than an Undesirable discharge. A large percentage of cases terminated through this "deal" process. The process varied in practice, from service to service, and from command to command within each service. Some commands would reduce the deal to writing, but most often, there was an understanding among the participants that a waiver could be withdrawn if the final decision maker would not approve the discharge central to the deal. The worst case was when the command dissuaded a servicemember from exercising the right to an administrative hearing, by threatening to stop the administrative process and immediately initiate a court-martial if the servicemember chose the administrative hearing. In this game of "chicken," the servicemember would usually back down and sign anything that would end the process and get them home ASAP. Add to that the time immemorial rumor that a less-than-fully honorable discharge would automatically be changed after six months, and the result was many a servicemember waiving all rights.

As a "reward" for paying close attention to the regulations, I was reassigned to be the person who oversaw the process in all the administrative separation cases. Most cases were routine,[16] but occasionally there were bizarre cases.[17]

How to stop these injustices? I encouraged assigned defense counsel to ask for an administrative board hearing when no deal for a non-Undesirable discharge was available and to request as many witnesses as possible. I convinced the Staff Judge Advocate (SJA) to recommend to the discharge authority that the servicemember receive an Honorable or General discharge despite the regulatory presumption of an Undesirable discharge.[18] I could argue that the servicemember was merely "unsuitable" as opposed to "unfit" or that there were no offenses rising to the level of "moral turpitude"—a standard the prosecutors and the SJA advising the discharge authority had informally created to avoid a formal hearing.

The servicemembers facing discharge proceedings at the installation to which I was assigned were lucky: the docket was small; defense counsel had ample time to prepare their cases; and the senior officers who decided the character of discharge issued to servicemembers were close to retirement and did not want a fight in every case. ("Making a federal case" they would say.)

There were four other installations within 200 miles of the one to which I had been assigned. The JAGs often compared notes. The servicemembers at the other three installations were receiving punitive discharges (Bad Conduct or Dishonorable) at courts-martial and administrative Undesirable discharges with regularity. The Marine Corps was the worst. The type of discharge a servicemember in trouble received was grossly inconsistent from service to service and equally arbitrary within each service.[19]

Post-Service Advocacy

After my discharge, I stayed current with military law and volunteered to counsel active duty servicemembers while I served as a staff attorney with the legal aid agency of the District of Columbia (now the D.C. Public Defender Service). Several of my clients there had less-than-fully honorable discharges.

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16. That is, in most cases, the servicemember was notified of their rights; wanted to get out of the service; received pro forma advice from a JAG; the servicemember waived all rights and was quickly discharged with an Undesirable discharge. "Sun downer" cases were those that could be processed in one day.

17. For example, a low-ranking Airman with a wife and four children was charged with "financial irresponsibility." His last assignment had been in the warm climate of Texas. At his new assignment in Rome, N.Y., he was not able to purchase winter clothing for his family. His commanding officer did not appreciate the constant calls from merchants about his overdue debts. With a little persuasion, common sense prevailed, and the Airman was retained on active duty.

18. U.S. Dep't of Def., Instr. 1332.14, Enlisted Administrative Separations (Dec. 1965, current through Change 5 of August 13, 1969).

19. U.S. Comptroller General, *Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review Needed* 22–35 (1980).

I then spent a year in Vietnam as a staff attorney with the Lawyers' Military Defense Committee (LMDC), an organization similar to the Lawyers Committee for Civil Rights' work in the Deep South in the early 1960s. There I saw "bad paper" flowing like a flood as the war wound down and drugs had reached a major epidemic stage.[20]

Upon return from Vietnam, one other LMDC attorney and I staffed the American Civil Liberties Union's military rights office. Within a short period, it became apparent that very few people knew anything about "appealing" less-than-fully honorable discharges. Even the amnesty movement, at first, focused only on draft resisters, "deserters," and others convicted of certain anti-war activities. This led to the ACLU's establishment of the National Military Discharge Review Project (NMDRP), which produced the first manual on military discharge upgrading, published in 1975.[21] Lawyers working under Legal Service Corporation grants, who ultimately became associated with the National Veterans Legal Services Program (NVLSP), produced the 1982 Manual on Military Discharge Upgrading and Introduction to Veterans Law and its 1990 Supplement.[22] It was during this period that I was part of the first great era of discharge upgrade advocacy.

A Brief History of Military Discharge Upgrading

The process of military discharge upgrading has been largely a hidden secret to the vast majority of the over two million veterans who, since World War II, were issued a less-than-fully honorable discharge.[23]

Until 1892, a servicemember (SM) could be discharged as honorable or "without honor."[24] In 1892, an administrative discharge process emerged that could issue less-than-fully honorable discharges. There are no known statistics about the numbers of less-than-fully honorable discharges issued before 1942.

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20. *GI Justice in Vietnam: An Interview with the Lawyers Military Defense Committee,* 2 YALE REV. L. & SOC. ACTION 25, 27 (1972), *available at* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1034&context=yrlsa.

21. The 1975 ACLU Practice Manual on Military Discharge Upgrading was written by David Addlestone and Susan Hewman. This was the first known "how to do it" work on the subject.

22. David Addlestone, Bart Stichman, Keith Snyder, and John Kosloske wrote the manual on Military Discharge Upgrading and Introduction to Veterans Administration Law in 1982, and Michael Ettlinger and David Addlestone wrote the 1990 Supplement with Cumulative Index and Case List. DAVID F. ADDLESTONE ET AL., MILITARY DISCHARGE UPGRADING AND INTRODUCTION TO VETERANS ADMINISTRATION LAW 564 (1982, 1990 supp.) [hereinafter MILITARY DISCHARGE UPGRADING], *available online at* https://ctveteranslegal.org/wp-content/uploads/2012/12/MilitaryDischargeUpgrading_lr.pdf; *see also* National Military Discharge Review Project, *Practice Manual on the Department of Defense Special Discharge Review Program for Vietnam-Era Veterans*, 4 MIL. L. REP. 6017 (1976).

23. Veterans Legal Clinic, Legal Services Center of Harvard Law School, *Undeserved: How the VA Wrongfully Excludes Veterans with Bad Paper* 48 (Mar. 2016), *available at* http://www.legalservicescenter.org/underserved [hereinafter *Underserved*].

24. Harry V. Lerner, *Effect of Character of Discharge & Length of Service on Eligibility to Veterans' Benefits*, 13 MIL. L. REP. 121, 127 (1961).

Discipline before 1951 was governed by the harsh Articles of War and a very summary administrative process, both of which had little regard for a servicemember's due process rights during disciplinary proceedings. Although no World War I statistics are available, the numbers from during and after World War II are shocking: one out of eight servicemembers were court-martialed during service.[25]

World War II military discipline and the other arbitrary adverse personnel actions sparked outrage from the millions of new veterans and the increasingly powerful Veterans Service Organizations (VSOs).[26] Prior to the G.I. Bill legislation in 1944, the only relief for veterans with complaints about unfair treatment, administratively or by court-martial, was the so-called Private Members Bill—a piece of legislation introduced by a member of Congress providing some form of relief for individual veterans.[27] The average former "G.I. Joe" clearly could not navigate, much less afford, this process.

The military establishment resisted any substantial change. The VSOs lobbied Congress to do something about the less-than-fully honorable discharge issue. There were hearings and a commission, but other post-war concerns delayed real change to the Articles of War. However, the returning veterans organized and persuaded Congress, in 1944, to establish Discharge Review Boards (DRBs) in each service[28] and, in 1946, Boards for Correction of Military Records (BCMRs).[29] The services promulgated new administrative discharge regulations in the late 1940s providing for a few basic procedural rights for servicemembers.[30]

In 1951, the Uniform Code of Military Justice (UCMJ) was enacted and the administrative discharge process modestly improved. The VSOs continued to urge for more changes in the military disciplinary system, especially the less-than-fully honorable discharges that were arbitrarily dispensed. There was little progress, and the DRBs and BCMRs provided relief in a relatively small percentage of cases involving less-than-fully honorable discharges issued between 1942 and the Vietnam era. The discharge review process continued to fail due to lack of outreach, individual case advocacy, legislative interest, relevant educational materials, and, in practice, limited court review of board decisions. Clearly, the holders of less-than-fully honorable discharges had little clout. The VSOs provided token representation before the DRBs and BCMRs, using their limited resources to instead

25. There were some modest changes before the enactment of the Uniform Code of Military Justice (UCMJ) in 1951. *See* Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from "Veteran" Services*, 122 Penn State L. Rev. 69, 74–96 (2017) [hereinafter Adams & Montalto]. However, until then, the court-martial was quick and easy and could include a dishonorable discharge (DD) in the sentence.

26. *See generally* Andrew S. Effron, Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 Harv. C.R.-C.L. L. Rev. 227 (1974); John T. Wills, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 Mil. L. Rev. 39 (1972).

27. *See* Adams & Montalto, *supra* note 25, at 81.

28. 10 U.S.C. § 1553; 32 C.F.R., Part 70.

29. 10 U.S.C. § 1552; 32 C.F.R. § 581.3 (Army); 32 C.F.R. § 865(A) (Air Force); 32 C.F.R. § 723 (Navy).

30. *See* Adams & Montalto, *supra* note 25, at 95.

focus on representing veterans with VA claims. Consequently, there were very few advocates—attorney or nonattorney—with any knowledge about these important agencies. No foundations or pro bono lawyers were available to create a movement to upgrade discharges, and certainly not on a large-scale basis.

By the Vietnam era, the VSOs had lost interest in any substantial changes to the system, which continued to issue bad paper at a steady rate. On a few occasions, perfunctory congressional hearings resulted in cosmetic changes to the administrative process, which was increasingly relied upon by commanders who did not want to deal with the more formal court-martial process required by the UCMJ.[31]

Returning Vietnam veterans with less-than-fully honorable discharges found that a holder of a bad paper discharge faced a serious barrier to compete for employment in the 1965–1975 U.S. economy. In addition, the VSOs were not interested in these bad paper veterans' particular concerns, such as readjustment counseling, adequate G.I. Bill educational benefits,[32] and challenging less-than-fully honorable discharges.

The concern about less-than-fully honorable discharges became noteworthy again only three decades after the creation of the DRBs. During the three-decade hiatus, there was virtually no advocacy for less-than-fully honorably discharged veterans. Throughout this time there was a tremendous need for advocacy beyond what the VSOs had to offer, but, unfortunately, only a few legal aid attorneys were aware of it. Pro bono counsel focused more on assisting draft resisters. There were very few civilian military law specialists beyond the small bar that handled "military pay cases." No vehicle for networking to exchange ideas and identify available advocates existed.

The public and advocates for low-income veterans remained largely unaware, or ignorant, of the plight of veterans with less-than-fully honorable discharges. The public equated less-than-fully honorable discharges with "deserters," which was far from the actual facts. The amnesty movement was late to include less-than-fully honorably discharged veterans, as its focus was on convicted or fugitive draft resisters and a few Absent Without Leave (AWOL) veterans in exile who regularly denounced the war. This climate was not conducive to changing attitudes without some significant action to catch the public's attention.

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31. It was generally believed that military personnel decisions were not reviewable by the federal courts. In 1958, the Supreme Court held in Harmon v. Brucker, 355 U.S. 579 (1958), that Dr. Harmon's membership in the Communist Party prior to his service could not be used to support a less-than-fully honorable discharge. *See also* Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965). Other than a few military pay cases in the Court of Claims, there were relatively few federal court challenges to less-than-fully honorable discharges. It was not until the 1970s, with a few exceptions, that the federal courts became a source for relief for veterans with less-than-fully honorable discharges.

32. The Veterans of Foreign Wars (VFW) opposed educational benefits for these new veterans until late in the war.

The need for advocacy around specific issues of concern to Vietnam veterans was apparent, and various organization—including the American Civil Liberties Union (ACLU) National Military Discharge Review Project (NMDRP), where I worked—stepped in to fill that need.[33] The NMDRP worked in conjunction with the ACLU's Amnesty Project, the Veterans' Education Project, the clinical programs at Georgetown and American University's law schools (the latter was known as the National Veterans Law Center), Vietnam Veterans of America Legal Services, and most importantly the National Veterans Legal Services Program (NVLSP).

We at the ACLU's NMDRP started with no real knowledge of how discharge upgrading really worked. So we plunged in and started taking cases to the DRBs and BCMRs. The cases were mostly referrals from the ACLU affiliates. We took on almost every case sent to us. We started with little insight into how the review system (really) worked. There was no written guidance. Even when I was an active duty JAG, there was no instruction about how we could appeal our clients' bad administrative discharges.[34]

In an attempt to learn how the system worked, we started reaching out to the Military Law committees of various bar associations. Nothing was learned. There was little case law or practical articles published that were of any value.

Both Susan Hewman (also of NMDRP) and I had criminal law backgrounds—an environment where it was important to learn the biases of certain judges, how to shop for the right judge for a case, and all the unwritten tricks learned by spending time in the court house, with open ears and questions to the "old timers" who inhabited the court house—the unwritten law of the underbelly of the local criminal law process.

We applied this approach to the review board system. We had chats with any other advocate we would meet awaiting our cases to be heard, conversations with the board support staff, discovery of the process how five board members ruled when clearly they did not have time to all read the applicant's file, and even lunch or coffee with friendly board members.[35]

We distilled this information, analyzed cases we won, read the BCMR decisions, which often contained some useful information, watched carefully the boards' reactions to claims of procedural errors, and used all logical analyses to try to discern how the boards would likely rule given certain sets of facts.

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33. The staff of the NMDRP was a part of several entities over the years before being fully absorbed by the current National Veterans Legal Services Program (NVLSP).

34. I did "appeal" one special court-martial conviction involving an illegal search and seizure. The BCMR granted relief. There was no bar in place at that time to limit a BCMR's ability to "correct" an erroneous court-martial decision. The appeal was successful, and my boss was angry that I did not inform him I had taken the case to the AFBCMR.

35. For many board members this assignment was to be their last, as they were left out of a track leading to better positions; often these were assignments where reservists were used; in one instance, it was apparent that several of the members were gay and being kept on an assignment from where they could retire; and an unusually number of high ranking female officers qualified for more important assignments.

Even though we were new to this area of law and had little information, our win rate was more than twice that of the overall approval rate for the boards. It was not that we were super lawyers. Rather, we were the only advocates who prepared written briefs, prepared our clients for cross-examination by five senior military officers, and introduced proof of good post-service conduct. It also did not hurt to tell the client to be respectful, how to dress, what questions to expect to be asked, and to not be afraid to admit to mistakes made in the past. This was just common sense. One thing was clear—the best way to win was to use the "good guy" rule, that is, your client was a good person placed in an unfair situation. Legal issues were generally to be noted and litigated should the basic rule not work.

Over time, a network of community based organizations (CBOs) and the formation of a few new, but small, veterans organizations emerged as new voices for veterans with less-than-fully honorable discharges. Besides the ACLU, the Legal Services Corporation (LSC) also discovered that veterans and their families were an underserved community. LSC financial support was key to the production of the 1982 Manual on Military Discharge Upgrading and its 1990 supplement. LSC additionally funded the production of a training module and two national training events on discharge upgrading. The ongoing work of NVLSP as an LSC national support center, and a sizeable closeout grant to allowed NVLSP to continue its work after the support centers were abolished.

The new advocacy work on the less-than-fully honorable discharge issue was through the typical spectrum of education (public awareness, advocate training, and publications), litigation, and legislative advocacy—all with the ultimate goal of the abolition of less-than-fully honorable discharges and relief for the millions adversely affected. The goal has yet to be reached, but the opportunity for relief for those with less-than-fully honorable discharges was greatly increased, and new means for relief on a class basis, or class notice, resulted in an opportunity for discharge upgrades for tens of thousands of veterans.

The NMDRP and the CBOs were able to generate media attention for the plight of veterans with less-than-fully honorable discharges. This helped with fundraising and public awareness, especially among attorneys, many of whom were veterans, interested in pro bono work.[36] NVLSP was able to attract modest foundation support for its work as the national link for the new movement.

Litigation Victories

Litigation was quite productive. Litigation was generally designed to (1) improve the review process; (2) require the boards to upgrade cases through class actions;

36. *See, e.g.*, Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973) (holding that a Plaquemine, Louisiana, city ordinance requiring municipally employed veterans to have an honorable discharge "impermissibly and irrationally" disqualified veterans with less-than-fully honorable discharges).

(3) force the boards to reconsider specific classes of cases previously rejected;[37] and (4) expand the principle that a military service must follow its regulations in the discharge process, absent clear harmless error.

Additionally, litigation sought to accomplish (1) reform and correction of improper process issues; (2) expand the rule of *Harmon v. Brucker*[38] to limit the type of conduct that could be considered in characterizing a discharge; (3) further establish that prejudicial regulatory errors during the discharge process were strict and the result should be a fully Honorable discharge or one that the veteran's service records mandated without regard to the evidence used in the discharge proceedings; (4) force notice or outreach to veterans who might benefit from a new liberalized rule or another opportunity to reapply to the appropriate board; and (5) require the reopening of an application denial for any reason pursuant to a court order.

First, process issues needed to be addressed. The boards only sent boilerplate decisions—"after carefully reviewing your military records [etc.] the board . . ."—which prevented veterans and their advocates from understanding why the board rejected a veteran's contentions and how the board reached its conclusions. Bart Stichman, now the Executive Director of NVLSP, hit on the solution. The litigation in the so-called *Urban Law* case was based on the failure of the boards to produce documents under the Freedom of Information Act (FOIA) which they were required by law to create.[39] The object was to force the boards (DRBs and BCMRs) to issue and make public, non-boilerplate decisions to enable the public and advocates to understand why the boards decided to grant or deny relief. This also gave the veteran applicant and counsel, if any, an opportunity to understand what was needed to prevail at any further review (administrative or judicial). After months of negotiations, the Department of Justice agreed with the plaintiffs that the boards needed to comply with many requirements of the Administrative Procedure Act. The boards would be required to provide findings and reasons for their decisions and respond to contentions of the veteran. The decisions were to be indexed and made (in redacted form) available to the public. These changes revolutionized the decision making of the boards.

Further litigation was needed to enforce compliance. One enforcement challenge resulted in the Department of Defense (DoD) having to send 50,000 letters to former applicants advising them of a right to a new hearing.

Another important issue related to allowing meaningful access to the federal courts was a challenge to the DOJ's position on the general federal statute of limitations.[40] The NMDRP entered as counsel or amicus in several U.S. Circuit Court

37. A board review of previously denied old applications for any reason often resulted in the application of new, liberalized standards, which, when applied to some of these old cases resulted in the application of the current practice of upgrading on that basis.

38. 355 U.S. 579 (1958).

39. Urban Law Inst. of Antioch Coll. v. Sec'y of Defense, No. 76-0530 (D.D.C. 1978).

40. 28 U.S.C. § 2401(a).

of Appeals cases where the government argued that the Administrative Procedure Act's six-year statute of limitations began to run from the date of discharge instead of the date of an erroneous DRB or BCMR decision.[41] The result was, in most circuits, that NMDRP and the veterans it advocated for prevailed: most courts held that a veteran who chose to apply to the DRB or BCMR before seeking relief in a federal district court had a new cause of action based on a board denial.

Several other cases resulting in board re-review of a group of decisions were:

- Successful challenge to the Army BCMR's allowing staff members, in violation to their regulations, to deny requests for reconsideration. Several thousand cases were re-reviewed, resulting in over 400 upgraded discharges. This issue re-occurred in several different forms until Congress settled it in 2017.[42]
- Successful challenge to Navy DRB's violation of their regulations requiring a majority of Marine members on the five-member panel when the applicant was a Marine veteran. A class of 160 was certified.[43]
- Successful challenge to Navy Secretary's practice reversing DRB decisions without issuing a statement of findings, conclusions, and reasons. There was a certified class of 70.[44]
- In another case, after the filing of the complaint, the Navy conceded that the DRB was in error in not upgrading a discharge based on the denial of counsel in administrative discharge cases, as required by regulations. An NMDRP petition to the Secretary of the Navy requesting relief for those similarly situated resulted in the DRB, on its own motion, reopening several hundred cases.[45]
- Another petition entitled *In re Cherry Point Investigation* successfully resulted in many cases processed by that command be reviewed on the basis that counsel had been similarly denied the servicemember in administrative discharge proceedings. (It is important to note that a DRB or the Secretary of a service can consider a case or class of cases on their own "motion."[46])

41. *See, e.g.*, Walters v. Sec'y of Def., 725 F.2d 107 (D.C. Cir. 1983); Baxter v. Claytor, 652 F.2d 181 (D.C. Cir. 1978); Calhoun v. Lehman, 725 F.2d 115 (D.C. Cir. 1983). *See also* Wood v. Sec'y of Def., 496 F. Supp. 192 (D.D.C. 1980).

42. *See, e.g.*, Heiler v. William, 4 Mil. L. Rep. 3009 (D.D.C. 1976). *See also* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 § 534(a)(2)(D) (2016) (codified as amended at 10 U.S.C. § 1552(d)).

43. Harvey v. Sec'y of the Navy, No. 76-1761, 6 Mil. L. Rep. 3003 (D.D.C. 1976).

44. Attard v. Sec'y of the Navy, No. 76-1701, 5 Mil. L. Rep. 2325 (D.D.C. 1977).

45. Bird v. Sec'y, No. 78-1897 (D.D.C. Oct. 13, 1976).

46. 10 U.S.C. § 1552(b); 72 C.F.R. § 70.8(b)(8)(i).

- Another group of cases challenged the use of conduct having no impact on the servicemember's performance of, or ability to perform, military duties to characterize a discharge as less-than-fully honorable.[47]
- Conviction by a civilian court of an offence having no impact on the plaintiff's service could not support an undesirable discharge.[48]
- Successful class action challenging the use of conduct while the servicemember was in the inactive reserves and had no duties to perform as the basis for a less-than-fully honorable discharge. The court granted relief to known class members and required extensive outreach effort to locate other potential class members.[49]
- Two cases, *Pittman v. Secretary*[50] and *Matlovich v. Secretary*,[51] challenged aspects of the military services' positions on LGB servicemembers and military service. *Pittman* challenged basing a less-than-fully honorable discharge on homosexual acts. *Matlovich* challenged the policy of excluding all, or in his specific case him, from military service. Pittman's challenge of his discharge for homosexual acts as the sole ground for his less-than-fully honorable discharge evoked an in-chambers outrage from one of the most conservative district court judges in the country. When he hinted that he was inclined to rule for Pittman, the Navy quickly revised its policy. The other services did the same. In 1981, DoD made a significant change in the type discharge that would be given to those who were discharged on the basis of homosexuality or homosexual acts. The type discharge would be based solely on the servicemember's record of service and an OTH discharge was no longer the presumptive characterization, unless there was some aggravating circumstance such as use of force or misuse of rank.[52] These cases also started the dialogue on the right of LGB servicemembers to serve openly—which took several more decades before the military's ban on open service by LGB servicemembers ended.[53]

Another group of class action cases were based on improper use of evidence in discharge proceedings:

- *Lipsman v. Brown*, No. 76-1175 (D.D.C. 1978), which challenged the Army's practice of awarding General discharges to servicemembers diagnosed with a "character and behavior disorder." The settlement provided that

47. A related issue is the DoD's determination that some reasons for discharge, usually a UD, were no longer consistent with current societal views or at least did not "punish" the servicemember who might be faking a condition to be discharged early with a HD, for example, enuresis, sleep walking, homosexual tendencies, unsanitary habits, and financial irresponsibility.

48. Roelofs v. Sec'y of Air Force, 628 F.2d 594 (D.C. Cir. 1980).

49. Wood v. Sec'y of Def., 496 F. Supp. 192 (D.D.C. 1980).

50. Pittman v. Sec'y of Def., No. 76-0948, 4 Mil. L. Rep. 3010 (D.D.C. 1976).

51. Matlovich v. Sec'y of Air Force, 591 F.2d 852 (D.C. Cir. 1978); Matlovich v. Sec'y of Air Force, No. 75-1750 (D.D.C. 1980) (ordering, on remand, Matlovich's reinstatement into the Air Force).

52. U.S. Dep't of Def., Instr. 1332.14 (Jan. 16, 1981).

53. See Chapter 12 on LGBTQ veterans.

this practice would cease and that the Army would change its regulations so as to provide for more favorable treatment in these common cases (usually discharges for "unsuitability" involving minor offenses), the amending of the Army DRB regulations to require similar relief to future applicants, and the mailing of approximately 10,000 letters to former DRB applicants.

- *Giles v. Secretary of Army*, 627 F.2d 554 (D.C. Cir. 1980), was a class action that successfully obtained an order that the Army had to recharacterize the less-than-fully honorable discharges of thousands of veterans when their discharge characterizations were based in whole or in part on urine tests for drug use in violation of the UCMJ's equivalent of the Fifth Amendment right against self-incrimination.[54]

Litigation also succeeded in raising the standards and the remedies available for procedural errors in discharge proceedings. For years, the old Court of Claims was the primary forum for servicemembers or veterans seeking money based on a military service's improper procedural errors in military personnel actions. Most plaintiff victories were only final after a remand to a BCMR or other agency of the veteran's service. The federal district courts had limited concurrent jurisdiction.

- In *Martin v. Secretary of Army*, 455 F. Supp. 634 (D.D.C. 1977), the District Court held that the inclusion of a record of a nonjudicial punishment, which by regulation was to be removed from the service records when the SM was transferred to a new command, was prejudicial and required an upgrade to fully honorable. See also *Carter v. United States*, 213 Ct. Cl. 727 (Ct. Cl. 1977). Both courts denied the government's argument that there should be a remand for a new proceeding or its equivalent.
- *White v. Secretary of Army*, 878 F.2d 501 (D.C. Cir. 1989), held that there was ineffective assistance of counsel to allow the servicemember to request a discharge in lieu of court-martial when the court-martial was not authorized to include a discharge as part of a sentence. Despite the servicemember's poor record of service, the Army was not permitted a "do over."[55]

Social Movements, Institutional Changes, and Backlash

In the 1970s, several events changed the discharge upgrade landscape forever. Beginning in 1971, presidential and DoD special programs and directives addressing the treatment of certain types of cases focused the DRBs on easy-to-apply rules with the objective of upgrading the discharges based on specific reasons

54. *See* Chapter 14 on discharges for drug and alcohol use.

55. *See* Chapter 1 for a discussion of discharges "for the good of the service." The remedy when the less-than-fully honorable discharge is rendered void due to prejudicial error in the discharge proceedings can be found in Chapters 2 and 6 of this Manual.

for discharge—a "class" approach rather than a strict case-by-case analysis. This change reflected a fresh look at the continuing increase in administrative discharge cases occurring outside the stricter procedural standards required by the UCMJ. Pressure on the DoD reflected the public concern generated by the unpopularity of the Vietnam war. The recognition of modern due process rights and the flaws and unfairness in the Selective Service System were also important in the change in attitude of some review boards.

All these factors resulted in some boards adopting an increased common sense standard of review, a system that required a reconsideration of past disciplinary actions that had used out-of-date standards years ago, often in a wartime setting. This realistic approach required a more forgiving approach to less-than-fully honorable discharges in the context of the totality of the circumstances and a serious, considered look at an applicant's assertion of mitigating factors surrounding the discharge. This also reflected a concern about the reasonableness of the continued imposition of a lifetime label many years after the perceived necessity for strict discipline. The BCMRs seemed to lead the way in this shift and often cited the enduring stigma as a reason to upgrade a discharge.

The first class of cases impacted by this shift involved the so-called Laird Memo, which was issued as part of the program to treat drug use as a rehabilitation issue as opposed to the previous "hard-nosed" approach.[56] Drug use among servicemembers in Vietnam and Germany had reached epic proportions. Use of heroin was so prevalent that by late 1970 some commanders ceased serious punitive action for servicemembers caught using only marijuana. Traditional harsh discipline and the sheer number of cases called for a streamlined solution. An amnesty program aimed at treatment, not punishment, was instituted. Secretary of Defense Melvin Laird issued a directive to the DRBs to consider upgrading veterans with administrative Undesirable discharges based on their use or possession for personal use of drugs on or before July 7, 1971.[57] While the Memo was valuable, the outreach by the DoD was not sufficient to reach the class affected. Litigation followed.[58]

The amnesty movement grew as the United States' involvement in Vietnam drew to a close. Part of the platform of the National Coalition for Universal and Unconditional Amnesty (NCUUA) was directed at a wholesale upgrade of the nearly 700,000 veterans who received bad paper during the Vietnam era (broadly defined as 1962 to 1975). This objective was far ahead of the public's perception of the

56. Sec'y of Defense, Review of Discharges Under Other Than Honorable Conditions Issued to Drug Users (Aug. 13, 1971) [hereinafter Laird Memorandum], 44 Fed. Reg. 25,046, 25,111 (Apr. 27, 1979).

57. *Id.*

58. A settlement in the *American Veterans Committee and Bonner v. Schlesinger*, 2 MIL. L. REP. 2239 (D.D.C. 1973) provided for the DoD to engage in an outreach effort to inform veterans and veterans advocates of the new policy.

issue. Two special programs were created by Presidents Ford and Carter.[59] Unfortunately, both programs were flawed in concept, implementation, and outreach.

The Ford Clemency Program (FCP) was in effect from September 16, 1974, to March 31, 1975. It was available only for those with an Undesirable, Bad Conduct, or Dishonorable discharge for absence-related offenses.[60] The FCP was based on the notion that a "clemency discharge" could be earned by a currently AWOL servicemember or a veteran with a less-than-honorable discharge. Most were required to apply to the Presidential Clemency Board (PCB), which in some cases conditioned the clemency discharge on the performance of "alternative service" "in the community." The vast majority of potential applicants would receive as a result only an Undesirable discharge in another form—though the clemency discharge perhaps sounded nicer than an Undesirable discharge, it did not qualify the holder for federal veteran benefits from the Veterans Administration (VA). Most AWOL servicemembers could turn themselves in and receive an Undesirable discharge if they agreed to perform alternative service to earn a clemency discharge. Almost all AWOL servicemembers who turned themselves in were already receiving Undesirable discharges outside the FCP. The services were eager to rid themselves of disenchanted draftees. Thus, the FCP was of little value to most veterans.

The Amnesty movement member organizations, through the Clemency Amnesty Law Coordinating Office (CALCO), urged a boycott of the program and urged veterans and their advocates to seek relief from the review boards using the normal process. FCP requests for public service announcement time on major networks (e.g., halftime at the Super Bowl) were followed by CALCO requests for equal time.

On his last day in office, President Ford issued a directive that veterans who had applied to the PCB and who had been wounded in combat or decorated for valor were to receive a General discharge absent compelling circumstances. This directive was purportedly issued to honor the request of Ford's friend, and antiwar Senator, Philip Hart, who lay dying.

FCP members defended the program,[61] but the FCP in reality only helped a few veterans—those with Bad Conduct or Dishonorable discharges from a court-martial conviction who would benefit from the accompanying presidential pardon.

In March 1977, President Carter announced his own program for Vietnam-era veterans with less-than-fully honorable discharges: the Special Discharge Review

59. See Chapter 18 of this Manual for a description of these programs and advocacy issues that still exist.

60. Presidential Proclamation No. 4313, Announcing a Program for the Return of Vietnam Era Draft Evaders & Military Deserters, 39 Fed. Reg, 33,293, 33,294–95 (Sept. 16, 1974).

61. Chance and Circumstance, *supra* note 4, at 222–23.

Program (SDRP).[62] Veterans with General and Undesirable discharges received between August 4, 1964, and March 28, 1973, could apply to their branch of service for a review of their discharges under liberalized standards established by the SDRP.[63] Unlike the Ford Clemency Program, eligibility was not limited to veterans discharged for absence-related conduct.

President Carter had appointed an advisor to report to him recommendations for implementing "amnesty," which was included in the Democratic Party's platform. A small group of NCUUA activists prepared a memorandum that urged a universal discharge upgrading of veterans with less-than-fully honorable discharges from the Vietnam era. The recommendation was accepted by Carter's advisor but the President's DoD liaison, Charles Kirbo, passed on the DoD's strong objection, which he also endorsed.

The SDRP criteria for upgrading consisted of two categories of cases. First, automatic upgrades were to be given if any of one of six certain special factors were present (e.g., combat wounds). Alternatively, if no automatic factors were present, a list of mitigating factors (e.g., age, aptitude, and length of service) could also support an upgrade. The factors applied only to veterans with Undesirable discharges, but those with General discharges were to be reviewed with the President's desire that the discharges be reviewed in the "spirit of compassion." These standards, in essence, ratified the most liberal approach of all the review boards currently reviewing cases. The Army DRB's President, Colonel William Weber, a Korean War combat veteran with an amputation as a result of a helicopter crash, was the driving force behind these realistically compassionate program standards.

Powerful members of Congress and their staff counsel—mainly from the Armed Services and Veterans Affairs Committees—were not pleased. Some of the large Veterans Service Organizations also objected to certain aspects of the SDRP, such as the automatic upgrading provision. Congress's first step was to cut off most funding needed to advertise the program. Threats were also made to cut off VA benefits of those with SDRP upgrades. The average veteran with a less-than-fully honorable discharge had to be confused by this back and forth. Some were afraid they could receive a "downgrade" of their discharge status, be forced to return to active duty, or have their discharge made publicly known. As a result, only 10 percent of eligible veterans applied. There were 20,000 upgrades granted, and, as originally planned, the program expired on October 4, 1977.[64]

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62. In his first week in office, President Carter issued a presidential pardon to all those with pending Selective Service violations and those who could be charged. Presidential Proclamation No. 4483, Granting Pardon for Violations of the Selective Service Act, August 4, 1694, to March 28, 1973, 42 Fed. Reg. 4,391 (Jan. 21, 1977). See Chapter 18 for more information about President Carter's discharge review program.

63. U.S. Dep't of Defense, Plan for Review of Discharges of Certain Vietnam Era Personnel, 42 Fed. Reg. 21,308, 21,308 (Apr. 26, 1977).

64. Military Discharge Upgrading, *supra* note 22, at 23/5.

Congress was not finished. After much rancor, it enacted Public Law 95-126 for the purpose of reversing much of the SDRP's impact.[65] All Undesirable discharges upgraded under the SDRP and President Ford's last directive were to be re-reviewed under standards required by that statute. These standards were to be uniform and historically consistent with upgrading criteria yet to be published.[66] Any SDRP upgrade must be reviewed by a board, which would determine whether to "affirm" that upgrade under the soon-to-be-published standards. If the upgrade was not affirmed, VA benefits were to be terminated. That law also provided that veterans discharged based on 180 or more days of AWOL, no matter the character of discharge, were to be barred from VA benefits absent compelling circumstances.

Public Law 95-126 did contain some favorable provisions, such as permitting the DRBs to waive the 15-year statute of limitations for all veterans for a period of time. In conjunction, the DoD published proposed DRB rules for public comment and conducted an outreach campaign to reach veterans who might benefit from the new uniform rules. NMDRP filed two lawsuits, one challenging some of the proposed rules and the other appealing the denial of a Freedom of Information Act request for the names and addresses of Vietnam veterans who might benefit from notice that new rules for upgrading had been implemented and the statute of limitations had been suspended.[67] The FOIA suit was settled with DoD to undertake an agreed upon outreach program. The other suit was settled with DoD to make certain internal documents used to adjudicate cases public.

One positive outcome of great significance was the formal adoption by the DoD of a rule already used by some boards and cited in different forms. The rule is basically that the DRB should apply current standards if there is substantial doubt that if the current procedures were in place at the time of the veteran's discharge that the discharge would be different. That is, a veteran should have the benefit of new law in a discharge review. The new rules required the same result if the change in policy were made expressly retroactive. These important rules are of major significance and are discussed in detail in Chapters 2 and 6 of this Manual.

Increased outreach to veterans who might be affected by this new rule was critical, especially because the DRBs extended the waiver of the statute of limitations only to April 1, 1981.

A series of events resulted in extensive outreach:

- An independent outreach effort using Public Service Announcements sent to all FCC-licensed radio and television stations sponsored by NMDRP's foundation funded Veterans Education Project (VEP);

65. *See generally* Pub. L. 95-126, 91 Stat. 1106 § 1 (1977) (codified at 10 U.S.C. §§ 1552, 1553, and 38 U.S.C. § 3103(e)).

66. This turned out to be a positive result given the current liberal attitude to discharge upgrading.

67. National Association of Concerned Veterans v. Sec'y of Defense, 487 F. Supp. 192 (D.D.C. 1979); Veterans Education Project v. Sec'y of Air Force, 509 F. Supp. 860 (D.D.C. 1981).

- A reopening of the *Urban Law* settlement, which resulted in the DRBs having to send 50,000 certified letters notifying veterans of the possibility of a re-review of their prior DRB adjudication; and
- The aforementioned settlement in VEP's FOIA suit.

In 1982, the DoD finally published its new administrative discharge directive.[68] It was a disappointment to those who sought an improvement of the administrative discharge system. The directive on balance is probably worse than its predecessor, another step in making the all-volunteer forces highly disciplined. Processing administrative discharges was streamlined. The nebulous term "misconduct" replaced several reasons for unfitness discharges. Only one act of misconduct had to be charged for the command to be able to avoid the strictures of the UCMJ. The "Undesirable" discharge was changed to an Under Other Than Honorable Conditions (UOTHC or OTH) discharge or, for those who had served less than 180 days, an Entry Level Separation that was Uncharacterized.[69] These new discharges were created to replace the vague reasons for discharge for those new servicemembers usually discharged under the general category of "unsuitability." This new approach reduced the number of General discharges that were given to those who simply "could not cut it." (There was a saying that there is a big difference between those "who could but won't" and "those who want but can't.")

The DRBs began to follow suit. The days of giving the veteran the benefit of doubt were coming to an end.[70] Most Vietnam-era attitudes were shelved, and many of the officer corps and senior enlisted ranks adapted or separated as quickly as possible. The review boards were largely staffed by adjudicators who felt the same way.

The 1980s and 1990s were relatively uneventful for discharge upgrading. NVLSP published an LSC-funded 1992 supplement to the 1982 Manual on Discharge Upgrading[71] and finished some of the litigation discussed earlier. LSC also kept funding the NVLSP until money for national support centers evaporated. The advocacy network for bad paper veterans no longer existed in any significant presence.

Similarly, advocacy for bad paper veterans was closing this period in the evolution of this issue. The public and the supporting foundations moved on to domestic issues. Vietnam veterans with bad paper were no longer of concern to any significant degree. Most organized Vietnam veterans and the Vietnam Veterans of America's priorities were focused elsewhere, such as on the repeal of the statutory bar to judicial review of Veterans Administration (VA) decisions; Agent Orange treatment and compensation; full recognition of post-traumatic stress disorder (PTSD); and the protection of the Vet Center network. Many CBOs ceased

68. U.S. Dep't of Def., Instr. 1332.14, Enlisted Administrative Separations (Jan. 28, 1982, current through Change 1 of Dec. 21, 1993). For the current version, see U.S. Dep't of Def., Instr. 1332.14, Enlisted Administrative Separations (Jan. 27, 2014).

69. The latter being for entry level separations. See Chapter 15 for more information on that topic.

70. From 1974 to 1982, according to DoD statistics, approximately 51,235 less-than-fully honorable discharges were upgraded. Military Discharge Upgrading, *supra* note 22, at 1A/1, 1S/3.

71. *See generally id.*

to exist, especially those whose focus was on bad paper discharges. The NMDRP became part of the National Veterans Legal Services Program (NVLSP). NVLSP, for its part, continued to work on some discharge upgrade advocacy but turned most of its focus on VA benefits issues, especially with the creation of judicial review and the Court of Veterans' Appeals (now the Court of Appeals for Veterans Claims).

Discharge Upgrade Advocacy Today

We are now in a renaissance of discharge upgrade advocacy. In this post-9/11 era, renewed attention is being paid to the needs of returning servicemembers, including those who have less-than-fully honorable discharges. This attention to our newest generation of veterans has forced a reconsideration of the way that our nation treated—or failed to treat—earlier generations of veterans, especially those who served during the Vietnam war. New organizations have been formed, and new resources made available to meet veterans' needs. Legal aid organizations, law school clinics, and private pro bono attorneys have all stepped up to address the pressing need for discharge upgrade advocacy and have already achieved some stunning victories for veterans' rights.

As in all social justice endeavors, no progress is made without experiencing significant setbacks. But, through relentless advocacy and a stubborn hope, we can ensure that the arc continues to bend toward justice.

At the beginning of my career, during the Vietnam era, if I had asked someone what types of military discharges there are, the answer would likely have been "honorable or dishonorable." In today's all volunteer force, when less than 1 percent of the U.S. population serves in uniform, that answer is all the more likely—in spite of decades of litigation, legislative advocacy, and public outreach to increase understanding.

Despite the continued shroud of secrecy and misunderstanding when it comes to the military and to discharge upgrades, there has been significant progress since my early days. New DoD policies have (sometimes only in theory) created more veteran-friendly DRB and BCMR review standards; advances in medical knowledge have delivered new understanding of—and life-saving treatments for—the psychological impacts of service; and the slow erosion of prejudice has produced a more inclusive military.

With these long overdue changes and with the rush of new advocates into this field of practice, it is critical that an updated Discharge Upgrade Manual incorporate current strategies with the old to support. If my personal journey has not yet inspired you, consider a few more shocking facts:

- Approximately three million less-than-fully honorably discharges were issued from 1941 to today.[72]

72. *Underserved*, *supra* note 23, at 43.