

MILITARY LAW REVIEW

Volume 227
Issue 2

COMBAT STRESS CLAIMS: VETERANS' BENEFITS AND POST-SEPARATION CHARACTER OF SERVICE UPGRADES FOR "BAD PAPER" VETERANS AFTER THE FAIRNESS FOR VETERANS ACT

MAJOR BRYANT A. BOOHAR*

*"The painful paradox is that fighting for one's country
can render one unfit to be its citizen."*¹

I. Introduction

After seventeen straight years of fighting wars in foreign lands, the United States now faces a significant public health epidemic here at home. The U.S. Department of Veterans Affairs (VA) estimates that twenty veterans commit suicide every day.² Alarming, only thirty percent of

* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 31st Air Defense Artillery Brigade, Fort Sill, Oklahoma. LL.M., 2018, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia; J.D., 2002, Widener University School of Law; B.A., 1995, Guilford College. Previous assignments Chief, Legal Assistance, 1st Sustainment Command (Theater), Fort Bragg, North Carolina, 2016-2017; Battalion Judge Advocate, 96th Civil Affairs Battalion (Airborne), Fort Bragg, North Carolina, 2014-2016; Defense Counsel, United States Army Trial Defense Service, Fort Hood, Texas, 2012-2014; Senior Trial Counsel, Trial Counsel, Legal Assistance Attorney, United States Army Cyber Center of Excellence and Fort Gordon, Fort Gordon, Georgia, 2009-2012. Member of the bars of Pennsylvania and New Jersey.

¹ JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* xx (2010).

² See News Release, U.S. Department of Veterans Affairs, VA Releases Veterans Suicide Statistics by State (Sept. 15, 2017), <https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=2951>.

those veterans who take their own lives receive services through the VA.³ While some veterans voluntarily choose not to seek VA services, there remain a great number of former service members who find themselves ineligible for many VA services due to misconduct that they engaged in while on active duty.⁴

When deciding to separate service members for misconduct, commanders routinely turn to their legal advisors for advice on how the character of service of the proposed discharge is likely to impact the service member's future eligibility for VA services. However, recent changes to both law and policy, including the Fairness for Veterans Act,⁵ make the analysis more complex and the outcome less certain. The purpose of this article is to provide command legal advisors with a better understanding of the effect that the character of service of a service member's discharge may have on his or her VA eligibility and the challenges that he or she is likely to encounter when attempting to upgrade the character of service post-separation under the current law and policy.

Put simply, if a service member commits misconduct while on active duty and is then separated from the military with "bad paper," or a less than honorable character of service, his or her access to VA services may be severely limited or even completely cut off. Unfortunately, many of these "bad paper" veterans also suffer from the invisible wounds of war, including Post-Traumatic Stress Disorder (PTSD) and related behavioral health conditions.⁶ Especially when left untreated, these conditions can lead to widespread negative effects for former service members and for society at large, including the devastating impact of suicide and the commission of violent criminal acts by veterans.⁷

³ See *id.*

⁴ See Major John W. Brooker et al., *Beyond "T.B.D.": Understanding Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 17 (2012) (discussing in depth the challenges of "'bad paper' veterans" as they navigate the complex system of veterans benefits).

⁵ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), amended by National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017).

⁶ See HANNAH FISCHER, CONG. RESEARCH SERV., RS22452, A GUIDE TO MILITARY CASUALTY STATISTICS: OPERATION FREEDOM'S SENTINEL, OPERATION INHERENT RESOLVE, OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM 2-5 (2015).

⁷ See Brandt A. Smith, *Posttraumatic Stress Disorder (PTSD) in the Criminal Justice System*, 29 MILITARY PSYCHOLOGIST 8 (2014),

In the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Congress passed, and the President signed into law, the bipartisan Fairness for Veterans Act.⁸ This law was designed to make it easier for Iraq and Afghanistan-era “bad paper” veterans suffering from PTSD and related behavioral health conditions to successfully upgrade their character of service, thereby removing a significant barrier to VA services.⁹ The law states that Discharge Review Boards shall give “liberal consideration” to character of service upgrade petitions by former service members suffering from PTSD and related behavioral health conditions.¹⁰ Discharge Review Boards have a fifteen-year statute of limitations from the date of discharge and, accordingly, are typically used by more recently discharged veterans.¹¹

Then, on 25 August 2017, the Department of Defense (DoD) issued clarifying guidance that interprets, and in some cases may limit, the application of the “liberal consideration” standard.¹² Lawmakers reaffirmed their stance on this issue on 12 December 2017, when the application of the “liberal consideration” standard was expanded to Boards for the Correction of Military Records, which have a waivable three-year statute of limitations and are more typically used by veterans of older conflicts, such as Vietnam veterans, who are beyond the statute of limitations for the Discharge Review Boards.¹³

The recent policy changes and the Fairness for Veterans Act take substantial steps towards expanding access to VA services for “bad paper” veterans suffering from PTSD and related behavioral health conditions.

https://www.militarypsych.org/uploads/8/5/4/5/85456500/military_psychologist_29-1.pdf (discussing the prevalence of violent crimes committed by veterans with PTSD).

⁸ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017).

⁹ See *Charlie Foxtrot*, WXIA-TV (Nov. 2016), <http://www.charliefoxtrot.org> [hereinafter *Charlie Foxtrot*].

¹⁰ See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017).

¹¹ See 10 U.S.C. § 1553(a) (2018).

¹² See Memorandum from Under Sec’y of Defense to Sec’y of the Military Departments, subject: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (25 Aug. 2017) [hereinafter *Clarifying Guidance*].

¹³ See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 520, 131 Stat. 1332 (2017).

However, it is critically important for legal advisors in the field to understand the process for VA eligibility and post-separation character of service upgrades when advising commanders prior to a service member's separation. To that end, this article begins with a discussion of the barriers to entry into the VA system as well as the development of the military's understanding of the symptoms and prevalence of PTSD within the ranks. This article then analyzes the development of the "liberal consideration" standard that is applied to post-separation character of service upgrade petitions, the problems with the standard's application at the board level, and the potential impact of the Fairness for Veterans Act and current DoD policy. Finally, this article suggests considerations that legal advisors in the field can incorporate into their advice to commanders prior to separating service members suffering from PTSD and related behavioral health conditions. By understanding the challenges that "bad paper" veterans face after separation, commanders can better ensure that their intent is being met and that the interests of the military, "bad paper" veterans, and the public are properly balanced.

II. "Bad-Paper" Paradox: Barriers to VA Services

Combat stress related disorders are as old as combat itself. In his book *Achilles in Vietnam*,¹⁴ Dr. Jonathan Shay highlights this point by showing the similarities between his Vietnam veteran patients still suffering from PTSD and Homer's epic portraits in *The Illiad* of the negative effects of combat stress on Trojan War soldiers.¹⁵ Dr. Shay explains that "unhealed PTSD can devastate life and incapacitate its victims from participation in the domestic, economic, and political life of the nation."¹⁶

Obviously, some physical combat injuries are relatively easy for medical professionals to observe and promptly initiate profiles, or even medical separations or retirements. The invisible wounds of PTSD, however, lurk beneath the surface and are often much more difficult to

¹⁴ SHAY, *supra* note 1.

¹⁵ *See id.* For example, Dr. Shay describes Achilles' reaction to Agamemnon's theft of his war prize, the captured woman Briseis, and Hector's killing of Achilles' close friend Patroklos, as follows, "His [indignant wrath], restrained at the brink of cutting down Agamemnon, is diverted to hacking away emotional bonds and driving away those he used to love [Indignant wrath] is also the first and primary trauma that converted subsequent terror, horror, grief, and guilt into a lifelong disability for Vietnam veterans." *Id.* at 21.

¹⁶ *Id.* at xx.

recognize, assess, and diagnose.¹⁷ Complicating the issue, PTSD often does not fully manifest until a service member returns to garrison and begins having difficulty reintegrating to life at home.¹⁸ Making matters worse, some service members try to self-medicate the symptoms by turning to alcohol and illegal drugs.¹⁹ These untreated symptoms, especially when fueled by substance abuse, can quickly send a service member into a spiraling descent of poor work performance, undesired behaviors at work and at home, and eventually career ending misconduct.²⁰ These misbehaviors can cause these suffering service members to place themselves at risk of misconduct separations.²¹

In order to better understand the challenges that “bad paper” veterans face after separation, it is important to understand their operating environment. To that end, this section discusses the framework for attaining access to VA services, the current understanding of PTSD symptoms and its prevalence among service members, and the significant correlation between PTSD and misconduct.

A. “Veteran” Status: The Threshold for Accessing VA Services

Generally, a former service member must apply for “veteran” status with the VA before accessing services through the VA.²² “Veteran” status

¹⁷ See Rand Corp., *Invisible Wounds: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* (Terri Tanielian & Lisa H. Jaycox eds., 2008).

¹⁸ See Hans Pols & Stephanie Oak, *War and Military Mental Health: The U.S. Psychiatric Response in the 20th Century*, 97 AM. J. PUB. HEALTH 2132 (2007); Major Cara-Ann M. Hamaguchi, *A Precarious Balance: Managing Stigma, Confidentiality, and Command Awareness in the Mental Health Arena*, 222 MIL. L. REV. 156 (2014).

¹⁹ See Karen H. Seal et al., *Substance Abuse Disorders in Iraq and Afghanistan Veterans in VA Healthcare, 2001-2010*, 116 DRUG AND ALCOHOL DEPENDENCE 93 (2011).

²⁰ See *id.*

²¹ See U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, para. 14-12 (19 Dec. 2016) [hereinafter AR 635-200].

²² On 9 January 2018, President Donald Trump signed an executive order stating his policy to “improve mental healthcare and access to suicide prevention resources available to veterans.” President Trump further ordered “the Secretary of Defense, the Secretary of Veterans Affairs, and the Secretary of Homeland Security [to] submit . . . a Joint Action Plan that describes concrete actions to provide, to the extent consistent with law, seamless access to mental health treatment and suicide prevention resources for transitioning uniformed service members in the year following discharge, separation, or retirement.” Exec. Order. No. 13,822, Fed. Reg. 1513 (Jan. 9, 2018). On 3 May 2018, the Secretary of the Department of Veterans Affairs (VA) Robert L. Wilkie submitted to President Donald Trump a Joint Action Plan which sets out three primary goals:

requires that a former service member meet the minimum service requirement and have a qualifying character of service.²³ In order to meet the service requirement, a former service member must serve the lesser of twenty-four months, or the full period of his or her initial obligation period, on “active military, naval, or air service.”²⁴ Former service members who meet the service requirement must also have a discharge with a qualifying character of service that is not subject to a statutory bar. A character of service of either honorable or general, under honorable conditions, require the VA to grant a former service member “veteran” status except when the discharge is the result of conscientious objection or desertion.²⁵ However, any character of service less favorable than honorable renders a former service member ineligible to receive his or her earned G.I. Bill education benefits.²⁶

Former service members with a character of service of other than honorable or a punitive discharge²⁷ require further analysis. If a former service member is sentenced to a punitive discharge by a general court-martial, in general, he or she does not receive “veteran” status.²⁸ If he or she receives a character of service of other than honorable, or a bad-conduct discharge from a special court-martial, then it may still be possible to receive “veteran” status. However, eligibility for “veteran” status requires that the reason for the discharge does not fall within one of the disqualifying categories below or give rise to a statutory bar.

There are five circumstances of discharge that disqualify former service members from “veteran” status without a statutory bar:

“Improve actions to ensure ALL transitioning Service members are aware of and have access to mental health services,” “Improve actions to ensure the needs of at risk Veterans are identified and met,” and “Improve mental health and suicide prevention services for individuals that have been identified . . . in need of care.” JOINT ACTION PLAN FOR SUPPORTING VETERANS DURING THEIR TRANSITION FROM UNIFORMED SERVICE TO CIVILIAN LIFE (Mar. 6, 2018, *rev.* Apr. 18, 2018).

²³ Determination of “veteran” status is a complex process that is governed by federal law and is administered on a case-by-case basis by the VA. This article provides only a broad overview of the process for general awareness and contextual purposes.

²⁴ 38 U.S.C. § 101(24) (2008); 38 U.S.C. § 5303A (2016).

²⁵ See 38 C.F.R. § 3.12(a) (2017). “A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.” *Id.*

²⁶ See 38 C.F.R. § 21.9520 (2009) (describing the basic eligibility requirements for the G.I. Bill).

²⁷ Punitive discharges include dismissal, dishonorable discharge, and bad-conduct discharge adjudged at a court-martial. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8) (2019).

²⁸ See 38 U.S.C. § 5303(a) (2016).

- (1) Acceptance of an undesirable discharge to escape trial by general court-martial²⁹.
- (2) Mutiny or spying.
- (3) An offense involving moral turpitude
- (4) Willful and persistent misconduct [and]
- (5) [Certain h]omosexual acts.”³⁰

In cases of other than honorable characterizations of service, a former service member may still be eligible to receive health care through the VA for the limited purpose of treating service-connected or service-aggravated injuries.³¹ If a Discharge Review Board later upgrades a former service member’s character of service to honorable or general, under honorable conditions, then “veteran” status is likely restored.³²

On the other hand, there are six absolute statutory bars to “veteran” status:

- [1][D]ischarge or dismissal by reason of the sentence of a general court-martial . . . ,
- [2][C]onscientious objector . . . ,
- [3][D]eserter,
- [4][A]bsence without authority from active duty for a continuous period of at least one hundred and eighty days . . . ,
- [5][O]fficer’s resignation for the good of the service,³³ or
- [6][D]ischarge of any individual during a period of hostilities as an alien³⁴

²⁹ For United States Army personnel, this refers to a chapter 10 discharge for enlisted service members. See AR 635-200, *supra* note 21, chapter 10.

³⁰ 38 C.F.R. § 3.12(d) (2017). Even though homosexuality is no longer a basis for separation from military service, prior discharges based on homosexual acts still disqualify former service members from “veteran” status. See AR 635-200, *supra* note 21.

³¹ See 38 C.F.R. § 3.360(a) (2017). “[H]ealth-care . . . shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty.” *Id.*

³² See 38 C.F.R. § 3.12(g) (2017).

³³ For United States Army personnel, this refers to a resignation for the good of the service in lieu of general court-martial for officers. See U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES, chapter 3, section VI (12 Apr. 2006).

³⁴ 38 U.S.C. § 5303(a) (2016). See 38 C.F.R. § 3.12(c) (2017).

A former service member is ineligible to receive VA services when a statutory bar applies, including service-connected and emergency health care.³⁵ In contrast to the disqualifying circumstances in the previous paragraph, the statutory bars generally still apply and deny “veteran” status to a former service member even if a Discharge Review Board subsequently upgrades the character of service.³⁶

Unfortunately for many “bad paper” veterans, the disqualifying circumstances and statutory bars contain a broad range of misconduct that is commonly seen in situations involving former service members suffering from PTSD. Some of these common offenses include desertion or long-term absence without leave, as well as abuse of illegal drugs, assault, and domestic violence resulting in punitive discharges from general courts-martial or discharges in lieu of court-martial.

³⁵ On 5 July 2017, the VA rolled out a new initiative to provide up to ninety days of emergency health care for service members with other than honorable discharges, whose “veteran” status has not yet been determined. However, “bad paper” veterans with a statutory bar remain ineligible to receive benefits under this program. See U.S. Department of Veterans Affairs, *Emergent Mental Health Care for Former Service Members* (June 2017), https://www.mentalhealth.va.gov/docs/Fact_Sheet-Emergent_Mental_Health_Care_Former_Service_Members.pdf

Effective July 5 [2017], all Veterans Health Administration (VHA) medical centers are prepared to offer emergency stabilization care for former service members who present at the facility with an emergent mental health need. What this means is that former service members with an OTH administrative discharge may receive care for their mental health emergency for an initial period of up to 90 days, which can include inpatient, residential or outpatient care Current character of discharge statutory still bars eligibility of this initiative to individuals with a dismissal, dishonorable discharge, or bad conduct discharge from a general court-martial If an individual received an OTH administrative discharge, he or she will be eligible for treatment at a VA medical facility for any disabilities determined to be service-connected, unless one of the statutory bars specified in 38 U.S.C. 5303 applies.

Id.

³⁶ See 38 C.F.R. § 3.12(g) (2017). “An honorable or general discharge issued on or after October 8, 1977, by a discharge review board . . . , sets aside a bar to benefits imposed under paragraph (d) [disqualifying circumstances], but not paragraph (c) [statutory bars], of this section” *Id.*

B. PTSD Awareness: Yesterday and Today

Today, more than three thousand years after the Trojan War, the recognition, diagnosis, and treatment of PTSD and related behavioral health conditions continue to be a challenge. During World War I, combat stress disorders were thought to be the result of a physical brain injury caused by the impact of artillery blasts, referred to as “shell shock.”³⁷ Common symptoms of “shell shock” included “stuttering, crying, trembling, paralysis, stupor, mutism, deafness, blindness, anxiety attacks, insomnia, confusion, amnesia, hallucinations, nightmares, heart problems, vomiting, and intestinal disorders.”³⁸ Then, during World War II, combat stress disorders began to be viewed as less of a physical injury and more of a mental health or psychiatric disorder. This shift in thinking caused a move away from the use of the term “shell shock” towards terms including “wartime neurosis” and “combat exhaustion.”³⁹

The understanding of combat stress disorders continued to develop throughout the Korean and Vietnam Wars, but PTSD was not officially recognized as a mental health diagnosis until 1980 when it was first included in the third edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Health Disorders (DSM-III).⁴⁰ However, its inclusion in the DSM-III was controversial among mental health professionals and many in the field could not agree on the proper diagnostic symptoms.⁴¹

Increased interest and study of PTSD in recent years led to further changes in the understanding and diagnosis of the disorder. In 2013, the

³⁷ See Pols & Oak, *supra* note 18, at 2,134.

³⁸ *Id.*

³⁹ Hamaguchi, *supra* note 18, at 164-65.

[T]here was a huge disparity among medical professionals in diagnosing and treating Soldiers who presented psychiatric symptoms The Army often used the number of psychological breakdowns in a unit as a gauge for the unit’s morale As a result, many Soldiers did not receive proper care and mental-health issues became further stigmatized.”

Id.

⁴⁰ See *id.* at 166. See also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III) 247-51 (3d ed. 1980) [hereinafter DSM III].

⁴¹ See Hamaguchi, *supra* note 18, at 166. “[D]espite its recognition in the DSM III, PTSD was not widely diagnosed or studied in the 1980s. This lack of focus on PTSD continued through the Gulf War.” *Id.*

American Psychiatric Association made several revisions to the classification and diagnostic criteria of PTSD in the fifth edition of the Diagnostic and Statistical Manual of Mental Health Disorders (DSM-5).⁴² In the DSM-5, PTSD was no longer classified as an “anxiety disorder.” Rather, it was now considered a “trauma- and stressor-related disorder.”⁴³ The DSM-5 explained that PTSD was associated with behaviors such as “irritable behavior or angry outbursts [and] [r]eckless or self-destructive behavior”⁴⁴ Based on these changes, the American Psychiatric Association explained that PTSD “causes clinically significant distress or impairment in the individual’s social interactions, capacity to work or other important areas of functioning.”⁴⁵

C. PTSD: Correlation with Misconduct and Prevalence in the Ranks

The difficulty in determining how to fairly treat “bad paper” veterans is that it can never really be known whether their PTSD or related behavioral health condition is actually the cause of the misconduct at issue.⁴⁶ Further, it is common for the misconduct to be the product, or byproduct, of alcohol and drug abuse.⁴⁷ This dilemma makes it extremely

⁴² See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 271-80 (5th ed. 2013).

⁴³ *Id.* See Robert F. Worth, *What If PTSD is More Physical Than Psychological?*, N.Y. TIMES (June 10, 2016), <https://www.nytimes.com/2016/06/12/magazine/what-if-ptsd-is-more-physical-than-psychological.html>. This article discusses a recent study by neuropathologist Dr. Daniel Perl suggesting that the shockwaves from combat related blasts cause significant physical damage to the brain resulting in PTSD symptoms. See *id.* In some ways, Dr. Perl’s findings may again loop us back to a World War I-era “shell shock” view of combat related stress disorders as a physical injury.

⁴⁴ DSM-5, *supra* note 42, at 272.

⁴⁵ AM. PSYCHIATRIC ASS’N, POSTTRAUMATIC STRESS DISORDER (2013).

⁴⁶ See Brooker et al., *supra* note 4, at 9-10.

The number of servicemembers with undiagnosed and untreated psychological wounds of war increases with each passing day. Associated with this general dilemma is the unconfirmed but highly suspected and logical connection between untreated mental illness and criminal offenses committed by combat veterans with specialized training in the art of war.

Id.

⁴⁷ See Seal et al., *supra* note 19, at 98. “[S]tudies have demonstrated that PTSD and depression symptoms precede or exacerbate drug and alcohol misuse, supporting the hypothesis that self-medication of psychiatric symptoms drives substance abuse in the context of PTSD and/or depression.” *Id.* See also Joshua E. Wilk et al., *Relationship of*

difficult for commanders, Discharge Review Boards, and the VA, to determine which cases truly deserve mitigation and which do not. Not surprisingly, this problem does not end with the service member's release from active duty. Highlighting the impact of this issue on society at large, one study of former service members suggests that as many as "[f]orty percent of veterans who suffer from PTSD are noted to have committed a violent crime since their completion of military service."⁴⁸

In order to fully appreciate how deeply this issue affects the military and society, it is helpful to consider how many current and former service members suffer from PTSD and related behavioral health conditions. A study published by the Congressional Research Service in 2015 found that between 2000 and 2015, approximately 177,461 service members were diagnosed with new cases of PTSD, including 138,197 deployment related cases.⁴⁹ An additional 327,299 service members were diagnosed with mild to severe Traumatic Brain Injury (TBI).⁵⁰ While these statistics are staggering, it not uncommon for both current and former service members suffering from PTSD to remain unidentified, undiagnosed, and untreated.⁵¹ Accordingly, the true numbers may be significantly higher.

III. Character of Service Upgrades and the Fairness for Veterans Act

"Bad paper" veterans who are ineligible for VA services may petition the appropriate Discharge Review Board to request an upgrade of their character of service.⁵² If successful, the upgrade can make a former service member eligible for "veteran" status with the VA so long as there

Combat Experiences to Alcohol Misuse Among U.S. Soldiers Returning from the Iraq War, 108 DRUG AND ALCOHOL DEPENDENCE 115, 117 (2011) "[Service members] who screened positive for alcohol misuse had significantly more mental health problems (i.e., symptoms of PTSD, major depression, and other anxiety disorders), and had significantly more combat experiences than those that screened negative for alcohol misuse". *Id.*

⁴⁸ Smith, *supra* note 7. "This surge [of violent crime] has an apparent link to certain symptoms of PTSD, specifically hyper-vigilance and hyper-aggression." *Id.*

⁴⁹ See FISCHER, *supra* note 6, at 2-5 (2015). This report counted the number of new PTSD cases with a "threshold of two or more outpatient visits . . ." *Id.*

⁵⁰ *See id.*

⁵¹ See Hamaguchi, *supra* note 18 (discussing the negative stigma that causes many active duty service members to avoid mental health treatment). See also Michael R Spont et al., *Impact of Treatment Beliefs and Social Network Encouragement on Initiation of Care by VA Service Users with PTSD*, 65 PSYCHIATRIC SERVICES 654 (2014). "Despite the [VA]'s expansion of mental health services to treat VA service users with [PTSD], many with PTSD do not engage in treatment." *Id.*

⁵² See 10 U.S.C. § 1553 (2018).

is not a statutory bar in place.⁵³ The intent of the Fairness for Veterans Act was to make this process easier for “bad paper” veterans whose PTSD and related behavioral conditions “potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the member’s discharge or dismissal.”⁵⁴

In order to better understand the Fairness for Veterans Act, and the subsequent DoD clarifying guidance, it is important to first consider the events leading up to the current law and policy. First, this section discusses key policy changes designed to assist “bad paper” veterans, including then-DoD Secretary Chuck Hagel’s memorandum dated 3 September 2014, known as the “Hagel Memo.”⁵⁵ These policies changed the landscape for many “bad paper” veterans suffering with PTSD and related behavioral health conditions by giving them a better chance to successfully upgrade their character of service and access VA services. Then, this section analyzes the conditions leading to the enactment of the Fairness for Veterans Act and the issuance of the subsequent DoD clarifying guidance, as well as the problems with applying the standard at the Board level.

A. Vietnam-Era Veterans Pave the Way for Change

As Vietnam-era veterans have aged and several have risen to positions of political power, they have become more organized in their advocacy efforts than veterans of more recent conflicts. In fact, these veterans have created an organization called the Vietnam Veterans of America (VVA) which is “the nation’s only congressionally chartered veterans’ service organization dedicated to the needs of Vietnam-era veterans and their families.”⁵⁶ This organization is constantly pressuring lawmakers, the

⁵³ See 38 C.F.R. § 3.12(g) (2017).

⁵⁴ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017).. See Charlie Foxtrot, *supra* note 9.

⁵⁵ See Memorandum from Sec’y of Defense to Sec’ys of the Military Departments, subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (3 Sept. 2014) [hereinafter Hagel Memo].

⁵⁶ See Press Release, Vietnam Veterans of America, VVA Celebrates Passage of Fairness for Veterans Act; Calls for Investigation into “Bad-Paper” Discharges (Dec. 13, 2016), <https://vva.org/wp-content/uploads/2016/12/VVA-Press-Release-16-35.pdf> [hereinafter VVA Press Release].

VA, and the DoD to institute reforms for the betterment of veterans from all conflicts, including “bad paper” veterans.

Over the past decade, under pressure from the VVA and with an increasing understanding of PTSD and related behavioral health conditions, the VA and DoD have implemented policy changes designed to decrease barriers to care for “bad paper” veterans. For example, for a former service member to receive VA benefits related to a claim of PTSD prior to 2010, the former service member was required to present corroborating evidence that he or she “actually experienced a stressor related to hostile military activity.”⁵⁷ This proved to be an onerous requirement since many service members did not have any such documentation in their official military files.⁵⁸ On 12 July 2010, then-Secretary of the VA Eric Shinseki removed this evidentiary requirement and published a new rule which allowed PTSD claims to be approved “if a VA doctor confirm[ed] that the stressful experience recalled by the Veteran adequately support[ed] a diagnosis of PTSD and the Veteran’s symptoms [were] related to the claimed stressor.”⁵⁹ This rule removed a major hurdle for many former service members and signaled a shift in the VA’s overall approach to providing PTSD care.

On 3 September 2014, then-Secretary of Defense Chuck Hagel issued the “Hagel Memo.”⁶⁰ This DoD memorandum represented a critical change in the way that Discharge Review Boards were instructed to adjudicate character of service upgrade petitions by “bad paper” veterans who claimed that they suffered from PTSD and related behavioral health conditions.⁶¹ This new guidance was prompted by the large numbers of discharge upgrade petitions by Vietnam-era veterans based on undiagnosed PTSD at the time of their discharges, many of which occurred a decade or more before PTSD was even officially recognized as a mental health diagnosis in the DSM-III.⁶² Due to the lack of available medical documentation, the DoD recognized the challenges of attempting to retroactively determine whether a former service member was affected by

⁵⁷ News Release, U.S. Department of Veterans Affairs, VA Simplifies Access to Health Care and Benefits for Veterans with PTSD (July 12, 2010, 8:00 AM), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=1922>.

⁵⁸ *See id.*

⁵⁹ *Id.*

⁶⁰ *See Hagel Memo, supra note 55.*

⁶¹ *See id.*

⁶² *See id. See also DSM-III, supra note 40, at 247-51.*

service-related PTSD during their Vietnam-era service and, accordingly, changed course.⁶³

The “Hagel Memo” instructed Discharge Review Boards that “[l]iberal consideration will be given in petitions for changes in characterization of service to Service treatment record entries which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions.”⁶⁴ While this change did allow many “bad paper” veterans to get their foot back in the door of the VA, the “Hagel Memo” was far from a guaranteed upgrade for “bad paper” veterans suffering from PTSD and related behavioral health conditions, especially in cases of serious or premeditated misconduct.⁶⁵

Despite its limiting language, the impact of the “Hagel Memo” was striking. In 2015, the Veterans Legal Services Clinic, a veterans’ advocacy organization operated by the Yale Law School, published a report based on information obtained under the Freedom of Information Act that analyzed the numbers of successful character of service upgrade petitions both before and after the implementation of the “Hagel Memo.”⁶⁶ The report stated that “[t]he overall grant rate for all veterans applying for PTSD-based discharge upgrades at the Army Board for the Correction of Military Records (ABCMR) has risen twelve-fold from 3.7% in 2013 to 45%” following the implementation of the “Hagel Memo.”⁶⁷ The report also noted that “Vietnam veterans applying are the most numerous

⁶³ See Hagel Memo, *supra* note 55.

⁶⁴ *Id.*

⁶⁵ See *id.*

Correction Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a characterization of service of other than honorable conditions. Potentially mitigating evidence of the existence of undiagnosed combat-related PTSD or PTSD-related conditions as a causative factor in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct . . . PTSD is not a likely cause of premeditated misconduct.

Id.

⁶⁶ See Sundiata Sideba & Francisco Unger, *Unfinished Business: Correcting “Bad Paper” for Veterans with PTSD*, JEROME N. FRANK LEGAL SERVICES ORGANIZATION AT YALE LAW SCHOOL,

<https://law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf>.

⁶⁷ *Id.* at 2.

applicants (67%) and have a higher grant rate at the ABCMR (59%) than veterans from other conflicts.”⁶⁸ These statistics showed a marked improvement for “bad paper” veterans and further highlighted the DOD’s changing attitudes and approach to these difficult cases.

B. Post-9/11 Veterans Push for Further Reforms

Notwithstanding the significant changes caused by the “Hagel Memo,” some argued that the guidance was “interpreted narrowly by the military’s review board agencies, impact[ed] a handful of Vietnam veterans,” and did not do enough to assist Post-9/11 veterans.⁶⁹ In November 2016, a team of investigative journalists from WXIA-TV based in Atlanta, Georgia, released a documentary series entitled *Charlie Foxtrot*.⁷⁰ The series told the stories of several former service members who claimed that they experienced combat related trauma in Iraq and Afghanistan and suffered the damaging effects of PTSD and TBI.⁷¹ The series focused on the difficulties that these service members had reintegrating into their units after deployment and their claims that the military unfairly and adversely discharged them for misconduct without properly considering their combat-related mental health conditions.

Within days, *Charlie Foxtrot* grabbed the attention of both the public and lawmakers.⁷² On 5 December 2016, one month after the series was released, the filmmakers were invited to the Capitol and the documentary series was shown to lawmakers in the Congressional Auditorium.⁷³ During that event, Senator Mike Coffman (R-CO), a sponsor of the

⁶⁸ *Id.* at 2.

⁶⁹ VVA Press Release, *supra* note 56.

⁷⁰ *See* *Charlie Foxtrot*, *supra* note 9.

⁷¹ *See id.* This series included stories of former service members such as: Private First Class Nicolas Jackson, U.S. Army, who reported having severe PTSD related to a suicide car bomb attack and multiple firefights while deployed and who was discharged under other than honorable conditions for absence without leave following his redeployment, and Sergeant Kristopher Goldsmith, U.S. Army, who reported having PTSD related to photographing bodies of dead and tortured people during his deployment and who was discharged for patterns of misconduct with a general under honorable conditions following a suicide attempt. *See id.*

⁷² *See id.* The filmmakers also created a petition in support of the Fairness for Veterans Act and collected 12,163 signatures, which they forwarded to Congress. *See id.*

⁷³ *See id.* *See also* WXIA Staff, *Video Forces Congress to Face Tragedy Among Troops*, 11ALIVE (Dec. 11, 2016), <http://www.11alive.com/article/news/investigations/charlie-foxtrot/video-forces-congress-to-face-tragedy-among-troops/85-362138515>.

Fairness for Veterans Act said, “What we’re trying to do is to go back and to reverse these discharges to get access to care.”⁷⁴ Senator Gary Peters (D-MI), another sponsor, said, “This is about basic fairness and it is about justice.”⁷⁵ Three days later, the Senate passed the Conference Report for the NDAA 2017 that included the Fairness for Veterans Act.⁷⁶ The NDAA 2017 was then signed into law by President Barack Obama on 23 December 2016.⁷⁷

The president of the VVA described the passage of the Fairness for Veterans Act as a “reason for every American to celebrate” saying that the NDAA 2017 both codified the “Hagel Memo” and “clarifie[d] and strengthen[ed] the spirit of the Hagel Memo by applying it more broadly to Post-9/11 veterans with less-than-honorable discharges.”⁷⁸ Similarly, the bill’s sponsors lauded its passage as a codification of the “Hagel Memo.”⁷⁹ One sponsor, Senator Kirsten Gillibrand (D-NY) stated that “[t]his provision will ensure that veterans who have PTSD or have experienced Military Sexual Trauma can more easily have their discharges upgraded . . . so that they can get the care they need and the benefits they earned.”⁸⁰

C. What the Fairness for Veterans Act Changes

The Fairness for Veterans Act is a short provision of the NDAA 2017 that amends 10 U.S.C. § 1553, Review of Discharge or Dismissal, in two significant ways.⁸¹ First, 10 U.S.C. § 1553 now contains a statutory

⁷⁴ Charlie Foxtrot, *supra* note 9.

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016).

⁷⁸ VVA Press Release, *supra* note 56.

⁷⁹ *See* Press Release, Office of Senator Thom Tillis, Peters, Daines, Tillis & Gillibrand Fairness for Veterans Provision to be Signed into Law (Dec. 8, 2016), <https://www.tillis.senate.gov/public/index.cfm/2016/12/peters-daines-tillis-gillibrand-fairness-for-veterans-provision-to-be-signed-into-law>. “The provision . . . codifies the principles of the 2014 Hagel memo to give liberal consideration to petitions for changes in discharge status to honorable if the servicemember has been diagnosed with PTSD, TBI or related conditions in connection with their military service.” *Id.*

⁸⁰ *Id.*

⁸¹ *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 520, 131 Stat. 1332 (2017); 10 U.S.C. § 1553 (2016), *amended by* 10 U.S.C. § 1553 (2017).

standard that the military's Discharge Review Boards are required to apply to character of service upgrade petitions. "[T]he Board shall . . . review the case with liberal consideration to the former member that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the member's discharge or dismissal."⁸² This standard is similar to, but arguably broader than, the "Hagel Memo" guidance.

Secondly, 10 U.S.C. § 1553 expands the application of the "liberal consideration" standard to a larger class of former service members, as follows:

[either] a former member of the armed forces who, while serving on active duty as a member of the armed forces, was deployed in support of a contingency operation and who, at any time after such deployment, was diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing post-traumatic stress disorder or traumatic brain injury as a consequence of that deployment⁸³

[or] a former member whose application for relief is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury as supporting rationale . . . whose post-traumatic stress disorder or traumatic brain injury is related to combat or military sexual trauma, as determined by the Secretary concerned.⁸⁴

Importantly, the law now specifically includes former service members suffering from TBI and military sexual trauma, and it levels the playing field for Post 9/11 veterans by removing the focus of the "Hagel Memo" on Vietnam-era veterans.⁸⁵

The following year, Congress passed, and President Donald Trump signed into law the National Defense Authorization Act for Fiscal Year 2018 (NDAA 2018) which contains a nearly identical provision expanding

⁸² *Id.* § 1553(d)(3)(A)(ii).

⁸³ *Id.* § 1553(d)(1).

⁸⁴ *Id.* § 1553(d)(3)(B).

⁸⁵ *See id.* § 1553(d)(3)(B).

the application of the “liberal consideration” standard to the Boards for the Correction of Military Records.⁸⁶

Notably, neither the Fairness for Veterans Act nor its companion provision in the NDAA 2018 defines the term “liberal consideration” and neither specifically states whether the limitations contained in the “Hagel Memo” guidance are superseded or remain in effect. The law also does not expressly grant the Secretary of Defense discretion to define, or otherwise limit, the “liberal consideration” standard.

D. Class Action Lawsuits and Clarifying Guidance

The brevity of the Fairness to Veterans Act is becoming problematic in the field as “bad paper” veterans and their advocates challenge the Discharge Review Boards’ application of the “liberal consideration” standard. On 17 April 2017, four months after the Fairness for Veterans Act became law, former service members Stephen Kennedy and Alicia Carson filed a class action lawsuit on behalf of “bad paper” veterans against the Honorable Robert Speer, then-acting Secretary of the Army.⁸⁷ The lawsuit sought to upgrade the character of service of the named plaintiffs as well as the entire class.⁸⁸ The crux of the plaintiff’s argument was that the Army Discharge Review Board “still frequently ignores the standards actually set out by the Hagel Memo . . . [and] follows these binding instructions only sporadically and unpredictably, and when it does purport to follow them, it does so inadequately.”⁸⁹ The plaintiff’s counsel

⁸⁶ See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332(2017); 10 U.S.C. § 1552 (2017) (including a minor conforming amendment to 10 U.S.C. § 1553 to match the statutory language of the two provisions).

⁸⁷ See Amended Complaint, *Kennedy v. Speer*, No. 3:16-cv-2010-EEW (D. Conn. Apr. 17, 2017) (Defendant Acting Secretary of the Army Robert Speer has since been substituted with Secretary of the Army Mark Esper). Stephen Kennedy is a former service member who served in Iraq and claims to be suffering from deployment related PTSD which he believes contributed to his two-week absence without leave, which ultimately led to his misconduct separation with a character of service of general under honorable conditions. Alicia Carson is a former Guardsman who served in Afghanistan and claims to be suffering from deployment related PTSD and TBI that she believes led to her missing drills, which ultimately led to her separation with a character of service of general under honorable conditions. See *id.*

⁸⁸ See *id.* at 33-34.

⁸⁹ *Id.* at 23.

estimated the size of the proposed class at approximately 50,000 “bad paper” veterans.⁹⁰

Then, on 25 August 2017, while the *Kennedy v. Esper* (formerly *Speer*) lawsuit was pending and prior to class certification or substantive rulings, the DoD issued clarifying guidance for Discharge Review Boards.⁹¹ Shortly after the issuance of the clarifying guidance, the court allowed the Army to voluntarily remand Stephen Kennedy and Alicia Carson’s upgrade petitions to the Army Discharge Review Board for reconsideration consistent with the new policy.⁹²

Interestingly, the clarifying guidance memorandum issued by the Under Secretary of Defense revived the “Hagel Memo” stating that it still applied to the Discharge Review Boards, but the memorandum did not contain any express reference to the Fairness for Veterans Act.⁹³ The clarifying guidance was favorable to “bad paper” veterans in many respects. It significantly reduced the evidentiary burden placed upon an upgrade petitioner stating that a “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.”⁹⁴ The memorandum also clarified the Secretary’s position that any “bad paper” veteran who “assert[s] a mental health condition without a corresponding diagnosis . . . will receive liberal consideration,”⁹⁵ a question that was left unanswered by the Fairness for Veterans Act.

On the other hand, the clarifying guidance did set some limits on the application of “liberal consideration” standard. Specifically, it contained language similar to the “Hagel Memo” which placed limitations on the application of the standard to discharges resulting from serious misconduct and premeditated misconduct.

The clarifying guidance memorandum explained that “[l]iberal consideration does not mandate an upgrade. Relief may be appropriate,

⁹⁰ See Veterans Legal Services Clinic, *Kennedy v. Esper*, YALE LAW SCHOOL, <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-speer> (last visited Mar. 14, 2019).

⁹¹ See Clarifying Guidance, *supra* note 12.

⁹² See *Kennedy v. Speer*, No. 3:16-cv-2010-WWE (D. Conn. Sept. 19, 2017).

⁹³ See Clarifying Guidance, *supra* note 12.

⁹⁴ *Id.* at 2.

⁹⁵ *Id.* at 2.

however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; . . . and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.”⁹⁶ The memorandum also explained that “[p]remeditated misconduct is not generally excused by mental health conditions, including PTSD However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.”⁹⁷ By contrast, the Fairness for Veterans Act did not contain these limitations on serious misconduct or premeditated misconduct and the comments by its legislative sponsors did not reveal any intent to place limitations on the application of the “liberal consideration” standard.⁹⁸

Following the voluntary remand in *Kennedy v. Esper*, the Army Discharge Review Board upgraded both Stephen Kennedy and Alicia Carson to a characterization of service of honorable.⁹⁹ Despite the Army’s argument that the characterization of service upgrades of the named plaintiffs rendered the issue moot, on 21 December 2018, the court certified the plaintiff class and allowed the lawsuit to proceed.¹⁰⁰ The certified class now includes:

All Army, Army Reserve, and Army National Guard veterans of the Iraq and Afghanistan era - the period between October 7, 2001 to present - who: (a) were discharged with a less-than Honorable service characterization (this includes General and Other than Honorable discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges); (b) have not received discharge upgrades to Honorable; and (c) have diagnoses of PTSD or PTSD-related conditions or record documenting one or

⁹⁶ *Id.* at 4.

⁹⁷ *Id.* at 3.

⁹⁸ See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017); 10 U.S.C. § 1553 (2016), *amended by* 10 U.S.C. § 1553 (2017).

⁹⁹ See Memorandum of Decision, *Kennedy v. Esper*, No. 3:16-cv-2010-WWE (D. Conn. Dec. 21, 2018), https://law.yale.edu/system/files/area/clinic/document/vlsc_order_12.21.18_074.00_-_order_granting_class_cert.pdf.

¹⁰⁰ See *id.*

more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.¹⁰¹

The litigation in *Kennedy v. Esper* remains ongoing.

Also, on 2 March 2018, Mr. Tyson Manker filed a separate class action lawsuit against the Honorable Richard Spencer, Secretary of the Navy.¹⁰² The complaint in *Manker v. Spencer* alleged that the Navy Discharge Review Board improperly applied the “liberal consideration” standard when it denied Mr. Manker’s character of service upgrade petition, and that it consistently and arbitrarily denied “almost 90 percent of applications alleging PTSD or PTSD-related conditions.”¹⁰³ This lawsuit is still pending, however, on 15 November 2018, the court certified a plaintiff class that mirrors the plaintiff class in *Kennedy v. Esper*.¹⁰⁴ Until the courts weigh in and settle the application of the “liberal consideration” standard for character of service upgrades, the fate of “bad paper” veterans

¹⁰¹ See *id.* at 16.

¹⁰² See Complaint, *Manker v. Spencer*, No. 3:18-cv-372 (D. Conn. Mar. 2, 2017), https://law.yale.edu/system/files/area/clinic/manker_v_spencer_complaint.pdf. Tyson Manker is a former service member who served in Iraq and claims to be suffering from deployment related PTSD that he believes contributed to his use of an illegal drug, and that ultimately led to his misconduct separation with a character of service of other than honorable. See *id.*

¹⁰³ *Id.* at 3.

¹⁰⁴ See Ruling, *Manker v. Spencer*, No. 3:18-cv-372 (D. Conn. Nov. 5, 2018), https://law.yale.edu/system/files/documents/pdf/lso/manker_rulingonclasscert_11.15.18.pdf. The certified plaintiff class includes:

Veterans who served during the Iraq and Afghanistan Era—defined as the period between October 7, 2001, and the present—who: (a) were discharged from the Navy, Navy Reserves, Marine Corps, or Marine Corps Reserve with less-than-Honorable statuses, including General and Other-than-Honorable discharges but excluding Bad Conduct or Dishonorable discharges; (b) have not received upgrades of their discharge statuses to Honorable from the NDRB; and (c) have diagnoses of PTSD, TBI, or other related mental health conditions, or records documenting one or more symptoms of PTSD, TBI, or other related mental health conditions at the time of discharge, attributable to their military service under the Hagel Memo standards of liberal or special consideration.

Id. at 21.

suffering from PTSD and related behavioral health conditions continues to hang in the balance.

IV. Best Practices: Advising Commanders in the Field

When deciding to separate a service member for misconduct, commanders must balance the needs of the service member, the unit, the military, and society at large. Even though the individual service member's time in the military may be necessarily at an end, Congress, the President, the DoD, and the VA all indicate that a great deal of thought must go into the manner in which he or she departs service. This is particularly so for cases in which the service member suffers from PTSD or related behavioral health conditions.¹⁰⁵ Not surprisingly, many commanders spend a significant amount of time wrestling with this decision in every case before signing the final paperwork and sending the service member to the transition point. Understanding the impact that the character of service has on attaining "veteran" status and receiving VA services allows legal advisors in the field to better advise their commanders who are charged with making these life-altering decisions.

A. Match the Separation Narrative to the Commander's Intent

When adjudicating character of service upgrade petitions and applying the "liberal consideration" standard, the Discharge Review Board considers both the former service member's submissions and the available documents in his or her official file.¹⁰⁶ This includes the separation packet.¹⁰⁷ In applying the "liberal consideration" standard, the Board balances the former service member's mitigating evidence against the basis for the separation.¹⁰⁸ In cases that involve claims of PTSD or related

¹⁰⁵ See AR 635-200, *supra* note 21, chapter 3, section II. This section discusses the types of discharges available, the potential impact on the separated service member, and the importance of the commander's decision. *See id.*

¹⁰⁶ See Department of Defense, Boards of Review Reading Rooms, <http://boards.law.af.mil> (last visited Mar. 14, 2019). *See, e.g.*, Army Discharge Review Board, AR20160000703 (2016), <http://boards.law.af.mil/ARMY/DRB/CY2016/AR20160000703.txt>.

¹⁰⁷ *See, e.g.*, Army Discharge Review Board, AR20160000658 (2016), <http://boards.law.af.mil/ARMY/DRB/CY2016/AR20160000658.txt>.

¹⁰⁸ *See id.*

behavioral health conditions, the Discharge Review Board attempts to determine whether there is a nexus between the mitigating condition and the misconduct.¹⁰⁹ The Discharge Review Board particularly focuses on the reason for the separation as it is described in the separation documents.¹¹⁰ The description of the misconduct the separation paperwork can make the difference between an upgrade petitioner's success or failure. Therefore, legal advisors ought to inform commanders of the lasting impact of the misconduct description.

In more severe cases, commanders may believe that the misconduct warrants a permanent loss of VA services. However, in other cases, commanders may want to send a strong message to the service member and the unit, but may not feel that the effects of the character of service should be a lifelong barrier to VA services. The legal advisor ought to ascertain the commander's intent and tailor the misconduct description accordingly, to either foreclose or leave open the possibility of access to VA services or a future character of service upgrade.

Liberal consideration will be given in petitions for changes in characterization of service to service treatment record entries which document one or more symptoms which meet the diagnostic criteria of [PTSD] or related conditions. Special consideration will be given to [VA] determinations which document PTSD or PTSD-related conditions connected to military services . . . or when any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct that caused the under other than honorable conditions characterization of service.

Id.

¹⁰⁹ See, e.g., Army Discharge Review Board, AR20160000396 (2016), <http://boards.law.af.mil/ARMY/DRB/CY2016/AR20160000396.txt>.

[T]here is a nexus between the applicant's diagnosis of [PTSD] and some, but not all, of the charges. The applicant was diagnosed with PTSD and TBI by qualified professionals. It is possible that the PTSD symptoms were present while he was still on active duty. Because PTSD symptoms can be associated with use of illicit drugs, alcohol, and/or abuse of prescription medications, avoidance behavior such as going AWOL, and defiance of superiors, there is more likely than not a nexus between the PTSD and the misconduct.

Id.

¹¹⁰ See *id.*

B. Consider the Application of the Statutory Bars

Additionally, in describing the misconduct in the separation documents, the legal advisor should remain mindful of the six statutory bars that can totally cut off a former service member's eligibility for VA services, regardless of whether his or her discharge is eventually upgraded by a Discharge Review Board.¹¹¹ For example, while misconduct that is described as an absence without leave for less than one hundred seventy-nine days does not subject a former service member to a statutory bar, adding one additional day of absence or characterizing the absence as a desertion does trigger such a bar.¹¹² Thus, the decisions that commanders and their legal advisors make in describing the misconduct in the separation documents can have an enormous impact on the "bad paper" veteran's post-separation life.

V. Conclusion

While there are still significant barriers to VA services for "bad paper" veterans suffering from PTSD and related behavioral health conditions, the clear trend over the past decade is to reduce these barriers. This shift has substantially increased the number of veterans who now have access to care. However, even after the enactment of the Fairness for Veterans Act, many "bad paper" veterans are still unable to access VA services and unable to upgrade their character of service. By understanding the challenges that these "bad paper" veterans face post-separation, legal advisors can assist commanders to make more informed decisions concerning misconduct separations, thereby limiting unintended and potentially inequitable consequences to these most vulnerable veterans.

¹¹¹ See 38 C.F.R. § 3.12(g) (2017).

¹¹² See 38 U.S.C. § 5303(a) (2016).