

## "[Secretary Shulkin], Tear Down This Wall!" Tearing Down the Wall Between Veterans Suffering From PTSD Due to Military Sexual Trauma and Compensation Benefits

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**“[SECRETARY SHULKIN], TEAR DOWN  
THIS WALL!”<sup>1</sup> TEARING DOWN THE WALL  
BETWEEN VETERANS SUFFERING FROM  
PTSD DUE TO MILITARY SEXUAL TRAUMA  
AND COMPENSATION BENEFITS**

ALEXANDRA YACYSHYN<sup>†</sup>

INTRODUCTION

Imagine you enlist in the Navy and are stationed overseas in Europe. You take your duties and commands very seriously, so when your immediate superior tells you to come out to the local club two and a half months into your assignment, you go. Imagine that evening ends with you losing your bodily integrity because your immediate superior rapes you. Now imagine you go to the chaplain to report the horror you just experienced by someone who you are supposed to look up to and seek to emulate, only to be told that you deserved to be raped. Your chaplain tells you that you should have fought harder and should just move on. After your immediate superior found out you reported him, you are once again raped in an act of retaliation. Now you must continue to go on day after day, taking orders from this individual who just violated you in the worst way. You try to move on from this nightmare, but you contract an STD. You feel no support and become lost. You do not know who you are anymore, so you attempt to take your own life. A short time later, you are on a plane home. An honorable discharge—you think you are finally free and can actually take the chaplain’s advice and move on.

<sup>1</sup> Ronald Reagan, President, U.S., Speech at the Brandenburg Gate (June 12, 1987) (transcript available at [http://www.au.af.mil/au/awc/awcgate/speeches/reagan\\_berlin.htm](http://www.au.af.mil/au/awc/awcgate/speeches/reagan_berlin.htm)).  
<sup>†</sup> J.D. 2018, St. John’s University School of Law. A special thanks to Prof. Rosa Castello for her guidance and feedback throughout this process, as well as to my family for their continuing love and support.

However, memories and flashbacks from that horrible evening constantly run through your mind. You are not the same strong, fearless young woman you were when you joined the Navy. You decide to go to your local Veteran's Affairs ("VA") Office for help. You feel a small sense of relief that you are finally going to change your situation. VA employees find several posttraumatic stress disorder ("PTSD") markers and gynecological issues but tell you that you are not eligible for any medical benefits to treat your PTSD symptoms. When you ask why, the VA coordinator explains that when the Navy discharged you, it did not list your sexual trauma as the cause. Instead, the Navy justified your discharge with a diagnosis of personality disorder. But you have no mental illness; you do not have a personality disorder. Rather, you were raped by a person you trusted: your immediate superior. But now you have no documentation to prove you were raped. Instead, the existing documentation states that you have a mental illness, which you do not, and that diagnosis does not entitle you to the VA medical benefits you so desperately need.

Because you cannot get help, your life spirals downwards. You begin to suffer from night terrors, severe migraines, panic attacks, and insomnia. You end up living in your van for two weeks and decide to file for benefits a second time, only to be denied again. You are told you did not provide enough evidence to support your rape claim, even though you presented a letter from your former spouse, which confirmed your rape, as well as the STD you contracted from it. What are you supposed to do now?

Unfortunately, this story is far too real for so many courageous veterans who were sexually assaulted during their time in the military. It is the story of Ruth Moore, a Navy veteran who was forced to wait twenty-three years to obtain compensation benefits.<sup>2</sup> Ruth Moore's twenty-three-year long fight for benefits represents the epitome of the problem with Section 3.3.04(f)(5) of Title 38 of the Code of Federal Regulations, the law regulating the VA's distribution of disability benefits to veterans suffering from PTSD caused by military sexual trauma ("MST").<sup>3</sup>

<sup>2</sup> *Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 112th Cong. 68 (2012) (statement of Ruth Moore, Constituent Witness).

<sup>3</sup> 38 C.F.R. § 3.304(f)(5) (2010).

To receive PTSD compensation, veterans must meet certain requirements, including an evidentiary one.<sup>4</sup> The evidentiary requirements vary depending upon the stressor that caused the PTSD.<sup>5</sup> Veterans who developed PTSD due to other military stressors can use lay testimony or personal accounts alone to prove that their PTSD resulted from those stressors.<sup>6</sup> On the other hand, veterans who developed PTSD due to MST must provide additional corroborative evidence to prove their military sexual trauma occurred.<sup>7</sup> Due to this additional evidentiary requirement, veterans suffering from MST-related PTSD are denied benefits at a much higher rate than veterans suffering from PTSD due to combat, prisoner of war status, and fear of hostile military activity.<sup>8</sup>

This Note addresses the disparate evidentiary requirements for veterans seeking combat-related PTSD disability compensation and veterans seeking MST-related PTSD disability compensation from the Veterans Benefits Administration (“VBA”). This Note proposes that the disproportionate rate of denials of disability compensation to MST-related PTSD claimants would be dramatically reduced if Congress amended 38 C.F.R. §3.304(f) to include a new provision, which would eliminate the corroborative evidentiary requirement of §3.304(f)(5) and allow veterans seeking MST-related PTSD compensation to establish the occurrence of their military sexual trauma with their lay testimony alone.<sup>9</sup> The proposed amendment would treat the claims of veterans seeking MST-related PTSD benefits the same as veterans seeking PTSD benefits due to all other in-service stressors and result in more benefits for those in need of them, like Ruth Moore and all other veterans suffering from MST-related PTSD.

Section I of this Note discusses the prevalence of sexual assault in the military and why so many victims do not report their assault. It draws on the link between underreporting and a lack

<sup>4</sup> See 38 C.F.R. § 3.304(f).

<sup>5</sup> See 38 C.F.R. § 3.304(f)(1)-(5).

<sup>6</sup> 38 C.F.R. § 3.304 (f)(1)-(4).

<sup>7</sup> See 38 C.F.R. § 3.304(f)(5).

<sup>8</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *MILITARY SEXUAL TRAUMA: IMPROVEMENTS MADE, BUT VA CAN DO MORE TO TRACK AND IMPROVE THE CONSISTENCY OF DISABILITY CLAIM DECISIONS* 14 (2014), <https://www.gao.gov/assets/670/663964.pdf> [hereinafter *MILITARY SEXUAL TRAUMA*].

<sup>9</sup> *Id.*; 38 C.F.R. § 3.304(f)(5).

of corroborative evidence. However, for those assaults that are reported, Section I briefly describes the two types of reports and the advantages and disadvantages of each. It draws on statistics, studies, and personal narratives to determine the most common causes for a victim's decision not to report his or her assault. This part briefly touches on how this problem is gender-neutral and not exclusive to females.

Section II of this Note discusses post-traumatic stress disorder, or PTSD, a chronic mental health condition suffered by many service-members due to their military service. Section II describes the symptoms of PTSD and how PTSD has a tendency to develop in those who suffer from MST. Section III provides an overview of the Veterans Benefit Administration, and more specifically, how the VBA assists veterans suffering from PTSD. This section analyzes 38 C.F.R. §3.304, the law governing VA compensation for PTSD, and explains that the law is flawed because of the uneven distribution of benefits. This section will also explain the appeals process for veterans whose claims are denied.

Section IV of this Note looks at past attempts to resolve the uneven distribution of PTSD disability benefits. Specifically, this Note examines Maine Congresswoman Chellie Pingree's Ruth Moore Act of 2015 and the Service Women Action Network's proposed amendment to 38 C.F.R. §3.304, §3.304(g).<sup>10</sup> This Note proposes similar legislation that would remove the additional corroborative evidentiary requirement imposed on veterans seeking MST-related PTSD benefits, allowing a veteran's lay testimony alone to establish the occurrence of MST. In addition, this Note proposes that immediately upon filing a claim, veterans should be provided with all necessary information required to monitor a claim and address any grievances or concerns that may arise throughout the whole process, including instructions on how and when to appeal a denied claim. By having this information immediately available, any veteran who has been adversely affected by inconsistent application of this regulation can have a second chance at filing for MST-related PTSD compensation. Finally, Section IV will address the VA Secretary's concerns regarding the removal of the corroborative evidentiary

<sup>10</sup> Ruth Moore Act of 2015, H.R. 1607, 114th Cong. § 1 (2015); Service Women's Action Network v. Sec'y of Veterans Affairs, 815 F.3d 1369, 1374 (Fed. Cir. 2016).

requirement and dispute the Secretary's explanations as to why the corroborative evidentiary requirement is not overly burdensome.

### I. WHY IS SEXUAL ASSAULT IN THE MILITARY SO PREVALENT YET SO UNDERREPORTED?

The number of sexual assaults in the military is alarming, and this issue is not gender-specific. Both servicemen and servicewomen experience sexual assaults by other servicemembers. Often the victim does not report his or her assault because the perpetrator is in the victim's chain of command. Failing to report often results in harsh consequences for victims in the future, for reasons this Note will address.

According to the Department of Defense's Annual Report on Sexual Assault, in 2015, 5,240 servicemember victims filed a report of sexual assault.<sup>11</sup> Only 504 of those victims (10%) reported having been sexually assaulted before entering the military, meaning that the remaining 4,736 victims (90%), were sexually assaulted during their service.<sup>12</sup> These figures show only a 1% decrease from the report of fiscal year 2014.<sup>13</sup>

Also, women are not the only victims of military assaults.<sup>14</sup> Because men enlist at a much greater rate, "[t]he moment a male enlists in the United States armed forces, his chances of being sexually assaulted increase by a factor of ten."<sup>15</sup> In a series of interviews with male veterans who were sexually assaulted during their service, *GQ*, the popular men's magazine, uncovered that most assaults have to do with power and control and that men have an increasingly difficult time reporting their claims.<sup>16</sup> For male and female victims, there are many reasons not to report the

<sup>11</sup> U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 27 (2015).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Nathaniel Penn, "Son, Men Don't Get Raped," *GQ* (September 2, 2014), <http://www.gq.com/long-form/male-military-rape> (stating "more military men are assaulted than women . . .").

<sup>15</sup> *Id.* (listing "overpowering shame, ... fear-of physical retaliation, professional ruin, social stigma...[and the belief] that attackers will [not] be punished" among the reasons why victims do not report MST).

<sup>16</sup> *Id.*

assault.<sup>17</sup> Many military sexual assault victims do not report their assaults due to a “natural bias” among commanding officers and the shame that accompanies reporting.<sup>18</sup> One interviewee described the reaction to reporting as follows:

[Let's say] I'm a company commander and I've got this sergeant first class who's done a great job of getting my company ready for combat. Then this private I don't know from Adam comes in and says, "Sergeant X assaulted me last night." I don't believe that private. I don't want to believe that private. I can't imagine that Sergeant X would do such a thing. Is there a natural bias that would say, "Can I make this go away?" That's probably a very typical reaction.<sup>19</sup>

Hence, many commanders likely are biased in that they have more trust and respect for a Sergeant than for a lower-ranked private. Considering that a great number of assaults are perpetrated by a victim's superior, many victims feel their report will not be taken seriously because it would be highly improbable that a commanding officer hearing the claim would believe one of his fellow officers would commit such an act.<sup>20</sup>

Another key reason servicemembers do not report sexual assault is due to their fear of retaliation by their fellow comrades and their chain in command, or superior officer.<sup>21</sup> In 48-49% of sexual assault cases, the perpetrator was a servicemember whom the victim worked with.<sup>22</sup> And in 23-26% of sexual assault cases, someone in the victim's chain of command was the perpetrator.<sup>23</sup> Due to the relationship between victims and their perpetrators, many victims do not report out of fear that their work environment

<sup>17</sup> *See id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* One victim stated “Hell no, I didn't report this. Who was I going to report it to? He had serious rank over me. After they ordered me to return to work with him, I stabbed myself in the neck so I could go home.”

<sup>21</sup> Alexandra Besso, *Veterans as Victims of Military Sexual Assault: Unequal Access to PTSD Disability Benefits and Judicial Remedies*, 23 *BUFF. J. GENDER, L. & SOC. POL'Y* 73, 76 (2015).

<sup>22</sup> Kaylee R. Gum, *Military Sexual Trauma and Department of Veterans Affairs Disability Compensation for PTSD: Barriers, Evidentiary Burdens, and Potential Remedies*, 22 *WM. & MARY J. WOMEN & L.* 689, 697 (2015).

<sup>23</sup> *Id.*

will become hostile, and they will lose any sense of unity.<sup>24</sup> In a series of interviews with three Maine residents, one victim stated “I didn’t say anything to anyone because once you do, your career goes down the tubes.”<sup>25</sup>

Additionally, a 2010-2011 survey of 1,339 serving and veteran servicewomen indicated that a majority of women (75%) did not officially report their sexual assaults; the most common reasons for not reporting included not knowing how to file a report and being embarrassed.<sup>26</sup> The study found that women did not report because they feared their careers would be negatively impacted, they felt that reporting would not make a difference, and they blamed themselves; however, the study also concluded that women feared that their identity would be revealed, their peers would shun them, and their leaders would blame them.<sup>27</sup>

While there is a tremendous prevalence of servicemembers who do not report their sexual assaults for reasons previously listed, there are some victims who do, and those victims are given two options: file a restricted report or file an unrestricted report.<sup>28</sup> While restricted reports are confidential and sent to designated military personnel without an official investigation, unrestricted reports initiate an official criminal investigation into the alleged assault.<sup>29</sup> Because of the difference in anonymity and proactivity in measures taken, each report has benefits and drawbacks.<sup>30</sup> For example, victims who file restricted reports receive healthcare for any mental or physical health issues and are entitled to advice from a Special Victim’s Counsel.<sup>31</sup> The Counsel allows victims to decide how and when their personal information will be released and whether they will continue the investigation.<sup>32</sup> The downside of filing restricted reports is that victims cannot receive military

<sup>24</sup> See Besso, *supra* note 21, at 76.

<sup>25</sup> Chellie Pingree, *Report: Military Sexual Trauma (pt 1)*, YOUTUBE (April 5, 2012), [https://www.youtube.com/watch?feature=player\\_embedded&v=v2VYGhGyOJM](https://www.youtube.com/watch?feature=player_embedded&v=v2VYGhGyOJM).

<sup>26</sup> Michelle A. Mengeling, et. al., *Reporting Sexual Assault in the Military: Who Reports and Why Most Servicewomen Don’t*, AM J. PREV. MED., 17, 21 (July 2014).

<sup>27</sup> *Id.* at 23.

<sup>28</sup> *Id.* at 18.

<sup>29</sup> See Gum, *supra* note 22, at 694.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

protective orders.<sup>33</sup> Accordingly, the victim could be subjected to a safety risk due to the potential for continued contact with his or her offender.<sup>34</sup>

However, because unrestricted reports lead to an official criminal investigation, victims who file unrestricted reports hold their offender responsible, thereby increasing their safety as well as the safety of others who may have fallen victim to that specific offender's assaults.<sup>35</sup> Since victims who file unrestricted reports hold their offenders accountable, many victims report that the process has afforded them a "sense of closure," and that it is their first step towards recovery.<sup>36</sup> Victims who file unrestricted reports can also request a military protective order or request to be moved to a different unit.<sup>37</sup> Yet victims who request a transfer may undergo additional stress because the request must be made to their commanding officer and be approved or disapproved within seventy-two hours of filing the request.<sup>38</sup> And because unrestricted reports reveal the victim's identity, the victim may feel a surge of shame or embarrassment.<sup>39</sup> Moreover, negative social reactions, such as different treatment by leadership, from fellow servicemembers are common.<sup>40</sup> Hence, 60% of servicewomen surveyed in the 2010-2011 study who filed a restricted report stated that they had a positive reporting experience, while only 30% of those who made an unrestricted report had a positive experience.<sup>41</sup>

Although servicemembers who were sexually assaulted during their service have the option of filing a report, a great deal of victims do not report due to a number of reasons previously

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> *Id.* (quoting U.S. DEPT OF DEF., *Sexual Assault Prevention and Response Office, Unrestricted Reporting*, <https://perma.cc/WNQ7-MQ9A> (last visited Jan. 14, 2016)).

<sup>37</sup> *See* Gum, *supra* note 22, at 694.

<sup>38</sup> *Id.* at 696 (quoting 10 U.S.C. § 673(b) (2012)).

<sup>39</sup> *See* Gum, *supra* note 22, at 694. Victims report that they experience retaliation professionally, socially, and administratively, including being put on a medical hold. *Id.* at 697.

<sup>40</sup> *Id.* at 698 (citing Michelle A. Mengeling et al., *Reporting Sexual Assault in the Military: Who Reports and Why Most Servicewomen Don't*, 47 AM. J. PREVENTATIVE MED. 17 (2014) ("More than half indicated that their military peers were hostile toward them after making an unrestricted report . . . 25% of servicewomen knew that the perpetrator(s) later harassed other military women . . .")).

<sup>41</sup> *Id.*; *see also* Mengeling et al., *supra* note 40, at 17.

mentioned in this Section.<sup>42</sup> But this failure to report can also have consequences. Many service-members develop physical and emotional reactions that mimic PTSD symptoms in response to their sexual assault.<sup>43</sup> While the Department of Veteran's Affairs offers relief for veterans suffering from PTSD, those servicemembers who choose not to report their sexual assault often struggle to obtain relief because they do not have anything in their service record that definitively proves their military sexual trauma occurred.<sup>44</sup>

## II. PTSD AS A MENTAL HEALTH REPERCUSSION OF MILITARY SEXUAL ASSAULT

PTSD is a common chronic mental health condition in veterans.<sup>45</sup> Given the nature of their work and what they encounter during their service, many servicemembers come home and develop PTSD-like symptoms.<sup>46</sup> While the most common cause for a veteran's PTSD is related to combat experiences, many veterans also develop PTSD due to military sexual trauma or trauma that resulted from a sexual assault during their time in the military.<sup>47</sup>

"PTSD is a [chronic mental health] disorder that develops in some people who have experienced a shocking, scary, or dangerous event."<sup>48</sup> Such an event, typically characterized as traumatic or life-threatening, may include combat, a natural disaster, a car accident, an act of terror, or sexual assault.<sup>49</sup> PTSD is especially

<sup>42</sup> See Gum, *supra* note 22, at 697.

<sup>43</sup> PATRICIA L. FLANFLIK, NAT'L DISTRICT ATTORNEY'S ASSOCIATION, VICTIM RESPONSES TO SEXUAL ASSAULT: COUNTERINTUITIVE OR SIMPLY ADAPTIVE? 4 (Aug. 2007) [http://biblioteca.cejamerica.org/bitstream/handle/2015/677/pub\\_victim\\_responses\\_sexual\\_assault.pdf?sequence=1&isAllowed=y](http://biblioteca.cejamerica.org/bitstream/handle/2015/677/pub_victim_responses_sexual_assault.pdf?sequence=1&isAllowed=y).

<sup>44</sup> See Gum, *supra* note 22, at 705.

<sup>45</sup> Ranak B. Trivedi, et al., *Prevalence, Comorbidity, and Prognosis of Mental Health Among US Veterans*, AM. J. OF PUB. HEALTH 2564, 2565 (Dec. 2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4638236/>.

<sup>46</sup> *Id.*

<sup>47</sup> *Mental Health: Military Sexual Trauma*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.mentalhealth.va.gov/msthome.asp> (last updated Oct. 20, 2016).

<sup>48</sup> NAT'L INST. OF MENTAL HEALTH, *Post-Traumatic Stress Disorder*, <https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml> (last revised Feb. 2016).

<sup>49</sup> *Id.*; see also Amitis Darabnia, *To Care for Him Who Shall Have Borne the Battle: Government's Response to PTSD*, 25 FED. CIR. B.J. 453, 457 (Feb. 15, 2016).

common after experiencing combat or sexual assault; it is the most chronic mental health problem among veterans.<sup>50</sup> The four most common symptoms of PTSD include reliving the event (by having a flashback), avoiding situations that remind you of the event, having increased negative thoughts and feelings, and feeling increasingly jittery or on edge.<sup>51</sup> Feelings of fear, aggression, disassociation, and anxiety are common as well.<sup>52</sup> Such disassociation often includes detachment from family and friends.<sup>53</sup> Other mood symptoms include trouble remembering key features of the trauma, “negative thoughts about oneself or the world[,] distorted feelings like guilt or blame[, and] loss of interest in enjoyable activities[.]”<sup>54</sup> In 2015, there were 138,197 veterans diagnosed with PTSD, yet a vast majority of servicemembers with this disorder remain undiagnosed.<sup>55</sup> A large number of these undiagnosed veterans acquired PTSD as a result of a sexual assault they incurred while in the military.<sup>56</sup>

Trauma that results from sexual abuse in the military is commonly referred to as Military Sexual Trauma (“MST”).<sup>57</sup> The VA defines MST as:

psychological trauma, which in the judgment of a mental health professional employed by the Department, 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, active duty for training, or inactive duty training.<sup>58</sup>

<sup>50</sup> See Darabnia, *supra* note 49, at 486.

<sup>51</sup> *Understanding PTSD and PTSD Treatment*, U.S. DEP’T OF VETERANS AFFAIRS, [https://www.ptsd.va.gov/public/understanding\\_ptsd/booklet.pdf](https://www.ptsd.va.gov/public/understanding_ptsd/booklet.pdf) (last updated Feb. 2018).

<sup>52</sup> Darabnia, *supra* note 49, at 458.

<sup>53</sup> See *Post-Traumatic Stress Disorder*, *supra* note 48.

<sup>54</sup> *Id.*

<sup>55</sup> Darabnia, *supra* note 49, at 461. A study of 1.7 million troops deployed during Operation Iraqi Freedom and Operation Enduring Freedom in 2008 revealed that approximately 308,000 were suffering from PTSD or depression.

<sup>56</sup> *Id.* One example is of Judy Alwood-Bell who was raped inside a barracks in Fort Devens, Massachusetts in 1981 and was forced to wait for over 30 years for the VA to finally approve her PTSD compensation claim in 2014.

<sup>57</sup> See *Mental Health: Military Sexual Trauma*, *supra* note 47.

<sup>58</sup> 38 U.S.C. § 1720D(a)(1) (2017).

Physical force is not required for MST.<sup>59</sup> For example, a service-member could have been threatened with negative consequences for refusing to cooperate.<sup>60</sup> Also, MST is not limited to events on-duty, on base, or during wartime.<sup>61</sup> MST can occur while the victim is off-duty, off base, and in peacetime.<sup>62</sup>

Just as the occurrence of MST is not limited to one location, victims are not limited to experiencing one emotional or physical reaction.<sup>63</sup> There is a wide range of physical and emotional reactions that victims of both military and civilian sexual assault experience.<sup>64</sup> While everyone responds to sexual assault differently, common physical reactions include aches and pains, sudden sweating, heart palpitations, changes in sleep patterns and appetite, increased alcohol or drug use, and overeating.<sup>65</sup> With regard to emotional reactions, victims may experience shock, fear, grief, disbelief, irritability, hyper-alertness, shame, mood swings, nightmares, feelings of helplessness, difficulty trusting, difficulty remembering, and depression.<sup>66</sup> Given the nature and wide range of responses to sexual assault, it is no surprise that victims of sexual assault may develop symptoms of PTSD.<sup>67</sup>

MST has a tendency to result in severe chronic conditions like PTSD.<sup>68</sup> Women who were sexually assaulted during their time in the military are nine times more likely to develop PTSD compared to female veterans who were not sexually assaulted during their military service.<sup>69</sup> And victims of MST who develop PTSD are often subject to a higher risk of unemployment due to diminished subjective well-being, depression, poor physical health, and the lack of will to get up in the morning.<sup>70</sup>

<sup>59</sup> *Id.*; see also *Effects of Military Sexual Trauma*, MAKE THE CONNECTION, <http://maketheconnection.net/conditions/military-sexual-trauma> (last visited Oct. 7, 2016).

<sup>60</sup> *Effects of Military Sexual Trauma*, *supra* note 59.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See* FLANFLIK, *supra* note 43, at 4.

<sup>66</sup> *Id.* at 4-5.

<sup>67</sup> *See Effects of Military Sexual Trauma*, *supra* note 59.

<sup>68</sup> *See id.*

<sup>69</sup> Alina Suris et al., *Mental Health, Quality of Life, and Health Functioning in Women Veterans: Differential Outcomes Associated with Military and Civilian Sexual Assault*, 22 J. INTERPERSONAL VIOLENCE 179, 181 (2007).

<sup>70</sup> *Id.* at 180-181.

Given the steadily rising number of female veterans in the military, the problem of females being subjected to military sexual assault is pressing and growing.<sup>71</sup> A 2014 VA survey found one in four female veterans said they experienced military sexual trauma.<sup>72</sup> However, as previously mentioned, both men and women are assaulted.<sup>73</sup> Sexual assault, especially by someone you know and thought you could trust, is an incredibly traumatic experience. And for many victims, the trauma never goes away. Thus, victims often develop PTSD-like symptoms.<sup>74</sup> Veterans who developed this chronic mental health condition due to their military service can seek disability benefits from the Veterans Benefits Administration.<sup>75</sup>

### III. THE VETERANS BENEFITS ADMINISTRATION AND ITS REGULATION OF PTSD BENEFITS

The Department of Veterans Affairs, specifically, the VBA, will compensate veterans for their PTSD treatment.<sup>76</sup> Veterans can go to the closest regional VA office and file a claim.<sup>77</sup> A VA psychologist or psychiatrist must confirm all PTSD diagnoses, and all veterans must prove that their PTSD resulted from an experience they had during their service.<sup>78</sup> The requirements for proving PTSD is connected to military service vary depending upon the specific in-service stressor that caused the PTSD.<sup>79</sup> The VA then either awards veteran claimants a tax-free monetary

<sup>71</sup> Emily Wax-Thibodeaux, *Female Veterans Battling from PTSD from Sexual Trauma Fight for Redress*, THE WASHINGTON POST, Dec. 25, 2014, [https://www.washingtonpost.com/politics/female-veterans-battling-ptsd-from-sexual-trauma-fight-for-redress/2014/12/25/f2f22d8e-7b07-11e4-b821-503cc7efed9e\\_story.html](https://www.washingtonpost.com/politics/female-veterans-battling-ptsd-from-sexual-trauma-fight-for-redress/2014/12/25/f2f22d8e-7b07-11e4-b821-503cc7efed9e_story.html).

<sup>72</sup> *Id.*

<sup>73</sup> Amy Street & Jane Stafford, *Military Sexual Trauma: Issues in Caring for Veterans*, U.S. DEPT OF VETERANS AFFAIRS, <https://www.ptsd.va.gov/professional/trauma/war/military-sexual-trauma.asp> (last updated Mar. 30, 2017).

<sup>74</sup> *Id.*

<sup>75</sup> *Disability Compensation*, U.S. DEPT OF VETERANS AFFAIRS, <https://www.benefits.va.gov/COMPENSATION/types-disability.asp> (last updated Jan. 9, 2018) [hereinafter *Disability Compensation*].

<sup>76</sup> *Id.*

<sup>77</sup> *Where to Get Help for PTSD*, U.S. DEPT OF VETERANS AFFAIRS, <https://www.ptsd.va.gov/public/where-to-get-help.asp> (last updated May 9, 2018).

<sup>78</sup> See *Disability Compensation*, *supra* note 75.

<sup>79</sup> *Disability Compensation Related to Military Sexual Trauma (MST)*, U.S. DEPT OF VETERANS AFFAIRS (March 2016), <https://benefits.va.gov/BENEFITS/factsheets/serviceconnected/MST.pdf> (Mar. 2016).

benefit or denies the claim.<sup>80</sup> Veterans whose claims are denied have the option to appeal the VA decision.<sup>81</sup>

The VBA is an organization of the United States Department of Veterans Affairs (“VA”).<sup>82</sup> The VA’s mission is “[t]o fulfill former President [Abraham] Lincoln’s promise ‘To 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.”<sup>83</sup> The VBA administers programs that provide medical and financial assistance to veterans and their dependents.<sup>84</sup> The VBA does a number of things for veterans. It provides compensation services, or a tax-free monetary benefit, to veterans with disabilities that are the result of any injury incurred or aggravated during their time in service.<sup>85</sup> The VBA provides pension services to protect these benefits should the beneficiary be unable to manage his VA benefits due to advanced age, disease, or injury.<sup>86</sup> The VBA also administers life insurance programs for veterans and their families.<sup>87</sup> Additionally, the VBA provides veterans with economic opportunities by providing educational and training services,<sup>88</sup> loan guaranty services,<sup>89</sup> vocational rehabilitation and employment services,<sup>90</sup> and services designed to help veterans transition to new careers.<sup>91</sup>

<sup>80</sup> *Disability Compensation*, *supra* note 75.

<sup>81</sup> *Veterans Appeals Improvements and Modernization Act of 2017*, U.S. DEP’T OF VETERANS AFFAIRS, <https://benefits.va.gov/benefits/appeals.asp> (last updated July 10, 2018).

<sup>82</sup> See *About VA*, U.S. DEP’T OF VETERANS AFFAIRS, [https://www.va.gov/landing2\\_about.htm](https://www.va.gov/landing2_about.htm) (last updated Apr. 11, 2018).

<sup>83</sup> *Id.*

<sup>84</sup> See *e.g.*, *Pension*, U.S. DEP’T OF VETERANS AFFAIRS, <https://www.benefits.va.gov/pension> (last updated Sept. 27, 2018) [hereinafter *Pension*].

<sup>85</sup> *Disability Compensation*, *supra* note 75.

<sup>86</sup> *Pension*, *supra* note 84.

<sup>87</sup> *Life Insurance*, U.S. DEP’T OF VETERANS AFFAIRS, <https://www.benefits.va.gov/insurance> (last updated Oct. 1, 2018).

<sup>88</sup> *Education and Training*, U.S. DEP’T OF VETERANS AFFAIRS, [https://www.benefits.va.gov/gibill/education\\_programs.asp](https://www.benefits.va.gov/gibill/education_programs.asp) (last updated Feb. 27, 2015).

<sup>89</sup> *VA Home Loans*, U.S. DEP’T OF VETERANS AFFAIRS, <https://www.benefits.va.gov/HOMELOANS/purchasecashout.asp> (last updated Oct. 22, 2013).

<sup>90</sup> *Education and Career Counselling*, U.S. DEP’T OF VETERANS AFFAIRS, [https://www.benefits.va.gov/VOCREHAB/edu\\_voc\\_counseling.asp](https://www.benefits.va.gov/VOCREHAB/edu_voc_counseling.asp) (last updated July 25, 2017).

<sup>91</sup> *Transitioning to Civilian Employment*, U.S. DEP’T OF VETERANS AFFAIRS, [https://www.benefits.va.gov/vocrehab/transitioning\\_from\\_service.asp](https://www.benefits.va.gov/vocrehab/transitioning_from_service.asp) (last updated Nov. 14, 2013).

One group of veterans entitled to disability compensation includes those suffering from PTSD.<sup>92</sup> The VBA will pay compensation for disabilities presumed to be related to circumstances of military service, even if they only arise after service, and PTSD is an example of such a disability.<sup>93</sup> However, a service connection is required for a veteran to receive compensation benefits.<sup>94</sup>

A service connection indicates that the injury or disease resulting in a disability is linked to military service.<sup>95</sup> Pursuant to Title 38 of the U.S. Code, to establish a service connection for PTSD, the veteran must (1) provide medical evidence diagnosing the condition, (2) show a link between the current symptoms and the trauma, and (3) provide credible supporting evidence that the claimed in-service stressor, or trauma, occurred.<sup>96</sup> Furthermore, evidence must show a link between the claimed medical condition and military service.<sup>97</sup> Evidence the VA reviews includes service personnel and medical records, private records, and lay statements.<sup>98</sup> Also, evidence should demonstrate a correlation between service and the current medical condition.<sup>99</sup>

Prior to 2010, many veterans who filed these claims had difficulty proving service connection because corroborating evidence was required if the stressor was not in-combat related.<sup>100</sup> Veterans who developed PTSD due to non-combat stressors, including prisoner of war status, fear of hostile military activity, and military sexual trauma, could not simply provide a personal account of what happened to prove the claimed in-service stressor occurred.<sup>101</sup> Unlike veterans suffering from in-combat related PTSD, veterans suffering from PTSD due to non-combat stressors were required to provide further corroborating evidence to prevail.<sup>102</sup> Mere presence in a war zone alone is traumatic, but

<sup>92</sup> See *Disability Compensation*, *supra* note 75.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> 38 C.F.R. § 3.304(f) (2010).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Cohen v. Brown*, 10 Vet. App. 128, 137 (1997).

<sup>100</sup> *Darabnia*, *supra* note 49, at 464-65 (2016).

<sup>101</sup> *Id.* at 473-74.

<sup>102</sup> *Id.* at 463.

veterans seeking disability had to point to a specific traumatic event that incited their PTSD symptoms.<sup>103</sup> Veterans could not only fear serious bodily injury or death, but also they were required to support their claims with specific dates, places, and names of individuals killed.<sup>104</sup> This high evidentiary standard has prevented many veterans from receiving the proper PTSD compensation they were entitled to.<sup>105</sup> In 2009, less than half (43%) of veterans who were diagnosed with PTSD by VA officials, received benefits.<sup>106</sup>

However, in 2010, Congress responded to this problem by relaxing the regulation and allowing veterans to establish their non-combat stressors with their lay testimony alone.<sup>107</sup> In essence, Congress relaxed the corroborative evidentiary requirement for all non-combat stressors except for military sexual trauma.<sup>108</sup> As a result, a veteran's lay testimony is sufficient to establish the in-service stressor, as long as the testimony is consistent with the circumstances of his or her service.<sup>109</sup> Section 3.304(f)(4) of the Code of Federal Regulations governing prisoner of war claims states:

If the evidence establishes that the veteran was a prisoner-of-war under the provisions of §3.1(y) of this part and the claimed stressor is related to that prisoner-of-war experience, 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.<sup>110</sup>

The same evidentiary standard applies to a veteran seeking PTSD-related disability benefits due to fear of hostile military or terrorist activity. Fear of hostile military or terrorist activity

<sup>103</sup> *Id.* at 463-64.

<sup>104</sup> *Id.* at 464.

<sup>105</sup> *Id.* at 463.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 465; *see also* 38 C.F.R. § 3.304(f) (2010).

<sup>108</sup> *See* Darabnia, *supra* note 49, at 466; *see also* 38 C.F.R. § 3.304(f)(5).

<sup>109</sup> Darabnia, *supra* note 49, at 464-65; *see also* 38 C.F.R. § 3.304(f)(1).

<sup>110</sup> 38 C.F.R. § 3.304(f)(4).

occurs when a veteran has experienced, has witnessed, or has been confronted with an event that involved actual or threatened death or serious injury, or threat to his physical integrity.<sup>111</sup> As long as a VA psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of PTSD, the veteran's lay testimony alone will establish the occurrence of the claimed in-service stressor.<sup>112</sup>

On the other hand, veterans seeking MST-related PTSD benefits are not given that benefit; their lay testimony alone is insufficient to establish the required in-service stressor.<sup>113</sup> In fact, the Federal Circuit has identified MST claims as an exception to the general rule for combat-related PTSD claims.<sup>114</sup> If a PTSD claim "is based on an in-service personal assault, evidence from sources other than the veteran's service records may corroborate the veteran's [lay testimony] of the stressor incident."<sup>115</sup> Unlike veterans seeking disability from PTSD due to in-combat stressors, fear of enemy combatants, and prisoner-of-war status,<sup>116</sup> veterans seeking disability from PTSD due to MST may not simply provide lay testimony to establish the claimed in-service stressor; they must provide additional corroborating evidence.<sup>117</sup>

Therefore, lay testimony is sufficient to establish the in-service stressor for all PTSD claims *except* for those that arose from military sexual assault.<sup>118</sup> So under the law as it stands, serious injury or fear of recurring serious injury and loss of bodily integrity due to terrorist or hostile military activity, is enough to establish the required in-service stressor.<sup>119</sup> However, actual serious injury, or fear of recurring serious injury due to sexual assault by a fellow servicemember, is not enough to establish the required in-service stressor.<sup>120</sup> By requiring additional evidence for fear of a fellow

<sup>111</sup> *See id.* § 3.304(f)(3).

<sup>112</sup> *Id.*

<sup>113</sup> *See id.* § 3.304(f)(5).

<sup>114</sup> *See* Serv. Women's Action Network v. Sec'y of Veterans Affairs, 815 F.3d 1369, 1372-73; *see also* Ben Kappelman, *When Rape Isn't Like Combat: The Disparity Between Benefits for Post-Traumatic Stress Disorder for Combat Veterans and Benefits for Victims of Military Sexual Assault*, 44 SUFFOLK U. L. REV. 545, 554 (2011).

<sup>115</sup> 38 C.F.R. § 3.304(f)(5).

<sup>116</sup> *See id.* § 3.304(f)(3).

<sup>117</sup> *See id.* § 3.304(f)(5).

<sup>118</sup> *See id.* §3.304(f) (emphasis added).

<sup>119</sup> *See id.* § 3.3.04(f)(3).

<sup>120</sup> *See id.* § 3.3.04(f)(5).

servicemember and not for fear of an enemy combatant, Congress has effectively determined that fear of being injured by an enemy combatant is greater than an actual attack by or fear of a recurring attack by a fellow servicemember. This raises the question how lawmakers could make such a determination. Nonetheless, regional VA offices must carry out this evidentiary standard, and there are certain procedures that VA adjudicators must adhere to when evaluating the evidence provided by MST claimants.<sup>121</sup>

When evaluating MST claims, VA adjudicators look for certain “markers” or indicators of MST to consider whether or not there is anything in the service record to support the claim.<sup>122</sup> Some of the markers the VA adjudicators look for include records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians, and statements from family members, roommates, fellow servicemembers, or clergy.<sup>123</sup> The types of evidence listed in §3.304(f)(5) are not exhaustive.<sup>124</sup> Other forms of corroborative evidence include behavioral changes (such as a request to transfer to another military duty assignment, deterioration in work performance), substance abuse, panic attacks, depression, or anxiety.<sup>125</sup>

This additional corroborative evidence requirement imposes a great burden on veterans whose PTSD developed due to sexual assault by a fellow servicemember.<sup>126</sup> MST-related PTSD claims are denied at a much greater rate than all other PTSD disability compensation claims because VA adjudicators tend to misapply the evidentiary standard.<sup>127</sup> For example, in 2011, the Government Accountability Office (“GAO”) conducted an audit of VA adjudicators and reported that 98 of 385 (about 25%) of MST claims had errors.<sup>128</sup> In those cases, the adjudicators should have identified veterans’ markers and ordered medical exams instead of denying the claims altogether.<sup>129</sup>

<sup>121</sup> *See id.*; *see also* MILITARY SEXUAL TRAUMA., *supra* note 8, at 7.

<sup>122</sup> *See* MILITARY SEXUAL TRAUMA, *supra* note 8, at 7.

<sup>123</sup> *Id.*; *see also* § 3.304(f)(5).

<sup>124</sup> *See* § 3.3.04(f)(5).

<sup>125</sup> *See id.*

<sup>126</sup> *See* MILITARY SEXUAL TRAUMA, *supra* note 8, at 22.

<sup>127</sup> *Id.* at 9.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

VA adjudicators also inconsistently identify MST markers. One interview revealed that an adjudicator failed to count a childbirth that occurred just nine months after the claimed MST incident as a marker.<sup>130</sup> A childbirth that occurred nine months after the alleged military sexual assault certainly should have been qualified as a marker and should have triggered a medical exam.<sup>131</sup> Furthermore, in the same GAO study, seven of nine interviewees said their colleagues vary in their level of thoroughness in reviewing MST claims.<sup>132</sup> These interviews revealed that some adjudicators complete exams in fifteen minutes when such exams should really take multiple hours if done correctly.<sup>133</sup> These less thorough exams often lead to less informed assessments of MST claims.<sup>134</sup> Since all other PTSD claims do not require any corroborative evidence, removing this requirement for MST claims would eliminate the need for adjudicators to identify markers.<sup>135</sup> And since VA adjudicators unevenly assess these markers, removing the need to identify markers altogether should decrease the likelihood that adjudicators will err when denying MST claims.<sup>136</sup>

Because many victims of MST-related PTSD are unable to meet this evidentiary burden, their claims are often denied.<sup>137</sup> If the claim is denied and the veteran is dissatisfied with the VA's determination, the veteran can file an appeal, specifically a Notice of Disagreement, with the VA.<sup>138</sup> Veterans must file a Notice of Disagreement within one year from the date they received a letter notifying them of the VA's initial decision on their claim.<sup>139</sup> Once a Notice of Disagreement is filed, the veteran's local VA office will again review the veteran's file, prepare a statement of the case or a written explanation of why the claim was denied, and mail it to

<sup>130</sup> *Id.* at 10–11.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 18.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 29.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 22.

<sup>138</sup> *Board of Veterans' Appeals, How Do I Appeal?*, DEP'T OF VETERANS AFFAIRS 5, [http://www.bva.va.gov/How\\_Do\\_I\\_Appeal.asp](http://www.bva.va.gov/How_Do_I_Appeal.asp) (last updated May 2015) [hereinafter *How do I Appeal?*].

<sup>139</sup> 38 U.S.C. §7105 (2013).

the veteran.<sup>140</sup> If the veteran disagrees with the statement of the case, he or she may file a Substantive Appeal to the Board of Veteran's Appeals.<sup>141</sup> Again, this Substantive Appeal must be filed within one year of receipt of the initial claim decision, or within sixty days of the letter accompanying the statement of the case.<sup>142</sup>

After the veteran files a Substantive Appeal, the local VA office will transfer the appeal to the Board of Appeals where a decision will be mailed to the veteran.<sup>143</sup> Veterans have the option of requesting an in-person hearing or a video teleconference.<sup>144</sup> While the veteran testifies under oath, hearings are informal, and the judge simply asks the veteran why he believes he is entitled to the benefits he seeks.<sup>145</sup> The Veteran Law Judge will not make a decision at the hearing; rather, he will consider every piece of evidence in the veteran's file and will grant, deny, or remand each issue.<sup>146</sup> Remand typically occurs when the Board finds it lacks enough evidence about an issue in the veteran's appeal to come to a proper decision.<sup>147</sup> The issue is sent back to a local VA office to collect more evidence, such as medical records.<sup>148</sup> If an issue is denied, the veteran has 4 options: file a new claim with a local VA office, file a motion asking the Board of Veteran's Appeals to reconsider the appeal, file a motion asking the Board of Veteran's Appeals to review the appeal again because there was clear and obvious error in its decision, or file a Notice of Appeal with the United States Court of Appeals for Veterans Claims.<sup>149</sup> A Notice of Appeal must be written, filed within 120 days from the date of the Board of Veterans' Appeals decision, and sent to the Clerk of the Court of Appeals for Veterans claims.<sup>150</sup>

Roughly 39% of these claims are denied at the regional level, and of the 14% that are appealed, the Board only grants 25%.<sup>151</sup> If

<sup>140</sup> *How do I Appeal?*, *supra* note 138, at 6.

<sup>141</sup> *Id.* at 7.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 8.

<sup>144</sup> *Id.* at 9.

<sup>145</sup> *See id.* at 10.

<sup>146</sup> *See id.* at 11.

<sup>147</sup> *See id.*

<sup>148</sup> *See id.* at 10.

<sup>149</sup> *See id.* at 12.

<sup>150</sup> *See id.*

<sup>151</sup> *See Darabnia, supra* note 49, at 478.

the regional office or the Board denies the claim, the veteran can appeal to the Court of Appeals for Veteran's Claims ("CAVC").<sup>152</sup> However, CAVC is one of the most active federal appellate courts in the United States, so it can be a long time before a veteran's appeal is even heard.<sup>153</sup> In 2009, it took a minimum of three years for the Board to rule on an appeal, and it took an extra three and a half years for the CAVC to decide an appeal.<sup>154</sup> Nonetheless, once the CAVC issues a decision, if the veteran is still dissatisfied, he or she can appeal to the Court of Appeals for the Federal Circuit.<sup>155</sup> Unlike the standard of review for the Board of Veteran's Appeals, the standard of review in the Federal Circuit is highly deferential.<sup>156</sup> The Circuit only decides if the decision was arbitrary, capricious, unconstitutional, or procedurally deficient.<sup>157</sup> The Circuit does not rule on the merits of the claim.<sup>158</sup> However, in 60% of these appeals, the regional office is found to have made an undeniable error, and the veteran is eventually granted his or her well-deserved benefits.<sup>159</sup> Hence, veterans continue to suffer and remain uncompensated for numerous years due to the lengthy appeals process.<sup>160</sup>

Although veterans have the option to appeal the VA's decision, many veterans do not want to revisit their painful memories and as a result, do not resubmit claims.<sup>161</sup> Therefore, by removing the corroborative evidentiary requirement of §3.304(f)(5), which statistics show has been inconsistently applied and is the reason for the greater rate of denied MST claims, the number of approved MST claims should uniformly increase and result in a decrease in the number of necessary appeals.<sup>162</sup>

<sup>152</sup> See Besso, *supra* note 21, at 78.

<sup>153</sup> *Id.*; see also Darabnia, *supra* note 49, at 478.

<sup>154</sup> See *id.* at 478-79.

<sup>155</sup> See 38 U.S.C. §7292(d)(1) (2002); see also Besso, *supra* note 21, at 78.

<sup>156</sup> See Besso, *supra* note 21, at 78.

<sup>157</sup> See 38 U.S.C. §7292(d)(1).

<sup>158</sup> *Id.*

<sup>159</sup> See Darabnia, *supra* note 49, at 479.

<sup>160</sup> *Id.* at 478-79.

<sup>161</sup> See MILITARY SEXUAL TRAUMA, *supra* note 8, at 20.

<sup>162</sup> *Id.* at 16, 18-20.

#### IV. PROPOSAL: TEAR DOWN THE WALL BETWEEN VETERANS SUFFERING FROM MST-RELATED PTSD AND COMPENSATION BENEFITS

Section 3.304(f)(5) of Title 38 of the Code of Federal Regulations currently serves as a barrier to veterans seeking compensation benefits for PTSD caused by MST.<sup>163</sup> The granting of MST-related PTSD disability benefits has historically lagged behind the granting of benefits for all other PTSD disability claims.<sup>164</sup> In 2010-2011, there was great disparity between the number of MST-related PTSD claims and all other types of PTSD claims.<sup>165</sup> For example, in 2010, while the VA granted a mere 32.3% of MST-based PTSD claims, it granted 56% of non-MST-based PTSD claims, or almost double what it granted for MST-based PTSD claims.<sup>166</sup> This great disparity is due to the heightened evidentiary burden that veterans seeking MST-based PTSD disability must face, which veterans seeking PTSD due to combat, fear of enemy combatant, and prisoner-of-war status do not bear.<sup>167</sup> Therefore, in recent years, two pieces of legislation were introduced to both address and remove this heightened evidentiary burden placed on veterans seeking MST-related PTSD disability compensation benefits. First, a Maine Congresswoman introduced House Bill 1607, a bill inspired by veteran Ruth Moore's twenty-three-year long struggle for compensation benefits.<sup>168</sup> Second, the Service Women's Action Network petitioned the VA Secretary to promulgate a new amendment to Title 38 of the U.S. Code governing PTSD compensation claims.<sup>169</sup>

<sup>163</sup> *Id.* at 7.

<sup>164</sup> Brief for Petitioner at 3, *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, No. 14-71115 (Fed. Cir. Aug. 07, 2014).

<sup>165</sup> *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1373 (Fed. Cir. 2016).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Ruth Moore Act of 2015, H.R. 1607, 114<sup>th</sup> Cong. § 1 (2015).

<sup>169</sup> *Serv. Women's Action Network*, 815 F.3d at 1374.

A. *Two Attempts: A Bill Before Congress and a Petition to the VA Secretary*

Chellie Pingree, a Maine Congresswoman who sits on the Armed Services Committee, attempted to remove the barrier imposed on veterans seeking MST-related PTSD disability benefits by proposing House Bill 1607.<sup>170</sup> After learning of fellow Maine citizen Ruth Moore's twenty-three year long fight to obtain PTSD compensation, Pingree was inspired to draft and introduce House Bill 1607.<sup>171</sup> The bill, renamed the Ruth Moore Act after Ruth Moore gained the confidence to speak publicly about her horrific experience, was amended in 2015 and passed the House in July 2015.<sup>172</sup> The purpose of the Act is to "amend title 38, United States Code, to improve the disability compensation evaluation procedure of the Secretary of Veteran Affairs for veterans with mental health conditions related to military sexual trauma, and for other purposes."<sup>173</sup> For the purposes of the bill, "covered claims" refers to claims for disability compensation submitted to the Secretary based on a mental health condition that the veteran claims to have incurred or have aggravated by MST.<sup>174</sup> The Act would also require the Secretary to provide each veteran who has submitted a covered claim with an abundance of information about filing a claim, including the number of covered claims that were granted or denied and the average time for processing claims at each regional office.<sup>175</sup>

<sup>170</sup> H.R. 1607.

<sup>171</sup> H.R. REP. NO. 114-207, at 5 (2015).

<sup>172</sup> *Id.* at 5-7.

<sup>173</sup> S. 865, 114th Cong. (2015).

<sup>174</sup> *Id.* at § 2.

<sup>175</sup> H.R. REP. NO. 114-207, at 3. The Ruth Moore Act of 2015 states in relevant part:

It is in 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 by—(1) ensuring that military sexual trauma is specified as an in-service stressor in determining the service-connection of post-traumatic stress disorder by including military sexual trauma as a stressor described in section 3.304(f)(3) of title 38, Code of Federal Regulations; and (2) recognizing the full range of physical and mental disabilities (including depression, anxiety, and other disabilities as indicated in the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association) that can result from military sexual trauma ... the Secretary shall provide to each veteran who has submitted a covered claim or been treated for military sexual trauma at a medical facility of

The annual report must be submitted to Congress by December 1 for each fiscal year and must include (1) the number of covered claims submitted or considered by the Secretary for that fiscal year, (2) the number of covered claims submitted by each sex, that were approved for each sex, and that were denied for each sex, (3) the rating percentage assigned to each claim for each sex, (4) the three most common reasons for why claims were denied, (5) the number of covered claims pending appeal, (6) the average number of days that covered claims take to be processed, beginning on the date which the claim was submitted, and (7) a description of the training the Secretary provides to its employees of the VBA, including the length, frequency, and content of such training.<sup>176</sup> The submission of an annual report would allow Congress to track the progress of MST-based PTSD claims and ensure that MST-based PTSD claims no longer lag behind all other PTSD claims at such an alarming rate.

Section 2(b) of the Act would require the VA Secretary to update and improve 38 C.F.R. §3.304(f)(3), the law governing PTSD disability compensation benefits, by listing MST as a specified in-service stressor for purposes of establishing the service connection requirement.<sup>177</sup> Hence, if MST is already codified as an in-service stressor, there is no need for corroboration or lay testimony.

Additionally, by incorporating the American Psychiatric Association's list of specific mental illnesses and disabilities that military sexual trauma can cause, claims processors will be trained to understand this broad category of mental health conditions and will be alerted to notice if any signs are present in veterans filing MST-based PTSD claims.<sup>178</sup>

the Department with a copy of the report . . . that includes (A) the date the Secretary plans to complete such updates and improvements to such regulations; (B) the number of covered claims that have been granted or denied during the month covered by such information; (C) a comparison to such rate of grants and denials with the rate for other claims regarding post-traumatic stress disorder; (D) the three most common reasons for such denials; (E) the average time for completion of covered claims; (F) the average time for processing covered claims at each regional office; and (G) any information the Secretary determines relevant with respect to submitting a covered claim. *Id.*

<sup>176</sup> *Id.* at 2.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

Finally, section (c) of the Act would require the Secretary to submit to each veteran who has submitted a claim for disability compensation monthly information that includes:

- (A) the date that the Secretary plans to complete such updates and improvements to the regulations;
- (B) the number of covered claims that have been granted or denied during that month...;
- (C) a comparison to such rate of grants and denials with the rate for other claims of [PTSD];
- (D) the three most common reasons for denials;
- (E) the average time for completion of covered claims;
- (F) the average time for processing each covered claim at each regional office; and
- (G) any information the Secretary finds relevant to submitting a covered claim . . . .<sup>179</sup>

This detailed information would provide veterans with a clear picture of the process and help veterans predict their likelihood of success in receiving benefits.

Similar to Congresswoman Pingree's introduction of the Ruth Moore Act to address the uneven distribution of PTSD compensation benefits to veterans suffering from MST-related PTSD and veterans suffering from PTSD due to other stressors, the Service Women's Action Network also attempted to change the current regulation for veterans seeking PTSD disability compensation due to military sexual trauma.

Because the Secretary of the VA ("Secretary") is authorized to implement all new rules and regulations regarding the right to benefits, the Service Women's Action Network ("SWAN") and the Vietnam Veterans of America petitioned the Secretary in 2014 to address this disparity.<sup>180</sup> SWAN, an advocacy group that provides a voice to all military women, seeks to ensure all service women "receive the opportunities, protections, benefits, and respect they

<sup>179</sup> Ruth Moore Act of 2015, H.R. 1607, 114<sup>th</sup> Cong. § 2 (2015).

<sup>180</sup> *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1373 (Fed. Cir. 2016).

deserve.”<sup>181</sup> SWAN petitioned the VA to promulgate a new subsection of 38 C.F.R. §3.304—3.304(g), which would allow the lay testimony alone of a veteran seeking MST-based PTSD relief to establish the claimed in service stressor, as long as there is not clear and convincing evidence to the contrary.<sup>182</sup> SWAN’s proposed subsection §3.304(g) states:

If a stressor claimed by a veteran is related to the veteran’s reported experience of military sexual trauma and a psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of a mental health condition and that the veteran’s symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, the veteran’s lay testimony alone may establish the occurrence of the claimed in-service stressor.<sup>183</sup>

Thus, SWAN’s proposed subsection 3.304(g) would simply impose the same standard that exists for veterans seeking PTSD benefits arising from combat, fear of enemy combatants, and prisoner-of-war experiences.<sup>184</sup> With the promulgation of this new rule, veterans seeking MST-related PTSD benefits would only have to prove that their assault occurred during their service in the military and would no longer need to present corroborative evidence.<sup>185</sup> In its petition, SWAN contended that “(1) systematic underreporting deprives survivors of military rape and sexual assault of the documentation required to corroborate their claims; (2) VA adjudicators often misapply the current evidentiary standard; and (3) the VA’s current rules for PTSD related to MST allow biased exercise of adjudicator’s discretion.”<sup>186</sup> SWAN based many of its contentions in the findings of a study that revealed the inconsistent application of the evidentiary standard.

While VBA guidelines do not provide a specific time frame for markers, an MST adjudicator in one regional office told the GAO

<sup>181</sup> *Who We Are*, SERVICE WOMEN’S ACTION NETWORK (last visited Sept. 28, 2018), <https://www.servicewomen.org/who-we-are>.

<sup>182</sup> *Serv. Women’s Action Network*, 815 F.3d at 1374.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1373-74.

<sup>185</sup> *Id.* at 1374.

<sup>186</sup> *Id.*

that she only counts evidence as a marker if it occurred within two months of the stated MST incident.<sup>187</sup> And in one 2013 claim file the GAO reviewed, the adjudicator did not consider a marker to be an HIV test taken two months after the veteran claimed the MST incident occurred.<sup>188</sup> Meanwhile, two supervisors reviewing the file told the GAO that it is highly possible that a different adjudicator may have considered the same HIV test to be a marker of MST given its close proximity to the claimed date.<sup>189</sup> On the contrary, in another regional office, an MST adjudicator told the GAO that she has counted as a marker a pregnancy test that occurred two years after the reported MST incident.<sup>190</sup> Given the lack of consensus among adjudicators regarding whether a two-month old marker or a two-year old marker is sufficient to establish MST, VA adjudicators misapply the standard.<sup>191</sup> Additionally, while some adjudicators in one regional office said that vague complaints of pain and anxiety around the time of the alleged MST incident qualified as markers, adjudicators from other offices did not consider such complaints to be markers.<sup>192</sup> As a result, the current evidentiary standard is being applied inconsistently, and veterans suffering from MST-related PTSD are suffering due to this burdensome corroborative evidentiary requirement.

Despite SWAN's contentions that VA adjudicators are erring in their application of the corroborative evidentiary standard, the Secretary denied the petition, and the petitioners appealed to the United States Court of Appeals for the Federal Circuit.<sup>193</sup> Unfortunately, the Court of Appeals' review is highly deferential and only "looks to see whether the agency employed reasoned decision-making in rejecting the petition."<sup>194</sup> As a result, the Court of Appeals denied the appeal, concluding that the Secretary clearly

<sup>187</sup> See *MILITARY SEXUAL TRAUMA*, *supra* note 8, at 17.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Serv. Women's Action Network*, 815 F.3d at 1374.

<sup>192</sup> See *MILITARY SEXUAL TRAUMA*, *supra* note 8, at 17.

<sup>193</sup> *Serv. Women's Action Network*, 815 F.3d at 1374.

<sup>194</sup> *Id.*

explained the facts and policy matters it used to reach its decision.<sup>195</sup>

Thus, considering that the Court of Appeals confirmed the VA Secretary's decision to deny SWAN's petition for a new subsection to §3.304, and that the Ruth Moore Act has been immobile in the Senate since July 28, 2015, there has yet to be any legislation implemented that addresses the issue of veterans being denied MST-related PTSD compensation benefits at an alarming rate.<sup>196</sup> Accordingly, this Note proposes the swift passage of a new piece of legislation that incorporates both the annual report provided to veterans filing a claim from the Ruth Moore Act and SWAN's proposed amendment, §3.304(g). This Note also calls for an additional provision that ensures veterans are fully informed about the appeals process.

*B. Another Proposal: Removing the Barrier and Adding Access to Essential Information*

Congress should amend Section 3.304 of Title 38 of the Code of Federal Regulations to remove the additional corroborative evidentiary requirement imposed on veterans seeking MST-related PTSD compensation.<sup>197</sup> This would ensure their PTSD claims are evaluated the same way other forms of PTSD claims listed in §3.304(f) are evaluated.<sup>198</sup> Additionally, the moment veterans file a PTSD claim, the amendment would require the VA to provide veterans with information regarding the reasons for claim denials and approvals, as well as the necessary information required to appeal a denied claim.<sup>199</sup>

<sup>195</sup> *Id.* at 1375.

<sup>196</sup> See S. 865, 114th Cong. § 1 (2015); see also S. 865 (114<sup>th</sup>): *Ruth Moore Act of 2015*, GOVTRACK.US <https://www.govtrack.us/congress/bills/114/s865> (last updated Feb. 2017) (indicating that the Ruth Moore Act of 2015 was introduced to the 114<sup>th</sup> Congress, which met from January 6, 2015 to January 3, 2017, and given that legislation not enacted by the end of a Congress is cleared from the books, the Ruth Moore Act has been cleared from the books).

<sup>197</sup> See 38 C.F.R. § 3.304(f) (2010).

<sup>198</sup> *Id.*

<sup>199</sup> See *Post-Traumatic Stress Disorder (PTSD)*, VETERANS DISABILITY INFO, <https://www.veteransdisabilityinfo.com/post-traumatic-stress-disorder-ptsd.php> (last visited Sept. 26, 2018) (showing four of the most common reasons for denials); 38 U.S.C.S. § 7105 (2012) (highlighting what the appeals process entails).

First, just as both the Ruth Moore Act and SWAN's petition suggest, the corroborative evidentiary requirement should be eliminated from §3.304(f)(5).<sup>200</sup> Due to the prevalence of underreporting and the varied methods for coping with PTSD, an overwhelming number of veterans suffering from MST-related PTSD lack the necessary corroborative evidence to be awarded compensation.<sup>201</sup> Second, just as SWAN's petition proposed, to establish the in-service stressor, a veteran's lay testimony on its own should be sufficient as long as a VA psychiatrist or psychologist confirms the MST resulted in PTSD, and there is no clear and convincing evidence to the contrary.<sup>202</sup> Just as veterans suffering from PTSD due to combat, fear of enemy combatants, and prisoner of war status are entitled to have their word alone suffice to establish the required in-service stressor, veterans suffering from MST-related PTSD should be afforded the same opportunity.<sup>203</sup> Additionally, the requirement that a VA doctor confirms the PTSD diagnosis and finds no clear and convincing evidence to the contrary ensures the validity of the disability claim.<sup>204</sup>

Third, similar to section (c) of the Ruth Moore Act, immediately upon filing a claim for PTSD compensation, veterans should receive information including the statistics of approved and denied claims, the most common reasons for denials, a comparison of the rate of grants and denials with the rate for other PTSD claims, the average time for completion of covered claims, the average time for processing covered claims at each regional office, and the one-year time constraint for appealing the VA's decision.<sup>205</sup> Veterans should not have to search for this information on the VA website; rather, they should be provided with it immediately so they have a clear picture of the realities of the process they are about to engage in.<sup>206</sup> Additionally, by knowing the common reasons for denials, veterans may be able to predict the likelihood of their

<sup>200</sup> See S. 865; *Serv. Women's Action Network*, 815 F.3d at 1374.

<sup>201</sup> See *Serv. Women's Action Network*, 815 F.3d at 1374.

<sup>202</sup> *Id.*

<sup>203</sup> See 38 C.F.R. § 3.304(f) (2010).

<sup>204</sup> See 38 C.F.R. § 3.304(f)(3).

<sup>205</sup> S. 865.

<sup>206</sup> See generally, Jason Davis, *Vets.gov adds disability claim status feature*, VANTAGE POINT (Sept. 26, 2018, 11:32 AM), <https://www.blogs.va.gov/VAntage/33324/vets-gov-adds-disability-compensation-claim-status-feature/>.

claim being granted or denied.<sup>207</sup> With information regarding the grants and denials of PTSD compensation claims, veterans could also identify any potential continued disproportionate distribution of benefits, which they could address in their appeal.<sup>208</sup>

Furthermore, section (c) of the Ruth Moore Act should be modified to include information about appeals for veterans dissatisfied with the VA's decision. Veterans should know how to address any grievances they have with the VA. The VBA only began to allow veterans to resubmit their previously denied MST-related PTSD claims in April 2013.<sup>209</sup> Although the VBA has always allowed veterans to resubmit claims if they obtained new evidence, the 2013 initiative was designed to correct VA adjudicators' past errors when evaluating MST-related PTSD claims.<sup>210</sup> So, the new initiative did not require veterans to submit any additional information.<sup>211</sup> The VBA sent 2,667 notification letters to veterans whose claims were denied between September 2010 and April 2013.<sup>212</sup> However, only 587 of those notified veterans resubmitted their claims, and the VBA only resolved 429 of those resubmitted claims.<sup>213</sup> Accordingly, this information regarding claim resubmission should be easily accessible for MST claimants. The first part of the amendment to §3.304(f)(5) would track the language of the subsections governing the other PTSD stressors, and the additional subsection (a) to §3.304 would track the language from section (c) of the Ruth Moore Act of 2015:

(5) If a stressor claimed by a veteran is related to the veteran's reported experience of military sexual trauma and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has

<sup>207</sup> See *Post-Traumatic Stress Disorder (PTSD)*, VETERANS DISABILITY INFO, <https://www.veteransdisabilityinfo.com/post-traumatic-stress-disorder-ptsd.php> (last visited Sept. 26, 2018).

<sup>208</sup> *Battle for Benefits VA Discrimination Against Survivors of Military Sexual Trauma*, VETERANS LEGAL SERVICES CLINIC, YALE LAW SCHOOL 1, 5 (Nov. 2013), <https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf>.

<sup>209</sup> See *MILITARY SEXUAL TRAUMA*, *supra* note 8, at 12.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See *MILITARY SEXUAL TRAUMA*, *supra* note 8, at 20. Many veterans who were notified said that the letters were vague, confusing, and impersonal. *Id.* The letters did not include a direct phone number to VBA staff assisting the MST claimants. *Id.* Additionally, many veterans were unwilling to risk having their claim denied a second time. *Id.*

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 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.

(a) Immediately upon filing for military-sexual trauma-related posttraumatic stress disorder compensation, each veteran is entitled to receive a report including:

- (1) the number of approved and denied claims for that fiscal year;
- (2) the most common reasons for denials;
- (3) a comparison to such rate of grants and denials with the rate for other claims regarding posttraumatic stress disorder;
- (4) the average time for completion of covered claims;
- (5) the average time for processing covered claims at each regional office; and
- (6) the one-year time limitation for appealing a claim, which commences the date the VA mails its letter notifying the claimant of its decision.

While the proposed amendment to § 3.3.04(f)(5) would allow veterans who suffer from PTSD due to MST to have the same opportunities as veterans who suffer from PTSD due to other in-service stressors, there are potential concerns with this amendment. Nonetheless, such potential concerns are far outweighed by the benefits that the amendment would bring to suffering veterans.

### *C. Opposing the Wall's Removal: Possible Concerns*

In support of the corroborative evidentiary requirement and his denial of SWAN's petition for the promulgation of a new subsection to §3.304, the Secretary indicated that the non-exhaustive list of sources in §3.304(f)(5) accounts for the underreporting of most personal assaults.<sup>214</sup> According to the Secretary, the list of non-exhaustive sources in §3.304(f)(5) should allow a veteran seeking MST-based PTSD compensation, who does not have service records, to show some kind of proof of the in-service stressor.<sup>215</sup>

However, as previously mentioned, the non-exhaustive list of corroborative evidence presumes that victims respond to their military sexual assault in a relatively similar way. Again, the list includes records from law enforcement, rape crisis centers, mental health centers, and statements from family, friends, roommates, and fellow service-members.<sup>216</sup> Yet, many veterans do not have records from law enforcement or any health service because most victims do not report their assault, for reasons previously mentioned in the background of this article. Additional sources of evidence included in the list are behavioral changes, detachment from loved ones, substance abuse, or a request to transfer to a different unit in the military, but “[p]sychologists observe that traumatized people, such as rape victims, often resume the outward forms of their previous lives, sometimes minimizing or suppressing trauma.”<sup>217</sup> Hence, a change in outward behavior might not necessarily exist. Thus, the list of evidentiary sources, or markers that VA adjudicators look for, wrongly presumes that veterans suffering from MST-related PTSD exhibit a similar set of behaviors; the adjudicators often look for evidence that may not even exist.<sup>218</sup>

<sup>214</sup> 38 C.F.R. §3.304(f)(5) (2010); *see also* *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1373 (Fed. Cir. 2016).

<sup>215</sup> 38 C.F.R. § 3.304(f)(5); *See Generally* Corrected Brief for The American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, *Service Women's Action Network v. Secretary of Veteran's Affairs* 815 F.3d 1369 (Fed. Cir. 2016) (No. 14-7115 [hereinafter *ACLU Brief*]).

<sup>216</sup> 38 C.F.R. § 3.304(f)(5).

<sup>217</sup> *ACLU Brief*, *supra* note 215 at 17 (citing Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Adaptive Strategies and Recovery from Rape*, 136 AM. J. PSYCHIATRY 1278, 1280 (1979)).

<sup>218</sup> *See ACLU Brief*, *supra* note 215 at 15.

Furthermore, in 2011, the Department of Defense (DOD) required all MST records to be destroyed after five years.<sup>219</sup> Since symptoms of PTSD might not be present for years after the trauma or it could be years before victims build up the courage to discuss their attack, this mandated destruction imposes an additional hurdle for veterans seeking MST-related PTSD benefits. Additionally, the DOD permits sexual assault reports to be destroyed after two years and rape kits to be destroyed after one year.<sup>220</sup> Thus, even if victims of MST do report their assaults, by the time they leave the military and apply for benefits, it is highly likely that they will be denied benefits because the required corroborating evidence has been destroyed.

Proponents of the corroborative evidentiary requirement argue that it prevents fraudulent claims by veterans who wish to acquire additional or unwarranted benefits from the VA.<sup>221</sup> Yet a 2005 study by the VA Office of the Inspector General (“OIG”) revealed that in a sample of 527 cases, only 13 were considered “potentially fraudulent,” and were referred to the OIG Office of Investigations.<sup>222</sup> Moreover, the potential for fraudulent claims is slim because veterans seeking mental health disability benefits are routinely subjected to a negative stigma.<sup>223</sup> Many veterans fear their request for medical attention will lead to a PTSD diagnosis, accompanied by a discharge, ultimately leaving them with no job or benefits.<sup>224</sup> Although it may seem simple to ask for help for the effects felt from past military trauma, it is incredibly difficult for veterans. Many are reluctant to seek a service-connection for PTSD because they view the act of asking for help for such an illness as shameful and socially unacceptable.<sup>225</sup>

<sup>219</sup> See Darabnia, *supra* note 49, at 467.

<sup>220</sup> See *id.*

<sup>221</sup> See *id.* at 481-82.

<sup>222</sup> *Review of State Variances in VA Disability Compensation Payments*, VA OFFICE OF INSPECTOR GENERAL 53, (May 19, 2005) <https://www.va.gov/oig/52/reports/2005/VAOIG-05-00765-137.pdf>.

<sup>223</sup> See Darabnia, *supra* note 49, at 475. Because military PTSD is often equated with cowardice, lack of resilience, and an attempt to escape service, veterans suffering from PTSD are afraid their coming forward will appear cowardly or weak.

<sup>224</sup> See *id.* at 475.

<sup>225</sup> Nina A. Sayer et al., *A Qualitative Study of U.S. Veteran's Reasons for Seeking Department of Veterans Affairs Disability Benefits for Posttraumatic Stress Disorder*, 24 J. OF TRAUMATIC STRESS 699, 703 (Dec. 2011).

Because the military trains its members to be strong at all times, many veterans perceive the simple act of asking for help as weak and cowardly.<sup>226</sup> One female veteran from the Persian Gulf War stated, “It still makes me feel funny because, point blank, I felt like a whore. I [would be] getting paid for being raped.”<sup>227</sup> Given the foregoing reasons, the Secretary’s concern that removing the corroborative evidentiary requirement will open the door to fraudulent MST-related PTSD compensation claims is unwarranted. Due to the shame and embarrassment that most MST victims feel, fraudulent claims of sexual assault are unlikely and should not be the predominate reason for the heightened evidentiary standard imposed on veterans seeking MST-related PTSD compensation.

Additionally, critics may argue that an increase in costs to the VA is inevitable due to a likely increase in the number of approved compensation claims.<sup>228</sup> Because the additional evidence would no longer be required, more veterans would be able to receive the PTSD benefits, which in turn would force the VA to spend more money.<sup>229</sup> And since the VA is a federally funded government agency, this increase in costs will be borne by taxpayers.<sup>230</sup> While the Congressional Budget Office (“CBO”) has estimated that implementing section two of the Ruth Moore Act would cost \$5 million over the 2016-2020 period, subject to the availability of appropriated funds, the CBO also determined that implementing the Ruth Moore Act would not affect direct spending or revenues.<sup>231</sup> Moreover, “it is rather inhumane and contrary to our long tradition of caring for veterans to have increased costs be a driving force in denying eligible veterans in need adequate support

<sup>226</sup> *See id.* However, many veterans eventually ask for help after encouragement from friends, family, and other veterans.

<sup>227</sup> *See id.*

<sup>228</sup> Darabnia, *supra* note 49, at 483.

<sup>229</sup> *See id.*

<sup>230</sup> *See Department of Veterans Affairs- Budget in Brief*, 2019 CONGRESSIONAL SUBMISSION 1, 6 (2018) <https://www.va.gov/budget/docs/summary/fy2019VAbudgetInBrief.pdf>.

<sup>231</sup> H.R. REP. NO. 114-207 (2015). Because section 2 of the Ruth Moore Act pertains to the annual reports that Congress would have to submit regarding the statistics of claims pending, approved, and denied, that section is mirrored in part A of this proposed legislation. Thus, the legislation proposed in this Note should not affect direct spending or revenues either.

and compensation.”<sup>232</sup> Of all the places taxpayer dollars go, this is a tax that arguably most Americans would not mind paying because it is a mere expression of gratitude to the brave service men and women who put their lives on the line so the rest of us can live comfortably and peacefully in the United States, uninvolved in the daily terror confronting these individuals serving abroad. And to fulfill the VA’s mission of upholding President’s Lincoln’s promise to care for those who have borne the battle, it is the responsibility of our nation to serve those who have already so selflessly served us.<sup>233</sup>

Another potential concern with enacting this amendment is that because sexual assault typically only involves two people, the victim and the attacker, the decision of whether to grant benefits comes down to whose word is more credible—that of the victim or the attacker.<sup>234</sup> However, the victim of MST is not looking to bring legal allegations against the attacker or even hold the attacker legally accountable.<sup>235</sup> In fact, the perpetrator is not involved in the VA compensation process whatsoever.<sup>236</sup> Hence, the question should not come down to whose word is more credible. As long as veterans claim that they were sexually assaulted during their time in service, a VA psychologist confirms a PTSD diagnosis, and there is no clear and convincing evidence to the contrary, veterans should be entitled to disability benefits for their MST-related PTSD.

## CONCLUSION

United States servicemen and servicewomen sacrifice their lives for our freedom. It is the duty of our nation, as President Lincoln eloquently stated, “to care for those who have borne the battle.”<sup>237</sup> Our soldiers serve the citizens of this country, and it is incumbent

<sup>232</sup> Darabnia, *supra* note 49, at 483.

<sup>233</sup> *See id.* at 456.

<sup>234</sup> *Id.* at 466.

<sup>235</sup> *See Getting Disability Compensation for MST*, FIGHT4VETS, <https://www.fight4vets.com/getting-disability-compensation-mst/> (last visited Sept. 23, 2018) (stating “if you have been victimized by another person and are now suffering mental anguish and anxiety as a result, you may be entitled to VA benefits”).

<sup>236</sup> *See Claims Process*, U.S. DEPT OF VETERANS AFFAIRS, <https://www.benefits.va.gov/compensation/process.asp> (last updated Jan. 19, 2018).

<sup>237</sup> Darabnia, *supra* note 49, at 487.

upon the citizens of this country to serve them when they return home and seek compensation for MST-related PTSD. Many soldiers return home physically and mentally wounded, and PTSD is the most chronic mental health condition that soldiers develop from their time in the military.<sup>238</sup> We, the citizens of the United States, should express our gratitude and serve these courageous individuals by contributing to the public funding of the Department of Veterans Affairs.

Specifically, the Veterans Benefits Administration provides financial assistance to our veterans and their families.<sup>239</sup> However, the VA does not evenly allocate disability benefits to veterans seeking PTSD disability claims.<sup>240</sup> Veterans seeking PTSD disability due to MST are denied benefits because they cannot provide the required corroborative evidence to prove that their injury was incurred or aggravated by a sexual assault they incurred in the military.<sup>241</sup> This additional requirement, which only veterans seeking MST-related PTSD disability must meet, reflects the VA's misperceptions about sexual assault. The non-exhaustive list set forth in §3.304(f)(5) wrongly presumes that most veterans quickly report their assaults, exhibit outward changes in behavior, or confide in others about their assault.<sup>242</sup> None of these presumptions are accurate. Moreover, interviews with employees across regional VA offices revealed that many adjudicators of MST claims misapply the evidentiary standard because they fail to identify markers, which subsequently should trigger a medical exam.<sup>243</sup> Finally, Title 38 of the Code of Federal Regulations promotes the notion that fear of harm from an enemy combatant is much greater than actual harm from sexual assault or fear of a recurring assault by a fellow servicemember.<sup>244</sup> If a veteran develops PTSD due to fear of an enemy combatant, he or

<sup>238</sup> See *id.* at 486.

<sup>239</sup> *Veterans Pension*, U.S. DEPT OF VETERANS AFFAIRS, [https://www.benefits.va.gov/pension/vetpen.asp?utm\\_source=vba\\_home&utm\\_medium=carousel&utm\\_campaign=vet-pension&utm\\_content=20180912](https://www.benefits.va.gov/pension/vetpen.asp?utm_source=vba_home&utm_medium=carousel&utm_campaign=vet-pension&utm_content=20180912) (last updated Sept. 27, 2017).

<sup>240</sup> See *MILITARY SEXUAL TRAUMA*, *supra* note 8, at 14. 94% of MST claims are made on the basis of PTSD. *Id.* at 6. The graph on page 14 shows the percentage of PTSD claims approved versus the percentage of claims approved based on other stressors. *Id.* at 14.

<sup>241</sup> *Id.* at 7.

<sup>242</sup> See 38 C.F.R. §3.304(f)(5) (2010).

<sup>243</sup> See *MILITARY SEXUAL TRAUMA*, *supra* note 8, at 7, 18.

<sup>244</sup> See 38 C.F.R. § 3.304(f)(3).

she can simply provide lay testimony to prove the required in-service stressor.<sup>245</sup> However, if veterans develop PTSD after being assaulted by another servicemember and simultaneously fear serious bodily harm, their word about their recent attack and fear is insufficient to establish the claimed in-service stressor required for PTSD.<sup>246</sup>

Given the history of underreporting in the military and the historically uneven distribution of VA benefits to veterans suffering from PTSD, this Note proposes swift passage and implementation of an amendment to Section 3.304(f) of Title 38 of the Federal Code of Regulations, which would eliminate the corroborative evidentiary requirement, or the wall, between veterans suffering from MST-related PTSD and the compensation benefits they deserve.<sup>247</sup>

<sup>245</sup> *Id.*

<sup>246</sup> *See* 38 C.F.R. § 3.304(f)(5).

<sup>247</sup> *See* 38 C.F.R. § 3.304(f).