Veterans as Victims of Military Sexual Assault: Unequal Access to PTSD Disability Benefits and Judicial Remedies

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"Sexual assault is a crime that has no place in the Department of Defense. It is an attack on the values we defend and on the cohesion our units demand, and forever changes the lives of victims and their families."1

The prevalence of sexual trauma in the military is astonishing. According to Department of Defense estimates, 26,000 service members were raped or sexually assaulted in fiscal year 2012.2 This is an estimated 7,000 case increase over last year's number of 19,000.3 This figure is even more startling when viewed with the knowledge that 1 in 5 women and 1 in 100 men responded affirmatively when screened for military sexual trauma (MST) at the Veterans Health Administration.4

Currently, there are approximately 22.3 million military veterans.5 The United States Department of Veterans Affairs (the VA) is responsible for the administration of benefits to those military veterans, as mandated by Congress, in order to provide for them and their families. In fiscal year

2 Id. at 12.
2012 alone, the VA dispensed approximately $50 billion in disability and death benefits to veterans and their families. The benefits are distributed when an accident, injury or death is connected to a veteran's military service. The distribution of VA disability benefits is a significant financial obligation of the United States government and an important responsibility.

Historically, until 1988, the VA's decisions of whether to grant or deny veterans' benefits were not reviewable by the judicial system. However, in 1988 the Veterans Judicial Review Act (VJRA) changed this constitutionally-questionable practice by creating the United States Court of Veterans Appeals, wherein veterans could appeal the decision of the VA to deny a benefits claim. This significant change marked the first time the judicial system became involved in providing veterans recourse to ensure they received the benefits to which they were entitled.

The mission of the VA is "[t]o fulfill President Lincoln's promise '[t]o care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's veterans." The process is non-adversarial, and doubt is supposed to always be resolved in the veteran's favor when evidence is in equipoise. However, many veterans, both male and female, find the process to be incredibly inefficient, burdensome, complicated and stressful. Moreover, due to the procedural aspects of obtaining VA disability benefits, as shall be explored below, the circumstances of combat compared to those surrounding military sexual assault make sustaining claims for PTSD more difficult for female veterans than for their male colleagues.

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6 Id. at 6.
7 38 U.S.C. § 1110 (2006) (Statutory entitlement to service-connected disability benefits requires the veteran be injured in the line of duty, disabled or released from duty other than dishonorable discharge, as long as the disability is not of the veteran's own willful misconduct or the result of alcohol and/or drug abuse).
Part I of this paper introduces sexual trauma in the military environment, its connection to post traumatic stress disorder and how those issues affect military service members. Part II examines the process veterans suffering from PTSD must go through in order to obtain disability benefits from the Veterans Administration, including basic requirements and barriers to obtaining disability benefits. Part III explores the service connection requirements for obtaining PTSD benefits for veterans who were engaged in combat. Part IV analyzes the service connection requirements for obtaining PTSD benefits for veterans who were victims of military sexual trauma. Part V examines the disparate impact the VA service connection regulation has on female veterans using equal protection framework. Part VI discusses additional barriers veterans face when seeking relief for sexual traumas committed against them in the military, and Part VII provides a brief conclusion.

PART I: MILITARY SEXUAL TRAUMA AND POST TRAUMATIC STRESS DISORDER

Sexual assault and trauma are a problem that disproportionately affects women in the military. Research suggests that more than half of veterans who screen positive for MST suffer from post-traumatic stress disorder (PTSD). PTSD is "an anxiety disorder that occurs after a traumatic event in which a threat of serious injury or death was experienced or witnessed, and the individual's response involved intense fear, helplessness, or horror." Military Sexual Trauma, as defined by the VA, is "psychological trauma, which in the judgment of a VA mental health professional, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the Veteran was serving on active duty or active duty for training." In more definite terms, MST is any sexual action in which someone is involved against his or her

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14 Rachel Kimerling et al., Military-Related Sexual Trauma Among Veterans Health Administration Patients Returning From Afghanistan and Iraq, 100 AM. J. PUB. HEALTH 1409, 1410-11 (2010) [hereinafter Kimerling et al., Military-Related Sexual Trauma].
will. The VA indicates that side effects of MST frequently include strong emotions, feelings of numbness, trouble sleeping, trouble with attention, problems with drugs and alcohol, relationship problems, trouble when reminded of the sexual trauma and physical health issues. Moreover, among VA medical record data, users of VA health benefits who suffered MST often suffer from PTSD as well.

The correlation between MST and PTSD is alarming on its own; however, it is unclear just how prevalent the issue is because MST is vastly underreported. In addition to developing PTSD, those who suffer a traumatic sexual act in the military are often exposed to other factors that further inhibit one’s desire or ability to report the sexual trauma and that may create a hostile work environment. For example, perpetrators are typically fellow service members with whom the victim may be forced to interact on a daily basis; such situations may increase the risk of distress and even victimization. Furthermore, living and working with one’s assailant impacts group cohesion and may force a victim to remain silent in order to maintain the status quo, especially when the attacker is one’s superior. As described in this section, survivors of MST regularly choose not to report assaults and, as a result, the process to help them is slow to develop.

PART II: THE COMPENSATION PROCESS FOR VA DISABILITY BENEFITS

The Veterans Benefits Administration is one of three administrations within the VA that provide benefits and services to veterans, service members and their families in acknowledgement of their service to the United States. The VBA compensates veterans for service-connected disabilities. Disability benefits are fundamentally important for veterans who suffer from PTSD because they provide critical medical care as well as monetary support for the veteran and his or her family. The VA and VBA are required to provide disability benefits to any veteran with a

17 Id.
18 Id.
19 Kimerling et al., Military-Related Sexual Trauma, supra note 14, at 1411.
20 Rachel Kimerling et al., The Veterans Health Administration and Military Sexual Trauma, 97 AM. J. PUB. HEALTH 2160, 2160 (2007).
21 Id.
22 Id.
service-connected disability. Generally, a service connection may be granted for a disability resulting from an injury or disease sustained by a veteran while on active military duty. A service connection may also be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service.

The time-consuming, complicated, bureaucratic process that veterans must endure in order to receive benefits has been widely criticized for years. The first step in initiating a disability benefits claim is for the veteran, or his or her representative, to file a 23-page claim application with the State VA Regional Office, which will then make an initial determination and either accept or deny that claim. If the claim is denied, the veteran may initiate an appeal.

Upon appeal, the regional VA office will re-examine the claim. If it determines the claim was rightfully denied, the regional office will send a file report to the Board of Veterans’ Appeals for de novo re-adjudication. In such a situation, the Board of Veterans’ Appeals shall base its review of the claim upon the entire record of the proceeding and will consider all evidence and material of record, as well as applicable law. The Board has an enormous workload, receiving and docketing 49,611 appeals in fiscal year 2012 with a final total for fiscal year 2013 expected to reach 54,033.

With such an immense caseload, it is not surprising that veterans must wait so long to receive benefits. If the veteran is still dissatisfied with the decision of the Board, he or she may appeal to the Court of Appeals for

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26 Id. at §§ 1110, 1131.
27 38 C.F.R. § 3.303(d) (2013).
29 See 38 U.S.C. §§ 5100-5101 (2012); Veterans for Common Sense v. Shinseki, 644 F.3d 845, 856 (9th Cir. 2011) (Vacated en banc on other grounds).
30 DANIEL T. SHEDD, CONG. RESEARCH SERV., R42609, OVERVIEW OF THE APPEALS PROCESS FOR VETERANS’ CLAIMS2-4 (2013)
31 Id.
32 38 U.S.C., at § 7104(a).
33 SHEDD, supra note 31, at 3.
Veterans' Claims (CAVC). Established by Congress, the CAVC is an Article I court with jurisdiction over appeals from the Board of Veterans' Appeals. The caseload at this court is heavy as well, with 3,649 appeals received in fiscal year 2012, making it one of the busiest federal appellate courts in the country. Veterans who are dissatisfied with the results at this level may appeal to the Court of Appeals for the Federal Circuit (Federal Circuit) and eventually to the Supreme Court. Decisions by the Federal Circuit are limited by statute to deciding whether certain laws or regulations are arbitrary and capricious, unconstitutional, or are procedurally deficient. The Federal Circuit does not decide challenges to factual determinations or challenges to the law based on the specific facts of the claim. Decisions of cases granted certiorari by the Supreme Court are final.

Further complicating the intricate web of appeals processes are the various deadlines and wait times with which a veteran must suffer before he or she receives VA benefits. Veterans wait an average of almost three years to receive a decision from the Board of Veterans' Appeals, in addition to the time it took for his or her appeal to pass through the VA regional office and the time it may take for the appeal to climb higher up the ladder to federal court. Deadlines for a veteran to appeal an administrative decision range from 120 days to one year, and if these strict deadlines are not met, the veteran may lose the chance to appeal and with it, any chance of success. Not only must veterans deal with a time-consuming administrative claims process, but veterans wishing to receive disability benefits for PTSD caused by military sexual trauma face additional difficulties. The most arduous obstacle is proving a service connection for the event that led to the veteran’s diagnosis of PTSD.

34 Id. at 3-4.
35 Id. at 4.
36 Id.
37 Id.
39 See 38 U.S.C., § 7266(a) (mandating time period for veteran to file notice of appeal in order to receive review by Court of Appeal of Veterans' Claims).
PART III: ESTABLISHING A SERVICE CONNECTION FOR COMBAT-RELATED PTSD CLAIMS

As mandated by statute, establishing a service connection for combat-related PTSD requires: (1) medical evidence diagnosing post-traumatic stress disorder; (2) a link, established by medical evidence, between the symptoms and the in-service stressor; and (3) credible evidence that the stressor actually occurred. Additionally, for VA purposes, the diagnosis of PTSD must conform to the American Psychiatric Association’s Diagnostic and Statistical Manual for Mental Disorders (DSM-IV), a matter of which the Veterans Appeals Court has taken judicial notice.

Most notably, this standard requires the existence of a stressor be proved by "credible supporting evidence." This standard, therefore, places the burden of proof on veterans to provide evidence so there is at least "an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." When positive and negative evidence is in equipoise, the benefit of the doubt is given to the veteran. Data suggest that such a standard may be tougher to overcome than it may seem at first glance. For example, while disability benefits claims are successful in approximately eighty percent of cases, the success rate for PTSD claims is a mere fifty percent. Even more alarming, disability claims for PTSD resulting from sexual trauma in the military have a contemptible success rate of approximately thirty-two percent. Most of these claims were denied for lack of a proven service connection.

40 38 C.F.R. § 3.304(f).
41 Id. § 4.125(a).
42 Cohen v. Brown, 10 Vet. App. 128, 153 (1997) (Stating mental illness of PTSD is treated the same as a physical illness for purposes of VA disability compensation when diagnosed as the result of an in-service stressor).
43 38 C.F.R. § 3.304(f).
45 Id.
47 Sandra Park, We Must Honor the Service of all Veterans, Including Sexual Assault Victims, ACLU BLOG OF RTS. (July 20, 2012, 4:55PM), http://aclu.org/blog/womens-rights/we-must-honor-service-all-veterans-including-sexual-assault-victims.
48 Cost Estimate; supra note 31, at 2.
Veterans must prove a service connection for injuries and illnesses acquired or aggravated while engaged in active military duty.\textsuperscript{49} Active duty is defined as "full time duty in the active military service of the United States."\textsuperscript{50} For women in the military, this is a difficult burden to bear as the majority of female service members are not engaged in direct combat.\textsuperscript{51} Moreover, for the majority of combat-related PTSD diagnoses, a veteran’s lay testimony alone about the stressor may suffice to prove his assertions, with no corroborating evidence necessary.\textsuperscript{52} For female veterans who are not engaged in combat during service, the luxury of their word is not an option.

For purposes of combat-related PTSD diagnosis, "engaged in combat with the enemy" has been held to mean that "a veteran have personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality."\textsuperscript{53} Whether or not a disability was incurred in combat is a factual issue to be determined on a case-by-case basis and may be supported by a veteran’s lay testimony.\textsuperscript{54}

If the evidence establishes a diagnosis of posttraumatic stress disorder during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.\textsuperscript{55}

While it might not appear too difficult to verify that an attack happened, the nature and circumstances of combat can make it difficult to obtain documentation, especially for non-combat veterans stationed in a combat zone. These non-combat veterans may provide additional evidence to

\textsuperscript{52} 38 C.F.R. § 3.304(d) (2013).
\textsuperscript{54} Id. at Discussion ¶ 5.
\textsuperscript{55} 38 C.F.R. §3.304(f)(1).
support their claim that the stressor was service-related. Additional evidence may include the fact that a non-combat veteran was stationed with a unit that was present during verified enemy attacks. Evidence of attacking or defending against an enemy attack is sufficient to prove a veteran had “engaged in combat,” but that general guideline is not comprehensive, and therefore, circumstances on an individual basis may be enough to prove engagement in combat.

PART IV: Establishing a Service Connection for MST-Related PTSD Claims

In order to establish a service connection for PTSD due to military sexual trauma, the veteran must prove 1) a diagnosis of PTSD; 2) the PTSD is the result of a military sexual trauma that occurred during active military duty; and 3) corroborating evidence of the specific trauma. Although theoretically every veteran claiming service-related PTSD faces the same burden of proof, veterans trying to establish a service connection for claims based on military sexual trauma face more obstacles than their counterparts whose claims most often fall under combat related injury. These obstacles are encountered when attempting to satisfy the requirement of outside corroboration of the sexual assault (as opposed to a combat veteran’s lay testimony). Many women do not report the assault against them for fear of losing unit cohesion, retaliation, shame and numerous other reasons. When an assault is not reported, corroborating evidence such as police and rape crisis center reports, and statements from friends and family are not available, and this prevents a disproportionate number of female PTSD victims from receiving compensation. Until early 2013, when the Department of Defense expanded the role of women in combat, females have not been involved in direct combat so the standards applying to proof for combat-related PTSD don’t often apply to them.

56 Pentecost v. Principi, 16 Vet. App. 124, 128 (2002) (veteran serving in Vietnam in non-combat capacity as a wharehouseman and messman was stationed with a unit that endured rocket attacks, used his unit’s records of those attacks as corroborating evidence to support his claim of PTSD).
57 Id.
58 Gen. Counsel Opinion, at ¶ 6, 7.
59 See 38 C.F.R. § 3.304(f).
60 Id. at (b)(5).
61 DOD Report 2012, supra note 1, Part 2 at 11, 18, 23, 24, 97.
Military sexual trauma is included in the VA’s definition of personal assault. MST is defined by Congress as "psychological trauma...resulting from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the Veteran was serving on active duty or active duty for training." Because neither this definition nor the VA regulations governing PTSD clearly define rape, sexual battery or sexual harassment, it is prudent to look to the Department of Defense’s definition of sexual assault:

[Intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. It includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim. “Consent” shall not be deemed or construed to mean the failure by the victim to offer physical resistance. Consent is not given when a person uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious.

Sexual trauma is an extremely personal issue, and as such, many incidents go unreported. Furthermore, the circumstances of MST do not often lend themselves to documentation so corroborating evidence is required.

Female veterans face a difficult evidentiary standard to overcome when seeking disability benefits for a PTSD diagnosis handed down after military service has concluded. If, as the case may be for female veterans, there was no participation in combat events, or the stressor was not the result of combat, there must be a showing of independent evidence to corroborate the veteran’s statement of the claimed stressor’s occurrence. Therefore, as a matter of law, a veteran who was not directly engaged in combat cannot establish the occurrence of a non-combat stressor by her testimony alone and instead must use corroborating evidence to do so.

64 38 U.S.C. § 1720D.
65 DOD Report 2012, supra note 1, at 133.
66 Kimerling et al., Military-Related Sexual Trauma, supra note 14, at 1411.
69 Dizoglio, 9 Vet. App. at 166.
This unintended consequence denies female veterans equal treatment under the law as they must furnish further evidence supporting MST-related PTSD claims.

First, to establish PTSD resulting from MST, a veteran must present a medical diagnosis of PTSD. However, procedurally, the opinion of a medical professional is not binding on the VA. Instead, the VA uses medical opinions to help VA adjudicators better understand and interpret evidence. Similarly, the Board of Veterans Appeals has held that a medical professional's diagnosis and opinion relating to MST related PTSD holds no more evidentiary credibility than would the veteran's lay testimony, and as such, cannot be used to substantiate a claim of PTSD due to MST. The VA does not need to accept a doctor's medical opinion when it is based upon the unsubstantiated medical history of his patient. The reasoning behind this policy is that a doctor's opinion about whether or not the claimed stressor occurred is no more probative than the veteran's testimony itself. This is because, as the majority of sexual assaults are unreported, "physical injuries usually heal before the victim seeks assistance and . . . in these cases the only evidence of assault that remains lies within the victim's psyche and a mental health professional is more likely than a medical doctor to be able to discern it." The heightened level of scrutiny surrounding medical diagnosis of PTSD is unique to claims based in MST. It is unnecessary for veterans trying to prove combat-related PTSD to prove the stressor through medical opinion; instead, his lay testimony is sufficient.

Once a medical diagnosis has been established, the veteran must then link that diagnosis to a sexual trauma that occurred while engaged in active service. If this link can be accomplished, there is still one more obstacle to surmount: proof that the alleged assault actually occurred, by corroborating evidence. This type of evidence is not usually found in a veteran's service record, so outside evidence from "mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted diseases; and statements from family members, roommates, fellow service members [in whom the veteran may have

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70 38 C.F.R. § 3.304(f).
72 Id.
73 Id.
74 Id.
75 Id.
76 38 C.F.R. § 3.304(d).
77 Id. at § 3.304(f).
78 Id.
confided], or clergy" may be used.\textsuperscript{79} Because, as described above, documentation of this type of evidence is often difficult to find, evidence of behavioral changes following the claimed attack, such as "a request for transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes" may be considered.\textsuperscript{80} Further complicating the process is the issue that affected individuals all present symptoms differently.\textsuperscript{81} According to the VA, a victim’s response may vary in terms of "the type of response, how severe it is, and how long it lasts," all of which may depend on whether the victim has previously experienced the same type of trauma and how often, as well as any reaction from others whom the victim may have reached out to at the time of the assault.\textsuperscript{82}

Although VA adjudicators are obliged to consider outside evidence as described above when considering a claim, cases with ample corroborating evidence do not always succeed. In \textit{YR v. West}, a female veteran had been raped while in service and, as a result, suffered from PTSD.\textsuperscript{83} Her service records did not reflect that she had been raped.\textsuperscript{84} The victim's sister submitted a statement testifying that the veteran had been raped and assaulted, and that the veteran had not reported the attack for fear of her life after threats were made to remain silent.\textsuperscript{85} After numerous visits with medical professionals the victim obtained several PTSD diagnoses and was successfully hypnotized to confirm that the rape and assault occurred during the veteran’s time in service.\textsuperscript{86} Despite the supporting documentation, the veteran’s claim was denied for lack of corroborating evidence at both the Regional Office and Board levels.\textsuperscript{87} It was not until the case reached the United States Court of Veterans Appeals that the case was remanded for re-adjudication. The court reasoned that lack of evidence in the veteran’s service record did not relieve the Board of its duty to evaluate the credibility and probative value of corroborating evidence she produced, and doing so resulted in prejudicial error.\textsuperscript{88} Similar to the situation in \textit{YR v. West}, even when there is documentation demonstrating the veteran suffered

\textsuperscript{79} \textit{Id.} at § 3.304(f)(5).
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} MST Fact Sheet (2013), \textit{supra} note 16.
\textsuperscript{82} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 395.
\textsuperscript{85} \textit{Id.} at 396.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 396-97.
\textsuperscript{88} \textit{YR,} 11 Vet. App. at 398 (\textit{citing} Doran v. Brown, 6 Vet. App. 283, 290-91 (1994)).
distress during her military service, the record may not be sufficient to prevail on a claim if that distress could reasonably be attributed to another cause at the time the record was written. The process involves a considerable amount of fact-finding by both the veteran and the VA. Specifically, "[b]ecause of the unique problems of documenting personal-assault claims, the regional office 'is responsible for assisting the claimant in gathering, from sources in addition to in-service records, evidence corroborating an in-service stressor..." When not contained in the veteran’s service record or documented as behavioral changes, the VA must alert the veteran to any additional credible evidence supporting the existence of an in-service stressor that the veteran may not be aware of before it may deny a claim.

The subjectivity in interpreting corroborating evidence during initial adjudicative levels has created an uncertain standard for determining the credibility and probative value of that evidence. As a result, female veterans who seek disability benefits for MST-related PTSD are disproportionately less successful than their male counterparts who seek combat-related PTSD relief and enjoy the presumption of lay testimony in support of a service-connection.

Perhaps most disconcerting is the VA’s 2010 liberalization of the evidentiary burden on combat-related PTSD, for administrative efficiency reasons, while the burden on MST-related PTSD has remained constant. The evidentiary burden for proving combat-related PTSD is lower than the evidentiary burden for proving MST-related PTSD. Much the same as MST, the individual circumstances that can trigger PTSD due to combat go undocumented. In an attempt to remedy this discrepancy, in 2010 the VA reduced the evidentiary burden for veterans claiming PTSD stressors resulting from fear of a hostile enemy attack or terrorist activity by eliminating the requirement of corroborating evidence that the stressor was service-related. Previously, only the lay testimony of veterans directly engaged in combat or those who were prisoners of war was sufficient to

89 See Lambert v. Peake, No. 05-1910, 2008 WL 2128053, at *5-6 (Vet. App. Feb. 29, 2008) (unpublished memorandum decision) (veteran’s claimed stressor was attributed to his previously existing “situational anxiety” that was present at the time he suffered a personal assault during service).
90 Id. at *5.
91 Id.
93 38 C.F.R. § 3.304(f)(3).
legally establish a service-related stressor. The service-related presumption will stand in the absence of clear and convincing evidence to the contrary and as long as the claimed stressor is "consistent with the places, types and circumstances of the veteran's service." Under the amended law, a veteran's testimony, coupled with a diagnosis by a VA health professional that relates the veteran's symptoms to the claimed stressor, will suffice if the claimed stressor is "related to the veteran's fear of hostile military or terrorist activity," and is "consistent with the places, types and circumstances of the veteran's service." This change is meant to reflect the changing face of conflict in which service in even non-hostile zones may put a service member at risk, yet it does not affect the evidentiary requirement for victims of MST. Service members who face in-service stressors that lead to PTSD no longer need to be engaged directly in combat to enjoy a lighter burden of proof, but service members whose in-service stressor is MST that leads to PTSD and also are not engaged in direct combat, have their burden of proof remain constant. Veterans suffering from the specific MST-related PTSD, even while the stressor occurred in-service, are treated differently than their similarly situated colleagues seeking the same remedy.

In April 2009, the Joint Executive Director for the National Veterans Legal Service Program testified to Congress that based on his organization's review of thousands of VA decisions regarding PTSD claims, under the rules at the time, the "VA ends up denying many claims that are truly meritorious simply because no evidence exists to corroborate the stressful events." This conclusion was based on the fact that it is simply impossible to keep records of every single event that a service member experiences, and therefore, it would be imprudent not to tailor the amendment to reflect such a reality. This then begs the question, why do veterans who suffer from PTSD resulting from MST face a higher burden of proof than veterans claiming combat-related PTSD (and now prisoners of war)?
war and those who feared terrorist attacks) when both face circumstances that are highly unlikely to be documented?  

PART V: THE DISCRIMINATORY EFFECT OF "SERVICE-CONNECTION"

The issue facing military PTSD benefits claims is whether the regulation for establishing a service connection to obtain PTSD benefits under 38 C.F.R. §3.304 (f) discriminates against women in violation of the Equal Protection clause of the Fourteenth Amendment. Many laws, while seemingly neutral, affect groups of people differently, even if on its face, the law treats all members of a class the same. A two-step analysis is required to challenge a statute that is gender-neutral on its face on the grounds that it disproportionately and adversely affects women. The first question is whether the statutory classification is actually gender-neutral, and, if so, the second question is whether the adverse effect reflects invidious gender-based discrimination.

The statute for establishing a service-connection in order to obtain PTSD benefits, 38 C.F.R. §3.304 (f), is gender-neutral on its face and therefore not per se invalid. The statute refers to a service-connected stressor suffered by the veteran. Although the majority of veterans are indeed male, there is nothing within the statute itself to suggest the term "veteran" is not a gender-neutral term referring to both men and women. Moreover, the specified veterans are similarly situated: they are veterans applying for PTSD benefits who experienced trauma during service, either in combat or because of sexual assault. Both are circumstances with a high probability of not being sufficiently documented.

Second, do the adverse effects of the statute reflect premeditated gender-based discrimination offensive to the Constitution? The Supreme Court has held, for purposes of equal protection analysis of gender-neutral statutes, "a discriminatory purpose sufficient to render the statute unconstitutional implies that the decisionmaker selected or reaffirmed a

101 Personnel Adm'r of Massachusetts, 442 U.S. at 274.
102 Id.
particular course of action at least in part because of its adverse effects on a single sex.103

Since its inception, C.F.R. § 3.304(f) has been amended eleven times over a span of fifty-nine years, most recently in 2010.104 Since 2004, the Department of Defense has published nine reports relating to sexual assault in the military, as required by Congress, including diagnoses of PTSD resulting from MST.105 The DOD itself admits that the majority of veterans who suffer MST are women,106 and by the Veterans’ Administration’s own statistics, the overwhelming majority of veterans who suffer from MST also suffer from PTSD.107 Moreover, the DOD admits that the vast majority of MST goes unreported.108 The top three reasons cited by the DOD for a victim not reporting a sexual assault in 2012 were: 1) 70 percent did not want anyone to know; 2) 66 percent felt uncomfortable making the report; and 3) 51 percent did not think the report would be kept confidential.109 The evidentiary standard described in the regulation does not take into consideration the reality that many victims do not report the incident(s) to anyone, including family members, for a variety of legitimate reasons, including shame, stigma, embarrassment, or disorientation associated with sexual trauma.110

38 C.F.R. § 3.304(f)(5), the subsection relating to sexual trauma, requires credible supporting evidence that the in-service stressor actually occurred.111 However, C.F.R. § 3.304(f)(3), the subsection relating to combat, merely requires a veteran’s lay testimony as sufficient supporting evidence that the in-service stressor actually occurred. The subsection, in relevant part, reads:

104 38 C.F.R. § 3.304.
109 Id. at Annex A p. 3.
111 38 C.F.R. § 3.304(f)(5).
If a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.\textsuperscript{112}

Thus, if the VA evaluates a veteran's claimed stressor under subsection (f)(3), his lay testimony alone may be sufficient to establish the occurrence of that stressor if the stressor is consistent with her service and a VA psychiatrist or psychologist opines that the stressor is adequate to support a diagnosis of PTSD. However, if the VA evaluates a veteran's claimed stressor under subsection (f)(5), her lay testimony must be corroborated by other evidence to establish the occurrence of the stressor.\textsuperscript{113} The law created the very class of veterans that it discriminates against: veterans who have "claims for service connection of posttraumatic stress disorder diagnosed during service."\textsuperscript{114} Under the law, combat veterans who fail to present adequate documentation for the purpose of obtaining disability benefits through the VA are permitted to submit lay testimony; their personal account of the events that contributed to the trauma. Conversely, veterans who fell victim to MST are not permitted to submit lay testimony as to the events of the trauma if they cannot provide the VA with sufficient documentation. Instead, these veterans must submit credible, supporting evidence that the stressor actually occurred.\textsuperscript{115} Depending on the circumstances of the sexual assault, such supporting evidence is difficult to produce. The evidentiary burden placed on veterans who suffer a sexual assault during service treats members of the class of veterans who suffer an in-service stressor that is difficult to document, a disproportionately large number of female veterans, unequally under the law.

Although the chance of adverse emotional responses and behaviors is increased in sexual assault, these symptoms are not always experienced by all MST claimants, and therefore, even if the assault is reported, there is

\textsuperscript{112} Id at § 3.304(f)(3).
\textsuperscript{114} 38 C.F.R. § 3.304(f).
\textsuperscript{115} Id. at § 3.304(f)(5).
a high probability that there will be a lack of credible supporting evidence upon which the Veterans' Administration may rely in order to award disability benefits. 116 Furthermore, if both the DOD and VA are intimately aware that MST is grossly underreported, then logically, these two institutions should also know that, of the 67 percent of cases that are not reported, 117 there is a high probability that there will be no such evidence of the in-service stressor, and therefore, female veterans face a more difficult burden in proving that the PTSD they suffer is related to a sexual assault experienced while in service to their country. This possible and all too-common outcome denies veterans MST-related PTSD benefits for a trauma that occurred during service, most of whom are women, the same protection under the law that is afforded to veterans within their same class who seek combat-related PTSD benefits. The failure to provide benefits equally to all veterans suffering from PTSD caused by an in-service stressor directly contradicts the purpose of the law.

The next issue deserving of attention is whether there is an important state interest and whether the law is substantially related to supporting that state interest. There is no question that providing PTSD benefits to our nation's veterans is an important state interest. The problem lies in the administration of those benefits, which proffers procedural discrimination and is therefore not substantially related to supporting the state interest.

In its fact sheet on the 2010 liberalization of the evidentiary standards of combat-related PTSD claims, the VA stated “[t]his will eliminate the requirement for [the] VA to search for records, to verify stressor accounts, which is often a very involved and protracted process. As a result, the time required to adjudicate a PTSD compensation claim in accordance with the law will be significantly reduced.” 118 The VA also stated that the reason for the amended regulation was, “[t]he final regulation is necessary to make [the] VA’s adjudication of PTSD claims both more timely and consistent with the current medical science.” Such administrative convenience has been ruled not to be an important state interest under equal protection analysis.

In *Reed v. Reed*, the court held that even though the State's interest in achieving administrative efficiency is not without some legitimacy, giving “mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is

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to make the very kind of arbitrary legislative choice forbidden by the [Constitution]."\(^{119}\) Reed is, of course, distinguished from the matter at hand in that the PTSD service connection law is not discriminatory on its face. However, the Court in Reed also held that the Equal Protection Clause denies States "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."\(^{120}\) The overarching objective of the VA regulation is to provide disability benefits to veterans suffering from PTSD resulting from an in-service stressor. The amendment to this regulation categorizes stressors as combat-related or personal assault-related. This categorization is precisely the grouping of veterans into different categories within a law that generates different treatment of those groups on the basis of criteria wholly unrelated to the objective of the law that the Reed Court ruled violated the Equal Protection Clause. Whatever the value in administrative efficiency, the choice in this context of subversive gender discrimination to amend only one part of the law is offensive to the Equal Protection Clause of the Constitution.

Furthermore, if both the DOD and VA are intimately aware that MST is grossly underreported, then logically, these two institutions should also know that of the 67 percent of cases that are not reported,\(^{121}\) there is a high probability that there will be no such evidence of the in-service stressor, and therefore, female veterans face a more difficult burden in proving that the PTSD they suffer is related to a sexual assault experienced while in service to their country.\(^{122}\) This possible and all too-common outcome denies veterans MST-related PTSD benefits for a trauma that occurred during service, most of whom are women, the same protection under the law that is afforded to veterans seeking combat-related PTSD benefits.

With the widely distributed and highly detailed amount of information relating to the prevalence of sexual trauma in the military that leads to PTSD and the underreporting thereof, it is confounding why the legislature has not taken steps to amend the service-connection requirement to ease the burden of proving that a sexual assault happened in order to receive PTSD disability benefits. The 2010 amendment of subsection (f)(3) of the regulation demonstrates an affirmative step by the United States Congress to maintain the status quo and not equalize the burden of proof for the entire regulation despite overwhelming evidence that it denies female veterans equal protection under the law.

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\(^{119}\) Reed v. Reed, 404 U.S. 71, 76 (1971).

\(^{120}\) Id. at 75-75.

\(^{121}\) DOD Report 2012, supra note 1, Part 2 at 3.

\(^{122}\) Id.
PART VI: ADDITIONAL JUDICIAL BARRIERS TO RELIEF

Service members seeking disability benefits for MST-related PTSD not only face unequal procedural remedies at the VA level, but veterans and military service members face another bar when seeking justice for the sexual assaults committed against them during service: the *Feres* doctrine.

The *Feres* doctrine is a judicially-created scheme barring claims by military service members against the United States that are deemed to have occurred “incident to service.” The *Feres* doctrine has been publicly criticized in the past, with the *New York Times* writing “... the ‘incident to service’ provision routinely cited as an impediment best fixed by Congress is nowhere to be found in federal statute, making legislative reform something of an existential puzzle.” This doctrine exempts the United States government from liability for claims that it would otherwise be accountable for under the Federal Tort Claims Act (FTCA), which waives the United States’ sovereign immunity for claims against a government employee sounding in tort. Under the *Feres* doctrine, service men and women are essentially denied the same opportunities for recovery as their civilian counterparts for similar injuries.

In 1950, the Supreme Court in *Feres v. United States* created an exception to the FTCA. *Feres* involved three separate cases in which military officials were sued by the executors of estates of active duty military personnel for damages on actions grounded on negligence under the FTCA. The Court held that the FTCA was not meant to create new causes of action against the military, but instead was intended to right “remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but [are] remediless solely because their perpetrator was an officer or employee of the government.” In *Feres*, because each wrong was sustained by the plaintiffs during active duty and would not merit liability “under like circumstances” in private claims, the Court unanimously held that the suits were not justiciable. The Court further articulated its view that Congress did not create the FTCA to handle

126 *Feres*, 340 U.S. at 135.
127 *Id.* at 136-38.
128 *Id.* at 139-40.
129 *Id.* at 146.
claims that would be based in local law for service-connected injuries and death, saying instead that federal law should govern such injuries.130

When an action does not lie in tort, a veteran who developed PTSD because she was sexually assaulted during active duty is denied the ability to sue the government because the FTCA, coupled with the Feres doctrine, has been increasingly liberally applied to claims against the government, including constitutional claims. Veterans who cannot obtain relief for VA disability benefits under the statutory scheme are barred by Feres from pursuing a remedy for constitutional claims.

The right to bodily integrity is a fundamental right protected by the Constitution. As noted by the Supreme Court, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Moreover, the right to bodily integrity has long been recognized. In Union Pac. Ry. Co. v. Botsford, the Supreme Court held that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Constitutional right violations that invade bodily integrity, such as rape and sexual assault, should never be considered merely incident to service, as the expansion of Feres suggests, and should instead enjoy a higher standard of review.133

In fact, it is difficult to imagine anything more personal and farther removed from military operations than sexual trauma. However, two main reasons have emerged since the Feres decision to justify why military plaintiffs receive limited access to constitutional remedies compared to the civilian population.

First, the relationship between the military and its service members is distinctively federal in nature. The relationship between the military and its servicemen and women is unlike the generally immobile, traditional employer-employee relationship enjoyed in the civilian sphere. "This . . . relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service. Performance of the military function in diverse parts of the country and the world entails a

130 Id.
133 Brief of Amici Curiae the CIOCA Plaintiffs in Support of Petition for a Writ of Certiorari at 4, Witt v. United States, No. 10-855 (9th Cir. 2001).
134 Feres, 340 U.S. at 143 (citing United States v. Standard Oil Co., 332 U.S. 301 (1947)).
‘[s]ignificant risk of accidents and injuries.’” 135 Furthermore, “where a service member is injured incident to service, that is because of his military relationship with the government, it ‘makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the government to [the] serviceman’.136 Under this rationale, however, it is difficult to imagine a scenario in which veterans’ constitutional claims would vary greatly depending on the situs of the injury. Consequently, courts have misplaced their concern regarding the government’s relationship to its service men and women and have instead denied them the opportunity for relief for claims involving sexual assault.

Second, the Court assumes service members and veterans already have access to “generous statutory disability and death benefits...for service related injuries.”137 The Feres Court noted that the primary purpose of the FTCA was to provide remedies for those who had none.138 Because service members and veterans already have access to an extensive disability benefits program, the Court in Feres saw no reason why the FTCA should provide them with additional remedy.139 However, remedy for constitutional claims is not provided for in the Veterans’ Benefit Act,140 and, as discussed above, many veterans who suffer sexual assault are denied disability benefits for failure to prove a service-connection.

The Court has increasingly deferred to the military for the adjudication of military affairs, moving away from judicial review of the same. Most significantly, Chappell v. Wallace expanded the Feres doctrine beyond the realm of tort claims into most aspects of military service-related claims, including claims with constitutional implications.141 Chappell, while not a case of military sexual trauma, involved five African-American soldiers who alleged they were overlooked for “desirable duties” on the basis of race.142 The plaintiffs in Chappell were denied the right to sue the government for their constitutional tort claim, which, up until that point, was permitted by Bivens. Bivens v Six Unknown Named Agents of Fed. Bur. of Narcotics allowed claims against federal employees for damages when a

136 Id.
137 Id.
138 Feres, 340 U.S. at 144.
139 Id. at 142.
142 Id. at 297.
plaintiff's constitutional rights had been violated.\textsuperscript{143} The court, in denying plaintiffs' claims, articulated that even though suits for damages against federal officials, while not expressly authorized by Congress, have been allowed by \textit{Bivens} in the past,\textsuperscript{144} such suits were not permissible when "special factors counseling hesitation" were at play.\textsuperscript{145} These "factors" include whether the FTCA applied in cases where the remedy could be extended to a serviceman who suffered injury incident to service where, in other circumstances, would be "an actionable wrong."\textsuperscript{146} The court then used reasoning from \textit{Feres}, in which, although a technical reading of the statute may appear to allow tort claims by a soldier against the United States for injuries acquired during service, Congress did not intend for the government to be subject to those claims by military personnel.\textsuperscript{147} Most notably, the \textit{Chappell} court held "[a]lthough this case concerns the type of non-statutory damage remedy recognized in [constitutional claims], rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in \textit{Feres} guides our analysis in this case."\textsuperscript{148} Effectively, the \textit{Chappell} court applied FTCA and \textit{Feres} doctrine principles to a constitutional claim despite the fact that both the FTCA and \textit{Feres} doctrine are frameworks for analyzing claims seated in tort.

The simultaneous expansion of \textit{Feres} and narrowing of \textit{Bivens} has irresponsibly endorsed judicial deference to military adjudication of military claims. "The result, decades later, is that a doctrine both created and expanded by the judiciary continues to serve as the basis for federal courts to abstain, more than a little disingenuously, from interfering in matters concerning military personnel."\textsuperscript{149} As such, service men and women continue to be denied adequate remedies for myriad claims, most appallingly remedy for constitutional violations committed against them while in service to the United States.

Perplexingly, even the Department of Defense has admitted that MST degrades military effectiveness and integrity, saying:

\begin{flushleft}
\textsuperscript{144} Chappell, 462 U.S. at 298.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 299.
\textsuperscript{147} Id.
\textsuperscript{148} Chappell, 462 U.S. at 299.
\end{flushleft}
In the armed forces sexual assaults not only degrade individual resilience but also erodes unit integrity. Service members risk their lives for each other to keep fellow service members out of harm’s way. Sexual assault breaks this important bond and tears apart military units. An effective fighting force cannot tolerate sexual assault within its ranks. Sexual assault is incompatible with military culture, and the costs and consequences for mission accomplishment are unbearable.\(^{150}\)

It becomes clear that in the context of MST, the *Feres* doctrine neither increases military integrity nor effectiveness. Instead, the *Feres* doctrine has merely maintained the cycle of silence and failure to report intra-military sexual assaults.\(^{151}\)

Automatic government immunity for constitutional rights violations against our service members and veterans under the *Feres* doctrine is iniquitous. Such practice neglects to contemplate the implications of excusing the military from any liability for constitutional rights violations. Complete immunity should only be granted by a congressionally-created doctrine that fully weighs the constitutional rights of our service members and veterans against the military policies underlying government immunity.\(^{152}\) The *Feres* doctrine does not address such principles and should therefore either be greatly narrowed or rejected by the judiciary.

The *Feres* doctrine should be replaced by the amended judicial process proposed by the Military Justice Improvement Act of 2013 (MJIA), offered by New York Senator Kirsten Gillibrand as Senate Bill 1752, submitted to the Senate for consideration on November 21, 2013. As of the Senate’s 2013 Thanksgiving recess, this bill has not been considered. The MJIA moves the decision to prosecute crimes punishable by one year or more away from military commanders to an independent military prosecutor.\(^{153}\) This proposed Act does not remove the waiver of liability the federal government currently enjoys, but it does vastly improve the justice system for veterans seeking relief for sexual trauma experienced during service. The MJIA in theory removes the fear of reporting a female veteran


\(^{151}\) Kimerling et al., Military-Related Sexual Trauma, *supra* note 14, at 1412.


may have because she does not want to disrupt unit cohesion or because she feels uncomfortable reporting to a superior who may have been the aggressor. Because this Act only modifies the adjudication of crimes punishable by one year or more that are not uniquely military in nature, it gives victims of sexual assault an un-biased judicial process while simultaneously maintaining the delicate nature of military affairs. The MJIA allows an independent military prosecutor to decide whether the results of an investigation into an assault claim will go to trial and court martial. If the trial goes to court martial, instead of the victim's commander convening it, and independent Captain ("O-6") shall do so. The MJIA attempts to address both the reasons discussed above for under-reporting that arise under 38 C.F.R. §3.304(f), and consistent judicial deference to military adjudication of military affairs that the Feres doctrine has wrongly expanded over the years.

There are two separate and unequal systems of remedy available to victims of sexual assault: one for service members and one for civilians. However, on June 4, 2013, the House of Representatives passed H.R. 617, popularly known as the Ruth Moore Act of 2013 (the Act), and referred it to the Senate and to the House Committee on Veterans' Affairs. Ruth Moore is a veteran who was raped multiple times by a supervisor during her tenure in the Navy, which she joined at age 18. Ruth Moore spent twenty-five years fighting for VA disability benefits for the PTSD she suffered because of MST. The Ruth Moore Act would merge the two currently conflicting burdens of proof under 38 CFR § 3.04(f)(3) and (5) for adjudication and distribution of disability benefits for PTSD resulting from military sexual trauma and combat. Generally, the Act would require the military to relieve service members and veterans of the burden of providing corroborating evidence that their in-service stressor actually occurred. The Act accomplishes this by stipulating MST as a sufficient in-service stressor for purposes of determining a service connection under 38 CFR § 3.04(f)(3), eliminating the requirement of corroborating evidence under 38 CFR § 3.04(f)(5), and for receiving disability benefits for a diagnosis of

157 Id.
PTSD. Furthermore, through the Act, Congress encourages the VA to formally recognize the multitude of mental and physical disabilities that result from MST. Such disabilities include "depression, anxiety, and other disabilities as indicated in the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association." This provision may help to alleviate the difficulty many veterans confront in trying to link their disability to MST. As discussed above, reactions to MST vary widely, and individuals may present symptoms of assault differently, making it tough for VA adjudicators to recognize. The Act would ensure equal treatment of veterans suffering from combat and MST under the PTSD service-connection regulation.

Most importantly, however, is the Act's embodiment of the changing ideology surrounding military adjudication of sexual assault claims. The Act amends 38 U.S.C. § 1164 (b) to read, "[i]t is the sense of Congress that the Secretary of Veterans Affairs should update and improve the regulations of the Department of Veterans Affairs with respect to military sexual trauma..." This reflects an evolving and increasingly publicized call for the equal treatment of survivors of MST.

**CONCLUSION**

The men and women who put their lives at risk to serve their country deserve to be treated with the utmost respect. That includes equal treatment of those attempting to claim disability benefits for PTSD. MST-related PTSD is far too common an occurrence within our military for its victims not to receive efficient claim adjudication equivalent to that experienced by veterans whose PTSD is the result of a combat stressor. Considering that female veterans constitute the fastest growing group of the

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158 H.R. Rep. No. 113-64.
159 Id.
160 Id.
161 MST Fact Sheet (2013), supra note 82.
162 H.R. Rep. No. 113-63.,
total veteran population, the current disparity between the burdens of proof for combat and MST-related PTSD is unacceptable because it denies service members, a disproportionate number of whom are women, equal treatment under the law. Imminent passage of the Ruth Moore Act will help ease the claims process for MST victims, but it will not address the root of the issue. Veterans can never be fully compensated for constitutional violations against their bodies, and, even with a lighter burden of proof under VA regulations, the Feres doctrine acts as another bar to justice.
