

Kicked Out, Kicked Again: The Discharge Review Boards' Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder

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In recent years, the Department of Defense (DoD) has responded to the growing awareness of mental health issues for military servicemembers during and after service. This Article focuses on veterans who have already been discharged from service, and specifically those who have been discharged under other-than-honorable conditions for misconduct that is likely the result of a mental health condition, including post-traumatic stress disorder (PTSD), traumatic brain injury, sexual assault, or sexual harassment. Thousands of former servicemembers have been kicked out of the military for misconduct rather than treated for mental health conditions they experienced due to their military service. When these veterans later seek an upgrade from a discharge review board based on their mental health conditions, they are typically kicked again when the discharge review board denies relief.

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In 2014, DoD created a new policy to give “liberal consideration” to veterans seeking to upgrade their other-than-honorable discharges due to mental health conditions. The policy, known as the Hagel Memo, was later clarified and supplemented in August 2017 by the Kurta Memo. This Article analyzes how the Naval Discharge Review Board as a representative of the discharge review boards has implemented the guidance based on decisions released after the August 2017 Kurta Memo’s clarifying guidance.

This Article contributes to the discussion on military and veterans’ mental health issues through the lens of how the discharge upgrade process fails to respond to the growing understanding and awareness of PTSD and other mental health conditions. This Article explains how the discharge review boards have failed to implement the liberal consideration policy guidance and offers a path forward, from a big picture redefinition of “Honorable” to specific revisions to Navy procedures that serve as examples for all the services to consider. The discharge review boards have the opportunity to acknowledge that the military abandoned these veterans at the discharge stage when they received an other-than-honorable discharge and—more importantly—to provide relief by giving them a hand up rather than kicking them again.

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INTRODUCTION

Michelle Essex served in the U.S. Navy Reserve for fifteen years.¹ She had an exemplary record of service as a Navy Reservist including multiple awards in recognition of that service.² She was never disciplined for any misconduct.³ She deployed to Afghanistan from May 2011 to February 2012 in support of Operation Enduring Freedom.⁴ Her performance record from November 2012 to November 2013 could not have been more positive: “[Petty Officer Essex] is on fire and is the workhorse of this Det[achment]. She is the right person at the right time to further elevate the unit’s success. Her LEADERSHIP and determination to drive others to perfection is unmatched and is a major asset to the entire command.”⁵

After completing her reserve duty, Petty Officer Essex received an honorable discharge and then enlisted for active duty for six years.⁶ She served only four months and five days before the Navy discharged her on October 13,

1. Michelle Essex is a fictitious name for the veteran in Naval Discharge Review Board (NDRB) decision ND17-01559. The decision is on file with the author.

2. NDRB No. ND17-01559.

3. *Id.*

4. *Id.*

5. *Id.* (emphasis in original).

6. *Id.*

2014, for using drugs.⁷ Given the Navy's zero-tolerance policy for drug abuse, she underwent mandatory processing for administrative separation.⁸ Despite her strong record but for this one incident, her command discharged her—kicked her out—with an “Under Other Than Honorable Conditions” characterization and “Misconduct (Drug Abuse)” as the narrative reason.⁹ This discharge characterization tainted her previous years of exemplary service.

Less than two years later, Michelle sought treatment for mental health concerns related to military sexual trauma (MST) she experienced while serving in the Navy.¹⁰ In February 2016, a civilian psychiatrist diagnosed Michelle with post-traumatic stress disorder (PTSD) due to the MST.¹¹

In September 2017, Michelle sought to upgrade her discharge to “Honorable” by filing the appropriate documents with the Naval Discharge Review Board (NDRB or “the Board”).¹² Michelle explained in the application that the MST and PTSD she experienced led her to use drugs to cope with how she was feeling.¹³ She explained that she had an impeccable record of service but for this one incident, and that her mental health condition, rather than intentional misconduct, had caused the incident.¹⁴ She provided medical and service records as well as her own statement to support her upgrade request.¹⁵

The Board recognized Michelle's MST and PTSD diagnosis.¹⁶ It recognized her fifteen years of service with no other adverse action and determined that Michelle's “diagnosed PTSD and MST was a mitigating factor associated with her in-service misconduct.”¹⁷ The Board described Michelle's service as “honest and faithful” and considered her combat tour and her exemplary performance record.¹⁸

The Board voted unanimously to change Michelle's discharge status, but granted her only a partial upgrade.¹⁹ The Board explained that it “does not consider PTSD as a reason to completely absolve the Applicant of her misconduct” and that “significant negative aspects of the Applicant's conduct outweighed the positive aspects of [her] service.”²⁰ Therefore, the Board

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* Throughout this Article, I refer to former servicemembers seeking discharge upgrades as “veterans” unless directly quoting from a decision with the term “Applicant” because the word “veteran” is more respectful of the servicemembers' service than the generic term “Applicant.” The term “veteran” is defined by statute as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. § 101(2) (2018).

changed Michelle’s discharge from “Under Other Than Honorable Conditions” to “General (Under Honorable Conditions).”²¹ The Board did not change the narrative reason, however, and Michelle’s discharge paperwork continues to refer to her misconduct and undermine her record of exemplary service by referring to her reason for discharge as “Misconduct (Drug Abuse).”²²

Like Michelle, thousands of servicemembers have been discharged with other-than-honorable discharges due to misconduct that can be traced to a mental health condition. According to a 2015 report, more than 600,000 servicemembers received a less-than-fully-honorable discharge between 2000 and 2013.²³ In May 2017, the Government Accountability Office reported that 62 percent of the 91,764 servicemembers discharged “for misconduct from fiscal years 2011 through 2015 had been diagnosed within the 2 years prior to separation with post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), or certain other conditions that could be associated with misconduct.”²⁴ In that five-year period, 57,141 servicemembers were kicked out of the military for what may have been behavior that resulted from a mental health condition.²⁵

After leaving the military with an other-than-honorable discharge, veterans are “generally ineligible to receive VA benefits, including education, housing, employment, disability compensation, burial benefits, and, in many cases, even healthcare.”²⁶ They may also be banned from joining veterans’ service

I use the term “veteran” more broadly than the statutory definition to refer to any person who served in the armed forces. See Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from “Veteran” Services*, 122 PENN. ST. L. REV. 69, 94 (2017) (explaining how statutory reorganization of veterans benefits law “has come to mean that a former servicemember deemed ineligible by the VA is essentially told that he or she is not a ‘veteran’ in the eyes of the federal government—despite the fact of his or her service in the armed forces”).

21. NDRB No. ND17-01559.

22. *Id.*

23. INST. FOR VETERAN POLICY, SWORDS TO PLOWSHARES, VETERANS AND BAD PAPER (2015), <https://www.swords-to-plowshares.org/wp-content/uploads/Bad-Paper-Fact-Sheet-June-2015.pdf> [<https://perma.cc/Y2CT-4KE5>]. “Bad paper” means “other-than-honorable, bad conduct, or dishonorable discharge, and may include a general discharge as well.” Michael J. Wishnie, “*A Boy Gets Into Trouble*”: *Service Members, Civil Rights, and Veterans’ Law Exceptionalism*, 97 B.U. L. REV. 1709, 1724 (2017).

24. 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, highlights (2017).

25. *Id.*

26. SUNDIATA SIDIBE & FRANCISCO UNGER, VIETNAM VETERANS OF AM. & NAT’L VETERANS COUNCIL FOR LEGAL REDRESS, UNFINISHED BUSINESS: CORRECTING “BAD PAPER” FOR VETERANS WITH PTSD 3 (2016), <https://www.vetsprobono.org/library/attachment.312768> [<https://perma.cc/KF3R-7PHG>]; see also Marcy L. Karin, “*Other Than Honorable*” Discrimination, 67 CASE W. RES. L. REV. 135, 137–39 (2016) (discussing how the Uniformed Services Employment and Reemployment Act (USERRA) has not protected veterans with other-than-honorable discharge and explaining that these discharges “have disproportionately impacted people with service-connected injuries like post-traumatic stress disorder and traumatic brain injury, servicemembers who have experienced military sexual trauma, and people with caregiving responsibilities”); Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 KAN. L. REV. 513, 564 (2019) (discussing

organizations, face challenges in employment, and experience homelessness.²⁷ These veterans are also “more likely to suffer mental health conditions . . . and to be involved with the criminal justice system, and they take their own lives twice as often as other veterans.”²⁸ Veterans with other-than-honorable discharges are typically outside the care of the Department of Veterans Affairs (VA), and “[the] rate of death by suicide among Veterans who do not use VA care is increasing at a greater rate than Veterans who use VA care.”²⁹ Beyond health care and economic resources, veterans with other-than-honorable discharges suffer a diminished status. They are “not permitted to wear their uniforms or receive a military burial.”³⁰ In sum, their service is not honored, and an other-than-honorable discharge “impos[es] a lifetime stigma that marks the former service member as having failed family, friends, and country.”³¹ In the truest sense of the words, these servicemembers are kicked out and left behind.

Once the military labels veterans with an other-than-honorable discharge, they have little recourse.³² Even though there are administrative remedies

the potentially “severe” consequences of other-than-honorable discharges, including loss of rights to “educational grants, home loans, healthcare, and disability benefits”).

27. SIDIBE & UNGER, *supra* note 26, at 3.

28. Wishnie, *supra* note 23, at 1724; *see also* HUMAN RIGHTS WATCH, *BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS* 4–5 (2016), https://www.hrw.org/sites/default/files/report_pdf/us0516_militaryweb_1.pdf [<https://perma.cc/5QJP-V255>] (discussing the correlation of “bad paper” with “high suicide rates, homelessness, and imprisonment”). I’m not arguing that discharge status caused these effects, but that there is a correlation between discharge characterization and access to benefits, and the lack of benefits such as health care may lead to untreated mental health symptoms. *See, e.g.*, HUMAN RIGHTS WATCH, *supra*, at 77; Tiffany M. Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1, 16 (2010) (noting “the strong correlation between PTSD and substance abuse, mental health problems, and persistent misconduct”).

29. *See* Hans Petersen, *Other-than-Honorable Discharge? You’re Still Eligible for VA Mental Health Care*, U.S. DEP’T VETERANS AFF.: VANTAGE POINT (May 15, 2019), <https://www.blogs.va.gov/VAntage/60349/other-than-honorable-discharge/> [perma.cc/M3HV-QGQP]; *see also* 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 (2012) (“The military, through its discharge process, is creating huge handicaps to readjustment and reintegration into society by limiting the possibility of care and failing to at the least stabilize these warriors before their rough ejection.”); Rebecca A. Clay, *Access to Care for All Veterans*, MONITOR ON PSYCHOL., June 2017, at 20 (describing 2017 suicide-prevention initiatives).

30. HUMAN RIGHTS WATCH, *supra* note 28, at 5; *see also* 38 U.S.C. § 2302 (2018) (limiting benefits to “veteran,” as defined in § 101(2) as a “person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable”); U.S. DEP’T OF DEF., DOD INSTRUCTION 1300.15, MILITARY FUNERAL SUPPORT 3–4 (2017), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130015p.pdf> [<https://perma.cc/Y7HW-2L37>] (stating that recipients of other-than-honorable discharges are ineligible for military funeral honors); *Eligibility for Burial in a VA National Cemetery*, U.S. DEP’T OF VETERANS AFFAIRS, <https://www.va.gov/burials-memorials/eligibility/> [<https://perma.cc/6K9Z-WTTT>] (stating that recipients of other-than-honorable discharges are ineligible for burial in a VA national cemetery).

31. Wishnie, *supra* note 23, at 1724.

32. HUMAN RIGHTS WATCH, *supra* note 28, at 5 (“Despite the high stakes for veterans, there is little meaningful opportunity to appeal a bad discharge (also called applying for an ‘upgrade’).”). The lack of “meaningful opportunity” to get the government to right a wrong is consistent with the ban on suits against the military for service-related injuries or harm. *Id.* (“[S]ervice members are prohibited

available for veterans to request a change to their discharge—called a “discharge upgrade”—very few discharge upgrade requests are granted.³³ “[T]he vast majority of applicants seeking to alter their discharge status (well over 90 percent and in some years as high as 99 percent) are rejected.”³⁴ The low grant rate reflects the “‘historic hostility’ in the military toward veterans with other-than-honorable discharges.”³⁵ These rejections are often based on the written application alone without the benefit of a hearing.³⁶ Furthermore, the application form itself is inherently limited by its two-page list of questions with check-boxes and small-text boxes, which do not lend themselves to conveying

by longstanding Supreme Court precedent from suing the military for injuries or harm that ‘arise out of or are in the course of activity incident to service.’” (quoting *Feres v. United States*, 340 U.S. 135 (1950)). The U.S. Supreme Court reinforced *Feres* in 2019 when it denied certiorari in a case asking the Court to reconsider *Feres* in a medical malpractice suit where petitioner’s wife, “Navy Lieutenant Rebekah Daniel, died at a naval hospital due to a complication following childbirth.” *Daniel v. United States*, 587 U.S. ___, 139 S. Ct. 1713 (2019) (mem.) (Thomas, J., dissenting). Justice Thomas dissented from the denial and warned that “[s]uch unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*.” *Id.* at 1714.

Though *Feres* still prohibits judicial claims, the National Defense Authorization Act for Fiscal Year 2020 included a provision to allow administrative claims “against the United States for personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider.” 10 U.S.C. § 2733a(a) (2020). This administrative remedy falls short of calls to allow servicemembers to sue the Department of Defense. See Rose Carmen Goldberg, Commentary, *Let’s Make 2020 the Year Injured Service Members Finally Get the Right to Sue DoD*, MIL. TIMES (Dec. 30, 2019), <https://www.militarytimes.com/opinion/commentary/2019/12/30/lets-make-2020-the-year-injured-service-members-finally-get-the-right-to-sue-dod/> [https://perma.cc/53VX-259A]; David P. Sheldon & Corey D. Bean, Explainer, *Can You Now Sue the Military for Medical Malpractice?*, NAVY TIMES (Dec. 26, 2019), https://www.navytimes.com/news/your-navy/2019/12/26/explainer-can-you-now-sue-the-military-for-medical-malpractice/?utm_source=Sailthru&utm_medium=email&utm_campaign=Navy%20122619&utm_term=Editorial%20-%20Navy%20-%20Daily%20News%20Roundup [https://perma.cc/8E78-V4H6].

33. HUMAN RIGHTS WATCH, *supra* note 28, at 5. It is also the case that very few veterans apply for an upgrade. *Id.* at 94 (“Though thousands of service members may have been wrongfully discharged, very few apply for a discharge upgrade or a change in narrative reason for separation.”); SIDIBE & UNGER, *supra* note 26, at 2 (“Tens of thousands of eligible veterans appear not to have submitted applications.”).

34. HUMAN RIGHTS WATCH, *supra* note 28, at 5.

35. Nikki Wentling, *Pentagon Expands Policy to Upgrade Vets’ Bad Paper Discharges*, STARS & STRIPES (Aug. 29, 2017), <https://www.stripes.com/news/pentagon-expands-policy-to-upgrade-vets-bad-paper-discharges-1.485038> [https://perma.cc/TX6P-CXZ2] (quoting Professor Michael Wishnie).

36. See, e.g., Robert Powers, President, NDRB, Sec’y of the Navy, Council of Review Boards, NDRB Presentation to Veterans Legal Assistance Conference of 2019, at 2–3 (June 7, 2019) (on file with author) (reporting 771 document review cases and 130 hearing cases in the first two quarters of FY19).

complicated information.³⁷ Very few veterans have legal counsel or representation.³⁸

To some extent, then, Michelle's story is a victory because any relief from the Board is relatively unusual. But Michelle received only partial relief. In giving her only partial relief, the Board ignored Michelle's exemplary service and focused exclusively on the one flaw in her record. For thousands of veterans discharged with other-than-honorable characterizations due to behavior connected to a mental health condition, the odds of even partial relief are slim to none. Thus, they live in a world where the military kicked them out rather than cared for them, and when they later sought relief, the Board kicked them again.

Rather than continue this pattern of punishing veterans for having mental health conditions—commander kicks them out and the discharge review board kicks them again—veterans deserve the opportunity for true relief in recognition of their service and the mental health condition they developed due to that service. Recent Department of Defense (DoD) policy guidance reflects this need for change. DoD requires discharge review boards to give “liberal consideration” to “veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.”³⁹ Liberal consideration recognizes the relationship between mental health conditions and behavior that looks like misconduct. The policy is aimed at correcting past injustices that resulted from commanders regularly discharging servicemembers under other-than-honorable conditions when their misconduct was related to a mental health condition.⁴⁰ This Article contributes to the discussion on military and veterans' mental health issues by assessing liberal consideration and its implementation.

Part I begins with a brief background on discharge characterizations and a description of the discharge upgrade process. Part II briefly discusses PTSD and two military-unique stressors: combat and military sexual trauma. This Part also

37. U.S. Dep't of Def., DD Form 293, Application for the Review of Discharge from the Armed Forces of the United States (Dec. 2019), <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0293.pdf> [https://perma.cc/2C89-H2E7].

38. See, e.g., NDRB No. ND17-00909 (on file with author) (“Representation: NONE”). Of the 477 NDRB decisions I reviewed for this project, three had a private representative, and eleven had civilian counsel. The rest had no counsel. See *NDRB Decisions (Shared)*, GOOGLE SHEETS https://docs.google.com/spreadsheets/d/19NYWu2HZkYvnmCw2h0zum8E_KBiciGrBl-WYCLc_cl0/ [https://perma.cc/LZ9T-MJE7]. See *infra* notes 41, 200 and accompanying text.

39. See Memorandum from Chuck Hagel, Sec'y of Def., to Secretaries of the Military Dep'ts 1 (Sept. 3, 2014), <https://www.secnav.navy.mil/mra/bcnr/Documents/HagelMemo.pdf> [https://perma.cc/P9A2-JXUZ] [hereinafter Hagel Memo]; A.M. Kurta, Acting Under Sec'y of Def. for Personnel and Readiness, to Secretaries of the Military Dep'ts, at Attach. ¶3 (Aug. 25, 2017), <https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf> [https://perma.cc/75X9-SFVF] [hereinafter Kurta Memo] (supplementing the Hagel Memo).

40. See Kurta Memo, *supra* note 39. For an in-depth discussion of liberal consideration, see *infra* Part III.B.

describes the relationship between PTSD and misconduct. Part III takes a broader-scope look at mental health care in the military and then narrows to articulate recent policy guidance to liberally consider the relationship between mental health conditions and misconduct in the context of discharge upgrades. By using the Naval Discharge Review Board as a representative of all the discharge review boards, Part IV identifies four themes based on Board decisions to explain how the boards have failed to implement the liberal consideration policy guidance.⁴¹ Part V offers a path forward, from a big-picture redefinition of “Honorable” to specific revisions to Navy procedures that serve as examples for all the armed services to consider. These changes can provide hope to veterans who were kicked out of the military for mental health conditions they experienced due to their military service. The boards have the opportunity to acknowledge that the military abandoned these veterans at the discharge stage when they received an other-than-honorable discharge and, more importantly, to provide relief by giving them a hand up rather than kicking them again.

I.

DISCHARGE CHARACTERIZATIONS AND UPGRADES

When a servicemember is discharged from military service, the quality of their service is memorialized on Department of Defense Form 214, Certificate

41. This Article identifies problems that are not unique to the NDRB but are shared by the other services’ boards. This Article uses the NDRB decisions to generalize about all the boards’ decisions even though the NDRB’s rates of relief have been lower than those of the other services’ boards (though all boards’ rates of relief have been relatively low given the initial optimism of liberal consideration) and because the Navy and Marine Corps have high rates of other-than-honorable discharges. *See, e.g., DoD Review Boards Select Claims Data Q3 2017*, U.S. DEP’T OF DEF., https://boards.law.af.mil/stats_CY2017_Quarter%204%20%28Oct-Dec%202017%29.htm [https://perma.cc/C9MG-NL5X] (Quarter 3 for mental health claims adjudicated, Air Force Discharge Review Board (AFDRB): 27.7 percent; Army Discharge Review Board (ADRB): 40.9 percent; NDRB: 25 percent); U.S. DEP’T OF DEF., *DoD Review Boards Select Claims Data Q4 2017*, https://boards.law.af.mil/stats_CY2017_Quarter%204%20%28Oct-Dec%202017%29.htm [https://perma.cc/C9MG-NL5X] (Quarter 4 for mental health claims adjudicated, AFDRB: 47 percent; ADRB: 63.6 percent; NDRB: 24 percent). Another reason this Article considers the NDRB decisions is that the “Navy’s screening policies [were] not consistent with DoD policy,” and the Navy’s training on TBI was also not compliant with DoD guidance, thus increasing the likelihood that discharge decisions were improper or inequitable. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 24, at 16. The Marine Corps apparently had compliant screening and training policies, but GAO found that implementation of these policies was possibly incomplete. *Id.* at 24–25. As a practical matter, the Article uses NDRB decisions because they are the decisions I had access to after the online reading room that provided access to all the boards’ decisions was shut down for an indeterminable amount of time in 2019. I started my research in January 2019 with the NDRB decisions and fortunately downloaded about 500 decisions before the reading room disappeared in April 2019. My research assistant, Heidi Weimer, created a database of the 477 decisions I had downloaded, and I used that set of decisions for my work on this article. *NDRB Decisions (Shared)*, *supra* note 38. The Department of Defense has agreed to make these decisions available again. *See* Patricia Kime, *Pentagon Agrees to Republish Discharge and Records Correction Decisions*, MIL. TIMES (Jan. 22, 2020), <https://www.militarytimes.com/news/your-military/2020/01/22/pentagon-agrees-to-republish-discharge-and-records-corrections-decisions/> [https://perma.cc/XM5E-LSKM].

of Release or Discharge from Active Duty, known as a DD-214.⁴² The discharge characterization is a decision that a commanding officer typically makes as part of the process of separation from service, and an upgrade is something veterans can seek after they have left military service. This Section briefly summarizes the various discharge characterizations and the process for requesting a discharge upgrade to lay the foundation for the later discussion about the Board's failure to implement policy guidance in reviewing discharge upgrade requests.

A. Discharge Characterizations

Discharges are categorized as either administrative or punitive. Administrative separations include Honorable, General (Under Honorable Conditions (UHC)), Under Other Than Honorable Conditions (UOTHC), and Uncharacterized.⁴³ The ideal discharge is Honorable, and the majority of servicemembers are honorably discharged. For example, in Fiscal Year 2015, 149,952 of the 189,411 discharges were Honorable.⁴⁴ Punitive discharges include Bad Conduct and Dishonorable. In Fiscal Year 2015, there were 809 punitive separations.⁴⁵ This Article focuses on administrative discharges because the overwhelming majority of discharges are administrative and most discharge upgrade requests are from veterans with an administrative separation.⁴⁶

1. Honorable Discharge

DoD loosely defines Honorable as “service [that] generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate.”⁴⁷ The Navy's definition of Honorable is basically the same, but

42. See *DD Form 214, Discharge Papers and Separation Documents*, NAT'L ARCHIVES, <https://www.archives.gov/personnel-records-center/dd-214> [<https://perma.cc/BVV4-CK79>].

43. DEF. MANPOWER DATA CTR., ACTIVE DUTY SEPARATIONS BY CHARACTER OF DISCHARGE (2016), https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Personnel_Related/16_F_0516_Number_Service_Members_Discharged_By_Characterization_And_Branch_Of_Service.pdf [<https://perma.cc/UWK4-TAHK>]. Uncharacterized discharge includes situations when the service was too short to be otherwise qualified, such as entry-level separation, or for void enlistment. See DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (Jan. 27, 2014) (C4, Apr. 12, 2019), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133214p.pdf?ver=2019-03-14-132901-200> [<https://perma.cc/HQT6-QWGE>] [hereinafter DoDI 1332.14]. For a history of discharge characterizations, see Adams & Montalto, *supra* note 20, at 74–80. For a history of administrative discharge, see Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 2–10 (1973).

44. DEF. MANPOWER DATA CTR., *supra* note 43.

45. See *id.*

46. *Id.* Of the 477 decisions in my decisions database, 453 involved veterans with administrative discharges and twenty-four involved veterans with punitive discharges. See *NDRB Decisions (Shared)*, *supra* note 38.

47. DoDI 1332.14, *supra* note 43, enclosure 4, para. 3(b)(2)(a); see also U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-9(a) (Nov. 7, 2017), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3941_AR135-178_WEB_Final.pdf

with specific reference to the Navy: Honorable should be assigned when “the quality of the member’s service generally met the standard of acceptable conduct and performance for naval personnel, or is otherwise so meritorious that any other characterization of service would be clearly inappropriate.”⁴⁸ Beyond this general definition, whether a servicemember receives an Honorable discharge is at the discretion of the Separation Authority, consistent with secretarial characterization.⁴⁹ The Separation Authority is typically the commander or commanding officer (the leader of a particular command), but may be a higher-level official.⁵⁰

The Honorable characterization is deeply rooted in the military culture of maintaining good order and discipline. As the DoD instruction explains, “[t]he quality of service of an enlisted Service member on active duty or active duty for training is adversely affected by conduct that is of a nature to bring discredit on the Military Services or is prejudicial to good order and discipline.”⁵¹ Military leaders consistently rely on the need for “good order and discipline” to oppose changes in military justice reform.⁵² The concept of “good order and discipline” is not clearly defined, however, and is mostly a matter of a commander’s broad discretion within the overall idea “that discipline is a fundamental basis for military effectiveness.”⁵³

Typically, the military determines Honorable service by considering the complete record of service, and only a pattern of misconduct can justify an other-

[<https://perma.cc/XC5J-4D5E>] [hereinafter AR 135-178] (same definition, replacing “military” with “Army”).

48. U.S. DEP’T OF NAVY, MILITARY PERSONNEL MANUAL (MILPERSMAN) 1910-304, DESCRIPTION OF CHARACTERIZATION OF SERVICE para. 1, at 1 (June 30, 2008), <https://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1910-304.pdf> [<https://perma.cc/Z8H7-GJV2>] [hereinafter MILPERSMAN 1910-304].

49. 10 U.S.C. § 1141 (2018); U.S. DEP’T OF NAVY, MILPERSMAN 1900-010, LIST OF DEFINITIONS para. 1(y) (Sept. 20, 2011), <https://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1900-010.pdf> [<https://perma.cc/8R7P-P3CN>].

50. See, e.g., U.S. DEP’T OF NAVY, MILPERSMAN 1910-702, GENERAL GUIDANCE FOR SEPARATION AUTHORITIES (SA) para. 1 (Jan. 3, 2018), <https://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1910-702.pdf> [<https://perma.cc/4M5H-9UM9>] [hereinafter MILPERSMAN 1910-702]; U.S. DEP’T OF NAVY, MILPERSMAN 1900-120, SEPARATION BY REASON OF CONVENIENCE OF THE GOVERNMENT – MEDICAL CONDITIONS NOT AMOUNTING TO A DISABILITY para. 2 (Nov. 9, 2018), <https://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1900-120.pdf> [<https://perma.cc/2ZPX-4EVL>].

51. DoDI 1332.14, *supra* note 43, enclosure 4, para. 3(b)(1)(b).

52. Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123, 125 (2017) (“Despite agreeing to some modifications, military leaders have opposed proposals to remove certain prosecution decisions from the commanders of the accused servicemembers.”).

53. *Id.* at 127. Also, in reviewing commanders’ decisions, “individual judges or court members must decide for themselves whether specific acts prejudiced good order and discipline based on their individual, unstated, fact-specific criteria.” *Id.* at 145.

than-honorable discharge.⁵⁴ But even this general requirement for a pattern of misconduct can be ignored if the commander determines that “a single incident provides the basis for [an other-than-honorable] characterization.”⁵⁵ The Navy’s guidance for types of discharge characterizations even more explicitly allows for one instance to justify an other-than-honorable discharge.⁵⁶

2. *Other-than-Honorable Discharge*

DoD generally defines the various other-than-honorable administrative discharge characterizations, but the specific parameters vary by service.⁵⁷ These characterizations are mostly based on a commander’s discretionary determination that a servicemember failed to maintain good order and discipline. This is demonstrated by a particular incident or pattern of incidents that “constitutes a significant departure from the conduct expected of enlisted Service members of the Military Services.”⁵⁸ Even though DoD characterizes these other-than-honorable discharges as administrative and not punitive, they are often punitive in nature. An other-than-honorable discharge carries a stigma and bars access to many veterans’ benefits.⁵⁹ The military specifically gives an other-than-honorable discharge to recognize and announce to the world that the servicemember did not fulfil their service commitment because they failed to meet “required standards of performance or discipline.”⁶⁰ Consistent with that failure, veterans with an other-than-honorable discharge are typically ineligible

54. Though “pattern” is mentioned several times in DoD’s instructions for separation decisions, that term is not defined, leaving it to the commander’s discretion on a case-by-case basis. See DoDI 1332.14, *supra* note 43, enclosure 3, para. 10(a)(2); *id.* enclosure 2, para. 2(a) (“administrative process based on command discretion”).

55. *Id.* enclosure 4, para. 3(b)(1)(c).

56. MILPERSMAN 1910-304, *supra* note 48, para. 1, at 2 (“one or more acts [or] omissions”).

57. Karin, *supra* note 26, at 159–60.

58. DoDI 1332.14, *supra* note 43, enclosure 4, para. 3(b)(2)(c)(1)(a).

59. HUMAN RIGHTS WATCH, *supra* note 28, at 6. An other-than-honorable discharge does not absolutely bar a veteran from all VA benefits, but it does create a presumptive ineligibility. See VETERANS BENEFITS ADMINISTRATION, *Applying for Benefits and Your Character of Discharge*, U.S. DEP’T VETERANS AFF., https://www.benefits.va.gov/benefits/character_of_discharge.asp [<https://perma.cc/P2E5-87ZD>] (“Generally, in order to receive VA benefits and services, the Veteran’s character of discharge or service must be under other than dishonorable conditions (e.g., honorable, under honorable conditions, general). However, individuals receiving undesirable, bad conduct, and other types of dishonorable discharges may qualify for VA benefits depending on a determination made by VA.”); U.S. DEP’T VETERANS AFF., CLAIMS FOR VA BENEFITS AND CHARACTER OF DISCHARGE: GENERAL INFORMATION (2014), https://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf [<https://perma.cc/ZJC8-4569>] (describing the relationship between VA benefits eligibility and character of discharge); *see also* ALI R. TAYYEB & JENNIFER GREENBURG, WATSON INST., “BAD PAPERS”: THE INVISIBLE AND INCREASING COSTS OF WAR FOR EXCLUDED VETERANS 4 (2017), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2017/Tayyeb%20Greenburg_Bad%20Papers%20.pdf [<https://perma.cc/JAK8-AVQ3>] (showing same).

60. U.S. DEP’T OF NAVY, MILPERSMAN 1910-010, ENLISTED ADMINISTRATIVE SEPARATION (ADSEP) POLICY AND GENERAL INFORMATION para. 2(a) (Oct. 18, 2019), <https://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1910-010.pdf> [<https://perma.cc/6PDZ-K5PM>].

for benefits and may face significant challenges in civilian life as mentioned in the Introduction. Even the General (UHC) discharge carries some stigma because it is by definition less than Honorable, though it does permit eligibility for some VA benefits.⁶¹

B. Discharge Upgrade

Veterans with other-than-honorable discharges can request a discharge upgrade through a military records correction board or discharge review board.⁶² Each service has its own administrative boards as established by statute and regulation,⁶³ and this Article focuses on the Naval Discharge Review Board, which reviews discharges for Sailors and Marines, as a representative example of all the boards. This Article focuses on the discharge review boards rather than the records correction boards because the discharge review boards are the first-stage boards for those seeking relief within fifteen years of their discharge. Improving the quality of the decision-making at the discharge review boards could reduce the number of appeals to the correction boards.

The process for requesting a discharge upgrade is standardized across the services. There are two forms: DD-293 and DD-149. The DD-293 is used for a request submitted to a discharge review board (DRB)⁶⁴ and the DD-149 goes to a records correction board.⁶⁵ Veterans may request a discharge upgrade through a DRB up to fifteen years after discharge,⁶⁶ and they can appeal a denial to a records correction board.⁶⁷ The records correction board is the only avenue available for veterans seeking an upgrade to a discharge of more than fifteen years old. The boards are expected to provide “uniformity among the Military Departments in the rights afforded applicants in discharge reviews,”⁶⁸ though each branch has its own policies and procedures. A discharge review board may grant relief for impropriety or inequity. Regulations governing DRB standards identify the objective of discharge review as “to examine the propriety and equity

61. DoDI 1332.14, *supra* note 43, enclosure 4, para. 3(b)(2)(b); *Applying for Benefits and Your Character of Discharge*, *supra* note 59 (listing the discharge requirements for various VA benefits).

62. 10 U.S.C. § 1553 (2018).

63. *Id.*

64. *Supra* note 37.

65. U.S. Dep’t of Def., DD Form 149, Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552 (Dec. 2014), <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf> [<https://web.archive.org/web/20191129022452/https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf>].

66. 10 U.S.C. § 1553(a) (2018).

67. 10 U.S.C. § 1552(a)(1) (2018); *see also Army Discharge Review Board*, ARMY REVIEW BOARDS AGENCY, <https://arba.army.pentagon.mil/adrb-faq.html> [<https://perma.cc/LV48-BZCA>] (“[Y]ou may appeal the written discharge review decision by applying to the Army Board for Correction of Military Records (ABCMR).”).

68. 32 C.F.R. § 70.4(b)(2) (2018); U.S. DEP’T OF DEF., INSTR. 1332.28 para 4.1.2 (Apr. 4, 2004), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133228p.pdf> [<https://perma.cc/X8HD-NN46>].

of the applicant's discharge."⁶⁹ Impropriety is generally defined as "an error of fact, law, procedure, or discretion associated with the discharge at the time of issuance."⁷⁰ Equity is generally understood as a question of fairness on the facts, despite a proper procedure.⁷¹ Equity relies on changes in policies and procedures that enhance rights or create "[a] substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available" at the time of discharge.⁷² A discharge may be inequitable if a "discharge was inconsistent with the standards of discipline"⁷³ at the time of discharge or if on the whole "it is determined that relief is warranted" based on quality of service and capability to serve "even though the discharge was determined . . . otherwise equitable and proper at the time of issuance."⁷⁴

The discharge review process is "slow, complicated, and opaque."⁷⁵ There is little information available to help guide pro se applicants about what it takes to be successful, and decision times range from ten months to almost two years.⁷⁶ In 2018, an article in the *Military Times* reported that "the three service review boards have nearly 26,000 cases that have been pending for more than 10 months, the department's standard for a backlogged request. More than half of those are before the Army, whose backlog is just under 14,000 cases."⁷⁷

The discharge review boards and corrections boards have been under closer scrutiny in the past few years as they increased their backlogs and lengthened their decision times. Additionally, the boards inconsistently implemented (if at all) the liberal consideration policy guidance intended to account for the

69. 32 C.F.R. § 70.9(a) (2018). The records correction boards review for error, injustice, or clemency. See 10 U.S.C. §§ 1552(a)(1), (f)(2); 32 C.F.R. § 581.3(e)(3)(iii) (2018); see also Memorandum from Robert L. Wilkie, Under Sec'y of Def., to Secretaries of the Military Dept's (July 25, 2018) (on file with author) (directing boards to use clemency "to ensure fundamental fairness" for "applications based on pardons for criminal convictions").

70. 32 C.F.R. § 70.9(b) (2018); DEP'T OF THE NAVY, SEC'Y OF NAVY INSTR. (SECNAVINST) 5420.174D, NAVAL DISCHARGE REVIEW BOARD (NDRB) PROCEDURES AND STANDARDS para. 502 (Dec. 22, 2004), <https://www.secnv.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5420.174D.pdf> [<https://perma.cc/8L5Q-49B7>] [hereinafter SECNAVINST 5420.174D].

71. 32 C.F.R. § 70.9(c) (2018).

72. *Id.* § 70.9(c)(1)(ii).

73. *Id.* § 70.9(c)(2).

74. *Id.* § 70.9(c)(3); SECNAVINST 5420.174D, *supra* note 70, at 503.

75. VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARV. LAW SCH., UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 19 (2016), <https://www.swords-to-plowshares.org/wp-content/uploads/Underserved.pdf> [<https://perma.cc/MEC4-7L7L>].

76. See *id.*; Robert Powers, *supra* note 36, at 4 (showing an average length of ten months to decision for documentary review and twenty-two months to decision for personal appearance hearing); see also SIDIBE & UNGER, *supra* note 26, at 1, 11; Alissa Figueroa, *A Losing Battle*, FUSION (2014), <http://interactive.fusion.net/a-losing-battle/> [<https://perma.cc/Q93T-J7DX>].

77. Leo Shane III, *Can DoD Fix the Painfully Long Wait for Reviews of Bad-Paper Discharges?*, MIL. TIMES (Sept. 28, 2018), <https://www.militarytimes.com/news/pentagon-congress/2018/09/28/lawmakers-eye-an-overhaul-of-military-review-boards-system/> [<https://perma.cc/R4Y4-967P>].

relationship between mental health conditions and behavior defined as misconduct under the Uniform Code of Military Justice (UCMJ). The liberal consideration policy guidance reflects a better understanding of the relationship between mental health and behavior, and at least questions—if not fully rejects—the traditional response to kick out servicemembers for misconduct that is related to PTSD or other mental health conditions. The next Section explains the relationship between mental health and behavior in the military as well as identifies military-unique stressors.

II.

HOW TO GET KICKED OUT: POST-TRAUMATIC STRESS DISORDER AND MILITARY SERVICE

Many servicemembers were (and continue to be) kicked out of the military with an other-than-honorable discharge characterization for misconduct when that misconduct is actually a result of PTSD, traumatic brain injury (TBI), military sexual assault, or other mental health conditions. PTSD “is a psychiatric disorder that can occur in people who have experienced or witnessed a traumatic event such as a natural disaster, a serious accident, a terrorist act, war/combat, rape or other violent personal assault.”⁷⁸ Servicemember PTSD has historically been referred to as “shell shock” and “combat fatigue,” and although this mental health condition is not limited to military servicemembers, the particular nature of military service may increase the chances a person experiences a traumatic event, or stressor, that causes PTSD.⁷⁹ In this Section, I briefly explain two uniquely military stressors for PTSD, combat and military sexual trauma, and then discuss how PTSD affects behavior.

A. PTSD: Traditional Combat-Related and Military Sexual Trauma

The modern understanding of PTSD grew from the experiences of those who served in the Vietnam War and the mental health struggles returning veterans experienced and continue to experience.⁸⁰ In 1980, five years after the Vietnam War ended, the American Psychiatric Association recognized PTSD as

78. *What is Posttraumatic Stress Disorder?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd> [<https://perma.cc/TJ3M-JTAP>]; see also NAT'L CTR. FOR PTSD, *PTSD Basics*, U.S. DEP'T VETERANS AFF., https://www.ptsd.va.gov/understand/what/ptsd_basics.asp [<https://perma.cc/4B36-XYXD>] (“PTSD . . . is a mental health problem that some people develop after experiencing or witnessing a life-threatening event, like combat, a natural disaster, a car accident, or sexual assault.”).

79. See *What is Posttraumatic Stress Disorder?*, *supra* note 78.

80. PUBLIC HEALTH, *PTSD and Vietnam Veterans: A Lasting Issue 40 Years Later*, U.S. DEP'T VETERANS AFF., <https://www.publichealth.va.gov/exposures/publications/agent-orange/agent-orange-summer-2015/nvvl.asp> [<https://perma.cc/7RXC-77EE>] (“It was first officially recognized as a mental health condition in 1980, only five years after the end of the Vietnam War. For hundreds of years, these symptoms have been described under different names in soldiers from many wars. However, Vietnam Veterans with these symptoms were the first to have the term ‘PTSD’ applied to them. Despite the passage of 50 years since the war, for some Vietnam Veterans, PTSD remains a chronic reality of everyday life.”). For a brief history of PTSD, see Chapman, *supra* note 28, at 6–23.

a “disorder” by adding it to the *Diagnostic and Statistical Manual of Mental Disorders*, thus finally legitimizing the various combat and combat-related mental health experiences of many Vietnam veterans.⁸¹ A VA study in 1983 concluded that “as many as 15 percent of Veterans had PTSD.”⁸² Estimates suggest that “[30 percent] of Vietnam Veterans have had PTSD in their lifetime.”⁸³ Even though experts later validated PTSD as a legitimate mental health diagnosis, that recognition did not help the many veterans the military already discharged for misconduct symptomatic of PTSD. In 2014, a class action lawsuit brought attention to Vietnam veterans in this situation.⁸⁴ The case was settled to achieve reforms, shining a light on the injustices that veterans with PTSD faced seeking a discharge upgrade, and directly led to new policy guidance, as discussed in Part III.B.⁸⁵

The military’s inadequate care for Vietnam veterans with PTSD is well documented,⁸⁶ and the inadequacy continues with current-conflict veterans.⁸⁷ As Professor Stacey-Rae Simcox explained, Vietnam veterans are affected by PTSD more than by other conditions, and “Iraq and Afghanistan veterans find themselves suffering from higher numbers of brain injury in addition to PTSD, a result of the life-saving technologies and body armor, which help to limit the impact of explosions that in previous conflicts would have caused death.”⁸⁸ The poor treatment of Vietnam veterans is certainly not excusable, but there was a real lack of understanding and awareness of PTSD at that time.⁸⁹

81. NAT’L INSTS. OF HEALTH, POST-TRAUMATIC STRESS DISORDER (PTSD) (2010), [https://archives.nih.gov/asites/report/09-09-2019/report.nih.gov/nihfactsheets/Pdfs/PostTraumaticStressDisorder\(NIMH\).pdf](https://archives.nih.gov/asites/report/09-09-2019/report.nih.gov/nihfactsheets/Pdfs/PostTraumaticStressDisorder(NIMH).pdf) [<https://perma.cc/JT3Z-SFCL>].

82. PUBLIC HEALTH, *supra* note 80.

83. NATIONAL CENTER FOR PTSD, *How Common is PTSD in Veterans?*, U.S. DEP’T VETERANS AFF., https://www.ptsd.va.gov/understand/common/common_veterans.asp [<https://perma.cc/HZ5V-Y7YN>].

84. Complaint, *Monk v. Mabus*, No. 3:14-cv-00260 (WWE) (D. Conn. 2014).

85. *Monk*, 2014 WL 7794807 (Nov. 18, 2014); *see also* VETERANS LEGAL SERVS. CLINIC, *Monk v. Mabus*, YALE LAW SCH., <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/monk-v-mabus> [<https://perma.cc/9GFH-N97A>] (providing overview of case).

86. *See, e.g.*, Evan R. Seamone, *Dismantling America’s Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479, 518 (2013).

87. Karin, *supra* note 26, at 162–69; Seamone, *supra* note 86, at 510 (“Although, for more than a generation, military lawyers, veterans’ advocates, legislators, VA psychiatry experts in PTSD, and senior mental health professionals within the military have consistently raised concerns over the Military Misconduct Catch-22, there has been no successful corrective action. In fact, the Marine Corps recently learned that 326 of the 1,019 Marines it had dismissed with less-than-honorable characterizations (in the first four years following the war in Iraq) had legitimate mental health care needs. Despite this knowledge, the Marine Corps made no effort to determine whether that population eventually obtained benefits.” (footnotes omitted)).

88. Simcox, *supra* note 26, at 564.

89. *See* Daniel Burgess et al., *Reviving the “Vietnam Defense”: Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, DEV. MENTAL HEALTH L., Jan. 2010, at 59, 59 (“[I]t was not until 1980 that the American Psychiatric Association officially recognized

Today, however, there is no such lack of awareness, and there is a significantly improved if incomplete understanding of PTSD and how it affects servicemembers during and after service. Thus, “the failure of the military to recognize and treat servicemembers from our current conflicts is inexcusable.”⁹⁰ The National Center for PTSD noted that for veterans of current conflicts (Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF)), “between 11-20% . . . who served in OIF or OEF have PTSD in a given year.”⁹¹ 12 percent of Gulf War (Desert Storm) veterans experience PTSD, and 15 percent of Vietnam veterans have PTSD with a current diagnosis “at the time of the most recent study in the late 1980s,” and about 30 percent “of Vietnam Veterans have had PTSD in their lifetime.”⁹² Combat is the most commonly known stressor for PTSD, and it may be “the most notoriously treatment-resistant.”⁹³

But combat is not the only military stressor for PTSD. MST is another major stressor, and sexual assault is a growing problem in the military (or a problem with growing recognition). In a recent report, DoD reported a 13 percent increase in sexual assault reports in the military from FY 2017 to FY 2018.⁹⁴ This most recent increase follows a 9 percent increase in sexual assault reports in the FY 2017 report, indicating an upward trend in reporting.⁹⁵ DoD defines sexual assault as:

Intentional sexual contact characterized by the use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent [T]he term includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses.⁹⁶

Vietnam Syndrome—or as it came to be known, post-traumatic stress disorder (“PTSD”)—as a psychological illness.”).

90. Simcox, *supra* note 26, at 565.

91. *How Common is PTSD in Veterans?*, *supra* note 83.

92. *Id.*

93. Deborah C. Beidel et al., *Trauma Management Therapy with Virtual-Reality Augmented Exposure Therapy for Combat-Related PTSD: A Randomized Controlled Trial*, 61 J. ANXIETY DISORDERS 64, 64 (2019) (citing Bradley V. Watts et al., *Meta-Analysis of the Efficacy of Treatments for Posttraumatic Stress Disorder*, 74 J. CLINICAL PSYCHIATRY 541 (2013)).

94. U.S. DEP’T OF DEF., APP. B: STATISTICAL DATA ON SEXUAL ASSAULT (2019), https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [<https://perma.cc/XRL2-NMAZ>].

95. DoD treats the increase in reporting as a positive: “With sexual assault being a significantly underreported crime, a higher proportion of reporting is an indicator that victims continue to gain confidence in the sexual assault prevention and response and military justice systems, especially when increased reporting is paired with decreased sexual assault prevalence (occurrence).” SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, U.S. DEP’T OF DEF., FISCAL YEAR 2017 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 1 (2018) https://www.sapr.mil/public/docs/reports/FY17_Annual/FY17_Annual_Report_Fact_Sheet.pdf [<https://perma.cc/N7PD-9LRQ>].

96. U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, glossary at 122 (Mar. 28, 2013) (C3, May 24, 2017),

Trauma from sexual assault and sexual harassment that a servicemember experienced is called military sexual trauma, as defined by the VA. This term is broader than DoD's definition of sexual assault, and it recognizes the "psychological trauma" caused by "a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty, active duty for training, or inactive duty training."⁹⁷

Just as with combat or combat-related stressors that lead to PTSD, MST is also a recognized stressor for PTSD.⁹⁸ In fact, "sexual assault has a larger impact on PTSD symptomatology than any other trauma, including combat exposure."⁹⁹ And MST "may be more strongly associated with PTSD and other health consequences than is civilian sexual trauma."¹⁰⁰ Some studies support "an estimated one in three sexual assault survivors experience[s] PTSD, as opposed to a 10 to 18 percent prevalence rate of PTSD for combat veterans."¹⁰¹ The particular nature of the military and its culture of discipline and obedience "may make survivors feel undutiful or disloyal when reporting [an] assault."¹⁰² Survivors often experience "intense shame, guilt, and disbelief" as they struggle to reconcile the assault with "respect for service and chain of command."¹⁰³ Based on VA data, mental health diagnoses associated with MST include PTSD (55.9 percent of women and 53.3 percent of men), depressive disorders (49.2 percent of women and 37.9 percent of men), and substance use disorders (7 percent of women and 15.3 percent of men).¹⁰⁴ Thus, combat's traditional role

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649502p.pdf>
[<https://perma.cc/5VX7-XBX7>] [hereinafter DoDI 6495.02].

97. 38 U.S.C. § 1720D(a)(1) (2018); see also INST. FOR VETERAN POLICY, SWORDS TO PLOWSHARES, MILITARY SEXUAL TRAUMA: UNDERSTANDING PREVALENCE, RESOURCES AND CONSIDERATIONS TO CARE 4 (2015), <https://www.swords-to-plowshares.org/wp-content/uploads/Military-Sexual-Trauma-Understanding-2015.pdf> [<https://perma.cc/DV54-8YZ3>] [hereinafter SWORDS TO PLOWSHARES, MILITARY SEXUAL TRAUMA] (citing § 1720D(a)(1)).

98. Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 COLUM. J. GENDER & L. 343, 344 (2014).

99. SWORDS TO PLOWSHARES, MILITARY SEXUAL TRAUMA, *supra* note 97, at 15.

100. *Id.*; see also Irene Williams & Kunsook Bernstein, *Military Sexual Trauma Among U.S. Female Veterans*, 25 ARCHIVES PSYCHIATRIC NURSING 138, 142 (2011) ("PTSD stemming from MST is perhaps one of the most pressing mental health concerns facing female service members and veterans today.").

101. HUMAN RIGHTS WATCH, *supra* note 28, at 7.

102. SWORDS TO PLOWSHARES, MILITARY SEXUAL TRAUMA, *supra* note 97, at 6–7.

103. *Id.* at 6.

104. *Id.* at 15. With the growing awareness and understanding of mental health conditions facing servicemembers and veterans, the concept of "moral injury" has emerged to identify the military-unique experience of trauma, especially MST. See, e.g., *id.* at 6 ("[M]oral injury [is] the pain that results from damage to a veteran's moral foundation. In contrast to [PTSD], which springs from fear, moral injury is a violation of what veterans consider right or wrong. Transgressions can arise from individual acts of commission or omission, the behavior of others, or by bearing witness to intense human suffering or the grotesque aftermath of battle."); see also Erik D. Masick, *Moral Injury and Preventive Law: A Framework for the Future*, 224 MIL. L. REV. 223, 224–25 (2016). Moral beliefs and expectations may be "culture-based" or "organizational," such as military culture and organization. *Id.* at 241. This Article does not explore the relationship between combat-related or MST stressors and moral injury, see *id.* at

as a stressor should be understood as only one of the military-unique stressors. This broadened understanding of PTSD stressors also helps frame the various behavioral implications, as discussed next.

B. The Relationship Between PTSD and Misconduct

In May 2017, the Government Accountability Office reported that “62 percent, or 57,141 of the 91,764 servicemembers separated for misconduct from fiscal years 2011 through 2015 had been diagnosed within the 2 years prior to separation with post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), or certain other conditions that could be associated with misconduct.”¹⁰⁵ Even though “the military has officially recognized the connection between service-connected stress conditions and misconduct—both on the battlefield and in manifestations after troops have returned home—and has urged commanders to at least consider mental conditions before taking disciplinary action,” such as issuing other-than-honorable discharges, that recognition has not solved the problem.¹⁰⁶

There is a significant volume of research and scholarship on the connection between PTSD and behavior, including how PTSD symptoms can look like misconduct.¹⁰⁷ This Article does not go in depth on that research but provides some context as an anchor to support the overall need for change. For example, in 2010, a group of scholars discussed “three typologies that closely correspond to criminal behavior in PTSD sufferers: dissociative reaction, sensation-seeking syndrome, and depression-suicidal syndrome.”¹⁰⁸ These three typologies along with six other “paradigm reactions among Vietnam veterans with PTSD” were identified by John P. Wilson and Sheldon D. Zigelbaum.¹⁰⁹

Each of the typologies provides a meaningful way to understand the relationship between PTSD and behavior that may look like misconduct when it is actually coping behavior. Dissociative reaction is triggered by the environment in ways that remind the servicemember of the original stress.¹¹⁰ The servicemember then “enters into what some call ‘survivor mode’” with “typical physiological symptoms of PTSD such as hyperalertness, hypervigilance, and excessive nervous system arousal.”¹¹¹ The person may “go[] on automatic” in

254–61, but recognizes that moral injury may be at play in these contexts. For example, moral injury may result in behavior that is misinterpreted as misconduct. Coping with moral injury can also result in “‘maladaptive coping,’ which may manifest as a diminished capacity or willingness to adhere to laws or values, and ‘can result in behavior that is simultaneously symptomatic and criminal.’” *Id.* at 248–49 (footnotes omitted).

105. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 24, highlights.

106. Seamone, *supra* note 86, at 490–92 (citations and emphasis omitted).

107. See, e.g., *What is Posttraumatic Stress Disorder?*, *supra* note 78; NAT’L CTR. FOR PTSD, *supra* note 78.

108. Burgess, *supra* note 89, at 65 (emphasis omitted).

109. *Id.*

110. *Id.*

111. *Id.* at 65–66 (citation omitted).

this state, and for a combat veteran, this could mean “a search-and-destroy mentality in which his or her automatic reaction is to find and kill any perceived source of danger.”¹¹² Sensation-seeking syndrome occurs when veterans “seek out activities that offer a level of danger similar to their combat experiences in an effort to maintain control over their surroundings.”¹¹³ These activities could be anything from legal skydiving to illegal drug activity.¹¹⁴ Veterans experiencing sensation-seeking syndrome are “capable of substantial premeditation” in contrast to veterans experiencing more of a spontaneous reaction to the environment.¹¹⁵ Depression-suicide syndrome manifests through “survivor guilt, hopelessness, despondency, and a deep depression.”¹¹⁶ A veteran may feel guilty for surviving combat, and this syndrome can lead the veteran to “subconsciously act out his anger through criminal acts,” even going so far as to seek out “suicide by cop”—engaging in criminal behavior to antagonize law enforcement to shoot.¹¹⁷

In many cases, “the behavior associated with PTSD and TBI is behavior that puts servicemembers directly at odds with their commanders and the larger military culture.”¹¹⁸ Some of the “symptoms associated with PTSD and TBI, such as poor impulse control, loss of temper, impaired thinking, and poor exercise of judgment, may appear indistinguishable from the behavior of a servicemember who has chosen to rebel against the good order and discipline so necessary to the military’s culture.”¹¹⁹ The National Center for PTSD noted that veterans may “cope with their PTSD by drinking heavily, using drugs, or smoking too much.”¹²⁰ PTSD may be unpredictable, but “studies indicate that substance abuse is significantly related to PTSD because alcohol or drug use is a method of coping with intrusive thoughts, nightmares, insomnia, and hyper-alertness.”¹²¹

112. *Id.* at 66; *see also* Chapman, *supra* note 28, at 15 (“Another associated feature of PTSD is misconduct, usually in the form of violent acts; in these cases, afflicted [servicemembers] are unable to transition from ‘survivor mode,’ where aggressiveness and hypervigilance is a necessity, to the relative calm of garrison life.”).

113. Burgess, *supra* note 89, at 66.

114. *Id.* at 66–67.

115. *Id.* at 67–68.

116. *Id.* at 68.

117. *Id.* The National Center for PTSD identifies four types of symptoms for PTSD: “reliving the event,” “avoiding things that remind you of the event,” “having more negative thoughts and feelings than before,” and “feeling on edge.” NAT’L CTR. FOR PTSD, UNDERSTANDING PTSD AND PTSD TREATMENT 5–6 (2019), https://www.ptsd.va.gov/publications/print/understandingptsd_booklet.pdf [perma.cc/X7HJ-LD4X].

118. Simcox, *supra* note 26, at 562.

119. *Id.*

120. NATIONAL CENTER FOR PTSD, UNDERSTANDING PTSD AND SUBSTANCE USE: FOR VETERANS, GENERAL PUBLIC, FAMILY AND FRIENDS, <https://www.ptsd.va.gov/publications/print/sudptsdflyer.pdf> [https://perma.cc/WK92-88JY] (“Almost 1 out of every 3 Veterans seeking treatment for [Substance Use Disorder] also have PTSD. More than 1 out of every 4 Veterans with PTSD also have SUD.”).

121. Chapman, *supra* note 28, at 13.

DoD also recognizes mental health effects related to sexual assault in the military. Similar to the behaviors associated to combat-related PTSD, MST survivors may exhibit coping mechanisms that are potentially acts of misconduct under the UCMJ. Such behaviors include “difficulties with hierarchical environments” and substance abuse.¹²² For many MST survivors, the coping mechanisms lead to “misconduct” under the UCMJ, and “[t]housands of victims have been pushed out of the service with less-than-honorable discharges, which can leave them with no or reduced benefits, poor job prospects and a lifetime of stigma.”¹²³ As the military better understands these stressors and related mental health conditions, DoD has worked to implement responsive support mechanisms.

III.

DoD’s RESPONSE TO GROWING MENTAL HEALTH AWARENESS

DoD’s response to mental health issues includes efforts targeted at active duty military and veterans. DoD developed policy to better care for servicemembers’ needs while they are on active duty and to carefully consider mental health conditions as part of the administrative separation process. DoD also established “liberal consideration” as a policy aimed at correcting past injustices resulting from commanders regularly discharging servicemembers under other-than-honorable conditions when their misconduct was related to a mental health condition. Before discussing liberal consideration in depth, this Section includes some background on DoD’s other efforts for a more complete understanding of liberal consideration’s underpinnings.

A. Providing Mental Health Care to Active Duty Servicemembers and Veterans

DoD has provided guidance and training to educate the military about mental health issues, support active duty servicemembers, and better equip leaders to handle mental health issues. For example, Congress required a medical examination before discharge for any servicemember who “has been deployed overseas in support of a contingency operation during the previous 24 months” and had a PTSD or TBI diagnosis or “reasonably allege[d] . . . the influence of such a condition.”¹²⁴ The National Defense Authorization Act for Fiscal Year 2013 included multiple provisions supporting mental health care for active duty servicemembers and veterans.¹²⁵ Consistent with these changes, the Navy

122. SWORDS TO PLOWSHARES, MILITARY SEXUAL TRAUMA, *supra* note 97, at 2.

123. Mark Thompson, *Military Sexual Assault Victims Discharged After Filing Complaints*, TIME (May 18, 2016), <http://time.com/4340321/sexual-assault-military-discharge-women/> [https://perma.cc/7A8H-JNBU].

124. 10 U.S.C. § 1177(a) (2012); *see also* HUMAN RIGHTS WATCH, *supra* note 28, at 3. For a brief discussion of DoD’s screening efforts, *see* Chapman, *supra* note 28, at 18–21.

125. Pub. L. No. 112-239, § 582, 126 Stat. 1632, 1766 (codified at 10 U.S.C. § 1071 note) (“Comprehensive Policy on Prevention of Suicide Among Members of the Armed Forces”).

updated its separation policies to require a pre-discharge determination of whether a diagnosed condition of PTSD or TBI “was a contributing factor” to misconduct giving rise to separation from service, whether administrative or in lieu of court martial.¹²⁶ This decision must be made “by a mental health professional diagnosing the PTSD or TBI, or a higher-level mental health professional.”¹²⁷ The new policy also required a higher-level separation authority, the Chief of Naval Personnel, to determine the appropriate discharge.¹²⁸

In recent years, “the US military has made a concerted effort to improve how it handles sexual assault cases,”¹²⁹ including requiring medical examinations before discharge for servicemembers who were sexually assaulted, just as it already required for PTSD and TBI cases.¹³⁰ These “reforms have provided important additional resources and protections for service members” who experienced military sexual assault.¹³¹ DoD continues to study sexual assault in the military with its most recent report released in May 2019 and to implement its Sexual Assault Prevention and Response (SAPR) Program in accordance with DoD Instruction 6495.02.¹³² DoD is also committed to its Sexual Assault Prevention and Response Strategic Plan, 2017-2021, intended to improve “organizational culture of dignity and respect where every Service member is empowered to prevent sexual assault and support victims when crimes do occur.”¹³³

No matter the cause of the mental health condition, DoD has recognized that mental health stigma “serves as a key barrier to help-seeking among service members in need of mental health treatment.”¹³⁴ In particular, research has

126. MILPERSMAN 1910-702, *supra* note 50, para. 1(c). The Marine Corps also revised its separation policies in line with the statute. *See* U.S. MARINE CORPS, ORDER 1900.16 CH 2, SEPARATION AND RETIREMENT MANUAL enclosure 1, para. 6110 (Feb. 15, 2019), <https://www.marines.mil/portals/1/Publications/MCO%201900.16%20CH%202.pdf?ver=2019-02-26-080015-447> [<https://perma.cc/L9UN-W7KP>].

127. MILPERSMAN 1910-702, *supra* note 50, para. 1(c), at 1.

128. *Id.* at 2.

129. HUMAN RIGHTS WATCH, *supra* note 28, at 3.

130. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 524, 130 Stat. 2000, 2116 (2016) (amending 10 U.S.C. § 1177(a) by inserting “, or sexually assaulted,” and “or based on such sexual assault”).

131. HUMAN RIGHTS WATCH, *supra* note 28, at 3.

132. *See* DoDI 6495.02, *supra* note 96.

133. Ash Carter, Sec’y of Def., *Foreword* to U.S. DEP’T OF DEF., SEXUAL ASSAULT AND PREVENTION AND RESPONSE STRATEGIC PLAN, 2017-2021 (2016), https://sapr.mil/public/docs/strategic-plan/DoD_SAPR_Strategic_Plan_2017-2021_Signed.pdf [<https://perma.cc/YA7A-7XPB>].

134. JOIE D. ACOSTA ET AL., MENTAL HEALTH STIGMA IN THE MILITARY 12 (2014), https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR426/RAND_RR426.pdf [<https://perma.cc/Z27Y-C5EZ>]. General Robert B. Neller, Commandant of the Marine Corps, wrote a letter addressing Marine suicide: [I]t is time we have honest and frank conversations about mental stress, trauma, suicide, and more importantly, mental wellness

demonstrated that “men perceive greater stigma associated with seeking help than women do,” and that men “seek[] care as a last resort because they are expected to be stoic, controlled, and self-sufficient.”¹³⁵ In the military, these expectations are even more entrenched given the norms of military life and “values of unit culture (e.g., shared mission, leave no soldier behind).”¹³⁶ The National Defense Authorization Act of Fiscal Year 2013 also recognized this stigma by requiring a suicide prevention policy that “[i]ncrease[s] awareness among members of the Armed Forces about mental health conditions and the stigma associated with mental health conditions and mental health care.”¹³⁷

More recently, former VA Secretary David Shulkin implemented an initiative to focus on mental health issues for veterans. Secretary Shulkin’s policy gave other-than-honorably discharged veterans the ability to “receive care for their mental health emergency for an initial period of up to 90 days.”¹³⁸ That policy had some positive effects, at least according to reports that more than three thousand veterans accessed that mental health care.¹³⁹ In early 2018, the Trump administration approved a “way for servicemembers to be enrolled automatically with the [VA] for mental health care when they leave the military.”¹⁴⁰ This new policy responded to the increasing rate of suicide for veterans and, in particular, to “the highest risk for veteran suicide,” which occurs during the twelve months immediately following service.¹⁴¹ Congress also passed new legislation in March 2018 requiring the VA to provide increased mental and behavioral health care to veterans with other-than-honorable discharges who served in certain operational capacities (e.g., combat) or who were victims of sexual assault.¹⁴²

Even so, for many veterans already discharged with an other-than-honorable characterization, these responses have had little effect and have been

. . . Most of us are very comfortable talking about our physical fitness and the mental hardening required to perform as our Nation’s sentinels. We are less comfortable discussing mental and spiritual wellness. We can no longer afford to set those conversations aside because we don’t think they are important enough or we are too embarrassed that it might be perceived as weakness.

David H. Berger (@CMC_MarineCorps), TWITTER (May 21, 2019, 11:01 AM), https://twitter.com/CMC_MarineCorps/status/1130866252321370112 [<https://perma.cc/37UH-GNNH>].

135. ACOSTA ET AL., *supra* note 134, at 12 (citation omitted).

136. *Id.*; *see also* Chapman, *supra* note 28, at 23 (“In the minds of some Soldiers, mental health issues, such as PTSD, are shameful, weak conditions.”).

137. Pub. L. No. 112-239, § 582(b)(1), 126 Stat. 1632, 1766 (codified at 10 U.S.C. § 1071 note).

138. News Release, U.S. Dep’t of Veterans Affairs, VA Secretary Formalizes Expansion of Emergency Mental Health Care to Former Service Members with Other-than-Honorable Discharges (June 27, 2017), <https://www.va.gov/OPA/pressrel/includes/viewPDF.cfm?id=2923> [<https://perma.cc/M356-S4X4>].

139. Nikki Wentling, *Trump Signs Order to Improve Mental Health Care for New Vets*, STARS & STRIPES (Jan. 9, 2018), <https://www.stripes.com/news/trump-signs-order-to-improve-mental-health-care-for-new-vets-1.505865> [<https://perma.cc/D3A3-42FR>].

140. *Id.*; *see also* Exec. Order No. 13,822, 83 Fed. Reg. 1513 (Jan. 9, 2018).

141. Wentling, *supra* note 139.

142. Consolidated Appropriations Act, 2018, § 1712I, Pub. L. No. 115-141, 132 Stat. 348, 826–28 (codified as amended at 38 U.S.C. § 1720I).

poorly implemented.¹⁴³ Furthermore, “virtually nothing has been done to address the ongoing harm done to thousands of veterans who reported sexual assault before reforms took place” and were discharged under various other-than-honorable conditions.¹⁴⁴ While DoD’s efforts may benefit current servicemembers and future veterans, they do little to help the thousands already discharged with an other-than-honorable discharge for behavior likely related to a mental health condition.

B. Requiring Liberal Consideration Toward Upgrading Other-than-Honorable Discharges for Veterans with Mental Health Conditions

For the thousands of veterans already discharged under other-than-honorable conditions due to a mental health condition, potential relief is available through seeking a discharge upgrade. In recognizing the connections between mental health and misconduct, DoD issued policy guidance to military records correction and discharge review boards to govern decisions involving mental health conditions.¹⁴⁵ The policy guidance requires the boards to give “liberal consideration” to discharge upgrade requests involving mental health conditions including those related to PTSD, TBI, sexual assault, and sexual harassment.¹⁴⁶

Liberal consideration is a way to view a servicemember’s behavior as a response to PTSD, TBI, or other mental health conditions, rather than as a voluntary or intentional violation of the UCMJ.¹⁴⁷ Liberal consideration explicitly recognizes that there are conditions and experiences that excuse, explain, or mitigate what seems to be bad behavior and that the military needs a new approach to get past the status quo of rejecting most upgrade requests.¹⁴⁸ This Article focuses on the current iteration of liberal consideration, but this Section first provides some background leading up to the current policy.

1. Early Liberal Consideration: The Hagel Memo

The liberal consideration policy was in part a response to a federal lawsuit seeking redress for Vietnam veterans with PTSD who were denied relief when

143. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 24, at 16, 22 (noting that “two of the four military services’ policies are inconsistent with DOD policies related to screening servicemembers for PTSD and TBI prior to separation” and that “the Army and Marine Corps may not have adhered to their own screening, training, and counseling policies”).

144. HUMAN RIGHTS WATCH, *supra* note 28, at 3.

145. In direct response to the lawsuit involving Vietnam veterans with PTSD and discharges well outside the fifteen-year limit for discharge review boards to consider, the initial memo on liberal consideration was specifically directed to the military boards for correction of military/naval records, and it recognized solely PTSD. See Hagel Memo, *supra* note 39. Clarifying guidance later included the discharge review boards and expanded the type of claims to include mental health conditions related to PTSD, TBI, sexual assault, and sexual harassment. Kurta Memo, *supra* note 39, attach. 1.

146. Kurta Memo, *supra* note 39, attach. 1.

147. See Hagel Memo, *supra* note 39; Kurta Memo, *supra* note 39.

148. See Hagel Memo, *supra* note 39; Kurta Memo, *supra* note 39.

they sought discharge upgrades.¹⁴⁹ Secretary Chuck Hagel released the original liberal consideration memo (known as “the Hagel Memo” or “PTSD Upgrade Memo” in veterans’ advocates circles). Liberal consideration was intended to help Vietnam veterans get upgrades based on “previously unrecognized Post Traumatic Stress Disorder” because PTSD “was not recognized as a diagnosis at the time of service and, in many cases, diagnoses were not made until decades after service was completed.”¹⁵⁰ DoD later clarified that liberal consideration applies to all veterans (not just Vietnam veterans) and to both records correction and discharge review boards, despite the Hagel Memo’s specific reference to Vietnam veterans and sole address to the records correction boards.¹⁵¹

The liberal consideration policy relaxes evidentiary standards for discharge upgrades and mandates a liberal view of evidence. PTSD or PTSD-related conditions “will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.”¹⁵² The policy requires boards to balance any mitigation with serious misconduct and to “exercise caution.”¹⁵³ Liberal consideration also eliminates PTSD as “a likely cause of premeditated misconduct” and requires caution in considering the causal relationship between PTSD and misconduct.¹⁵⁴

Liberal consideration was codified at 10 U.S.C. § 1553(d) for the discharge review boards.¹⁵⁵ By statute, liberal consideration that a mental health condition “potentially contributed to the circumstances resulting in the discharge”¹⁵⁶ is required for two categories of cases:

- 1) cases involving deployment “in support of a contingency operation” where the servicemember, “at any time after such deployment, was diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing post-traumatic stress disorder or traumatic brain injury as a consequence of

149. See Andrew Tilghman, *DoD Willing to Reconsider Discharges of Vietnam Vets with PTSD*, MIL. TIMES (Sept. 3, 2014), <https://www.militarytimes.com/news/pentagon-congress/2014/09/03/dod-willing-to-reconsider-discharges-of-vietnam-vets-with-ptsd> [<https://perma.cc/BS9H-ZNJ9>] (“The Pentagon’s new rule comes in response to a federal lawsuit filed on behalf of several veterans . . . that claimed the Defense Department was wrongfully denying discharge upgrade applications from veterans with claims and evidence of PTSD.”); see also *Complaint, Monk v. Mabus*, No. 3:14-cv-00260 (WWE) (D. Conn. 2014).

150. Hagel Memo, *supra* note 39, at 1.

151. Memorandum from Brad Carson, Acting Principal Deputy Under Sec’y of Def., to Secretaries of the Military Dept’s (Feb. 24, 2016), <https://ctveteranslegal.org/wp-content/uploads/2017/10/carson.pdf> [<https://perma.cc/NBB3-AZDQ>].

152. Hagel Memo, *supra* note 39, attach. at 1.

153. *Id.*

154. *Id.* attach. at 2.

155. This legislative change satisfied one of the *Unfinished Business* report’s recommendations to codify “liberal standards of consideration for evidence of PTSD.” See SIDIBE & UNGER, *supra* note 26, at 9. Congress did not, however, go as far as to codify “a presumption of record correction for veterans with documented PTSD,” as the report urged. See *id.*

156. 10 U.S.C. § 1553(d)(3)(A)(ii) (2018).

that deployment”;¹⁵⁷ and

- 2) cases involving PTSD or TBI “related to combat or military sexual trauma.”¹⁵⁸

In these cases, the boards are required to “review the case with liberal consideration to the former member that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge” of a lesser characterization.¹⁵⁹ This statute also established the requirement to expedite decisions in cases involving PTSD or TBI¹⁶⁰ and to include on the review board in all cases from the two categories defined above “a clinical psychologist or psychiatrist, or a physician with training on mental health issues connected with post traumatic stress disorder or traumatic brain injury (as applicable).”¹⁶¹

The overall thrust of the liberal consideration policy is that the boards should grant more upgrades to veterans with mental health conditions because those conditions mitigate their misconduct.¹⁶² There was an initial increase in upgrades after the boards first implemented liberal consideration. A joint study of the Army Board for the Correction of Military Records (ABCMR) for the first year post-Hagel Memo determined that “[t]he overall grant rate for all veterans applying for PTSD-based discharge upgrades . . . [rose] more than twelve-fold from 3.7% in 2013 to 45%.”¹⁶³ Vietnam veterans made up 67 percent of applicants and had a much higher grant rate than other veterans.¹⁶⁴ The ABCMR granted seventy-four out of one hundred applications for veterans with a PTSD diagnosis and zero of fifty-four for veterans who did not submit evidence of any

157. *Id.* § 1553(d)(1)(A).

158. *Id.* § 1553(d)(3)(B).

159. *Id.* § 1553(d)(3)(A)(ii).

160. *Id.* § 1553(d)(2).

161. *Id.* § 1553(d)(1)(A).

162. See Lisa Ferdinando, *DoD Clarifies Liberal Consideration for Veterans’ Discharge Upgrade Requests*, U.S. DEP’T OF DEF. (Aug. 28, 2017), <https://www.defense.gov/Explore/News/Article/Article/1292904/dod-clarifies-liberal-consideration-for-veterans-discharge-upgrade-requests> [<https://perma.cc/EQ6B-BVCW>] (noting that liberal consideration is intended to “ease the burden on veterans”); see also Dep’t of Def., *DoD Clarifies Discharge Upgrade Requests 00:14–00:35* (Aug. 24, 2017), YOUTUBE, <https://www.youtube.com/watch?v=syMRP0kmlLU> (Air Force Lieutenant Colonel Reggie Yager, acting director of legal policy in the Office of the Undersecretary of Defense for Personnel and Readiness, explaining that liberal consideration intends to give veterans “a reasonable opportunity and that the burdens are not unreasonable on the veteran to be able to establish when in fact [their] basis for discharge was precipitated by things outside the veteran’s control like mental health conditions or post-traumatic stress. And so this clarifying guidance is intended to ease those burdens and make it easier for an applicant to establish that.”).

163. SIDIBE & UNGER, *supra* note 26, at 2. The inadequate implementation was also documented and at issue in Amended Complaint, *Kennedy v. Esper*, No. 3:16-cv-02010-WWE (D. Conn. Apr. 17, 2017).

164. SIDIBE & UNGER, *supra* note 26, at 2. Of course, part of the high percentage for Vietnam veteran applicants here is that current-era veterans go to the discharge review board first, but Vietnam veterans can only seek redress through the records correction boards due to the fifteen-year statute of limitations at the discharge review boards. 10 U.S.C. § 1553(a).

diagnosis.¹⁶⁵ This report focused on the ABCMR because of the Army's "comprehensive response" to a FOIA request, a response that included "copies of 164 post-PTSD Upgrade Memo decisions on PTSD-based discharge upgrade applications."¹⁶⁶

Despite some increase in grant rates, the boards did not fully implement liberal consideration. Yale Law School's Legal Services Clinic filed two class action lawsuits documenting this lack of implementation, one against the Army¹⁶⁷ and one against the Navy.¹⁶⁸ In both cases, the named plaintiffs explained how their misconduct was the result of a diagnosed mental health condition and that they were entitled to an upgrade under the Hagel Memo's liberal consideration policy because of their mental health condition and its nexus to their behavior.¹⁶⁹ In a major win for veterans, the court certified a class in both cases.¹⁷⁰ Both cases are docketed to move forward, but there are no decisions on the merits yet.¹⁷¹

165. SIDIBE & UNGER, *supra* note 26, at 2.

166. *Id.* at 5.

167. Amended Complaint, *Kennedy*, *supra* note 163.

168. Complaint, *Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. Mar. 2, 2018).

169. In *Kennedy v. Esper*, the case against the Army, the court certified a class of Army veterans of the Iraq and Afghanistan era who:

- a) were discharged with a less-than[-]Honorable service characterization (this includes General and Other than Honorable discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges);
- b) have not received discharge upgrades to Honorable; and
- c) have diagnoses of PTSD or PTSD-related conditions or records documenting one or more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.

No. 3:16-cv-02010-WWE, 2018 WL 6727353, at *1 (D. Conn. Dec. 21, 2018). And in *Manker*, the case against the Navy, the court certified a class of Navy and Marine Corps veterans of the Iraq and Afghanistan era who:

- (a) were discharged from the Navy, Navy Reserves, Marine Corps, or Marine Corps Reserve with less-than-Honorable statuses, including General and Other-than-Honorable discharges but excluding Bad Conduct or Dishonorable discharges;
- (b) have not received upgrades of their discharge statuses to Honorable from the NDRB; and
- (c) have diagnoses of PTSD, TBI, or other related mental health conditions, or records documenting one or more symptoms of PTSD, TBI, or other related mental health conditions at the time of discharge, attributable to their military service under the Hagel Memo standards of liberal or special consideration.

329 F.R.D. at 123.

170. *See supra* note 169.

171. In the case against the Army, both named plaintiffs received upgrades to Honorable from the Army after the court remanded their cases to the Army Discharge Review Board. *Kennedy*, 2018 WL 6727353, at *2. In rejecting the Army's argument for mootness, the court explained in its decision certifying the class that even though the named plaintiffs received relief, the Army "has not demonstrated assurance that there exists no reasonable expectation that the ADRB will continue to disregard the Hagel Memo PTSD directive in its . . . review of discharge upgrade applications." *Id.* at *4. The court also denied the Army's motion to dismiss. 2019 WL 7290933, at *2 (Jan. 9, 2019). A judicial settlement conference was scheduled for January 2020. Posting of Michael Wishnie, michael.wishnie@yale.edu, to veteransclinics@lists.wm.edu (Nov. 30, 2019) (on file with author). In the case against the Navy, the court denied the Navy's motion to dismiss and granted a partial remand. *Manker v. Spencer*, No. 3:18-

2. *Liberal Consideration Today: The Kurta Memo*

Approximately three years after the Hagel Memo and various reports of the boards' inadequate and inconsistent implementation of liberal consideration, the Kurta Memo renewed and expanded liberal consideration for veterans with mental health conditions.¹⁷² Deputy Under Secretary Kurta called for "greater uniformity amongst the review boards" and for "veterans [to] be better informed about how to achieve relief in these types of cases."¹⁷³ Kurta went on to recognize that "there are frequently limited records for the boards to consider, often through no fault of the veteran," rendering cases involving "[i]nvisible wounds" difficult.¹⁷⁴ The Kurta Memo urges the boards to consider each unique case "and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later."¹⁷⁵ The memo's four-page attachment offers the most substantive guidance to date, with a series of questions for boards to consider.¹⁷⁶ The attachment includes an eleven-item non-exclusive list of how to liberally consider upgrade requests.¹⁷⁷ For example, the guidance recognizes that "[m]ental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported."¹⁷⁸

The Kurta Memo reinforces the Hagel Memo with additional guidance based on DoD's review of discharge upgrade policy and public comment.¹⁷⁹ The Kurta Memo reflects DoD's commitment to easing the burden on veterans and "ensur[ing] fair and consistent standards of review" for veterans seeking a discharge upgrade based on a mental health condition, sexual assault, or sexual harassment.¹⁸⁰ The entire veteran-favorable policy is grounded in leniency; a Pentagon official described the clarifying guidance as follows:

It's in our interest to ensure those who have suffered injustice or believe

cv-372 (CSH), 2019 WL 5846828, at *20–21 (D. Conn. Nov. 7, 2019). Though the court remanded the cases for the two named plaintiffs, Manker and Doe, the court noted "there is neither a basis for, nor justice in staying, the entire class action while that limited remand goes forward." *Id.* at *19. For the partial remand, the court ordered the NDRB to "issue its decisions following the consideration on remand not later than March 7, 2020." *Id.* at *20. The parties are directed to file the decisions with the court, and the court stayed the proceedings pending those decisions but only in regard to Manker and Doe. *Id.* A judicial settlement conference was scheduled for February 2020. Posting of Michael Wishnie, *supra*.

172. Kurta Memo, *supra* note 39.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See id.* attach.

177. *Id.* attach. ¶ 26.

178. *Id.* attach. ¶ 26(e).

179. Kurta Memo, *supra* note 39; *see also* Wentling, *supra* note 35 ("After Hagel issued his memo three years ago, observers said the guidance was applied differently based on military branch, and veterans' applications for upgrades grew into a backlog of cases.").

180. Kurta Memo, *supra* note 39.

their discharge is unfair, that they have a reasonable opportunity . . . to establish the basis for their discharge was precipitated by things outside their control. This clarifying guidance is intended to ease those burdens and make it easier for an applicant to establish that.¹⁸¹

To that end, the Kurta Memo provides the boards a four-question analytical framework to implement liberal consideration:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?¹⁸²

The Kurta Memo identifies categories of evidence, in addition to or in the absence of a medical diagnosis that the boards can use to establish the existence of a veteran's mental health condition. The Kurta Memo also addresses the nexus issue by directing boards to give liberal consideration to "[c]onditions or experiences that may reasonably have existed at the time of discharge" and to consider those conditions or experiences as "excusing or mitigating the discharge."¹⁸³ It implicitly suggests that there should be many cases that merit relief based on liberal consideration, stating that "[i]n some cases, the severity of misconduct may outweigh any mitigation from mental health conditions."¹⁸⁴ This language limits the number of cases; although not quantified, "some" does not suggest "most." The guidance is permissive, indicating that even severe misconduct may be mitigated. The Kurta Memo further allows room for the boards to excuse premeditated conduct in line with the sensation-seeking and depression-suicide syndromes.¹⁸⁵ The Kurta Memo also explains that mental health conditions "inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected."¹⁸⁶

Reflecting the understanding of how mental health conditions affect behavior, liberal consideration sets forth a lens through which the boards should view discharge upgrade requests in a way that is favorable to the veteran. For example, the Kurta Memo directly addresses what to do about an absence of

181. Wentling, *supra* note 35 (quoting Air Force Lieutenant Colonel Reggie Yagel, Under Secretary Kurta's point of contact in the Office of Legal Policy).

182. Kurta Memo, *supra* note 39, attach. ¶ 2.

183. *Id.* attach. ¶ 16.

184. *Id.* attach. ¶ 18.

185. The Memo does not mention these syndromes but implicitly relies on the idea that mental health conditions may mitigate even premeditated misconduct. The Kurta Memo specifically mentions "substance-seeking behavior" and "self-medication" as potentially mitigating misconduct. The Kurta Memo advises boards to "exercise caution," but does not give any guidance on how to exercise that caution or how to evaluate "the causal relationship between asserted conditions or experiences and premeditated misconduct." Kurta Memo, *supra* note 39, attach. ¶ 19.

186. *Id.*, attach. ¶ 26(e).

medical evidence. Instead of using the lack of evidence to deny relief, the boards must consider the “veteran’s testimony alone, oral or written.”¹⁸⁷ That testimony—alone—can “establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.”¹⁸⁸ Under liberal consideration, the boards are required to assess the veteran’s testimony in applying the four-question framework.¹⁸⁹ Of course, the boards should still make a credibility determination about a veteran’s testimony and evaluate that testimony in the context of any conflicting evidence in the record.¹⁹⁰ The Kurta Memo does not establish a guaranteed path to upgrade, but intends to make the path easier for veterans.

The Kurta Memo also acknowledges that “[m]ental health conditions, including PTSD; TBI; sexual assault; and sexual harassment . . . are often undiagnosed or diagnosed years afterwards, and are frequently unreported.”¹⁹¹ Under liberal consideration, the boards are required to shift the interpretation of a lack of evidence and see it as potentially consistent with mental health conditions. The Kurta Memo also specifically connects misconduct and mental health conditions to broaden the way the boards have historically viewed misconduct. Misconduct itself may be evidence of a mental health condition, and “[a] veteran asserting a mental health condition without a corresponding diagnosis of such condition from a licensed psychiatrist or psychologist, will receive liberal consideration of evidence that may support the existence of such a condition.”¹⁹² Thus, the lack of a diagnosis should not stand as an automatic bar to upgrade.

Of course, implementation of liberal consideration does not mean a 100 percent grant rate.¹⁹³ But despite the potential for sweeping change¹⁹⁴ in how the boards view misconduct in relation to mental health conditions, liberal consideration has not yet had a transformative effect on the number of discharge upgrades or on the boards’ reasoning in their decisions. The next part discusses in detail how the NDRB, as a representative example of all of the discharge review boards, has failed to implement liberal consideration.

187. *Id.* attach. ¶ 7.

188. *Id.*

189. *Id.*

190. *See* 32 C.F.R. § 70.8(e)(6)(ii)(B)(2) (2018) (providing that boards shall evaluate testimony for being “sufficiently credible”).

191. Kurta Memo, *supra* note 39, attach. ¶ 26(d).

192. *Id.* attach. ¶ 11.

193. *Id.* attach. ¶ 26(k) (“Liberal consideration does not mandate an upgrade.”).

194. Wentling, *supra* note 35 (“The Defense Department on Monday issued a sweeping policy change to afford more leeway to veterans seeking upgrades to their other-than-honorable discharges.”).

IV.

KICKED AGAIN: THE NDRB'S FAILURE TO IMPLEMENT LIBERAL
CONSIDERATION

Through liberal consideration, DoD sought to respond to the historic problems for servicemembers seeking discharge upgrade requests. DoD has attempted a significant shift in recognizing how mental health conditions mitigate what was categorized as misconduct in an effort to provide long overdue recognition and relief to veterans. Recent statistics from the NDRB suggest that the shift has not taken effect. As part of a recent conference on veterans' legal issues, the President of the NDRB shared the following statistics for FY 2019:

Upgrade requests involving PTSD:	64 Cases / 10 Upgrades (17 percent) ¹⁹⁵
Upgrade requests involving TBI:	6 Cases / 1 Upgrade (17 percent)
Upgrade requests involving MST:	21 Cases / 2 Upgrades (10 percent)
Upgrade requests involving Mental Health:	90 Cases / 14 Upgrades (16 percent) ¹⁹⁶

These rates are low, and they are consistent with the low rates of upgrade over the past few years under liberal consideration.¹⁹⁷

Of course, liberal consideration provides no guarantee and does not require that a veteran receive an upgrade. Yet, the whole basis for liberal consideration suggests that upgrades involving PTSD, TBI, MST, and other mental health conditions should be granted liberally toward the goal of providing "a reasonable

195. Note the data do not specify whether the upgrades were full or partial, and it is unlikely that all of these upgrades provided full relief.

196. Robert Powers, President, NDRB, Sec'y of the Navy, Council of Review Bds., NDRB Presentation to Veterans Legal Assistance Conference of 2019, at slide 3 (June 7, 2019) (slides on file with author).

197. According to the President of the NDRB in a presentation given in 2018, the grant rate for Navy discharge upgrade requests to which liberal consideration applied has been low. In 2015, there were 116 "liberal consideration claims" and nineteen were granted (16 percent). Robert Powers, President, NDRB, Sec'y of the Navy, Council of Review Bds., NDRB Presentation to National Law School Veterans Clinic Consortium for the 2018 NLSVCC Conference, at 12 (Feb. 28–Mar. 1, 2018) (on file with author). Taking a closer look at the month-by-month breakdown, the low rate of upgrades is stark. *See id.* In April 2015, only two of thirteen were granted; and in June, only five of thirty-four were granted. *Id.* In 2016 and 2017, the grant rate remained low: 16 percent in 2016 and a decline to 14 percent in 2017. *Id.* The grant rate for Marine Corps discharge upgrade requests to which liberal consideration applied was also low, although there was a jump in 2017. *See id.* In 2015 and 2016, the upgrade rate was 15 percent and 14 percent. *Id.* In 2017, that jumped to 27 percent. *Id.* In the first two quarters of FY 2018, the grant rates remained low. *See Powers, supra* note 36, at 3. For Navy PTSD cases, only five out of twenty-eight received an upgrade (18 percent) and for Navy mental health cases, only nine out of fifty-one received an upgrade (18 percent). *Id.* For Marine Corps PTSD cases, twenty-six of seventy-two received an upgrade (36 percent) and for Marine Corps mental health cases, nineteen of fifty received an upgrade (38 percent). *Id.*

opportunity for relief.”¹⁹⁸ And to the extent liberal consideration was a response to past low grant rates due to inadequacies in recognizing mental health issues and understanding how mental health affects behavior, it is reasonable to expect to see higher rates of discharge upgrades.¹⁹⁹

Despite the liberal consideration policy that mandated changes in how the boards review cases involving invisible wounds, the NDRB seems to reach decisions not to upgrade in the same way it did before liberal consideration. The NDRB decisions even use the same language as pre-liberal consideration decisions, further suggesting the Board’s lack of engagement with the Kurta Memo’s substantive guidance about evaluating evidence liberally within the four-question framework. There are various thematic ways that liberal consideration has not been fully or consistently implemented based on a review of the Board’s decisions.²⁰⁰ These themes represent shortcomings in both the policy itself and in the Board’s implementation of liberal consideration.

198. Kurta Memo, *supra* note 39.

199. The liberal consideration policy did not change the standards for an upgrade; those standards remain equity and propriety. Instead, liberal consideration requires the boards to consider the facts liberally and with an understanding of how facts may establish a mental health condition and a nexus between a mental health condition and what may appear to be misconduct. Thus, the expectation for an increased grant rate is not based on a change in the legal standards for upgrade, but a change in how the boards consider the facts to meet those standards. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (discussing the potential to wrongly assume a “rate of plaintiff verdicts to be an accurate measure of the influence of a legal standard” in the absence of “litigated disputes [that are] representative of the entire class of underlying disputes”); *supra* note 169 and accompanying text (describing the two classes certified as veterans with mental health diagnoses who should have been upgraded to Honorable discharges—or who at least warranted liberal consideration).

200. Prior to April 2019, NDRB decisions were available in an online public reading room. In April 2019, the reading room was removed, and there was no information provided regarding its return. While the reading room was down, the online Boards of Review Reading Rooms webpage included the following note near the top:

The Army, Air Force, Navy/Marine Corps, and Coast Guard Review Boards decisional documents normally published in the Department of Defense Reading Room have temporarily been removed to conduct a quality assurance review. We will update this webpage when we have a better estimate[] of when the decisional documents will again be available.

Boards of Review Reading Rooms, U.S. DEP’T OF DEF., <https://boards.law.af.mil/index.htm> [perma.cc/DC7L-MJU8].

Litigation in early 2020 spurred the Pentagon to “agree[] to promptly make all past decisions of the [boards] publicly available.” Press Release, Nat’l Veterans Legal Servs. Program, In Response to NVLSP Lawsuit, Pentagon Swiftly Agrees to Promptly Make All DRB and Correction Board Decisions Publicly Available (Jan. 17, 2020), <https://www.nvlsp.org/news-and-events/press-releases/in-response-to-nvlsp-lawsuit-pentagon-swiftly-agrees-to-promptly-make-all-d> [https://perma.cc/SE3T-S5DE]. The Pentagon promised to post all old decisions (pre-April 2019) by February 14, 2020. *Id.* But that did not happen. For example, as of February 15, 2020, the NDRB had only one folder of decisions available. U.S. DEP’T OF DEF., *Naval Discharge Review Board (DRB)*, BOARDS OF REVIEW READING ROOMS, https://boards.law.af.mil/NAVY_DRB.htm. The current reading room announcement states that the decisions since October 1998 are included in the reading room, but that some “documents have been temporarily removed to conduct a quality assurance review.” *Boards of Review Reading Rooms*, *supra*. Early on in my research for this project, my research assistant, Heidi Weimer, created a database of decisions as an alternative to the closed reading room. This database is limited to the decisions I downloaded in early 2019 before the reading room disappeared, but a partial database was better than

A. *(Over)Reliance on the Presumption of Government Regularity*

By regulation, the Board presumes “regularity in the conduct of governmental affairs,” stating “this presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.”²⁰¹ The entire scheme of liberal consideration is founded on the realization that the military was “doing it wrong” when it comes to discharging servicemembers for misconduct when that misconduct was the result of a mental health condition.²⁰² Thus, to the extent the presumption is an often-used default basis to deny upgrade requests, it is inconsistent with the underlying basis for liberal consideration. The presumption of regularity assumes the original decisions were correct, lawful, and in good faith,²⁰³ but liberal consideration mandates review outside that lens to fully and fairly evaluate whether a mental health condition mitigated behavior previously identified as misconduct.²⁰⁴ Continuing to rely on the presumption of regularity is one way the Board maintains its traditional approach of merely rubber-stamping the command-level discharge decisions rather than fully engaging in liberal consideration.

In many cases, the Board ignores the recognition of past failures that gave rise to liberal consideration and instead continues to use the government’s “presumption of regularity in the conduct of its affairs” to justify rejections of discharge upgrade requests without fully engaging in the principles of liberal consideration. The conflict between liberal consideration and the presumption of government regularity is not specifically addressed in the Kurta Memo. Without addressing the conflict, the NDRB continues to rely on the presumption as a default justification for denying upgrade requests.

no database. The database is available at *NDRB Decisions (Shared)*, *supra* note 38. The database is intended to make the decisions available and organized in a way that will provide helpful information to future applicants. Giving future applicants better guidance on how to be successful is part of the reporting requirement, but as of now, there is little an applicant can learn about how to be successful. Even now that the public reading room is again available, there is a limited search capability and no way to download a batch of decisions.

201. 32 C.F.R. § 724.211 (2018).

202. See Hagel Memo, *supra* note 39 (explaining the impetus of the policy as the lack of recognition of PTSD as a basis for discharge upgrade).

203. See Edward C. Segura, President, AFDRB, and Robert Powers, President, NDRB, *Inside the Discharge Review Boards*, at 4 (Mar. 20-21, 2019), http://www.umt.edu/law/files/events/10_Inside-the-Discharge-Review-Boards.pdf [<https://perma.cc/MVP4-QDDF>] (emphasizing Air Force Discharge Review Board’s presumption that the “military discharged its duties correctly/lawfully/in good faith”); see also *infra* Part V (discussing how the Board views Honorable within a limited construct of how commanders assessed it at the time of discharge).

204. On June 7, 2019, as part of a panel presentation, NDRB President Powers said that liberal consideration and presumption of government regularity are not mutually exclusive, but rather are just two different standards. But they are at least partially mutually exclusive, as liberal consideration was promulgated in part due to problematic government decision-making in discharge decisions. Notes from Presentation by Robert Powers, President, NDRB, Sec’y of the Navy, Council of Review Bds., NDRB Presentation to Veterans Legal Assistance Conference of 2019 (June 7, 2019) (on file with author) [hereinafter Notes from Powers Presentation] (“[P]resumption of regularity and liberal consideration do not equal mutually exclusive.”).

For example, in the case of a former Marine who requested relief due to PTSD and TBI as mitigating factors for his behavior involving drugs, the Board relied on the presumption of government regularity to justify denying relief.²⁰⁵ The veteran's service record documented three deployments, one in 2005 in support of Operation Iraqi Freedom and two in 2012 and 2013 in support of Operation Enduring Freedom.²⁰⁶ In this particular case, the veteran was charged with a felony later reduced to a misdemeanor related to marijuana possession and intent to manufacture.²⁰⁷ This felony charge led to the veteran's discharge.²⁰⁸ In his upgrade request, he asked the Board to consider the underlying mental health reasons for his behavior, consistent with liberal consideration.²⁰⁹

However, with only a cursory mention of the veteran's assertion that his PTSD and TBI mitigated his misconduct, the Board noted the presumption of regularity and the veteran's burden to overcome the presumption with "substantial and credible evidence."²¹⁰ The Board acknowledged the veteran's statement that his mental health condition was the cause of his misconduct, but then rejected that connection as insufficient to overcome the presumption on the basis of the lack of evidence. The Board described the veteran's actions as "conscious decisions to violate the tenants [sic] of honorable and faithful service," and denied relief.²¹¹

Even if the Board's decision was a reasonable result based on the extent of the veteran's involvement with drugs, the Kurta Memo demands liberal consideration before reaching that decision. For example, the Kurta Memo specifically recognizes "inability of the individual to conform . . . behavior to the expectations of the military," and "substance abuse" as evidence of a mental health condition and the type of behavior that can be mitigated by mental health conditions.²¹² Liberal consideration recognizes even misconduct itself as evidence of PTSD or TBI, yet in this case, the Board does not appear to consider how PTSD and TBI may have explained the veteran's behavior.

Viewing the veteran's request with the heavily government-favored presumption of regularity means that the Board is not taking account of all the research that shows that PTSD and TBI "may result in a series of cognitive, behavioral, and mood changes impacting an individual's ability to function in

205. NDRB No. MD17-01353 (on file with author).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* For other examples of cases where the Board relied on the presumption to deny relief, see NDRB No. ND18-00471 (denying relief when the government's presumption was not overcome by "substantial and credible evidence" even though evidence included post-service documentation of PTSD and the veteran's own statement that he suffered PTSD); NDRB No. ND18-00171 (ignoring the blatant relationship between the veteran's reported and documented MST and the DUI that occurred on the same day in context of the presumption of government regularity to deny relief).

212. Kurta Memo, *supra* note 39, attach. ¶ 5.

society,” with “some of those changes includ[ing] poor attention, memory difficulties, depressed mood and rapid fluctuations in mood, poor impulse control, and disregard for social norms.”²¹³ Research like this is what led to policy guidance for the boards to “fully and carefully consider every petition based on PTSD brought by each veteran.”²¹⁴ Yet the President of the NDRB freely and earnestly admits that NDRB members are biased in favor of commanders’ original decisions and typically think that the veteran probably “got what they deserved.”²¹⁵ This position is consistent with the Council of Review Board’s statement that “the Department of the Navy, in issuing a discharge will always presume it was correct in that action.”²¹⁶ The Board members are typically Navy and Marine Corps officers—often former commanders—who see the same “misbehaviors” they review as board members.²¹⁷ Commanders play a “central disciplinarian role”²¹⁸ in maintaining good order and discipline, and board members may be continuing that role in denying relief or merely deferring to their peers in that role.

Liberal consideration—though the policy guidance does not explicitly say so—required the Board to be open-minded in reviewing this veteran’s case, rather than blinded by the presumption of government regularity. That presumption effectively blocked the Board from fairly evaluating whether the veteran’s mental health condition mitigated his involvement in drugs. Given his fourteen years of service—including a previous period of honorable service—and three deployments, it is reasonable in the sphere of liberal consideration to view his involvement with drugs as unusual and possibly connected to a mental health condition. Yet, by focusing on the presumption of government regularity instead of potential mitigation, the Board did not appear to consider that the

213. Stacey-Rae Simcox et al., *Understanding TBI in our Nation’s Military and Veterans: Its Occurrence, Identification and Treatment, and Legal Ramifications*, 84 UMKC L. REV. 373, 380 (2015).

214. Hagel Memo, *supra* note 39, at 1.

215. Notes from Powers Presentation, *supra* note 204. Colonel Edward C. Segura of the AFDRB said the same thing on the panel: “I have a bias as a former commander.” Notes from Presentation by Edward C. Segura, President, AFDRB, Best Practices Before Military Review Boards, Veterans Legal Assistance Conference of 2019 (June 7, 2019) (on file with author); *see also* Complaint ¶¶ 218–19, *Manker*, *supra* note 168 (“Finally, Defendant’s high rate of denying PTSD-related discharge upgrade applications—about 85 percent—indicates that the NDRB has a systemic institutional bias or secret policy that discriminates against applicants who suffer from PTSD. This secret policy is unfair and contrary to the Plaintiffs’ constitutional right to due process because it contradicts public guidance, such as the Hagel Memo, and because it underlies a sham decisionmaking process whereby denial is virtually preordained for applicants before the NDRB due to prejudice.”); Segura & Powers, *supra* note 203, at 4, 18 (emphasizing Air Force Discharge Review Board’s presumption that “military discharged its duties correctly/lawfully/in good faith” and NDRB’s treatment of conflicting facts as “[d]iscovered dishonesty [that] creates doubt concerning an Applicant’s submitted evidence”).

216. COUNCIL OF REVIEW BOARDS, *Preparing for a Personal Appearance Hearing at Washington Navy Yard, DC, SEC’Y OF THE NAVY*, <https://www.secnav.navy.mil/mra/CORB/Pages/NDRB/hphd.aspx> [https://perma.cc/3U3W-H9HC].

217. SECNAVINST 5420.174D, *supra* note 70, ¶ 403(a) (directing that board members be “career military officers”).

218. Weber, *supra* note 52, at 129.

veteran's criminal drug activity was exactly the type of behavior related to TBI, even though the veteran asserted that the TBI caused or at least heavily influenced his behavior.

Of course, liberal consideration does allow that "the severity of misconduct" in some cases "may outweigh any mitigation from mental health conditions."²¹⁹ Here, though, instead of weighing the severity of misconduct and considering whether the mental health condition mitigated the behavior, the Board merely rejected the veteran's request by saying the "record did not show that a Mental Health Diagnosis was a sufficient mitigating factor" without an explanation for why and how the "record did not show."²²⁰ While not explicit, the why and how was likely the presumption of government regularity and the veteran's failure to overcome the presumption.²²¹

Furthermore, in this assessment, the Board ignored the Kurta Memo's guidance that Honorable discharges do not require "flawless military service."²²² An Honorable discharge may be appropriate "despite some relatively minor or infrequent misconduct."²²³ Here, the behavior was certainly infrequent; in the veteran's fourteen years of service, this was an isolated event. And within the construct of liberal consideration, a mental health condition can mitigate a drug charge. If the Board determined that a felony charge later reduced to a misdemeanor was not "relatively minor," it should have stated so and then considered whether the infrequency of the conduct—a single isolated event in a fourteen-year period of service—justified an upgrade. That the Board rejected this possibility in favor of the government further shows how the Board defers to the deeply rooted presumption in favor of the commanders who made the original decisions. The Board's rejection also reflects the deeply rooted ideals of good order and discipline, consistent with the Board's unwillingness to accept that less-than-flawless service is Honorable.

B. Refusal to Allow Mitigation of Willful Misconduct

In the context of liberal consideration, "willful misconduct" is used to mask the Board's lack of engagement with relaxed evidentiary standards and its rejection of a relationship between mental health conditions and specific instances of behavior. Liberal consideration responds to the connection between mental health conditions and misconduct, giving veterans with mental health

219. Kurta Memo, *supra* note 39, attach. ¶ 18.

220. NDRB No. ND17-01353, *supra* note 205.

221. The paragraph that concluded with the determination that the mental health diagnosis was insufficient began with a statement of the presumption of regularity, suggesting the decision was related to the presumption. *See id.* In other decisions, the Board made the decision more explicit. *See, e.g.,* NDRB No. ND17-01269 (on file with author) ("The Applicant attributes her drug abuse to MST brought about after the alleged sexual assault. As mentioned above, the Board presumes regularity in the conduct of governmental affairs unless there is substantial credible evidence to rebut the presumption. The Applicant failed to provide credible evidence to substantiate her claim.").

222. Kurta Memo, *supra* note 39, attach. ¶ 26(h).

223. *Id.*

conditions reasonable opportunities for relief when past misconduct was due to a mental health condition. Liberal consideration recognizes that misconduct may be unrelated to a mental health condition, and the Kurta Memo cautions the boards to balance severity with mitigation.²²⁴ The Board, however, often replaces the required balancing with a blanket rejection of the need to balance by categorizing the misconduct as “willful misconduct,” thereby justifying denial of relief.²²⁵ As the Kurta Memo makes clear, the idea of willful misconduct is problematic in the sphere of mental health conditions because what appears to be willful misconduct can be a symptom of a mental health condition, for which a veteran should not be punished.²²⁶ Yet the idea of willful misconduct remains a default basis for rejecting a request for relief and affirming a commander’s decision.²²⁷

For example, in a case where a veteran claimed that a mental health condition mitigated his drug use, the Board used the lack of in-service or post-service mental health diagnosis to conclude that “the record reflects willful misconduct that demonstrated he was unfit for further service.”²²⁸ This decision completely ignored the Kurta Memo’s directives that a “veteran’s testimony alone . . . may establish the existence of a condition,”²²⁹ that evidence of a mental health condition includes “changes in behavior” and “substance abuse,”²³⁰ and that misconduct itself “may be evidence of a mental health condition.”²³¹ This veteran had over four years of service and a Good Conduct Medal, among other awards.²³² Given that the veteran had documented good service, liberal consideration suggests at least a possibility that his drug abuse was related to a mental health condition. However, the Board did not consider this, in disregard of the Kurta Memo’s directive to give liberal consideration to these factors when there is no documented diagnosis beyond the veteran’s statement.²³³

Even when there is documentation of a mental health condition, the Board typically fails to implement liberal consideration by focusing on the misconduct rather than considering whether the mental health condition mitigated the misconduct. In a case involving documentation of a sexual assault report, mental health conditions, and a post-service PTSD diagnosis originating from an in-service MST, the NDRB—egregiously and in flagrant disregard for the Kurta Memo’s guidance—denied the veteran’s request for an upgrade, citing to the

224. *Id.* attach. ¶ 18.

225. *See, e.g.*, NDRB No. ND17-01269, *supra* note 221 (“Though the Applicant may feel that MST and other mental health conditions may have been an underlying cause to her misconduct, the record reflects willful misconduct that demonstrated she was unfit for further service.”).

226. Kurta Memo, *supra* note 39, attach. ¶ 6.

227. *See, e.g.*, NDRB No. ND17-01269, *supra* note 221.

228. NDRB No. ND18-00184 (on file with author).

229. Kurta Memo, *supra* note 39, attach. ¶ 7.

230. *Id.* attach. ¶ 5.

231. *Id.* attach. ¶ 6.

232. NDRB No. ND18-00184, *supra* note 228.

233. Kurta Memo, *supra* note 39, attach. ¶¶ 7, 11.

absence of “credible evidence to substantiate her claim.”²³⁴ The veteran “attribute[d] her drug abuse to MST brought about after the alleged sexual assault.”²³⁵ Rather than engaging in an assessment of whether the MST and other mental health conditions excused or mitigated the discharge, the Board simply ignored the evidence that would favor an upgrade and focused on other evidence to reach a negative decision on the basis of willful misconduct.

In that case, the Board may have focused on the fact that the veteran admitted to using drugs prior to enlistment—something she had not admitted to at the time of enlistment—in order to conclude that her asserted mental health conditions did not mitigate her misconduct.²³⁶ Although a former instance of self-medication for food poisoning had nothing to do with the drug use that led to her discharge, the Board used the veteran’s untimely drug use admission as a basis for determining “she was unfit for further service.”²³⁷ The Board, though, did not engage with an explanation for how or why that prior drug use outweighed the veteran’s documented sexual assault and mental health conditions. Instead, the Board just dismissed the evidence as the veteran’s feelings:

The Applicant attributes her drug abuse to MST brought about after the alleged sexual assault. . . . Though the Applicant may feel that MST and other mental health conditions may have been an underlying cause to her misconduct, the record reflects willful misconduct that demonstrated she was unfit for further service. There is not sufficient evidence to suggest that the Applicant’s claim of MST or other mental health conditions mitigated the Applicant’s misconduct.²³⁸

The Board finally mentioned mitigation but did not engage in any sort of balancing to determine or explain why the mental health condition did not mitigate the drug use that occurred while she was on active duty.²³⁹

The Board’s focus on the previous instances of the veteran’s premeditated drug use masked the actual question that liberal consideration required: whether her documented in-service MST, sexual assault, and PTSD mitigated the drug use that led to her discharge. By not considering the possibility that the veteran’s conditions “affect[ed] [her] behaviors and choices,” the Board failed to implement liberal consideration.²⁴⁰ Furthermore, the Board offered no reasoning to explain why and how the “MST or other mental health conditions did not mitigate the Applicant’s misconduct”; instead, the Board generically referred to insufficient evidence.²⁴¹ To the extent the Board determined that the severity of the conduct outweighed any mitigation from mental health conditions, the Board

234. NDRB No. ND17-01269, *supra* note 221.

235. *Id.*

236. *Id.*

237. *See id.*

238. *Id.*

239. *See id.*

240. Kurta Memo, *supra* note 39, attach. ¶ 26(e).

241. NDRB No. ND17-01269, *supra* note 221.

should have explained its conclusion to demonstrate its application of liberal consideration.²⁴² Instead, the Board relied on “willful misconduct” to avoid implementing liberal consideration—or at least appearing to avoid it.²⁴³

C. Rejection of Relaxed Evidentiary Standards

Liberal consideration requires relaxed evidentiary standards in determining whether the veteran has (or had) a mental health condition that may have mitigated misconduct. Relaxed evidentiary standards are central to liberal consideration. The Kurta Memo specifically instructs that the veteran’s testimony—and that testimony alone—“may establish the existence of a condition or experience.”²⁴⁴ The veteran’s testimony can also serve as evidence that connects the condition or experience to the veteran’s military service and that the condition “excuses or mitigates the discharge.”²⁴⁵ The Board fails to apply these relaxed evidentiary standards to two bases upon which it denies relief: (1) absence of a formal mental health diagnosis, and (2) insufficient nexus between a mental health condition and behavior.

1. Absence of a Formal Mental Health Diagnosis

Despite the Kurta Memo’s guidance, the Board continues to reject discharge upgrade requests on the basis that there is no diagnosis, either during or post-service. The Kurta Memo explicitly instructs the boards what to do when there is a lack of medical diagnosis for the veteran’s claimed condition or experience: accept the veteran’s testimony as evidence of the condition or experience.²⁴⁶ But the Board continues to treat the absence of a formal diagnosis as a death knell for the upgrade request. In some of these cases, the Board not only rejects a diagnosis based on the veteran’s statement alone, but also finds that the veteran’s prior failure to reach out for support casts doubt on the veteran’s testimony. This approach, in conflict with liberal consideration, perpetuates the Board’s historic hostility to recognizing the role of mental health conditions in servicemembers’ behavior.²⁴⁷ By rejecting veterans’ statements in the absence of a diagnosis, the Board further entrenches the “Military Misconduct Catch-22”: the Board requires evidence a veteran does not have

242. See, e.g., Kurta Memo, *supra* note 39, attach. ¶¶ 18–19.

243. NDRB No. ND17-01269, *supra* note 221.

244. Kurta Memo, *supra* note 39, attach. ¶ 7.

245. *Id.*

246. *Id.*

247. In granting class certification, the United States District Court for the District of Connecticut also noticed the NDRB’s failure to implement liberal consideration in the cases of the two named plaintiffs. *Manker v. Spencer*, 329 F.R.D. 110, 120–21 (D. Conn. 2018) (“It is arguably unclear from the NDRB’s explanation of their denials what standard is being used nor when PTSD would mitigate misconduct . . . [T]he NDRB’s decision appears to use a stricter standard that seems to disbelieve that Manker could have suffered from PTSD without an official diagnosis and that his PTSD could have influenced his ‘willful’ actions.”).

access to, because the veteran's discharge status makes the veteran ineligible for VA health care.²⁴⁸

For example, in one case, a former marine explained that "his drug use was caused by an in-service medical health condition," i.e., general anxiety and bipolar disorder.²⁴⁹ Under liberal consideration, the marine's statement should have been enough to establish the possibility that he suffered from a mental health condition.²⁵⁰ Instead of liberally considering his testimony, the Board required "evidence to undoubtedly indicat[e] he was diagnosed with anxiety or bipolar disorder."²⁵¹ This requirement for undoubtable evidence goes beyond the Board's regular credibility determination and thwarts liberal consideration.²⁵²

The Kurta Memo also provides that the Board "should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case."²⁵³ In this case, liberal consideration would have required the Board to at least consider whether it was reasonable or likely that the marine's record contained evidence of a mental health condition. Even if this were not reasonable or likely, liberal consideration would have given the marine the benefit of the doubt, especially because the Kurta Memo warns that "[m]ental health conditions . . . are frequently unreported."²⁵⁴ Instead, in denying relief based on the lack of documentation, the Board's decision shows no true engagement with liberal consideration.

In part to remedy the past approach of stopping inquiry in the absence of a documented diagnosis, liberal consideration requires the Board to assess other evidence that could support the diagnosis. Here, the veteran's misconduct was drug abuse, and liberal consideration recognizes "substance abuse" as evidence of a mental health condition.²⁵⁵ When faced with facts about substance abuse as a result of a mental health condition, and when nothing suggests that the requesting servicemember had a sustained drug use problem or that his drug use was *not* related to a mental health condition, liberal consideration would have instructed the Board to give favorable weight to evidence supporting the existence of a mental health condition. Instead of liberally viewing the evidence of substance abuse as evidence of a mental health condition, the Board cursorily

248. Seamone, *supra* note 86, at 503 ("[T]he Military Misconduct Catch-22 concerns a very specific dilemma. Concisely stated by Attorney Carissa Picard: [']What's the point of DoD recognizing that PTSD/TBI causes misconduct when it doesn't do anything to stop [the] "pattern of misconduct" discharges for soldiers with PTSD/TBI? How can it say [that] this is evidence of a service-related disability only to use this evidence to deny servicemembers access to benefits for that disability?[']") (alterations in original) (citations omitted)).

249. NDRB No. MD17-00856 (on file with author).

250. See Kurta Memo, *supra* note 39, attach. ¶ 7.

251. NDRB No. MD17-00856, *supra* note 249.

252. See 32 C.F.R. § 70.8(e)(6)(ii)(B)(2) (2018) (explaining the boards' evaluation of evidence as to whether it is "sufficiently credible").

253. Kurta Memo, *supra* note 39, attach. ¶ 26(f).

254. *Id.* attach. ¶ 26(d).

255. *Id.* attach. ¶ 5.

rejected the veteran's statement.²⁵⁶ The Board claimed to have done "a thorough review," but did not discuss that review or indicate engagement with the Kurta Memo's guidance.²⁵⁷

The Board then went even further afield from liberal consideration by finding that the marine's failure to reach out to anyone or take advantage of the various resources available to assist active duty servicemembers justified its rejection of his mental health condition. The Board noted that "the Applicant did not provide any evidence to indicate he attempted to use the numerous services available for servicemembers who undergo personal or mental health problems during their enlistment, such as the Navy Chaplain, Medical or Mental Health professionals, Navy Relief Society, Family Advocacy Programs, or even the Red Cross."²⁵⁸ Under liberal consideration, the marine's failure to seek assistance is consistent with how "[m]ental health conditions . . . inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected."²⁵⁹ Essentially, even if the Board believed that a servicemember suffering from a mental health condition should logically reach out to available resources, liberal consideration acknowledges that these conditions could cause different behaviors. At a minimum, liberal consideration required the Board to grapple with the possibility that the lack of reaching out was a legitimate behavior, rather than dismiss the discharge upgrade request based on a lack of evidence that the servicemember sought assistance.

The Board has failed to implement liberal consideration in the absence of a formal diagnosis on several other occasions. For instance, the Board flat out ignored the Kurta Memo's guidance when it concluded that "statements alone, without sufficient documentary evidence" cannot support a favorable decision.²⁶⁰ The Board noted the multiple sources where it did not find evidence of a diagnosis: military records, post-service VA records, and the veteran's documentation submitted with the upgrade request.²⁶¹ The Board also noted the lack of evidence that the servicemember had sought out any mental health assistance while in service.²⁶² Instead of relying on the veteran's statement as evidence of a mental health condition, the Board declared itself "unable to establish this contention as a basis for mitigation or consideration as an extenuating circumstance," citing the absence of a mental health diagnosis.²⁶³ But the veteran's statement was evidence, and the Board should have at least considered that statement, even if it did not ultimately find the evidence credible.

256. NDRB No. MD17-00856, *supra* note 249.

257. *See id.*

258. *Id.*

259. Kurta Memo, *supra* note 39, attach. ¶ 26(e).

260. *See* NDRB No. ND17-00793; Kurta Memo, *supra* note 39, attach. ¶ 7.

261. NDRB No. ND17-00793, *supra* note 260.

262. *Id.*

263. *Id.*

2. *Insufficient Nexus Between Mental Health Condition and Misconduct*

The Kurta Memo directs boards to ask whether there is a nexus between a mental health condition and misconduct.²⁶⁴ In evaluating the nexus, the boards must consider challenges the veteran may have in “presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran’s life.”²⁶⁵ Rather than extend liberal consideration in cases where the nexus is not clear, the Board has gone out of its way to deny relief based on insufficient nexus.

For example, in case ND18-00046, the NDRB denied relief to a Navy veteran with almost five years of active duty service who claimed that PTSD due to an MST mitigated her periods of Unauthorized Absence (UA),²⁶⁶ because the Board found no nexus between the mental health condition and UA.²⁶⁷ This case is certainly the type of case in which, if properly applied, liberal consideration would support an upgrade: a servicemember experiences a military sexual trauma, had PTSD due to that trauma, and her PTSD symptoms included periods of her avoiding her military responsibilities through UA.

The Board focused on nexus in this case and to some extent used the veteran’s evidence against her rather than viewing it through the lens of liberal consideration. In support of her request for an upgrade to Honorable, the veteran provided her statement of MST, resultant PTSD, and related periods of UA.²⁶⁸ She also provided a record from the VA that showed she had a 70 percent disability “tie[d] . . . to” the PTSD that resulted from her assault.²⁶⁹ The veteran’s request for relief showed that the assault happened in 2004, relatively early in her enlistment, prior to her separation in 2008.²⁷⁰ She had one period of UA in 2004 and two in 2008.²⁷¹ The Board concluded that the veteran did not explain how the 2004 MST mitigated the 2008 misconduct.²⁷² Here, the Board was wrong in focusing on an insufficient explanation in the veteran’s pro se application. The Board should have liberally considered the possibility that the veteran could still be dealing with PTSD four years after an MST and that it is not unreasonable or inconsistent for someone with PTSD to show symptoms at different times. The veteran may not have included a specific statement that tied the 2004 MST and the 2008 UA together, but she did assert in her upgrade request that “PTSD mitigate[d] her misconduct [because] her periods of UA were her protecting herself from additional military assaults.”²⁷³ Even so, the Board

264. See Kurta Memo, *supra* note 39, attach. ¶ 2.

265. *Id.* attach. ¶ 26(g).

266. Known as AWOL in other branches.

267. NDRB No. ND18-00046,

https://boards.law.af.mil/NAVY/DRB/2018_Navy/ND1800046.rtf [<https://perma.cc/MB47-ADWK>].

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

denied relief, citing the lack of “additional explanation explaining how the 2004 event can explain or mitigate the misconduct in 2008.”²⁷⁴

Liberal consideration would recognize that PTSD “inherently affect[s] one’s behaviors and choices” in ways that cause a veteran “to think and behave differently than might otherwise be expected.”²⁷⁵ In relying on an insufficient nexus, the Board’s decision did not mention liberal consideration, nor did it explain how it liberally considered the veteran’s evidence.²⁷⁶ After a mere five-sentence discussion of the issue, the Board focused on the gap in time as determinative rather than liberally considering how earlier events could have later behavioral effects:

Without an additional explanation explaining how the 2004 event can explain or mitigate the misconduct in 2008, the NDRB found the characterization of the Applicant’s discharge was equitable and consistent with the characterization of discharge given others in similar circumstances.²⁷⁷

The Board did not engage with the possibility that the gap in time may simply be different from what the Board expected, rather than a sign that there was no connection between the two events. Any number of triggers could have arisen in 2008 that related to the veteran’s 2004 MST experience. Perhaps the veteran was able to cope for several years after the trauma, but then broke down under the stress. Here, had the Board used liberal consideration, the relaxed evidentiary standards would have benefited the veteran by taking some of the burden off of her.²⁷⁸ Liberal consideration would also take into account the possibility that the veteran may have difficulty presenting a complete explanation of the nexus, given the severity of the PTSD and how it has affected the veteran.²⁷⁹ Rather than look to the unrepresented veteran to present a complete and cohesive explanation of how her PTSD mitigated her behavior, the Board should have eased the burden on the veteran by looking through the lens of liberal consideration to provide some relief and honor this MST survivor’s service.²⁸⁰

In another example, the Board invoked “liberal consideration” but refused to accept a veteran’s explanation of the nexus between his PTSD and drug use. In this case, the veteran had over eleven years of active duty with numerous awards, including two Good Conduct Medals, three Meritorious Unit

274. *Id.*

275. Kurta Memo, *supra* note 145, attach. ¶ 26(e).

276. NDRB No. ND18-00046, *supra* note 267.

277. *Id.*

278. For example, liberal consideration mandates that the boards “should not condition relief on the existence of evidence that would be unreasonable or unlikely under the specific circumstances of the case.” *See* Kurta Memo, *supra* note 39, attach. ¶ 26(f).

279. *See id.* attach. ¶ 26(g) (explaining that veterans “may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran’s life”).

280. *See* Kurta Memo, *supra* note 39, attach. ¶ 26(g); *see also* sources cited *supra* note 162.

Commendations, and overseas deployments.²⁸¹ The military discharged the veteran for drug abuse, and he sought a discharge upgrade on the basis that his PTSD mitigated the drug abuse.²⁸² He explained that he used drugs “to stay awake and protect his children” and “to self-medicate for the PTSD and anxiety caused by the previous trauma.”²⁸³ Self-medication for PTSD is a known coping mechanism, and finding a nexus between PTSD and drug use is reasonable, if not the exact scenario liberal consideration grew out of.²⁸⁴

The Board mentioned liberal consideration, but cursorily applied it without explanation. With a dearth of reasoning, the Board stated that “even when viewing this case through the lens of liberal consideration, [it] did not find an adequate nexus and/or mitigation to warrant an upgrade.”²⁸⁵ The veteran had a solid and positive service record, serving “five out of the six years of the contract honorably.”²⁸⁶ He had a diagnosed mental health issue, and the Kurta Memo recognized drug abuse as a known coping mechanism for PTSD.²⁸⁷ The veteran acknowledged his mistakes, and the Board noted what it viewed as inconsistencies in the veteran’s reasons for using drugs: caring for his children and self-medicating.²⁸⁸ Rather than at least recognizing the self-medication as a symptom and even partially mitigating his status, the Board suggested that caring for children could not justify drug use even if self-medication could.²⁸⁹ It is not clear whether the Board would have upgraded the veteran’s status if he had not mentioned caring for children, because the Board did not clarify whether both bases for drug use were inadequate to establish a nexus.²⁹⁰

A. Resistance to Providing Full Relief

Liberal consideration is a veteran-friendly policy shift, designed to give veterans a “reasonable opportunity for relief.”²⁹¹ Liberal consideration encourages relief but does not require full relief in the form of upgrades to Honorable. Still, the premise of liberal consideration suggests that real and full

281. NDRB No. ND18-00333, https://boards.law.af.mil/NAVY/DRB/2018_Navy/ND1800333.rtf [https://perma.cc/8E2K-T3LH].

282. *Id.*

283. *Id.*

284. For example, in the Vietnam veteran class action lawsuit that directly led to the Hagel Memo, Class Representative Conley Monk “self-medicated with drugs” after experiencing multiple combat and racial stressors while stationed in Vietnam. Complaint, *Monk v. Mabus*, *supra* note 84, ¶ 33. He experienced flashbacks and “took drugs to cope with the symptoms of his then-undiagnosed PTSD.” *Id.* The Complaint further explained that Monk was diagnosed “with PTSD that is attributable to his service.” *Id.* ¶ 39. It continued: “Mr. Monk’s misconduct that led to his other than honorable discharge is also attributable to the PTSD he developed during the course of his military service.” *Id.* ¶ 39.

285. NDRB No. ND18-00333, *supra* note 281.

286. *Id.*

287. *See id.*; Kurta Memo, *supra* note 39, attach. ¶ 5.

288. *See* NDRB No. ND18-00333, *supra* note 281.

289. *See id.*

290. *See id.*

291. Kurta Memo, *supra* note 39.

relief comes only from an upgrade to Honorable.²⁹² The Board, however, often skirts full relief by finding in favor of granting relief based on liberal consideration, but then denying full relief on other grounds.²⁹³ It is reasonable that there could be some cases where partial relief (or no relief) is appropriate even within the liberal consideration scheme. For example, when a pattern of misconduct is so egregious as to suggest some level of willfulness or when the connection between a mental health condition and particular behavior is too tenuous. Partial relief may be better than denial, but an upgrade to less-than-Honorable does not reflect the purpose or principles of liberal consideration, especially when that partial relief is granted seemingly in disregard of liberal consideration.

For example, in a case where the Board viewed “the case with liberal consideration that the Applicant’s well-documented mental health situation mitigated the misconduct, the NDRB found the characterization of the Applicant’s discharge was inequitable and not consistent with the characterization of discharge given others in similar circumstances” for “disrespect.”²⁹⁴ If the decision ended there, the veteran would presumably have received an upgrade. Instead, the Board went on to discuss how the veteran’s commitment to a civilian treatment facility—for treatment of the documented mental health condition—was a serious offense of UA.²⁹⁵

In this confusing and contradictory decision, the Board recognized the well-documented mental health condition and the nexus between the mental health condition and the “disrespect” that led to his discharge. However, the Board ignored the nexus between getting treatment for his mental health condition and his time away from the Navy.²⁹⁶ Here, the Board did not explain how or why the mental health condition did not mitigate the resultant time away in the civilian

292. See *id.* attach. ¶¶ 24, 26(h) (implying the primacy of upgrades to Honorable).

293. See, e.g., NDRB No. ND18-00013, https://boards.law.af.mil/NAVY/DRB/2018_Navy/ND1800013.rtf [<https://perma.cc/8HJ7-L5FM>].

294. *Id.*

295. See *id.* The Board’s decision also discussed how the veteran “waived [his] right” to present his case to an administrative board before discharge and that—because he waived his right—he accepted his other-than-honorable discharge. *Id.* This waiver analysis is problematic in general given the military power dynamic between a commander and an enlisted servicemember. In the context of liberal consideration’s recognition that those original discharge decisions may have been wrong, a waiver cannot legitimately stand in for acceptance of an erroneous decision. For many servicemembers separating under stressful conditions, including other-than-honorable discharge, signing the waiver is just one more task in a stack of paperwork to complete before being released from the military, and that signature may not represent a valid waiver of rights or acceptance of discharge characterization. With PTSD due to combat, MST, or other stressors, the validity of a waiver is at least questionable. “Deeply traumatized and often very young service members may not be in any condition to make such an important decision in the aftermath of a sexual assault.” HUMAN RIGHTS WATCH, *supra* note 28, at 8. Servicemembers experiencing trauma may “not fully comprehend the characterization of the separation and would ‘take anything just to get out.’” *Id.* (quoting phone interview with a veteran). Other servicemembers, even if not experiencing trauma, may just not want to question their commander, and “[a]ll too often they fail to appreciate the consequences of a bad discharge or mistakenly believe that it will be easy to upgrade later.” *Id.*

296. See NDRB No. ND18-00013, *supra* note 293.

treatment facility in the same way that it mitigated the disrespect.²⁹⁷ This veteran had a strong record of service, with Honorable service for seven years prior to the enlistment he was on at the time of discharge.²⁹⁸ During those seven years, he earned two Good Conduct Medals, a Navy Achievement Medal, and other awards and promotions.²⁹⁹ His period of UA while in a civilian treatment facility—where he was receiving medical care for a mental health condition—seems like just the sort of circumstance liberal consideration intended to view favorably as mitigating the UA, and not as premeditated misconduct.³⁰⁰ In fact, a UA for receiving mental health treatment seems even more legitimate as a basis for relief than many other types of mental health-associated misconduct, because the reason for the “misconduct” was getting treatment for a mental health condition.

For another example, this Article returns to Navy Veteran Michelle Essex’s story in the Introduction to demonstrate how the Board avoids full relief. Michelle requested an upgrade from “Under Other Than Honorable Conditions” to “Honorable” based on MST and related PTSD, which she argued mitigated her drug abuse.³⁰¹ The Board acknowledged her documented PTSD and the nexus to her behavior, stating that “the NDRB determined [her] diagnosed PTSD and MST was a mitigating factor associated with her in-service misconduct.”³⁰² Prior to her active duty enlistment, Michelle had six years of reserve duty and received multiple awards including three Navy and Marine Corps Achievement Medals and the Naval Reserve Meritorious Service Medal.³⁰³ She served a combat tour in support of Operation Enduring Freedom, and her exemplary service was well documented in her performance record.³⁰⁴

On these facts, liberal consideration required a balancing of the MST and PTSD against the misconduct, drug abuse (a recognized coping mechanism for PTSD). But the Board did not engage in that balancing; instead, the Board found that Michelle’s “service was honest and faithful but significant negative aspects of [her] conduct outweighed the positive aspects of [her] service which warrant[ed] changing [her] discharge” to only General (Under Honorable Conditions) rather than to Honorable.³⁰⁵ The Board’s balancing was about positive and negative service aspects, not about how MST and PTSD could have mitigated her drug abuse. Thus, the Board misdirected its decision, veering away from the lens of liberal consideration.

297. *See id.*

298. *Id.*

299. *Id.*

300. *See* Kurta Memo, *supra* note 39 (ensuring “fair and consistent standards of review for veterans with mental health conditions”).

301. NDRB No. ND17-01559, *supra* note 1.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

The Board also recognized that “PTSD and MST [were] a mitigating factor.”³⁰⁶ As a basis for the partial relief of a General (Under Honorable Conditions) upgrade, the Board stated that “the NDRB does not consider PTSD as a reason to completely absolve the Applicant of her misconduct.”³⁰⁷ This statement stood on its own with no engagement with how it may be inconsistent with liberal consideration.³⁰⁸ Liberal consideration indicates that the severity of the misconduct will only outweigh the mental health condition in “some cases,”³⁰⁹ but the Board did not explain how this particular case falls into that limited scope of cases.³¹⁰ Instead, the Board seemed to use a predetermination that PTSD could not absolve misconduct, in disregard of the Kurta Memo’s guidance relevant to the facts here that “substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration.”³¹¹ The Kurta Memo further instructs that the “relative severity of some misconduct can change over time, thereby changing the relative weight of the misconduct,”³¹² yet the Board ignores this with the blanket boilerplate statement: “Violation of Article 112a though isolated, warrant[s] separation from the Naval Service to maintain proper order and discipline.”³¹³ The Board’s recognition of the violation as isolated renders its determination not to upgrade to Honorable even more egregious. This is because liberal consideration is founded on the idea that relief is appropriate when a servicemember’s infrequent or isolated misconduct resulted from a mental health condition.³¹⁴

Michelle should have benefited from liberal consideration and received a full upgrade to Honorable under the Kurta Memo. As the Kurta Memo directs, “Honorable discharge characterization does not require flawless service” but rather includes even “some relatively minor or infrequent misconduct.”³¹⁵ Because of the Board’s illiberal consideration, the Board granted partial relief to change her service characterization to “General (Under Honorable Conditions).” But, the Board did nothing to change the narrative reason for her discharge, and so she continues to carry “Misconduct (Drug Abuse)” on her DD-214 even though the Board determined some relief was appropriate.³¹⁶

The Board has also managed to deny relief by outright ignoring liberal consideration. For example, in the case of a servicemember discharged as a result of an agreement to separate from service rather than face court-martial for drug

306. *Id.*

307. *Id.*

308. *Id.*

309. Kurta Memo, *supra* note 39, attach. ¶ 18.

310. *See* NDRB No. ND17-01559, *supra* note 1.

311. Kurta Memo, *supra* note 39, attach. ¶ 19.

312. *Id.* attach. ¶ 26(i).

313. NDRB No. ND17-01559, *supra* note 1 (referring to 10 U.S.C. § 912a, which concerns “[w]rongful use, possession, etc., of controlled substances”).

314. Kurta Memo, *supra* note 39, attach. ¶ 26(h).

315. *Id.* attach. ¶ 26(h).

316. NDRB No. ND17-01559, *supra* note 1.

charges, the Board focused on “using, transporting, and possessing narcotics” as an offense warranting separation, without putting the offense in the context of liberal consideration.³¹⁷ The servicemember had documented PTSD, and the Board noted that the records “support[ed] the Applicant’s contention that his PTSD could have been a mitigating factor associated with the in-service misconduct.”³¹⁸ The Board also noted “the Applicant’s heroic and meritorious service in combat.”³¹⁹ With clear answers to the first three Kurta Memo questions (documented diagnosis, in-service, and nexus), liberal consideration requires balancing.³²⁰ However, there was no balancing in the decision. Instead, the Board left open the question of how to balance PTSD with the misconduct, and concluded by denying relief.

In these partial and no-relief cases involving mental health conditions and misconduct, the Board almost seemed to mock servicemembers by acknowledging their mental health condition, the connection between the condition and misconduct, and the potential for the condition to mitigate the misconduct. It is not clear what motivated the Board to deny relief in cases that appeared to warrant relief under liberal consideration. Still, these themes may suggest a bias in favor of the original commander’s decisions and a resistance to recognizing Honorable as other than flawless.³²¹ Thus, any solution requires grappling with these underlying limitations.

V.

STOP KICKING AND START LIBERALLY CONSIDERING: MECHANISMS FOR ENSURING LIBERAL APPLICATION OF LIBERAL CONSIDERATION AT THE NDRB

The themes described in Part IV represent shortcomings in both the liberal consideration policy itself—in terms of insufficient implementation guidance—and in the Board’s implementation of liberal consideration, and many of the themes (and decisions) reflect a mix of shortcomings. On a general level, liberal consideration’s failure at the NDRB seems to stem from two interrelated reasons. First, the Kurta Memo did not explain how liberal consideration changes deeply entrenched ideas about what Honorable means. Second, the Kurta Memo did not change existing guidance or procedures, including traditional presumptions under which the NDRB operates, or the inherent and acknowledged bias board

317. NDRB No. ND17-01210 (on file with author).

318. *Id.*

319. *Id.*

320. Kurta Memo, *supra* note 39, attach. ¶¶ 2(d), 18–19.

321. *See, e.g.,* Kennedy v. Esper, No. 3:16-cv-02010-WWE, 2018 WL 6727353, at *5 (D. Conn. Dec. 21, 2018) (noting the alleged “systematic failure of the ADRB to give proper consideration to the directive of the Hagel Memo relevant to discharge upgrade applications”); Manker v. Spencer, No. 3:18-cv-00372-CSH, 2019 WL 5846828, at *11 (D. Conn. Nov. 7, 2019) (discussing the plaintiffs’ contention that the “NDRB has systematically denied veterans a fair discharge review process”); Complaint at 3, 37, *Manker, supra* note 168 (noting the NDRB’s denial of “almost 90 percent of applications alleging PTSD or PTSD-related conditions” and describing the NDRB’s low grant rate as indicating “systemic institutional bias or secret policy”); *see also supra* note 215 and accompanying text.

members have in favor of commanders' original discharge decisions. In other words, liberal consideration created a means to relief but did not provide the infrastructure to grant relief. And the Board has not taken it upon itself to create that infrastructure, but instead continues to rely on past approaches.

At least to some extent, it seems that the Board's "reasons" for denying relief are just ways to mask the tension between what Honorable has historically meant and what Honorable can mean in the liberal consideration context. This is especially true in light of how the Board often describes an Honorable discharge as a limited characterization due to only those who deserve it:

The NDRB recognizes that serving in the all-volunteer Armed Forces is challenging but reflects a commitment to our Nation; thus, service members deserve to be recognized upon completion of their service. One of the ways in which our service members are recognized is through the determination of their characterization of service. Most servicemembers, however, serve honorably and therefore earn their Honorable discharges. In fairness to those Marines and Sailors who served honorably, Commanders and Separation Authorities are tasked to ensure that undeserving servicemembers receive no higher characterization than is due.³²²

In this statement, the Board implicitly rejects an expansive interpretation of Honorable, even though that is exactly what liberal consideration contemplates as a result of no longer punishing servicemembers for having mental health conditions that mitigate misconduct.³²³ Though the NDRB does not explicitly define Honorable as limited, this oft-repeated blanket statement about declining to upgrade a discharge to preserve the honor and fairness to others with an Honorable discharge suggests that the Board's standard is "flawless." This standard persists even though neither DoD's guidance nor the Navy's guidance requires flawless service to justify an Honorable characterization. Furthermore, the Board's statement about "undeserving servicemembers" suggests that upgrading other-than-honorable discharges would somehow taint original Honorable discharges.³²⁴ These limitations of liberal consideration under the Kurta Memo serve as a starting point for strengthening implementation.³²⁵

A. *Redefining Honorable in a Liberal Consideration World*

Liberal consideration requires tolerance, open-mindedness, and receptiveness to change. The NDRB must suspend its disbelief that mental health conditions can mitigate bad behavior to the extent that an Honorable discharge

322. NDRB No. ND18-0047, *supra* note 211.

323. See sources cited *supra* note 162.

324. Without advancing any supporting evidence, the Board often relies on this assumption—that upgrading would have an effect of undermining others' Honorable service.

325. There are probably solutions at the Separation Authority level, as well, that would prevent the military from discharging servicemembers with an other-than-honorable discharge in the mental health-misconduct scenarios, but that is not the focus here.

is justified. The Board has to get away from its traditional approach: refusing to upgrade and confirming the punishment (or discipline) that the Separation Authority issued. Under liberal consideration, the Board needs to end the practice of providing only partial relief in the form of General discharges. The Board's denial of many discharge upgrade requests under ostensibly liberal consideration is a failure to implement policy; the denial also perpetuates injustice for those who have served.

To that end, "Honorable" in the context of Honorable discharge requires an update. Honorable should be reimagined in the context of all that is known about mental health conditions and behavior, as experienced by servicemembers. Rather than punishing servicemembers for how their bodies and minds reacted to what they experienced while in service, discharge characterizations should consider service fulfilled despite health challenges and should avoid a requirement of flawless service. Honorable characterizations in cases where misconduct is linked to mental health conditions also reflect the nature of the unwritten contract between the service and the servicemember: to leave no man or woman behind.³²⁶ To truly leave no man or woman behind, to erase the historic hostility and bias against what is viewed as weakness when it is in fact a mental health condition, and to remove the punitive nature of other-than-honorable discharges, "Honorable" must be viewed expansively through the lens of liberal consideration. Redefining Honorable does not mean lessening the value or honor to those who already have an Honorable discharge, but instead more fairly recognizes a range of service and more accurately reflects a changing military and society.

With authority over each service branch, DoD should ultimately mandate any redefinition of "Honorable," with each branch implementing the change in its own service-specific documents. As a reminder, DoD defines Honorable as "service [that] generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate."³²⁷ The services each define Honorable similarly.³²⁸

326. See, e.g., Charles Bausman, *Leave No Man Behind- Implications, Criticisms, and Rationale*, MOUNTAIN TACTICAL INST. (Sept. 2, 2016), <https://mntactical.com/knowledge/leave-no-man-behind-implications-criticisms-rationale/> [<https://perma.cc/BU4T-ZG7G>] ("'Leave No Man Behind' is a creed and ethos often repeated and adhered to by various units and soldiers."); Sean D. Naylor & Christopher Drew, *SEAL Team 6 and a Man Left for Dead: A Grainy Picture of Valor*, N.Y. TIMES (Aug. 27, 2016), <https://www.nytimes.com/2016/08/28/world/asia/seal-team-6-afghanistan-man-left-for-dead.html> [<https://perma.cc/A6MA-EXFE>] ("Like some other military units, Team 6 accepts as an article of faith that its members never leave a fallen comrade behind. While that can be difficult to fulfill, it is a creed as old as warfare itself, a pact with those facing great peril. Abandoning a wounded man to fight and die by himself, however inadvertent, officers say, would be devastating.").

327. DoDI 1332.14, *supra* note 43, enclosure 4, para. 3(b)(2)(a).

328. See, e.g., AR 135-178, *supra* note 47, para. 2-9(a) (defining Honorable as "appropriate when the quality of the Soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate"); MILPERSMAN 1910-304, *supra* note 48, para. 1, at 1 (defining

A redefinition project should involve various stakeholders working collaboratively toward a new definition, and should not rely solely on high-level DoD officials at the development stage.³²⁹ These stakeholders include active-duty servicemembers and veterans; officers and enlisted personnel; mental health care providers; representatives from Veteran Service Organizations;³³⁰ veterans' advocates; veterans law clinic directors; and law professors. The stakeholders should craft an explicit statement supporting the idea that Honorable includes service by someone who experienced a traumatic event, PTSD, or another mental health condition, and acted consistently with symptoms of that condition, even when those actions would otherwise be defined as misconduct by the UCMJ.

There are three considerations in redefining Honorable to account for liberal consideration, the evolving nature of military service, and a changing society. First, a reimagined definition of Honorable should be more inclusive, explicitly rejecting a requirement of flawless service and explaining the standards of acceptable conduct and performance within a range that includes behavior consistent with a mental health condition. The new definition should grapple with the concept of good order and discipline and what that means in the context of mental health conditions that today's military servicemembers experience. Rather than focusing on good order and discipline from the exclusive perspective of commanders charged with "tight control over their forces,"³³¹ a new definition should account for a broader understanding of military service.

Second, the definition should include language about mental health conditions and how they can mitigate behavior that may otherwise be categorized as misconduct. For example, the definition could say something like: "In the recognition that military service can include stressors that cause PTSD or other mental health conditions, servicemembers should not be punished for behavior related to these conditions and instead should be recognized for their service in spite of these challenges." Alternatively, the definition could provide: "Honorable service includes behavior that may be categorized as misconduct under the UCMJ but is actually behavior consistent with a mental health condition due to military service." A redefinition should clarify that the

Honorable as "[when] the quality of the member's service generally met the standard of acceptable conduct and performance for naval personnel, or is otherwise so meritorious that any other characterization of service would be clearly inappropriate").

329. Such a collaboration has also been proposed by Human Rights Watch in regard to developing a "working group with representatives from each service's Board, civilian lawyers, and veterans' organizations to study standards for granting relief, determine best practices and procedures, and make recommendations for uniform standards and procedures to be included in revised Defense Department instructions." HUMAN RIGHTS WATCH, *supra* note 28, at 118.

330. OFFICE OF THE SEC'Y, U.S. DEP'T OF VETERANS AFFAIRS, VETERANS AND MILITARY SERVICE ORGANIZATIONS, <https://www.va.gov/vso/VSO-Directory.pdf> [<https://perma.cc/6GQ5-6CK3>].

331. Weber, *supra* note 52, at 160.

connection between behavior and mental health recognizes the servicemember's honor and commitment to service while facing mental health challenges.

In the context of mental health conditions, there could also be a bifurcated definition of Honorable: one for a commander's original discharge decision, and one for an upgrade decision. This could be particularly effective when a servicemember is discharged for misconduct without a mental health condition diagnosis, but later presents a post-service diagnosis to a discharge review board. For example, an Honorable definition for discharge upgrades could include language such as: "Honorable service includes service by a servicemember originally discharged for misconduct when it is later determined that an in-service mental health condition mitigates that misconduct under liberal consideration."

Third, the definition or guidance accompanying the definition should explain that the discharge characterizations should reflect military and societal changes. The definition should make room for the "significant modifications" to warfare, "the pool of people from which the military draws," and "society's expectations on how military members will be treated."³³² For example, the definition could add language to account for the specific context of the servicemember's service. Instead of defining Honorable as justified when "the quality of the member's service generally met the standard of acceptable conduct and performance for naval personnel,"³³³ the definition could broaden the definition to recognize quality as holistic and the standard as modified by particular duty assignments. An example of this change could be: "[based on a holistic assessment,] the quality of the member's service generally met the standard of acceptable conduct and performance for naval personnel [in the particular duty assignment(s)]."

The definition should also outline how the historical severity of some misconduct can change over time to become less severe, as a way to force the boards to see the changing landscape, so the boards are not blinded by traditional views on behavior. For example, the Kurta Memo recognizes that "marijuana use is still unlawful in the military but it is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe today than it was decades ago."³³⁴ The military is an organization of tradition; it changes very slowly and often with heavy resistance, but a definition that acknowledges changing views can force commanders and discharge review boards to grapple with outdated assumptions that no longer warrant an other-than-honorable discharge.

If defining Honorable with all these considerations proves too complex, DoD could provide a general definition and then go into details in subsections.

332. *Id.* at 161; *see also id.* at 176–77 (proposing a "workable definition of good order and discipline").

333. MILPERSMAN 1910-304, *supra* note 48, para. 1, at 1.

334. Kurta Memo, *supra* note 39, attach. ¶ 26(i). Note that changes to the UCMJ would be an additional forward-looking step, but that is beyond the scope of this Article.

DoD could add language to the definition to remind the boards that a discharge decision must be made on an individual basis. For example, the phrase “acceptable conduct and performance of duty for military personnel,”³³⁵ could be modified to include “under the circumstances,” to acknowledge the variety of situations military personnel experience and to require the boards to fully consider the particular circumstances of each case.

To the extent that structuring a definition may prove challenging given the various stakeholders’ interests, the stakeholders should not let the challenge stop them from working toward a compromise, even if that compromise yields a complicated result. There is plenty of existing complexity and specificity in many DoD and military policies and procedures. Furthermore, none of the proposed changes would mean that suddenly everyone receives an Honorable discharge. The military may also need to slightly alter the remaining discharge characterizations, but these characterizations would not be substantively affected by expanding the meaning of Honorable. Moreover, misconduct unrelated to a mental health condition would not necessarily warrant an Honorable discharge under a new definition, though there may be room for a relaxed view of some behavior in line with societal changes. For example, as described above, an isolated instance of recreational marijuana use that is not connected to a mental health condition might still warrant an upgrade given changing societal norms. The stakeholders should work towards a compromise, even if doing so seems challenging.

A broader definition of Honorable would not, as the Board suggests, be unfair to other servicemembers because broadening the definition would not change the quality of service.³³⁶ Unfairness would result from designating Honorable to someone who did not meet the definition; for example, someone with multiple violations of the UCMJ and no mental health condition to mitigate the violations, someone with a mild mental health condition that could not be connected to subsequent misconduct, or someone with a mental health condition and misconduct that was connected to something else (e.g., stealing to pay off a gambling debt or defacing property as artistic expression).

Accordingly, an expanded definition merely accounts for the evolving understandings of mental health and behavior in a liberal consideration world. Acknowledging that some behavior historically labeled as “misconduct” is actually coping behavior connected to a mental health condition, and recognizing that service under those conditions is as honorable as service completed without a mental health condition and resulting misconduct, only serve to raise the overall profile of military service in modern times. The fact that the number of Honorable discharges could and should increase under an expanded definition does not diminish other veterans’ Honorable service. Rather than continuing to dismiss veterans with mental health conditions and records of misconduct as

335. DoDI 1332.14, *supra* note 43, enclosure 4, para. 3(b)(2)(a).

336. *See, e.g.*, NDRB No. ND18-00471, *supra* note 211.

“undeserving,” a reimagined definition would reflect a better, fairer, and more just understanding of the various parameters of Honorable service.

With a more expansive definition that incorporates the underpinnings of liberal consideration, the NDRB would have a better infrastructure within which to make decisions.³³⁷ Of course, given its track record, there may be little reason to think the Board would fully comply with a more expansive definition just because it was supposed to.³³⁸ For this reason, additional, more specific changes are required, as discussed in the following Section.

*B. Revising Presumptions, Policies, and Procedures to Resolve
Inconsistencies Between Liberal Consideration and Service-specific
Procedural Guidance*

In addition to reimagining the meaning of Honorable, there are numerous presumptions, policies, and procedures that also require revision for consistency with liberal consideration and a more expansive meaning of Honorable. Given the number of presumptions, policies, and procedures involved in the boards’ decision-making, including some that may be unstated,³³⁹ this Article offers some initial suggestions.³⁴⁰

*1. Eliminate the Presumption of Government Regularity in Cases
Involving Mental Health Conditions*

One of the most powerful bases to deny discharge upgrade requests is the presumption of government regularity.³⁴¹ The boards treat this regulatory presumption as a blanket justification for denying relief.³⁴² In other words, when the boards invoke the presumption, all other considerations seem to fall away. That approach, however, is inconsistent with liberal consideration that, in essence, undermines the nature of a presumption of government regularity. Given the inherent and acknowledged bias board members have in favor of the

337. A more expansive or current definition could also lead to fewer other-than-honorable discharges at the time of discharge, and that change would also be a win for servicemembers with mental health conditions, but my focus here is about relief at the discharge review board for the thousands of veterans already discharged.

338. See *supra* Part IV (discussing the Board’s failure to implement liberal consideration).

339. See, e.g., Complaint, *Manker*, *supra* note 168. The prayer for relief includes injunctive relief to require the NDRB to “establish[] constitutionally and statutorily compliant adjudication procedures, including, but not limited to, publication of secret policies, improved training of agency personnel, and clarified evidentiary standards,” and also “to ensure that the [NDRB] meaningfully and consistently applies its own procedural standards in considering the effects of class members’ PTSD when determining whether to upgrade their discharge statuses.” *Id.* at 41.

340. Of course, DoD policy change alone has been inadequate, but service-level policy change consistent with a redefined, more expansive and inclusive understanding of Honorable would at least create the opportunity to push the boards in the right direction.

341. 32 C.F.R. § 724.211 (2018) (“There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.”).

342. See *supra* Part IV.A.

commanders who made the original decisions,³⁴³ this presumption of government regularity creates too high a burden for veterans seeking upgrade related to a mental health condition.

The underlying point of liberal consideration is that commanders were unfairly discharging servicemembers with other-than-honorable discharges. The unfair discharges focused on the misconduct while ignoring the existence of PTSD and other mental health conditions that could explain the misconduct as behavior consistent with the mental health condition rather than as willful misconduct. When the NDRB relies on the presumption of regularity to deny relief in the liberal consideration world, it is reaffirming what may have been unfair in its regularity. In other words, “regular” does not mean “right” in the context of how the military has responded to mental health conditions and misconduct in the past. Presuming government regularity as a mechanism for denying a discharge upgrade request is inconsistent with liberal consideration’s recognition that past decisions may have been wrong, or at least inequitable. Therefore, the NDRB must at least recognize this contradiction, stop relying on the presumption as a strong justification for denying relief, and more fully engage in the review of discharge decisions through the lens of liberal consideration. Without letting go of the presumption, the Board cannot truly and fully apply liberal consideration.

To eliminate the presumption of government regularity in cases involving mental health conditions, DoD could issue clarifying guidance. A potential guidance statement could read: “In cases involving mental health conditions diagnosed in-service, there is no presumption of government regularity in the discharge decision.” For those cases involving no in-service diagnosis, but with a post-service diagnosis, the guidance could be something like this:

In cases involving mental health conditions unknown to the separation authority at the time of discharge but later diagnosed, the presumption of government regularity does not override the principles of liberal consideration. Even though an original discharge decision may have been regular, liberal consideration recognizes the potential inequity given the post-service diagnosis. Thus, no decision may rest solely on the presumption of government regularity and that presumption will not automatically outweigh any potential mitigation due to a mental health condition.

Ideally, new guidance would force the boards to grapple with the presumption of regularity and how it does not work in the context of mental health conditions and misconduct—or at least recognize how it does not work exactly the same way as it did before liberal consideration. This change would also make it harder for board members to act on their bias in favor of the commanders. Without the presumption to rely on as a complement to bias against the veteran, the boards

343. See *supra* note 215 and accompanying text.

would necessarily have to more fully consider each discharge upgrade request related to a mental health condition.

To take this proposal to eliminate the presumption of government regularity even further, the Board can interpret liberal consideration as creating a veteran-favorable presumption and rejecting the traditional government-favorable presumption of government regularity. This is consistent with the Kurta Memo's guidance to recognize veterans as "victim[s] of injustice" rather than as wrongdoers.³⁴⁴ Within such a presumption, instead of applying government regularity to deny relief as usual, the Board would presume that the government's regularity was actually problematic in assigning a less-than-honorable discharge in the first place. That presumption may not be enough to grant relief, but it would tip the balance toward finding in favor of the veteran rather than simply affirming a commander's decision.

2. *Limit Discretion in Some Cases for Presumptive Relief Under Liberal Consideration*

To improve compliance with liberal consideration (as well as combat the admitted bias the NDRB has against the "unsophisticated" veterans and in favor of their peer-commanders), DoD could limit the boards' discretion. To that end, DoD could mandate upgrades under certain conditions such as mental health or PTSD. Other advocates have called for similar presumptions.³⁴⁵ For example, liberal consideration could require an upgrade to Honorable when the following elements are satisfied:

1. veteran has a documented mental health diagnosis;
2. veteran's misconduct was of a certain type (e.g., drug use or UA for a limited number of days); and
3. there is evidence supporting the connection between the mental health condition and the misconduct, such as general research showing the type of behavior likely related to the mental health condition.³⁴⁶

344. Kurta Memo, *supra* note 39, attach. ¶ 26(j).

345. See, e.g., HUMAN RIGHTS WATCH, *supra* note 28, at 122 (recommending that Congress "[c]odify a presumption for veterans with documented PTSD that the PTSD contributed materially to discharge classification"); SIDIBE & UNGER, *supra* note 26, at 9 ("Legislation should codify a presumption of record correction for veterans with documented PTSD so that boards continue to improve their handling of PTSD-related discharge upgrade applications."); see also *supra* Part V.B.3.

346. DoD could consider creating specific metrics mandating an upgrade in some cases and allowing discretion in others. For example, a documented PTSD diagnosis, two instances of drug use, a nexus between the PTSD and drug use, and no other misconduct could be a scenario requiring an automatic upgrade. On the other hand, a documented PTSD diagnosis, five instances of drug use, a nexus between the PTSD and the drug use, and no other misconduct could require the Board's discretion in applying liberal consideration due to the number of instances of drug use. Any changes to establish presumptive relief would also require updating service-specific instructions as illustrated by the examples in this part. For example, if drug use is recognized as a mitigated behavior in mental health condition cases, instructions requiring mandatory processing for administrative separation for drug use—regardless of grade, performance, or time in service—would have to be revised. The Kurta Memo

This presumptive approach eliminates the balancing that the Kurta Memo requires,³⁴⁷ to minimize the boards' discretion. DoD could decide which categories of minor misconduct are presumptively mitigated by mental health conditions and require the boards to upgrade in those scenarios. This approach would also prevent the boards from falling back on government regularity or other presumptions to avoid granting relief, and help prevent bias against the veteran.

3. *Revise Navy Instructions for Consistency with Liberal Consideration*

All services have their own instructions governing separation procedures in addition to the general DoD guidance. The examples here focus on Navy instructions but are applicable to all the branches. Given the specificity of Navy instructions governing discharges and discharge upgrades, change is needed to comply with liberal consideration as it exists and further develops. For example, the Navy has not updated its instruction for NDRB procedures and standards since December 22, 2004, well before liberal consideration was implemented.³⁴⁸ This gap may offer some explanation for the NDRB's failure to implement the Kurta Memo guidance because the Board may view compliance with the Navy-specific instruction as more precedential than the general DoD guidance. To eliminate any conflict, the Navy instruction should be revised for consistency with liberal consideration. To the extent that there is a new definition of Honorable, the Board still needs revisions such as those proposed here to comply with that new definition.

In other words, to the extent that there is some overlap between the proposal to redefine Honorable and the suggestion to revise Navy instructions, this is intentional. For example, the conflict between liberal consideration and the presumption of government regularity as it currently exists should be resolved in Navy policy. Navy policy recognizes the presumption of government affairs generally and also within the context of how to review evidence and testimony. In both instances, revision is needed for consistency with liberal consideration. The following examples show the existing language of the instruction in regular text followed by the proposed language for resolving the conflict in italicized text.

Example 1:

Existing Text of Instruction:

211. Regularity of Government Affairs

explains that drug use may be viewed as consistent with mental health conditions and opens the door to a less strict view on drug use. However, without a corresponding change in Navy policy, the NDRB may uphold a discharge under Navy policy even if inconsistent with liberal consideration.

347. Kurta Memo, *supra* note 39, attach. ¶ 18.

348. SECNAVINST 5420.174D, *supra* note 70. Even though the Navy website lists December 16, 2015, as the "modified" date, the instruction was last updated December 22, 2004. *Id.* app. D.

There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.³⁴⁹

Proposed Revision:

211. *Regularity of Government Affairs*
- a. *In cases not involving mental health conditions, there is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied unless there is substantial credible evidence to rebut the presumption.*
 - b. *In discharge upgrade applications involving a mental health condition³⁵⁰ as potentially mitigating the misconduct that was the basis for discharge, the presumption of regularity in the conduct of government affairs shall not apply. Instead, the Board will apply the liberal consideration policy guidance set forth in the Kurta Memo to fully consider the discharge upgrade request with the understanding that the government has no favored position in cases involving discharges with diagnosed or undiagnosed mental health conditions.*

Example 2:

Existing Text of Instruction:

403. *Conduct of Reviews*
- m. *Evidence and Testimony*

(6) There is a presumption of regularity in the conduct of governmental affairs. This presumption will be applied in any review unless there is substantial credible evidence to rebut the presumption.³⁵¹

Proposed Revision:

403. *Conduct of Reviews*
- m. *Evidence and Testimony*
- (6)(a) *In cases not involving a mental health condition, there is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied unless there is substantial credible evidence to rebut the presumption.*
- (b) *In discharge upgrade applications involving a mental health condition as potentially mitigating the misconduct that was the basis for discharge, the presumption of regularity in the conduct of*

349. *Id.* para. 211.

350. An alternative proposal is to include the Kurta Memo's specifically named mental health conditions, "PTSD; TBI; sexual assault; and sexual harassment," *supra* note 39, attach. ¶¶ 26(d)–(e), as a way to limit the change to the presumption. But that list could prove too restrictive as more becomes understood about mental health conditions and military service. A broader term here would allow room for developments in the research of mental health conditions and their relationships to behavior, as well as create flexibility to respond to the evolving nature of the military.

351. SECNAVINST 5420.174D, *supra* note 70, para. 403(m)(6).

government affairs shall not apply. Instead, the Board will apply the liberal consideration policy guidance set forth in the Kurta Memo to fully consider the discharge upgrade request with the understanding that the government has no favored position in cases involving discharges with diagnosed or undiagnosed mental health conditions.

(c) Liberal consideration relaxes the evidentiary standard in the veteran's favor.

These changes would eliminate the conflict between liberal consideration and the presumption of government regularity in cases involving mental health conditions. The absence of the presumption would force the Board to grapple with liberal consideration to explain its decisions.

These suggestions are offered as examples of the comprehensive changes needed to resolve conflicts between liberal consideration and service-specific policy. The Navy and all services should conduct a comprehensive review of internal policies and procedures, identify all the conflicting provisions, and update them accordingly. Though this Article does not identify and offer revision for every Navy policy in need of updating to comply with liberal consideration, the examples here could serve as templates for the rest of the work.

4. Improve Oversight and Accountability for Compliance with Liberal Consideration

Greater and enforced accountability for the boards' compliance with liberal consideration is critical. One way to improve accountability by eliminating or at least lessening bias against upgrades would be to rebuild the boards themselves with all new members, including a medical practitioner and a lawyer. Again, considering the NDRB as an example, one approach would be to remove all existing board members and the president of the NDRB in light of the deeply rooted bias and little likelihood that the Board would on its own suddenly comply with liberal consideration. Even though the Board regularly rotates, a completely fresh start may be the most likely path to success. Such a measure, however, could displace institutional knowledge and raise questions of consistency and continuity.

A more tempered approach would be to restructure the Board over time to change the pool of board members to always include junior and senior enlisted personnel and non-veteran civilians. For example, a five-member board could include two enlisted personnel (one junior and one senior), two officers, and one civilian with no prior military service. Changing the membership and the pools of members will at least limit the overwhelming bias in favor of commanders' decisions. Enlisted servicemembers may not necessarily favor upgrades, but they may offer a perspective for the experiences that led to their fellow enlisted servicemembers requesting discharge upgrades. Moreover, including a civilian on the board presents an opportunity for a broader perspective free from any

biases or presumptions developed as part of military service. Thus, with only two officers on a five-member board, the opportunity for bias is minimized. With these former commanders in a minority, the officers may contribute to an overall higher quality of decision-making that requires grappling with issues that may have gone unaddressed or received only superficial attention under the current Board's makeup.³⁵²

Additionally, each board should include at least one medical practitioner. There is already a statutory requirement that the boards "shall include a member who is a clinical psychologist or psychiatrist, or a physician with training on mental health issues connected with [PTSD] or [TBI]" in specific cases.³⁵³ These special cases are limited to diagnosed mental health conditions. The requirement should expand to include a clinical psychologist or psychiatrist, or a specially trained physician, for all cases involving mental health conditions, specifically including those without a diagnosis. This would create the opportunity for some medical evaluation of the record and at least potentially interrupt the boards' historical response to reject upgrade requests in the absence of a diagnosis. Even though there may be some efficiency lost for those upgrade applications that do not involve mental health conditions, there may be veterans who do not specifically identify a mental health condition as part of their request for a discharge but have indicators in their record that a medically trained board member could recognize or identify as a basis to request additional information before making a decision.

Furthermore, at least one lawyer or judge should be on each board, perhaps even as a non-voting member. Adding a law-trained member to the board could strengthen the decision-making process because lawyers are trained to read, interpret, and apply the law. The Kurta Memo's guidance is robust and complicated, creating a challenging framework for anyone, but perhaps even more so for the typical non-lawyer board members. Lawyers and judges are held to, and often hold themselves to, ethical standards of professionalism and accountability.³⁵⁴ They understand the critical need for substantiating decisions and avoiding bias. A lawyer's presence on the board could inject these ethical

352. In response to the backlogs and varied approval rates among the service boards reported in 2018, Representative Jackie Speier proposed a unified review board to ensure fairness. Shane, *supra* note 77. A unified review board could lead to easier oversight and accountability of a single board, but a consolidated board may not necessarily lead to more efficiency or consistency. *Id.* In any event, the process of creating a unified board would not in itself solve the problems with illiberal application of liberal consideration. An overhaul of the process has also been proposed by Human Rights Watch. Human Rights Watch concluded that there needs to be wholesale changes in how the military reviews such discharges, including the right to hearings where military personnel can tell their stories. See HUMAN RIGHTS WATCH, *supra* note 28, at 13. Cases should be recorded, summarized, and available to petitioners to help guide their appeals. *See id.*

353. 10 U.S.C. § 1553(d) (2018).

354. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018) (describing the basic client-lawyer relationship as one requiring "legal knowledge, skill, thoroughness and preparation"); MODEL CODE OF JUDICIAL CONDUCT canon 1 (AM. BAR ASS'N 2001) (recognizing values of "independence, integrity, and impartiality").

standards into the board's operations and decision-making, to the benefit of both the veteran applicants and the board members.

Accountability also requires more individualized attention in decisions. Like the other boards' decisions, many of the NDRB's decisions reflect boilerplate responses, and the nature of boilerplate indicates a lack of the individualized attention that liberal consideration requires. That decisions have the same "reasons" for denial before and after liberal consideration also suggests that the boards have not complied with liberal consideration to the extent that it requires a different approach to decision-making. Here, an internal, non-judicial method of oversight would be helpful to ensure compliance with liberal consideration. Even an artificial-intelligence method could check for whether the boards' approach to decisions is individualized by identifying all phrases, sentences, and paragraphs that are repeated in decisions. Of course, to some extent, reuse of language makes sense: it is an efficiency tool and many of the decisions do involve similar facts and issues. However, liberal consideration requires that the Board do more; efficiency does not outweigh liberal consideration's overall purpose of fairness and justice.

A robust training program would also help with accountability and create opportunities for growth in how the boards function. For example, implicit bias training could be an effective method for board members to learn to recognize when their implicit biases are getting in the way of liberal consideration.³⁵⁵ The boards could also consider joint training with one another to share and learn best practices and work toward more consistency among the boards. This joint training could be a particularly effective method for contributing to revised DoD standards with buy-in from all the services. Of course, training is time away from the hearings and decisions in an already-backlogged system, but additional delays are worth an overall better process and result for veterans.³⁵⁶

Finally, in terms of accountability, the boards must comply with reporting requirements. The Board is currently not meeting its reporting requirements or its public reading room requirements, and there seems to be no penalty for these

355. Given that the board members typically have a non-law-trained background, another potential training would cover how boilerplate language is insufficient for the often-complex issues raised in discharge upgrade decisions to better equip the board for the individualized decision-making process.

356. The National Defense Authorization Act for Fiscal Year 2020 (NDAA) calls for more training for board members and other improvements. The Act directs the discharge review boards and military records corrections boards to seek "advice and counsel . . . from a psychiatrist, psychologist, or social worker with training on mental health issues associated with post-traumatic stress disorder or traumatic brain injury or other trauma." 10 U.S.C. § 1552(g)(2) (2020). The statute also requires the Defense Secretary to establish a final review procedure giving the Defense Secretary authority to review a discharge upgrade request and to recommend upgrade to the Secretary of the military department. 10 U.S.C. § 1553(a) (2020). The boards' training curriculum has been expanded to include the topics of sexual trauma, intimate partner violence, spousal abuse, and "various responses of individuals to trauma." § 1553 note. The NDAA also calls for reducing the required number of board members from five to "not fewer than three." § 1553(a).

shortcomings.³⁵⁷ To increase accountability, DoD should implement new standards to ensure accurate and timely reporting of data, commit to a redeveloped website that allows future applicants to access decisions in ways that help them understand how to write a successful application, and reprimand board members for their failures in these areas.³⁵⁸

Improved accountability during the discharge process is also worth mentioning here. As awareness of the relationship between PTSD and combat-related activities, military sexual assault, or sexual harassment has grown, military leaders should take on the burden of providing fair discharges at the outset, to avoid any need of a later upgrade. A more expansive meaning of Honorable would also help here, to encourage a cultural shift in how the military makes discharge decisions. Liberal consideration should be the driving force both at the discharge review boards and also at the command-level decisions when faced with servicemembers experiencing mental health conditions. Instead of focusing on “the effects of substance abuse . . . on . . . discipline and performance,”³⁵⁹ for a case involving PTSD, commanders should, as is consistent with liberal consideration, consider PTSD as mitigating the behavior. Without change on the inside consistent with change at the discharge review stage, military leaders will continue on the same path, funneling the next generation of the forgotten on to the discharge review boards where, so far, veterans have every reason to expect the same historic hostility.

CONCLUSION

The ongoing class action lawsuits serve as a potential enforcement mechanism for liberal consideration and may create a path to a broader solution. Just as the Vietnam veterans’ class action lawsuit led to the Hagel Memo’s introduction of liberal consideration, the *Kennedy* and *Manker* class actions may lead to further policy guidance. However, as has been demonstrated, policy guidance alone will not solve the problems at the discharge review boards. Furthermore, based on the specific definitions of the classes, the *Kennedy* and *Manker* cases can potentially provide relief only to a limited group. Veterans,

357. See *supra* note 200 and accompanying text. Even though the public reading room is again available, the decisions are not “indexed in a usable and concise form so as to enable the public, and those who represent applicants before the DRBs, to isolate from all these decisions that are indexed, those cases that may be similar to an applicant’s case and that indicate the circumstances under or reasons for (or both) which” a request was granted or denied. See 32 C.F.R. § 724.810(d) (2018). In the context of requesting records from the Board for Correction of Naval Records, the Navy has established itself as resistant to sharing records. Without increased accessibility, “it will remain difficult to conduct a more comprehensive and accurate assessment of the branch’s performance regarding PTSD-based claims.” SIDIBE & UNGER, *supra* note 26, at 7. Human Rights Watch also called for “searchable and accessible” decisions and “[enforcement of] the requirement that Boards publish, summarize, and index all decisions.” HUMAN RIGHTS WATCH, *supra* note 28, at 121.

358. “The development of discharge upgrades and the Department of Defense’s retooling of regulation to prevent unjust discharge from occurring in the first place will be worth tracking in the next few years as these efforts come to fruition and spark new efforts.” Simcox, *supra* note 26, at 572.

359. Chapman, *supra* note 28, at 14.

whether included in a class or not, deserve to be recognized for their honorable service, especially when that service comes at the cost of a mental health condition.

With some or all of the proposed changes described above to redefine Honorable or revise internal policies and procedures, there will be a need to reconsider prior board decisions denying relief. That will be a daunting task, but well worth it for those who were previously denied true liberal consideration. For example, a temporary review board could review Michelle's case and grant relief in the form of an Honorable discharge without requiring any additional documents from her. On the record alone, there is enough to grant relief, consistent with liberal consideration and an expanded definition of Honorable. This review should be done for all liberal consideration cases that were denied relief or granted only partial relief.

Future applicants and their advocates should use the boards' weaknesses to strengthen their applications. For example, with an understanding of the boards' bias in favor of the original discharge decision, an application should remind the board that liberal consideration requires abandoning that bias and giving full liberal consideration to an upgrade involving a mental health condition. Future applicants could also stress how an expanded definition of Honorable is consistent with liberal consideration to show the board that they are deserving of an Honorable discharge. Upgrade requests should be reframed to show how a veteran deserves an Honorable discharge because he suffered or suffers from a mental health condition and because that condition mitigates his misconduct. With that approach, the boards may be more likely to extend the hand of liberal consideration to honor these other-than-honorably discharged veterans and break the kicked out-kicked again cycle.

