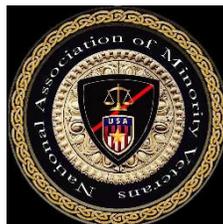

NO JUSTICE, NO PEACE:

THE MILITARY'S FAILURE TO REPAIR RACIAL TRAUMA OF BLACK VETERANS



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Executive summary

The U.S. military has grappled with racism throughout its history -- from formal segregation, to informal cultural racism, to the recent controversies around racist symbols and statues at military bases. Whether formal policies, or informal internal culture, every manifestation has significantly impacted the careers of Black, Indigenous, and servicemembers of color.

A consequence of this racism has been disparate disciplinary practices and “bad discharges” for servicemembers of color.¹ A bad discharge is a less than honorable discharge. Every service member receives a character of discharge when leaving the military. The military has six primary character of discharge categories: honorable, general under honorable conditions, other than honorable, bad conduct, dishonorable, and uncharacterized. Only two of those—honorable and general—provide access to Veterans Affairs (VA) benefits. Several other veterans’ benefits, like state and county resources or insurance through the private company USAAA, require an honorable discharge. The remaining discharge categories, called “bad discharges,” follow a veteran for the rest of their lives affecting employment, housing, and many other opportunities.

The remedy for a veteran with an unfair bad discharge is a discharge upgrade. A discharge upgrade not only corrects a veteran’s discharge paperwork but opens opportunities for VA and other veterans’ benefits. Veterans must apply for a discharge upgrade through one of the correction boards in their branch. Each military branch has two boards: (1) a discharge review board (DRB) for veterans within 15 years of discharge, and (2) a board for correction of military records (BCMR) for all other veterans and those denied at the DRB. Both Boards have authority to upgrade a discharge based on unfair discrimination/racial trauma.

¹ Don Christensen, Col. (ret.) & Yelena Tsilker, *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System*, PROTECT OUR DEFENDERS, (2017) (available at: https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf) ; DEPARTMENT OF DEFENSE, *The Administration of Military Justice in the Armed Forces* (1972) (available at: <https://ctveteranslegal.org/wp-content/uploads/2013/03/DoD-Task-Force-on-the-Administration-of-Military-Justice-in-the-Armed-Forces-v1.pdf>).

These correction boards are the military's final opportunity to correct past wrongs and injustices.²

While the path to an upgrade is difficult—long wait times and low grant rates—the military has been more lenient when aggregate research shows historical injustice to a particular category of veterans. A prominent example is veterans with posttraumatic stress disorder (PTSD) and traumatic brain injury (TBI). In 2014, after aggregate research revealed veterans were unfairly discharged for symptoms of PTSD and TBI, then-Secretary of Defense Chuck Hagel created a more lenient standard for veterans requesting an upgrade based on mental health.³ Secretary Hagel also committed to increased outreach to veterans eligible for this accessible path to upgrade.⁴ In 2015, under this new policy grant rates for PTSD and TBI claims increased from 3.7% in 2013 to 45%.⁵

Most administrative and civil courts have statutes of limitations that restrict the time available for a victim to seek redress from employment discrimination or harassment. The virtually unlimited timeframe for seeking discharge upgrade applications provides military correction boards a rare and unique opportunity to make at least some amends for discrimination and trauma on a vast scale. As our nation continues to grapple with the injustices of our past, military correction boards are a unique venue for reconciliation.

To determine how effective military correction boards have been in addressing racism through discharge upgrades, the Legal Aid Society of Columbus evaluated the past 10 years of discharge upgrade decisions. During LASC's initial review of the available data, we found that despite consistent research showing racial disparities in bad discharges and military discipline, very few discharge decisions mention discrimination at all. Of the thousands of applications each board gets in a single year, none of the Boards had more than

² 10 U.S.C. 1552 (a)(1) ("The Secretary of a military department may correct any military ... if necessary to correct an error or remove an injustice."); 32 C.F.R. § 70.9(a) (DRBs authorized to upgrade discharges on grounds of equity or propriety).

³ Chuck Hagel, *Memorandum for Secretaries of the Military Departments* (Sept. 3, 2014) (available at: <https://www.secnv.navy.mil/mra/bcncr/Documents/HagelMemo.pdf>).

⁴ *Id.*

⁵ Sundiata Sidibe et. al, *Unfinished Business: Correcting "Bad Paper" for Veterans with PTSD* VIETNAM VETERANS OF AMERICA (2016) (available at: <https://www.law.yale.edu/sites/default/files/documents/pdf/unfinishedbusiness.pdf>).

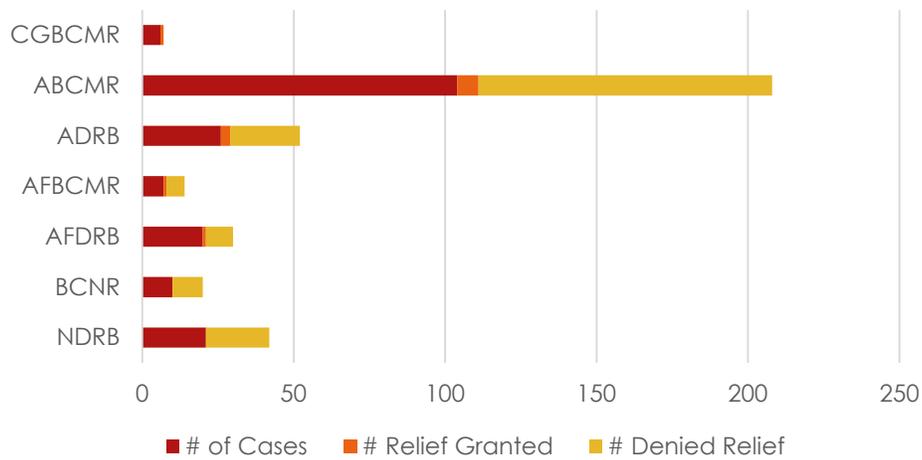
104 cases over the last 10 years. This low sample size hinders our ability to robustly review the boards' treatment of discrimination claims.

An analysis of the available data suggests the correction boards have completely abdicated this role. Except for the Air Force Board for Correction of Military Records (AFBCMR), each of the Boards grants claims based on racial discrimination at a much lower rate than their overall grant rate. These lower grant rates demonstrate the Boards' discrediting of racial trauma claims. In most of the decisions that denied an upgrade, LASC found the Board provided minimal rationale or analysis of racial trauma claims. Where the Boards did discuss these claims, they often summarily dismissed the veterans' accounts.

Key findings

- The publicly available information on discharge upgrade decisions is incomplete, despite a legal obligation to post all decisions back to 1996;
- The Boards exhibited arbitrary decision making and largely discounted or discredited veterans' stories of racial abuse;
- None of the Boards granted upgrades based on racial abuse at a rate higher than 17%.

Racial Trauma Grant Rates



Relief Granted



Number of Racial Trauma Cases



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Background

Servicemembers of color have generally borne higher costs of war with fewer rewards. During the Vietnam War, servicemembers of color were disproportionately deployed to combat zones, and consequently suffered a higher casualty rate.⁶ In addition to combat trauma, servicemembers of color report experiencing high levels of explicit racism and implicit bias during service. Servicemembers of Color also face tough obstacles to promotion and disproportionately receive military discipline and bad discharges. These in-service traumas have serious health consequences. Veterans of color generally show disproportionately high levels of post-traumatic stress disorder (PTSD), even when controlled for combat exposure and military rank.⁷

⁶ Oregon Public Broadcasting, History Detectives, *African Americans in Combat* (2014) (last visited Nov. 9, 2020) <https://www.pbs.org/opb/historydetectives/feature/african-americans-in-combat/>.

⁷ Williams, D.Z. (2007). Examining the relationship between race-related stressors and post-traumatic stress disorder among African American male Vietnam veterans [Unpublished doctoral dissertation]. Washington State University. Black veterans also show a high lifetime prevalence rate of 13.7%.; Chalsa M. Loo, 37% of Asian American Pacific Islander Vietnam War veterans suffered from PTSD.

Veterans of color report experiencing significant racial trauma during service. A 1999 Department of Defense survey over 70% of respondents identifying as a servicemember of color reported experiencing offensive encounters.⁸ A majority of those reporting offensive encounters, did not report the incident.⁹ In a 2019 survey of Military Times subscribers on active duty, 53% of minority service members polled reported witnessing racism and white nationalism among their colleagues, compared to the overall response rate of 36%.¹⁰

In addition to pervasive racist slurs or symbols on bases, some branches even have military-specific racially derogatory monikers. For example, “nonswimmer” for a Black Marine draws on stereotypes that Black people are not good swimmers; at least in part tied to the long history of segregation and exclusion of Black Americans from public pools and beaches. This derogatory terminology solidifies the general sense of unacceptance that minority service members report feeling.

Racism creates significant barriers to promotion and advancement. In 2020, the *New York Times* documented racial disparities in promotion and leadership opportunities.¹¹ For example, the Marines have never—in 244 years—promoted a Black, Indigenous, or servicemember of color to a four-star general. This has not been for lack of qualified candidates. In that article, the *Times* highlighted the story of lieutenant general who never got his fourth star, despite serving in the Marines for 40 years and being the first black man to command the First Marine Division.

Each of these intersections of racism in the military coalesce in military discipline. Aggregate research has long documented two vastly different military justice systems for Black, Indigenous, and people of color versus White service members. A 1972 Department of Defense task force on racial inequities found

⁸ Jacqueline Scarville et. al, *Armed Forces Equal Opportunity Survey*, DEFENSE MANPOWER DATA CENTER SURVEY & PROGRAM EVALUATION DIVISION, 11 (DMDC Report No. 97-027, Aug. 1999)

⁹ *Id.* at iv.

¹⁰ Helene Cooper, *African Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html>.

¹¹ *Id.*

pervasive racial and ethnic discrimination in the military justice system. In 2017, Protect our Defenders (POD) again revealed disparities in military discipline. Ten years of courts-martial and non-judicial punishment records showed racial disparities in disciplinary referrals and guilty verdicts across all five service branches. This disparity worsened in the Air Force and Marine Corps especially.

From career advancement to discharge, racism gravely impacts the experience of Black, Indigenous, and servicemembers of color. With more research comes a greater understanding of racism in the military. However, this knowledge is not translating into better treatment or career opportunities. Nowhere is this more apparent than in the military justice system and the discharge review process.

Methods

LASC compiled the data in this report from the publicly available DRB and BCMR decisions located at the online reading rooms for each Board at <https://boards.law.af.mil/>. LASC also cross referenced our findings with the publicly available discharge upgrade database published by the Connecticut Veterans Legal Center (CVLC) available at <http://upgrade.vet/vetup/>. These are not complete collections of the Boards' full library of decisions, but it is our understanding of the most reliable publicly available data on discharge upgrade decisions. The grant rates cited in this report are the best available overall grant rates as reported by each board, either on their own website or in Congressional hearing testimony.

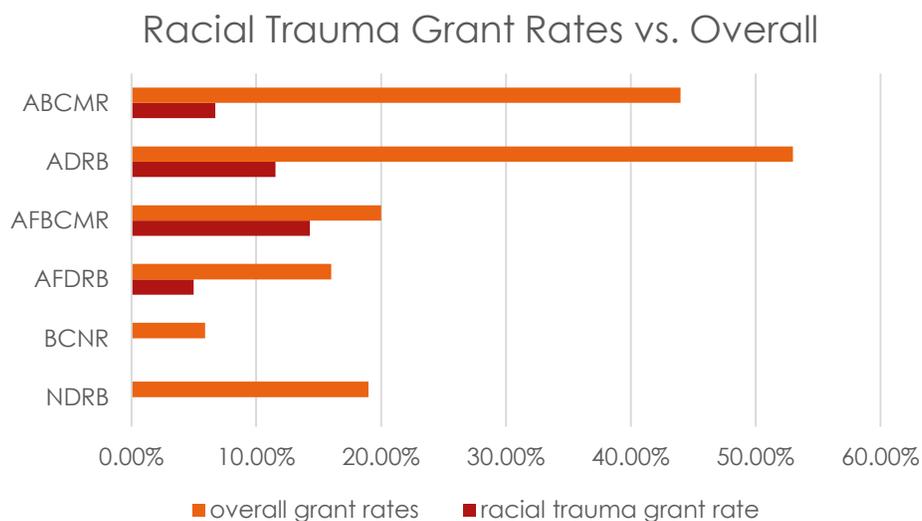
LASC restricted the time period to the last 10 years (2010 to present). In each reading room, LASC searched for the following key words: discrimination, racism, race, prejudice, and bias. In some of the reading rooms, the search function was not working. In that circumstance, we looked through each individual decision. With each hit on our search terms, we then read through the decision to confirm that it was relevant. We omitted any claims of reverse racism and any decisions that did not explain the type of discrimination claimed by the applicant. This key word search and analysis was informed by Lillian Conas-Diaz's definition of racial trauma:

[A] form of race-based stress, refers to People of Color and Indigenous individuals' (POCI) reactions to dangerous events and real or perceived experiences of racial discrimination. Such experiences may include threats of harm and injury, humiliating and

shaming events, and witnessing racial discrimination toward other POCI. Although similar to posttraumatic stress disorder, racial trauma is unique in that it involves ongoing individual and collective injuries due to exposure and re-exposure to race-based stress.¹²

We chose to rely on publicly available decisions, rather than a Freedom of Information Act (FOIA) request, because these decisions are the only information available to veterans calculating whether to apply for a discharge upgrade. Also, assuming the Boards comply with their legal obligation under 32 C.F.R. § 70.8 to publish decisions in an “indexed” and “usable” format, LASC should not need additional FOIA requests. Under Department of Defense Directive, 1332.42, the Boards are required to publish decisions for the public to review. These decisions are veterans’ only window into the Board. They help the veteran understand what is eligible for upgrade and their application’s likelihood of success.

Findings and Analysis



¹² Lillian Comas-Diaz et. al, Racial Trauma: Theory, Research, and Healing: Introduction to the Special Issue, 74 American Psych. 1, 1 (2019)

An overarching finding from LASC's analysis is the lack of information to veterans seeking a discharge upgrade. This is particularly true for those seeking an upgrade based on racial trauma. Despite the Boards' obligation under 32 C.F.R. § 70.8 and Department of Defense Directive 1332.41 to post all decisions back to 1996, each Board has omitted decisions from their reading rooms. For example, the Board for Correction of Naval Records (BCNR) has not posted any cases since 2018. Also, the Air Force Board for Correction of Military Records (AFBCMR) only posted 11 decisions for calendar year 2018, despite docket numbers that indicate they received over 3,000 applications.

Where the decisions are available for review, the Boards often provide very little context or analysis of "discrimination" claims, making it difficult to figure out what type of discrimination the veteran reported. For example, in 2013 the Army Discharge Review Board (ADRB) authored at least 68 decisions where it stated "There is no evidence in the record, nor has the applicant produced any evidence to support the contention that he/[she] was unjustly discriminated."¹³ In ADRB decision AR20130001137, the Board only said "The applicant requests to upgrade ... to fully honorable. The applicant did not present any additional issue." Then in its analysis, the ADRB included the exact same sentence cited above, that the veteran did not present any evidence to support his "contention" of unjust discrimination. These decisions suggest that the Board was liberally using the term discrimination as a stand in for general mistreatment, or even as stock language in denial decisions.

These examples reflect a common trend across the Boards of liberally using the term discrimination to mean unfairness without any further analysis. Diluting this term downplays the severity of actual accounts of discrimination. It also confuses veterans trying to prepare their own applications.

In the findings detailed below, the trend among all Boards remains low sample sizes, low grant rates, and inadequate analysis of racial trauma claims. These findings reveal a need for better outreach and more thoughtful analysis for all boards to acknowledge past racial injustices.

¹³ See e.g., AR20130000165.

Army

The Army boards granted racial trauma claims at much lower rates than their overall grant rates. The Army Discharge Review Board (ADRB) granted 3 of 23 total applications, a grant rate of 11.54%. This is compared to the ADRB's reported overall grant rate of 52%, last reported in 2015.¹⁴ Only 12 cases from 2010 to 2020 mention racial discrimination as a potential factor in the veteran's discharge. Based on the docket numbers, which begin at 1 each year and go up as the Board adds new cases, these 12 cases are compared to as many as 197,681 total cases at the ADRB in that same time.

In 7 cases the Board never explained the type of discrimination the veteran was claiming. For example, in AR20110020722, the Board mentions the applicant's claim of discrimination only once towards the end of the decision. It merely states "the applicant [has not] produced any evidence, to support the contention that she was unjustly discriminated [against]." As discussed in the methods section, LASC omitted those cases from the grant rate for racially related claims. This lack of detail only creates more confusion for veterans. It also underscores the minimal attention and analysis the Board gives discrimination claims generally.

The Army Board for Correction of Military Records (ABCMR) had a significantly higher sample size. Of the 104 applications based on racial trauma, the ABCMR granted 7 upgrades, for a grant rate of 6.73%. This is compared to an overall ABCMR grant rate of 44%.¹⁵ Of those 104 applications, the ABCMR summarily denied 72% for a lack of evidence in one or two sentences, without any further analysis.

Where the Board did discuss the veteran's claims of racial trauma, LASC found the Board was quick to discredit and discount the veteran's experiences.

For example, in AR20100015806 the Vietnam War era veteran with an other than honorable discharge requested an upgrade for retaliation after a racist

¹⁴ 115 Congress, Hearing Before the Subcommittee on Military Personnel HASC No. 115-10 (March 2, 2017) <https://www.govinfo.gov/content/pkg/CHRG-115hhrg24682/html/CHRG-115hhrg24682.htm>

¹⁵ 115 Congress, Hearing Before the Subcommittee on Military Personnel, *Update on Military Review Board Agencies 27* (Sept. 27, 2018).

incident. The veteran explained that after he reported a civil rights violation by a superior officer, his command targeted him for a bad discharge. His disciplinary infractions were as minor as failing to maintain a haircut. His most serious offense was one AWOL for 3 days, which is a “minor offense” under the U.S. military’s Manual for Courts-Martial.¹⁶ The ABCMR accepted an Investigator General’s conclusion that the racist incident “was done in fun and, therefore, was not racially motivated.” The Board concluded that the veteran’s nine counseling incidents for only minor offenses were “clearly the result of the applicant’s own misconduct or failure to perform the duties of his rank and position.”

This case is illustrative of the Boards’ practice of discrediting and discounting the trauma of veterans of color. The standard for upgrade is unfairness, which includes the impact on the veteran and disproportionate punishment.¹⁷ The Board in this case emphasizes the intent of the offender, rather than the harm to the veteran. The Board also focused on whether the veteran actually committed the misconduct, rather than the proportionality of a bad discharge for such minor offenses. These gaps in analysis are a missed opportunity and an abdication of the Board’s responsibility

Navy and Marines

After an extensive review of the Boards’ reading rooms and the CVLC database, LASC could not find any The Naval Discharge Review Board (NDRB) or Board for Correction of Naval Records (BCNR) discharge upgrade applications that were granted based on a claim of racial trauma.. This is compared to an overall grant rate of 19% at the NDRB¹⁸ and 6.73% at the BCNR.¹⁹ LASC did identify some BCNR racial trauma claims granted before 2010, but none within the time frame for this study.

Like the ADRB, the Navy Boards, which hear Navy and Marine Corps cases, had low sample sizes. NDRB had 21 total cases and the BCNR had 10 total cases.

¹⁶ MCM Part IV, para. 10.d (Article 86.d). Any AWOL under 30 days is a minor offense.

¹⁷ See, 32 C.F.R. § 70.9 (c)(3)(ii)(D).

¹⁸ NDRB Quarterly Data (available at: <https://www.secnav.navy.mil/mra/bcnr/Pages/BCNR-Data.aspx>).

¹⁹ Department of the Navy, 10 U.S. Code § 1552- Review of discharge or release reporting (available at: <https://www.secnav.navy.mil/mra/bcnr/Pages/BCNR-Data.aspx>).

These low sample sized limit our ability to understand trends in their decision-making.

The NDRB 85% of BCNR and 72% of NDRB cases were summarily denied for lack of evidence. This limited analysis also restricts our ability to draw conclusions from the data. However, the data suggests both boards attribute incredibly low levels of credibility to claims based on racial trauma. Where the Board acknowledged the veteran's experiences of racism, in most cases, it still found the experiences insufficient to warrant an upgrade.

For example, the decision in NR20190001035, Vietnam Veteran Jenkins Smith's application is illustrative of the BCNR's trend of discounting a veteran's severe racial trauma:



Jenkins Smith enlisted in the U.S. Navy in 1965 at 18-years-old and half-way through the Vietnam War. Mr. Smith enjoyed Bootcamp and believed he was on his way to a successful Navy career. The Navy assigned him to the USS Montrose and shortly after deployed the Montrose to Vietnam. In Vietnam, Mr. Smith served on a troop landing boat, delivering supplies and troops down the Danang River to units in desperate need of reinforcements. The ships were a target for Viet Cong soldiers on the shores, and frequently took on enemy fire.

In addition to the Viet Cong, Mr. Smith also had to defend himself from attacks within his own unit. His colleagues and superiors called him any and all variations of racial epithets and enjoyed kicking him in the butt and giggling as he walked by. He watched fellow Black and Puerto Rican sailors endure similar treatment. Eventually, their abuse escalated to threats of serious physical harm. Mr. Smith complained to his superiors, but this only led to retaliation and further abuse.

Then, Mr. Smith heard a rumor that a group of white sailors openly hostile to Black sailors planned to attack him in the night. He knew their threats were credible because he had already witnessed this group assaulting another black sailor near the laundry area. He set up cans around his bunk, so he would know if anyone tried to approach him at night.

In October 1965, Mr. Smith reached a breaking point. He could no longer endure the inhumane treatment from his fellow service members and seriously feared for his safety. After he returned from deployment, he walked off the pier in California and went home to Cleveland, Ohio. When he returned to the ship, the harassment only got worse. At the next opportunity, Mr. Smith went AWOL again. When he returned, he was confined on the ship and transferred to the Philadelphia Naval Station for further disciplinary proceedings. He went AWOL again, and the Navy discharged him with an other than honorable discharge.

When Mr. Smith took this story to the BCNR, it denied an upgrade. The BCNR rationalized that even though Mr. Smith was the victim of racial abuse on his ship, he still went AWOL after leaving the ship. Thus, they found, the racial abuse was insignificant to his AWOLs and he did not deserve an upgrade.

Air Force

The Air Force Discharge Review Board (AFDRB) granted only one of 20 applications claiming racial trauma for a grant rate of 5%. This is compared to the ADRB's highest reported average overall grant rate of 20%.²⁰

The Air Force Board for Correction of Military Records (AFBCMR) came the closest to matching their overall grant rate. The AFBCMR granted 16.67% of the 6 applications claiming racial trauma. The AFBCMR however, also had the lowest sample size of all the Boards. Given this incredibly low sample size, there is little we can extrapolate from the Board's grant rate.

Coast Guard

The Coast Guard Board for Correction of Military Records (CGBCMR) had a 16.67% grant rate. The CGBCMR web page did not have any discrimination cases for 2010 or later. However, LASC supplemented this number with cases available on CVLC's publicly available searchable database referenced in the methods section. The Coast Guard Discharge Review Board (CGDRB) does not have any of its decisions posted publicly. The web page where the Board is legally

²⁰ Alexander Blewett III, *Inside the Discharge Review Boards 6* (Mar. 20-21, 2019) (available at: http://www.umt.edu/law/files/events/10_VETLAW-InsideDischargeReviewBoards-Full-Slide-Handout.pdf.)

obligated to post its decisions is empty. This page directs the viewer to a Coast Guard staff contact. That contact directed LASC to submit a FOIA request. Without any cases available online, Coast Guard veterans are unable to study or evaluate previous decisions.

Conclusion

The military's failure to correct past injustices is not only an abdication of its statutory duty, but also a missed opportunity. Despite clear evidence of racial disparities in military discipline and promotions, the corrections boards tasked with rectifying these wrongs have done little to help repair these disparities. The grant rates for discharge upgrade applications based on racial trauma are lower than most boards' general grant rates. This seems to have effectively discouraged veterans from seeking redress because very few veterans even attempt applications for upgrade based on racial trauma. There is a grave need for the boards to increase outreach and facilitate a path to upgrade for veterans that suffered racially related trauma during service.