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Volume 11 | Issue 3

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5-10-2024

## Adequate, but Not Ideal: The U.S. Navy's Need to Refine Its Administrative Separation Board Procedures

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### Recommended Citation

Sierra Ross, *Adequate, but Not Ideal: The U.S. Navy's Need to Refine Its Administrative Separation Board Procedures*, 11 Tex. A&M L. Rev. 715 (2024).

Available at: <https://doi.org/10.37419/LR.V11.I3.7>

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# ADEQUATE, BUT NOT IDEAL: THE U.S. NAVY'S NEED TO REFINE ITS ADMINISTRATIVE SEPARATION BOARD PROCEDURES

by: Sierra Ross\*

## ABSTRACT

*While the Navy is likely not mandated by the Constitution to edit its procedures for Administrative Separation Boards, it should do so. Service members can be subject to a variety of serious consequences through Administrative Separation Boards, so the processes should be as effective as possible to ensure that they are adequately protected.*

*To improve the Administrative Separation Board Procedures for the United States Navy, this Comment suggests two policy changes. First, this Comment suggests that the Navy provide more training to Senior Members to ensure they are implementing the existing evidence rule correctly. Second, this Comment suggests that the Navy should add a version of the personal knowledge rule and lay witness opinion rule to the Administrative Separation proceedings. This Comment argues that these suggestions would benefit the Navy even though the Navy is not likely constitutionally mandated to make the changes.*

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DOI: <https://doi.org/10.37419/LR.V11.I3.7>

\* Texas A&M University School of Law Class of 2024. I would like to thank Professor Nancy Welsh for her invaluable guidance and assistance as my faculty advisor. I would also like to thank my military justice professor, Brandon Barnett, whose thoughts and suggestions helped me deepen my analysis.

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## I. INTRODUCTION

The U.S. military's power to create and employ personnel management processes is vast and pervasive; this power's implementation ranges from minor punishments to administrative removals to criminal proceedings. Each of these processes follows its own set of rules, and those rules vary by branch and the type of service member going through the process. For example, the process to separate commissioned officers in the Navy differs from the process to separate enlisted members.<sup>1</sup> To narrow the scope of this Comment, I will focus on the U.S. Navy and its procedures for Administrative Separation Boards ("Adsep Boards") when the sailor is an enlisted member. While the Navy's procedures are likely constitutionally valid, this Comment will show that the Navy or Department of Defense ("DOD") could and should improve the separation process to better protect service members.

This protection is necessary because an Adsep Board's results are not without significance. An Adsep Board can award several types of discharges,<sup>2</sup> and a discharge characterization can significantly affect a sailor's future.<sup>3</sup> For example, those who receive an Other Than Honorable ("OTH") discharge are stigmatized by the discharge;<sup>4</sup> an Honorable Discharge is the ideal, so society rejects anything less.<sup>5</sup> The negative effects of an OTH discharge are significant and varied. Thus, the system should protect service members while they go through this process.

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1. See generally U.S. Dep't of the Navy, *1900-1999 Separation*, MYNAVY HR, <https://www.mynavyhr.navy.mil/References/MILPERSMAN/1000-Military-Personnel/1900-Separation/> [<https://perma.cc/GK6N-PM83>] (possessing the rules for separation processes).

2. U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-300, GUIDELINES ON CHARACTERIZATION OF SERVICE 1 (2021), [https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-300.pdf?ver=AGYoEyRbyxlHA\\_RD0ik-yA%3D%3D](https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-300.pdf?ver=AGYoEyRbyxlHA_RD0ik-yA%3D%3D) [<https://perma.cc/7LGZ-2G3R>] [hereinafter MILPERSMAN 1910-300].

3. See John W. Brooker et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, MIL. L. REV., Winter 2012, at 1, 14.

4. Jeffrey Janaro & Christopher Clifton, *A Virtual Reality: Preserving the Right to Appear "In Person" Before an Administrative Separation Board*, 25 RICH. PUB. INT. L. REV. 43, 48-49 (2022).

5. Daniel Scapardine, Comment, *Leaving "Other Than Honorable" Soldiers Behind: How the Departments of Defense and Veterans Affairs Inadvertently Created a Health and Social Crisis*, 76 MD. L. REV. 1133, 1136 (2017).

This Comment will discuss three possibilities to improve this system. First, the DOD or Navy may design training programs to ensure Senior Members (“SM”), who are the individuals who manage Adsep Boards,<sup>6</sup> understand when evidence is relevant, authentic, and competent and are able to explain and apply the factors they consider when characterizing a discharge. Second, the DOD or Navy could create two rules that would only be applicable in cases where a service member could receive an OTH discharge. One rule would be to limit witnesses to testifying about matters about which they have personal knowledge. Another rule would be to limit the type of opinions that lay witnesses can present to the Board. Third, the DOD or Navy could remove OTH discharges from the purview of Adsep Boards and leave this discharge to courts-martial.<sup>7</sup> Of these solutions, the new training programs and the two new rules are the most likely to increase the quality of Adsep Boards without also harming the Navy’s personnel management system. The Navy’s administrative system has value; it allows the Navy to manage its personnel and ensure its standards are satisfied.<sup>8</sup> The Navy is not simply an employer—it is a branch of the military tasked with protecting the United States. As a result, the Navy needs to be able to manage its personnel efficiently. Thus, the system should be tweaked but left intact.

This Comment is divided into five parts. Part II will explain the history of the military’s justice system and administrative processes. Many of these developments involved government actions that affected all branches. Part III will analyze an OTH discharge’s effect on its recipient and who is likely to be a recipient of an OTH discharge. Part IV considers the constitutional boundaries, or lack thereof, that the Navy must operate within. Part V discusses the three possible solutions mentioned above and details the benefits and drawbacks of each solution. Ultimately, Part V concludes that the Navy should implement better training procedures for SMs and apply two new rules of evidence to Adsep Boards involving OTH discharges while dismissing the idea that OTH discharges should be removed from the Adsep Board’s toolset.

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6. U.S. DEP’T OF THE NAVY, MILPERSMAN 1910-506, SENIOR MEMBER OF BOARD 1 (2021), [https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-506.pdf?ver=s3ctxrg4JyTPLpogs\\_s\\_3w%3D%3D](https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-506.pdf?ver=s3ctxrg4JyTPLpogs_s_3w%3D%3D) [<https://perma.cc/8YP4-JJAD>] [hereinafter MILPERSMAN 1910-506].

7. A court-martial is the military’s version of a trial. *Military Justice Overview*, DoD VICTIM AND WITNESS ASSISTANCE, <https://vwac.defense.gov/military.aspx> [<https://perma.cc/P5NQ-BGAZ>].

8. Hugh McClean, Essay, *Discharged and Discarded: The Collateral Consequences of a Less-Than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2217 (2021); U.S. DEP’T OF THE NAVY, MILPERSMAN 1910-010, ENLISTED ADMINISTRATIVE SEPARATION (ADSEP) POLICY AND GENERAL INFORMATION 1 (2019), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-010.pdf?ver=-fRltHyYlBjWfZoKnSj1BNg%3D%3D> [<https://perma.cc/YU4Q-THE9>] [hereinafter MILPERSMAN 1910-010].

## II. BACKGROUND

When service members sign their contracts, which are created by the DOD, they agree to submit to the Uniform Code of Military Justice (“UCMJ”) and the President’s regulations.<sup>9</sup> These rules govern service members’ behavior and the processes to which they are subject if they do not, in fact, behave.<sup>10</sup> Adsep Boards—administrative procedures designed to determine whether a sailor should remain in the military or be excused from service<sup>11</sup>—are not governed by the UCMJ.<sup>12</sup> Instead, the DOD and the individual military branches govern this separation method.<sup>13</sup> As a result, much of Part II’s discussion focuses on regulations that govern Adsep Boards instead of the UCMJ. However, Part II does include a brief discussion of the evolution of the military justice system and the UCMJ to provide context.

A. *Military Justice Summary*

The UCMJ is relatively new; Congress created it in 1950.<sup>14</sup> Across the military branches, the UCMJ increased the uniformity of service members’ due process rights.<sup>15</sup> The UCMJ established a forum to receive service members’ legal complaints: the United States Court of Appeals for the Armed Forces (“CAAF”).<sup>16</sup> The CAAF, an Article I court,<sup>17</sup> expanded upon the UCMJ’s protections and, in some instances, incorporated the Supreme Court’s precedent to military cases.<sup>18</sup> The CAAF

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9. U.S. DEP’T OF DEF., DD FORM 4, ENLISTMENT/REENLISTMENT DOCUMENT – ARMED FORCES OF THE UNITED STATES 3 (2020), <https://www.esd.whs.mil/portals/54/documents/dd/forms/dd/dd0004.pdf> [<https://perma.cc/Z25W-YNZG>].

10. See generally JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES (2019 ed.), [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610) [<https://perma.cc/2D79-V3S6>] [hereinafter MANUAL FOR COURTS-MARTIAL] (detailing the crimes service members can be convicted of via courts-martial and the rules that govern this process).

11. LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 134 (3d ed. 2019).

12. See generally Janaro & Clifton, *supra* note 4, at 52–53; McClean, *supra* note 8, at 2212.

13. Janaro & Clifton, *supra* note 4, at 52–53; McClean, *supra* note 8, at 2211.

14. Janaro & Clifton, *supra* note 4, at 47.

15. *Id.*

16. Jonathan Lurie, *Military Justice 50 Years After Nuremberg: Some Reflections on Appearance v. Reality*, MIL. L. REV., Summer 1995, at 189, 190.

17. ANNA C. HENNING, CONG. RSCH. SERV., RL34697, SUPREME COURT APPELLATE JURISDICTION OVER MILITARY COURT CASES 3 (2009).

18. Justin Biolo, Note, *Thank You, Servicemember! But Your Process Is in Another Forum: The Misuse of Civilian Jurisprudence to Inform UCMJ Rights*, 64 HASTINGS L.J. 1381, 1385 (2013).

creates the military's version of common law,<sup>19</sup> and it is superior to each of the branches' courts of criminal appeals.<sup>20</sup>

Within this system, commanders with convening authority play a crucial role.<sup>21</sup> A convening authority ("CA") has the power, in most cases, to determine whether charges will be brought against an individual and which type of court-martial the case should be sent to.<sup>22</sup> Generally, a CA has the discretion to determine how precisely to separate a service member from the military.<sup>23</sup> If the CA decides to separate a service member and an Adsep Board is required, the service member being discharged may waive their right to an Adsep Board.<sup>24</sup> That waiver could be seen as a type of plea agreement; service members may waive their right if they receive a discharge or separation description that is better than the worst discharge or separation description they could receive at the Adsep Board.<sup>25</sup> However, it is ultimately the CA who determines the general path of a service member's discharge.<sup>26</sup>

### B. *Adsep Boards*

A CA may send service members to an Adsep Board.<sup>27</sup> An Adsep Board is not a criminal proceeding; instead, it is a process to manage the military's personnel.<sup>28</sup> The DOD maintains that Adsep Boards are administrative procedures used to "promote the readiness of the military and provide a means to evaluate the suitability of servicemembers based on their ability to meet required performance, conduct, and disciplinary standards."<sup>29</sup> The Navy echoes that sentiment; the purpose of Adsep Boards is to promote readiness by (1) assessing a service member's ability to properly serve, (2) maintaining certain levels of quality throughout the service by way of characterizing service, and (3) allowing for the separation of service members in certain situations.<sup>30</sup>

The reasons why a service member can be involuntarily discharged via an Adsep Board vary—some of the possibilities include mental conditions, parenthood, alcohol rehabilitation failure, unsatisfactory performance, and criminal misconduct.<sup>31</sup> In some criminal misconduct cases,

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19. Lurie, *supra* note 16, at 191.

20. SCHENCK, *supra* note 11, at 7.

21. *See id.* at 241–42; Scapardine, *supra* note 5, at 1139.

22. *See* SCHENCK, *supra* note 11, at 241–42.

23. Scapardine, *supra* note 5, at 1139.

24. U.S. DEP'T OF DEF., INSTRUCTION NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 38–39 (2014), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133214p.pdf> [<https://perma.cc/YH5E-8HKD>].

25. *Id.* at 40.

26. Scapardine, *supra* note 5, at 1139.

27. *See id.* at 1138–39.

28. McClean, *supra* note 8, at 2212.

29. *Id.* at 2217.

30. MILPERSMAN 1910-010, *supra* note 8, at 1.

31. U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-100, REASONS FOR SEPARATION 1–2 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/>

a CA will send service members to an Adsep Board when the CA does not have enough evidence to secure a conviction at a court-martial.<sup>32</sup> Because Adsep Boards require less from the government in regard to due process, Adsep Boards are a more common way to involuntarily discharge someone from the military.<sup>33</sup> The burden of proof is lower in an Adsep Board than in a court-martial, and the Military Rules of Evidence (“MRE”) do not apply.<sup>34</sup> In an Adsep Board, the burden of proof is by a preponderance of the evidence.<sup>35</sup> Conversely, the burden of proof in a court-martial is beyond a reasonable doubt.<sup>36</sup> Additionally, the Board’s decision does not have to be unanimous.<sup>37</sup> Ultimately, Adsep Boards are versatile, and the reasons why CAs use them vary.

Adsep Boards are governed by several sources: Congress, the DOD, and the Navy.<sup>38</sup> In 1959, the DOD created uniform regulations for Adsep Boards to address the services’ frequent use of Adsep Boards.<sup>39</sup> These guidelines direct the U.S. military through regulations and policy memoranda.<sup>40</sup> The Navy is responsible, at the behest of Congress and the DOD, for managing its own discharge processes and performing the discharges.<sup>41</sup>

In the Navy, a Board determines whether the evidence proves that a basis for a sailor’s separation exists.<sup>42</sup> The Board consists of “at least three experienced commissioned, warrant, or noncommissioned officers . . . .”<sup>43</sup> If the Board includes an enlisted member, that enlisted member must be an “E-7 or above and be senior in pay grade to [the] respondent.”<sup>44</sup>

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1000/1900Separation/1910-100.pdf?ver=AiSfOrew5rHXgnHKD-u4PA%3D%3D [https://perma.cc/Q69D-ALV9].

32. Janaro & Clifton, *supra* note 4, at 47.

33. *Id.* at 47–48; McClean, *supra* note 8, at 2212.

34. SCHENCK, *supra* note 11, at 135.

35. *Id.*

36. *Id.*

37. *Id.*

38. Janaro & Clifton, *supra* note 4, at 52–53.

39. *Id.* at 53.

40. McClean, *supra* note 8, at 2211.

41. Janaro & Clifton, *supra* note 4, at 52–53; McClean, *supra* note 8, at 2211.

42. U.S. DEP’T OF THE NAVY, MILPERSMAN 1910-518, FINDINGS AND RECOMMENDATIONS 1 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-518.pdf?ver=oE350F31XYpIjYkDkhgxEA%3D%3D> [https://perma.cc/9UY7-SVRF] [hereinafter MILPERSMAN 1910-518].

43. U.S. DEP’T OF THE NAVY, MILPERSMAN 1910-502, ADMINISTRATIVE BOARD COMPOSITION 1 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-502.pdf?ver=y5LaIYXyAxqjzh-4qz9haig%3D%3D> [https://perma.cc/A8C9-32HK] [hereinafter MILPERSMAN 1910-502].

44. *Id.* The term “E-7” refers to a specific pay range. *Military Pay & Benefits*, U.S. NAVY, <https://www.navy.com/what-to-expect/military-pay-and-benefits> [https://perma.cc/7XQE-F7VA].

The SM presides over the Board.<sup>45</sup> They decide what evidence is admitted, and they are charged with ruling on procedural matters.<sup>46</sup> As stated earlier, the MRE do not apply to Adsep Boards.<sup>47</sup> The SM's responsibility extends to determining whether the Board needs to hear a witness's personal testimony.<sup>48</sup> For someone to serve as a SM, that individual must "be a U.S. Navy (Active or Reserve) officer in paygrade O-4 or above . . ."<sup>49</sup> Ultimately, while the SM must be of a certain rank, the SM is not required to have legal training or experience.<sup>50</sup> To help the SM direct the Adsep Board, the SM uses a script that tells them what to say and the path of the proceeding.<sup>51</sup>

The Board is responsible for determining if there is a basis for separation.<sup>52</sup> If a basis exists, the Board can recommend to the Separation Authority that the sailor be retained or separated.<sup>53</sup> The Board makes this determination by looking at several factors: the offense's seriousness, the likelihood of the service member committing the offense again, the service member's future potential if retained, and the service member's military record.<sup>54</sup> Additionally, if the circumstances of the case indicate that the offender can be rehabilitated, the Board may recommend a suspension of the separation.<sup>55</sup> However, the Separation Authority is not obligated to follow that recommendation.<sup>56</sup>

At an Adsep Board, neither party needs to adhere to the rules of evidence for military courts-martial or other judicial proceedings.<sup>57</sup>

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45. MILPERSMAN 1910-506, *supra* note 6, at 1.

46. *Id.*

47. SCHENCK, *supra* note 11, at 135.

48. U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-508, WITNESSES AT ADMINISTRATIVE BOARD 2 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-508.pdf?ver=mg18D7TamrVPFwSoASrG4g%3D%3D> [<https://perma.cc/7BD2-W72P>].

49. MILPERSMAN 1910-506, *supra* note 6, at 1; *see also* MILPERSMAN 1910-502, *supra* note 43, at 1.

50. *See generally* MILPERSMAN 1910-506, *supra* note 6.

51. *See* DEP'T OF THE NAVY, MILPERSMAN 1910-516, RECORD OF PROCEEDINGS FOR ADMINISTRATIVE SEPARATION (ADSEP) BOARDS 2-11 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-516.pdf?ver=omBenOmKO1uWWTPyj0JQQ%3D%3D> [<https://perma.cc/N4GL-HGKU>].

52. MILPERSMAN 1910-518, *supra* note 42, at 1.

53. *Id.*

54. U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-212, FACTORS CONSIDERED IN RETENTION OR SEPARATION 1 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-212.pdf?ver=D3F3iFbE4f-T2WkR2j6JRA%3D%3D> [<https://perma.cc/8URT-5F58>].

55. U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-222, SUSPENSION OF SEPARATION 1 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-222.pdf?ver=KV1Og3rzW6d-Jq-luQfqPhw%3D%3D#:~:text=Unless%20prohibited%20by%20this%20manual,a%20reasonable%20likelihood%20of%20rehabilitation.> [<https://perma.cc/2GZA-R2JR>]; *see also* MILPERSMAN 1910-518, *supra* note 42, at 1.

56. MILPERSMAN 1910-518, *supra* note 42, at 1.

57. U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-510, PRESENTATION OF EVIDENCE 1 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/>



The Board can consider any evidence so long as it observes reasonable restrictions “concerning authenticity, relevancy, and competency of evidence presented.”<sup>58</sup> This standard is much more relaxed when compared to the entirety of the Rules for Courts-Martial—the military’s rules of evidence.<sup>59</sup>

While the burden of proof is lower in Adsep Boards than in a court-martial, service members still possess some rights in an Adsep Board. For example, service members have a right to counsel.<sup>60</sup> Accused service members (called respondents in an Adsep Board) also have the right to testify on their own behalf before the Board.<sup>61</sup> Their counsel may challenge a voting member’s inclusion if counsel has cause, call and examine witnesses, and argue on behalf of their client.<sup>62</sup>

Service members can receive three main types of discharges at an Adsep Board: Honorable, General Under Honorable Conditions (“General”), and OTH.<sup>63</sup> Service members receive an Honorable discharge when their conduct meets “the standard of acceptable conduct and performance for naval personnel, or is otherwise so meritorious that any other characterization of service would be clearly inappropriate.”<sup>64</sup> Service members receive a General discharge when their service was “honest and faithful[,]” but the quality of their service was mostly negative.<sup>65</sup> Service members receive an OTH discharge when their conduct “involv[es] one or more acts of omissions that constitute a significant departure from the conduct expected of members of Naval Service.”<sup>66</sup> The Board may also grant an Entry Level Separation.<sup>67</sup>

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1000/1900Separation/1910-510.pdf?ver=JcuZ8qNvwh4zaLrJKDWRtQ%3D%3D [https://perma.cc/A49T-7KYN] [hereinafter MILPERSMAN 1910-510].

58. *Id.*

59. See generally MANUAL FOR COURTS-MARTIAL, *supra* note 10 (detailing the crimes service members can be convicted of via courts-martial and the rules that govern this process).

60. See U.S. DEP’T OF THE NAVY, MILPERSMAN 1910-504, RIGHT TO COUNSEL 1 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-504.pdf?ver=WzwYFVQyzoUpMK5LupOWFw%3D%3D> [https://perma.cc/M7J2-NEJ3] [hereinafter MILPERSMAN 1910-504].

61. U.S. DEP’T OF THE NAVY, MILPERSMAN 1910-512, RIGHTS OF THE RESPONDENT 1 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-512.pdf?ver=47Ie-07IJmwN9WQ-0fY-0VA%3D%3D> [https://perma.cc/5E4T-YNG7].

62. *Id.*

63. Biolo, *supra* note 18, at 1388; see also MILPERSMAN 1910-300, *supra* note 2, at 1.

64. U.S. DEP’T OF THE NAVY, MILPERSMAN 1910-304, DESCRIPTION OF CHARACTERIZATION OF SERVICE 1 (2008), [https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-304.pdf?ver=\\_IvP5DpDEK-ighxD\\_RK3fw%3D%3D](https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-304.pdf?ver=_IvP5DpDEK-ighxD_RK3fw%3D%3D) [https://perma.cc/G7PC-N5Y2] [hereinafter MILPERSMAN 1910-304].

65. *Id.*

66. *Id.* at 2.

67. MILPERSMAN 1910-300, *supra* note 2, at 1.

Service members receive an Entry Level Separation when their status is still entry-level and no other discharge status is required.<sup>68</sup> Service members are entry-level if their time in the service has not exceeded 180 days.<sup>69</sup> This type of discharge is uncharacterized.<sup>70</sup> The type of discharge a service member receives depends largely on the circumstances surrounding the service member's separation.<sup>71</sup>

Once the Adsep Board is complete, the results are forwarded to the Separation Authority via letter<sup>72</sup> for approval.<sup>73</sup> In situations where the Board recommends an OTH discharge, the Separation Authority can be the General Court-Martial Convening Authority<sup>74</sup> or Region Commander.<sup>75</sup> The Separation Authority cannot alter the result of the Adsep Board to anything less favorable to the separated service member; basically, the Separation Authority cannot approve a worse result than the result the service member received from the Board.<sup>76</sup> If the Separation Authority "believe[s] that the respondent has been processed contrary to policy, and that the deviation from policy disparaged the enumerated rights of the respondent, . . . the case may be referred to a new board made up of all new members."<sup>77</sup> Separation Authorities may also refer the case to a new Board if they believe fraud or collusion caused the Board's decision.<sup>78</sup> In cases where the service member received an OTH discharge, a Judge Advocate General ("JAG") Corps Officer or civilian attorney will review the Board's findings before the Separation Authority makes a final decision.<sup>79</sup>

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68. VETERANS' EMP. & TRAINING SERV., U.S. DEP'T OF LAB., VETS USERRA FACT SHEET #3: FREQUENTLY ASKED QUESTIONS – SEPARATIONS FROM UNIFORMED SERVICE, CHARACTERIZATIONS OF SERVICE, AND EFFECTS ON RIGHTS AND BENEFITS UNDER USERRA 7–8, <https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Fact-Sheet-3-Separations.pdf> [<https://perma.cc/59ZY-8BEN>].

69. *Id.* at 8.

70. *Id.* at 7.

71. See MILPERSMAN 1910-304, *supra* note 64, at 1–2 (explaining when service members receive certain types of discharges).

72. U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-600, FORWARDING CASES TO THE SEPARATION AUTHORITY (SA) 1 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-600.pdf?ver=sWG8Hk05hYckzSk-QU91Cg%3D%3D> [<https://perma.cc/JW3Q-LZ5Z>].

73. See U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-702, GENERAL GUIDANCE FOR SEPARATION AUTHORITIES (SA) 1–3 (2021), <https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-702.pdf?ver=lrjn1CXHbF-GyzIswFVE8g%3D%3D> [<https://perma.cc/XQ46-SCDC>] [hereinafter MILPERSMAN 1910-702].

74. U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-704, DETERMINING SEPARATION AUTHORITY 2 (2021), [https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-704.pdf?ver=Xfp0\\_EKwmYBADIhtgOsbUA%3D%3D](https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-704.pdf?ver=Xfp0_EKwmYBADIhtgOsbUA%3D%3D) [<https://perma.cc/VN93-G6RL>].

75. *Id.*

76. MILPERSMAN 1910-702, *supra* note 73, at 2.

77. *Id.*

78. *Id.*

79. *Id.* at 3.

## III. THE AFTERMATH OF AN OTHER THAN HONORABLE

Even though some OTH discharge recipients definitely need assistance,<sup>80</sup> an OTH discharge usually bars its recipients from receiving many veteran's benefits.<sup>81</sup> In some cases, an OTH "can result in a total denial of VA entitlements."<sup>82</sup> These benefits include "education, housing, employment, disability compensation, burial benefits, and, in many cases, even healthcare."<sup>83</sup> Thus, an OTH discharge can significantly curtail service members' resources after they leave the Navy.

Additionally, an OTH discharge from the Navy can affect a service member's earning potential and ability to grow.<sup>84</sup> Recipients of an OTH are also stigmatized by the discharge;<sup>85</sup> an Honorable discharge is the ideal, so anything less is frowned upon.<sup>86</sup> This stigma limits service members' ability to find civilian employment.<sup>87</sup> An OTH discharge can cause "many of the same punitive consequences as a court-martial: loss of employment, revocation of veterans' benefits, diminished future employment opportunities, forfeiture of retirement pay, and lingering stigma."<sup>88</sup> In a more immediate sense, service members lose their "military employment, salary, medical, dental, clothing, commissary, and housing benefits, as well as access to all family support services" when they receive a negative discharge.<sup>89</sup> Ultimately, service members who receive an OTH discharge are not honored for their service.<sup>90</sup> These adverse effects make it harder for recipients of negative discharges to re-enter society.<sup>91</sup>

Many service members receive an OTH, and they often struggle with other aggravating issues. Over a twelve-year period between 2002 and 2013, more than 103,000 enlisted service members received an OTH discharge.<sup>92</sup> Recipients of an OTH discharge are more likely to be homeless than those who receive the other two types of discharges.<sup>93</sup> Service members "with OTH discharges represent 25% of the total homeless veteran population . . ."<sup>94</sup> Additionally, from 2011 to 2015, the majority of recipients discharged for misconduct were diagnosed with

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80. See Brooker et al., *supra* note 3, at 10–11.

81. Biolo, *supra* note 18, at 1388; Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards' Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 CALIF. L. REV. 1357, 1368 (2020).

82. Brooker et al., *supra* note 3, at 14.

83. Wherry, *supra* note 81, at 1361.

84. See Brooker et al., *supra* note 3, at 36.

85. Janaro & Clifton, *supra* note 4, at 48.

86. Scapardine, *supra* note 5, at 1136.

87. *Id.*

88. Biolo, *supra* note 18, at 1384.

89. McClean, *supra* note 8, at 2232–33.

90. Wherry, *supra* note 81, at 1362.

91. McClean, *supra* note 8, at 2232.

92. Scapardine, *supra* note 5, at 1136.

93. *Id.* at 1136–37.

94. McClean, *supra* note 8, at 2237.

PTSD, TBI, or other conditions shortly before they were discharged; it is possible that these “servicemembers were kicked out of the military for what may have been behavior that resulted from a mental health condition.”<sup>95</sup> Of that majority, 23% received an OTH discharge.<sup>96</sup> The Government Accountability Office “concluded that servicemembers with mental health issues were being disproportionately discharged with OTH or general discharges . . . without due consideration of their mental health statuses.”<sup>97</sup> Thus, in addition to the stigma that surrounds an OTH discharge, it is likely that many of those service members also struggle with mental health issues and homelessness.

However, recipients of an OTH discharge are not without recourse; service members can apply for a discharge upgrade.<sup>98</sup> Still, success is unlikely: most applicants are rejected.<sup>99</sup> In some years, 99% of applicants failed to upgrade their status.<sup>100</sup> Service members may also try to appeal their case through the judicial system.<sup>101</sup> However, the courts typically consider procedural, rather than substantive, issues.<sup>102</sup> If the matter for appeal is substantive, the courts generally defer to the Services.<sup>103</sup> Essentially, the courts only look to the procedures used by the Adsep Board and leave the question of whether a soldier should be separated to the military.<sup>104</sup> And as we will see in the next Part, challenges regarding Adsep Board procedures, if the procedures follow the prescribed rules, will likely fail.<sup>105</sup> Thus, while service members do have options if they receive an OTH discharge, those options are not promising.

Ultimately, an OTH discharge can affect its recipients in a variety of ways—service members lose many resources that would help them reintegrate into society. Because an OTH discharge can be harmful and is difficult to upgrade, the Navy should, to the best of its ability, ensure that those who receive an OTH discharge deserve it.

#### IV. THE CONSTITUTIONAL BOUNDARIES

##### A. *The Rules That Govern Adsep Boards*

In the military, the Constitution’s applicability varies by forum: a court-martial requires more constitutional protections than an Adsep

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95. Wherry, *supra* note 81, at 1361.

96. McClean, *supra* note 8, at 2206.

97. *Id.*

98. Wherry, *supra* note 81, at 1362–63; McClean, *supra* note 8, at 2244.

99. Wherry, *supra* note 81, at 1363; McClean, *supra* note 8, at 2244.

100. Wherry, *supra* note 81, at 1363.

101. SCHENCK, *supra* note 11, at 139–40.

102. *Id.* at 140.

103. *Id.*

104. *Id.*

105. *Infra* Part IV.

Board.<sup>106</sup> As a result, this Comment will distinguish which protections apply specifically to Adsep Boards. Congress only gave the CAAF power to review appeals from lower criminal courts.<sup>107</sup> Thus, if service members wish to appeal matters that are not criminal, like an Adsep Board decision, their appeals must go to a different forum.<sup>108</sup> First, the service member must challenge their separation before a higher-level commander.<sup>109</sup> If that fails, the sailor can appeal, in this order, to the Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court.<sup>110</sup>

### Basic Appeals Process<sup>111</sup>



While the Supreme Court governs military courts,<sup>112</sup> the rules governing civilian trials and administrative processes do not always apply to military trials and administrative processes in the same manner.<sup>113</sup> The differences between the two worlds—the civilian realm and the military realm—are not without consequence.<sup>114</sup> The Court recognizes that due process requirements from the civilian sector may differ from the requirements in the military sector.<sup>115</sup> While service members still possess constitutional rights, the military’s unique mission and culture requires the Court to apply the Constitution in a different manner.<sup>116</sup> This is the reality because “Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.’”<sup>117</sup> As a result, judicial deference is at its peak when dealing with Congress’s decisions regarding the military—even when service members’ rights are at stake.<sup>118</sup> Because Congress must strike a balance between protecting service members’ rights and fulfilling the military’s needs, the Court will largely defer to Congress.<sup>119</sup>

106. See Biolo, *supra* note 18, at 1385.

107. 10 U.S.C. § 867(a)(1)–(3).

108. SCHENCK, *supra* note 11, at 139–40.

109. *Id.* at 139.

110. *Id.* at 139–40.

111. *Id.*

112. *Id.* at 7.

113. See Biolo, *supra* note 18, at 1385.

114. See *Weiss v. United States*, 510 U.S. 163, 177 (1994).

115. *Id.*

116. *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

117. *Weiss*, 510 U.S. at 177 (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)).

118. *Id.*

119. *Id.*; see also *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (“[W]e must give

Courts are also hesitant “to intrude upon the authority of the Executive in military and national security affairs.”<sup>120</sup> The courts give great deference to the President when the President’s Article II duties are involved,<sup>121</sup> and such deference also extends to “the professional judgment of military authorities concerning the relative importance of a particular military interest.”<sup>122</sup> The courts also defer to the executive branch’s military personnel and discipline decisions.<sup>123</sup> Ultimately, the judiciary largely believes that its competence does not extend to the oversight and control of military forces.<sup>124</sup> That power is given to the branches that are subject to civilian control via elections—the judiciary is not such a branch.<sup>125</sup>

Thus, while *Mathews v. Eldridge* created a three-part balancing test to determine the constitutionality of administrative government procedures in the civilian realm,<sup>126</sup> that test does not govern military matters.<sup>127</sup> *Mathews* was not crafted in or for a military context.<sup>128</sup> Granted, a plurality of the Court did apply *Mathews* to military matters in *Hamdi v. Rumsfeld*.<sup>129</sup> However, the issues in *Hamdi* did not relate to internal military personnel decisions.<sup>130</sup> Instead, the Court has turned to *Middendorf v. Henry* for such issues.<sup>131</sup> Basically, the courts ask whether the factors in favor of changing a challenged process are so “extraordinarily weighty as to overcome the balance struck by Congress.”<sup>132</sup> These factors vary depending on the circumstances surrounding the case.<sup>133</sup> The procedure in question and the rights at stake will determine

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particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.”).

120. *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

121. *Id.* at 529–30.

122. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)); *see also* *Collins v. United States*, 24 Cl. Ct. 32, 37 (1991) (“The court also recognizes that judicial deference should be afforded, in this case to the Navy, when reviewing matters which impinge upon military affairs and national defense, absent explicit legislative guidance.”).

123. *Pilchman v. Dep’t of Def.*, 154 F. Supp. 2d 415, 421 (E.D.N.Y. 2001).

124. *Navy SEAL 1 v. Austin*, 600 F. Supp. 3d 1, 9–10 (D.D.C. 2022); *Gilligan v. Morgan*, 413 U.S. 1, 10–11 (1973) (“[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.”); *see also* *Emory v. Sec’y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987).

125. *Gilligan*, 413 U.S. at 10–11.

126. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

127. *Weiss v. United States*, 510 U.S. 163, 177–78 (1994).

128. *Id.* at 177.

129. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–34 (2004).

130. *See id.* at 510 (stating that the case deals with the detention of an individual with no mention of that individual being a member of the U.S. military).

131. *Weiss*, 510 U.S. at 177–78.

132. *Id.* (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

133. *See id.* at 178–81 (considering the history of fixed terms of offices for members of the military’s judiciary, judicial impartiality, and the quality of oversight over the military’s judiciary); *Middendorf*, 425 U.S. at 45–48 (considering the effect of the proposed procedural change and the accused’s ability to protect his rights in other ways).

what the Constitution demands.<sup>134</sup> The CAAF extended that same test to challenges regarding the Rules for Court-Martial<sup>135</sup>—rules drafted by the President.<sup>136</sup> Thus, it would seem that the Court’s deference to Congress in *Middendorf* also extends to the executive branch.

Because OTH discharges stigmatize their recipients, the Court of Federal Claims stated that there needs to be some type of due process.<sup>137</sup> According to the Court in *Weaver*, service members discharged with an OTH are “constitutionally entitled to notice and a pre-discharge hearing.”<sup>138</sup> More specifically, the government fulfills its responsibilities when five requirements are met: “(1) written notice, (2) a reasonable time to prepare for the Board of Inquiry, (3) an opportunity to appear in person, (4) representation by counsel before the Board of Inquiry, and (5) full access to records relevant to the case except where national security interests require.”<sup>139</sup>

### B. *Adsep Boards Likely Satisfy the Constitution*

When the Court of Federal Claims’ standard is coupled with the deference that the Executive Branch and Congress receive from the courts, the current administrative safeguards provided by Adsep Boards are likely adequate. The Court’s holding in *Weaver*, while not as weighty as a Supreme Court opinion, gives no indication that it or any other court or entity had concerns about the constitutionality of Adsep Boards and did not suggest any need for change.<sup>140</sup> This acceptance likely results, at least in part, from the great deference courts give the Executive Branch and Congress in this area. The courts are wary of intruding upon military matters,<sup>141</sup> and an intrusion is likely not warranted here. The Navy’s procedures provide service members with the opportunity to present their case and defend their interests.<sup>142</sup> The processes in place may be deficient, but they are probably not so deficient as to warrant judicial interference in internal military matters. As such, the Constitution likely does not mandate fundamental changes to Adsep Boards.

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134. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Middendorf*, 425 U.S. at 43.

135. *United States v. Breeding*, 44 M.J. 345, 355 (C.A.A.F. 1996); *see also* *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (“The *Weiss* standard controls Appellee’s claim that Article 29(b), UCMJ, and the procedures to implement it set forth in R.C.M. 805(d)(1) are unconstitutional as applied to him.”).

136. SCHENCK, *supra* note 11, at 5.

137. *Weaver v. United States*, 46 Fed. Cl. 69, 77 (2000).

138. *Id.*

139. *Id.* at 80; *see also* *Milas v. United States*, 42 Fed. Cl. 704, 718 (1999).

140. *See generally Weaver*, 46 Fed. Cl. 69.

141. *See Dep’t of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988); *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008); *Collins v. United States*, 24 Cl. Ct. 32, 37 (1991); *Pilchman v. Dep’t of Def.*, 154 F. Supp. 2d 415, 421 (E.D.N.Y. 2001).

142. *See Weaver*, 46 Fed. Cl. at 80.

However, the lack of a constitutional mandate does not mean that there is no need for the Navy to improve its processes. The Constitution establishes the minimum, not the maximum, safeguards the government must afford its members. It does not bar the Navy from doing more than it must.

## V. POLICY ANALYSIS

There are several reasons why the Navy or the DOD should consider improving its Adsep Board procedures. For starters, being separated from the military is not analogous to being fired in the civilian world.<sup>143</sup> In reality, the military “is more than an employer . . . .”<sup>144</sup> To service members, the military “provides housing, medical services, transportation, food, and recreational outlets.”<sup>145</sup> When the military discharges service members, those service members are deprived of many of the necessities they rely on.<sup>146</sup> The potential side effects of an OTH discharge alone should encourage those in control of the system to ensure that the Navy is only giving such discharges to those who deserve them. The Navy should protect those who have served it faithfully by ensuring, to the best of its ability, that the Navy is only discharging those who deserve it.

This is particularly true considering how old many service members are when they join the Navy or Marine Corps and how many of them possess mental health issues when they are discharged. In 2018, 46.9% of enlisted members in the Navy were under the age of 26.<sup>147</sup> That percentage did not change at all in 2020.<sup>148</sup> Similarly, in the Marine Corps in 2018, 73.6% of the enlisted members were under the age of 26.<sup>149</sup> In 2020, that percentage remained high: 72.7% of the enlisted members in the Marine Corps were under the age of 26.<sup>150</sup> Essentially, many of those serving in the Navy and Marine Corps are young.<sup>151</sup> In some instances, the military may be all they have known for most of their adult life. Unfortunately, youth may increase the likelihood of an OTH

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143. See Biolo, *supra* note 18, at 1388.

144. *Id.*

145. *Id.*

146. See *id.*

147. OFF. OF THE DEPUTY ASSISTANT SEC’Y OF DEF. FOR MIL. CMTY. & FAM. POL’Y, DEP’T OF DEF., 2018 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 39, <https://download.militaryonesource.mil/12038/MOS/Reports/2018-demographics-report.pdf> [<https://perma.cc/HGF9-XLE4>] [hereinafter 2018 DEMOGRAPHICS].

148. OFF. OF THE DEPUTY ASSISTANT SEC’Y OF DEF. FOR MIL. CMTY. & FAM. POL’Y, DEP’T OF DEF., 2020 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 37, <https://download.militaryonesource.mil/12038/MOS/Reports/2020-demographics-report.pdf> [<https://perma.cc/SD2D-CHGU>] [hereinafter 2020 DEMOGRAPHICS].

149. 2018 DEMOGRAPHICS, *supra* note 147, at 39.

150. 2020 DEMOGRAPHICS, *supra* note 148, at 37.

151. See 2018 DEMOGRAPHICS, *supra* note 147, at 39; 2020 DEMOGRAPHICS, *supra* note 148, at 37.



Discharge.<sup>152</sup> The Navy should not send such individuals—young men and women who rely on the military—back into the civilian world with an OTH discharge without ensuring that this result is fair. This is especially true when we remember how many of those who receive an OTH struggle with homelessness<sup>153</sup> and mental health issues.<sup>154</sup>

If the Navy ever decides to improve its Adsep Board procedures, it will have numerous options. However, this Comment addresses only three. First, the DOD or Navy could increase the amount of training that SMs receive before the Adsep Board begins. This training would help SMs understand when evidence is relevant, authentic, and competent and the different factors that could inform how the Board characterizes a discharge. Second, the DOD or Navy could apply two new rules to witness testimony presented at Adsep Boards when OTH discharges are a possibility. Third, the DOD or Navy could remove OTH discharges from the purview of Adsep Boards and leave this discharge to courts-martial. Of these solutions, the first and second are the most likely to benefit the Navy without requiring too high a price.

#### A. *Option One: Improved Training for Senior Members*

##### 1. Option One's Characteristics

Option One suggests that the DOD or Navy should design training programs to teach SMs when evidence is relevant, authentic, and competent and help them understand the factors they should consider when characterizing a discharge. This policy suggestion hopes to ensure that SMs have the necessary information to properly guide and manage an Adsep Board. The training would be comprehensive to help the SM understand every aspect of their duty. The training could be a concise handbook and video series crafted by Naval Justice School faculty.<sup>155</sup>

First, the training would include a thorough explanation of when evidence is relevant, authentic, and competent. Naval Military Personnel Manual (“MILPERSMAN”) 1910-510, the source of this rule, does not elaborate as to what evidence is relevant, authentic, and competent,<sup>156</sup> so some explanation of these terms prior to the Adsep Board would increase SMs’ understanding of their duties. The definitions contained in the MRE could provide guidance as to what those terms mean. For

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152. Eric B. Elbogen et al., *Psychosocial Risk Factors and Other Than Honorable Military Discharge: Providing Healthcare to Previously Ineligible Veterans*, 183 MIL. MED. 532, 534 (2018), doi.org/10.1093/milmed/usx128 (“Among demographic factors, older age was significantly associated with reduced odds of OTH discharge . . .”).

153. Scapardine, *supra* note 5, at 1136–37.

154. Wherry, *supra* note 81, at 1361; McClean, *supra* note 8, at 2206.

155. See generally *Naval Justice School*, U.S. NAVY REGION MID-ATL., <https://cnrma.cnic.navy.mil/Installations/NAVSTA-Newport/About/Tenant-Commands/Naval-Justice-School/> [<https://perma.cc/YQ3B-SUAJ>] (establishing that the Naval Justice School trains service members in a variety of areas, including legal work).

156. See MILPERSMAN 1910-510, *supra* note 57.

example, MRE 401 states that evidence is relevant when it meets two criteria: (1) “it has any tendency to make a fact more or less probable than it would be without the evidence,” and (2) “the fact is of consequence in determining the action.”<sup>157</sup> Essentially, the training would explain that the evidence must help prove or disprove a fact that will affect the likelihood of the service member committing the act in question. The MRE could also guide the SM as to what evidence is authentic. There is a lot of detail in the MRE, but generally, evidence is authentic when the person entering the evidence can “produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>158</sup> This is a very broad definition, but it would provide the SM with some boundaries to operate within instead of simply telling the SM to only admit authentic evidence.

This training, however brief, should supplement the script the SMs use to manage the proceedings and help SMs properly apply these rules to specific situations. Because SMs govern what evidence is admitted into the Adsep Board,<sup>159</sup> they must have a grasp of how these rules should be applied. If the Navy is going to place SMs in the position to admit or reject evidence,<sup>160</sup> SMs should have the tools to properly do so. The proper application of these rules will do three things: (1) ensure that the accused service member is properly protected; (2) ease the burden on JAG Corps Officers by decreasing how much law they will have to teach the Board during the Adsep Board proceedings,<sup>161</sup> and (3) allow the JAG Corps Officers to better anticipate which items of evidence will be admitted. This training should strengthen the overall quality of the Adsep Board.

Second, the training would provide the SM with information regarding what Post Traumatic Stress Disorder (“PTSD”) and Traumatic Brain Injuries (“TBI”) are, how to spot those issues, and how these issues affect behavior. While this information would be useful for the whole board, as its leader, it is especially important for the SM to understand these issues. For PTSD, the training should explain what PTSD is and how adults can be diagnosed with PTSD.<sup>162</sup> The PTSD training should

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157. MIL. R. EVID. 401(a)–(b).

158. MIL. R. EVID. 901(a).

159. MILPERSMAN 1910-506, *supra* note 6, at 1.

160. *See id.*

161. JAG’s School, U. S. Army, *The Art of Trial Advocacy: To Advocate and Educate: The Twin Peaks of Litigating Administrative Separation Boards*, 1999 ARMY L. 35, 35–36 (“In administrative separation boards, counsel are required to do more than just advocate the facts of their case; they must educate the board members on the substantive law, and persuade the board president to follow certain procedures.”).

162. *Post-Traumatic Stress Disorder*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd> [<https://perma.cc/SG7V-SGLD>] (stating that adults can be diagnosed with PTSD if they experience one re-experiencing symptom and one avoidance symptom, in addition to two or more arousal and reactivity symptoms and two or more cognition and mood symptoms, for at least one month).

put extra emphasis on symptoms that affect behavior and performance at work because those symptoms are more likely to be visible to the Board. For example, symptoms of PTSD can include angry outbursts, concentration issues, or irritability.<sup>163</sup> Those experiencing PTSD may also partake “in risky, reckless, or destructive behavior” or have issues sleeping.<sup>164</sup> These arousal and reactivity symptoms can “interfere with parts of daily life, such as sleeping, eating, or concentrating.”<sup>165</sup> The training should supplement this information with an explanation that those experiencing PTSD can heal if they get proper support.<sup>166</sup> For TBIs, the training should explain the symptoms of a mild TBI and a moderate to severe TBI. Those who have a mild TBI can experience, just to name a few symptoms, anxiety, anger, sleep issues, and fatigue.<sup>167</sup> A mild TBI can also cause someone to have issues concentrating or remembering things.<sup>168</sup> A moderate to severe TBI can cause someone to struggle with communicating, thinking clearly, or controlling behavior.<sup>169</sup> Individuals with a TBI can also be more angry, depressed, or anxious than normal.<sup>170</sup> These symptoms are just an example of the type of information this training should include. There are more details that the SM, and the Board as a whole, could use for their determination.

This training does not have to be an exhaustive process. A couple of training videos accompanied by a packet of information would adequately explain the rules and the potential medical issues the Board may have to address. The training could be broken up into several categories: (1) the rules that the SM must apply and how to apply them, (2) PTSD information, and (3) TBI information. The SM should also be able to keep the packet with them during the proceedings so they can reference it as needed. If necessary, the packet alone would improve the system as it is. However, videos would be a valuable part of the training because videos, when used correctly, can be a useful educational tool.<sup>171</sup>

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163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.*

167. *Symptoms of Mild TBI and Concussion*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 10, 2023), <https://www.cdc.gov/traumaticbraininjury/concussion/symptoms.html> [<https://perma.cc/FV99-HJJP>].

168. *Id.*

169. *Potential Effects of a Moderate or Severe TBI*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 10, 2023), <https://www.cdc.gov/traumaticbraininjury/moderate-severe/potential-effects.html> [<https://perma.cc/3LS5-RVT5>].

170. *Id.*

171. *See generally* Cynthia J. Brame, Essay, *Effective Educational Videos: Principles and Guidelines for Maximizing Student Learning from Video Content*, CBE LIFE SCI. EDUC., Dec. 2016, doi.org/10.1187/cbe.16-03-0125.

## 2. Option One's Benefits and Drawbacks

This training can help the SM and its Board accomplish two things. First, this information could help the SM better determine if a suspension of separation is warranted because the accused can be rehabilitated. Second, an understanding of PTSD and TBIs can help the SM and the Board determine the proper discharge characterization for the service member in question. When characterizing a discharge, the Board can consider specific circumstances surrounding the case and the service member's physical and mental conditions.<sup>172</sup> This training would be useful for every member of the Board. However, it is especially useful for the SM since the SM leads the Board.<sup>173</sup> This leadership position requires a higher level of knowledge,<sup>174</sup> so the Navy should ensure that the SM possesses that knowledge.

A few drawbacks accompany these benefits. First, the Navy would have to assemble and disperse the training, which requires funding. However, the simplicity of the training should minimize the costs. Additionally, once the Navy assembles the packet, it should not have to do so again for at least a few years; thus, part of the costs should only occur sporadically. The low cost of this option is outweighed by the potential utility of the training.

Furthermore, some could argue that this training is unnecessary because the JAG Corps Officers of both sides can guide the Board as to the proper application of the rules,<sup>175</sup> but that argument is flawed. The onus should not be completely on the JAG Corps Officers to educate the decision-maker as to their options, every factor they should consider, and the rules that apply. The SM, at the very least, should begin the proceedings with some of the background knowledge referenced in the previous paragraphs. At a minimum, it would not hurt SMs to have the concepts explained to them more than once, especially considering the impact that OTH discharges have on service members.

It could also be argued that the training is unnecessary because the DOD requires the services to screen service members being separated in certain circumstances for PTSD or TBI before they are separated,<sup>176</sup> so the potential medical issues will be addressed prior to the Adsep Board. However, the circumstances in which screening is required are limited: the service member must meet four criteria.<sup>177</sup> First, the Navy

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172. U.S. DEP'T OF NAVY, MILPERSMAN 1910-302, GENERAL CONSIDERATIONS ON CHARACTERIZATION OF SERVICE 1 (2021), [https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-302.pdf?ver=w1Mmpd2Af-Ge1Uw6dIqKm\\_g%3D%3D](https://www.mynavyhr.navy.mil/Portals/55/Reference/MILPERSMAN/1000/1900Separation/1910-302.pdf?ver=w1Mmpd2Af-Ge1Uw6dIqKm_g%3D%3D) [https://perma.cc/VHN4-GWHB].

173. MILPERSMAN 1910-506, *supra* note 6.

174. *See generally id.* (establishing that the SM presides over the Board and makes decisions regarding procedures and evidentiary matters).

175. JAG's School, *supra* note 161, at 36.

176. U.S. DEP'T OF DEF., *supra* note 24, at 49.

177. *Id.*

must separate the service member with an OTH discharge.<sup>178</sup> Second, the service member must have been “deployed overseas to a contingency operation or was sexually assaulted during the previous 24 months.”<sup>179</sup> Third, the service member must have been diagnosed with PTSD or TBI or have alleged that he or she was experiencing symptoms as a result of the second criterion.<sup>180</sup> Fourth, the separation cannot be the result of a court-martial or a UCMJ proceeding.<sup>181</sup> These criteria limit the frequency of the screening, so not every service member is screened for PTSD or TBI prior to an Adsep Board.<sup>182</sup> Additionally, this screening does not ensure that SMs understand the significance of a finding that the service member was experiencing symptoms of PTSD or TBI. Thus, the training would still help SMs fulfill their duties.

Ultimately, Option One’s potential benefits outweigh the potential drawbacks. This Option could increase SMs’ effectiveness and the quality of Adsep Boards overall. This increase could, in turn, increase the faith that the public and service members have in the military’s administrative processes. Thus, the Navy should consider implementing this process.

## B. *Option Two: New Rules for Adsep Boards Involving OTH Discharges*

### 1. Option Two’s Characteristics

This next possibility would require the Navy to amend the MILPERSMAN to include two new rules for Adsep Boards involving OTH discharges. Option Two’s amendments would (1) limit witness testimony to matters where the witness has personal knowledge and (2) limit the type of opinions that lay witnesses can present to the Board. At the moment, evidence must simply be relevant, authentic, and competent for it to be admitted to an Adsep Board.<sup>183</sup> This standard is very broad and does not offer SMs a lot of direction—especially in the area of witness testimony. For example, the relevant, authentic, and competent rule could allow the SM to accept testimony from an untrained individual who states that they believe that a fire started in a certain spot because that is where most of the damage is found. The SM could find that such testimony is not competent. However, the SM could also be convinced that competent simply means that the testifier is competent to testify, not that they are qualified in a certain area. This rule, due to its haziness, does not adequately guide the SM as to what type of evidence lay witnesses should be able to give during their testimony. The

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178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *See id.*

183. MILPERSMAN 1910-510, *supra* note 57, at 1.

addition of two rules based largely on MRE 602 and MRE 701 should help provide some boundaries for the SM to operate within and provide more protection to service members being separated via an Adsep Board where they could receive an OTH discharge.

The first proposed rule is based on MRE 602, which is a personal knowledge rule. MRE 602 requires witnesses to only speak about a matter if “evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”<sup>184</sup> This requirement can be met through the witness’s own testimony.<sup>185</sup> Essentially, MRE 602 requires witnesses to only testify regarding matters they know about—matters they have perceived themselves.<sup>186</sup> This rule would allow SMs to exclude witness testimony regarding matters or events that witnesses did not actually perceive themselves.<sup>187</sup> For example, a witness could not testify that the witness knew that the accused hit the victim with a hammer unless the witness actually saw the event. However, it is important to note that this rule would not exclude hearsay statements so long as witnesses heard the statements themselves.<sup>188</sup> For example, a witness could testify that the accused told the witness that the accused hit the victim with a hammer, provided that the witness makes clear that they only heard the statement and did not see the event. This rule is a simple one, but it should help corral witness testimony in Adsep Boards.

The next proposed rule is similar in that it regulates witness testimony. In particular, this new rule regards opinion testimony of lay witnesses. It will be modeled after MRE 701. However, unlike the previous rule, this new rule will not exactly follow its MRE counterpart. MRE 701 dictates that lay witnesses can only testify as to their opinion if the evidence is “rationally based on the witness’ perception” and “helpful to clearly understanding the witness’ testimony or to determining a fact in issue . . . .”<sup>189</sup> The opinion must also not be “based on scientific, technical, or other specialized knowledge within the scope of [MRE] 702.”<sup>190</sup> For Adsep Boards, the first two requirements would largely remain the same because they are relatively simple and easy to understand. However, given that Adsep Boards are not governed by MRE 702,<sup>191</sup> that last requirement would have to be amended to fit the context. The last requirement could be revised to say that the witness’s opinion must not be based on scientific, technical, or other specialized knowledge

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184. MIL. R. EVID. 602.

185. *Id.*

186. FED. R. EVID. 602, Notes of Advisory Committee on Proposed Rules (explaining that the “require[ment] that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact’ is a ‘most pervasive manifestation’ of the common law insistence upon ‘the most reliable sources of information’”).

187. *See id.*

188. *Id.*

189. MIL. R. EVID. 701.

190. *Id.*

191. *See* SCHENCK, *supra* note 11, at 135.

unless counsel establishes that the witness is qualified to testify about such matters. This rule would be broad, yes, but it would limit a witness's ability to testify as to their opinion without first establishing that the witness is at least somewhat qualified to do so. Ultimately, it would be up to the SM to determine if witnesses are qualified.

## 2. Option Two's Benefits and Drawbacks

Implemented together, both rules would increase the quality of information received from witnesses. These rules would supplement the relevant, authentic, and competent requirement by ensuring that the information the Board receives from witnesses is trustworthy. Generally, rules of evidence help the fact-finder filter untrustworthy information from the proceedings so the fact-finder can more accurately determine the truth.<sup>192</sup> More specifically, the purpose of rules like MRE 602 is to promote the reliability of witness testimony.<sup>193</sup> The purpose of rules like MRE 701 is to ensure that the fact-finder receives accurate information.<sup>194</sup> Naturally, if the Board is basing its decision upon the evidence it receives from witnesses, the Navy should desire for that information to come from an acceptable source. These rules are simple, so they should be easy enough for the SM to apply—especially if the SM receives some training about the rules before the Adsep Board begins.

Like every proposal, there are some drawbacks to Option Two. First, the Board and all those involved—like the JAG Corps Officers<sup>195</sup>—would have to adjust to the new rules. This adjustment may be hard, but these changes are not so substantial that the adjustment period should be too long or difficult. The JAG Corps Officers would simply have to put more thought into which witnesses they call and the questions they ask. Second, the new rules have the potential to complicate the Adsep Board procedures, and simplicity is one of the benefits of an Adsep Board. However, the burden would be slight. The rules require very little from those involved: the JAG Corps Officers must simply adjust their witness list and be prepared to not have a lay witness with no qualifications speak as if they are qualified.

Another potential issue is that the SM will not understand how to apply these new rules; they are not lawyers, so the concepts may be foreign to them. To address this problem, there will need to be training

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192. See CHRISTOPHER B. MUELLER ET AL., EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 2 (9th ed. 2019).

193. See *Murray v. Just in Case Bus. Lighthouse, LLC*, 374 P.3d 443, 455 (Colo. 2016) (en banc) (stating that the purpose of a personal knowledge rule is to ensure that the witness's testimony is reliable); see also *United States v. Lemire*, 720 F.2d 1327, 1347 (D.D.C. 1983).

194. See FED. R. EVID. 701, Notes of Advisory Committee on Proposed Rules (“The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.”).

195. See generally MILPERSMAN 1910-504, *supra* note 60 (establishing that accused service members are entitled to counsel).

on the proper application of these rules or a MILPERSMAN to tell the SM how to apply the rules. Training would help SMs properly apply the rules, and the cost of such training, as argued previously, should be minimal.

Ultimately, the burden on the system is slight enough that the potential benefits outweigh the harm. These new rules would help refine and improve the Adsep Board system and increase the safeguards available to those who may receive an OTH discharge, so they should not be discarded.

### C. *Option Three: The Removal of an OTH Discharge from Adsep Boards*

#### 1. Option Three's Characteristics

The next option for improving Adsep Boards is to transform OTH discharges into punitive discharges—removing OTH discharges from the Board's toolbox altogether and giving them to the judge and/or members in a court-martial. This option is relatively straightforward: the Board would only be able to recommend a General or Honorable discharge.

#### 2. Option Three's Benefits and Drawbacks

The benefits of this option are also relatively straightforward. This option would remove the Board's ability to, in a way, punish a service member. While an OTH discharge may not technically be a punishment, it can be one in reality.<sup>196</sup> By removing the OTH discharge from the Board's purview, the Navy would reduce the risk that service members are being penalized through a process that affords them reduced protection.<sup>197</sup>

However, there are drawbacks to Option Three. The Navy benefits from the Adsep Boards' ability to award OTH discharges. There are valid reasons why someone who deserves an OTH discharge would be sent to an Adsep Board instead of a court-martial. First, there may not be enough evidence to prove the accused's crime beyond a reasonable doubt, but there may be enough evidence to warrant the accused's removal from the Navy and inability to receive benefits from the VA. There may be situations where a service member does not deserve the benefits that accompany being a veteran,<sup>198</sup> and an OTH discharge allows

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196. See Scapardine, *supra* note 5, at 1136; Biolo, *supra* note 18, at 1384; McClean, *supra* note 8, at 2233; Wherry, *supra* note 81, at 1362.

197. See generally SCHENCK, *supra* note 11, at 135 (establishing that fewer rules govern Adsep Boards and the standard of proof is only preponderance of the evidence).

198. For example, service members involved with drug smuggling. See, e.g., Jason Lemon, *U.S. Navy Sailors Plead Guilty to Being Part of Drug Ring Aboard Aircraft Carrier Stationed in Japan*, NEWSWEEK (Jan. 10, 2019, 5:18 PM), <https://www.newsweek.com>.



the Board to take that into consideration. Additionally, the removal of an OTH discharge could subsequently affect how the public views a General discharge: the General discharge could become the discharge service members receive at an Adsep Board when they are discharged for bad behavior. Therefore, leaving this discharge totally in the purview of a court-martial, a complete criminal proceeding, would unduly limit the Board's ability to perform its duties properly. Ultimately, the best place for the OTH discharge is in an Adsep Board.

While there are concerns about service members receiving OTH discharges in a forum that offers meaningfully reduced procedural safeguards, this discharge characterization is useful and where it needs to be. There are other options available to the Navy to decrease the likelihood of a service member unfairly receiving an OTH discharge, so the Navy should employ those methods instead of Option Three. If the Adsep Board procedures are improved overall, the dangers highlighted in this Part will be mitigated.

## VI. CONCLUSION

Each of these three options possess benefits and drawbacks. Of the options discussed, there are two where the cost/benefit calculus favors the change: Option One and Option Two. The Navy would benefit from designing a training program, even a very short one, to ensure SMs understand what is expected of them. SMs need to know when evidence is relevant, authentic, and competent, and they should be prepared to make decisions regarding service members' mental health. More training would help the Navy reach that goal. The Navy would also benefit from adding two rules to Adsep Board procedures: one limiting witnesses to testifying about matters about which they have personal knowledge and the other limiting the type of opinions that lay witnesses can present to the Board. Option One would better prepare SMs for their role, and Option Two would increase the quality of information considered by the Board.

The Navy's administrative system has value because it allows the Navy to manage its personnel quickly and promotes good order and discipline. By improving the system, the Navy would increase its effectiveness and overall quality. Hopefully, an improved system would help ensure that service members are not receiving an OTH discharge, and all the negative side effects that accompany the discharge, without first receiving a quality Adsep Board. Increasing SMs' competency while

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com/us-navy-sailors-guilty-drug-ring-1287520 [https://perma.cc/3Q3J-9K3Y] (explaining a case where service members smuggled drugs). There may be enough evidence to separate service members, but not enough to convict them at a court-martial. Janaro & Clifton, *supra* note 4, at 47. Alternatively, there may be enough evidence to convict them, but the Navy wishes to administratively separate the service members because Adsep Boards are simpler than a court-martial. See SCHENCK, *supra* note 11, at 134–35.

also fine-tuning what evidence can be admitted is a good step to ensuring that the Navy is only separating service members who should no longer be entitled to the benefits and honor that come from serving in the Navy.

