

AS RACIAL TENSIONS RISE IN THE NATION, IT IS TIME TO ACKNOWLEDGE THE IMPACT OF RACIAL TRAUMA-INDUCED PTSD AND RELATED MENTAL HEALTH CONDITIONS ON BLACK SERVICEMEMBERS

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I. INTRODUCTION

“I am an American Soldier. . . . [I] live the Army Values. . . . I am disciplined, physically and mentally tough . . . I always maintain my arms, my equipment and myself. I am an expert, and I am a professional.”¹ The Soldier’s Creed establishes the ethos Army Soldiers are expected to live by. Failure to conform with the Creed can result in negative consequences for the Soldier. The Creed is not intended solely to make Soldiers feel excited or invested in whatever task they are about to engage; it serves to remind Soldiers that maintaining their arms and equipment is important: Failure to properly maintain your weapon in combat can lead to the serious injury or death of the Soldier, or members of their team.² Every branch of the military has a creed for their servicemembers which serves as a verbal affirmation of the branch values.³ In its Soldier’s Creed, the Army stresses the importance of both physical and mental health.⁴ Mental toughness helps Soldiers to overcome any adversity they will inevitably face.⁵ But what happens when

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¹ *Soldier’s Creed*, U.S. Army, <https://www.army.mil/values/soldiers.html> [https://perma.cc/JS5E-MAVK] (the Army Values are loyalty, duty, respect, selfless service, honor, integrity, and personal courage. *The Army Values*, U.S. Army, <https://www.army.mil/values/> [https://perma.cc/MMX9-4VTC]).

² Command Sgt. Maj. Arthur L. Coleman Jr., III, *Profession of Arms Defined in Soldier’s Creed*, FT. HOOD SENTINEL (Dec. 22, 2015), http://www.forthoodsentinel.com/editorial/profession-of-arms-defined-in-soldier-s-creed/article_7fcd322c-3008-57ff-81d8-af8377bb4936.html [https://perma.cc/4TJH-EFC2].

³ *Setting the Tone for Each Service: Learning the Military Creeds*, MILITARY.COM (2021), <https://www.military.com/join-armed-forces/military-creeds.html> [https://perma.cc/99PE-KAY6].

⁴ See *supra* note 1.

⁵ See *supra* note 2.

mental toughness is impeded by posttraumatic stress disorder (PTSD) or related mental health conditions?⁶

PTSD can create symptoms that manifest as behavior inconsistent with military values and, ultimately, misconduct can lead to other than honorable discharges (bad paper discharges).⁷ Servicemembers can be discharged from military service through either administrative separations or punitive separations.⁸ Administrative separations are initiated by commanding officers and can be characterized as honorable, general, or other than honorable.⁹ Punitive discharges occur after the conclusion of a court martial proceeding.¹⁰ Servicemembers who believe their discharge was mischaracterized can seek a discharge upgrade to receive a more favorable characterization.¹¹ Further explanation of the discharge process and characterization of service is discussed in Section II of this Note.

Black servicemembers are at a higher risk of receiving a bad paper discharge due to exposure to racial trauma, which can lead to PTSD or related mental health conditions.¹² Such trauma can be the result of societal factors

⁶ Throughout this Note there will be references to PTSD related mental health conditions. The 2017 United States General Accounting Office report listed PTSD-related mental health conditions as adjustment disorders, alcohol-related disorders, depressive disorders, substance abuse disorders, and anxiety disorders. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-260, DOD HEALTH: ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS 3 n.6 (2017), <https://www.gao.gov/assets/gao-17-260.pdf> [<https://perma.cc/GD5A-LBS5>] [hereinafter 2017 GAO Report].

⁷ See generally THE FALLOUT OF A 'BAD PAPER' DISCHARGE, VETERANS HEALTHCARE POL'Y INST. (Aug. 26, 2020), <https://www.veteranspolicy.org/post/the-fallout-of-a-bad-paper-discharge> [<https://perma.cc/NN69-BDRD>] (providing that bad paper discharges consist of all military discharges not characterized as 'honorable.').

⁸ 2017 GAO Report, *supra* note 6, at 6.

⁹ 1 Veterans Benefit Manual 2.2.3 (2020).

¹⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8)(A)–(C) (2019) [hereinafter MCM].

¹¹ See Sundiata Sidibe & Francisco Unger, *Unfinished Business: Correcting "Bad Paper" for Veterans with PTSD: The Defense Department's Adjudication of Discharge Upgrade Applications One Year Since Its September 2014 PTSD Directive*, VIETNAM VETERANS OF AM. & NAT'L VETERANS COUNCIL FOR LEGAL REDRESS 2 (2016), <https://www.vetsprobono.org/library/attachment.312768> [<https://perma.cc/R966-V2FB>].

¹² Compare Marie Carlson et al., *Addressing the Impact of Racism on Veterans of Color: A Race-Based Stress and Trauma Intervention*, 8 PSYCHOL. OF VIOLENCE 748, 748–49 (2018) (stating that, "even when controlling for severity of war zone and post-deployment stressors, racial and ethnic minorities still experience higher rates of PTSD than their White counterparts, suggesting unique experiences (e.g., racial/ethnic discrimination) associated with being a racial or ethnic minority may play a prominent role."), and Monnica T. Williams et al., *Assessing Racial Trauma Within a DSM-5 Framework: The UConn Racial/Ethnic Stress and Trauma Survey*, 3 PRAC. INNOVATIONS 242, 243 (2018) (asserting that racial discrimination can adversely impact mental health and lead to increases in substance use), and Monnica T. Williams et al., *Assessing Racial Trauma with the Trauma Symptoms of Discrimination Scale*, 8 PSYCHOL. OF VIOLENCE 735, 736 (2018) (describing that trauma-related symptoms like anxiety and negative affect can be linked to perceived discrimination), with 2017 GAO Report, *supra* note 6, at 12 (stating that 62% of servicemembers separated for misconduct in fiscal years 2011–2015 had been

in the civilian world, or the result of racism or racial violence experienced in the military itself.¹³ If a black servicemember experiences racial trauma, induced mental health conditions that manifest in misconduct and documented racial disparity in the military justice system can lead to more bad paper discharges for black servicemembers.¹⁴

While there has been a perception among civilians and top military commanders that racism is no longer an issue in the ranks, that servicemembers look at each other in uniform and only “see green,” this is not the reality of many servicemembers of color.¹⁵ As society reflects on the impact of racism through police violence, the rise of extremism as one of the nation’s biggest security threats, and the rise in hate crimes, it should also reflect on the additional trauma that is placed on black servicemembers.¹⁶ black servicemembers must deal with the racial tensions of the civilian world while navigating racism, racial bias, and fewer promotion opportunities in the military.¹⁷ This combination of stressors can lead to a trauma response that manifests in misconduct, subjecting black servicemembers to a military justice system that affords great discretion to commanders determining how to address misconduct.¹⁸

In addition to the discrimination in the discharge process, the discharge upgrade boards have provided inconsistent results for servicemembers, despite guidance from the Department of Defense to apply liberal consideration to claims involving PTSD or related mental health conditions.¹⁹ There have been numerous attempts to change the upgrade process to account for the link between bad paper discharges and trauma-induced mental health conditions including PTSD.²⁰ In 2014, then-Secretary of Defense Hagel produced guidance for the boards requiring liberal consideration of evidence be given for servicemembers claiming that the misconduct that led to a bad paper discharge was related to PTSD.²¹ Subsequent clarifications to the Hagel

diagnosed with PTSD or certain other conditions which could be associated with misconduct in the two years before separation).

¹³ See Carlson, *supra* note 12, at 748–49.

¹⁴ See *infra* text accompanying Section III(A).

¹⁵ Helene Cooper, *African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (Jun. 9, 2020, 6:16 PM), <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html> [<https://perma.cc/2F8C-CLS2>]; David Barno & Nora Bensahel, *Reflections on the Curse of Racism in the U.S. Military*, TEX. NAT’L SECURITY REV.: WAR ON THE ROCKS, (Jun. 30, 2020) <https://warontherocks.com/2020/06/reflections-on-the-curse-of-racism-in-the-u-s-military/> [<https://perma.cc/N6GX-MBL7>].

¹⁶ *Id.*; see also *infra* text accompanying Section II.C.1.a.

¹⁷ See *infra* Section II.C.1.a.

¹⁸ See *infra* Sections II.C.1.a, III.A.1.

¹⁹ See *infra* Section III.B.2.a.i.

²⁰ See *infra* Section III.B.2.

²¹ See generally Sec’y of Def., Memorandum for Secretaries of the Military Departments:

Memo were issued in 2016 and 2017.²² The Fairness for Veterans Act of 2016 (FVA) officially codified the Hagel Memo's requirement of liberal consideration, as well as officially recognizing military sexual trauma (MST) as a traumatic event that can lead to misconduct.²³ Despite the language in the Hagel Memo, further Department of Defense (DoD) clarifications, and the FVA, class action lawsuits have been filed to compel the Boards to apply the Hagel Memo for veterans of the Iraq and Afghanistan conflicts.²⁴

The current discharge upgrade process is fundamentally flawed and has a disproportionately negative impact on minorities with non-combat-induced PTSD because current guidance only explicitly recognizes traumatic brain injuries (TBI), PTSD, related mental health conditions caused by combat, and MST.²⁵ The continued prevalence of racial violence and racial microaggressions in both the civilian and military world leave black servicemembers at a higher risk for developing PTSD or related mental health conditions that can lead to misconduct and involvement in a military justice system, which has documented racial disparities in punishment for black servicemembers.²⁶ This combination of factors leads to a higher probability that black servicemembers will receive bad paper discharges.²⁷

Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (2014), <https://www.secnav.navy.mil/mra/bcncr/Documents/HagelMemo.pdf> [https://perma.cc/DX55-TYSP] [hereinafter Hagel Memo].

²² See generally Under Sec'y of Def., Memorandum for Secretaries of the Military Departments: Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) (2016), <https://veteransclinic.law.wfu.edu/files/2017/09/Carson-Memo.pdf> [https://perma.cc/79LB-NL3G] [hereinafter Carson Memo]; see also Under Sec'y of Def., Memorandum for Secretaries of the Military Departments: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (2017), <https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf> [https://perma.cc/N9ZE-PTNL] [hereinafter Kurta Memo].

²³ Fairness for Veterans Act of 2016, 10 U.S.C. § 1553(d) (2016).

²⁴ See, e.g., Julia Bergman, *Connecticut Vet Sues Over Discharges for Those with Mental Health Problems*, THE DAY (Apr. 17, 2017, 8:52 PM), <https://www.theday.com/military/20170417/connecticut-vet-sues-over-discharges-for-those-with-mental-health-problems> [https://perma.cc/E3BH-8YTZ].

²⁵ 10 U.S.C. § 1552(h)(1) (2020); 10 U.S.C. § 1553(d)(1)(A)–(B) (2020).

²⁶ See generally Don Christensen, Col. (Ret.) et. al., *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System*, PROTECT OUR DEFENDERS 15 (May 5, 2017), https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf [https://perma.cc/9VDP-N2C8].

²⁷ *It's Not "Quality of Life," it's "Life or Death": The Disparate Structural Barriers that Accompany VA Regulatory Policies for Minority Veterans Holding "Bad Paper" Discharge Characterizations: Hearing on Stuck in Red Tape: How VA's Regulatory Policies Prevent Bad Paper Veterans from Accessing Critical Benefits Before H. Veterans Aff. Subcomm. on Disability Assistance and Mem'l Aff.*, 117th Cong. 3 (2020) (statement of Andy L. Blevins and Kai River Blevins, Law & Policy Consultants,

This Note intends to: (1) Raise awareness of the inherent unfairness in the current discharge characterization review and upgrade process (discharge upgrade); (2) raise awareness of racial trauma-induced PTSD and related mental health conditions and the potential impacts on servicemembers' conduct that could lead to bad paper discharges; and (3) demonstrate the applicability of prior changes to the discharge upgrade process to address the impact of these factors.

The second section will provide background information on the military discharge process and the discharge upgrade process. In addition, it will discuss PTSD, related mental health conditions, and racial trauma-induced mental health conditions. This section will provide background information about racism and racial violence in the military, including white supremacy and extremism, as well as the prevalence of Civil War relics.

The third section will discuss the racial disparity in the military justice system that can lead to disproportionate amounts of bad paper discharges for black servicemembers, and the unfairness black servicemembers face when seeking a discharge upgrade. It will discuss the amount of command discretion in punishment decisions, the lack of black officers in high command, and the boards' inconsistent application of the Hagel Memo and resulting class action lawsuits.

The fourth section will discuss logical legislative amendments that would officially recognize racial trauma-induced PTSD, and related mental health conditions, by amending the relevant Code to remove the disproportionate obstacles black servicemembers face in the upgrade process. Finally, the Note's conclusion will provide sample legislation that would apply the proposed solutions.

II. BACKGROUND

A. The Military Discharge Process

When a servicemember is discharged from the service—before or after the expiration of their contract—their time in service is characterized.²⁸ The character of service determines the benefits a servicemember receives

Minority Veterans of America), <https://www.minorityvets.org/wp-content/uploads/2020/10/VA-Red-Tape-Its-Not-Quality-of-Life-its-Life-or-Death.pdf> [<https://perma.cc/7WE9-SRLL>].

²⁸ 2017 GAO report, *supra* note 6, at 8; *see generally* TYSON MANKER, VA HANDBOOK FOR VETERANS AND ADVOCATES: HOW TO FILE FOR VA BENEFITS AND APPEAL YOUR CLAIM 73 (AuthorHouse, 2021).

following discharge.²⁹ Discharges can be either administrative or punitive, and are classified as honorable, general, other than honorable (bad paper discharge), bad conduct, and dishonorable.³⁰ Honorable and general discharges are administrative discharges initiated when commanding officers file the appropriate paperwork for separation of a servicemember before the expiration of their contract.³¹ These discharges have no judicial oversight and are subject to great command discretion.³² Bad paper discharges are also administrative discharges, though these discharges receive some oversight.³³ Despite being subject to some oversight, as a whole, they are limited and provide “virtually no due process for the servicemember.”³⁴ Typically, these discharges occur in conjunction with a form of non-judicial punishment known as an Article 15 (Art. 15), or summary court-martial for violations of the Uniform Code of Military Justice (UCMJ).³⁵ Servicemembers can also request a voluntary separation in lieu of court martial that, if approved, is handled as an administrative separation.³⁶

Punitive discharges result in bad conduct or dishonorable discharges and are given only after court martial proceedings for violations of the UCMJ.³⁷ Bad conduct discharges are given as a punishment for bad conduct that does not warrant the severity of a dishonorable discharge, or when there is a collection of minor offenses that warrant separation from service.³⁸ An example of such conduct is disrespect towards a Commanding Officer,³⁹ Non-Commissioned Officer, or Warrant Officer.⁴⁰ Dishonorable discharges are given to enlisted servicemembers and warrant officers after conviction of a serious offense in a general court-martial.⁴¹ Typically, convictions that lead to dishonorable discharges involve offenses that are “usually recognized in civilian jurisdictions as felonies, or offenses of a military nature requiring severe punishment.”⁴² However, some UCMJ violations do not have a

²⁹ See MANKER, *supra* note 28, at 73.

³⁰ 2017 GAO Report, *supra* note 6, at 6, 8, 35.

³¹ MANKER, *supra* note 28, at 74.

³² *Id.*; see also *infra* Section III.A.1.

³³ MANKER, *supra* note 28, at 74.

³⁴ *Id.* at 75.

³⁵ *Id.*

³⁶ 2017 GAO Report, *supra* note 6, at 20, 51.

³⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8)(A)-(C) (2019) [hereinafter MCM].

³⁸ *Id.*, at R.C.M. 1003(b)(8)(A) (describing commissioned officers are subject only to dismissal and cannot receive a bad conduct or dishonorable discharge), 1003(b)(8)(C).

³⁹ *Id.* at pt. IV, ¶15.d.(1) (2019).

⁴⁰ *Id.* at ¶17.d.(5)-(6) (2019).

⁴¹ MANKER, *supra* note 28, at 7.

⁴² *Id.* (quoting MCM, *supra* note 37, at R.C.M. 1003(b)(8)(B)).

civilian law counterpart.⁴³ For example, servicemembers can be dishonorably discharged for violations or failures to obey lawful general orders or regulations.⁴⁴ Servicemembers may also be dishonorably discharged for extramarital sexual conduct that is “directly prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.”⁴⁵

Historically, there has been a practice by commanders of filing discharges to drop unwanted or unneeded servicemembers.⁴⁶ Commanders have broad discretion in whether or not to bring punishment against anyone who falls under their command, and are encouraged to use their

spectrum of administrative military personnel actions they can use to motivate, improve, and rehabilitate Soldiers whose performance is unsatisfactory or who exhibit other problems which interfere with duty performance or the unit’s mission.⁴⁷

The subjective decisions of commanders can lead to inconsistent characterization outcomes.⁴⁸ Bad paper discharges have a disproportionate negative impact on servicemembers with PTSD.⁴⁹ Further, bad paper discharges can be a complete bar to Veterans’ Administration benefits to healthcare, education, disability payments, and home loans.⁵⁰ Former servicemembers may seek a discharge upgrade to attain some or all of these benefits.⁵¹

B. The Discharge Upgrade Process

A former servicemember seeking an upgrade must successfully navigate a complex administrative adjudication process that can take upwards of

⁴³ MCM, *supra* note 37, at pt. IV, ¶18.d (2019).

⁴⁴ *Id.*

⁴⁵ *Id.* at ¶99.c.(1); *see generally* *Assessing Racial Trauma Within a DSM-5 Framework*, *supra* note 12, at 243 (stating racial discrimination acts as a stressor and can lead to risky sexual behavior).

⁴⁶ Stephanie S. Ledesma, *PTSD and Bad Paper Discharges: Why the Fairness to Soldiers Act is Too Little, Too Late*, 10 ELON. L. REV. 189, 227 (2018).

⁴⁷ THE U.S. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL 2018 – 2019 GENERAL ADMINISTRATIVE LAW DESKBOOK F-2, <https://tjaglcspublic.army.mil/documents/27431/37158/General+Administrative+Law+Deskbook+2020/3e1431f4-1e1f-4dcf-82a2-ed31e0e5e02a?version=1.1> [<https://perma.cc/8ULC-WY2K>].

⁴⁸ *Id.* at C-9.

⁴⁹ Marcy L. Karin, “*Other than Honorable*” *Discrimination*, 67 CASE W. RES. 135, 164 (2016).

⁵⁰ *See* 1 Veterans Benefit Manual 2.2.3 (2020); Ledesma, *supra* note 46, at 191; Maj. 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*, 214 MIL. L. REV. 1, 11–15 (2012).

⁵¹ *See generally* 1 Veterans Benefit Manual 2.2.3.5 (2020).

twelve months.⁵² There are two separate boards with the ability to determine whether or not a discharge upgrade is appropriate.⁵³ Former servicemembers are also permitted to seek relief through federal courts under the Administrative Procedures Act, limited by a six-year statute of limitations.⁵⁴ Both boards have the authority to change the characterization of service following consideration of whether or not PTSD was a factor in the discharge.⁵⁵

1. The Discharge Review Board

The Discharge Review Board (DRB) reviews applications from servicemembers, unless they were discharged by general court-martial or dishonorably discharged.⁵⁶ To get a decision from the DRB, servicemembers must apply within fifteen years of their discharge.⁵⁷ The DRB determines whether or not the characterization of service should be changed based on principles of propriety and equity.⁵⁸ The propriety principle states that an upgrade will be granted if there has been a policy change that was made expressly retroactive (such as the repeal of Don't Ask Don't Tell) or if there was an error of fact, procedure, law, or discretion which was prejudicial to the veteran during the discharge process.⁵⁹ An upgrade will be granted for equity reasons if the discharge was inconsistent with disciplinary standards at the time of discharge, if there is evidence provided that the quality of service or capability to serve is not consistent with the characterization given, or if the current discharge policies are materially different than those the veteran experienced.⁶⁰

The DRB consists of five members appointed by the secretary of the servicemember's branch of service.⁶¹ One of the members on the board will serve as the presiding officer for the petition at issue, a designation that is

⁵² See ARMY REVIEW BOARDS AGENCY, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (ABCMR): APPLICANT'S GUIDE TO APPLYING TO THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (ABCMR) 4–6 (2019), <https://arba.army.pentagon.mil/documents/ABCMRAplicantsGuide20191028Final.pdf> [<https://perma.cc/JJ6Y-HY3M>].

⁵³ See 10 U.S.C. § 1552 (2020); see also 10 U.S.C. § 1553 (2020).

⁵⁴ 28 U.S.C. § 2401 (2020).

⁵⁵ See generally Kurta Memo, *supra* note 22.

⁵⁶ See 32 C.F.R. § 70.8(a)(3) (2021).

⁵⁷ See 32 C.F.R. § 70.9 (2021).

⁵⁸ *Id.*

⁵⁹ See generally 10 U.S.C. § 654 (repealed 2010) (mandating separation of servicemembers for engaging in homosexual acts, stating that they are homosexual, or attempting to marry a person of their same biological sex); see also 32 C.F.R. § 70.9(b) (2021).

⁶⁰ See 32 C.F.R. § 70.9(c)(1)–(3) (2021).

⁶¹ See 32 C.F.R. § 70.8(b)(1) (2021).

provided by the secretary.⁶² There are no race, ethnic, or gender requirements to serve on the board.⁶³ Decisions are made by a simple majority.⁶⁴ When considering PTSD claims, combat-related PTSD requires the addition of a mental health professional with experience managing PTSD, and non-combat related PTSD requires the advice and counsel of a mental health professional with training in the trauma specified.⁶⁵

2. The Board for Correction of Military Records/Board for Correction of Naval Records

The Board for Correction of Military Records (BCMR) and the Board for Correction of Naval Records (BCNR) have broad authority to change the characterization of and reasons for discharge, subject to a three-year statute of limitations from actual knowledge of any error.⁶⁶ It is very rare that the board will grant an in-person hearing, necessitating impeccable completion of all required forms, providing all required records, and making a persuasive argument for why the request should be granted.⁶⁷ Requests for correction will only be granted if the panel finds there was an error or injustice.⁶⁸ The three-year statute of limitations will be waived if the board determines it is in the interest of justice to do so.⁶⁹ Each application focuses on whether the preponderance of the evidence shows that an error or injustice exists.⁷⁰ If there is an error or injustice, the board determines what relief is appropriate.⁷¹ If there is no evidence of error or injustice, no relief will be granted.⁷² The BCMR/BCNR is appointed by the secretary of the servicemember's branch of service.⁷³ A panel consists of at least three civilian members who consider the petitions brought before it.⁷⁴

C. Posttraumatic Stress Disorder

⁶² *Id.*

⁶³ *See generally* 32 C.F.R. § 70.8 (2021).

⁶⁴ *See* 32 C.F.R. § 70.8(c)(8) (2021).

⁶⁵ 10 U.S.C. § 1553(d)(1)(A)–(B) (2020).

⁶⁶ 10 U.S.C. § 1552(b) (2020).

⁶⁷ Michael J. Wishnie, “A Boy Gets into Trouble”: *Service Members, Civil Rights, and Veterans’ Law Exceptionalism*, 97 B.U. L. REV. 1709, 1728 (2017).

⁶⁸ 10 U.S.C. § 1552(b) (2020).

⁶⁹ *Id.*

⁷⁰ *See* 32 C.F.R. § 581.3(e)(3)(iii)(A) (2021).

⁷¹ *Id.*

⁷² *See* 32 C.F.R. § 581.3(e)(3)(i)–(iii) (2021).

⁷³ 10 U.S.C. § 1552(a)(1) (2020), *see also* 32 C.F.R. § 581.3(c)(1) (2021).

⁷⁴ *Id.*

PTSD occurs following exposure to one or more traumatic events, and results in: Involuntary and intrusive remembrance of the traumatic event; having repetitive nightmares about the event; disassociation from people, places, or things involving the event; and behavioral changes such as hypervigilance, angry outbursts following little to no provocation, concentration problems, being easily startled, and sleep disturbances.⁷⁵ PTSD impacts between 8.1% to 15.2% of the veteran population, a rate higher than that of civilians.⁷⁶

1. Racial Trauma Induced PTSD and Related Mental Health Conditions

“So racial trauma is watching George Floyd have a knee to his neck for eight minutes and forty-six seconds. Racial trauma is watching Ahmaud Aubrey be gunned down while jogging. That’s what racial trauma is.”⁷⁷

There does not have to be a single incident of racial trauma to trigger PTSD symptoms.⁷⁸ In fact, the experience of ongoing racial microaggressions has been linked to negative psychological effects, and may contribute to the traumatization process.⁷⁹ The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) officially recognizes that repeated exposure to mildly traumatic encounters can culminate in the development of PTSD.⁸⁰ However, the DSM-5 focuses on traumatic events that involve “actual or threatened death, serious injury, or sexual violence.”⁸¹ While research has indicated that there can be trauma-induced mental health

⁷⁵ CENTER FOR SUBSTANCE ABUSE TREATMENT, U.S. DEP’T OF HEALTH AND HUM. SERV., TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES, TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES NO. 57, AT 62 (2014), https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf [<https://perma.cc/2EFR-HEDH>].

⁷⁶ Emily M. Johnson & Kyle Possemato, *Correlates and Predictors of Mental Health Care Utilization for Veterans With PTSD: A Systematic Review*, 11 PSYCHOL. TRAUMA: THEORY, RES., PRAC., AND POL’Y 851, 851 (2019).

⁷⁷ Doha Madani, *America’s Racial Reckoning is Putting a Spotlight on Black Mental Health*, NBC NEWS (Sept. 26, 2020, 10:50 AM), <https://www.nbcnews.com/news/nbcblk/america-s-racial-reckoning-putting-spotlight-black-mental-health-n1241127> [<https://perma.cc/PH66-MJW9>] (quoting Ashley McGirt, a licensed therapist who specializes in racial trauma).

⁷⁸ *Assessing Racial Trauma Within a DSM-5 Framework*, *supra* note 12, at 244–45.

⁷⁹ *Id.* at 244.

⁸⁰ *Assessing Racial Trauma with the Trauma Symptoms of Discrimination Scale*, *supra* note 12, at 735 (stating that the DSM-5 provides mental health providers with diagnostic requirements for mental health disorders).

⁸¹ Tahirah Abdullah et. al., *Microaggressions and Posttraumatic Stress Disorder Symptom Scores Among Black Americans: Exploring the Link*, TRAUMATOLOGY 1, 1 (2021) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013)).

conditions as a result of racial trauma, in the absence of an event involving actual or threatened death, the resulting mental health conditions cannot be officially classified as PTSD under the DSM-5.⁸² Since 1992, however, the World Health Organization's International Classification of Diseases has declined to restrict what traumas can lead to PTSD.⁸³ Because racism has been linked to mental health conditions and symptoms like anxiety, depression, and hypervigilance, both racial trauma-induced PTSD and racial trauma-induced mental health conditions will be linked together for the purposes of this Note.⁸⁴

In a study to determine the best method of treating racially based trauma, servicemembers reported events such as: A sailor was made aware that his white shipmates were actively planning on throwing him overboard; a servicemember was being purposely exposed to white phosphorus (a deadly substance) that led to full body burns; and a servicemember witnessed the deliberate murder of a black servicemember.⁸⁵ Furthermore, Army Captain Mary Tobin discussed an event where a white superior "dressed her down with his hand on his gun."⁸⁶ When she requested he take his finger out of the trigger-well he responded: "Why? Why are you afraid of my hand in the trigger-well? It's because you're from the 'hood? Is this what you're used to? You're used to people shooting at you?"⁸⁷ While these examples represent singular events that would meet the DSM-5 event requirement for a PTSD diagnosis, they are not the common cause of racial trauma-induced mental health conditions.⁸⁸ Typically, racial trauma-induced mental health conditions are a result of being exposed to repeated racial harassment, or microaggressions.⁸⁹

Microaggressions—words or actions that communicate hostility towards a marginalized group—do not count as a traumatic event under the DSM-5, though research indicates that the impact of microaggressions can cumulatively result in the equivalent of a traumatic event.⁹⁰ Racial discrimination is a stressor that can lead to trauma response symptoms like

⁸² *Assessing Racial Trauma Within a DSM-5 Framework*, *supra* note 12, at 246.

⁸³ *Id.*

⁸⁴ Madani, *supra* note 77.

⁸⁵ Carlson, *supra* note 12, at 749.

⁸⁶ *Military Veterans Say Racism in the Ranks Often Isn't Camouflaged: "It Hurt Me Dearly"*, CBS NEWS (Aug. 10, 2020, 9:50 AM), <https://www.cbsnews.com/news/military-veterans-say-racism-in-the-ranks-often-isnt-camouflaged/> [<https://perma.cc/6SRY-XM2R>].

⁸⁷ *Id.*

⁸⁸ See *Assessing Racial Trauma with the Trauma Symptoms of Discrimination Scale*, *supra* note 12, at 735 (stating that the DSM-5 provides mental health providers with diagnostic requirements for mental health disorders).

⁸⁹ See generally Carlson, *supra* note 12.

⁹⁰ Abdullah et. al., *supra* note 81, at 2–3.

anxiety, distress, substance abuse, and risky sexual behavior.⁹¹ Moreover, there is evidence of a link between the frequency of microaggressions and the severity of PTSD symptoms.⁹² Continued experiences of racial mistreatment and overt acts of racism can have a compounding effect, and can lead to worsening trauma response symptoms.⁹³

Black servicemembers have a higher risk of developing negative mental health outcomes when compared to their white counterparts, even if they shared the same combat experience during their time in service.⁹⁴ Psychologists have suggested that the military embraces the idea of “color-evasion,” an ideology that emphasizes the similarities of members of a group while denying the existence racial differences.⁹⁵ Embracing this ideology serves as a chilling effect for servicemembers who experience racism and wish to report it: If the institution diminishes the importance of race, there are more barriers to reporting racism.⁹⁶

Suggested reasons for the discrepancy in PTSD rates between black servicemembers and white servicemembers is the unique racial experiences and increased exposure to negative racial experiences after returning to civilian life.⁹⁷ The team-centered nature of the military cultivates an environment that requires interdependence to not only complete the mission, but also to stay alive and safe.⁹⁸ Black servicemembers are unable to avoid fellow servicemembers who participate in racially motivated violence or verbal abuse.⁹⁹ Additionally, the focus on the integrity of the group can serve as an incentive to ostracize the black servicemember, or lead to negative implications for a servicemember who reports the event(s).¹⁰⁰

a. Racial Microaggressions and Overt Racism Exist in the Military

A June 2020 Washington Post article stated that institutions seeking to address racism should look toward the military as an example, citing the

⁹¹ *Assessing Racial Trauma Within a DSM-5 Framework*, *supra* note 12, at 243; *see also* MANKER, *supra* note 28.

⁹² Abdullah, *supra* note 81, at 7.

⁹³ *Assessing Racial Trauma Within a DSM-5 Framework*, *supra* note 12, at 249.

⁹⁴ Carlson et al., *supra* note 12, at 748.

⁹⁵ *Id.* at 749.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See id.*; Phil Stewart et al., *U.S. Troops Battling Racism Report High Barrier to Justice*, REUTERS (Sept. 15, 2020, 3:00 PM), <https://www.reuters.com/investigates/special-report/usa-military-civilrights/> [<https://perma.cc/NW6T-A8ZZ>].

growth of black military officers from 7% in 1980 to 9% in 2009.¹⁰¹ The author attributes the slowing rate of promotions for black officers to *Saunders v. White*, which prohibited promotions boards from considering race as a factor.¹⁰² However, in February 2020, a lawsuit alleging racism driven attempts to remove black Navy fighter pilots was filed in federal court, and detailed how one pilot was called “eggplant” in group chats and given the call sign “8-Ball.”¹⁰³ Military jargon and culture has embraced some racist microaggressions: Black Marines are sometimes called “nonswimmers” (intended to reference the racist stereotype that black people cannot swim) and black Army Rangers are sometimes referred to as “Night Rangers.”¹⁰⁴

The DoD has been required to conduct surveys every four years about discrimination in the service, and the Pentagon faced intense scrutiny in December 2020 after reporting showed that they had not released survey data from 2017.¹⁰⁵ The data—finally released in January 2021—showed that nearly one-third of black servicemembers reported racial discrimination, harassment, or both during a 12-month period.¹⁰⁶ Reported discrimination included racially driven insults, stereotypes, and claims of racial superiority.¹⁰⁷ Further, some servicemembers chose not to report the incidences of discrimination because they thought the behavior would go unpunished, or that reporting would lead to a hostile work environment.¹⁰⁸ A majority of those that *did* report the incidents did not know the outcome of the complaint.¹⁰⁹

The military established Equal Opportunity offices (EO) on military bases to provide servicemembers the equivalent of Equal Employment Opportunity (EEO) system protections afforded to civilian workers.¹¹⁰ Despite servicemembers outnumbering civilian employees two to one, civilian complaints under the EEO were significantly higher than those filed

¹⁰¹ Margaret B. Montgomery, *The Military Provides a Model for how Institutions Can Address Racism*, WASH. POST (Jun. 23, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/06/23/military-provides-model-how-institutions-can-address-racism/> [https://perma.cc/4GJ7-FV29].

¹⁰² *Id.* (citing *Saunders v. White*, 191 F. Supp.2d 95 (D.D.C. 2002)).

¹⁰³ Cooper, *supra* note 15.

¹⁰⁴ *Id.*

¹⁰⁵ *The Pentagon has Sat on Racial Discrimination Survey Data for Years*, REUTERS (Dec. 18, 2020, 11:30 AM), <https://www.nbcnews.com/news/nbcblk/pentagon-has-sat-racial-discrimination-survey-data-years-n1251701> [https://perma.cc/3CSU-3N87].

¹⁰⁶ Phil Stewart, *Long-Withheld Pentagon Survey Shows Widespread Racial Discrimination, Harassment*, REUTERS (Jan. 14, 2021, 8:05 AM), <https://www.reuters.com/article/us-usa-military-civilrights-exclusive-idUSKBN29J1N1> [https://perma.cc/3HMM-UWJR].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *U.S. Troops Battling Racism Report High Barrier to Justice*, *supra* note 100.

by servicemembers.¹¹¹ For example, Navy civilian workers file about 200 complaints per 100,000 personnel, while sailors file about 21 complaints per 100,000 personnel.¹¹² Going to the EO office can be taken as a sign of defiance for a reporting servicemember, and, because the military performs its own investigations, this perceived defiance can backfire on the reporter.¹¹³ The EO office collects witness testimony and physical evidence, and provides the information they recover to military commanders.¹¹⁴ Ultimately, the commanders determine whether or not the complaint is founded, not the EO office.¹¹⁵ Senator Kirsten Gillibrand noted that a 2017 report showed that minority servicemembers face “rampant discrimination and harassment . . . and those that report it are nearly as likely to face punishment as the perpetrators.”¹¹⁶

i. White Supremacy and Extremist Groups Have Made Inroads in the Military

While black servicemembers face the possibility of punishment for reporting their experiences of racism, a large number of minority servicemembers report witnessing racist events.¹¹⁷ In February 2020, the *Military Times* reported that more than one-third of active-duty servicemembers reported witnessing displays of white nationalism or racism.¹¹⁸ Among minority servicemembers, the number jumped to more than half reporting instances of white nationalism or racism.¹¹⁹ Reported instances included swastikas being drawn on servicemembers’ cars, Nazi-style salutes between individuals, stickers supporting the Ku Klux Klan, racist language, and discriminatory attitudes.¹²⁰ This was not a new development; Cassie Miller, a research specialist for the Southern Poverty Law Center, said that there have been requests to look into white supremacy in the military since 1986.¹²¹

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*; see also *infra* Section III.A.1.

¹¹⁶ *Long-Withheld Pentagon Survey Shows Widespread Racial Discrimination, Harassment, supra* note 106.

¹¹⁷ Leo Shane III, *Signs of White Supremacy, Extremism Up Again in Poll of Active-Duty Troops*, THE MILITARY TIMES (Feb. 6, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/02/06/signs-of-white-supremacy-extremism-up-again-in-poll-of-active-duty-troops/> [https://perma.cc/K3BU-5J2V].

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Despite the concern about white supremacy groups in the military, the DoD has very little data about the number of servicemembers in such groups.¹²² Part of the problem is that, as long as the servicemember is not actively fundraising or recruiting into the group, belonging to the group is not against the rules.¹²³ There is also no centralized method for the military to identify symbols associated with white supremacy or extremist groups; while some symbols (like a swastika) are easily recognized, other symbols (like Pepe the Frog) are not.¹²⁴ Servicemembers have taken advantage of the inability to identify symbols of extremist groups; a user of the Iron March chatroom—a white supremacist online forum—posted that the best way to find “our kind” in the ranks is “to simply wear a shirt with some obscure fascist logo.”¹²⁵

Brandon Russell, a founder of the white supremacy group Atomwaffen Division, bragged in the chat about being comfortable being a neo-Nazi in the service because “[he] was 100% open about everything with the friends I made at training. They know about it all. They love me too cause I’m a funny guy.”¹²⁶ Despite his openness with his fellow servicemembers, and his tattoo of Atomwaffen’s insignia (a radiation warning symbol), no red flags were raised.¹²⁷ Atomwaffen Division members have been arrested for hate-crimes and murders.¹²⁸ Despite finding explosives in Russell’s garage, he was released after claiming the materials were for model rockets.¹²⁹ He was later apprehended with another Atomwaffen member traveling to the Florida Keys with rifles and 1,000 rounds of ammunition.¹³⁰ While there is no indication that there are a large number of white supremacists in the service, the inability of the DoD to track current and potential servicemembers’ membership, and the inability to punish a service member belonging to such a group unless the servicemember is an active member, has led to embedded extremists within

¹²² Missy Ryan et al., *Seeking to Combat Extremists in Ranks, the Military Struggles to Answer a Basic Question: How Many Are There?*, WASH. POST (Feb. 9, 2021, 8:24 AM), https://www.washingtonpost.com/national-security/military-extremist-threat-lloyd-austin-/2021/02/09/198794c8-66f9-11eb-bf81-c618c88ed605_story.html [https://perma.cc/Q25R-F9NE].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ John M. Donnelly, *Pentagon Report Reveals Inroads White Supremacists Have Made in Military*, ROLL CALL (Feb. 16, 2021, 12:16 PM), <https://www.rollcall.com/2021/02/16/pentagon-report-reveals-inroads-white-supremacists-have-made-in-military/> [https://perma.cc/SC65-UR32].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

the ranks.¹³¹ Further, unpunished displays of white supremacist ideas and symbolism fuel the racial trauma experienced by black servicemembers.¹³²

ii. The Confederate Battle Flag Has Been Banned, but Other Civil War Relics Remain

In 2020, then Defense Secretary Mark Esper banned the Confederate battle flag from military bases and installations after the Marines and Navy banned display of the Confederate flag on their installations.¹³³ This was a welcome move: Army Captain Mary Tobin described how the Confederate flag was used to elicit a response from her when she was a West Point student leader.¹³⁴ Part of her responsibilities included checking for dust in other cadets' rooms with a white glove and ensuring that rooms were tidy.¹³⁵ She recalls walking into the room of two white cadets and finding a large Confederate flag, and understanding that they were trying to "get a reaction out of me."¹³⁶ After this happened, she explained to them the hurt that accompanied seeing the large flag displayed on at least two occasions.¹³⁷ Twenty years after Captain Tobin's experience, the Confederate flag is banned on military installations but on the West Point campus alone there is Lee Barracks, Lee Road, Robert E. Lee Housing Area, and Lee Gate.¹³⁸ Further, there are a large number of military posts, roads, and buildings named after Civil War generals.¹³⁹ Congress has created a commission for renaming military bases that will issue a formal plan in October 2022.¹⁴⁰ An amendment to the National Defense Authorization Act noted that "[m]illions of servicemembers of color have lived on, trained at, and deployed from installations named to honor traitors that killed Americans in defense of chattel slavery."¹⁴¹ These experiences can compound with other

¹³¹ *Id.*

¹³² *See supra* Section II.C.1.

¹³³ Caroline Linton, *New Pentagon Policy Effectively Bans Confederate Symbols at Military Sites*, CBS NEWS (Jul. 17, 2020, 8:30 PM), <https://www.cbsnews.com/news/new-pentagon-policy-effectively-bans-confederate-symbols-at-military-sites/> [<https://perma.cc/A3X7-2AB8>].

¹³⁴ *Military Veterans Say Racism in the Ranks Often Isn't Camouflaged*, *supra* note 86.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Rory E. Riley-Topping, *It's Time to Rename Government Facilities Named After Confederate War Heroes*, THE HILL (Feb. 23, 2021, 10:30 AM), <https://thehill.com/opinion/civil-rights/539982-its-time-to-rename-government-facilities-named-after-confederate-war> [<https://perma.cc/D55V-THZG>].

¹⁴⁰ *Id.*

¹⁴¹ *See* Jordain Carney, *Senate Passes Bill with Plan to Change Confederate-Named Bases Over Trump Veto Threat*, THE HILL (Jul. 23, 2020, 2:41 PM), <https://thehill.com/homenews/senate/508721-senate-passes-bill-with-plan-to-change-confederate-named-bases-over-trump> [<https://perma.cc/7K9J->

microaggressions and overt racism that black servicemembers experience during their time in service, potentially creating racial trauma-induced mental health conditions.¹⁴²

III. BLACK SERVICEMEMBERS FACE BOTH A MILITARY JUSTICE SYSTEM WITH GREAT RACIAL DISPARITIES IN PUNISHMENT AND A DISCHARGE UPGRADE SYSTEM HESITANT TO GRANT UPGRADE PETITIONS FOR MENTAL HEALTH CONDITIONS WITH CAUSES NOT EXPLICITLY INCLUDED IN THEIR GUIDANCE

Racial bias can impact black servicemembers during both their separation from the military and seeking a discharge upgrade.¹⁴³ Racial disparities in military justice can influence the severity of punishment and, because conduct records are a considering factor in characterizing some discharges, can disproportionately negatively impact black servicemembers.¹⁴⁴ Further, the current upgrade process puts black servicemembers at an unfair disadvantage because it favors combat-related trauma.¹⁴⁵ But even explicit guidance to give liberal consideration to servicemembers seeking an upgrade for combat related trauma has not been uniformly applied to veterans of the Iraq and Afghanistan conflicts.¹⁴⁶

A. Racial Disparities in the Military Justice System

Protect Our Defenders released a 2017 report that detailed how black servicemembers face non-judicial punishment and court-martials at a significantly higher rate than white servicemembers, the breakdown of which is included below:¹⁴⁷

Branch of Service	Dates	Percentage Difference between Black and White Servicemembers
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AY7Y]; Jordain Carney, *Senate Democrats Warn Against Nixing Plan Renaming Confederate-Named Bases from Defense Bill*, THE HILL (Nov. 11, 2020, 9:03 AM), <https://thehill.com/policy/defense/525452-senate-dems-warn-against-nixing-plan-renaming-confederate-named-bases-from> [https://perma.cc/3RUT-U6NX].

¹⁴² See *supra* Section II.C.1.

¹⁴³ Christensen et al., *supra* note 26, at 15.

¹⁴⁴ *Id.*

¹⁴⁵ See *infra* Section III.B.2.

¹⁴⁶ See *infra* Section III.B.2.a.i.

¹⁴⁷ Christensen et al., *supra* note 26, at i.

Air Force	2006–2015	71% more likely to face court-martial or non-judicial punishment ¹⁴⁸ <ul style="list-style-type: none"> • <u>Court-Martial</u>: 1.67 times more than white servicemembers¹⁴⁹ • <u>Non-Judicial Punishment</u>: 1.72 times more than white servicemembers¹⁵⁰
Marines	2006–2015	32% more likely to face court-martial or non-judicial punishment ¹⁵¹ <ul style="list-style-type: none"> • <u>General Court Martial</u>: 2.61 times more likely than white servicemembers¹⁵² • <u>Non-Judicial Punishment</u>: 1.29 times more likely than white servicemembers¹⁵³
Navy	2014–2015	40% more likely face court-martial or non-judicial punishment ¹⁵⁴ <ul style="list-style-type: none"> • <u>Referred for military justice proceedings</u>: 1.40 times more likely than white servicemembers¹⁵⁵ • <u>Note</u>: The disparity nearly disappears once the case has been resolved in a court-martial¹⁵⁶
Army	2006–2015	61% more likely to face court-martial or non-judicial punishment ¹⁵⁷ <ul style="list-style-type: none"> • <u>General Court-Martial or Special Court Martial</u>: 1.61 times more likely than white servicemembers¹⁵⁸

This report generated interest in determining why this disparity exists and how to remedy the military justice system. An accompanying bill for the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 4.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at ii.

¹⁵² *Id.* at 6.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at ii.

¹⁵⁵ *Id.* at 10.

¹⁵⁶ *Id.* at 11.

¹⁵⁷ *Id.* at ii.

¹⁵⁸ *Id.* at 13.

National Defense Authorization Act for Fiscal Year 2018 directed the United States General Accounting Office (GAO) to investigate disparities in the military justice system, and the extent to which such disparities exist.¹⁵⁹ This report discovered that, while there are fewer statistically significant disparities in the outcomes of cases resolved through court-martials, black servicemembers were more likely to be the subject of recorded investigations, more likely to be tried in general or special court-martials, and more likely to face non-judicial punishment.¹⁶⁰

The Air Force—which had the highest racial disparities—conducted its own racial disparity review, published in December 2020. Included in this report were survey responses about Airmen’s confidence in the Air Force discipline process, and the developmental opportunities as compared to their white fellow Airmen:

- 2 out of every 5 black enlisted, civilian, and officers do not trust their chain of command to address racism, bias, and unequal opportunities,¹⁶¹
- 1 out of every 3 black servicemembers said they believe the military discipline system is biased against them,¹⁶²
- 3 out of every 5 black servicemembers believe they do not and will not receive the same benefit of the doubt as their white peers if they get in trouble,¹⁶³
- 1 out of every 3 black officers do not believe the Air Force and Space Force provide them the same opportunities to advance as their white peers,¹⁶⁴ and
- 2 out of every 5 black civilians have seen racial bias in the services’ promotion system.¹⁶⁵

The report found that black airmen were 74% more likely to receive Article 15s and 60% more likely to face court martials than their white peers.¹⁶⁶ This finding directly impacted the rate of discharges for misconduct;

¹⁵⁹ See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-344, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES (2019), <https://www.gao.gov/assets/gao-19-344.pdf> [https://perma.cc/2845-VRPK] [hereinafter 2019 GAO Report].

¹⁶⁰ *Id.*

¹⁶¹ INSPECTOR GENERAL DEPT. OF THE A.F., REPORT OF INQUIRY (S8918P), INDEPENDENT RACIAL DISPARITY REVIEW 4 (2020), <https://www.af.mil/Portals/1/documents/ig/IRDR.pdf> [https://perma.cc/4BJB-M7UT].

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 6.

black airmen received about 50% more administrative discharges than would have been expected by their population proportion in the Air Force.¹⁶⁷

Concern about the racial disparities in military justice, besides evidencing racial bias in the ranks, involves the many equalizing factors that accompany military service.¹⁶⁸ Recruits go through a rigorous screening process for criminal behavior and drug use.¹⁶⁹ Servicemembers are provided steady income, and provided with opportunity for educational advancement.¹⁷⁰ Systemic racism can lead to misconduct that would result in punishment, so the military should eliminate these injustices.¹⁷¹ Consistently identified potential causes for the disparity in the military justice system include the amount of command discretion, the lack of diversity among military officers, and the lack of consistent data to track racial disparities in military justice.¹⁷²

1. Command Discretion

A 1972 DoD Task Force was created to investigate whether there was racial disparities in the military justice system.¹⁷³ The findings of the 1972 Task Force are consistent with the current statistics of racial disparity in the military justice system.¹⁷⁴ Concern about command discretion being a factor stems from the statistics that show once a black servicemember has gone through the court-martial procedure, they are *not* punished more severely or frequently than their white peers.¹⁷⁵ The determination of whether or not to administer punishment, or refer misconduct to court-martials, lies within the commander's discretion.¹⁷⁶ Because commanders are oftentimes the

¹⁶⁷ *Id.* at 17.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Christensen et al., *supra* note 26, at ii.

¹⁷² See REPORT OF INQUIRY (S8918P), *supra* note 161, at 17–18; Sarah Armstrong, *Veterans Day 2020: The Troubling Racial Disparities That Still Exist in Military Justice*, HARV. C.R. C.L. REV. (Nov. 11, 2020), <https://harvardcrcl.org/veterans-day-2020-the-troubling-racial-disparities-that-still-exist-in-military-justice/> [<https://perma.cc/HS34-XDKZ>]; Dan Lamothe, *He Became One of the Navy's First Black Four-Star Admirals. The Military Has Work to do on Diversity, He Says*, WASH. POST (Feb. 16, 2021, 6:29 PM), https://www.washingtonpost.com/national-security/navy-black-admiral-cecil-haney/2021/02/16/5e86b69a-6658-11eb-bf81-c618c88ed605_story.html [<https://perma.cc/54N8-T7CF>]; Cooper, *supra* note 15.

¹⁷³ Barry K. Robinson & Edgar Chen, *Déjà vu All Over Again: Racial Disparity in the Military Justice System*, JUST SECURITY (Sep. 14, 2020), <https://www.justsecurity.org/72424/deja-vu-all-over-again-racial-disparity-in-the-military-justice-system/> [<https://perma.cc/H9XT-SZW7>].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

decision-makers in the military justice system, the disparity in punishment for black servicemembers may indicate racial bias or discrimination.¹⁷⁷

a. Lack of Diversity Among Military Officers

The 1972 DoD Task Force findings also showed a lack of black officers in the military's higher ranks.¹⁷⁸ Today, black servicemembers make up 19% of the enlisted ranks but only 9% of officers.¹⁷⁹ The lack of minority voices at the top of the chain of command means that there is also a lack of minority perspectives at the top of the chain of command.¹⁸⁰ The absence of this voice has allowed implicit bias and unconscious bias to exist to the point that white officers do not believe that there is a race problem.¹⁸¹ Minority servicemembers point to a statement by the vice chairman of the Joint Chiefs of Staff, General John E. Hyten, in a Senate committee hearing as illustrative of this issue: "When I came into the military, I came in from Alabama, and racism was a huge problem . . . I watched commander after commander take charge. . . and eliminated it from the formation. Now when I'm in uniform, I feel colorblind, which is amazing."¹⁸² He expressed that he no longer thought racism was a problem in the service, and that the sole focus should be on combating sexism.¹⁸³

In 2020, out of 41 four-star generals and admirals, only two were black.¹⁸⁴ This is likely due to the lack of black officers who qualify for promotion to the highest ranks; qualification to the highest ranks is reserved for officers who have served in combat arms, and black officers are more frequently assigned to combat support and logistics.¹⁸⁵ These assignments are the self-evident result of a lack of black officers in combat arms leading to fewer white officers working under black commanders, and less interaction with black soldiers and commanders outside of support roles—creating the

¹⁷⁷ See generally 2017 GAO Report, *supra* note 6.

¹⁷⁸ Robinson & Chen, *supra* note 173.

¹⁷⁹ Zachery Cohen & Janie Boschma, *Military Data Reveals Dangerous Reality for Black Service Members and Veterans*, CNN (Jun. 14, 2020, 11:52 AM), <https://www.cnn.com/2020/06/13/politics/military-diversity-data/index.html> [<https://perma.cc/W3FW-6FQL>].

¹⁸⁰ Cooper, *supra* note 15.

¹⁸¹ See generally *id.*

¹⁸² *Id.*

¹⁸³ *Id.*; see also Eric Schmitt & Helene Cooper, *Promotions for Female Generals Were Delayed Over Fears of Trump's Reaction*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/2021/02/17/us/politics/women-generals-promotions-trump.html> [<https://perma.cc/ZWE6-KWFC>] (stating that sexism is also a barrier to reaching the top ranks of the military).

¹⁸⁴ David Barno & Nora Bensahel, *Reflections on the Curse of Racism in the U.S. Military*, TEX. NAT'L SECURITY REV.: WAR ON THE ROCKS (Jun. 30, 2020), <https://warontherocks.com/2020/06/reflections-on-the-curse-of-racism-in-the-u-s-military/> [<https://perma.cc/N6GX-MBL7>].

¹⁸⁵ *Id.*

perception that black servicemembers were better placed in support jobs instead of frontline combat.¹⁸⁶ The trend of few black officers in the highest ranks is likely to persist; the time it takes for officers to achieve such a high rank means that this problem will continue for decades.¹⁸⁷

2. Lack of Consistent Data to Track Racial Disparities

The 2019 GAO Report also found that there are inconsistent or non-existent standards for collecting information about race and ethnicity within the military justice system.¹⁸⁸ With no consistent collection of this data, it is difficult for the DoD to figure out the causes of racial disparity in the military justice system and remedy them.¹⁸⁹ Fifteen different databases are used among the branches to track investigations, non-judicial punishments, and court-martials.¹⁹⁰ The options for race that can be chosen when racial data is collected range from 5 to 32 choices.¹⁹¹ The GAO noted that consistent data collection—both *actually* collecting the data and having the same amount of options for documenting race—would likely help determine the root cause of the racial disparity in military justice.¹⁹²

B. Unfairness in the Discharge and Discharge Upgrade Process

Black servicemembers face disadvantages in both the discharge and discharge upgrade processes. While DoD policy mandates screening servicemembers for PTSD and TBI prior to any discharge for misconduct, they are often not followed properly.¹⁹³ Once the servicemember is out of the military, the next step is to navigate the boards.

1. Military Branches Do Not Always Follow DoD Policies Aimed at Preventing Servicemembers with PTSD or Related Mental Health Conditions from Receiving Bad Paper Discharges

The GAO issued a 2017 report which found that, of the 91,764 servicemembers separated for misconduct between 2011 and 2015, 62%

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ 2019 GAO Report, *supra* note 159, at 26.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Robinson & Chen, *supra* note 173.

¹⁹² *Id.*

¹⁹³ 2017 GAO Report, *supra* note 6, at 16.

(57,141 servicemembers) had been diagnosed with PTSD, a related mental health condition, or TBI in the two years leading up to the discharge.¹⁹⁴ Of these, 23% (13,283 servicemembers) received a bad paper discharge.¹⁹⁵ The DoD has established policies that require screening servicemembers for PTSD and TBI before separating them for misconduct.¹⁹⁶ However, the 2017 GAO report found that the DoD did not routinely monitor adherence to these policies.¹⁹⁷ Had they done so, they would have found what the GAO did: That neither the Army nor the Marines had sufficient data to see if screening was even occurring.¹⁹⁸ The Army created a system where the responsibility for screening fell to commanders and installation judge advocates to ensure that screening was being performed.¹⁹⁹ The Marines recognized that they *should* be monitoring this data, but lacked sufficient information to routinely monitor separation information.²⁰⁰ Officials told the GAO that they were exploring options including an electronic system that would allow for routine monitoring; however, one of the officials disclosed that the electronic system was only being used in 40% of separation cases.²⁰¹

2. The Discharge Upgrade Boards Have Declined to Apply PTSD Guidance to Servicemembers of the Iraq and Afghanistan Conflicts

Once servicemembers have been discharged for misconduct, any challenge to their characterization of service must be done through the DRB or BCMR/BCNR.²⁰² There have been numerous attempts to address the upgrade process to be friendlier to servicemembers with PTSD, mental health conditions, TBI, and MST. In 2014, the Hagel Memo was released, officially recognizing the correlation between the servicemembers' discharges and undiagnosed PTSD, mental health conditions, TBI, and MST; it also required military review boards to use liberal consideration when reviewing records for servicemembers claiming their misconduct was due to mental health conditions.²⁰³ The Fairness for Veterans Act of 2016 (FVA) codified the Hagel Memo, requiring the DRB to review medical records and apply liberal

¹⁹⁴ *Id.* at 12.

¹⁹⁵ *Id.* at 14.

¹⁹⁶ *Id.* at 16.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 28.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 29.

²⁰¹ *Id.*

²⁰² *See generally* Hagel Memo, *supra* note 21.

²⁰³ *Id.*

consideration for servicemembers asserting PTSD, TBI, or MST potentially contributed to the discharge under a lesser characterization.²⁰⁴

a. The Hagel, Carson, and Kurta Memos

Vietnam veterans, seeing a possible connection between the misconduct that led to their bad paper discharges and undiagnosed PTSD, pushed for changes to the discharge upgrade process.²⁰⁵ The Hagel Memo established that liberal consideration was to be given for trauma-related mental health conditions and TBI out of recognition that PTSD, and its effects, were not recognized at the time of the Vietnam War; thus, medical and personnel records would not have sufficient information to satisfy the boards' evidentiary standards for upgrades.²⁰⁶ The connected medical guidance details that liberal consideration will be given to servicemembers who have service medical records that documented one or more symptoms meeting the diagnostic criteria for PTSD, or related mental health conditions, when service records or documents substantiate the existence of such symptoms during time in service—or when a civilian provider has diagnosed the servicemember with PTSD, or related mental health conditions, and document narratives support that those symptoms existed during a servicemember's time in service.²⁰⁷ The Army Board for Correction of Military Records (ABCMR) has provided the most information about post-Hagel Memo PTSD decisions, and their decisions show a significant increase of upgrade approval for Vietnam veterans, rising from 3.7% favorable to 45% favorable for those with an existing PTSD diagnosis.²⁰⁸

Servicemembers who served in the Iraq and Afghanistan conflicts have been less successful in getting their petition approved, receiving a favorable decision only 23% of the time.²⁰⁹ When questioned about this sharp drop in favorability, the board explained that PTSD was not a known illness during the Vietnam War, but was recognized prior to the start of the Iraq and Afghanistan conflict.²¹⁰ Because it was a known diagnosis, they felt that a diagnosis would be in servicemembers' medical records, and the liberal consideration guaranteed by the Hagel Memo was not warranted.²¹¹ The 2017 GAO Report contradicts this reasoning, stating that “mental health conditions

²⁰⁴ Fairness for Veterans Act of 2016, 10 U.S.C. § 1553(d) (2016).

²⁰⁵ Hagel Memo, *supra* note 21, at 1.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Sidibe & Unger, *supra* note 11, at 2.

²⁰⁹ *Id.* at 6.

²¹⁰ *Id.*

²¹¹ *Id.*

and cognitive impairments such as . . . PTSD and . . . TBI are ‘signature wounds’ of the conflicts in Afghanistan and Iraq.”²¹² Further, these impairments can go unrecognized, despite impacts on behavior and mood.²¹³

Further supplemental guidance was given in the form of DoD memorandums in 2016 and 2017. In 2016, then-Acting Principal Deputy Under Secretary of Defense Carson waived the statute of limitations for BCMR/BCNR petitions of servicemembers claiming PTSD or related conditions (the Carson Memo) to ensure fairness.²¹⁴ In addition, any cases that had previously been considered by the DRB or BCMR/BCNR that did not receive liberal consideration would be granted *de novo* review upon petition.²¹⁵ Further clarifying guidance was given in 2017 by then-Acting Under Secretary of Defense for Personnel and Readiness Kurta (the Kurta Memo). The Kurta Memo reiterated the Hagel Memo point that “invisible wounds” are difficult to review and generally have less documentation supporting claims, leading to unsuccessful claims.²¹⁶ The clarifying guidance provides a series of questions and considerations the boards should assess when reviewing case petitions with claims that PTSD, TBI, or MST contributed to misconduct.²¹⁷ Under the Kurta Memo, evidence of behavior changes and misconduct — including that which led to the discharge — could be considered as evidence of a mental health condition.²¹⁸ If no clear evidence to the contrary is presented, a diagnosis from a licensed psychiatrist or psychologist could be used as evidence that may mitigate or excuse the discharge.²¹⁹ Another important clarification involves *which* boards are impacted. The Hagel Memo mentions only the BCMR/BCNR.²²⁰ The Carson Memo mentions only the BCMR/BCNR as impacted by the waiver of statute of limitations, though mentioning both the DRB and BCMR/BCNR for *de novo* review.²²¹ For the first time, clear language established that guidance in both the Hagel and Carson Memos applied to the DRB and BCMR/BCNR.²²² The FVA codified the Hagel Memo and requires DRBs review cases where PTSD potentially played a role in their misconduct, with liberal consideration.²²³ Following passage of the FVA, then-Secretary of the Navy

²¹² 2017 GAO Report, *supra* note 6, at 1.

²¹³ *Id.*

²¹⁴ Carson Memo, *supra* note 22.

²¹⁵ *Id.*

²¹⁶ Kurta Memo, *supra* note 22.

²¹⁷ *Id.* at 2.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See generally* Hagel Memo, *supra* note 21.

²²¹ Carson Memo, *supra* note 22.

²²² Kurta Memo, *supra* note 22, at 3.

²²³ Fairness for Veterans Act of 2016, 10 U.S.C. § 1553(d) (2016).

Spencer stated that the NDRB began applying the liberal consideration standards.²²⁴

i. Class Actions Seeking to Compel the Boards to Follow the Hagel Memo's Guidance

Despite the clarifications provided in the Carson and Kurta Memos, the Army DRB (ADRB) continued to deny petitions of servicemembers that raised mental health arguments as a factor.²²⁵ In 2017, Steve Kennedy and Alicia Carson filed a class action lawsuit against the Army and Army National Guard to compel the ADRB to fairly adjudicate applications under the guidance set forth by the Hagel Memo.²²⁶ Kennedy alleged the Army routinely discharges soldiers with bad paper discharges after misconduct stemming from mental health conditions, instead of helping them get treatment.²²⁷ Kennedy stated that when his PTSD became impossible for him to manage on his own, his commander told him he could only get treatment if he left the Army and received a bad paper discharge.²²⁸ Kennedy had experienced a successful career until he returned from Iraq and began experiencing PTSD symptoms; he had been rapidly promoted, assigned leadership roles, and received multiple service medals.²²⁹ After coming home from Iraq he began abusing alcohol, self-mutilating, and endured suicidal thoughts.²³⁰ After he was told he could not take leave to attend his own wedding, he went absent without leave (AWOL) and was given a general discharge in 2009.²³¹

Another class action lawsuit was filed in 2018, this time against then-Secretary of the Navy Richard Spencer, who was in charge of the Navy Discharge Review Board (NDRB).²³² The plaintiffs sought a class-wide injunction to ensure the Navy followed the Hagel Memo's directive to use liberal consideration for diagnoses of PTSD or PTSD symptoms, and related mental health conditions.²³³ From 2002 to the time of filing, 100,000 sailors and Marines had been discharged with a bad paper discharge, thousands of

²²⁴ Manker v. Spencer, No. 3:18-cv-372, 2019 U.S. Dist. LEXIS 193434, at *45 (D. Conn. Nov. 7, 2019).

²²⁵ *Connecticut Vet Sues Over Discharges for Those with Mental Health Problems*, *supra* note 24.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² Manker v. Spencer, No. 3:18-cv-372, 2019 U.S. Dist. LEXIS 193434, at *2 (D. Conn. Nov. 7, 2019).

²³³ *Id.* at *3.

whom had combat-related PTSD or related conditions, TBI, or MST that contributed to their misconduct.²³⁴ Of these servicemembers, nearly all who petitioned for a discharge upgrade to the NDRB were denied.²³⁵

Secretary Spencer asserted that the claims were moot because the Hagel Memo was released to BCMR/BCNRs—a separate entity.²³⁶ The DRB was not addressed until the Kurta Memo in 2017, but Secretary Spencer conceded that, when reading the Hagel and Kurta memos together, the DRB was to follow the guidance set forth.²³⁷ However, he argued that DRBs were not required to apply Hagel Memo guidance until the release of the Kurta Memo, and petitions between the two memorandums did not have to be reviewed with liberal consideration.²³⁸ The failure of the Hagel Memo to explicitly state that *all* boards were to give consideration created a loophole; until the Kurta Memo the DRBs — or at least the NDRB — did not feel compelled by Hagel Memo guidance to apply liberal consideration to their PTSD related petitions.²³⁹

Kennedy often doubted he would be successful in a discharge upgrade, but in 2018, after eight years and multiple appeals, he succeeded.²⁴⁰ The class action lawsuit he filed with Alicia Carson settled in November 2020.²⁴¹ The settlement requires the Army to review PTSD and related mental health condition petitions from 2011 to 2020, and also send notification to those who were denied an upgrade between 2001 and 2011.²⁴² The ADRB also committed to provide additional training on how to handle PTSD and mental health conditions applications.²⁴³

IV. LEGISLATIVE AMENDMENTS CAN HELP REDUCE THE DISPARITIES BLACK SERVICEMEMBERS EXPERIENCE WHEN SEEKING DISCHARGE UPGRADES

With a well-established bureaucratic procedure, why should statutory change be the goal? Why not put in place a military policy to ensure potential racial trauma-induced PTSD and related mental health condition claims are

²³⁴ *Id.* at *11.

²³⁵ *Id.*

²³⁶ *Id.* at *28.

²³⁷ *Id.* at *43.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Julia Bergman, *The Army is Reconsidering Thousands of Bad Paper Discharges of Iraq and Afghanistan Veterans*, TASK & PURPOSE (Nov. 19, 2020), <https://taskandpurpose.com/news/army-bad-paper-discharge-lawsuit/> [https://perma.cc/H7KN-ZYAK].

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

vetted before discharging for misconduct? The DoD already has a policy which mandates screening for PTSD and TBI before discharges for misconduct.²⁴⁴ All military branches fall under the umbrella of the DoD and, as the 2017 GAO Report showed, the DoD either cannot or does not track the branches to ensure they are following DoD policies and directives.²⁴⁵ Under the Hagel, Carson, and Kurta Memos, the DRB and BCMR/BCNR *chose* which PTSD cases would get the benefit of liberal consideration, but, following passage of the FVA, DRBs began applying the liberal consideration standard to all petitions involving PTSD or related mental health conditions.²⁴⁶

Though the FVA codified the liberal consideration guidance, it does not provide a clear path towards getting racial trauma-induced PTSD and related mental health conditions recognized. Racial disparity has persisted in the military justice system despite many reports about its existence.²⁴⁷ The bureaucracy and size of the DoD, coupled with the ability of service branches to act independently and without DoD oversight, allows branches to either partially or fully fail to comply with DoD mandates meant to ensure no misconduct bad paper discharges are given without proper consideration of any possible contributing trauma-related mental health conditions.²⁴⁸ *Manker v. Spencer* demonstrates how the DRB can try to sidestep guidance that does not explicitly say that the guidance applies to that board.²⁴⁹ Amending 10 U.S.C. § 1552 and 10 U.S.C. § 1553 to include racial trauma-induced PTSD and related mental health conditions would provide a path for black servicemembers to succeed in a discharge upgrade proceeding.

*A. 10 U.S.C. § 1552 and 10 U.S.C. § 1553 Should Be Amended to
Include Racial Trauma-Induced PTSD and Related Mental Health
Conditions*

Black servicemembers are at risk of developing PTSD not only from the normal risks that accompany military service, but also ethnic and racial tensions they are exposed to in both military service and the civilian world.²⁵⁰ The current language of § 1552 and § 1553 includes PTSD, mental health

²⁴⁴ See *supra* Section III.A.2.

²⁴⁵ *Id.*

²⁴⁶ *Connecticut Vet Sues Over Discharges for Those with Mental Health Problems*, *supra* note 24.

²⁴⁷ See *supra* Section III.A.

²⁴⁸ See generally 2017 GAO Report, *supra* note 6.

²⁴⁹ *Manker v. Spencer*, No. 3:18-cv-372, 2019 U.S. Dist. LEXIS 193434, at *2 (D. Conn. Nov. 7, 2019).

²⁵⁰ See *supra* Section II.C.1.

conditions, and TBI related to combat or MST.²⁵¹ The absence of language involving racial trauma means that PTSD and related mental health conditions caused by racial trauma are harder to recognize.²⁵² Research has shown that, even if there is not a traumatic event that satisfies the DSM-5 requirement for a diagnosis of PTSD, racial trauma can lead to mental health conditions like anxiety, depression, and other mental health conditions recognized in the 2017 GAO Report as potential contributors to misconduct that led to a bad paper discharge.²⁵³ Renewed attention to the impact of racial trauma on black mental health would make this revision of the Code timely. Further, codifying racial trauma-induced PTSD and mental health conditions would be in the spirit of the Hagel Memo, which noted that liberal consideration should be granted for diagnoses that did not exist at the time of the servicemember's discharge.²⁵⁴ Revision should also include a rebuttable presumption of racial trauma-induced mental health conditions for black servicemembers seeking an upgrade to their discharge for misconduct, and the addition of a neutral third-party to the DRB and BCMR/BCNR in petitions of black servicemembers claiming their misconduct was partially or fully caused by PTSD or a related mental health condition.

1. The Amendment Should Create a Rebuttable Presumption of PTSD or Related Mental Health Condition for Black Servicemembers Seeking Upgrades to Administrative Discharges

In addition to adding racial trauma induced PTSD and related mental health conditions to § 1552 and § 1553, there should be a rebuttable presumption of racial trauma-induced mental health conditions as excusing or mitigating the impact of misconduct on the discharge characterization for administrative discharges. The racial disparities in the military justice system seem mainly to be associated with non-judicial punishment and other punishments that fall within command discretion with little to no judicial oversight.²⁵⁵ Limiting the presumption to administrative discharges would help remedy the disparity in the military justice system, particularly because racial disparity in punishments or convictions is nearly eliminated once the case is sent to court-martial proceedings.²⁵⁶ Creating a rebuttable

²⁵¹ 10 U.S.C. § 1552(h)(1) (2020); 10 U.S.C. § 1552(i) (2020); 10 U.S.C. § 1553(d) (2020).

²⁵² *Id.*

²⁵³ *See supra* Section II.C.1; *see generally* 2017 GAO Report, *supra* note 6.

²⁵⁴ Hagel Memo, *supra* note 21.

²⁵⁵ *See supra* Section III.A.1.

²⁵⁶ Christensen et al., *supra* note 26, at 10.

presumption of racial trauma for discharge upgrades for administrative discharges would provide both recognition of the racial disparity present when commanders have discretion in punishment severity, and also provide a remedy for black servicemembers who may have been discharged for misconduct stemming from racial trauma-induced mental health conditions. Pairing this presumption with the inclusion of neutral third-party psychology professionals in the review of black servicemember petitions would help mitigate any racial biases in the discharge review process.

2. The Amendment Should Include Neutral Third Parties in the Military Discharge Upgrade Process

The inclusion of neutral third parties would provide more objectivity in deciding the outcome of claims involving issues of racism and racial bias. There is precedent for involving civilians into veterans' issues: The Veterans Administration (VA) hires both civilians and veterans to work in the Department.²⁵⁷ Specifically, the VA Medical system has a robust psychology program that allows mental health professionals to work in all parts of the field, and provides an opportunity to conduct research supported by the VA's large budget for funding.²⁵⁸ Mental health professionals are hired from all career stages, and the VA also provides internships for pre- and post-doctoral students.²⁵⁹

The successful integration of civilian mental health professionals indicates outside parties can successfully be involved in issues involving veterans. Allowing a third party to come into the discharge upgrade process would allow for unbiased eyes to review discharges. These parties would be more likely to objectively review conduct that led to discharge. Rather than having retired military civilians or retired commanders review the record, who may view misconduct as a violation of the military spirit rather than a result of PTSD, a neutral third party could take a holistic view of the circumstances.²⁶⁰ The addition of mental health professionals to considerations of PTSD or other mental health conditions already exists under both § 1552 and § 1553.²⁶¹

²⁵⁷ See Amy Novotney, *The VA is Hiring*, AM. PSYCHOL. ASS'N (Oct. 2018), <https://www.apa.org/monitor/2018/10/careers-va-hiring> [<https://perma.cc/MPL7-SL8J>].

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ See *supra* Section II.B.

²⁶¹ See 10 U.S.C. § 1552 (2020) (stating that BCMR/BCNR will receive advice and counsel from mental health professionals); 10 U.S.C. § 1553 (2020) (stating that DRB will include a mental health professional on the review panel for combat related trauma but will only receive advice and counsel for MST-related trauma).

There is a distinct difference between the level of involvement for mental health professionals in combat versus non-combat-induced PTSD claims: Combat-induced PTSD requires the addition of a mental health professional to the panel, while non-combat-induced requires only the board receiving advice and consent from a mental health professional.²⁶² This shows a bias towards non-combat-induced PTSD and mental health conditions.²⁶³ There are indications that racial trauma creates mental health conditions comparable to those that occur from sexual harassment, rape, domestic violence, and other types of assaultive violence.²⁶⁴ While there is a disparity in review of cases of combat versus non-combat-induced mental health conditions (combat and sexual trauma are both assaultive traumas, yet they are treated differently), the additional factor of racial disparity and racial bias in the military justice system warrants inclusion of mental health professionals in the same capacity as present in the reviews of combat.

V. CONCLUSION

Sample legislation that includes explicit language addressing racial trauma-induced PTSD and related mental health conditions has been provided at the end of this Note.²⁶⁵ This sample legislation mirrors the FVA that officially codified the Hagel Memo. Underreporting of experiences of racism, the racial disparity in the military justice system, and the continued research on racial trauma-induced PTSD and related mental health conditions warrant the liberal consideration granted by the Hagel Memo and FVA. The difference in application of the liberal consideration standard when it was mandated by the Hagel Memo, and when it was mandated by federal law, justifies legislation that officially recognizes misconduct that may arise out of racial trauma-induced mental health conditions. This additional consideration is necessary to obtain a more equitable system that accounts for the unique experiences of black servicemembers, and additional traumas they may have experienced solely because of their race.

²⁶² 10 U.S.C. § 1552 (2020); 10 U.S.C. § 1553 (2020).

²⁶³ Assaultive violence encompasses both military combat and sexual assault. The differing involvement of mental health professionals between combat and MST—both types of assaultive violence—is indicative of a bias towards combat-induced mental health conditions. See *Assessing Racial Trauma Within a DSM-5 Framework*, *supra* note 12, at 244.

²⁶⁴ See Janet E. Helms et al., *Racism and Ethnobiology as Trauma: Enhancing Professional and Research Training*, 18 *TRAUMATOLOGY* 65, 67 (2012); *Assessing Racial Trauma Within a DSM-5 Framework*, *supra* note 12, at 244; *Assessing Racial Trauma with the Trauma Symptoms of Discrimination Scale*, *supra* note 12, at 736; Carlson et al., *supra* note 12, at 749.

²⁶⁵ The sample legislation provides for the amendment of 10 U.S.C. § 1553. However, 10 U.S.C. § 1552 should also be amended to ensure that racial trauma-induced mental health conditions are recognized by both the DRB and BCMR/BCNR.

VI. SAMPLE LEGISLATION

A BILL

To amend title 10, United States Code, to provide for a review of the characterization or terms of discharge from the armed forces of individuals with mental health disorders alleged to affect terms of discharge.²⁶⁶

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,*²⁶⁷

SECTION 1. SHORT TITLE.

This act may be cited as the “Fairness for Black Veterans Act of 2021.”

SECTION 2. REVIEW OF CHARACTERIZATION OR TERMS OF DISCHARGE FROM THE ARMED FORCES OF INDIVIDUALS WITH MENTAL HEALTH DISORDERS ALLEGED TO AFFECT TERMS OF DISCHARGE.

Section 1553(d) of title 10, United States Code, is amended by adding at the end the following new paragraph:²⁶⁸

“(4)(A) In addition to the requirements of paragraphs (1) and (2), in the case of a former member described in subparagraph (B), the board shall—²⁶⁹

“(i) review medical evidence of the Secretary of Veterans Affairs or a civilian health care provider that is presented by the former member; and²⁷⁰

“(ii) review the case with a rebuttable presumption in favor of the former member that racial trauma-induced posttraumatic stress disorder or related mental health conditions materially contributed to the circumstances resulting in the discharge of a lesser characterization; and²⁷¹

“(iii) shall include a neutral third-party with experience in the field of racial trauma.

“(B) A former member described in this subparagraph is a former member described in paragraph (1) or a former member whose application for relief is based in whole or in part on matters relating to

²⁶⁶ H.R. Res. 4683, 114th Cong. 1 (2016).

²⁶⁷ *Id.* at 2, ll. 1–2.

²⁶⁸ *Id.* at ll. 5–7.

²⁶⁹ *Id.* at ll. 8–10.

²⁷⁰ *Id.* at ll. 11–13.

²⁷¹ *Id.* at ll. 14–18.

posttraumatic stress disorder or traumatic brain injury as a supporting rationale, or as justification for priority consideration, whose posttraumatic stress disorder or traumatic brain injury is related to combat, military sexual trauma, or racial trauma, as determined by the Secretary concerned.”²⁷²

²⁷² *Id.* at 2–3.