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The Military Discharge Review Boards’ Irregular Presumption of Regularity

Jessica Lynn Wherry

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The Military Discharge Review Boards' Irregular Presumption of Regularity

*Jessica Lynn Wherry**

“There is a presumption of regularity in the conduct of governmental affairs.” With these twelve words in the Department of Defense’s Code of Federal Regulations, the military discharge review boards (DRBs) have denied relief to thousands of veteran-applicants seeking a discharge upgrade. While seemingly innocuous, this administrative principle has become a nearly insurmountable barrier to relief for veterans with a less-than-honorable discharge. Veterans with a less-than-honorable discharge are generally ineligible for a range of veterans benefits, including health care and education benefits, and they have higher suicide rates compared to honorably discharged veterans.

For most veteran-applicants, the administrative path to a discharge upgrade offers little more than a dead end. The DRBs routinely deny hundreds of discharge upgrade requests every year, often relying on a mere statement of the presumption of regularity without explanation. Used in this way, the presumption effectively operates as a rubber-stamp to affirm the original discharge characterization rather than as a framework for analyzing a discharge upgrade request.

Despite its wide-reaching negative impact on veterans, the presumption as used by the DRBs has received little scholarly attention. This Article offers the first in-depth examination of the presumption’s regulatory history, revealing critical flaws in application. I argue that the DRBs erroneously apply the presumption and identify six irregularities in support of this thesis. I identify these irregularities in contrast to the presumption of regularity in other contexts and further characterize the irregularities as inconsistent with the DRBs’ governing body of regulations and other guidance documents that demand more than a rubber-stamp. The Article then offers four parameters for resolving or at least mitigating the irregularities, with an eye toward full, fair, and impartial review balanced with an appropriate level of deference to the government.

* Associate Professor of Law, University of Baltimore School of Law. With gratitude to: Hugh McClean for reading multiple drafts and providing insightful and supportive feedback; my University of Baltimore School of Law colleagues for attending and participating in my faculty research and development workshop, especially Michele Gilman and Margaret Johnson; Yelena Duterte, Meghan Brooks, Ellie Morales, Richard Prebil, Morgan Zimarakos, and Katie Becker for support and feedback during the National Law School Veterans Clinic Consortium Scholarship Committee’s summer writing series; Sofia Liban Abdullaahi Dirie for exceptional research assistance; and University of Baltimore School of Law Dean LaVonda Reed for summer research support. I also thank the *Chapman Law Review* editors for supporting my work and for their exceptional attention to detail throughout the editing process.

I. INTRODUCTION

“There is a presumption of regularity in the conduct of governmental affairs.”¹ With these twelve words, the military discharge review boards (DRBs) have denied relief to thousands of veteran-applicants seeking a discharge upgrade. While seemingly innocuous, this administrative principle has become a nearly insurmountable barrier to relief for thousands of veterans with a less-than-honorable discharge.²

No one joins the military with the expectation that they will get a less-than-honorable discharge, yet, since 1941, millions of servicemembers have received one.³ In the years 2002 through the first quarter of 2024, over 850,000 servicemembers received a less-than-honorable discharge⁴—a discharge characterization that can be devastating. Veterans with a less-than-honorable discharge are generally ineligible for a range of veterans benefits, including health care and education benefits.⁵ Without access to benefits, veterans may experience “collateral consequences” including loss of access to state, federal, and Department of Veterans Affairs (VA) benefits, such as healthcare, housing, education,

¹ 32 C.F.R. § 70.8(b)(12)(vi) (2025).

² As suggested by several readers, this introduction could include examples of veterans who have struggled to receive a discharge upgrade and the consequences of their unsuccessful attempts. Illustrating the problem through narrative examples is a technique I have often used in my previous work. *See, e.g.*, Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards’ Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 CALIF. L. REV. 1357, 1359–65 (2020) [hereinafter Wherry, *Kicked Out, Kicked Again*]. Indeed, it is a technique I recommend in my co-authored textbook on scholarly writing. JESSICA LYNN WHERRY & KRISTEN E. MURRAY, *SCHOLARLY WRITING: IDEAS, EXAMPLES, AND EXECUTION* 165–77 (4th ed. 2025). Here, however, I intentionally do not include narrative examples to avoid distracting the reader from this Article’s goal to force into the light the story of the boards’ egregious misapplication of the presumption of regularity.

³ *See* David F. Addlestone, *Preface* to MARGARET KUZMA ET AL., *MILITARY DISCHARGE UPGRADE: LEGAL PRACTICE MANUAL*, at xliii (2021) (citing VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD L. SCH., *UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER* 43 (2016), <https://www.swords-to-plowshares.org/research-publications/underserved> [<https://perma.cc/7V7B-HR5V>]).

⁴ *See* U.S. GOV’T ACCOUNTABILITY OFF., *GAO-25-107354, MILITARY DISCHARGE: ACTIONS NEEDED TO HELP ENSURE CONSISTENT AND TIMELY UPGRADE DECISIONS* 75–81 (2025). This is nearly 20% of the total servicemembers discharged during this time period. *See id.*

⁵ *See Veterans Benefits Administration: Applying for Benefits and Your Character of Discharge*, U.S. DEPT OF VETERANS AFFS. (Apr. 16, 2025) [hereinafter *Veterans Benefits Administration*], https://www.benefits.va.gov/benefits/character_of_discharge.asp [<https://perma.cc/2R9L-QB6C>]; SUNDIATA SIDIBE & FRANCISCO UNGER, *VETERANS LEGAL SERVS. CLINIC, UNFINISHED BUSINESS: CORRECTING “BAD PAPER” FOR VETERANS WITH PTSD* 3 (2017) (identifying discharge requirements for disability compensation, education, and healthcare benefits, among others).

and employment programs, as well as “[m]oral [i]njury.”⁶ Furthermore, veterans with a less-than-honorable discharge “take their own lives twice as often as other veterans.”⁷

A less-than-honorable discharge is not necessarily permanent. Veteran-applicants can seek an upgrade through an administrative process.⁸ Unfortunately, for many, this process is just another barrier; the DRBs deny hundreds of discharge upgrade requests every year.⁹ In the first quarter of 2025, the rate of denial was about 50%, with a staggering disparity among the boards.¹⁰ The Air Force DRB (AFDRB) denied 92.4% of mental health claims, 100% of sexual assault claims, and 50% of claims other than mental health and sexual assault.¹¹ The Army DRB (ADRB) denied 47.9% of mental health claims, 31.1% of sexual assault claims, and 35% of other claims.¹² The Naval DRB (NDRB) denied 56.7% of mental health claims, 61.1% of sexual

⁶ Hugh McClean, *Discharged and Discarded: The Collateral Consequences of a Less-than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2231–55 (2021) (cataloging the collateral consequences of a less-than-honorable discharge and comparing those consequences to collateral consequences in the criminal context).

Professor McClean defines collateral consequences as “the legal constraints placed on individuals with criminal records in the communities to which they return.” *Id.* at 2219–20; see HUM. RTS. WATCH, *BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS* 4–5 (2016) (discussing the correlation between “bad paper” and “high suicide rates, homelessness, and imprisonment”).

⁷ Michael J. Wishnie, “A Boy Gets into Trouble”: *Service Members, Civil Rights, and Veterans’ Law Exceptionalism*, 97 B.U. L. REV. 1709, 1724 (2017); see also VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD L. SCH., *UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER* 43 (2016), <https://www.swords-to-plowshares.org/research-publications/underserved> [<https://perma.cc/5G52-Y587>] (“Veterans with bad paper discharges are often in great need of the VA’s support. They are more likely to have mental health conditions and twice as likely to commit suicide. They are more likely to be homeless and to be involved with the criminal justice system.”).

⁸ 10 U.S.C. §§ 1552–1553; see *infra* Part II.

⁹ See HUM. RTS. WATCH, *supra* note 6, at 5. The DRBs have been under scrutiny as their historically low grant rates have kept thousands of veterans from receiving the recognition and benefits that they deserve. See *id.* (“The 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 . . .”).

Multiple class action lawsuits filed by Yale Law School’s Veterans Legal Services Clinic and subsequent settlements also shed light on the DRBs’ failure to implement policy in favor of granting relief. See, e.g., Complaint at 4–6, 10–11, 23, 30, 32, 34, 36, 38–40, *Manker v. Spencer*, No. 3:18-cv-00372 (D. Conn. Mar. 2, 2018) [hereinafter *Manker Complaint*]. For a history of discharge upgrades, see Adlestone, *supra* note 3, at xxix–xl.ii.

¹⁰ See DEPT OF THE AIR FORCE, *SELECT CLAIMS DATA FOR REVIEW BOARDS: QUARTER (Jan - Mar 25) (Apr. 29, 2025)*, <https://boards.law.af.mil/stats/CY2025/01.%20Jan-Mar%202025%20Quarterly%20Stats%20for%20Review%20Bds.pdf> [<https://perma.cc/AG2T-TZEX>]. As of December 15, 2025, the boards had not posted any statistics for the second and third quarters of 2025. *Id.*

¹¹ *Id.*

¹² *Id.*

assault claims, and 38.3% of other claims.¹³ Combined, the boards denied 611 of 1224 cases, at a rate of 49.9%.¹⁴ This rate is consistent with recent years, though a bit lower than the overall denial rate of 57.6% in 2023.¹⁵

It may not be possible to determine the “right” rate of denial, but the disparities among the boards and the relative role the presumption of regularity plays at least merit examination. For example, the AFDRB’s high rate of denial may correlate to its practice to include a statement of the presumption in every discharge decision while the ADRB’s higher grant rate may reflect the absence of the presumption in discharge decisions. It’s also possible to speculate that the boards get it wrong often enough to question the denial rates. In a recent report from the ADRB related to court-mandated reconsideration of previous denials, the Board reported that it granted relief in 47.5% of the cases it had previously denied.¹⁶

Though there can be legitimate reasons for denying relief, the DRBs often state the presumption of regularity as a justification for denial without explanation. For example, “Since the Board relies on the presumption of regularity, it concluded that the discharge received by the Applicant was appropriate.”¹⁷ Or, in disregarding veteran-applicants’ statements in support of an upgrade, the NDRB relies on boilerplate language to invoke the presumption as a tool for denying relief: “The Applicant’s statements alone do not overcome the government’s presump-

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The DRBs’ overall denial rate was 51% in 2024 and 57.6% in 2023. *Boards Statistics: CY 2023*, DEP’T OF THE A.F. (Jul. 18, 2025, at 13:01 CT), https://boards.law.af.mil/stats_CY2023.htm [<https://perma.cc/5Q74-7HSQ>] (choose “Jan-Mar 2023 Quarterly Stats for Review Bds.pdf,” “Mar-Jun 2023 Quarterly Stats for Review Bds.pdf,” “Jul-Sep 2023 Quarterly Stats for Review Bds.pdf,” and “Oct-Dec 2023 Quarterly Stats for Review Bds.pdf”); then open the downloaded files); *Boards Statistics: CY 2024*, DEP’T OF THE A.F. (Jul. 18, 2025, at 13:01 CT), https://boards.law.af.mil/stats_CY2024.htm [<https://perma.cc/M5LU-K6JQ>] (choose “Jan-Mar 2024 Quarterly Stats for Review Bds.pdf,” “Apr-Jun 2024 Quarterly Stats for Review Bds.pdf,” “Jul-Sep 2024 Quarterly Stats for Review Bds.pdf,” and “Oct-Dec 2024 Quarterly Stats for Review Bds.pdf”); then open the downloaded files).

¹⁶ See Letter from the Army Rev. Bds. Agency, Dep’t of Def., to Charles S. Haight, Judge (Dec. 1, 2025), https://law.yale.edu/sites/default/files/documents/documents/pdf/Clinics/six-monthreport_letter_20251112b-final.pdf [<https://perma.cc/XQLA-CEQF>]; see also *infra* note 21 and text accompanying note 312.

¹⁷ Air Force Discharge Review Board Decisional Document, Case No. FD-2025-00036 (Air Force Rev. Bds. Agency Apr. 9, 2025), <https://boards.law.af.mil/AF/DRB/CY2025/FD-2025-00036%2001%20FD202500036.pdf> [<https://perma.cc/75AL-A3FJ>].

tion of regularity in this case.”¹⁸ This boilerplate language is typically included as a final statement that stands on its own without explanation.¹⁹

Used in this way, the presumption effectively operates as a rubber-stamp affirming the original discharge characterization rather than as a framework for analyzing a discharge upgrade request. The boards use the presumption to deny relief rather than engage with the presumption as a rebuttable standard as intended—and indeed as the word “presumption” implies.²⁰ Thus, the presumption can, and often does, stand in the way of a veteran-applicant’s eligibility for health care, education benefits, and even peace of mind.

The presumption has been challenged in class action lawsuits²¹ and on a case-by-case basis,²² and veterans law scholars and advocates have criticized the presumption.²³ Yet, the pre-

¹⁸ Naval Discharge Review Board (NDRB) Discharge Review Decisional Document, No. ND22-00064 (Dept of the Navy Apr. 11, 2022), https://boards.law.af.mil/NAVY_DRB_2022_Navy.htm [https://perma.cc/3DPA-KWWQ] (choose “ND22-00064.rtf”; then open the downloaded file).

¹⁹ *Id.*

²⁰ Black’s Law Dictionary defines “presumption of regularity” as “[t]he law’s robust assumption that, unless there is a clear showing to the contrary, all official actions have taken place in the ordinary course of governmental administration and according to lawful authority.” *Presumption of Regularity*, BLACK’S LAW DICTIONARY (12th ed. 2024). That there could be “a clear showing to the contrary” means the presumption is rebuttable rather than absolute. *See id.* A conclusive presumption is one “that cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute” *Conclusive Presumption*, BLACK’S LAW DICTIONARY (12th ed. 2024).

²¹ *See, e.g.*, Manker Complaint, *supra* note 9, at ¶¶ 17–19, 92–94, 185–86, 209, 214–15, 233, 240. Though *Manker* and other cases settled, the settlements did not reflect a substantive determination on the presumption of regularity. For example, the NDRB agreed to annual training on the presumption of regularity, but nothing further. *See* Stipulation and Agreement of Settlement at 15, *Manker v. Del Toro*, No. 3:18-cv-00372 (D. Conn. Sep. 17, 2021). The class action settlement against the Army, *Kennedy v. McCarthy*, made no mention of the presumption of regularity in the settlement agreement. *See generally* Stipulation and Agreement of Settlement, No. 3:16-cv-02010 (D. Conn. Nov. 17, 2020) (omitting the “presumption of regularity” language).

The same is true for the class action settlement against the Air Force. *See generally* Stipulation and Agreement of Settlement, *Johnson v. Kendall*, No. 3:21-cv-01214 (D. Conn. Apr. 24, 2023) (omitting the “presumption of regularity” language).

²² Anecdotal evidence of this includes conversations with veterans’ advocates. For my clients, I have raised arguments (in written briefs and oral argument) about the presumption as problematic and explained why the board should not rely on the presumption in deciding the cases.

²³ Jessica Lynn Wherry, Geo. U.L. Ctr., What Does ‘Review’ Mean in Discharge Review Board?, Address at the National Law School Veterans Clinic Consortium Annual Conference 2022 (June 23, 2022) (on file with author) (discussing the presumption of regularity and how the boards misinterpret the presumption as substantive); Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1389–92.

sumption as used by the DRBs has received little scholarly attention. This Article offers the first in-depth examination of the presumption's regulatory history, revealing critical flaws in application. I argue that the DRBs misapply the presumption and identify six irregularities in support of this thesis. I identify these irregularities by contrasting applications of the presumption in other contexts and further characterize the irregularities as inconsistent with the DRBs' governing body of regulations and other guidance documents that demand more than a rubber-stamp. This Article thus begins a robust scholarly discussion by uncovering the numerous irregularities and setting the groundwork for resolving or at least mitigating these irregularities.

This Article's examination of the presumption as used by the DRBs proceeds as follows. In Part II, the Article provides brief background on discharge characterizations, the discharge upgrade process, and the DRBs. This background is intentionally brief to give the reader a basic understanding of what is at stake for veterans with a less-than-honorable discharge, the limited opportunity for discharge upgrade, and the discharge review boards' role in those decisions.

In Part III, the Article explores the body of law involving the presumption of regularity in two distinct areas: (1) generally in federal case law, and (2) in cases at the United States Court of Appeals for Veterans Claims (CAVC) involving VA mailing procedures. This discussion creates context for identifying and understanding the DRB presumption's irregularities in Part IV.

Part IV identifies six irregularities in the DRB presumption, beginning with irregularities related to the DRB presumption's regulatory history. This Article's exploration of the origin and regulatory history of the DRB presumption is significant because no other presumption of regularity has a robust regulatory framework. This regulatory history on its face is a significant irregularity. Furthermore, despite the DRBs' robust regulatory framework calling for explanation when relying on the presumption, DRB decisions are typically inconsistent with the prescribed framework, revealing further irregularities by way of misapplication of the presumption. Finally, this Part discusses irregularities in the intersection of branch-specific and Department of Defense (DoD) guidance, and how federal courts reinforce the presumption.

In Part V, the Article sketches out considerations for realigning the DRB presumption consistent with its regulatory framework and the broader body of law on the presumption of regularity. For example, the Article advocates for a robust analytical

framework for accurately and fairly applying the presumption of regularity as a path forward. The Article then concludes by calling for change as informed by the DRB presumption's irregularities.

II. DISCHARGE CHARACTERIZATIONS, DISCHARGE UPGRADES, AND MILITARY DISCHARGE REVIEW BOARDS

This Part is intentionally brief in focusing on only the background needed to understand the role of the presumption in discharge upgrades. Here, the Article identifies types of discharges, describes the mechanism for changing a discharge, and explains the DRBs' role in the discharge upgrade process. Interested readers may consult various resources for further background on military discharges and upgrades, including some of my previous work.²⁴

A. Discharge Characterizations

Upon completion of service, a servicemember is discharged and their service is characterized based on the circumstances of their service and "a commander's discretionary determination."²⁵ There are two categories of discharge characterizations: administrative and punitive.²⁶ Administrative separations are the most common and include Honorable, General (Under Honorable Conditions), Under Other Than Honorable Conditions, and Uncharacterized.²⁷ Punitive discharges are Bad Conduct and Dishonorable.²⁸ Even though General (Under Honorable Conditions) and Under Other Than Honorable Conditions are administrative separations, they are punitive in nature. These less-than-honorable discharges are stigmatizing, and they "bar[] access to many veterans' benefits."²⁹ As mentioned in Part I and discussed in depth by Professor McClean, veterans with a less-than-honorable discharge may experience devastating collateral consequences ranging from ineligibility for veterans benefits and higher rates of homelessness and suicide. A veteran's discharge characterization can quite literally be a matter of life or death. Fortunately, there

²⁴ See, e.g., Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1365–70; Jessica Lynn Wherry, *Denied by Dysfunctional Design: How the DD-293 Application Form Thwarts Pro Se Veteran-Applicants' Discharge Upgrade Requests*, 74 AM. U. L. REV. 1057, 1059–67 (2025) [hereinafter Wherry, *Denied by Dysfunctional Design*]; KUZMA ET AL., *supra* note 3, at 13–62; McClean, *supra* note 6, at 2210–19.

²⁵ Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1368.

²⁶ *Id.* at 1366.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1368.

is a mechanism for changing a discharge characterization that can lead to restoration of benefits eligibility.³⁰

B. Discharge Upgrade Requests and Grounds for Relief

Veterans with a less-than-honorable discharge may apply for a discharge upgrade by submitting the requisite application to a DRB, records correction board, or both depending on the timing and nature of the request.³¹ Applications for discharge upgrade are submitted via a DoD form.³² Veterans may ask for record review, a hearing, or both if they request record review first.³³ “The objective of a discharge review is to examine the propriety and equity of the applicant’s discharge and to effect changes, if necessary.”³⁴ In assessing a discharge, the regulations prohibit any factor from “requir[ing] automatic change or denial of a change in discharge.”³⁵ The boards and Service Secretaries are obligated to “give full, fair, and impartial consideration[] to all applicable fac-

³⁰ *Veterans Benefits Administration*, *supra* note 5 (explaining that there is an alternative path to benefits via the VA’s character of discharge determinations).

VA can “expand[] access to VA care and benefits for some former service members discharged under other than honorable conditions or by special court-martial.” *Id.* For a discussion of the presumption of regularity in context of advocating for collaboration between VA and DoD, see Brent Filbert, Elizabeth G. Kubala & Seth M. Owens, “*Out of Step*”: *How Executive Departments Must March Together in Recognizing “Honorable” Service*, SSRN (Feb. 4, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6178245 [<https://perma.cc/867M-X8NS>].

³¹ See *Military/Civilian Records, DEERS, and DOW ID Cards: Request Correction of Military Records*, U.S. DEP’T OF DEF. (Sep. 5, 2025), <https://www.defense.gov/Contact/Help-Center/Article/Article/2742476/request-correction-of-military-records/> [<https://perma.cc/ECA5-6ZKF>].

³² DEP’T OF DEF., OMB NO. 0704-0004, DD FORM 293: APPLICATION FOR THE REVIEW OF DISCHARGE FROM THE ARMED FORCES OF THE UNITED STATES (2025), <https://www.esd.whs.mil/portals/54/documents/dd/forms/dd/dd0293.pdf> [<https://perma.cc/2PAV-JY9Q>]; DEP’T OF DEF., OMB NO. 0704-0003, DD FORM 149: APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552 (2025), <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf> [<https://perma.cc/C8HN-622Q>].

³³ 10 U.S.C. § 1553(c); see also KUZMA ET AL., *supra* note 3, at 66 (“Every applicant has the option for the Discharge Review Board to decide the application on a records review or to appear before the board at a personal appearance hearing. In most cases, it is preferable to first apply to the DRB for a records review”); Council of Rev. Bds., *FAQs*, DEP’T OF THE NAVY, <https://www.secnav.navy.mil/mra/CORB/Pages/FAQS.aspx> [<https://perma.cc/RKS8-H6C6>] (last visited Feb. 16, 2026) (“Determine a type of discharge review you prefer. If you never had a discharge review with the NDRB before, you are eligible for 2 reviews. The first one is a record review. Next is a personal appearance hearing review. However, if you choose to have a personal appearance hearing first, you will no longer be eligible for a document review or an additional personal appearance hearing.”).

³⁴ 32 C.F.R. § 70.9(a) (2026); DEP’T OF DEF., INSTRUCTION NO. 1332.28, DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS enclosure 4, para. E4.1 (2004) [hereinafter DODI 1332.28].

³⁵ 32 C.F.R. § 70.9(a); DODI 1332.28, *supra* note 34.

tors before reaching a decision.”³⁶ The DRBs must “review[] the individual merits of each application on a case-by-case basis.”³⁷

There are three bases for relief: (1) impropriety (e.g., error of fact, law, or procedure), (2) inequity (e.g., current policies or procedures represent a substantial enhancement of rights), and (3) clemency (e.g., fundamental fairness and second chances). Only propriety and equity are included in the governing regulations while clemency has been more recently recognized in policy guidance.³⁸

As for propriety, a discharge is “deemed proper unless” there is “an error of fact, law, procedure, or discretion associated with the discharge at the time of the issuance,” and this error caused the discharge characterization.³⁹ Relief may also be granted on propriety grounds due to a policy change “made expressly retroactive to the type of discharge under consideration.”⁴⁰

There are three paths to relief based on equity. First, a discharge is inequitable when “the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable” as long as the “[c]urrent policies or procedures represent a substantial enhancement of the rights afforded . . . and [t]here is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available . . . at the time of the discharge proceedings under consideration.”⁴¹ Second, there is an inequity if “the discharge was incon-

³⁶ 32 C.F.R. § 70.9(a); DODI 1332.28, *supra* note 34.

³⁷ 32 C.F.R. § 70.9(b)(3). The DoDI does not include this reference to equity in the propriety subsection.

³⁸ See 32 C.F.R. § 70.9(b)–(c); Memorandum from Robert L. Wilkie, Under Sec’y of Def. for Pers. & Readiness, to Sec’y of the Mil. Dep’ts (July 25, 2018) [hereinafter Wilkie Memo], <https://afrrba-portal.cce.af.mil/app/assets/2018-Wilkie-Memo-25-Jul-2018-DRB-Guidance.pdf> [<https://perma.cc/Q5CU-P9V5>].

³⁹ 32 C.F.R. § 70.9(b)(1)–(1)(i); see DODI 1332.28, *supra* note 34, enclosure 4, paras. E4.2.1–4.2.1.1.

⁴⁰ 32 C.F.R. § 70.9(b)(1)(ii); DODI 1332.28, *supra* note 34, enclosure 4, para. E4.2.1.2.

⁴¹ 32 C.F.R. § 70.9(c)(1)(i)–(ii); DoDI 1332.28, *supra* note 34, enclosure 4, paras. E4.3.1–4.3.1.2. For example, service members discharged for failing to comply with orders to receive the COVID-19 vaccine can receive an upgrade due to the rescission of the vaccine mandate. Memorandum from Lloyd J. Austin, Sec’y of Def., to Senior Pentagon Leadership et al. (Aug. 24, 2021), <https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/Memorandum-for-mandatory-coronavirus-disease-2019-vaccination-of-department-of-defense-service-members.pdf> [<https://perma.cc/WFQ5-GD8V>]; Memorandum from Lloyd J. Austin, Sec’y of Def., to Sec’y of the Mil. Servs. et al. (Nov. 30, 2021), <https://media.defense.gov/2021/Nov/30/2002900918/-1/-1/1/MEMORANDUM-ON-CORONAVIRUS-DISEASE-2019-VACCINATION-FOR-MEMBERS-OF-THE-NATIONAL-GUARD-AND-THE-READY-RESERVE.PDF> [<https://perma.cc/U5CW-EZVT>].

sistent with standards of discipline” that existed at the time of discharge for the applicant’s particular branch of service.⁴² Third, inequity can be determined “based upon consideration of the applicant’s service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this section . . . , even though the discharge was determined to have been otherwise equitable and proper at the time of issuance.”⁴³ The non-exclusive factors are divided into two categories. “Quality of service” includes awards, time in service, service history, promotions or demotions, and civil or court-martial convictions.⁴⁴ “Capability to serve” includes (1) “[t]otal capabilities” as demonstrated by “age, educational level, and aptitude scores,” (2) “[f]amily and [p]ersonal [p]roblems” that may have contributed to and therefore mitigated the veteran’s behavior, (3) “[a]rbitrary or capricious action” that shows “a clear abuse of . . . authority,” and (4) “[d]iscrimination.”⁴⁵

In addition to propriety and equity grounds, relief may be granted for clemency. In a July 25, 2018, memorandum to the military review boards, then Under Secretary of Defense Robert L. Wilkie directed the boards to “upgrade discharges or correct military records to ensure fundamental fairness.”⁴⁶ Secretary Wilkie issued this memo in response to the “[i]ncreasing attention . . . being paid to pardons for criminal convictions and the circumstances under which citizens should be considered for second chances.”⁴⁷ The guidance creates space for relief on the grounds of fairness.⁴⁸ The Wilkie Memo defines clemency as “re-

The DoD subsequently rescinded the vaccination mandate. Memorandum from Lloyd J. Austin, Sec’y of Def., to Senior Pentagon Leadership et al. (Jan. 10, 2023), <https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-ON-RESCISSION-OF-CORONAVIRUS-DISEASE-2019-VACCINATION-REQUIREMENTS-FOR-MEMBERS-OF-THE-ARMED-FORCES.PDF> [<https://perma.cc/FVL7-A37F>]. As an example of how this policy change affects discharge upgrade requests, the AFDRB granted an upgrade because “involuntary separation actions were taken in accordance with valid lawful policy in effect at the time, however, the Applicant’s discharge is now inequitable due to the changes in law and policy.” Air Force Discharge Review Board Decisional Document, Case No. FD-2025-00025 (Air Force Rev. Bds. Agency Apr. 25, 2025), <https://boards.law.af.mil/AF/DRB/CY2025/FD-2025-00025%2001%20FD202500025.pdf> [<https://perma.cc/9H9C-C9HH>].

42 32 C.F.R. § 70.9(c)(2); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.3.2.

43 32 C.F.R. § 70.9(c)(3); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.3.3.

44 32 C.F.R. § 70.9(c)(3)(i); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.3.3.1.

45 32 C.F.R. § 70.9(c)(3)(ii); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.3.3.2.

46 Wilkie Memo, *supra* note 38.

47 *Id.*

48 *Id.* (“While not everyone should be pardoned, forgiven, or upgraded, in some cases, fairness dictates that relief should be granted.”).

lief specifically granted from a criminal sentence and is a part of the broad authority that [military boards] have to ensure fundamental fairness.”⁴⁹ Clemency in this context is broader than that and “applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.”⁵⁰ The Wilkie Memo sets forth twelve factors for consideration including “favor[ing] second chances” and recognizing that “[e]vidence in support of relief may come from sources other than a veteran’s service record.”⁵¹ The Memo further directs the boards to consider another eighteen factors including “[l]ength of time since misconduct” and “[w]hether misconduct may have been youthful indiscretion.”⁵² Clemency is not yet codified in the regulations.

C. Military Discharge Review Boards

There are three main DRBs: Army, Naval (which reviews both Navy and Marine Corps applications), and Air Force.⁵³ A board is typically a three- or five-member panel of active-duty military servicemembers.⁵⁴ Board members are not law-trained and there is little information about what kind of training they receive. Most “decisions” are just templates with little reasoning, and a common “reason” for denial is the “presumption of regularity in the conduct of governmental affairs.”⁵⁵ The boards are supposed to provide “uniformity among the Military Departments in

⁴⁹ *Id.* attach., para. 2.

⁵⁰ *Id.* attach., para. 4.

⁵¹ *Id.* attach., para. 6(a–l).

⁵² *Id.* attach., para. 7(a–r). See generally Ashlyn Anderson-Keelin, “*I Was Young and Dumb*”: *Why Age Should Be Considered in the Military Discharge Upgrade Process*, 12 TEX. A&M L. REV. 431 (2025) (offering proposals to factor age into the discharge upgrade process as an explicit consideration).

⁵³ See *Boards of Review Reading Rooms*, DEP’T OF DEF., <https://boards.law.af.mil/index.htm> [<https://perma.cc/G3L9-LP9R>] (last visited Mar. 3, 2026) (listing the military DRBs, including one for the Air Force, the Army, and the Navy).

The Coast Guard also has a DRB, but that Board has fewer cases posted in comparison to the other boards. See *Coast Guard Discharge Review Board Records (DRB)*, U.S. COAST GUARD (Jan. 9, 2026), https://boards.law.af.mil/CG_DRB.htm [<https://perma.cc/YN5W-UX3G>]. There is also the DoD Discharge Appeal Review Board (DARB). In its first three annual reports, the DARB reported only one “viable request” without any context or result. See *DoD Discharge Appeal Review Board (DARB)*, DEP’T OF DEF. (Jul. 18, 2025), https://boards.law.af.mil/OSD_DARB.htm [<https://perma.cc/CJ65-Z8XY>].

⁵⁴ 10 U.S.C. § 1553(d)(1)(A).

⁵⁵ 32 C.F.R. § 70.8(b)(12)(vi) (2026); Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1389 (“[T]he presumption is an often-used default basis to deny upgrade requests . . . [and it] assumes the original [discharge characterizations] were correct, lawful, and in good faith . . .”).

the rights afforded applicants in discharge reviews,” but each branch has its own policies and procedures.⁵⁶

III. THE PRESUMPTION OF REGULARITY

The presumption of regularity is a common law principle of administrative law with a long history reaching back to English common law.⁵⁷ The United States Supreme Court first stated the presumption in the 1926 case, *United States v. Chemical Foundation*: “[I]n the absence of clear evidence to the contrary, courts presume that [government officials] have properly discharged their official duties.”⁵⁸ Generally speaking, official government acts performed by government officials are presumed to have been carried out properly.⁵⁹

In examining the presumption of regularity in DRB decisions, this Article first explores the presumption in two other contexts—federal case law generally and CAVC case law involving VA mailing procedures—to better understand the presumption as a legal principle and how decisionmakers engage with it. The CAVC has a well-developed body of law involving the presumption of regularity in cases involving VA mailing practices within VA’s duty to provide notice of decisions.⁶⁰ Thus, this Article identifies three categories of the presumption of regularity and will refer to them by category going forward:

- (1) “General presumption,” the general presumption of regularity in federal courts excluding the CAVC;
- (2) “VA mailing presumption,” the presumption of regularity in CAVC cases involving questions of VA mailing practices,⁶¹ and

⁵⁶ 32 C.F.R. § 70.4(b)(2); see *infra* Part V.

⁵⁷ See Aram A. Gavoor & Steven A. Platt, *In Search of the Presumption of Regularity*, 74 FLA. L. REV. 729, 734–36 (2022) [hereinafter Gavoor & Platt, *In Search of*].

⁵⁸ 272 U.S. 1, 14–15 (1926); see also Gavoor & Platt, *In Search of*, *supra* note 57, at 737 (summarizing *Chemical Foundation* as “an early example of the presumption being used as a sword against the government instead of a shield”).

⁵⁹ See Gavoor & Platt, *In Search of*, *supra* note 57, at 733.

⁶⁰ See 38 U.S.C. § 5104 (requiring VA to “provide to the claimant (and to the claimant’s representative) notice of such decision”); 38 C.F.R. § 3.103(b)(1) (2026) (“Claimants and their representative are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief.”); see also § 3.103(f) (listing the elements required to be included in the notice); *infra* Section III.B (discussing the VA mailing presumption’s analytical framework).

⁶¹ The Board of Veterans’ Appeals (BVA) also relies on the VA mailing presumption. BVA decisions are consistent with the CAVC’s approach to VA mailing decisions, but because they are non-precedential agency decisions, they are outside the scope of this Arti-

- (3) “DRB presumption,” the presumption of regularity as used by the DRBs.

Though all three categories of the presumption share a common origin in English common law and Supreme Court precedent citing English common law, the DRB presumption stands out in contrast to both the general presumption and the VA mailing presumption. While there are some similarities among the presumptions, the DRB presumption is used far more often and much more substantively than the other presumptions. Many veteran-applicants have had no chance at relief given the power of the presumption as wielded by the DRBs.

In this Part, I provide background on the general presumption and the VA mailing presumption to contextualize the forthcoming examination of the DRB presumption. The general presumption is flexible with legal principles that have sometimes suggested an expanded presumption and a varied level of engagement with the analytical framework. Given the CAVC’s limited jurisdiction,⁶² the VA mailing presumption has developed in a more concrete factual realm and with a clearer analytical framework, distinct from, but consistent with, the body of law involving the general presumption. While the general presumption lacks clarity on what generally counts as “clear evidence” to rebut the presumption, the VA mailing presumption operates within a concrete analytical framework and yields robust examples of what evidence counts as substantial enough to rebut the presumption.

Together, the general and VA mailing presumptions create a lens through which to view and examine the DRB presumption. After exploring the principles of the general presumption and the parameters of the VA mailing presumption, this Part will conclude by threading together the characteristics of the two presumptions before turning to an examination of the DRB presumption’s irregularities. This discussion is intentionally limited in scope; it does not discuss the general presumption in depth but rather draws out governing principles based on the body of

cle. See, e.g., Title Redacted by Agency, No. 23024631, 2023 WL 5707158, at *1–2 (Bd. Vet. App. Apr. 27, 2023).

⁶² See 38 U.S.C. § 7252(a) (establishing that the court has “exclusive jurisdiction to review decisions of the Board of Veterans’ Appeals”); see also Jonathan M. Gaffney, *U.S. Court of Appeals for Veterans Claims: A Brief Introduction*, CONG. RSCH. SERV. (Apr. 22, 2021), <https://www.congress.gov/crs-product/IF11365> [<https://perma.cc/H62Z-D6PK>] (“These decisions concern entitlement to various types of VA benefits, including disability compensation, pensions, education benefits, and survivor benefits.”).

law.⁶³ Given the nature of the CAVC case law, the discussion of the VA mailing presumption is more detailed in discussing the analytical framework.

A. Principles of the General Presumption of Regularity

Despite its long history, there is limited scholarship engaging with the presumption of regularity.⁶⁴ In a 2022 article, scholars Aram A. Gavoor and Steven A. Platt cataloged various instances of the presumption, explaining that the presumption of regularity “applies in a number of ways that are not identified by or discussed in the current literature or corpus of judicial opinions,” and identified the “hazards of the presumption’s vagueness.”⁶⁵ The presumption of regularity is “amorphous” and “heavily weigh[s] in favor of the government.”⁶⁶

For the purposes of this Article, I limit the discussion to focus on what is relevant in the context of comparing the general presumption to the VA mailing presumption and ultimately to the DRB presumption to uncover the DRB presumption’s irregularities.⁶⁷ Thus, I set forth the overarching characteristics of the general presumption with some examples for context.

The presumption of regularity gained some attention during the first Trump administration.⁶⁸ Scholars addressed the pre-

⁶³ Readers interested in learning more about the general presumption of regularity are encouraged to read Gavoor and Platt’s article, *In Search of*, *supra* note 57, and Ryan Goodman et al., *The “Presumption of Regularity” in Trump Administration Litigation*, JUST SEC. (Nov. 20, 2025), <https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation/> [<https://perma.cc/ACG7-HNHR>].

⁶⁴ See Gavoor & Platt, *In Search of*, *supra* note 57, at 731 (noting that the presumption is “a largely under-researched concept”); Wherry, *Kicked Out, Kicked Again*, *supra* note 2, at 1389–91.

⁶⁵ Gavoor & Platt, *In Search of*, *supra* note 57, at 757. Gavoor and Platt catalog instances of the presumption of regularity in federal courts. *Id.* at 732. The presumption of regularity as used by the DRBs is outside the scope of Gavoor and Platt’s work.

⁶⁶ *Id.* at 733–34 (“[C]ourts are imprecise on the domain of the presumption of regularity. This classification uncertainty is exacerbated by the fact that the Supreme Court has not comprehensively set out the presumption’s contours.”).

Gavoor & Platt note the impossibility of “discern[ing] a unified conception of the presumption across the federal judiciary.” *Id.* at 747.

⁶⁷ See Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431 (2018) [hereinafter *The Presumption of Regularity*] (examining the basic typology and underlying theories of the presumption of regularity to “shed[] light on how the presumption has evolved alongside the Court’s attitude”). See generally Gavoor & Platt, *In Search of*, *supra* note 57 (discussing the “contemporary domain of the presumption [of regularity] and its applications from its pre-Founding Era source”).

⁶⁸ See *The Presumption of Regularity*, *supra* note 67, at 2432 (“[T]he presumption has never been the subject of focused academic treatment.”); Aram A. Gavoor & Steven A. Platt, *A History, Taxonomy and Qualified Defense of the Presumption of Regularity*,

sumption's imprecise contours and argued for "a strict presumption that a government official performed ministerial tasks and . . . [a] rebuttal standard for a preponderance of the evidence, not clear evidence."⁶⁹ Based on their robust research, Gavoor and Platt concluded that it was "impossible to discern a unified conception of the presumption across the federal judiciary."⁷⁰ The presumption can mean not only that "a public official followed all of the procedures required," but also something broader and harder to determine: that "a public official acted with lawful motivation."⁷¹ The presumption, however, is not so amorphous as to legitimize any action. As Gavoor and Platt argued, "The current state of the presumption poses a threat with its unduly high rebuttal standard" and its "unbounded expansive use" that "amounts to an inappropriate distortion of the separated powers by executive aggrandizement."⁷² With similar concerns about "unbounded expansive use," I draw on the general presumption to uncover the DRB presumption's irregularities.⁷³

As to the broader scope of the general presumption, Gavoor and Platt cataloged "at least fifteen unique uses" of the presumption and identified over 800 cases citing *United*

LAWFARE (Oct. 6, 2021, at 10:53 PT) [hereinafter Gavoor & Platt, *A History*], <https://www.lawfaremedia.org/article/history-taxonomy-and-qualified-defense-presumption-regularity> [<https://perma.cc/CR9Y-Q64Z>] ("The presumption gained national significance during the Trump administration, but, with a few notable exceptions, the presumption of regularity has benefited from little scholarly engagement.").

⁶⁹ Gavoor & Platt, *In Search of*, *supra* note 57, at 757; *see also* Gavoor & Platt, *A History*, *supra* note 68 ("We conclude by making the case that the Supreme Court or Congress should articulate a lawful and sensible doctrinal standard for the presumption of regularity to benefit each of the branches of the federal government and the American public."); Carissa Byrne Hessick, *A Bit of History on the Presumption of Regularity*, PRAWFSBLAWG (Jan. 14, 2019, at 7:06 PT), <https://prawfsblawg.blogs.com/prawfsblawg/2019/01/a-bit-of-history-on-the-presumption-of-regularity.html> [<https://perma.cc/DD23-W9X4>] ("[I]t is worth noting the shaky foundations of the modern presumption of regularity. History shows that it is an evidentiary presumption that applied to public and private actors alike; it was used to allocate burdens of proof, not to prevent discovery or to insulate executive action from judicial review.").

⁷⁰ Gavoor & Platt, *A History*, *supra* note 68.

⁷¹ Gavoor & Platt, *In Search of*, *supra* note 57, at 743.

⁷² *Id.* at 762.

⁷³ Though in this Article I do not question the presumption of regularity's general legitimacy or explore potential inconsistencies between the presumption and due process, the set of class actions against the boards raised due process concerns related to the presumption of regularity. *See, e.g.*, Complaint ¶ 169, *Johnson v. Kendall*, No. 3:21-cv-01214 (D. Conn. filed Sep. 13, 2021) ("The failure of the AFDRB to explain how the presumption of regularity operates, when it is rebutted, and why it is justified results in veterans lacking adequate notice of the standards that will be used to adjudicate their applications. This violates constitutional rights to procedural due process, which is a violation of the [Administrative Procedure Act]'s guarantee of constitutional agency actions.").

These due process questions certainly deserve further research.

States v. Chemical Foundation as of August 14, 2021.⁷⁴ The “fifteen unique uses” ranged from general to specific. For example, the general uses include a “presumption that a public official has the authority to act” and “presumption that an agency has produced a complete administrative record.”⁷⁵ More specifically, there is a “presumption that a prosecutor is not committing unconstitutional selective prosecution.”⁷⁶ Despite the impossibility of discerning “a unified conception of the general presumption,” there are four identifiable characteristics of the general presumption relevant to this Article.

1. The Presumption of Regularity is Deferential

First, the presumption of regularity is deferential to government actor decisions. As stated in *Chemical Foundation*, “The presumption of regularity supports the official acts of public officers” and “courts presume that they have properly discharged their duties.”⁷⁷ That, of course, seems to be the basic purpose of the presumption: to give deference to government actors.⁷⁸ Deference is at the core of the presumption, but it is not deference unbounded.

2. The Presumption Requires Engagement with an Analytical Framework

Second, because the general presumption is “not . . . a legal fiction wholly beyond judicial review or impervious to rebuttal,”⁷⁹ it requires engagement with an analytical framework. Though the framework is not always clearly stated in federal case law, it consists of three steps: (1) applicability, (2) rebuttal evidence, and (3) shifted burden. For example, in a 2022 case, *Broadgate*,

⁷⁴ Gavoor and Platt organized the cases into several categories including “Cases In Which the Presumption of Regularity Is Described As Being Rebutted (to any degree),” “Cases In Which The Presumption Of Regularity Was Not Rebutted,” and “Cases In Which The Court Takes No Position Or Only Describes The Presumption Of Regularity.” Gavoor & Platt, *In Search of*, *supra* note 57, at 732, 772–74.

⁷⁵ *Id.* at 732, 748.

⁷⁶ *Id.* at 750.

⁷⁷ *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (first citing *The Confiscation Cases*, 87 U.S. (20 Wall) 92, 108 (1873); then citing *United States v. Page*, 137 U.S. 673, 679–80 (1891); and then citing *United States v. Nix*, 189 U.S. 199, 205 (1903)); *see also* Hessick, *supra* note 69 (explaining how “the presumption has expanded well beyond the cases that have been used to justify it”).

⁷⁸ *See Alaska Airlines v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993) (“[T]his presumption usually runs in favor of the government.”); *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004) (referring to the presumption as “a presumption of legitimacy” of “the Government’s official conduct”).

⁷⁹ Gavoor & Platt, *In Search of*, *supra* note 57, at 761.

Inc. v. Secretary, Department of Labor, the United States District Court for the District of Michigan first determined that the presumption applied to the case because it involved a question of a public officer's authority to take an action.⁸⁰ In this case, the action was issuing a determination letter, and the court decided that, because the public officer issued the letter, she had authority to do so, and thus "create[d] a presumption that she did."⁸¹ The court then assessed whether the presumption was rebutted by clear evidence, noting that the plaintiff "produced no evidence to rebut" and thus the presumption was not rebutted.⁸² In that situation, there was no shifting of the burden to the agency to prove actual authority to issue the letter because the presumption was not rebutted.⁸³ But the court did recognize that had the presumption been rebutted, the burden would have shifted to the Secretary to "produce evidence to show that the District Director was actually redelegated authority to issue the letter."⁸⁴

In some instances, the first step—applicability—is assumed. For example, in a case involving prosecutorial discretion, the Supreme Court explained, "The presumption of regularity supports their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'"⁸⁵ The Court did not explicitly make an initial determination as to whether the presumption applied to the case but noted that "[a] selective prosecution case asks a court to exercise judicial power over a 'special province' of the Executive."⁸⁶ Thus, the Court implied that the presumption applied to prosecutors because "they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"⁸⁷

⁸⁰ 631 F. Supp. 3d 449, 458 (E.D. Mich. 2022).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 457–58. Consistent with *Broadgate*, the Federal Circuit in *Alaska Airlines* also engaged a three-step analytical framework, though the court did not identify the framework in those terms. *Alaska Airlines*, 8 F.3d at 795–96.

⁸⁴ *Broadgate*, 631 F. Supp. 3d at 458. Interestingly, the court relied on a CAVC case, *Romero v. Tran*, to acknowledge the burden shifting after the presumption is rebutted and distinguished that situation from this case. *Id.* (citing *Romero v. Tran*, 33 Vet. App. 252 (2021)); see also *infra* Section III.B.ii (discussion of *Romero*).

⁸⁵ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

⁸⁶ *Id.* at 464.

⁸⁷ *Id.*

3. Some Level of Evidence is Required to Rebut the Presumption

Third, and consistent with the preceding discussion about the analytical framework, some level of evidence is required to rebut the presumption—but what exactly that level is and what it takes to satisfy it are unclear.⁸⁸ According to *Chemical Foundation*, “clear evidence to the contrary” is required to rebut the presumption but there is no unified understanding of “clear evidence” in this context.⁸⁹ For example, in *Latif v. Obama*, dissenting Judge Tatel questioned the majority’s application of the general presumption: “Whether the presumption can be overcome by a preponderance of the evidence or by clear and specific evidence—this court never says which”⁹⁰

In the selective-prosecution case *United States v. Armstrong*, the Court noted the “clear evidence” standard for rebuttal. The Court did not explain the standard but determined that, in selective-prosecution claims, “clear evidence” means “a showing of failure to prosecute similarly situated individuals.”⁹¹ The Court discussed “convincing direct evidence” and “indisputable evidence” in another case, *Hunter v. Underwood*.⁹² Distinguishing from *Hunter*, the Court further explained what was needed: “some evidence that similarly situated defendants of other races could have been prosecuted, but were not.”⁹³ The Court then rejected each piece of evidence offered by the respondents to establish a failure to prosecute similarly situated individuals for various inadequacies: a study that did not “identify individuals who were not black,” a newspaper article about irrelevant “drug sentencing laws,” and affidavits that “recounted hearsay and reported personal conclusions based on anecdotal evidence.”⁹⁴ The Court thus suggested, without articulating to a certainty, that

⁸⁸ See Gavoor & Platt, *In Search of*, *supra* note 57, at 765–66 (calling for the Supreme Court to “clarify” the “clear evidence” required by *Chemical Foundation* and advocating for “the preponderance of the evidence” standard instead as the requisite for rebuttal).

⁸⁹ *Chem. Found.*, 272 U.S. at 14–15. Gavoor & Platt argue that “clear evidence” is too high a burden under the Administrative Procedure Act and SCOTUS decisions. See Gavoor & Platt, *In Search of*, *supra* note 57, at 765. They suggest that “the preponderance of the evidence standard” is a better standard for showing that “the government is acting unlawfully.” *Id.* at 765.

⁹⁰ 666 F.3d 746, 779 (D.C. Cir. 2011) (Tatel, J., dissenting).

⁹¹ *Armstrong*, 517 U.S. at 467.

⁹² *Id.* (citing *Hunter v. Underwood*, 471 U.S. 222, 227, 229–31 (1985)).

⁹³ *Id.* at 469.

⁹⁴ *Id.* at 470.

this flawed evidence did not rise to the level of “clear evidence,”⁹⁵ whatever that means. Even so, it remains the case that some level of evidence is required and—significantly—that it must be evaluated within the presumption’s analytical framework.

Finally, a recent case involving a challenge to an executive order that “removed [substantial] bargaining rights from approximately two-thirds of the federal workforce” addressed the presumption of regularity, followed the standard three-step analytical framework, and assessed each piece of evidence.⁹⁶ In looking for “‘clear evidence’ that the official did not discharge his or her official duties properly,” the court determined that the plaintiff rebutted the presumption, thus satisfying the requirement for clear evidence.⁹⁷ First, the executive order was in “stark contrast” to relevant congressional findings and “directly contrary to Congress’s conclusion” about “labor policy and labor organizations.”⁹⁸ Second, statements in the “White House Fact Sheet reflect[ed] retaliatory motive towards certain unions.”⁹⁹ Third, the executive order was “in furtherance of unrelated policy goals rather than based on the statutory criteria.”¹⁰⁰ Thus, in sum, clear evidence to rebut includes various instances of measurable contradictions and inconsistencies that at least indicate the possibility of an irregularity.¹⁰¹

4. The Presumption Exists Only in Common Law

Fourth, the presumption is not codified in the U.S. Code.¹⁰²

B. The VA Mailing Presumption’s Analytical Framework

As a federal court, the United States Court of Appeals for Veterans Claims could be included in the discussion of the general presumption in federal case law, but I discuss the presumption in CAVC case law separately and in greater depth because of

⁹⁵ *Id.* at 470–71.

⁹⁶ *Nat’l Treasury Emps. Union v. Trump*, 780 F. Supp. 3d 237, 245 (D.D.C.), *stay granted*, 2025 WL 1441563 (D.C. Cir. 2025).

⁹⁷ *Id.* at 254 (quoting *Owlfeather-Gorbey v. Avery*, 119 F.4th 78, 86 (D.C. Cir. 2024)).

⁹⁸ *Id.* at 254–55.

⁹⁹ *Id.* at 255.

¹⁰⁰ *Id.* at 254.

¹⁰¹ *See* *Am. Foreign Serv. Ass’n v. Trump*, 783 F. Supp. 3d 248, 262 (D.D.C.) (citing *Nat’l Treasury Emps. Union*, 780 F. Supp. 3d at 254), *stay granted*, 2025 WL 1742853 (D.C. Cir. 2025). In both cases, the court did not address burden shifting because the procedural posture of the case was a preliminary injunction. *Id.*; *Nat’l Treasury Emps. Union*, 780 F. Supp. 3d at 254.

¹⁰² Gavoor & Platt, *In Search of*, *supra* note 57, at 743.

its unique characteristics. First, unlike the general presumption that covers a vast range of factual scenarios, the VA mailing presumption applies to a narrow context: VA's official duty to provide notice to a claimant and claimant's representative, if any. Second, the presumption in CAVC case law has a more developed analytical framework, though it is consistent with the general presumption. Third, the CAVC case law has developed an understanding of what does and does not count as "clear evidence." I provide some limited background on the veterans disability compensation benefits system to set the stage for explaining the VA mailing presumption.

1. A Brief Sidebar: Notice and Deadlines in Veterans Disability Compensation Benefits Claims

For context, I briefly explain veterans disability compensation as it relates to the VA mailing presumption.¹⁰³ Veterans with a service-connected disability or condition may be eligible for veterans disability compensation benefits.¹⁰⁴ The process for applying for benefits involves submitting forms and evidence to VA. These applications are called "claims"¹⁰⁵ and are processed by a regional office.¹⁰⁶ Regional office decisions may be appealed.¹⁰⁷

Throughout the claims and appeals processes, there are statutory notice requirements for VA to communicate information with veteran-claimants and veteran-claimants' representatives, if any. For example, 38 U.S.C. § 5104(a) requires that

¹⁰³ As any veterans advocate can attest, the law and regulatory scheme of veterans disability compensation benefits is complicated—much more complicated than this brief sidebar suggests.

¹⁰⁴ *Eligibility for VA Disability Benefits*, U.S. DEP'T OF VETERANS AFFS. (Apr. 23, 2025), <https://www.va.gov/disability/eligibility/> [https://perma.cc/N6YU-CEYZ].

¹⁰⁵ *VA Disability Compensation*, U.S. DEP'T OF VETERANS AFFS. (Sep. 16, 2025), <https://www.va.gov/disability/> [https://perma.cc/6PG2-X3RV]; see also STACEY-RAE SIMCOX & DAVID E. BOELZNER, *VETERANS BENEFITS: LAW, THEORY, AND PRACTICE* 29 (2023) (explaining the "claims" are processed for the various types of benefits that VA offers).

¹⁰⁶ *How to File a VA Disability Claim*, U.S. DEP'T OF VETERANS AFFS. (Jan. 6, 2026), <https://www.va.gov/disability/how-to-file-claim/> [https://perma.cc/KEF3-8LQM]; see also SIMCOX & BOELZNER, *supra* note 105, at 29 (explaining how the regional office process has changed over time); Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 397–99 (2011) (describing the claims process at the regional office level).

¹⁰⁷ See *VA Decision Reviews and Appeals*, U.S. DEP'T OF VETERANS AFFS. (Feb. 10, 2026), <https://www.va.gov/decision-reviews/> [https://perma.cc/GQ56-J3KH] (identifying the three decision review options: supplemental claim, higher-level review, or board appeal); *Choosing a Decision Review Option*, U.S. DEP'T OF VETERANS AFFS. (Apr. 19, 2024), <https://www.va.gov/resources/choosing-a-decision-review-option/> [https://perma.cc/ZAT8-KERT]; see also SIMCOX & BOELZNER, *supra* note 105, at 29–33 (describing the appeals process).

“the Secretary shall, on a timely basis, provide to the claimant (and to the claimant’s representative) notice of [a decision by the Secretary involving a benefits claim]. The notice shall include an explanation of the procedure for obtaining review of the decision.”¹⁰⁸ The Board of Veterans’ Appeals (one of the avenues of appeal) has a similar notice requirement under 38 U.S.C. § 7104(e).¹⁰⁹ Notice is typically sent by traditional mail to the veteran’s last known physical address as indicated in the veteran’s claim file.¹¹⁰ These statutory “official duties” to provide notice trigger the presumption of regularity because the presumption generally applies to official government acts, including these requirements to provide notice.

2. The VA Mailing Presumption’s Concrete Analytical Framework: *Romero v. Tran*

Within this context of VA notice requirements, the CAVC has a robust body of case law involving the presumption of regularity.¹¹¹ This body of law provides an example of how the presumption of regularity operates within another agency, in contrast to DoD. This section discusses *Romero v. Tran* in detail to define and explain the VA mailing presumption.

Building on previous CAVC decisions, now-Chief Judge Allen provided a primer on the presumption of regularity and set forth a clear analytical framework in the 2021 case, *Romero v. Tran*. Judge Allen’s decision in *Romero* began with a clear description of the presumption of regularity, rooting the presumption in *Chemical Foundation*:

This case is about the presumption of regularity—how it may be triggered as well as rebutted. Courts often cite *United States v. Chemical Foundation, Inc.*, for the Supreme Court’s statement of the presump-

¹⁰⁸ 38 U.S.C. § 5104(a); *see also* 38 C.F.R. § 3.103(b)(1) (2026) (noting when claimants and their representatives have a right to notice).

¹⁰⁹ 38 U.S.C. § 7104(e) (“After reaching a decision on an appeal, the Board shall promptly issue notice (as that term is defined in section 5100 of this title) of such decision . . .”).

¹¹⁰ *See* 38 C.F.R. § 19.30(a) (explaining that the BVA must send the Statement of the Case and directions for appealing to “the appellant at the latest address of record and a separate copy provided to his or her representative (if any)”).

¹¹¹ The Federal Circuit recognized the CAVC’s analytical framework in *Toomer v. Shinseki*, 524 F. App’x. 666, 668–69 (Fed. Cir. 2013) (“The Veterans Court has developed a specific process to evaluate whether the veteran has rebutted the presumption. Beginning with *Ashley v. Derwinski*, 2 Vet. App. 307, 309 (1992), and continuing in a long line of cases, the Veterans Court requires clear evidence that the VA’s normal mailing practices were not followed. If the veteran presents clear evidence to rebut the presumption, the burden then shifts to the government to affirmatively prove that they followed their normal practices and mailed the decision.”).

tion: “The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” The presumption of regularity reflects Federal courts’ deference to the other branches of Government and efficiency concerns. But it is not a *carte blanche*. After all, the presumption of regularity is rebuttable.¹¹²

In brief, the facts in *Romero* involved the VA mailing a Statement of the Case (SOC) to a veteran-applicant without mailing a copy to the veteran’s representative despite VA’s legal duty to do so.¹¹³ According to the governing appeals process at the time, an appeal of a SOC must be submitted to VA within 60 days from the date on the SOC.¹¹⁴ The SOC, dated August 16, 2017, “den[ie]d [the veteran’s] claim for an increased disability rating for [post-traumatic stress disorder], as well as entitlement to [Total Disability Individual Employability] and service connection for the other conditions.”¹¹⁵ Upon discovering on November 2, 2017—a date well past the sixty-day period that began on August 16, 2017—that the veteran-applicant’s claims file included the August 16, 2017, SOC, the veteran-applicant’s representative realized they had not received a copy and notified VA of the error.¹¹⁶ The representative therefore “argu[ed] that VA was not entitled to the presumption of regularity and alleg[ed] ongoing problems with VA’s mailing system that called into question its regularity.”¹¹⁷ Four days after discovering the error, the representative filed a Substantive Appeal of “all the issues listed in the SOC”—well beyond the sixty-day time limit if measured by the date on the SOC that the representative did not receive.¹¹⁸ The representative “argued that the appeal was timely because VA failed to notify it of the SOC,” and again “assert[ed] that VA’s mailing practices are irregular.”¹¹⁹ VA determined that the appeal was untimely because it was submitted more than sixty days after August 16, 2017.¹²⁰ The representa-

¹¹² *Romero v. Tran*, 33 Vet. App. 252, 254 (2021) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

¹¹³ *Id.* at 254–55.

¹¹⁴ *Manage a Legacy VA Appeal*, U.S. DEPT OF VETERANS AFFS. (Apr. 30, 2025), <https://www.va.gov/decision-reviews/legacy-appeals/> [<https://perma.cc/UP4N-XDZX>]. This sixty-day period was under the legacy system that applied at the time. *Id.*

¹¹⁵ *Romero*, 33 Vet. App. at 255.

¹¹⁶ *Id.* at 255–56.

¹¹⁷ *Id.* at 256.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

tive then filed a Notice of Appeal, “arguing for the timeliness of appellant’s Substantive Appeal.”¹²¹

The representative put forth three documents in support of the argument that the Substantive Appeal was timely. First, a 2017 Government Accountability Office study and report of VA mailing concluded that “VA is not managing its mail program effectively, as it lacks key elements of an effective mail management program,” and “VA is unable to determine the extent to which its mail operations are efficient and effective.”¹²² Second, a lawyer from the representative firm provided a statement of his “aware[ness] of at least 863 instances between July 2015 and May 2018 where VA failed to mail him a copy of a case-related document.”¹²³ In conversations between firm staff and VA employees, VA “acknowledged VA’s continued failure to consistently mail representatives copies of their claimants’ decisional documents as required” by law.¹²⁴ VA did not dispute this description of the conversation.¹²⁵ Third, “Diane Rauber, executive director of the National Organization of Veterans’ Advocates, Inc. (NOVA) . . . described NOVA’s efforts to inform VA of mailing failures.”¹²⁶ Rauber noted “272 examples of VA mailing failures.”¹²⁷

In denying the appeal as untimely, the Board of Veterans’ Appeals determined that VA mailed a copy of the August 16, 2017, SOC to the representative; that the SOC included correct addresses for both the veteran and the representative; that the Substantive Appeal was filed on November 6, 2017; and that “the evidence she submitted was ‘not clear evidence sufficient to rebut the presumption that the August 16, 2017[,] SOC was mailed to’ appellant and [her representative].”¹²⁸

The Board recognized “the substantial evidence . . . that reflects a widespread problem with VA not mailing correspondence,” but then concluded that “there is no clear evidence that VA did not mail the actual August 2017 SOC.”¹²⁹ Furthermore, “[t]he Board reasoned that [the representative’s] statement of nonre-

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 256–57.

¹²⁷ *Id.* at 257.

¹²⁸ *Id.*

¹²⁹ *Id.*

ceipt alone was not sufficient to rebut the presumption.”¹³⁰ The Board explained that evidence to clearly rebut the presumption of regularity “should be specific to the facts of the case at hand.”¹³¹ Although there was evidence of a general mailing problem, the Board stated that “the Veteran has not submitted any evidence specific to this Veteran’s file of the mailing practices as applicable to the handling of this Veteran’s case.”¹³² The Board also relied on VA’s acknowledgement of a general mailing problem but lack of admitting a problem with the specific August 16, 2017, mailing.¹³³ With a focus on what was missing, “[t]he Board concluded that the evidence ‘[d]id not *clearly* rebut the presumption that the August 16, 2017[,] SOC was mailed’ because there was ‘little, if any, evidence’ of a failure to mail the August 16, 2017, SOC.”¹³⁴ Without “any” evidence to rebut the presumption, the presumption of regularity applied to the August 16, 2017, SOC as “properly mailed.”¹³⁵

In discussing the presumption of regularity, Judge Allen acknowledged that the “presumption of regularity’s origins are not entirely clear from or well explained in case law.”¹³⁶ The presumption is “less a rule of evidence than a general working principle’ or ‘a collection of deference doctrines.”¹³⁷ The distinction between an evidentiary rule and deference doctrine is significant, as the court noted, because “[e]videntiary presumptions typically apply only upon a showing of predicate evidence,” but for the presumption of regularity, “*either* evidence or law can trigger it.”¹³⁸ The presumption of regularity, therefore, means that “if law imposes a relevant, official duty on an official, we presume that the official has properly performed that duty, unless there is evidence to the contrary.”¹³⁹

Judge Allen discussed various rationales underlying the presumption of regularity, “includ[ing] separation of powers and

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 257–58.

¹³⁶ *Id.* at 258 (citations omitted).

¹³⁷ *Id.* at 259 (first quoting Nat’l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174 (2004); and then quoting Alan Z. Rozenshtein, *Another Blow to the Presumption of Regularity*, LAWFARE (Mar. 10, 2020, at 13:47 PT), <https://www.lawfareblog.com/another-blow-presumption-regularity> [<https://perma.cc/KS97-5LG4>]).

¹³⁸ *Id.* (citing *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998)).

¹³⁹ *Id.* (citing *Ashley v. Derwinski*, 2 Vet. App. 307, 308 (1992)).

administrative efficiency.”¹⁴⁰ But even with these important principles, there are limits to the presumption. For example, “when irregularity plainly appears from the record, both the Federal Circuit and this Court have refused to presume regularity.”¹⁴¹ In these situations of plain irregularity, the courts have “reverse[d],’ or inverted, the presumption—or assumed that that which appears irregular is in fact irregular.”¹⁴² In such a situation, the government then has the opportunity “to disprove the appearance of irregularity.”¹⁴³ Without a plain irregularity, “a challenger gets an opportunity to produce clear evidence to rebut the presumption,” and if that is successful, the burden shifts to the government.¹⁴⁴

The court then considered the facts and arguments within the presumption of regularity’s analytical framework. The first step is a question of the presumption’s applicability and requires determining whether there is an official duty at issue. Judge Allen refers to this step as the “predicate” in *Romero*. Relying on previous CAVC decisions, Judge Allen explained that the presumption of regularity applied in this case because it “concerns VA’s performance of [a] legal duty as provided in statute and regulation.”¹⁴⁵ An “official duty” triggers the presumption, and “the presumption of regularity applies” to “presume” performance of an official duty “unless there is clear evidence to the contrary.”¹⁴⁶ Thus, the predicate was satisfied, and the presumption applied to the official duty.

The second step is determining whether the presumption is rebutted by “clear evidence.”¹⁴⁷ This is a “question of law that the Court considers *de novo*.”¹⁴⁸ As Judge Allen explained, “the inquiry here is whether [the] appellant has produced clear evidence sufficient to persuade us that we should not continue to *presume* that VA did its duty and instead should require VA to *prove* that it did its duty in *this* case.”¹⁴⁹ In this case, the evidence included

¹⁴⁰ *Id.* at 259–60 (summarizing SCOTUS case law on the presumption).

¹⁴¹ *Id.* at 260 (first citing *United States v. Roses, Inc.*, 706 F.2d 1563, 1567 (Fed. Cir. 1983); and then citing *Wise v. Shinseki*, 26 Vet. App. 517, 527 (2014)).

¹⁴² *Id.* at 261 (alteration in original) (quoting *Roses, Inc.*, 706 F.2d at 1567).

¹⁴³ *Id.* (citing *Roses, Inc.*, 706 F.2d at 1567).

¹⁴⁴ *Id.* (citing *Crumlich v. Wilkie*, 31 Vet. App. 194, 205–06 (2019)).

¹⁴⁵ *Id.* at 262.

¹⁴⁶ *Id.* (citing *Kyhn v. Shinseki*, 716 F.3d 572, 577 (Fed. Cir. 2013)). If there is no predicate, step one is not satisfied and no presumption of regularity is applied.

¹⁴⁷ *Id.* at 264 (quoting *Crumlich*, 31 Vet. App. at 205).

¹⁴⁸ *Id.* (quoting *Crumlich*, 31 Vet. App. at 205).

¹⁴⁹ *Id.*

“a statement of nonreceipt” of the VA mailing plus evidence “that reflects a widespread problem with VA not mailing correspondence.”¹⁵⁰ Thus, the combined statement of nonreceipt particular to this case and the general problem was enough to count as “clear evidence . . . to the contrary.”¹⁵¹ Judge Allen explained that the rebuttal was “like a finding of substantial evidence that says ‘VA’s “regular” mailing practices are not regular’ where the presumption concerns the regularity of particular VA mailing practices.”¹⁵² Though it may be impossible to “prove that the SOC was or was not, in fact, mailed,” VA is not “entitled to the benefit of the presumption” in these circumstances.¹⁵³

As for the clear evidence requirement, the court explained that the evidence may be general or specific and rejected the Board’s approach to require rebuttal evidence “specific to the facts of the case at hand.”¹⁵⁴ The court already held that “non-claimant-specific evidence could be clear rebuttal evidence” in a previous case.¹⁵⁵ Indeed, that case “instructs [the court] that the standard for what evidence suffices as clear rebuttal evidence in a given case certainly depends on the nature of the presumption at issue in a given case, but clear evidence need not be claimant specific.”¹⁵⁶ With this understanding of the requisite evidence, the court concluded that the general “widespread problem” plus specific nonreceipt was enough: “Presumption rebutted.”¹⁵⁷

With the presumption rebutted, the third and final step shifted the burden to the government. “[T]he standard of proof is preponderance of the evidence” and requires the government to show that it met the specific official duty.¹⁵⁸ In this case, the court noted that VA “conceded that there is nothing in the record that could demonstrate actual mailing.”¹⁵⁹ Given that concession, the court determined that VA “fail[ed] to carry [its] burden to show actual mailing or receipt.”¹⁶⁰

¹⁵⁰ *Id.* at 265.

¹⁵¹ *Id.* at 267.

¹⁵² *Id.* at 265 (quoting *Ashley v. Derwinski*, 2 Vet. App. 307, 309 (1992)).

¹⁵³ *Id.* (second quotation quoting *Ashley*, 2 Vet. App. at 309).

¹⁵⁴ *Id.* at 266.

¹⁵⁵ *Id.* at 267 (citing *Ashley*, 2 Vet. App. at 310).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (citing *Toomer v. Shinseki*, 524 F. App’x 666, 669 (Fed. Cir. 2013)).

¹⁵⁹ *Id.* at 268.

¹⁶⁰ *Id.* at 268–69.

In sum, the CAVC's robust body of law involving the VA mailing presumption is consistent with the general presumption's origin and governing principles.¹⁶¹ The CAVC case law includes a clear analytical framework for the presumption:

- (1) Predicate
- (2) Rebuttal
- (3) Burden-Shifting¹⁶²

In addition, the case law yields abundant examples of evidence that both rebutted and failed to rebut the presumption. For example, nonreceipt alone¹⁶³ and an address omitting a directional street designator were insufficient to rebut the presumption.¹⁶⁴ On the other hand, nonreceipt in addition to evidence that VA did not have the current address on file,¹⁶⁵ a missing signature on a Board decision,¹⁶⁶ an undated letter,¹⁶⁷ and mailing to the wrong street name were sufficient to rebut the presumption.¹⁶⁸

¹⁶¹ This robust body of law is reflected in Board of Veterans' Appeals decisions. *See, e.g.*, Title Redacted by Agency, No. 24005208, 2024 WL 1365304, at *2–3 (Bd. Vet. App. Feb. 1, 2024) (citing *Ashley v. Derwinski*, 2 Vet. App. 307, 308 (1992) and other cases) (discussing the presumption of regularity's burden shifting and analyzing a challenge to the presumption).

¹⁶² Expressed another way:

- (1) Does the presumption of regularity apply in this case? (If no, stop. If yes, go to 2.)
- (2) Is there clear evidence that rebuts the presumption? (If no, presumption carries in favor of the government. If yes, go to 3.)
- (3) Does the government's evidence overcome the presumption's rebuttal to show that the government action was regular?

¹⁶³ *Romero*, 33 Vet. App. at 264–65 (“Though a statement of nonreceipt standing alone is not enough to rebut the presumption, a statement of nonreceipt coupled with other evidence can be.”).

¹⁶⁴ *Clarke v. Nicholson*, 21 Vet. App. 130, 135 (2007) (finding that the claimant's omission of “the ‘NE.’ postdirectional designator from his address when [VA] mailed him notice of the decision . . . was inconsequential to delivery” and was therefore not enough to rebut the presumption).

¹⁶⁵ *Sthele v. Principi*, 19 Vet. App. 11, 17–18 (2004) (nonreceipt plus file had the claimant's son's address rather than the claimant's address); *Crain v. Principi*, 17 Vet. App. 182, 189 (2003) (nonreceipt plus wrong zip code).

¹⁶⁶ *Alexander v. Principi*, No. 04-62, slip op. at *1 (Vet. App. Mar. 16, 2004) (“[T]he document . . . is missing a signature and has its own, originally-affixed issuance date (as opposed to a copy of the original date), and therefore does not appear to be regular on its face.”).

¹⁶⁷ *Crumlich v. Wilkie*, 31 Vet. App. 194, 205 (2019) (“[T]he notice letter in this case was undated, and the Secretary conceded that, in practice, notice letters are sometimes dated later than the date of the SOC itself. This alone is sufficient to show that, even, assuming the Secretary has a regular procedure for dating and mailing SOC's as he described, that procedure was not followed in this case.” (citations omitted)).

¹⁶⁸ *Fluker v. Brown*, 5 Vet. App. 296, 298 (1993) (“The Court finds that the mailing by VA to an incorrect address on December 17, 1990, constitutes the ‘clear evidence’ necessary to rebut the presumption of regularity . . .”).

In threading together the general and VA mailing presumptions' characteristics, the presumptions' analytical framework is clear and consistent. Despite the more flexible approach appropriate to the broad range of government actors and actions in the general presumption, contrasted with the concrete approach in the limited context of VA mailings, there is no question that the presumption requires analysis, even if the case law does not always reflect a step-by-step approach. The case law reflects the core reality: The presumption did not originate as a rubber-stamp, and it is not one now. The narrow scope of the VA mailing presumption reinforces that core reality and provides a strong model for analysis—a model that is consistent with, though better developed than, the general presumption.

With this understanding of the general and VA mailing presumptions, including the various governing legal principles, the analytical framework, and examples of evidence sufficient for rebuttal, I now turn to an examination of the DRB presumption presented as a catalog of irregularities. After identifying the irregularities and why they matter, this Article explores how the DRB presumption's irregularities could be resolved.

IV. THE IRREGULAR DRB PRESUMPTION

This Part identifies six irregularities stemming from differences between the DRB presumption and the general and VA mailing presumptions, as well as inconsistencies with the DRB presumption's own governing regulations (the existence of which is itself an irregularity!). In uncovering these irregularities, I rely on regulatory history and guidance to reveal how the DRBs misuse and misapply the presumption to deny relief to thousands of veterans without justification. The body of governing regulations includes the Code of Federal Regulations (C.F.R.), DoD instructions, and branch-specific guidance.¹⁶⁹

¹⁶⁹ The branch-specific regulations reinforce the DRB presumption as stated in the DoD-level C.F.R. and Instruction, often merely restating the DoD-level regulations within a varied organizational scheme. However, the branch-specific regulatory approaches sometimes exceed the scope of the higher-level authorities and are inconsistent among the branches. The Navy and Air Force DRBs have similar branch-specific regulations that track much of the DoD-level C.F.R. language while the Army DRB's governing regulations provide less branch-specific guidance. Relevant in the context of this Article, the Navy and Air Force DRBs' regulations address the presumption of regularity, but the presumption of regularity is not mentioned in the Army DRB regulations. Though beyond the scope of this Article, the Army DRB's lack of reliance on the presumption of regularity may be related to its higher grant rates.

A. Irregularity No. 1: The DRB Presumption has a Regulatory Origin and Robust Regulatory History

Like the general and VA mailing presumptions, there is no statutory DRB presumption. The DRB presumption, however, is codified in the C.F.R., military directives, and other governing documents. The discussion of the presumption throughout the rulemaking process establishes robust context for the presumption—context that is unique compared to the case law development of the general and VA mailing presumptions. Though the case law engaging the general and VA mailing presumptions provides some context or explanation for the presumption's existence, only the DRB presumption has an origin story that can be traced through the regulatory history. Thus, the first irregularity: the mere existence of regulations that identify and engage with the presumption.

The DRB presumption began in the C.F.R. and shares the same common law history as the general and VA mailing presumptions. The existence of the regulatory history is itself irregular, but there is more to it—the regulatory history and current regulations are threaded throughout all the other irregularities. The regulatory history unveils how the DRB presumption has evolved away from the legal principles governing the general and VA mailing presumptions despite continuing to share a common legal basis. The regulations also provide robust guidance to the DRBs for engaging with the presumption, creating an opportunity to check the DRB decisions for regulatory compliance. In addition to the mere existence of regulations as an irregularity, a deep reading of the regulatory history and governing regulations and other guidance uncovered multiple substantive irregularities, as discussed next.

B. Irregularity No. 2: The DRB Presumption Applies to “Any Review”

Congress established the discharge review boards in Public Law 87-651, amending title 10 of the United States Code to require the Defense Secretary to “establish a board of review.”¹⁷⁰ Regulations followed. Unlike the general and VA mailing presumptions that require a predicate—some initial determination of a government official and an official act—for the presumption

¹⁷⁰ Act of Sep. 7, 1962, Pub. L. No. 87-651, sec. 110, § 1553, 76 Stat. 506, 509.

to apply, the DRB presumption applies to any review, according to the regulations.¹⁷¹

But the DRB presumption was not always this broad. The presumption of regularity had a narrow beginning in a 1977 initial rule, relevant only to cases involving lack of records.¹⁷² Over time, however, and without explanation, the presumption expanded to “any review,” essentially eliminating the predicate requirement. This expansive statement of the presumption remains in effect today and appears to give the DRB presumption more substantive power than the general and VA mailing presumptions.

The presumption of regularity initially appeared in the C.F.R. subpart on discharge review procedures, specifically 70.5(b)(9)(iii)(C), under the “availability of records” heading in the “conduct of reviews.”¹⁷³ The presumption’s placement within this availability of records subpart illustrated the presumption’s original narrow applicability and procedural nature.¹⁷⁴ The discussion of availability of records began by noting that the applicant “may have access to the records considered by the DRB in the review.”¹⁷⁵ The rule explained how to obtain copies of military records and advised applicants to request documents before submitting the discharge upgrade application form.¹⁷⁶ The rule addressed missing records and identified actions to take when “the official records relevant to the discharge review are not available at the agency having custody of the records.”¹⁷⁷

The rule provided a three-step process for dealing with missing records. The first two steps involved notice to the petitioner and a request “to provide such information and documents as may be desired in support of the request for discharge review,” and after either a response to the request for documents and information or “the expiration of a reasonable period of time . . . , the review shall be conducted with information available to the DRB.”¹⁷⁸ The third step governed cases with unavailable records even after steps one and two were completed, and this is where the DRB presumption originated:

¹⁷¹ 32 C.F.R. § 70.8(b)(12)(vi) (2026).

¹⁷² Discharge Review Boards (DRBs) Procedures and Standards, 42 Fed. Reg. 62934, 62935–36 (proposed Dec. 14, 1977) (to be codified at 32 C.F.R. pt. 70).

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* at 62936 (quoting proposed § 70.5(b)(9)(i)).

¹⁷⁶ *Id.* (referencing proposed § 70.5(b)(9)(ii)).

¹⁷⁷ *Id.* (quoting proposed § 70.5(b)(9)(iii)).

¹⁷⁸ *Id.* (quoting proposed § 70.5(b)(9)(iii)(A–B)).

If the information/documents furnished by the petitioner are not sufficient to provide a basis for the determination that a change in the type or nature of the discharge is warranted, the discharge shall be deemed to be proper under the legal principle that there is a presumption of regularity in the conduct of government affairs. The application of this presumption is not restricted solely to those reviews in which the entire official record is missing, but rather can be applied in any review in which there are missing documents and the evidence of record does not establish sufficient grounds to overcome this presumption.¹⁷⁹

This subsection on availability of records concluded with guidance to the DRBs. This guidance implored the DRBs to get additional information “when a review of available evidence suggests certain aspects of the review would be incomplete without the additional information or when the applicant presents testimony or documents which require additional information to evaluate properly.”¹⁸⁰ The rule further required a board to share with the applicant any information the board obtained, “if requested.”¹⁸¹

This original statement of the DRB presumption emphasized the limited application to cases involving missing records and reflected the core of any presumption—some initial condition that makes the presumption relevant. The sentence was a conditional: “if” there’s not enough information or documentation, then the presumption of regularity can justify deeming the discharge proper. Furthermore, this initial rule acknowledged the presumption was available in limited circumstances: when the entire record is missing, or “in any review in which there are missing documents” and there is not enough evidence to overcome the presumption. Thus, the original DRB presumption was intentionally limited to decisions involving missing or otherwise unavailable records. But then the presumption changed.

After the initial rule, there was a four-year period of robust rulemaking with proposed and final rules, discussion of comments, and lengthy commentary on the final rule. There was also litigation during this time that heavily contributed to the rule changes and commentary. Here, I highlight the significant devel-

¹⁷⁹ *Id.* (quoting proposed § 70.5(b)(9)(iii)(C)).

¹⁸⁰ *Id.* (quoting proposed § 70.5(b)(9)(iv)).

¹⁸¹ *Id.* (quoting proposed § 70.5(b)(9)(iv)). The proposed rule underwent a comment period that was originally scheduled to end on January 13, 1978, but was extended to January 23, 1978. *Id.* at 62934; Discharge Review Boards (DRBs) Procedures and Standards; Extension of Comment Period, 43 Fed. Reg. 2634 (proposed Jan. 18, 1978) (to be codified at 32 C.F.R. pt. 70).

opments—instances of the DRB presumption’s revision and relocation—during this period to understand how the presumption expanded beyond the limited scope of missing records to any review.

Without explanation, the text of the presumption of regularity was revised and relocated in a supplemental notice of proposed rule for DRB procedures and standards in February 1978.¹⁸² The revised presumption of regularity was stated as follows: “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.”¹⁸³

The revised text broadened the presumption’s applicability to “any review,” in contrast to the initial rule’s limited scope of applicability to cases involving missing documents.¹⁸⁴ The proposed rule also added the phrase “substantial credible evidence” as the burden to rebut the presumption, though it did not define that phrase.¹⁸⁵

In addition to these substantive revisions, the presumption of regularity was relocated from the narrower subpart “availability of Records” in § 70.5(b)(9) to § 70.5(b)(12)(vi), a subpart of “Discharge Review [P]rocedures” about evidence and testimony in the “[c]onduct of reviews.”¹⁸⁶ This relocation further broadened the presumption’s applicability because it moved out of the narrower “Availability of Records” (a subsection that remained with-

¹⁸² Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 8240, 8244 (proposed Feb. 28, 1978) (to be codified at 32 C.F.R. pt. 70). This supplemental notice was a republication from February 24, 1978, in the Federal Register “for the convenience of the public.” *Id.* In the summary of the supplemental notice, DoD explained that the supplement:

contains adoption of a number of recommendations made after the initial proposed rule was published, and reflects editorial format changes. Moreover, the Department of Defense has reevaluated both the proposed rule and the previous notice of rulemaking. Based upon that reevaluation, DOD has determined that a more detailed notice and a revised proposal should be published to provide a further opportunity for comment.

Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 7932 (Feb. 24, 1978).

¹⁸³ Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 8240, 8244 (proposed Feb. 28, 1978) (to be codified at 32 C.F.R. pt. 70) (quoting proposed § 70.5(b)(12)(iv)).

¹⁸⁴ *Id.* (referencing proposed § 70.5(b)(12)(iv)).

¹⁸⁵ *Id.* (referencing proposed § 70.5(b)(12)(iv)).

¹⁸⁶ *Id.* at 8243 (referencing proposed § 70.5(b)(9)). 32 C.F.R. § 70.5(b)(9) remained as “Availability of Records,” but the original text and § 70.5(b)(9)(iii)(C) were eliminated without explanation. *See* 32 C.F.R. § 70.8(b)(9).

in the rule) to the broader “Evidence and testimony.”¹⁸⁷ Even with the move, the presumption of regularity remained within § 70.5, discharge review procedures.¹⁸⁸

DoD’s final rule on March 31, 1978, included a discussion of the comments received “from some 80 organizations and individuals”¹⁸⁹ and responsive changes. DoD gave “[f]ull and careful consideration” to the comments and revised the rule “to clarify the directive, to facilitate access to the discharge review process, and to enhance the fairness of the proceedings.”¹⁹⁰ DoD acknowledged “[m]ajor changes” to the rule and “numerous alterations . . . to eliminate repetitive material and to promote consistency and clarity in grammar, vocabulary, and style.”¹⁹¹ In the discussion of “major changes,” DoD explained that “[v]arious changes were made with respect to the availability of records to insure [sic] that the applicant has reasonable access to information relevant to the review,” but it did not address the relocation of the presumption of regularity or the presumption’s extension to “any review.”¹⁹²

In the singular mention of the presumption of regularity in this discussion, DoD did not fully explain how or why the language and location changed. DoD merely stated, “The discussion of the presumption of regularity in governmental affairs has been revised in order to emphasize that the presumption may be rebutted by substantial credible evidence.”¹⁹³

This explanation addressed the change from the 1977 proposed rule’s description of how to overcome the presumption.¹⁹⁴ The previous language, “sufficient grounds to overcome the presumption,” was revised to “substantial credible evidence.”¹⁹⁵ With

¹⁸⁷ Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. at 8243–44 (referencing proposed § 70.5(b)(9) and (b)(12)). The 1977 version of the proposed § 70.5 “Discharge Review Procedures” had subsections (a) through (l). Discharge Review Boards (DRBs) Procedures and Standards, 42 Fed. Reg. 62934, 62934–38 (proposed Dec. 14, 1977) (to be codified at 32 C.F.R. pt. 70) (referencing proposed § 70.5).

¹⁸⁸ Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 8240, 8244 (proposed Feb. 28, 1978) (to be codified at 32 C.F.R. pt. 70) (referencing proposed § 70.5(b)(12)(iv)).

¹⁸⁹ Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 13564, 13566 (proposed Mar. 31, 1978).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 13567.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Discharge Review Boards (DRBs) Procedures and Standards, 42 Fed. Reg. 62934, 62936 (proposed Dec. 14, 1977) (to be codified at 32 C.F.R. pt. 70) (quoting proposed § 70.5(b)(9)(iii)(C)); 32 C.F.R. § 70.8(b)(12)(vi) (2025).

no other explanation for the changes to the presumption of regularity, DoD was silent on the broadening of the presumption from its original applicability to cases of unavailable records to “any review” in the final rule.¹⁹⁶ There was also no definition provided for “substantial credible evidence.”¹⁹⁷

This expansive version of the presumption is mirrored in DoD Instruction 1332.28, which governs DRB procedures and standards, as well as in branch-specific guidance.¹⁹⁸ For the NDRB, 32 C.F.R. § 724.211, titled “Regularity of government affairs,” mirrors the expansive presumption language from 32 C.F.R. § 70.8(b)(12)(vi) and the DoD Instruction.¹⁹⁹ Like § 70.8 and the DoD Instruction, the term “substantial credible evidence” is not defined in the Navy regulation, nor is there guidance on what it takes to rebut the presumption or what happens when the presumption is rebutted. The Navy regulations and instructions are also silent on the broadening of the presumption to apply to any review.²⁰⁰

The DRB presumption’s applicability to “any review” is inconsistent with the concept of a presumption and the analytical framework’s first step to determine whether the presumption applies. This irregularity indicates confusion about the meaning of “presumption”²⁰¹ and ignores the body of federal case law involving the presumption of regularity. Even if there is some legitimacy to the “any review” approach, automatically applying the presumption to “any review” skips the first step in the analytical framework: a determination of whether the presumption applies.²⁰² Analysis beyond the first step of applicability is still re-

¹⁹⁶ Discharge Review Boards (DRBs) Procedures and Standards, 43 Fed. Reg. 13564, 13567 (proposed Mar. 31, 1978) (to be codified at 32 C.F.R. pt. 70).

¹⁹⁷ *Id.* There were some other, less significant developments after this final rule and before the 1982 reissued final rule.

¹⁹⁸ DoDI 1332.28, *supra* note 34, enclosure 4.

¹⁹⁹ 32 C.F.R. § 724.211; 32 C.F.R. § 70.8(b)(12)(vi); DoDI 1332.28, *supra* note 34, enclosure 4.

²⁰⁰ The Navy regulation retains a section on unavailable records. In 32 C.F.R. § 724.210, titled “Review action in instances of unavailable records,” the presumption is stated as “applicable in instances of unavailable records depending on the circumstances of the case.” 32 C.F.R. § 724.210. No further details are provided, for example, on what circumstances justify the presumption’s applicability. *Id.*

²⁰¹ *See supra* note 20 and accompanying text.

²⁰² Nat’l Treasury Emps. Union v. Trump, 780 F. Supp. 3d 237, 254 (D.D.C. 2025) (“The presumption of regularity, however, is just that, a presumption. The presumption can be rebutted with ‘clear evidence’ that the official did not discharge his or her official duties properly.” (quoting Owlfeather-Gorbey v. Avery, 119 F.4th 78, 86 (D.C. Cir. 2024))).

quired, just as the courts do with the general presumption when the first step of applicability is presumed rather than articulated.

C. Irregularity No. 3: The DRBs Do Not Engage an Analytical Framework When Applying the Presumption of Regularity Despite Regulations Requiring Explanation

The DRBs' lack of engagement with an analytical framework in decisions involving the presumption is a third irregularity. This irregularity stands out in stark contrast to the general and VA mailing presumptions, especially the CAVC's clear three-step analytical approach. Despite the robust regulatory guidance explaining the presumption and examples of how to engage with it, the DRBs typically do not engage either the standard three-step analytical framework nor the regulatory requirements to explain decisions involving the presumption. The regulations do not explicitly mention the presumption's three-step analytical framework, but DoD's response to litigation challenging the DRBs' boilerplate decisions and failure to provide documents under the Freedom of Information Act established a requirement for explanation when the boards rely on the presumption.²⁰³ This requirement for explanation equates to the second step of the analytical framework: whether the presumption is rebutted.

Even though the presumption may be applied in "any review," which essentially eliminates the first step, there is no guidance that suggests a mere statement of the presumption is sufficient to deny relief. The governing regulations, military directives, and other governing documents require explanation of how and why the presumption applies as a basis for denying relief and why the applicant's evidence was "insufficient to overcome the presumption."²⁰⁴ As the subsequent discussion indicates, nowhere in the governing regulations and other documents is there a statement supporting the DRB presumption as a rubber-stamp or as a reason that stands for itself. And yet that is often how it operates, giving rise to the third irregularity.

Of course, the DRBs are not judicial bodies nor are the board members law-trained, and thus perhaps it is reasonable to expect less robust reasoning in a DRB decision as compared to a judicial decision. Even so, the gap between the two is too

²⁰³ Discharge Review Boards (DRBs) Procedures and Standards, 47 Fed. Reg. 37770, 37789 (proposed Aug. 26, 1982) (to be codified at 32 C.F.R. pt. 70).

²⁰⁴ *Id.* at 37775.

broad, with almost no reasoning from the DRBs about how and why the presumption favors denial of relief. Furthermore, DoD recognized the flaws in this gapped approach and provided extensive guidance for closing the gaps—specifically in response to inadequate decisions.²⁰⁵

In discussing the 1982 final rule, DoD explained that “changes were made as a result of the Department’s overall reexamination of the proposed amendments in light of the comments.”²⁰⁶ And it noted that other “changes were made as a result of the recently concluded proceedings in *Urban Law Institute of Antioch College, Inc. v. Secretary of Defense*.”²⁰⁷ The *Urban Law* litigation involved challenges to the boards’ boilerplate decisions and failure to provide documents under the Freedom of Information Act.²⁰⁸ The litigation aimed “to force the boards (DRBs and BCMRs) to issue and make public, non-boilerplate decisions to enable the public and advocates to understand why the boards decided to grant or deny relief.”²⁰⁹ Eventually, the Department of Justice agreed with the demands for better decisional documents, and the rule was revised to require the boards to “provide findings and reasons for their decisions and respond to contentions of the veteran.”²¹⁰ This latter requirement concerns reasoning and engaging with an analytical framework, even though DoD did not use the phrase “analytical framework.”

DoD provided in-depth discussion and guidance to the DRBs in the sectional analysis to the final reissued rule.²¹¹ From this robust discussion, a clear main principle emerged: More explanation is needed in decisional documents.²¹² For example, under the reissued rule, “the DRB must set forth reasons” when it “concludes that aggravating factors outweigh mitigating factors (or

²⁰⁵ *See id.* at 37781–82.

²⁰⁶ *Id.* at 37770.

²⁰⁷ *Id.*

²⁰⁸ Addlestone, *supra* note 3, at xxxiv (citing *Urban Law Inst. of Antioch Coll., Inc. v. Sec’y of Def.*, No. 76-0530 (D.D.C. 1978)).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Discharge Review Boards (DRBs) Procedures and Standards, 47 Fed. Reg. at 37770–71. The sectional analysis of the reissued final rule is approximately fifteen pages of dense, three-column-per-page text in the Federal Register. The analysis began with a summary of changes to §§ 70.1–70.7 and then introduced the lengthy discussion that follows: “In order to provide the public with detailed background on these matters, the relevant portions of the Court Order and Settlement Agreement are printed below.” *Id.* at 37771. These relevant portions include two annexes with “model statements.” *Id.*

²¹² *Id.* at 37770–85.

vice versa),”²¹³ the decisions “must contain a statement of findings, conclusions, and reasons,”²¹⁴ and “[c]onclusory statements of reasons for the Board’s findings and conclusions do not suffice.”²¹⁵

Consistent with the broad directive to provide more explanation, the regulations specifically address the presumption of regularity and its role in decisional documents in two categories: “[f]indings of fact” and “[c]omplaints concerning decisional documents and index entries.”²¹⁶ Though DoD did not articulate it as such, the examples essentially direct the DRBs to engage with an analytical framework to explain the reasoning involving the presumption of regularity.

For example, when a board uses the presumption of regularity to resolve contradictory evidence, the decision must “explain why the information that was relied upon was more persuasive than the information that was rejected.”²¹⁷ “If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall: (1) [s]et forth the basis for applying the presumption of regularity, and (2) explain why the contradictory evidence was insufficient to overcome the presumption.”²¹⁸ This two-step approach is equivalent to the analytical framework in the general and VA mailing presumptions, except that it assumes the analysis ends with step two—the determination that the evidence was insufficient to rebut the presumption. This guidance also suggests that “any review” may not necessarily eliminate the need to establish a predicate for the presumption because decisional documents must “[s]et forth the basis for applying the presumption.”²¹⁹

As for explaining “why the contradictory evidence was insufficient to overcome the presumption,” the sectional analysis provides further guidance. Such an explanation “may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant’s testimony to be sufficiently credible to overcome the presumption.”²²⁰ For example, the regulations provide an example of an

²¹³ *Id.* at 37777.

²¹⁴ *Id.*

²¹⁵ *Id.* at 37782.

²¹⁶ *Id.* at 37774–76, 37779–80.

²¹⁷ *Id.* at 37775.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* These statements are problematic in that they create space to shortcut the analytical framework. A decision that evidence was not sufficiently corroborating requires

insufficient explanation in a case involving a challenge to proper procedures at disenrollment on the grounds that the applicant did not receive written notice. The decisional document had the following statement: “The contention, as stated, can neither be refuted nor supported by the documentation and testimony provided by the applicant. Based upon the presumption of regularity in governmental operations, the Board concludes [sic] that the contention does not provide a basis for relief.”²²¹

Under the final rule, a decision in which the “DRB determined . . . that the applicant did receive such written notice in a timely manner, and the reason for this determination was the presumption of regularity, a statement of the reasons for this determination must consist of more than a citation to the presumption of regularity.”²²² Read that last part again: “more than a citation to the presumption of regularity.” The regulations did not provide an example of what explanation would be sufficient but made clear that a statement of the presumption, on its face without explanation, is insufficient. Even in a case involving an issue more procedural than substantive, the boards are directed to justify the presumption.

In a case involving a contention that “specific procedures were not followed, and the DRB concludes that there was no error requiring a change in discharge,” the DRB can rely on the presumption for that determination.²²³ Whether there was a record of proper procedure or a lack of sufficient evidence to support or refute the lack of proper procedure, “the DRB could rely upon the presumption of regularity as the reason for its findings and conclusion.”²²⁴ The sectional analysis calls into question the substantive validity of this approach: “Whether such reliance would be correct in any case would be a matter of substantive law beyond the scope of the Stipulation or decisional document principles.”²²⁵

In additional guidance not related to a particular example, the sectional analysis noted that “whether to use the presumption . . . is a substantive matter” outside the scope of the stipula-

explanation as to why the evidence was insufficient, but according to the regulation, “a statement” of the insufficiency is enough. Similarly, DRBs may determine a lack of credibility but the regulations leave unsaid the requirement to explain the basis for that determination.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

tion and the “decisional document principles.”²²⁶ In other words, the regulations do not endorse the presumption but merely identify what is required in explaining its use. Even so, the DoD noted that in an undefined “appropriate case, the DRB may conclude that there is no error with respect to a specific procedure, base that conclusion on a finding that relevant documents are in proper order, and cite the presumption of regularity for its findings and conclusion.”²²⁷ Note that this use of the presumption rings most true to its common law roots, a purely procedural question.

Furthermore, decisional documents are required to identify the DRB’s conclusions, including whether the presumption of regularity was the basis for the decision and whether the evidence was “a legally sufficient basis for the denial,” and if so, what evidence supported that conclusion.²²⁸ The guidance further explained that “[i]f the DRB decided the case on the basis of the presumption of regularity despite the applicant’s presentation of evidence to the contrary, . . . the DRB would have to explain why it did not find the applicant’s evidence sufficient to overcome the presumption.”²²⁹ If the presumption of regularity is used to reject a complaint, “the response to the complaint must set forth the reasons why the evidence submitted by the complainant was not sufficient to overcome the presumption.”²³⁰ Again, this requirement for explanation and reasoning sounds like the analytical framework used by courts in the general and VA mailing presumptions, even though here again the regulations seem to assume that no one meets the rebuttal standard.

Despite the robust engagement in evaluating examples and providing guidance for engaging with the presumption of regularity, none of the “Model Statements” addressed the presumption of regularity, leaving the DRBs with no examples of how to effectively provide an explanation in decisions relying on the presumption of regularity. Even so, there is no dearth of guidance identifying the requirement for explanation.

As part of the 1982 revised rule, the presumption of regularity was again relocated, this time to 32 C.F.R. § 70.8(b)(12)(vi) but with no change to the language and remaining within “procedures.”²³¹ The

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 37780.

²³¹ *Id.* at 37790.

revised rule expanded on how the presumption may be used in denying discharge upgrade requests based on issues of propriety and equity. The rule directed the DRBs to make a finding of fact when the reason for denial “is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance.”²³² For each of these findings, the DRB “shall list the specific source of the information relied upon,” unless the fact is included in the service record.²³³ “[T]he specific source of information . . . may include the presumption of regularity in appropriate cases.”²³⁴

Consistent with the overall theme of “more explanation needed,” the regulation further explained how to use the presumption of regularity in situations involving contradictory evidence in deciding issues of propriety or equity. “[T]he decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected.”²³⁵ When the board uses the presumption of regularity “as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption.”²³⁶ The boards are further directed that “a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant’s testimony to be sufficiently credible” satisfies the explanation requirement.²³⁷ The explanation requirement remains in the current rule.²³⁸

²³² 32 C.F.R. § 70.8(e)(3)(ii)(B)(1)–(2), (e)(6)(ii)(B) (2026). Although organized by issues of propriety and issues of equity, the presumption of regularity language is the same.

²³³ *Id.* § 70.8(e)(3)(ii)(B)(1), (e)(6)(ii)(B)(1).

²³⁴ *Id.* § 70.8(e)(3)(ii)(B)(1), (e)(6)(ii)(B)(1).

²³⁵ *Id.* § 70.8(e)(3)(ii)(B)(2), (e)(6)(ii)(B)(2).

²³⁶ *Id.* § 70.8(e)(3)(ii)(B)(2).

²³⁷ *Id.* The requirement for explanation is consistent with the general presumption in federal case law. *See, e.g.,* Conley v. United States, 5 F.4th 781, 791 (7th Cir. 2021) (“The presumption of regularity is an analytic tool, not an excuse to rubber-stamp any and all executive action as lawful absent clear evidence to the contrary.”).

Consistent with the discussion of the presumption of regularity, 32 C.F.R. § 70.10 addresses “decisional documents and index entries” for the DRBs. § 70.10. These regulations direct boards to “set forth the reasons why the evidence submitted by the complainant was not sufficient to overcome the presumption” in cases where the board denies an upgrade request “on the basis of the presumption of regularity.” *Id.* § 70.10(d)(1)(iv)(C). These regulations further explain that, in connection with § 70.8 “with respect to explaining use of the presumption of regularity,” the requirement to explain governs only decisions issued on or after November 27, 1982. *Id.* § 70.10(d)(1)(v)(F). Decisions prior to that date that rely on the presumption and are challenged as lacking explanation require “corrective action . . . only if a reasonable person familiar with the discharge review process cannot understand the basis for relying on the presumption.” *Id.*

²³⁸ There were two 1983 amendments to part 70. *See* Discharge Review Boards (DRBs) Procedures and Standards, 48 Fed. Reg. 9855, 9855 (Mar. 9, 1983) (to be codified

Despite the requirement for explanation, DRB decisions typically do not provide explanation for how and why the presumption of regularity supports a denial. The AFDRB's approach to applying the presumption is particularly dismissive of applicants' requests for relief and engages no framework with which to justify the presumption's applicability or its force. For example, in a case involving a request for relief based on in-service racial discrimination and post-traumatic stress disorder (PTSD) due to that racial discrimination, the AFDRB invoked the presumption in a series of unsubstantiated and even contradictory sentences.²³⁹ First, the Board "determined that there is no evidence in the available records to support the Applicant's request for an upgrade."²⁴⁰ This statement is flat-out wrong based on the facts discussed in other parts of the decision. The applicant provided VA records of PTSD and a statement "that the flight chief continuously insulted them with racist remarks, which were witnessed by multiple people, both civilian and military."²⁴¹ Surely, VA medical records and statements were at least supporting evidence that deserved engagement rather than erasure.

Second, the Board reinforced its non-investigative nature and explained the presumption of regularity as holding "that commanders, supervisors, and other officials acted fairly and in good faith in the absence of evidence to the contrary."²⁴² Here, the applicant provided evidence to support his position that the commander acted in a racially discriminatory manner, but the Board glossed over that evidence by overstating the presumption of regularity as an assumption that the commander "acted fairly and in good faith."²⁴³ The evidence proffered at least merited consideration as potentially rebutting the presumption but the Board did not even consider the evidence, nor did it explain why

at 32 C.F.R. pt. 70); Discharge Review Boards (DRBs) Procedures and Standards, 48 Fed. Reg. 35644, 35644 (Aug. 5, 1983) (to be codified at 32 C.F.R. pt. 70). Amendments to 32 C.F.R. § 70.8(e)(3)(ii)(B)(2), (e)(6)(ii)(B)(2) retained the language from the 1983 reissued final rule but reordered the clause "set forth the basis for relying on the presumption of regularity." *Id.* § 70.8(e)(3)(ii)(B)(2), (e)(6)(ii)(B)(2). Instead of including the clause as part of the first sentence of the subsection, the clause was moved to the second sentence following the opening clause, "If the presumption of regularity is cited as the basis for rejecting such information." *Id.*

²³⁹ Air Force Discharge Review Board Decisional Document, Case No. FD-2024-00033 (Air Force Rev. Bds. Agency Aug. 29, 2024), https://boards.law.af.mil/AF/DRB/CY2024/FD-2024-00033%2000_FD202400033.pdf [<https://perma.cc/4D2X-3H99>].

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *See id.*

the evidence did not rise to the level of rebutting the presumption. Here, the Board avoided engaging with the evidence given the lack of an analytical framework.²⁴⁴

Third, the Board noted that it “will only grant relief if sufficient evidence shows the discharge was improper or inequitable.”²⁴⁵ The Board referenced multiple statements of racial discrimination, including the applicant’s statement “*that their discharge ‘was the result of actions taken by my flight chief [which were] racist.’*”²⁴⁶ Again, the Board did not address why the veteran-applicant’s evidence of a discharge fueled by racial discrimination was not sufficient. Especially in a case involving racial discrimination where it is unlikely that military records documenting the discrimination exist, a veteran-applicant’s statements of racism are often the only available evidence. Yet, those statements were essentially erased by the Board’s lack of engagement with an analytical framework.

Finally, the Board determined that “the Applicant failed to establish a clear connection between their mental health condition and how it would mitigate their misconduct.”²⁴⁷ Though the Board does not mention the presumption, this sentence appears in the paragraph invoking the presumption.²⁴⁸ By acknowledging the mental health condition, this sentence contradicts the Board’s previous statements regarding the lack of evidence. Furthermore, the statement acknowledging the mental health condition contradicts a later statement that “[t]here was no evidence of PTSD or any other major mental health diagnosis.”²⁴⁹ Instead of treating the applicant’s lay statement and VA medical diagnosis as evidence, the Board focused on the lack of mental health care in the service treatment records.²⁵⁰ And then used that “lack of evidence” as a basis for the presumption of regularity as a justification for denying relief without ever providing any of the required explanation.²⁵¹

Even in a rare case of successfully overcoming the DRB presumption, the boards’ decisions typically do not engage an ana-

²⁴⁴ See *id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See *id.*

²⁵¹ See *id.*

lytical framework that reflects why and how the evidence in the case overcame the presumption and how or why the shifted burden was not satisfied. For example, in a case involving “administrative error,” the NDRB stated the presumption, noted that it “complete[d] a thorough review of the circumstances,” and acknowledged the evidence provided by the applicant.²⁵² The evidence in this case was “the CO’S endorsement of administrative discharge as well as the Applicant’s official separation orders. Both documents reflect the Applicant’s characterization of service as honorable.”²⁵³ The Board further noted that it “did not find any information within the official record to refute the Applicant’s claim and considered the evidence provided as substantial and credible. Therefore it outweighs the government’s presumption of regularity.”²⁵⁴ Though this result is favorable for the veteran, it further entrenches the lack of an analytical framework and gives future applicants no sense of how to similarly overcome the presumption. The decision merely stated the existence of “evidence” without details or assessment, the lack of information to refute the applicant’s claim, and then baldly stated that the evidence outweighs the presumption.²⁵⁵ Especially given that there are hundreds if not thousands of decisions that use the lack of evidence to deny relief, the lack of explanation here is not just irregular—it is egregious.

D. Irregularity No. 4: The DRBs’ Branch-Specific Regulations Conflict with the DoD-Level C.F.R. and DoD Instruction

The way the DRBs use the presumption is further complicated by the branch-specific regulations because they do not fully engage with nor reflect DoD’s regulations. In implementing the C.F.R., the DoD Instruction (DoDI) governing the DRBs matches the C.F.R. language in several ways. First, the presumption can be a “specific source of information” used “in appropriate cases” to meet the requirement for the DRBs to “list reasons for its conclusion.”²⁵⁶ Second, the DoDI restates the regulatory requirement to explain “why the contradictory evidence was insufficient to

²⁵² Naval Discharge Review Board (NDRB) Discharge Review_Decisional Document, No. ND24-9960 (Dep’t of the Navy Mar. 11, 2025), https://boards.law.af.mil/NAVY_DRB_2024_Navy.htm [<https://perma.cc/SNB4-92QS>] (choose “ND24-9960.rtf”; then open the downloaded file).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See id.*

²⁵⁶ DoDI 1332.28, *supra* note 34, enclosure 3, paras. E3.5.3.2.2.1 (propriety), E3.5.6.2 (equity).

overcome the presumption,” by identifying “a statement that the applicant failed to provide sufficient corroborating evidence” or the board determined that the applicant’s testimony was not “sufficiently credible.”²⁵⁷ Third, the DoDI includes the C.F.R. language directing the DRBs to “set forth the basis for relying on the presumption of regularity” in decisions in which the boards rely on the presumption to reject conflicting evidence.²⁵⁸

At the branch level, however, the requirement for explanation is missing. In conflict with the DoD-level regulations’ extensive discussion of the need for explanation in decisional documents, the branch-specific regulations do not require explanation. This inconsistency creates a gap and raises questions as to the legitimacy of the DRB decisions that may comply with the branch-specific guidance but do not comply with the higher-level regulations. For example, the presumption of regularity in the NDRB regulations for “Decisional issues” in 32 C.F.R. § 724.806 closely tracks the DoD-wide regulations governing “Decisional issues” in 32 C.F.R. § 70.8(e) and the matching DoDI with one significant difference.²⁵⁹ In the Navy-specific regulation explaining the NDRB’s responsibilities in making a finding of fact based on contradictory evidence, the text omits the requirement to “set forth the basis for relying on the presumption of regularity.”²⁶⁰ This inconsistency is significant because it strips away the NDRB’s responsibility—a DoD-level responsibility under 32 C.F.R. § 70.8(e) and DoDI 1332.28—to justify the applicability of the presumption as an initial step to using the presumption to deny relief on propriety or equity grounds. The requirement to “set forth the basis for relying on the presumption” is not only missing, but its absence is not explained nor acknowledged.²⁶¹

Adding to the confusion, much of the guidance in the Navy’s Discharge Review Manual, an internal guidance document that exists outside the C.F.R., restates the language in the DoD-wide regulations. For example, the manual restates the general principle of the presumption,²⁶² mirroring the language in 32 C.F.R. §§ 70.8 and 724, and restates the guidance for decisional documents.²⁶³ Significantly, the manual mirrors current 32 C.F.R.

²⁵⁷ *Id.* enclosure 3, paras. E3.5.3.2.2.2 (propriety), E3.5.6.2.2.2 (equity).

²⁵⁸ *Id.*

²⁵⁹ 32 C.F.R. §§ 70.8(e), 724.806 (2026).

²⁶⁰ *Id.* §§ 70.8(e)(3)(ii)(B)(2), 724.806(c)(2)(ii)(B).

²⁶¹ *Id.* § 70.8(e)(3)(ii)(B)(2); *see id.* § 724.806(c)(2)(ii)(A)–(B).

²⁶² DEP’T OF THE NAVY, SECNAV M-5420.1, DISCHARGE REVIEW BOARD MANUAL 20 (2020).

²⁶³ *Id.* at 22–28 (referencing section 224 “Decisional Issues”).

§ 70.8 language to include the requirement to explain the basis for the presumption of regularity in fact-finding based on contradictory evidence: “If the presumption of regularity is cited as the basis for rejecting [conflicting evidence], the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption.”²⁶⁴

The manual includes the requirement to justify application of the presumption of regularity despite the lack of a requirement in the NDRB-specific regulations.²⁶⁵ The manual does not, however, acknowledge the inconsistent guidance for how to engage the presumption in a decision. The manual explains that the NDRB “shall be guided by the applicable statutes, regulations, manuals and directives,” among other things.²⁶⁶ Thus, the Navy-specific guidance is inconsistent within itself as well as inconsistent with the higher-level DoD regulations.

The current AFDRB regulations address the presumption of regularity in two subsections, and like the Navy, do not fully implement the higher-level regulations. First, like the NDRB, 32 C.F.R. § 865.109 restates the presumption of regularity in the regulation governing “Procedures for hearings” in the same language as 32 C.F.R. § 70.8(b)(12)(vi).²⁶⁷ Second, and again similar to the NDRB, 32 C.F.R. § 865.112 governing “Decisional issues” references the presumption of regularity in terms of findings of facts and omits 32 C.F.R. § 70.8’s requirement to “set forth the basis for relying on the presumption of regularity.”²⁶⁸

In addition to the inconsistencies in requiring explanation for decisions involving the presumption, Air Force Instruction 36-2023 expands the presumption of regularity in subpart “3.2.4. Consideration by the Board.”²⁶⁹ The presumption of regularity is stated in the context of recognizing that the AFDRB “is not an investigative body.”²⁷⁰ The instruction goes on:

The presumption of regularity dictates that, absent evidence to the contrary, commanders, supervisors, and other officials involved with an action acted fairly and in good faith. The applicant bears the bur-

²⁶⁴ *Id.* at 24 sec. 224(e)(2)(b)2), 27 sec. 224 (f)(2)(b)2).

²⁶⁵ *See id.* The manual includes 32 C.F.R. § 723 in the references but that is the part governing the Board for Correction of Naval Records, not the NDRB. *Id.* at vii.

²⁶⁶ *Id.* at 1 sec. 103.

²⁶⁷ 32 C.F.R. §§ 70.8(b)(12)(vi), 865.109(h) (2026).

²⁶⁸ *Id.* § 70.8(e)(3)(ii)(B)(2), (e)(6)(ii)(B)(2); *id.* § 865.112(f)(2)(ii), (i)(2)(ii).

²⁶⁹ DEP’T OF THE AIR FORCE, DAFI 36-2023, para. 3.2.4. (2022) [hereinafter DAFI 36-2023].

²⁷⁰ *Id.*

den of providing evidence to overcome this presumption, and the board will only grant relief if it determines there is sufficient evidence to conclude the applicant's discharge was not proper or equitable in accordance with Enclosure 4 of DoDI 1332.28.²⁷¹

This statement of the presumption goes well beyond the presumption as stated in 32 C.F.R. § 70.8 by characterizing officials' actions as "fair[] and in good faith."²⁷² The other language in the statement further reinforces the power of the presumption: "dictates" makes it sound mandatory in all cases; "absent evidence to the contrary" mischaracterizes the requirement for substantial credible evidence to overcome the presumption; "applicant bears the burden" ignores the board's duty to consider all the evidence; "only" suggests the bar is very high for getting a discharge upgrade; and "sufficient evidence" is inconsistent with "substantial credible evidence."²⁷³

There is no explanation for this broader statement of the presumption, but these terms are reinforced and further expanded by the language on the AFDRB website: "The Board is **not an investigative body** and **presumes regularity** in the conduct of governmental affairs. This means that, absent evidence to the contrary, the Board presumes that military and civilian personnel involved in a member's discharge carried out their duties correctly, lawfully, and in good faith."²⁷⁴ The website language does at least hint at the concept of explanation in stating, "[f]ollowing the vote on each case, the presiding officer approves results and a decisional document is issued, which explains the Board's rationale."²⁷⁵

This website-only statement of the presumption goes even further by adding "lawfully" to the characterization of official action. But again, there is no explanation for the extension of the presumption beyond 32 C.F.R. § 70.8. As Gavor and Platt argue, the "historical origins of the presumption" indicate a limited ap-

²⁷¹ *Id.*

²⁷² *Id.*; see also Gavor & Platt, *In Search of*, *supra* note 57, at 750 ("The presumption of regularity is similar to, but distinct from, the presumption of good faith, although the presumption of good faith is also partially supported by *Chemical Foundation*." (footnotes omitted)).

²⁷³ DAFI 36-2023, *supra* note 269, para. 3.2.4. And the instruction itself is mandatory as stated at the top of the first page, "COMPLIANCE WITH THIS PUBLICATION IS MANDATORY." *Id.* at 1; 32 C.F.R. § 70.8(b)(12)(vi) (2026).

²⁷⁴ *Air Force Discharge Review Board (AFDRB)*, A.F. REV. BDS. AGENCY: INFO. WEBSITE & APPLICATION PORTAL, <https://afdba-portal.cce.af.mil/#board-info/drb> [<https://perma.cc/8HXE-EG3F>] (last visited Jan. 30, 2026).

²⁷⁵ *Id.* The AFDRB is unique in mentioning the presumption; the NDRB and ADRB websites do not mention it. See Council of Rev. Bds., *supra* note 33.

plicability “to technical matters.”²⁷⁶ Staying true to that origin and the direct line of authority to the governing regulations, there is no legitimate basis for treating the presumption as a substantive tool. And yet, the boards continue to do just that under the branch-specific guidance.

E. Irregularity No. 5: The DRBs Treat the Absence of Evidence as Substantive Confirmation that the Original Discharge was Correct

The DRBs often treat missing information as substantive “support” for an original decision, erroneously extending the presumption beyond “conduct of governmental affairs.”²⁷⁷ In doing so, the boards erroneously equate procedural propriety with substantive correctness. This approach reflects and reinforces the rubber-stamp approach in direct conflict with the requirement for full, fair, and impartial consideration.

For example, in a case involving no documentation about the discharge, the AFDRB relied on the lack of documents to deny the upgrade.²⁷⁸ The veteran-applicant asked for a discharge upgrade based on post-service conduct.²⁷⁹ The AFDRB denied relief, stating, “[u]pon review of the Applicant’s service record, the Board was not able to find any documentation regarding the discharge.”²⁸⁰ Even though the Board had no information about the discharge, the Board did find evidence of nonjudicial punishments in the veteran’s service record.²⁸¹ Given that evidence, the Board relied on the presumption of regularity to deny relief.²⁸² “Since the Board relies on the presumption of regularity, and the Applicant did not submit any evidence to substantiate an inequity or impropriety, it concluded the discharge . . . was appropriate.”²⁸³

Here, the presumption essentially erased the evidence the veteran-applicant presented—his post-service self-improvement with education and skills. The veteran-applicant provided “two letters of reference and [a] certificate” but the Board found that

²⁷⁶ Gavoor & Platt, *In Search of*, *supra* note 57, at 766.

²⁷⁷ See 32 C.F.R. § 70.8(b)(9)(iii), (b)(12)(vi).

²⁷⁸ Air Force Discharge Review Board Decisional Document, No. FD-2024-00484 (Air Force Discharge Rev. Bd. Dec. 13, 2024), <https://boards.law.af.mil/AF/DRB/CY2024/FD-2024-00484%20FD202400484.pdf> [<https://perma.cc/TL6J-3GDM>].

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

evidence insufficient to “represent a substantial investment in the community” without explaining the basis for that determination.²⁸⁴ The Board seemed to recognize that the letters and certificate were evidence, but still concluded that “the Applicant did not submit any evidence to substantiate an inequity or impropriety.”²⁸⁵ Then, on the basis of that absence of evidence, the Board defaulted to the presumption of regularity to deny relief.²⁸⁶ This approach goes too far. The Board used the presumption to both erase the post-service conduct evidence and treat the so-called absence of evidence as substantive confirmation of the original discharge. In the absence of discharge documents, the presumption can be used to assume the discharge process was procedurally proper, but that propriety does not equate to substantive confirmation of the discharge characterization. Here, the Board relied on the presumption rather than engaging in a full, fair, and impartial review of the evidence.²⁸⁷ Especially where the veteran-applicant asked the DRB to consider post-service conduct, the procedural propriety of the discharge—which occurred before the post-service conduct—is not relevant to the question of equity.

In another example from the AFDRB, the Board acknowledged an incomplete “discharge package,” and stated that the incomplete package “limited the board’s ability to conduct a comprehensive review.”²⁸⁸ Rather than recognize an opportunity for further records collection before making a decision, the Board then used the incompleteness to deny relief on the presumption of regularity.²⁸⁹ In the absence of a complete package, “the presumption of regularity applies, meaning it is assumed that the discharge process was conducted properly, with due consideration of all relevant factors by the applicant’s commander and chain of command. While the character letters were noted, they alone did not substantiate a basis for overturning the discharge.”²⁹⁰ Perhaps even more egregious, the AFDRB “recommended the applicant submit . . . additional documents for further consideration,” yet still made a decision on the incomplete

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Air Force Discharge Review Board Decisional Document, No. FD-2024-00522 (Air Force Discharge Rev. Bd. Jan. 27, 2025), <https://boards.law.af.mil/AF/DRB/CY2024/FD-2024-00522%2000%20FD202400522.pdf> [<https://perma.cc/6UDQ-XWGA>].

²⁸⁹ *Id.*

²⁹⁰ *Id.*

record rather than waiting for a full package.²⁹¹ While it may be consistent with the presumption to presume “proper conduct” of the discharge process in the absence of discharge documents, the Board took the presumption too far into “correct on the merits” territory rather than the more accurate limited view of “proper conduct.”

While these cases involving incomplete records might be exactly the type of cases anticipated by the original 1977 DRB presumption, the way the presumption is used today goes beyond merely presuming a commanding officer followed proper procedures or “conducted” the discharge properly to determining that the original discharge decision was correct on the merits. A determination that a discharge was conducted properly does not equate to the correctness of the discharge characterization, yet that is precisely the result. For example, in an NDRB decision, the Board:

presumed regularity in governmental affairs in that the Separation Authority and Staff Judge Advocate review of the discharge package ensured that the Applicant was afforded all of his administrative rights pursuant to the separation process. The Applicant did not submit any documentation to rebut any presumption of regularity in governmental affairs²⁹²

And the Board denied relief.²⁹³ Although the presumption that the separation authority and staff judge advocate reviewed the discharge package addressed an administrative task, completion of that task does not mean the discharge characterization was correct, proper, or just. In fact, invoking the presumption this way demonstrated the power of the presumption in treating completion of a ministerial task as equivalent to a correct outcome.²⁹⁴

Using the absence of evidence to substantively confirm original discharge decisions conflicts with the origin of the presumption as stated in *Chemical Foundation*: “The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that

²⁹¹ *Id.*

²⁹² Naval Discharge Review Board (NDRB) Discharge Review Decisional Document, No. ND24-9682 (Dep’t of the Navy Nov. 4, 2024) [hereinafter Decisional Document No. ND24-9682], https://boards.law.af.mil/NAVY_DRB_2024_Navy.htm [<https://perma.cc/SNB4-92QS>] (choose “ND24-9682.rtf”; then open the downloaded file).

²⁹³ *Id.*

²⁹⁴ *See id.*

they have properly discharged their official duties.”²⁹⁵ Nowhere in that case is there even a suggestion that properly discharging duties equates to “correct” decisions.²⁹⁶ Even so, the DRB presumption is regularly used as a substantive justification for decisions rather than a tool to check for “regular conduct.”

Though the language of the DRB presumption is limited to “the conduct of governmental affairs,” as stated in the regulatory guidance,²⁹⁷ the presumption often goes beyond that limited scope to validate original decisions. The lack of explanation in DRB decisions may be consistent with the branch-specific regulations (that are in conflict with the higher-level regulations), but not even the branch-specific regulations support the idea that the presumption of regularity can be used as substantive confirmation of the original discharge decision.

F. Irregularity No. 6: The DRB Presumption is Reinforced by Judicial Super Deference to Military Decisions

While the general presumption is powerful, the DRB presumption is even more powerful given that courts are heavily deferential to military decisions. Courts typically do not review DRB decisions for a variety of reasons including veteran-applicants’ lack of awareness of judicial relief as an option and how to pursue it, and “very few lawyers practice this type of law, with even fewer practicing pro bono or at a cost that veterans can afford.”²⁹⁸ When courts review military personnel decisions, they recognize “the validity of official military acts.”²⁹⁹ Federal courts have noted that “[s]trong policies compel the court to allow the widest possible latitude to the armed services in their admin-

²⁹⁵ See *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (citations omitted). See generally Decisional Document No. ND24-9682 (denying relief to the applicant because there was no evidence to rebut the presumption of regularity).

²⁹⁶ See generally *Chem. Found.*, 272 U.S. 1 (discussing how the presumption of regularity presumes proper discharge of official duties).

²⁹⁷ 32 C.F.R. § 70.8(b)(12)(vi) (2026).

²⁹⁸ KUZMA ET AL., *supra* note 3, at 76.

²⁹⁹ See, e.g., *Armstrong v. United States*, 205 Ct. Cl. 754, 762 (1974) (presuming the Air Force Selection Board properly performed its function in a military pay case).

This super deference to military decisions extends beyond discharge decisions. See, e.g., *The Presumption of Regularity*, *supra* note 67, at 2442 (“Eager to leave the day-to-day operation of the draft to more expeditious and expert draft boards, courts presumed that boards had followed the intricate web of guidelines and procedures. . . . Because contrary evidence was so difficult to gather, this presumption that the order of call requirements had been followed verged on a presumption that the orders were valid.” (citing Frank H. Easterbrook, Comment, *Due Process in Selective Service Appeals*, 39 U. CHI. L. REV. 331, 332 & n.6 (1972))).

istration of personnel matters.”³⁰⁰ This extreme deference makes judicial review a mostly illusory avenue of relief for veterans seeking a discharge upgrade.

The general presumption “narrows judicial scrutiny and widens executive discretion over decisionmaking processes and outcomes” but the DRB presumption narrows judicial scrutiny even further.³⁰¹ For example, in a case involving a discharge upgrade request that was denied by both the NDRB and the Board for Correction of Naval Records, the court explained the presumption of regularity as requiring “‘cogent and clearly convincing evidence’ . . . [to] ‘overcome the presumption that military administrators discharge their duties correctly, lawfully, and in good faith.’”³⁰² This is “a particularly deferential standard of review.”³⁰³ The court even identified the extra deference in this case: the court, in the military context, is “unusually deferential” to “avoid destabiliz[ing] military command.”³⁰⁴ Driven by the fear of destabilizing military commands, judicial review reinforces, without fully evaluating, the already powerful presumption.³⁰⁵ Furthermore, in ruling against the veteran plaintiff, the court explained that it did not consider “whether [the Secretary’s] deci-

³⁰⁰ *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) (quoting *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979)). Judicial review of discharge upgrade decisions is “clustered in the Court of Federal Claims and the Federal District Court for the District of Columbia, because those courts have special jurisdiction over certain types of claims or over the military review boards, respectively.” *KUZMA ET AL.*, *supra* note 3, at 76. For further discussion on judicial review of discharge upgrade decisions, see *id.* at 76–98.

³⁰¹ See *The Presumption of Regularity*, *supra* note 67, at 2432.

³⁰² *Bogus v. Spencer*, No. 1:18-cv-00030-RCL, 2019 WL 4169212, at *2, *4 (D.D.C. Sep. 9, 2019) (quoting *Mueller v. England*, 404 F. Supp. 2d 51, 55 (D.D.C. 2005)).

³⁰³ *Id.* at *6 (quoting *Piersall v. Winter*, 435 F.3d 319, 325 (D.C. Cir. 2006)).

³⁰⁴ *Id.* at *4 (quoting *Mueller v. Winter*, 485 F.3d 1191, 1198 (D.C. Cir. 2007)).

³⁰⁵ *But see* *Rutledge v. Del Toro*, No. 23-cv-1583, 2024 WL 3225958, at *1 (D.D.C. June 28, 2024). In this case involving a request to restore lost designations, the court remanded based on a lack of explanation in the Board for Correction of Naval Records decision. See *id.* at *1–2, *12. The court identified multiple instances of inadequate reasoning, noting that the Board “denied the petition in a two-page opinion which concluded, without much elaboration, that Rutledge had not presented sufficient evidence to rebut the ordinary presumption of regularity in military disciplinary matters,” *id.* at *1, *17–18, “the Board did not adequately explain the bases for its decision,” *id.* at *2, and “the Board swiftly dispensed with [the arguments],” *id.* at *1, *6. Though not a discharge upgrade case, the way the court recognized limits on the presumption is instructive. The court acknowledged the “highly deferential standard of review” and noted, “[e]ven under this highly deferential standard of review, the Board still must adequately explain its decision.” *Id.* at *7. The court also recognized a limit to the high deference: “Although [the] BCNR decisions rightly receive substantial deference, the Court cannot defer into a void.” *Id.*

sion was correct,” but “only whether the Secretary’s decision-making process was deficient.”³⁰⁶

This extra deference to military decisions may be traced to a case that pre-dates the 1982 (and current) version of the DRB presumption. In *Sanders v. United States*, the Court of Claims described the presumption of regularity as a “strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith.”³⁰⁷ The court cited to seven previous Court of Claims decisions to trace this version of the presumption back to 1967.³⁰⁸ The court explained, “[s]trong policies compel the court to allow the widest possible latitude to the armed services in their administration of personnel matters.”³⁰⁹ The court further explained just how wide that latitude extends. Because “Congress entrusted primary responsibility for the record-correction function to the service Secretaries acting through correction boards,”³¹⁰ even if judges disagreed “about whether or not a specific situation was unjust, [judges] will not substitute [their] judgment for the board’s when reasonable minds could reach differing conclusions.”³¹¹

This “widest-possible-latitude” approach strips away any chance of reviewing a DRB’s use of the presumption of regularity to deny relief. Given the extreme deference, judicial decisions typically do not engage in an analysis of whether the boards’ decisions complied with the regulations, leaving unaddressed the broader question of whether the presumption of regularity was appropriately analyzed or explained. This extreme judicial deference contrasts with CAVC cases that recognize reviewing “[w]hether clear evidence exists to rebut the presumption is a

³⁰⁶ *Bogus*, 2019 WL 4169212, at *6 (quoting *Kreis v. Sec’y of the Air Force*, 866 F.2d 1508, 1512 (D.C. Cir. 1989)).

³⁰⁷ *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Though outside the scope of this Article, this idea—or assumption—that military administrators are like “other public officers” is likely false, or at least questionable, given the military’s unique chain of command structure that is integral to military culture and operations in support of “good order and discipline.” See, e.g., Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 KAN. L. REV. 513, 562 (2019) (referring to “the good order and discipline so necessary to the military’s culture”); Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123, 128 (2017) (“Modern military regulations repeatedly stress to commanders the central importance of maintaining good order and discipline.”).

³⁰⁸ See *Sanders*, 594 F.2d at 813.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 813–14.

³¹¹ *Id.* at 814.

question of law that the Court considers de novo.”³¹² While veteran-claimants seeking disability compensation benefits may be entitled to de novo review in a case involving the presumption of regularity, no such entitlement exists for veteran-applicants seeking judicial review of discharge upgrade decisions.

In a series of successful class action lawsuits filed by Yale Law School’s Veterans Legal Services Clinic against the Navy,³¹³ Air Force,³¹⁴ and Army,³¹⁵ the court recognized weaknesses in the DRBs’ decisional documents, as documented in detail in the complaints.³¹⁶ The settlement agreements, however, did not mandate any changes to how the boards use the presumption of regularity.³¹⁷ Thus, even with the positive results in these cases, the presumption remains a powerful tool for the boards to deny relief. And, as demonstrated throughout this Article, the NDRB and AFDRB continue to use the presumption as a “reason” to deny relief without explanation.³¹⁸

In the DRB realm, the presumption of regularity can be—and often is—applied in every single case. That alone is significant, problematic, and irregular. Given the presumption’s dominance in decisions and its dominance as a “reason” for denying upgrade requests, the presumption demands examination. In taking up this examination, this Article previously identified six irregularities of the DRB presumption. With those irregularities in mind, the Article now seeks a path toward a more legitimate, fair, and

³¹² *Crumlich v. Wilkie*, 31 Vet. App. 194, 205 (2019).

³¹³ Ruling and Order Approving Class Action Settlement, *Manker v. Del Toro*, No. 3:18-cv-00372 (D. Conn. Feb. 15, 2022) [hereinafter *Manker Class Action*].

³¹⁴ Ruling and Order Approving Class Action Settlement, *Johnson v. Kendall*, No. 3:21-cv-01214 (D. Conn. June 11, 2024) [hereinafter *Johnson Class Action*].

³¹⁵ *Kennedy v. Whitley*, 539 F. Supp. 3d 261, 261 (D. Conn. 2021).

³¹⁶ For example, in *Manker v. Del Toro*, the complaint challenged the way the NDRB relied on the presumption of regularity, noting the DoDI 1332.28 requirement for explanation in decisions. *Manker Complaint*, *supra* note 9, ¶¶ 15, 17, 19. The complaint alleged that the “NDRB invoked a presumption of governmental regularity . . . to dismiss Mr. Manker’s claims that the military improperly investigated and adjudicated his drug use. The NDRB did not explain why the evidence submitted by Mr. Manker failed to rebut the presumption of regularity.” *Id.* ¶ 92. The complaint further noted how the NDRB described the presumption in a letter to Mr. Manker: “[T]he NDRB will assume the government acted properly and fairly in releasing or discharging you.” *Id.* ¶ 94 (internal quotation marks omitted); *see also id.* ¶ 209 (“[T]he NDRB’s application of the presumption of regularity in government affairs is arbitrary and capricious, in violation of the [APA], 5 U.S.C. § 706(2)(A).”).

³¹⁷ *See Kennedy*, 539 F. Supp. 3d at 266–68; *Manker Class Action*, *supra* note 315, at 8–10; *Johnson Class Action*, *supra* note 315, at 4–5.

³¹⁸ *See supra* Sections IV.C, IV.E (discussing examples of NDRB and AFDRB decisions relying on the presumption without explanation).

regular DRB presumption. Given the number of irregularities and the depth of regulatory history, my goal here is to set the groundwork for further research on how to resolve the irregularities. This Article begins exploring potential solutions and provides direction for moving forward.

V. MOVING TOWARD FULL, FAIR, AND IMPARTIAL REVIEW:
REDEFINING THE PARAMETERS OF THE DRB PRESUMPTION OF
REGULARITY

This Article identifies four parameters for resolving or at least mitigating the DRB presumption's irregularities: limiting the scope of the DRB presumption, establishing and mandating an analytical framework, resolving inconsistencies among regulations, and suggesting an oversight mechanism for decisions involving the presumption of regularity. Though ideally these parameters would work in combination, each could make an impact on its own, and the order in which they are discussed here is not intended to be sequential.

These parameters are heavily informed by the general and VA mailing presumptions. The VA mailing presumption is particularly instructive here because it focuses on conduct or ministerial tasks rather than underlying substance. In assessing whether a letter or notice was mailed in accordance with procedural regularities, the CAVC avoids conflating the question of whether the information in the letter was correct. In this way, the VA mailing presumption provides a strong model for the DRBs. Of course, other similarities between the CAVC and DRBs are also helpful here: both the court and the boards have a limited population of claimants/applicants and cases (veterans and veterans-specific issues), and both the court and the boards regularly engage with pro se plaintiffs or applicants, including pro se applicant-turned-plaintiffs later represented on appeal.³¹⁹ Finally, the clarity of the CAVC's analytical framework is helpful in guiding the analysis and creating space for checking the decisionmaker. The clear analytical framework may be particularly helpful to the non-law-trained board members by giving them a method for engaging in reasoning.

³¹⁹ See U.S. CT. OF APPEALS FOR VETERANS CLAIMS, FISCAL YEAR 2023 ANNUAL REPORT 1 (2023), <https://www.uscourts.cavc.gov/documents/FY2023AnnualReport.pdf> [<https://perma.cc/8KDQ-EG6D>] (reporting 15% pro se appeals and 56% pro se petitions); Wherry, *Denied by Dysfunctional Design*, *supra* note 24, at 1061 ("Most discharge upgrade applications are submitted by veteran-applicants without legal representation . . .").

A. Limit the Presumption's Applicability to Propriety Grounds

The DRB presumption should be defined as limited to propriety grounds consistent with the language of the presumption as applicable to the “conduct of governmental affairs.” The DRB presumption should not apply to equity and clemency grounds because those go beyond conduct to the merits of decisions.³²⁰ Though the DoD-level regulations and branch-specific guidance include the phrase “conduct of governmental affairs” in the statement of the presumption, that limited scope is often ignored in the DRB decisions—thus, the need for a concrete, limited scope.

A limited-scope definition is consistent with the presumption's origin as applicable to ministerial acts and the DRBs' governing regulations and instructions that refer to “conduct of governmental affairs.”³²¹ The limited scope is also in line with the general and VA mailing presumptions. Similar to Gavoorn and Platt's call for a “*Defined and Balanced*”³²² general presumption, and their suggestion that “[t]he best version of a doctrinal (or statutory) presumption of regularity is a limited one: a limited presumption that a senior governmental official performed ministerial tasks,”³²³ the DRB presumption should be limited to ministerial acts and balanced to afford some but not unlimited deference to military commanders while creating space for “full, fair, and impartial consideration[.]”³²⁴

A limited-scope DRB presumption should define “conduct of governmental affairs,” including a specific statement that conduct does not include substance. For example, in the DRB context, conduct includes following the procedural steps for a discharge (e.g., completing the relevant paperwork, signatures on discharge documents), but conduct does not include the actual discharge characterization decision that resulted from the procedural steps. Though the government may be entitled to a presumption that a procedure was proper or that a signature on a document is valid, those procedural regularities are distinct from a review of the discharge decision itself. To maintain this distinction, the presumption of regularity should not extend beyond propriety challenges and specifically should not apply to the merits of a discharge characterization decision.

³²⁰ See 32 C.F.R. § 70.8(b)(12)(vi) (2026).

³²¹ *Id.*

³²² Gavoorn & Platt, *In Search of*, *supra* note 57, at 757.

³²³ *Id.* at 763.

³²⁴ 32 C.F.R. § 70.9(a); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.1.

Upgrade requests on equity or clemency grounds should not be subject to the presumption of regularity because a presumption of regularity “in the conduct of governmental affairs” does not equate to fairness of a decision nor erase the opportunity for second chances. These substantive and policy-based questions are beyond the scope of the presumption and require the DRBs to engage in robust analysis applying the legal standards and governing guidance for equity and clemency. The fact that the boards are directed to consider many types of evidence and factors in equity and clemency decisions further reinforces the inapplicability of the presumption of regularity in these contexts.³²⁵ To truly give “full, fair, and impartial consideration,” the boards must evaluate the substance of the discharge on equity and clemency grounds and not rely on procedural regularities as a substitute for substantive correctness.³²⁶

Though this approach to limit the presumption to propriety grounds would potentially create a further backlog in cases or delay decisions due to the DRBs needing more time to engage in the decision-making process, that is a worthwhile tradeoff—or at least is not a good reason to avoid change given that there is already an unreasonable length of time between filing an application and receiving a decision.³²⁷ While the boards may have to work harder without the efficient denials based on the presumption, working harder is a means to the goal of providing better decisions. This approach may also reduce the number of cases appealed to the boards of corrections or courts if relief is granted at the DRB.

Moreover, a limited DRB presumption would also better reflect the purpose of the DRBs. If the DRBs exist merely to rubber-stamp the original decisions, there would be no reason to have boards “of review.” Given that the DRBs have statutory authority to upgrade a discharge on equity or propriety grounds, and on clemency grounds by policy guidance, the DRBs’ purpose is not limited to reviewing procedural irregularities. Procedural

³²⁵ See 32 C.F.R. § 70.9(c)(i)(A)–(O) (listing fifteen “[q]uality of service” factors and four “[c]apability to serve” factors); Wilkie Memo, *supra* note 38, para. 7 (identifying eighteen factors).

³²⁶ 32 C.F.R. § 70.9(a); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.1.

³²⁷ Posting of Jessica L. Wherry, jwherry@ubalt.edu, to veteransclinics@lists.wm.edu (Feb. 17–18, 2025) (on file with author) (interpreting “an analyst has not been assigned yet. . . . to mean no one has even looked at the case in 3+ years.” “Every time we reach out for status updates, the number of days before cases are being boarded goes up. Last time I checked in, it was 1000+ days. (!?!).” “Army DRB petitions are now at the 3-year mark.”).

irregularities are difficult to establish—especially for a pro se veteran-applicant years removed from the discharge process. The lack of proof for a procedural irregularity should not eliminate the DRBs' requirement to review the substance of a discharge on equity grounds. The requirement to provide “full, fair, and impartial consideration” should not be erased by the presumption. Instead, the presumption as limited to questions of propriety could support the boards' efforts to focus on the substantive issues presented by discharge upgrade applications.

B. Establish a Required Analytical Framework for the Presumption

Just as the general presumption is “not . . . a legal fiction wholly beyond judicial review or impervious to rebuttal,”³²⁸ the DRB presumption can be rebutted and thus requires engagement with an analytical framework. In line with limiting the presumption's scope, this Article calls for an analytical framework within which to apply the presumption, borrowing from the CAVC case law (case law that is consistent with, but more developed than, the general presumption case law). Unlike the VA mailing presumption, which is rooted in statutory and regulatory requirements for the process of notice to veteran-claimants and their representatives but has a judge-made analytical framework, the DRB presumption is rooted in a detailed regulatory scheme within the broader context of multiple layers of deference. The deference in the DRB context has led to a lack of an analytical framework, and that gap can be resolved by adopting the CAVC approach.

The well-established CAVC analytical framework provides a ready-made and tested approach: (1) Predicate; (2) Rebuttal; (3) Burden-Shifting.³²⁹ Adapting this three-step analytical framework to the DRB presumption could look like this:

Step One: Does the presumption of regularity apply in this case? Asked another way, was there an official duty at issue?

Step Two: Is there evidence to overcome the presumption? (Without judging the validity or weight of the evidence, determine whether there is any evidence proffered.) Given the evidence, is the presumption rebutted? Why or why not?

If there is no evidence proffered or if the presumption is not rebutted based on the evidence and that lack of rebuttal is explained by the DRB, the presumption stands.

³²⁸ Gavoor & Platt, *In Search of*, *supra* note 57, at 761.

³²⁹ See discussion *supra* Section III.B.2.

If the presumption is rebutted, Step Three: What evidence does the DRB have to show the propriety despite the rebuttal evidence? How and why does this evidence overcome the presumption's rebuttal?

The DRBs could implement this approach immediately, even without any other regulatory change, because the framework is consistent with the governing DoD-level C.F.R. and the general presumption.³³⁰ In fact, the DRBs have already adopted analytical structures without specific regulatory guidance. For example, in decisions involving mental health conditions governed by the DoD's "liberal consideration" policy,³³¹ the DRBs have incorporated the policy guidance's factor-based approach into their decisions.³³² According to the policy guidance, there are four factors, or questions, in assessing a discharge upgrade request involving relief related to a mental health condition:

- (1) "Did the veteran have a condition or experience that may excuse or mitigate the discharge?"
- (2) Did that condition exist/experience occur during military service?
- (3) Does that condition or experience actually excuse or mitigate the discharge?
- (4) Does that condition or experience outweigh the discharge?"³³³

³³⁰ See 32 C.F.R. § 70.8(e)(3)(ii)(B)(2). The requirement for explanation is consistent with the general presumption in federal case law. See, e.g., *Conley v. United States*, 5 F.4th 781, 791 (7th Cir. 2021) ("The presumption of regularity is an analytic tool, not an excuse to rubber-stamp any and all executive action as lawful absent clear evidence to the contrary.").

³³¹ Memorandum from Chuck Hagel, Sec'y of Def., to Sec'ys of the Mil. Dep'ts (Sep. 3, 2014), <https://www.secnnav.navy.mil/mra/bcnr/Documents/HagelMemo.pdf> [<https://perma.cc/T772-XGQE>]; Memorandum from Brad Carson, Acting Principal Deputy Under Sec'y of Def. for Pers. & Readiness, to Sec'ys of the Mil. Dep'ts (Feb. 24, 2016), <https://ctveteranslegal.org/wp-content/uploads/2017/10/carson.pdf> [<https://perma.cc/9YJ9-8433>]; Memorandum from A.M. Kurta, Acting Under Sec'y of Def. for Pers. & Readiness, to Sec'ys of the Mil. Dep'ts (Aug. 25, 2017) [hereinafter Kurta Memo], <https://www.secnnav.navy.mil/mra/CORB/Documents/SECNAVCORB-Policy-Letter-2017-3-Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf> [<https://perma.cc/J4JT-TPZW>] (supplementing the Hagel Memo).

The liberal consideration policy is outside the scope of this Article, but I anticipate a next project addressing the mutual exclusivity of liberal consideration and the presumption of regularity.

³³² See U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-107354, MILITARY DISCHARGE: ACTIONS NEEDED TO HELP ENSURE CONSISTENT AND TIMELY UPGRADE DECISIONS 45–50 (2025).

³³³ Kurta Memo, *supra* note 331, attach. at 1, para. 2(a)–(d). These factors are known among veterans advocates as "the Kurta factors."

This analytical framework has become part of DRB decisional documents, to various degrees among the DRBs, without any regulatory guidance at the DoD or branch level. For example, NDRB decisions include a table with the four questions along the left and answers to the questions on the right. This approach provides clarity and forces the Board to engage in an analysis of each question.³³⁴ AFDRB decisions also engage with the Kurta factors, but in a more narrative format.³³⁵ Despite the different approaches, the boards have demonstrated an ability to incorporate an analytical framework, indicating feasibility to do so with the presumption of regularity. Though regulatory change is not required to incorporate an analytical framework, I still recommend regulatory change to ensure universal implementation of an analytical framework for the presumption of regularity.

Additionally, and within the analytical framework, there should be guidance for what it takes to rebut the presumption. This is an area that needs more research to determine what evidence rebuts the DRB presumption given the unique features of the discharge upgrade context, including lack of access to or non-existence of military records, length of time since discharge, prose status of veteran-applicants, and availability of evidence to veteran-applicants. Even without a clear definition for what counts as rebutting the presumption in the case law engaging the general presumption and VA mailing presumption, this aspect of developing the analytical framework should not be overlooked.

Looking to the CAVC for guidance, it may be reasonable to determine that a veteran-applicant's statement alone may not be enough to overcome a presumption of regularity on propriety grounds. But that should be scrutinized to determine what is required beyond a veteran-applicant's statement and to try to identify other types or categories of evidence that would be accessible to a veteran-applicant. If the presumption of regularity continues to potentially apply to equity and clemency grounds, the standard for rebuttal evidence should be relatively low and a veteran-applicant's statement alone should be enough to overcome the presumption. That low standard is consistent with all the policy

³³⁴ The table alone is not a solution, but the question-and-answer approach does reflect the ability to incorporate an analytical framework.

³³⁵ See, e.g., Air Force Discharge Review Board Decisional Document, No. FD-2022-00082 (Air Force Discharge Rev. Bd. June 21, 2022), https://boards.law.af.mil/AF_DRB_CY2022.htm [<https://perma.cc/F4NN-PBRR>] (choose "02a_AFDRB Decisional Rationale – FD-2022-00082.rtf"; then open the downloaded file) (including the four Kurta questions with answers).

guidance directing the boards to give “full, fair, and impartial consideration[],” to give second chances, and to view post-discharge evidence.³³⁶ Given the strength of the government’s position, allowing more rebuttal evidence will not eliminate the power of the presumption, but it would force the DRBs to engage more deeply with the facts in deciding that the presumption justified denial of relief.³³⁷

Although courts usually give extreme deference to the boards,³³⁸ there has been some judicial recognition of the lack of analytical engagement in board decisions and examples for how to approach the analysis. In a rare case that fully engages with review of a board decision, *Jenkins v. Speer* offers some guidance for more effective engagement with the presumption. In reviewing a repeatedly denied discharge upgrade request, the court noted that “[d]istrict court review of agency decisions is . . . typically narrow and deferential,” and acknowledged the even more deferential standard for the boards.³³⁹ The court noted that the board’s “actions ‘must be supported by reasoned decisionmaking.’”³⁴⁰ Within this context of the extreme—but not total—deference to military decisions, the court reviewed the Board’s reliance on the presumption of regularity, recognizing that the burden was on the veteran-applicant.³⁴¹

Ultimately, the court determined that the Board failed to fully engage with the evidence the veteran provided.³⁴² The court provided a series of benchmarks which can be taken forward to create parameters for DRB decisions. First, the court explained that the presumption “requires a court to treat the Government’s records as accurate; it does not compel a determination that the

³³⁶ See, e.g., Kurta Memo, *supra* note 331, attach. at 2, para. 7 (“The veteran’s testimony alone, oral or written, may 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.”); 32 C.F.R. § 70.9(a) (2026); DODI 1332.28, *supra* note 34, enclosure 4, para. E4.1.

³³⁷ Defining the evidentiary requirements for rebutting the presumption is beyond the scope of this Article.

³³⁸ See *supra* Section IV.F.

³³⁹ *Jenkins v. Speer*, 258 F. Supp. 3d 115, 124 (D.D.C. 2017) (“The ABCMR, as a military board, is further entitled to ‘an unusually deferential application of the “arbitrary and capricious” standard.’” (quoting *Kreis v. Sec’y of the Air Force*, 886 F.2d 1508, 1514 (D.C. Cir. 1989))). Though the court reviewed a corrections board decision, the analytical approach to the presumption is just as relevant to the DRBs.

³⁴⁰ *Id.* (quoting *Haselwander v. McHugh*, 774 F.3d 990, 996 (D.C. Cir. 2014)).

³⁴¹ *Id.*

³⁴² *Id.* at 136.

record establishes what it is offered to prove.”³⁴³ Here, a presumption that the veteran and his captain signed a discharge form “does not compel a determination that the advice referred to in the form actually occurred.”³⁴⁴ The court noted that the Board went too far in treating the signatures as confirmation of a substantive event.³⁴⁵ Significantly, the court explained the unfairness of requiring a plaintiff to prove a negative: “[I]t was unreasonable to expect a plaintiff who claimed that he was not counseled to produce a counseling-related form that his supervisor allegedly did not prepare.”³⁴⁶

Furthermore, the court explained that the Board entirely ignored evidence the veteran offered as rebuttal evidence, a cover letter from his captain and his own statements. The court analyzed the cover letter to point out its weaknesses, noting that it “did not include legal advice on any of the ten mandatory topics. Instead, it focused entirely on the possible advantages of the chapter 10 discharge.”³⁴⁷ Without engaging in the disadvantages to the veteran, the court determined the letter was “one-sided” and fell “short of the threshold for providing objective advice on the merits of the chapter 10 discharge.”³⁴⁸ The court further explained that the veteran’s declaration was ignored.³⁴⁹ In total, ignoring the evidence led the court to determine the Board’s decision was arbitrary. The court explained that the Board was obligated to “weigh” the evidence rather than rely on the presumption of regularity alone.³⁵⁰ This detailed discussion of each piece of evidence and how to consider it in terms of rebutting the presumption provides a starting point to developing a template for implementing a robust analytical framework. Especially in regard to proving a negative and weighing a veteran’s statement, the court’s guidance suggests how the DRBs can fully and fairly consider each piece of evidence in step two of the proposed analytical framework.

³⁴³ *Id.* at 128 (quoting *Latif v. Obama*, 666 F.3d 746, 750 (D.C. Cir. 2011)).

³⁴⁴ *Id.*

³⁴⁵ *See id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *See id.* at 129.

³⁵⁰ *See id.* at 130.

C. Resolve Inconsistencies Among the C.F.R. and Other Governing Documents

Given the various inconsistencies identified in the previous discussion, DoD should, in collaboration with the branches, undertake a comprehensive revision of the regulations governing the DRBs to identify all the inconsistencies and then revise toward a consistent approach.³⁵¹ Such an approach reflects the DoD-level regulations' requirement for "uniformity among the Military Departments in the rights afforded applicants in discharge reviews."³⁵² Consistency is key here as the regulatory variations among the branches can lead to inconsistencies in veteran-applicants' rights to "full, fair, and impartial consideration[]." ³⁵³ For example, the branch-level guidance should be revised to require explanation in decisions involving the presumption of regularity consistent with the requirement for explanation as detailed in the DoD regulations.

A holistic effort to compare the DoD regulations with each of the branches' regulations could identify all the inconsistencies, discover opportunities for reconciliation, and potentially uncover needs for additional rulemaking. While there may be room for some variation among the branches in how they approach the presumption, any variation should be consistent with the higher-level regulations. Depending on other potential changes, including limiting the presumption's scope and establishing an analytical framework, this holistic review and revision might be more effective as a later, rather than first, step.

D. Use the Discharge Appeals Review Board as an Interim Review Mechanism and Resource Creator

With a limited-scope DRB presumption that is consistent with the governing regulations and other guidance, and a well-established analytical framework for the presumption, oversight for at least an initial period would be useful in ensuring full implementation of the changes. Of course, the records correction boards and courts are possible avenues of oversight, but there is an opportunity to use the Discharge Appeals Review Board

³⁵¹ No doubt this would be a significant undertaking but worth the effort. Generative AI could be used to identify inconsistencies among the various governing documents.

³⁵² 32 C.F.R. § 70.4(b)(2) (2026); *see also* DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.1.2 (mirroring the C.F.R. language).

³⁵³ 32 C.F.R. § 70.9(a); DoDI 1332.28, *supra* note 34, enclosure 4, para. E4.1.

(DARB) to oversee the DRBs and potentially eliminate the need for appeals to the records correction boards and courts.

The DARB was established by statute to provide “a final review” of a discharge upgrade request.³⁵⁴ The DARB’s jurisdiction is limited to cases involving discharge or dismissal on or after December 20, 2019, and exhaustion of all administrative remedies.³⁵⁵ Applications to the DARB must be submitted within 365 days of the records correction board decision.³⁵⁶ The DARB’s limited function is “*de novo* review” of board decisions.³⁵⁷ In Fiscal Years 2022, 2023, and 2024, the DARB received a combined total of forty-five applications, but only one was reviewable by the DARB.³⁵⁸ Given what seems to be a lack of work for the DARB, the nineteen-person staff could take on an oversight role, reviewing all DRB decisions relying on the presumption of regularity for compliance with an established analytical framework.³⁵⁹

The DARB could identify best practices over a period of review and issue recommendations to the DRBs to better implement and engage with the required analytical framework for the presumption of regularity. The DARB could develop templates and examples based on its review, as well as catalog the types of evidence sufficient and insufficient to rebut the presumption. These resources would be useful to the boards, veteran-applicants, and veterans advocates. Given the DARB’s limited scope by statute, some level of statutory amendment or rulemaking may be required for this to work.

VI. CONCLUSION

This Article takes a critical look at the DRB presumption with an eye toward resolving regulatory inconsistencies and increasing the robustness of the DRB decisional documents. There is no perfect definition for the DRB presumption, but there is room to redefine it as narrowly applicable to propriety issues in

³⁵⁴ 10 U.S.C. § 1553a(a).

³⁵⁵ 32 C.F.R. § 73.5(a)(1), (3).

³⁵⁶ *Id.* § 73.5(c)(2).

³⁵⁷ *Id.* § 73.6(b)(2).

³⁵⁸ See Jessica Lynn Wherry, *16th Annual Veterans Legal Assistance Conference & Training*, VETERANS L. PROF BLOG (Apr. 11, 2025), <https://www.veteranslawprofblog.com/2025/04/16th-annual-veterans-legal-assistance-conference-training-by-jessica-lynn-wherry-university-of-balti/> [<https://perma.cc/SVV5-M8PZ>]; *DoD Discharge Appeal Review Board (DARB)*, *supra* note 53 (choose “FY22 DARB Annual Report.xlsx,” “FY23 DARB Annual Report v1.xlsx,” and “FY24 DARB Annual Report.xlsx”); then open the downloaded files). As of March 29, 2026, the DARB had not yet posted the data for FY2025. See *id.*

³⁵⁹ See Wherry, *supra* note 358.

line with the historical origin of the presumption, develop an analytical framework consistent with the regulatory requirements for explanation, and develop parameters for evidentiary standards within the unique features of discharge upgrades. These changes, consistent with the history of the presumption, allow space for tailoring. Just as the VA mailing presumption is consistent with the general presumption yet has its own unique parameters in terms of what triggers the presumption and what evidence is sufficient to rebut, the DRB presumption can adapt to similarly reconcile with the general presumption while maintaining context-specific principles and limitations.

A narrowed DRB presumption applied and analyzed within a robust analytical framework will do much to improve the discharge upgrade process—both for the veteran-applicants to receive a true “full, fair, and impartial” review, and for the DRB board members as they could have a clear path for analysis. Just as the DRBs have adapted to incorporate the Kurta factors framework resulting in increased decisional clarity, the DRBs can further increase decisional clarity by adopting an analytical framework for the presumption of regularity.

A refined DRB presumption with a required analytical framework would decrease opportunities for historical bias and deference to original decisions. Without the presumption applying to “any review,” board members would have no choice but to more fully engage in the decision-making process and thereby move closer to the required “full, fair, and impartial” review as well as better meet the regulatory requirements for explanation. Jettisoning old boilerplate language would create space for engaging in the analytical framework. There is still room for the efficiency of boilerplate in creating a template that takes the board through the presumption analysis step by step, starting with an explanation and justification for how and why the presumption applies in the first place.

The stakes are high for many veteran-applicants seeking a discharge upgrade. Historically and today, the presumption of regularity plays a significant role in denying relief to countless veteran-applicants. Informed by the general and VA mailing presumptions, this Article examines the DRB presumption to uncover its irregularities. With these irregularities exposed, there are opportunities to confront and resolve them toward a balanced entitlement to “full, fair, and impartial” review—something every veteran-applicant deserves.