



ALBANY LAW SCHOOL

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Thank You For Your Service:

A Human Rights Conference for Veterans, Their Families, and Their Advocates

March 14, 2019

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ALBANY LAW SCHOOL

Thank You For Your Service: A Human Rights Conference For Veterans, Their Families, and Their Advocates

Thursday, March 14, 2019
Albany Law School - 80 New Scotland Ave. Albany, NY 12208

Agenda

8:00 – 9:00 a.m.	Registration and Continental Breakfast	DAMC Foyer
9:00 – 10:15 a.m.	For All Who Served: Service Members and Veterans Overcoming Biases <ul style="list-style-type: none">• Cheryl Dupris, American Indian Community House• David Lester, Albany Black Veterans Association• Mansoor Shams, U.S. Marine Veteran• Ashton Stewart, SAGEVets• Benjamin Pomerance, NYS Division of Veterans' Affairs	DAMC
10:15 – 10:30 a.m.	Break	DAMC Foyer
10:30 – 11:45 a.m.	Willing and Able to Serve: Combating Discrimination Against Veterans After Their Return Home <ul style="list-style-type: none">• Christine Asbee, Disability Rights New York• John Herrion, New York State Division of Human Rights• Peter Kempner, Volunteers of Legal Service• Samantha Kubek, New York Legal Assistance Group• Joseph Sluszkza, Albany Housing Coalition	DAMC
12:00 – 1:00 p.m.	Lunch	East Foyer
1:15 – 2:45 p.m.	Keynote: The Civilian Law of Military Trauma Prof. Daniel Nagin <i>Clinical Professor of Law; Vice Dean for Experiential and Clinical Education Faculty Director; WilmerHale Legal Services Center & Veterans Legal Clinic at Harvard Law School</i>	DAMC
2:45 – 3:00 p.m.	Break	DAMC Foyer
3:00 – 4:15 p.m.	Justice for All: Serving The Needs of Justice-Involved Veterans <ul style="list-style-type: none">• Art Cody, Veterans Defense Program• John Darcy, New York State Department of Corrections• Sydney Tarzwell, Prisoners' Legal Services of New York• J. Paul Noonan, New York State Office of Alcoholism and Substance Abuse Services• Derek Coy, New York Health Foundation	DAMC
4:15 p.m.	End Program	

Veterans' Human Rights Conference

March 14, 2019

SPEAKER BIOGRAPHIES

CHRISTINE ASBEE, ESQ., is a program director and attorney at Disability Rights New York. She serves New York State residents with disabilities receiving, interested in receiving, or having difficulty obtaining assistive technology. Ms. Asbee has helped individuals receive devices such as motorized wheelchairs, speech generating devices, computers, and training services through the VA, state and private health insurance providers, schools, employers, and other funding agencies. Her work helps people live independently, meet educational goals, and find and maintain employment. Ms. Asbee received a J.D. from Vermont Law School in 2011. Prior to law school, she received a B.S. from Elmhurst College in Chicago, IL, attended Universitat Pompeu Fabra in Barcelona, Spain, and worked for two years in Akita, Japan.

CAPT. ART CODY, ESQ., is a retired US Navy captain and the Deputy Director of the Veterans Defense Program of the New York State Defenders Association. He began his career as an Army helicopter pilot followed by a similar role in the US Navy Reserve, flying for a Strike Rescue/Special Operations Squadron. Captain Cody served aboard the USS *Enterprise* (CVN-65) in the initial response to the 9-11 attacks and was most recently deployed to Afghanistan (2011–2012) as the Staff Director of the Rule of Law Section, US Embassy in Kabul. In total, his active and reserve military career spans more than thirty years. As a civilian lawyer, he has represented criminal defendants for over twenty years and is former chair of the Capital Punishment Committee of the New York City Bar Association. Captain Cody frequently presents nationally on the defense of veterans; provides counsel to lawyers for veterans, particularly those under sentence of death; and recently served as lead counsel in a veteran capital clemency hearing. In addition to an aerospace engineering degree from West Point, he graduated magna cum laude from Notre Dame Law School, where he was the Executive Editor of the *Notre Dame Law Review* and founded the Notre Dame Coalition to Abolish the Death Penalty. He is a recipient of the New York City Bar Association's Thurgood Marshall Award for Capital Representation, the Four Chaplains Legion of Honor Humanitarian Award for Lifetime Service, and the New York State Bar Association's 2019 David S. Michaels Award for his representation of veterans in Criminal Courts. His military decorations include the Navy Bronze Star Medal, Meritorious Service Medal, Naval Aviator Badge, Army Aviator Badge, Army Parachutist Badge, and the German Armed Forces Parachutist Badge. Additionally, Captain Cody received the State Department's Meritorious Honor Award for his service in Kabul.

DEREK COY currently serves as the Veterans' Health Officer at the New York State Health Foundation (NYSHealth), where he focuses on expanding veterans' access to community-based services and leveraging external funding to increase resources available to returning veterans in New York State. For more than a decade, he has

served as a thought leader, convener, and advocate to improve the health of returning veterans and their families. Prior to joining NYSHealth, Mr. Coy was a nonprofit consultant, where he used his experience in advocacy and the nonprofit sector to help clients diversify their fundraising efforts, modernize internal structures to adapt to changing environments, and reinforce their brands through targeted messaging and social media. Previously, he served in a variety of different roles at leading nonprofits, such as the Doe Fund, American Civil Liberties Union, and Iraq and Afghanistan Veterans of America. Mr. Coy has considerable experience working in the veteran space and has used his passion and understanding of the community to advocate for changes in our nation's capital. He has appeared in numerous television, print, and radio outlets, including *CNN*, *NBC*, *ABC*, *The Wall Street Journal*, and *SiriusXM Radio*. He is a regular contributor to *Task & Purpose*, and has had pieces shared by the Obama White House. Mr. Coy received a bachelor of arts degree from the University of Houston Clear Lake, and a master's degree in Middle Eastern history from the City College of New York, where he focused on 20th century Iran. He is also a former sergeant in the US Marine Corps and served a yearlong deployment to Iraq's Anbar Province in 2005, as well as another deployment aboard the *USS Essex* in 2007.

JOHN P. DARCY is employed by the NYS Department of Corrections and Community Supervision and, since 2014, serves as the Guidance Specialist for Veterans Affairs. Mr. Darcy has been with the Department since 2000, working in various positions. As the Veterans Affairs Guidance Specialist, he is responsible for coordinating and monitoring services within NYSDOCCS facilities, and serves as the Department's Veterans Services Liaison with other agencies. The Department currently has 2,300 Veterans in custody and 1,600 Veterans under Community Supervision, and offers the Veterans Residential Therapeutic Program at Clinton Annex, Gouverneur, Groveland, and Mid-State Correctional Facilities. Mr. Darcy has represented New York State as a member of the National Institute of Corrections, Justice Involved Veterans Network (JIVN) since 2015. The JIVN meets bi-annually to discuss the state of affairs within the Veterans communities, and share strategies to identify and develop innovative and holistic approaches to assist justice-involved veterans. The Department continues to strive to improve the services offered to incarcerated Veterans, and with the securement of a US Department of Labor grant in 2017 updating the current curriculum and increasing staff training of available Veterans Services, the Department is enhancing the focus of programming to concentrate on assisting Veterans to actively change their ideas and attitudes. The goal for DOCCS is to provide a healing, peaceful environment in a correctional setting so the Veterans can address their service-related problems. Mr. Darcy is passionate about the program and is a Veteran himself.

CHERYL DUPRIS is a retired U.S. Army Sergeant First Class (E-7). She served in the US Army for 33 years, serving 20 years active duty as a Personnel Manager and a Chaplain Assistant and thirteen years in the US Army Reserve, National Guard, and Individual Ready Reserves (IRR). Sergeant Dupris is a full-blooded Native American from the Sioux Nation of South Dakota. Her reservation is the Cheyenne River Sioux Tribe. She came to New York City after the last Gulf War in 1997 and joined the New York Army National Guard as a long-haul tractor trailer truck driver in a very elite 18-

wheel truck company, the only one of its kind on the East Coast, where the travels take drivers from the East Coast to the West Coast. As a Reservist, she also worked for Verizon, the Corporation who supported her during all her deployments. She retired from Verizon in 2014 after fifteen years of service. Sergeant Dupris deployed on 9/11 in New York City and then went on to deployments from 2003–2010. She was deployed to Iraq four times, one time to Afghanistan, and undertook a Humanitarian Tour to Hurricane Katrina and Rita. Sergeant Dupris served under all the major commands of the Operation Iraqi Freedom tours: Multi-National Forces-Iraq (MNF-I); Multinational Corps Iraq Official (MNC-I); and Multi-National Security Transition Command (MNSTC-I). In Afghanistan, she served one tour in Operation Enduring Freedom with Combined Joint Task Force-76. In between deployments, she returned to New York City, where, in 2007, she was diagnosed with Post Traumatic Stress Disorder, or PTSD. At the time, she had no idea what it was or what it meant. Then she was deployed back to Iraq in 2008. She left Iraq in 2009 on orders to retire. She was told she had too much time in the service and needed to retire. She returned back to Ft. Belvoir, VA, to begin her out-processing from active duty to full retirement in August 2010. After multiple surgeries from wear and tear, she had to recover on her own. When she returned to New York City, she entered into the Manhattan Veterans Administration Health System. It was here that she learned how difficult PTSD is to treat. So she went back to the roots of her culture and made a recommendation to the VA and the Indian Health Service (IHS) to establish a clinic that would serve only Native Americans with Native American staff. She was introduced to Telehealth and she found peace. She was able to speak to someone who understood her culture, and she was able to practice her culture and interact with her culture—and it worked. Sergeant Dupris has been asked so many times how she did it. She is a passionate advocate for investing in Telehealth, and she feels strongly that others will benefit when the VA and the IHS support this concept of culture.

JOHN HERRION, ESQ., is an attorney with extensive experience in disability rights. In March 2008, Mr. Herrion became Director of Disability Rights for the New York State Division of Human Rights. In this capacity he assists with enforcement of the New York State's Human Rights Law provisions that prohibit discrimination against persons with disabilities. Prior to working at the New York State Division of Human Rights, Mr. Herrion was Counsel to the United Spinal Association for twelve years, where he represented and assisted persons with disabilities on a wide variety of issues relating to employment, housing, and access to places of public accommodation. Mr. Herrion has published articles and lectured extensively, including presenting Continuing Legal Education programs for attorneys on the rights of persons with disabilities. He is a past Chair and Secretary of the New York City Bar Association's Committee on Legal Issues Affecting Persons with Disabilities. Mr. Herrion holds a law degree from Pace University School of Law and a bachelor of arts degree from Manhattan College.

PETER KEMPNER, ESQ., is the Director of the Elderly Project at Volunteers of Legal Service (VOLS), where he has worked since May 2018. Mr. Kempner's career has focused on a comprehensive population-based approach to providing free legal services. His work at VOLS focuses on leveraging the private bar to provide pro bono

end-of-life planning for low-income seniors, providing public education about the importance of end-of-life planning, and running free legal clinics at senior centers in New York City. Prior to working at VOLS, he was the Director of the Veterans Justice Project and Deputy Director of the Housing Unit at Brooklyn Legal Services, where he worked from September 2001 until May 2018. Mr. Kempner was a Senior Staff Attorney and Government Benefits Specialist in the LGBT/HIV Unit from 2001 until 2011, where he provided general legal services to HIV-positive clients. In May 2011, Mr. Kempner helped create the Veterans Justice Project at Brooklyn Legal Services, an innovative general legal services practice focusing on veterans and active duty military personal and their families. In 2013, he became Legal Services NYC's citywide Coordinator of Veteran Litigation, and he became Director of the Veterans Justice Project and Deputy Director of the Housing Unit at Brooklyn Legal Services in March 2015. Mr. Kempner received a J.D. from the Benjamin N. Cardozo School of Law at Yeshiva University in 2001 and was admitted to the New York State Bar in 2002. He received a B.A. in political science from the State University of New York College at Purchase in 1996 and he received an M.A. in political management from the Graduate School of Political Management at the George Washington University in 1998. He has served as a member of the Social Welfare Law Committee of the Association of the Bar of the City of New York from 2007 until 2013 and served as the Chairperson of the Committee from 2013 until 2016. He served on the Advisory Committee to the Brooklyn Veteran Treatment Court from 2012 until 2018 and was a member of the New York State Bar Association's Committee on Veterans from 2013 until 2017. Mr. Kempner is admitted to practice in the Eastern and Southern Districts of New York and is accredited to practice before the US Department of Veterans Affairs. He has lectured extensively on veterans issues for the New York State Bar Association, the New York City Bar Association, and at law schools and legal services providers throughout New York. He has been called on to give expert testimony on numerous occasions to the New York City Council and to draft model legislation for the Council's Veterans Committee. Mr. Kempner is also an adjunct clinical professor at New York Law School, where he created and has co-taught their Veterans Justice Clinic since 2015.

SAMANTHA KUBEK, ESQ., is a Staff Attorney with the New York Legal Assistance Group's LegalHealth Division. Samantha joined NYLAG in September 2016. In January 2017, she established the nation's first legal clinics for women Veterans at the Bronx and Manhattan VA hospitals. These clinics provide a safe space in which clients can receive trauma-informed legal assistance. Ms. Kubek serves women Veterans on a variety of civil legal issues, including VA and other government benefits, family law matters, discharge upgrades, credit issues, and advanced planning. Previously, Ms. Kubek has also staffed LegalHealth's clinics for Post-9/11 Veterans and their caregivers at the Bronx and Manhattan VA Medical Centers. She prepared the third edition of the *New York City Veteran's Legal Guide*, which has been distributed to Veterans, service providers, and VA staff. Ms. Kubek also assisted in creating LegalHealth's first DSRIP-focused curricula on domestic violence and family law, which she presents to healthcare professionals throughout New York City. Currently, she is establishing a training curriculum for non-VA health care providers to educate them on Veteran cultural

competency and Veteran status as a social determinant of health. Ms. Kubek is a graduate of New York University School of Law and Georgetown University.

DAVID LESTER is Co-founder of Albany Black Veterans Association (A.B.V.A). Mr. Lester is a former U.S. Marine as well as a veteran of the Army National Guard. His deployments while in service include tours in Somalia in 1994 as well as two tours in Iraq in 2005 and in 2006–07. He served as an infantryman throughout his time in service. Presently Mr. Lester has a small startup print and design business, which has been certified as a service-disabled veteran-owned small business. A.B.V.A. was created with the intent of sharing information, giving support, and assisting veterans of all ethnicities who may not be aware or are unable to navigate services that exist specifically for them

PROFESSOR DANIEL NAGIN is Clinical Professor of Law, Vice Dean for Experiential and Clinical Education, and Faculty Director of the WilmerHale Legal Services Center, a community-based public interest law firm home to five Harvard Law School civil practice clinics. He is also Faculty Director of the Legal Service Center's Veterans Legal Clinic, which he founded in 2012. His teaching and research interests focus on clinical education, social welfare law and policy, Veterans law, and delivery of legal services. Previously, Professor Nagin was on the faculty of the University of Virginia School of Law, where he founded and directed a public benefits clinic and taught anti-poverty law courses. Professor Nagin has also taught in the clinical program at Washington University in St. Louis School of Law, directed a social service and legal advocacy program for homeless New Yorkers living with HIV/AIDS, and worked as a staff attorney in the Queens office of Legal Services NYC. Among his recognitions, Professor Nagin has received the John G. Brooks Legal Services Award from the Boston Bar Association, the Goldberg v. Kelly Lives Award from the Virginia Statewide Legal Aid Conference, and the Access to Equal Justice Award from the Washington University in St. Louis School of Law. He is also a Fellow of the American Bar Foundation. Professor Nagin's current activities include serving as an appointed member of the US Court of Appeals for Veterans Claims Judicial Advisory Committee, on the Executive Committee of the Section on Poverty Law of the American Association of Law Schools, and on the Veterans Affairs Subcommittee of the Making Justice Accessible: Designing Legal Services for the 21st Century Project (American Academy of Arts and Sciences). He holds a B.A. in history and government, Phi Beta Kappa and with distinction in all subjects, from Cornell University; an M.A. from Stanford University; and a J.D., with honors, from the University of Chicago Law School, where he received the Edwin F. Mandel Award for excellence as a clinical law student.

J. PAUL NOONAN is presently serving as Coordinator of Veterans and Older Adult Services for the NYS Office of Alcoholism and Substance Abuse Services (OASAS). He has worked in New York State government since 1984, when he joined the former Division of Substance Abuse Services. Mr. Noonan received a BA from Merrimack College in 1977 and an MA (1980) and MPA (1992) from the University at Albany. He also received his New York State Teaching Certification in Secondary Education in 1980.

BENJAMIN POMERANCE, ESQ. '13, is the Deputy Director for Program Development for the New York State Division of Veterans' Affairs. In this role, he serves as the Deputy General Counsel for the agency, as well as working as the agency's Legislative Liaison and overseeing several of the Division's programming initiatives. Mr. Pomerance's work focuses on advocacy and assistance for Veterans and Service Members and their families on a wide range of federal and state issues. Apart from his work for the Division, scholarly journals at Albany, Belmont, Delaware, Florida Coastal, Gonzaga, Hamline, Ohio Northern, Marquette, Maryland, Oregon, and Wyoming law schools have published or will soon publish his articles on topics ranging from elder law to the federal judiciary to freedom of speech in post-revolutionary governments. Mr. Pomerance also contributed a chapter to an internationally published elder law anthology. The US Court of Appeals for Veterans' Claims has cited his written work, as have several books and legal journals. Mr. Pomerance's recent speaking engagements include panel discussions at the 2018 National Association of Consumer Advocates Convention; the 2017 international Academy of Criminal Justice Sciences Conference; the international Law & Society Conference in 2015, 2016, and 2018; the International Elder Law & Policy Conference; and the International Conference on Contracts, as well as facilitating programs in every region of New York State regarding benefits, programs, and services for Veterans and their families. Mr. Pomerance graduated as the salutatorian of his class from Albany Law School in 2013. While at Albany Law, he founded and directed the school's Veterans' Rights Pro Bono Project, for which he received the "President's Pro Bono Service Award" from the New York State Bar Association. He served as the Executive Editor for Symposium for the *Albany Law Review*, led the school's student chapter of the National Academy of Elder Law Attorneys, and published a report about human rights concerns confronting America's aging prison population as an Edgar & Margaret Sandman Fellow with the Government Law Center. He is admitted to practice law in New York. Apart from his work in the law, Mr. Pomerance is an avid arts journalist with more than 500 published articles, a pursuit for which he has received first-place awards in feature writing from the New York State Press Association.

MANSOOR SHAMS is a U.S. Marine Veteran, business owner, and Muslim youth leader. He's also the founder of MuslimMarine.org, where he uses his platform of both "Muslim" and "Marine" to counter hate, bigotry, and Islamophobia mainly through education, conversation, and dialogue. His tagline for MuslimMarine.org is "unifying people through conversation." He served four years in the U.S. Marine Corps, where he attained the rank of corporal (non-commissioned officer) and received several honors including a meritorious promotion, Marine of the Quarter, and Certificate of Commendation. Corporal Shams has been featured by PBS, NPR, BBC, Voice of America, the New York Times, and more, and he has made national TV appearances as a commentator on CNN and MSNBC. Last year he visited 24 states across America with a simple sign, "I'm a Muslim and US Marine, ask anything" in an effort to start conversations. This year he launched the "29/29 Ramadan initiative," where he teamed up with Veterans For American Ideals during the 29 days of Ramadan to bring US Military Veterans to spend a night at the home of random Muslim families across America in an effort to encourage fellow Americans to get out of their comfort zones and

get to know each other. Corporal Shams holds a master's degree in government, with an emphasis on national security studies, and an MBA from Johns Hopkins University. He is currently owner and partner of a technology distribution company, Eye Deal Systems LLC. He is also owner and partner of FHM LLC dba T-Mobile. From 2005 to 2008, soon after receiving an honorable discharge, Corporal Shams began working for the federal government as an assistant to two SEC chairmen.

JOSEPH SLUSZKA has dedicated his 36-year career to promoting social justice, first in developing affordable housing and for the last fourteen years as Executive Director of the Albany Housing Coalition Inc., a non-profit serving the needs of homeless Veterans in upstate New York. In his time there, he has developed and implemented successful programs by observing trends and listening to Veterans' needs. Several of his programs have been studied and are recognized as national models. In 2009 Former VA Secretary Eric Shinseki recognized those achievements with his Secretary's Award for outstanding service to homeless Veterans. Mr. Sluzska's agency serves over 500 homeless Veterans each year with housing, rent subsidies, health benefits, access to employment, legal, and peer-to-peer support. In 2018, 164 Veterans were moved from homelessness to permanent housing and 44 Veterans secured well-paying jobs. Mr. Sluzka's dedicated staff includes retired military officers and formerly homeless Veterans. He serves on a number of local and statewide boards, and he has provided expertise to the New York State Division of Veterans Affairs, the New York State Interagency Council on Homelessness, US Department of Housing and Urban Development, NYS Bar Association, and NYS Office of Temporary Disabilities on Veterans homelessness issues and programs. He has presented at annual conferences of the National Coalition for Homeless Veterans, National Alliance to End Homelessness, and the National Association of Drug Court Professionals. Mr. Sluzka is an advisor to the board of directors of the Research and Recognition Project, a ground-breaking protocol that successfully treats PTSD according to published clinical trials. The organization works in California, Florida, New Mexico, New York, at Walter Reed Hospital, the northeast region of VA's Community Based outreach Centers, and among NYS Corrections Officers. Mr. Sluzka graduated from the Cathedral College of the Immaculate Conception with a BA in philosophy and master's degree credits from City College. He was an active civil rights worker in the '60's and carries that tradition forward.

ASHTON STEWART serves as the SAGEVets Program Coordinator. He comes from a long line of military men and women. With a sense for adventure on the high seas, he entered the US Navy through the Delayed Entry Program and served during the First Gulf War. His career as an advocate began with a successful grassroots preservation campaign to protect his residence, the Villa Elaine, in Los Angeles. After moving to New York, Mr. Stewart served as the executive director of the New York City chapter of the League of Women Voters advocating for voting rights. Most recently, he earned a master's degree in public administration from Baruch College while caring for his boy/girl twins. Mr. Stewart is thrilled to be working as the SAGEVets program coordinator and advocating for fellow Veterans.

SYDNEY TARZWELL, ESQ., has been a staff attorney with Prisoners' Legal Services of New York since 2017. At PLS, Ms. Tarzwell represents people incarcerated in New York Department of Corrections and Community Supervision facilities on a variety of legal issues, including: disciplinary matters, administrative segregation, health and mental health care access, conditions of confinement, harassment and brutality, and sentence calculation. Previously, Ms. Tarzwell has been the Native Law Unit Supervisor at Alaska Legal Services Corporation and the Project Director of the Peter Cicchino Youth Project in the Urban Justice Center. She graduated from the Columbia University School of Law in 2007 with awards including the Allan Morrow Sexuality & Gender Law Prize and recognition as a James Kent Scholar. She then clerked for the Honorable Sidney R. Thomas on the US Court of Appeals for the Ninth Circuit. She began her social justice career as a Skadden Fellow.

**For All Who Served: Service Members and
Veterans Overcoming Biases**

Panelists:

Cheryl Dupris
David Lester
Mansoor Shams
Ashton Stewart
Benjamin Pomerance, Esq.

Glossary

United States Department of Veterans Affairs (VA) Structure

3 Branches:

National Cemetery Administration: Honors Veterans and their eligible family members with final resting places in national shrines and with lasting tributes commemorating military service. VA maintains more than 130 national cemeteries that honor Veterans and their eligible family members.

Veterans Health Administration: Integrated health system providing care to eligible Veterans and their dependents. Consists of medical centers, community-based outpatient clinics, community living centers, Vet Centers, and Domiciliaries.

- *Medical Centers (VAMCs)* = Largest VA healthcare facilities, frequently called “VA Hospitals,” provided a wide range of inpatient and outpatient healthcare services for Veterans and their dependents. Typically, VAMCs are located in urban areas (e.g., New York City, Albany, Syracuse, Buffalo) or near urban areas (e.g., Canandaigua, which is close to Rochester).
- *Community-Based Outpatient Clinics (CBOCs)* = Smaller than a VAMC, these satellite clinics provide the most common outpatient services, including health and wellness visits, to Veterans and their family members. Often, CBOCs lack the advanced medical technology that a VAMC will provide, but offer a good “first step” site for medical screenings, check-ups, etc. Commonly, CBOCs are located in rural areas to accommodate the Veterans and dependents who cannot easily access a VAMC. The Veterans Health Administration also offers a widely used “telemedicine” program to connect patients visiting a CBOC with specialists who examine the patient from a remote location.
- *Community Living Centers (CLCs)* = Facilities offering a “nursing home level of care” to Veterans who need assistance with activities of daily living and/or skilled nursing care (and, when necessary, palliative care). Typically, Veterans remain in a CLC for a relatively

short-term stay. However, a Veteran can (if medically necessary) continue to reside in a CLC for the remainder of his or her life.

- *Vet Center* = Facilities providing a broad range of counseling, outreach, and referral services to combat Veterans and their families. Services for a Veteran may include individual and group counseling in areas such as Post-Traumatic Stress Disorder (PTSD), alcohol and drug assessment, and suicide prevention referrals. All services are free and confidential.
- *Domiciliaries* = Residential facilities offering residential rehabilitation and treatment services for Veterans with multiple and severe medical conditions, mental illness, addiction, or psychosocial deficits. Treatment intensity, environmental structures, and type of supervision vary based on population served.

Veterans Benefits Administration (VBA): The entity responsible for administering the Department's programs that provide financial and other forms of assistance to Veterans, their dependents, and survivors.

- *Regional Office (VARO)* = The most localized office level within the VBA. New York State has VAROs in New York City and Buffalo. Interestingly, pension claims filed in New York typically are processed at the Philadelphia VARO.

Common VA Benefits

Disability Compensation = Tax-free monetary benefit paid to Veterans with disabilities incurred or aggravated during active duty military service. The Veteran must prove a nexus between a current disability and the Veteran's military service, demonstrating that the disability was "as likely as not" caused by military service.

The VA bases amount of money that the Veteran receives upon the degree of the Veteran's disability. VA employees review evidence that the Veteran submits in support of his or her claim and, based on this evidence, awards the Veteran a disability compensation rating on a scale from 10% ("least severe") to 100% ("most severe").

The VA awards ratings in 10% increments. Chapter 38 of the Code of Federal Regulations contains the specific medical criteria for each rating level of each disability.

A Veteran who receives a 0% rating for a disability receives free VA medical care for that disability, but no financial compensation. Generally, a Veteran will use a VA Form 21-526 or a VA Form 526-EZ to file for disability compensation.

Dependency and Indemnity Compensation (DIC) = Tax-free monetary benefit payable to surviving spouses and other dependents of Veterans who died from their "service-connected disabilities" (disabilities for which the Veteran received a rating from the VA). In general, the surviving spouse or other dependent uses a VA Form 21-534 to file a claim for DIC.

Non-Service-Connected Pension = Tax-free benefit for Veterans who served during a period of war for a non-service-connected disability. The Veteran does not need to serve in a combat zone to qualify. Service for at least one day during a period when the United States was at war (not limited to combat service) is enough to satisfy the "wartime service" requirement for this benefit. To qualify, the Veteran's countable income must fall below a specific dollar amount set by Congress. Additionally, a Veteran cannot have household assets above a threshold set by Congress to qualify for a VA pension. All asset transfers are subject to a three-year lookback provision, with potential penalties for transfers that are not for fair market value. The VA automatically deems a Veteran who is age 65 or older "disabled" for pension eligibility. Typically, a Veteran uses a VA Form 21-527EZ to apply for a non-service-connected pension.

"Special" Pension = A Veteran or a surviving spouse who meets all of the criteria for a "regular" VA non-service-connected pension *and* requires another person's assistance with two or more activities of daily living (washing, dressing, eating, toileting, etc.) can receive a larger financial benefit known as the "Aid & Attendance Special Pension."

A Veteran or a surviving spouse who meets all of the criteria for a "regular" VA non-service-connected pension *and* is "substantially confined to your immediate premises because of permanent disability" can receive a larger financial benefit known as the "Housebound Special Pension."

A Veteran or a surviving spouse cannot receive both Aid & Attendance and Housebound simultaneously.

Survivors Pension ("Death Pension") = Tax-free monetary benefit payable to a low-income, un-remarried surviving spouse and/or unmarried children of a deceased Veteran who served during a period of war. The claimant's countable household income must fall below a threshold that Congress establishes annually. Typically, a surviving spouse or dependent child uses a VA Form 21-534EZ to apply for a Survivors Pension.

Vocational Rehabilitation & Employment ("Voc. Rehab.") = Program assisting Veterans with service-connected disabilities prepare for, find, and maintain employment. Services include evaluations to determine employable skills, vocational counseling, job training programs, assistance finding and keeping a job, post-secondary training opportunities, and Independent living services for Veterans unable to work due to the severity of their disabilities. See Title 38, Chapter 31, of the U.S. Code for full range of services.

Post-9/11 Educational Assistance Program ("Post-9/11 G.I. Bill") = Educational benefit available only to honorably discharged Veterans with a qualifying period of active duty service after September 10, 2001, and their qualifying dependents. Recipients are eligible for financial assistance for up to 36 months when pursuing their education at qualifying institutions of higher education and vocational training programs in the form of tuition and fees, a monthly housing allowance, and a books and supplies stipend. The program also provides certain recipients the opportunity to transfer unused post-9/11 G.I. Bill educational benefits to their spouses and children.

For all fully eligible recipients attending a public college, university, or other public school, the VA pays full tuition and fees directly to the school. For recipients attending a private school, tuition and fees are capped at a national maximum rate. Post-9-/11 G.I. Bill benefits are payable for 15 years following the Veteran's discharge from military service.

Full criteria for post-9/11 G.I. Bill eligibility are found in Title 38, Chapter 33, of the United States Code.

Montgomery G.I. Bill = Educational benefits program that was the most widely used program prior to the post-9/11 G.I. Bill's implementation. Under the Active Duty Component of the Montgomery G.I. Bill (Title 38, Chapter 30, of the United States Code), honorably discharged Veterans and active duty Servicemembers with at least two years of active duty military service may receive up to 36 months of education benefits. Benefits are generally payable for 10 years following separation from military service.

Under the Selected Reserve Component of the Montgomery G.I. Bill, eligible members of Reserve units may receive up to 36 months of education benefits. Generally, a Reservist in good standing must have a six-year service obligation to qualify for this benefit. Typically, eligibility under the Selected Reserve Component ends on the date of separation from the Reserves. However, the VA may extend eligibility if the Reservist was discharged due to a disability not caused by the Reservist's own willful misconduct,

or if the Reservist is mobilized from his or her Reserve status to active duty military service.

Specially Adapted Housing Grant = Available funding to help Veterans with certain severe service-connected disabilities purchase or construct an adapted home, or modify an existing home to accommodate a disability. Among the most common eligible service-connected disabilities are: loss of the use of both legs or both arms, loss of the use of one leg and one arm, severe burns, blindness in both eyes, and the loss of the use a lower extremity on or after September 11, 2001, that prevents the Veteran from moving without the aid of braces, crutches, canes, or a wheelchair. Typically, a Veteran will use a VA Form 26-4555 to apply for a Specially Adapted Housing Grant.

Burial Benefits = VA burial benefits include a gravesite in any of the National Cemetery Administration's 133 national cemeteries with available space, opening and closing of the grave, perpetual care, a Government headstone or marker, a burial flag, and a Presidential Memorial Certificate, at no cost to the deceased Veteran's family. Typically, a claimant uses VA Form 21P-530 to apply for burial benefits.

Burial benefits available for Veterans' spouses and dependents buried in a national cemetery include burial with the Veteran, perpetual care of the gravesite, and the spouse's or dependent's name and date of birth and death inscribed on the Veteran's headstone, at no cost to the family. Spouses and dependents receive these burial benefits even if they predecease the Veteran.

If a Veteran is buried in a private cemetery, available burial benefits include a government-issued headstone, marker or medallion, a burial flag, and a Presidential Memorial Certificate, at no cost to the family. However, no burial benefits are available for Veterans' spouses or dependents buried in private cemeteries.

Additionally, a Veteran's surviving spouse (or the Veteran's surviving dependent children if no spouse survives the Veteran) may be eligible for a burial allowance to help offset funeral costs. If the Veteran died from a service-connected disability on or after September 1, 2001, the maximum burial allowance is \$2,000. If the Veteran died from a service-connected disability before September 11, 2001, the maximum burial allowance is \$1,500.

If the Veteran's death was not service-connected, the maximum burial allowance today is \$300, along with a payment of approximately \$700 (varies by the year of the Veteran's death) to pay for the plot of land on which the Veteran is interred. If the Veteran dies while under the care of a Veterans Health Administration facility, then the maximum amount of money in the burial allowance payout increases.

Common VA Benefits Procedural Terms

Accreditation = Under federal law, any individual representing a party in the preparation, presentation, and prosecution of a claim for VA benefits must first receive accreditation from the VA as a claims agent, attorney, or representative of a VA-recognized Veterans Service Organization (VSO). Individuals seeking accreditation as a VSO representative apply by filing VA Form 21; individuals seeking accreditation as a claims agent or as an attorney apply by filing VA Form 21a.

Maintaining accreditation includes, but is not limited to, certain requirements regarding reimbursement for assisting claimants. No person or organization may charge claimants a fee for assistance in preparing applications for VA benefits or presenting claims to VA. Accredited agents and attorneys may charge fees for assistance on a claim for VA benefits only after VA issues a decision on a claim and the claimant files a Notice of Disagreement initiating an appeal of that decision. If a party ever charges a Veteran a fee at any stage in the process, that party must file the fee agreement with the VA for the VA's review and approval.

Title 38, Chapter 59, of the United States Code, and Title 38, Sections 14.626 through 14.637 of the Code of Federal Regulations, provides the legal provisions regarding obtaining and maintaining accreditation through the VA.

Appeal = Any party who receives a decision on a VA claim has the right to appeal that decision. To initiate the appellate process, the Veteran must timely file a Notice of Disagreement with the VA. (See "Notice of Disagreement" below). From there, the appellate process moves through various steps — first, administratively within the VA, and secondly, beyond the VA to the United States Court of Appeals for Veterans' Claims. Supreme Court caselaw requires these appellate proceedings to be "non-adversarial" and "claimant-friendly" processes.

Board of Veterans' Appeals (BVA) = One of the three options of appellate review within the VA's administrative review process. The BVA's Veterans Law Judges, all of whom are attorneys experienced in Veterans' Law and in reviewing VA benefits claims, issue written decisions for each appeal. Staff attorneys, also trained in Veterans' Law, review each appeal and assist the BVA's Law Judges in reaching their final conclusions.

Appellants can choose to appeal directly to the BVA, or to seek review from a VA personnel in other "lanes" of the appellate process first. The appellant has the right to request an in-person hearing or a hearing via videoconference before a Veterans Law Judge, but such a hearing is not required if the appellant wants strictly a documentary review of the case without appearing before a judge.

Claim = The initial filing for any variety of VA benefits. All VA claims go to a VARO for initial handling and processing. There is no time limits regarding filing a claim. For instance, a World War II Veteran could file a disability compensation claim tomorrow for a service-connected disability incurred or exacerbated in 1942 without facing any prejudice from the VA's reviewers for "waiting" so long.

Clear and Unmistakable Error (CUE) = A collateral attack on a final VA rating decision. To prevail, the Veteran must prove three elements: (1) the facts known at the time of the decision being attacked on the basis for CUE were not before the adjudicator *or* the VA incorrectly applied the law then in effect; (2) an error occurred based on the record and the law that existed at the time; and (3) had the VA not made the error, the outcome would have been manifestly different. A successful CUE petition forces the VA to revise its previously final decision, even if the customary appeals deadline has expired.

Effective Date = The date on which VA benefits payments begin. Sometimes, a Veteran's effective date allows for retroactive payments from the VA that pre-date the actual submission of the claim to the VA. Generally, an effective date for service-connection for a disability that is directly linked to an injury or disease incurred or exacerbated by military service is the date VA receives a claim or the date entitlement arose, whichever is later. However, if the claimant files the claim within one year of separating from active duty military service, then the effective date is the day after separation from service.

Fully Developed Claim (FDC) = Optional VA initiative providing a pathway for faster claims processing if the claimant submits all relevant evidence in the initial claims filing. If the claimant subsequently submits additional evidence regarding a claim that was initially filed as a FDC, the VA will remove the claim from the FDC program and process it through the traditional claims process. Generally, a claimant uses a VA Form 21-526EZ to file a FDC for disability compensation benefits (or a Form 21-527EZ for pension benefits, or a Form 21-534EZ for survivors' benefits).

Higher-Level Review = A fast-tracked appeal of an initial decision by the VA in which the claimant cannot add any new evidence into the record. The appellant may have an informal phone conference with an employee of the Veterans Benefits Administration, but the appellant has no rights to receive a formal hearing if choosing this method of appeal. The VA has a goal of resolving all higher-level review appeals within 125 days of receiving the appeals package from the appellant.

New and Material Evidence = Information that a claimant submits to the VA to supplement a Request for Reconsideration or a request to re-open a claim. This

evidence must be relevant and relate to an unestablished fact necessary to prove the claim. It has to have a legitimate influence or bearing on the decision, and cannot be cumulative or redundant. It cannot be information that the claimant previously provided to the VA.

Ninety-Day Notice = A request from the BVA asking the appellant to submit any additional evidence before the BVA renders a final decision regarding the appeal. The appellant has 90 days from the date of this request to provide this evidence to the BVA. If the BVA does not receive any new evidence during this 90-day period, then the BVA will proceed on the record without any additional materials.

Notice of Disagreement (NOD) = A statement of intent to appeal a VA decision regarding a claim for benefits. A party has one year from the date of the VA's decision to file the Notice of Disagreement with the VA.

Request for a Reopened Claim = A claimant's request for a new judgment on certain varieties of previously denied claims submitted after the one-year appeal deadline expires. Generally, this avenue is available for only disability compensation, DIC, and burial benefits claims. (Claimants typically pursue a brand-new claim for other denials).

Request for Reconsideration = A claimant's request for a new judgment on a previously denied claim submitted within the one-year appeal deadline. Frequently, a claimant will submit a Request for Reconsideration using VA Form 21-4138 ("Statement in Support of Claim"), but using this form is not mandatory.

Statement of the Case (SOC) = A statement from the VA to the appellant declaring the VA's positions on the facts and law relevant to the appeal. The VA prepares and sends this statement to the appellant after receiving the NOD. The VA will mail this statement to the appellant's last known address. Frequently, the VA will take several months to prepare a SOC. If the appellant disagrees with the VA's positions in the SOC, then the appellant should proceed by filing a VA Form 9.

Supplemental Claim = An appeal in which the appellant may submit new evidence into the record, but the appellant is not entitled to an in-person hearing or a video hearing to present the appeal. This appeals lane is designed for faster processing and resolution than the appeal to the Board of Veterans' Appeals.

Supplemental Statement of the Case (SSOC) = If an appellant submits new evidence with a VA Form 9, that new evidence goes to the VARO. The VARO will then respond to this new evidence presented by sending a SSOC to the appellant.

Importantly, an appellant is legally guaranteed 60 days from the date when the VA issued the SSOC to respond in writing to the SSOC, even if the other customary deadlines for filing a Form 9 have already expired.

Common New York State Veterans' Benefits

Blind Annuity = Monthly payment from New York State to legally blind wartime Veterans and to the unremarried surviving spouses of legally blind wartime Veterans who reside and are domiciled in New York State. Blindness *does not* need to be service-connected for the Veteran or the spouse to qualify. Military service needs to occur during a time of war, but does not necessarily need to occur in a combat zone. Eligibility depends on the Veteran's blindness, so the legally blind non-Veteran spouse of a non-blind Veteran would not qualify.

Experience Counts = Governor Cuomo's multi-faceted initiative to help Veterans utilize skills learned in the military to transition into New York's workforce. For example, Veterans who gained military training and experience as a medic can use this experience to count toward certification as a civilian paramedic, home health aide, or nursing home aide in New York State. The Department of Motor Vehicles waives the road test for a Commercial Driver's License for Veterans with experience driving trucks and heavy equipment during military service. Veterans with other Military Occupational Specialties can transfer these skills into careers in New York ranging from working as a Licensed Radiological Technologist to working as a security guard.

In addition, recognizing the frequency at which military families move from place to place, the Experience Counts program also includes pathways for military spouses in certain licensed professions to transfer their careers into New York State with greater ease. For example, New York recognizes out-of-state licenses for military spouses who are real estate brokers, cosmetologists, barbers, and other careers requiring a license from the New York State Department of State.

Gold Star Parent Annuity = Authorizes an annuity payment of up to \$500 per Gold Star Parent of a Servicemember who was killed in combat. Recipients must be residents and domiciliaries of New York State. Payments are disbursed in semi-annual installments (March and September). Controlling definition of "Gold Star Parent" appears in federal law (10 USC 1126). Definitions that privately run "Gold Star organizations" use may not necessarily match the controlling definition in federal law.

Hire-A-Vet Credit = A statewide tax incentive for businesses hiring post-9/11 Veterans to full-time jobs. To qualify, the business must employ a post-9/11 Veteran with an Honorable or General discharge for no less than 35 hours per week for one

calendar year. The Veteran must attest that he or she was not employed for 35 or more hours in the previous 180 days for the business to qualify for the tax exemption. Businesses may earn up to \$5,000 for hiring a qualified Veteran, and up to \$15,000 for hiring a qualifying Veteran who is disabled.

Lifetime Liberty Pass = Pass from the New York State Department of Parks, Recreation, and Historic Preservation granting the holder free access to state parks, boat launch sites, historic sites, and park preserves throughout New York State, as well as free entry to 28 New York State golf courses. Veterans with a VA-rated disability of 40% or higher who are New York State residents qualify for this pass.

Supplemental Burial Allowance = A payment of up to \$6,000 from New York State to immediate family members of Servicemembers killed in combat zones or dying from wounds incurred in combat to offset funeral and interment expenses.

State Veterans Homes = The New York State Department of Health operates four state Veterans homes for Veterans, spouses and certain parents: a 242-bed Veterans home at Oxford, Chenango County, a 250-bed Home at St. Albans, Queens; a 126-bed Home in Batavia, Genesee County; and a 250-bed home at Montrose, Westchester County. A 350-bed Veterans Home on the campus of SUNY Stony Brook in Long Island is operated by the University's Health Sciences Center. Health care and skilled nursing services are available at all facilities.

To be eligible for care in a State Veterans Home, a Veteran must have received an honorable discharge from military service, served for at least 30 days on active duty, and either entered active duty military service from New York State or resided in New York for at least one year to applying for admission to the State Veterans Home.

Troops To Energy = National employment initiative for Veterans seeking careers in the energy industry. New York became part of this program in 2014. Available jobs are listed through a Troops To Energy clearinghouse website.

Veterans Distinguishing Mark = Honorably discharged Veterans (including members of the National Guard and Reserves) can receive the word "Veteran" printed on their driver's license, learner's permit, or non-driver's ID at any local New York State Department of Motor Vehicles office. There is no charge for this printing service. This designation gives Veterans a far more convenient alternative to carrying around their discharge paperwork as proof of military service.

Veterans Tuition Award = Scholarship from the New York State Higher Education Services Corporation to combat Veterans entering a higher education course of study as

a matriculated student. The financial award per semester equals to the lesser amount of either the undergraduate tuition that the State University of New York (SUNY) charges New York State residents or the actual tuition of the combat Veteran's program of study.

Veterans With Disabilities Employment Program (55-c or "55 Charlie") = Section 55-c of New York State's Civil Service Law authorizes 500 entry-level public sector positions to be filled with qualified wartime Veterans with disabilities. Applicants must meet the minimum qualifications for the position, but are not required to take a Civil Service examination.

Any Veteran who has received the Purple Heart or has a VA disability rating of at least 10% is automatically eligible for this program.

Other Commonly Used Veterans' Terms

Active Duty = A Servicemember is on Active Duty if he or she works for the military full-time and can be deployed at any time. Individuals serving in the Reserve or in the National Guard are not full-time active duty military personnel, although they can be activated to active duty status at any time should the need arise. Also frequently referenced as "Title 10 Status."

DD214 = A Veteran's Certificate of Release or Discharge from Active Duty issued by the United States Department of Defense. This is the most important single record that a Veteran can possess to prove that he or she served in the Armed Forces.

National Personnel Records Center = Agency of the National Archives and Records Administration that serves as a repository for military records. Based in St. Louis, this is the entity to which a Veteran submits a Standard Form 180 (SF 180) when seeking copies of his or her DD214, military medical records, records necessary to substantiate an application for a lost or destroyed military medal or decoration, or other records pertaining to that Veteran's military personnel file.

Operation Enduring Freedom (OEF) = Military operation that began on October 7, 2001 with allied air strikes on Taliban and al Qaeda targets.

Operation Iraqi Freedom (OIF)/Operation New Dawn (OND) = Military operation that began in March 2003 with the American-led coalition's invasion of Iraq. Labeled Operation Iraqi Freedom until 2010, when it was re-named Operation New Dawn.

Power of Attorney (POA) = A Veteran or dependent must grant Power of Attorney to a VA-accredited representative before that representative can represent the Veteran or dependent in a claim or appeal for VA benefits. The Veteran or dependent must file a Declaration of Representation with the VA to designate a person or organization as his or her representative. To appoint an accredited representative of a Veterans Service Organization (such as the NYS Division of Veterans' Affairs), the Veteran or dependent must first file VA Form 21-22 with the VA. To appoint a VA-accredited attorney, the Veteran or dependent must first file VA Form 21-22a with the VA.

Importantly, a validly executed Power of Attorney recognized under state law has no effect on an individual's legal ability to prosecute a VA benefits claim. Only a POA executed under the VA's own standards discussed above will legally allow an individual to represent a Veteran or dependent in a VA benefits matter.

Servicemembers Civil Relief Act (SCRA) = A powerful yet often-underutilized set of equity-based consumer protection statutes for Servicemembers on active duty, recently discharged Veterans, and their dependents. Provisions include the ability to stay civil actions during the duration of an individual's military service, the ability to avoid certain civil fines and penalties during the duration of an individual's military service, and the implementation of a 6% interest rate cap for all obligations entered into before beginning active duty if the military service materially affects his or her ability to meet the obligations. Codified at 50 U.S.C. Appx. 501–593.

Standard Form 180 (SF 180) = The form used to request military records, including but not limited to a Veteran's DD214, from the National Personnel Records Center in St. Louis and from that Veteran's particular branch of service.

Uniformed Services Employment and Re-employment Rights Act (USERRA) — A set of statutes protecting Servicemembers' re-employment rights when returning from a period of military service (including activation to Title 10 status from the National Guard or Reserves) and guarding against employer-based discrimination due to past, present, or future military service. If an employee notifies his or her employer in advance about upcoming military service obligations, and returns to that job in a timely manner after serving in the military for five years or less, that employee receives several protections under USERRA, including the right to be re-employed with all of the job-based benefits the Veteran would have attained if he or she had not been absent due to military service. Codified at 38 U.S.C 4301–4335.

Veterans Treatment Court = Alternative resolution program within the criminal justice system that links eligible Veterans with treatment services using a team-centered model supervised by the court's presiding judge. Building on the existing

models of Drug Treatment Courts, these courts offer Veteran defendants (typically referenced as “justice-involved Veterans”) the opportunity to complete a rigorous treatment program in lieu of incarceration for certain criminal offenses.

Each jurisdiction structures its Veterans Treatment Court model differently. Overall, however, the Veterans Treatment Court model requires regular court appearances (generally a bi-weekly minimum in the early phases of the program), as well as mandatory attendance at treatment sessions with an interdisciplinary treatment team and frequent and random testing for substance abuse. Veterans Treatment Courts also link the justice-involved Veteran to a Veteran mentor for peer-to-peer assistance and support in a structured setting. Veterans Treatment Courts act as a “one-stop shop,” linking Veterans with the programs, benefits and services they have earned, particularly through interactions with the VA’s Veterans Justice Outreach officers (VJOs).

Commonly Seen Military Discharge Classifications

- **Honorable.** This is the highest classification of discharge. It means that the Veteran completed his or her service obligation at or above the level required by that branch of service. An individual with this classification meets the discharge classification requirements for all Veterans’ benefits that the United States Department of Veterans Affairs oversees.
- **General Discharge Under Honorable Conditions.** This classification means that the Veteran provided satisfactory service in the estimation of his or her branch of the military, but the Veteran’s conduct was in some way not meritorious enough to deserve an Honorable discharge. Individuals with this discharge classification can receive most VA benefits, but cannot receive education benefits under the G.I. Bill.
- **Discharge Under Other Than Honorable Conditions.** This classification, usually called “an OTH” in conversation among military members and Veterans, means that the Veteran engaged in a “pattern of behavior that constitutes a significant departure from the conduct expected” of an individual in military service. Receiving this level of discharge can (but does not always) deprive Veterans of many Veterans’ benefits. Additionally, individuals who receive an OTH classification are usually barred from re-enlisting into any branch of the military.
- **Bad Conduct Discharge (BCD).** An individual can receive this discharge only if a military court-martial finds him or her guilty of certain particularly serious offenses under the Uniform Code of Military Justice (UCMJ). Receiving this

discharge classification has severe post-discharge consequences for the Veteran, including deprivation of most Veterans benefits.

- **Dishonorable Discharge.** An individual can receive this discharge only if a General Court-Martial finds him or her guilty of "serious offenses of a civil or military nature." (NOTE: If a commissioned officer is convicted at a General Court-Martial, then the officer's discharge paperwork will list that he or she received a "Dismissal," which carries the same negative consequences as a Dishonorable Discharge).

Discharge Upgrade = A procedure by which a Veteran can appeal his or her character of discharge. While these cases are difficult to win, a victory can bring many positive outcomes to the Veteran, particularly regarding benefits eligibility. Generally, a discharge upgrade proceeding can follow one of two basic pathways:

- (1) ***Discharge Review Board.*** Every branch of the military (Army, Navy, Air Force, Marines, Coast Guard) maintains its own Discharge Review Board. Each Discharge Review Board consists of a panel of five officers from that branch of service. A minimum of three votes are required to change the Veteran's discharge classification. A Discharge Review Board cannot review Dishonorable Discharges or Bad Conduct Discharges (unless issued by a Special Court-Martial), but can review all other classifications of discharge.

A Veteran can appeal to the Discharge Review Board within fifteen years after the individual's discharge from military service. After fifteen years passes, then the Discharge Review Board cannot hear the Veteran's appeal.

Typically, a Discharge Review Board will upgrade a Veteran's discharge based on grounds of equity or propriety. (10 U.S.C. §1553; 32 C.F.R. §70.9).

Department of Defense Form 293 is the proper form to use when appealing to a Discharge Review Board. Applicants to a Discharge Review Board can elect either a "non-personal appearance review" or a "personal appearance review" before the Discharge Review Board's members. Commonly, advocates will request a "non-personal appearance review" first. Then, if the Discharge Review Board denies the upgrade, the Veteran (and his or her advocates) can request that the Discharge Review Board reconsider the case with a personal appearance before the board.

The Discharge Review Board must expedite the Veteran's case if the Veteran served during a wartime period and was later diagnosed with Traumatic Brain Injury (TBI) or Post-Traumatic Stress Disorder (PTSD). Additionally, the Discharge Review Board in such situations must include at least one member who is a psychiatrist, a clinical psychologist, or a physician.

- (2) ***Board for Correction of Military Records.*** Each branch of the service also maintains a Board for Correction of Military Records (or, in the case of the Navy and Marine Corps, a "Board for Correction of Naval Records"). Each Board for Correction of Military Records consists of civilians who are employed within that particular service branch.

Unlike a Discharge Review Board, the Board for Correction of Military Records may amend not only the Veteran's discharge classification, but also virtually any other component of the Veteran's discharge paperwork, including removing incorrect statements about the reasons for the Veteran's separation from military service, altering re-enlistment codes, changing the Veteran's date of discharge, and any other area of the Veteran's discharge paperwork that reveals an "error or injustice." (10 U.S.C. §1552(b)).

A Veteran can appeal to the Board for Correction of Military Records at any time, regardless of date of discharge from military service.

However, every Board for Correction of Military Records operates under a legal presumption that it will accept an appeal from a Veteran only within three years after the date when the Veteran discovers the "alleged error or injustice" in his or her discharge records. To overcome this presumption, the Veteran's application to the Board for Correction of Military Records must include a statement expressing why the Board should, in "the interest of justice," abandon the three-year requirement and hear the case.

Department of Defense Form 149 is the proper form to use when appealing to a Board for Correction of Military Records.

HOW TO FILE A COMPLAINT

If you believe you have been discriminated against based on your military status, you can file a complaint with the New York State Division of Human Rights.

A complaint must be filed with the Division within one year of the alleged discriminatory act.

To file a complaint:

- Visit the Division's website, at WWW.DHR.NY.GOV, and download a complaint form. Completed complaints must be signed before a notary public, and returned to the Division (by mail or in person).
- Stop by a Division office in person.
- Contact one of the Division's offices, by telephone or by mail, to obtain a complaint form and/or other assistance in filing a complaint.

For more information or to find the regional office nearest to your home or place of employment, visit our website at: WWW.DHR.NY.GOV.

SOME EXAMPLES:

You're looking at potential apartments and a landlord asks if you're in the military. You tell the landlord you're in the Reserves. The landlord then declines to rent to you. Is this unlawful?

It is unlawful in New York State to refuse to rent to otherwise qualified active duty military or a member of the Reserves based solely upon military status.

You return from service overseas and need to utilize a wheelchair based upon your disability. You cannot access your workstation at your place of employment as the wheelchair doesn't fit into the existing workstation. You are otherwise qualified to perform all aspects of your job responsibilities. What rights do you have?

Your employer has a duty to provide you with a reasonable accommodation based upon your disability. This means that the employer must modify the workstation to permit you access, unless the employer can demonstrate that providing access is an undue hardship.

You and a group of other service members go out to a nightclub. Some, but not all, are in uniform. The bouncer denies you access, claiming the nightclub is full. One hour later, you and your group are still waiting outside and you've observed a few dozen others go in. Is this unlawful?

If the nightclub denied you and your group access based upon your military status, then this would be unlawful.



Division of
Human Rights

Discrimination Based Upon **MILITARY STATUS** And Against **VETERANS** With Disabilities

ONE FORDHAM PLAZA
BRONX, NEW YORK 10458
1-888-392-3644
TTY: 718-741-8300
WWW.DHR.NY.GOV

The Human Rights Law

The New York State Human Rights Law prohibits discrimination based upon military status.

Additionally, the Human Rights Law has long protected persons with disabilities, including veterans, in employment, housing, and public accommodations.

Service Members with Disabilities Face Special Challenges

The Division of Human Rights helps to ensure that injured service members return to civilian life by strictly enforcing New York's broad prohibition against discrimination based upon disability.

New York State is among those states expanding disability laws to afford its constituents the broadest protection possible.

Service members returning from combat with disabilities may for the first time in their lives experience discrimination.

One example is an employer refusing to hire veterans with disabilities believing that they'll need more time off for doctor's visits or will cost the company more in medical premiums.

Another example is a landlord not permitting veterans with disabilities to modify their apartments to accommodate their disabilities.

Many service members return with psychological disabilities rather than overt physical ones. For example, large numbers of veterans returning from overseas have Post Traumatic Stress Disorder, which is a recognized disability.

Military Status is defined as a person's participation in the military service of the United States or the military service of another state, including the Armed Forces of the United States, the Army National Guard, the Air National Guard, the New York Naval Militia, and the New York Guard.

Reserved Armed Forces is defined as service other than permanent, full-time service in the military forces of the United States, including service in the United States Army Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Air Force Reserve, and the United States Coast Guard Reserve.

Organized Militia of the State is defined as service other than permanent, full-time service in the military forces of the State of New York, including but not limited to the New York Army National Guard, the New York Air National Guard, the New York Naval Militia, and the New York Guard.

The Human Rights Law protects returning veterans with disabilities as they re-enter the employment and housing markets, and the Division is here to make sure that the Human Rights Law is strongly enforced.

Retaliation for Filing a Complaint is Unlawful

The Human Rights Law prohibits retaliation for the filing of a complaint of discrimination or for opposing practices that are discriminatory.

Retaliation is also prohibited after the filing of a complaint with the Division or during the time the complaint is pending.

Retaliation claims can be filed and adjudicated as separate and independent complaints.

How to File a Complaint

The New York State Division of Human Rights only handles matters related to unlawful discrimination.

If you feel you have been subjected to discrimination in housing, employment, credit, places of public accommodation, volunteer firefighting, or private non-sectarian educational institutions based on age, creed, race, color, sex, sexual orientation, national origin, disability, pregnancy-related condition, domestic violence victim status, marital status, military status, arrest record, conviction record, predisposing genetic characteristics or familial status you can file a discrimination complaint with the Division of Human Rights.

COMPLAINTS WITH THE DIVISION MUST BE FILED WITHIN ONE YEAR OF THE MOST RECENT INCIDENT OF DISCRIMINATION OR YOU MAY BE ABLE TO FILE DIRECTLY IN STATE COURT WITHIN THREE YEARS OF THE INCIDENT. FILING WITH THE DIVISION IS FREE OF CHARGE.

Ways to file a complaint:

- File a complaint in person by visiting one of the Division's 12 offices in New York State. Locations are listed on the back of this flyer. You can also visit our website at www.dhr.ny.gov or call our toll-free number 1-888-392-3644 for more information.
- Visit our website and download a complaint form. Complete and sign it before a notary public and return it by mail or in person to one of the Division's offices.
- Contact any of the Division's regional offices by telephone or mail to obtain a complaint form and to request assistance in filing the complaint.

Regardless of the way you file a complaint be prepared to do the following:

- Identify and provide contact information whenever possible of the individuals, if any, who saw or heard something that can support your claim of discrimination.
- Identify any other individuals who, in a situation similar to yours, may have been treated differently or the same by the alleged discriminator.
- Provide specific details such as dates, statements and circumstances of the discriminatory incident.

Division of Human Rights Offices

HEADQUARTERS

The Bronx

One Fordham Plaza
Fourth Floor
Bronx, NY 10458
Tel. (718) 741-8400
Toll Free Number
(888) 392-3644

REGIONAL OFFICES

Albany

Agency Building 1, 2nd Floor
Empire State Plaza
Albany, New York 12220
Tel. (518) 474-2705 (or 2707)

Binghamton

44 Hawley Street, Room 603
Binghamton, NY 13901
Tel. (607) 721-8467

Brooklyn

55 Hanson Place, Room 304
Brooklyn, NY 11217
Tel. (718) 722-2856

Buffalo

65 Court Street, Suite 506
Buffalo, NY 14202
Tel. (716) 847-7632

Long Island (Suffolk)

250 Vet. Memorial Hwy.
Suite 2B-49
Hauppauge, NY 11788
Tel. (631) 952-6434

Long Island (Nassau)

50 Clinton Street
Suite 301
Hempstead, NY 11550
Tel. (516) 539-6848

Manhattan

163 West 125th Street
Fourth Floor
New York, NY 10027
Tel. (212) 961-8650

Office of Sexual Harassment Issues/Queens

55 Hanson Place, Room 900
Brooklyn, NY 11217
Tel. (718) 722-2060

Rochester

One Monroe Square
259 Monroe Avenue
Suite 308
Rochester, NY 14607
Tel. (585) 238-8250

Syracuse

333 East Washington Street
Room 543
Syracuse, NY 13202
Tel. (315) 428-4633

White Plains

7-11 South Broadway
Suite 314
White Plains, NY 10601
Tel. (914) 989-3120

Additional Resources

I'm a Muslim U.S. Marine, But Am I American Enough?

By: Mansoor Shams

<https://www.newsweek.com/im-muslim-us-marine-am-i-american-enough-opinion-1227664>

It's time to bridge the military-civilian divide in the US

Analysis By:

Brianna Keilar, CNN Author

<https://www.cnn.com/2019/02/06/politics/home-front-keilar-column/index.html>

Suit Calls Navy Board Biased Against Veterans With PTSD

By: Dave Philipps

<https://www.nytimes.com/2018/03/02/us/navy-ptsd-lawsuit.html>

For All Who Served: Service Members and Veterans Overcoming Biases

Panelists:

Cheryl Dupris
David Lester
Mansoor Shams
Ashton Stewart
Benjamin Pomerance, Esq.

AMERICANS WITH DISABILITIES ACT OF 1990, 1990 Enacted S. 933, 101 Enacted S. 933

Enacted, July 26, 1990

Reporter

104 Stat. 327 *; 101 P.L. 336; 1990 Enacted S. 933; 101 Enacted S. 933

UNITED STATES PUBLIC LAWS > 101st Congress -- 2nd Session > PUBLIC LAW 101-336 > [S. 933]

Text

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

SECTION 1. <<Notes>>|

SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE. -- This Act may be cited as the "Americans with Disabilities Act of 1990".

(b) TABLE OF CONTENTS. --

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Commented [1]: NOTE: 42 USC 1201 note

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SEC. 2. <<Notes>>|

Commented [2]: NOTE: 42 USC 12101

FINDINGS AND PURPOSES.

(a) FINDINGS. -- The Congress finds that --

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies,

[*329] failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) PURPOSE -- It is the purpose of this Act --

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

SEC. 3. <<Notes>>|

Commented [3]: NOTE: 42 USC 12102

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DEFINITIONS.

As used in this Act:

(1) AUXILIARY AIDS AND SERVICES. -- The term "auxiliary aids and services" includes --

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) DISABILITY. -- The term "disability" means, with respect to an individual --

[*330] (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) STATE. -- The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I -- EMPLOYMENT

SEC. 101. <<Notes>>|

Commented [4]: NOTE: 42 USC 12111

DEFINITIONS.

As used in this title:

(1) COMMISSION. -- The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 ([42 U.S.C. 2000e-4](#)).

(2) COVERED ENTITY. -- The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) DIRECT THREAT. -- The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) EMPLOYEE. -- The term "employee" means an individual employed by an employer.

(5) EMPLOYER. --

(A) IN GENERAL. -- The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) EXCEPTIONS. -- The term "employer" does not include --

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) ILLEGAL USE OF DRUGS. --

(A) IN GENERAL. -- The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act ([21 U.S.C. 812](#)). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

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(B) DRUGS. -- The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

[*331] (7) PERSON, ETC. -- The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (*42 U.S.C. 2000e*).

(8) QUALIFIED INDIVIDUAL WITH A DISABILITY. -- The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) REASONABLE ACCOMMODATION. -- The term "reasonable accommodation" may include --

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and with other similar accommodations for individuals with disabilities.

(10) UNDUE HARDSHIP. --

(A) IN GENERAL. -- The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) FACTORS TO BE CONSIDERED. -- In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include --

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

SEC. 102. <<Notes>>|

Commented [5]: NOTE: 42 USC 12112

DISCRIMINATION.

(a) GENERAL RULE. -- No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation,

[*332] job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION. -- As used in subsection (a), the term "discriminate" includes --

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with

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an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration --

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or a applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) MEDICAL EXAMINATIONS AND INQUIRIES. --

(1) IN GENERAL. -- The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

[*333] (2) PREEMPLOYMENT. --

(A) PROHIBITED EXAMINATION OR INQUIRY. -- Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) ACCEPTABLE INQUIRY. -- A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) EMPLOYMENT ENTRANCE EXAMINATION. -- A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if --

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that --

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) EXAMINATION AND INQUIRY. --

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(A) PROHIBITED EXAMINATIONS AND INQUIRIES. -- A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) ACCEPTABLE EXAMINATIONS AND INQUIRIES. -- A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) REQUIREMENT. -- Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

SEC. 103. <<Notes>>|

Commented [6]: NOTE: 42 USC 12113

DEFENSES.

(a) IN GENERAL. -- It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity,

[*334] and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) QUALIFICATION STANDARDS. -- The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) RELIGIOUS ENTITIES. --

(1) IN GENERAL. -- This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) RELIGIOUS TENETS REQUIREMENT. -- Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) LIST OF INFECTIOUS AND COMMUNICABLE DISEASES. --

(1) IN GENERAL. -- The Secretary of Health and Human Services, not later than 6 months after the date of enactment of this Act, shall --

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) APPLICATIONS. -- In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) CONSTRUCTION. -- Nothing in this Act shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

SEC. 104. <<Notes>>|

Commented [7]: NOTE: 42 USC 12114

ILLEGAL USE OF DRUGS AND ALCOHOL.

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(a) QUALIFIED INDIVIDUAL WITH A DISABILITY. -- For purposes of this title, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

[*335] (b) RULES OF CONSTRUCTION. -- Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who --

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) AUTHORITY OF COVERED ENTITY. -- A covered entity --

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 ([41 U.S.C. 701](#) et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that --

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are

[*336] employed in such positions (as defined in the regulations of the Department of Transportation).

(d) DRUG TESTING. --

(1) IN GENERAL. -- For purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) CONSTRUCTION. -- Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) TRANSPORTATION EMPLOYEES. -- Nothing in this title shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to --

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(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection(c).

SEC. 105. <<Notes>>|

Commented [8]: NOTE: 42 USC 12115

POSTING NOTICES.

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 ([42 U.S.C. 2000e-10](#)).

SEC. 106. <<Notes>>|

Commented [9]: NOTE: 42 USC 12116

REGULATIONS.

Not later than 1 year after the date of enactment of this Act, the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code.

SEC. 107. <<Notes>>|

Commented [10]: NOTE: 42 USC 12117

ENFORCEMENT.

(a) POWERS, REMEDIES, AND PROCEDURES. -- The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 ([42 U.S.C. 2000e-4](#), [2000e-5](#), [2000e-6](#), [2000e-8](#), and [2000e-9](#)) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.

(b) COORDINATION. -- The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and

[*337] part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (*46 Fed. Reg. 7435*, January 23, 1981)) in regulations implementing this title and Rehabilitation Act of 1973 not later than 18 months after the date of enactment of this Act.

SEC. 108. <<Notes>>|

Commented [11]: NOTE: 42 USC 12111 note

EFFECTIVE DATE.

This title shall become effective 24 months after the date of enactment.

TITLE II -- PUBLIC SERVICES

SUBTITLE A -- PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY

APPLICABLE PROVISIONS

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SEC. 201. <<Notes>>|

Commented [12]: NOTE: 42 USC 12131

DEFINITION.

As used in this title:

(1) PUBLIC ENTITY. -- The term "public entity" means --

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

(2) QUALIFIED INDIVIDUAL WITH A DISABILITY. -- The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

SEC. 202. <<Notes>>|

Commented [13]: NOTE: 42 USC 12132

DISCRIMINATION.

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

SEC. 203. <<Notes>>|

Commented [14]: NOTE: 42 USC 12133

ENFORCEMENT.

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 ([29 U.S.C. 794a](#)) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

SEC. 204. <<Notes>>|

Commented [15]: NOTE: 42 USC 12134

REGULATIONS.

(a) IN GENERAL. -- Not later than 1 year after the date of enactment of this Act, the Attorney General shall promulgate regulations in an accessible format that implement this subtitle. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 223, 229, or 224.

[*338] (b) RELATIONSHIP TO OTHER REGULATIONS. -- Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) shall be consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 ([29 U.S.C. 794](#)). With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) STANDARDS. -- Regulations under subsection (a) shall include standards applicable to facilities and vehicles covered by this subtitle, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act.

SEC. 205. <<Notes>>|

Commented [16]: NOTE: 42 USC 12131 note

EFFECTIVE DATE.

(a) GENERAL RULE. -- Except as provided in subsection (b), this subtitle shall become effective 18 months after the date of enactment of this Act.

(b) EXCEPTION. -- Section 204 shall become effective on the date of enactment of this Act.

SUBTITLE B -- ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY

PUBLIC ENTITIES CONSIDERED DISCRIMINATORY

PART I -- PUBLIC TRANSPORTATION OTHER THAN BY AIRCRAFT OR CERTAIN RAIL

OPERATIONS

SEC. 221. <<Notes>>|

Commented [17]: NOTE: 42 USC 12141

DEFINITIONS.

As used in this part:

(1) DEMAND RESPONSIVE SYSTEM. -- The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) DESIGNATED PUBLIC TRANSPORTATION. -- The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 241)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) FIXED ROUTE SYSTEM. -- The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) OPERATES. -- The term "operates", as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

[*339] (5) PUBLIC SCHOOL TRANSPORTATION. -- The term "public school transportation" means transportation by schoolbus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) SECRETARY. -- The term "Secretary" means the Secretary of Transportation.

SEC. 222. <<Notes>>|

Commented [18]: NOTE: 42 USC 12142

PUBLIC ENTITIES OPERATING FIXED ROUTE SYSTEMS.

(a) PURCHASE AND LEASE OF NEW VEHICLES. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a public entity which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following the effective date of this subsection and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) PURCHASE AND LEASE OF USED VEHICLES. -- Subject to subsection (c)(1), it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a public entity which operates a fixed route system to purchase or lease, after the 30th day following the effective date of this subsection, a used vehicle

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for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) REMANUFACTURED VEHICLES. --

(1) GENERAL RULE. -- Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system --

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following the effective date of this subsection; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended;

unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) EXCEPTION FOR HISTORIC VEHICLES. --

(A) GENERAL RULE. -- If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of paragraph

[*340] (1) and which do not significantly alter the historic character of such vehicles.

(B) VEHICLES OF HISTORIC CHARACTER DEFINED BY REGULATIONS. -- For purposes of this paragraph and section 228(b), a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

SEC. 223. <<Notes>>|

Commented [19]: NOTE: 42 USC 12143

PARATRANSIT AS A COMPLEMENT TO FIXED ROUTE SERVICE.

(a) GENERAL RULE. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such systems.

(b) ISSUANCE OF REGULATIONS. -- Not later than 1 year after the effective date of this subsection, the Secretary shall issue final regulations to carry out this section.

(c) REQUIRED CONTENTS OF REGULATIONS. --

(1) ELIGIBLE RECIPIENTS OF SERVICE. -- The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section --

(A)(i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time

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(or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (B), accompanying the individual with a disability provided that space for these additional individuals is available on the paratransit vehicle carrying

[*341] the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) SERVICE AREA. -- The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) SERVICE CRITERIA. -- Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) UNDUE FINANCIAL BURDEN LIMITATION. -- The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to provide such services to the extent that providing such services would not impose such a burden.

(5) ADDITIONAL SERVICES. -- The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) PUBLIC PARTICIPATION. -- The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) PLANS. -- The regulations issued under this section shall require that each public entity which operates a fixed route system --

(A) within 18 months after the effective date of this subsection, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) PROVISION OF SERVICES BY OTHERS. -- The regulations issued under this section shall --

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

[*342] (B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) OTHER PROVISIONS. -- The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this sections.

(d) REVIEW OF PLAN. --

(1) GENERAL RULE. -- The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

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(2) DISAPPROVAL. -- If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) MODIFICATION OF DISAPPROVED PLAN. -- Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secretary, and commence implementation of, such modified plan.

(e) DISCRIMINATION DEFINED. -- As used in subsection (a), the term "discrimination" includes --

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7);

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d)(3);

(3) submission to the Secretary of a modified plan under subsection (d)(3) which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) STATUTORY CONSTRUCTION. -- Nothing in this section shall be construed as preventing a public entity --

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

SEC. 224. <<Notes>>|

Commented [20]: NOTE: 42 USC 12144

PUBLIC ENTITY OPERATING A DEMAND RESPONSIVE SYSTEM.

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable

[*343] by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

SEC. 225. <<Notes>>|

Commented [21]: NOTE: 42 USC 12145

TEMPORARY RELIEF WHERE LIFTS ARE UNAVAILABLE.

(a) GRANTING. -- With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 222(a) or 224 to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary --

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

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(b) DURATION AND NOTICE TO CONGRESS. -- Any relief granted under subsection (a) shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) FRAUDULENT APPLICATION. -- If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) was fraudulently applied for, the Secretary shall --

- (1) cancel such relief if such relief is still in effect; and
- (2) take such other action as the Secretary considers appropriate.

SEC. 226. <<Notes>>|

Commented [22]: NOTE: 42 USC 12146

NEW FACILITIES.

For purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*), it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

SEC. 227. <<Notes>>|

Commented [23]: NOTE: 42 USC 12147

ALTERATIONS OF EXISTING FACILITIES.

(a) GENERAL RULE. -- With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*), for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or

[*344] access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) SPECIAL RULE FOR STATIONS. --

(1) GENERAL RULE. -- For purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*), it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) RAPID RAIL AND LIGHT RAIL KEY STATIONS. --

(A) ACCESSIBILITY. -- Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on the effective date of this paragraph.

(B) EXTENSION FOR EXTRAORDINARILY EXPENSIVE STRUCTURAL CHANGES. -- The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following the date of the enactment of this Act at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

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(3) PLANS AND MILESTONES. -- The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection --

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

SEC. 228. <<Notes>>|

Commented [24]: NOTE: 42 USC 12148

PUBLIC TRANSPORTATION PROGRAMS AND ACTIVITIES IN EXISTING FACILITIES AND ONE CAR PER TRAIN RULE.

(a) PUBLIC TRANSPORTATION PROGRAMS AND ACTIVITIES IN EXISTING FACILITIES. --

(1) IN GENERAL. -- With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 202 of this Act and section 504 of Rehabilitation Act of 1973 (*29 U.S.C. [345] 794*), for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) EXCEPTION. -- Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 227(a) (relating to alterations) or section 227(b) (relating to key stations).

(3) UTILIZATION. -- Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) ONE CAR PER TRAIN RULE. --

(1) GENERAL RULE. -- Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*), it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) HISTORIC TRAINS. -- In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 222(c)(1) and which do not significantly alter the historic character of such vehicle.

SEC. 229. <<Notes>>|

Commented [25]: NOTE: 42 USC 12149

REGULATIONS.

(a) IN GENERAL. -- Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this part (other than section 223).

(b) STANDARDS. -- The regulations issued under this section and section 223 shall include standards applicable to facilities and vehicles covered by this subtitle. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504 of this Act.

SEC. 230. <<Notes>>|

Commented [26]: NOTE: 42 USC 12150

INTERIM ACCESSIBILITY REQUIREMENTS.

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If final regulations have not been issued pursuant to section 229, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of

[*346] such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 226 and 227, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 504(a) of this Act, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

SEC. 231. <<Notes>>|

Commented [27]: NOTE: 42 USC 12141 note

EFFECTIVE DATE.

(a) GENERAL RULE. -- Except as provided in subsection (b), this part shall become effective 18 months after the date of enactment of this Act.

(b) EXCEPTION. -- Sections 222, 223 (other than subsection (a)), 224, 225, 227(b), 228(b), and 229 shall become effective on the date of enactment of this Act.

PART II -- PUBLIC TRANSPORTATION BY INTERCITY AND COMMUTER RAIL

SEC. 241. <<Notes>>|

Commented [28]: NOTE: 42 USC 12161

DEFINITIONS.

As used in this part:

(1) COMMUTER AUTHORITY. -- The term "commuter authority" has the meaning given such term in section 103(8) of the Rail Passenger Service Act (45 U.S.C. 502(8)).

(2) COMMUTER RAIL TRANSPORTATION. -- The term "commuter rail transportation" has the meaning given the term "commuter service" in section 103(9) of the Rail Passenger Service Act (45 U.S.C. 502(9)).

(3) INTERCITY RAIL TRANSPORTATION. -- The term "intercity rail transportation" means transportation provided by the National Railroad Passenger Corporation.

(4) RAIL PASSENGER CAR. -- The term "rail passenger car" means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single-level and bi-level sleeping cars, single-level and bi-level lounge cars, and food service cars.

(5) RESPONSIBLE PERSON. -- The term "responsible person" means --

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable basis by regulation by the Secretary of Transportation; and

(C) in a case where no part owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

[*347] (6) STATION. -- The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

SEC. 242. <<Notes>>|

Commented [29]: NOTE: 42 USC 12162

INTERCITY AND COMMUTER RAIL ACTIONS CONSIDERED DISCRIMINATORY.

(a) INTERCITY RAIL TRANSPORTATION. --

(1) ONE CAR PER TRAIN RULE. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 244, as soon as practicable, but in no event later than 5 years after the date of enactment of this Act.

(2) NEW INTERCITY CARS. --

(A) GENERAL RULE. -- Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after the effective date of this section, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(B) SPECIAL RULE FOR SINGLE-LEVEL PASSENGER COACHES FOR INDIVIDUALS WHO USE WHEELCHAIRS.

-- Single-level passenger coaches shall be required to --

- (i) be able to be entered by an individual who uses a wheelchair;
- (ii) have space to park and secure a wheelchair;
- (iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and
- (iv) have a restroom usable by an individual who uses a wheelchair,

only to the extent provided in paragraph (3).

(C) SPECIAL RULE FOR SINGLE-LEVEL DINING CARS FOR INDIVIDUALS WHO USE WHEELCHAIRS. -- Single-level dining cars shall not be required to --

- (i) be able to be entered from the station platform by an individual who uses a wheelchair; or
- (ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

[*348] (D) SPECIAL RULE FOR BI-LEVEL DINING CARS FOR INDIVIDUALS WHO USE WHEELCHAIRS. -- Bi-level dining cars shall not be required to --

- (i) be able to be entered by an individual who uses a wheelchair;
- (ii) have space to park and secure a wheelchair;
- (iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or
- (iv) have a restroom usable by an individual who uses a wheelchair.

(3) ACCESSIBILITY OF SINGLE-LEVEL COACHES. --

(A) GENERAL RULE -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a person who provides intercity rail transportation to fail to have on each train which includes one or more single-level rail passenger coaches --

(i) a number of spaces --

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train,

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as soon as practicable, but in no event later than 5 years after the date of enactment of this Act; and

(ii) a number of spaces --

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 10 years after the date of enactment of this Act.

(B) LOCATION. -- Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) LIMITATION. -- Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) OTHER ACCESSIBILITY FEATURES. -- Single-level rail passenger coaches and food service cars on which the spaces required by subparagraph (A) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to be entered from the station platform by an individual who uses a wheelchair.

(4) FOOD SERVICE. --

[*349] (A) SINGLE-LEVEL DINING CARS. -- On any train in which a single-level dining car is used to provide food service --

(i) if such single-level dining car was purchased after the date of enactment of this Act, table service in such car shall be provided to a passenger who uses a wheelchair if --

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adjacent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (i) through which an individual who uses a wheelchair may enter.

(B) BI-LEVEL DINING CARS. -- On any train in which a bi-level dining car is used to provide food service --

(i) if such train includes a bi-level lounge car purchased after the date of enactment of this Act, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) COMMUTER RAIL TRANSPORTATION. --

(1) ONE CAR PER TRAIN RULE. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 244, as soon as practicable, but in no event later than 5 years after the date of enactment of this Act.

(2) NEW COMMUTER RAIL CARS. --

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(A) GENERAL RULE. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a person to

[*350] purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after the effective date of this section, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(B) ACCESSIBILITY. -- For purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*), a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require --

- (i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger;
- (ii) space to fold and store a wheelchair; or
- (iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) USED RAIL CARS. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(d) REMANUFACTURED RAIL CARS. --

(1) REMANUFACTURING. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a person to remanufacture a rail passenger car for use in intercity or commuter rail transportation so as to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(2) PURCHASE OR LEASE. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) STATIONS. --

(1) NEW STATIONS. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(2) EXISTING STATIONS. --

[*351] (A) FAILURE TO MAKE READILY ACCESSIBLE. --

(i) GENERAL RULE. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (*29 U.S.C. 794*) for a responsible person to fail to make existing stations in the intercity rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 244.

(ii) PERIOD FOR COMPLIANCE. --

(I) INTERCITY RAIL. -- All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after the date of enactment of this Act.

(II) COMMUTER RAIL. -- Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3

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years after the date of enactment of this Act, except that the time limit may be extended by the Secretary of Transportation up to 20 years after the date of enactment of this Act in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) DESIGNATION OF KEY STATIONS. -- Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) PLANS AND MILESTONES. -- The Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) REQUIREMENT WHEN MAKING ALTERATIONS. --

(i) GENERAL RULE. -- It shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the

[*352] maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) ALTERATIONS TO A PRIMARY FUNCTION AREA. -- It shall be considered discrimination, for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) REQUIRED COOPERATION. -- It shall be considered discrimination for purposes of section 202 of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for an owner, or person in control, of a station governed by subparagraph (A) or (B) to fail to provide reasonable cooperation to a responsible person with respect to such station in that responsible person's efforts to comply with such subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this Act.

SEC. 243. <<Notes>>|

Commented [30]: NOTE: 42 USC 12163

CONFORMANCE OF ACCESSIBILITY STANDARDS.

Accessibility standards included in regulations issued under this part shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 504(a) of this Act.

SEC. 244. <<Notes>>|

Commented [31]: NOTE: 42 USC 12164

REGULATIONS.

Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this part.

SEC. 245. <<Notes>>|

Commented [32]: NOTE: 42 USC 12165

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INTERIM ACCESSIBILITY REQUIREMENTS.

(a) STATIONS. -- If final regulations have not been issued pursuant to section 244, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is

[*353] issued shall suffice to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities as required under section 242(e), except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 504(a) of this Act, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) RAIL PASSENGER CARS. -- If final regulations have not been issued pursuant to section 244, a person shall be considered to have complied with the requirements of section 242(a) through (d) that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 504(a) of this Act) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this part and are in effect at the time such design is substantially completed.

SEC. 246. <<Notes>>|

Commented [33]: NOTE: 42 USC 12161 note

EFFECTIVE DATE.

(a) GENERAL RULE. -- Except as provided in subsection (b), this part shall become effective 18 months after the date of enactment of this Act.

(b) EXCEPTION. -- Sections 242 and 244 shall become effective on the date of enactment of this Act.

TITLE III -- PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE

ENTITIES

SEC. 301. <<Notes>>|

Commented [34]: NOTE: 42 USC 12181

DEFINITIONS.

As used in this title:

(1) COMMERCE. -- The term "commerce" means travel, trade, traffic, commerce, transportation, or communication --

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) COMMERCIAL FACILITIES. -- The term "commercial facilities" means facilities --

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 242 or covered under this title, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 ([42 U.S.C. 3601](#) et seq.).

(3) DEMAND RESPONSIVE SYSTEM. -- The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

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[*354] (4) **FIXED ROUTE SYSTEM.** -- The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) **OVER-THE-ROAD BUS.** -- The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) **PRIVATE ENTITY.** -- The term "private entity" means any entity other than a public entity (as defined in section 201(1)).

(7) **PUBLIC ACCOMMODATION.** -- The following private entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce --

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) **RAIL AND RAILROAD.** -- The terms "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (*45 U.S.C. 431(e)*).

(9) **READILY ACHIEVABLE.** -- The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include --

(A) the nature and cost of the action needed under this Act;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the

[*355] impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) **SPECIFIED PUBLIC TRANSPORTATION.** -- The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

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(11) VEHICLE. -- The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 242 or covered under this title.

SEC. 302. <<Notes>>|

Commented [35]: NOTE: 42 USC 12182

PROHIBITION OF DISCRIMINATION BY PUBLIC ACCOMMODATIONS.

(a) GENERAL RULE. -- No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) CONSTRUCTION. --

(1) GENERAL PROHIBITION. --

(A) ACTIVITIES. --

(i) DENIAL OF PARTICIPATION. -- It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) PARTICIPATION IN UNEQUAL BENEFIT. -- It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) SEPARATE BENEFIT. -- It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege,

[*356] advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) INDIVIDUAL OR CLASS OF INDIVIDUALS. -- For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) INTEGRATED SETTINGS. -- Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) OPPORTUNITY TO PARTICIPATE. -- Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) ADMINISTRATIVE METHODS. -- An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration --

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) ASSOCIATION. -- It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) SPECIFIC PROHIBITIONS. --

(A) DISCRIMINATION. -- For purposes of subsection (a), discrimination includes --

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or

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accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally

[*357] alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) FIXED ROUTE SYSTEM. --

(i) ACCESSIBILITY. -- It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 304 to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) EQUIVALENT SERVICE. -- If a private entity which operates a fixed route system and which is not subject to section 304 purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) DEMAND RESPONSIVE SYSTEM. -- For purposes of subsection (a), discrimination includes --

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 304 to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily

[*358] accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) OVER-THE-ROAD BUSES. --

(i) LIMITATION ON APPLICABILITY. -- Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) ACCESSIBILITY REQUIREMENTS. -- For purposes of subsection (a), discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 306(a)(2) by a private entity which

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provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) SPECIFIC CONSTRUCTION. -- Nothing in this title shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

SEC. 303. <<Notes>>|

Commented [36]: NOTE: 42 USC 12183

NEW CONSTRUCTION AND ALTERATIONS IN PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES.

(a) APPLICATION OF TERM. -- Except as provided in subsection (b), as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes --

(1) a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this title; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and

[*359] scope (as determined under criteria established by the Attorney General).

(b) ELEVATOR. -- Subsection (a) shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

SEC. 304. <<Notes>>|

Commented [37]: NOTE: 42 USC 12184

PROHIBITION OF DISCRIMINATION IN SPECIFIED PUBLIC TRANSPORTATION SERVICES PROVIDED BY PRIVATE ENTITIES.

(a) GENERAL RULE. -- No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) CONSTRUCTION. -- For purposes of subsection (a), discrimination includes --

(1) the imposition or application by a entity described in subsection (a) of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to --

(A) make reasonable modifications consistent with those required under section 302(b)(2)(A)(ii);

(B) provide auxiliary aids and services consistent with the requirements of section 302(b)(2)(A)(iii); and

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(C) remove barriers consistent with the requirements of section 302(b)(2)(A) and with the requirements of section 303(a)(2);

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over-the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(4)(A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 306(a)(2); and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following

[*360] the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or base by such entity of a new rail passenger car that is to be used to provide specified public transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) HISTORICAL OR ANTIQUATED CARS. --

(1) EXCEPTION. -- To the extent that compliance with subsection (b)(2)(C) or (b)(7) would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in violation of any rule, regulation, standard, or order issued by the Secretary of Transportation under the Federal Railroad Safety Act of 1970, such compliance shall not be required.

(2) DEFINITION. -- As used in this subsection, the term "historical or antiquated rail passenger car" means a rail passenger car --

(A) which is not less than 30 years old at the time of its use for transporting individuals;

(B) the manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(C) which --

(i) has a consequential association with events or persons significant to the past; or

(ii) embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

SEC. 305. STUDY. <<Notes>>|

Commented [38]: NOTE: 42 USC 12185

(a) PURPOSES. -- The Office of Technology Assessment shall undertake a study to determine --

(1) the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service; and

(2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.

(b) CONTENTS. -- The study shall include, at a minimum, an analysis of the following:

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[*361] (1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.

(2) The degree to which such buses and service, including any service required under sections 304(b)(4) and 306(a)(2), are readily accessible to and usable by individuals with disabilities.

(3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.

(4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost saving developments in equipment and devices.

(5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible restrooms which do not result in a loss of seating capacity.

(6) The impact of accessibility requirements on the continuation of over-the-road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

(c) **ADVISORY COMMITTEE.** -- In conducting the study required by subsection (a), the Office of Technology Assessment shall establish an advisory committee, which shall consist of --

(1) members selected from among private operators and manufacturers of over-the-road buses;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study, including manufacturers of boarding assistance equipment and devices.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) **DEADLINE.** -- The study required by subsection (a), along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall be submitted to the President and Congress within 36 months after the date of the enactment of this Act. If the President determines that compliance with the regulations issued pursuant to section 306(a)(2)(B) on or before the applicable deadlines specified in section 306(a)(2)(B) will result in a significant reduction in intercity over-the-road bus service, the President shall extend each such deadline by 1 year.

(e) **REVIEW.** -- In developing the study required by subsection (a), the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 ([29 U.S.C. 792](#)). The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d).

SEC. 306. <<Notes>>

Commented [39]: NOTE: 42 USC 12186

REGULATIONS.

(a) **TRANSPORTATION PROVISIONS.** --

(1) **GENERAL RULE.** -- Not later than 1 year after the date of the enactment of this Act, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections

[*362] 302(b)(2) (B) and (C) and to carry out section 304 (other than subsection (b)(4)).

(2) **SPECIAL RULES FOR PROVIDING ACCESS TO OVER-THE-ROAD BUSES.** --

(A) **INTERIM REQUIREMENTS.** --

(i) **ISSUANCE.** -- Not later than 1 year after the date of the enactment of this Act, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 304(b)(4) and 302(b)(2)(D)(ii) that require each Private entity which uses an over-the-road bus to provide transportation of individuals to provide accessibility to such bus; except that such regulations

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shall not require any structural changes in over-the-road buses in order to provide access to individuals who use wheelchairs during the effective period of such regulations and shall not require the purchase of boarding assistance devices to provide access to such individuals.

(ii) EFFECTIVE PERIOD. -- The regulations issued pursuant to this subparagraph shall be effective until the effective date of the regulations issued under subparagraph (B).

(B) FINAL REQUIREMENT. --

(i) REVIEW OF STUDY AND INTERIM REQUIREMENTS. -- The Secretary shall review the study submitted under section 305 and the regulations issued pursuant to subparagraph (A).

(ii) ISSUANCE. -- Not later than 1 year after the date of the submission of the study under section 305, the Secretary shall issue in an accessible format new regulations to carry out sections 304(b)(4) and 302(b)(2)(D)(ii) that require, taking into account the purposes of the study under section 305 and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs.

(iii) EFFECTIVE PERIOD. -- Subject to section 305(d), the regulations issued pursuant to this subparagraph shall take effect --

(I) with respect to small providers of transportation (as defined by the Secretary), 7 years after the date of the enactment of this Act; and

(II) with respect to other providers of transportation, 6 years after such date of enactment.

(C) LIMITATION ON REQUIRING INSTALLATION OF ACCESSIBLE RESTROOMS. -- The regulations issued pursuant to this paragraph shall not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

(3) STANDARDS. -- The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 302(b)(2) and 304.

(b) OTHER PROVISIONS. -- Not later than 1 year after the date of the enactment of this Act, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this title not

[*363] referred to in subsection (a) that include standards applicable to facilities and vehicles covered under section 302.

(c) CONSISTENCY WITH ATBCB GUIDELINES. -- Standards included in regulations issued under subsections (a) and (b) shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504 of this Act.

(d) INTERIM ACCESSIBILITY STANDARDS. --

(1) FACILITIES. -- If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 303, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 504(a) of this Act, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) VEHICLES AND RAIL PASSENGER CARS. -- If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this title, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 504(a) of this Act) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this title and are in effect at the time such design is substantially completed.

SEC. 307. <<Notes>>|

Commented [40]: NOTE: 42 USC 12187

EXEMPTIONS FOR PRIVATE CLUBS AND RELIGIOUS ORGANIZATIONS.

The provisions of this title shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) or to religious organizations or entities controlled by religious organizations, including places of worship.

SEC. 308. <<Notes>>|

Commented [41]: NOTE: 42 USC 12188

ENFORCEMENT.

(a) IN GENERAL. --

(1) AVAILABILITY OF REMEDIES AND PROCEDURES. -- The remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) are the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this title or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of

[*364] section 303. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

(2) INJUNCTIVE RELIEF. -- In the case of violations of sections 302(b)(2)(A)(iv) and section 303(a), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

(b) ENFORCEMENT BY THE ATTORNEY GENERAL. --

(1) DENIAL OF RIGHTS. --

(A) DUTY TO INVESTIGATE. --

(i) IN GENERAL. -- The Attorney General shall investigate alleged violations of this title, and shall undertake periodic reviews of compliance of covered entities under this title.

(ii) ATTORNEY GENERAL CERTIFICATION. -- On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this Act for the accessibility and usability of covered facilities under this title. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this Act.

(B) POTENTIAL VIOLATION. -- If the Attorney General has reasonable cause to believe that --

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this title; or

(ii) any person or group of persons has been discriminated against under this title and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) AUTHORITY OF COURT. -- In a civil action under paragraph (1)(B), the court --

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this title --

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

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[*365] (B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount --

(i) not exceeding \$ 50,000 for a first violation; and

(ii) not exceeding \$ 100,000 for any subsequent violation.

(3) SINGLE VIOLATION. -- For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) PUNITIVE DAMAGES. -- For purposes of subsection (b)(2)(B), the term "monetary damages" and "such other relief" does not include punitive damages.

(5) JUDICIAL CONSIDERATION. -- In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this Act by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

SEC. 309. <<Notes>>|

Commented [42]: NOTE: 42 USC 12189

EXAMINATIONS AND COURSES.

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

SEC. 310. <<Notes>>|

Commented [43]: NOTE: 42 USC 12181 note

EFFECTIVE DATE.

(a) GENERAL RULE. -- Except as provided in subsections (b) and (c), this title shall become effective 18 months after the date of the enactment of this Act.

(b) CIVIL ACTIONS. -- Except for any civil action brought for a violation of section 303, no civil action shall be brought for any act or omission described in section 302 which occurs --

(1) during the first 6 months after the effective date, against businesses that employ 25 or fewer employees and have gross receipts of \$ 1,000,000 or less; and

(2) during the first year after the effective date, against businesses that employ 10 or fewer employees and have gross receipts of \$ 500,000 or less.

(c) EXCEPTION. -- Sections 302(a) for purposes of section 302(b)(2)(B) and (C) only, 304(a) for purposes of section 304(b)(3) only, 304(b)(3), 305, and 306 shall take effect on the date of the enactment of this Act.

[*366] TITLE IV -- TELECOMMUNICATIONS

SEC. 401. TELECOMMUNICATIONS RELAY SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

(a) TELECOMMUNICATIONS. -- Title II of the Communications Act of 1934 ([47 U.S.C. 201](#) et seq.) is amended by adding at the end thereof the following new section:

"SEC. 225. <<Notes>>|

Commented [44]: NOTE: 47 USC 225

TELECOMMUNICATIONS SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

"(a) DEFINITIONS. -- As used in this section --

"(1) COMMON CARRIER OR CARRIER. -- The term 'common carrier' or 'carrier' includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b).

"(2) TDD. -- The term 'TDD' means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

"(3) TELECOMMUNICATIONS RELAY SERVICES. -- The term 'telecommunications relay services' means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

"(b) AVAILABILITY OF TELECOMMUNICATIONS RELAY SERVICES. --

"(1) IN GENERAL. -- In order to carry out the purposes established under section 1, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

"(2) USE OF GENERAL AUTHORITY AND REMEDIES. -- For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this Act by a common carrier engaged in interstate communication.

"(c) PROVISION OF SERVICES. -- Each common carrier providing telephone voice transmission services shall, not later than 3 years after the date of enactment of this section, provide in compliance with the

[*367] regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations --

"(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d); or

"(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) for such State.

"(d) REGULATIONS. --

"(1) IN GENERAL. -- The Commission shall, not later than 1 year after the date of enactment of this section, prescribe regulations to implement this section, including regulations that --

"(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

"(B) establish minimum standards that shall be met in carrying out subsection (c);

"(C) require that telecommunications relay services operate every day for 24 hours per day;

"(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

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"(E) prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

"(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

"(G) prohibit relay operators from intentionally altering a relayed conversation.

"(2) TECHNOLOGY. -- The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 7(a) of this Act, the use of existing technology and do not discourage or impair the development of improved technology.

"(3) JURISDICTIONAL SEPARATION OF COSTS. --

"(A) IN GENERAL. -- Consistent with the provisions of section 410 of this Act, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

"(B) RECOVERING COSTS. -- Such regulations shall generally provide that costs caused by interstate telecommunications

[*368] relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f), a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

"(e) ENFORCEMENT. --

"(1) IN GENERAL. -- Subject to subsections (f) and (g), the Commission shall enforce this section.

"(2) COMPLAINT. -- The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

"(f) CERTIFICATION. --

"(1) STATE DOCUMENTATION. -- Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the State program.

"(2) REQUIREMENTS FOR CERTIFICATION. -- After review of such documentation, the Commission shall certify the State program if the Commission determines that --

"(A) the program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d); and

"(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

"(3) METHOD OF FUNDING. -- Except as provided in subsection (d), the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

"(4) SUSPENSION OR REVOCATION OF CERTIFICATION. -- The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

"(g) COMPLAINT. --

"(1) REFERRAL OF COMPLAINT. -- If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) is in effect, the Commission shall refer such complaint to such State.

"(2) JURISDICTION OF COMMISSION. -- After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if --

"(A) final action under such State program has not been taken on such complaint by such State --

[*369] "(i) within 180 days after the complaint is filed with such State; or

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"(ii) within a shorter period as prescribed by the regulations of such State; or

"(B) the Commission determines that such State program is no longer qualified for certification under subsection (f).".

(b) CONFORMING AMENDMENTS. -- The Communications Act of 1934 ([47 U.S.C. 151](#) et seq.) is amended --

(1) in section 2(b) ([47 U.S.C. 152\(b\)](#)), by striking "section 224" and inserting "sections 224 and 225"; and

(2) in section 221(b) ([47 U.S.C. 221\(b\)](#)), by striking "section 301" and inserting "sections 225 and 301".

SEC. 402. CLOSED-CAPTIONING OF PUBLIC SERVICE ANNOUNCEMENTS.

Section 711 of the Communications Act of 1934 <<Notes>>

is amended to read as follows:

"SEC. 711. CLOSED-CAPTIONING OF PUBLIC SERVICE ANNOUNCEMENTS.

"Any television public service announcement that is produced or funded in whole or in part by any agency or instrumentality of Federal Government shall include closed captioning of the verbal content of such announcement. A television broadcast station licensee --

"(1) shall not be required to supply closed captioning for any such announcement that fails to include it; and

"(2) shall not be liable for broadcasting any such announcement without transmitting a closed caption unless the licensee intentionally fails to transmit the closed caption that was included with the announcement.".

TITLE V -- MISCELLANEOUS PROVISIONS

SEC. 501. <<Notes>>

CONSTRUCTION.

(a) IN GENERAL. -- Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 ([29 U.S.C. 790](#) et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) RELATIONSHIP TO OTHER LAWS. -- Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of an State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act. Nothing in this Act shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by title I, in transportation covered by title II or III, or in places of public accommodation covered by title III.

(c) INSURANCE. -- Titles I through IV of this Act shall not be construed to prohibit or restrict --

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms

[*370] of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III.

Commented [45]: NOTE: 47 USC 611

Commented [46]: NOTE: 42 USC 12201

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(d) ACCOMMODATIONS AND SERVICES. -- Nothing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

SEC. 502. <<Notes>>|

Commented [47]: NOTE: 42 USC 12202

STATE IMMUNITY.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

SEC. 503. <<Notes>>|

Commented [48]: NOTE: 42 USC 12203

PROHIBITION AGAINST RETALIATION AND COERCION.

(a) RETALIATION. -- No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) INTERFERENCE, COERCION, OR INTIMIDATION. -- It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(c) REMEDIES AND PROCEDURES. -- The remedies and procedures available under sections 107, 203, and 308 of this Act shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to title I, title II and title III, respectively.

SEC. 504. <<Notes>>|

Commented [49]: NOTE: 42 USC 12204

REGULATIONS BY THE ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD.

(a) ISSUANCE OF GUIDELINES. -- Not later than 9 months after the date of enactment of this Act, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of titles II and III of this Act.

(b) CONTENTS OF GUIDELINES. -- The supplemental guidelines issued under subsection (a) shall establish additional requirements, consistent with this Act, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) QUALIFIED HISTORIC PROPERTIES. --

(1) IN GENERAL. -- The supplemental guidelines issued under subsection (a) shall include procedures and requirements for [*371] alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) SITES ELIGIBLE FOR LISTING IN NATIONAL REGISTERS. -- With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act ([16 U.S.C. 470](#) et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7 (1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites. -- With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1) (b) and (c) of the

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Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

SEC. 505. <<Notes>>

Commented [50]: NOTE: 42 USC 12205

ATTORNEY'S FEES.

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

SEC. 506. <<Notes>>

Commented [51]: NOTE: 42 USC 12206

TECHNICAL ASSISTANCE.

(a) PLAN FOR ASSISTANCE. --

(1) IN GENERAL. -- Not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this Act, and other Federal agencies, in understanding the responsibility of such entities and agencies under this Act.

(2) PUBLICATION OF PLAN. -- The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act).

(b) AGENCY AND PUBLIC ASSISTANCE. -- The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a), including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) IMPLEMENTATION. --

(1) RENDERING ASSISTANCE. -- Each Federal agency that has responsibility under paragraph (2) for implementing this Act may render technical assistance to individuals and institutions that have rights or duties under the respective title or titles for which such agency has responsibility.

(2) IMPLEMENTATION OF TITLES. --

(A) TITLE I. -- The Equal Employment Opportunity Commission and the Attorney General shall implement the

[*372] plan for assistance developed under subsection (a), for title I.

(B) TITLE II -- .

(i) SUBTITLE A. -- The Attorney General shall implement such plan for assistance for subtitle A of title II.

(ii) SUBTITLE B. -- The Secretary of Transportation shall implement such plan for assistance for subtitle B of title II.

(C) TITLE III. -- The Attorney General, in coordination with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for title III, except for section 304, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) TITLE IV. -- The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) TECHNICAL ASSISTANCE MANUALS. -- Each Federal agency that has responsibility under paragraph (2) for implementing this Act shall, as part, of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this Act no later than six months after applicable final regulations are published under titles I, II, III, and IV.

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(d) GRANTS AND CONTRACTS. --

(1) IN GENERAL. -- Each Federal agency that has responsibility under subsection (c)(2) for implementing this Act may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this Act. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients or grants described in this paragraph.

(2) DISSEMINATION OF INFORMATION. -- Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this Act and to provide information and technical assistance about techniques for effective compliance with this Act.

(e) FAILURE TO RECEIVE ASSISTANCE. -- An employer, public accommodation, or other entity covered under this Act shall not be excused from compliance with the requirements of this Act because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

SEC. 507. <<Notes>>|

Commented [52]: NOTE: 42 USC 12207

FEDERAL WILDERNESS AREAS.

(a) STUDY. -- The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act ([16 U.S.C. 1131](#) et seq.).

[*373] (b) SUBMISSION OF REPORT. -- Not later than 1 year after the enactment of this Act, the National Council on Disability shall submit the report required under subsection (a) to Congress.

(c) SPECIFIC WILDERNESS ACCESS. --

(1) IN GENERAL. -- Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) DEFINITION. -- For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

SEC. 508. <<Notes>>|

Commented [53]: NOTE: 42 USC 12208

TRANVESTITES.

For the purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

SEC. 509. <<Notes>>|

Commented [54]: NOTE: 42 USC 12209

COVERAGE OF CONGRESS AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE SENATE. --

(1) COMMITMENT TO RULE XLII. -- The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate which provides as follows:

"No member, officer, or employee of the Senate shall, with respects to employment by the Senate or any office thereof --

"(a) fail or refuse to hire an individual;

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"(b) discharge an individual; or

"1(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap."

(2) APPLICATION TO SENATE EMPLOYMENT. -- The rights and protections provided pursuant to this Act, the Civil Rights Act of 1990 (S. 2104, 101st Congress), the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973 shall apply with respect to employment by the United States Senate.

(3) INVESTIGATION AND ADJUDICATION OF CLAIMS. -- All claims raised by any individual with respect to Senate employment, pursuant to the Acts referred to in paragraph (2), shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to S. Res. 338, 88th Congress, as amended, or such other entity as the Senate may designate.

(4) RIGHTS OF EMPLOYEES. -- The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under the Acts referred to in paragraph (2).

(5) APPLICABLE REMEDIES. -- When assigning remedies to individuals found to have a valid claim under the Acts referred to in paragraph (2), the Select Committee on Ethics, or such other entity as the Senate may designate, should to the extent

[*374] practicable apply the same remedies applicable to all other employees covered by the Acts referred to in paragraph (2). Such remedies shall apply exclusively.

(6) MATTERS OTHER THAN EMPLOYMENT. --

(A) IN GENERAL. -- The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to the conduct of the Senate regarding matters other than employment.

(B) REMEDIES. -- The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) PROPOSED REMEDIES AND PROCEDURES. -- For purposes of subparagraph (B), the Architect of shall submit proposed remedies and procedures to the Senate Committee on Rules and Administration. The remedies and procedures shall be effective upon the approval of the Committee on Rules and Administration.

(7) EXERCISE OF RULEMAKING POWER. -- Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraph (2) and (6)(A) shall be within the exclusive jurisdiction of the United States Senate. The provisions of paragraph (1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) COVERAGE OF THE HOUSE OF REPRESENTATIVES. --

(1) IN GENERAL. -- Notwithstanding any other provision of this Act or of law, the purposes of this Act shall, subject to paragraphs (2) and (3), apply in their entirety to the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE. --

(A) APPLICATION. -- The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION. --

(i) IN GENERAL. -- In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) RESOLUTION. -- The resolution referred to in clause (i) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a successor to, the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(C) EXERCISE OF RULEMAKING POWER. -- The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

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[*375] (3) MATTERS OTHER THAN EMPLOYMENT. --

(A) IN GENERAL. -- The rights and protections under this Act shall, subject to subparagraph (B), apply with respect to the conduct of the House of Representatives regarding matters other than employment.

(B) REMEDIES. -- The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) APPROVAL. -- For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Speaker of the House of Representatives. The remedies and procedures shall be effective upon the approval of the Speaker, after consultation with the House Office Building Commission.

(c) INSTRUMENTALITIES OF CONGRESS. --

(1) IN GENERAL. -- The rights and protections under this Act shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES. -- The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively.

(3) REPORT TO CONGRESS. -- The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) DEFINITION OF INSTRUMENTALITIES. -- For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, and the United States Botanic Garden.

(5) CONSTRUCTION. -- Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act 1980 and regulations promulgated pursuant to that Act.

SEC. 510. <<Notes>>|

Commented [55]: NOTE: 42 USC 12210

ILLEGAL USE OF DRUGS.

(a) IN GENERAL. -- For purposes of this Act, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) RULES OF CONSTRUCTION. -- Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who --

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

[*376] except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) HEALTH AND OTHER SERVICES. -- Notwithstanding subsection (a) and section 511(b)(3), an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) DEFINITION OF ILLEGAL USE OF DRUGS. --

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(1) IN GENERAL. -- The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act ([21 U.S.C. 812](#)). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(2) DRUGS. -- The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

SEC. 511. <<Notes>>|

Commented [56]: NOTE: 42 USC 12211

DEFINITIONS.

(a) HOMOSEXUALITY AND BISEXUALITY. -- For purposes of the definition of "disability" in section 3(2), homosexuality and bisexuality are not impairments and as such are not disabilities under this Act.

(b) CERTAIN CONDITIONS. -- Under this Act, the term "disability" shall not include --

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

SEC. 512. AMENDMENTS TO THE REHABILITATION ACT.

(a) DEFINITION OF HANDICAPPED INDIVIDUAL. -- Section 7(8) of the Rehabilitation Act of 1973 ([29 U.S.C. 706\(8\)](#)) is amended by redesignating subparagraph (C) as subparagraph (D), and by inserting after subparagraph (B) the following subparagraph:

"(C)(i) For purposes of title V, the term 'individual with handicaps' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

"(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who --

"(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

"(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

"(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

[*377] except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

"(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under titles I, II and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

"(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

"(v) For purposes of sections 503 and 504 as such sections relate to employment, the term 'individual with handicaps' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others."

(b) DEFINITION OF ILLEGAL DRUGS. -- Section 7 of the Rehabilitation Act of 1973 ([29 U.S.C. 706](#)) is amended by adding at the end the following new paragraph:

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"(22)(A) The term 'drug' means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act ([21 U.S.C. 812](#)).

"(B) The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law."

(c) CONFORMING AMENDMENTS. -- Section 7(8)(B) of the Rehabilitation Act of 1973 ([29 U.S.C. 706\(8\)\(B\)](#)) is amended --

(1) in the first sentence, by striking "Subject to the second sentence of this subparagraph," and inserting "Subject to subparagraphs (C) and (D),"; and

(2) by striking the second sentence.

SEC. 513. <<Notes>>|

Commented [57]: NOTE: 42 USC 12212

ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials,

[*378] and arbitration, is encouraged to resolve disputes arising under this Act.

SEC. 514. <<Notes>>|

Commented [58]: NOTE: 42 USC 12213

SEVERABILITY.

Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

Descriptors

DISCRIMINATION AGAINST THE HANDICAPPED; DISCRIMINATION IN EMPLOYMENT; TRANSPORTATION OF THE HANDICAPPED; MEDICAL EXAMINATIONS AND TESTS; LABOR UNIONS; EMPLOYMENT SERVICES; DEPARTMENT OF HEALTH AND HUMAN SERVICES; GOVERNMENT INFORMATION AND INFORMATION SERVICES; COMMUNICABLE DISEASES; FOOD POISONING; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; DEPARTMENT OF JUSTICE; ADMINISTRATIVE LAW AND PROCEDURE; CIVIL PROCEDURE; FEDERAL-STATE RELATIONS; FEDERAL-LOCAL RELATIONS; NATIONAL RAILROAD PASSENGER CORP.; ARCHITECTURAL BARRIERS; RAILROAD ROLLING STOCK; MOTOR BUS LINES; TRANSPORTATION REGULATION; GOVERNMENT AND BUSINESS; OFFICE OF TECHNOLOGY ASSESSMENT; DEPARTMENT OF TRANSPORTATION; TELECOMMUNICATION REGULATION; TELEPHONE AND TELEPHONE INDUSTRY; HEARING AND HEARING DISORDERS; SPEECH DISORDERS; TELEVISION; FEDERAL COMMUNICATIONS COMMISSION; ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD; WILDERNESS AREAS; CONGRESSIONAL EMPLOYEES

UNITED STATES PUBLIC LAWS

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HOUSING RIGHTS FOR PEOPLE WITH DISABILITIES

The Fair Housing Act provides certain protections to individuals with disabilities.

WHAT DOES DISABILITY INCLUDE?

The Federal Fair Housing Act defines a person with a disability as "Any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such an impairment." New York State and New York City have fair housing laws with even broader definitions of disability.

In general, a physical or mental impairment includes hearing, mobility and visual impairments, chronic alcoholism, chronic mental illness, AIDS, AIDS Related Complex, and intellectual disabilities that substantially limit one or more major life activities. Major life activities include walking, talking, hearing, seeing, breathing, learning, performing manual tasks, and caring for oneself.

WHAT FORMS OF DISCRIMINATION ARE PROHIBITED?

It is unlawful for a housing provider to refuse to rent or sell to a person simply because of a disability. A housing provider may not impose different application or qualification criteria, rental fees or sales prices, and rental or sales terms or conditions than those required of or provided to persons who are not disabled.

WHAT ARE HOUSING PROVIDERS REQUIRED TO DO?

REASONABLE ACCOMMODATIONS

Housing providers are required to provide reasonable accommodations, which are changes in rules, policies, practices, or services so that a person with a disability will have an equal opportunity to use and enjoy a dwelling unit or common space. A housing provider should do everything they can to assist, but they are not required to make changes that would fundamentally alter the program or create an undue financial and administrative burden. Reasonable accommodations may be necessary at all stages of the housing process, including application, tenancy, or to prevent eviction.

Example: A housing provider would make a reasonable accommodation for a tenant with mobility impairment by fulfilling the tenant's request for a reserved parking space in front of the entrance to their unit, even though all parking is unreserved.

REASONABLE MODIFICATIONS

Housing providers may also be required to allow persons with disabilities to make reasonable modifications. A reasonable modification is a structural modification that is made to allow persons with disabilities the full enjoyment of the housing and related facilities.

Examples of a reasonable modification would include allowing a person with a disability to: install a ramp into a building, lower the entry threshold of a unit, or install grab bars in a bathroom.

Reasonable modifications are usually made at the resident's expense. However, sometimes there are resources available for helping fund building modifications. Additionally, if you live in federally assisted housing, or in NYC, the housing provider may be required to pay for the modification if it does not amount to an undue financial and administrative burden.

ACCESSIBLE MULTI-FAMILY HOUSING

The Fair Housing Act laws require that covered multi-family housing built for first occupancy after March 13, 1991 be designed and constructed to be accessible. In covered multi-family housing with no elevator that consists of 4 or more units, all ground floor units must comply with the Fair Housing Act design and construction requirements. There are limited exemptions for owner-occupied buildings and for single-family housing.

If you live in federally assisted multi-family housing consisting of five or more units, five percent of these units (or at least one unit, whichever is greater) must meet more stringent physical accessibility requirements. Additionally, two percent of units (or at least one unit, whichever is greater) must be accessible for persons with visual or hearing disabilities.

ZONING AND LAND USE

It is unlawful for local governments to utilize land use and zoning policies to keep persons with disabilities from locating to their area. For more information, see the **Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act**.

THE AMERICANS WITH DISABILITIES ACT

Title III of the ADA covers public and common use areas at housing developments when these public areas are, by their nature, open to the general public. For example, it covers the rental office since the rental office is open to the general public.

Title II of the ADA applies to all programs, services, and activities provided or made available by public entities. This includes housing when the housing is provided or made available by a public entity. For example, housing covered by Title II of the ADA includes housing operated by States or units of local government, such as housing on a State university campus. It also includes some public housing authorities.

HOW DO I FILE A COMPLAINT?

To file a complaint or for information on how to file housing discrimination complaints, you may contact the U.S Department of Housing and Urban Development (HUD), the NYS Division of Human Rights, or the NYC Commission on Human Rights. There are firm deadlines by which such complaints must be filed, either administratively or judicially; and filing with one agency may preclude you from filing the same complaint with another agency. You may wish to seek the advice of legal counsel concerning when and where to file your complaint, or to secure representation in prosecuting your complaint.

FOR ADDITIONAL INFORMATION

See the websites for HUD, the NYS Division of Human Rights and the NYC Commission on Human Rights, as well as reputable advocacy organizations such as the Bazelon Center for Mental Health Law and the United Spinal Association.

DISABILITY RIGHTS NEW YORK CONTACT INFORMATION

Albany:

725 Broadway, Suite 450
Albany, New York 12207
Fax: 518-427-6561

Brooklyn:

25 Chapel Street, Suite 1005
Brooklyn, New York 11201
Fax: 718-797-1161

Rochester:

44 Exchange Blvd., Suite 110
Rochester, New York 14614
Fax: 585-348-9823

Mail@DRNY.org • www.DRNY.org

Toll free: 1-800-993-8982 • Voice: 518-432-7861 • TTY: 518-512-3448

DISCLAIMER:

THIS INFORMATION SHEET IS INTENDED TO GIVE BASIC INFORMATION ABOUT DISABILITY RIGHTS IN HOUSING. DISABILITY RIGHTS NEW YORK ACCEPTS NO LIABILITY FOR THE CONTENT OF THIS DOCUMENT OR FOR THE CONSEQUENCES OF ANY ACTIONS TAKEN ON THE BASIS OF THE INFORMATION PROVIDED. FOR MORE INFORMATION, SEE THE WEBSITES FOR HUD, NYS DIVISION OF HUMAN RIGHTS AND THE NYC COMMISSION ON HUMAN RIGHTS.

HOUSING RIGHTS FOR PEOPLE WITH DISABILITIES, V.1.0

38 CFR 3.12

§ 3.12 Character of discharge.

(a) If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) A discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)).

(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term established basic eligibility to receive Department of Veterans Affairs benefits means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds or 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.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

(e) An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of [10 U.S.C. 1552](#) is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(f) An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (h) (1), (2) and (3) of this section by a discharge review board established under [10 U.S.C. 1553](#) set aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(g) An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under [10 U.S.C. 1553](#), sets aside a bar to benefits imposed under paragraph (d), but not paragraph (c), of this section provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military, naval or air service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(h) Unless a discharge review board established under [10 U.S.C. 1553](#) determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (g) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(Authority: [38 U.S.C. 5303](#) (e))

(i)No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (h) of this section which would not be awarded under the standards set forth in paragraph (g) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (g) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(j)No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

(k)Uncharacterized separations. Where enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of the three categories of administrative separation that do not require characterization of service by the military department concerned. In such cases conditions of discharge will be determined by the VA as follows:

(1)Entry level separation. Uncharacterized administrative separations of this type shall be considered under conditions other than dishonorable.

(2)Void enlistment or induction. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation, with reference to the provisions of § 3.14 of this part, to determine whether separation was under conditions other than dishonorable.

(3)Dropped from the rolls. Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation to determine whether separation was under conditions other than dishonorable.



OFFICE OF THE UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

AUG 25 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment

In December 2016, the Department announced a renewed effort to ensure veterans were aware of the opportunity to have their discharges and military records reviewed. As part of that effort, we noted the Department was currently reviewing our policies for the Boards for Correction of Military/Naval Records (BCM/NRs) and Discharge Review Boards (DRBs) and considering whether further guidance was needed. We also invited feedback from the public on our policies and how we could improve the discharge review process.

As a result of that feedback and our internal review, we have determined that clarifications are needed regarding mental health conditions, sexual assault, and sexual harassment. To resolve lingering questions and potential ambiguities, clarifying guidance is attached to this memorandum. This guidance is not intended to interfere with or impede the Boards' statutory independence. Through this guidance, however, there should be greater uniformity amongst the review boards and veterans will be better informed about how to achieve relief in these types of cases.

To be sure, the BCM/NRs and DRBs are tasked with tremendous responsibility and they perform their tasks with remarkable professionalism. Invisible wounds, however, are some of the most difficult cases they review and there are frequently limited records for the boards to consider, often through no fault of the veteran, in resolving appeals for relief. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. This clarifying guidance ensures fair and consistent standards of review for veterans with mental health conditions, or who experienced sexual assault or sexual harassment regardless of when they served or in which Military Department they served.

Military Department Secretaries shall direct immediate implementation of this guidance and report on compliance with this guidance within 45 days. My point of contact is Lieutenant Colonel Reggie Yager, Office of Legal Policy, (703) 571-9301 or reggie.d.yager.mil@mail.mil.

A. M. Kurta
Performing the Duties of the Under Secretary of
Defense for Personnel and Readiness

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs

Attachment

Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions; Traumatic Brain Injury; Sexual Assault; or Sexual Harassment

Generally

1. This document provides clarifying guidance to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault; or sexual harassment.
2. Requests for discharge relief typically involve four questions:
 - a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
 - b. Did that condition exist/ experience occur during military service?
 - c. Does that condition or experience actually excuse or mitigate the discharge?
 - d. Does that condition or experience outweigh the discharge?
3. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.
4. Evidence may come from sources other than a veteran's service record and may include records from the DoD Sexual Assault Prevention and Response Program (DD Form 2910, *Victim Reporting Preference Statement*) and/or DD Form 2911, *DoD Sexual Assault Forensic Examination [SAFE] Report*), law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, physicians, pregnancy tests, tests for sexually transmitted diseases, and statements from family members, friends, roommates, co-workers, fellow servicemembers, or clergy.
5. Evidence may also include changes in behavior; requests for transfer to another military duty assignment; deterioration in work performance; inability of the individual to conform their behavior to the expectations of a military environment; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; unexplained economic or social behavior changes; relationship issues; or sexual dysfunction.
6. Evidence of misconduct, including any misconduct underlying a veteran's discharge, may be evidence of a mental health condition, including PTSD; TBI; or of behavior consistent with experiencing sexual assault or sexual harassment.

7. The veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.

8. Cases falling under this guidance will receive timely consideration consistent with statutory requirements.

Was there a condition or experience?

9. Absent clear evidence to the contrary, a diagnosis rendered by a licensed psychiatrist or psychologist is evidence the veteran had a condition that may excuse or mitigate the discharge.

10. Evidence that may reasonably support more than one diagnosis should be liberally considered as supporting a diagnosis, where applicable, that could excuse or mitigate the discharge.

11. A veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.

12. Review Boards are not required to find that a crime of sexual assault or an incident of sexual harassment occurred in order to grant liberal consideration to a veteran that the experience happened during military service, was aggravated by military service, or that it excuses or mitigates the discharge.

Did it exist/occur during military service?

13. A diagnosis made by a licensed psychiatrist or psychologist that the condition existed during military service will receive liberal consideration.

14. A determination made by the Department of Veterans Affairs (VA) that a veteran's mental health condition, including PTSD; TBI; sexual assault; or sexual harassment is connected to military service, while not binding on the Department of Defense, is persuasive evidence that the condition existed or experience occurred during military service.

15. Liberal consideration is not required for cases involving pre-existing conditions which are determined not to have been aggravated by military service.

Does the condition/experience excuse or mitigate the discharge?

16. Conditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.

17. Evidence that may reasonably support more than one diagnosis or a change in diagnosis, particularly where the diagnosis is listed as the narrative reason for discharge, will be liberally

construed as warranting a change in narrative reason to “Secretarial Authority,” “Condition not a disability,” or another appropriate basis.

Does the condition/experience outweigh the discharge?

18. In some cases, the severity of misconduct may outweigh any mitigation from mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.

19. Premeditated misconduct is not generally excused by mental health conditions, including PTSD; TBI; or by a sexual assault or sexual harassment experience. However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.

Additional Clarifications

20. Unless otherwise indicated, the term “discharge” includes the characterization, narrative reason, separation code, and re-enlistment code.

21. This guidance applies to both the BCM/NRs and DRBs.

22. The supplemental guidance provided by then-Secretary Hagel on September 3, 2014, as clarified in this guidance, also applies to both BCM/NRs and DRBs.

23. The guidance memorandum provided by then-Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness Brad Carson on February 24, 2016, applies in full to BCM/NRs but also applies to DRBs with regards to de novo reconsideration of petitions previously decided without the benefit of all applicable supplemental guidance.

24. These guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather apply to any petition seeking discharge relief including requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations.

25. Unless otherwise indicated, liberal consideration applies to applications based in whole or in part on matters related to diagnosed conditions, undiagnosed conditions, and misdiagnosed TBI or mental health conditions, including PTSD, as well as reported and unreported sexual assault and sexual harassment experiences asserted as justification or supporting rationale for discharge relief.

26. Liberal consideration includes but is not limited to the following concepts:

a. Some circumstances require greater leniency and excusal from normal evidentiary burdens.

b. It is unreasonable to expect the same level of proof for injustices committed years ago when TBI; mental health conditions, such as PTSD; and victimology were far less understood than they are today.

- c. It is unreasonable to expect the same level of proof for injustices committed years ago when there is now restricted reporting, heightened protections for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment than ever before.
- d. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported.
- e. Mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected.
- f. Reviews involving diagnosed, undiagnosed, or misdiagnosed TBI or mental health conditions, such as PTSD, or reported or unreported sexual assault or sexual harassment experiences should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.
- g. Veterans with mental health conditions, including PTSD; TBI; or who experienced sexual assault or sexual harassment may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran's life.
- h. An Honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct.
- i. The relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct to the mitigating evidence in a case. For example, marijuana use is still unlawful in the military but it is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago.
- j. Service members diagnosed with mental health conditions, including PTSD; TBI; or who reported sexual assault or sexual harassment receive heightened screening today to ensure the causal relationship of possible symptoms and discharge basis is fully considered, and characterization of service is appropriate. Veterans discharged under prior procedures, or before verifiable diagnosis, may not have suffered an error because the separation authority was unaware of their condition or experience at the time of discharge. However, when compared to similarly situated individuals under today's standards, they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care.
- k. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; or behaviors commonly associated with sexual assault or sexual harassment; and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.



Understanding Your Employment Rights Under the Americans with Disabilities Act (ADA): A Guide for Veterans

Introduction

In recent years, the percentage of veterans who report having service-connected disabilities (i.e., disabilities that were incurred in, or aggravated during, military service)[1] has risen. About twenty-nine percent of recent veterans report having a service-connected disability, as compared to about thirteen percent of all veterans.[2] Common injuries experienced by veterans include missing limbs, spinal cord injuries, burns, post traumatic stress disorder (PTSD), hearing loss, traumatic brain injuries, and other impairments. Other veterans leave service due to injuries or conditions that are not considered service-connected.

This guide is intended to answer questions you may have about your rights as an injured veteran, now that you have left the service and are returning to a civilian job or seeking a new job. It also explains the kinds of adjustments (called reasonable accommodations) that may help you be successful in the workplace.

1. Are there any laws that protect veterans with disabilities in employment?

Yes. There are several federal laws that provide important protections for veterans with disabilities who are looking for jobs or are already in the workplace. Two of those laws --the **Uniformed Services Employment and Reemployment Rights Act (USERRA)** and Title I of the **Americans with Disabilities Act (ADA)** - protect veterans from employment discrimination. See Qs&As 6 and 7 for a discussion of laws providing veterans' preference and special hiring for veterans.

USERRA has requirements for reemploying veterans with and without service-connected disabilities and is enforced by the U.S. Department of Labor (DOL) and the Department of Justice (DOJ). Title I of the ADA, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), prohibits private and state and local government employers with 15 or more employees from discriminating against individuals on the basis of disability.[3] Any veteran with a disability who meets the ADA's definition is covered, regardless of whether the veteran's disability is service-connected.

2. What does USERRA do?

USERRA prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations. It also protects the reemployment rights of individuals who leave their civilian jobs (whether voluntarily or involuntarily) to serve in the uniformed services, including the U.S. Reserve forces and state, District of Columbia, and territory (e.g., Guam) National Guards.

Under USERRA, employers must make "reasonable efforts" to help a veteran who is returning to employment to become qualified to perform the duties of the position he or she would have held but for military service whether or not the veteran has a service-connected disability. If the veteran has a disability incurred in, or aggravated during, his or her service, the employer must make reasonable efforts to accommodate the disability and return the veteran to the position in which he or she would have been employed if the veteran had not performed military service. If the veteran is not qualified for that position due to the disability, USERRA requires the employer to make reasonable efforts to help qualify the veteran for a job of equivalent seniority, status, and pay, the duties of which the person is qualified to perform or could become qualified to perform. This could include providing training or retraining for the position at no cost to the veteran. See Title 38, United States Code, Chapter 43 - Employment and Reemployment Rights of Members of the Uniformed Services, 38 U.S.C. § 4313; 20 C.F.R. §§ 1002.198, 1002.225 - .226. USERRA applies to all veterans, not just those with service-connected disabilities, and to all employers regardless of size. For more information on the reemployment rights of uniformed service personnel, see DOL's website at www.dol.gov/vets.

3. What protections does the ADA provide?

Title I of the ADA prohibits an employer from treating an applicant or employee unfavorably in all aspects of employment -- including hiring, promotions, job assignments, training, termination, and any other terms, conditions, and privileges of employment -- because he has a disability, a history of having a disability, or because the employer regards him as having a disability. That means, for example, that it is illegal for an employer to refuse to hire a veteran because he has PTSD, because he was previously diagnosed with PTSD, or because the employer assumes he has PTSD. The ADA also limits the medical information employers may obtain and prohibits disability-based harassment and retaliation.

Finally, the ADA provides that, absent undue hardship (significant difficulty or expense to the employer), applicants and employees with disabilities are entitled to reasonable accommodation to apply for jobs, to perform their jobs, and to enjoy

equal benefits and privileges of employment (e.g., access to the parts of an employer's facility available to all employees and access to employer-sponsored training and social events).

Section 501 of the Rehabilitation Act applies the same standards of non-discrimination and reasonable accommodation as the ADA to Federal Executive Branch agencies and the United States Postal Service. Documents explaining Title I of the ADA and the Rehabilitation Act can be found on EEOC's website at www.eeoc.gov.

4. I was injured during active duty but don't think of myself as "disabled." How do I know if I am protected by the ADA?

You are protected if you meet the ADA's definition of disability and are qualified for the job you want or hold. The ADA defines an **"individual with a disability"** as a person who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment (i.e. was substantially limited in the past, such as prior to undergoing rehabilitation); or (3) is regarded, or treated by an employer, as having such an impairment, even if no substantial limitation exists. You are considered qualified if you are able to meet an employer's requirements for the job, such as education, training, employment experience, skills, or licenses, and are able to perform the job's essential or fundamental duties with or without reasonable accommodation.

As a result of changes to the ADA made by the ADA Amendments Act of 2008, it is now much easier for individuals with a wide range of impairments to establish that they are individuals with disabilities and entitled to the ADA's protections. For example, the term "major life activities" includes not only activities such as walking, seeing, hearing, and concentrating, but also the operation of major bodily functions, such as functions of the brain and the neurological system.[4]

Additionally, an impairment need not prevent or severely or significantly restrict your performance of a major life activity to be considered substantially limiting; the determination of whether an impairment substantially limits a major life activity must be made without regard to any mitigating measures (e.g., medications or assistive devices, such as prosthetic limbs) that you may use to lessen your impairment's effects; and impairments that are episodic or in remission (e.g., epilepsy or PTSD) are considered disabilities if they would be substantially limiting when active.[5] Some service-connected disabilities, such as deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, major depressive disorder, and PTSD, will easily be concluded to be disabilities under the ADA.[6]

5. If I have a military disability rating or a disability rating from the VA, does that mean I am also covered by the ADA?

Yes, you are probably covered. Although the ADA uses different standards than the U.S. Department of Defense and the U.S. Department of Veterans Affairs (VA) in determining disability, many more service-connected disabilities will also be considered disabilities under the ADA than prior to the ADA Amendments Act. See Q&A 4.

6. Under the ADA, is a private employer required to hire me over other applicants because I have a disability?

Though it is not **required** to do so, a private employer **may decide to give** a veteran with a disability a preference in hiring. The ADA prohibits discrimination "on the basis of disability." This means that if you are qualified for a job, an employer cannot refuse to hire you because you have a disability or because you may need a reasonable accommodation to perform the job. Even if you are qualified for a job, an employer may choose another applicant without a disability because that individual is better qualified.

Some laws, however, require private employers to give a preference to veterans with disabilities. For example, the **Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA)** requires that businesses with a federal contract or subcontract in the amount of \$100,000 or more, entered into on or after December 1, 2003, take affirmative action to employ and advance qualified disabled veterans. VEVRAA also requires these businesses to list their employment openings with the appropriate employment service and to give covered veterans priority in referral to such openings.[7]

7. Are there any laws that will give me special consideration if I am looking for a job with the federal government?

Yes. Under the Veterans Preference Act, veterans with and without disabilities are entitled to preference over others in hiring from competitive lists of eligible applicants and may be considered for special noncompetitive appointments for which they are eligible.[8]

Federal agencies also may use specific rules and regulations, called "special hiring authorities," to hire individuals with disabilities outside the normal competitive hiring process, and sometimes may even be required to give preferential treatment to veterans, including disabled veterans, in making hiring decisions.

Here are some of the special hiring authorities that may apply to you if you are looking for a job with the federal government:

- The **Veterans' Recruitment Appointment (VRA)** program allows agencies to appoint eligible veterans without competition.
- The **Veterans Employment Opportunity Act (VEOA)** can be used when filling permanent, competitive service positions. It allows veterans to apply for jobs that are only open to "status" candidates, which means "current competitive service employees."
- The **Schedule A Appointing Authority**, though not specifically for veterans, allows agencies to appoint eligible applicants who have a severe physical, psychological, or intellectual disability.

For more information on veterans' preferences and special hiring authorities, see the "Vet Guide" on the U.S. Office of Personnel Management (OPM) website at www.opm.gov/staffingportal/vetguide.asp#intro, "Feds Hire Vets - Veterans'

Preference" at www.fedshirevets.gov/job/vetpref/index.aspx, and Special Hiring Authorities for Veterans at www.fedshirevets.gov/job/shav/index; see also OPM's Disabled Veterans Affirmative Action Program at www.opm.gov/veterans/dvaap.asp.

8. During a job interview, may an employer ask about my amputation, why I am in a wheelchair, or how I sustained any other injury I may have?

No. Even if your disability is obvious, an employer cannot ask questions about when, where, or how you were injured. However, where it seems likely that you will need a reasonable accommodation to do the job, an employer may ask you if an accommodation is needed and, if so, what type. In addition, an employer may ask you to describe or demonstrate how you would perform the job with or without an accommodation. For example, if the job requires that you lift objects weighing up to 50 pounds, the employer can ask whether you will need assistance or ask you to demonstrate how you will perform this task. Similarly, if you voluntarily reveal that you have an injury or illness and an employer reasonably believes that you will need an accommodation, it may ask what accommodation you need to do the job.

9. Do I have to disclose an injury or illness that is not obvious during an interview or indicate on a job application that I have a disability?

No. The ADA does not require you to disclose that you have any medical condition on a job application or during an interview. However, if you will need a reasonable accommodation to participate in the application process, such as more time to take a test or permission to provide oral instead of written responses, you must request it. Additionally, some veterans with service-connected disabilities may choose to disclose that they have medical conditions, such as PTSD or a traumatic brain injury, because of symptoms they experience or because they will need a reasonable accommodation at work. Once an employer makes a job offer, it may ask you questions about your medical conditions, and perhaps even require you to take a medical examination, as long as it requires everyone else in the same job to answer the same questions and/or take the same medical examination before starting work.

10. Some applications ask me to indicate whether I am a "disabled veteran." Is this legal?

Yes, if the information is being requested for **affirmative action purposes**. See EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990 (1995) at www.eeoc.gov/policy/docs/preemp.html. An employer may ask applicants to voluntarily self-identify as individuals with disabilities or "disabled veterans" when the employer is: (1) undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities; or (2) voluntarily using the information to benefit individuals with disabilities, including veterans with service-connected disabilities.

If an employer invites you to voluntarily self-identify as a disabled veteran, it must clearly inform you in writing (or orally, if no written questionnaire is used) that: (1) the information is being requested as part of the employer's affirmative action program; (2) providing the information is voluntary; (3) failure to provide it will not subject you to any adverse treatment; and (4) the information will be kept confidential and only used in a way that complies with the ADA.

11. What types of reasonable accommodations may I want to request for the application process or on the job?

The following are examples of types of accommodations that you may need for the application process or while on the job:

- written materials in accessible formats, such as large print, Braille, or on computer disk
- extra time to complete a test if you have difficulty concentrating or have a learning disability or traumatic brain injury (TBI)
- interviews, tests, and training held in accessible locations
- modified equipment or devices (e.g., assistive technology that would allow you to use a computer if you are blind or to use a telephone if you are deaf or hard of hearing; a glare guard for a computer monitor if you have a TBI; a one-handed keyboard if you are missing an arm or hand)
- physical modifications to the workplace (e.g., reconfiguring a workspace, including adjusting the height of a desk or shelves if you use a wheelchair)
- permission to work from home
- leave for treatment, recuperation, or training related to your disability
- a modified or part-time work schedule
- a job coach who could assist you if you initially have some difficulty learning or remembering job tasks
- modification of supervisory methods, such as having a supervisor break complex assignments into smaller, separate tasks, provide some additional feedback or guidance on a task, or adjust methods of communication (e.g., give written rather than oral instructions for completing certain tasks)
- reassignment to a vacant position if your disability prevents you from performing the duties of your current position or where any reasonable accommodation in your current position would result in undue hardship (i.e., significant difficulty or expense)

12. How do I ask for a reasonable accommodation?

You simply have to indicate -- orally or in writing -- that you need an **adjustment or change** in the application process or at work for a reason related to a medical condition. For example, if you have a vision loss and cannot read standard print, you would need to inform the employer that you need the application materials in some other format (e.g., large print or on computer disk) or read to you. You do not have to mention the ADA or use the term "reasonable accommodation." Someone acting on your behalf, such as a family member, rehabilitation counselor, health professional, or other representative, also can make the request.

13. What happens after I request a reasonable accommodation?

A request for reasonable accommodation is the first step in an **informal interactive process** between you and the employer.

The process will involve determining whether you have a disability as defined by the ADA (where this is not obvious or already known) and identifying accommodation solutions. An employer also may ask if you know what accommodation you need that will help you apply for or do the job. There are extensive public and private resources to help identify reasonable accommodations for applicants and employees with particular disabilities. For example, the website for the Job Accommodation Network (JAN) provides a practical guide for individuals with disabilities on requesting and discussing reasonable accommodations and on finding the right job. See JAN's website at www.askjan.org.

14. I am not sure whether I will need a reasonable accommodation. If I don't ask for one before I start working, can I still ask for one later?

Yes. You can request an accommodation at any time during the application process or when you start working even if you did not ask for one when applying for a job or after receiving a job offer. If you are already receiving a reasonable accommodation, you may also request a different or additional accommodation later if your disability and/or the job changes, or if another accommodation becomes available that will help you.

Generally, you should request an accommodation when you know that there is a workplace barrier that is preventing you from competing for or performing a job or having equal access to the benefits of employment. As a practical matter, it is better to request a reasonable accommodation before your job performance suffers.

15. What can I do if I feel that an employer has violated the ADA by not hiring me or providing a reasonable accommodation?

If you believe that your employment rights have been violated on the basis of disability (or for some other discriminatory reason), there are actions you can take:

- **Claims against a private or a state or local government employer:** To take formal action, you must file a charge of discrimination with the EEOC. The charge must be filed by mail or in person with the local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination law also covers the charge.

The EEOC will send you and the employer a copy of the charge and may ask for responses and supporting information. Before a formal investigation, the EEOC may select the charge for EEOC's mediation program. Mediation is free, confidential, and voluntary for both parties. A charge will only be mediated if both parties agree to participate in the process. Mediation may prevent a time-consuming investigation of the charge.

If a charge goes to mediation but is unsuccessful or is not selected for mediation, the EEOC investigates the charge to determine if there is "reasonable cause" to believe discrimination has occurred. If reasonable cause is found, the EEOC will then try to resolve the charge with the employer. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue you a notice of a "right to sue," which will give you 90 days to file a court action. You also can request a notice of a "right to sue" from the EEOC 180 days after the charge first was filed with the EEOC and may then bring suit within 90 days after receiving the notice.

For a detailed description of the process, visit our website at www.eeoc.gov/charge/overview_charge_filing.html.

- **Claims against a federal government agency:** If you are a federal employee or applicant and you believe that a federal agency has discriminated against you, you have a right to file a complaint. Each agency is required to post information about how to contact the agency's EEO Office. You can contact an EEO Counselor by calling the office responsible for the agency's EEO complaints program.

The first step is to contact an EEO Counselor at the agency where you work or where you applied for a job. Generally, you must contact the EEO Counselor within 45 days from the day the discrimination occurred. In most cases the EEO Counselor will give you the choice of participating either in EEO counseling or in an alternative dispute resolution (ADR) program, such as a mediation program.

If you do not settle the dispute during counseling or through ADR, you can file a formal discrimination complaint against the agency with the agency's EEO Office. You must file within 15 days from the day you receive notice from your EEO Counselor about how to file. Once you have filed a formal complaint, the agency will review the complaint and, if the complaint is not dismissed for procedural reasons (e.g., because it was filed too late), the agency will conduct an investigation. The agency has 180 days from the day you filed your complaint to finish the investigation. When the investigation is finished, the agency will issue a notice giving you two choices: either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether the discrimination occurred.

For a detailed description of the federal complaint process, visit our website at www.eeoc.gov/federal/fed_employees/complaint_overview.cfm

Resources

Laws Protecting Veterans with Service-Connected Disabilities

ADA**U.S. Equal Employment Opportunity Commission (EEOC)**

www.eeoc.gov

1-800-669-4000

1-800-669-6820 (TTY)

U.S. Department of Justice (DOJ)

www.ada.gov

1-800-514-0301

1-800-514-0383 (TTY)

USERRA**U.S. Department of Labor (DOL)**

www.dol.gov/vets

1-866-4-USA-DOL

1-877-889-5627 (TTY)

VEVRAA**DOL, Office of Federal Contract Compliance Programs (OFCCP)**

<http://www.dol.gov/ofccp/regs/statutes/4212.htm>

1-800-397-6251

1-877-889-5627 (TTY)

Recruiting and Hiring

National Resource Directory (NRD)

A partnership among the Department of Defense (DoD), Department of Veterans Affairs (VA), and DOL

www.nationalresourcedirectory.gov

1-800-342-9647

DOL One Stop Career Centers

www.careeronestop.org

1-877-348-0502

1-877-348-0501 (TTY)

Employer Assistance and Recruiting Network (EARN)

www.AskEARN.org

1-855-Ask-EARN (1-855-275-3276)

Occupational Information Network (O*NET) Online

Provides comprehensive occupational descriptions and data for use by job seekers, employers, and others

www.onetcenter.org/

U.S. Department of Veterans Affairs

www.va.gov

1-800-827-1000

U.S. Office of Personnel Management

www.fedshirevets.gov/

1-202-606-5090

Reasonable Accommodation

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA

www.eeoc.gov/policy/docs/accommodation.html

Job Accommodation Network (JAN)

www.askjan.org

1-800-526-7234

1-877-781-9403 (TTY)

DoD Computer/Electronic Accommodations Program (CAP)

www.tricare.mil/cap

1-703-681-8813

1-703-681-3978 (TTY)

[1] See Title 38, United States Code § 101 (defining "service-connected" disabilities of military veterans).

[2] See Bureau of Labor Statistics, Employment of Veterans Summary (August 2015) available at <http://www.bls.gov/news.release/vet.t08.htm>.

[3] The EEOC also is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee (including a veteran) because of the person's race, color, religion, sex (including pregnancy), national origin, age

(40 or older), or genetic information.

[4] 29 C.F.R. § 1630.2(j)(1)(i)-(ii).

[5] 29 C.F.R. § 1630.2(j)(1)(ii)-(vii).

[6] 29 C.F.R. § 1630.2(j)(3)(iii).

[7] These provisions of VEVRAA are enforced by the Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor (DOL). See www.dol.gov/compliance/laws/comp-vevraa.htm

[8] Some states also grant veterans' preference for state government jobs. To find out if your state has a veterans' preference program, contact your state's labor office.

Keynote:
The Civilian Law of Military Trauma

Speaker:

Prof. Daniel Nagin



The Credibility Trap: Notes on a VA Evidentiary Standard

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Essay

The Credibility Trap: Notes on a VA Evidentiary Standard

DANIEL L. NAGIN*

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I. INTRODUCTION

The system we currently use to deliver disability compensation to injured veterans is deeply flawed. This system—the service-connected disability compensation program administered today by the U.S. Department of Veterans Affairs (“VA”)—was de-

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signed and built for a different era.¹ But the system's original framework persists, with enormous negative consequences.

VA's system was originally designed to consider average loss of earning capacity based on disability within the context of a mostly agrarian and industrial economy; it was not designed for today's service economy and diversified labor market.² VA's system was originally designed to consider the severity of individual disabilities based on uniform and precise measurement in percentage increments; it was not designed to take into account the enormous expenditure of time that such determinations would require when the number and complexity of disability claims multiplies, as they have in recent decades.³ VA's system was originally designed to consider a relatively narrow range of common disabilities; it was not designed to consider the multifaceted, invisible wounds of war and environmental toxins that are the hallmarks of recent conflicts.⁴ VA's system was originally designed to consider and decide disability claims that were completely insulated from judicial review; it was not designed to decide claims subject to federal court review and the growing body of court-made law that exists today.⁵ VA's nearly century-old framework has performed

1. The roots of the service-connected disability compensation program stretch back to the nation's founding. See Act of Sept. 29, 1789, ch. 24, 1 Stat. 95 (continuing payment of military pensions for one year to "invalids who were wounded and disabled during the late war"). The modern version of the program has its origins in World War I. In 1917, Congress amended the War Risk Insurance Act to allow veterans who incurred injuries, or aggravated pre-existing injuries, in the line of duty to receive ongoing payment as compensation, based on the severity of those injuries and the average loss of civilian occupational earning capacity. See War Risk Insurance Act, ch. 26, 40 Stat. 102 (1917); War Risk Insurance Act, ch. 105, 40 Stat. 398 (1917).

2. See James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 1, 3–5 (2013).

3. See A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 92–138, 252–71 (Michael McGeary et al. eds., 2007).

4. See *id.* at 139–200; see generally INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY (Terri Tanielian & Lisa H. Jaycox eds., 2008).

5. See James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 135–37 (2011).

precisely as one would expect any other antique to perform when confronted by the new and more complex demands of a changing world—poorly.⁶

Today, a range of challenges besets the service-connected disability compensation system: claims backlogs, appeals backlogs, remand backlogs, layer upon layer of suffocating complexity, outmoded technology, and poor customer service.⁷ Hoping that VA's current system framework will effectively fulfill the program's fundamental goal of accurately and efficiently compensating veterans for service-connected injuries⁸—not just with respect to today's veterans, but with respect to succeeding generations of veterans too—is a risky proposition.

To be sure, there have been some modest improvements to the system in the last couple of years: the claims backlog has shrunk; modern technology is finally, if haltingly, being integrated into the program; and new initiatives may be increasing efficiency in some respects.⁹ But these improvements reflect changes at the margins. At present, nearly everyone agrees that the program

6. For a superb discussion of these and other historical considerations, how they have shaped VA's current system, and what they suggest about future reform efforts, see James D. Ridgway, *A Benefits System for the Information Age*, in GLIMPSES OF THE NEW VETERAN: CHANGED CONSTITUENCIES, DIFFERENT DISABILITIES, AND EVOLVING RESOLUTIONS 131 (Alice A. Booher ed., 2015).

7. Robert N. Davis, *Veterans Fighting Wars at Home and Abroad*, 45 TEX. TECH L. REV. 389, 400–04 (2013).

8. See VETERANS BENEFITS ADMIN., DEPARTMENT OF VETERANS AFFAIRS (VA) STRATEGIC PLAN TO ELIMINATE THE COMPENSATION CLAIMS BACKLOG 3 (2013), available at http://benefits.va.gov/transformation/docs/VA_Strategic_Plan_to_Eliminate_the_Compensation_Claims_Backlog.pdf (outlining the VA's transformation plan “to deliver faster, better decisions for Veterans”).

9. Daniel L. Nagin, *Goals vs. Deadlines: Notes on the VA Disability Claims Backlog*, 10 U. MASS. L. REV. 50, 71–74 (2015). It is important to note that even the apparent improvements at VA are not without controversy. For example, there is increasing evidence that VA's efforts to reallocate resources to reduce the claims backlog have led to an increase in the VA appeals backlog. See Tara Copp, *'Tsunami' of Veterans Appeals Approaches*, WASH. EXAMINER (Jan. 22, 2015, 2:25 PM), <http://www.washingtonexaminer.com/tsunami-of-veterans-disability-appeals-approaches/article/2559098> (quoting member of House of Representatives VA subcommittee as saying “We're trading a claims backlog for an appeals backlog We're trading the devil for the witch.”).

needs a meaningful overhaul to reflect modern demands, modern systems management, and modern science.¹⁰ What remains uncertain and deeply contested is what precisely that overhaul should look like. Proposals run the gamut.¹¹ What is more, the politics of veterans benefits suggests that substantial change will be controversial, no matter how well intentioned the various actors and institutions whose voices should and do count.¹²

As important as it is for veterans' advocates to consider these larger questions of systemic reform and to participate in debates about large-scale change, much work remains to be done to ensure that veterans with new and pending claims receive justice today. Thus, while the larger debate continues to unfold, it continues to be useful to dissect individual areas of veterans benefits law in order to highlight more precisely the flaws in VA's existing framework for adjudicating disability claims. By examining the choke points in the existing system, we can better ensure that today's veterans receive fair treatment—and help ensure that the lessons of the past and recent past inform the design of the next system.

10. See generally THE VA CLAIMS BACKLOG WORKING GROUP REPORT (2014) (containing recommendations for reform developed by bipartisan U.S. Senate working group).

11. Compare Rory E. Riley, *Preservation, Modification, or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1, 3 (2008) (arguing for some amount of reform, but not radical overhaul), with *The Impact of Operation Iraqi Freedom/Operation Enduring Freedom on the U.S. Department of Veterans Affairs Claims Process: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 48–51 (2007) (statement of Linda J. Bilmes, Faculty, Professor, John F. Kennedy School of Government, Harvard University), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg34310/pdf/CHRG-110hhrg34310.pdf> (recommending, among other things, that in order to address systemic delays in adjudication processes the VA should (1) grant all claims when filed and then audit, in manner akin to the IRS, a sampling of the claims to review for accuracy and (2) should simplify the disability rating categories to yield four basic levels of disability).

12. See Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 156–57 (1992).

To this end, this Essay explores some of the dimensions of traditional evidence law when it is applied in the realm of veterans benefits. In particular, the Essay focuses on VA credibility determinations, which have been the subject of several important court decisions in the last few years and are a common issue raised on appeal when veterans challenge adverse VA decisions on judicial review.¹³ The central point is that even though the veterans benefits field is permeated with so-called “veteran friendly” presumptions and legal doctrines, including with respect to the weighing of evidence, VA continues to disbelieve veteran claimants by relying on a common law credibility test that is too often nonsensical as applied and decidedly veteran unfriendly in practice. I call this dynamic the credibility trap.

When VA communicates to a veteran that it does not believe him or her, VA sends a powerful and disquieting message to those who have worn the uniform. So, it is especially important that VA get it right when making an adverse credibility determination. No agency can be expected to adjudicate complex cases, which disability claims very often are, with 100% accuracy. But the framework VA uses to decide whether a veteran is credible should have sufficient protections to limit the number of false negative errors. The credibility trap has downstream consequences too, beyond depriving individual veterans of earned compensation. It contributes to VA’s own administrative burdens, as claims denied on credibility grounds are prone to enter already backlogged appeal, remand, and claim reopening pipelines. The point is not

13. The role of lay evidence in VA adjudications has received increasing attention in the law review literature, although the question of VA credibility determinations regarding lay evidence generally has not received sustained analysis. See, e.g., Victoria Hadfield Moshiaswili, *Ending the Second “Splendid Isolation”?* *Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437, 1473–80 (2014); Sarah K. Mayes, *Unraveling the PTSD Paradox: A Proposal to Simplify the Adjudication of Claims for Service Connection for Post-traumatic Stress Disorder*, 6 VETERANS L. REV. 125, 128–29 (2014); Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 COLUM. J. GENDER & L. 343, 381–83 (2014); Alison Atwater, Comment, *When is a Combat Veteran a Combat Veteran?: The Evidentiary Stumbling Block for Veterans Seeking PTSD Disability Benefits*, 41 ARIZ. ST. L.J. 243, 244–46 (2009); Andrew Woodbury, Note, *Witnesses to War: Using Lay Evidence to Assert a Veteran’s Claim for Benefits*, 23 FED. CIR. B.J. 159, 160–61 (2013).

that VA should somehow be prohibited from evaluating a veteran's credibility¹⁴ or from finding a veteran's statements incredible, or that VA should approve every claim a veteran files. Rather, as explained more fully below, the point is that the credibility trap reveals one of the less visible tensions in VA benefit scheme when common law standards from adversarial proceedings are married to the supposedly informal, non-adversarial framework of the veterans benefit system. There are important lessons from this experience for efforts to reform VA system.

II. VA SERVICE-CONNECTED DISABILITY COMPENSATION PROGRAM

VA's service-connected disability compensation program is a critical source of support for the nation's injured veterans. There are nearly 22 million veterans in the U.S.¹⁵ In 2013, 3.5 million veterans received service-connected disability compensation totaling \$54 billion.¹⁶ In the last fifteen years, as the veteran's population has aged and newer generations of veterans who served in the conflicts in Iraq and Afghanistan have entered the system, the percentage of veterans receiving service-connected compensation has more than doubled.¹⁷

There are five basic elements to a service-connected disability compensation claim. The first three are: (1) status as a veteran; (2) existence of a current disability; and (3) a connection between the veteran's service and the disability.¹⁸ If these three requirements are established, VA must then (4) decide the severity of the disability by reference to the standards found in the Schedule for Rating Disabilities.¹⁹ Finally, VA must (5) decide the date the

14. *Padgett v. Nicholson*, 19 Vet. App. 133, 145 (2005) (describing the "well-recognized role of the Board" to "assess in the first instance the credibility of the hearing testimony of a claimant"), *withdrawn*, 19 Vet. App. 334 (2005), *reinstated nunc pro tunc sub nom.* *Padgett v. Peake*, 22 Vet. App. 159 (2008).

15. CONG. BUDGET OFFICE, VETERANS' DISABILITY COMPENSATION: TRENDS AND POLICY OPTIONS 1 (2014), *available at* https://www.cbo.gov/sites/default/files/45615-VADisability_2.pdf.

16. *Id.*

17. *See VA Budget Request for FY 2016*, U.S. DEP'T VETERANS AFF., <http://www.va.gov/opa/budget-briefing-charts.asp> (last visited May 6, 2015).

18. *See* 38 U.S.C. §§ 1110, 1131 (2012); 38 C.F.R. § 3.4 (2014).

19. *See* 38 C.F.R. § 4.1.

entitlement to compensation arose.²⁰ These five elements may sound simple.²¹ However, each element is marked by enormous complexity.²²

Moreover, depending on the initial determination VA makes in a case, these steps and the evidence relevant thereto are examined and re-examined at multiple levels of administrative review. VA is made up of fifty-seven regional offices and a centralized Board of Veterans' Appeals ("BVA") in Washington, D.C.²³ The appropriate regional office—via a rating officer—is responsible for making the initial decision on a claim. If a veteran is not satisfied with the outcome at that stage—whether because VA completely denied the claim, partially denied the claim, assigned an improper disability rating, or determined an improper effective date for compensation—there are multiple layers of administrative appeal available. These include a Decision Review Officer hearing at the regional office and an appeal to the BVA, where Veterans Law Judges decide appeals from regional offices.²⁴ As described more fully in the sections to follow, at each stage of the adjudica-

20. See 38 U.S.C. § 5110; 38 C.F.R. 3.400.

21. See VETERANS BENEFITS MANUAL ch. 3 (Barton F. Stichman et al. eds., 2014) (providing an overview of the eligibility requirements for service-connected disability compensation benefits).

22. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 295–98 (2010).

23. See *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1017 (9th Cir. 2012) (noting that veterans' disability compensation claims begin at one of the VA's fifty-seven regional offices before proceeding to the BVA); *VA Careers*, U.S. DEP'T VETERANS AFF., <http://www.vacareers.va.gov/about-va/divisions.asp> (last visited May 6, 2015); see also OFFICE OF AUDITS & EVALUATIONS, VA OFFICE OF INSPECTOR GEN., INSPECTION OF VA REGIONAL OFFICE ATLANTA, GEORGIA 18 (2014), available at <http://www.va.gov/oig/pubs/VAOIG-14-00902-207.pdf> (noting that disability claims are processed by fifty-six VA regional offices and a Veterans Service Center in Cheyenne, Wyoming); U.S. DEP'T OF VETERANS AFFAIRS, 2014 PERFORMANCE AND ACCOUNTABILITY REPORT 8 (2014), available at <http://www.va.gov/budget/docs/report/2014-VAparFullWeb.pdf> (noting fifty-six regional offices).

24. See VETERANS BENEFITS MANUAL, *supra* note 21, at pt. V (describing the VA claims adjudication process). Once the BVA issues a final decision, judicial review is available at the U.S. Court of Appeals for Veterans Claims. See 38 U.S.C. § 7252.

tion process, VA's assessment of the veteran's credibility can play a crucial role determining whether the veteran's claim is approved, only partially approved, or denied.

III. VA ASSESSMENT OF LAY EVIDENCE

In order to appreciate the troubling ways in which VA sometimes renders adverse credibility determinations within this system, one must first take into account the singular backdrop against which these credibility determinations are supposed to be made. First, unlike virtually all other administrative adjudication systems, VA's service-connected disability compensation system is intended to be uniquely pro-claimant—that is, the entire system is intended to be veteran friendly.²⁵ Second, there is no deadline by which a veteran must file a claim for service-connected disability compensation—claims may, and often are, filed years and sometimes decades after a veteran's military service, meaning that numerous evidentiary challenges may exist in adjudicating a case.²⁶ Third, VA has an affirmative duty to assist claimants throughout the benefit application and adjudication process—VA “shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim.”²⁷ Fourth, “in the veterans' context, traditional requirements for admissibility [of evidence] have been relaxed.”²⁸ Fifth, under the benefit-of-the-doubt doctrine, whenever the evidence is in equipoise, and unless a different standard applies because of the particular issue in dispute, VA must find in favor of the veteran.²⁹ And sixth, the entire VA system is intended to be fundamentally “non-adversarial.”³⁰

25. Henderson v. Shinseki, 131 S. Ct. 1197, 1200 (2011).

26. James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 115–16 (2009).

27. 38 U.S.C. § 5103A(a)(1).

28. Jandreau v. Nicholson, 492 F.3d 1372, 1376 (Fed. Cir. 2007) (citing 28 U.S.C. 5107(b)).

29. 38 U.S.C. § 5107(b) (“When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.”).

30. Trilles v. West, 13 Vet. App. 314, 326 (2000) (en banc) (describing “the VA pro-claimant nonadversarial claims adjudication process”); see also Caluza v. Brown, 7 Vet. App. 498, 508 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir.

This backdrop, one would think, might suggest that VA would also be subject to a particularly onerous standard before it denies a claim on the basis that it disbelieves the veteran. Not so.

VA considers a veteran's statements to be "lay" evidence, as distinguished from medical evidence.³¹ Lay evidence can be critical to a successful claim for service-connected disability compensation. Such evidence may provide the critical link to establish that an in-service event occurred, that the veteran experienced illness or injury at a particular point in time, that an injury or illness has a particular origin, that an illness or injury interferes with the veteran's activities of daily living or ability to obtain or maintain employment, and the like. Numerous cases have found that lay evidence can provide the necessary link in substantiating a veteran's claim for compensation.³²

While the VA has a duty to consider pertinent lay evidence, VA "retains discretion to make credibility determinations and otherwise weigh the evidence submitted, including lay evidence."³³

1996) ("[VA] is not a party trying to disprove a claim; indeed, VA's special obligations to assist claimants are the very antithesis of adversarial claims adjudication."). It is also worth noting that—although not always directly implicated in cases involving a contested credibility determination—where a dispute does arise regarding the meaning of a veterans benefits statute, the statute must be interpreted liberally in favor of veterans. *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)). For a discussion of the interaction of this veterans-friendly interpretative principle with other statutory interpretation doctrines, see Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59 (2011).

31. In deciding a claim, the VA must consider "all pertinent medical and lay evidence." 38 U.S.C. § 1154(a); *see also* 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.303(a), 3.307(b) (2014). While this Essay assumes that the claimant harmed by an adverse credibility determination is a veteran, the claimant before VA could just as easily be a dependent or survivor of a veteran.

32. *See, e.g., Jandreau*, 492 F.3d at 1376–77 (holding that the VA erred in concluding that veteran's lay evidence by itself was inadequate to establish element of veteran's claim).

33. *Id.* at 1376. Whether lay evidence is competent is a distinct—and antecedent—question. *Id.* at 1376–77. If lay evidence is incompetent, the credibility question is never reached. My focus is on the second question: whether and how competent lay evidence is determined to be credible or incredible.

This Essay focuses on that discretion—and how it is exercised.³⁴ In making credibility determinations, Veterans Law Judges (“VLJs”)³⁵ at the BVA may consider the following factors: interest, self-interest, bias, inconsistency, bad character, desire for monetary gain, and witness demeanor.³⁶

The seminal case regarding the credibility of lay evidence is *Caluza v. Brown*, a 1995 decision of the U.S. Court of Appeals for Veterans Claims (“the Veterans Court”) that was affirmed by the U.S. Court of Appeals for the Federal Circuit.³⁷ These courts—and the BVA—consistently cite to *Caluza* as the foundational basis for the factors VLJs should rely upon when assessing the credibility of lay evidence.³⁸ The key language in *Caluza* is this, and it is worth excerpting citations included:

The credibility of a witness can be impeached by a showing of interest, bias, inconsistent statements, or, to a certain extent, bad character. *See State v. Asbury*, 187 W. Va. 87, 415 S.E.2d 891, 895 (1992); *see also Burns v. HHS*, 3 F.3d 415, 417

34. To be clear about my goals here, the unique evidentiary issues that pertain to claims based on personal assault and military sexual trauma (“MST”) are specialized topics outside the scope of this Essay. For a discussion of those topics, see Seamone & Traskey, *supra* note 13, at 384–86. The same is true of the many questions that pertain to VA’s evidentiary standard for PTSD found in 38 C.F.R. 3.304(f), which among, other things, requires “credible supporting evidence that the claimed in-service stressor occurred.” For a discussion of that topic, see generally Mayes, *supra* note 13. Rather my purpose is at a layer removed from these subjects: to examine the tensions that exist in general when common law evidentiary standards from adversarial proceedings are married to the supposedly informal, non-adversarial framework of the veterans benefit system.

35. VLJs are agents of, and act in the name of, the BVA when they conduct appeal hearings and issue decisions. *See* VETERANS BENEFITS MANUAL, *supra* note 21, at ch. 13.1 (“Veterans Law Judges . . . are the principal actors in the BVA decision-making process . . .”). This Essay uses the terms VLJ and BVA mostly interchangeably, except in places where it is helpful to emphasize that it is an individual VLJ who presides at a hearing and makes credibility determinations regarding a veteran’s lay evidence.

36. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006).

37. 7 Vet. App. 498, 511 (1995), *aff’d*, 78 F.3d 604 (Fed. Cir. 1996).

38. *See, e.g., White v. Shinseki*, No. 08-2526, 2010 WL 1017046, at *2 (Vet. App. Mar. 22, 2010) (quoting *Caluza*, 7 Vet. App. at 511).

(Fed. Cir. 1993) (testimony was impeached by witness' "inconsistent affidavits" and "expressed recognition of the difficulties of remembering specific dates of events that happened . . . long ago"); *Mings v. Department of Justice*, 813 F.2d 384, 389 (Fed. Cir. 1987) (impeachment by testimony which was inconsistent with prior written statements). Although credibility is often defined as determined by the demeanor of a witness, a document may also be credible evidence. See, e.g., *Fasolino Foods v. Banca Nazionale del Lavoro*, 761 F. Supp. 1010, 1014 (S.D.N.Y. 1991); *In re National Student Marketing Litigation*, 598 F. Supp. 575, 579 (D.D.C. 1984).³⁹

What should be obvious from this excerpt is that the *Caluza* Court borrowed tools for assessing credibility from numerous other legal contexts and imported them wholesale into the veterans benefit context. There is nothing inherently wrong with having done so. Indeed, at the time *Caluza* was decided, the Veterans Court was but five years old, and judicial review of VA decisions was in its infancy.⁴⁰ As it set about to construct for the first time a court-made law of veterans benefits, the Veterans Court naturally needed to look to doctrines, conventions, and tools used in other legal contexts in order to fulfill the function Congress created for the Veterans Court.⁴¹

We should ask, however, whether VLJs have used the factors first articulated in *Caluza* in a defensible and appropriate way—one that fits the singular ecosystem of the veterans benefits framework. In a system intended to be veteran friendly and non-

39. *Caluza*, 7 Vet. App. at 511.

40. See Veterans' Judicial Review Act, Pub. L. No. 100-687, § 4051, 102 Stat. 4105 (1988) (codified as amended at 38 U.S.C. § 7251 (2012)) (establishing the Court of Veterans' Appeals).

41. But see *Hodge v. West*, 155 F.3d 1356, 1361 (Fed. Cir. 1998) (admonishing Veterans Court for looking outside the veterans benefit context to guide interpretation of veterans benefit statute and regulations). For a discussion of the increasing trend in the other direction (that is, towards incorporating elements of law from outside the veterans benefits context), see Hadfield Moshishwili, *supra* note 13, 1511–12.

adversarial, where substantial gaps in time between a veteran's military service and the adjudication of his or her claim can create difficult evidentiary questions, where the agency has a statutory duty to assist the veteran, where the benefit of the doubt must be given to the veteran, and where there are widespread and lengthy delays in deciding individual claims and appeals once they are filed—given all of this, has it made sense for VLJs to use the same factors to determine a veteran's credibility as a trier of fact would use for a plaintiff testifying in a tort suit or a defendant in a criminal trial?

It turns out that the informality and non-adversarial process that are supposed to be the hallmarks of the veteran-friendly VA system have, in perhaps surprising ways, created genuine challenges in the area of credibility determinations.

IV. VA CREDIBILITY DETERMINATIONS

Decisions by VLJs and the Veterans Court about witness credibility frequently cite *Caluza*, and they frequently refer to one sentence from *Caluza* in particular: “[t]he credibility of a witness can be impeached by a showing of interest, bias, inconsistent statements, or, to a certain extent, bad character.”⁴² Particularly telling is the *Caluza* Court's phrasing here: witnesses can be “impeached” when certain “showing[s]” are made.⁴³ This language invokes the trappings of a traditional adversarial proceeding, where each side in the litigation is armed with attorney representation and seeks through questioning to undermine the credibility of the adversary's witnesses. Indeed, the *Caluza* Court derived this key sentence from the 1992 West Virginia Supreme Court decision in *State v. Asbury*.⁴⁴ In *Asbury*, the West Virginia Supreme Court affirmed a defendant's conviction for assault following a jury trial.⁴⁵ The *Asbury* Court saw no error in the prosecutor's cross examination of a defense witness, finding that the questions were a

42. See, e.g., *White*, 2010 WL 1017046, at *2 (quoting *Caluza*, 7 Vet. App. at 511).

43. *Caluza*, 7 Vet. App. at 511.

44. 415 S.E.2d 891, 895 (W. Va. 1992) (“The term ‘credibility’ includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness’ character.”).

45. *Id.* at 897.

proper and expected attempt by one party to impeach an adverse witness's credibility through cross-examination suggesting bias or interest.⁴⁶

VA benefit adjudications exist in an entirely different universe.⁴⁷ In appeal hearings before a VLJ, there is no such cross-examination of a veteran.⁴⁸ Counsel does not represent VA. A VLJ will of course ask questions of a veteran to elicit relevant evidence and develop the record, but a VLJ is not permitted to cross-examine the veteran and should not be in the business of making a "showing" of any kind.⁴⁹ VA is prohibited from seeking to defeat the veteran's claim.⁵⁰

The credibility standard identified in *Caluza* therefore—at least rhetorically—seems quite out of place in the non-adversarial veteran-friendly context of VA appeals. In this way, as an initial matter, we might be concerned that the rhetoric found in *Caluza* may contribute to unjustifiably aggressive adverse credibility determinations by VLJs. Whether *Caluza* is a contributing factor or not, there is ample evidence that VLJs have frequently exceeded their authority in discrediting lay evidence from veterans.⁵¹

46. *Id.*

47. *See supra* notes 25–30 and accompanying text.

48. 38 C.F.R. § 20.700(c) (2014) ("Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but *cross-examination will not be permitted.*" (emphasis added)).

49. *Id.*

50. *Manio v. Derwinski*, 1 Vet. App. 140, 144 (1991) ("Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. . . . I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof." (alteration in original) (emphasis omitted) (quoting H.R. Rep. No. 100-963, at 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795)).

51. *See, e.g., Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (stating that the VA's interpretation of the standard for assessing the credibility of lay evidence—which, in the VA's view, required lay evidence to be corroborated by medical evidence—is "legally untenable"); *Kahana v. Shinseki*, 24 Vet. App. 428, 433 n.4 (2011) ("We generally agree . . . that too often the

But there is another concern about the *Caluza* standard that has more to do with process than substance—and about which we should be equally, if not more, troubled. This is where the credibility trap truly comes into play. In a traditional adversarial proceeding in which one party seeks to impeach the other party's witness, the second party will always have the opportunity to attempt to rehabilitate the witness whose credibility has been undermined. Whether through questions proffered on re-direct, through a rebuttal witness, or through closing argument, a party can always take steps before the case is submitted for decision to respond and to defend a witness's credibility.⁵²

In the non-adversarial context of a VLJ hearing, the veteran has no opportunity to rehabilitate himself, except perhaps in one narrow circumstance. If the regional office decision on appeal to the VLJ denied the claim by finding the veteran's lay evidence incredible, then the veteran is presumably on notice to some extent that his credibility is at issue. The veteran is aware that he should use the opportunity of the VLJ hearing to seek to bolster his credibility by explaining inconsistencies, providing context for past statements, offering corroborating evidence, making a strong personal presentation, or the like.⁵³ If the regional office denied the veteran's claim in whole or part on the basis of finding the veteran's lay evidence incredible, the veteran would receive notice of

Board makes overbroad categorical statements regarding the competency and credibility of lay testimony.”).

52. What is more, an attorney can also seek, in the moment, to protect a witness who is being impeached on cross-examination—by objecting to the questions that are being proffered. Such objections might go to the form of the question or the substance of the question. Timely and well-grounded objections may have the effect of limiting the harm done to a witness whose credibility is under attack. For a general discussion of impeachment and rehabilitation of witnesses in an adversarial proceeding, see Penny J. White, *The Art of Impeachment and Rehabilitation*, PRAC. LITIGATOR, Mar. 2002, at 29.

53. While this sentence and others use the male pronoun to refer to the veteran, it must be noted that an increasing percentage of veterans are women. See generally NAT'L CTR. FOR VETERANS ANALYSIS & STATISTICS, U.S. DEP'T OF VETERANS AFFAIRS, AMERICA'S WOMEN VETERANS: MILITARY SERVICE HISTORY AND VA BENEFIT UTILIZATION STATISTICS 1 (2011), available at http://www.va.gov/vetdata/docs/specialreports/final_womens_report_3_2_12_v_7.pdf (stating that by 2035 women will make up 15 percent of all living veterans).

the adverse credibility finding via the Statement of the Case issued by the regional office or the written decision issued by the Decision Review Officer (“DRO”) in cases where the veteran requested review by a DRO.⁵⁴ The VLJ would then reinforce that notice and be duty bound to explain to the veteran at the outset of the BVA appeal hearing that the question of credibility is before the VLJ and to suggest to the veteran the submission of evidence that might help him substantiate his claim.⁵⁵ As discussed below in Part V, this scenario—particularly with respect to the regional office placing the veteran on notice in the first instance that his personal credibility has been rejected—may not be very likely at all.

In any event, outside of this single circumstance, a VLJ’s determination that the veteran’s lay evidence is incredible will, almost by definition, catch the veteran off guard. The veteran will have no opportunity to respond at all before the VLJ issues the Board’s final decision in the matter. Instead, the veteran will first learn that his credibility was even in question when he receives the final Board decision in his appeal.⁵⁶ This is the credibility trap. It exists not because of nefarious actors but because of dynamics inherent to the current veterans benefit framework.⁵⁷

First, a VLJ is extraordinarily unlikely to declare during an appeal hearing that the VLJ has already found—or is inclined to find or is considering finding—the veteran incredible. Indeed, to do so would presumably violate the VLJ’s duty to impartially consider the evidence in the case and to avoid pre-adjudicating the case.⁵⁸

54. See VETERANS BENEFITS MANUAL, *supra* note 21, at pt. V (providing an overview of the VA claims adjudication process).

55. 38 C.F.R. § 3.103(c)(2) (2014); see also *Bryant v. Shinseki*, 23 Vet. App. 488, 496–97 (2010); *Procopio v. Shinseki*, 26 Vet. App. 76, 81 (2012).

56. At this point, the record is closed and the only further appeal is to the Veterans Court.

57. See *Arneson v. Shinseki*, 24 Vet. App. 379, 382 (2011) (“Unlike a traditional judicial appeal where review is of the record, the opportunity for a personal hearing before the Board is significant because it is the veteran’s one opportunity to personally address those who will find facts, make credibility determinations, and ultimately render the final Agency decision on his claim.” (citing *McDowell v. Shinseki*, 23 Vet. App. 207, 214 (2009)))

58. See *Bryant*, 23 Vet. App. at 496 (stating that “there is no requirement to preadjudicate an issue or weigh the evidence” and that a VLJ “should focus

Second, the informal, non-adversarial nature of a VLJ hearing makes it unlikely that a veteran will receive even informal and indirect warning that a VLJ questions his credibility. It might be appropriate to expect an experienced litigator to detect during a trial that a line of questioning to a witness reflects skepticism about the witness's credibility, and to further expect the experienced litigator to respond in the moment through the give and take of a trial to protect and bolster his witness. But that is not the format of a VLJ hearing, that is not the design of the veterans benefit adjudication system, and those are not appropriate expectations for *pro se* veterans or non-attorney advocates.⁵⁹ Most veterans appear before VLJs with non-attorney representation.⁶⁰

Third, a sizeable number of appeals are decided without a hearing—meaning there is no opportunity for the veteran in those cases to interact directly with the VLJ and to receive even minimal cues that the VLJ views, or might view, the veteran's credibility with skepticism.⁶¹

on the issues that remain outstanding, and whether evidence has been gathered as to those issues").

59. See *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, C.J., dissenting) ("[T]he veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus. It is entirely inquisitorial in the regional offices and at the Board . . . where facts are developed and reviewed. The purpose is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case."). To be clear, in making these arguments, I am not suggesting that more formalistic procedures akin to a civil trial and correspondingly greater attorney involvement in the VA system are the solution. Whether the VA benefit system should be open or closed to attorney representation of veterans, should encourage or discourage attorney representation, should limit or expand the role of attorneys based on the stage of the case—all are questions of considerable controversy, complicated history, and continuing debate. For a discussion of some of the general tensions between formality and informality and between inquisitorial and adversarial modes in the mass administration of benefit claims, see generally JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); Jon S. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997).

60. See U.S. DEP'T OF VETERANS AFFAIRS, BOARD OF VETERANS' APPEALS: ANNUAL REPORT 25 (2013), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf.

61. See *id.* at 27.

And fourth, the BVA—unlike the regional offices—is required by statute to provide reasons or bases for its decision, including the reasons or bases for its credibility determinations.⁶² This is the first moment when VA is duty bound to explain in greater detail the grounds for its decision.

Put together, we are left with a troubling paradox. VLJs possess wide latitude to decide whether a veteran's lay evidence is credible—the same wide latitude that a judge would possess when presiding at a traditional adversarial bench trial. But, unlike the parties participating in such a bench trial, the informal and non-adversarial design of VA appeal process deprives many veterans of the opportunity to effectively defend themselves against an attack on their credibility.

To underscore the point that veterans may receive no meaningful notice at the agency level that their credibility is very much in dispute, consider that the Veterans Court described the reasons or bases requirement found in 38 U.S.C. § 7104(d)(1) for VLJ decisions as “serv[ing] a function similar to that of cross-examination in adversarial litigation.”⁶³ In other words, it is only in the written final decision that marks the end of the administrative process that the adjudicator must show his hand with respect to his assessment—or, as the case may be, his critique—of the evidence, including a veteran's lay evidence. The Veterans Court's use of the term “cross-examination” is telling because it is suggestive of precisely what I have argued here—that VLJs, understandably given their assigned role, engage in a kind of adversarial cross-examination of the evidence through their written decisions, but in doing so of course afford no opportunity for the witness to respond, explain, or rebut the problems seized upon by the VLJ.

In short, when a veteran first learns that his credibility is under attack and the specific basis for that attack, it is often too late to do anything to defend himself before the agency. Hence the term “trap” to describe this phenomenon. A veteran who disagrees with a VLJ's credibility finding can certainly appeal to the Veter-

62. 38 U.S.C. § 7104(d)(1) (2012); 38 C.F.R. § 3.103(f) (2014); *see also Bryant*, 23 Vet. App. at 494 (“[T]he Board's statement of reasons or bases was inadequate”); *Procopio v. Shinseki*, 26 Vet. App. 76, 84 (2012) (“[T]he Board's statement of reasons or bases was not inadequate”).

63. *Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994).

ans Court.⁶⁴ But there, the veteran is generally precluded from offering new evidence to rehabilitate his credibility or otherwise.⁶⁵ Moreover, the Veterans Court will review the VLJ's adverse credibility finding under a deferential standard—whether the VLJ's finding was clearly erroneous.⁶⁶ The veteran's best hope might be to argue to the Veterans Court that the VLJ failed in his written decision to provide adequate reasons or bases for disbelieving the veteran, in violation of 38 U.S.C. § 7104(d)(1). Whether this argument is successful will depend on the extent to which the VLJ adequately justified in his written decision the adverse credibility finding. Even then, if the veteran is successful in his appeal to the Veterans Court, the veteran will secure only a remand back to the BVA for further proceedings. The veteran will have spent many months—if not more than a year—just to get right back where he started.

V. A CASE EXAMPLE

While there do not yet appear to be any reported cases that address this paradox, the problem is percolating beneath the surface. Consider the following case, an otherwise unremarkable appeal which resulted in an unpublished memorandum decision from the Veterans Court.⁶⁷ A veteran filed a claim with VA for service-

64. See 38 U.S.C. §§ 7252(a), 7266 (providing the Veterans Court with exclusive jurisdiction over BVA appeals and procedures for filing a notice of appeal). True, a veteran can also file a motion for reconsideration with the BVA itself. See 38 C.F.R. § 20.1000. However, that is typically an unfruitful strategy. See VETERANS BENEFITS MANUAL, *supra* note 21, at ch. 14.3.1 (describing reasons that motions for reconsideration are “generally not an effective means for obtaining a change in a previous final BVA decision”).

65. See 38 U.S.C. § 7252(b) (“Review in the Court shall be on the record of proceedings before the Secretary and the Board.”).

66. 38 U.S.C. § 7261(a)(4).

67. This same troubling dynamic—veterans who have been blindsided by adverse credibility findings in BVA decisions—can be seen in some of the cases we have reviewed and accepted on referral for our Veterans Court docket at the Veterans Legal Clinic. These case referrals prompted much of my thinking about the role of BVA credibility findings in the veterans benefit system. The Veterans Legal Clinic is part of the Legal Services Center of Harvard Law School, a community-based public interest law firm and clinical teaching program.

connected disability compensation.⁶⁸ The regional office denied the claim, but did not state in its decision to deny that the veteran's personal credibility had anything to do with the adverse outcome. The veteran appealed the denial to the BVA, where the case was assigned to a VLJ. The VLJ denied the claim because the VLJ found the veteran not credible about an in-service occurrence.⁶⁹

At the Veterans Court, the veteran argued through counsel that the BVA's decision to deny the claim based on an adverse credibility determination was fundamentally unfair given that the regional office had never specifically called the veteran's personal credibility into question.⁷⁰ Counsel argued that the veteran was therefore never properly on notice that his credibility would be in dispute at the BVA, in violation of *Bernard v. Brown*.⁷¹ In *Bernard*, the Veterans Court found that the BVA erred when, without advance notice to the veteran, it proceeded to reopen a claim and decide that claim on the merits in circumstances where the regional office has denied the claim to reopen and never developed or adjudicated the merits.⁷² The BVA's decision to adjudicate the claim on the merits undermined the "extensive procedural requirements to ensure a claimant's rights to full and fair assistance and adjudication in the VA claims adjudication process."⁷³

The Veterans Court rejected counsel's argument that the principle articulated in *Bernard* applied to the BVA's decision to make an adverse credibility determination without first placing the veteran on adequate notice of that risk. In rejecting counsel's argument, the Court made three points. First, *Bernard* was distinguishable because, unlike adjudicating a claim to reopen at the BVA in the first instance, the question of credibility is inherently subsumed within claims on appeal.⁷⁴ So long as the regional office had adjudicated the veteran's claim for compensation, then the veteran's credibility was fair game for the BVA to consider, even if the regional office had been silent on the credibility question or

68. *Stegall v. Shinseki*, No. 10-3268, 2012 WL 445919, at *1 (Vet. App. Feb. 14, 2012).

69. *Id.* at *2.

70. *Id.* at *1.

71. *Id.* (citing *Bernard v. Brown*, 4 Vet. App. 384 (1993)).

72. *Bernard*, 4 Vet. App. at 394.

73. *Id.* at 392.

74. *Stegall*, 2012 WL 445919, at *2.

had even found the veteran credible.⁷⁵ Second, the veteran should have been on notice that his credibility would be an issue before the BVA because it was an obvious question in the case and the regional office had sent notices describing the types of corroborating evidence the veteran might obtain.⁷⁶ And third, the Court noted that the veteran had recourse by virtue of the instant appeal to the Court, where the veteran could argue that the BVA was clearly erroneous in finding the veteran not credible or failed to offer adequate reasons or bases for finding the veteran not credible.⁷⁷ In other unpublished memorandum decisions, the Veterans Court has rejected a version of this same argument for nearly identical reasons.⁷⁸

The Veterans Court's resolution of this argument is certainly understandable to a point. As one of the unpublished decisions put it, there is no existing authority "for the proposition that a party must be notified that his credibility, or the credibility of any evidence, is for consideration."⁷⁹ Sure enough, the *Bernard* decision that served as the linchpin of the veterans' arguments did not involve a credibility determination. Instead, it involved a BVA decision—without notice to the veteran—to reopen a claim and determine the merits of that claim where the regional office had done neither.⁸⁰

75. See *id.* at *2 ("[T]he board has jurisdiction to decide any question pertaining to a matter that the [regional office] has decided. . . . The determination of credibility of any evidence pertaining to such matters is a fundamental function that is committed to the Board." (citations omitted)).

76. *Id.*

77. *Id.*

78. See, e.g., *Dailey v. Shinseki*, No. 11-2660, 2013 WL 1964837, at *6 (Vet. App. May 13, 2013); *Cavalli v. Shinseki*, No. 11-1898, 2012 WL 6082708, at *3 (Vet. App. Dec. 7, 2012).

79. *Dailey*, 2013 WL 1964837, at *6.

80. The holding in *Bernard* did not explicitly limit the principle that the veteran must be given adequate advance notice to the BVA's potential adjudication of previously unadjudicated "claims," a term that has a particular legal meaning within the veterans benefits scheme. See, e.g., *Cacciola v. Gibson*, 27 Vet. App. 45, 53 n.2 (2014) ("Although there have been efforts to definitively define what is and is not a 'claim,' such efforts have not produced uniformity."). The *Bernard* court used the term "questions":

[T]he [c]ourt holds that[] when . . . the [BVA] addresses in its decision a *question* that had not been addressed by the [re-

What is missing from the discussion, however, is a fuller sensitivity to the difference between credibility being at issue in a general sense and a veteran's credibility being subject to attack on specific grounds. For starters, regional office initial rating decisions, Statements of the Case, and decisions from DROs, are typically long, intricate documents filled with boilerplate language.⁸¹ And when such documents finally address the facts of an individual veteran's case, they are written at a fairly high level of generality. Even when they may suggest indirectly that the regional office disbelieves a veteran, they almost never give a reason, let alone a specific reason.⁸² Instead, a regional office decision will, for example, in a personal assault case, state in conclusory and non-personalized terms that "[t]he evidence of record does not provide credible evidence that the claimed stressor occurred."⁸³ Or in the case of an in-service sexual assault, the decision will state, "To this date the record of evidence has not shown that a military sexual

gional office], it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that *question* and an opportunity to submit such evidence and argument and to address that *question* at a hearing, and, if not, whether the claimant has been prejudiced thereby.

Bernard v. Brown, 4 Vet. App. 384, 394 (1993) (emphasis added). A "question" is "[a]n issue in controversy; a matter to be determined." BLACK'S LAW DICTIONARY 1366 (9th ed. 2009). According to the Veterans Court, *Bernard* is not helpful here because a veteran's credibility is always in controversy—is always a matter to be determined. See *Dailey*, 2013 WL 1964837, at *6 (providing that "credibility determinations are an inherent part of every decision by a trier of the fact[,]” including decisions of the regional offices and the BVA).

81. For discussions of VA's use of lengthy and unhelpful boilerplate notices, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-395, VETERANS BENEFITS ADMINISTRATION: CLARITY OF LETTERS TO CLAIMANTS NEEDS TO BE IMPROVED 35–38 (2002), available at <http://www.gao.gov/assets/240/234416.pdf>; David E. Boelzner, *In Sight, It Must Be Right: Judicial Review of VA Decisions for Reasons and Bases vs. Clear Error*, 17 RICH. J.L. & PUB. INT. 681, 693 (2014); Ridgway, *supra* note 26, at 121.

82. Decisions issued by the regional office—whether in the form of initial rating decisions, DRO decisions, or Statements of the Case—are not subject to the adequate reasons or bases requirement. These decisions must give a reason for the decision and a summary of the evidence considered, but specifics or adequate explanations are not required. 38 U.S.C. § 5104 (2012).

83. Redacted documents from this case are on file with the author.

trauma took place.”⁸⁴ The veteran will typically be provided no further explanation for why his or her lay account of what occurred has been disbelieved. Indeed, decisions will rarely if ever even convey the sense that the veteran has actually been personally disbelieved—only that more evidence is needed if the claim is to be substantiated. For these reasons, even where a veteran is arguably on notice that something like credibility is at issue, it is only in the most vague and non-specific sense. The veteran will not have any inkling of the specific reasons—such as particular alleged inconsistencies in the veteran’s lay evidence—that led to the failure to convince the regional office.

Whether or not the regional office denied the claim for reasons having anything to do with the credibility of the veteran’s lay evidence, the BVA of course serves as the final agency arbiter of the veteran’s credibility.⁸⁵ As described above, however, unlike a party in an adversarial proceeding who can readily identify during the course of motion practice or trial the specific bases for an attack on his credibility and can take steps to respond to the attack, a veteran appealing to the BVA will typically have no warning of the specific inconsistencies, alleged biases, or other grounds a VLJ might rely on to discredit the veteran.⁸⁶ The veteran will first receive notice of these grounds when the appeal is over—that is, when the veteran receives final agency action in the form of a BVA decision.

84. Redacted documents from this case are on file with the author.

85. See *Arneson v. Shinseki*, 24 Vet. App. 379, 382 (2011) (“[T]he opportunity for a personal hearing before the Board is significant because it is the veteran’s one opportunity to personally address those who will find facts, make credibility determinations, and ultimately render the final Agency decision on his claim.” (citing *McDowell v. Shinseki*, 23 Vet. App. 207, 214 (2009))).

86. To be clear, pursuant to *Bryant* and *Procopio*, a veteran might be told by the VLJ at the appeal hearing what additional evidence might be needed to substantiate the claim. However, that is quite different than putting the veteran on notice that there are specific grounds for calling into question his credibility, identifying those grounds, and providing the veteran an opportunity to respond directly to the particular grounds cited. The submission of additional evidence may not be responsive directly to the specific grounds the VLJ considers.

VI. THE CREDIBILITY TRAP IN ACTION

To appreciate how the credibility trap actually plays out in practice—and to highlight how the BVA is prone to overreach in making adverse credibility determinations—it is helpful to look at the specific facts in dispute in a case example. As it happens, the very same unpublished case decision described above—in which counsel unsuccessfully argued to the Veterans Court that the BVA had violated *Bernard* by blindsiding the veteran with its credibility determination—provides a revealing exemplar.

There, the veteran had filed a claim for disability compensation stating that he had mental disorders arising from an in-service physical assault.⁸⁷ According to the veteran, the regional office denied the claim without addressing his personal credibility.⁸⁸ The veteran appealed to the BVA, where a hearing was conducted. In the written decision following the hearing, the BVA agreed that the veteran was suffering from diagnosed mental disorders.⁸⁹ The BVA also agreed that there is “at least provisional medical evidence linking [the veteran’s] disability to an in-service injury, the alleged beating.”⁹⁰ The BVA, however, found that the in-service personal assault never occurred.⁹¹ According to the BVA, the veteran’s account of the assault was “not credible, given inconsistencies in statements made to VA, and given a lack of documentation from civilian and military authorities regarding the alleged assault.”⁹² The BVA decision went on to identify what it described as multiple inconsistencies in the veteran’s lay evidence.⁹³ From all appearances, the veteran did not learn that the BVA had identified these putative inconsistencies and considered them decisive to the outcome of the case until the BVA issued its written decision.⁹⁴

87. *Stegall v. Shinseki*, No. 10-3268, 2012 WL 445919, at *1 (Vet. App. Feb. 14, 2012).

88. *Id.* at *2.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

One by one, the Veterans Court concluded that the BVA failed to provide adequate reasons or bases for finding the veteran's lay evidence incredible. Among other things, the BVA had found the veteran not credible because of an absence of certain records.⁹⁵ This is an extraordinarily common basis for the BVA to discredit a veteran's lay evidence, a dynamic the Veterans Court and the Federal Circuit have repeatedly sought to curtail.⁹⁶ The records in question in this case were law enforcement records regarding the assault, which the veteran said he had reported to authorities at the time.⁹⁷ The BVA issued its decision in 2010.⁹⁸ The alleged assault occurred forty-six years earlier, in 1966.⁹⁹ The record in the case indicated that local law enforcement had informed VA that it did not have records from as long ago as 1966.¹⁰⁰ In scathing language, the Veterans Court declared that "[i]t is hardly logical to derive a negative credibility finding, even in part, because the [veteran's] allegations are not corroborated by nonexistent records."¹⁰¹

The BVA also found the veteran not credible because "variations [had] occurred in [his] story since the filing of his claim."¹⁰² This too is a common basis for finding a veteran not credible, as it is not difficult to locate putative inconsistencies in records that span hundreds if not thousands of pages and many years of a veteran's life. Here, the BVA seized upon the following variation: in filing his claim with VA, the veteran stated that personnel from one branch of service assaulted him; at the hearing before the BVA, the veteran stated that personnel from a different branch of service assaulted him.¹⁰³ The Veterans Court found this rationale from the BVA lacking:

95. *Id.* at *6.

96. *See, e.g., AZ v. Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013); *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011) (holding that the BVA may not treat absence of evidence as substantive negative evidence).

97. *Stegall*, 2012 WL 445919, at *6.

98. *Id.* at *1.

99. *Id.*

100. *Id.* at *6.

101. *Id.*

102. *Id.*

103. *Id.*

It is clear from all the veteran's testimony . . . that he did not know the men who allegedly attacked him and that he was speculating on who they might have been from second-hand hearsay. The [c]ourt does not perceive that any inconsistency about such a peripheral matter is to be used as grounds for a negative credibility determination.¹⁰⁴

The BVA also found evidence that the veteran was "fabricating his story" by pointing to a single line in a psychologist's report.¹⁰⁵ In that line, the psychologist observed that it was not clear to the psychologist whether the veteran had "actual memories" of the assault or had "reconstructed it later by interviewing several people who witnessed it."¹⁰⁶ This, the Veterans Court concluded, was an entirely insufficient basis to suggest fabrication on the part of the veteran. According to the Veterans Court, the psychologist's statement "neither highlight[s] an inconsistency nor logically lead[s] to a conclusion of fabrication."¹⁰⁷ Rather, the psychologist's statement simply reflected that the psychologist "was uncertain where memory left off and hearsay began."¹⁰⁸

The Court concluded its assessment of the BVA's credibility findings by counseling the BVA: "Sometimes corroboration or refutation of allegations such as those presented in this case is not merely a matter of reviewing documents."¹⁰⁹ The Court set aside the BVA decision and remanded the case for further proceedings and readjudication.¹¹⁰

The point is that each of the BVA's grounds for finding the veteran incredible was relatively easy to rebut, if not refute outright. But only if one knows these grounds are being considered by the BVA. Had the veteran been on notice that the BVA was challenging his credibility on these grounds, he—and his advocate—had ready and persuasive responses: the lack of documentation from law enforcement should be immaterial because law en-

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at *7.

110. *Id.*

forcement has not maintained records from that period; the inconsistency in describing the branch of service of his attackers should not be given significance because it is a trivial difference and the veteran acknowledged he could only speculate about the identity of his attackers; the single sentence from the psychologist's report simply should not, by its own terms, suggest fabrication on the part of the veteran.

VII. REMEDIES

The credibility trap is at odds with a system that is intended to be non-adversarial, uniquely pro-claimant, and veteran friendly, and in which VA has a duty to assist the veteran and to apply the benefit of the doubt doctrine to the evidence. What, if any, remedy exists for the credibility trap? Fully exploring potential remedies is beyond the purpose of this short Essay. For the moment, a few general possibilities are worth mentioning—none of them, however, without weaknesses.

Some potential remedies are within the Veterans Court powers. First, the Veterans Court introduced the *Caluza* credibility standard into VA cases when judicial review of VA decisions was in its infancy;¹¹¹ the Court could, in response to arguments from appellants' counsel, presumably amend the standard to reflect the experience of the standard's application at VA during the past twenty-five years. This might entail, for example, requiring an inconsistency to be material before the BVA relies upon it to make an adverse credibility determination. This would not be an unprecedented doctrinal innovation. In the immigration law context, several circuits at one point made use of, and sometimes still use, a "heart of the claim" test, whereby inconsistencies could only be grounds for an immigration judge's adverse credibility determination in an asylum case if the inconsistencies were truly material to the claim at issue in the case.¹¹²

111. See *supra* note 40 and accompanying text.

112. See Tania Galloni, *Keeping It Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037, 1047 (2008) (describing the heart of the claim test, but also examining the impact of the REAL ID Act of 2005, Congress' effort to override the heart of the claim test).

Second, the Veterans Court could, under *Bryant* and *Procopio*, require the BVA in some circumstances to place the veteran on notice that personal credibility is at issue. The Court could also interpret *Bernard* to extend to credibility determinations, requiring that the BVA provide advance notice of some kind when personal credibility is directly at stake and to undertake a prejudice analysis when advance notice is not provided. Among many potential downsides, including uncertainty whether these doctrinal reforms are achievable, these court-driven remedies entail creating more law—further complicating the maze of rules that burden the system and too often imperfectly serve their original goals of encouraging accurate and efficient decisions.¹¹³

Some potential remedies are within VA's powers. VA could require that decisions from regional offices that rely on personal credibility to deny a claim to actually say so and to provide greater specificity as to the reasons for that determination. VA could require that the pre-hearing notices issued to veterans in advance of a BVA appeal hearing highlight that personal credibility will potentially be at issue and provide guidance about how veterans can prepare for and address this issue. VLJs could be tasked with doing the same at the outset of a BVA hearing. Among many potential downsides, these possibilities entail adding to the already overwhelming amount of information, both in the form of written notice and otherwise, VA provides to veterans. Any single piece of information is easily lost in this avalanche of communication, much of it already boilerplate, confusing, and unhelpful.

Some remedies are within the advocacy community's powers. Advocates who represent veterans at the BVA could be more attentive to the credibility trap and attempt prophylactically to address what issues the VLJ might seize upon to discredit the veteran's lay evidence. Advocates who represent veterans at the BVA could, consistent with 38 C.F.R. § 3.103(c)(2) and *Bryant* and *Procopio*, inform the VLJ before the appeal hearing's close that the veteran wishes to be informed of any evidence in the record the VLJ considers to be negative evidence and to be informed of what types of additional evidence might rebut this negative evidence. Both of these possibilities have disadvantages too. As to the first, for the same reason that it is relatively easy for a VLJ to pick apart

113. Ridgway, *supra* note 22, at 253.

a voluminous record and find numerous inconsistencies, it is relatively difficult to anticipate which grounds the VLJ will seize upon for rendering a credibility determination and immunize the veteran from having his lay evidence discredited on those grounds. As to the second, it is not clear that VLJs are fully responsive to the proffered interpretation of 38 C.F.R. § 3.103(c)(2), *Bryant*, and *Procopio*.

Finally, the most far-reaching remedies are of course within Congress' powers. Congress, faced with innumerable questions about the future shape of the service-connected disability compensation system,¹¹⁴ has mostly tinkered around the edges. At a minimum, any remedy that Congress might consider for the credibility trap—whether targeted or part of a larger reform effort—should be mindful of the following: it should not elongate the appeal process; it should not have the net effect of increasing the complexity of the system; and it must balance the need for efficiency with the value of accuracy.¹¹⁵

VIII. CONCLUSION

The potential remedies briefly noted above have many more nuances than can be catalogued here. And there are certainly many other remedies one might consider, both small scale and large scale. In the end, no matter how we think about the credibility trap—whether as a problem in need of an immediate fix or an unavoidable element of the system we have—the phenomenon ought to inform our thinking about what the next version of VA's adjudication system might look like. That next system would be best served if a veteran had a meaningful and timely opportunity to respond directly to VA—and not just to the Veterans Court—when VA decides not to believe the veteran.

114. See *supra* note 11 for examples of the continuum of reform proposals that have been proposed to Congress.

115. See Ridgway, *supra* note 6, at 131, for Professor Ridgway's more extended discussion of these and other considerations in reform efforts.

Justice for All: Serving the Needs of Justice-Involved Veterans

Panelists:

Capt. Art Cody, Esq.
Derek Coy
John Darcy
J. Paul Noonan
Syndey Tarzwell, Esq.

Porter v. McCollum

Supreme Court of the United States

November 30, 2009, Decided

No. 08-10537

Reporter

558 U.S. 30 *; 130 S. Ct. 447 **; 175 L. Ed. 2d 398 ***; 2009 U.S. LEXIS 8377 ****; 22 Fla. L. Weekly Fed. S 9

GEORGE PORTER, JR., Petitioner v. BILL MCCOLLUM,
ATTORNEY GENERAL OF FLORIDA, et al.

Subsequent History: On remand at, Remanded by, Decision reached on appeal by *Porter v. AG*, 593 F.3d 1275, 2010 U.S. App. LEXIS 875 (11th Cir. Fla., Jan. 14, 2010)

Prior History: [****1] ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Porter v. AG, 552 F.3d 1260, 2008 U.S. App. LEXIS 27122 (11th Cir. Fla., 2008)

Disposition: The judgment reversing the grant of a writ habeas corpus was reversed, and the case was remanded for further proceedings.

Syllabus

EDITOR'S NOTE: The following syllabus was added after the slip opinion was issued.

Petitioner Porter was sentenced to death for murder. In postconviction proceedings, both the trial court and the Florida Supreme Court reserved judgment on counsel's deficiency at the penalty phase, but ruled that Porter had not been prejudiced by counsel's failure to investigate and present mitigating evidence of Porter's abusive childhood, his heroic military service and associated trauma, his long-term substance abuse, and his impaired mental health and mental capacity. The Federal District Court subsequently granted habeas relief, concluding that counsel's failure to adduce that evidence violated Porter's Sixth Amendment right to effective assistance of counsel, but the Eleventh Circuit reversed on the ground that the State Supreme Court's ruling was a reasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Held: The performance of Porter's counsel was deficient, and the Florida Supreme Court unreasonably applied *Strickland* in holding that Porter was not prejudiced by that deficiency. That counsel failed to conduct even a cursory investigation into Porter's background shows that his performance fell below an objective standard of reasonableness. See 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. And it was objectively unreasonable for the state court to conclude there was no reasonable probability the sentence would not have been different had the sentencing judge and jury heard the significant mitigation evidence Porter's counsel neither uncovered nor presented. See id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Certiorari granted in part; 552 F.3d 1260, reversed and remanded.

Judges: Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor.

Opinion

[*30] [**448] **Per Curiam.**

Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man. His commanding officer's moving description of those two battles was only a fraction of the mitigating evidence that his counsel [*31] failed to discover or present during the penalty phase of his trial in 1988.

In this federal postconviction proceeding, the District Court held that Porter's lawyer's failure to adduce that evidence violated his *Sixth Amendment* right to counsel and granted his application for a writ of habeas corpus. The Court of Appeals for the Eleventh Circuit reversed, on the ground that the Florida Supreme Court's determination that Porter

[**401] was not prejudiced by any deficient performance by his counsel was a reasonable application of [Strickland v. Washington](#), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Like the District Court, we are persuaded that it was objectively unreasonable to conclude there [****2] was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented. We therefore grant the petition for certiorari in part and reverse the judgment of the Court of Appeals.¹

I

Porter was convicted of two counts of first-degree murder for the shooting of his former girlfriend, Evelyn Williams, and her boyfriend, Walter Burrows. He was sentenced to death on the first count but not the second.

In July 1986, as his relationship with Williams was ending, Porter threatened to kill her and then left town. When he returned to Florida three months later, he attempted to see Williams, but her mother told him that Williams did not want to see him. He drove past Williams' house each of the two days prior to the shooting, and the night before the murder he visited Williams, who called the police. Porter then went to two cocktail lounges and spent the night with a friend, who testified Porter was quite drunk by 11 pm. Early the next morning, Porter shot Williams in her house. Burrows [*32] struggled with Porter [****3] and forced him outside where Porter shot him.

Porter represented himself, with standby counsel, for most of the pretrial proceedings and during the beginning of his trial. Near the completion of the State's case in chief, Porter pleaded guilty. He thereafter changed his mind about representing himself, and his standby counsel was appointed as his counsel for the penalty phase. During the penalty phase, the State attempted to prove four aggravating factors: Porter had been "previously convicted" of another violent felony (*i.e.*, in Williams' case, killing Burrows, and in his [**449] case, killing Williams);² the murder was committed during a burglary; the murder was committed in a cold, calculated, and premeditated manner; and the murder was especially heinous, atrocious, or cruel. The defense put

on only one witness, Porter's ex-wife, and read an excerpt from a deposition. The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son. Although his lawyer told the jury that Porter "has other handicaps that weren't apparent during the trial" and Porter was not "mentally healthy," he did [****4] not put on any evidence related to Porter's mental health. 3 Tr. 477-478 (Jan. 22, 1988).

The jury recommended the death sentence for both murders. The trial court found that the State had proved all four aggravating circumstances for the murder of Williams but that only [****402] the first two were established with respect to Burrows' murder. The trial court found no mitigating circumstances and imposed a death sentence for Williams' murder [*33] only. On direct appeal, the Florida Supreme Court affirmed the sentence over the dissent of two justices, but struck the heinous, atrocious, or cruel aggravating factor. [Porter v. State](#), 564 So. 2d 1060 (1990) (*per curiam*). The court found the State had not carried its burden on that factor because the "record is consistent [****5] with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful." *Id.*, at 1063 (emphasis deleted). The two dissenting justices would have reversed the penalty because the evidence of drunkenness, "combined with evidence of Porter's emotionally charged, desperate, frustrated desire to meet with his former lover, is sufficient to render the death penalty disproportional punishment in this instance." *Id.*, at 1065-1066 (Barkett, J., concurring in part and dissenting in part).

In 1995, Porter filed a petition for postconviction relief in state court, claiming his penalty-phase counsel failed to investigate and present mitigating evidence. The court conducted a 2-day evidentiary hearing, during which Porter presented extensive mitigating evidence, all of which was apparently unknown to his penalty-phase counsel. Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired [****6] mental health and mental capacity.

The depositions of his brother and sister described the abuse Porter suffered as a child. Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter

¹ We deny the petition insofar as it challenges his conviction.

² It is an aggravating factor under Florida law that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." [Fla. Stat. § 921.141\(5\)\(b\)](#) (1987). In Porter's case, the State established that factor by reference to Porter's contemporaneous convictions stemming from the same episode: two counts of murder and one count of aggravated assault. Tr. 5 (Mar. 4, 1988).

instead. According to his brother, Porter attended [*34] classes for slow learners and left school when he was 12 or 13.

To escape his horrible family life, Porter enlisted in the Army at age 17 and fought [**450] in the Korean War. His company commander, Lieutenant Colonel Sherman Pratt, testified at Porter's postconviction hearing. Porter was with the 2d Division, which had advanced above the 38th parallel to Kunu-ri when it was attacked by Chinese forces. Porter suffered a gunshot wound to the leg during the advance but was with the unit for the battle at Kunu-ri. While the 8th Army was withdrawing, the 2d Division was ordered to hold off the Chinese advance, enabling the bulk of [****7] the 8th Army to live to fight another day. As Colonel Pratt described it, the unit "went into position there in bitter cold night, terribly worn out, terribly weary, almost like zombies because we had been in constant--for five days we had been in constant contact with the enemy fighting our way to the rear, little or no sleep, little or no food, literally as I say zombies." 1 Tr. 138 (Jan. 4, 1996). The next morning, the unit engaged in a "fierce hand-to-hand fight with the Chinese" and later that day received permission to [***403] withdraw, making Porter's regiment the last unit of the 8th Army to withdraw. *Id.*, at 139-140.

Less than three months later, Porter fought in a second battle, at Chip'yong-ni. His regiment was cut off from the rest of the 8th Army and defended itself for two days and two nights under constant fire. After the enemy broke through the perimeter and overtook defensive positions on high ground, Porter's company was charged with retaking those positions. In the charge up the hill, the soldiers "were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire you can [****8] imagine and they were just dropping like flies as they went along." *Id.*, at 150. Porter's company lost all three of its platoon sergeants, [*35] and almost all of the officers were wounded. Porter was again wounded, and his company sustained the heaviest losses of any troops in the battle, with more than 50% casualties. Colonel Pratt testified that these battles were "very trying, horrifying experiences," particularly for Porter's company at Chip'yong-ni. *Id.*, at 152. Porter's unit was awarded the Presidential Unit Citation for the engagement at Chip'yong-ni, and Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations.

Colonel Pratt testified that Porter went absent without leave (AWOL) for two periods while in Korea. He explained that this was not uncommon, as soldiers sometimes became disoriented and separated from the unit, and that the commander had decided not to impose any punishment for the

absences. In Colonel Pratt's experience, an "awful lot of [veterans] come back nervous wrecks. Our [veterans] hospitals today are filled with people mentally trying to survive the perils and hardships [of] . . . the Korean War," particularly [****9] those who fought in the battles he described. *Id.*, at 153.

When Porter returned to the United States, he went AWOL for an extended period of time.³ He was sentenced to six months' imprisonment for that infraction, but he received an honorable discharge. After his discharge, he suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night.⁴ Porter's [**451] family eventually [*36] removed all of the knives from the house. According to Porter's brother, Porter developed a serious drinking problem and began drinking so heavily that he would get into fights and not remember them at all.

In addition to this testimony regarding his life history, Porter presented an expert in neuropsychology, Dr. Dee, who had examined Porter and administered a number of psychological assessments. Dr. Dee concluded that Porter suffered from brain damage that could manifest in impulsive, [***404] violent behavior. At the time of the crime, Dr. Dee testified, Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance, two statutory mitigating circumstances, *Fla. Stat. § 921.141(6)*. Dr. Dee also testified that Porter had substantial difficulties with reading, writing, and memory, and that these cognitive defects were present when he was evaluated for competency to stand trial. 2 Tr. 227-228 (Jan. 5, 1996); see also Record 904-906. Although the State's experts reached different conclusions regarding the statutory mitigators,⁵ each expert testified that he could not

³Porter explained to one of the doctors who examined him for competency to stand trial that he went AWOL in order to spend time with his son. Record 904.

⁴Porter's expert testified that these symptoms would "easily" warrant a diagnosis of posttraumatic stress disorder (PTSD). 2 Tr. 233 (Jan. 5, 1996). PTSD is not uncommon among veterans returning from combat. See Hearing on Fiscal Year 2010 Budget for Veterans' Programs before the Senate Committee on Veterans' Affairs, 111th Cong., 1st Sess., 63 (2009) (uncorrected copy) (testimony of Eric K. Shinseki, Secretary of Veterans Affairs (VA), [****10] reporting that approximately 23 % of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD).

⁵The [****11] State presented two experts, Dr. Riebsame and Dr. Kirkland. Neither of the State's experts had examined Porter, but each testified that based upon their review of the record, Porter met neither statutory mitigating circumstance.

diagnose Porter or rule out a brain abnormality. 2 Tr. 345, 382 (Jan. 5, 1996); 3 *id.*, at 405.

The trial judge who conducted the state postconviction hearing, without determining counsel's deficiency, held that Porter had not been prejudiced by the failure to introduce any of that evidence. Record 1203, 1206. He found that Porter had failed to establish any statutory mitigating circumstances, *id.*, at 1207, and that the nonstatutory mitigating evidence would not have made a difference in the outcome [*37] of the case, *id.*, at 1210. He discounted the evidence of Porter's alcohol abuse because it was inconsistent and discounted the evidence of Porter's abusive childhood because he was 54 years old at the time of the trial. He also concluded that Porter's periods of being AWOL would have reduced the impact of Porter's military service to "inconsequential proportions." *Id.*, at 1212. Finally, he held that even considering all three categories of evidence together, the "trial judge and jury still would have imposed death." *Id.*, at 1214.

The Florida Supreme Court affirmed. [****12] It first accepted the trial court's finding that Porter could not have established any statutory mitigating circumstances, based on the trial court's acceptance of the State's experts' conclusions in that regard. [Porter v. State, 788 So. 2d 917, 923 \(2001\)](#) (*per curiam*). It then held the trial court was correct to find "the additional nonstatutory mitigation to be lacking in weight because of the specific facts presented." [Id.](#), at 925. Like the postconviction court, the Florida Supreme Court reserved judgment regarding counsel's deficiency. *Ibid.*⁶ Two justices dissented, reasoning [**452] that counsel's failure to investigate and present mitigating evidence was "especially harmful" because of the divided vote affirming the sentence on direct appeal--"even without the substantial mitigation that we now know existed"--and because of the reversal of [*38] the heinous, atrocious, and cruel aggravating factor. [Id.](#), at [***405] 937 (Anstead, J., concurring in part and dissenting in part).

⁶The postconviction court stated defense counsel "was not ineffective for failing to pursue mental health evaluations and . . . [Porter] has thus failed to show sufficient evidence that any statutory mitigators could have [****13] been presented." Record 1210. It is not at all clear whether this stray comment addressed counsel's deficiency. If it did, then it was at most dictum, because the court expressly "decline[d] to make a determination regarding whether or not Defense Counsel was in fact deficient here." *Id.*, at 1206. The Florida Supreme Court simply paraphrased the postconviction court when it stated "trial counsel's decision not to pursue mental evaluations did not exceed the bounds for competent counsel." [Porter v. State, 788 So. 2d 917, 923-924 \(2001\)](#) (*per curiam*). But that court also expressly declined to answer the question of deficiency. [Id.](#), at 925.

Porter thereafter filed his federal habeas petition. The District Court held Porter's penalty-phase counsel had been ineffective. It first determined that counsel's performance had been deficient because "penalty-phase counsel did little, if any investigation . . . and failed to effectively advocate on behalf of his client before the jury." [Porter v. Crosby, No. 6:03-cv-1465-Orl-31KRS, 2007 U.S. Dist. LEXIS 44025, 2007 WL 1747316, *23 \(MD Fla., June 18, 2007\)](#). It then determined that counsel's deficient performance was prejudicial, finding that the state court's decision was contrary [****14] to clearly established law in part because the state court failed to consider the entirety of the evidence when reweighing the evidence in mitigation, including the trial evidence suggesting that "this was a crime of passion, that [Porter] was drinking heavily just hours before the murders, or that [Porter] had a good relationship with his son." [2007 U.S. Dist. LEXIS 44025, \[WL\] at *30](#).

The Eleventh Circuit reversed. It held the District Court had failed to appropriately defer to the state court's factual findings with respect to Porter's alcohol abuse and his mental health. [552 F.3d 1260, 1274, 1275 \(2008\)](#) (*per curiam*). The Court of Appeals then separately considered each category of mitigating evidence and held it was not unreasonable for the state court to discount each category as it did. [Id.](#), at 1274. Porter petitioned for a writ of certiorari. We grant the petition and reverse with respect to the Court of Appeals' disposition of Porter's ineffective-assistance claim.

II

[HNI](#)[↑] [LEdHNI](#)[1][↑] [1] To prevail under *Strickland*, Porter must show that his counsel's deficient performance prejudiced him. To establish deficiency, Porter must show his "counsel's representation fell below an objective standard of reasonableness." [466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674](#). [****15] To establish prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional [*39] errors, the result of the proceeding would have been different." [Id.](#), at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Finally, Porter is entitled to relief only if the state court's rejection of his claim of ineffective assistance of counsel was "contrary to, or involved an unreasonable application of", *Strickland*, or it rested "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

[HN2](#)[↑] [LEdHN2](#)[2][↑] [2] Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*. [Rompilla v. Beard, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 \(2005\)](#). It is unquestioned that under the prevailing professional norms at the time of Porter's trial, [HN3](#)[↑]

[LEdHN3](#)^[↑] [3] counsel had an "obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396, [*****453**] 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The investigation conducted by Porter's counsel clearly did not satisfy those norms.

Although Porter had initially elected to represent himself, his standby counsel became his counsel for the penalty phase a little over a month prior to the [*****16**] sentencing proceeding before the jury. It was the first time this lawyer had represented a defendant during a penalty-phase proceeding. At the postconviction hearing, he testified that he had only one short meeting with Porter regarding [*****406**] the penalty phase. He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family. In *Wiggins v. Smith*, 539 U.S. 510, 524, 525, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), we held counsel "fell short of . . . professional standards" for not expanding their investigation beyond the presentence investigation report and one set of records they obtained, particularly "in light of what counsel actually discovered" in the records. Here, counsel did not even take the first step of interviewing witnesses or requesting records. Cf. *Bobby v. Van Hook*, ante, at _____, 130 S. Ct. 13, 175 L. Ed. 2d 255 (holding performance not deficient when counsel gathered a substantial amount of information and then made a reasonable decision not to pursue additional [***40**] sources); *Strickland*, 466 U.S., at 699, 104 S. Ct. 2052, 80 L. Ed. 674 ("[Counsel's] decision not to seek more character or psychological evidence than was already in hand was . . . reasonable"). Beyond that, like the counsel in *Wiggins*, he ignored pertinent [*****17**] avenues for investigation of which he should have been aware. The court-ordered competency evaluations, for example, collectively reported Porter's very few years of regular school, his military service and wounds sustained in combat, and his father's "over-disciplin[e]." Record 902-906. As an explanation, counsel described Porter as fatalistic and uncooperative. But he acknowledged that although Porter instructed him not to speak with Porter's ex-wife or son, Porter did not give him any other instructions limiting the witnesses he could interview.

Counsel thus failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment. *Wiggins*, supra, at 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471. Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation. See *Rompilla*, supra, at 381-382, 125 S. Ct. 2456, 162 L. Ed. 2d 360.

III

Because we find Porter's counsel deficient, we must determine whether the Florida Supreme Court unreasonably applied *Strickland* in holding Porter was not prejudiced by that deficiency. Under *Strickland*, [*****18**] [HN4](#)^[↑] [LEdHN4](#)^[↑] [4] a defendant is prejudiced by his counsel's deficient performance if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S., at 694, 104 S. Ct. 2052, 80 L. Ed. 674. [HNS](#)^[↑] [LEdHN5](#)^[↑] [5] In Florida, the sentencing judge makes the determination as to the existence and weight of aggravating and mitigating circumstances and the punishment, *Fla. Stat. § 921.141(3)*, but he must give the jury verdict of life or death "great weight," *Tedder v. State*, 322 So. 2d 908, [***41**] 910 (*Fla.* 1975) (per curiam). [HN6](#)^[↑] [LEdHN6](#)^[↑] [6] Porter must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider "the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding" [*****454**] --and "reweig[h] it against the evidence in aggravation." *Williams*, supra, at 397-398, 120 S. Ct. 1495, 146 L. Ed. 2d 389.

[*****407**] This is not a case in which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge." *Strickland*, supra, at 700, 104 S. Ct. 2052, 80 L. Ed. 674. The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them [*****19**] to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with Williams, his crimes, and almost nothing else. Had Porter's counsel been effective, the judge and jury would have learned of the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins*, supra, at 535, 123 S. Ct. 2527, 156 L. Ed. 2d 471. They would have heard about (1) Porter's heroic military service in two of the most critical--and horrific--battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling. See *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable"). Instead, they heard absolutely none of that evidence, evidence which "might well have influenced the jury's appraisal of [Porter's] moral culpability." *Williams*, supra, at 398, 120 S. Ct. 1495, 146 L. Ed. 2d 389.

On the other side of the ledger, the weight [****20] of evidence in aggravation is not as substantial as the sentencing judge thought. As noted, the sentencing judge accepted the jury's [*42] recommendation of a death sentence for the murder of Williams but rejected the jury's death-sentence recommendation for the murder of Burrows. The sentencing judge believed that there were four aggravating circumstances related to the Williams murder but only two for the Burrows murder. Accordingly, the judge must have reasoned that the two aggravating circumstances that were present in both cases were insufficient to warrant a death sentence but that the two additional aggravating circumstances present with respect to the Williams murder were sufficient to tip the balance in favor of a death sentence. But the Florida Supreme Court rejected one of these additional aggravating circumstances, *i.e.*, that Williams' murder was especially heinous, atrocious, or cruel, finding the murder "consistent with . . . a crime of passion" even though premeditated to a heightened degree. [564 So. 2d, at 1063-1064](#). Had the judge and jury been able to place Porter's life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating [****21] side of the scale, there is clearly a reasonable probability that the advisory jury--and the sentencing judge--"would have struck a different balance," [Wiggins, supra, at 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471](#), and it is unreasonable to conclude otherwise.

The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough--or even cursory--investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing. [HN7](#) [↑] [LEdHN7](#) [↑] [7] Under Florida law, mental health evidence [***408] that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating. See, *e.g.*, [Hoskins v. State, 965 So. 2d 1, 17-18 \(Fla. 2007\)](#) (*per curiam*). Indeed, the Constitution [***455] requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." [Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 \(1982\)](#). Yet neither the postconviction trial court nor the Florida Supreme [***43] Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality [****22] and cognitive defects.⁷ While the State's experts identified perceived problems with the tests

that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge.

Furthermore, the Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service. It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams. It is also unreasonable to conclude that Porter's military service would be reduced to "inconsequential proportions," [788 So. 2d, at 925](#), simply because the jury would also have learned that Porter went AWOL on more than one occasion. Our Nation has [****23] a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did.⁸ Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating [*44] the intense stress and mental and emotional toll that combat took on Porter.⁹ The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea.

As the two dissenting justices in the Florida Supreme Court reasoned, "there exists too much mitigating evidence that was not presented to now be ignored." [Id., at 937](#) (Anstead, J., [***409] concurring in part and dissenting in part). Although the burden is on petitioner to show he was prejudiced by his counsel's deficiency, the Florida Supreme

⁸ See Abbott, *The Civil War and the Crime Wave of 1865-70*, 1 Soc. Serv. Rev. 212, 232-234 (1927) (discussing the movement to pardon or parole prisoners who were veterans of the Civil War); Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. Crim. L. & C. 722, 733-734 (1940) (describing a 1922 study by the Wisconsin Board of Control that discussed the number of veterans imprisoned in the State and considered "the greater leniency that may be shown to ex-service men in court").

⁹ Cf. [Cal. Penal Code Ann. § 1170.9\(a\)](#) [****24] (West Supp. 2009) (providing a special hearing for a person convicted of a crime "who alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military"); [Minn. Stat. § 609.115, Subd. 10](#) (2008) (providing for a special process at sentencing if the defendant is a veteran and has been diagnosed as having a mental illness by a qualified psychiatrist).

⁷ The Florida Supreme Court acknowledged that Porter had presented evidence of "statutory and nonstatutory mental mitigation," [788 So. 2d, at 921](#), but it did not consider Porter's mental health evidence in its discussion of nonstatutory mitigating evidence, [id., at 924](#).

Court's conclusion that Porter failed to meet this burden was an unreasonable application of our clearly established law. We do not require a defendant to show "that counsel's deficient conduct more likely than not altered the outcome" of his penalty proceeding, but rather that he establish "a probability sufficient to undermine **[**456]** confidence in [that] outcome." [Strickland, 466 U.S., at 693-694, 104 S. Ct. 2052, 80 L. Ed. 2d 674.](#) **[****25]** This Porter has done.

The petition for certiorari is granted in part, and the motion for leave to proceed *in forma pauperis* is granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

References

U.S.C.S., *Constitution, Amendment 6*; 28 U.S.C.S. § 2254(d)

Moore's Federal Practice §§ 635.02, 671.12 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law § 46.7; Habeas Corpus § 47

L Ed Index, Capital Offenses and Punishment

Supreme Court's construction and application of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provision (28 U.S.C.S. § 2254(d)), restricting grant of federal habeas corpus relief to state prisoner on claim already adjudicated by state court on merits. [154 L. Ed. 2d 1147.](#)

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances--Supreme Court cases. [111 L. Ed. 2d 947.](#)

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. [90 L. Ed. 2d 1001.](#)

When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel--Supreme Court cases. [83 L. Ed. 2d 1112.](#)



ENTRY INFORMATION FOR INCARCERATED VETERANS

The New York State Division of Veterans' Affairs thanks you for your service to our Nation. As a justice-involved Veteran, you need to know certain pieces of information regarding the benefits that you earned through your military service. This document briefly summarizes key points that you should have at your disposal.

Despite your incarceration, you and your family members may be eligible to receive certain benefits from the United States Department of Veterans Affairs (VA). However, you also have certain obligations regarding specific benefits that you may be already receiving. Understanding this information will avoid problems with the federal government during your incarceration and upon your release, and ensure that you receive the full complement of benefits that you deserve.

Notifying The VA

You need to notify the VA and inform them about your incarceration. Otherwise, if the VA continues paying you as if you were not incarcerated, they can hold that you have been overpaid. **The VA can then withhold all financial benefits from you and your family until the overpayment is recovered.**

To prevent that from happening, ensure that the VA receives notice in writing from you stating that you are incarcerated. Ask that the VA send you written confirmation of this receipt. Keep a copy of both your letter to the VA and the VA's confirming response.

When you get out of prison, you also need to notify the VA with proof of your release. Otherwise, the VA will assume that you are still incarcerated, and will continue paying your benefits at a reduced rate.

If you are released on parole, an original letter (not a photocopy) from your parole agent on government stationery should suffice as proof. A "movement history" from your parole agent generally will not be enough for VA purposes. Again, ask that the VA send written confirmation of receiving your letter of notification. Keep a copy of your letter to the VA and the VA's confirming response.

Disability Compensation

If you are presently receiving disability compensation payments from the VA, these payments **do not necessarily stop** because you are incarcerated.

If you are convicted of a **misdemeanor, or a felony for which you are incarcerated for fewer than 60 days, your benefits payments are not reduced.**

If you are convicted of a felony and imprisoned for more than 60 days, your disability compensation payments **will not stop, but will be reduced.**

- If you have a VA disability rating of **20% or higher**, you will be paid as if your disability rating were 10% during your period of incarceration.
- If you have a VA disability rating of **10%**, your current payment at the 10% rating level will be cut in half during your period of incarceration.
- Payments are **not reduced** for recipients participating in **work release programs, residing in halfway houses, or under community control.**

Apportionment To Dependent Family Members

While you are imprisoned, your family may be able to receive all or part of the portion by which your benefits are reduced. For instance, if you have a disability rating of 70% when you enter prison, you will personally receive payment at a 10% rating level while imprisoned, but your family can apply to the VA to receive up to the remaining 60% of your benefits.

However, this is not automatic. Your family must apply to the VA for “Apportionment” using VA Form 21-0788. A copy of that form is attached to this letter. This form is also available on the VA’s website (www.va.gov).

The VA determines how much money from a Veteran’s remaining benefits will be apportioned to his or her spouse, children, and/or dependent parent(s) **based on individual need.** The VA will evaluate factors such as the applying family member’s household income and living expenses, and the number of family members applying, when deciding how much money from an incarcerated Veteran’s benefits to apportion to the family.

Pension

If you are receiving a non-service-connected VA pension, **the VA will terminate pension payments on your sixty-first day of imprisonment, regardless of whether you are serving prison time for a felony or a misdemeanor.**

When you are released, you can apply for a VA pension again, and the VA can grant you a pension if you still meet all of the eligibility requirements (i.e., income below the Congressionally established limit, assets that are not deemed “excessive” by the VA, etc.).

Education Benefits

If you are incarcerated for committing a **misdemeanor**, and you are receiving education benefits from the VA when you entered prison, you can continue receiving your **full monthly education benefits** while you are incarcerated.

If you are incarcerated for committing a **felony**, then you can be paid only the costs of **tuition, fees, books, and equipment or supplies** from the VA. You can receive these payments only if another federal, state, or local program is not already paying for these items.

If you are convicted of a felony, and you are **participating in a work release program or residing in a halfway house** (also called a “residential re-entry center”), then you can continue receiving your **full monthly education benefits**.

Health Care For Re-Entry Veterans

The Health Care For Re-Entry Veterans program (HCRV) aims to address the physical and mental care needs of Veterans returning to the community, including connection to health care benefits that your military service earned.

Importantly, planning for these post-release steps should begin during your period of incarceration. Beginning at least one year before your conditional release date or maximum sentence date, you should request to be placed on call out to meet with your facility’s Veterans Liaison to discuss the HCRV program and other VA benefits that may be available to you upon your release.