

Military Sexual Trauma and Department of Veterans Affairs Disability Compensation for PTSD: Barriers, Evidentiary Burdens and Potential Remedies

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Repository Citation

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 (2016), <https://scholarship.law.wm.edu/wmjowl/vol22/iss3/8>

MILITARY SEXUAL TRAUMA AND DEPARTMENT OF
VETERANS AFFAIRS DISABILITY COMPENSATION FOR
PTSD: BARRIERS, EVIDENTIARY BURDENS AND
POTENTIAL REMEDIES

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INTRODUCTION

Both the Department of Defense (DoD) and the Department of Veterans Affairs (VA) have recently been under heightened scrutiny in the public sphere. The DoD is currently under fire for the high prevalence of sexual assault and harassment within the military and its inability to sufficiently reduce its occurrence.¹ The VA is receiving increasing criticism for its slow adjudication process and scandals involving the destruction of veterans' claims.² Both agencies continue to struggle to protect and serve service members and veterans who experience sexual assault and harassment.³ However, with increasing

1. See Stav Ziv, *Report on Sexual Assault in the Military Draws Criticism*, NEWSWEEK (Dec. 8, 2014, 4:39 PM), http://www.newsweek.com/report-sexual-assault-military-draws-criticism-290173?piano_t=1 [<http://perma.cc/4LJY-SUZQ>].

2. See Bryant Jordan, *VA Accused of Changing Rules to Reach Goals*, MILITARY.COM (Feb. 6, 2014), <http://www.military.com/daily-news/2014/02/06/va-accused-of-changing-rules-to-reach-goals.html> [<http://perma.cc/CP82-FPD9>]. See also Rob Garver, *New Scandal at VA: Workers Hid and Shredded Benefits Claims*, FISCAL TIMES (July 15, 2014), <http://www.thefiscaltimes.com/Articles/2014/07/15/New-Scandal-VA-Workers-Hid-and-Shredded-Benefits-Claims> [<http://perma.cc/6JWK-X6QK>].

3. U.S. DEP'T OF DEF., *Initiatives to Combat Sexual Assault in the Military*, http://archive.defense.gov/home/features/department_messages/DoD_Initiatives_to_Combat_Sexual_Assault.pdf [<http://perma.cc/2PXC-QGDX>] [hereinafter DoD, *Combat Sexual Assault*]; see also Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 COLUM. J. GENDER & L. 343, 433 (2014) (discussing sexual assault claims in the VA disability benefits backlog).

urgency, both government entities are looking for ways to better perform their duties to assist service members and veterans.⁴

Sexual assault and harassment continue to be pervasive problems in all branches of the United States Armed Forces.⁵ Former Secretary of Defense Robert Gates stated, “The . . . [DoD] has a no-tolerance policy toward sexual assault. This type of act not only does unconscionable harm to the victim; it destabilizes the workplace and threatens national security.”⁶ Secretary Gates’ views of sexual assault in the military (SAIM) are supported by research: “SAIM undermines trust in military units, mission readiness, and the health and safety of all service members.”⁷ Although sexual assault and related incidents are detrimental to both the victim and the DoD’s ability to function effectively, the armed forces continue to have significant numbers of rape, sexual assault, and harassment every year.⁸

Veterans who are survivors of military sexual trauma (MST) currently face an unfair evidentiary burden when seeking disability compensation for mental illnesses related to their assault or MST—particularly post-traumatic stress disorder (PTSD)—from the VA.⁹ These veterans face significant barriers from reporting the incident while on active duty to proving an in-service connection to their mental disorder after separating from the military, particularly when they did not report the incident while in service.¹⁰ However, when service members do report these incidents while in service, they can more easily substantiate claims for mental disabilities after separating from the armed forces.¹¹ Reforms to reporting and disciplinary procedures in the military could increase the number of individuals who choose to report MST incidents, and make it easier for survivors

4. See U.S. DEP’T OF VETERANS AFFAIRS, *Fully Developed Claims*, <http://www.benefits.va.gov/fdc> [<https://perma.cc/YF6E-GWR9>]; see also DoD, *Combat Sexual Assault*, *supra* note 3.

5. See U.S. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 1 (2013), <http://www.army.mil/e2/c/downloads/343174.pdf> [<https://perma.cc/926E-AF8Y>] [hereinafter 2013 ANNUAL REPORT ON SEXUAL ASSAULT].

6. U.S. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (2010), http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_sexual_assault_in_the_Military.pdf [<http://perma.cc/R9T6-F9HH>] [hereinafter 2010 ANNUAL REPORT ON SEXUAL ASSAULT].

7. 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, 17 (2014).

8. See 2010 ANNUAL REPORT ON SEXUAL ASSAULT, *supra* note 6, at 2.

9. See Seamone & Traskey, *supra* note 3, at 375.

10. See Mengeling et al., *supra* note 7, at 18; Seamone & Traskey, *supra* note 3, at 412.

11. Seamone & Traskey, *supra* note 3, at 349.

to obtain benefits for PTSD and other mental disabilities associated with MST. Additionally, implementing these changes could increase the number of service members who seek crucial, immediate mental and physical health care following assaults and other types of MST.¹²

I. BACKGROUND

The term “military sexual trauma” (MST) encompasses varying degrees of sexual harassment and assault that men and women face in the military.¹³ Conservative estimates and statistics consistently indicate that “just over 20% of females and 1% of males are sexually assaulted in a physical manner during their service.”¹⁴ The numbers are substantially higher—“20% of males and 70% of females in studies where verbal trauma is included in the definition” of sexual assault.¹⁵

Studies also indicate that there are even higher instances of sexual assault and harassment during deployments.¹⁶ An anonymous survey conducted by the VA indicates that nearly one in four women were sexually assaulted during a deployment, while almost fifty percent of women experienced sexual harassment while deployed.¹⁷ These results are troubling because they indicate that service members are experiencing combat related trauma and MST simultaneously, thus putting our service members at greater risk of developing debilitating mental illnesses.¹⁸

The DoD’s Annual Report on Sexual Assault in the military estimates that just under seventeen percent of individuals who experienced sexual assault in 2012 reported the incidents—including

12. *See id.* at 434.

13. “The Secretary shall operate a program under which the Secretary provides counseling and appropriate care and services to veterans . . . to overcome 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 . . .” 38 U.S.C. § 1720D(a)(1) (2012).

14. Seamone & Traskey, *supra* note 3, at 344.

15. Seamone & Traskey, *supra* note 3, at 344. It should be noted that, while verbal abuse is usually not included in the definition of sexual assault, verbal abuse of a sexual nature and sexual harassment are encompassed in the term “military sexual trauma.”

16. “The findings show that there are traumatic strains beyond combat when troops go to war, said Amy Street, a lead researcher, clinical psychologist and a deputy director at one of VA’s National Centers for PTSD (post-traumatic stress disorders) in Boston.” Gregg Zoroya, *VA Finds Sexual Assaults More Common in War Zones*, USA TODAY (Dec. 26, 2012, 11:57 PM), <http://www.usatoday.com/story/news/nation/2012/12/26/va-finds-sexual-assaults-more-common-in-war-zones/1793253> [<http://perma.cc/9EMM-XANW>].

17. *See id.*

18. *Id.*

both restricted and unrestricted reports.¹⁹ That report also indicated that junior enlisted members (lower ranking service men and women) perceived greater barriers to reporting incidents of sexual assault within their units.²⁰ Junior enlisted members were also less informed about their reporting options than were junior officers.²¹ Eighty-six percent of junior enlisted members demonstrated knowledge that filing a restricted report would allow them to receive medical and psychological help without initiating a formal investigation into the incident(s).²² This indicates that just under fifteen percent of junior enlisted members do not know that they can make a report that will provide access to medical and support resources without opening a formal investigation into their rape, assault, or incidents of sexual harassment.²³

With such low numbers of service members reporting incidents of sexual assault and sexual harassment, the DoD must act to ensure that service men and women are receiving the help and support they need as soon as possible. In order to accomplish that goal, reporting numbers need to be enhanced to ensure service members receive immediate support and health services, and that veterans are not unfairly denied benefits, which they have earned and are entitled to upon separation from the armed forces.²⁴ The VA must also act to alleviate current evidentiary burdens for disabilities related to military sexual trauma, and ensure veterans are receiving a fair claims adjudication process, in light of the low reporting statistics.²⁵

II. CURRENT DoD SEXUAL ASSAULT AND SEXUAL HARASSMENT REPORTING PROCEDURES

The DoD currently has in place reporting methods for service men and women who experience rape, sexual assault, and/or sexual

19. U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 64 (vol. 2 2012), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf [<http://perma.cc/V5K5-JLJG>]. The different types of reports will be defined later in this Note. *See infra* Part II.

20. 2013 ANNUAL REPORT ON SEXUAL ASSAULT, *supra* note 5, at 53–54.

21. *Id.* at 57.

22. *Id.*

23. *Id.*

24. U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, *Restricted Reporting*, <http://sapr.mil/index.php/dod-policy/reporting-options/restricted-reporting> [<http://perma.cc/EYK9-697T>] [hereinafter DoD, *Restricted Reporting Policy*].

25. *See* Emily Hansen, Comment, *Carry That Weight: Victim Privacy Within the Military Sexual Assault Reporting Methods*, 28 J. MARSHALL J. COMPUTER & INFO. L. 551, 573 (2011).

harassment.²⁶ According to the Uniform Code of Military Justice (UCMJ), a member of the armed forces or a dependent who is sexually assaulted or harassed may be provided with the following: assistance from a Sexual Assault Response Coordinator (SARC),²⁷ assistance from a Sexual Assault Victim Advocate,²⁸ and/or legal assistance from military or civilian legal counsel.²⁹ The UCMJ applies its own designation of what constitutes rape³⁰ and sexual assault³¹ in Title 10 of the United States Code. The DoD mandates the following: “[w]e have required that each brigade or equivalent unit have its own full-time trained and qualified Sexual Assault Response Coordinator (SARC) and sexual assault victim advocate. We have established strong recordkeeping requirements for reports of sexual assault.”³² These resources—provided through the Sexual Assault Prevention and Response Program—have been made available at the brigade, or equivalent level, in order to make reporting and health resources easier and more accessible to victims.³³

When victims make a report, it can be restricted, meaning the report will remain confidential and no other individuals, including those in command, will be informed of the report except in limited

26. U.S. DEP’T OF DEF., Directive 6495.01, at 5 (Apr. 30, 2013), <http://www.sapr.mil/public/docs/directives/649501p.pdf> [<http://perma.cc/EPM9-82F4>] [hereinafter DoD Directive 6495.01].

27. *Id.* at 3 (“The SARC shall serve as the SINGLE POINT OF CONTACT for coordinating appropriate and responsive care for sexual assault victims. SARCs shall coordinate sexual assault victim care and sexual assault response when a sexual assault is reported.”).

28. *Id.* (“The SAPR VA shall provide non-clinical crisis intervention and ongoing support, in addition to referrals for adult sexual assault victims. Support will include providing information on available options and resources to victims.”).

29. Uniform Code of Military Justice, 10 U.S.C. § 1565b(a) (2012).

30. Rape is defined in part as: “Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who commits a sexual act upon another person by (1) using unlawful force against that other person; . . . (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (4) first rendering that other person unconscious . . .” 10 U.S.C. § 920(a)(1)(3)–(4) (2012).

31. Sexual Assault is defined in part as: “Any person subject to this chapter who commits a sexual act upon another person by—(A) threatening or placing that other person in fear; (B) causing bodily harm to that other person. . . commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or . . . is incapable of consenting to the sexual act due to—(A) impairment by any drug, intoxicant . . .” 10 U.S.C. § 920(b)(1)–(3) (2012).

32. *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Servs.* 113th Cong. 3 (2013) (Statement of Sen. Carl Levin, Chairman, S. Comm. on Armed Servs.).

33. See U.S. DEP’T OF DEF., Instruction 6495.02, at 20 (July 7, 2015), <http://dtic.mil/whs/directives/corres/pdf/649502p.pdf> [<http://perma.cc/M24K-X2EK>] [hereinafter DoD Instruction 6495.02].

circumstances.³⁴ Alternatively, a service member who experiences MST may make an unrestricted report, which will initiate an official criminal investigation into the incident, and command will be notified.³⁵ There are benefits and downsides to both restricted and unrestricted reporting.³⁶ The Sexual Assault Prevention and Response Program notes that making an unrestricted report has many benefits.³⁷ After reporting, victims may “feel a sense of closure or healing which can aid recovery.”³⁸ The military will have the ability “to hold the offender appropriately accountable,” and unrestricted reporting can increase “the safety of the victim and of others, who may be victimized by the same suspect.”³⁹ Furthermore, the victim can “request a Military Protective Order . . . [and/or] an Expedited Transfer to move to a different unit or base.”⁴⁰ However, the victim may be embarrassed and wish to have his or her confidentiality preserved, which is not an option if an unrestricted report is made.⁴¹

The SAPR states that the benefits of making a restricted report include allowing the victim to receive healthcare (physical and mental health) and victim advocacy after the assault; providing personal space and time for the victim to contemplate his or her options and to begin the healing process; empowering victims “to seek relevant information and support to make more informed decisions about participating in the criminal investigation;” allowing victims to get legal advice from a Special Victims Counsel; providing the victim control over the release and management of personal information; and giving the victim control over whether and when to move forward with an investigation.⁴² However, making a restricted report alone will not allow the individual to receive a Military Protective Order.⁴³ Evidence could be destroyed if not collected soon after the attack, and the victim may have to have continual contact with the assailant.⁴⁴ Furthermore, victims may not be able to discuss the attack with friends who could be mandatory reporters.⁴⁵

34. *Id.* at 5–6.

35. U.S. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, *Unrestricted Reporting*, <http://sapr.mil/index.php/dod-policy/reporting-options/unrestricted-reporting> [<https://perma.cc/WNQ7-MQ9A>] [hereinafter DoD, *Unrestricted Reporting Policy*].

36. See DoD, *Restricted Reporting Policy*, *supra* note 24.

37. See DoD, *Unrestricted Reporting Policy*, *supra* note 35.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. DoD, *Restricted Reporting Policy*, *supra* note 24.

43. *Id.*

44. *Id.*

45. *Id.*

There are some exceptions to non-disclosure of restricted reporting.⁴⁶ When a victim provides a restricted report, the confidential communications may be disclosed in the following limited situations:

- (1) the victim authorizes the suspension;
- (2) law enforcement or command officials determined that disclosure is necessary to prevent further harm;
- (3) disclosure to healthcare personnel for disability retirement determinations;
- (4) SARC, VA, or healthcare personnel determine that supervision and/or coordination for victim treatment [is necessary; or]
- (5) when disclosure is ordered by military or civilian courts of competent jurisdiction.⁴⁷

Confidential communications are “[o]ral, written, or electronic communications of personally identifiable information concerning a sexual assault victim and the sexual assault incident provided by the victim to the SARC, SAPR VA, or healthcare personnel in a Restricted Report.”⁴⁸ The resident SARC reviews the communication and makes the determination of whether an exception will apply.⁴⁹ Even though a restricted report is supposed to remain confidential, there are circumstances in which a victim’s personal information will be disclosed apart from their explicit consent.⁵⁰ Further, if information regarding the sexual trauma is disclosed to a commander independently of a restricted report, the commander may open an official investigation, even if the victim did not want a criminal investigation to begin and made a restricted report.⁵¹ After the investigation commences, the perpetrator, and potentially the victim, may receive disciplinary action.⁵² The military has strict “good order and discipline” protocol, which stipulates that sexual assault victims must be investigated if they admit to breaking regulations when reporting an assault.⁵³ These offenses can include underage drinking, drug use, or consensual sexual

46. DoD Instruction 6495.02, *supra* note 33, at 37.

47. Hansen, *supra* note 25, at 554 n.19.

48. DoD Directive 6495.01, *supra* note 26, at 15.

49. *See* Hansen, *supra* note 25, at 559.

50. *Id.*

51. *See* DoD Directive 6495.01, *supra* note 26, at 5.

52. *See* DoD Instruction 6495.02, *supra* note 33, at 6–7.

53. *See* Paul D. Shinkman, *Military Sexual Assault Victims May Get Amnesty for Minor Crimes*, U.S. NEWS & WORLD REPORT, (May 5, 2014, 5:41 PM) <http://www.usnews.com/news/articles/2014/05/05/military-sexual-assault-victims-may-get-amnesty-for-minor-crimes> [<http://perma.cc/2SS4-A34C>].

relations in a war zone.⁵⁴ If a victim can be subjected to administrative action or a court martial after reporting an assault, he or she may be strongly deterred from making an unrestricted report.⁵⁵

Even if the former exceptions do not apply, the SARC may make a report to command notifying them that an assault occurred.⁵⁶ However, the victim's personal information will not be disclosed.⁵⁷ The DoD has implemented this confidential system of reporting to keep command informed and increase their ability to provide for the safety and well-being of all its members.⁵⁸ Although these exceptions to non-disclosure exist, the DoD stated in Instruction 6495.02 that a victim's decision to participate or not participate in an investigation should be honored.⁵⁹ This policy could also deter victims from reporting if they believe there is a way that their confidentiality could be broken. Currently, the data from restricted reporting must also be submitted to the DoD for its review to track changes in the numbers of assaults occurring and to report to Congress on its progress.⁶⁰

Because of recent reforms, victims of sexual assault may also request a duty station or unit change to prevent retaliation for reporting the assault in an unrestricted report.⁶¹ Of course, this option could be a drastic and stressful transition for a service member who has experienced sexual trauma.⁶² The UCMJ provides that an

application submitted by a [service] member for a change of station or unit transfer must be approved or disapproved by the member's commanding officer within 72 hours of the submission of the application. . . . Additionally, if the application is disapproved by the commanding officer, the member . . . [will receive] the opportunity to request review by the first general officer or flag officer in the chain of command of the member, and that decision must be made within 72 hours of submission of the request for review.⁶³

54. *Id.*

55. *See id.*

56. DoD Instruction 6495.02, *supra* note 33, at 35.

57. *Id.*

58. DoD, *Restricted Reporting Policy*, *supra* note 24.

59. The DoD explains:

Details regarding the incident will be limited to only those personnel who have an official need to know. The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command.

DoD Instruction 6495.02, *supra* note 33, at 36.

60. *Id.* at 109.

61. *Id.* at 51.

62. *See id.* at 53.

63. 10 U.S.C. § 673(b) (2012).

Based on the language of the statute, even though a survivor has an opportunity to make a transfer request, it can be denied.⁶⁴ Command may have little incentive to authorize a unit or duty station change, because they may be inconvenienced or left short-handed if their members are permitted to transition.

A study conducted in 2010–2011 found that the primary reason female service members do not report sexual assault was actual and perceived reporting consequences.⁶⁵ These fears are substantiated by the identity of the perpetrators. A study conducted by the National Defense Research Institute reported that between 48–49% of sexual assaults were committed by a service member with whom the victim worked.⁶⁶ And, between 23–26% of the perpetrators were in the victim’s chain of command.⁶⁷ The fact that many perpetrators assault individuals within their command may deter victims from reporting, because they fear retaliation.⁶⁸ This is further exacerbated by the military criminal justice system’s adjudication process, which gives prosecutorial discretion to commanders.⁶⁹ Furthermore, the data indicates that victims do in fact face retaliation in the form of disciplinary action and professional/social retaliation.⁷⁰ Among women who reported a sexual assault in 2013, 62% reported professional retaliation, social retaliation and/or administrative actions, including being put on a medical hold.⁷¹ With victims experiencing these types of retaliation, it is no surprise that many victims decide not to report. Although this type of retaliation is illegal, investigating and substantiating reprisal claims is a “daunting” task⁷²:

[T]o allege a reprisal for reporting sexual assault, a Service member must first file a complaint petition with the DoD Inspector General’s Office. Only if the Inspector General’s Office substantiates the petition may the Service member petition

64. *See id.*

65. Mengeling et al., *supra* note 7, at 17.

66. Coreen Farris, Terry L. Schell & Terri Tanielian, *Physical and Psychological Health Following Military Sexual Assault: Recommendations for Care, Research, and Policy*, NAT’L DEF. RESEARCH INST. 1, 4–5 (2013).

67. *Id.* at 4.

68. Mengeling et al., *supra* note 7, at 22.

69. Rachel E. VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389, 390–91 (2014).

70. *See* Farris, Schell & Tanielian, *supra* note 66, at 7.

71. “These findings reveal the paradox of disclosure. Disclosing a traumatic event opens the door to medical and legal services, but at the same time, victims often face negative social and professional consequences following disclosure.” *Id.* at 7.

72. U.S. COMM’N ON CIVIL RIGHTS, 2013 STATUTORY ENFORCEMENT REPORT: SEXUAL ASSAULT IN THE MILITARY 32 (2013).

his/her Service's Board for the Correction of Military Records (Board) for redress.⁷³

If the Board makes an unfavorable determination, the victim may appeal to the Secretary of Defense.⁷⁴

Another report indicated service women had a more positive experience when they made a restricted report.⁷⁵ "Restricted reporters were more likely to say they were treated in a positive, supportive fashion, offered post-SAIM physical health care and emotional support, and were less likely to be told to 'forget about it' or to report loss of confidentiality."⁷⁶ Sixty percent of the service women surveyed found their restricted reporting experience was positive while only thirty percent of those who made an unrestricted report had a positive experience.⁷⁷

The study further stated that although positive support helped individuals who reported, negative social reactions are common and have substantial negative impacts on the victim's mental health.⁷⁸ More than half of the women stated that they experienced hostility from coworkers after making the report, 48% indicated that no action was taken against the perpetrator, and 25% knew that the perpetrator later harassed other service women.⁷⁹

More importantly, the vast majority (75%) did not report the incident at all.⁸⁰ The top reasons for choosing not to report were: feeling embarrassed (77%), fearing a negative impact on their career (79%), not knowing how to report, fearing the report would not be kept confidential, blaming themselves for the attack, and believing that nothing would be done.⁸¹ The research also noted that, even though education regarding reporting has improved significantly, the numbers of those who choose to report remain low.⁸² Education and the availability of a restricted reporting option beginning in 2005 did increase the number of service men and women who chose to report.⁸³ This indicates that the perceived and actual consequences of reporting are indeed what prevent service members from reporting sexual

73. *Id.*

74. *Id.*

75. Mengeling et al., *supra* note 7, at 20.

76. *Id.*

77. *Id.* at 22.

78. *Id.* at 21.

79. *Id.*

80. *Id.*

81. Mengeling et al., *supra* note 7, at 21.

82. *Id.*

83. "Between 2005, when restricted reporting was implemented, and 2006, MSA [military sexual assault] reports by servicemembers grew by nearly 30 percent." Farris, Schell & Tanielian, *supra* note 66, at 7 (internal citation omitted).

assault and seeking the help they need. According to the DoD Sexual Assault Prevention and Response Program, confidential reporting can actually increase the numbers of individuals who decide to report sexual assault and harassment.⁸⁴

Reporting of incidents of sexual assault and other forms of military sexual trauma may also be discouraged by the broad prosecutorial discretion given to military commanders. Generally, commanders have largely unconstrained authority to determine which violations should receive judicial or nonjudicial proceeding and punishments.⁸⁵

A commander, who often lacks legal training, possesses the authority to dispose of criminal charges and respond to misconduct in his or her unit.⁸⁶ He or she can decide to dismiss the accusation or can convene a court martial to prosecute the individual.⁸⁷ This prosecutorial discretion is provided to commanders so that they can maintain the necessary order and discipline required for mission readiness.⁸⁸ When the commander chooses to prosecute, he or she may also choose the pool of jurors that will be the fact-finders in the proceedings.⁸⁹ The commander can also enter into binding plea bargains with the accused.⁹⁰ Previously, commanders possessed this broad authority over sexual assault prosecutions. However, Congress took action in 2014 to limit command control over sexual assault cases in passing the 2014 National Defense Authorization Act, which amended some provisions of the UCMJ.⁹¹ Now, if the Staff Judge Advocate (SJA) recommends to a commander who is the convening authority that the case should be referred to a general court martial, and the commander disregards the SJA's recommendation, the case will go to the Secretary of the Service for review.⁹² In the case where both the SJA and the convening authority determine that the case should *not* go to court martial, the case will be reviewed by the next highest authority.⁹³ This is a good step to remove potential commander bias, but victims' perception of command influence may take time to change. Further, the extra levels of review may not actually

84. DoD, *Restricted Reporting Policy*, *supra* note 24.

85. *See* VanLandingham, *supra* note 69, at 390.

86. *See id.*

87. *Id.*

88. CHARLES STIMSON & STEVEN P. BUCCI, HERITAGE FOUND., *CHANGING THE MILITARY JUSTICE SYSTEM: PROCEED WITH CAUTION 2* (2013) (arguing that the unique military environment necessitates command prosecutorial discretion).

89. VanLandingham, *supra* note 69, at 390.

90. *Id.*

91. National Defense Authorization Act, Pub. L. No. 113-66, 127 Stat. 672 (2013).

92. *Id.*

93. *Id.*

make much difference, as the higher levels of review still primarily lack formal legal training.⁹⁴

Despite having such broad prosecutorial discretion, commanders are provided with little regulatory guidance, particularly in comparison to the civilian federal prosecutors.⁹⁵ Without formal guidance provided to commanders, their decisions can seem capricious or arbitrary. Worse, their decisions may be influenced by their own personal or cultural values, which will inevitably vary from commander to commander.⁹⁶ The guidance that is provided to commanders is generally structured in a range of punishments that can be administered for misconduct, ranging from no action, nonjudicial reprimand, to prosecution.⁹⁷ If service members have this impression of their command's prosecutorial discretion, they may be deterred from making an unrestricted report of an assault. This issue is even more acute in instances where the attacker serves in the same unit or under the same commander.

III. SEEKING DISABILITY COMPENSATION FROM THE DEPARTMENT OF VETERANS AFFAIRS

The mission of the VA is “[t]o care for him who shall have borne the battle, and for his widow, and his orphan.”⁹⁸ VA disability compensation is a tax-free benefit paid to veterans with disabilities resulting from a disease or injury incurred or aggravated during active duty military service.⁹⁹

Compensation [benefits] may also be paid for post-service disabilities that are considered related or secondary to disabilities occurring in service and for disabilities presumed to be related to circumstances of military service, even though they may arise after service. Generally, the degrees of disability specified are also designed to compensate for considerable loss of working time from exacerbations or illnesses.¹⁰⁰

To qualify for VA disability compensation, an individual must establish each of the following elements: be considered a veteran

94. *Id.*

95. VanLandingham, *supra* note 69, at 391.

96. *Id.* at 397.

97. *Id.* at 400–01.

98. *Mission, Vision, Core Values & Goals: About VA*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.va.gov/about_va/mission.asp [<http://perma.cc/4CEK-EDBZ>] (quoting President Abraham Lincoln).

99. *Compensation*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/compensation/types-disability.asp> [<http://perma.cc/TF22-ZJV8>].

100. *Id.*

according to the VA's definition,¹⁰¹ have a current disability,¹⁰² and establish that his or her disability is service-connected.¹⁰³ To determine whether a service member should be classified as a veteran, the VA primarily looks at the individual's discharge grade.¹⁰⁴ The following discharges generally qualify a service member for veteran status: honorable discharge, general discharge, discharge under honorable conditions and uncharacterized (generally attributed to entry level).¹⁰⁵ The veteran must also have a current disease or disability, which can include certain mental health disabilities.¹⁰⁶ The veteran must establish a service connection, or a nexus, to his or her disability.¹⁰⁷ Generally, he or she must have incurred the disease or disability in service or his or her condition must have been exacerbated by his or her service in the armed forces.¹⁰⁸

The requirements for establishing claims for mental disability are similar for other physical and chronic disabilities. The individual must be a veteran, have a current disability, and demonstrate that

101. The VA defines terms as follows:

(a) Armed Forces means the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including their Reserve components.

(b) Reserve component means the Army, Naval, Marine Corps, Air Force, and Coast Guard Reserves and the National and Air National Guard of the United States.

(c) Reserves means members of a Reserve component of one of the Armed Forces.

(d) Veteran means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.

38 C.F.R. § 3.1 (2015).

102. 38 C.F.R. § 3.303(a) (2016).

103. The VA outlines principles relating to service conditions as follows:

(a) *General*. Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions. Each disabling condition shown by a veteran's service records, or for which he seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record

Id.

104. *Guide to Understanding an Applicant's DD-214 for VVA Membership Eligibility*, VIETNAM VETERANS OF AM. (Apr. 17, 2010), <https://vva.org/wp-content/uploads/2016/03/Guide-to-DD214-VVA-Membership-Eligibility.pdf> [<http://perma.cc/7LCX-EW5R>].

105. *See* 38 C.F.R. § 3.12 (2016).

106. *Id.* § 3.303(c).

107. *Id.* § 3.303(a).

108. *Id.* § 3.303(d).

an in-service event caused that disability.¹⁰⁹ For post-traumatic stress disorder (PTSD) the veteran is generally required to prove that an “in-service stressor” caused his or her PTSD.¹¹⁰ 38 C.F.R. § 4.130 governs the ratings for compensation of mental disabilities.¹¹¹ Depending on the level of the veteran’s social and occupational impairment, the veteran will receive a rating.¹¹² For example, a veteran must establish the following to receive a 100% rating for a qualifying mental disorder: “Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; [or] grossly inappropriate behavior”¹¹³ A veteran may receive a 10% rating if he or she demonstrates the following symptoms: “Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication.”¹¹⁴ The language is imprecise, and often mental disorders may have overlapping symptoms and types of impairment.¹¹⁵ When symptoms overlap, veterans may only receive a rating for one mental disability, when they really suffer from multiple illnesses and accordingly should receive multiple ratings, which would in turn increase the amount of monthly disability compensation the veterans receive.¹¹⁶

The consequences of sexual assault can include immediate physical injury to the victim, transmission of sexually transmitted diseases and associated complications, pregnancy, mental disorders, and chronic health problems.¹¹⁷ Among the physical and chronic health conditions that may develop following sexual assault are lacerations, cervical trauma, Human Immunodeficiency Virus (HIV), fibromyalgia, gastrointestinal symptoms associated with irritable bowel syndrome, infertility, chronic fatigue, and chronic pain.¹¹⁸

The development of mental disorders is common among individuals who experience MST; victims of MST are more likely than the general population to develop psychiatric disorders.¹¹⁹ The VA itself

109. *Id.* § 3.304.

110. *Id.* § 3.304(f).

111. 38 C.F.R. § 4.130 (2016).

112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.*

116. Seamone & Traskey, *supra* note 3, at 392.

117. Farris, Schell & Tanielian, *supra* note 66, at 5.

118. *Id.* at 6.

119. *Id.*

reports that 65% of male victims and 45.9% of female victims of sexual assault experience a lifetime struggle with PTSD.¹²⁰ Data indicate that women with an MST experience are five times more likely to develop PTSD than women who have not experienced sexual violence.¹²¹ Alarming, women who experience MST were four times more likely to experience PTSD than civilian women who experienced sexual assaults.¹²² The study also indicates that about half of MST survivors suffer from major depressive disorder and substance abuse.¹²³ Women who have MST experience are twice as likely to have alcohol abuse problems.¹²⁴ Further, about 27% of MST survivors suffer from some eating disorder.¹²⁵ In a VA study, women who experienced non-violent MST were four times more likely to experience stress disorders than individuals who experienced duty-related stress alone.¹²⁶ Data also indicates that individuals who served in Operation Iraqi Freedom or Operation Enduring Freedom were more likely to experience negative mental health conditions post-deployment when they experienced instances of MST.¹²⁷ Research indicates that this population is particularly hesitant to report issues relating to their mental health.¹²⁸

With such debilitating disabilities and mental illnesses affecting military personnel and veterans who have experienced MST, ensuring they are provided for must be a priority for both the DoD and the VA. With data indicating such high numbers of veterans suffering from mental illness, these government entities must work to reduce some of the obstacles these veterans face when seeking disability compensation.

120. Amy Street & Jane Stafford, *Military Sexual Trauma: Issues in Caring for Veterans*, in NATIONAL CENTER FOR POST-TRAUMATIC STRESS DISORDER, IRAQ WAR CLINICIAN GUIDE (2d ed. 2004), <http://www.ptsd.va.gov/professional/trauma/war/military-sexual-trauma.asp> [<http://perma.cc/S5HS-MEBP>].

121. Alina Suris & Lisa Lind, *Military Sexual Trauma: A Review of Prevalence and Associated Health Consequences in Veterans*, 9 TRAUMA, VIOLENCE, & ABUSE 250, 259 (2008).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. However, survivors of sexual trauma often delay disclosure and treatment of their experiences, and Operation Enduring Freedom and Operation Iraqi Freedom Veterans report stigma associated with help-seeking. Thus, the population of Operation Enduring Freedom and Operation Iraqi Freedom veterans seeking Veterans Health Administration care for military sexual trauma may increase with time.

Rachel Kimerling et al., *Military-Related Sexual Trauma Among Veterans Health Administration Patients Returning from Afghanistan and Iraq*, 100 AM. J. PUB. HEALTH 1409, 1411 (2010) (citations omitted).

128. *Id.*

IV. DIFFICULTIES THAT VICTIMS OF MILITARY SEXUAL TRAUMA FACE WHEN SEEKING VA COMPENSATION FOR MENTAL ILLNESSES

It is first important to recognize that many veterans who would qualify for disability compensation do not even apply for their benefits at all.¹²⁹ The process can be daunting for even healthy adults, but individuals who are experiencing mental illness or physical disabilities may have even more difficulty sorting through the process to file a successful disability compensation claim.¹³⁰

Combat veterans receive a presumption that they experienced an in-service stressor that caused their PTSD or other mental illness.¹³¹ Joel Marrero argues that “because combat trauma occupies a preeminent role in military disability policy, non-combat trauma is often disregarded and relegated to obscurity.”¹³² Unlike combat veterans who receive a presumption, victims of MST must prove that it is as likely as not that their MST incident occurred in service, just as veterans must do for other physical illnesses.¹³³ In other words, the veteran must prove that there is a 50% certainty that the assault occurred and that assault or MST was the cause of their current disability.¹³⁴ This burden of proof may not seem difficult, but when claimants are suffering from mental illness this process is particularly daunting.¹³⁵ Furthermore, claimants must begin the claims process *pro se*, and can only hire an attorney after they have been denied benefits by the VA.¹³⁶

Many veterans associate the VA with the military, which could deter them from seeking benefits if, while serving in the military, the veterans' complaints of MST were ignored, or they had experienced retaliation for reporting the assault or harassment.¹³⁷ Additionally, many veterans feel stigmatized by their experience, particularly male survivors of sexual assault.¹³⁸ The VA also has a history of failing to

129. Seamone & Traskey, *supra* note 3, at 347.

130. Ben Kappelman, Note, *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, 549–50 (2011).

131. See, e.g., *id.* at 548.

132. Joel Marrero, *Reframing and Reconstituting Normative Views of Military Trauma Moving Beyond Gendered Paradigms and Correcting Policies that Unduly and Unlawfully Subject Non-Combat Trauma Claims to Stricter Scrutiny*, 47 IND. L. REV. 509, 541 (2014).

133. Kappelman, *supra* note 130, at 546.

134. *Id.*

135. See *id.* at 557.

136. Leslie C. Rogall, *An Attorney's Guide to Veterans' Rights and Benefits*, AM. BAR ASS'N (Feb. 2005), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/anattyguide.html [<http://perma.cc/94A4-79KP>].

137. Seamone & Traskey, *supra* note 3, at 346.

138. Farris, Schell & Tanielian, *supra* note 66, at 7.

maintain sensitivity to gender when addressing sexual assault.¹³⁹ A woman may have to receive treatment from a male health professional despite the stress and discomfort this may cause her.¹⁴⁰ Conversely, many programs are geared towards women and may alienate male survivors.¹⁴¹

While the VA recognizes that there are many incidents of MST and that reporting on those occurrences is low, the agency continues to deny high numbers of veterans seeking compensation related to MST.¹⁴² Even assuming the veteran can establish that the MST occurred, the VA can still deny based on stressors experienced by the veteran prior to their service or after their service.¹⁴³ Therefore, even though the veteran's burden of proof is "as likely as not," that standard may be more difficult if he or she experienced trauma at any point before or after service in the armed forces.¹⁴⁴

In *AZ v. Shinseki*, the Court of Appeals for the Federal Circuit resolved the issue of whether, in cases considering post-traumatic stress disorder disability claims based on in-service sexual assaults, the VA may properly rely on the absence of contemporaneous service records reporting a sexual assault.¹⁴⁵ In that case, the court held that "[w]here an alleged sexual assault, like most in-service sexual assaults, is not reported, the absence of service records documenting the alleged assault is not pertinent evidence that the assault did not occur."¹⁴⁶ The VA cannot treat a claimant's failure to report an alleged sexual assault to military authorities as pertinent evidence that the sexual assault did not occur, particularly because most sexual assaults go unreported due to a fear of personal and professional reprisal.¹⁴⁷

Although *AZ v. Shinseki* indicates some progress, it has effectively done little for veterans trying to substantiate disability compensation claims. Even though the absence of evidence is not negative evidence, the veteran still faces the burden of proving that it is as likely as not that an in-service stressor occurred.¹⁴⁸ Without contemporaneous evidence in their military service records, proving that the in-service stressor occurred is difficult.

139. Seamone & Traskey, *supra* note 3, at 345.

140. *Id.* at 345–46.

141. *Id.* at 345.

142. *Id.*

143. *Id.* at 354.

144. *See id.* at 388.

145. *AZ v. Shinseki*, 731 F.3d 1303, 1306 (Fed. Cir. 2013).

146. *Id.* at 1318.

147. *See id.* at 1313.

148. *Id.* at 1318.

Some argue that the current claims adjudication process unfairly favors combat veterans over those who have experienced MST.¹⁴⁹ The Court of Appeals for Veterans Claims acknowledged this disparity in *Acevedo v. Shinseki*, noting that “lay testimony alone may be sufficient to establish the occurrence of [a] stressor [based on fear of hostile military or terrorist activity] if the stressor is consistent with [a claimant’s] service and a VA psychiatrist or psychologist opines that the stressor is adequate to support a diagnosis of PTSD.”¹⁵⁰ In contrast, lay testimony must be corroborated by other evidence to establish the occurrence of the stressor when VA evaluates a claimant’s MST stressor.¹⁵¹ Essentially, a victim of MST does not get the same presumption of an in-service stressor as combat veterans do.¹⁵² The victim must corroborate the stressor when there is no report in his or her records.¹⁵³ Examples of evidence corroborating lay testimony could include statements from friends or family members, medical evidence of tests for sexually transmitted diseases, or decreases in performance ratings following the alleged MST.¹⁵⁴ When it evaluates a veteran’s claim, the VA must look at all the evidence in the veteran’s record to determine whether it is as likely as not that the in-service stressor occurred and that it is the stressor that caused the veteran’s current mental illness.¹⁵⁵ Without contemporaneous reports in the veteran’s record, this burden can be difficult to meet.

Veterans have very little confidence in the VA’s ability to efficiently and fairly adjudicate veterans’ disability claims.¹⁵⁶ This lack of confidence is likely related to the long, arduous process claimants face—which tends to take even greater periods of time for MST-related claims—and recent scandals that call into question the integrity of the VA adjudication process.¹⁵⁷

149. Marrero, *supra* note 132, at 510.

150. *Acevedo v. Shinseki*, 25 Vet. App. 286, 291 (2012) (referring to 38 C.F.R. § 3.304(f)(3), which provides criteria for establishing a service connection for PTSD related to the stressor of fear of hostile military or terrorist activity).

151. “If a posttraumatic stress disorder claim is based on an in-service personal assault, evidence from sources other than the veteran’s service records may corroborate the veteran’s account of the stressor incident.” 38 C.F.R. § 3.304(f)(5) (2016).

152. *See id.*

153. *Id.*

154. *AZ v. Shinseki*, 731 F.3d at 1311.

155. 38 C.F.R. 3.303(a) (2016).

156. *See Why are Veterans Waiting Years on Appeal? A Review of the Post-Decision Process for Appealed Veterans’ Disability Benefits Claims: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans’ Affairs*, 113th Cong. 31 (2013) (statement of Michael P. Allen, Professor of Law and Director of the Veterans Law Institute at Stetson University College of Law).

157. *Id.* at 65 (statement of Disabled American Veterans, a veterans service organization).

Service members experience the stress and emotional damage, and the physical damage, of MST while in service and face significant barriers in obtaining disability compensation as veterans. Servicemen and women are deterred from reporting initially, and are again deterred from seeking compensation benefits to which they are entitled to by law.¹⁵⁸ When victims are unfairly denied benefits for disabilities resulting from MST, they are victimized twice.

V. POTENTIAL REMEDIES

Many efforts have been initiated within the VA to assist veterans in seeking claims for military sexual trauma.¹⁵⁹ However, reporting of MST remains low within the armed forces.¹⁶⁰ Removing some of the deterrents would encourage survivors to report. With reported incidents, it is much easier for the veteran to establish that a stressor occurred while in service.¹⁶¹ In-service reports of MST would allow service men and women to receive the compensation to which they are entitled. In order for restricted reports to assist veterans with their disability claims, evidence of that restricted report must be available to the veteran and to the VA.¹⁶² If an unrestricted report is available, a veteran will easily be able to prove the occurrence of an in-service stressor and satisfy the VA's nexus requirement.¹⁶³ In order to increase reports, the causes of low reporting numbers should be ameliorated. As indicated earlier, the top reasons for opting out of reporting were embarrassment, fear of negative career consequences, and belief that nothing will be done.¹⁶⁴

The DoD should make significant changes to the disciplinary and reporting procedures relating to sexual assault and harassment in order to increase the number of individuals who come forward. Increasing reporting will ease the evidentiary burdens veterans face when seeking their disability compensation benefits.¹⁶⁵ Studies indicate that victims believe nothing will be done even if they report an

158. Seamone & Traskey, *supra* note 3, at 345.

159. U.S. DEP'T OF VETERANS AFFAIRS, *The Budget for Fiscal Year 2015*, <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/veterans.pdf> [<http://perma.cc/LKW9-CMA5>].

160. 2010 ANNUAL REPORT ON SEXUAL ASSAULT, *supra* note 6, at 2.

161. *Id.* at 16.

162. Seamone & Traskey, *supra* note 3, at 349.

163. *Id.*

164. Farris, Schell & Tanielian, *supra* note 66, at 7.

165. Kevin Freking, *More than 85,000 Vets Sought Treatment for Sex Abuse in 2012 Alone*, TALKING POINTS MEMO (May 20, 2013, 11:23 AM), <http://talkingpointsmemo.com/news-more-than-85-000-vets-sought-treatment-for-sex-abuse-in-2012-alone> [<http://perma.cc/EN6W-4B7K>].

assault. Unfortunately, this fear is supported by current prosecution and conviction rates.¹⁶⁶ Even with strong political and public pressure, assaults continue without punishment.¹⁶⁷ President Obama has stated, “I don’t want just more speeches or awareness programs or training but, ultimately, folks look the other way If we find out somebody is engaging in this stuff, they’ve got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period. It’s not acceptable.”¹⁶⁸ However as it stands, only about 8% of reported attacks are prosecuted.¹⁶⁹ The Air Force reported that 45% of cases prosecuted in courts-martial in 2013 ended in a conviction.¹⁷⁰ In 2012, one in three service members who were convicted remained in the military.¹⁷¹ When victims feel their reports will be futile, they are less likely to report instances of MST.¹⁷² This is particularly relevant for victims who work in the same unit as the perpetrator.

Some advocates point to the vast prosecutorial discretion given to commanders as a reason why conviction and disciplinary rates remain low for perpetrators of sexual assault among the armed forces. They claim that removing that discretion from commanders will decrease favoritism, bias, and ensure victims receive justice.¹⁷³ On May 16, 2013, Senator Kirsten Gillibrand proposed the Military Justice Improvement Act, which called for the removal of certain offenses from command authority, the elimination of a commander’s power to overturn or downgrade convictions in clemency, and elimination of a commander’s consideration of the character of the accused

166. Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES (May 1, 2014), <http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html> [<http://perma.cc/5CUD-ZRXD>].

167. See SERV. WOMEN’S ACTION NETWORK, QUICK FACTS: RAPE, SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE MILITARY (2012), <http://servicewomen.org/wp-content/uploads/2012/10/Final-RSASH-10.8.2012.pdf> [<http://perma.cc/XVR6-XXFG>] [hereinafter SERV. WOMEN’S ACTION NETWORK].

168. Michael D. Shear, *Obama Calls for ‘Moral Courage’ at Naval Academy Graduation*, N.Y. TIMES (May 24, 2013), <http://www.nytimes.com/2013/05/25/us/politics/obama-naval-academy-commencement.html> [<http://perma.cc/T9LY-DCJA>].

169. SERV. WOMEN’S ACTION NETWORK, *supra* note 167. In addition, “[w]hile sexual assaults are generally under-reported, under-reporting is exacerbated in military settings. In 2010, out of the 19,000 sexual assaults that occurred in the military, the Department of Defense (DOD) estimates that only 13.5% of survivors reported assault. It is difficult to determine the actual number of assaults in 2011 since the *Workplace and Gender Relations Survey of Active Duty Member* (WGRA) was not conducted in 2011.” *Id.*

170. U.S. AIR FORCE JUDGE ADVOCATE GEN. CORPS, AIR FORCE SEXUAL ASSAULT COURT-MARTIAL CONVICTIONS 2010–OCT. 2014, at 2 (2014).

171. SERV. WOMEN’S ACTION NETWORK, *supra* note 167.

172. See Farris, Schell & Tanielian, *supra* note 66, at 8.

173. Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 134 (2014).

in decisions about the initial disposition of a sexual assault case.¹⁷⁴ Army Major Elizabeth Murphy asserts that “military lawyers in prosecutorial roles, rather than commanders, should have decision-making authority for preferral and referral of certain cases to special and general courts-martial.”¹⁷⁵ She suggests limiting the application of this modification to offenses that can result in incarceration for one year; other offenses could receive administrative or judicial punishment at the discretion of commanders.¹⁷⁶ Modifying the disciplinary procedures could encourage service men and women to make unrestricted reports that would lead to prosecutions of those accused of sexual assault. If unrestricted reporting increases, then more service members will have clear evidence that an incident of MST occurred.¹⁷⁷

Encouraging service members to make restricted reports could combat the two primary reasons that veterans decide not to report—fear of reprisal and embarrassment.¹⁷⁸ Currently, service members who are victims of MST may make restricted reports that will not inform command or initiate an official investigation.¹⁷⁹ The restricted report can preserve contemporaneous evidence of an MST as long as the service member has access to that report after separating from service.¹⁸⁰ Restricted reports allow survivors to receive immediate counseling on the treatment resources available to them while they are in service.¹⁸¹ Studies indicate “[o]ne of the most important elements of mental health care in the immediate aftermath of a sexual assault is nonjudgmental, compassionate support from informal and formal support persons.”¹⁸² The DoD currently has resources available for those individuals who choose to report incidents of sexual assault and other forms of military sexual trauma. Sexual Assault Response Coordinators and Sexual Assault Victim Advocates¹⁸³ are available at every military installation at the brigade, or force equivalent level. With accessible reporting services, service members can

174. See Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013); see also Murphy, *supra* note 173, at 130.

175. Murphy, *supra* note 173, at 134.

176. *Id.*

177. Farris, Schell & Tanielian, *supra* note 66, at 7.

178. A related remedy would allow for the preservation of restricted reports in sealed files. Brianne Ogilvie & Emily Tamlyn, *Coming Full Circle: How VBA Can Complement Recent Changes in DOD and VHA Policy Regarding Military Sexual Trauma*, 4 VETERANS L. REV. 1, 10 (2012).

179. DoD, *Restricted Reporting Policy*, *supra* note 24.

180. Ogilvie & Tamlyn, *supra* note 178, at 22.

181. 2010 ANNUAL REPORT ON SEXUAL ASSAULT, *supra* note 6, at 16.

182. Farris, Schell & Tanielian, *supra* note 66, at 15.

183. U.S. DEP'T OF DEFENSE SEXUAL ASSAULT ADVOCATE CERTIFICATION PROGRAM, *Overview*, <http://www.sapr.mil/index.php/victim-assistance/d-saacp> [<http://perma.cc/KEG6-7BES>].

report incidents of sexual assault and harassment anonymously, but still receive the immediate support, advice, and medical care they need.¹⁸⁴

Restricted reporting could have the twofold benefit of helping a victim's immediate mental health needs and substantiating his or her entitlement to disability benefits when he or she file future claims for mental health disabilities. However, in order for restricted reports to be used as evidence in disability compensation claims, those reports must be preserved after service, and there must be a mechanism in place for veterans to access their reports later on. The DoD currently has a directive that allows a victim to release the confidential information included in a restricted report while in service.¹⁸⁵ According to recent regulations, forensic evidence that is collected for a restricted or unrestricted report is preserved for five years.¹⁸⁶ The preservation of the restricted reports could allow the veteran to later release their report to the VA to better substantiate his or her in-service stressor, establishing a service connection more easily. The forensic proof, if still in existence at the time the veteran files a claim, could help prove that an in-service stressor occurred.¹⁸⁷

The DoD also has provisions that allow for the release of confidential reporting at the request of the veteran, yet it is unclear how that information is preserved in the long term.¹⁸⁸ The DoD must consider the victim's privacy interests while preserving evidence that could later prove essential to a veteran's disability claim for mental illnesses caused by MST.¹⁸⁹ In order to preserve valuable evidence of MST, the DoD should research methods of preserving information helpful to veterans who may later seek disability compensation while still maintaining victims' confidentiality when they have made restricted reports. If an appropriate method of report preservation is developed, veterans will have access to contemporaneous evidence of MST, and the evidentiary burden of proving a stressor would be substantially alleviated.¹⁹⁰

Of course, for restricted reports to help veterans in their disability compensation claims, the veteran must have made a report initially while in service. Therefore, the DoD must focus its efforts to increase the percentage of service men and women who report sexual assault and sexual harassment. Reporting has shown an increase in the

184. 2010 ANNUAL REPORT ON SEXUAL ASSAULT, *supra* note 6, at 16.

185. *Id.* at 16.

186. Farris, Schell & Tanielian, *supra* note 66, at 7.

187. *See id.*

188. *Id.*

189. *See id.* at 8.

190. DoD, *Restricted Reporting Policy*, *supra* note 24.

previous two years, but the data is not conclusive as to whether the percentage of individuals reporting has increased or whether the number of assaults has increased.¹⁹¹ Regardless, increased numbers of reports translates into increasing numbers of veterans who have secured evidence of in-service occurrences of MST.¹⁹²

Additionally, the VA and the DoD must work together to develop a system that will preserve evidence of restricted reports for the veteran's use later when seeking disability compensation. Currently, there is not a system in place for veterans to ensure preservation of records of their restricted reports.¹⁹³ Accordingly, the DoD should work on developing its system to provide service members with proof of their restricted report before they separate from the military. Service members and veterans should also be better informed of the significance of in-service reports in pursuing benefits through the VA. This counseling on veterans' benefits claims could be provided through the Sexual Assault Prevention and Response Program or through Victim's Advocates.¹⁹⁴

Increasing the number of unrestricted and restricted reports of MST must be a long term goal on the part of the DoD. The DoD should focus its studies on what is currently inhibiting victims from coming forward to make restricted and unrestricted reports. Developing a system for preserving restricted reports will also take time, resources, and commitment on the part of all SARCs and the Sexual Assault Prevention and Response Program intervention programs. In the meantime, the VA should look at the data on the low levels of reporting and modify its evidentiary burdens for compensation claims related to MST.

The evidentiary burden for MST-related PTSD claims could be alleviated in a similar way to the combat veteran presumption.¹⁹⁵ By applying a similar presumption, a psychological diagnosis along with a service member's lay testimony supporting the in-service trauma would be enough to establish a disability compensation claim.¹⁹⁶ Alternatively, the VA could give greater weight to lay evidence presented by the veteran in the form of a personal statement, or statements by the veteran's family, friends, or coworkers.

191. Farris, Schell & Tanielian, *supra* note 66, at 7.

192. Ogilvie & Tamlyn, *supra* note 178, at 35.

193. *Id.*

194. SEXUAL ASSAULT ADVOCATE CERTIFICATION PROGRAM, *supra* note 183.

195. "Combat. Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation." 38 C.F.R. § 3.304(d) (2016).

196. *See id.*

Without cooperation and recognition of the difficult evidentiary burdens veterans face, the VA will deny veterans the disability compensation to which they are entitled.

CONCLUSION

Veterans make many sacrifices in service to their nation. Congress has created benefits for those who are injured while in service and face disabilities, both physical and mental, after separation from the military. Veterans who were victims of military sexual trauma and face mental disabilities because of those traumatic experiences are entitled to disability compensation.

Veterans who are survivors of MST face an unfair evidentiary burden when seeking disability compensation for mental illnesses related to their assault—particularly PTSD—from the VA. Veterans face barriers starting from reporting the incident while on active duty to proving an in-service connection to their mental disorder after separating from the military, particularly when they did not report the incident while in service. Modifying reporting and disciplinary procedures in the military will make it easier for survivors to obtain benefits for PTSD and other mental disabilities associated with MST. Increasing confidence in reporting instances of MST is essential for repairing the culture surrounding sexual assault and harassment within the armed forces. The DoD and the VA must make committed efforts to improve the quality of care victims of MST receive and to ensure that veterans receive the benefits they have earned through service to their nation.

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