

# Coming Full Circle: How VBA Can Complement Recent Changes in DoD and VHA Policy Regarding Military Sexual Trauma

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## INTRODUCTION

The number of service women and female veterans<sup>2</sup> is increasing, and this increase has been accompanied by a shift in attention to a new epidemic in sexual assault.<sup>3</sup> Many service members and young veterans are currently experiencing the unique “double traumas” of war and sexual assault.<sup>4</sup> Recently, the Department of Defense (DoD) and the Department of Veterans Affairs’ (VA) Veterans Health Administration (VHA) have recognized the plight of female veterans; in response, they have implemented drastic changes in reporting methods for service members and in treatment for victims of such traumas.<sup>5</sup>

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<sup>2</sup> Although the authors recognize that military sexual trauma (MST) affects both men and women, the majority of this Article will focus on women, as women are the majority of victims of sexual assault. In the United States, five to ten percent of rapes are of males. U.S. DEP’T OF DEF., REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES 6 & n.10 (Dec. 2009), [http://www.sapr.mil/media/pdf/research/DTFAMS-Rept\\_Dec09.pdf](http://www.sapr.mil/media/pdf/research/DTFAMS-Rept_Dec09.pdf) (citing U.S. DEP’T OF JUSTICE STATISTICS, 2005 NATIONAL CRIME VICTIMIZATION STUDY) [hereinafter TASK FORCE REPORT]. However, all suggestions presented in Part IV would be applied to any victim of MST.

<sup>3</sup> See generally Helen Benedict, *The Plight of Women Soldiers*, THE NATION, May 6, 2009, <http://www.npr.org/templates/story/story.php?storyId=103844570> (noting that female veterans experience depression and posttraumatic stress disorder (PTSD) at double the rate of male veterans); Katie Couric, *Sexual Assault Permeates U.S. Armed Forces*, CBS NEWS (Mar. 18, 2009), available at <http://www.cbsnews.com/stories/2009/03/17/eveningnews/main4872713.shtml> (noting that one in three female members of the military will experience sexual assault during their service); Yochi J. Dreazen, *Rate of Sexual Assault in Army Prompts an Effort at Prevention*, WALL ST. J., Oct. 3, 2008, at A17, available at <http://online.wsj.com/article/SB122298757937200069.html> (discussing the Department of Defense’s (DoD) efforts to prevent MST from occurring instead of only dealing with its aftermath).

<sup>4</sup> See Benedict, *supra* note 3.

<sup>5</sup> See 38 U.S.C. § 1720D (2006) (providing a program of counseling and care at VA for veterans who are victims of sexual trauma); U.S. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION

DoD, VHA, and the Veterans Benefits Administration (VBA) are interconnected in providing care for service members and veterans. Unfortunately, VBA's current regulations on personal assault (to include sexual assault) will not complement these new, recently implemented changes to the reporting and treatment of sexual assault trauma. Instead, veterans applying for compensation benefits for posttraumatic stress disorder (PTSD) based on military sexual trauma (MST)<sup>6</sup> have and will continue to confront a looming evidentiary problem when establishing their stressors.<sup>7</sup>

In Part I of this Article, the authors will discuss the rising epidemic of sexual assault in the military, as well as the recent changes to sexual assault reporting and treatment policy within the military. Part I will also examine how those changes are being implemented, and raise the possibility of new evidence problems arising from these policy changes. In Part II, the authors will examine the history of care provided for veterans suffering from MST-related disorders at VHA. This section will cover provisions addressing MST-related mental disorders in the recently passed Caregivers and Veterans Omnibus Health Services Act of 2010 and look at the changes currently being implemented to VA healthcare

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& RESPONSE, MISSION & HISTORY, <http://www.sapr.mil/index.php/about/mission-and-history> (last visited Oct. 1, 2011) [hereinafter MISSION & HISTORY] (explaining that the Joint Task Force for Sexual Assault Prevention and Response was created as the "single point of accountability for sexual assault policy" within DoD); Dreazen, *supra* note 3.

<sup>6</sup> Although MST is not specifically defined in any regulation, the United States Code refers to experiences of "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." 38 U.S.C. § 1720D(a)(1) (2006). See discussion *infra* notes 151-53 and accompanying text.

<sup>7</sup> Generally, the requirement of a "stressor" is one criterion for establishing a diagnosis of PTSD (specifically Criterion A) described as follows:

The person has been exposed to a traumatic event in which both of the following were present:

- (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
- (2) the person's response involved intense fear, helplessness, or horror.

THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81 (Am. Psychiatric Ass'n 4th ed.) (1994) [hereinafter DSM-IV]. See also discussion *infra* Part III.

for women. Part II will also address outstanding problems that remain after implementation of this law.

In Part III, the authors will discuss the evolution of PTSD claims based on personal assault in regulations and through cases decided by the United States Court of Appeals for Veterans Claims (“Court”) and the United States Court of Appeals for the Federal Circuit (Federal Circuit). This Part will examine current PTSD regulations, including those regarding PTSD based on personal assault. The authors will also address the recent changes in stressor corroboration by noncombat veterans for PTSD based on “fear of hostile military or terrorist activity.”<sup>8</sup>

In Part IV, the authors will address the current evidence problems facing veterans suffering from in-service MST-based PTSD as a result of new policy changes in combination with existing VBA procedures and regulations. This Part will provide suggestions for in-service preservation of evidence for future compensation claims. By using the new fear-based PTSD regulation as a guide, the authors will provide suggestions for a new framework for regulations regarding PTSD based on MST.

## I. DOD

### A. The “Double Traumas” Facing Women in the Military

Women comprise approximately fourteen percent of the active duty service members in the military, representing a doubling in the past thirty years.<sup>9</sup> In the next ten years, that number is expected to double again.<sup>10</sup> With an increased female

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<sup>8</sup> Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,852 (July 13, 2010).

<sup>9</sup> Rick Rogers, *Female Vets Issues Finally Getting Attention*, N. COUNTY TIMES, May 7, 2010, [http://www.nctimes.com/news/local/military/article\\_a0af3ed8-22ee-5a52-800b-4886704bed1f.html](http://www.nctimes.com/news/local/military/article_a0af3ed8-22ee-5a52-800b-4886704bed1f.html). Also, 17.5% of reserves and 20% of new recruits are women. *Id.*

<sup>10</sup> *Id.*

presence in the military, the wars in Iraq and Afghanistan represent a further shift, historically, in the typical deployed service member. The number of women who have fought and died in Iraq surpasses the total number of women who fought and died in all wars since World War II.<sup>11</sup> As of 2009, over 206,000 women have served in the Middle East since the start of the Iraq War in March 2003.<sup>12</sup> Most have served in Iraq, where one in ten service members is a woman.<sup>13</sup> The recession has also attracted new recruits to the military, with between sixteen and twenty-nine percent of new recruits being women.<sup>14</sup>

Research of veterans of the wars in Iraq and Afghanistan has suggested that the mental health effects of the wars are considerable.<sup>15</sup> Various studies have estimated that from nineteen to as many as forty-two percent of all veterans of these two wars are estimated to have mental health disorders.<sup>16</sup>

As the number of women in combat increases, Congress and DoD have begun to find it imperative to finally address the “double traumas of combat and sexual persecution” that plague female veterans.<sup>17</sup> Exposure to MST is one of the potential contributors to mental illness, with those who experience sexual trauma having a sixty percent increased chance of developing a mental illness.<sup>18</sup> A 2008 RAND Corporation study found that female veterans are suffering twice the rates of depression and

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<sup>11</sup> Benedict, *supra* note 3.

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

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

<sup>14</sup> *Id.*

<sup>15</sup> Rachel Kimerling et al., *Military-Related Sexual Trauma Among Veterans Health Administration Patients Returning from Afghanistan and Iraq*, 100 AM. J. PUB. HEALTH 1409, 1409 (2010).

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

<sup>17</sup> Benedict, *supra* note 3.

<sup>18</sup> Laura Fitzpatrick, *Landmark Bill Bolsters Care for Female Veterans*, TIME, May 5, 2010, <http://www.time.com/time/nation/article/0,8599,1987315,00.html>; Kimerling et al., *supra* note 15, at 1409.

PTSD than male veterans.<sup>19</sup> Recent studies have also revealed that women with past military service are more likely to commit suicide, as compared to women without military service.<sup>20</sup> These findings have demonstrated what some psychiatrists and psychologists are calling “a hidden epidemic of suicide among younger women with military service.”<sup>21</sup> Female veterans are also four times more likely to become homeless than their civilian counterparts.<sup>22</sup>

## **B. Sexual Assault in the Military**

The statistics of sexual assault and rape in the military are not fully known due, in part, to underreporting and relatively new tracking programs.<sup>23</sup> In 2004, Congress mandated that the Pentagon begin a comprehensive program by fiscal year 2006 to monitor incidents of sexual assault.<sup>24</sup> Prior to this date, a less complete—but still grim—picture was present. A 1995 study of female veterans of the Gulf and earlier wars, found that ninety percent had been sexually harassed.<sup>25</sup> A 2003 survey found that one-third of female veterans reported that they had

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<sup>19</sup> Benedict, *supra* note 3.

<sup>20</sup> Bentson H. McFarland et al., *Self-Inflicted Deaths Among Women with U.S. Military Service: A Hidden Epidemic?*, 61 PSYCHIATRIC SERVICES 1177, 1177 (2010).

<sup>21</sup> *Id.*

<sup>22</sup> Rogers, *supra* note 9.

<sup>23</sup> See William H. McMichael, *Battle Buddy Concept Combats Sex Assaults*, NAVY TIMES, Mar. 6, 2009, [http://www.navytimes.com/news/2009/03/military\\_sex\\_assault\\_030609w/](http://www.navytimes.com/news/2009/03/military_sex_assault_030609w/) (noting that upwards of three-quarters of all sexual assault victims do not report the crime); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1013T, MILITARY PERSONNEL: PRELIMINARY OBSERVATIONS ON DOD'S AND THE COAST GUARD'S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS 5, 12 (2008) [hereinafter GAO REPORT] (finding that instances of sexual assault exceeded the rates being reported and suggesting that the military had “only limited visibility over the incidence of these occurrences” and that data collected from current methodology was confusing and could be misinterpreted by Congress).

<sup>24</sup> GAO REPORT, *supra* note 23, at 1; MISSION & HISTORY, *supra* note 5; see Charlie Coon, *GAO: DOD Not Addressing Sex Assaults*, STARS AND STRIPES, Sept. 15, 2008, available at <http://www.stripes.com/news/gao-dod-not-addressing-sex-assaults-1.83021>.

<sup>25</sup> Maureen Murdoch & Kristin L. Nichol, *Women Veterans' Experiences with Domestic Violence and with Sexual Harassment While in the Military*, 4 ARCHIVES FAM. MED. 411 (1995), available at <http://archfam.ama-assn.org/cgi/reprint/4/5/411>.

been sexually assaulted or raped while serving.<sup>26</sup> A 2004 study of veterans found that seventy-one percent of women seeking treatment for PTSD were sexually assaulted or raped while serving.<sup>27</sup>

In fiscal year 2006, once DoD began tracking incidents of sexual assault, there were 2,947 cases of rape and sexual assault among all branches of service, and only 292 cases resulted in a military trial.<sup>28</sup> In fiscal year 2007, approximately 2,200 military cases were reported, and only 181 were prosecuted.<sup>29</sup> Data from 2007 also indicates that only 2.6 soldiers per 1,000 reported a sexual assault in the Army; in the Marine Corps and Navy, it was 1.1 per 1,000; and in the Air Force, it was 1.6 per 1,000.<sup>30</sup> In fiscal year 2008, 2,389 sexual assault cases were investigated.<sup>31</sup> These investigations involved 2,763 subjects, of which 317 were prosecuted by courts martial.<sup>32</sup> In academic year 2009-2010, sexual assault reports at the three United States military academies (Military Academy at West Point, Naval Academy, and Air Force Academy) also rose sixty-four percent.<sup>33</sup>

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<sup>26</sup> Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 266 (2003).

<sup>27</sup> Maureen Murdoch et al., *Prevalence of In-Service and Post-Service Sexual Assault Among Combat and Noncombat Veterans Applying for Department of Veterans Affairs Posttraumatic Stress Disorder Disability Benefits*, MIL. MED., May 2004, at 3.

<sup>28</sup> U.S. DEP'T OF DEF., ANNUAL REPORT ON MILITARY SERVICES SEXUAL ASSAULT FOR CY 2006, at 2, 5 (2007), <http://www.sapr.mil/media/pdf/reports/2006-annual-report.pdf>.

<sup>29</sup> U.S. DEP'T OF DEF., FY07 REPORT ON SEXUAL ASSAULT IN THE MILITARY 18 (2008), <http://www.sapr.mil/media/pdf/reports/2007-annual-report.pdf> [hereinafter FY07 REPORT ON SEXUAL ASSAULT].

<sup>30</sup> Dreazen, *supra* note 3; *see generally* FY07 REPORT ON SEXUAL ASSAULT, *supra* note 29.

<sup>31</sup> U.S. DEP'T OF DEF., FY08 REPORT ON SEXUAL ASSAULT IN THE MILITARY 36 (2009), [http://www.sapr.mil/media/pdf/reports/dod\\_fy08\\_annual\\_report\\_combined.pdf](http://www.sapr.mil/media/pdf/reports/dod_fy08_annual_report_combined.pdf) [hereinafter FY08 REPORT ON SEXUAL ASSAULT].

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

<sup>33</sup> SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES, ACADEMIC PROGRAM YEAR 2009-2010, at 3 (2010), [http://www.sapr.mil/media/pdf/reports/FINAL\\_APY\\_09-10\\_MSA\\_Report.pdf](http://www.sapr.mil/media/pdf/reports/FINAL_APY_09-10_MSA_Report.pdf); *see More Sex Assaults Reported at Military Academies*, ASSOCIATED PRESS, Dec. 15, 2010, [http://www.msnbc.msn.com/id/40685586/ns/us\\_news-crime\\_and\\_courts](http://www.msnbc.msn.com/id/40685586/ns/us_news-crime_and_courts).

These alarming numbers, along with a Pentagon report from 2008 that found that more than three-quarters of all sexual assault victims do not report the crime, caught the attention of senior personnel at DoD.<sup>34</sup> Adding to the concern was a 2008 report by the Government Accountability Office (GAO), which found that approximately half of the service members at fourteen installations who had been sexually assaulted over the last twelve months chose not to report the crime, often because of the concern that reporting the crimes would negatively impact their careers.<sup>35</sup>

This concern, sadly, was completely valid. Many female veterans who reported sexual assault by a fellow soldier or commander were threatened with prosecution for various crimes.<sup>36</sup> One female officer refused to return to a post with a fellow officer who she reported had raped her, and the Army threatened to prosecute her for desertion.<sup>37</sup> Similarly, when female soldiers refused to deploy with soldiers who sexually assaulted them, they were prosecuted for desertion, and in some cases, imprisoned.<sup>38</sup> In other instances, direct action was taken against the female soldier who reported rape, such as one woman who reported being gang-raped by three service members, and her command charged her with indecent behavior.<sup>39</sup> In a separate incident, a woman who was raped while on guard duty in Afghanistan was threatened with court martial for leaving her weapon behind.<sup>40</sup> After incidents similar to those above, in February 2011, seventeen veterans (fifteen females and two males) filed a

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<sup>34</sup> McMichael, *supra* note 23; see DEFENSE MANPOWER DATA CENTER (DMDC), 2006 GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS, DMDC Report No. 2007-022, at xi-xii (2008), <http://www.dtic.mil/dtic/tr/fulltext/u2/a476661.pdf>.

<sup>35</sup> GAO REPORT, *supra* note 23, at 13; see Dreazen, *supra* note 3. The Government Accountability Office (GAO) found that factors that discourage service members from reporting a sexual assault include the belief that nothing would be done; fear of ostracism, harassment, or ridicule; and concern that peers would gossip. GAO REPORT, *supra* note 23, at 14.

<sup>36</sup> *E.g.*, Benedict, *supra* note 3.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

federal lawsuit in the United States District Court for the Eastern District of Virginia, accusing DoD of “failing to take reasonable steps to prevent Plaintiffs from being repeatedly raped, sexually assaulted and sexually harassed by federal military personnel, and by impeding Plaintiffs’ exercise of their First Amendment rights.”<sup>41</sup> The current and former Secretaries of Defense were accused of fostering an environment where:

[M]ilitary personnel openly mocked and flouted the modest Congressionally-mandated institutional reforms [and] ran institutions in which Plaintiffs and other victims were openly subjected to retaliation, were encouraged to refrain from reporting rapes and sexual assaults in a manner that would have permitted prosecution, and were ordered to keep quiet and refrain from telling anyone about the criminal acts of their work colleagues.<sup>42</sup>

The wars in Afghanistan and Iraq have further increased the climate for sexual assault. In 2008, the Pentagon reported an eight percent increase overall in the reports of sexual assault, but also reported a twenty-six percent increase specifically in Iraq and Afghanistan.<sup>43</sup> Women deployed to Afghanistan and Iraq live and work in an environment that provides less personal security than those who are not deployed, due to security measures taken by the bases.<sup>44</sup> GAO additionally found that it could take days for criminal investigators to even report to a base in Iraq to investigate a rape.<sup>45</sup>

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<sup>41</sup> Complaint at 35, *Cioca v. Rumsfeld*, No. 1:2011cv00151 (E.D. Va. filed Feb. 15, 2011) (on file with authors); Courtney E. Martin, *Facing Sexual Assault*, THE AM. PROSPECT, Feb. 21, 2011, [http://www.prospect.org/cs/articles?article=facing\\_sexual\\_assault](http://www.prospect.org/cs/articles?article=facing_sexual_assault).

<sup>42</sup> Complaint, *supra* note 41, at 3.

<sup>43</sup> FY08 REPORT ON SEXUAL ASSAULT, *supra* note 31, at 33; Luis Martinez, *DOD Sexual Assault Report*, ABC NEWS (Mar. 17, 2009, 3:01 PM), <http://abcnews.go.com/blogs/politics/2009/03/dod-sexual-assa/>.

<sup>44</sup> Coon, *supra* note 24. For example, bases are often blacked out at night. *Id.*

<sup>45</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-1146T, *MILITARY PERSONNEL: ACTIONS NEEDED TO STRENGTHEN IMPLEMENTATION AND OVERSIGHT OF DOD’S AND THE COAST GUARD’S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS* 4 (2008).



Many service members sought to forgo prosecution of their assailants due to such concerns and evidentiary problems.<sup>46</sup> Of those service members who did seek prosecution, only an estimated 10.9% of these cases resulted in court martial in 2008, and a mere 8% were prosecuted in 2009.<sup>47</sup> Since then, DoD has hired dozens more investigators and set aside millions of dollars for the new investigators to be trained.<sup>48</sup> In the spring of 2011, DoD's Sexual Assault Prevention and Response Office (SAPRO) released a report indicating that courts martial for those accused of sexual assault have increased to fifty-two percent.<sup>49</sup>

### **C. The GAO Report and Changes in the Military**

In 2008, GAO presented its preliminary observations on DoD and the Coast Guard's sexual assault prevention and response programs, and the report was dismal.<sup>50</sup> Overall, the GAO found that DoD and the Coast Guard lacked an oversight framework to adequately evaluate the effectiveness of sexual assault prevention and reporting programs.<sup>51</sup> The GAO report found that the military had not adequately planned for dealing with MST among deployed personnel, had a shortage of mental health care providers, provided inconsistent information for rape victims, and had not provided adequate counseling for sex-crime victims.<sup>52</sup> Service members severely underreported incidences of sexual assault, which suggested that DoD and the Coast Guard only had "limited visibility over the incidence of" sexual assaults.<sup>53</sup> Factors that

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<sup>46</sup> See Benedict, *supra* note 3.

<sup>47</sup> *The Diane Rehm Show: Sexual Assault and the U.S. Military*, Am. Univ. Radio (Feb. 17, 2011), available at <http://thedianerehmshow.org/shows/2011-02-17/sexual-assault-and-us-military/transcript> [hereinafter *Diane Rehm Show*]; Benedict, *supra* note 3.

<sup>48</sup> *Diane Rehm Show*, *supra* note 47.

<sup>49</sup> U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULTS IN THE MILITARY: FISCAL YEAR 2010, at 73 (2011), [http://www.sapr.mil/media/pdf/reports/DoD\\_Fiscal\\_Year\\_2010\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf).

<sup>50</sup> See generally GAO REPORT, *supra* note 23.

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 3; Coon, *supra* note 24.

<sup>53</sup> GAO REPORT, *supra* note 23, at 12.

discouraged service members from reporting MST included fear of backlash, ridicule, and gossip, along with the belief that reporting the crime would be of no benefit since no changes would be implemented or no action would be taken against the accused.<sup>54</sup>

Although Congress mandated that DoD establish a task force to examine matters related to sexual assault (to include studying victims and offenders) in 2004, GAO found that the task force had not yet begun its review nearly four years later.<sup>55</sup> Senior officials within the Office of the Under Secretary of Defense for Personnel and Readiness intend “to use the task force’s findings to evaluate the effectiveness of DoD’s sexual assault prevention and response programs.”<sup>56</sup> Without these findings, DoD’s programs have had little to no oversight.<sup>57</sup>

DoD had, however, taken positive steps toward establishing a program to prevent, respond to, and resolve sexual assault, including establishing a confidential reporting option (named “restricted reporting”), instituting SAPRO to serve as a point of accountability, establishing training requirements for service members, and reporting data to Congress.<sup>58</sup>

The purpose of establishing restricted reporting was mainly to encourage victims to receive medical care after sexual assault without the risk of being stigmatized or punished.<sup>59</sup> Prior to the installation of restricted reporting, victims who reported sexual assault to any official did not remain anonymous, and their commanders were notified about their assertions of assault.<sup>60</sup> This created an incentive to forgo reporting any instance of

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<sup>54</sup> *Id.* at 14.

<sup>55</sup> *Id.* at 5.

<sup>56</sup> *Id.* at 20.

<sup>57</sup> *Id.* at 18-20.

<sup>58</sup> *Id.* at 8-9.

<sup>59</sup> TASK FORCE REPORT, *supra* note 2, at ES-4; Martinez, *supra* note 43.

<sup>60</sup> Martinez, *supra* note 43.

sexual assault in order to protect one's own identity.<sup>61</sup> Under the restricted reporting option, victims of MST are now able to obtain psychological and medical care, while remaining anonymous to their chain of command.<sup>62</sup> A restricted report may only be made to a Sexual Assault Response Coordinator, victim advocate, medical personnel, or chaplain.<sup>63</sup> Under restricted reporting, charges are not filed, but the victim has a year to change his or her mind about remaining anonymous and may pursue charges.<sup>64</sup> In contrast, under the unrestricted reporting option, the service member's chain of command is immediately informed of the alleged sexual assault.<sup>65</sup> The chain of command may thereafter choose to pursue a criminal investigation, and eventually, prosecution of the offender.<sup>66</sup> Although the GAO Report praised DoD and the Coast Guard for establishing an effective reporting system, it also found that several factors were problematic to the successful implementation of that system, to include inconsistent support for the programs, limited training of coordinators, and limited access to mental health services.<sup>67</sup>

In December 2009, the Defense Task Force on Sexual Assault in the Military Services ("Task Force") issued a lengthy report with recommendations and findings for DoD.<sup>68</sup> Recommendation 26a was that the Secretary of Defense direct that medical records of sexual assault victims contain accurate and complete information with respect to the physical and emotional injuries resulting from the assault.<sup>69</sup> Recommendation 26b was that separation physicals specifically ask questions regarding sexual assault and sexual assault

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

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

<sup>63</sup> GAO REPORT, *supra* note 23, at 7.

<sup>64</sup> Martinez, *supra* note 43.

<sup>65</sup> GAO REPORT, *supra* note 23, at 7.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 10-12.

<sup>68</sup> TASK FORCE REPORT, *supra* note 2.

<sup>69</sup> *Id.* at 75.

services.<sup>70</sup> Both recommendations specifically reference the fact that taking these steps would be beneficial for victims seeking future benefits with VA.<sup>71</sup>

The Task Force also recommended that DoD ensure more complete reporting, noting that Congress had mandated the creation of a database of sexual assault incidents in the Armed Forces.<sup>72</sup> Several data base systems were supposed to be in place and working, but the main system—the Defense Sexual Assault Incident Database (“DSAID”)—was not yet active.<sup>73</sup> Also, there were already problems identified with the current proposal for DSAID.<sup>74</sup>

In response to the December 2009 Task Force report, DoD prepared a seven-page report in May 2010.<sup>75</sup> DoD generally agreed with the recommendations made by the Task Force.<sup>76</sup> DoD did not, however, comment on recommendations 26a and b, the recommendations that would greatly assist VA in its adjudication of claims for service connection for PTSD.<sup>77</sup> Despite this, DoD did state that in January 2010 it released a request for a proposal to establish a contract for the development, implementation, and maintenance of DSAID.<sup>78</sup>

Recent changes have also included the implementation of a sexual assault awareness campaign. One aspect of the new campaign includes a program encouraging bystander intervention to prevent

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 79 (citing Pub. L. No. 110-417, § 563 (codified at 10 U.S.C. § 113, Note (2006 & Supp. IV 2010)).

<sup>73</sup> *Id.*

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

<sup>75</sup> U.S. DEP’T OF DEF., ASSESSMENT: DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES REPORT (2010), [http://www.sapr.mil/media/pdf/research/DoD\\_Response\\_to\\_DTF-SAMS\\_Signed\\_Letters\\_to\\_Congress\\_and\\_Response\\_Combined.pdf](http://www.sapr.mil/media/pdf/research/DoD_Response_to_DTF-SAMS_Signed_Letters_to_Congress_and_Response_Combined.pdf).

<sup>76</sup> *Id.* at 1.

<sup>77</sup> *See id.* at 3, 6.

<sup>78</sup> *Id.* at 6.

sexual assault and rape.<sup>79</sup> Named “I AM Strong,” with the “I AM” standing for “intervene, act, motivate,” the program builds on the “battle buddy” concept that is already familiar to service members.<sup>80</sup> The military encourages service members to watch out for each other and “never leave a fallen comrade.”<sup>81</sup> The new awareness campaign also includes broadcast videos aimed at educating service members about rape, to include an aim to dismiss the common misconception that rape is often committed by a stranger.<sup>82</sup>

The military recently established a sexual assault hotline in cooperation with the Rape, Abuse, and Incest National Network, to ensure that any service member located anywhere in the world is able to call the hotline.<sup>83</sup>

#### **D. Existing and Potential Problems**

Although changes have been made by the military, these changes are not without problems. GAO found that because the sexual assault prevention and reporting program was in the early stages of development, it still lacked direction and consistency.<sup>84</sup> Thus, data from this program remained unreliable, as a consistent methodology for reporting incidents across several branches of service had not been established.<sup>85</sup>

Another significant problem with tracking the trends of sexual assault in the military is that any increase in reported incidents could mean that more incidents are being reported

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<sup>79</sup> McMichael, *supra* note 23.

<sup>80</sup> Dreazen, *supra* note 3; McMichael, *supra* note 23.

<sup>81</sup> McMichael, *supra* note 23.

<sup>82</sup> *Id.*

<sup>83</sup> *RAINN Helps Victims of Sexual Assault in the Military Through Groundbreaking Service for Department of Defense*, RAPE, ABUSE & INCEST NAT’L NETWORK, <http://www.rainn.org/news-room/SAFEHelpline> (last visited Oct. 1, 2011); see *Diane Rehm Show*, *supra* note 47.

<sup>84</sup> GAO REPORT, *supra* note 23, at 15.

<sup>85</sup> *Id.* at 19.

rather than an increase in crime.<sup>86</sup> Alternatively, it could mean both.<sup>87</sup> Rape is the most underreported crime in the military,<sup>88</sup> and it is well known that sexual assault leads to negative mental health consequences among both civilian and military populations.<sup>89</sup> GAO additionally found that DoD and the Coast Guard's inconsistent reporting methods could be misinterpreted by Congress.<sup>90</sup> Defense officials have attributed the drastic increase in the number of reported sexual assaults as partly due to new programs encouraging reporting;<sup>91</sup> however, without years of data and consistent reporting techniques, it will be extremely difficult to understand the success of any newly implemented programs.

To complicate issues, although Congress ordered DoD to formally address sexual assault in 2004, senior figures in DoD ignored subpoenas to update Congress on the military's progress in 2008.<sup>92</sup> The Task Force's report only first became available in December 2009.<sup>93</sup> Unfortunately, DoD's tracking programs are relatively new and have not been treated seriously until only recently. As of August 2010, there had been absolutely no data regarding MST in the context of post-deployment mental health among veterans of the Afghanistan and Iraq wars.<sup>94</sup>

Now that Congress and DoD have begun to understand the severity of sexual assault among (mainly female) service members in the military, changes have been implemented. The military,

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<sup>86</sup> Benedict, *supra* note 3.

<sup>87</sup> *Id.*; Martinez, *supra* note 43.

<sup>88</sup> Couric, *supra* note 3.

<sup>89</sup> Kimerling et al., *supra* note 15, at 1409.

<sup>90</sup> GAO REPORT, *supra* note 23, at 19. The GAO Report cites as an example Sexual Assault Response Coordinators "who focus on victim care, report data on the number of sexual assault incidents brought using the restricted reporting," whereas the criminal investigative organizations "report data on the number of sexual assault incidents brought using the unrestricted reporting option." *Id.* The latter data is reported on a "per incident" basis, which could include data for "multiple victims or alleged offenders." *Id.*

<sup>91</sup> Diane Rehm Show, *supra* note 47; Martinez, *supra* note 43.

<sup>92</sup> Coon, *supra* note 24.

<sup>93</sup> TASK FORCE REPORT, *supra* note 2.

<sup>94</sup> Kimerling et al., *supra* note 15, at 1409.

however, maintains a serious problem with its reporting options: they remain shortsighted. In this regard, one of the most serious problems remains that those who choose the anonymous restricted reporting method will not have any of their files available *after* service in order to pursue VA-related benefits.

## II. VHA

With increasing numbers of women in the military comes increasing numbers of female veterans. Currently, there are an estimated 1.8 million female veterans.<sup>95</sup> Female veterans are more likely to use VA healthcare than male veterans, and they also use VA healthcare more often than their male counterparts.<sup>96</sup> The number of females using the VA health care system is expected to double by 2015.<sup>97</sup> With an estimated twenty percent of military women who experience sexual assault,<sup>98</sup> these victims of MST have an increased risk of developing mental health problems, such as PTSD.<sup>99</sup> VA has reported that as of late 2009, the number of female veterans diagnosed with PTSD reached 11,713.<sup>100</sup>

Historically, since 1992 Congress has recognized the growing number of MST-related victims, and has mandated that VHA respond accordingly. The Veterans Health Care Act of 1992 first authorized VA to provide female veterans who were victims of MST with counseling and treatment programs.<sup>101</sup> In 1994, the law was expanded for VA to also provide counseling and treatment for

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<sup>95</sup> *Bill Aims to Expand VA Care for Underserved*, AM. LEGION (Apr. 22, 2010), <http://www.legion.org/legislative/12841/bill-aims-expand-va-care-under-served>. By 2023, the number of female veterans is expected to exceed two million. U.S. DEP'T OF VETERANS AFFAIRS OFFICE OF INSPECTOR GEN., REP. NO. 10-01640-45, REVIEW OF COMBAT STRESS IN WOMEN VETERANS RECEIVING VA HEALTH CARE AND DISABILITY BENEFITS 1 (2010), <http://www.va.gov/oig/52/reports/2011/VAOIG-10-01640-45.pdf> [hereinafter COMBAT STRESS REPORT].

<sup>96</sup> COMBAT STRESS REPORT, *supra* note 95, at 12-13.

<sup>97</sup> Fitzpatrick, *supra* note 18.

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

<sup>99</sup> *Id.*

<sup>100</sup> Rogers, *supra* note 9.

<sup>101</sup> Pub. L. No. 102-585, § 102, 106 Stat. 4943, 4945-46 (codified at 38 U.S.C. § 1720D).

men who were sexually assaulted.<sup>102</sup> In 2004, Congress passed the Veterans Health Programs Improvement Act of 2004 which permanently extended VA's authority to provide treatment to MST victims.<sup>103</sup> In a VHA Directive in 2005, VHA employees were mandated to conduct universal screenings of all enrolled veterans for a history of MST.<sup>104</sup> MST Coordinators were also to be appointed for oversight of screenings and eventual treatment.<sup>105</sup> In 2010, a new VHA directive rescinded the 2005 VHA Directive and mandated that VHA provide MST-related care to all veterans, despite whether the veteran was service connected or even eligible for VA care.<sup>106</sup>

In response to the increasing number of female veterans, as well as the surge of women-specific health issues, President Obama signed the Caregivers and Veterans Omnibus Health Services Act of 2010 ("Veterans Health Services Act") in May 2010.<sup>107</sup> The Veterans Health Services Act merged two veterans' healthcare bills. The merged bill had passed Committee with unanimous bipartisan support in the summer of 2009 but was blocked from a floor vote by a single Senator until November 2009.<sup>108</sup>

The Veterans Health Services Act specifically calls for VA mental health professionals to be trained to handle sexual trauma.<sup>109</sup> The Secretary of VA is also mandated to submit to

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<sup>102</sup> Veterans Health Programs Extension Act of 1994, Pub. L. No. 103-452, § 101, 108 Stat. 4783, 4783-84 (codified in scattered sections of 38 U.S.C.).

<sup>103</sup> Pub. L. No. 108-422, § 301, 118 Stat. 2379, 2382-83 (codified as amended at 38 U.S.C. § 1720D).

<sup>104</sup> COMBAT STRESS REPORT, *supra* note 95, at 4.

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

<sup>106</sup> VETERANS HEALTH ADMIN., DIRECTIVE 2010-033, at 1, 6 (July 14, 2010), [http://www.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=2272](http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2272).

<sup>107</sup> Pub. L. No. 111-163, 124 Stat. 1130 (codified as amended at 38 U.S.C. § 1720D); *see* Fitzpatrick, *supra* note 18.

<sup>108</sup> Press Release, U.S. Senate Comm. on Veterans Affairs, Senate Passes Sweeping Reform for Veterans and Their Caregivers 98-0 (Nov. 19, 2009), <http://veterans.senate.gov/press-releases.cfm> (follow "2009" hyperlink; then follow "November" hyperlink; then follow "Senate Passes Sweeping Reform for Veterans and Their Caregivers 98-0" hyperlink).

<sup>109</sup> Pub. L. No. 111-163, § 202, 124 Stat. at 1142-43.



Congress an annual report on the counseling, care, and services provided to veterans suffering from PTSD and/or sexual trauma.<sup>110</sup> The annual report must include recommendations for improvements in the treatment of female veterans with sexual trauma and PTSD.<sup>111</sup>

Although female veterans' issues have only recently begun to be addressed, officials recognize that more must be done, especially in the area of sexual trauma response.<sup>112</sup> A recent survey released by the American Legion in March 2011 indicated that one in four female veterans said that the availability of gender-specific health care was poor within the VA system, and over half believed that the sexual trauma services were inadequate.<sup>113</sup> Many female veterans who are survivors of sexual trauma have experienced re-triggering of the trauma simply because VA staff had not been properly trained to handle sexual assault cases.<sup>114</sup>

Over time, as the Veterans Health Services Act is implemented at VA Medical Centers across the country, the caliber of care for female veterans will most likely increase, attracting more female veterans. As the military and VHA have both recognized the pressing issue of sexual assault facing service members and begun to make significant changes in response, VBA must also consider its current policy for those filing claims to establish entitlement to service connection for mental disorders arising from these in-service incidents.

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Leo Shane III, *Survey: Female Vets Frustrated with VA Health Care*, STARS AND STRIPES, Mar. 22, 2011, <http://www.stripes.com/news/survey-female-vets-frustrated-with-va-health-care-1.138566#>.

<sup>113</sup> *Id.*

<sup>114</sup> *Diane Rehm Show, supra note 47.*

### III. VBA

#### A. Establishing Service Connection for PTSD

Service members who leave the service with a disability or develop a disability after separation from service due to an in-service disease or injury may be awarded compensation for such disabilities; briefly, for a direct claim for service connection, a claimant must generally show that he or she has a present disability and that disability was incurred or aggravated in service.<sup>115</sup> A claim for service connection for PTSD, however, is unique and specific requirements for establishing entitlement to service connection are set forth in 38 C.F.R. § 3.304(f).<sup>116</sup>

To establish entitlement to service connection for PTSD under § 3.304(f), there are three elements. First, there must be medical evidence diagnosing PTSD in accordance with § 4.125(a), which addresses diagnoses of mental disorders.<sup>117</sup> The diagnosis should conform to the Diagnostic Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)<sup>118</sup> and should be supported by the findings on the examination report; otherwise the rating agency (the Regional Office) should return the report to the examiner to substantiate the diagnosis.<sup>119</sup>

Second, there must be a link between current symptoms and an in-service stressor.<sup>120</sup> This link must be established by

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<sup>115</sup> 38 U.S.C. §§ 1110, 1131 (2006); 38 C.F.R. §§ 3.303, 3.304 (2010).

<sup>116</sup> 38 C.F.R. § 3.304(f).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* § 4.125(a). There is currently a text revision of the DSM-IV (DSM-IV-TR) available. See *Summary of Text Changes in DSM-IV-TR*, AM. PSYCHIATRIC ASS'N, <http://www.psych.org/MainMenu/Research/DSMIV/DSMIVTR/DSMIVvsDSMIVTR/SummaryofTextChangesInDSMIVTR.aspx> (last visited Oct. 1, 2011). The DSM-V is anticipated in May 2013. *DSM-5: The Future of Psychiatric Diagnosis*, AM. PSYCHIATRIC ASS'N, <http://www.dsm5.org/Pages/Default.aspx> (last visited Oct. 1, 2011).

<sup>119</sup> 38 C.F.R. § 4.125(a).

<sup>120</sup> *Id.* § 3.304(f).

medical evidence.<sup>121</sup> In other words, the clinician diagnosing PTSD must state that the disorder is a direct result of the stressor. Finally, there must be credible supporting evidence that the claimed in-service stressor actually occurred.<sup>122</sup>

Several other provisions apply to claims for PTSD depending on the type of stressor claimed. One provision addresses when the veteran was diagnosed with PTSD while in service and another addresses when the veteran was in combat.<sup>123</sup> Another covers veterans who were prisoners-of-war (POWs).<sup>124</sup> Stressors of combat veterans (those awarded certain combat citations or shown to have been in combat) and veterans who were POWs are presumed to have occurred and there is a lightened burden of evidence for these claimants.<sup>125</sup>

## **B. Solving the Evidence Problem for Some**

On July 13, 2010, VA published a final rule that amended its adjudication regulation governing service connection for PTSD by liberalizing, in certain circumstances, the evidentiary standard for establishing the occurrence of the required in-service stressor.<sup>126</sup> The revisions add to the types of claims for which VA will accept credible lay testimony

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* § 3.304(f)(1), (2).

<sup>124</sup> *Id.* § 3.304(f)(3); *see* Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,852 (July 13, 2010) (redesignating paragraph (f)(3) of § 3.304 as (f)(4)). For a complete history of § 3.304(f), which dates back to 1993, *see* Nathaniel J. Doan & Barbara C. Morton, *A New Era for Establishing Service Connection for Posttraumatic Stress Disorder (PTSD): A Proposed Amendment to the Stressor Verification Requirement*, 2 VETERANS L. REV. 249, 253-57 (2010).

<sup>125</sup> 38 C.F.R. § 3.304(f)(1), (2). The United States Court of Appeals for the Federal Circuit has provided a definition for “presumption” as follows: “The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue.” *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998).

<sup>126</sup> Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. at 39,843; *see* Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 41,092 (July 15, 2010) (correcting the effective and applicability dates from July 12, 2010, to July 13, 2010).

alone as sufficient to establish the occurrence of an in-service stressor without undertaking other development to verify the veteran's account.<sup>127</sup>

The revisions to 38 C.F.R. § 3.304(f) eliminate the requirement for corroborating evidence of the claimed in-service stressor if it is related to the veteran's "fear of hostile military or terrorist activity."<sup>128</sup> The new regulatory provision requires that a VA psychiatrist or psychologist, or contract equivalent, must confirm that the claimed stressor is adequate to support a diagnosis of PTSD; that the claimed stressor is consistent with the places, types, and circumstances of the veteran's service; and that the veteran's symptoms are related to the claimed stressor.<sup>129</sup> If these criteria are all met, then the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.<sup>130</sup> The amendment has no substantive impact on PTSD claims that arise out of in-service diagnoses of PTSD, stressors experienced during combat, internment as a POW, or as the result of personal assault; these situations are covered in the other provisions of § 3.304(f).<sup>131</sup>

"Fear of hostile military or terrorist activity" is described as "a veteran [who] experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others."<sup>132</sup> Several examples of "hostile military or terrorist activity" are provided, including: "an actual or potential improvised explosive device; . . . incoming artillery, rocket, or mortar fire; grenade; small arms fire . . . ; or attack upon friendly military aircraft."<sup>133</sup> The veteran's response to the

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<sup>127</sup> Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. at 39,843.

<sup>128</sup> *Id.* at 39,852.

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

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*; see 38 C.F.R. § 3.304(f) (2010).

<sup>132</sup> Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. at 39,852.

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

event or circumstance must have involved a “psychological or psycho-physiological state of fear, helplessness, or horror.”<sup>134</sup>

The fear-based PTSD regulation is a presumption that applies to those veterans who do not qualify for the combat presumption under § 3.304(f)(2) or the POW presumption under redesignated § 3.304(f)(4).<sup>135</sup> Under the fear-based regulation, a veteran who has no combat awards, no combat military occupational specialty, and no documentation regarding a stressor other than his or her own allegations still may prevail in a claim for PTSD.<sup>136</sup> The regulation change was enacted to alleviate the evidence problem that has long plagued VA adjudicators in fear-related PTSD claims.<sup>137</sup>

The history of war zone-related PTSD and its evolution has long been and will continue to be a subject of great interest.<sup>138</sup> Similarly, although the trouble with in-service MST-related PTSD cases has been explored, regulation changes have not yet occurred.<sup>139</sup>

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

<sup>135</sup> *See id.* (redesignating the provision for prisoners of war (POWs) as paragraph (f)(4) of § 3.304).

<sup>136</sup> *See id.* at 39,846 (establishing that the revised regulation “eliminates the need for corroborating evidence of the event if the requirements of the rule are met”).

<sup>137</sup> *Id.* at 39,843. *See* Doan & Morton, *supra* note 124, at 253–57 (discussing stressor corroboration); *see also* Bradley A. Fink, *Presume Too Much: An Examination of How the Proposed COMBAT PTSD Act Would Alter the Presumption of a Traumatic Stressor’s Occurrence for Veterans*, 2 VETERANS L. REV. 221 (2010) (discussing different evidentiary requirements for combat and non-combat veterans seeking service connection for PTSD).

<sup>138</sup> *See generally* F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1 (2010) (explaining the historical development of PTSD related to service in a war zone).

<sup>139</sup> *See generally* Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma*, 16 WM. & MARY J. WOMEN & L. 155 (2009) (arguing that current regulations are too burdensome for female veterans in PTSD-related combat and MST cases).

### C. Current Personal Assault Regulations

If a veteran's claim for PTSD is not combat-related, it is often governed by the provisions in redesignated § 3.304(f)(5), which address in-service personal assault.<sup>140</sup> This paragraph directs that special notice and assistance be provided to the claimant and outlines the specific type of evidence pertinent to the claim.<sup>141</sup> Unlike in the combat or fear-based PTSD provisions, this paragraph does not provide for any special presumption.<sup>142</sup> The paragraph states that VA will not deny a PTSD claim based on in-service personal assault without first advising the veteran that evidence from sources other than the veteran's service records or evidence of behavior changes may constitute credible supporting evidence of the stressor.<sup>143</sup> VA must also allow the veteran the opportunity to furnish this type of evidence or advise VA of potential sources of such evidence before denying the claim.<sup>144</sup> Also notable is the regulation's direction regarding providing a VA examination: "VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred."<sup>145</sup>

Examples of evidence that may substantiate a claim for PTSD based on in-service personal assault are identified within the personal assault provision of § 3.304(f), and include records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted diseases; statements from

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<sup>140</sup> Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. at 39,852 (redesignating the provisions on in-service personal assault from 38 C.F.R. § 3.304(f)(4) to § 3.304(f)(5)). There are exceptions; for example, a veteran could claim that PTSD developed after he or she witnessed a plane crash during peacetime. Assuming PTSD was not diagnosed in service, this type of stressor would not be covered under any of the specified revised provisions of 38 C.F.R. § 3.304(f).

<sup>141</sup> 38 C.F.R. § 3.304(f)(4) (2010) (setting forth the special notice requirements).

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

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

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

<sup>145</sup> *Id.*

family members, roommates, fellow service members, or clergy; and evidence of behavior changes.<sup>146</sup> Evidence establishing behavior changes is also specifically delineated, and includes “a request for a 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.”<sup>147</sup> The regulation notes that the examples given are not exhaustive, but have been provided to show the types of evidence that are being sought by VA adjudicators—secondary and behavioral evidence that may provide clues as to the veteran’s circumstances at the time period surrounding the assault.<sup>148</sup>

It is clear from the examples of evidence given that MST claims are contemplated as a subset of in-service personal assault claims.<sup>149</sup> However, not all in-service personal assault claims are MST claims. For example, a veteran may allege having PTSD due to being punched by a fellow service member. This too would be a personal assault case and must be given the proper notice procedures as described above.

In this regard, MST is not specifically mentioned or defined in § 3.304(f).<sup>150</sup> Statutes governing VA medical care directly address the issue. In 38 U.S.C. § 1720D(a)(1), a section dealing with treatment in a hospital, nursing home, domiciliary, and/or medical care, VA is mandated to operate a program where psychological trauma caused by sexual assault is addressed.<sup>151</sup> The psychological trauma must, in the judgment

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* In particular, the reference to pregnancy tests and tests for sexually transmitted diseases illustrates that MST is considered a type of in-service personal assault. See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,330 (Mar. 7, 2002).

<sup>150</sup> See Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,852 (July 13, 2010); 38 C.F.R. § 3.304(f)(4).

<sup>151</sup> 38 U.S.C. § 1720D(a)(1) (2006).

of a mental health professional employed by VA, have “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.”<sup>152</sup> The term “sexual harassment” is defined in § 1720D(f) as “repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character.”<sup>153</sup> VA’s National Center for PTSD references this statute to define MST.<sup>154</sup>

Essentially, in MST cases, 38 C.F.R. § 3.304(f)(5) states that lay evidence *could* be the sole source of corroboration for an in-service stressor.<sup>155</sup> VA *may* submit the evidence to a health care professional for an opinion, which *could* help in making the determination, but whether a stressor occurred is a factual question left to VA adjudicators.<sup>156</sup> There is currently no mandate to provide the veteran with a VA examination, and whether the lay evidence is sufficient to obtain an examination is a question left for adjudicators.<sup>157</sup>

#### **D. Current Evidence Development**

Currently, VA’s protocol for developing service-connection claims for PTSD based on personal trauma is set forth in VA’s Adjudication Procedures Manual Rewrite (“Manual”).<sup>158</sup> The Manual’s direction on this subject has evolved over the years as the DSM and relevant VA regulations have changed.

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* § 1720D(f).

<sup>154</sup> *Military Sexual Trauma*, NAT’L CTR. FOR PTSD, <http://www.ptsd.va.gov/public/pages/military-sexual-trauma-general.asp> (last updated Apr. 27, 2011).

<sup>155</sup> See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,332 (Mar. 7, 2002); Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. at 39,852 (redesignating paragraph (f)(4) of 38 C.F.R. § 3.304 as (f)(5)).

<sup>156</sup> See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,332.

<sup>157</sup> *Id.* at 10,330-31.

<sup>158</sup> VA ADJUDICATION PROCEDURES MANUAL REWRITE M21-1MR, pt. IV, subpt. ii, ch.1, § D.17 (Sept. 2009) (on file with authors).



Currently, personal trauma is defined in the Manual as “an event of human design that threatens or inflicts harm.”<sup>159</sup>

The Manual acknowledges that veterans “claiming service connection for disability due to in-service personal trauma face unique problems documenting their claims.”<sup>160</sup> The Manual states that stressors are “often violent and may lead to the development of PTSD,”<sup>161</sup> but recognizes that stressors are not always documented.<sup>162</sup> Examples of in-service personal assault are provided, and include rape, physical assault, domestic battering, robbery, mugging, stalking, and harassment.<sup>163</sup> The standard of evidence required to establish service connection is reiterated,<sup>164</sup> as well as guidance regarding obtaining sensitive evidence from the veteran “as compassionately as possible.”<sup>165</sup> The Manual also reminds adjudicators that many incidents are not officially reported and victims often find it difficult to produce evidence to support the stressor.<sup>166</sup>

The Manual also addresses alternative sources that may be used to corroborate MST/personal assault cases, identifying sources such as rape crisis centers or centers for domestic abuse, counseling facilities, health clinics, family members or roommates, faculty members, civilian police reports, medical reports from civilian physicians or caregivers who may have treated the veteran either immediately following the incident or some time later, chaplain or clergy, fellow service personnel, or personal diaries or journals.<sup>167</sup> The Manual also provides instructions to adjudicators on obtaining police reports filed while the veteran was on active duty.<sup>168</sup>

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<sup>159</sup> *Id.* § D.17.a.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* § D.17.f.

<sup>163</sup> *Id.* § D.17.a.

<sup>164</sup> *Id.* § D.17.b.

<sup>165</sup> *Id.* § D.17.c.

<sup>166</sup> *Id.* § D.17.f.

<sup>167</sup> *Id.* § D.17.g.

<sup>168</sup> *Id.* § D.17.h.

### **E. The Courts' Take and Regulatory Changes**

The case law regarding PTSD, to include as due to in-service personal assault, has evolved with the regulations over time as these types of cases have become more prominent. In an early case, *Wood v. Derwinski*,<sup>169</sup> the Court found that VA is not bound to accept a veteran's uncorroborated account of what happened in service, regardless of whether a social worker or psychiatrist believes her or him.<sup>170</sup> In this case, the Veteran<sup>171</sup> claimed that his PTSD stemmed from combat stressors, but did not provide enough specific information for VA to confirm the stressors.<sup>172</sup>

In *Zarycki v. Brown*,<sup>173</sup> the Court addressed the duty of VA to inform the Veteran of additional information needed to substantiate a claim for service connection for PTSD.<sup>174</sup> At that time, the regulation did not set forth any specific provisions for personal assault.<sup>175</sup> In *Zarycki*, the Veteran claimed that his

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<sup>169</sup> 1 Vet. App. 190 (1991).

<sup>170</sup> *Id.* at 192.

<sup>171</sup> In January 2009, Secretary Shinseki issued a directive indicating in VA publications the "v" in "veteran" should be capitalized to read "Veteran" when used as a proper noun. See E-mail from Ken Greenberg, Exec. Sec'y to the Dep't, U.S. Dep't of Veterans Affairs, to VA Central Office Exec. Secretariat (Jan. 23, 2009 9:20 AM EST) (on file with the *Veterans Law Review*).

<sup>172</sup> *Wood*, 1 Vet. App. at 192-93 Note, however, that this case did not involve personal assault.

<sup>173</sup> 6 Vet. App. 91 (1994).

<sup>174</sup> *Id.* at 99-100.

<sup>175</sup> In 1993, 38 C.F.R. § 3.304(f) looked very different than it does currently and did not delineate separate provisions for different in-service experiences, although combat and POW issues were addressed:

(f) *Post-traumatic stress disorder.* Service connection for post-traumatic stress disorder requires medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor. If the claimed stressor is related to combat, service department evidence that the veteran engaged in combat or that the veteran was awarded the Purple Heart, Combat Infantryman Badge, or similar combat citation will be accepted, in the absence of evidence to the contrary, as conclusive evidence of the claimed inservice stressor. Additionally, if the claimed stressor is

currently diagnosed PTSD was based on a number of combat and war exposures (such as witnessing dead bodies).<sup>176</sup> Based on the old version of the regulation and the parameters set forth in the Manual at the time, the Court held that the evidence required to support the occurrence of an in-service stressor varied depending on whether or not a veteran was in combat.<sup>177</sup> When VA determined that a veteran did not engage in combat, the veteran's lay testimony alone would not be enough to establish the occurrence of the alleged stressor.<sup>178</sup>

*Moreau v. Brown*<sup>179</sup> is another example that reflects the limitations of lay statements in a noncombat case. In *Moreau*, the Veteran argued that because his psychologist believed his stressor actually happened (he claimed, among other things, he gathered remains of other soldiers<sup>180</sup>), he had satisfied all three required PTSD elements.<sup>181</sup> However, there was evidence from the service department that directly contradicted the Veteran's testimony about being involved with graves registration; the Veteran claimed he had to retrieve bodies, but the service department stated that "units recovered their own dead during operations."<sup>182</sup>

At the time *Moreau* was decided, the Manual had been revised to state that corroborating evidence of a stressor was not restricted to service records but could be obtained from other sources.<sup>183</sup> Still, the Court held in *Moreau* that "something more than medical nexus evidence" was needed to fulfill the PTSD

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related to the claimant having been a prisoner-of-war, prisoner-of-war experience which satisfies the requirements of § 3.1(y) of this part will be accepted, in the absence of evidence to the contrary, as conclusive evidence of the claimed inservice stressor.

<sup>176</sup> *Zarycki*, 6 Vet. App. at 95-96.

<sup>177</sup> *Id.* at 98.

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

<sup>179</sup> 9 Vet. App. 389 (1996), *aff'd*, No. 97-7021, 1997 WL 559878 (Fed. Cir. Sept. 9, 1997).

<sup>180</sup> *Id.* at 391.

<sup>181</sup> *Id.* at 395-96.

<sup>182</sup> *Id.* at 392.

<sup>183</sup> *Id.* at 394-95.

element of “credible supporting evidence” required by the version of 38 C.F.R. § 3.304 in effect at the time.<sup>184</sup> An opinion by a mental health professional based solely on a post-service examination of the Veteran could not be used to establish the occurrence of the stressor.<sup>185</sup> In *Cohen v. Brown*,<sup>186</sup> another case where PTSD based on combat was alleged, the Court cited to the principle it had established in *Moreau*, stating, “[a]n opinion by a mental health professional based on a post service examination of the veteran cannot be used to establish the occurrence of the stressor.”<sup>187</sup>

Following the Court’s development of case law regarding medical opinions in non-MST-related PTSD cases, the Court decided a significant MST case, *YR v. West*.<sup>188</sup> This case highlighted the importance of findings in regard to credibility.<sup>189</sup> At the time this case was decided, an earlier version of § 3.304 was in effect.<sup>190</sup> In *YR*, the Veteran alleged that she had been raped in service and had developed PTSD as a result.<sup>191</sup> Her sister submitted a statement that attested to the Veteran having bruises and abrasions around the time of the alleged assault.<sup>192</sup> The Court found that the Board failed to address the weight and credibility of the sister’s statement and that this was a prejudicial error.<sup>193</sup> The Court also found that the Board failed to address hypnosis evidence in favor of the Veteran.<sup>194</sup>

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<sup>184</sup> *Id.* at 396.

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

<sup>186</sup> 10 Vet. App. 128 (1997).

<sup>187</sup> *Id.* at 145.

<sup>188</sup> 11 Vet. App. 393 (1998).

<sup>189</sup> *See id.* at 398-99.

<sup>190</sup> *See* discussion *supra* note 175. Title 38 C.F.R. § 3.304 was amended in 1999 and 2002. *See infra* text accompanying notes 207-15.

<sup>191</sup> *YR*, 11 Vet. App. at 395-96.

<sup>192</sup> *Id.* at 396.

<sup>193</sup> *Id.* at 398.

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

In arriving at its conclusion in *YR*, the Court referenced the Manual, which at the time stated that alternative sources of evidence, such as testimonial statements from family members, were to be considered in analyzing claims based on in-service personal assault.<sup>195</sup> The Court also emphasized the importance of the provisions set forth in the Manual as a reference for how these types of cases should be properly adjudicated.<sup>196</sup> From this case, it is apparent that analyzing submitted alternative sources of evidence is very important in MST cases.

The Court again addressed analysis of evidence in MST cases in *Patton v. West*.<sup>197</sup> In that case, the Veteran's service treatment records showed that he was admitted to the hospital and showed signs of mental illness while in service.<sup>198</sup> He later stated that he developed PTSD as a result of in-service MST.<sup>199</sup> The Court again referred to the Manual and discussed the special development that was required for MST-related cases.<sup>200</sup> Although the standards set forth in *Moreau* were discussed, the Court in *Patton* distinguished the case at hand from *Moreau* and *Cohen*, which were not personal assault cases.<sup>201</sup> At the time *Patton* was decided, the Manual stated that a veteran's behavioral changes that occurred around the time of the alleged incident might require interpretation by a clinician.<sup>202</sup> As a result, the Court found that the categorical statements regarding the evidentiary standard were "not operative" in personal assault cases.<sup>203</sup>

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

<sup>196</sup> *Id.* at 399.

<sup>197</sup> 12 Vet. App. 272 (1999).

<sup>198</sup> *Id.* at 274-75.

<sup>199</sup> *Id.* at 275-76.

<sup>200</sup> *Id.* at 278-80.

<sup>201</sup> *Id.* at 280.

<sup>202</sup> *Id.* at 279.

<sup>203</sup> *Id.* at 280.

In other words, the Court established in *Patton* that the categorical statements cited in *Moreau* and *Cohen* regarding the evidence necessary for corroboration of an alleged in-service stressor did not apply in personal assault cases because part of the development of personal assault claims set forth in the Manual included allowing “interpretation of behavior changes by a clinician and interpretation in relation to a medical diagnosis.”<sup>204</sup> Because clinical interpretations of a veteran’s behavior were allowed in personal assault cases, an opinion by a mental health professional *could* be used to corroborate an in-service stressor.<sup>205</sup> The Court also noted the importance of discussing the credibility of all evidence, including lay statements, when providing an adequate statement of reasons and bases.<sup>206</sup>

In 1999 and 2002, 38 C.F.R. § 3.304(f) was amended.<sup>207</sup> The changes in 1999 noted that medical evidence diagnosing PTSD had to be in accordance with § 4.125(a) (which required that the DSM-IV be used in making the diagnosis and that the diagnosis be supported by findings in the examination report) and relaxed the adjudication requirements for PTSD claims involving combat and POWs.<sup>208</sup> The 2002 revision separated the provisions regarding combat and POW status, and gave “in-service personal assault” its own provision.<sup>209</sup> The regulation is essentially the same today, although in 2008, a separate provision was added for PTSD diagnosed in service,<sup>210</sup> and in 2010, the provision regarding “fear” was added. During the notice-and-comment period for the amendment of § 3.304 in 2002, VA stated that if a doctor’s

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 280-81.

<sup>207</sup> Direct Service Connection (Post-Traumatic Stress Disorder), 64 Fed. Reg. 32,807 (June 18, 1999); Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330 (Mar. 7, 2002).

<sup>208</sup> Direct Service Connection (Post-Traumatic Stress Disorder), 64 Fed. Reg. at 32,807-08. These changes were implemented as a result of the United States Court of Appeals for Veterans Claims decision in *Cohen v. Brown*, 10 Vet. App. 128 (1997).

<sup>209</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,332.

<sup>210</sup> Posttraumatic Stress Disorder, 74 Fed. Reg. 14,491 (Mar. 31, 2009).

diagnosis is competent and credible, then “in all likelihood” the opinion would constitute competent medical evidence.<sup>211</sup> A commenter pointed out that determining whether a stressor occurred is a fact decision for the adjudicator and “expressed concern that asking a medical professional for an opinion regarding whether a stressor occurred was in essence taking the fact-finding out of the hands of the VA decisionmaker.”<sup>212</sup> VA responded as follows:

We believe that a determination as to whether a stressor occurred is a factual question that must be resolved by VA adjudicators. Nonetheless, an opinion from an appropriate medical or mental health professional could be helpful in making that determination. Such an opinion could corroborate the claimant’s account of the stressor incident. In certain cases, the opinion of such a professional could help interpret the evidence so that the VA decisionmaker can better understand it. Opinions given by such professionals are not binding upon VA, but instead are weighed along with all the evidence provided. Therefore, we make no change based on this comment.<sup>213</sup>

VA also stated that a doctor’s recitation of facts collected from the veteran is no more probative than the veteran’s own statement.<sup>214</sup> As a result, VA is not required to accept a doctor’s diagnosis of PTSD as proof that a stressor occurred.<sup>215</sup>

After the regulation’s amendment, in May 2003, the Federal Circuit decided a challenge to the new personal assault

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<sup>211</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330-31.

<sup>212</sup> *Id.* at 10,330.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 10,330-31.

provision in *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*.<sup>216</sup> The Federal Circuit held that the regulation did not conflict with 38 U.S.C. §§ 1154(a) or 5107(b).<sup>217</sup> The former states that consideration of the circumstances of service should be taken into account in regulations pertaining to service-connected disabilities.<sup>218</sup> The latter pertains to the evidentiary standard to be used in service connection claims and states that when there is a balance of positive and negative evidence, the veteran should be given the benefit of the doubt (or, the tie goes to the veteran).<sup>219</sup> The Federal Circuit found in *National Organization of Veterans' Advocates* that the new regulation was consistent with statutes governing VA's claims process because it did not preclude the consideration of lay evidence and did not alter VA's responsibility to review all of the evidence of record.<sup>220</sup>

Since the amendment to include a personal assault provision in 38 C.F.R. § 3.304 in 2002, the Court has decided two major PTSD personal assault cases that relate to the amount of notice VA is required to provide to the claimant. In *Bradford v. Nicholson*,<sup>221</sup> the Court held that VA was still required to give the appropriate notice set forth by the personal assault provision of § 3.304 even where the Veteran had no diagnosis of PTSD and therefore seemingly could not prevail on his claim.<sup>222</sup> This case also reiterated that whether the Veteran is to receive a VA examination in personal assault cases is “wholly within the discretion” of VA; an examination is not required by the regulation.<sup>223</sup> In a more recent decision, *Gallegos v. Peake*,<sup>224</sup>

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<sup>216</sup> 330 F.3d 1345 (Fed. Cir. 2003).

<sup>217</sup> *Id.* at 1350-51.

<sup>218</sup> 38 U.S.C. § 1154(a) (2006).

<sup>219</sup> *Id.* § 5107(b).

<sup>220</sup> *Nat'l Org. of Veterans' Advocates, Inc.*, 330 F.3d at 1352.

<sup>221</sup> 20 Vet. App. 200 (2006). However, this personal assault case did not involve allegations of MST.

<sup>222</sup> *Id.* at 206-07.

<sup>223</sup> *Id.* at 207.

<sup>224</sup> 22 Vet. App. 329 (2008).



the Court addressed a situation where the Veteran had not been given proper timely notice of the alternate evidence that could substantiate his claim for PTSD that involved MST.<sup>225</sup> The Court made clear that VA has a duty to provide the Veteran with notice that secondary and behavioral evidence, as detailed in the personal assault provision of § 3.304(f), could substantiate the claim.<sup>226</sup> However, the Court ultimately decided that there was no prejudicial error because the Veteran had demonstrated actual knowledge of what was needed to substantiate his claim.<sup>227</sup>

Recently, the Federal Circuit addressed the personal assault provision of § 3.304(f) in light of *Patton* in *Menegassi v. Shinseki*.<sup>228</sup> In *Menegassi*, the Veteran had filed a service-connection claim for PTSD based on an alleged in-service sexual assault.<sup>229</sup> In its decision, the Board determined that the preponderance of the evidence did not support a finding of a sexual assault or behavioral changes during the Veteran's service.<sup>230</sup> The Board considered post-service records as directed in the personal assault provisions in § 3.304(f); this evidence included a report of contact with the Regional Office, a letter from a colleague, notes from a treatment program, and a VA medical examiner's opinion finding that the Veteran had a diagnosis of PTSD based on her account of in-service MST.<sup>231</sup> In considering all this evidence, the Board finally determined that unfavorable negative evidence in the file outweighed the positive evidence of the VA examiner's opinion and the colleague's letter.<sup>232</sup>

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<sup>225</sup> *Id.* at 331-33.

<sup>226</sup> *Id.* at 335-37.

<sup>227</sup> *Id.* at 338-39.

<sup>228</sup> 638 F.3d 1379 (Fed. Cir. 2011).

<sup>229</sup> *Id.* at 1380.

<sup>230</sup> *Id.* at 1380-81.

<sup>231</sup> *Id.* at 1380.

<sup>232</sup> *Id.* at 1380-81.

The Court affirmed the Board's decision.<sup>233</sup> In doing so, the Court, quoting *Cohen*, found that “[a]n opinion by a mental health professional based on a postservice examination of the veteran cannot be used to establish the occurrence of the stressor.”<sup>234</sup> The Court continued to unequivocally hold that although an examination report “can be used to establish a diagnosis of PTSD, it cannot be used to establish the occurrence of a stressor.”<sup>235</sup>

On appeal to the Federal Circuit, both the Veteran and VA agreed that *Cohen* did not apply in the Veteran's case because, as explained above, in a case where PTSD is predicated on MST, a medical opinion may be used to corroborate the occurrence of a stressor if it interprets behavioral evidence.<sup>236</sup> Although the Federal Circuit affirmed the Court's decision, it found that the Court erred in determining that *Cohen* applied to MST-related PTSD claims.<sup>237</sup> The Federal Circuit ultimately found this error to be harmless, however, due to the very detailed credibility analysis completed by the Board.<sup>238</sup> The Federal Circuit noted that the Board “exhaustively considered” the evidence in the file, including service treatment records, personnel records, and all other records contemporaneous to the Veteran's service.<sup>239</sup> In a footnote, the Federal Circuit, citing to the 2002 final rulemaking adding the personal assault provision to § 3.304(f), further clarified that the Board may weigh a medical opinion in the context of other evidence for a PTSD personal assault claim.<sup>240</sup>

It is clear that VA's duty to notify is an important part of properly adjudicating MST-related PTSD claims. Regarding the duty to assist, *Patton* shows that medical interpretation of

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<sup>233</sup> *Menegassi v. Shinseki*, No. 08-1895, 2010 WL 672785, at \*3 (Vet. App. Feb. 26, 2010).

<sup>234</sup> *Id.* (alteration in original) (quoting *Cohen v. Brown*, 10 Vet. App. 128, 145 (1997)).

<sup>235</sup> *Id.*

<sup>236</sup> *Menegassi*, 638 F.3d at 1381-82.

<sup>237</sup> *Id.* at 1382.

<sup>238</sup> *Id.* at 1383.

<sup>239</sup> *Id.* at 1380.

<sup>240</sup> *Id.* at 1382 n.1.

behavioral evidence may help corroborate claims for PTSD if personal assault is alleged.<sup>241</sup> In some cases, however, there may not be enough evidence for the Veteran to get a VA examination, and the Veteran may not have a way to get a private medical opinion. As such, the issue remains as to whether the prescribed duty to assist is adequate, particularly in MST-related cases.

#### IV. PROPOSAL

As the regulation governing service connection for PTSD in MST cases is currently written, DoD's new restricted reporting options may eventually be harmful to a veteran's claim for a mental health disorder due to MST. In order to adequately compensate and treat these veterans, VA would need to ensure preservation of the anonymous files while the service branches remained able to maintain the service member's anonymity. These files could potentially be important to VBA in a veteran's pursuit of establishing entitlement to service connection for any resulting mental health illness. The logistics, however, of such a record keeping system would be extremely difficult. The GAO's criticism that the military lacks direction and consistency regarding implementation of sexual assault prevention and reporting programs<sup>242</sup> suggests that implementation of any of this type of system is currently virtually impossible.

Currently, the only possible solution to retaining this important evidence is to provide the service member with a full copy of his or her restricted reporting file that is maintained with the Sexual Assault Response Coordinator before the file is destroyed. The service member should be adequately informed that he or she has the only copy of the records regarding the MST and the records may be necessary later when the service member applies for VA-related benefits.

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<sup>241</sup> Patton v. West, 12 Vet. App. 272, 280 (1999).

<sup>242</sup> GAO REPORT, *supra* note 23, at 19.

In examining the changes to DoD policy, and the current implementation of sexual assault related training at VHA, changes at VBA will eventually become necessary. By its very nature, restricted reporting ensures that service members who choose that option have essentially erased all key evidence of their assault. Some have suggested that the requirement for corroborating evidence for PTSD service-connection claims involving MST should be completely discarded.<sup>243</sup> Here, the authors, instead, suggest that the recently implemented fear-based PTSD regulations can serve as a guide to a potential amendment of personal assault regulations.

First, the authors recommend that MST be separated from personal assault in the regulation. A service member who is sexually assaulted is less likely to report the crime based on the sensitive nature surrounding sexual assault.<sup>244</sup> The current regulation addresses victims of rape the same as victims of a bar fight. This does not allow the regulation to be adequately tailored to victims of MST (where the crime is of a sensitive nature), as opposed to personal assault (which often involves crimes that are not necessarily of a sensitive nature).

Second, the authors recommend that the recently implemented fear-based PTSD regulation serve as an example framework for revision of the MST regulation. Through this regulation, VA liberalized the evidentiary standard for corroboration of a stressor in certain cases where an evidentiary gap was expected.<sup>245</sup> Similarly, victims of MST also suffer from the fear surrounding the in-service assault, and remain unable to establish their stressors because of lack of evidence. The authors suggest that a new sexual assault regulation codify

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<sup>243</sup> See Schingle, *supra* note 139, at 175-77.

<sup>244</sup> See, e.g., Couric, *supra* note 3 (noting that rape is the most underreported crime in the military).

<sup>245</sup> Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,846 (July 13, 2010).

*Patton*<sup>246</sup> and specifically state that an interpretation of credible behavioral evidence by a clinician may be used to corroborate an MST-related stressor. As *Menegassi* shows, the current case law causes confusion even among the courts about when and how a clinician can corroborate evidence.<sup>247</sup> As a result, VA should create a separate regulation for PTSD based on MST regarding the interpretation of behavioral evidence by a clinician as established by the holding in *Patton* (and as affirmed by the Federal Circuit again in *Menegassi*).

In this regard, similar to the newly implemented PTSD regulations, the authors propose that any veteran claiming MST should be provided an examination with a VA or VA-contract psychologist or psychiatrist, who may diagnose PTSD; confirm that the claimed stressor is adequate to support a diagnosis of PTSD; opine that the claimed stressor is consistent with credible behavioral evidence taking place after the stressor; and opine that the veteran's current symptoms are related to the claimed stressor. If these four criteria are met, then the veteran's lay testimony alone may be sufficient to establish the occurrence of the claimed in-service stressor. VA adjudicators, however, should still maintain the ability to make a full credibility determination based on a careful review of the claims file.

VA has stated that "an opinion from an appropriate medical or mental health professional could be helpful" in determining whether a stressor occurred.<sup>248</sup> The authors believe that if the clinician appropriately references all relevant facts and information in his or her opinion, such opinion is *always* helpful. The clinician who meets with the veteran face-to-face, takes diagnostic psychiatric tests, fully reviews the claims file, and synthesizes that information to arrive at a conclusion may be a better evaluator of

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<sup>246</sup> *Patton*, 12 Vet. App. 272; see discussion *supra* notes 197-206 and accompanying text.

<sup>247</sup> See *Menegassi v. Shinseki*, 638 F.3d 1379 (Fed. Cir. 2011).

<sup>248</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,330 (Mar. 7, 2002).

the veteran's credibility than an adjudicator looking only at a paper file. If there is a major problem with an examiner's opinion, the clear and convincing clause serves as a measure by which the claim may be denied or remanded for clarification. For example, if the examiner cites a fact that is shown to be likely false in the file, there would be clear and convincing evidence that the Veteran did not have PTSD due to an in-service event. At that point, the claim could be denied on this basis, or potentially remanded for clarification.

Serious considerations should be weighed in liberalizing any regulation. For example, proposals to expand presumptions may encourage malingering.<sup>249</sup> Fraud is always a concern, and an examination of a recent VA Office of Inspector General report shows that VBA is not immune to fraudulent claims.<sup>250</sup> Still, it seems that providing clinicians with the opportunity to detect malingering upon examination is more desirable than requiring adjudicators to read between the lines in a paper file.<sup>251</sup>

The authors recognize that fact finding and credibility determinations have typically been within the province of the adjudicator.<sup>252</sup> However, since the implementation of the fear-based PTSD regulations, this role is now shared with the examining VA clinician, who is essentially diagnosing the veteran based largely on his or her own statements.<sup>253</sup> The authors

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<sup>249</sup> See, e.g., Fink, *supra* note 137, at 241-42.

<sup>250</sup> See, e.g., U.S. DEP'T OF VETERANS AFFAIRS OFFICE OF INSPECTOR GEN., SEMI-ANNUAL REPORT TO CONGRESS 26-30: APRIL 1, 2010 – SEPTEMBER 30, 2010 (2010), <http://www.va.gov/oig/pubs/VAOIG-SAR-2010-2.pdf> (discussing investigations into fraudulent activity during the reporting period that resulted in payment of fines, restitution, and penalties amounting to almost nine million dollars).

<sup>251</sup> Fink, *supra* note 137, at 247. As for those who believe that rape is a crime that is often falsely raised, estimates for false reports of rape range from two to eight percent, which is similar to other felonies. TASK FORCE REPORT, *supra* note 2, at 6 (citing Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 THE VOICE 1, 2 (2009)). There is no reason to believe that MST claims are any different.

<sup>252</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330.

<sup>253</sup> See Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,849 (July 13, 2010).

propose that victims of MST should be afforded the same type of procedure. Notably, if VA adjudicators ultimately find that the veteran's statements are not credible in the fear-based PTSD regulation due, for example, to internally conflicting evidence, the claim may be denied.<sup>254</sup> The same should apply in MST claims.

As the regulations are currently written and as the DoD policy stands on destroying restricted reports of MST, the veteran risks becoming lost in the bureaucracy without the means to adequately establish service connection, especially if he or she elects to protect his or her own anonymity in service. One good reason for VA to be proactive in amending the current regulation would be to avoid Congress or the courts fashioning an overly broad solution to this evidence problem. On the other hand, as women continue to represent a minority of veterans,<sup>255</sup> there is the possibility that nothing may happen because they may not be a large enough population to successfully agitate for change.

## CONCLUSION

In consideration of new attention given to sexual assault in the military by the media and Congress, DoD is beginning to make well-documented changes to address this problem. The public is also becoming increasingly more aware of this problem.

The current difficulty with how VA adjudicates MST-related PTSD cases lies in the lack of evidence available to establish a stressor. Because DoD is now allowing service members to file restricted reports about MST, there are serious problems with how this evidence is maintained for later claims. As a result, the evidence problem will only get worse.

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<sup>254</sup> *Id.* at 39,852 (providing that a stressor must be consistent with the places, types, and circumstances of the veteran's service).

<sup>255</sup> WOMEN IN MILITARY SERV. FOR AM. MEM'L FOUND., INC., STATISTICS ON WOMEN IN THE MILITARY (Feb. 18, 2011), <http://www.womensmemorial.org/PDFs/StatsonWIM.pdf>.

When VA faced this evidence problem with PTSD in the context of fear-related cases, it made a regulatory fix. The authors recommend that VA similarly change its PTSD regulations to complement DoD's new changes in MST reporting procedures. In making a regulatory change, VA should separate MST claims from those for personal assault and then model the regulation after the fear-based PTSD regulation. This new regulation should be developed with a clear and convincing evidence clause. Also, VA should recommend that DoD either retain the restricted reports regarding sexual assault in a comprehensive database or release the restricted report to the veteran for safekeeping to ensure that the paperwork will be available if the veteran files a claim for entitlement to service connection for PTSD based on MST.

DoD and VHA have already recognized the unique challenges facing women service members and veterans. VBA will eventually have to make its own changes to adapt to incoming MST-related claims. As VBA has previously addressed a similar situation in the fear-based PTSD regulations, this can serve as a helpful framework to providing what's only fair to this country's veterans who are victims of sexual assault.<sup>256</sup>

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<sup>256</sup> Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. at 39,843. *See supra* notes 126-137 for further discussion of this regulatory amendment.