

DISABILITY AND THE MILITARY COMMUNITY

This is a verbatim transcript of the March 29, 2019 symposium panel. The video of the panel is available at: http://bit.ly/Military_ADAAA.

Speaker names are in bold, followed by the minute and second marks in parenthesis to indicate the location at which the remarks begin on the corresponding video.

Nicole Tuchinda¹ (moderator) (00:01)

Thank you, all of you for coming to this panel session on disability and the military. We're so glad that you're here. And I'm the moderator, Nicole Tuchinda. I'm here with fantastic panelists who do wonderful extremely valuable work to protect and advance the rights the disability rights of servicemembers and veterans. So, I just want to start off by talking about a few numbers, but I'll get real personal, real quick. But.

So, since 2001, since 2001, there have been 2.7 million service members who have volunteered to go to the war zones of Iraq and Afghanistan. Of those, 6,809 were killed in the war zone. And 52,010 were wounded in action. But the number of people who submitted disability claims is extremely high. Nearly a million, 970,000 of the, of the members who went to Iraq and Afghanistan claimed for disability. Now if you had to volunteer for a job and knew that meant you had a 1 in 3 or 1 in 4 chance of thinking that you needed to claim disability because you, you were, have, because you had new limitations that impaired your ability to return to your old job or to have the health and well-being that you had before you served, would you take that? Would you take that job? Would you volunteer?

And just bring it closer to home, I think that I was chosen to be the moderator for this panel because I'm a military spouse. My husband's in the U.S. Navy and he's been in it for the last 10 years. We had three kids during that time and all along we knew that he, he might have to make the ultimate sacrifice. He's been deployed four times and we have three kids, so our seven-year-old has been away from his father for a year and a half due to the four deployments. And so, and I, and most of the time when people think about military disability, they might think of the IEDs or the gun shots that wound and kill service members, but I also want to just point out that unlike any other job in the United States, you can never say, you generally cannot say no when you're ordered to do something when you are a service member. And I'll just point it out to illustrate that by a story about my husband, who is a surgeon at Walter Reed, and he joined the military because it supported his values, but also to help pay for medical school.

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And in residency there are limits of 80 hours per week when a resident can work, and individuals', residents are not supposed to have shifts of longer than 30 hours at a time. My husband's surgeon partner had to deploy for a six-month period of time. And during that period of time he spent over 200 days on call. That's way more than 80 hours a week, more than 30 hours a shift. That's 200 days when he could receive any call and would have to go in to operate if needed, and do whatever it took to follow his orders or face the consequences of a court martial, which could result in five years of incarceration. So, I just want to tell you that, I want to highlight sort of that-that the impact on that and insomnia was just one of, [*Laughter*] one of the repercussions of that type of work demand.

And I realize that my husband had lots of privileges to being a military officer, as well as a physician in the military. But the wear and tear on folks who serve is really, really profound and-and is, as you can see by the numbers, I gave are way beyond physical. So, I so, I want to just note that I thank all of the panelists for coming today. Because they serve, they play such a vital role in protecting the rights of our service members and helping them to return to a healthy and productive lives after their service and during. And since we're so, we don't have very much time, I'm going to ask each of you to introduce what you do and what you do to protect and improve disability rates for people who have served in the military. And can you also tell us about what kinds of cases and issues are pressing in well, in your work right now and also what kinds of systems change you think needs to happen going forward. We'll start with David Boelzner.

David Boelzner² (05:42)

You want us to do that all-in order or introduce first and just as we go.

Nicole Tuchinda (06:45)

Why don't you just introduce as you speak, and we'll have about eight minutes per person. And then we'll have time for questions. Thanks.

David Boelzner (0:5:53)

Ok, I'm setting my watch so that I don't go over. I'm Dave Boelzner. I'm on the faculty at William and Mary and I co-direct the Veterans Benefits Clinic there. And we assist veterans with disability benefits. So, my task this morning is to sort of give you the overview of the system. There are actually three of us on the panel who are involved with disability benefits and we sort of coordinated our remarks, so we wouldn't overlap. So, we'll hope that we do--do well at that.

The first thing to say I think is that the V.A. provides a great many benefits to veterans. There are a variety of programs, health care of course is huge, huge benefit that's very important to many veterans. Education, G.I. bill also extremely important. But

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disability compensation is a focus of many veterans, a very valuable benefit, if you can get it because it is tax-free income. It runs from about 190 dollars a month at the low end up to over 3,000 a month. So that can be a pretty valuable benefit if you can get it. And so many veterans are interested in getting it. And so that's, that's what we work with. The amount that you get paid is based on how severe your disability is and also, some, how many dependents you have, can affect it as well.

If you do this work as we all do, you will get frustrated. You will get angry. You will get annoyed, and you will get stressed, cynical, and I find that it's helpful to tell our students, sort of how we got to this system that we have, because it is so frustrating. And it's a little helpful if you can understand why it's as peculiar as it is and frustrating as it is. So just very quickly sort of where we got--how we got what we got.

The original benefits payment to veterans in this country were cash payments called pension, or sometimes bonus, and they were just cash pay in exchange for having fulfilled your military commitment.

But around the Civil War, during the Civil War, there was a lot of corruption by agents and attorneys representing, helping veterans, which really meant they were helping themselves to a big portion of the benefits and the veterans weren't getting many of them. And so, Congress put its foot down and said enough. They capped the amount of money that a lawyer could be paid to represent a veteran on a claim at \$5 at first, raised it to \$10. It never changed thereafter from 1860's to 1988, 120 years or more, it stayed that. As a result of which, you don't have a lot of lawyers helping veterans thereafter, because lawyers have to be paid for their money. So that has led to the evolution of a system that was not designed to have legal representation, even though what you're doing is trying to get a legal claim, in a sense, in essence a legal claim pursuit.

So, after World War I, the Great Depression of course set in and everybody in the country was hard up, and the idea of handing out cash payments to veterans was not very popular with the public at that point as you might imagine. So, Congress sort of decided that a better course would be to tie benefits to something that the veteran had lost, namely a disability. So, they switched over to compensation. And so, the money is paid based on your impairment of your ability to work. Seemed like a good idea at the time, probably was a good idea, politically as well as anything. But what probably no one foresaw was that if you're going to determine whether a disability is related to something that happened in service, you have to have an adjudication. You have to have this whole apparatus of judges or people acting like judges, evidence, medical evidence, and legal argumentation. And so, you have this whole adjudicatory system within the agency, the V.A., that gets very complicated and it has, due to many factors, has gotten very slow and delayed.

So, but you need medical evidence on whether--what the disability is, whether it is in fact related to something that happened in the service, because you have to make that showing. So, it's a huge task. So, some odd aspects of the system as a result of the way we got it. One is that--that the--these are medical legal determinations right

involving medicine, involving law. The people who make the initial decisions at the V.A. are not lawyers and they are not doctors. They are essentially clerks, many of high school educated, many times, and they are operating according to an instruction manual that tells them how to do it step by step, called the M21-1. So, as you might imagine that results in a rather strict and channeled way of thinking and, and often, unsatisfactory decision at the beginning. Lawyers are now actually permitted to represent veterans before the V.A. at certain stages, but they still are not permitted to be paid to represent a veteran until the initial decision has been made by the agency. Now if, some of you may be thinking, well gee that would be a place where the lawyer could be particularly helpful in getting the claim together and the proof and what sort of evidence will be helpful. And you'd be right.

It would be a great thing to have happen, but it doesn't happen. It was a political compromise back in the late 80's and so, lawyers are still not permitted to represent veterans at that initial stage. One of the things my clinic does is, we are able to help veterans at that stage because we don't take fees. We're pro-bono essentially. And so, we're able to help with that stage, but a regular lawyer, such as I was in private practice for 12 years, really can't do it because you can't afford to do it, except very occasionally pro-bono. Another peculiar thing because it's a non-lawyer and unrepresented type of claim, the system is set up to be veteran friendly and V.A. has certain duties to help get the evidence together on the claim. And so, in theory, it is a system set up to help veterans without the assistance of counsel, put a claim together and pursue it. In reality, anybody who works in this system will tell you it is anything but veteran friendly. If anything, it seems veteran hostile many times for a variety of reasons. I could give you speculation later, but I won't do it at this point.

So, V.A. does have to help with certain aspects of the claim, and they have a duty to get-gather certain records. And I have to say candidly I think V.A. does fairly well at collecting records. There are issues from time to time, but I'd say they do this pretty well. The other thing. V.A. is obliged to do is if there is medical evidence or medical opinion needed to decide the claim fairly, V.A. is supposed to provide that medical opinion and it does lots of lots of these compensation and pension exams. C&P exams, they are a disaster, unmitigated disaster. Once in a while you'll get a good one. But by and large you get a very bad one because V.A. is trying to do two and a half million of these exams every year. They don't have the staff; they don't have the resources to do it. They're contracting a lot of them out. And for a lot of reasons the quality of the medical exam that you get is often very poor and sometimes downright hostile to the veterans claim. We do a lot of fighting in the clinic over medical exams that V.A. has gotten. Even if you have good evidence, medical evidence of your own the V.A. will say, well we need to get our own opinion, which often comes against the claim. And so, you're fighting that all the time.

So, here's the, here's the process in a nutshell. The claim is submitted through a central submission point but then it goes out usually to the regional office in the state near the veteran where it's administered. Evidence is gathered from the veteran, from the doctor if necessary, records. And then there's a decision by the regional office. This is the point at which a lawyer can now get involved, after that initial decision. If they

grant service-connection, determined the disability is related to service, then they'll rate the disability on how severe it is and base your payment on that monthly amount. Your monthly payment on that-that-that impairment goes up in 10% increments. If they deny either service-connection or you're not happy with the rating they assign, then you can appeal. And you now have, as of last month, a brand-new system for appeal. They've-- they've changed it. But it boils down to this, you can, you can get a review by a senior reviewer at the V.A., at the V.A. who just has handled more claims. Take a second look at it see if anything was missed and see if they'll change the decision. No new evidence may be considered now by that reviewer. That's different from the way it used to be. Or you can go to the Board of Veterans Appeals and this is the first level at which a lawyer will actually take a look at the claim, usually.

Again, no new evidence may be considered. Sorry about the type-o there. If you have evidence, more evidence that you want to submit to bolster your claim you can submit it, but you have to opt for the third lane, which is a supplemental claim and they'll, they'll take a second review and issue a new decision on it. There are provisions that sort of protect your effective date of benefits if you go through these processes that I won't go into at this point and you can move from one lane to the other if you're disappointed. Ultimately, if you get a board decision you're not happy with, you are also able to appeal outside the agency for a court review.

This is what changed in 1988. There didn't used to be any review of what the agency decided. But now you can go to court. There's a special court: the Court of Appeals for Veterans Claims that has initial jurisdiction. They will usually, when they decide the claim, usually the remedy is they send it back for correction of errors gathering more evidence or whatever. This process tends to repeat over and over, because they'll fix one thing. It goes back. They don't fix everything. It goes back again. And one judge has referred to it as the hamster wheel of veteran's benefits because it does that. You can also seek review in the Federal Circuit if you don't like the Veterans Court decision. Very limited jurisdiction there and not very much help from that court frankly. It has to be a pure question of law, which is hard to scrape up. You can also petition the Supreme Court for cert and the Supreme Court does occasionally decide a veteran's claim. That's it, I think I almost made it.

Nicole Tuchinda (17:07)

Thank you so much. By the way, we got extra time so we're actually ending at 1:25 and there's food in the back. Please grab some. There's vegan and veggie in the hallway and. Thank you.

Brandy Disbennett³ (17:24)

All right great. So, my name is Brandy Disbennett. I am the training manager for the Virginia Department of Veterans Services. We are a, we're a state organization. So, we're all state employees. We are--we operate like a VSO or like a Veteran's Service Organization. So, when you think about those other kind of Big Six, DAV, and that's MOAA next to me, those are the folks that that kind of, we're in line with. So, whereas Dave was telling you that attorneys can't pick up until after that initial decision, VSOs are there to help with that client getting through the initial decision and getting through that initial claim.

Now certainly we do appeals as well and VSOs across the board also do appeals. But this is really the space that was supposed to, was created by V.A. to be this kind of veteran friendly, to-to help them get through this administrative process.

So, I would say kind of first the challenge is the volume of claimants. Right? Because the VSOs, because there's no other place for veterans to seek help, unless they want to do it pro se, they're all coming into VSO. Now in Virginia we have eight hundred thousand veterans, approximately, we at DVS have 34 offices across the state. And then our VSO partners as well. So, you're always dealing with volume. There's people coming in every day seeking help for how to get through this initial claim. So, our job is really to-to help prepare that person and to facilitate that process.

Preparedness is one thing that, that is a challenge for us as a VSO, because as Dave said there's frustrations in this process. So, we can put together the best claim in the world and yet we have to counsel our veterans that V.A. could still deny this claim. So, there's, there's always frustration in terms of what should happen with the claim and what actually does happen with the claim. So, there's a lot of education that goes into the process so that we're making sure that that veteran is fully prepared, when we kind of send them down the line with their claim. So, the first thing that we do is explain that, and as Dave said, the main benefit that we're all working with is that service-connected disability compensation benefit.

So, when you're talking about service-connection, there's three prongs that-that veteran has to meet. You have to have an in-service event: injury; illness; diagnosis; something that happened to you in service. Hopefully, it's documented somewhere. You have to have a current diagnosed condition. Right? Something still has to be currently wrong with you, a diagnosis on file that has to be chronic and there's a couple of different exceptions to that in terms of getting that chronic diagnosis, and then you have to have a nexus. So, you're building the bridge between those two, between whatever happened to you in service to whatever you're experiencing today. There has to be a relationship there. That relationship normally comes from a doctor saying we believe it's

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at least as likely as not, which is V.A. magic language, that the kind of diagnosed condition is related to whatever happened in service. And--and that's where the gap really lives. That is where a claim tends to be denied. The majority of the time is that there's not this nexus piece in the middle that the veteran can actually go and get.

So, there's hurdles in developing these three prong. First, when you're talking about that in-service event. Like I said, hopefully it's documented. I'd say maybe eight times out of ten, it's not. So those things like I hurt my knee or I twisted my ankle while I was running, or you know, this--some kind of event happened, or it could be a stressor event or anything like that. A lot of times, it's not in the medical records because that veteran isn't actively seeking--seeking treatment. They're not going to go to the doc or just sick call every time they're knee hurt. They're gonna take Motrin and drink water and move on. So, a lot of this stuff doesn't actually end up in the service treatment records so that we can go back and say, well yes you did have six times that you went for your knee. That just doesn't happen. So, so there's a gap there that we're trying to fill. The current diagnosed condition we could have a gap there as well depending on that veteran's access to health care. So, there is the V.A. health care system. Some veterans and there's various ways that you can be eligible for V.H.A. care, but sometimes that eligibility stems from having a service-connected disability first.

So sometimes they don't have that current diagnosed condition and they don't have a way to get it. So sometimes that's the gap, going into the claim and then, like I said, the nexus is usually always a gap, because you're--you're trying to ask a doctor to say, especially when you're far removed from service that--that knee sprain that happened 20 years ago is the same reason that you have arthritis in your knee today. And that can be a hard place for a doc to be and want to actually put that opinion out there. Even though it's not a medical certainty standard, it's just this at least as likely as not, there's so much between that can happen in that 20 years that really makes that doctor hesitate before they put that down in writing.

So those are a lot of the gaps that get you in. So, V.A. does have that duty to assist, as Dave talked about, that allows a claimant to say, hey this is my claim, but you've got to help me put this together. I'm missing this diagnosis; I'm missing a nexus. This is what happened to me in service. This is what I'm experiencing today. Please order an exam for me and that exam, therein, lies even more frustration.

So, when that veteran shows up at the exam. The doc may or may not have reviewed all of the records the V.A. has before the exam. Sometimes they do it after the exam, sometimes they don't do it at all. But ideally, they do it before the exam. Now that may not be very helpful if there's no private treatment records, there's no continuity of care, there may not be a diagnosis there, and there may not be anything in the service record. So, you come in that C&P exam is normally 15-20 minutes. I'd say at the best-case scenario, where that doctor is trying to get an entire history of what's going on and then form that opinion too. It's a checklist. OK. There's not really a whole lot of room for creativity or for probing in these exams. The doc is trying to move through, and they've got another exam behind you, and another exam behind that, and another exam behind

that. So, it's a churn and--and again they're not being very creative. They're doing their job and they're answering that checklist. They're not the treatment provider. OK.

So even if that veteran were in the V.A. Medical Center and enrolled, they're not going to their doctor for this exam. They're going to a doc they've never seen before, have no relationship with whatsoever. So then think about that veteran walking in, to an unknown doctor, knowing they're in this administrative process and that their entire claim turns on this-this exam. What do you say? How do you most effectively present your case and especially when you're talking about psychiatric disorders like PTSD? How do you relay an entire history in 20 minutes and make yourself sound credible and competent to that examiner? It's--it's nearly impossible. So, what do we do to try to help that veteran get through that claim? We try to develop a bunch of evidence on the front end. Right? So, that when you actually do get in front of that doc there is something in the file. Sometimes that has to take the effect of, or take the form of a lay statement. So, you're getting the veteran to write down everything that happened. Ok?

Or you're getting veteran's significant others, or siblings, or somebody that they knew in service or shortly thereafter service to say yes, this event happened, or I saw the ramifications of this event. You know, I saw him when he was in a brace or I saw him when his personality changed. Right? He didn't come back the same as he went in. So those types of statements can really help round out a file and put a lot of context there. And then we try as best we can to--to get private treatment records, if they exist, or if those service records, if they may exist. We try to look through those and kind of pull that information out. So. But it's difficult when you have a culture that's, while in the military almost discourages you from seeking treatment, and then when you come out and you're trying to fulfill this claim, there's no evidence there to go back and rely on and V.A. is not going to do anything unless they can check all three boxes.

So, the question to the panel is about remedies and changes that we would recommend. It's very difficult to say that. [*Laughter*] You know, I wish the V.A. would consider lay statements more than they do. A lay statement can be credible and can be competent and can be really good evidence. But V.A. a lot of times doesn't like to be there. They don't like to be in that realm where they're basing a claim entirely on a lay statement and you still have to have the medical evidence to go with it. So. But that's just such a challenge. You could overhaul the entire C&P process. You would need a ton of resources and a ton of money to do it though.

So, I think I answered all your questions. [*Laughter*] So, I will pass to Aniela.

Aniela Szymanski⁴ (27:21)

Do you want me to go next or Peter? Do you want me to go next or Peter? Then I will. I will keep going.

⁴ Civil Affairs Officer, U.S. Marine Corps Reserves, and Director of Veterans and Survivor Services, Military Officers Association of America.

So. My name is Aniela Szymanski and I work in my full-time job at Military Officers Association of America, where I do spend the majority of my time lobbying Congress for laws related to military and veteran disability and benefits issues. And I'd like to first mention that when I think about disability and the military, that the first thing that comes to mind is that the Department of Defense issued a memo last October. It came out October 1, 2018, which said that if a service member is non-deployable due to a physical or mental condition for 12 months or longer, they have to be kicked out of the military and cannot continue serving. And this came about because there was an impression, I don't know how valid this was or whether there were real statistics behind it. But there was a perception that service meant that some service members were staying on active duty yet were unable to deploy because they had some condition preventing them from being fully deployable and thus the burden of deployment was falling on a smaller group of service members that had to repeatedly deploy, while these other sort of broken service members were just hanging out, collecting paychecks was the perception.

I don't, I don't know that there was an in-depth analysis done of whether perception was actually valid or not. But this memo came out and last week Acting Secretary Shanahan, Acting Secretary of Defense Shanahan said, testified before Congress that twenty-one thousand, the way that he termed it was, twenty-one thousand fewer service members are non-deployable. So, it was unclear whether that meant twenty-one thousand had been kicked out of the military because of that, or there was some other reason for them no longer being non-deployable.

Other defense special officials have said that since the memo was issued one hundred and twenty thousand service members have gone from a non-deployable status to a deployable status, which to me seems to mean that whatever their condition was, they either got better or they just went into a deployable status possibly with the condition continuing. And this creates a problem because in--when we think about military and disabilities there are actually three different systems. Three different legal systems that touch these service members. One is the Department of Defense system, which will decide whether somebody can, like I said stay in the military, if they can't stay in the military because of a medical condition then they would either be medically separated or medically retired.

And if they are medically retired, they continue receiving a medical retirement military paycheck, not paycheck, military retirement check for the rest of their life from the time that they are medically retired military and DOD has their own process for determining that.

Then there is a separate V.A. process for determining what their V.A. disability would be. So, V.A. if they find a service member, a veteran has been disabled will pay them disability compensation through the V.A., separate from their military retirement. In certain circumstances those are offset and if your injury didn't happen in a combat zone or if you are less than 50 percent disabled by military standards then you can't receive both. But in large number of circumstances the disabled service member would receive both their disability retirement from DOD and their V.A. disability compensation.

Then there's a whole third system of Social Security Disability because military members pay into the Social Security system and can avail themselves of Social Security Disability as well.

So, there's a possibility that there are three different legal systems that this veteran/service member is going to have to navigate. And I'll tell you it is extremely rare to find a lawyer that operates in all three of those. You, like, the service member likely need three different lawyers: a Social Security Disability lawyer; a V.A. disability lawyer; and possibly a lawyer to get them through the medical board process within DOD. So, it's extremely arduous on these service members to even know where to begin and to know everything they have to do in order to get through this process.

And I'd like to talk a little bit about some of the pressing issues. And one of the pressing issues that we are currently struggling with dealing is, how to deal with toxic exposures and the conditions that result from them. And this is very difficult because toxic exposures often--often happen in combat zones. They don't always happen in combat zones. I know that you may have heard of the toxic water exposure in Camp Lejeune, North Carolina. So, it could be on military bases also and they also sometimes happen unfortunately in family housing. If you've seen some of the news reports lately about the mold infestations in military family housing or pesticides being used or lead paint being used in these houses and families being exposed to those toxins while they're living in military housing. It can happen there too. And the biggest challenge is identifying who has been exposed and documenting that exposure. So, that later on when they do go to the V.A. and say I have this respiratory condition or I have this cancer and it was most likely I think caused by things I was exposed to in the military, that there is some way that, that could be tied back. If there is no documentation that this exposure occurred while the person was in the military, it's very difficult to even get to step one, that I was exposed, and this condition was caused by it.

So, if you can't even get to the "I was exposed" part, it's really hard to get past even the--the front door of V.A. to get treatment because a lot of these, a lot of these veterans don't really care about the disability compensation as much as they care about getting access to the health care for these conditions. Because one of the unfortunate circumstances is that disabled veterans tend to have higher unemployment rates after they leave service and therefore may not have access to the same health care resources that somebody who, you know, is not disabled, has a full time job with benefits and is able to cope with these issues much, much more easier. And I find that, that's a common misconception especially among politicians. No surprise. That these veterans are just wanting to go after money, just want disability compensation, when really if you look at how veterans enter the V.A. system, a vast majority of them enter the V.A. system, first going to V.A. for health care and then say--and then being told, "oh you have this condition because of service. You should also apply for disability compensation," not vice versa.

So, I think that it's important to understand that there are deeper motivations than just trying to get money from the government at play when these conditions are--are being dealt with. Also, the biggest pressing issue is identifying what these toxic

exposures cause and this is exceptionally problematic because if you speak to Environmental Health experts, they will tell you, "Well I don't know what the burn pits in Afghanistan cause because I would need a sample of that air to let you know what toxins are in that air to know whether this occurred." So, it's really never going to be an exact science.

And that's really difficult to--for veterans to then be able to prove that something happened to them because of military service because there is no exact science. But where that, where--where those gaps exist are gaps where Congress can fill in these issues with legal presumptions and this happened with Agent Orange Exposure. So. If you read any of the articles about why the V.A. hates Agent Orange Exposure presumptions, presuming that people were exposed to Agent Orange, they will tell you it's because the science isn't there. But the science is very clear about what Agent Orange does to the human body. There's no, there's no argument about what that, what Agent Orange does to people. The argument is about who was exposed to this Agent Orange and that's not a science issue. That's a record keeping issue. And unfortunately, in the Vietnam era there were very poor records of where Agent Orange went, how far it was, how far it drifted into the water system, how far it was sprayed over, over bays and harbors. So, the real problem is record keeping in these situations.

Then the second problem is proving what is caused by those exposures. So those are areas that really the government needs to act in filling in those gaps with legislative-- with legal presumptions and doing things like what we've done with Agent Orange. We're going to presume you were exposed because there's no way you can prove you're exposed to this. But that makes the government really uneasy because it means they're on the hook for paying all of this money to you and the budget is always an issue, is always a topic of discussion when it comes to convincing Congress to institute these presumptions. The first question that they asked me when I come to their office and talk about veterans' benefits is how are you going to pay for this. And [*Laughter*] they're right.

And another emerging issue, another pressing issue is women veterans. This chart shows the number of active duty military personnel from 1945 to 2015. So, we're not even at our peak of women veterans right now as you can see it peaked probably in about 1989. But what we are at the peak of, is women participating in fields that they didn't participate in before, and therefore getting injuries that we didn't see before and getting exposures that we didn't see before.

So, one of the things that I am really concerned about as a woman veteran myself, still serving, is how traumatic brain injuries impact women. There is very little, if any, information on how a traumatic brain injury will differently impact a woman versus a man. And there are differences that we've been able to identify from non-military studies from just women who have been in car accidents or in sports and how that might impact them differently and this goes into issues such as fertility, neurocognitive processing because all of our brains are not the same, as anybody who's married might know. [*Laughter*]

So, I think that this is a really pressing issue that needs to be addressed by V.A., by DOD, and by our government as a whole. Congress could address this through granting funding and finding other ways to study this issue because it's very important. Also, mental health is, it's not necessarily an emerging issue for women veterans, but it is a pressing issue because studies have found that women veterans commit suicide at much higher rates, at about four times the rate as male veterans commit suicide at. And they report depression at about 140% times the rate as male veterans. So, we know that something's happening mental health wise with women and with--with women service members and veterans. But I don't think we know enough yet about what causes that and how to either prevent or treat it effectively. If you search women veterans and V.A. health care, you'll probably see a lot of articles about women who have been made to feel very unwelcome in V.A. health centers because they will be sexually harassed or, or they'll be subject to comments of "where's is your husband?" and sort of things that are disrespectful to the service that they provided to their nation that can very deeply impact them, especially if they're already in a, in a unwell state. So, I think that more needs to be done in that area and that there's a lot of opportunity there for women.

So, one of the things that I really would like to see a system change in is the medical retirement separation system for the military. I mentioned that--that system exists. So, in the medical retirement separation system within DOD, at your first go through the system when you're, when the DOD is deciding whether to medically retire or separate you, they can make a decision. They make a decision based on the same exams that V.A. It's now called the Integrated Disability Evaluation System.

So, at some point thankfully someone came up with the idea we have these two different legal systems, let's integrate V.A. and DOD. So now, thankfully, it is integrated into the Integrated Disability Evaluation System. So the service member will be flagged for, okay you've been twelve months, you've been unable to deploy. We're putting you through the medical board system and then V.A., they send them to V.A. doctors to get their medical exams to determine what their disabling conditions are, and then V.A. makes a rating decision on what percentage those disabilities should be rated. At and then DOD is required to use the same information in their determination of medical retirement or separation. So, if V.A. says you have PTSD and it's 50% disabling, then the DOD has to also assign a 50% medical retirement rating for that service member.

The loophole exists, in that the DOD can unilaterally decide that instead of saying you are medically retired, have a nice life, they can say we're putting you on the temporary disabled, retired list and in a couple of years we're going to call you back and re-evaluate your conditions. And at the point that that happens the Integrated Disability Evaluation System ends, and it goes into the legacy system. And the legacy system is the old system where DOD didn't--wasn't required to accept these ratings and findings. So, in a couple of years, the service member could be brought back, and DOD can say I think your PTSD has gotten better. You're now at 10% and the service member can say well V.A. says I'm still at 50% or maybe V.A. even increased it to 100% and DOD can say, "I don't care. That's not binding on me anymore and I'm taking your military retirement away." So that's a system, that's a loophole in the system that is very

disturbing to me and I don't think that that was the intent, original intent, of the Integrated Disability Evaluation System to create this way that DOD can come back and reduce ratings later. So that's a serious problem that I think is long overdue in getting addressed.

So, the other trend I wanted to mention is just that legislatively, what I've seen is a lot of politicians, kind of being under the impression that if veterans just went back to work, they would be fine. And maybe what their problem is, is that they're sitting at home, thinking they're disabled, collecting a \$3000 disability check every month, playing Xbox and not getting off their butt and getting back to work. If you would just get back to work, you would be fine. And I don't mean to point fingers at anybody, but this tends to coincide with a little like PR tour that Sebastian Junger did on Capitol Hill, for his book called The Tribe. And Sebastian Junger wrote a book called The Tribe, and in The Tribe, he talks about how previous eras of veterans didn't have the option to collect disability compensation. They were forced to work so they would have to come back from World War II and go back to work on their farm and then they appeared to be coping much better because they were part of their tribe again. They went back to the tribe that they had known, and they were accepted, and they had this support structure. But I'm not 100% convinced that that's how it is the case. And if it is, where, we live in a different society now, then we did post-World War II. So, I don't know that we can use the same concepts now, that we that that appear to have worked then. And considering that in World War II they didn't even understand that PTSD existed, I'm not sure that we can make an educated analysis.

So, what I find is that Congress is constantly wanting to draw down V.A. benefits and increase their, the ability for veterans to work, which is great. But if you're doing it just because you want to save the government money, that's not so great. Just to deny disability compensation in the guise of, we don't want to pay you, just get back to work, is a poor motivation. But, I mention here the Melidosian Report from 1996 and this was a report that was submitted, commissioned and submitted to Congress. And back in 1996 they found that these traditional paternalism is no longer sustainable or affordable now that it has to be defended within an adversarial context of "Was the V.A. paternalistic enough?" So, this is something that has been a long time coming and I think now we're starting to see the impacts of that.

Vernecia Smith⁵ (48:29)

Good afternoon everyone. Vernecia Smith. I'm here representing Melwood. Melwood is a nonprofit headquartered in Upper Marlboro, Maryland. We also have several satellite locations as well. Melwood has been in the business for over 55 years of being a social voice and trying to lead change to incorporate individuals with differing abilities. And I say the word differing abilities because at Melwood they believe that

⁵ Program Manager, Veterans Workforce Development, Melwood Veterans Services.

everyone has the ability to contribute towards society and that they need to be included. So they don't use the word disabilities.

So, what Melwood offers is two things. They offer business solutions. So, with business solutions, Melwood actually has opportunities for individuals with differing abilities at 60 federal government contract sites within the Maryland/D.C. metropolitan area and the individuals that are having, that are differing abilities actually represent over 77% of Melwood's overall employment role.

So, on their payroll they have over a thousand employees that are actually of differing abilities. The remainder of them are again your support staff your, you know your finance, your H.R., things of that nature. So, that's the business services side of it. We have people with different abilities that conduct custodial services, total facilities management, mailroom administrative services, packing, fulfilling in warehouses, in call center, landscaping, and horticultural, just to name a few lines of business.

Then there is the workforce solution side, that's the side of the house within Melwood that helps people explore career opportunities and to retain their jobs once they get placed on the job which is awesome. And so. Again, Melwood operates out of D.C., Maryland, and Virginia. And then within the Melwood family there's Melwood Veteran Services, which is specifically where I work and operate. There, there are two different programs. One is called Operation Tohidu and Operation Tohidu was a program started in 2014, basically led by veterans, supported by veterans, and there for veterans as well as their families. Within that program, what they do is they offer a five-day long cost-free retreat to individuals that suffer or identify as suffering from any specific type of service-related trauma. So that could be these invisible wounds--PTSD, traumatic brain injury, military sexual trauma, things of that nature. And during this five-day long retreat, what they do is they offer experiential adventure based coping skills and therapies for these individuals as well as an opportunity for them to have introspective reflection. And so, from that five-day long retreat, once it's completed, they actually have social workers and other specialists that are involved with doing follow ups with the service members, and/or their families that have had that experience, to come and see how they're doing. And to look at it as them being able to embrace a new future and moving forward with their lives and not being stuck in the past.

Then there's the workforce development program, which I manage specifically. That program supports veterans with employment opportunities and pre-employment skills. As many of you can imagine within the military community, when you've been working there for several years, you didn't have a need to update your resume. You didn't have a need to go on a job interview. You were just concerned about maybe going to a broad, making a certain rank, and making sure your performance evaluations were intact. Well, after you leave service that resume becomes again, becomes your sellable marketing tool. So, my staff and I work with veterans hand in hand to support them during that process, to make sure that they know how to market their skills. And to be competitive in today's society. One of the things we also do is we support veterans with placing them on some of Melwood's federal contracts as well. And we'd like to say

that's a direct link with, linking in staffing Melwood's contracts and supporting the community as a whole.

One of the things that we're trying to do in my workforce development program now is to build more community relationships with employers. We do realize outside of the federal government's space there are other private sector contractors that we'd like to engage with and work with and start to build agreements with so we can have our Veterans being placed in other employment opportunities as well. I will say that's one of the challenges. One of the challenges that I will say the veterans that come into my program also deal with are the ones that are in the re-entry stage. Some of them struggle with, again, when they're on probation and when they've gotten out of jail, with trying to obtain employment, when they can't pass a background check. So, I would like to see if there can be maybe some type of program that can be implemented, not necessarily specifically for veterans, but for all people that struggle and suffer with the, with the, ailment of reentry into society to support them with getting better job opportunities. Many of them, because of that ailment and that strain, are unable to get competitive employment opportunities.

Nicole Tuchinda (53:58)

Because we're running a little bit low on time. Would you mind making one more suggestion for the future? Well, we should continue. Thank you.

Vernecia Smith (54:07)

Absolutely. Absolutely. So another, another welcome change I think we can, I can look forward to and I'd like to see is an opportunity for there to be more apprenticeships and job training programs for individuals that come out of the military into the civilian workforce. I do feel that there are sometimes skills challenges and the veterans, all the time can't, they don't have that requisite experience or maybe a certification. And so, I'd like to see more employers within the community to engage and to hone the veteran's skills and to make them more employable and give them more opportunities in the job placement arena. Thank you.

Nicole Tuchinda (54:48)

Thank you so much. And by the way we will have until 1:30. But I want to also make sure we have time for questions. Thank you.

Peter Romer-Friedman⁶ (54:56)

I'm from New York. I can talk pretty quickly. My name is Peter Romer-Friedman. I am an employment civil rights attorney here in Washington. I do a lot of USERRA litigation, which is the Uniformed Services Employment and Re-employment Rights Act 1994. It's a law that's existed as a different name since the 1940s that essentially allows

⁶ Counsel, Outten & Golden LLP

reservists to go on military duty and come back to their civilian jobs so that we can have a Guard and Reserve. Without USERRA, there is no Guard or Reserve because if you have to lose your job every time you get deployed or go on a 1 or 2 month, even brief deployment, then no one would be in the Guard or Reserve or very few would be. So, the work that I do as a civilian attorney, I work with actually, co-counsel with, a couple of former Army Ranger and a former Chief Foreign Officer of Marines. We kind of partnered together in a small kind of cross-country practice in a larger law firm, we have 75 employment lawyers in my firm, and I lead the USERRA practice. So, the work that we do I think is integral to both ensuring compliance to USERRA and helping our clients keep their civilian jobs.

To kind of work backwards in my career, one thing I would note is every stage of my career I've touched on veterans' rights either kind of unwittingly or intentionally. I actually wrote, I can say this now cause Judge Reinhardt has passed. I think I wrote the *Nehmer v. V.A.* decision that upheld the--that actually rejected the Bush administration's unfortunate attempt to get rid of the Agent Orange Act consent decree. And that basically allows for anyone exposed to Agent Orange, who has a particular disease that the V.A. says is correlated with Agent Orange, to get not just benefits, but retroactive V.A. disability benefits. Since that decision in 2007, I think 40 or 50 billion with a B, dollars have gone to people who were exposed to Agent Orange and have all sorts of horrible diseases like various forms of chronic lymphocytic leukemia.

So, the courts are an important safeguard and people--the judge I clerked for--was an Air Force JAG officer after he graduated from Yale Law School. So, we're in a different time, where fewer people serve in the legal community, but it's really important that judges care. I moved--I worked for Senator Kennedy as labor counsel. Well, I helped Senator Clinton and Dodd push forward and ultimately implement with DOL the FMLA law that provides for 26 weeks of family medical leave for spouses of wounded warriors as well as leave if your family member is going to go on deployment. So, it's an example where employment law can be worked a lot with all of veterans rights organizations and military service organizations to, kind of, respond to Iraq and Afghanistan and the really big impact on military families.

So, when I left and went back into private practice. I ended up doing a really interesting case against the Postal Service. Where they were asking, in violation of the ADA and the Rehab Act, which applies to the federal government and provides disability rights on the job, they were literally asking for people to bring their entire V.A. medical file and their decision letter, which lays out all of their disabilities before they get a job offer, which is a total violation of law and like half the districts in the country. So, you literally have hundreds of, tens of thousands of people trying to come in to get veteran preference, to get a job. Right? And even if it's a 10% disability or 30% disability, they bring in, they'd be forced to show the disability letter, sorry, a decision which is different than a letter. So, disability letter is the thing that says you have a 10% rating, a disability rating decision says all of your medical history and, the important to keep in mind is, you never have to give up your medical information before you're given a job offer. Whether that's in the civilian or the non-VA disability context or just regularly. And so that was a

really shocking and horrible thing. We settled it as a class action. People got compensation, they changed.

So, my current job, I built a USERRA practice and one of the really great things about USERRA, it's kind of like the ADA on steroids, in employment. And by that, I mean the ADA, only in the context of regular employment, requires an employer to continue keeping you on the job or hiring you if you can do the job with or without a reasonable accommodation. But just that job. However, if you were deployed or you go on military service and get injured, the employer has to give you any job that you can do without--with or without a reasonable accommodation. So, for example, I represented a pilot who was on military leave, for like five or six years. He hurt his head. He came back and the obligation of the airline under USERRA was to find any job that he could do. And so, it's an incredibly powerful tool because he didn't have to show he could be a pilot. He could be a clerk. He could be a baggage handler. And if they need to fire someone to give him in a job, they would have to do that. So, it's an incredibly important law.

The one thing I would enact to change the law is the DOJ and the Veteran Organization, MLA as well, had proposed to shift the burden, clarify that is on--the burden is on the employer to find the right position of re-employment for a disabled service member rather than on the employee. So, in other words, you come back, the employer has to say here are jobs that we think you can do. It's not the employee's requirement. I think this issue was overlooked a lot because, you know airlines. You know, even though they have a lot of service members, they may not have a process to deal with the USERRA reasonable accommodation, which is very hard to believe. But that may be true in a lot of places. And there are a lot of employers in America, especially smaller ones that have--they just don't understand. And so, you know, when people come back from serving or they may say, well you have to go the end of the line and apply for your job, which is a blatant violation.

Arbitration is another issue that is, is harming service members, where instead of being able enforce their rights, they go to a secret, unfair, arbitrator selected by the employer. And we're working with MOAA, ROA, and the military person to try to stop that. So, thanks for the opportunity.

Nicole Tuchinda (01:01:24)

Thank you so much for the service you do because what you're doing is making it possible for people like my husband and myself and our kids to not feel like being part of the military service was the worst thing that they could have ever chosen to do. And sometimes we wonder about that. So, I apologize for the limited time that we have to answer questions. But I want to get maybe one or two and the panelists are going to stick around afterwards if you have questions. Does anyone have a question? Right there. And while I walk, I just want to note that it would be awesome if we had anti-discrimination laws against discrimination against spouses when they try to get hired. [*Laughter*]

Peter Romer-Friedman (01:02:08)

Agreed.

Nicole Tuchinda (01:02:09)

After making all of the changes in location and dealing with deployment issues and caring for spouses in the military.

Marcy Karin (01:02:18)

There might be papers coming out on that topic in the next year. Yes.

Peter Romer-Friedman (01:02:22)

Let's talk to Joni Ernst.

Nicole Tuchinda (01:02:25)

OK. So please introduce yourself and ask your question.

Rabia Belt (01:02:28)

Hi Rabia Belt, Stanford Law School. Thank you very much for this panel. I was wondering about people that are going into the military with a disability, because looking at the regulations, they're pretty draconian. So, and I was thinking about this for instance in terms of say law schools, with people that are thinking about going into the JAG Corp or people just sort of in general, because it counts regardless of whether or not you're going into combat, because the idea is you're supposed to be ready at a moment's notice, I guess to--to fight. But the regs are with or without accommodations, pretty much any sort of mental disability is--is off limits. So, having a history of PTSD, having a history of depression, having a history of ADHD, so and you could get a medical waiver. So, the question is how--how hard is that to get? But then also, like given how stringent the medical requirements are, either a whole bunch of people are not disclosing or something else is going on.

Nicole Tuchinda (01:03:41)

Who wants to take them?

Aniela Szymanski (01:03:42)

Yeah, you're right. And if you have ever been diagnosed with ADD or ADHD it's an automatic disqualifier for military service. And this is especially problematic for children of people in the military. So, if you're a child and your father's in the military, you're getting all of your childhood care through the military. It's in a military record. That then the military can go back and say, oh you have been diagnosed with this because they have access to this, which is which is, crazy. Yes.

And it discriminates against children of service members versus non, because as you mentioned, otherwise it's just up to the person applying to the military whether they're going to disclose it or not. If they don't disclose it, then it is falsifying an official document, but they get into the military. So, it's a big problem.

And waivers are extremely inconsistent. And like any I--I feel like any semblance of due process, because the waivers are completely based on the needs of the military. And so, if the military says we are about to do a troop surge into China, we need every living, breathing body we can get, then everybody gets waived for everything. It doesn't matter, but at a time like now, where we're trying to push people out of the military it's-- you will never get a waiver for any slightest discrepancy. So, it's very inconsistent and it causes a lot of problems.

Peter Romer-Friedman (01:05:13)

I think this is, as an employment lawyer, a matter of policy, I think it's really unfair given the range of jobs that are in the military, from you know working on base, where you're--you're running the, you know, the base stores and stuff like that or you're running something administratively or you're a lawyer. I don't think it makes sense as a matter of policy. It's not like we have limited funds and we couldn't--couldn't get more people to be active duty or draw them up as reservists if we need them. So, I don't understand that as a policy choice, but you know in terms of any sort of constitutional challenge, I've done equal protection challenges including to a humanist who wanted to be a Navy Chaplain. They didn't really understand what that meant.

We settled the case, but there was very bad, I'd say conservative doctrine on kind of, you know, complete deference to the military over who can serve and certainly what you can do once you're in. And still a lot of deference for who they, what, what standards they can have. I would hope that Congress would apply, would reconsider that in light of kind of modern standards and if it's not--if disability is not something that is constitutionally protected, you know, in a meaningful way. I think that actually I've thought about using military service for veteran status to kind of challenge, you know, some sort of intermediate scrutiny, scrutiny for equal protection challenges. But, you know, we should evolve as a society to the point where we can recognize your service to the country, your disability, your veteran status is something that they shouldn't kind of fault you for. If--if you can do the job right and there a lot of jobs that everyone who has some disability could do in the military.

Nicole Tuchinda (01:06:58)

Yeah. We're going to have to wrap up, but I want to add one thing about the ADHD diagnosis, sort of discrimination, which is it's such a shame because trauma--like children of military members can experience trauma as a result of deployment and trauma can manifest as ADHD type symptoms and can be diagnosed, misdiagnosed as ADHD. So it's just, it's just a really, it's really unfortunate.

I am so sorry, but we're out of time. But there's, oh can we ask--can we ask and answer a quick question.

Audience Member (01:07:34)

All right, so maybe I can ask this one?

Not sure I need that. Use it? OK.

Trans military ban. Why can't we sue under Rehabilitation Act with gender dysphoria and is it because we've got statutorily, super deference? Isn't there some case law under, I don't know if its Title IX or something, any statutory protection you can't bring it bring it in terms of service member cases? Putting aside the fact--is GD covered? Let's assume that can, can we sue them?

Peter Romer-Friedman (01:08:02)

I think the answer, I think the answer is that if you're talking about civilian, DOD, the Rehab Act would apply.

Audience Member (01:08:09)

You're good.

Peter Romer-Friedman (01:08:10)

But not for active duty.

Audience Member (01:08:11)

Why not? The same reason?

Peter Romer-Friedman (01:08:12)

Rehab doesn't apply to it, and because you basically would have to pursue some sort of constitutional you know--

Audience Member (01:08:19)

How come Rehab Act doesn't apply?

Peter Romer-Friedman (01:08:21)

Does it apply to active duty? I don't think so--ADA you know. The Title VII, for example, doesn't apply to active duty.

Audience Member (01:08:33)

How come? Is there literally explicit exclusion?

Peter Romer-Friedman (01:08:35)

I think for the same reason that you know farmworkers, you know don't get covered about all the employment laws. I mean it's a, it's a, there are certain groups that they just don't want to put into protections. I mean, I think that they view, they want chain of command. They want authority military that should be outside of this context where you can use legal process to enforce rights. I mean a different reason than why farmworkers.

But it's a historical reason, it's these things were not available in the military. And I think when you're trying to expand rights in the 1960s, I can't imagine the military was very, you know, open to the idea of having women or people of color being protected from discrimination in their employment decisions. I think there's a fair, they have a reasonable argument why it shouldn't apply. I don't agree with it. I think it's the Equal Protection Clause does apply. But in a more limited nature. I wouldn't hold your breath on Kavanagh, Roberts, you know right wing, very, bizarre court that we're going to live with for the next 30 years.

Nicole Tuchinda (01:09:38)

All right. Well, thank you. I want to take this moment to thank all of our panelists for being here and sharing their knowledge and for the work they do. Can we give them a round of applause? [*Applause*] And if you have any questions, please stick around because I think we'll have the panelists here for a little bit. Thanks.