

Presume Too Much: An Examination of How the Proposed COMBAT PTSD Act Would Alter the Presumption of a Traumatic Stressor's Occurrence for Veterans

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INTRODUCTION

Consider the cases of a pair of hypothetical Vietnam veterans. The first veteran has been trained as an infantry soldier, while the second veteran's military occupational specialty is a mechanic.² When the infantryman reports to his unit, he is sent on patrol. When the mechanic arrives, he is told that there are no vehicles in need of repair. He is handed a rifle and ordered to stand watch. Over the course of their service in Vietnam both soldiers come under fire while on duty. Only the infantry soldier, however, is awarded a combat citation.

To an outside observer, the two veterans appear to have had similar service histories. Yet under the Department of Veterans Affairs (VA) benefit system, the two situations are treated quite differently. For example, in this hypothetical situation, when each veteran applies for VA benefits years after service after being diagnosed with posttraumatic stress disorder (PTSD), each would need to present evidence supporting the fact that an in-service "stressor" occurred. VA applies the presumption of occurrence to the infantryman's statements because combat is consistent with the conditions of his service. VA, however, does not apply the same presumption to the mechanic's statements because mechanics are not often involved in combat. Therefore, the mechanic would not be entitled to VA benefits for PTSD unless he can present independent evidence verifying that he was fired upon while standing guard duty many years ago.³

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² The second hypothetical veteran is loosely based on the appellant in *Cohen v. Brown*, 10 Vet. App. 128 (1997).

³ See *id.* at 142.

A veteran seeking VA benefits for PTSD must establish three facts: an in-service stressing event, a current medical diagnosis of PTSD, and medical evidence linking the event to the current diagnosis.⁴ Thus, even after a veteran is diagnosed with PTSD, he or she will not be entitled to benefits unless VA finds that there is sufficient evidence that the underlying event actually occurred.⁵ For a veteran seeking benefits years after service, it can be exceptionally difficult to establish that this event, known as the “in-service stressor” or the “traumatic stressor,” ever occurred. In many cases, the only evidence toward establishing that the stressor occurred may be the veteran’s own words, as the stressor may not have been documented in the veteran’s personnel, unit, or service treatment records.⁶

Recognizing the ambiguities inherent in the “chaotic endeavor”⁷ of combat, Congress relaxed the evidentiary standard for some veterans to establish that a traumatic stressor occurred.⁸ This relaxed standard, found in section 1154(b) of title 38 of the United States Code, provides that “any veteran who engaged in combat with the enemy” may prove by testimony alone that an injury or disease originated in service, so long as the injury is consistent with the “circumstances, conditions, or hardships” of the service.⁹ This rule can be described as the “presumption of

⁴ 38 C.F.R. § 3.304(f) (2008).

⁵ *Cohen*, 10 Vet. App. at 138.

⁶ *The Nexus Between Engaged in Combat with the Enemy and PTSD in an Era of Changing Warfare Tactics: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans’ Affairs* [hereinafter *Mar. Subcomm. Hearing*], 111th Cong. 3 (1st session 2009) (statement of Ian C. De Planque, The American Legion).

⁷ *Id.* at 1.

⁸ 38 U.S.C. § 1154(b) (2006).

⁹ *Id.* (“In the case of any veteran who engaged in combat with the enemy . . . the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service. . . .”). For further discussion of 38 U.S.C. § 1154(b) and the problems surrounding “engaged in combat with the enemy” see Alison Atwater, Comment, *When Is a Combat Veteran a Combat Veteran?: The Evidentiary Stumbling Block for Veterans Seeking PTSD Disability Benefits*, 41 ARIZ. ST. L.J. 243 (2009).

occurrence based on lay statements,” or simply as the “presumption of occurrence.”¹⁰ Although this presumption eases a combat veteran’s burden of proving that a traumatic stressor occurred during service, many otherwise deserving veterans cannot employ it because the evidence in their military personnel file does not denote that they participated in combat.

Congress originally codified the current rule establishing which veterans are entitled to a presumption of participation in combat in 1941,¹¹ at the opening of an armed conflict that is far removed from the one facing today’s soldiers. Although the current rule has been a problem for Vietnam veterans, it may be even worse for Iraq and Afghanistan war veterans.¹² In the current wars encompassing the “Global War on Terrorism,” soldiers without infantry training routinely travel in convoys that may be subject to attack from an improvised explosive device, and there is no traditional “front” and “rear.”¹³ More than ever, a service member’s military occupational specialty does not necessarily designate who is at risk for engaging in combat.¹⁴

Many veterans’ advocacy groups argue that the VA system needs to be reformed to accommodate deserving veterans who suffer from PTSD but who cannot prove that an in-service stressor actually

¹⁰ It should be noted that this is a rebuttable presumption, as clear evidence that the claimed event did not occur may rebut the combat veteran’s lay statement that it occurred. 38 C.F.R. § 3.304(f)(2) (2008) (“If the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, *in the absence of clear and convincing evidence to the contrary*, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran’s service, the veteran’s lay testimony alone may establish the occurrence of the claimed in-service stressor.” (Emphasis added)).

¹¹ See *Mar. Subcomm. Hearing, supra* note 6, at 4 (Statement of Ian C. De Planque).

¹² See, e.g., *id.* at 3-4 (statement of Ian C. De Planque).

¹³ See *Compensation Owed for Mental Health Based on Activities in Theater Post-Traumatic Stress Disorder: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs* [hereinafter *Apr. Subcomm. Hearing*], 111th Cong. 3-5 (1st session 2009) (statement of Richard P. Cohen, National Organization of Veteran’s Advocates, Inc.).

¹⁴ See *id.* at 1 (statement of Norman Bussel, American Ex-Prisoners of War (“A cook, a Seabee, a supply [sergeant] are no more immune from injury or death than anyone else in a combat zone.”)).

occurred.¹⁵ Representative John J. Hall of New York has introduced a bill in Congress seeking to respond to the calls to reform VA's current system for dealing with PTSD.¹⁶ The bill, House Bill 952, is entitled the "Compensation Owed for Mental Health Based on Activities in the Theater Post-Traumatic Stress Disorder Act" (COMBAT PTSD Act).¹⁷ Senator Daniel Akaka of Hawaii has also introduced a bill, Senate Bill 919, entitled the "Clarification of Characteristics of Combat Service Act of 2009" (Combat Service Act) that would reform the requirements to prove the existence of PTSD stressors.¹⁸

This article will examine the COMBAT PTSD Act as well as the Combat Service Act to consider their potential effect on the VA compensation system for PTSD. The first section will

¹⁵ See *Mar. Subcomm. Hearing, supra* note 6 (Statements of Ian C. De Planque at 4-5 and Thomas J. Berger, Vietnam Veterans of America at 6).

¹⁶ See H.R. 952, 111th Cong. (1st session 2009).

¹⁷ *Id.* Section 2 of the Bill states:

(a)(2) For the purposes of this subsection, the term "combat with the enemy" includes service on active duty--

(A) in a theater of combat operations (as determined by the Secretary in consultation with the Secretary of Defense) during a period of war; or

(B) in combat against a hostile force during a period of hostilities.

(b) Effective Date- Paragraph (2) of subsection (b) of section 1154 of title 38, United States Code, as added by subsection (a), shall apply with respect to a claim for disability compensation under chapter 11 of such title pending on or after the date of the enactment of this Act.

¹⁸ S. 919, 111th Cong. § 2 (2009). Section 2 of the Bill states:

Subsection (a) of section 1154 of title 38, United States Code, is amended to read as follows:

(a)(1) The Secretary shall include in the regulations pertaining to service-connection of disabilities the following:

(A) Additional provisions in effect requiring that in each case where a veteran is seeking service-connection for any disability due consideration shall be given to the places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence.

(B) Additional provisions specifying that, in the case of a veteran who served in a particular combat zone, the Secretary shall accept credible lay or other evidence as sufficient proof that the veteran encountered an event that the Secretary specifies in such regulations as associated with service in particular locations where the veteran served or in particular circumstances under which the veteran served in such combat zone.

provide a short history of PTSD and will examine the elements that a claimant must establish in order to obtain entitlement to VA benefits for PTSD. The second section contains an examination of how VA and courts have interpreted the current statutory requirements and presumptions for proving that a traumatic stressor occurred. Finally, the third section will examine the proposed legislation and the bills' potential benefits and limitations.

I. OVERVIEW OF PTSD DISABILITY COMPENSATION

A. History

Before exploring the proposed legislation, it is useful to understand how PTSD is diagnosed and the evolution of VA's current system for treating PTSD. Posttraumatic stress disorder was first formally defined in 1980, with the publication of the *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM-III).¹⁹ Experts, however, have long recognized that psychological wounds can be caused by exposure to combat. By 1941, researchers had identified a combat-related neurosis common among World War I veterans.²⁰ During World War II, approximately 500,000 service members were discharged from the Army during the war because of psychiatric disorders.²¹ Mental health repercussions of combat service lasted for a long time after the end of World War II, and a significant portion of VA's treatment resources were dedicated to psychiatric disabilities.²²

¹⁹ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS [hereinafter DSM-III-R], § 309-89 (3rd Ed. Rev. 1987).

²⁰ INST. OF MED. & NAT'L RES. COUNCIL OF THE NAT'L ACADS., PTSD COMPENSATION & MILITARY SERVICE [hereinafter NAT'L RES. COUNCIL] 42 (2007). This mental disorder was comprised of several symptoms or indicators that would later be commonly associated with PTSD diagnoses, including exposure to a traumatic event, a diminished capacity to participate in normal activities, and distorted perceptions. *Id.*

²¹ Paul Wanke, *American Military Psychiatry and Its Role Among Ground Forces in World War II*, 63 THE J. OF MIL. HIST. 127, 127 (1999).

²² NAT'L RES. COUNCIL, *supra* note 20, at 45. For example, five years after World War II, 34 out of 136 VA hospitals were exclusively dedicated to neuropsychiatric care. *Id.* Over half of VA's total number of beds were at these mental health facilities. *Id.*

In 1952, the American Psychiatric Association published the first edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-I).²³ VA essentially adopted the DSM-I approach to categorizing and diagnosing mental health disorders, and it instructed its disability raters to become familiar with the DSM-I's diagnostic criteria.²⁴ The diagnostic manual included an entry for a condition called "gross stress reaction," a disability related to combat exposure that was essentially a precursor to PTSD.²⁵ Gross stress reaction was described as a reaction to a great or unusual stress with overwhelming fear.²⁶ A second edition of the DSM, released in 1968, did not contain the entry for gross stress reaction.²⁷ When the DSM-III was released in 1980, it contained an entry for post-traumatic stress disorder.²⁸ In 1993, the VA Secretary created a set of presumptions for certain veterans seeking to establish that they incurred PTSD in service.²⁹

B. PTSD Elements

As some commentators have observed, PTSD is a disease that it defined by its cause.³⁰ An essential factor in any PTSD diagnosis is direct personal experience of a stressing, traumatic event in which death or serious bodily harm occurs, is threatened, or is witnessed.³¹ The definition also involves a subjective component,

²³ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS [hereinafter DSM-I] (1952).

²⁴ 38 C.F.R. § 4.125 (1965).

²⁵ DSM-I, *supra* note 23, at 40.

²⁶ *Id.*

²⁷ NAT'L RES. COUNCIL, *supra* note 20, at 46. Some have speculated that because the disorder was exclusively combat related the drafters were pressured to exclude the disorder to reduce potential financial obligations for mental care related to the ongoing war in Vietnam. *Id.* Another explanation has been that the authors of the DSM-II had no experience with war neurosis from the World Wars. W.J. Scott, *PTSD in DSM-III: A Case in the Politics of the Diagnosis of Disease*, 37 SOCIAL PROBLEMS 294, 297 (1990).

²⁸ DSM-III-R, *supra* note 19, at 247.

²⁹ Direct Service Connection (Post-traumatic Stress Disorder), 58 Fed. Reg. 29,110 (May 19, 1993) (codified at 38 C.F.R. § 3.304(f)).

³⁰ David Dobbs, *The Post-Traumatic Stress Trap*, SCI. AM., Apr. 13, 2009, at 66.

³¹ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS [hereinafter DSM-IV-TR], § 309-89 at 463 (Text Rev. 2000).

as the individual's response to the traumatic event must involve "intense fear, helplessness, or horror."³² In addition to experiencing a traumatic event, there are five other PTSD criteria that must be met for an accurate diagnosis: re-experiencing the event, avoidance behavior, hyperarousal, symptomatology for more than a month, and significant impairment in social, occupational, or other important areas of functioning.³³ PTSD is considered chronic when its symptoms continue unabated for longer than three months, and it is considered to have a delayed onset if symptoms do not appear until six or more months after the traumatic stressor.³⁴

Several factors make PTSD a unique disability in the VA disability compensation system. First, it is an inherently subjective condition, as the veteran's response to a traumatic stressor must involve fear, helplessness, or horror.³⁵ The type of claimed traumatic stressor cannot, by itself, be used to determine whether the event was sufficient to cause PTSD.³⁶ A second unique factor is that PTSD symptoms can wax or wane in severity over time.³⁷ Some individuals may recover quickly, while others do not even begin to experience symptoms until years after the trauma.³⁸ Even after a decrease in symptoms, reactivation of PTSD can occur when reminded of the original trauma or during stressful moments in daily life.³⁹ Thus, because the condition does not remain static, no evaluation can ever be considered truly "final". A third significant factor is that PTSD symptoms may go unreported by military members because of an aversion to reporting mental-health problems in military culture.⁴⁰ Failure to report the onset of

³² *Id.* at 467. This represents a major shift from the objective definition of a stressor in the DSM-III, which required that the traumatic event be "outside the range of usual human experience" and would cause distress "in almost anyone." DSM-III-R, *supra* note 19, at 247.

³³ DSM-IV-TR, *supra* note 31, at 463.

³⁴ *Id.* at 465.

³⁵ *Id.* at 463.

³⁶ *See generally id.*

³⁷ *Id.* at 466.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ NAT'L RES. COUNCIL, *supra* note 20, at 170.

symptoms while in the military may make it difficult many years later to establish that the condition was, in fact, caused by military service.⁴¹ Finally, PTSD is different than many other service-related disabilities because it can be effectively treated, and, in some cases, fully cured.⁴²

II. ESTABLISHING VA BENEFITS FOR PTSD⁴³

In order to obtain entitlement to VA benefits for PTSD, a veteran must demonstrate that a current diagnosis of PTSD exists, provide credible evidence that an in-service stressor occurred, and show that medical evidence supports a conclusion that the incident is linked to the current PTSD diagnosis.⁴⁴ As noted in the introduction, a PTSD diagnosis, by itself, does not entitle a veteran to VA benefits; he or she must show through independent evidence that a traumatic stressor actually occurred in service.⁴⁵ Some veterans may have independent proof that the traumatic stressor occurred, such as an incident report or hospitalization records. But veterans who lack documentation that their stressors occurred must find some other means of proving that the events happened. Often, testimonial evidence is the only proof they are able to present.⁴⁶

Many veterans try to find soldiers they served with to provide corroborating “buddy statements.”⁴⁷ This can be a daunting

⁴¹ See Section I.2 *infra* for examples of veterans experiencing difficulty establishing that PTSD is related to military service.

⁴² See DSM-IV-TR, *supra* note 31, at 466. For a study suggesting that PTSD can be effectively treated, see Kathryn L. Bleiberg & John C. Markowitz, *A Pilot Study of Interpersonal Psychotherapy for Posttraumatic Stress Disorder*, 162 AM. J. PSYCHIATRY 181 (2005); see also David Dobbs, *The Post-Traumatic Stress Trap*, SCI. AM., Apr. 13, 2009, at 67 (When describing one possible PTSD treatment, stating that “[i]f someone with genuine PTSD goes to the people who do this really well, they have a good chance of getting better.”).

⁴³ For a discussion of consideration of the problems a veteran may still face even after he or she establishes entitlement to VA benefits for PTSD, see Scott Simonson, Comment, *Back from War – A Battle for Benefits: Reforming VA’s Disability Ratings System for Veterans with Post-Traumatic Stress Disorder*, 50 ARIZ. L. REV. 1177 (2008).

⁴⁴ 38 C.F.R. § 3.304(f) (2008).

⁴⁵ *Id.*

⁴⁶ See *Moreau v. Brown*, 9 Vet. App. 389, 394 (1996); *West v. Brown*, 7 Vet. App. 70, 76 (1994).

⁴⁷ *Garlejo v. Derwinski*, 2 Vet. App. 619, 621 (1992). In 1992, the Court of Appeals for Veterans Claims (then called the Court of Veterans Appeals), found that VA erred by not providing a

task for veterans who have not spoken to their former comrades in decades.⁴⁸ Many publications geared toward Vietnam veterans contain advertisements from veterans seeking to find anyone who remembers them and can help in verifying their stressors.⁴⁹

For those veterans who are still unable to present independent evidence that the traumatic stressor occurred, another option exists. In certain situations, a veteran's words alone may be sufficient to establish that a traumatic stressor occurred. Three overlapping sources of authority—the United States Code, VA regulations, and court decisions—regulate when a veteran's statements are sufficient to establish that a traumatic stressor occurred.

Section 1154(b) of Title 38 of the United States Code creates a general presumption of occurrence, not limited to PTSD claims, for injuries which a veteran asserts occurred in combat.⁵⁰ Under this basic rule, the Secretary must accept a veteran's oral statements as sufficient evidence that a disease or injury occurred in service when the veteran had engaged in combat with the enemy and claims that the injury stems from such combat.⁵¹

In addition to the general statutory presumption of occurrence are the Secretary's special PTSD rules contained in 38 C.F.R. § 3.304(f).⁵² These limited presumptions can be used to establish that a traumatic stressor occurred for veterans who were

veteran notice that “buddy statements” would be acceptable evidence that an injury was incurred in service. *Id.* Note, however, that this case did not involve PTSD. For a PTSD specific case, see *Sizemore v. Principi*, 18 Vet. App. 264, 273-74 (2004).

⁴⁸ See generally *Delorge v. Shinseki*, No. 07-0279, 2009 U.S. App. Vet. Claims LEXIS 474.

⁴⁹ See, e.g., *Locator*; THE VVA VETERAN, Mar./Apr. 2009, available at <http://www.vva.org/veteran/0409/locator.html> (indicating, “seeking help for VA claim to verify stressors. Anyone from AIT Class 09 D-10-MPB, Group 03, 4th Bde., Graduated Aug. 28, 1974, Ft. Gordon.”).

⁵⁰ 38 U.S.C. § 1154(b) (2006).

⁵¹ *Id.*

⁵² 38 C.F.R. § 3.304(f)(1) (2008) (providing that “[i]f the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.”).

prisoners-of-war or alleged an in-service personal assault.⁵³ The Secretary also created a special rule for veterans claiming that their PTSD was caused by exposure to combat.⁵⁴ Section 3.304(f)(1) provides that a statement from a veteran who “engaged in combat with the enemy” is sufficient to establish that the event occurred so long as the claimed stressor is consistent with the “conditions, hardships, or circumstances” of the veteran’s service.⁵⁵

This rule does not apply to the many veterans, who by their military occupational specialties or other evidence surrounding their military service, cannot demonstrate that combat was consistent with the conditions or circumstances of their service.⁵⁶ These veterans must present independent evidence that the claimed stressor occurred.⁵⁷ Therefore, many veterans attempt to prove that they in fact engaged in combat.

The Court of Appeals for Veterans Claims (CAVC)⁵⁸ and the Court of Appeals for the Federal Circuit have explored how a veteran may establish that he or she engaged in combat. In 1996, CAVC heard *Moreau v. Brown*, in which a Vietnam veteran argued that the Board of Veterans’ Appeals (Board) erred by failing to accept a psychologist’s opinion that a traumatic stressor occurred as sufficient evidence of its occurrence.⁵⁹ The veteran did not claim that he had engaged in combat, but claimed that his diagnosed PTSD was caused by gathering the remains of service members killed in combat.⁶⁰ The only proof that his claimed stressor occurred were his own statements and a psychologist’s

⁵³ 38 C.F.R. § 3.304(f)(2), (3) (2008).

⁵⁴ *Id.* § 3.304(f)(1).

⁵⁵ *Id.*

⁵⁶ *Moreau v. Brown*, 9 Vet. App. 389, 394 (1996).

⁵⁷ *Id.*

⁵⁸ Prior to 1998, the Court of Appeals for Veterans Claims was formerly known as the U.S. Court of Veterans Appeals. See Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315 (1998) (amending 38 U.S.C. § 7261 (1994) to rename the U.S. Court of Veterans Appeals). To avoid confusion, that court will be called the Court of Appeals for Veterans Claims (CAVC) for the purposes of this article.

⁵⁹ *Moreau*, 9 Vet. App. at 393.

⁶⁰ *Id.* at 391.

opinion that “I have no doubt as to the honesty in [Mr. Moreau’s] reports.”⁶¹ The veteran’s statements were not entitled to the section 3.304(f)(1) presumption of occurrence because he had not served in combat.⁶² Mr. Moreau argued that his psychologist’s opinion that “expressly found the veteran’s recitation of facts to be credible” was sufficient “credible supporting evidence” to corroborate that the stressor had occurred.⁶³ CAVC disagreed, reasoning that if VA was required to accept an examiner’s opinion that a stressor occurred, this opinion alone would establish stressor occurrence and medical nexus, two of the three PTSD elements.⁶⁴ CAVC found that this would eliminate the purpose for requiring independent corroborating evidence, holding that after-the-fact medical opinions could not be used to prove that an in-service stressor occurred.⁶⁵

A year later, CAVC decided *Cohen v. Brown*, in which a Vietnam veteran who had been a power generator mechanic in service alleged that he had participated in armed combat, dealt with casualties, and performed guard duty and other assignments for long hours with little sleep.⁶⁶ The veteran was diagnosed with PTSD, but the Board denied him entitlement to disability benefits after finding insufficient evidence that the claimed stressors occurred.⁶⁷ The Board found that the section 3.304(f)(1) presumption of occurrence did not apply because the veteran did not have a combat specialty and there was a lack of evidence that his unit was involved in combat operations.⁶⁸ The Board also concluded that the events described by the veteran were inadequate to serve as a traumatic stressor.⁶⁹ On appeal, CAVC found that where a clear PTSD diagnosis exists, VA must presume the *sufficiency* of the alleged stressors to cause PTSD, although it need not accept that the claimed

⁶¹ *Id.* at 395.

⁶² *See id.*

⁶³ *Id.* at 396.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Cohen v. Brown*, 10 Vet. App. 128, 132 (1997).

⁶⁷ *Id.* at 136.

⁶⁸ *See id.*

⁶⁹ *Id.* at 143.

stressors actually occurred.⁷⁰ The veteran was still required to prove that he participated in combat or provide credible supporting evidence to prove that the traumatic stressor actually occurred.⁷¹ The Court also reiterated that the relaxed evidentiary standards for lay evidence contained in 38 U.S.C. § 1154(b) only applied once participation in combat has been established and could not be used to prove the fact of combat itself.⁷²

In *Gaines v. West*, the appellant was a Marine Corps veteran who served in Vietnam and sought VA benefits for PTSD, but he had not received any combat-specific military decorations.⁷³ The veteran's claimed stressor was that he had been subjected to mortar and sniper attacks and that he fired a machine gun at night toward unseen targets.⁷⁴ CAVC noted that the question of whether a veteran engaged in combat is often the "critical part of the adjudication of a PTSD claim."⁷⁵ CAVC found that a veteran can demonstrate participation in combat if he had been awarded certain combat citations.⁷⁶ Additionally, a veteran can prove combat engagement by presenting "other supportive evidence," a phrase that the court noted provided for "an almost unlimited field of potential evidence."⁷⁷ Moreover, while a veteran's statements alone are insufficient to establish that the veteran engaged in combat, CAVC also noted that VA cannot ignore such statements.⁷⁸ VA must consider these statements in the context of all the evidence tending to prove or disprove participation in combat.⁷⁹

In 1999, the VA General Counsel issued an opinion addressing the meaning of the phrase "engaged in combat with the enemy" as

⁷⁰ *Id.* at 144.

⁷¹ *Id.* at 146-47.

⁷² *Id.* at 146.

⁷³ *Gaines v. West*, 11 Vet. App. 353, 355 (1998).

⁷⁴ *Id.* at 355-56.

⁷⁵ *Id.* at 358.

⁷⁶ *Id.* at 359.

⁷⁷ *Id.*

⁷⁸ *See id.*

⁷⁹ *See id.*

found in 38 U.S.C. § 1154(b).⁸⁰ The VA General Counsel first opined that the phrase’s “ordinary meaning” was that a service member took part “in a fight or encounter with a military foe or hostile unit or instrumentality.”⁸¹ The fight or encounter could be in the form of attacking or defending against an attack, so long as the veteran personally participated in the fight.⁸² Thus, “engaged in combat” was distinguished from mere presence in a general combat theater.⁸³ According to VA General Counsel, service record notations that a veteran participated in a “campaign” or an “operation” are not synonymous with participation in combat, as campaigns involve many non-combat activities.⁸⁴ VA General Counsel also opined that in “appropriate cases,” the lack of citations, an ordinary indicator of combat, can “support a reasonable inference that the veteran did not engage in combat.”⁸⁵

One issue that was not discussed in the VA General Counsel’s opinion was a definition of the types of actions that constituted “combat”. In 2004, CAVC decided *Sizemore v. Principi*, which addressed the question of whether a Vietnam veteran engaged in combat when he had never received fire from the enemy.⁸⁶ The veteran had a combat-related specialty in artillery, but the Board found that his unit’s records indicated that it had never received any “counterfire” during its combat support missions.⁸⁷ The veteran responded by arguing that he had engaged in combat because he fired artillery rounds into enemy positions.⁸⁸ CAVC held that the Board had improperly failed

⁸⁰ Vet. Aff. Op. Gen. Couns. Prec. 12-99 ¶ 2 (Oct. 18, 1999).

⁸¹ *Id.* One criticism of the General Counsel opinion is that it did not analyze the historical context in which the bill was passed, as Congress may not have chosen the words “engaged in combat” with any precision. Alison Atwater, Comment, *When is a Combat Veteran a Combat Veteran?: The Evidentiary Stumbling Block for Veterans Seeking PTSD Disability Benefits*, 41 ARIZ. ST. L. J. 243, 268-69 (2009).

⁸² Vet. Aff. Op. Gen. Couns. Prec. 12-99 at ¶ 4, 6.

⁸³ *Id.* at ¶ 2-3.

⁸⁴ *Id.* at ¶ 12.

⁸⁵ *Id.* at ¶ 19.

⁸⁶ *Sizemore v. Principi*, 18 Vet. App. 264, 268-69 (2004).

⁸⁷ *Id.* at 271.

⁸⁸ *Id.* at 269.

to determine whether firing artillery rounds constituted engagement in combat, stating that it was error for the Board to rely on receiving fire as the sole factor in determining whether the veteran had participated in combat.⁸⁹ Finally, the Court held that VA erred by failing to inform the veteran that he should submit corroborating “buddy statements” to prove that his claimed stressor occurred.⁹⁰

One final case of interest is *Moran v. Peake*, in which a veteran argued to the Federal Circuit that his presence in a combat zone should be *prima facie* evidence of service in combat.⁹¹ The Federal Circuit rejected this argument, finding that accepting it would be tantamount to replacing the requirement that a veteran be “engaged in combat with the enemy” under 38 U.S.C. § 1154(b) with the phrase “in a combat zone.”⁹² The Federal Circuit held that Congress’s clear intent in requiring proof of combat before applying the presumption of occurrence was to ensure that only those veterans who participated in actual combat should benefit from the presumption.⁹³

Thus, VA and the courts have narrowly applied the 38 U.S.C. § 1154(b) and 38 C.F.R. § 3.304(f) presumptions of a stressor’s occurrence based on engagement in combat.⁹⁴ The presumption that a veteran’s lay evidence is sufficient to prove that a traumatic stressor occurred only applies *after* it has been found that a veteran engaged in combat.⁹⁵ Such lay statements cannot be used to establish that the veteran actually engaged in combat.⁹⁶ “Combat with the enemy” must entail personal participation in a fight, though it may be enough for a veteran to show that an attack occurred without receiving return fire.⁹⁷

⁸⁹ *Id.* at 272.

⁹⁰ *Id.* at 273-74.

⁹¹ *Moran v. Peake*, 525 F.3d 1157, 1159 (Fed. Cir. 2008).

⁹² *Id.*

⁹³ *Id.* This in essence affirmed the 1999 General Counsel Opinion.

⁹⁴ See Vet. Aff. Op. Gen. Couns. Prec. 12-99 (Oct. 18, 1999); *Sizemore*, 18 Vet. App. at 268-69; *Moran*, 525 F.3d. at 1159.

⁹⁵ *Cohen v. Brown*, 10 Vet. App. 128, 146 (1997).

⁹⁶ *Id.*

⁹⁷ *Sizemore*, 18 Vet. App. at 272. One question that has not been addressed by the CAVC or the Federal Circuit is whether witnessing civilian casualties falls under the definition of “engaged in combat with the enemy.”

III. THE PROPOSED BILLS

For veterans who had combat specialties or those who were awarded certain combat citations, it is not difficult to prove that they engaged in combat and can, therefore, use the presumption of occurrence. But for those veterans who witnessed the horrors of war despite having non-combat military designations, it can be nearly impossible to find paper records from several years ago documenting situations in which paperwork would be the last priority. The problem of establishing that a traumatic stressor occurred is no small matter, as PTSD is the fourth most prevalent service-connected disability.⁹⁸

In February 2009, Representative John J. Hall of New York introduced House Bill 952, known as the “Compensation Owed for Mental Health Based on Activities in the Theater Post-Traumatic Stress Disorder Act” (COMBAT PTSD Act).⁹⁹ The proposed legislation would amend 38 U.S.C. § 1154(b) to define the phrase “combat with the enemy” as including any active duty service in a “theater of operations” as defined by the VA Secretary in consultation with the Secretary of Defense.¹⁰⁰ Additionally, the phrase would incorporate combat against any hostile force during a period of hostilities.¹⁰¹

⁹⁸ 2008 U.S. DEP’T. OF VETERANS AFF., VETERANS BENEFITS ADMIN., ANN. BENEFITS REPORT 5.

⁹⁹ H.R. 952, 111th Cong. § 2(a)(2) (1st session 2009). The Bill states:

For the purposes of this subsection, the term “combat with the enemy” includes service on active duty--

(A) in a theater of combat operations (as determined by the Secretary in consultation with the Secretary of Defense) during a period of war; or

(B) in combat against a hostile force during a period of hostilities.

(b) Effective Date- Paragraph (2) of subsection (b) of section 1154 of title 38, United States Code, as added by subsection (a), shall apply with respect to a claim for disability compensation under chapter 11 of such title pending on or after the date of the enactment of this Act.

¹⁰⁰ H.R. 952 § 2(2)(A).

¹⁰¹ H.R. 952 § 2(2)(B). As significant of a change as this legislation would bring, it should be noted that this is not the first time Congress has considered expanding the understanding of what activities constituted “engaged in combat with the enemy.” A proposed bill in 1941 would have applied the presumption of occurrence based on lay statements to any veteran who served “in a combat area.” H.R. 4737, 77th Cong. (1941).

In April 2009, Senator Akaka of Hawaii introduced Senate Bill 919, the “Clarification of Characteristics of Combat Service Act of 2009” (Combat Service Act).¹⁰² This bill, which is not limited to PTSD claims, would amend section 1154 to require that VA give “due consideration” to the “places, types, and circumstances” of a veteran’s service, including the “official history of each” service branch.¹⁰³ The second provision of the Combat Service Act provides that VA must accept credible lay evidence from veterans who served in a “particular combat zone” that an event which is “associated with service in particular locations” occurred.¹⁰⁴

In this section, the prospective benefits and potential drawbacks of the COMBAT PTSD Act will be explored. Then, the COMBAT PTSD Act will be compared to the Senate’s Combat Service Act. Finally, based on the number of potential problems with the two bills, alternatives to the proposed legislation will be considered.

A. Benefits of the COMBAT PTSD Act

Supporters of the COMBAT PTSD Act contend that the proposed legislation would provide two potential benefits.¹⁰⁵ First, the act could reduce VA’s administrative burden by simplifying the fact-finding process.¹⁰⁶ Second, it would eliminate the injustice done to otherwise deserving veterans who are incorrectly denied entitlement to VA benefits.¹⁰⁷

The first suggested benefit of the proposed legislation is that it would ease VA’s administrative burden. Currently, when a veteran asserts that he engaged in combat in order to benefit from the section 1154(b) presumption, VA must obtain the veteran’s service records and must also attempt to obtain the records from

¹⁰² S. 919, 111th Cong. (2009).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See Apr. Subcomm. Hearing, supra* note 13, at 7-8 (statement of Richard P. Cohen).

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

the veteran's unit.¹⁰⁸ According to one veterans' advocacy group, these unit records are not electronically searchable and the backlog of unprocessed requests reaches into the thousands.¹⁰⁹ Under the COMBAT PTSD Act, the inquiry would be simpler, as VA would only have to ascertain whether a veteran was present in a general theater of operations.¹¹⁰ This information could be found by looking for theater citations or by looking for foreign service on a veteran's record of discharge. Thus, the proposed legislation would simplify (or altogether eliminate) the need to carry out time consuming unit record investigations when a veteran seeks to establish the presumption of occurrence. As the CAVC noted in *Gaines v. West*, the factual determination of whether a veteran participated in combat is often the "critical part of the adjudication of a PTSD claim."¹¹¹

In simplifying VA's administrative burden, the amended presumption of occurrence in the COMBAT PTSD Act is akin to VA's presumption of service connection for certain diseases when a veteran was exposed to Agent Orange.¹¹² This Agent Orange presumption was created, in part, to allow VA to avoid having to make difficult factual adjudications on claims involving complex and poorly understood scientific questions.¹¹³ Similarly, a revised presumption of occurrence could ease VA's fact-finding burden for veterans claiming that a traumatic stressor occurred in a combat theater.

Richard Cohen, the executive director of the National Organization of Veterans' Advocates, suggested at an April 23, 2009 Congressional subcommittee hearing on the bill that a simplified rule for the presumption of occurrence would save money by eliminating

¹⁰⁸ See 38 U.S.C. § 5103A (2006).

¹⁰⁹ See *Mar. Subcomm. Hearing, supra* note 6, at 5 (statement of Thomas J. Berger).

¹¹⁰ See H.R. 952, 111th Cong. (1st session 2009).

¹¹¹ *Gaines v. West*, 11 Vet. App. 353, 358 (1998).

¹¹² See 38 U.S.C. § 1116(b) (2006); 38 C.F.R. § 3.307(a)(6) (2008). The presumption is that certain diseases were caused by Agent Orange in veterans who were exposed to the herbicide agent in service.

¹¹³ See Marc Brown, *The Role of Science in Department of Veterans Affairs Disability Compensation Policies for Environmental and Occupational Illnesses and Injuries*, 13 J.L. & POL'Y, 593, 600-06 (2005).

the costs of appealing denied PTSD claims.¹¹⁴ Additionally, he asserted that a streamlined rule for determining the oft-disputed question of a stressor's occurrence could reduce the processing time for PTSD claims, which could reduce VA's administrative costs and possibly improve the average processing time per claim, helping the system function more efficiently.¹¹⁵

The second suggested benefit of the COMBAT PTSD Act is that it would reduce the number of incorrectly denied claims. Veterans' advocates tend to focus on this justification for passing the bill.¹¹⁶ These advocates relate horror stories about otherwise deserving individuals who have been diagnosed with PTSD but who are denied benefits because they lack adequate documentation establishing that they served in combat.¹¹⁷

For example, John Wilson of the Disabled American Veterans related the story of one female veteran who, during her service in Iraq, was temporarily assigned to accompany an all-male Marine unit on combat patrols.¹¹⁸ Her job was to search Iraqi women and children for hidden weapons.¹¹⁹ During a routine patrol mission, the Marine unit to which she was assigned was ambushed.¹²⁰ During the ensuing fire fight, she fought alongside the Marines and performed medical aid on the injured.¹²¹ When she applied for VA benefits for PTSD, however, she encountered deep skepticism that she had actually been in combat due to her military occupational specialty being in supply.¹²²

Additionally, veterans' advocates argue that beyond the inherent wrong of denying benefits to deserving individuals, Congress should

¹¹⁴ See *Apr. Subcomm. Hearing, supra* note 13, at 7-8 (statement of Richard P. Cohen).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *id.* (statements of John Wilson, Disabled Am. Veterans, at 3; Richard P. Cohen, at 6-7).

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 1-2 (statement of John Wilson).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

consider the psychological damage to a veteran who is told that his or her words will not be taken at face value.¹²³

B. Potential Problems with the Bill

The COMBAT PTSD Act is not without its potential problems, the most obvious of which is the legislation's cost. In July 2008, the Congressional Budget Office (CBO) released a review of a similar bill, and found the main reason VA denied PTSD claims was because veterans could not prove that the in-service stressor occurred.¹²⁴ The CBO estimated that changing the presumption of occurrence to cover all PTSD claims originating in a "theater of operations" would cost \$4.8 billion over a ten-year period.¹²⁵ Altering section 1154(b) would cost VA over \$400 million a year by the fourth year, and the spending increase would expand \$800 million a year by the tenth year.¹²⁶ This would constitute a significant increase in VA's expenditures for PTSD disability benefit payments, which totaled \$4.3 billion as of 2004.¹²⁷

Related to this increased cost for PTSD claims is the fact that despite the title of the proposed legislation, its scope is not limited to PTSD. Under the current law, a veteran must present evidence that an injury was incurred in service to receive benefits for the condition.¹²⁸ The COMBAT PTSD Act would apply the presumption of occurrence to any injury for any veteran who served in a theater of operations, creating a shortcut for proving that non-combat injuries occurred in

¹²³ See, e.g., *id.* at 4 (statement of Norman Bussel).

¹²⁴ CONG. BUDGET OFFICE, H.R. 5892: VETERANS DISABILITY BENEFITS CLAIMS MODERNIZATION ACT OF 2008 [*hereinafter* CBO ESTIMATE] 2.

¹²⁵ *Id.* at 3. See also DEP'T. OF VETERANS AFF., DEP'T. OF VETERANS AFF. 2010 BUDGET HIGHLIGHTS (noting that VA's annual funding for health related costs for 2009 was \$42.8 billion), available at http://www.va.gov/budget/summary/2010/Fast_Facts_VA_Budget_Highlights.pdf.

¹²⁶ CBO ESTIMATE, *supra* note 124, at 2. The author notes that a \$400 increase in payments amounts to around a one percent increase in VA's annual health budget based on \$42.6 billion for 2009.

¹²⁷ NAT'L RES. COUNCIL, *supra* note 20, at 124.

¹²⁸ See *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996); *Duenas v. Principi*, 18 Vet. App. 512, 519 (2004).

service.¹²⁹ The 2008 CBO estimate only considered the increased costs in PTSD claims and did not factor in the increased cost if all disability claims could employ a relaxed presumption of occurrence.¹³⁰ Thus, under the proposed legislation, VA would be required to accept a veteran's unverified statements that diabetes, hernias, hypertension, or any number of other conditions began during service in a theater of operations.¹³¹ This would dramatically expand an otherwise limited presumption applying only to combat injuries into a broad presumption covering all injuries that a veteran asserts occurred in a theater of operations. The legislation's cost would therefore increase.

In contrast to the possibility that the proposed legislation may cover too many conditions, upon implementation, the COMBAT PTSD Act may not cover as many veterans as its drafters intended. The proposed legislation would delegate the authority to determine which areas constitute a "combat theater of operations" to the VA Secretary in consultation with the Secretary of Defense.¹³² The bill does not provide any guidance or limitations as to how the "theater of operations" is to be defined, nor does it provide for the safeguard of Congressional review of the Secretary's determination.¹³³ Unchecked, the Secretary could hypothetically exclude from his definition of "theater of operations" certain areas like the "Green Zone" in Iraq, or a "safe" province in Afghanistan. Veterans who served in these areas would ultimately be in the same position that they were in before the contemplated legislation. Thus, the COMBAT PTSD Act may not prevent the denial of VA benefits to otherwise deserving veterans.

An additional potential problem with the bill is that it may encourage doctors to over-diagnose PTSD in veterans who are actually

¹²⁹ H.R. 952, 111th Cong. (1st session 2009).

¹³⁰ See, e.g., CBO ESTIMATE, *supra* note 124, at 2-3.

¹³¹ See H.R. 952.

¹³² *Id.*

¹³³ The Secretary, however, would be required to accept input as part of the formal administrative rulemaking process.

suffering from other similar mental disorders.¹³⁴ One prominent psychologist has suggested that some veterans diagnosed with late-onset PTSD actually suffer from depression.¹³⁵ These veterans are misdiagnosed because they attribute their current mental health conditions to memories that have gained new significance as time has passed.¹³⁶ It is axiomatic that the first step to effective treatment of a disorder is a proper diagnosis of that disorder. However, if it becomes easier for veterans to establish that PTSD is service-connected, and if the new presumption of occurrence were limited to that condition, that is the condition on which veterans and mental health professionals will focus. Thus, more veterans may be funneled into PTSD diagnoses, even where depression or another disorder is the more accurate diagnosis.

Another issue with the proposed legislation is that it may be rendered obsolete. The American Psychiatric Association has indicated that a fifth version of the Diagnostic and Statistical Manual for Mental Disorders may be released in the near future.¹³⁷ This new version may significantly overhaul the definition of PTSD, thus rendering the currently proposed legislation unnecessary.

Another problem with the proposed legislation that must be considered is that it may encourage malingering—the fabrication of symptoms for certain benefits, including financial compensation.¹³⁸ While the extent of malingering is not clear,¹³⁹ it is beyond doubt that some veterans submit fraudulent statements in order to obtain entitlement to VA PTSD benefits.¹⁴⁰ If the system were changed so that veterans could establish the occurrence of a claimed stressor

¹³⁴ This criticism assumes that the COMBAT PTSD Act would be limited to PTSD claims only. See discussion *supra* pp. 20-21.

¹³⁵ David Dobbs, *The Post-Traumatic Stress Trap*, SCI. AM., Apr. 13, 2009, at 66.

¹³⁶ *Id.*

¹³⁷ DSM-V: THE FUTURE MANUAL, <http://www.psych.org/dsmv.asp>. (last viewed September 23, 2009).

¹³⁸ NAT'L RES. COUNCIL, *supra* note 20, at 178.

¹³⁹ *Id.* at 176.

¹⁴⁰ For an egregious example, see *U.S. v. Roberts*, 534 F.3d 560 (7th Cir. 2008).

through his or her statements alone, some veterans may fabricate combat experiences to support their claims. While there is no indication as to how prevalent malingering may be, the proposed legislation removes one potential safeguard against fraud.

C. Comparison of the House and Senate Bills

The same benefits as found in the COMBAT PTSD Act are also found in the Senate's Combat Service Act. The presumption contained in the second provision, which requires that the Secretary accept lay statements as evidence that certain events occurred, would ease VA's administrative burden.¹⁴¹ As with other presumptions, there would be one less factual determination to be subject to challenge. Moreover, as the Combat Service Act is not limited to PTSD claims, the presumption could reduce the administrative burden in adjudicating a great many claims. The first provision of the Combat Service Act, however, which requires that "due consideration" be given to the official history of the location and character of a veteran's service, would not significantly reduce VA's administrative burden.¹⁴² Instead, the "due consideration" requirement would likely lead to appeals from veterans arguing that VA did not engage in such consideration in evaluating their claims.

The Combat Service Act also presents many of the same limitations as the COMBAT PTSD Act. The Combat Service Act would certainly cost more than the current system. Even if the presumption only applied to certain acts (like roadside bombs in Iraq) that are "associated with service in a particular location," there are no additional safeguards to prevent malingering. As noted above, the COMBAT PTSD Act removes the small barrier to malingering created by the requirement that veterans must provide some evidence that a traumatic stressor occurred. Moreover, as the Combat Service Act applies to any conditions, its cost would be greater than a bill just targeting PTSD.

¹⁴¹ S. 919, 111th Cong. § 2(a)(1)(B) (2009).

¹⁴² *Id.* at § 2(a)(1)(A).

Additionally, the Combat Service Act's first provision, which requires that due consideration be given to the place and type of a veteran's service, does not represent a substantial improvement over the current standards. VA is already required to account for its reasons and bases for making its factual determinations.¹⁴³ Even under the current state of the law, VA would potentially fail to carry this burden if it did not already account for the circumstances of a veteran's service.

The Combat Service Act does offer one advantage over the COMBAT PTSD Act, in that it calls for a more limited presumption of occurrence where the occurrence of the stressor is based on lay statements. Lay evidence would only be accepted as to certain events "associated with service in particular locations."¹⁴⁴ This would allow the Secretary to compile a tailored list of events, such as roadside bombs in Iraq, for which the presumption would apply. This list could prevent compensation-seeking veterans (who cannot prove that they were in a position to be subjected to these events) from fraudulently obtaining benefits.

D. Potential Alternatives

Given the COMBAT PTSD Act's weaknesses, Congress should consider a bill that is either narrowly focused on removing administrative burdens or on preventing incorrect denials. While both of these policy goals are not mutually exclusive in a system of unlimited resources, the high cost of implementing the COMBAT PTSD Act presumably serves as a financial constraint on its adoption. If the current bill stalls in Congress due to its cost, there are potential alternatives that could either reduce the long, wasteful processing times for PTSD claims, or that could reduce the injustice caused by the erroneous denial of benefits to deserving veterans.

¹⁴³ Baldwin v. West, 13 Vet. App. 1, 8 (1999).

¹⁴⁴ S. 919 § 2(a)(1)(B).

Tension between these differing goals underlying the COMBAT PTSD Act and the change it would bring to VA presumptions is hardly unique. Statutory presumptions may be created to advance a social policy (such as aiding deserving veterans who are erroneously denied benefits), or may be intended to facilitate easy claim adjudication and thus reduce administrative burdens.¹⁴⁵ Legal presumptions in veterans' law have traditionally been understood to serve the purpose of advancing a social policy, which normally entails providing veterans with the benefit of the doubt.¹⁴⁶ Presumptions, however, have also served to alleviate administrative burden, as in the case of the presumption that certain medical conditions were caused by exposure to Agent Orange.¹⁴⁷

One potential alternative to the COMBAT PTSD Act would be to allow VA to address the problem by amending the PTSD compensation requirements in 38 C.F.R. § 3.304(f).¹⁴⁸ Bradley Mays, the director of the VA Compensation and Pension Service, advocated this approach during his testimony before the House Committee on Veterans' Affairs on April 23, 2009.¹⁴⁹ Mr. Mays called attention to an October 2008 amendment to section 3.304(f) to suggest that the Secretary could address the unique problems

¹⁴⁵ See Kenneth S. Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. REV. 697, 703-04 (1984) (discussing the creation of presumptions to further public policy).

¹⁴⁶ See, e.g., *Hearings before the House Comm. on Veterans' Affairs*, 84th Cong. 3654-55 (1957) (Statement of Donald R. Wilson) (stating "until American medicine has reached a point where it can determine with more than a reasonable degree of accuracy whether in fact certain types of disease did or did not have their inception during the course of a man's service, the veteran should be entitled, in areas of doubt . . . to the presumption that his disease or disability, within reasonable periods now or to be specified, was the result of his service.").

¹⁴⁷ See Marc Brown, *The Role of Science in Department of Veterans Affairs Disability Compensation Policies for Environmental and Occupational Illnesses and Injuries*, 13 J.L. & POL'Y, 593, 600 (2005).

¹⁴⁸ As part of its Budget summary for 2010, VA indicated that it would be working "to revise the mental health portion of the rating schedule with particular emphasis on PTSD." DEP'T. OF VETERANS AFF., DEP'T. OF VETERANS AFF. 2010 BUDGET SUBMISSION, Vol. III, at 4B-21, available at http://www.va.gov/budget/summary/2010/Volume_3-Benefits_and_Burial_and_Dept_Admin.pdf.

¹⁴⁹ *Apr. Subcomm. Hearing*, *supra* note 13 (statement of Bradley Mays, Compensation and Pension Service).

posed by PTSD without Congressional action.¹⁵⁰ This change to section 3.304(f) eliminated the requirement of proving an in-service stressor for veterans who are diagnosed with PTSD while on active duty.¹⁵¹ If the change to section 3.304(f) is any indication, however, the Secretary may only be able to take incremental steps toward solving the problems posed by PTSD in unconventional warfare. PTSD claims from veterans who are diagnosed during service are uncomplicated, as the proof of an in-service stressor is already in the veterans' service treatment records. Moreover, there have been reports suggesting that psychiatrists have been pressured to avoid diagnosing deserving active duty service members with PTSD.¹⁵² If there is merit to these allegations, the change to § 3.304(f) would be of no assistance to even the most deserving veterans. Given the minimal benefit from the change the Secretary has already made, it is likely that future changes would also be incremental in nature.

A second alternative would be a bill similar to the COMBAT PTSD Act, but which is limited to claims involving traumatic stressors that occurred after 2001. Some psychologists have suggested that imperfect human memory may account for some cases of delayed onset PTSD.¹⁵³ A bill limited to veterans of the most recent conflicts would entitle events in the recent memory to the presumption of occurrence, thereby preventing VA benefits from being awarded to veterans who cannot otherwise substantiate their claims.

Another potential alternative to the COMBAT PTSD Act would be to create a compensation system that provides benefits to deserving veterans while recognizing that recovery is possible by providing incentives to return to the workforce. One potential model would be the Australian disability system, in which a combat-injured

¹⁵⁰ *Id.* at 1-2

¹⁵¹ 38 C.F.R. § 3.304(f) (2008); Posttraumatic Stress Disorder, 74 Fed. Reg. 14,491 (Mar. 31, 2009) (to be codified at 38 C.F.R. pt. 3).

¹⁵² Michael De Yoanna & Mark Benjamin, *I Am Under a Lot of Pressure to Not Diagnose PTSD*, SALON, Apr. 8, 2009, available at http://www.salon.com/news/special/coming_home/2009/04/08/tape/index.html.

¹⁵³ David Dobbs, *The Post-Traumatic Stress Trap*, SCI. AM., Apr. 13, 2009, at 66.

veteran receives lifetime non-economic disability payments and an “incapacity” payment that is eliminated after either five years or after a veteran finds employment.¹⁵⁴ Because PTSD is unique in that some individuals can achieve full recovery, there would be less concern that a change to the PTSD compensation model would be a harbinger for a complete overhaul of the VA benefits system. This approach would do little to reduce the administrative burden on VA, but by reducing the total lifetime benefits paid per veteran, such a legislative scheme would create the financial flexibility to allow all deserving individuals to receive some PTSD benefits. Such a system, however, would require additional safeguards to ensure that all veterans continue to have access to continued PTSD treatment and healthcare.

Another approach that Congress could consider would be to allow a trained VA psychiatrist’s opinion to serve as credible evidence that an in-service stressor occurred, even when the opinion is based exclusively on the veteran’s own statements.¹⁵⁵ This change would be tantamount to overruling the CAVC’s *Moreau* decision.¹⁵⁶ Under this approach, mental health professionals would listen to a veteran describe his or her stressor and symptoms, and would then evaluate the veteran’s credibility. The evaluator could be provided with a memorandum describing the known and unknown facts concerning the conditions of the veteran’s service. This approach would partially increase VA’s administrative burden by requiring mental health evaluators to spend more examination time evaluating the veteran’s statements. Currently, these evaluators may spend as little as 20 minutes in an initial examination.¹⁵⁷ Increasing the time spent on each evaluation would also increase the waiting time to obtain such evaluations in the first place, and would likely necessitate that VA

¹⁵⁴ *Id.* at 68.

¹⁵⁵ The Secretary has already made such a rule when an in-service assault is the claimed stressor. Under 38 C.F.R. § 3.304(f)(3), when a veteran’s claim is based on an in-service personal assault, “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.” *Id.*

¹⁵⁶ See discussion *supra* Part II.

¹⁵⁷ NAT’L RES. COUNCIL, *supra* note 20, at 178.

hire additional evaluators. The result would be increased system costs and administrative delay in adjudicating veterans' claims.

Despite the initial burden this alternative would place on VA's mental health professionals, it could still be a cost effective manner of achieving the aims of the COMBAT PTSD Act. First, allowing mental health professionals to evaluate a veteran's credibility could greatly decrease the number of incorrect denials. Psychiatrists and psychologists are well suited to probe an individual's honesty and detect behaviors suggesting deceit or malingering.¹⁵⁸ Allowing mental health professionals' opinions to serve as credible evidence that an in-service stressor occurred would be a cost effective method of reducing the number of incorrect denials while still preventing some non-deserving veterans from gaining access to benefits by malingering or mistake. This system would cost less than the COMBAT PTSD Act because some veterans who could establish presence in a theater of operations but who offer narratives that are not credible would be screened out of the system.¹⁵⁹

Administratively, such a system would reduce the burden on VA rating adjudicators by allowing mental health professionals, who are already evaluating PTSD claims, to make a factual finding regarding the occurrence of the veteran's stressor. It would also be easy to administer, as formalized evidentiary hearings would not be required and factual findings would be made at the lowest possible level. Moreover, the system could be designed to prevent individuals from directly challenging the mental health professionals' credibility determinations. Appeals of the psychologists' opinions would be

¹⁵⁸ *Id.*

¹⁵⁹ This approach would cost more in disability than the current system, as many deserving veterans would be entitled to receive benefits. This should not be considered a deterrent, however, as the system should only seek to exclude non-deserving veterans. See Alison Atwater, Comment, *When is a Combat Veteran a Combat Veteran?: The Evidentiary Stumbling Block for Veterans Seeking PTSD Disability Benefits*, 41 ARIZ. ST. L. J. 243, 269 (2009) (stating "if every veteran with a valid claim suddenly hit evidentiary pay dirt tomorrow, arrived at the VA with that evidence in hand, and met the remaining requirements for disability benefits, that would also cost more.").

allowed, but the veteran would be limited to proving that the stressor occurred by offering independent evidence and not by directly challenging the psychologist's findings. With these safeguards in place, allowing mental health professionals to evaluate whether a stressor occurred could serve as a less costly and administratively streamlined alternative to the COMBAT PTSD Act that would reduce the number of deserving veterans who are incorrectly denied benefits.

CONCLUSION

Congress has spent decades trying to determine the best approach for dealing with the mental health ramifications of service in combat. The current system is not the first method for compensating veterans for their mental wounds, and, given the injustices associated with the presumption of occurrence for combat veterans, it is not likely to be the last system. The COMBAT PTSD Act proposed by Representative Hall takes a major step toward recognizing and correcting the problems posed by veterans trying to establish involvement in combat in order to gain access to the presumption of occurrence. While the proposed legislation would be a step forward, there would still be significant problems after the bill passed, including how to pay for the increased cost in benefits.¹⁶⁰

¹⁶⁰ The author thanks James Ridgway and Allison Fentress for their assistance in developing this article.