UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONLEY MONK, KEVIN MARRET, GEORGE SIDERS, JAMES COTTAM, JAMES DAVIS, VIETNAM VETERANS OF AMERICA, VIETNAM VETERANS OF AMERICA CONNECTICUT STATE COUNCIL, and NATIONAL VETERANS COUNCIL FOR LEGAL REDRESS, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. RAY MABUS, Secretary of the Navy, JOHN McHUGH, Secretary of the Army, and DEBORAH LEE JAMES, Secretary of the Air Force, *Defendants*.	3:14-CV-00260-WWE July 2, 2014

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR VOLUNTARY REMAND

Grady Lowman, Law Student Intern
Jennifer McTiernan, Law Student Intern
V Prentice, Law Student Intern
Michael J. Wishnie, ct27221
Veterans Legal Services Clinic
Jerome N. Frank Legal Svcs. Org.
P.O. Box 209090
New Haven, CT 06520-9090
Telephone: (203) 432-4800
Facsimile: (203) 432-1426

Counsel for Plaintiffs

Susan J. Kohlmann
Jeremy M. Creelan
Jared F. Davidson
Jenner & Block LLP
919 Third Avenue
New York, NY 10022-3908
Telephone: (212) 891-1600

Marina K. Jenkins
Jenner & Block LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001-4412
Telephone: (202) 639-6000

INTRODUCTION

Defendants' motion to remand the individual claims of three of the Named Plaintiffs in this class action case is one part of a cynical strategy to "pick off" plaintiffs and avoid meaningful consideration, by this Court, of the systemically unconstitutional and discriminatory approach the U.S. military has taken when considering applications from among the tens of thousands of Vietnam War veterans with Post-Traumatic Stress Disorder (PTSD) who received other-than-honorable discharges due to conduct attributable to their undiagnosed and untreated PTSD, and who seek an upgrade in discharge status on that basis. Time and time again, the U.S. military's record correction review boards have denied applications by such Vietnam War veterans, often citing a Kafkaesque "logic" that proceeds as follows: Their Vietnam-era discharges should not be upgraded because they were not diagnosed with PTSD prior to discharge, even though PTSD did not even exist as a diagnosis until 1980, well after the end of the Vietnam war. This case challenges Defendants' unlawful approach to *all* such applications.

The proposed remands would do nothing at all to address such systematic violations, nor even address the problem for the three Named Plaintiffs. Instead, Defendants' purpose is to stymie judicial scrutiny of these practices. This strategy was made plain by Defendants' motion to dismiss filed earlier this week, which argues, at bottom, that the Court must leave to the records correction boards themselves any consideration of whether their own standards, procedures, and Kafkaesque "logic" have deprived these veterans of their lawful opportunity to obtain a discharge upgrade. For the reasons set forth below, this Court should not permit Defendants to evade the claims the Named Plaintiffs seek to bring on behalf of a rapidly aging class of veterans.

Some background is critical to understand the nature of those claims. The exigencies of the battlefield can lead commanding officers to make hasty or erroneous decisions to discharge service members, especially when those officers lack accurate medical information about a wounded member of their unit. The separation of a service member with an "other than honorable" discharge, however, has lifetime consequences, including barring the veteran and his or her family from employment, housing, education, and disability benefits, impairing private sector employment, precluding a military burial, and stigmatizing the veteran for decades. Congress has recognized the twin needs for command flexibility in the field and just treatment of veterans, and after World War II directed the military branches to establish boards of civilian employees to review post-hoc requests from veterans seeking to "correct an error or remove an injustice" in military records.

The medical community first recognized PTSD in 1980 and, since then, the military has put in place numerous protections to ensure that service members potentially suffering from the disorder are not discharged without careful screening. Rather than receive other-than-honorable discharges, many veterans with PTSD now receive discharges on medical grounds and are therefore not deprived of the critical care and support they need after being discharged.

The Vietnam generation did not have the benefit of these procedures, however, and by definition Vietnam veterans could not have been diagnosed with the disorder. Yet as noted, when Vietnam veterans who have been diagnosed since their discharges with PTSD have applied to these civilian boards to upgrade an other-than-honorable discharge, the boards have summarily denied nearly all of their applications. The boards' illogical

and discriminatory approach has produced devastating results for the elderly, disabled, and indigent members of the proposed class.

Five individuals and three membership-based organizations brought this class action suit to challenge these systematic violations of law in the way that the record correction boards adjudicate cases of Vietnam veterans who received bad discharges due to service-related PTSD that was not diagnosed prior to discharge. The Plaintiffs do not blame their commanding officers for failing to notice the symptoms of PTSD during Vietnam. Rather, Plaintiffs allege that the boards' failure to apply medically appropriate standards and their discriminatory and constitutionally deficient practices violate the Administrative Procedure Act, the Rehabilitation Act, and the Fifth Amendment. Rather than "remov[ing] an injustice," these boards perpetuate one.

Defendants move for remand purportedly to cure two potential errors – apparently discovered by the Defendants only after Plaintiffs filed suit – that Plaintiffs have not come to Court to remedy. These "errors" are pre-textual. And, significantly, Defendants do not even suggest that a remand of the three individual Plaintiffs' cases would address any of the severe, systemic violations of law at issue in this case. The Court should reject this gambit.

The Navy's contention that it is "revising," ECF No. 18 at 7, an illegal regulation pursuant to which staff (rather than board members) decide requests for reconsideration, evidences the bad faith with which the boards have treated members of the proposed class. It has been more than ten years since a court invalidated the Army's comparable regulation, and at least four years since the Navy persuaded another U.S. District Court to remand a case so that board members, rather than staff, could adjudicate a request for

reconsideration. But the Navy has not even rescinded its illegal regulation, let alone published a proposed rule or adopted a final one. Instead, Defendants seek remands to evade judicial scrutiny of their unlawful standards and procedures, while continuing to enforce those same regulations to deny the applications of *pro se* individuals like Plaintiffs Siders, Marret and other class members.

Tellingly, even the Defendants' proposed order commits the boards to no deadlines on remand, nor to provide Plaintiff Cottam with the newly-discovered records Defendants now claim to have unearthed, nor to forego enforcement of the Navy's regulation against other class members, nor to apply the medically appropriate standards required by law, nor to provide any of the other procedural protections sought in this suit.

Plaintiffs Marret, Siders and Cottam, and Vietnam veterans like them have waited forty years for the U.S. military to recognize their honorable service in the Vietnam War. A remand would do nothing to address the claims Plaintiffs have pressed and would, in fact, further Defendants' cynical efforts to avoid having those claims heard in this Court.

FACTS AND PROCEEDINGS

More than 260,000 Vietnam veterans received an other-than-honorable discharge (OTH). Compl. ¶ 127. Veterans with an OTH are generally ineligible for benefits such as disability compensation and a military burial. *Id.* ¶ 128. One third or more Vietnam veterans who received an OTH have PTSD. *Id.* ¶ 137. The behaviors that caused these discharges were symptoms of the veterans' underlying, undiagnosed PTSD. *Id.* ¶ 138. But none of the veterans with service-connected PTSD who received an other-than-honorable discharge was diagnosed with PTSD at the time of their discharge, because the diagnosis did not then exist. *Id.* ¶ 24.

Congress has authorized the Secretary of each military branch, acting through a board of civilians, to revise military records when necessary to "correct an error or remove an injustice." 10 U.S.C § 1552(a); Compl. ¶ 142. This power is frequently used to upgrade the discharge status of a former service member. *Id.* Nonetheless, in the past two decades, the boards have *categorically* denied applications for upgrades of other than honorable discharges by Vietnam veterans with PTSD, rejecting nearly 100% of the hundreds of applications received. *Id.* ¶¶ 146-47, 153.

The boards have also engaged in numerous other practices that deny applicants procedural due process. For instance, the boards have refused to hold in-person hearings for years or decades. *See* Eugene R. Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, 65 ADMIN. L. REV. 499, 502 (2013) ("The [ABCMR] conducted no live hearings in fiscal year 2012. The BCNR has not conducted one in the last twenty years. The Coast Guard board has not conducted one in the last ten years."). Discovery will also demonstrate that the boards violate the statutory deadlines for adjudication of applications, rely on secret evidence withheld from applicants, and typically decide 70-80 cases per day, based on staff recommendations and consideration of individual cases for no more than a few minutes each. This is not the system that Congress intended or the Constitution requires.

Plaintiffs filed suit on behalf of themselves and a proposed class of "all veterans of the Vietnam War Era who served in the Vietnam Theater and: (a) were discharged under other than honorable conditions (also referred to as an undesirable discharge); (b) have not received discharge upgrades to honorable or to general (affirmed under uniform standards); and (c) have been diagnosed with PTSD attributable to their military service."

Compl. ¶ 158. Plaintiffs contend that the Boards' practices violate the APA, § 504 of the Rehabilitation Act of 1974, and the Fifth Amendment. They ask this Court *inter alia* to issue an injunction ordering the boards to utilize consistent and medically appropriate standards for considering the effects of PTSD when determining whether to upgrade their discharge status. Compl, *Prayer for Relief*, ¶ 2. In addition to the instant motion to remand the claims of three Plaintiffs, Plaintiffs have moved to certify a class, ECF No. 24, and Defendants have moved to dismiss the claims of all other Plaintiffs. ECF No. 26.

Kevin Marret and George Siders

Kevin Marret joined the U.S. Marine Corps in 1969 and was deployed to Vietnam from October 1969 to October 1970. Compl. ¶ 43. He served valiantly through firefights and mortar attacks, and developed PTSD as a result of witnessing and experiencing numerous horrific incidents in Vietnam. *Id.* ¶¶ 44, 46. These traumatic events caused Mr. Marret to suffer from blackouts, hypervigilance, panic attacks, anxiety, and abdominal cramps. *Id.* ¶¶ 47, 49. Mr. Marret returned from Vietnam and was stationed at Beaufort Air Station in South Carolina. *Id.* ¶ 48-49. His symptoms caused him to struggle with his assigned tasks, and he began leaving the base for days at a time without permission in order to seek treatment. *Id.* ¶ 51-52. Eventually, Mr. Marret left the base for four months without leave and was issued an other-than-honorable discharge. *Id.* ¶ 54.

Mr. Marret was diagnosed with PTSD in 1994 and the diagnosis was affirmed by psychiatric and medical examinations in 1997 and 2012. The psychiatrist who examined Mr. Marret in 1997 concluded that Mr. Marret's mental condition likely resulted from his service in Vietnam and had caused the AWOL that led to his other than honorable discharge. *Id.* ¶ 58-59. Mr. Marret applied to the Board for Correction of Naval Records

("BCNR") in 1999, 2007, 2010, 2012, asserting that his OTH resulted from his PTSD. *Id.* ¶¶ 58, 60. The BCNR denied each application. *Id.* ¶ 60.

George Siders joined the U.S. Marine Corps at age eighteen and was deployed to Vietnam in May 1968. *Id.* ¶ 11. Mr. Siders participated in twenty-six major operations in Vietnam, witnessed and experienced multiple violent events including multiple helicopter crashes, and received a Purple Heart for his service. *Id.* ¶ 64-65. In 1969, Mr. Siders was rotated out of Vietnam and stationed at Marine Corps Base Camp Lejeune in North Carolina. *Id.* ¶ 68. He suffered from nightmares, anxiety, and anger as a result of undiagnosed PTSD. *Id.* ¶ 70. Mr. Siders was twice absent without leave, but voluntarily returned to base each time. *Id.* ¶ 71-73. He received an OTH in 1971. *Id.*. ¶ 74.

Mr. Siders applied to the BCNR for a discharge upgrade in 2003. *Id.* ¶ 75. He began receiving treatment for PTSD in 2004 and has since submitted multiple requests for reconsideration to the BCNR, which has denied them all. *Id.* ¶¶ 77-78, 80.

The Executive Director of the BCNR, not the Board itself, denied the most recent applications of Mr. Siders and Mr. Marret. ECF Nos. 18-1, 18-2. This practice violates 10 U.S.C. § 1552(a)(1), which requires that the BCNR members, not their staff, adjudicate applications – as Judge Urbina held in *Lipsman v. Secretary of the Army*, 335 F. Supp. 2d 48 (D.D.C. 2004), and Defendants tacitly acknowledge. ECF No. 18, at 5-6. Representing that the Navy "is currently revising" its regulation, *id.* at 6, Defendants have moved to remand these cases. The Navy offers dates by which it "anticipates," *id*. at 9, a decision on remand may be completed, but notably, the Navy's proposed order, ECF No. 18-4, contains no deadlines for adjudication. Nor does the proposed order provide that this Court will retain jurisdiction over these cases, nor that the boards will apply

medically appropriate standards, or any of the other relief sought in this action. *See id.*

James Cottam

James Cottam enlisted in the Army in 1968 and was deployed to Vietnam from October 1969 to November 1970. While deployed, Mr. Cottam witnessed artillery fire kill a Vietnamese girl and then observed her screaming mother drag away her body. Compl. ¶ 85. As a result, Mr. Cottam suffered from nightmares, night sweats, and heightened irritability. *Id.* ¶¶ 86, 89. Mr. Cottam returned from Vietnam in 1970, and was assigned Fort Lewis in Washington. *Id.* ¶ 87. Mr. Cottam left base without permission in January 1974, and voluntarily returned in May 1974. *Id.* ¶ 89. He received an OTH in August 1974. *Id.*

The U.S. Department of Veterans Affairs ("VA") diagnosed Mr. Cottam with PTSD in 1982 and again in 1985. *Id.* ¶ 90. In 2002, the VA gave Mr. Cottam a 100% disability rating for service-connected PTSD. *Id.* ¶ 91. In 2009, he applied to the Army Board for Correction of Military Records ("ABCMR") for a discharge upgrade, asserting his discharge was the result of service-connected PTSD. *Id.* ¶ 94. ECF No. 18-3 at 3. The Board denied his application without meaningfully addressing Mr. Cottam's PTSD or the impact it may have had on his discharge. *Id.* at 4-5.

Now, the Army has "located certain separation documents and medical records" and moves to remand to the ABCMR on this basis. ECF 18 at 8. The Army has not produced these documents to Mr. Cottam or his counsel, despite his submission of records requests. It would not be the first time the ABCMR relied on secret evidence withheld from applicants and counsel. *See, e.g., Shepherd v. McHugh,* No. 3:12-cv-641-AWT (D.Conn.), Amended Complaint, ECF No. 50, ¶ 34 (ABCMR relied on records not

disclosed "to Mr. Shepherd or his counsel, who therefore lacked any notice of the evidence on which the [ABCMR] decision was based and who were denied any opportunity to be heard as to that evidence").

ARGUMENT

I. A REMAND IS APPROPRIATE ONLY IN LIMITED CIRCUMSTANCES.

Courts have the authority to consider requests by the government to remand claims to the administrative agency which first rendered the decision, "preserv[ing] [the] Court's scarce judicial resources by providing federal defendants the opportunity to 'cure their own mistakes.'" *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)). Courts "commonly grant motions for voluntary remand… [when] *both sides* acknowledge [the record] to be incorrect or incomplete." *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 40-41 (D.D.C. 2013) (emphasis added); *see also Carpenters Indus. Council*, 734 F.Supp.2d at 131 (granting remand on consent).

Remand is especially appropriate where the government agrees to consider curing the error upon which plaintiffs seek judicial review. *See Ethyl Corp. v. Browner*, 989 F.2d at 524 (holding new evidence related to the central litigated issue of the denial of an application for a waiver under the Clean Air Act merited a remand). Proposing to cure a mistake that is a contested issue between the parties helps an agency demonstrate that its concern is "substantial and legitimate," and not pretextual. *SKF USA Inc. v. United States,* 254 F.3d 1022, 1029 (Fed. Cir. 2001). Defendants cite no case, however, in which a court ordered a remand over objection of plaintiffs to cure errors not explicitly

the subject of the litigation.[1]

Moreover, an agency's ability to reconsider a decision "is not unlimited; rather, an agency may not do so it if would be arbitrary, capricious, or an abuse of discretion." *Frito-Lay, Inc. v. U.S. Dep't of Labor*, 3:12-CV-1747-B, 2014 WL 2027525 (N.D. Tex. Feb. 11, 2014); *e.g.*, *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002) and 5 U.S.C. § 706(2)(A). Thus, "a remand may be refused if the agency's request is frivolous or in bad faith." *SKF USA Inc.*, 254 F.3d at 1029; *see also Lutheran Church–Missouri Synod v. FCC,* 141 F.3d 344, 349 (D.C. Cir. 1998) (denying a remand request because it was based on a potential policy statement that would not have had the effect of binding the FCC). Courts may decline to remand when the agency offers reasons that are pretextual in nature and suggest a desire to evade judicial review. *Id.* at 348 (noting that plaintiffs raised a number of "quite serious and far-reaching" claims to challenge defendants' conduct, and a remand would serve not to remedy them but to only to evade judicial review). In light of this standard, a remand is not appropriate in this case.

II. THIS COURT SHOULD DECLINE TO REMAND THE CASES OF PLAINTIFFS MARRET AND SIDERS.

Defendants argue that a remand is warranted in the cases of Plaintiffs Marret and Siders because the Navy "is currently revising" its regulation permitting staff, rather than the BCNR itself, to adjudicate motions for reconsideration. ECF No. 18 at 6. The motion should be denied. First, a remand would be futile. Second, the Navy's representation that it "is currently revising" its illegal regulation, such that remand is appropriate, is

---

[1] A court may remand so that an agency may address one of several contested issues, where a remand "could make these proceedings moot." *Sierra Club v. Van Antwerp,* 560 F.Supp.2d 21, 25 (D.D.C.2008). Such is not the case here.

[2] Discharge review boards, such as the ADRB and the NDRB, are similar to the records corrections boards at issue in this case, but with narrower jurisdiction and a non-waivable fifteen year statute of limitations. *See* 10 U.S.C. § 1553.

[3] Notably, in another case pending before this Court, the Army continues to defend staff denials by the

evidence of bad faith. Third, the Navy's proposed order would permit indefinite delay, and would merely re-subject Marret and Siders to the same discriminatory and constitutionally inadequate procedures that they have come to Court to challenge.

A. A Remand Would be Futile.

At both the BCNR and the ABCMR, the process by which the Boards evaluate the applications of Vietnam veterans with PTSD and other than honorable discharges is a discriminatory and constitutionally deficient. The records correction boards have denied nearly 100% of applications by Vietnam veterans with an other-than-honorable discharge and PTSD, even on remand from a U.S. District Court. *See, e.g., Shepherd v. McHugh*, No. 3:12-cv-641-AWT (D.Conn.), Amended Complaint, ECF No. 50 (following remand on consent of parties, ABCMR adhered to decision denying application of Vietnam veteran with PTSD and OTH, leading to renewal of federal lawsuit); *see also Schmidt v. United States*, 749 F.2d 1064, 1065 (D.C.Cir. 2014) (same, in case involving remand to BCNR after diagnosis of Gulf War I veteran with PTSD). The boards will continue to conduct discriminatory proceedings if they do not apply medically appropriate standards that properly consider the significance of service-related PTSD on the behavior and conduct of plaintiffs and Vietnam veterans like Plaintiffs Marret and Siders. Without addressing these systemic problems, remanding these cases is futile.

Plaintiffs Marret and Siders, like other Vietnam veterans who have applied to the boards to upgrade an OTH based on evidence of PTSD, have been systematically denied. Since 1993, 95.47% of such veterans, including Plaintiffs Marret and Siders, have been denied at the boards. Compl. ¶ 147. This near-categorical denial of such claims is in stark contrast to the 30.58% of all applications approved by the ABCMR for any reason,

or by the Army Discharge Review Board (ADRB) and the Navy Discharge Review Board (NDRB) for a discharge upgrade.[2] *Id.* ¶ 148. The difference in grant rates between Vietnam veterans with PTSD (4.53%) and all veterans applying (30.58%) is statistically significant at a very high level of significance, $p < .001$. *Id.* ¶ 149. These numbers demonstrate the systemic discrimination that Vietnam veterans with PTSD face at the boards, which a remand will not address. *See also* Rebecca Izzo, Comment, *In Need of Correction: How the Army Board for Correction of Military Records is Failing Veterans with PTSD*, 123 Yale L. J. 1587, 1592 (2014) ("the ABCMR's policies make it nearly impossible for a veteran with a bad discharge caused by undiagnosed PTSD to obtain a discharge upgrade"); *see also id.* at 1596 ("the ABCMR has repeatedly explained the denial of Vietnam veterans' applications by noting that their records did not show that they were *diagnosed* with PTSD before discharge. Such statements . . . fail to recognize, however, that it was medically impossible to have a PTSD diagnosis before 1980").

The categorical denial of nearly every application by a Vietnam veteran with PTSD reflects the failure of the records correction boards to apply medically appropriate standards and other procedural protections required by law. Such standards are necessary for the boards to properly account for how PTSD affected the abilities of Plaintiffs and veterans like them to perform their duties when determining whether a discharge upgrade is appropriate to "correct an error or remove an injustice." 10 U.S.C. § 1552(a).

Moreover, there is evidence that Congress recognizes the systemic failure of the boards to give "due consideration" to whether a Vietnam veteran was later diagnosed with service-connected PTSD when reviewing a request to upgrade an OTH. *See, e.g.,* S.

[2] Discharge review boards, such as the ADRB and the NDRB, are similar to the records corrections boards at issue in this case, but with narrower jurisdiction and a non-waivable fifteen year statute of limitations. *See* 10 U.S.C. § 1553.

2410, Carl Levin National Defense Authorization Act for Fiscal Year 2015, § 525(a) (113th Cong., 2d Sess.) (approved 25-1 on June 2, 2014 by Senate Armed Services Committee) (expressing sense of Senate that Board "should give all due consideration" to upgrade from OTH for Vietnam veterans with subsequent diagnosis of service-connected PTSD); *see also* S. Rep. No. 113-176 at 106-107 (2014) (directing DoD to submit report regarding application of "medically appropriate standards" when considering upgrade applications from Vietnam-era veterans with PTSD, as well as other procedural reforms).

When "'the outcome of a new administrative proceeding is preordained,' a district court may forego the futile gesture of remand to the agency." *Berge v. United States*, 949 F. Supp. 2d 36, 43 (D.D.C. 2013) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F. 3d 1484, 1489 (D.C. Cir. 1995)). A remand to the BCNR without a prohibition on discriminatory and unconstitutional procedures will be futile, and the motion should be denied.

B. The Navy's Representation Regarding Its Alleged Revision of an Illegal Regulation is Evidence of Bad Faith.

Defendants argue that a Navy regulation permitting staff, rather than the BCNR members themselves, to adjudicate a request for reconsideration, is "valid and effective," ECF No. 18 at 5 (discussing 32 C.F.R. § 723.9), despite a decade-old decision invalidating a comparable Army regulation, *see Lipsman v. Secretary of the Army,* 335 F. Supp. 2d 48, 54 (D.D.C. 2004) – but nevertheless move to remand because the Navy is allegedly now "revising" its own regulation. The Navy cites no notice of proposed rule-making in the Federal Register, nor any other concrete steps it has taken in connection with this alleged revision. In fact the Navy's regulation is unlawful, for the reasons explained ten years ago by Judge Urbina in *Lipsman*. But more importantly, this Court

should reject the Navy's bad faith gambit and deny remand in this case.[3]

In 2004, the Court in *Lipsman* held that pursuant to 10 U.S.C. § 1552(a)(1), "the Secretary [of the Army is] bound to act through the [ABCMR], not its staff members, when evaluating the merits of request for reconsideration." 335 F.Supp. 2d at 54. Five years later, an opinion by the Chief Judge of the Court of Federal Claims noted the likelihood that the Navy's regulation was unlawful for the same reason. *Schmidt v. United States*, 89 Fed. Cl. 111, 124 (Fed. Cl. 2009); *see also Mosley v. Dep't of Navy, Bd. for Correction of Naval Records*, 7:10-CV-973 NAM/GHL, 2011 WL 3651142 (N.D.N.Y. Aug. 18, 2011) (same). Because the Court of Federal Claims lacked jurisdiction to invalidate the Navy's regulation, it transferred the *Schmidt* case to a U.S. District Court. There, the Navy promptly sought to evade invalidation of its regulation by requesting a remand so that the BCNR, not its staff, could adjudicate the application. *Schmidt v. United States,* No.1:10-cv-570-GK (D.D.C.), Consent Motion to Remand to Agency, ECF No. 12, at ¶ 4 ("Defendant requests the issues be remanded to the BCNR for further action" by "a board of members"). The Navy pursued the same strategy in a second case, moving to "remand plaintiff's case to the full three member BCNR for consideration of plaintiff's requests for reconsideration." *Mosely v. Dep't of Navy, Bd. for Correction of Naval Records*, 7:10-CV-973 NAM/GHL (N.D.N.Y.), Motion for Remand, ECF No. 62-1 at 4.[4]

[3] Notably, in another case pending before this Court, the Army continues to defend staff denials by the ABCMR. *See Dolphin v. McHugh*, No. 3:12-cv-1578-WWE (D.Conn.), ECF No. 56, Defendant's Memorandum of Law in Support of Motion to Dismiss, or in the Alternative, for Summary Judgment (defending lawfulness of 2010 and 2012 ABCMR staff denials).

[4] Unsurprisingly, the *Schmidt* remand was futile, as the BCNR denied the application, and the veteran suffering PTSD returned to U.S. District Court. *Schmidt v. United States*,749 F.3d at 1065. The U.S. District Court in *Mosley* refused to remand the case unless the Navy conceded either that its regulation was unlawful, or that Mosley's application contained new and material evidence such that it should be submitted to the BCNR board members. The Navy conceded the latter point, and the case was remanded.

In the ten years since *Lipsman*, the four years since the Navy sought a remand in *Schmidt* to evade judicial review of its illegal reconsidereation rule, and the nearly three years since the Navy sought a remand in *Mosley*, the BCNR Executive Director has unlawfully denied the reconsideration requests of countless service members, including Plaintiffs Siders and Marret. *See* ECF Nos. 18-1, 18-2. In this case, the Defendants' motion to remand makes no offer to cease applying the Navy's illegal regulation to other class members, or other former service members not in the class whose claims are illegally denied. The Navy secured remands in *Schmidt* and *Mosley* while continuing to apply its illegal regulation to Siders, Marret, and an unknown number of other *pro se* veterans. Its bad faith should not be rewarded with another remand in this case.

C. A Remand Would Cause Delay and Re-Subject Plaintiffs to the Very Discriminatory and Unconstitutional Procedures They Challenge.

Plaintiffs Marret and Siders filed suit to end the discriminatory and constitutionally inadequate procedures of the BCNR. A remand would compel them to resubmit to those same flawed procedures. And while the government "anticipates" that the BCNR will decide whether to grant reconsideration within 90 days, and if so "anticipates" adjudicating the requests in an additional 90 days, ECF No. 18 at 9, it is telling that the Defendants' proposed order contains no such deadlines. ECF No. 18-4 at 1-2. Nor does the government propose that BCNR apply medically appropriate standards, or that this Court maintain jurisdiction over these two cases, or provide for reinstatement of their claims to this Court's docket upon an adverse BCNR decision. *Id.*

As the experience of Conley Monk, another Plaintiff in this action, demonstrates, the BCNR does not hesitate to violate its statutory deadlines for adjudication of cases.

ECF No. 90 at 2. The BCNR denied the remanded *Mosley* application as well. *Mosley v. Dep't of the Navy*, NAM/TWD, 6:12-cv-00493, ECF No. 46 (granting summary judgment to Navy in refiled case).

Congress directed that the records correction boards complete review of all applications within eighteen months of receipt. 10 U.S.C. § 1557(b). It has been nearly 24 months since the BCNR received Mr. Monk's application, Complaint, ¶ 40, without a decision.

A remand without protection from discrimination and unconstitutional procedures will cause further delay. It has been many years since Plaintiffs Siders and Marret first requested correction of their military records in light of their diagnosis of service-connected PTSD. The BCNR has repeatedly denied each man, as it has categorically denied nearly every single other Vietnam veteran with PTSD and OTH, including on remand from U.S. District Court. This Court should not credit the Navy's "anticipated" deadlines, and should not subject Marret and Siders to additional, prolonged delay while the BCNR re-applies its discriminatory and unconstitutional proceedings.

III. THE COURT SHOULD DECLINE TO REMAND THE CASE OF PLAINTIFF COTTAM.

Defendant's belated discovery of additional records relating to Plaintiff Cottam, ECF No. 18, provides no basis, let alone a "substantial and legitimate" ground, *SKF USA Inc.*, 254 F.3d at 1029, upon which to order a remand. Plaintiff Cottam previously requested his military records, but the records newly-discovered by the Army were not disclosed. Nor has the Army yet produced these allegedly material records to Mr. Cottam or his counsel. As with Plaintiffs Marret and Siders, a remand would be futile, delay resolution of the systemic challenges Mr. Cottam has brought, and serve only to subject him again to the discriminatory and unconstitutional procedures used by the Board. Moreover, in his case, the ABCMR should not be permitted to revise its brief, boiler-plate decision, *see* ECF No 18-3, at 5-6, in an effort to shield its discriminatory and unconstitutional procedures from this Court's scrutiny.

The case of Plaintiff Cottam is not the first time the ABCMR has denied an application while claiming important records are unavailable, but upon the veteran pursuing judicial review, then located missing records. For instance, in a case pending now before Judge Hall, the ABCMR denied a records correction application by a Gulf War II veteran. After he filed suit, missing records appeared. *See Cowles v. McHugh*, 3:13-cv-1741-JCH (D.Conn.), Memorandum of Law in Support of Defendant's Motion to Dismiss and for Summary Judgment, ECF No. 15-1, at 12 n. 4 ("Following commencement of litigation these exhibits were discovered in the files of the Veterans Administration. Defendant provided all the newly-discovered documents to Plaintiff on January 9, 2014").[5] The Army's discovery of additional records did not require Judge Hall to remand the *Cowles* case to the ABCMR before proceeding to dispositive motions on that plaintiff's claims, including his Rehabilitation Act and Fifth Amendment causes of action, *see id*., and the same is true for the claims of Plaintiff Cottam.

Plaintiff Cottam has waited almost 40 years for recognition of his honorable service in the Vietnam War. Without offering a sound basis for doing so, the government is now asking him to wait even longer. He objects to the government's motion.

IV. ANY REMAND MUST INCLUDE CONDITIONS SUFFICIENT TO AVOID PREJUDICE TO PLAINTIFFS.

Should this Court order a remand of the claims of Plaintiffs Marret, Siders, or Cottam, it should impose conditions to ensure that no Plaintiff is prejudiced. "Remand involves all interested parties and should receive the careful and thoughtful scrutiny of the court not mere deference to the desires of one party." Toni M. Fine, *Agency Requests For "Voluntary Remand: A Proposal for the Development of Judicial Standards*, 28 Ariz.

[5] Of course, most former service members do not have access to counsel who can pursue judicial review.

St. L.J. 1079, 1092 (1996).[6] Plaintiffs request that in the event this Court orders a remand, it include the directives to the ABCMR and BCNR set forth below. These conditions are necessary to protect Plaintiffs from prejudice as well as ensure the Boards function fairly and without discrimination, as Congress intended.

A. Mandatory Deadlines for Adjudication.

On remand, this Court "may . . . set a time limit for action by the administrative tribunal, and this is often done." *Zambrana v. Califano*, 651 F.2d 842, 844 (2d Cir. 1981) (addressing claims remanded to Social Security Administration). A remand may cause substantial delay if the Boards are not required to make a decision promptly. *See* Compl. ¶¶ 40, 42 (Plaintiff Monk's application pending nearly 24 months at BCNR). Plaintiffs respectfully request that if their cases are remanded, the Court set the following schedule:

1. Plaintiffs Marret, Siders, and Cottam shall submit their applications to the BCNR or ABCMR within 60 days, including any supplemental statement containing new or additional evidence;

2. The BCNR shall determine, within 60 days of receipt of their supplemental statements, whether it will grant reconsideration of the applications of Plaintiffs Marret or Siders.

3. If it grants reconsideration to Plaintiffs Marret or Siders, the BCNR shall make a substantive decision within an additional 60 days.

4. The ABCMR shall immediately produce the additional records located by the Army. The ABCMR shall adjudicate Plaintiff's Cottam's application within 60 days of receipt of his supplemental statement.

5. Upon an adverse decision by the BCNR or ABCMR, Plaintiffs Marret, Siders, or Cottam shall reinstate their case to this Court's active docket within 30 days of receipt by counsel of the adverse decision.

[6] In one noteworthy case, a U.S. District Court remanded seven times to the BCNR, *Pettiford v. Sec'y of the Navy*, 858 F.Supp.2d 86 (D.D.C. 2012), when the BCNR repeatedly failed to "address plaintiff's arguments," conduct proceedings in accordance with law, or properly understand facts. *Pettiford v. Sec'y of the Navy*, 774 F.Supp.2d 173, 185, 186 n. 9 (D.D.C. 2011). Attaching appropriate conditions to any remands ordered by this Court is essential to avoid prolonged re-litigation of BCNR errors.

B. In-Person Hearings Before the Boards.

Plaintiffs request that this Court direct the ABCMR and BCNR to allow Plaintiffs Cottam, Marret, and Siders in-person hearings. *See* 32 C.F.R. § 581.3 (b)(4)(iii) (authorizing ABCMR in-person hearing "in the interest of justice"); *id.* § 723.4 (same, as to BCNR). The procedural value of in-person hearings is self-evident, but the BCNR has not held a live hearing "in the last twenty years," Fidell, *The Boards for Correction of Military and Naval Records*, 65 ADMIN. L. REV. at 502, and discovery will reveal that an in-person hearing at the ABCMR is also extremely rare.

The boards' blanket refusal to hold in-person hearings is detrimental to the applications of many former service members, and it has drawn the critical attention of Congress. *See* S. Rep. No. 113-176 at 107 (2014) (directing DoD to report to Congress regarding use of videoconferencing "and other initiatives to increase the number of in-person hearings granted" by record correction boards). If the Defendants insist on a remand over Plaintiffs' objection, they should be required to exercise their long-dormant authority to permit each man to appear in person with his counsel.

C. Medically Appropriate Standards.

Plaintiffs Marret, Siders, and Cottam contend that Defendants violate Section 504 of the Rehabilitation Act, which provides that no person with a disability shall be "excluded from the participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a), Count Two Compl. ¶ 176-177. Defendants discriminate against Plaintiffs on the basis of their disability by "failing to utilize consistent and medically appropriate standards for consideration of PTSD when reviewing the military records of

Vietnam veterans to determine whether to upgrade their discharge statuses." *Id*. ¶ 180. To ensure non-discriminatory treatment, this Court should order the BCNR and ABCMR to utilize medically appropriate standards on remand when evaluating the application of Plaintiffs Marret, Siders, and Cottam. *See also* S. 2410, Carl Levin National Defense Authorization Act for Fiscal Year 2015, § 525(a) (expressing sense of Senate that Boards "should give all due consideration" to upgrade from OTH for Vietnam veterans with service-connected PTSD); S. Rep. No. 113-176 at 106-107 (2014) (directing DoD to report to Congress regarding the application of "medically appropriate standards" when considering upgrade applications from Vietnam veterans with PTSD).

D. Retention of Jurisdiction.

Courts may expressly retain jurisdiction over a case remanded to an administrative agency. *See American Gas Ass'n v. FERC,* 888 F.2d 136, 153 (D.C. Cir. 1989). Plaintiffs Marret, Siders, and Cottam respectfully request that if this Court remands their cases over objection, that the Court retain jurisdiction.

E. Benefit of Any Relief Awarded to the Class

Plaintiffs request that this Court include direction that if their cases are remanded, Plaintiffs Marret, Siders, and Cottam shall receive the benefit of relief awarded to the class, if any, in the event that their claims are pending before the BCNR and ABCMR at such time as class-wide relief is ordered. Such a provision is necessary to ensure any remanded Plaintiffs are not prejudiced while this suit proceeds.

CONCLUSION

Remanding the cases of three individual Plaintiffs will not address the broader systemic problems of the records correction boards in their categorical denial of nearly all

applications by Vietnam veterans with PTSD and an OTH. In addition to these three Plaintiffs, tens of thousands of other Vietnam veterans received an OTH as a result of poor conduct attributable to their underlying, undiagnosed PTSD, which was not a recognized medical diagnosis until 1980. Today's military provide numerous protections for members of the armed forces to ensure that they are not discharged without careful consideration as to whether PTSD may have affected their service. The Vietnam generation could not benefit from these protections, and those who sought discharge upgrades from the boards established by Congress to "correct an error or remove an injustice" have been systematically discriminated against and denied due process. Compelling these three Plaintiffs to resubmit to discriminatory and constitutionally flawed procedures on remand is no remedy at all.

Respectfully submitted,

By: /s/ Michael J. Wishnie
Grady Lowman, Law Student Intern
Jennifer McTiernan, Law Student Intern
V Prentice, Law Student Intern
Michael J. Wishnie, ct27221
Veterans Legal Services Clinic
Jerome N. Frank Legal Svcs. Org.
P.O. Box 209090
New Haven, CT 06520-9090
Telephone: (203) 432-4800
Facsimile: (203) 432-1426

Counsel for Plaintiffs

Susan J. Kohlmann
Jeremy M. Creelan
Jared F. Davidson
Jenner & Block LLP
919 Third Avenue
New York, NY 10022-3908
Telephone: (212) 891-1600
Facsimile: (212) 891-1699

Marina K. Jenkins
Jenner & Block LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001-4412
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

CERTIFICATE OF SERVICE

I hereby certify that, on July 2, 2014, a copy of the foregoing motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filings as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/EFC system.

The following parties were served by electronic means:

Matthew A. Josephson, U.S. Department of Justice

Michelle McConaghy, U.S. Attorney's Office, District of Connecticut

/s/_ Michael J. Wishnie
Michael J. Wishnie, ct27221
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800